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Beyond *Lawrence*: Metaprivacy and Punishment

ABSTRACT. *Lawrence v. Texas* remains, after three years of precedential life, an opinion in search of a principle. It is both libertarian—Randy Barnett has called it the constitutionalization of John Stuart Mill’s *On Liberty*—and communitarian—William Eskridge has described it as the gay rights movement’s *Brown v. Board of Education*. It is simultaneously broad, in its evocation of our deepest spiritual commitments, and narrow, in its self-conscious attempts to avoid condemning laws against same-sex marriage, prostitution, and bestiality. This Article reconciles these competing claims on *Lawrence*’s jurisprudential legacy. In Part I, it defends the view that *Lawrence* constitutionalizes what I call “metaprivacy”: When societal consensus internalizes a breach of the historical legal divide between particular “conduct” and an associated “status,” punishment of that conduct cannot be based on moral approbation alone. The Article then, in Part II, harmonizes this view of *Lawrence*’s legacy with pre-*Lawrence* constitutional privacy doctrine and theory. Finally, in Part III, the Article applies this understanding of *Lawrence* interdoctrinally, to capital sentencing. The Article suggests that all that separates the impermissible moral judgments made by a legislature in prohibiting sodomy from the permissible—indeed, almost constitutionally required—moral judgments made during the sentencing phase of a capital trial is a preference for gays over other a priori criminals. Notwithstanding the obvious appeal of permitting such a preference, *Lawrence* provides no support for it.

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[P]rivacy is nothing less than society's limiting principle.¹

INTRODUCTION

Can the state kill someone for being a bad person? Consider the following Connecticut case: In 1997, Todd Rizzo, then eighteen years old and already an ex-Marine, invited thirteen-year-old Stanley Edwards into his backyard, telling him that they would be hunting snakes. Once there, Rizzo straddled Edwards, in Rizzo's words, "like a horse," and struck him thirteen times with a sledgehammer as the boy pleaded for his life. He dumped the dead body in the woods nearby. Rizzo's motive? While stationed in Hawaii less than a year before the murder, the members of Rizzo's platoon had been asked to list their ten goals in life. The second goal on Rizzo's list was "to kill a man." An avid student of past serial killings, Rizzo told police after he was taken into custody that he had bludgeoned Edwards to death because he wanted to see what it felt like. He pleaded guilty to capital murder and was sentenced to death in August 1999.²

I suspect that many Americans, regardless of their moral or legal stance on capital punishment, would at least deny any inconsistency in believing both that the state may execute people like Todd Rizzo, and that it may not kill someone for being a bad person. It is not a difficult moral position to make out: Individuals are sentenced to death because they are convicted of committing heinous crimes, not because they are bad people, though the former may be strong evidence of the latter. The premise of this position is more complicated, however, than I have presented it. While being convicted of a heinous crime is a necessary precondition of a capital sentence, it is not a sufficient one. Many convicted of murder are not sentenced to death, and not only because of the capricious nature of sentencing juries or the serendipity of a plea bargain. In *Woodson v. North Carolina*, the Supreme Court found within the Eighth Amendment the notion that some convicts are more death-worthy than others.³ As such, no capital sentence since *Woodson* may be imposed without considering, in some fashion,⁴ those factors that aggravate and

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1. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-1, at 1302 (2d ed. 1988).
 2. *State v. Rizzo*, 833 A.2d 363 (Conn. 2003). Rizzo was discharged from the Marines after failing a drug test. See Trish Willingham, *Letter Shows Cold, Calculating Killer*, HARTFORD COURANT, June 16, 1999, at A12.
 3. *Woodson v. North Carolina*, 428 U.S. 280 (1976).
 4. State schemes for considering aggravating and mitigating factors may be divided into two types. Under "weighing" schemes, aggravators and mitigators are balanced against each

mitigate an individual's death-worthiness. Among the aggravating factors that were a but-for cause of Todd Rizzo's capital sentence were his "long-standing fascination with violent death and serial killers; his preexisting desire to kill; and the callous way in which he disposed of the victim's body."⁵ Rizzo, then, was not sentenced to death because he was found guilty of a heinous murder — that only explains his detention. He was sentenced to death because he had what Immanuel Kant called "inner wickedness."⁶ He would be a prime candidate for a diagnostic label for which a number of psychiatrists have been agitating in recent years: clinically "evil."⁷

For most of America's constitutional history, the distinction between detention for conduct and detention for constitutive character has not been legally relevant. That American courts did not, by and large, scrutinize punishments for unconstitutional excess before the mid-twentieth century provides a partial explanation,⁸ but the more important one is that we have viewed punishment for "inner wickedness" with skepticism during only a brief and recent epoch in our constitutional life. The homosexuality cases are paradigmatic. As late as 1986, the Court was "quite unwilling," in *Bowers v. Hardwick*, to "announce . . . a fundamental right to engage in homosexual sodomy."⁹ Homosexual sex acts could be criminalized because the Court refused to acquiesce in the view that "majority sentiments about the morality of homosexuality should be declared inadequate."¹⁰ The past decade, however, has brought us *Romer v. Evans*, in which the Court declared that a Colorado constitutional amendment prohibiting the enactment of gay-friendly

other. See, e.g., CAL. PENAL CODE § 190.3 (West 2005). Under "threshold" schemes, jurors have the option of a death sentence so long as a given number of aggravators is present, but they are told that they must consider mitigating evidence. See, e.g., S.C. CODE ANN. § 16-3-20 (2004).

5. *Rizzo*, 833 A.2d at 382.
6. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 106 (Mary Gregor ed., 1996) (1797).
7. See Benedict Carey, *For the Worst of Us, the Diagnosis May Be 'Evil'*, N.Y. TIMES, Feb. 8, 2005, at F1.
8. See *Weems v. United States*, 217 U.S. 349 (1910) (holding, for the first time, a punishment unconstitutional under the Eighth Amendment). The Supreme Court did not hold that the Eighth Amendment was incorporated against the states until 1962. See *Robinson v. California*, 370 U.S. 660 (1962); see also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (assuming, without deciding, that a state's violation of Eighth Amendment principles would violate the Due Process Clause of the Fourteenth Amendment). The *Weems* case involved a punishment administered in the Philippines, which was then under the control of the federal government. See *infra* text accompanying notes 295-298.
9. 478 U.S. 186, 191 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).
10. *Id.* at 196.

antidiscrimination laws violated the Equal Protection Clause,¹¹ and *Lawrence v. Texas*, which affirmed the right of adults to engage in consensual homosexual relations in the privacy of their homes.¹² Whatever its enduring contours, *Lawrence* seems at least to turn a suspicious eye toward arguments against conduct grounded in the subjective moral illegitimacy—rather than the objective social effects—of that conduct.

This Article develops this reading of *Lawrence* and, focusing particularly on capital sentences, considers the extent to which the logic of *Lawrence* compels an inquiry into the constitutionality of incremental punishment based on character. On Justice Kennedy's terms, *Lawrence* stands for the proposition that the state may not punish the conduct that "define[s]" an individual as homosexual,¹³ but need not endorse a homosexual lifestyle as legitimate, nor afford gay persons the same protection against invidious discrimination granted to those identified by race or sex. Writing this time for an outright majority, Justice Kennedy reaffirmed in *Lawrence* an opaque and controversial statement made by the plurality in *Planned Parenthood v. Casey*, that the Court's "obligation is to define the liberty of all, not to mandate [its] own moral code."¹⁴ Without making any judgments about the rightness or wrongness of *Lawrence*'s reasoning or holding, this Article scrutinizes what follows from taking Justice Kennedy at his word. I conclude that, subject to the inevitable retroactive tinkering of the common law,¹⁵ the character-based retributive rationale for capital punishment that the doctrine presently employs does not survive scrutiny under *Lawrence* because it is not character-neutral. That is, it depends intimately and therefore impermissibly on judgments about the punishment-worthiness of an individual's defining moral characteristics.

The Article proceeds as follows. Part I scrutinizes *Lawrence* itself in an effort to identify a nonarbitrary principle that justifies its result. Unless the holding is *sui generis*, *Lawrence* may be justified by one of at least two broad, competing rationalizations. The first is the one Justice Scalia suggests in dissent, namely that the state may not criminalize "morals" offenses, such as incest or public nudity.¹⁶ This rationale, grounded as it is in an overtly libertarian live-and-let-live ethic, would read into the Constitution some form of John Stuart Mill's "harm principle," the notion that an individual has an absolute right to

11. 517 U.S. 620 (1996).

12. 539 U.S. 558 (2003).

13. See *id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

14. *Id.* at 571 (quoting *Casey*, 505 U.S. at 850).

15. See *infra* text accompanying notes 351-352.

16. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

perform either self-regarding acts or consensual acts affecting others.¹⁷ Section I.A rejects this view of *Lawrence*, and Section I.B argues for a second, more narrow, rationale for its holding—the proposition that conduct agreed by social consensus to be “status-definitional” cannot be punished for morality’s sake. Punishment, that is, may be moral, but it must be impersonal. I term the right to remain free of government interference with one’s transcendent identity a right to “metaprivacy.”

Part II attempts to harmonize my reading of *Lawrence* with the existing doctrinal and theoretical landscape. Section II.A traces the evolution of metaprivacy within the tort privacy, Fourth Amendment privacy, and fundamental-decision privacy cases. Section II.B situates metaprivacy within the academic literature on privacy. I ultimately argue that refusing to read into the doctrine a distinction between homosexual conduct and certain other forms of a priori criminal conduct is consistent with a gradual shift in our understanding of liberty toward a government of presumptively limited powers.

Part III connects *Lawrence*’s conception of metaprivacy to the particular form of retributive punishment countenanced by present capital punishment doctrine. Section III.A explains, in doctrinal terms, the elusive concept of retribution and argues that retributive punishment in action involves impermissible judgments about the content of the condemned’s constitutive commitments, and is therefore susceptible to attack under the principles of *Lawrence*-style metaprivacy. Section III.B responds to some anticipated objections to extending metaprivacy principles into the capital sentencing thicket. The Article ultimately theorizes *Lawrence*’s most defensible working principle, then hypothesizes an end point for that principle that lies beyond the bedroom walls. It will be for present and future courts and politics to determine whether this is heartening or dangerous territory.

I. LAWRENCE V. TEXAS AND METAPRIVACY

In September 1998, officers of the Harris County Police Department entered a private residence in the Houston area to investigate a report of an armed intruder breaking into a home.¹⁸ Upon entering the home, the officers witnessed John Geddes Lawrence and Tyron Garner engaged in anal sex. The

17. See JOHN STUART MILL, ON LIBERTY 139 (David Bromwich & George Kateb eds., 2003) (1859).

18. See R.A. Dyer, *Two Men Charged Under State’s Sodomy Law*, HOUSTON CHRON., Nov. 6, 1998, at A1. The report turned out to be false. See *id.*

two men were arrested, charged, and convicted of violating section 21.06(a) of the Texas Penal Code, which prohibited “deviate sexual intercourse” with someone of the same sex.¹⁹ The case on appeal concerned the constitutionality of the statute under the Fourteenth Amendment. *Lawrence*’s incontrovertible result was that Texas’s prohibition on same-sex sodomy violated the Due Process Clause, and that *Bowers v. Hardwick* was wrong, both in methodology and in outcome, the day it was decided.²⁰

Lawrence is otherwise famously obtuse. An extraordinary number of commentators have weighed in on its holding and we must, as always, look forward to future cases to vindicate this account or that one. But a lawyer’s job is to harmonize evidence, and *Lawrence* leaves many clues as to its holding, clues that provide substantial fodder for discourse even at this relatively early stage in its precedential life. This Part defends one reading of *Lawrence*, namely that the case raises a bar to morals-based regulation of conduct recognized by social consensus as status-defining. Along the way, I demonstrate how this reading is related to but distinct from three alternative views: first, that the case instantiates a broad form of John Stuart Mill’s harm principle; second, that it is fundamentally a case about desuetude; and third, that it forms a part of what William Eskridge has described as a “jurisprudence of tolerance.”²¹

A. *Lawrence as On Liberty*

Reading into *Lawrence* John Stuart Mill’s harm principle—the idea that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”²²—is tantalizing, and Justice Kennedy does not do enough to discourage it. *Lawrence* does not, after all, call itself a “privacy” case, speaking instead in terms of “liberty,” a concept far closer to Mill’s heart. The opinion mentions the right of “privacy” only in stating the questions presented for certiorari and in recapping the Court’s holding in *Griswold v. Connecticut*,²³

19. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003), *invalidated by Lawrence*, 539 U.S. 558. The Texas Penal Code defined “deviate sexual intercourse” as “any contact between any part of the genitals of one person and the mouth or anus of another person” or “the penetration of the genitals or the anus of another person with an object.” *Id.* § 21.01(4).

20. *Lawrence*, 539 U.S. at 576-78.

21. William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review To Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004).

22. MILL, *supra* note 17, at 80.

23. *See Lawrence*, 539 U.S. at 564-65 (discussing 381 U.S. 479 (1965)).

whereas it mentions “liberty” upwards of twenty-five times.²⁴ The opinion makes its emphasis clear from the opening paragraph:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.²⁵

This passage could be the prologue to Mr. Herbert Spencer’s *Social Statics*, and it is far from the opinion’s only grist for the libertarian mill. Justice Kennedy wrote that the Court’s ruling, “as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”²⁶ In attempting to define, as it had to, what was meant by “injury,”²⁷ the Court made clear that morals offenses would not suffice. Justice Kennedy wrote explicitly that Justice Stevens’s *Bowers* dissent, in particular the hardly obvious assertion that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,”²⁸ controlled the analysis in *Lawrence*. Finally, the six-Justice majority reaffirmed the statement made by a three-judge plurality in *Planned Parenthood v. Casey*, that the Court’s “obligation is to define the liberty of all, not to mandate our own moral code.”²⁹ This view carries strong echoes of the neo-Millian philosophy of H.L.A. Hart, who believed that even prostitution could not be regulated so long as it occurred outside of public view.³⁰

24. See Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, in *CATO SUP. CT. REV.*, 2002-2003, at 21, 34 (James L. Swanson ed., 2003).

25. *Lawrence*, 539 U.S. at 562.

26. *Id.* at 567.

27. Mill never defined “harm” with any satisfaction. Living as we do within social space, virtually every action we take intrudes in some way upon the interests of others. See *infra* note 190 and accompanying text.

28. See *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

29. *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

30. H.L.A. HART, *LAW, LIBERTY AND MORALITY* 13 (1963).

While some commentators have taken the “harm principle” bait,³¹ others have kept the wax of constitutional pragmatism firmly in their ears.³² Perhaps the best evidence that Justice Kennedy’s principle is neither Mill’s nor Hart’s is that he more or less tells us as much. He explains in dicta that the case “does not involve . . . prostitution,” implying thereby that it would be a different case if it did.³³ Although one can imagine theoretical grounds for distinguishing anti-prostitution from anti-sodomy laws—based, for example, on implied coercion, or regulation of commerce—these distinctions are impeachable. Not all commercial sex exchanges are coercive, and refusing to allow individuals to engage in a particular form of commerce because it is viewed as immoral runs only slightly less directly afoul of a Millian reading of *Lawrence* than the Texas anti-sodomy regulation. Moreover, Justice Kennedy conspicuously segregated his mention of prostitution from his earlier mention of “persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”³⁴ It is difficult to avoid the conclusion that anti-prostitution laws still survive scrutiny not on some consent-based theory but because prostitution is traditionally viewed as immoral.

Similarly, Justice Kennedy in two places appeared determined to remove same-sex marriage from the scope of *Lawrence*’s holding. First, he exempted from the case’s purview, as mentioned above, “abuse of an institution the law protects.”³⁵ Second, he disclaimed having announced that “the government must give formal recognition to any relationship that homosexual persons seek to enter.”³⁶ What beyond an explicitly moral judgment, Laurence Tribe has asked, “could be the rationale for permitting an otherwise eligible same-sex couple to enjoy the tangible benefits and assume the legal obligations of some version of civil union but withholding from them that final measure of respect—that whole that plainly exceeds the mere sum of its component legal

31. See, e.g., Barnett, *supra* note 24, at 21; Richard A. Epstein, *Of Same Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 SUP. CT. ECON. REV. 75 (2004); Paul M. Secunda, *Lawrence’s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117 (2005).

32. See, e.g., Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2004); Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312 (2004). But see Randy E. Barnett, Correspondence, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582 (2005).

33. *Lawrence*, 539 U.S. at 578.

34. *Id.* The second clause is an obvious reference to incest.

35. *Id.* at 567.

36. *Id.* at 578.

parts?”³⁷ It is not for a court, in dicta, to limit the prospective scope of its holdings.³⁸ But a court’s attempts to do so speak directly to the principle it is presumptively announcing, and Justice Kennedy’s various proscriptions and disclaimers do not seem consistent with a broad harm principle.

We can expand our examination of prospective applications beyond what is express, and hypothesize responses to other morals legislation, including the remainder of Justice Scalia’s laundry list of state laws he believes threatened by the majority’s holding. Faced with his imagined challenges to laws against bigamy, bestiality, and obscenity,³⁹ or, say, drug use, kidney sales, suicide, or slave wages,⁴⁰ among others, an approach that identifies Mill’s harm principle as the prophylactic against state regulatory authority is hardly a model of passive virtue.⁴¹ Justice Kennedy wrote that “adults may choose to enter upon [a homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons,”⁴² and so perhaps the correct limiting principle is that consensual conduct will be protected when it occurs within the home. Such a principle does not seem well-tailored to the text of the opinion, however, as it would appear to protect incest and prostitution, and would be deeply inconsistent with the majority’s apparently self-conscious shift away from the word “privacy.” “There are other spheres of

37. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1946 (2004); see also *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (“[P]reserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples.” (quoting *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring in the judgment))).
38. See *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (“This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.” (quoting *Lawrence*, 539 U.S. at 578 (majority opinion))).
39. *Id.* at 590.
40. Randy Barnett has argued that *Lawrence* in fact opens the door to challenges to economic regulation, and properly so. See Barnett, *supra* note 24, at 21. But see Carpenter, *supra* note 32, at 1152 (“A Court about to embark on a new and highly controversial adventure into judicially mandated laissez-faire economics would at least drop a hint.”).
41. As Justice White wrote in *Bowers*, “The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.” *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003); see also Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 758-59 (2006) (“Despite the depth of Justice Scalia’s ire, his dissent and Justice Kennedy’s opinion for the Court notably share a common commitment to maintaining a robust category of sexual practices that can be legally prohibited; they simply disagree about whether or not same-sex sodomy belongs in that category.”).
42. *Lawrence*, 539 U.S. at 567.

our lives and existence, outside the home,” the Court told us, “where the State should not be a dominant presence. Freedom extends beyond spatial bounds.”⁴³ Thus, while *Lawrence*’s libertarian overtures are too brazen to be countenanced fully, they are also too brazen to be ignored. The opinion clearly meant to disfavor certain species of morals legislation. The trick is to figure out what is so special about anti-sodomy laws.

B. *Lawrence as Metaprivacy*

The principle *Lawrence* announced is both bolder and more timid than a simple harm principle. It does not reach the full panoply of morals regulation, but failing to do so grants it the jurisprudential space to be arguably more protective of particular facets of individual liberty than even Mill would allow. In the eyes of the *Lawrence* majority, laws regulating the private sexual conduct of homosexuals do not simply infringe on their right to privacy, the way a law against viewing pornography in the home might,⁴⁴ or on their right to liberty, the way a law against public nudity might.⁴⁵ Rather, the Court held that such regulations effect a dignitary harm. Justice Kennedy used the word “demean” in three places in the opinion. First, he wrote, “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”⁴⁶ Second, he wrote that *Bowers*’s very “continuance as precedent demeans the lives of homosexual persons.”⁴⁷ Finally, he wrote that “[t]he State cannot demean [petitioners’] existence or control their destiny by making their private sexual conduct a crime.”⁴⁸

The comparison to marriage should help illuminate how it is that defining the right at issue in *Bowers* and *Lawrence* simply as a right to engage in sexual intercourse is not just misleading but is in fact a dignitary insult. Justice Kennedy’s allusion to marriage referred directly to *Griswold*, in which the Court struck down Connecticut’s anti-birth-control laws.⁴⁹ In that case, Justice Douglas wrote in sweeping terms for the majority that marriage “is an

43. *Id.* at 562.

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

45. See *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting).

46. *Id.* at 567 (majority opinion).

47. *Id.* at 575.

48. *Id.* at 578.

49. 381 U.S. 479 (1965), cited in *Lawrence*, 539 U.S. at 564-65.

association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”⁵⁰ Physical intimacy in marriage is no mere vulgar satisfaction of prurient interests, but rather stands in for a transcendent, merged identity. Marriage is a redefinition of personhood, of which the freedom to engage in sexual intercourse—with or without birth control—is but one element. Similarly, engaging in sexual intercourse within a homosexual relationship is popularly perceived as not just sex, but as a form of self-identification.⁵¹ Thus it is that criminalization of homosexual conduct both demeans the lives of homosexuals and controls their destiny. The connection to *Casey*, which Justice Kennedy cited repeatedly, is readily apparent, for outlawing abortion outright similarly threatens to control an individual’s destiny, that of the would-be mother. He wrote, quoting *Casey*, that a homosexual person, as much as a heterosexual, “may seek autonomy” for the purpose of “defin[ing] the attributes of personhood” by “defin[ing] one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁵²

The crucial rhetorical move is the presumption that private sex acts are elemental to the status-definition of gays. Justice Scalia made much in his dissent in *Romer v. Evans* of the lack of a meaningful distinction between homosexual “orientation” and homosexual “conduct.”⁵³ So long as *Bowers* remained good law, it was useful for someone urging the constitutionality of laws disfavoring gays to collapse this distinction. Said Justice Scalia in *Romer*, “[W]here criminal sanctions are not involved, homosexual ‘orientation’ is an acceptable stand-in for homosexual conduct.”⁵⁴ *Lawrence* said, in essence, that when criminal sanctions are involved, the fact that homosexual conduct is a stand-in for homosexual orientation means anti-sodomy laws must fail. It is precisely because homosexual orientation may be defined by homosexual conduct that a law disfavoring the conduct is, like *Romer*’s Amendment 2, in fact a law whose purpose is to disfavor a class of individuals. As Justice Kennedy wrote, “When homosexual conduct is made criminal by the law of the

50. *Griswold*, 381 U.S. at 486.

51. See *Lawrence*, 539 U.S. at 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”); see also Tribe, *supra* note 37, at 1905-06 (arguing that even if the Texas law had applied both to same-sex acts and to opposite-sex acts, the statute still would be struck down because “sodomy” is pervasively and pejoratively associated with gays).

52. *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

53. *Romer v. Evans*, 517 U.S. 620, 640-42 (1996) (Scalia, J., dissenting).

54. *Id.* at 642.

State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”⁵⁵ The principle that we can draw from this statement is that when an individual’s status is defined by conduct, the state may not outlaw that conduct on moral grounds.⁵⁶ To do so would interfere too intrusively in the life of the individual, and violate her right to privacy “in its more transcendent dimensions.”⁵⁷

The reading I urge helps to explain why Justice Kennedy did not specify the level of scrutiny he is applying. On one hand, he wrote that Texas’s anti-sodomy statute “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”⁵⁸ This formulation implies that Justice Kennedy was employing rational basis review. On the other hand, he made this statement immediately after quoting *Casey*’s mandate that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”⁵⁹ Under our constitutional tradition, the realm of personal liberty that the government may not enter is not protected by mere rational basis review.⁶⁰ Rather, the state must justify its entrance into such realms with a compelling interest, and it must tailor its means narrowly to effectuate that interest. To suggest, as Justice Kennedy did explicitly, that *Lawrence* follows from the *Griswold* line of cases is to imply that strict scrutiny applies.⁶¹ A third option, of course, is that Justice Kennedy was employing strict scrutiny, but that he did not believe the statute survived even rational basis review. The important point, though, is that once we collapse the status-conduct distinction, it becomes unnecessary to specify a particular standard of review. In the spirit of the Bill of Attainder clauses, to make a particular class of individuals a target of the criminal law for no reason other than disapproval of their very being is illegitimate as a matter of first

55. *Lawrence*, 539 U.S. at 575.

56. Cf. *Robinson v. California*, 370 U.S. 660, 666 (1962) (striking down a statute for making “the ‘status’ of narcotic addiction a criminal offense”).

57. *Lawrence*, 539 U.S. at 562.

58. *Id.* at 578.

59. *Id.* at 578 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)).

60. See *infra* text accompanying notes 151–152 (discussing the doctrinal void formed by weakening the level of scrutiny to apply to Fourth Amendment cases).

61. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 48 (“The Court’s assimilation of the *Lawrence* problem to that in *Griswold* and its successors suggests that a fundamental right was involved.”); Tribe, *supra* note 37, at 1917 (“[T]he strictness of the Court’s standard in *Lawrence*, however articulated, could hardly have been more obvious.”).

principles.⁶² Thus, on this view, even to reach a tiers-of-scrutiny analysis in *Lawrence* demeans the lives of homosexual persons.

What is so special, then, about anti-sodomy laws is that they threaten not the undifferentiated liberty to do what one wants, but the quite specific liberty to be oneself. We now have an answer to the libertarian who extols the opinion's scant references to "privacy." *Lawrence* does not concern what Michael Sandel calls "old privacy" – "the interest in keeping intimate affairs from public view" – but is far closer to what he calls "new privacy" – "the right to make certain sorts of choices, free of interference by the state."⁶³ Given that *Lawrence* happened to involve paradigmatic "old privacy" conduct, it would have confused matters to write the opinion in the language of privacy rights.

I wish to be still more precise. *Lawrence* refines the set of choices that an individual has a presumptive right to make to those that qualify in some relevant way as status-defining. In a sense, then, the case marks a "Third Reconstruction" in privacy jurisprudence. The right first discovered as "old privacy" in the 1890s was converted into a relatively unbounded "new privacy" in the 1960s,⁶⁴ and now must navigate the more jurisprudential landscape of modern constitutional law. Accordingly (and with apologies to Derrida), I call this newly transformed iteration a right to "metaprivacy," and define it as the right to engage in status-definitional conduct free from normalizing governmental interference.

1. *On Desuetude*

To this point, however, my argument remains vastly underspecified. I have not yet nominated any particular catalyst for identification of conduct as status-definitional. Surely not all acts of self-definition are protected. Unless *Lawrence* identifies a process for defining the relevant class, it has no answer to Justice Scalia's criticism that a law against public nudity, for example, is suspect because it "targets 'the conduct that is closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class.'"⁶⁵ Miranda Oshige McGowan has illustrated the point by comparing

62. See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996) (arguing that the Colorado amendment at issue in *Romer* could have been invalidated under the logic of the Bill of Attainder Clauses).

63. Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 526, 528 (1989).

64. See *infra* Section II.A.

65. *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) (quoting *Lawrence*, 539 U.S. at 583 (majority opinion)).

Lawrence to *Barnes v. Glen Theatre*, in which a Court plurality held that an Indiana statute that required strippers to wear pasties and g-strings in adult-only clubs “furthers a substantial government interest in protecting order and morality.”⁶⁶ Unless *Lawrence* overrules *Barnes*, it must explain, as McGowan put it, “[w]hy . . . the liberties of nude dancers and strip club goers [don’t] count, and the liberties of gays do.”⁶⁷ The answer McGowan settled on is that “gays as a set are a *group* while the set of nude dancers and people who go to strip clubs are not a group.”⁶⁸ She wrote that in distinguishing between simple classifications and relevant groups, “the Court’s practice is essentially normative.”⁶⁹

This Article’s project is to not give up quite so easily. I wish to take seriously the Justices’ contention that the distinctions drawn in *Lawrence* are neither ad hoc judgments nor naked manifestations of their own moral codes. The Court expended substantial ink on the idea that the crucial moving part in defining the scope of the Due Process Clause is not the composition of the Court but rather social convention. Justice Kennedy rejected the backward-looking amateur historiography of the *Bowers* majority in favor of his own sideways-looking amateur sociology. “In all events,” he wrote, “we think that our laws and traditions in the past half century are of most relevance here. These references show an *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁷⁰ The references Justice Kennedy cited included changes in the Model Penal Code and state statutes, the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*,⁷¹ and, perhaps most significantly, the fact that sodomy statutes had been systematically unenforced.⁷²

Cass Sunstein, acknowledging the importance of this language in the opinion, has concluded that *Lawrence* is an application of the common law principle of desuetude.⁷³ The idea at play in *Lawrence*, Sunstein suggested, is that “at least in some circumstances, involving certain kinds of human

66. McGowan, *supra* note 32, at 1326 (quoting 501 U.S. 560, 569 (1991) (plurality opinion)).

67. *Id.* at 1329.

68. *Id.*

69. *Id.* at 1334.

70. *Lawrence*, 539 U.S. at 571-72 (emphasis added).

71. 45 Eur. Ct. H.R. (ser. A) at 21 (1981) (holding that Northern Ireland’s anti-sodomy law violated Article 8 of the European Convention on Human Rights).

72. *Lawrence*, 539 U.S. at 572-73.

73. See Sunstein, *supra* note 61, at 30.

interests, a criminal law cannot be enforced if it has lost public support.⁷⁴ The justification for desuetude is that statutes that remain on the books but are not generally enforced invite arbitrary, discriminatory, and undemocratic prosecutions.⁷⁵ The individual interest at stake in *Lawrence* was thereby converted from an interest in sexual autonomy to an interest in avoiding victimization by arbitrary exercises of public power. This reading of *Lawrence*, Sunstein noted, “mutes the apparent roots of *Lawrence* in substantive due process. The idea of desuetude is, in a sense, a procedural one.”⁷⁶ Because the *Lawrence* Court framed the issue as primarily one of “notice,” it was not simply responding to social fact, but “requiring[] an evolution in public opinion—something like a broad consensus that the practice at issue should not be punished.”⁷⁷

Sunstein criticized the libertarian reading of *Lawrence*—what he called the “simple autonomy reading”—for insufficiently taking account of the role social consensus played in the opinion.⁷⁸ But the desuetude reading might similarly be criticized as insufficiently responsive to the remainder of the opinion. Sunstein essentially conceded as much. Referring to the “narrow” version of his thesis, that “the state may not rely on a justification [for a criminal statute] that has lost public support,”⁷⁹ Sunstein wrote that “[f]or it to operate, we must have an antecedent way, to some extent independent of public convictions, to determine whether an interest has some kind of constitutional status.”⁸⁰ Social consensus, that is, is not in itself sufficient to cabin *Lawrence*’s holding within workable limits. Neither, I argue, is the principle of status-definitional conduct. The best way to understand the roles of social consensus and of status-definitional conduct, however, is in combination.

74. *Id.*

75. *Id.* at 50; see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 152 (1962) (“When [an unenforced statute] is resurrected and enforced, it represents the *ad hoc* decision of the prosecutor, and then of the judge and jury, unrelated to anything that may realistically be taken as present legislative policy.”).

76. Sunstein, *supra* note 61, at 50.

77. *Id.* at 49.

78. *Id.*

79. *Id.* at 51.

80. *Id.* Sunstein did not resolve this difficulty.

2. *On Recognizing Recognition*

Social consensus plays a crucial role in delimiting the contours of the right that the Court seeks to protect. It may operate in *Lawrence*—and presumably in other privacy cases—in one of at least two ways. First, it may function literally as Justice Kennedy suggested: An emerging awareness that a particular practice forms part of the liberty protected by the Due Process Clause incorporates that practice into the canon of fundamental freedoms. One is reminded here of Justice Handy’s views on the central role public opinion should play in the fate of the Speluncean Explorers.⁸¹ While this tautological approach to constitutional decisionmaking is perfectly sensible for a legal realist like Justice Handy, it will not satisfy the doctrinalist, ceaselessly concerned that “legislative policy making . . . be distinguished from judicial rule applying.”⁸² The role of a judge is to apply law, such as the Due Process Clause, to relevant facts, such as the presence of a particular social consensus. Taken literally, this approach would convert fact into law by allowing social consensus to supplant the judge as decisionmaker.

Social consensus is not, however, incapable of playing a part in principled constitutional decisionmaking. Consider the following alternative reading of Justice Kennedy’s concession to public conviction: The relevant social consensus is not that homosexual sodomy is protected by the Due Process Clause, but rather that homosexual sodomy is definitional—as opposed to merely incidental—conduct for certain members of the political community. It is true that reasonable people may differ as to whether “gay person” describes an identity in precisely the same way as, say, “nudist” does, but *Lawrence* might plausibly be read as a judicial announcement of public recognition of the former identity but not the latter. Nudism, that is, is not (yet?) recognized as an attribute of personhood. Rather, like “ juggler,” “ jogger,” or “ strip club goer,” it is viewed, rightly or wrongly, as a recreational choice incidental to one’s constitution. The advantage of this approach over the Justice Handy approach is that its rule of decision is not the fact of social consensus, but the legal principle that status-definitional conduct forms part of the liberty protected by the Due Process Clause. What doctrine asks of its principles is that they define with consistency the contours of the relevant legal debate. The first approach, awarding due process protection to conduct that social consensus recognizes as deserving due process protection, generates no criteria for debate. The second approach allows lawyers, judges, and academics to

81. See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 637-44 (1949).

82. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 41 (1982).

engage in Socratic dialogue over whether status-definitional conduct, however defined, is sufficiently important or coherent to warrant incorporation into substantive due process.

If this approach sounds difficult to apply, that's because it is. In essence, I have told judges that the bases are ninety feet apart, and that the object is to cross home plate, but I have yet to tell them how to swing a bat. "However defined," in other words, is the trick. But judges identify social consensus all the time. Sometimes they do it openly, as when they conduct the Eighth Amendment's "evolving standards of decency" analysis.⁸³ In recent cases, this inquiry has focused on national surveys of both codified laws and actual penological practices, along with the secular trends evident therein, the opinions of professional organizations, foreign and international law and custom, and even, in *Atkins v. Virginia*, public opinion polls.⁸⁴ More often, no doubt, judges more tacitly recognize the evolutions in national opinion that generate particular social facts. For example, the number and quality of amicus briefs submitted in support of the University of Michigan in the *Gratz v. Bollinger* and *Grutter v. Bollinger* affirmative action cases were more than just an application of raw political pressure; they were designed, successfully, to demonstrate to the Justices a consensus around a particular social fact—that racial diversity in higher education is socially beneficial.⁸⁵

So how might judges go about identifying a social consensus that particular conduct defines a status rather than simply describes an activity? As in the Eighth Amendment context, the overall landscape of American law is certainly relevant: To what extent is the status associated with the conduct at issue generally recognized as a legal and social category? With respect to sodomy, a more robust inquiry into social consensus than the *Lawrence* majority engaged in might have examined, for example, the extent to which sexual orientation is included as a classification in state antidiscrimination laws, or social scientific research on the relative immutability of homosexuality⁸⁶ or the salience of gay

83. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

84. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); see also *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

85. See, e.g., Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 10-27, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516); Brief of the Harvard Black Law Students Ass'n et al. as Amici Curiae Supporting Respondents at 10-14, *Grutter*, 539 U.S. 306; Brief of 13,922 Current Law Students at Accredited American Law Schools as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306.

86. As others have noted, a trait need not necessarily be biological in order to be immutable. See, e.g., Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1378 n.6 (1999).

“culture.”⁸⁷ On the flip side, a judge might note the very existence of Colorado’s Amendment 2, which was a powerful indicator that “gay” had been recognized as a status to an extent that “juggler” or “masturbator” has not. A polity does not develop sufficient political momentum to seek to exclude a class of individuals from the political process unless that class has been recognized as a status group, with competing, if “repugnant,” political claims.⁸⁸ One could hardly imagine a variant on Amendment 2 being proposed or passed with respect to nudists; and if it were, it would indicate, perhaps, that it was time for the claims of nudists qua nudists to be taken seriously by judges.

Given this limited role for social consensus, and accepting that standards exist for identifying that consensus, Justice Scalia’s list of threatened morals laws begins to diminish.⁸⁹ As suggested, there is hardly an identifiable social consensus that masturbators or those who have sex with animals are, like gays, a class of individuals whose life choices are not merely “deviant” incidents of their personalities, but are in fact constitutive of their personhood,⁹⁰ and prostitution is commonly thought of as a labor not of love, but of necessity. Bigamy and same-sex marriage are more difficult to distinguish. As I have discussed, marriage earns its status as a fundamental right under our jurisprudence precisely because it is “an association that promotes a way of life.”⁹¹ Not only is marriage almost explicitly excluded from *Lawrence*’s sweep, however, but it is also problematic to refer to bans on certain types of marriages as a form of sanctioning or punishment. *Lawrence* does not demand (as resort to the Equal Protection Clause might) that the state not discriminate against gays at all, only that it not use its coercive power to criminalize their identities. Although criminal sanctions for particular cohabitational choices, say, may indeed raise *Lawrence* problems, refusing to extend formal legal recognition to particular social arrangements is hardly analogous.

87. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 845 (2002) (cataloging “aspects of culture, including but not limited to gender-atypical activity, associated with being a gay man or being a lesbian”).

88. The military’s “Don’t Ask, Don’t Tell” policy provides another example of social consensus around homosexuality as a status, in that it sanctions individuals who engage in homosexual conduct only if the individuals are, “in fact,” homosexual. See Mary Anne Case, *Of “This” and “That” in Lawrence v Texas*, 2003 SUP. CT. REV. 75, 89.

89. See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

90. Moreover, as Sunstein has observed, there are no laws against masturbation. Sunstein, *supra* note 61, at 49.

91. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); see *supra* notes 49–51 and accompanying text.

3. *On the Politics of Recognition*

Another way to understand the meaning of metaprivacy is through William Eskridge's taxonomy of identity-based social movements.⁹² Eskridge has described three stages of such movements. At stage one, a "[m]inority group challenges consensus that its distinguishing trait (color, sex, sexuality) is a malignant variation from the norm."⁹³ At stage two, "[s]ociety revises consensus to allow that the minority trait is a tolerable variation but not as good as the norm."⁹⁴ Finally, in stage three, society again "revises consensus to recognize that the minority trait is a benign variation and that there is no single norm."⁹⁵ In my view, Justice Kennedy's opinion is best read as solidifying a transition, one begun in *Romer*, from stage zero to stage one; that is, from not being a constitutionally recognized identity group at all to being one whose standing as a member of the polity is recognized, if grudgingly.⁹⁶ As Justice Scalia argued vociferously in *Romer*,⁹⁷ this recognition is a precondition to the (John Hart) Elysian protection of gay political representation that Amendment 2 threatened, and that race-based and sex-based minority groups unquestionably enjoy.⁹⁸

Eskridge himself would contest the above characterization of the opinion. Calling the post-*Lawrence* landscape "nothing less than, but also nothing more than, a jurisprudence of tolerance,"⁹⁹ Eskridge has argued that the phase shift that *Romer* and *Lawrence* represent for gays is analogous to the shift that *Brown v. Board of Education*¹⁰⁰ and *Loving v. Virginia*¹⁰¹ represented for blacks, and that *Roe v. Wade*¹⁰² and *Craig v. Boren*¹⁰³ represented for women.¹⁰⁴ In practice, this

92. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2065 (2002).

93. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1296 (2005).

94. *Id.*

95. *Id.*

96. Cf. Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1413 (2004) ("*Lawrence* recognizes, in a manner far more robust than *Romer v. Evans*, that homosexuals are rights-bearing subjects.").

97. *Romer v. Evans*, 517 U.S. 620, 640-41 (1996) (Scalia, J., dissenting).

98. See Eskridge, *supra* note 21, at 1077 (discussing the value of "assur[ing] each clashing group an opportunity to persuade the community of its normative agenda").

99. *Id.* at 1025.

100. 347 U.S. 483 (1954).

101. 388 U.S. 1 (1967).

102. 410 U.S. 113 (1973).

means that the Court has reached stage two, wherein it “accept[s] the norm that sexual variation is tolerable as a matter of fact and ought to be treated as presumptively irrelevant as a matter of law.”¹⁰⁵ In my view, Eskridge overstates the Court’s solicitude of gay claims in *Romer* and *Lawrence*. I think it significant that the Court refused to accept an express invitation to elevate sexual orientation to a suspect classification and therefore explicitly to apply heightened scrutiny to regulations that discriminate against gays.¹⁰⁶ The Court’s unwillingness even to confront the appropriate level of scrutiny at least undermines the claim that a particularized tolerance for gays was the majority’s central animating concern.¹⁰⁷ Rather, I argue, the Court was using gay rights cases to reinforce first principles of representative government—that conduct rather than status must be the subject of criminal law. In any event, my differences with Eskridge on this score may be largely semantic. I agree with his bottom line, that “traditionalists can no longer deploy the state to hurt gay people or render them presumptive criminals, but room remains for the state to signal the majority’s preference for heterosexuality, marriage, and traditional family values.”¹⁰⁸

Deeper are my differences with Eskridge on the role of social consensus. A key feature of his “politics of recognition” is the role of the gay rights movement itself in forcing the Court’s hand. Because Eskridge’s is a story of how constitutional change occurs on the ground, it is vital to his account that the discriminated-against group so characterize itself, and that it advance a political agenda. Wrote Eskridge, “The key to understanding *Lawrence*—and all its doctrinal complexities—is the Supreme Court’s recognition that American

103. 429 U.S. 190 (1976).

104. Eskridge, *supra* note 21, at 1040; *see also* McGowan, *supra* note 32, at 1332-34 (arguing that *Lawrence* fits into Eskridge’s scheme).

105. Eskridge, *supra* note 21, at 1040.

106. Justice O’Connor would have struck down the Texas sodomy law under the Equal Protection Clause; in her view it failed even rational basis review. *See Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring in the judgment). Laurence Tribe has called the Equal Protection Clause route a “dead end,” arguing that relying on the Clause would have been inadequate to the task of protecting the dignity of gays. Tribe, *supra* note 37, at 1907-16. Tribe, however, implicitly accepted Justice O’Connor’s rational basis standard of review. *See id.* Justice Kennedy defended his recourse to the Due Process Clause by saying that reliance on the Equal Protection Clause would leave open the question of whether a gender-neutral statute would be constitutional. *Lawrence*, 539 U.S. at 575.

107. *But see* Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447 (2004) (arguing that gay rights cases are making tiers-of-scrutiny analysis anachronistic).

108. Eskridge, *supra* note 21, at 1025.

democratic pluralism must meet the lesbian, gay, bisexual, and transgendered (LGBT) rights movement at least halfway.”¹⁰⁹

For Eskridge, then, the self-definition of the group itself necessarily motivates the social consensus. Although it is difficult to dispute that only a sufficiently robust movement can generate the political conditions necessary for the kinds of regime shifts with which Eskridge is concerned, there is no indication within the *Lawrence* majority opinion itself that such agitation forms part of the doctrinal test. *Lawrence*, that is, does not source its emerging awareness within the gay rights movement. The right I suggest that the Court has recognized is not libertarian in a formal sense. It permits society to use law, as it always has, to circumscribe expressive conduct. But *Lawrence* alters the criteria upon which putatively protected expressive conduct is to be formally judged. The question is not *what* is being expressed, but rather *who*. Does the conduct at issue identify someone as a member of a sociopolitical entity, or does it do no more than identify someone as a person who participates in the conduct? This question cannot be answered by asking the sodomist, the prostitute, or the nudist—the *Lawrence* Court was not prepared to cede control so completely.¹¹⁰ Rather, we must put the question to the People, and as Amendment 2 demonstrated, their actions may speak louder than their words.

II. ON CONSTITUTIONAL FIT

I have attempted to articulate thus far how *Lawrence* might be explained in a way that makes it useful for future application. But a principled decision owes a debt to its past as well as its future. Ronald Dworkin has famously described the analytic process a principled judge goes through in adjudicating hard cases. He argued that she must observe the doctrine of “political responsibility.”¹¹¹ That is, the principle that gives rise to her rule of decision must “fit” settled legal rules and practices; it must be “shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in . . . hypothetical circumstances.”¹¹² Then, if multiple decisional rules fit the existing legal landscape, the jurist chooses the normative theory that best

109. *Id.*

110. Given that the encounter in *Lawrence* was a one-night stand, see Tribe, *supra* note 37, at 1904-05, emphasizing the Court’s responsiveness to the gay rights movement also would have won Kennedy neither rhetorical nor political points.

111. RONALD DWORGIN, TAKING RIGHTS SERIOUSLY 87 (1977).

112. *Id.* at 88.

justifies the present body of law.¹¹³ I have thus far been relatively inattentive to these external interpretive constraints.

This Part demonstrates that the conception of metaprivacy just sketched is not a radical departure from settled rules. Neither is it inconsistent with extant understandings of what a liberal democratic political order requires of the relationship between personal privacy and government regulation. To wit, this Part briefly discusses the relationship between metaprivacy and the extant privacy doctrine and literature.

A. *Constitutional Privacy in the Courts*

The privacy right as understood in American jurisprudence encompasses a potpourri of distinct if related concepts: the freedom not to have one's name or likeness appear in advertisements without consent;¹¹⁴ the freedom from government intrusion into one's home and personal effects;¹¹⁵ the freedom to hold a group meeting without providing a membership list to the government;¹¹⁶ the freedom to use contraceptives;¹¹⁷ the freedom to marry;¹¹⁸ and the freedom to have noncommercial sexual relations with consenting adults¹¹⁹ all have been defended under the same banner. The privacy doctrine can be segregated into at least three broad categories: tort privacy, Fourth Amendment privacy, and fundamental-decision privacy.¹²⁰ To elucidate the thread that runs through these doctrinal species of privacy, I briefly discuss each in turn.

1. *Tort Privacy*

Privacy has a quotidian meaning that we all essentially understand, even if it escapes precise definition. Our right to privacy protects us from the

113. See *id.* at 106-07.

114. See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

115. See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

116. See *NAACP v. Alabama*, 357 U.S. 449 (1958).

117. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold* to unmarried persons).

118. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978).

119. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

120. Some have identified more. See, e.g., Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (suggesting "First Amendment" privacy and "state constitutional" privacy as additional categories).

nonconsensual prying of others into matters we consider to be personal or intimate. Thus it protects us from peeping Toms, both literal and metaphorical. When Samuel Warren and Louis Brandeis wrote their seminal 1890 article, *The Right to Privacy*,¹²¹ they had this quotidian meaning in mind. According to William Prosser, Warren was upset at the aggressive coverage the Boston newspapers had been giving to his wife's high society parties, particularly the recent wedding of the Warrens' daughter.¹²² Warren's revenge was to conspire with his former law partner Brandeis to declare, in the pages of the *Harvard Law Review*, a "right 'to be let alone'."¹²³ Each individual, they argued, has a common law right to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others,"¹²⁴ to decide, that is, "whether that which is his shall be given to the public."¹²⁵ According to Warren and Brandeis, the palpable injury to the individual caused by unwarranted invasions of this right is and should be actionable. While Warren and Brandeis did not invent the privacy tort, theirs represents the first attempt to define its contours comprehensively. And over the next decade, several courts also began to recognize a common law right to determine the uses of one's image by others.¹²⁶

121. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

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

123. Warren & Brandeis, *supra* note 121, at 195 (quoting THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888)). The anecdote has some holes, to say the least. As Ken Gormley has noted, the Warrens' daughter was six years old in 1890. See Gormley, *supra* note 120, at 1349.

124. Warren & Brandeis, *supra* note 121, at 198.

125. *Id.* at 199.

126. See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (holding that the plaintiff-artist could invoke his privacy rights in suing an insurance company for the use of his endorsement and his image in an advertisement without his consent); *Corliss v. E. W. Walker Co.*, 64 F. 280, 282 (C.C.D. Mass. 1894) (declaring in dicta that "the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced"); *Marks v. Jaffa*, 26 N.Y.S. 908, 909 (Sup. Ct. 1893) (enjoining the use of the plaintiff actor's name and photograph in a newspaper popularity contest); *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240 (Sup. Ct. 1891) (enjoining the use of a doctor's name in an advertisement for certain medicinal pastilles); *Schuyler v. Curtis*, 15 N.Y.S. 787 (Sup. Ct. 1891) (enjoining the erecting of an unauthorized statue to commemorate the philanthropy of the plaintiff's deceased family member); *Manola Seeks an Injunction*, N.Y. TIMES, June 21, 1890, at 2 (reporting a case in which a photographer was enjoined from publishing a photograph of an actress wearing tights on stage); *Miss Manola Gets an Injunction*, N.Y. TIMES, June 18, 1890, at 3 (same); *Photographed in Tights*, N.Y. TIMES, June 15, 1890, at 2 (same).

The twentieth century saw the right to control the use of one's image in public establish itself still more firmly at common law,¹²⁷ under a handful of state statutes,¹²⁸ and in the Restatement of Torts.¹²⁹ In 1960, Prosser advanced the legal community's understanding of "private" privacy rights by identifying four distinct torts: (1) "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs"; (2) "[p]ublic disclosure of embarrassing private facts about the plaintiff"; (3) "[p]ublicity which places the plaintiff in a false light in the public eye"; and (4) "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness."¹³⁰ Although Prosser fairly characterized the direction in which tort privacy evolved, one hears in Warren and Brandeis echoes of a broader philosophical claim, even if they advanced it only instrumentally. The right to privacy, they wrote, is "part of the more general right to the immunity of the person, — the right to one's personality."¹³¹ A right to "personality" is by no means self-defining, though the right to private control of one's public image is one of several options. I discuss other contenders below.

2. Fourth Amendment Privacy

The Brandeis legacy is, of course, much larger than the privacy tort. Brandeis's views on privacy must be read *in pari materia* with his general view of the appropriate relationship between individuals and the social and political institutions that threaten to dominate their lives. Brandeis was averse to the commodification of our social life and what he referred to as "The Curse of Bigness" both in the private sector and in government.¹³² Like Mill's, Brandeis's individualism was civic-minded; he believed that the political

127. By 1960, only four state courts—in Rhode Island, Nebraska, Texas, and Wisconsin—had expressly rejected a common law privacy right. Prosser, *supra* note 122, at 388.

128. See, e.g., UTAH CODE ANN. §§ 76-4-8 to -9 (1953) (making appropriation a misdemeanor and providing a private cause of action for damages); VA. CODE ANN. § 8.01-40 (1950) (providing for a suit in equity or for damages); Act of Apr. 6, 1903, ch. 132, §§ 1-2, 1903 N.Y. Laws 308, 308 (making appropriation of one's "name, portrait or picture" for the purposes of trade or advertising a misdemeanor and providing a cause of action in equity or for damages).

129. See RESTATEMENT OF TORTS § 867 (1939).

130. Prosser, *supra* note 122, at 389.

131. Warren & Brandeis, *supra* note 121, at 207.

132. See PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 72-99 (1993); David W. Levy, *Brandeis and the Progressive Movement*, in *BRANDEIS AND AMERICA* 99, 111 (Nelson L. Dawson ed., 1989).

dialogue necessary for a healthy democratic state presupposed a respect for individual liberty.¹³³

Naturally then, Brandeis's concern for privacy rights was not limited to the private sphere. As Justice Brandeis, he articulated, in dissent in *Olmstead v. United States*,¹³⁴ the Court's first comprehensive recognition of a right to privacy against the state:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men [E]very unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.¹³⁵

As Brandeis recognized, the Fourth Amendment is the Constitution's most evident application of the spirit of the privacy tort to the public sphere.¹³⁶ It asks, in effect, under what circumstances and subject to what limitations government agents may invade an individual's private space and search her belongings against her will. The Fourth Amendment does not mention "privacy" in express terms. The right it speaks of, that "of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"¹³⁷ appears to sound more in property than in privacy.¹³⁸

133. See STRUM, *supra* note 132, at 2.

134. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). The *Olmstead* majority rejected a challenge to a federal wiretap on the ground that the Fourth Amendment applied only to either "an official search and seizure of [one's] person, or . . . papers or . . . tangible material effects," or "an actual physical invasion of [one's] house 'or curtilage' for the purpose of making a seizure." *Id.* at 466 (majority opinion).

135. *Id.* at 478 (Brandeis, J., dissenting).

136. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) (commenting that the "global command" of the Fourth Amendment "that all government searches and seizures be reasonable sounds not in criminal law, but in constitutional tort law"); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 51 (declaring that the Fourth Amendment protects "interests in bodily integrity, mental tranquility, and freedom of movement traditionally protected by tort actions").

137. U.S. CONST. amend. IV.

In the years since *Olmstead*, however, the Court has attempted to give definition to the meaning of the word “persons” in the search-and-seizure context.¹³⁹

A pair of Warren Court decisions partially vindicated Brandeis but, in so doing, substantially contributed to the confusion in this area. First, in *Warden v. Hayden*,¹⁴⁰ a case involving a warrantless search that yielded various personal items of a man eventually convicted of armed robbery, the Court held that the search was valid even though the items obtained were “mere evidence” rather than “instrumentalities, fruits, or contraband.”¹⁴¹ The reason the so-called mere evidence rule was no longer applicable, Justice Brennan wrote, was that the protections of the Fourth Amendment attached not to particular categories of property, but to individuals: “We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”¹⁴²

Seven months later the Court expanded upon its newfound Fourth Amendment privacy conception in *Katz v. United States*,¹⁴³ which held that the exclusionary rule applied to an FBI recording of a conversation on a device placed outside a telephone booth. “[T]he Fourth Amendment protects people, not places,” wrote Justice Stewart. “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁴⁴ Justice Harlan’s *Katz* concurrence spelled out the test of whether a situation or location is one that an individual seeks to preserve as private.¹⁴⁵ He articulated a two-part requirement, “first that a person [exhibit] an actual (subjective) expectation of

138. See Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 562 (1996).

139. The Court’s earliest effort at Fourth Amendment interpretation came in *Boyd v. United States*, 116 U.S. 616 (1886), in which the Court held unconstitutional the compelled production of an invoice for allegedly illegally imported plate glass.

140. 387 U.S. 294 (1967).

141. *Id.* at 300 (internal quotation marks omitted).

142. *Id.* at 304.

143. 389 U.S. 347 (1967).

144. *Id.* at 351 (citations omitted).

145. See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 525 (1984); *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹⁴⁶

Significantly, the reasonable expectation of privacy test that *Katz* birthed is not a measure of the general issue, whether a governmental intrusion is unreasonable—for this inquiry, probable cause will suffice—but is rather a test of whether a warrant or any other qualification is even required in the first place. Had the FBI agents only taken the trouble to seek a warrant, the *Katz* Court suggested that they would have obtained one and the search would have been constitutional.¹⁴⁷ “[I]n substituting reasonable expectations of privacy for property rights as the focus of fourth amendment protection, the Court was not substituting one inviolable interest for another,” one commentator wrote. “It appears that the Court now believed that the sole function of that amendment is to ensure that privacy is not invaded in an arbitrary manner, rather than to ensure that privacy receives absolute protection against invasion.”¹⁴⁸ The effect of this shift was to convert the Fourth Amendment inquiry into a probable cause test. This is not quite what Justice Brandeis had in mind when he called the right to be let alone, as against the government, “the right most valued by civilized men.”¹⁴⁹

With *Hayden* and *Katz*, the Court achieved Brandeis’s vision of unmooring the Fourth Amendment from fetishistic property protection, but did not concomitantly maintain the heightened scrutiny that both the *Boyd* Court and Brandeis considered essential to the review of rights they thought fundamental.¹⁵⁰ Thus, a doctrinal void was formed. Justice Stewart recognized as much when he wrote in *Katz* that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy’. . . . Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.”¹⁵¹ Heightened protection of man’s “spiritual nature”¹⁵² would be left to other constitutional provisions and their attendant jurisprudence.

146. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

147. *See id.* at 354-55 (majority opinion).

148. Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 203 (1977).

149. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

150. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 199 (1993) (suggesting that present Fourth Amendment doctrine most closely parallels rational basis review); *see also* Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1424-25 (1974) (suggesting that fundamental-decision privacy does not necessarily protect the more obvious invasions of privacy encompassed within the Fourth Amendment).

151. *Katz*, 389 U.S. at 350.

152. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

3. *Fundamental-Decision Privacy*

The development of a more transcendent constitutional right of privacy, of the sort envisioned by Brandeis in his *Olmstead* dissent, would come in 1963, in *Griswold v. Connecticut*,¹⁵³ though it was a long time in the making. As early as 1914, Margaret Sanger had begun agitating for a woman's right to control her own fertility, in a self-published monthly magazine called *The Woman Rebel*.¹⁵⁴ An obvious thread within the Warren and Brandeis conception of privacy as sovereignty over one's public image views being "let alone" not as an end in itself but as a means to personal autonomy. *The Woman Rebel* took as its subtitle "No Gods No Masters,"¹⁵⁵ because privacy in its most transcendent form is about control. Woman, that is, should be the mistress of her own destiny, and repeal of the anti-birth-control laws was necessary to her emancipation from a form of economic slavery. Wrote Sanger in an editorial in the magazine's first issue, "No plagues, famines or wars could ever frighten the capitalist class so much as the universal practice of the prevention of conception."¹⁵⁶

The application of the privacy right to contraception was the brainchild of Fowler Harper, a Yale Law School professor and antigovernment gadfly.¹⁵⁷ As counsel for the plaintiffs in *Poe v. Ullman*,¹⁵⁸ the second of three direct legal challenges to Connecticut's anti-birth-control laws,¹⁵⁹ Harper devoted a section of his merits brief to the privacy rights of married people. He quoted Justice Brandeis's *Olmstead* dissent and argued that the Connecticut statute was a "colossal irrelevancy to any proper concern of the legislature of the State of

153. 381 U.S. 479 (1965).

154. DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 10 (1998).

155. WOMAN REBEL, Mar. 1914, at 1, reprinted in WOMAN REBEL 1 (Alex Baskin ed., 1976) [hereinafter Baskin].

156. Editorial, *The Prevention of Conception*, WOMAN REBEL, Mar. 1914, at 8, reprinted in Baskin, *supra* note 155, at 8. The Malthusian undertones of this rhetoric were self-conscious. See Clara Newcome, *Neo-Malthusianism—What It Is*, WOMAN REBEL, May 1914, at 2, reprinted in Baskin, *supra* note 155, at 26.

157. In 1946, Fowler resigned from the Indiana University Board of Trustees on suspicion of being a communist sympathizer. Later, while at Yale, he persuaded twenty-two of his colleagues to sign an open letter calling for the abolition of the House Un-American Activities Committee. See GARROW, *supra* note 154, at 148-49.

158. 367 U.S. 497 (1961).

159. The first was *Tileston v. Ullman*, 26 A.2d 582 (Conn. 1942), which the Supreme Court dismissed on standing grounds, 318 U.S. 44 (1943) (per curiam).

Connecticut.”¹⁶⁰ The state, Harper urged, had an obligation to accord equal respect to the conscience and beliefs of those who believe in and wish to use contraceptives “in the privacy of the home.”¹⁶¹ Although the Court dismissed *Poe* on standing grounds,¹⁶² Justice Douglas’s dissent laid the seeds for a vast expansion of constitutional rights against the government. After quickly dismissing the justiciability issue as chimerical,¹⁶³ he outlined the thick liberty interest for birth control patients that would soon command a majority. On Justice Douglas’s view, the liberty of which the Due Process Clause speaks “is a conception that sometimes gains content from the emanations of other specific guarantees or from experience with the requirements of a free society.”¹⁶⁴

Although Justice Douglas did suggest that the Connecticut statute was inconsistent with the spirit of the Third Amendment,¹⁶⁵ he did not cull his support primarily from constitutional text. He cited instead a long passage from an article in a journal called *Natural Law Forum*:

“One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State. . . . In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community.”¹⁶⁶

It hardly seems fitting to describe a statute that has been enforced once in eighty-one years in such Orwellian terms, but Justice Douglas’s program was broader than one little blue law. To be sure, his particular account of the appropriate relationship between citizen and democratic government did not accurately describe the United States in 1960. Seven years before *Loving v.*

160. Brief for Appellant at 28, *Poe*, 367 U.S. 497 (No. 60).

161. *Id.*

162. The Court held that, given that the only known prosecution under the anti-birth control statute was *State v. Nelson*, 11 A.2d 856 (Conn. 1940), no actual case or controversy was before the Court. *Poe*, 367 U.S. at 501-02.

163. *Poe*, 367 U.S. at 510-13 (Douglas, J., dissenting).

164. *Id.* at 517 (citation omitted).

165. *Id.* at 522. The Third Amendment states: “No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. amend. III.

166. *Poe*, 367 U.S. at 521-22 (Douglas, J., dissenting) (quoting Robert L. Calhoun, *Democracy and Natural Law*, 5 NAT. L.F. 31, 36 (1960)).

Virginia,¹⁶⁷ much of America could well be called “megatherian,” and indeed the understanding of “social good” Justice Douglas would himself endorse thirteen years later in *Roe v. Wade* was not obviously democratic. But the anti-totalitarian, anti-control normative aspiration Justice Douglas’s dissent represents captures much of what had motivated Sanger and carries considerable purchase even today.¹⁶⁸

When *Griswold* finally came down in 1965, then, it was anything but spontaneous. Justice Douglas’s opinion for the majority made clear, if nothing else, that the right to privacy could not be cabined within a single constitutional norm. The First Amendment protections of associational rights, the Third and Fourth Amendment protections against government intrusion upon one’s home and personal effects, and the Fifth Amendment protections of one’s inner thoughts conspire to create “zones of privacy.”¹⁶⁹ Since *Griswold*, the Court has found that the constitutional right to fundamental-decision privacy protects the use of contraceptives by single people¹⁷⁰ and minors;¹⁷¹ the ability of prisoners or those behind in their child support to marry;¹⁷² the possession of pornography in one’s home;¹⁷³ and, most controversially, a woman’s decision to have an abortion.¹⁷⁴ But the right does not, for example, extend to the decision to ask a physician to end one’s own life;¹⁷⁵ a family’s decision to impose euthanasia without clear consent of the patient;¹⁷⁶ or a parent’s decision to send her child to a segregated school.¹⁷⁷

In attempting to distinguish between those activities that are protected by the right to fundamental-decision privacy and those that are not, the essential question is, what is the substance and scope of the ultimate end being protected? Margaret Sanger, Justice Douglas, and, to a lesser extent, Justice

167. 388 U.S. 1 (1967).

168. Justice Harlan dissented separately in *Poe*, but his opinion more directly invoked the doctrinal connection with the Fourth Amendment. *Poe*, 367 U.S. at 548-51 (Harlan, J., dissenting).

169. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

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

171. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 691-99 (1977) (plurality opinion).

172. *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

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

174. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

175. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

176. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

177. *Runyon v. McCrary*, 427 U.S. 160, 177-79 (1976).

Harlan articulated an anti-totalitarian vision concerned with the state's ability to control the lives of its citizens. On this view, certain rights, such as the family's inherent right to sovereignty, are less appropriately subject to political regulation than others. Fowler Harper embraced a more Lockean approach that, while not excluding the anti-totalitarian view, emphasizes a woman's right to controvert the morals of the community as an exercise of her liberty of conscience.

The abortion cases give us considerable guidance on the extent to which these conceptions of privacy have survived doctrinally. *Roe v. Wade* declared in clear terms remarkably similar to *Lawrence* that a woman's right to have an abortion is a constitutionally protected privacy right "founded in the Fourteenth Amendment's concept of personal liberty."¹⁷⁸ The Court deemed fundamental the decision whether to terminate one's pregnancy because of the impact childbirth can have on the mother's future life plans. Not only might pregnancy carry medical risks, but "[m]aternity, or additional offspring, may force upon the woman a distressful life and future," due to psychological stress, the burdens of child care, social stigma, and the like.¹⁷⁹ Presenting an abortion ban as working a kind of Hobson's choice illustrates *Roe's* connection both to *Griswold* and to *Lawrence*. As Sanger argued, a prohibition on contraceptives effects a form of slavery on women that forces them to choose between childbearing and abstinence. Analogously, a prohibition on sodomy forces gays into a choice between criminality and the closet.¹⁸⁰ Balanced against a decision deemed fundamental because of its profound impact on the life of an individual, the moral qualms of the community seem cruel and trifling.

Planned Parenthood v. Casey, in which a Court plurality changed *Roe's* categorical tripartite framework into an "undue burden" balancing test, picked up this thread.¹⁸¹ Of most interest to my analysis is the sweeping language the plurality used to justify its reaffirmation of fundamental-decision privacy as applied to the abortion decision. As with prior opinions, the Court described the protected zone of privacy as "a realm of personal liberty which the government may not enter."¹⁸² But just as *Griswold* construed that realm as transcending the physical curtilage of the home and reaching certain private choices by individuals, *Casey* extended *Roe's* protective net into more abstract

178. *Roe*, 410 U.S. at 153.

179. *Id.*

180. See *supra* text accompanying notes 51-52.

181. 505 U.S. 833, 874 (1992).

182. *Id.* at 847.

space. In one of its most cited passages, the Court wrote that the issues to which a privacy right had been extended

involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

. . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.¹⁸³

Fundamental-decision privacy, on this formulation, is not about privacy at all, at least not as conventionally understood. Until *Casey*, it was possible to view the Court's privacy decisions through a fictional prophylactic lens. Consider the following reading: The constitutional right of privacy protects against unwarranted physical invasions of the home. A statute barring the use of contraceptives, barring the viewing of pornography, or barring abortions cannot properly be enforced without a physical invasion of the home. Although *Roe's* language about the impact of childbearing on the mother's life course undermines such a formalistic reading of the fundamental-decision cases, such a reading still could serve to moor these cases to traditional notions of privacy grounded in physical space, and provide guidance in future decisions. *Casey*, however, linked fundamental-decision privacy explicitly to concepts of autonomy, personal conscience, and self-definition.¹⁸⁴

Bowers v. Hardwick had already been decided six years prior to *Casey*, a convenience which, by leaving on the table anti-sodomy laws and like morals legislation, provided additional cover for the *Casey* plurality's open-ended claims about the nature of constitutional privacy. *Bowers* had drawn a line in the sand. To those who thought that the incremental logic of common lawmaking demanded a close examination of the asserted state interest in

183. *Id.* at 851-852. This portion of the opinion was joined by Justices Blackmun and Stevens and thus commanded a majority.

184. Because *Casey* upheld controversial restrictions on abortion rights, political expediency allowed and perhaps compelled the Court to speak in such far-reaching terms. See generally GARROW, *supra* note 154, at 700 (describing the reaction to *Casey* as follows: "Some pro-choice groups . . . self-defeatingly tried to insist that 'Roe v. Wade is dead,' while right to life activists castigated the O'Connor-Kennedy-Souter trio as 'backstabbing' members of a 'wimp bloc.'").

regulating private, consensual, noncommercial sexual conduct, Justice White's statement of the issue presented was more than mildly discouraging.¹⁸⁵ The *Bowers* Court construed the doctrinal definition of fundamental rights protected by substantive due process – those “implicit in the concept of ordered liberty”¹⁸⁶ – as limited to those that were expressly permitted historically. But *Lawrence* vindicated the vision of privacy that Justice Blackmun stated succinctly in dissent:

This case is no more about ‘a fundamental right to engage in homosexual sodomy’ . . . than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, the right to be let alone.¹⁸⁷

The majority framed the case as about the freedom to engage in sodomy. The dissent framed the case as about freedom to make fundamental personal decisions. The prophylactic fiction discussed above facilitated this debate by minimizing the individual interest to the interest of a gay person in having sex in his home, which is susceptible to interpretation as either more or less important than the community's interest in policing morals.

After *Casey*, however, privacy interests were expressly defined as the interests of all people in a measure of autonomy and self-definition. Thus stated, the form that self-definition takes is more obviously irrelevant to the constitutional analysis. The related anti-totalitarian view of privacy rights, which I have associated with Margaret Sanger and Justice Douglas, sees privacy as control of one's destiny. Understood in this way, privacy is instrumental to the prospective identity of the individual, not merely to her recreational choices.

185. See *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (calling the issue “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

186. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

187. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

B. Constitutional Privacy in the Academy

Casey is a classic example of doctrine chasing theory. Owing to *Griswold* and its progeny, the 1960s and 1970s were the heyday of privacy scholarship. The case failed to announce a holistic theory of privacy. Rather, each of the opinions in *Griswold* attempted to argue from doctrine why the right of married persons to use contraceptives was, in a sense, already constitutionally protected. But the die had been cast. *Griswold* was one of those cases through which doctrine leaps to a new orbit and, consequently, spawns a fresh set of academic commentary. Thomas Grey wrote in 1983 that “[f]rom the first, the Court’s development of a right to privacy has suggested to philosophical-minded commentators the possible elevation to constitutional status of Mill’s principle of liberty.”¹⁸⁸ This principle is the view that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”¹⁸⁹ Constitutionalizing Mill’s principle would have raised profound questions about the legitimacy of laws against drug use, prostitution, and a host of other arguably victimless crimes, and would have precipitated endless debate over the meaning of a “self-regarding act.”¹⁹⁰ One can safely say, however, that *Bowers* shut the door on the harm principle. As doctrines mature, the rights-generating principles that spawned them crystallize into something closer to rules, and the scope of their ancillary application narrows. But *Lawrence* was, like *Griswold* before it, a quantum leap in the doctrine. It reinvigorated hibernating theories of privacy, but at the same time forced them to reckon with a new set of interpretive constraints and invitations.

In order to place into perspective the body of privacy scholarship that best precipitates and embraces *Lawrence*-style metaprivacy, it will first be helpful to discuss briefly some competing conceptions. One particularly inventive approach that remains influential is Charles Fried’s idea of privacy as a form of social currency. Fried wrote his seminal article on the topic in 1968, three years after *Griswold* and one year after *Katz*, when privacy had, as he noted, “become

188. THOMAS C. GREY, THE LEGAL ENFORCEMENT OF MORALITY 8 (1983).

189. MILL, *supra* note 17, at 80.

190. Compare Joel Feinberg, *Offensive Nuisances*, in PHILOSOPHY OF LAW 278 (Joel Feinberg & Jules Coleman eds., 2004) (highlighting nuisance as problematic for Mill’s principle), with HART, *supra* note 30, at 42 (arguing for a strong public-private distinction in delineating self-regarding acts). One problem for both Mill and Hart is that they do not adequately explain why community sensibility, even with respect to private acts, cannot serve as a source of public duties.

the object of considerable concern.”¹⁹¹ Like Justice Kennedy, Fried viewed privacy as central to self-definition. The difference is that, for Fried, privacy is purely, but uniquely, instrumental to self-definition. Privacy preserves for the individual a sphere of exclusive personal knowledge. Fried treated this personal knowledge as a form of entitlement that the individual uses, in essence, to purchase the fundamental social bonds of love, friendship, and trust.¹⁹² Wrote he, “Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable.”¹⁹³ Fried did not argue that his was the only way of understanding privacy, only that his was the only way that justifies the lofty status of the “right” to privacy.¹⁹⁴

A “market conception of personal intimacy”¹⁹⁵ also emerges in Richard Posner’s work in this area. Posner viewed privacy not as an inflexible moral right but as a tradable entitlement best assigned to the party that will use the private information most efficiently.¹⁹⁶ Neither Fried’s nor Posner’s “economic” view of privacy rights captures Justice Kennedy’s concerns in *Lawrence*. Posner would subject privacy rights to the vagaries of the “market” for such rights. Fried’s conception places restrictions on the valuable uses of privacy that *Lawrence*-style metaprivacy eschews. *Lawrence* prized a definitional autonomy that is “transcendent,” plausibly extending beyond love, friendship, and trust. Moreover, Fried’s conception is overinclusive, in that it assigns a meaning to the alienation of one’s privacy entitlement that may not always be present.¹⁹⁷ In any event, it is safe to assume that the *Lawrence* majority would reject the commodification of the right it seeks to protect.

Lloyd Weinreb, on the other hand, has connected privacy explicitly to human autonomy. In this way, his conception seems more closely to approximate the metaprivacy ideal. He does not, however, believe that any rights necessarily follow from this conception. Weinreb wrote that “privacy might be regarded as the face that autonomy presents to others similarly situated in the same community, merely one side of the abstract dichotomy between public and private: Whatever is public is not private, and whatever is

191. Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968).

192. *See id.* at 484.

193. *Id.* at 477.

194. *See id.* at 484.

195. Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 32 (1976).

196. *See* Richard A. Posner, *An Economic Theory of Privacy*, REGULATION, May-June 1978, at 19.

197. *See, e.g.,* Reiman, *supra* note 195, at 33 (“One ordinarily reveals information to one’s psychoanalyst that one might hesitate to reveal to a friend or lover. That hardly means one has an intimate relationship with the analyst.”).

private is not public.”¹⁹⁸ Taking as axiomatic that humans have something called “autonomy,” and that it is this autonomy that enables them to be called individuals, Weinreb believes that privacy is a conventional label for this abstract notion. In this sense, neither privacy nor autonomy have any content or can have any content. Rather, the public-private distinction is “scarcely more than [a] reminder[] that human beings are at one and the same time constituted as persons within a human community and autonomous.”¹⁹⁹

Fried, Weinreb, and others who do not view the right to privacy as an independent value-holder are responding to an older intellectual tradition that sees privacy as both unique and valuable in many of the same ways as Justice Kennedy appears to. Privacy as “personhood” is not a new idea. Roscoe Pound, for example, is an early proponent of the idea that the law of torts should protect an individual’s “personality” interests, which include a right to physical integrity and personal liberty, a reputational right to personal honor, and a right to belief and opinion.²⁰⁰ Similarly, Jeffrey Reiman has advanced the proposition that privacy represents “a social ritual by means of which an individual’s moral title to his existence is conferred.”²⁰¹ That is, a thick sense of personal entitlement to one’s thoughts, body, and actions is necessary to the formation of “self.”²⁰² Whether conceptualized in terms of “personality” or “selfhood,” it is easy to see how “privacy” rights applied against the government could eventually produce opinions like *Roe* and *Lawrence*.

But metaprivacy as I have described it also draws on a heretofore distinct strand within privacy theory, the “privacy as autonomy” school. Louis Henkin offered one of the earliest defenses of the position that the legal concept of privacy post-*Roe* represents the moral freedom of an individual to pursue her own projects and plans. Writing in 1974, Henkin argued that the Supreme Court’s recognition of privacy protected not “freedom from . . . intrusion” — privacy’s ordinary meaning — but “something . . . farther-reaching, an additional zone of autonomy, of presumptive immunity to governmental

198. Lloyd L. Weinreb, *The Right to Privacy*, in *THE RIGHT TO PRIVACY* 25, 31 (Ellen Frankel Paul et al. eds., 2000).

199. *Id.* at 34.

200. See Roscoe Pound, *Interests in Personality*, 28 *HARV. L. REV.* 343, 355 (1915).

201. Reiman, *supra* note 195, at 39 (emphasis omitted).

202. *Id.*; see also Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 156 (Ferdinand David Schoeman ed., 1984) (arguing that public scrutiny creates conformity and thus makes us less differentiated as people); Jed Rubenfeld, *The Right of Privacy*, 102 *HARV. L. REV.* 737, 752 n.93 (1989) (collecting sources that equate privacy with “personhood”).

regulation.”²⁰³ Henkin traced the fundamental primacy of the individual lying behind substantive due process to our constitutional ideal of limited government.²⁰⁴ The “liberty” protected by the Fifth Amendment, Henkin wrote, echoing Justice Douglas’s position in *Poe*,²⁰⁵ “did not mean Adam Smith but did mean John Stuart Mill.”²⁰⁶ Henkin was not troubled by the constitutionalization of an open-ended, *prima facie* freedom from governmental regulation for certain ill-defined fundamental rights.²⁰⁷ He saw it, rather, as a mandate to explore the “compelling state interest” side of the inevitable balance between private rights and public good. Instead of focusing all of our intellectual attention on defining the contours of the right, a potentially fruitless exercise, we should have a robust discourse about the ends for which society ever can intrude upon our individual autonomy.²⁰⁸

Joel Feinberg took the notion of privacy as autonomy a step further than Henkin. “[I]f the privacy concept already attributed to the Constitution is not identical to personal sovereignty,” he went so far as to ask, “what can it be?”²⁰⁹ Feinberg argued that the Supreme Court’s invocation of “privacy” is in fact the constitutionalization of what philosophers call “personal autonomy” or “self-determination,” meaning “the sovereign authority to govern oneself, which is absolute within one’s own moral ‘boundaries.’”²¹⁰ These boundaries of personal sovereignty, Feinberg suggested, extend not just to the limits of the physical body but also to “the right to decide how one is to live one’s life, in particular how to make the critical life-decisions.”²¹¹ Like Henkin, Feinberg connected this idea of privacy explicitly to the philosophy of John Stuart Mill. He argued that Mill’s sphere of self-regarding acts is a good rough cut at the limits of personal autonomy that the jurisprudential definition of privacy is

203. Henkin, *supra* note 150, at 1411.

204. *See id.* at 1412-13. Some would tether a constitutional respect for the natural rights of the individual to the stillborn Privileges or Immunities Clause of the Fourteenth Amendment rather than to substantive due process. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 525-26 (1999) (Thomas, J., dissenting); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 163-80 (1998); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 22-30 (1980).

205. *See supra* note 166 and accompanying text.

206. Henkin, *supra* note 150, at 1417.

207. *See id.* at 1427.

208. *See id.* at 1431.

209. Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 *NOTRE DAME L. REV.* 445, 492 (1983).

210. *Id.* at 446-47 (emphasis omitted).

211. *Id.* at 454.

attempting to substantiate²¹²: “[R]espect for a person’s autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him.”²¹³ Feinberg lamented, however, that the Justices have too cavalierly recognized state power to counteract certain fundamental rights through morals legislation that “enforc[es] the requirements of decency”;²¹⁴ he would prefer a more absolute embrace of Mill.

Feinberg wrote before *Bowers*, *Casey*, and *Lawrence*, and so his positive description of American law comes with a significant caveat. We get further with Jed Rubenfeld’s conception of privacy. On Rubenfeld’s account, privacy is best understood not as an individual right to personhood, autonomy, or some other fundamental entitlement, but as a prophylactic against state tyranny.²¹⁵ Writing three years after *Bowers* (but, presciently, three years before *Casey*), Rubenfeld found the analysis of both the majority and the dissents in that opinion lacking, namely because both called for arbitrary judicial decrees of the limits of the privacy principle under discussion.²¹⁶ Why, for example, does fundamental-decision privacy protect the right to engage in homosexual sodomy but not the right to engage in adultery or incest?²¹⁷ Neither the “privacy as personhood” nor the “privacy as autonomy” strands of the academic literature satisfactorily explain, for Rubenfeld, “which choices and decisions are protected.”²¹⁸ He offered the following conception in response:

Anti-abortion laws, anti-miscegenation laws, and compulsory education laws all involve the forcing of lives into well-defined and highly confined institutional layers. At the simplest, most quotidian level, such laws tend to *take over* the lives of the persons involved: they occupy and preoccupy. They affirmatively and very substantially shape a person’s life; they direct a life’s development along a particular avenue. These laws do not simply proscribe one act or remove one liberty; they inform the totality of a person’s life.²¹⁹

212. *Id.* at 487.

213. *Id.* at 464 (emphasis omitted).

214. *Id.* at 489 (internal quotation marks omitted).

215. See Rubenfeld, *supra* note 202, at 784.

216. See *id.* at 747-50.

217. See *id.* at 750.

218. *Id.* at 751.

219. *Id.* at 784.

Rubinfeld's totalitarian conception of privacy in practice effectuates the limited autonomy conception we see in *Lawrence*. Rubinfeld suggested that the novelty of his conception lies in the sharp distinction he drew between an inquiry into what the state is trying to forbid versus an inquiry into what the state is producing.²²⁰ Rather than trying arbitrarily to limit the conduct the state may regulate, he argued, we should instead reject governmental attempts to control the lives of citizens. As I argued in Section I.B, the most consistent justification Justice Kennedy offered for the majority position in *Lawrence* was that "[t]he State cannot demean [petitioners'] existence or control their destiny by making their private sexual conduct a crime."²²¹ Because the conduct at issue was status-definitional, regulating it necessarily subordinated gay Americans' lives to the interests of the state—this was the linchpin of its unconstitutionality.

This idea is the centerpiece of Justice Douglas's *Poe* dissent²²²: Rubinfeld's Orwellian state is the megatherian conception Douglas feared.²²³ "By all accounts," wrote Rubinfeld, "privacy has everything to do with delineating the legitimate limits of governmental power."²²⁴ Also coded within this idea is the quasi-First Amendment notion that we should be free to embody even unpopular conceptions of the good. Ruth Gavison has written that privacy provides a context within which we can deliberate about potentially deviant ideas free from social pressure.²²⁵ Rubinfeld alluded to this freedom implicitly when he called privacy "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state."²²⁶

Acting alone, however, Rubinfeld's presumptive autonomy ideal provides only limited guidance to a judge deciding a hard case. Rubinfeld hoped that, by reconceptualizing privacy rights along anti-normativity lines rather than along fundamental rights lines, he could escape Mill's and Feinberg's jurisprudential problem. But even if Rubinfeld succeeded at capturing the common thread between laws against home schooling, abortion, and sodomy—each "involve[s] a peculiar form of obedience that reaches far beyond

220. *Id.* at 783.

221. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

222. *Poe v. Ullman*, 367 U.S. 497, 521-22 (1961) (Douglas, J., dissenting).

223. See *supra* text accompanying note 166.

224. Rubinfeld, *supra* note 202, at 737.

225. Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 448-56 (1980).

226. Rubinfeld, *supra* note 202, at 784.

mere abstention from the particular proscribed act"²²⁷—his principle does no better than Mill's at deciding actual cases and controversies.

Lawrence offered a solution to this problem through convention. Social consensus around the status-definitional nature of proscribed conduct triggers the presumptive protection against morals regulation to which Henkin, Feinberg, and Rubinfeld attach normative value.

III. METAPRIVACY AND CRIMINAL SENTENCES

Having taken pains to articulate how *Lawrence*-style metaprivacy is neither doctrinally nor theoretically sui generis, it is only natural that I suggest how metaprivacy can actually be applied outside of the gay rights context. As Rubinfeld has written, the time-honored (and generally inadvertent) tradition of confining legal reasoning to intradoctrinal application "tends to suppress appreciation of how differing lines of case law relate to one another."²²⁸ Recognizing the ways in which similar reasoning applies in different doctrinal contexts can make hard cases harder, but it has the benefit of enforcing the analytic consistency necessary to the legitimate exercise of judicial review.

Lawrence is a case about punishment, but most commentary on its import focuses on the threshold question of which rationales, if any, justify using the criminal law to regulate primary conduct.²²⁹ I have argued that *Lawrence* restricts a community's use of the criminal law to suppress status masquerading as conduct. One other area of law in which we conspicuously permit communities to use criminal sanctions in just this way is in capital sentencing. Accordingly, this Part argues that, if the principles of *Lawrence* are to be applied interdoctrinally, a retributive rationale based on "character" is constitutionally inadequate as a justification for capital punishment.

Two analytic moves are necessary to make out the argument. First, I must demonstrate that the retributive rationale necessarily relies on a judgment about the character of the accused. Second, I must demonstrate that this judgment is status-linked in a constitutionally impermissible way. After describing how the kinds of judgments made in the capital sentencing process parallel those declared impermissible in *Lawrence*, I will respond to a number of anticipated objections.

227. *Id.* at 792-93.

228. See Jed Rubinfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1145 (2002).

229. I use the term "primary conduct" to describe the day-to-day actions of free individuals, as opposed to acts of negotiation with the criminal justice system. See *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part).

A. Our Retribution Is Character-Based

Retributive punishments, oversimplified, rely on the idea that punishment should be deserved. The obvious attraction of retribution is that it conforms nicely to our intuitions about the morality of punishment.²³⁰ Although many gradations of retributive punishment might be identified,²³¹ retributive theories can be broadly segregated into act-based and character-based models. An act-based model assigns moral value to particular acts, holding that “[a] person who deserves punishment deserves it because, and only because, she has performed a culpable wrongdoing.”²³² By contrast, a character-based model holds that “[a] person who deserves punishment deserves it because, and only because, she has a bad moral character.”²³³

In the realm of capital punishment, the character-based theory of retribution not only is dominant but is, in a sense, constitutionally required. The overriding command of the Court’s death penalty jurisprudence in the years following *Gregg v. Georgia*²³⁴ is that capital punishment must be

230. The retributive rationale is in the midst of a philosophical renaissance. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 23-24 (2003) (describing the “philosophical revival of retributivism” as “the most important Anglo-American movement of the last forty years or so”); Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 845 (2002) (calling retributivism “all the rage”).

231. Michael Moore’s work in this area has been particularly innovative. See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 83-188 (1997).

232. STEPHEN KERSHNER, *DESERT, RETRIBUTION, AND TORTURE* 15 (2001). For examples of act-based retributive theories, see, for example, *id.* at 27, noting that “a bad character is neither necessary nor sufficient for deserved punishment [and] the punishment that a wrongdoer deserves [does not] track the badness of her moral character”; and ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 53 (1985), stating that, “If the state is to carry out the authoritative response to [wrongful] conduct . . . then it should do so in a manner that testifies to the recognition that the conduct is wrong.”

233. KERSHNER, *supra* note 232, at 15-16. For examples of character-based theories, see, for example, KANT, *supra* note 6, at 106, which argues that only the death penalty appropriately corresponds to the “inner wickedness” of a murderer; ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 383 (1981), which suggests that punishment is only appropriate for acts “attributed to a defect of character”; and Frederic R. Kellogg, *From Retribution to “Desert”: The Evolution of Criminal Punishment*, 15 CRIMINOLOGY 179 (1977), which argues that a report by the Committee for the Study of Incarceration reflects a concern with the individuation of punishment that finds relevant the offender’s moral character.

234. 428 U.S. 153 (1976).

appropriately individualized.²³⁵ Writing for a five-Justice majority in *Penry v. Lynaugh*, Justice O'Connor argued that "it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense."²³⁶ Character evidence introduced at the sentencing phase of a capital trial is often designed to be mitigating, good traits speaking as well as bad traits to an individual's moral character. The theory behind allowing evidence of good works or community involvement is that a convict should be permitted to rebut the judgment that his crime completely determines his moral worth. As Russell Dean Covey has written, defendants must be allowed to introduce mitigating evidence "to prove that their crime was not consistent with, or a manifestation of, a morally defective or dangerous character."²³⁷ Consistent with this understanding, one theory in support of a constitutional prohibition on the execution of juveniles is that the character of a juvenile has not been sufficiently concretized.²³⁸ Justice Kennedy embraced this theory in *Roper v. Simmons*, writing that "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."²³⁹ This inquiry into an individual's fundamental moral character thus is a central feature of our death penalty jurisprudence.

235. See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

236. 492 U.S. 302, 327-28 (1989) (holding that, though the Eighth Amendment did not prevent the execution of mentally retarded convicts, evidence as to mental retardation could not be excluded as a mitigating factor), *overruled in part by Atkins v. Virginia*, 536 U.S. 304 (2002).

237. Russell Dean Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 212 (2004).

238. See Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 834 (2003) ("[L]ike the adult actor who establishes mitigation, it can be said that the adolescent's harmful act does not express his bad character; indeed, it does not manifest 'character' at all, but something else—in this case, developmental immaturity.").

239. *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005). As the trial court in *Boy Scouts of America v. Dale* reminded us through its inartful use of parentheses, "depravity" and "homosexuality" have, at times, been used interchangeably. See *Dale v. Boy Scouts of Am.*, No. MON-C-330-92, slip. op. at 39 (N.J. Super. Ct. Ch. Div. Nov. 3, 1995) ("'Sodomy' is derived from the name of the biblical city, Sodom, which, with the nearby city of Gomorrah, was destroyed by fire and brimstone rained down by the Lord because of the sexual depravity (active homosexuality) of their male inhabitants." (quoting *Genesis* 18:16-19:28 (King James))), *rev'd*, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

Actual statutory aggravators and mitigators reinforce this doctrinal mandate. For the sake of economy, I will use as an example Texas, the state that accounted for more than thirty-five percent of all executions nationwide from 1977 to 2003.²⁴⁰ A murder qualifies as capital murder under the Texas Penal Code if any of the following conditions applies: the victim is known to be a peace officer or a fireman in the course of duty; the murder is intentionally committed in the course of committing another felony; it is a contract killing; it is committed in the course of a prison escape; the defendant is incarcerated and the victim is a prison employee; it is prison-gang related; there are multiple victims; or the victim is a child under the age of six.²⁴¹ At the sentencing phase of a capital murder trial, the state must prove intent to kill and it must show that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”²⁴² If the state carries its burden, the jury is further instructed to answer whether life imprisonment should be imposed instead of death, “taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant.”²⁴³ The Texas Code of Criminal Procedure additionally reiterates that the jury “shall consider mitigating evidence that a juror might regard as reducing the defendant’s moral blameworthiness.”²⁴⁴

To summarize, the crimes to which Texas applies its capital murder statute appear to be those that seem particularly socially injurious (e.g., murder of a police officer, murder in the course of a prison escape) or particularly heinous (e.g., murder of a small child). Although it is difficult to disaggregate the different rationales, we can say broadly that the former category reflects a deterrence rationale and the latter reflects some form of retributive rationale. The deterrence rationale is further vindicated by the instruction that there must be a probability of recidivism, and the retribution rationale is further vindicated by the inquiry into character and moral blameworthiness. The view of the Texas statutes is intensely personal: Identical crimes may be

240. THOMAS P. BONCZAR & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2003, at 9 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf>.

241. TEX. PENAL CODE ANN. § 19.03 (Vernon 2005).

242. TEX. CODE CRIM. PROC. ANN. art. 37.0711, § 3(b)(2) (Vernon 2005).

243. *Id.* § 3(e).

244. *Id.* § 3(f)(3).

differentially punished based on the presence of a malevolent disposition within the offender.²⁴⁵

It is possible to argue that the inquiry into character is not grounded in retribution at all, but rather serves the purposes of specific deterrence. Covey, for example, has written that “the doctrine of individual consideration and the decision to permit future dangerousness to be argued at the penalty phase both grow out of a philosophical belief that capital sentencing decisions should turn on non-retributive, offender-based evaluations of the defendant’s character.”²⁴⁶

Whatever its historical pedigree, the argument that the character inquiry speaks only to future dangerousness is both implausible and constitutionally problematic. The spectrum of positive character traits permitted under *Lockett v. Ohio*, which prohibited states from limiting the scope of mitigating evidence as it relates to a defendant’s “record and character,”²⁴⁷ is far broader than a focus on future dangerousness would allow. As Stephen Garvey has pointed out,²⁴⁸ mitigators have ranged, either in dicta or in practice, from being “a fond and affectionate uncle,”²⁴⁹ to working with one’s father as a painter and being “a good son,”²⁵⁰ to winning a choreography prize,²⁵¹ to having a “peaceful nature.”²⁵² In Texas, whose capital sentencing scheme I have just discussed, a defendant’s parole eligibility was not even admissible at the penalty phase until 1999;²⁵³ three years earlier, a Texas jury sentenced to death a convict suffering

245. This type of inquiry is not uncommon. See, e.g., FLA. STAT. ANN. § 921.141(5) (West 2005) (providing as aggravators that “[t]he capital felony was especially heinous, atrocious, or cruel,” “was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification,” or “was committed by . . . a sexual predator . . . or a person previously designated as a sexual predator who had the sexual predator designation removed”); KAN. STAT. ANN. § 21-4636 (1995 & Supp. 2004) (including as an aggravator “desecration of the victim’s body in a manner indicating a particular depravity of mind”); 42 PA. CONS. STAT. ANN. § 9711 (e)(8) (West 2005) (permitting as mitigating evidence “any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense”).

246. Covey, *supra* note 237, at 209. Covey argued that this philosophical belief is the progeny of the utilitarian views of Herbert Wechsler, who helped draft the Model Penal Code. See *id.* at 207-24.

247. *Lockett v. Ohio*, 438 U.S. 586, 589 (1978) (plurality opinion).

248. Stephen P. Garvey, “As the Gentle Rain from Heaven”: Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1026 & n.145 (1996).

249. *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987).

250. *Payne v. Tennessee*, 501 U.S. 808, 814 (1991).

251. *Boyd v. California*, 494 U.S. 370, 382 n.5 (1990).

252. *California v. Brown*, 479 U.S. 538, 539 (1987).

253. See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(2)(B) (Vernon 2005).

from AIDS whose life expectancy was three years.²⁵⁴ Common sense suggests that the purpose of the character inquiry is not entirely or even primarily to assess future dangerousness but rather to establish a link between conduct and character, to “make the defendant’s whole career and soul the subject of the penalty trial”²⁵⁵ for the purpose of judging the extent to which he has internalized norms of ethical conduct.

To the extent that prosecutors do adduce character evidence at capital trials in order to assess future dangerousness, they run into potential constitutional difficulties. The Court has repeatedly and recently applied a heightened standard of review to capital sentencing schemes, holding that the imposition of the death penalty cannot be “excessive.”²⁵⁶ To suggest that execution is the least restrictive means of specific deterrence for anyone below an exceedingly rarified stratum of impulsively violent people fails the laugh test.²⁵⁷ Clearly some value is at play beyond preventing future crimes by the convict.

B. The Constitutionality of Character-Based Retribution

Even if I have established that the retributive theories we rely upon in sentencing individuals to death are personal, I have not established that they

254. See Janet Morrow & Robert Morrow, *In a Narrow Grave: Texas Punishment Law in Capital Murder Cases*, 43 S. TEX. L. REV. 979, 984-85 (2002) (discussing *Dickerson v. State*, No. 71,920 (Tex. Crim. App. Dec. 4, 1996)).

255. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 335. In his empirical study of how capital jurors react to actual and potential aggravators and mitigators, Stephen Garvey found that while factors relating to future dangerousness are highly aggravating, so too is the defendant’s lack of remorse. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1560-61 (1998).

256. See *infra* text accompanying notes 288-293.

257. One controversial approach to incurably violent inmates has been confinement in supermax prisons, which have been characterized as having “[d]ynamics of domination, control, subordination, and submission [that] are fundamentally different from those in regular maximum security prisons.” Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, in 28 CRIME & JUST. 385, 390 (Michael Tonry ed., 2001). Little empirical research has emerged on the effectiveness of supermax prisons at reducing violence, but for one study’s take, see Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341 (2003), which finds that supermaxes in Illinois, Arizona, and Minnesota could not be justified as a means of increasing inmate safety, but finds mixed results as to staff safety. See also Richard L. Lippke, *Against Supermax*, 21 J. APPLIED PHIL. 109, 113 (2004) (arguing that proponents have not carried their burden of demonstrating that the benefits of supermax facilities outweigh their enormous costs). The fact that states themselves are the typical proponents of the argument that supermax prisons reduce violence should raise red flags as to the appropriateness of the future dangerousness inquiry at its present level of generality.

are personal in a constitutionally impermissible way. There are obvious differences, to say the least, between convicted homosexual sodomists and convicted murderers. A convincing view of *Lawrence* is that it simply recognizes some social consensus that engaging in homosexual conduct does not violate a public duty, whereas murder certainly does. This distinction conforms to the moral intuitions of many, but is unsatisfying. I have argued that the only way to understand *Lawrence* as a creature of the doctrinal tradition, rather than as a *sui generis* determination that writing moral disapprobation of gays into statutes is unconstitutional, is to recognize the principle that status-definitional conduct is protected by substantive due process in a way that other conduct is not. If we can identify status-definitional elements of other forms of a priori criminal conduct, why should that conduct not also be constitutionally protected against morals legislation?

Imagine the Texas legislature enacts the following amendment to its capital murder statute:

Capital Murder Sodomy. A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) under the following conditions:

the person commits the murder while committing sodomy against a minor; and the person and the minor are of the same sex.

By punishing homosexual conduct more severely than like heterosexual conduct, such a statute would pose obvious difficulties under *Lawrence*.²⁵⁸ Yet *Lawrence* does not on its own terms furnish any grounds upon which to distinguish gay people from “inwardly wicked” or otherwise morally blameworthy people. Justice Kennedy expressly eschews “mandat[ing] [his] own moral code.”²⁵⁹ Yet many Americans believe that homosexuality reflects deep character flaws, and moreover that these flaws are particularly likely to manifest themselves as crimes of moral turpitude. If we are to take Justice

258. The Supreme Court suggested as much in *Limon v. Kansas*, in which the Court vacated and remanded an opinion by the Kansas Court of Appeals upholding a Kansas statute that punished homosexual sodomy of a minor more severely than its heterosexual counterpart. 539 U.S. 955 (2003); see *infra* text accompanying notes 317-322.

259. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

Kennedy's words seriously, they must mean that the Court should be, to borrow from the First Amendment jurisprudence, content-neutral.²⁶⁰

If this is so, then the crucial question is: content-neutral with respect to what? A tempting option is to say that the Court must be content-neutral within the category of acts that individuals have the moral freedom to engage in. One does not have a liberty right to engage in criminal conduct, but the cases have not articulated a principle that excludes homosexual sodomy from the family of criminal conduct. Without a theory of the instrumental value of same-sex sexual relations, anti-sodomy laws are just another example of "laws representing essentially moral choices."²⁶¹ The theory articulated in *Lawrence*, I have argued, is that anti-sodomy laws breach the status-conduct divide by punishing for who someone is rather than for what they do. And yet the retributive rationale upon which our death penalty doctrine largely relies does the same, for it attaches penological relevance to the substance of an individual's constitutive commitments.

Lawrence is not our only jurisprudential paean to this kind of content-neutrality in punishment. The Court expressed a similar idea more than forty years ago when it held in *Robinson v. California* that punishing a "status" crime violates the Eighth Amendment.²⁶² As Justice Douglas wrote in concurrence: "[T]he principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick."²⁶³ It will be objected that the morally depraved is "sick" not in the medical but in the colloquial sense. Whereas sickness or addiction is simple bad luck, a mentally competent person, even one with bad "constitutive" luck,²⁶⁴ commits a heinous murder as an act of will.²⁶⁵ Even without engaging the determinist's response to this objection, it will suffice to note that *Lawrence* does not, either explicitly or implicitly, rely on a judgment about whether the status defined by the conduct was willful or not.

The illiberality of punishing someone for having a disfavored constitution also finds expression in the Bill of Attainder clauses. Those clauses were meant

260. See, e.g., *United States v. Grace*, 461 U.S. 171 (1983) (requiring time, place, and manner restrictions on speech in public forums to be content-neutral and to satisfy heightened scrutiny analysis).

261. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

262. *Robinson v. California*, 370 U.S. 660 (1962).

263. *Id.* at 676 (Douglas, J., concurring).

264. Constitutive luck is that which inheres in the innate characteristics and abilities with which life blesses (or curses) us. See THOMAS NAGEL, *MORTAL QUESTIONS* 24, 28 (1979).

265. See MOORE, *supra* note 231, at 217.

to embody the idea that it is wrong for a criminal statute to “designate[] *criminals* rather than *crimes*.”²⁶⁶ Wrote Akhil Amar, “[b]oth legislation and adjudication must be suitably impersonal. Neither legislators nor judges can punish me simply because they do not like me.”²⁶⁷ Neither, I argue, can they enhance your sentence for that reason if *Lawrence* declares “we don’t like you” to be an ad hominem rather than a determinant of criminal liability. Amar suggested that one’s “intent and predispositions” may be relevant to “punishment and deterrence” once a person “has violated a legitimate criminal law.”²⁶⁸ Post-*Lawrence*, at least, I suggest that one’s predispositions are relevant only to the extent that they help the state to effectuate legitimate penological objectives such as sentence length, correctional classification, and rehabilitative regimen. To say, without more, that one must die because he is morally depraved ignores the command of impersonality.

C. Responding to Objections

A number of difficulties remain for my argument. This Section responds to five anticipated objections. First, after all my talk of “constitutional fit” and “political responsibility,”²⁶⁹ it may seem that I have suddenly abandoned all prudential constraint and ignored a political tradition in sentencing that already has gamely survived innumerable constitutional challenges. Second, it may seem that I have glossed over the constitutional distinction between a community’s regulation of primary conduct and its choice of punishments. Third, social consensus may not play the same role in criminal sentencing as it plays in *Lawrence*. Fourth, my thesis may appear to require that belief in free will be read out of the Constitution, which is inconsistent with any reasonable concession to judicial restraint. Finally, the future of mitigation evidence under my scheme is uncertain, if the state is to take seriously the mandate of content-neutrality. I address each objection in turn.

1. Hate Speech and the First Amendment

One might ask why a prudent judge ever would upset substantially settled death penalty jurisprudence in service of a rather tottering and uncertain new principle. One answer is to concede that a prudent judge would not do so. It is

266. Amar, *supra* note 62, at 211.

267. *Id.* at 210.

268. *Id.* at 218.

269. See *supra* text accompanying notes 111-113.

not the argument of this Article that judges should take *Lawrence* as an opportunity to launch the metaprivacy revolution. Rather, this Article is a provocation directed at judges and scholars, both to think in terms of principles and to resist second-guessing the natural consequences of those principles. Its claim is that the more one considers the particular slice of capital sentencing doctrine that has been this Article's focus, the more one recognizes that it is not metaprivacy, but viewpoint-discriminatory character evaluation that is the doctrinal outlier.

The best example, perhaps, of metaprivacy's fit with constitutional jurisprudence outside of the privacy cases is found in First Amendment doctrine. Viewpoint discrimination remains paradigmatically repugnant to the First Amendment.²⁷⁰ Within a public forum, the state may no more disfavor criminal advocacy than gay rights advocacy, abortion rights advocacy, or black power.²⁷¹ Even a Ku Klux Klan member shouting racist invective and agitating for "revengeance" before a burning cross to a group of armed followers cannot be convicted unless it can be shown that his advocacy not only "is directed to inciting or producing imminent lawless action," but also that such advocacy "is likely to incite or produce such action."²⁷² If the character of the committed murderer is precisely analogous to the words of the committed inciter, then a character-based penalty phase inquiry not intended to adduce a likelihood of imminent danger is inappropriate.

But the committed murderer is not analogous, at least not precisely. Our First Amendment doctrine historically has attempted to distinguish, as it must, between expressive speech and expressive conduct. Thus, in *R.A.V. v. City of St. Paul*, the Court struck down as unconstitutionally overbroad and content-based a St. Paul, Minnesota, ordinance that criminalized the display of a "symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on

270. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding unconstitutional a public after-school program that prohibited a Christian group from using school facilities); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998) (holding that the statutory requirement that the National Endowment for the Arts take "decency and respect" into consideration does not "engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.").

271. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

272. *Id.* at 447.

the basis of race, color, creed, religion, or gender.”²⁷³ While conceding for decisional purposes that the statute was aimed at “fighting words,” a category of regulable speech,²⁷⁴ the Court concluded that the ordinance was invalid because it “applies only to ‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender.’”²⁷⁵ It was precisely because fighting words constitute a category of regulable speech rather than a form of communication “entirely invisible” to the First Amendment that the ordinance was struck down.²⁷⁶

Contrast this approach with the Court’s approach in *Wisconsin v. Mitchell*, in which a unanimous Court upheld a Wisconsin statute that enhanced the sentence of any criminal convict who intentionally selected his victim on account of “race, religion, color, disability, sexual orientation, national origin or ancestry.”²⁷⁷ The defendant, who was black and had robbed and beaten a white boy apparently selected because of his race, argued that the statute impermissibly “punishes bigoted thought and not conduct.”²⁷⁸ The Court disagreed, arguing that the statute “is aimed at conduct unprotected by the First Amendment.”²⁷⁹ The fact that the statute took motive into account made it no different than Title VII of the Civil Rights Act,²⁸⁰ not to mention a host of ordinary criminal statutes. Accounting for motive does not alter the conduct-based nature of the statute’s prohibitions. As in the antidiscrimination context, the First Amendment is no defense to criminal conduct.

A robust speech-conduct distinction would provide a daunting obstacle, grounded in doctrinal integrity, to any argument for a metaprivacy defense to a character-based retributive death sentence. The distinction does not, however, adequately explain the doctrine, for the First Amendment in fact provides a defense to generally applicable laws regulating conduct, in the form of the right to expressive association.²⁸¹ In *Boy Scouts of America v. Dale*, the Court upheld the Boy Scouts’ right to an exemption from New Jersey’s public accommodations laws on the ground that retaining an avowedly gay scoutmaster “would significantly burden the organization’s right to oppose or

273. 505 U.S. at 380 (quoting the ordinance).

274. *See id.* at 381.

275. *Id.* at 391 (quoting the ordinance).

276. *Id.* at 383.

277. 508 U.S. 476, 480 (1993).

278. *Id.* at 483.

279. *Id.* at 487.

280. *Id.*

281. *See* Rubinfeld, *supra* note 228, at 1157-58.

disfavor homosexual conduct.”²⁸² Such a burden could only be justified through a searching strict scrutiny test satisfied only when enforcing the statute “would not materially interfere with the ideas that the organization sought to express.”²⁸³ *Dale* seems to imply a new constitutional defense to Title VII,²⁸⁴ unless its bona fide occupational qualification defense miraculously dovetails with the newly thickened right to expressive association. If some principle distinguishes *R.A.V.* and *Mitchell* under the post-*Dale* constitutional order, it would not appear to be speech versus conduct.

Lawrence as metaprivacy recommends a way out of this doctrinal confusion. Like *Dale*, *Lawrence* allows an exemption from generally applicable and otherwise constitutional laws that regulate conduct. And like *Dale*, the exemption appears to be grounded not in a speech-conduct distinction but in an incidental-definitional distinction.²⁸⁵ The *Dale* Court took pains to inquire into the significance of the burden that allowing an openly gay scoutmaster would have on the Boy Scouts’ expressive rights.²⁸⁶ A charitable reading of the case is that heterosexual propaganda is an essential part of the organization’s message, and, therefore, that subjecting the organization to the state’s antidiscrimination laws would defeat its right to self-definition. A right to expressive association may thus be recharacterized as a corporate right to metaprivacy.

I do not wish to overemphasize the links between metaprivacy and the First Amendment expressive association doctrine. My more modest objective has been to demonstrate that an open-ended tolerance for the most deeply unpopular of ethical commitments is consistent with the First Amendment, and that the fact that convicted criminals have engaged in conduct rather than speech does not defeat this consistency.

282. 530 U.S. 640, 659 (2000).

283. *Id.* at 657. Chief Justice Rehnquist argued in *Dale* that the Court was simply reaffirming a right it had recognized in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), which allowed the organizers of Boston’s St. Patrick’s Day Parade to avert Massachusetts antidiscrimination laws to prevent a gay rights group from marching. *Dale*, 530 U.S. at 653-54.

284. See David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 125-32 (2001).

285. See *supra* text accompanying notes 82-89.

286. *Dale*, 530 U.S. at 650-56.

2. *Judicial Review of Choice of Punishment*

Judicial review of legislative choices about the kinds of punishments to employ looks different, of course, than judicial review of criminal statutes. My argument must answer two important questions: first, whether the principles governing judicial review of primary conduct apply neatly to review of punishment decisions, and second, whether those principles extend equally to all punishments. If the answer to the second question is yes, then my argument would become unwieldy, as it would logically extend to the entire criminal justice system.

In applying the Eighth Amendment, the Supreme Court maintains that it owes legislatures deference in their choice of punishments, though the degree of deference has wavered over time and among Justices. “[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity,” Justice Stewart wrote three decades ago in *Gregg v. Georgia*. “We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.”²⁸⁷ Outside the context of criminal punishment, whose jurisprudence tends not to speak in such terms, Justice Stewart’s Eighth Amendment reviewing standard would be akin to a “rational basis” test. It does not require narrow tailoring; it merely asks that the punishment not be cruel or unusual, the punishment analog to “arbitrary” in the levels-of-scrutiny context. Moreover, the test Justice Stewart articulated does not, on its face, prohibit “excessive” punishment; such a prohibition would require that the legislature select the least severe penalty possible.

The Court has since repudiated this reading, at least as applied to capital cases. In the Court’s most recent high-profile death penalty case, *Roper v. Simmons*, Justice Kennedy wrote for the majority that “the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions.”²⁸⁸ A ban on “all excessive punishments”²⁸⁹ necessarily applies a heightened standard of scrutiny, because it requires a heightened degree of proportionality between the offense and the punishment.²⁹⁰ It might well be argued that the

287. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

288. 125 S. Ct. 1183, 1190 (2005).

289. *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002).

290. *See id.* at 311 (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” (citing *Weems v. United States*, 217 U.S. 349, 367 (1910))).

standard is akin to the “strict scrutiny” standard that attends race-based governmental classifications.²⁹¹ Indeed, the Court has required an individual inquiry into the character of an offender before he is sentenced to death in order to avoid “the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.”²⁹² This inquiry into mitigating factors is based on the judgment in *Woodson v. North Carolina* that “the penalty of death is qualitatively different from a sentence of imprisonment, however long.”²⁹³ Allowing that “death is different” has cloven the Court’s review of punishments into separate inquiries for ordinary imprisonment versus the death penalty. In noncapital cases, the “heightened scrutiny” that prevents excessive punishment is neutered, at best, to what Justice Kennedy has called a “narrow proportionality principle.”²⁹⁴

This distinction between the justiciability of the length of a prison term and the mode of punishment checkers Eighth Amendment jurisprudence. The first case to consider the constitutionality of a criminal statute under the Eighth Amendment was *Weems v. United States*, in which the Court invalidated a Philippines statute that imposed a fifteen-year prison sentence, a \$4,000 fine, and costs for the crime of falsifying a public document.²⁹⁵ The imprisonment in *Weems* was itself atypically draconian, involving “a chain at the ankle and wrist of the offender,”²⁹⁶ and, in the words of the statute itself, “hard and painful labor [with] no assistance whatsoever from without the institution.”²⁹⁷ It is at least arguable that the *Weems* Court was concerned more with the mode of punishment than the length itself, particularly because it took pains to describe the conditions of confinement in what it called “graphic” detail.²⁹⁸ Similarly, a

291. See, e.g., *The Supreme Court 1986 Term: Leading Cases—Death Penalty—Victim Impact Statements*, 101 HARV. L. REV. 119, 168-69 (1987) (describing the Supreme Court’s application of strict scrutiny to capital punishments).

292. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

293. 428 U.S. 280, 305 (1976).

294. *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring); see also *Ewing v. California*, 538 U.S. 11, 20 (2003) (plurality opinion). Justice Kennedy is the only member of the current Court known to support a “narrow” proportionality rule for noncapital sentences. Justices Stevens, Souter, Ginsburg, and Breyer would have a “broad and basic” proportionality principle govern noncapital cases, see *Ewing*, 538 U.S. at 33-35 (Stevens, J., dissenting), and Justices Scalia and Thomas would have none at all in such cases, see *id.* at 31 (Scalia, J., concurring in the judgment); *id.* at 32 (Thomas, J., concurring in the judgment). The views of Chief Justice Roberts and Justice Alito remain unknown as of this writing.

295. *Weems v. United States*, 217 U.S. 349 (1910).

296. *Id.* at 366.

297. *Id.* at 364.

298. *Id.* at 366.

Court plurality declared in *Trop v. Dulles*, which overturned a statute that stripped wartime deserters of their American citizenship,²⁹⁹ that “[f]ines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.”³⁰⁰ The Court relied explicitly on the length-mode distinction in *Rummel v. Estelle*, in which the Court upheld a Texas recidivist statute.³⁰¹ Then-Justice Rehnquist wrote that, unlike “unique” punishments such as the *Weems* statute and the death penalty, “the length of the sentence actually imposed is purely a matter of legislative prerogative.”³⁰² Therefore, for prudential reasons (at least),³⁰³ Eighth Amendment doctrine limits my argument to capital punishment.

The *Roper* and *Atkins* Courts dutifully reiterated that the sine qua non of judicial review for excessiveness under the Eighth Amendment is the “evolving standards of decency” inquiry discussed in Subsection I.B.2.³⁰⁴ Under the doctrine in capital cases, the Court is to look first at “objective indicia of consensus” that a punishment is disproportionate, and then “determine, in the exercise of [its] own independent judgment” whether there is reason to question the revealed consensus.³⁰⁵ This statement of the doctrine is

299. *Trop v. Dulles*, 356 U.S. 86 (1958).

300. *Id.* at 100.

301. *Rummel v. Estelle*, 445 U.S. 263 (1980).

302. *Id.* at 274.

303. A full account of the relationship between excessive punishment and metaprivacy would ask whether this difference is salient because it is “constitutional” or because it is “prudential.” That is, does the Court’s reluctance to engage in an excessiveness inquiry in noncapital cases result from a determination that excessive prison sentences are unproblematic constitutionally, or is it rather a matter of deference to legislative judgments, a recognition that a court simply lacks the competence to determine whether a prison sentence is too long? Justice Scalia’s *Harmelin* opinion provides a useful articulation of the prudential argument against constitutionalizing a proportionality principle in cases reviewing the lengths of prison terms: “While there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are ‘cruel and unusual,’ *proportionality* does not lend itself to such analysis.” *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991). The length of a prison term is a continuous variable, and so the difference between one term and the next is not susceptible to controlled analysis that references agreed-upon principles. But because “[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind,” *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), the legislative analysis that begets it is more amenable to judicial scrutiny.

304. See *Roper v. Simmons*, 125 S. Ct. 1183, 1190 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

305. *Roper*, 125 S. Ct. at 1192; see also *Atkins*, 536 U.S. at 313-16.

incomplete, however. In *Skinner v. Oklahoma*, the Court unanimously invalidated an Oklahoma statute that provided for the sterilization of those thrice convicted of “crimes amounting to felonies involving moral turpitude.”³⁰⁶ The *Skinner* Court struck the statute down on equal protection grounds because it drew what the Court regarded as arbitrary lines between similarly situated classes of individuals, denying to one class “one of the basic civil rights of man.”³⁰⁷ For example, Justice Douglas wrote for the majority: “A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler [and therefore exempt from sterilization].”³⁰⁸ *Skinner* demonstrates, among other things, that the Eighth Amendment is not the last word on the constitutionality of a particular mode of criminal punishment.³⁰⁹ Punishment statutes may well implicate fundamental rights other than the right to life; when they do so, those statutes are subject to heightened scrutiny. The answer to whether a capital punishment regime is excessive, then, will be informed not only by community consensus or (potentially) the subjective views of the Justices themselves, but also must answer as well to the substantive rights protected elsewhere in the Constitution.

This doctrinal qualifier, obvious perhaps but rarely stated, parallels the Court’s treatment of convicts serving ordinary prison sentences. Though not always so historically, it is now axiomatic that “prisoners do not shed all constitutional rights at the prison gate.”³¹⁰ The Court has repudiated the view that the fact of conviction grants to the state license to punish arbitrarily. The Court has noted, for example, that the protections of the Free Exercise Clause, the Due Process Clause, and the Equal Protection Clause all apply to prisoners as well as to the general population.³¹¹ Current doctrine strongly implies that the only extraconstitutional deprivations that may be visited upon prisoners are those that “effectuate[] prison management and prisoner rehabilitative

306. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) (internal quotation marks omitted).

307. *Id.* at 538-39, 541.

308. *Id.* at 539 (citation omitted). Of course, if he is an embezzler, he is also more likely to be white.

309. In the post-*Griswold* era, *Skinner* has been converted into a substantive due process case. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 389 (2000) (describing *Skinner* as a privacy case).

310. *Sandin v. Conner*, 515 U.S. 472, 485 (1995).

311. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974); see also *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam) (applying the Free Exercise Clause to a Buddhist inmate).

goals.”³¹² The standard formulation requires that prison-imposed burdens on most constitutional rights be “reasonably related to legitimate penological interests.”³¹³ Being convicted of a crime naturally diminishes the convict’s rights against the state, but it does so only incident to the necessities of carrying out the initial sentence.³¹⁴

Relatedly, the Court has stressed that the broad inquiry into aggravating and mitigating factors in the penalty phase of a capital trial cannot be so broad as to threaten independent constitutional imperatives. A state may not, for example, “characterize the display of a red flag, the expression of unpopular political views, or the request for trial by jury as an aggravating circumstance.”³¹⁵ Neither may it “attach[] the ‘aggravating’ label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant.”³¹⁶ The state’s obligation to adhere to the limitations of metaprivacy is no exception.

Limon v. Kansas is instructive in this regard. *Limon* concerned whether the State of Kansas may punish homosexual sodomy of a minor more severely than heterosexual sodomy.³¹⁷ The Kansas Court of Appeals initially held that the discrepancy was permissible.³¹⁸ The Kansas Supreme Court initially denied review, but the U.S. Supreme Court granted certiorari, vacated the decision,

312. *Sandin*, 515 U.S. at 485; see also *Wolff*, 418 U.S. at 555-56 (“There is no iron curtain drawn between the Constitution and the prisons of this country.”).

313. *Turner v. Safley*, 482 U.S. 78, 89 (1987). The *Apprendi* line of cases also supports a broader notion that the full range of punishment, and not merely the predicate of a given conviction, is subject to the evidentiary cousin of “strict scrutiny,” that is, proof beyond a reasonable doubt. See *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (“Merely using the label ‘sentencing enhancement’ to describe [the additional time imposed for a racial motive] surely does not provide a principled basis for treating [it] differently [from the underlying offense].”). *But cf.* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 816 (1994) (challenging the idea that the reasonable doubt standard can be meaningfully substituted for strict scrutiny).

314. See *Johnson v. California*, 125 S. Ct. 1141, 1149 (2005) (noting that the Court has applied the relaxed standard requiring that a constitutional deprivation in prison bear a reasonable relationship to legitimate penological interests “only to rights that are inconsistent with proper incarceration” (internal quotation marks omitted)).

315. *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (citations omitted).

316. *Id.*

317. *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004), *rev’d*, 122 P.3d 22, 35 (Kan. 2005).

318. *State v. Limon*, 41 P.3d 303 (Kan. Ct. App. 2002) (mem.), *vacated and remanded by* 539 U.S. 955 (2003) (mem.).

and remanded in light of *Lawrence*.³¹⁹ The Kansas Court of Appeals ruled on remand that the differential is justifiable,³²⁰ but the Kansas Supreme Court reversed, holding that, per *Lawrence* and *Romer*, “moral disapproval of a group cannot be a legitimate governmental interest.”³²¹ I have argued that where the rubber meets the road in *Lawrence* is in the definition, for constitutional purposes, of a “group.” The take-home point of *Limon* is the recognition—explicit in the opinion of the Kansas Supreme Court and implicit in the Supreme Court’s initial remand—that the principles of *Lawrence*, as with all other independent constitutional principles, inform judicial review of a sentencing enhancement no less than they do primary conduct.³²²

3. *Recognizing Recognition Redux*

We have seen that social consensus plays a role in delineating the protected interests in *Lawrence*, namely in identifying status-definitional conduct.³²³ There are at least two potential problems in extending this logic to other forms of criminality. First, even if we accept the command of content-neutrality, it is not obvious that the requisite determination has even been made in the criminal sentencing context. Wrote Jed Rubenfeld:

When a person obeys the law against murder, or almost any other law, his life is constrained but not usually informed or taken over to any substantial degree with a set of new activities and concerns. He is not thrust into a set of new institutions or relations. The category of “non-murderer” is essentially a formal one; it is not a defined role or identity with substantial, affirmative, institutionalized functions.³²⁴

Criminals may actualize their autonomy through criminal behavior, or they may not. Moreover, our evidence of such actualization—the character evidence introduced at the sentencing phase of a trial—may not indicate the kind of metacommithment thought relevant in *Lawrence*.

319. *Limon v. Kansas*, 539 U.S. 955 (2003) (mem.).

320. *Limon*, 83 P.3d at 229.

321. *State v. Limon*, 122 P.3d 22, 35 (Kan. 2005).

322. See *id.* at 28–29. Capital punishment is the ultimate sentencing enhancement, as it “definitively eliminates the condemned man.” ALBERT CAMUS, *Reflections on the Guillotine* (1957), reprinted in *RESISTANCE, REBELLION, AND DEATH* 173, 210 (Justin O’Brien trans., Alfred A. Knopf 1961).

323. See *supra* text accompanying notes 81–90.

324. Rubenfeld, *supra* note 202, at 793.

This objection proves too much. Participating in homosexual sodomy does not necessarily reflect an attempt at self-actualization either, and indeed Justice Scalia was deeply skeptical of any distinction between homosexual sodomy and nudism in their respective substantiations of self-defining conduct.³²⁵ The question is whether having a moral character tied to criminal behavior is, from the vantage point of social consensus, more like nudism or more like homosexual sodomy. That is, does social consensus indicate that the criminal behavior of, say, Todd Rizzo,³²⁶ is incidental to his being, or that it is constitutive of it?

The inquiry has two parts: First, I must demonstrate that social consensus is the instrument of decisionmaking. Then, I must show that the judgment made by social consensus in the criminal sentencing context is like the judgment referenced in *Lawrence*. The first issue is essentially answered by stipulation. A statute listing moral blameworthiness, bad character, or history as a sexual predator as aggravators is itself a powerful demonstration of social consensus. The legislative designation of character-linked sentencing factors indicates to the jury a community's devaluation of a particular status. When, relying on such aggravators, the jury designates as death-eligible someone who has committed an act, it is declaring, in effect, that the act is an inexorable manifestation of the disfavored status.³²⁷ *Furman*'s command of individualized capital sentencing merely decentralizes social consensus, forcing the legislature to delegate to the jury its authority as the principal instrument of that consensus.

The answer to the second issue—whether these two facially distinct manifestations of social consensus are truly analogous—is more difficult. For assistance, I turn to the Supreme Court case of *Dawson v. Delaware*.³²⁸ In *Dawson*, the State of Delaware sought to rebut mitigating “good” character evidence of the defendant’s kindness and prison good time credits with “bad” character evidence that Dawson belonged to an avowedly racist gang, the Aryan Brotherhood.³²⁹ The Court refused to allow the evidence on the ground that the First Amendment prevents a state from “employing evidence of a defendant’s abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried.”³³⁰ Belonging to a racist gang might indicate

325. *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

326. See *supra* text accompanying note 2.

327. See *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005).

328. 503 U.S. 159 (1992).

329. *Id.* at 167–68.

330. *Id.* at 168.

“bad” moral character, but only the fact that the evidence was not demonstrably relevant to Dawson’s criminal tendencies prevented it from being used.³³¹ A jury weighing aggravating factors is not asked to judge whether a convict might happen to be a bad person incidental to being a criminal, but rather whether he is a criminally bad person, one whose moral commitments tend—nay, hurdle—toward the criminal activity for which he has been convicted. The judgment being made is whether criminal activity is a manifestation of a deeper identity. Withholding an enhanced punishment but for the presence of this identity is inconsistent with *Lawrence*, just as withholding enhanced punishment but for the presence of abstract beliefs and political affiliations is inconsistent with First Amendment doctrine.

4. *On Free Will*

If this Article’s argument requires that the state reject free will and adopt a determinist position on human agency, that may be sufficient reason to reject it. One explanation for the principle of content-neutrality that this Article has sketched would be that someone with a criminal constitution cannot be held responsible for his criminal actions. On this view, *Lawrence* rests on the idea that gay identity is not freely chosen, and therefore the conduct associated with gay identity should not be criminalized. If one also cannot choose not to be a committed criminal, it would follow that punishing on this basis is also impermissible. Imputing to the Constitution so controversial a philosophical view would be so aggressively radical—activist, I dare say—that we would have to reject it on its face.

A determinist explanation is not the only one, however. An alternative position is an epistemological one: Even if criminals are exercising their free will in committing crimes, how is one ever to know? Evidence of inherent bad character may demonstrate a decreased likelihood that a bad act is freely chosen. A third position is that *Lawrence*-style metaprivacy does not accept any determinist account, but simply requires that the state take no position, as retributive punishment might,³³² on whether people with criminal character are exercising free will in committing crimes. Finally, *Lawrence* may have nothing whatsoever to do with free will, and may just be a case about the appropriate

331. See *id.* at 167 (“Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on Dawson’s part, but on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible.”).

332. But see NOZICK, *supra* note 233, at 393 (arguing that a belief in determinism is not inconsistent with retributive punishment).

limits of the state's power to judge identities. This list does not exhaust the possibilities, but it makes the point, namely that my argument makes no necessary assumption about the constitutional legitimacy of the state's assumptions regarding free will.

5. *On Mitigation*

If this Article's claim is correct, and the state must indeed be content-neutral, does it mean that, contrary to *Lockett v. Ohio*,³³³ a capital jury no longer may hear evidence at the penalty phase that, say, church attendance, random acts of kindness, or a generally pacific nature demonstrate that a defendant deserves to live? One might be tempted reflexively to say no, on the ground that *Lawrence* is about making only pejorative moral judgments about constitutive character. Because mitigation evidence is not used as a form of punishment, it falls outside the scope of the principles of metaprivity. But any time the state decreases a punishment based on mitigating evidence, it necessarily creates a differential between people who possess the trait in evidence and those who do not. Those convicts for whom mitigation evidence is unavailing are executed, though the presence of sufficient mitigating character evidence would have spared them. Content-neutral this is not.

The position this Article takes, then, as it must, is that mitigating evidence is equally capable of violating the principles of *Lawrence*. When such evidence is adduced to vindicate a belief that certain personal metacommitments are deontologically more worthy of enhanced punishment than others, it must be excluded. Indeed, mitigation is arguably the dominant situs for the injection of character judgments into capital sentencing. In a practical sense, this means that in order to enforce faithfully a no-character-judgment capital punishment regime, one would have to police the use of mitigators, and thereby limit *Lockett* severely. Applying metaprivity to capital punishment would, in other words, put to the public a choice between, on one hand, more executions of those who would otherwise be saved by a jury's approval of their character, and on the other hand, fewer executions generally, of the favored and disfavored alike. I do not know which of these options Americans would choose. But punting a transparent and difficult political choice to legislatures (free of unconstitutional bias) is the end, not the beginning, of judicial review. The tendency of judicial condemnation of certain pejorative character judgments to

333. 438 U.S. 586 (1978) (plurality opinion).

undermine the introduction of mitigation evidence is therefore a political, not an analytical, objection to this Article's claim.³³⁴

D. *The Normative Question*

I want to emphasize, finally, that mine is a lawyer's argument, not a philosopher's. The doctrine may have an implicit answer to the open-ended conception of metaprivacy that this Article has sketched. There is, after all, an immense literature on the line of demarcation between legitimate and illegitimate normativity. Although here is not the place for a theoretical discussion on the range of acceptable ethical views, it may be useful to consider at least one defensible distinction, if only to provide a template for an alternative conception. We might, for example, define an ethical view as a fundamental moral claim that has an answer to what Christine Korsgaard calls "the normative question."³³⁵ On this view, though it may be definitionally necessary that ethical claims "issue in a deep way from our sense of who we

334. Even if metaprivacy-like principles were to prohibit a particular form of retributive punishment, as outlined above, the constitutionality of capital punishment generally would remain an open question. The Supreme Court reiterated recently that the Constitution "does not mandate adoption of any one penological theory," *Ewing v. California*, 538 U.S. 11, 25 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 597, 999 (Kennedy, J., concurring)), though the Court has cited only deterrence and retribution as acceptable rationales for capital punishment. See *Roper v. Simmons*, 125 S. Ct. 1183, 1196 (2005). It will be fruitful to examine whether the death penalty can withstand scrutiny under wholly nonretributive rationales for punishment, but that inquiry is beyond the scope of this Article. It may be useful to ask, for example, what deference is owed to any legislative evidence supporting a general deterrence rationale, especially in light of the Court's recent interest in scrutinizing legislative factfinding in federalism cases. See, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001) (discussing *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997)). Virtually all will agree that the empirical debate is inconclusive at best. See Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 8 (1996) (finding that approximately eighty percent of criminologists believe that, according to present literature, the death penalty has no significant deterrent effect). But see Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 369 (2003) (suggesting that each execution may save eighteen lives on average). At a higher level of generality, it may be necessary to consider the extent to which general deterrence itself represents a competing moral claim that cannot trump an individual's right to metaprivacy.

335. Christine Korsgaard, *The Normative Question*, in *THE SOURCES OF NORMATIVITY* 7, 9-10 (Onora O'Neill ed., 1996).

are,³³⁶ it is not sufficient. An ethical view must be more than simply held; it must be justified.

Korsgaard's four-part taxonomy of modern answers to the normative question will be helpful in illustrating what is meant by an ethical view. She divides theories of the sources of our ethical obligations into voluntarism, realism, reflective endorsement, and the appeal to autonomy.³³⁷ Whereas the voluntarist justifies normativity by its origin in superior authority;³³⁸ the realist does so through the irreducible fact of the existence of obligations;³³⁹ and the proponents of reflective endorsement and the appeal to autonomy through forms of self-conscious introspection.³⁴⁰ All of the above accounts share an obvious and important feature. Though Hobbes and Kant, say, differed dramatically as to their views on the source of our obligations toward others –

336. *Id.* at 18.

337. *Id.* at 18–19.

338. See, e.g., THOMAS HOBBS, *LEVIATHAN* 124 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651) (“It is true that they that have Sovereigne power, may commit Iniquity; but not Injustice, or Injury in the proper signification.”); SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 17 (Basil Kennett trans., 4th ed. 1729) (“For, since Honesty (or moral Necessity) and Turpitude are Affections of human Deeds, arising from their Agreeableness or Disagreeableness to a Rule, or a Law; and since a Law is the Command of a Superior, it does not appear how we can conceive any Goodness or Turpitude before all Law, and without the Imposition of a Superior.”).

339. Wrote Thomas Nagel, illustrating the Occam's razor-like quality of realist argumentation:

If I have a severe headache, the headache seems to me to be not merely unpleasant, but a bad thing. Not only do I dislike it, but I think I have a reason to try to get rid of it. It is barely conceivable that this might be an illusion, but if the idea of a bad thing makes sense at all, it need not be an illusion, and the true explanation of my impression may be the simplest one, namely that headaches are bad, and not just unwelcome to the people who have them.

THOMAS NAGEL, *THE VIEW FROM NOWHERE* 145–46 (1986); see also H. A. PRICHARD, *Does Moral Philosophy Rest on a Mistake?*, in *MORAL OBLIGATION: ESSAYS AND LECTURES* 1, 7 (1949) (“The sense of obligation to do, or of the rightness of, an action of a particular kind is absolutely underivative or immediate.”); W. D. ROSS, *THE RIGHT AND THE GOOD* 40 (1930) (“[W]hat we are apt to describe as ‘what we think’ about moral questions contains a considerable amount that we do not think but know, and . . . this forms the standard by reference to which the truth of any moral theory has to be tested . . .”).

340. See, e.g., IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 65 (Lewis White Beck trans., 1959) (1785) (“What else, then, can freedom of the will be but autonomy, i.e., the property of the will to be a law to itself?”); JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1971) (suggesting that the principles of justice be determined by “[t]he choice which rational men would make in [a] hypothetical situation of equal liberty”); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 117 (1985) (“[C]ritical reflection should seek for as much shared understanding as it can find on any issue, and use any ethical material that, in the context of the reflective discussion, makes some sense and commands some loyalty.”).

one thought it extrinsic, the other quite the opposite—both allowed that we have them.

Now consider the claims of gays versus those of committed murderers. The first thing to recognize is that both are underdetermined as ethical claims. Neither the fact that an individual wishes to engage in sodomy nor the fact that one wishes to murder tells us much about the individual's answer to the normative question. One may argue, however, that there is a difference in that the claim of the committed homosexual is not inconsistent with an ethical view, while the claim of the committed murderer is. We might characterize the depravity inquiry at the penalty phase as, in effect, an effort to determine whether the convict considers himself to have obligations toward others. As Canadian psychologist Robert Hare said, "[T]here are some people for whom evil acts—what we would consider evil acts—are no big deal."³⁴¹ It is not implausible to believe that an individual who can be so characterized has not satisfied the threshold of an ethical claim—that he accord some minimal level of moral respect to the claims of others—and therefore is not entitled to have his views respected. On this view, the committed murderer does not make a debatable claim, but rather makes none at all. Such an individual is to conduct as the obscene is to speech: "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."³⁴² Does not a similar distinction in the realm of conduct better comport, if not with the express language of constitutional doctrine, then at least with the theoretical assumptions of American law?

Perhaps. But it is for the doctrine, not for me, to so declare. The ethical theories just mentioned are subtle and difficult. I discuss above what doctrine asks of its principles;³⁴³ navigating these subtleties is what principles ask of the doctrine that sustains them. No case has yet declared that the inquiry into character at the penalty phase of a capital trial is designed to adduce, and properly so, whether the defendant's ethical views are consistent with the collective reflective equilibrium of mankind. On the face of things, it seems rather that society simply thinks it better that individuals with uncommonly and demonstrably vile character be dead than be alive. The doctrine must tell us why a legislative determination to give effect to this desire is sufficient for some conduct but not other conduct.

It is possible, alas, that gays are in fact constitutionally *sui generis*, that they are simply the rare class of individuals granted the autonomy to engage in

341. See Carey, *supra* note 7.

342. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

343. See *supra* text accompanying notes 82–83.

conduct prohibited by otherwise constitutional laws. For the Court to so declare would, however, require the political courage to declare common law constitutionalism a fraud and the deep sense of irony to announce that gays share their constitutional singularity with the Boy Scouts of America.

CONCLUSION

An eighteenth-century Englishman could have been hanged for “[s]tealing property worth a shilling or more, setting fire to a heap of hay, breaking down the head of a fish pond so that the fish might escape, defacing Westminster Bridge [or] cutting a hop-bind in a hop plantation.”³⁴⁴ There are at least three reasons for this apparent brutality. First, prisons were far less developed then than now, and so capital punishment had fewer rivals.³⁴⁵ Second, the death penalty was used far less than it was authorized to be used: “[F]or most offences, capital punishment was there primarily to serve as a deterrent and . . . only a limited number of executions were necessary to bring this point home to the public.”³⁴⁶ When alternatives to capital punishment are limited, that is, it is sensible to make all crimes capital but only punish a few criminals. James Whitman has highlighted a third reason for the high number of capital crimes, but his is timeless: “Punishment,” he noted, “puts people in their place.”³⁴⁷ Whitman’s (anthropological) claim is that “degradation in punishment is, and always has been, closely related to traditions and practices of social status.”³⁴⁸ On this view, punishment acts as a means of asserting social superiority.

Accepting Whitman’s thesis makes it easy to see that prisoners and identity-based social movements share a common foe: the libidinal need to assert one’s own moral superiority. The more we recognize this tendency, the more we must take care that law exercise its ordered violence to protect us and not to sate us. Robert Cover reminded us that the “deliberate infliction of pain in order to destroy the victim’s normative world and capacity to create shared realities we call torture”³⁴⁹ as well as law. H.L.A. Hart reminded us, in this regard, that the Nazis believed that “anything is punishable if it is deserving of punishment according to the fundamental conceptions of a penal law and

344. JOHN BRIGGS ET AL., *CRIME AND PUNISHMENT IN ENGLAND: AN INTRODUCTORY HISTORY* 73 (1996).

345. *See id.* at 82.

346. *Id.* at 76.

347. WHITMAN, *supra* note 230, at 22.

348. *Id.* at 26.

349. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1603 (1986).

sound popular feeling.”³⁵⁰ The impulses to degrade Jews, gays, and prisoners, though obviously distinct in their particulars, are all influenced, heavily perhaps, by an inherent human desire to engage in (small-c) constitutional discrimination. Exorcising the fruits of this desire from law, as Mill and Brandeis recognized, is the great challenge of liberalism. *Lawrence* is a salvo in that struggle.

I have argued in this Article that *Lawrence*’s doctrinal contribution is to constitutionalize official neutrality between substantive metacommitments, whether those commitments are to “gayness” or to a “depraved consciousness.” Many will say these are one and the same and have seen fit to legislate to that end. We can deploy the law’s coercion as a response to antisocial conduct, of course, but to punish for dangerous character threatens to confuse normativity with homogeneity. I have not argued that the death penalty is per se unconstitutional. Neither have I argued that *Lawrence* was correctly reasoned or even correctly decided. Had the case been decided on equal protection grounds, for example, this Article could not have been written. Part of my project, then, is to demonstrate the logical consequences of speaking in broad terms of an identity group to whom one is not prepared to extend the respect of heightened scrutiny.

A footnote is in order before I conclude. By taking seriously the language Justice Kennedy used in *Lawrence*, this Article engages in a self-conscious act of what Roberto Mangabeira Unger has termed, with considerable distress, “rationalizing legal analysis.”³⁵¹ Rationalizing legal analysis is the translation of “[l]aw prospectively made as the product of conflicting wills and imaginations, interests and ideals,” into “law retrospectively represented as the expression of connected policies and principles.”³⁵² It is turning one’s head at jurisprudence as sociopolitical compromise and pretending that it is grounded in reason. A convincing realist reading of *Lawrence* is plainly available. *Lawrence* appears to be but the most high-profile installment in a politically inspired jurisprudence of homosexuality that arose in the years following *Bowers*.³⁵³ But this Article is less interested in what the Justices were doing than in what they were saying. Cases such as *Romer*, *Lawrence*, and *Limon* could be limited to their facts, but they would not then qualify as jurisprudence under our doctrinal fictions. I am

350. HART, *supra* note 30, at 12 (internal quotation marks omitted).

351. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 36 (1996).

352. *Id.* at 69.

353. Whatever its rhetoric, *Romer* could be viewed as doing for gays what *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), did for the mentally retarded: It extended to them the courtesy of heightened scrutiny without quite saying so.

less interested in dictating a conclusion as to the meanings of these cases or the scope of their prospective applications than I am in broadening the terms of doctrinal debate by challenging the Court to articulate a nonarbitrary reason why particular a priori criminal conduct—sodomy—receives unique judicial protection. If the reader and I end this conversation disagreeing only on the proper place of legal formalism in American constitutional discourse, then I consider it a victory for the argument.

This Article, then, is an incitement, not a conclusion. It raises a number of difficult questions worthy of far more extensive treatment than a work of manageable scope can provide. I hope, at the very least, to have persuaded the reader that when we look past the political context in which *Lawrence* was written and pause to reorient its “historical mess,”³⁵⁴ we recognize a tension. Our jurisprudence is both notionally committed not to punish disfavored status and fundamentally committed—both in practice and in theory—not just to personal responsibility but also to personal blame, stubbornly insisting on the legal relevance of the content of one’s character. The tension thus identified, the next move is the Court’s.

354. See UNGER, *supra* note 351, at 68 (“The voice of reason must speak, although belatedly, in history, redescribing and reorienting the historical mess.”).