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BEYOND THE PRIVACY PRINCIPLE†

*Kendall Thomas**

The law may not be able to make a man love me, but at least it can keep him from lynching me.

—Martin Luther King, Jr.¹

INTRODUCTION

In *Bowers v. Hardwick*,² the U.S. Supreme Court was asked to address the constitutionality of a Georgia criminal statute prohibiting certain private sexual practices by consenting adults.³ The Georgia

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1. Quoted in Alan F. Westin & Barry Mahoney, *The Trial of Martin Luther King* 41 (1974).

2. 478 U.S. 186 (1986).

3. The Georgia statute against which the federal constitutional claim was counterposed read, in pertinent part:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.

...

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.

Ga. Code Ann. § 16-6-2 (Michie 1985).

It bears remarking that the statute under which Hardwick was arrested and charged casts a very broad net. By its terms it imposes a blanket prohibition on the stated conduct, making no distinction *whatsoever* between men or women, homosexuals, bisexuals or heterosexuals, married or unmarried persons. See Ga. Code Ann. § 16-6-2 (Michie 1985). The Supreme Court's decision to consider only the question of the law's constitutionality as applied to consensual activity of adults of the same sex may be explained in part by the treatment of the facial attack in the lower courts. Indeed, the trial court in *Bowers v. Hardwick* refused to grant standing to John and Mary Doe, a married couple who joined Michael Hardwick in challenging the constitutionality of the Georgia statute. The district court's dismissal of the Does' claim for lack of standing was affirmed by the Court of Appeals. See *Hardwick v. Bowers*, 760 F.2d 1202, 1206-07 (11th Cir.), cert. granted, 474 U.S. 943 (1985), rev'd on other grounds, 478 U.S. 186 (1986). Ostensibly relying on this dismissal of the Does as parties to the case, the

citizens who brought the suit sought a judgment regarding the constitutionality of the statute on its face, but the Court resolutely avoided consideration of that issue. The Court took the view that the only federal question properly before it was the constitutional validity of the law as applied to private, sexual activity by consenting adults of the same gender, or what it called "homosexual sodomy."⁴ Having thus

Supreme Court restricted itself to consideration of the constitutionality of the Georgia statute "as applied to consensual homosexual sodomy," pointedly noting that it was "express[ing] no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." 478 U.S. at 188 n.1.

This disclaimer aside, one may well ask whether the *Hardwick* Court's statement of the issue is as restricted and respectful of the case's actual posture as Justice White seemed to believe. Hardwick formally asserted in his complaint that he had engaged and intended to continue to engage in the conduct prohibited by the state. Although Hardwick was identified in the complaint as a "practicing homosexual," the complaint did not specify whether Hardwick's contemplated (or for that matter past) violations of the statute would take place with women or other men. See Joint Appendix at 3, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140). This means that the trial court's refusal to grant standing to the Does did not necessarily foreclose the Supreme Court from addressing the constitutionality of the Georgia statute as applied to consensual sexual activity across gender lines. The inclusion of the Does as parties to the case may plausibly be explained as an effort by Hardwick's counsel to insure that the facial validity of the statute would be addressed. However, what has been said about the terms of Hardwick's complaint demonstrates that the question of facial validity did not necessarily disappear from the case when the Does were dismissed. In point of fact, then, there was nothing in the history of *Hardwick* to warrant the Court's insistence that "[t]he only claim properly before the Court . . . is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy." 478 U.S. at 188 n.1 (emphasis added).

Thus, the Court could have considered the facial constitutionality of the statute without violating its prudential canons of self-restraint. To my mind, the Court's refusal to do so can be best explained as a reflection of what Justice Blackmun called its "almost obsessive focus on homosexual activity." *Id.* at 200 (Blackmun, J., dissenting). Taken together, the terms of Hardwick's complaint and the generalized language of the statute itself make it difficult to avoid the conclusion that the Court's decision to limit itself to a judgment regarding the constitutionality of the Georgia statute "as applied" was driven more by political, than by prudential, concerns. In my view, neither the framing of the issue in *Hardwick* nor its disposition can be understood apart from the extra-legal (which is to say, political) considerations that inform them. Given this background, a critical account of *Bowers v. Hardwick* ought not lose sight of the political genealogy of the case and its implications for analysis of the constitutional interests for which Michael Hardwick sought the Court's protection.

4. 478 U.S. at 188 n.2. This is an appropriate point at which to note the problematic persistence in our constitutional discourse of the word "sodomy," whether used alone, or conjoined (as in *Hardwick*) with the medical term "homosexual." As concepts and images, the terms' presence in the Court's opinion in *Bowers v. Hardwick* reflects and perpetuates the usually unacknowledged parasitic relationship between secular constitutional discourse on the one hand, and other normative and discursive systems such as religion and medicine on the other. A knowledge of the sedimented histories of the terms "sodomy" and "homosexual" is absolutely indispensable if we are to understand the regnant biases that informed the *Hardwick* decision.

The word "sodomy" comes to us, of course, from a Biblical story that appears in the Book of Genesis. According to the Old Testament account, because its "sin [was] very

limited the scope of its constitutional inquiry, the Court refused to in-

grievous," the city of Sodom was destroyed by "brimstone and fire from the Lord out of heaven." Genesis 18:20; 19:24 (King James). Over time, the destruction of Sodom came to be attributed to sexual (mis)conduct between and among those of the same gender. This understanding led to the identification of the "sodomite" with the figure of the "homosexual." See John McNeil, *The Church and the Homosexual* 42 (3d ed. 1988).

Some modern Biblical scholars have argued that the (homo)sexualization of the Sodom story reflects a deep misunderstanding of the Old Testament account. In their view, the sin for which the inhabitants of Sodom were punished was not sexual (mis)conduct but a sadistic lack of hospitality, which violated customary law. See *id.* at 46. Other scholars have contended that the sexual theme of the Genesis legend is clear: Sodom incurred God's wrath because the "men of the City . . . both old and young," Genesis 19:4-9 (King James), attempted to gang-rape two (male) angels who sought refuge in the house of Lot. See McNeil, *supra*, and sources cited therein.

Although these two readings of the story are not mutually exclusive, what is most interesting about the history of its interpretation is that (1) the violation of hospitality theme has been thoroughly overshadowed by the sexual one, and (2) the terms associated with this understanding of the story have been uncritically imported into our secular law. Its use, in short, embodies less an effort at impartial description than an implicit moral judgment.

The term "homosexual" is of more recent provenance. This term was introduced by Karl Maria Benkert in two anonymous pamphlets published in 1869. See Wayne Dynes, *Homolexis: A Historical and Cultural Lexicon of Homosexuality* 67 (1985). In fact, the concept "homosexual" pre-dates the concept "heterosexual." Although the term was not originally used in any "scientific" sense, by the end of the century it had achieved hegemonic status in professional medical discourse. Unlike the term "heterosexual," however, "homosexual" was from its inception invested with pathological connotations, and became the abnormal "other" against which to discuss the heterosexual "norm." See Jonathan N. Katz, *Gay/Lesbian Almanac: A New Documentary* 147-50 (1983). As Justice Blackmun notes in his dissent in *Bowers v. Hardwick*, by 1973 the psychiatric community, which had been primarily responsible for sustaining the view that "homosexuality" was a clinical disease, had come to reject this understanding. See 478 U.S. at 203 n.2 (Blackmun, J., dissenting). However, it is fair to say that the word/image of the "homosexual" still carries pathological connotations in popular discourse. It is for this reason that Simon Watney, among others, has argued that it is a category "which we cannot continue to employ." Simon Watney, *The Spectacle of AIDS*, 43 *October* 71, 79 (1987).

I am fully sympathetic with Watney's claim. And yet, I am persuaded that "homosexual sodomy" is a term that a critical constitutional analysis of *Bowers v. Hardwick* finally cannot do without. Its use by the Court is a textual fact of the *Hardwick* opinion and of countless prior judicial decisions. The term sheds much light on the structuring premises, or more precisely, the prejudices that organize the Court's analysis of the Georgia statute. Thus, I have chosen to retain the term when referring to the legally defined acts proscribed by the Georgia law. I use the terms "lesbian" and "gay" to refer to those persons and groups whose sexual practices and social and political identities are the subject of the statute's prohibitions.

Although I follow the *Hardwick* Court in using the term "homosexual sodomy," I do so fully aware of the normative difficulties attending that usage. Perhaps the most salient among these is the way in which an anachronistic, ideologically loaded appellation such as "homosexual sodomy" actively hampers rational public discourse about the constitutional limits of state intrusion upon the intimate sexual lives of consenting adults. To the obvious objection that the *Hardwick* Court might well have used another rhetorical term without changing the basic reasoning or result of its

validate the challenged application of the Georgia statute. In an opinion by Justice White, a closely divided Court concluded that the Federal Constitution does not “[confer] a fundamental right upon homosexuals to engage in sodomy,” and thus cannot support judicial invalidation of “the laws of the many States” that “make such conduct illegal and have done so for a very long time.”⁵ The Court further held that the “presumed belief” of a majority of the state’s electorate “that homosexual sodomy is immoral and unacceptable” is not “an inadequate rationale to accept the law,” and on this ground found the statute valid under the less stringent standard of minimum scrutiny, which required the Court to uphold the law if it could be said to have had some “rational basis.”⁶

In the past five years, the Court’s decision in *Hardwick* has been the object of considerable scholarly commentary. Much of the critical literature has revolved around the question whether the Court’s refusal to invalidate the Georgia “sodomy” statute challenged in *Hardwick* comports with, or contradicts, its earlier decisions regarding the so-called constitutional “right to privacy.”⁷ Given the historically close relationship between the terms of judicial discourse and legal academic dis-

decision, one might offer this equally obvious and simple response: It did not. One might well ask whether the fact that the Court did not choose an alternative characterization of the statutorily proscribed conduct is a textual register of how deeply the social voice of homophobia is inscribed in the institutional voice of the Constitution, the Supreme Court: in short, the presence of the term “homosexual sodomy” in *Hardwick* may be an integral part of the opinion’s inaugurating bias and structuring (il)logic. More generally, the unreflective use of the term “homosexual sodomy” may be diagnosed as a rhetorical symptom of the *Hardwick* Court’s unacknowledged, but impassioned indifference to how linguistic choices distort rational constitutional discussion, particularly of questions as ideologically charged as the regulation of sexuality and gender identities. In a chapter of a longer work of which this article is a part, I draw on contemporary textual theory to map the relations among doctrine, discourse and desire in *Bowers v. Hardwick*. See Kendall Thomas, *The Eclipse of Reason: The Rhetoric of Bowers v. Hardwick*, (unpublished manuscript, on file with author).

5. 478 U.S. at 191.

6. 478 U.S. at 196.

7. See, e.g., Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 Ind. L.J. 215, 221–37 (1987); Annamay T. Sheppard, *Private Passion, Public Outrage: Thoughts on Bowers v. Hardwick*, 40 Rutgers L. Rev. 521 (1988); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. Chi. L. Rev. 648 (1987).

One can find efforts in the literature to move beyond the method of exclusively internal critique toward alternative doctrinal and theoretical arguments regarding the constitutionality of homosexual sodomy laws. See, e.g., Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 Yale L.J. 1073 (1988); Frank Michelman, *Law’s Republic*, 97 Yale L.J. 1493 (1988); Jed Rubinfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989); Symposium, *Law, Community and Moral Reasoning*, 77 Cal. L. Rev. 475 (1989); Norman Vieira, *Hardwick and the Right of Privacy*, 55 U. Chi. L. Rev. 1181 (1988).

However, even these revisionist accounts are circumscribed by the perceived necessity to establish the contention that the issue in *Hardwick* is indeed that of privacy. I offer a critical discussion of two such efforts—those of Frank Michelman and Jed Rubinfeld—in a later section of this Article. See *infra* notes 207–267 and accompanying text.

course, it is not surprising that scholarly analysis of *Hardwick* has been dominated by the same conceptual framework in which the Court articulated and adjudicated *Hardwick's* claim. However, if one believes, as I do, that the intellectual concerns and commitments of students of constitutional jurisprudence overlap but are not congruent with those of the Supreme Court itself, one might well ask whether this strategy of assessing the Court's work exclusively or primarily on its own terms helps or hinders the distinctively *critical* project of constitutional scholarship.

Two separate but related questions may be posed in this connection. In theoretical discourse, does the language of privacy provide an adequate vocabulary for critically assessing the Court's reasoning and result in *Hardwick*? In political discourse, does it permit a sufficiently precise articulation of the concrete social interests for which *Hardwick* served as a constitutional flashpoint? A careful reading of the text and surrounding context of the *Hardwick* decision suggests that the rhetoric of privacy is indeed incapable of discharging either of these tasks. The limitations of privacy rhetoric as a conceptual resource for discussing the constitutional issues at stake in *Hardwick* lead me to follow a somewhat different itinerary than has been pursued in most scholarly discussion of the decision.

My project proceeds as follows. Part I discusses what I take to be the chief limitations of privacy analysis developed in the line of cases ending with *Hardwick* and in the scholarship on that law. It also introduces the question of corporeality or embodiment as an issue for constitutional analysis of homosexual sodomy law. I argue that the lack of close attention to the actual human beings whose bodies are touched by laws like that challenged in *Hardwick* deprives privacy analysis of an important and indispensable conceptual resource.

Part II sets out to demonstrate in some detail just how and why laws criminalizing private homosexual sodomy belong to a constellation of public practices whose constitutional dimensions are best described, explained, understood and argued as a kind of "body politics." My task here is to show that the law against homosexual sodomy has been vexed from its inception by a persistent and pervasive practice of homophobic violence on the part of public officials and private citizens alike. This violence is at odds with one of the most basic normative commitments of American constitutionalism: the physical security of the embodied individual. I argue that when set against the backdrop of its violent political history, the substance of the constitutional claim asserted in *Hardwick* is best viewed as a right to "corporal integrity," whose textual grounding is the Eighth Amendment prohibition against "cruel and unusual" punishments. My thesis is that homosexual sodomy statutes work to legitimize homophobic violence and thus violate the right to be free from state-legitimated violence at the hands of private and public actors.

Part III discusses the primary points of convergence and divergence between my argument and two other theoretical attempts to generate a "political" argument against the constitutionality of the law upheld in *Hardwick*. My discussion of these two efforts to set forth a political framework for constitutional analysis of the law challenged in *Hardwick* finds them wanting in a number of important respects. I conclude that the corporal or "body-based" model developed here offers a more precise and less abstract political framework for thinking about the constitutionality of homosexual sodomy statutes than these competing theories are able to provide. Part IV offers some final thoughts on the theoretical and practical exigencies that militate in favor of the alternative vision of homosexual sodomy statutes as an unconstitutional invasion of political rights, as against rights of privacy.

I harbor no illusions that the theoretical argument elaborated in these pages will find doctrinal expression in the constitutional jurisprudence of the current Supreme Court. Given the ideological and institutional realities of our time, one would have to be impossibly naive to entertain such a hope. Rather, this Article should be read as an effort to develop a conceptual compass that will enable critical constitutional analysis of homosexual sodomy statutes to move beyond the privacy paradigm.

I. THE PRISONHOUSE OF PRIVACY

A. *Trail of Blood: The Untold Story of Bowers v. Hardwick*

By 1986, when the Supreme Court rendered its judgment in *Bowers v. Hardwick*, the concept of the right to privacy had become a central term in the lexicon of twentieth century constitutional argument.⁸ From our present perspective, it may be difficult to imagine another root concept that would have served as well as this one to articulate and advance the concerns at stake in *Griswold v. Connecticut*⁹ and its progeny. With *Hardwick*, however, privacy's term of service seems to have run its

8. The pre-*Hardwick* literature is voluminous. Participants in the debate include Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. Rev. 34 (1967); Paul Freund, *Privacy: One Concept or Many*, in *Privacy: NOMOS XIII* 182 (1972); Richard B. Parker, *A Definition of Privacy*, 27 Rutgers L. Rev. 275 (1974); Louis Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410 (1974); Judith Jarvis Thomson, *The Right to Privacy*, 4 Phil. & Pub. Aff. 295 (1975); Thomas Scanlon, *Thomson on Privacy*, 4 Phil. & Pub. Aff. 315 (1975); Gary L. Bostwick, *Comment, A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 Cal. L. Rev. 1447 (1976); Jeffrey H. Reiman, *Privacy, Intimacy and Personhood*, 6 Phil. & Pub. Aff. 26 (1976); Charles Fried, *Correspondence*, 6 Phil. & Pub. Aff. 288 (1977); Tom Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 233 (1977); June Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 Harv. C.R.-C.L. L. Rev. 361 (1979). The classical theoretical formulation of the case for legal recognition of a right to privacy may of course be found in Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

9. 381 U.S. 479 (1965).

course. This, at least, is the lesson I draw from the case and from the terms in which the Supreme Court discussed the constitutional issues it presented.

Let me acknowledge at the outset that the view of *Hardwick* urged here may seem something of a paradox. *Hardwick* seems to be the most private of all privacy cases. After all, one might note, Michael Hardwick *was* arrested in the privacy of his own bedroom, for conduct that took place there. On this view, *Hardwick* lends itself perfectly to analysis through the lens of privacy, since it appears to present a textbook example of the kind of state practices against which the doctrine was designed to protect. In this perspective, the most likely explanation for the *Hardwick* Court's refusal to apply the doctrine to the private consensual sexual conduct of Michael Hardwick and his partner has more to do with the disposition of the Supreme Court than with any purported defects in the doctrine of constitutional privacy itself.

The first step in response to this claim is to note two crucial and contestable factual predicates on which it may be said to rest. The first assumption is that the relevant focal point for constitutional analysis of the statute challenged in *Hardwick* is, indeed, the time and place of his arrest. The second assumption is that Hardwick was in fact arrested for engaging in the act of homosexual sodomy with which he was formally charged. I want to suggest that both of these assumptions are belied by other, and to my mind, more significant facts of the case. Thus, to the extent that the argument for viewing *Hardwick* in particular through the prism of privacy depends on these empirical premises, it is deeply flawed.

In order to establish this contention, we need to recall certain "public" facts about *Bowers v. Hardwick* that never found their way into the record before the Supreme Court. Taken together, they tell an all too typical story of the gay and lesbian experience under the American legal system. Although we shall have occasion to review that larger history,¹⁰ my immediate theoretical interest is in the local history of the *Hardwick* case itself.¹¹ When *Hardwick* is viewed in the light of this history, it becomes possible to argue—indeed impossible to deny—that the case presents a number of issues that require a more realistic analysis than the privacy principle can provide.

Michael Hardwick's first encounter with the police power of the state of Georgia took place one morning a block away from the gay bar

10. See *infra* notes 116–149 and accompanying text.

11. I shall forego an elaborate methodological defense of my "on the ground" account of the background facts of *Hardwick*, or of my reliance on Michael Hardwick's personal narrative of the case. For a theoretical discussion of the value of constitutional analysis "from the bottom" see my *Rouge et Noir* Re-read: A Popular History of *Herndon v. Georgia*, 65 S. Cal. L. Rev. (forthcoming July 1992) (manuscript at 9–11, on file with the Columbia Law Review).

in Atlanta where he worked.¹² An Atlanta police officer named K.R. Torick stopped Hardwick after seeing him throw a beer bottle into a trashcan outside the bar. As Hardwick recounts the story, the officer "made me get in the car and asked me what I was doing. I told him that I worked there, which immediately identified me as a homosexual, because he knew it was a homosexual bar."¹³ Torick then issued Hardwick a ticket for drinking in public. Because of a discrepancy on the ticket between the day and the date he was to appear in court, Hardwick failed to appear. Within two hours of Hardwick's scheduled appearance, Torick went to Hardwick's house with a warrant for his arrest, only to find that he was not at home. When Hardwick returned to his apartment, his roommate told him of the police officer's visit. Hardwick then went to the Fulton County courthouse, where he paid a \$50 fine. In Hardwick's words:

I told the county clerk the cop had already been at my house with a warrant and he said that was impossible. He said it takes forty-eight hours to process a warrant. He wrote me a receipt just in case I had any problems with it further down the road. That was that, and I thought I had taken care of it and everything was finished, and I didn't give it much thought.¹⁴

Three weeks later, Hardwick arrived home from work to find three men whom he did not know outside his house. In his account of the incident, Hardwick admits that he has no proof that these men were police officers, "but they were very straight, middle thirties, civilian clothes."¹⁵

I got out of the car, turned around, and they said 'Michael' and I said yes, and they proceeded to beat the hell out of me. Tore all the cartilage out of my nose, kicked me in the face, cracked about six of my ribs. I passed out. I don't know how long I was unconscious. . . . I managed to crawl up the stairs into the house, into the back bedroom. What I didn't realize was that I'd left a trail of blood all the way back.¹⁶

A few days after this incident, and nearly a month after his first visit, Officer Torick again appeared at Hardwick's home. Torick found Hardwick in his bedroom having sex with another man.

He said, My name is Officer Torick. Michael Hardwick, you are under arrest. I said, For what? What are you doing in my bedroom? He said, I have a warrant for your arrest. I told

12. This information is taken from Michael Hardwick's account of the case, which appears in Peter Irons, *The Courage of Their Convictions* 392-403 (1988), and from Laurence Tribe's discussion of *Hardwick* in Laurence H. Tribe, *American Constitutional Law* 1424-25 (2d ed. 1988). Professor Tribe argued the case on Hardwick's behalf before the Supreme Court.

13. Irons, *supra* note 12, at 394.

14. *Id.*

15. *Id.* at 395.

16. *Id.*

him the warrant isn't any good. He said, It doesn't matter, because I was acting under good faith.¹⁷

Torick handcuffed Hardwick and his partner and took them to jail, where they were booked, fingerprinted, and photographed. As the two men were taken to a holding tank, Hardwick recalls that the arresting officer "made sure everyone in the holding cells and guards and people who were processing us knew I was in there for 'cocksucking' and that I should be able to get what I was looking for. The guards were having a *real* good time with that."¹⁸ Some hours later, Hardwick and his partner were transferred to another part of the building in which he was being held, in the course of which the jail officers made it clear to the other inmates that the men were gay, remarking "Wait until we put [him] into the bullpen. Well, fags shouldn't mind—after all, that's why they are here."¹⁹ Hardwick and his partner remained in jail for the greater part of the day, when friends were permitted to post bail for their release.

Shortly after his release, Hardwick accepted an offer from the Georgia affiliate of the American Civil Liberties Union to undertake his defense in the state courts. Hardwick and his attorneys planned to challenge the constitutionality of the state sodomy law's criminalization of the sexual conduct for which he had been arrested. Before the case came to trial, however, the Fulton County District Attorney declined to seek a grand jury indictment against Hardwick on the sodomy charges. In legal terms, this did not mean that the matter was at an end; the governing statute of limitations rendered Hardwick subject to indictment on the sodomy charges at any time within the next four years. In political terms, it meant that Hardwick (and gays and lesbians throughout the state) continued to be vulnerable to harassment and violence that would likely go unchecked and unchallenged so long as the sodomy statute remained in the Georgia criminal code. Faced with this prospect, Hardwick agreed to take his constitutional claim to the federal courts.

For those who are familiar with the history of sodomy statutes, the story recounted here contains few surprises. *Hardwick* is merely the most visible recent chapter of a larger, unfinished plot.²⁰ What bears remarking is the degree to which so much of the background biography of *Hardwick* resists translation into the language and logic of sexual privacy. Obviously, I do not want to deny the significance of Hardwick's arrest or discount the importance of the fact that the arrest took place in his bedroom. Nor do I wish to suggest that Officer Torick did not in

17. *Id.* at 395–96.

18. *Id.* at 396.

19. Tribe, *supra* note 12, at 1424 n.32.

20. See, e.g., Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 *UCLA L. Rev.* 643 (1966); Goldstein, *supra* note 7.

fact find and arrest Hardwick for engaging in sexual acts prohibited by Georgia criminal law. I mean to make two rather different observations.

The first is that Hardwick's arrest in the privacy of his bedroom was the culmination of a series of events that was set in motion long before, beginning with his public, on-the-street encounter with Officer Torick outside that Atlanta gay bar. A second, related observation is that while Hardwick had certainly engaged in sexual acts punishable by eight to twenty years imprisonment under Georgia law, it is not implausible to think that Hardwick would never have been charged for violating that law had Officer Torick not gone to Hardwick's home to serve the expired warrant. Recall that the first piece of information Hardwick gave Officer Torick outside the bar was about the kind of work he did, not about the kind of sex he practiced. In my view, this aspect of the case provides some basis for a belief that the officer's visit on the day of the arrest had less to do with what Hardwick had done, than with his discovery some weeks before of who and what Hardwick was. Had Michael Hardwick not first been ascribed a homosexual *identity*, it is unlikely that he would ever have been observed or arrested for engaging in prohibited homosexual *acts*.²¹

Two related points of theoretical import are suggested by this sequence of events. I shall have more to say below about their precise doctrinal ramifications. Here it suffices to note the respects in which *Hardwick* requires a broader conception of the constitutional interests at stake in the case than the privacy paradigm allows.

First, as a temporal matter, Hardwick's arrest at his home must be situated in a *chronological sequence* whose inaugural moment was the earlier, involuntary revelation of his sexuality during his initial encounter with Officer Torick. Furthermore, an adequate analytical "time chart" of *Hardwick* must also include the bloody beating Hardwick sustained outside his home, as well as the threat of sexualized violence to which he and his partner were deliberately exposed while in police custody. These incidents are not isolable events; they inhabit the same temporal field, whose horizons exceed privacy's chronometry.

Second, as a conceptual matter, when situated in its broader factual context, the formal claim raised and rejected in *Hardwick* must be viewed as a semantic conductor for a complex current of substantive concerns. The criminalization of homosexual sodomy challenged in *Hardwick* belongs to, and must be analyzed as, a *constellation* of diverse practices. My image of homosexual sodomy statutes as the site of a "constellation" of practices is intended to capture the essential inseparability of these laws from the actual methods—public or private, offi-

21. I shall say more later in this Article about the dangers of reducing the concept of gay or lesbian identity to the category of the "sexual." See *infra* notes 260-267 and accompanying text.

cial or unofficial, sanctioned or unsanctioned, act-based or identity-based, instrumental or symbolic—by which the social control of those to whom they are directed is undertaken and achieved. Thus, I am going to take it as a basic premise that the factual background of *Hardwick* undermines the traditional distinction between the formal prohibition of homosexual sodomy and the substantive means by which that prohibition is enforced (or not enforced, as the case may be): form and substance are inextricably linked.

This constellation of prohibitive practices interdicts (homo)social identity *and* (homo)sexual intimacy; enlists the unauthorized, unofficial disciplinary power of private actors *and* the authorized, official police power of state institutions; subjects those designated as “homosexual” to lawless and random aggression and violence *and* lawful and regularized constraint and control; targets the bodies *and* the behavior of those to whom its edicts are directed; enjoins homosexual existence *and* homoerotic acts.²² Given this complexity, the question becomes whether the factual predicates of the issues presented in *Hardwick* can be cleanly or comprehensively contained within the constitutional category of privacy.

At least three possible answers to this question suggest themselves. One might flatly deny that anything of theoretical consequence flows from what I have said about the public biography of *Hardwick*. This position holds that there is still a close enough conceptual connection between the privacy paradigm and the more public dimensions of *Hardwick* to warrant rejection of an alternative perspective, even if that perspective illuminates aspects of the case that escape the view of privacy. In my view, this position is indefensible. The unmodified privacy framework fails to satisfy a basal requirement that any interpretive model must meet: namely, that the model fit the data it aims to explain.²³ While the resolute refusal to come to grips with *Hardwick*'s public biography may preserve the purity of privacy analysis, the perceived benefits of its preservation entail too great a conceptual cost. We may ignore the mentioned public determinants and dimensions of

22. I shall argue below that what I have called a “constellation” of practices may be productively understood by way of John Rawls’ concept of an “institution.” See *infra* note 140 and accompanying text.

23. For a similar argument, see Richard B. Parker, *A Definition of Privacy*, 27 *Rutgers L. Rev.* 275, 276 (1974). As the title of his article suggests, Professor Parker is concerned with assessing the competing definitions of the concept of privacy; he understands the relevant data against which a particular definition of privacy should be assessed to consist of “our shared intuitions of when privacy is or is not gained or lost.” *Id.* My point here differs from Professor Parker’s in two key respects. First, I take the question of “fit” to apply not only to specific conceptions of privacy, but to the broader concept of privacy itself. Second, I understand the relevant data to be empirical rather than notional: for me, the data in light of which the validity of privacy analysis must be tested are our concrete experiences with the legal regime that the privacy model purports to interpret.

Hardwick, but we cannot erase them altogether: they remain substantive and significant facts of the case.

A second possible response to the claim that *Hardwick* raises issues that cannot be forced into the conceptual grid of the privacy paradigm does not deny the claim's force, but tries instead to deflect it. This response concedes that an adequate constitutional analysis of *Hardwick* cannot justifiably overlook the apparently public features of the case, but rejects the implication that attention to these concerns necessarily entails the abandonment of privacy analysis *tout court*. It begins by noting that the reservations mentioned regarding the value of the privacy model as a framework for analysis of *Hardwick* fail to distinguish between the larger concepts associated with the privacy principle, on the one hand, and the local factual premises that inform its analysis, on the other. With this distinction in mind, one can accept the claim that the factual premises that typically inform privacy thinking overlook the public features of *Hardwick*. At the same time, one can insist that nothing I have said about the contingent factual assumptions of the privacy paradigm warrants repudiation of its core ideas. To put the point another way, one might argue that the basic conceptual framework of privacy analysis is sufficiently elastic to cover these dimensions of *Hardwick*. Our task, then, is simply to reformulate or redescribe the particular public facts of the case in terms that reveal their family resemblance to already acknowledged privacy interests.²⁴ I criticize this position in greater detail below. I would simply note here that it is far from clear why this semantic sleight-of-hand is preferable to an open admission that *Hardwick* might be better understood by use of a richer conceptual vocabulary than that which the privacy paradigm is able to offer.

A third response is to contend, as I do, that privacy's narrow temporal and categorical frameworks render it too blunt a tool for the critical task before us.²⁵ *Hardwick* is not just a story about private homoerotic acts and their interdiction; it is also an account of the harassment, the humiliation, and the violence that await the mere assertion or imputation of homosexual identities and existences in the public sphere. A more extended and unified account of the events that preceded and followed the encounter in *Hardwick*'s bedroom militates toward a broader conception of our analytic object than the privacy principle permits. These events do not simply straddle the boundaries between the public and private; they overrun them altogether. Thus,

24. We might, on good precedential authority, view *Hardwick*'s initial encounter with Officer Torick as one in which *Hardwick* may be said to have had an "expectation of privacy." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

25. For two very different discussions of the relation between the choice of temporal framework and the terms of legal analysis, see Bruce Ackerman, *Reconstructing American Law 47-71* (1984); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *Stan. L. Rev.* 591, 593-94 (1981).

against the sheer taken-for-grantedness of the view that *Hardwick* is most productively understood within the language and logic of privacy, I would urge that close attention to the public dimensions of *Hardwick* demands analysis in other, more comprehensive terms. We must, in short, force privacy to go public.

In order to see why privacy doctrine ultimately buckles under the weight of the irreducibly public dimensions of *Hardwick*, I turn next to a discussion of the key arguments for the right to privacy that have been developed in the decisions of the Court and in the scholarly literature. A reading of the privacy decisions suggests that the difficulties of privacy analysis must be attributed not only to the theoretical and factual premises that inform its key concepts and categories, but to those categories and concepts themselves.

B. *Dominant Privacy Paradigms: A Brief Overview*

Analytically, one can isolate three broad conceptions²⁶ of the constitutional right to privacy in contemporary case law and literature: zonal, relational and decisional. I do not aim here to construct anything like an exhaustive anatomy of privacy. My goal is rather to offer a brief overview of the concept. My chief concern is to identify and explore the implications for *Hardwick* of the two main features of the dominant versions of the privacy principle: its adherence to analogical method on the one hand and axiological method on the other.

This descriptive account of the analogical and axiological foundations of privacy analysis is interwoven with a more normative claim. This claim, in summary form, has to do with the vexed relation between the "subject" and the "object" of privacy. My contention is that the focus in the cases and commentary alike on the analogical defense of one or another vision of the morality of privacy is a symptom of a deeper difficulty. One consequence of the privacy paradigm's understanding of its "object" is a persistent and pervasive absence of anything approaching an adequate understanding of the "subject" of privacy. As we shall see, the cases and commentary lack the terms for a sufficiently sharp or deep appreciation of the precise practices whereby the proscriptions of homosexual sodomy law are inscribed on the physical bodies of the actual, empirical individuals to whom they are di-

26. The distinctions are largely ideal-typical, and thus should be understood as mainly heuristic. It is not unusual to find elements of one model present in others. Indeed, in his dissent in *Hardwick*, Justice Blackmun characterizes the Supreme Court's approaches to the question of constitutional privacy as being "along two somewhat distinct, albeit complementary, lines." 478 U.S. at 203-04. On the one hand, the Court "has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make." On the other, "it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged." *Id.* at 204 (citations omitted) (Blackmun, J., dissenting).

rected. The result, I argue, is that the privacy paradigm lacks the analytical instruments for grasping the substantive, material core of the interests at the heart of *Hardwick*: the constitutionally secured political right to corporal integrity.

1. *Fences: The Zonal Paradigm of Privacy*. — The first formulation of privacy rests on a “space/place”-based conception of the right. It is derived from views about the combined force of constitutional values whose most notable textual residence is in the Third and Fourth Amendments. This zonal model holds that the constitutional right to privacy is anchored in the same values embodied in the Constitution’s prohibition of certain state searches and seizures of one’s “person, house, papers and effects,” and in the protection against the expropriation of private homes for military residence. In the words of one commentator, the zonal paradigm of privacy comprehends a space of civil sanctuary from which the individual can “[prohibit] *other persons* from seeing, hearing, and knowing”²⁷ what goes on there.

Two prominent formulations of the space-based conception of privacy in Supreme Court jurisprudence may be found in *Stanley v. Georgia*²⁸ and *Paris Adult Theater I v. Slaton*.²⁹ Writing for the Court in *Stanley*, Justice Marshall rejected Georgia’s assertion that its police power could reach the “mere possession of printed or filmed [obscene] matter in the privacy of a person’s own home.”³⁰ *Stanley* draws a zone of “no power” within which the state cannot intrude upon the “right to satisfy [one’s] intellectual and emotional needs in the privacy of [one’s] home.”³¹ In Justice Marshall’s view, the Constitution bars a state from using criminal obscenity laws to “[tell] a man, *sitting alone in his own house*, what books he may read or what films he may watch.”³²

The majority in *Paris Adult Theater I* also relied on a space-based conception of the right of privacy in upholding a Georgia statute that permitted issuance of a civil injunction prohibiting the commercial exhibition of obscene films. Chief Justice Burger’s opinion distinguished *Stanley* on the grounds that the “‘zone’ of ‘privacy’ ”³³ is “restricted to a place, the home.”³⁴ The Court denied any conceptual or constitu-

27. Bostwick, *supra* note 8, at 1456.

28. 394 U.S. 557 (1969). In holding that mere possession of “obscene” matter cannot constitutionally be made a crime, the *Stanley* Court emphasized that “in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person’s own home,” the right of privacy “takes on an added dimension.” *Id.* at 564.

29. 413 U.S. 49 (1973). In *Paris Adult Theater I*, the zonal dimension of the right of privacy appears to have provided the rationale for rejecting a claim for a right to privacy (in the Court’s words) “to watch obscene movies in places of public accommodation.” *Id.* at 66.

30. 394 U.S. at 564.

31. *Id.* at 565.

32. *Id.* (emphasis added).

33. 413 U.S. at 66.

34. *Id.* at n.13.

tional connection between the doctrine of privacy, which it understood in zonal terms, and the screening of obscene movies in a "place of public accommodation."³⁵ In short, *Paris Adult Theater I* stands for the proposition that the right recognized in *Stanley* does not travel beyond fixed private borders.³⁶

The zonal justification for privacy provides one of the two main strands of argument for Justice Blackmun's dissent in *Hardwick*. "The behavior for which *Hardwick* faces prosecution," noted Blackmun, "occurred in his own home."³⁷ For Blackmun, this fact clearly implicates the space-based protections set forth in the Fourth Amendment. In his view, *Hardwick* thus falls squarely within the rule of *Stanley*, a decision whose textual anchoring sounds in both the First and Fourth Amendments. The asserted relevance of the Fourth Amendment in *Hardwick* is a crucial part of Blackmun's insistence that, notwithstanding the majority's characterization of his case, *Hardwick's* claim does find express "support in the text of the Constitution."³⁸ Against this textual and decisional backdrop, argued Blackmun, "the right of an individual to conduct intimate relationships *in the intimacy of his or her own home* seems to me to be the heart of the Constitution's protection of privacy."³⁹

2. *Intimacy and Association: The Relational Paradigm of Privacy.* — A second line of argument in favor of the constitutional right to privacy extrapolates from the language of the First Amendment. This model adheres to a "relationally" based conception of the right, rooting the protection of privacy in the freedom to associate with others in intimate relation. The most powerful version of the model in the theoretical literature is that elaborated by Kenneth Karst.⁴⁰ Professor Karst asserts that associational freedom "is an ancient idea in political philosophy,"⁴¹ whose constitutional lineage can be attributed most prominently to an expansive interpretation of the text and theory of the First Amendment. Karst argues that "[t]he freedom to choose our intimates and to govern our day-to-day relations with them is more than an opportunity for the pleasures of self-expression; it is the foundation for the one responsibility among all others that most clearly defines our humanity."⁴² He asserts that in order to regulate the right to freedom of intimate association, a state must be prepared to show that its regula-

35. *Id.* at 66–67.

36. The application of this topographical conception of privacy is implicit in the Court's reasoning about the scope and limits of Fourth Amendment expectations of privacy in *California v. Greenwood*, 486 U.S. 35, 143–44 (1988) (rejecting a claim of privacy with respect to trash placed on the street for garbage collection).

37. *Hardwick*, 478 U.S. at 206 (Blackmun, J., dissenting).

38. *Id.* at 208 (Blackmun, J., dissenting) (quoting *id.* at 195).

39. *Id.* at 208 (Blackmun, J., dissenting) (emphasis added).

40. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *Yale L.J.* 624 (1980).

41. *Id.* at 626.

42. *Id.* at 692.

tory intervention is directed against a demonstrable harm. In this connection, Professor Karst rejects as presumptively illegitimate arguments for impairment of the right based on speculation that the moral values embodied in a particular intimate association will come to be shared by others.⁴³

The relational model of privacy is also a central strand in the Court's elaboration of the doctrine. For example, Justice Douglas states in *Griswold v. Connecticut*⁴⁴ that a law against the use of contraceptives "concerns a relationship"—the association of marriage—that lies "within the zone of privacy."⁴⁵ The right at issue in *Griswold* can be framed as a right to define the marriage relationship as a non-reproductive association. Similarly, in his dissent in *Hardwick*, Justice Blackmun takes the Court's opinion to task for its refusal "to recognize . . . the fundamental interest all individuals have in controlling the nature of their intimate associations with others."⁴⁶ The relational model of privacy focuses on persons rather than places. Accordingly, it is not subject to the built-in geographical limit characteristic of the zonally-centered defense of constitutional privacy. The associational model of the right of privacy presumptively insulates its holders from state interference even when that right is exercised in the public sphere.⁴⁷

3. *Private Choice Theory: The Decisional Paradigm of Privacy.* — A third line of analysis formulates the right of privacy as a constitutional guarantee of a certain spectrum of decisional freedom. The core value, from this perspective, is often framed in terms of "autonomy" and "self-determination." Perhaps the best known instance of this view in the case law is the opinion of Justice Brennan in *Eisenstadt v. Baird*:⁴⁸ "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the *decision* whether to bear or beget a child."⁴⁹ *Eisenstadt* thus extends to unmarried persons the principle *Griswold* adopts with respect to married persons: individuals have a right to choose non-procreative sexual relations. A similar interest in protecting self-determination informs Justice Blackmun's opinion in *Roe v. Wade*,⁵⁰ recognizing a woman's right to decide (albeit in consultation with her physician⁵¹) whether to termi-

43. See *id.* at 627.

44. 381 U.S. 479 (1965).

45. *Id.* at 485.

46. 478 U.S. at 206 (Blackmun, J., dissenting).

47. Although the precise limits of the associational conception of privacy are not specified in the case law, the outer boundaries of the right would most probably be drawn at the point it infringed upon others' right to intimate association.

48. 405 U.S. 438 (1972).

49. *Id.* at 453 (second emphasis added).

50. 410 U.S. 113 (1973).

51. At least one commentator has noted that in *Roe v. Wade*, the Court "was not upholding a *woman's* right to determine whether to bear a child, as abortion proponents

nate a pregnancy in its early stages. In *Whalen v. Roe*,⁵² Justice Stevens ratifies this understanding of the decisional values that underwrite privacy doctrine's protection of abortion rights when he frames the right as an "interest in independence in making certain kinds of important decisions."⁵³

In *Hardwick*, much of the force of Justice Blackmun's dissent derives from his reliance on the conception of privacy as a recognition of a presumptively protected interest in autonomous decision-making in matters of intimate sexual conduct. Blackmun rejects the terms in which the opinion of the Court characterizes the substance of *Hardwick's* claim, and insists that the issue presented is not whether there is a constitutionally protected "fundamental right to engage in homosexual sodomy."⁵⁴ As Blackmun sees it, the question the Court is being asked to decide is whether "Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives [based on nothing more than the assertion] that the choice they have made is an 'abominable crime not fit to be named among Christians.'⁵⁵ In Justice Blackmun's view, when viewed as a general claim that individuals have the "freedom to choose how to conduct their lives,"⁵⁶ rather than a specific claim to engage in particular conduct, the interest asserted in *Hardwick* is as "fundamental" as any of the rights against the state that the Court has constitutionally protected in its earlier privacy decisions.

The conception of the doctrine of privacy as involving a claim of autonomous choice or dispositional power over matters of sexuality and reproduction has dominated the scholarly discourse. In a critical discussion of the Court's jurisprudence from *Griswold* through *Roe v. Wade*, Louis Henkin argues that the concept of individual autonomy provides the most coherent axiological underpinning for the doctrine of privacy.⁵⁷ According to Professor Henkin, constitutional challenges to laws that prohibit certain sexual and reproductive practices present a conflict between an autonomy-based claim of "private right" on the one hand, and an authority-based claim of "public good" on the other. For Henkin, when a court declares such legislation constitutionally invalid, it should justify its decision on the grounds that the "private right" of the individual to make autonomous choices regarding sexual-

and feminists had argued. Instead, it was upholding a *doctor's* right to make a medical decision!" Kristin Booth Glen, *Abortion in the Courts: A Laywoman's Historical Guide to the New Disaster Area*, *Feminist Stud.*, Feb. 1978, at 1, 9.

52. 429 U.S. 589 (1977).

53. *Id.* at 599-600.

54. *Hardwick*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting 478 U.S. at 195).

55. *Id.* at 199-200 (Blackmun, J., dissenting) (emphasis added) (quoting *Herring v. State*, 46 S.E. 876, 882 (Ga. 1904)).

56. *Id.* at 205-06 (Blackmun, J., dissenting).

57. See Henkin, *supra* note 8, at 1410-11. Indeed, Professor Henkin intimates that a formulation of the interest at stake in *Griswold* and its progeny as a claim of autonomy *per se* better captures the substance of the right than does privacy. See *id.* at 1426-27.

ity and reproduction limits the asserted authority of government to preempt those choices in the name of the "public good."⁵⁸

A more recent theoretical elaboration of privacy as personal autonomy may be found in the work of David A. J. Richards, who specifically argues for application of the doctrine to homosexual intimacy.⁵⁹ Drawing on the work of John Rawls, Richards sets out to defend a broad principle of "love as a civil liberty":⁶⁰

Freedom to love means that a mature individual must have autonomy to decide how or whether to love another. Restrictions on the form of love imposed in the name of the distorting rigidities of convention that bear no relation to individual emotional capacities and needs would be condemned. Individual autonomy, in matters of love, would ensure the development of people who could call their emotional nature their own, secure in the development of attachments that bear the mark of spontaneous human feeling and that touch one's original impulses.⁶¹

Since they deprive those subject to their interdictions of a distinctively human right of sexual autonomy through which "people define the meaning of their lives,"⁶² Richards concludes that homosexual sodomy laws "egregiously violate these considerations,"⁶³ and may thus be struck down on identifiable, albeit unwritten, constitutional grounds.⁶⁴

C. On the "Subject" of Privacy: A Critique

Together, these three lines of argument form the main conceptual pillars of the much-maligued "penumbral" justification for the protection of the sexual and reproductive rights currently subsumed under the rubric of privacy. The space-based model of privacy emphasizes the degree to which protection of the physical integrity of the home is a precondition for intimate life. Its roots can be traced to the ideology of liberal individualism. Its core concern is to guarantee the individual a private haven in a heartless public world. By recognizing a physical zone of privacy into which the state may not intrude to interdict consensual intimate conduct, the Supreme Court has shown itself to be

58. *Id.* at I430-32. For an argument that a right of personal autonomy is neither inherently independent of nor essentially inimical to the pursuit of the collective public good, see Joseph Raz, *The Morality of Freedom* 250-55 (1986).

59. David Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *Hastings L.J.* 957 (1979).

60. *Id.* at I005 (emphasis omitted).

61. *Id.* at I006.

62. *Id.* at I018.

63. *Id.* at I006.

64. Other arguments exploring the links between privacy and autonomy can be found in Eichbaum, *supra* note 8; Rogers M. Smith, *The Constitution and Autonomy*, 60 *Tex. L. Rev.* 175 (1982).

sensitive to the mutually constitutive relationship between the intimate life of the individual and the places in which that intimate life unfolds.

The relation-based model of privacy underscores the extent to which the interests at stake find expression in the voluntary, intimate associations individuals form with one another. It also bears remarking that the associational defense of privacy recognizes the degree to which the right is shared, rather than individuated. In this respect, the relational conception of privacy may fairly be described as a version of collective rights, since it derives its coherence from some notion of intimate community.

The decision-based understanding of the right to privacy finds its bearings in the idea of individual autonomy. From this emphasis, the decisional model of privacy finds a presumptive right to freedom of individual choice, which entails a coordinate presumption of a constitutional limit on the use of state power to impair the autonomous choices of individuals regarding their sexual lives. It recognizes the constitutive role that intimate decisions play in the creation of human personality, and thus creates some room for an understanding of sexual orientation and identification as the product of the dynamic interaction of individual and act, rather than the expression of an *a priori* stable essence or identity.⁶⁵

Each of the three antecedents for the protection of privacy exemplifies a historically important component of arguments regarding the scope and limits of individual rights. There are, however, a number of reasons for believing that the spatial, associational, and decisional formulations of privacy doctrine should no longer be viewed as an adequate or acceptable foundation for contemporary constitutional thinking about sexuality in general, and those forms of sexuality criminalized in homosexual sodomy statutes in particular.

1. *The Institutional Argument*. — The first reason to believe that contemporary privacy analysis has reached an impasse is institutional.⁶⁶ Justice White's opinion for the Court in *Hardwick* leaves no doubt that he and his colleagues take a dim view of the prospects for further development and application of the constitutional law of privacy. One specific passage makes this emphatically clear:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the

65. See the essays collected in *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (Edward Stein ed., 1992).

66. While I do not believe that these institutional concerns offer a comprehensive explanation for the outcome in *Hardwick*, they must certainly be taken into account, if only because of the rhetorical force with which Justice White introduces them into his constitutional calculus.

1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.⁶⁷

The current members of the Supreme Court are haunted by the specter of *Lochner v. New York* and the dreaded doctrine of substantive due process, of which *Griswold's* progeny, especially *Roe v. Wade*, are suspected of being the modern illegitimate descendants.⁶⁸ The present Court is either unwilling or unable to see privacy as anything other than a misbegotten doctrine; as such, its continuing recognition appears to pose too great a threat to the Court's institutional respectability.⁶⁹ Unless the Court can be persuaded that the right of privacy is expressly and inarguably rooted in the text of the Constitution, the case for overruling *Hardwick* is not likely to receive a sympathetic hearing.

It is doubtful that any of the versions of the privacy principle I have discussed can lay claim to such a secure textual pedigree. This absence brings us to a second difficulty that besets current formulations of the privacy principle, a problem internal to the doctrine itself. The decisional, zonal and associational cases for privacy embody two distinct methodological strategies, both of which seriously limit the ability of these interpretive models to comprehend the substantive rights that they seek to secure.

2. *The Analogical Argument.*

a. *Textual Analogy.* — The first of these is a reliance on analogical argument, which has taken two main forms.⁷⁰ One might be called the

67. 478 U.S. at 194–95.

68. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 929–30, 937–41 (1973).

69. One recent example suggesting that the current Court might be willing to resort to another rubric to protect rights that in years past might have been framed in terms of privacy is the decision in *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990). In his opinion for the Court, the Chief Justice pointedly declined to view the right to refuse medical treatment as part of a "generalized right to privacy," preferring instead to characterize the former right as an assertion of a Fourteenth Amendment "liberty" interest. Curiously, the case the Court cites to support its choice of liberty as an alternative to privacy is *Bowers v. Hardwick*. See *id.* at 2851 n.7.

70. Analogical thinking, of course, is paradigmatic in Anglo-American legal reasoning. Although its legitimacy is taken for granted in common law analysis, there seems to be widespread resistance to its use in this area of constitutional law, particularly when it takes the form of analogical appeals to the text of the Constitution instead of to the case law. Indeed, one can read Justice White's opinion as a sustained repudiation of textual analogic method—at least when privacy is claimed for private, consensual same-sex intimacy. For a general explication of the possible uses of analogic

method of "textual" analogy. Faced with the absence of explicit textual anchors for the claimed right, proponents of privacy have had to establish the existence of the doctrine by an analogical strategy of "indirection."⁷¹ This two-step process involves (1) identification of some constitutional provision to which privacy is asserted to bear a rough relation, and (2) elaboration of a sufficiently generalized principle that is said to be common both to the right of privacy and the interests recognized by the textual provision, so that the provision then becomes the principle's safe harbor.

The results of this form of analogical argument thus far have been less than satisfactory. Proponents of privacy doctrine have constantly had to defend its analogical derivation against the textualist charge that the method used to make the case for privacy is a sign of its presumptive illegitimacy. However, even if one is not categorically hostile to analogical methods of constitutional interpretation, it is difficult to overlook their substantive incompleteness. To state the objection bluntly, analogical methods of arguing for privacy seem all too often to miss the mark.

Similarly, while it is true that the Third and Fourth Amendments seek to guarantee the integrity of the homes and apartments in which intimate conduct takes place, it bears remarking that the protections these provisions afford are in significant part framed, and limited by, their procedural terms.⁷² For example, the Third Amendment makes it clear that the right to forbid quartering of soldiers in one's home, deemed absolute during peaceful periods, may be procedurally overridden in times of war.⁷³ Similarly, although the Fourth Amendment does speak of unreasonable searches and seizures, its language could be read to suggest that otherwise unreasonable state intrusions are cured if the state proceeds on a facially valid warrant.⁷⁴ What the analogies to the Third and Fourth Amendments fail to capture, then, is that the issue presented by the criminalization of homosexual sodomy is not simply

reasoning in constitutional method see Charles L. Black, Jr., *Decision According to Law* (1981).

71. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Douglas, J.); Thomas E. Kauper, *Penumbras, Emanations, Things Fundamental, Things Forgotten: The Griswold Case*, 64 Mich. L. Rev. 235 (1965).

72. But see John Hart Ely, *Democracy and Distrust* 96-97 (1980) (arguing that Fourth Amendment safeguards substantive goals of preserving integrity of home and circumscribing official discretion); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1069-70 (1980) ("one must . . . rely on substantive values in elaborating the requirements of . . . procedural form").

73. See U.S. Const. amend. III.

74. See *Segura v. United States*, 468 U.S. 796, 813-16 (1984) ("Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized."); see also *Murray v. United States*, 487 U.S. 533, 542 (1988) (evidence admissible "[s]o long as a later lawful seizure is genuinely independent of an earlier, tainted one").

whether the Constitution imposes certain procedural limitations on the methods the state uses to police and punish the intimate lives of consenting adults. Rather, these statutes raise deeper questions regarding whether and to what extent the Constitution embodies substantive prohibitions of certain forms of state intervention, however procedurally correct. It may be true that substantive rights frequently inhere in the interstices of procedure; nonetheless, if a more explicit foundation can be found for the interests currently spoken of under the rubric of privacy, we should certainly seek it out.

For example, the First Amendment analogy seems inapposite if only because the right to peaceably assemble appears by its very terms to speak to the public corporate conduct of individual citizens. The expressive dimensions of private intimate association are obviously different, not just in degree but in kind, from those of a coalition of citizens petitioning the government.⁷⁵ Although some commentators have contended that the opportunity for self-expression in intimate private relationships is the "foundation" for civic expression in the public sphere,⁷⁶ the asserted connection between these two forms of association is in point of fact neither logically nor historically necessary. A less obvious, but no less persuasive argument might hold that the significance of sexual intimacy resides in what might be described as a shared "private language." For the individuals involved, the discourse of their sexual desire may not at all be instrumentally related (or only contingently so) to the discursive practices through which they join with others to express and address their public, political concerns to the institutions of the state.⁷⁷

The defense of privacy by way of the notion of autonomy may be said to stand on even weaker textual ground than the associational and zonal models. This is so because the case for privacy as a dispositional power is not limited to asserted analogies between the right of privacy

75. Another way of putting this point would be to say that the analogy between intimate and political association finds its condition of possibility in an unwarranted assimilation of "publicity" to privacy. Richard Sennett traces the genealogy of this analytic assimilation to the end of a distinctively "public culture," and the concomitant emergence in the nineteenth century of what he calls the "ideology of intimacy." See Richard Sennett, *The Fall of Public Man* 259-63 (1977).

76. See Karst, *supra* note 40, at 692 ("The freedom to choose our intimates and to govern our day-to-day relations with them is more than an opportunity for the pleasures of self-expression; it is the foundation for the one responsibility among all others that most clearly defines our humanity."); Michelman, *supra* note 7, at 1535 ("privacies of personal refuge and intimacy" are "a matter of constitutive political concern as underpinning the independence and authenticity of the citizen's contribution to the collective determinations of public life").

77. It should, however, be noted that there are those who view homosexual intimacy as a form of political resistance. See, e.g., Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *Powers of Desire: The Politics of Sexuality* 177, 199 (Ann Snitow et al. eds., 1983) [hereinafter *Powers of Desire*] ("Woman-identification is a source of energy, a potential springhead of female power. . .").

and those rights that are expressly recognized in the text of the Constitution. Both of the two mentioned versions of the autonomy argument⁷⁸ assume the existence of an unwritten constitution, which they take to be no less a legitimate source for judicial development of privacy doctrine than the text itself.⁷⁹ To be sure, scholars have marshalled powerful historical and conceptual arguments for the viability and value of extra-textual constitutional norms as a framework and foundation for judicial protection of fundamental rights, and indeed, for the very practice of judicial review.⁸⁰ Nonetheless, it seems clear that theoretical efforts to extract the right of privacy from the principles of an unwritten constitution are unlikely to overcome the burden under which they labor, which has less to do with proof than persuasion. Arguments among constitutional lawyers about the operational content of an unwritten constitutional norm of human autonomy turn on issues “about which reasoned argument is possible but full and definitive resolution often unlikely.”⁸¹ The very notion of individual autonomy is, and will likely remain, an “essentially contested”⁸² justification of the right to privacy.

b. *Factual Analogy*. — In addition to the method of “textual” analogy, privacy analysis has relied on a second version of analogical reasoning which might be termed “factual.” Since 1965, one recurrent justification the Court has offered in defending its extensions of the right of privacy is that the practices at issue in the later cases—the distribution of contraceptives to unmarried individuals in *Eisenstadt v. Baird*, or the termination of pregnancy in *Roe v. Wade*—are not factually distinguishable in any constitutionally relevant aspect from the use of contraceptives by married persons upheld in *Griswold v. Connecticut*, in which the right of privacy was first held to apply to matters of sexual and reproductive practice.⁸³

78. See *supra* notes 48–64 and accompanying text.

79. See Henkin, *supra* note 8, at 1414 (one can look to the a priori individual autonomy of our original philosophy, “unwritten” in the constitution, or implied in the Ninth Amendment and incorporated in the Fourteenth); Richards, *supra* note 59, at 958 (“philosophical explication of human rights . . . will give solid foundations to the idea of an unwritten constitution underlying . . . the written Constitution”).

80. See, e.g., Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969); Ely, *supra* note 72; Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 *Stan. L. Rev.* 703 (1975); Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 *N.Y.U. L. Rev.* 278 (1981).

81. William E. Connolly, *The Terms of Political Discourse* 10 (1974) (2d ed., Princeton Univ. Press 1983).

82. W.B. Gallie, *Essentially Contested Concepts*, 56 *Proc. Aristotelian Soc’y* 167, 169 (1955–56) (“[T]here are concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.”).

83. Indeed, in *Griswold* itself, Justice Douglas first asserts a factual kinship between the “association of people” who come together in marriage and other forms of association to which the Court has previously extended constitutional protection, before

In *Hardwick*, the Court summarily forecloses appeal to factual analogies between *Hardwick* and the modern sexual privacy cases. The Court is equally emphatic about the absence of any factual similarity between *Hardwick* and the earlier decisions that have come to be seen as *Griswold's* antecedents, such as *Meyer v. Nebraska*,⁸⁴ *Pierce v. Society of Sisters*,⁸⁵ and *Prince v. Massachusetts*.⁸⁶ The *Hardwick* Court flatly asserts that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."⁸⁷

In his dissent, Justice Blackmun insists that Justice White's claim that "none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference 'bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy [asserted in *Hardwick*],' "⁸⁸ misunderstands the earlier cases. Blackmun argues that the common principle underlying the right of privacy is a commitment to "the 'moral fact that a person belongs to himself and not others nor to society as a whole.' "⁸⁹ When interpreted in this framework, contends Blackmun, the cases leading up to *Hardwick* represent much "more than the mere aggregation of a number of entitlements to engage in specific behavior."⁹⁰ On this account, the practices at issue in the earlier privacy cases received the Court's protection because "they form so central a part of an individual's life."⁹¹ For Justice Blackmun, the application of factual analogical analysis, when guided by this general principle, demonstrates the similarities between the conduct protected in the cases before *Hardwick* on the one hand, and consensual sexual activities of gay men and lesbians on the other.

At another level, however, a phenomenological case can be made for the proposition that there *is* a constitutionally relevant sense in which the consensual sexual conduct of gay men and lesbians bears "no connection" to the other types of associations that have been accorded protection under the rubric of privacy. This phenomenological difference can best be glimpsed by looking at how concepts of privacy and secrecy have interacted historically in the lived experience of gay men and lesbians in America.

For heterosexuals, the concept of privacy serves to carve out a safe

he even mentions the notion of the right of privacy. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

84. 262 U.S. 390 (1923).

85. 268 U.S. 510 (1925).

86. 321 U.S. 158 (1944).

87. *Hardwick*, 478 U.S. at 191.

88. *Id.* at 204 (Blackmun, J., dissenting).

89. *Id.* (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5, quoting *Fried*, *supra* note 8, at 288-89).

90. *Id.* at 206 (Blackmun, J., dissenting).

91. *Id.* at 204 (Blackmun, J., dissenting).

haven for human flourishing. The category of the private may thus be said to carry a singularly positive valence: privacy is the place where individuals come to understand and express their understanding of the meaning of intimacy. For gays and lesbians, however, the language of privacy has never represented such an unqualified good. To be sure, the rhetoric of privacy has made it possible for gay men and lesbians to argue that what individuals do with other individuals in their bedroom is no one else's business, and certainly not the state's. However, because of their historical social position, gay men and lesbians have not been able to ignore the double resonance of this argument. For them, the claim of privacy always also structurally implies a claim to secrecy. Under the existing legal and political regime, gay men and lesbians are aware that the chief value of the language of privacy is that it can be used not so much to provide a space for self-discovery, but to provide against the dangers of disclosure. What this means, I think, is that when gay men and lesbians use the language of privacy, they do so based on a *tactical* decision, one that is part of a dual strategy. I do not mean to deny that gay men and lesbians would like to have an intimate haven of the kind the law has granted heterosexuals. I do want to insist that given their vulnerability, gays and lesbians recognize the more urgent need for some legal protection which will enable them to avoid being forced out of what has come to be known as "the closet."

The problem with the reliance on privacy, however, is that "the closet" is less a refuge than a prisonhouse. In the words of one commentator, "[t]he closet is the defining structure for gay [and lesbian] oppression in this century."⁹² Steven Winter has recently contended that the result in *Hardwick* can be explained (in part) by the fact that the Justices who decided against *Hardwick* were ignorant of the intimate lives of gay men and women.⁹³ This may be a plausible account of the decision in *Hardwick*, at least as far as it goes. What Professor Winter overlooks, though, is the degree to which the *Hardwick* Court's "willful blindness"⁹⁴ toward gay and lesbian life in America and the privacy paradigm are governed by the same logic.

The appeal to privacy represents an implicit claim by gay men and lesbians to secrecy, a secrecy of which (most) heterosexuals have no need, for the simple reason that exposure of one's heterosexuality does not entail the same consequences as the unwanted revelation of gay or lesbian sexuality. The cloak of secrecy drawn around gay and lesbian lives in turn allows heterosexuals to maintain "the epistemological priv-

92. Eve Kosofsky Sedgwick, *Epistemology of the Closet* 71 (1990).

93. See Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 Cal. L. Rev. 1441, 1475 (1990) ("What ultimately decides the issue is . . . the concept of 'intimacy' that the judges bring to the case. If the judges . . . know lesbians and gays only as Other, then *Bowers* is always and already lost.").

94. *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting).

ilege of unknowing."⁹⁵ It is precisely this "ignorance effect" that provides an ideological anchor for the oppression of gays and lesbians, which the secrecy of the "closet" has historically aimed to mitigate. From the perspective of gay men and lesbians, then, the privacy paradigm has always been both a tool and a trap, insofar as privacy has functionally served as a cornerstone for the very structure of domination that the principle has been used to attack. Viewed in these terms, the method of factual analogy urged by Justice Blackmun and others may be said to obscure the singularly sinister significance that the invocation of privacy has historically entailed for gays and lesbians.

3. *The Axiological Argument.* — The analogical method of privacy analysis is joined to a second interpretive strategy, which I call the axiological method. I use the term to designate that form of argument that sets out to identify the underlying moral values that are thought to inform the constitutional right of privacy. The metaphysical interest in establishing the morality of sexual privacy is a common feature of all three versions of privacy analysis. Thus, Michael Sandel has argued that proponents and opponents of the outcome in *Hardwick* cannot help but adopt some view regarding the substantive morality (or immorality) of homoerotic intimacy.⁹⁶ There is, on this view, no neutral moral position.⁹⁷

Lest I be misunderstood, let me make clear what I am not arguing. I believe that each of the three main conceptions of privacy articulates distinctive and important dimensions of the moral conditions and consequences of sexual intimacy. Insofar as they urge us "to move away from a situation where we [look only at] the nature of the act, to one where we consider the context and the meaning of the act for the participants,"⁹⁸ these efforts to identify and secure a sphere of protected places, intimate and emotional engagements, and individual autonomy generate helpful insights about the conditions without which a concrete personal sexual morality is impossible. Nonetheless, I am persuaded that a defense of the *morality* of privacy is not necessary to establish the case for the protected *constitutional* status of the interests to which the doctrine refers. From this perspective, the difficulties with these axiologically-grounded arguments for privacy lie less in the answers they offer, than in the questions they beg.

How is this claim to be understood? Proponents of the right of privacy have spent enormous critical energy seeking to establish the

95. Sedgwick, *supra* note 92, at 5.

96. See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521, 521 (1989).

97. For a trenchant critique of Sandel's thesis, see Michael Moore, *Sandelian Antiliberalism*, 77 Cal. L. Rev. 539, 539 (1989) (arguing that by focusing on court decisions rather than on the forces that do (or should) motivate legislators, Sandel loses "the forest for the trees").

98. Jeffrey Weeks, *Sexuality* 115 (1986).

proposition that the interests the doctrine has been framed to protect are integral to the moral life of the individual.⁹⁹ The felt necessity to secure the *metaphysics* of privacy has left defenders of the doctrine insufficiently attentive to what might be called its *materiality*. That is to say, in its extant formulations, privacy analysis lacks the terms for understanding how the laws it assesses mark the flesh-and-blood bodies of real, actual individuals.

This claim regarding privacy's lack of specificity implicates two different concerns. The first has to do with the theory of the state, or as I prefer, the police power, that is brought to bear on individuals whose sexual acts and identities are subject to its regulation. I describe the precise workings of this technology of state power more fully in later sections. I want to focus here on a second concern, namely, the theory of the human subject that informs privacy analysis.

To the extent that proponents of the right to privacy have offered a theory of its individual agent, that theory is found in the idea of "personhood." As Jed Rubenfeld has noted, the notion of "'personhood' has so invaded privacy doctrine that it now regularly is seen either as the value underlying the right or as a synonym for the right itself."¹⁰⁰ Privacy doctrine's reliance on the concept of personhood is not surprising; after all, personhood (in either singular or plural form) is the predominant category employed in the rights-granting provisions of the Constitution.¹⁰¹

Defenders of the right argue that privacy is "a condition of the original and continuing creation of 'selves' or 'persons.'"¹⁰² At the same time, proponents of privacy fail to provide anything more than an abstract, etiolated conception of the human agent for whom the protec-

99. See, e.g., Charles Fried, *Privacy*, 77 *Yale L.J.* 475 (1968); Ruth Gavison, *Privacy and the Limits of Law*, 89 *Yale L.J.* 421 (1980); David A.J. Richards, *Interpretation and Historiography*, 56 *S. Cal. L. Rev.* 490 (1985).

100. Rubenfeld, *supra* note 7, at 752.

101. See, e.g., U.S. Const. art. I, § 2, cl. 1 (representatives to be chosen by the "people of the several states"); art. I, § 3, cl. 3 ("[n]o person shall be a Senator" who is less than thirty); art. II, § 1, cl. 5 ("[n]o person" shall be President who is neither thirty-five, nor a "natural born citizen"); art. III, § 3, cl. 1 ("[n]o person shall be convicted of treason"); amend. I; amend. IV; amend. V; amend. IX; amend. X; amend. XIV, § 1. Alexander Bickel has argued that the category of personhood is more central to American constitutionalism than the category of citizenship:

The Preamble speaks of "We the people of the United States," not, as it might have, of we the citizens of the United States at the time of the formation of this Union. And the Bill of Rights throughout defines rights of people, not of citizens [T]he original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen.

Alexander M. Bickel, *Citizenship in the American Constitution*, 15 *Ariz. L. Rev.* 369, 370 (1973).

102. Reiman, *supra* note 8, at 40.

tion of the doctrine is claimed. An axiological case for privacy perforce presupposes some theory of the subject to whom the right of privacy runs. The force of the case for privacy very much depends on the strength of its substantive conception of the individuals who are its origin and end. And indeed, it is precisely here that I find axiological privacy analysis' most debilitating limitation: its curiously *disembodied* understanding of the living subject of privacy rights.

For the most part, the body is an absent concept in privacy thinking.¹⁰³ Although one can point to a few instances in which its proponents have acknowledged the relevance of corporal interests for privacy doctrine, these discussions remain underdeveloped and incomplete. One representative example will suffice to establish this contention.

In what is still the most systematic exploration of the connections between privacy and corporality,¹⁰⁴ Tom Gerety argues that the right to privacy ultimately reposes in a claim about "the most basic vehicle of selfhood: the body."¹⁰⁵ Control over one's body "is the first form of autonomy and the necessary condition . . . of all later forms."¹⁰⁶ Having introduced the corporal dimensions of privacy doctrine, however, Gerety immediately denies its sufficiency. The assertion of a legally protected right of control over the body, in his view, cannot be established unless augmented by a concomitant claim of a right to intimacy. For Gerety, "[i]nvasions of privacy take place whenever we are deprived of control over such intimacies of our bodies and minds as to offend what are ultimately shared standards of autonomy."¹⁰⁷

There are two problems with Gerety's argument about the signifi-

103. For an interesting recent philosophical exploration of the problem of corporal absence, see Drew Leder, *The Absent Body* (1990).

104. See Gerety, *supra* note 8. Two other notable efforts to elaborate a view of the right of privacy as a corporal interest are Parker, *supra* note 8, and Tribe, *supra* note 12, 1329-71.

I forego discussion of the contributions of Professors Parker and Tribe for two reasons. First, Professor Gerety's analysis of the relation between privacy and corporeality offers a powerful critique, as well as a more persuasive reformulation, of Professor Parker's argument. Professor Parker describes the substance of the right to privacy as a claim of "control over who can sense us." Parker, *supra* note 8, at 280. As Professor Gerety demonstrates, however, Parker fails to elaborate a limiting principle that would not render "all sensing . . . of us by others . . . subject to our claims of privacy." Gerety, *supra* note 8, at 267. I agree with Gerety that the breadth of the Parker thesis fatally undermines its analytical and operational force. Second, Gerety's discussion provides the chief theoretical foundation for Professor Tribe's analysis of the corporal dimensions of the right of privacy. See Tribe, *supra* note 12, at 1329-30. In view of his considerable reliance on the terms of Gerety's treatment of the body as a conceptual resource in privacy thinking, a separate discussion of Professor Tribe's argument would be redundant. It should be noted that Professor Tribe never connects his analysis of *Hardwick* with the discussion of what he terms "governmental control of the body." See *id.* at 1422-35.

105. Gerety, *supra* note 8, at 266.

106. *Id.*

107. *Id.* at 268.

cance of the body for thinking about the constitutional interests currently subsumed under the rubric of privacy. First, in Gerety's schema, corporal interests are legally cognizable only so long as they remain under the guardianship of two other values—"autonomy" and "intimacy." This relation of conceptual dependency means that corporal interests can be accorded constitutional protection only in settings in which the challenged bodily restriction also infringes interests in personal "control"¹⁰⁸ and "intimacy."¹⁰⁹ The factual background of *Hardwick*, however, suggests that corporal interests may be implicated in contexts in which neither of these two additional values is at issue.¹¹⁰

A second and related point is that Gerety's framework too easily assimilates concepts of "physicality" to those of "personal identity." This perspective prevents him from seeing the obvious, but important analytical distinction between "bodily control" and "bodily intimacy" on the one hand, and "bodily integrity" on the other. The latter term, at least as I use it here, is the notional foundation for a presumptive right to simple physical existence in and of itself. It may be true that "we can give no sense to the concept of a particular personality without reference to a body."¹¹¹ However, the concept of the human body, or more precisely, the legal protection of its integrity, in no way requires a theory of personal identity. Professor Gerety effectively collapses the physical fact of corporality into the mentalist notion of personality. As a result, his analytical use of corporality devolves upon an idealized, abstract body that is ultimately more mind than matter.

In my view, in order to develop a sufficiently precise conception of the human beings whose "personhood" is the target of homosexual sodomy statutes, we need a "concrete" rather than an "abstract" understanding of the body. I have already suggested why it would be a mistake to view *Hardwick* as raising only the question whether the State of Georgia could prohibit and punish Michael Hardwick for engaging in sexual acts with another consenting adult male in the privacy of his own home. Close attention to its factual background indicates that an even more fundamental issue presented in *Hardwick* was whether the State of Georgia could constitutionally permit its police power, specifically, its criminalization of homosexual sodomy, to serve as a justification for threatened and actual violence toward one of its citizens.¹¹² We would do well here to remember that the road that led Michael Hardwick to the bar of the Supreme Court was, in his words, "a trail of blood"—his

108. Gerety uses the concepts of control and autonomy interchangeably. See *id.* at 281.

109. "Intimacy is the chief restricting concept in the definition of privacy given here. . . . What is needed is the concept of intimacy. . . . Intimacy itself is always the consciousness of the mind in its access to its own and other bodies. . . ." *Id.* at 263, 268.

110. I am thinking here of the verbal and physical attacks on Hardwick. See *supra* notes 11–19 and accompanying text.

111. Gerety, *supra* note 8, at 266 n.119.

112. See *supra* notes 11–25 and accompanying text.

own. Hence, I believe that it would be a mistake to view *Hardwick* as a case about the state's power to regulate sexual intimacy or personal morality. Rather, *Hardwick* ought to be understood as a case about Michael Hardwick's right to be protected from state-sanctioned invasion of his corporal integrity, that is, of his very bodily existence.

From this perspective, *Hardwick* casts the limitations of the theory of the subject in which privacy principle is grounded into stark, unflattering relief. The "personhood" privileged in privacy analysis relies too heavily on an abstract image of the human subject as a *moral self*. The "personhood" at stake in *Hardwick*, however, calls for a more materialist view of the human subject as an *embodied self*. *Hardwick* powerfully underscores the fact that the interests privacy analysis seeks to defend are initially, and indispensably, *body-generated*.¹¹³ In the instant context, this means simply that the bodies of the actual, empirical individuals to whom homosexual sodomy statutes are addressed are not merely a derivative supplement, but the generative substrate of the constitutional rights the privacy principle attempts to secure. The rights claimed under privacy doctrine live and move and have their being in the material body of the human subject. Without the prior and primary recognition of a basal right of corporal integrity, the right of privacy is not only incomplete, but quite literally impossible.

In the next section, I illustrate the extent to which a body-based, materialist analysis offers a more incisive understanding of the constitutional interests that are implicated in this context than does the morality-driven, metaphysical framework of privacy.¹¹⁴

113. See Beverly W. Harrison, *Making the Connections: Essays in Feminist Social Ethics* 13 (1985). Harrison argues that this "disembodied" rationality is one of the central features of Western analytical method. *Id.*

114. The distinction drawn here between "materialist" and "metaphysical" explanation might be usefully understood in relation to John Rawls' contrast between "political" and "metaphysical" theorizing. See John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *Phil. & Pub. Aff.* 223, 230 (1985) ("[P]olitical theory should avoid, to the extent possible, contested questions of philosophy, morality or religion. In contrast, the goal of metaphysics is to resolve such conflicts and set forth a 'true' answer or doctrine."). Later sections more fully elaborate the political source and substance of my body-based case for invalidating homosexual sodomy statutes. Here I want simply to remark that since the adjective "political" obviously means many different things to different people, I have chosen the term "material" to give the concept of the "politics" of sodomy statutes determinate content.

A second observation in this context is that my rejection of a metaphysical interpretive model for understanding homosexual sodomy law should not be understood as a rejection of normative argument as such. The method of "political materialism" urged here is thoroughly and unabashedly normative. My effort is rather an attempt to stake out a normative case against sodomy statutes that does not rely on the moral language of privacy. For a series of exchanges on the possibility and desirability of "non-normative" legal argument, see Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 *U. Pa. L. Rev.* 933 (1991); Margaret V. Radin & Frank Michelman, *Pragmatist and Post Structuralist Critical Legal Practice*, 139 *U. Pa. L. Rev.* 1019 (1991); Pierre Schlag, *Normativity and*

II. ONE BODY, MANY MEMBERS: CORPOREALITY AND AMERICAN CONSTITUTIONALISM

The preceding section argued that the regnant emphasis on abstract, private personhood can never provide more than a partial account of the actual individual against whom homosexual sodomy statutes operate. The constitutional theory we need now must move beyond the axiological premises and perspectives that inform privacy analysis. If the core issue presented by these statutes concerns limitations on the power of the body politic to intervene in the sexual lives of its actual or potential members, it is only fitting that we begin by thinking about the embodied experience of the people who are touched by sodomy laws. It is, after all, the bodies of the individuals that homosexual sodomy laws address that provide the "raw material" on which the police power acts. Reaching a clear understanding of the concrete corporal implications of homosexual sodomy statutes is a crucial task. In order to discharge it, we must be prepared to abandon the assumption that since the laws at issue have to do with sexuality, the language of sexuality ought accordingly to provide the governing terms of analysis. I begin instead from a rather different assumption that the conceptual framework that will best enable us to understand the concrete operations of homosexual sodomy law focuses on political power rather than on personal pleasure.

This is a political analysis because it poses and aims to answer one of the most basic questions of our constitutional law: What is the substance of the relationship between the government of the individual and the government of the body politic? Building on an empirical account of the concrete "body politics" of homosexual sodomy law, I want to suggest that the beginnings of an answer to this question may be found in the Cruel and Unusual Punishments Clause of the Eighth Amendment, whose terms allow us to flesh out the rights of "personhood" that privacy analysis so abstractly purports to comprehend. As I read it, the Eighth Amendment is the constitutional marker of a basic political right to be free from state-sanctioned torture and terror. However, the lived experience of gay men and lesbians under the legal regime challenged and upheld in *Bower v. Hardwick* is one in which government not only passively permits, but actively protects, acts of violence directed toward individuals who are, or are taken to be, homosexual. In my view, this state-legitimized violence represents an unconstitutional abdication of one of the most basic duties of government.

the Politics of Form, 139 U. Pa. L. Rev. 801 (1991); Pierre Schlag, Normative and Nowhere to Go, 43 Stan. L. Rev. 167 (1990); Steven L. Winter, Contingency and Community in Normative Practice, 139 U. Pa. L. Rev. 963 (1991); Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Cal. L. Rev. 1441 (1990).

A. "Choked to Death, Burnt to Ashes": A Political Anatomy of Homophobic Violence

In October 1987, hundreds of people were arrested during the course of a demonstration against the decision in *Bowers v. Hardwick*. Those arrested had participated in a massive act of civil disobedience in which they had literally laid their bodies on the steps outside the Supreme Court building.¹¹⁵ The protest dramatically underscored the concrete corporal interests that the *Hardwick* Court ignored and evoked the tangible historical experience of gay and lesbian Americans in which the case must be situated.

Stated bluntly, that history is a story of homophobic aggression and ideology. Its central theme is the fear, hatred, stigmatization, and persecution of homosexuals and homosexuality.¹¹⁶ Over the course of American history, gay men and lesbian women have been discursively marked as "faggots" (after the pieces of kindling used to burn their bodies), "monsters," "fairies," "bull dykes," "perverts," "freaks," and "queers." Their intimate associations have been denominated "abominations," "crimes against nature," and "sins not fit to be named among Christians."¹¹⁷ This symbolic violence has produced and been produced by congeries of physical violence. Gay men and lesbians in America have been "condemned to death by choking, burning and drowning; . . . executed, [castrated], jailed, pilloried, fined, court-martialed, prostituted, fired, framed, blackmailed, disinherited, [lobotomized, shock-treated, psychoanalyzed and] declared insane, driven to insanity, to suicide, murder, and self-hate, witch-hunted, entrapped, stereotyped, mocked, insulted, isolated . . . castigated . . . despised [and degraded]."¹¹⁸

The historical roots of this violence are older than the nation itself. The 1646 Calendar of Dutch Historical Manuscripts reports the trial, conviction, and sentence on Manhattan Island, New Netherland Colony of one Jan Creoli, "a negro, [for] sodomy; second offense; this crime being condemned of God (Gen., c. 19; Levit., c. 18:22, 29) as an abomination, the prisoner is sentenced to be conveyed to the place of public execution, and there choked to death, and then burnt to ashes."¹¹⁹ On the same date the Calendar records the sentence of "Manuel Congo . . . on whom the above abominable crime was committed," whom the Court ordered "to be carried to the place where Creoli is to be executed, tied to a stake, and faggots piled around him, for justice sake,

115. See Scott Tucker, *Gender, Fucking and Utopia*, 27 Soc. Text 3, 21-22 (1990).

116. For explications of the concept of homophobia, see Jonathan Dollimore, *Sexual Dissidence* 233-34 (1991); Dynes, *supra* note 4, at 66-67.

117. See Jonathan Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 11, 22-23, 44, 127-28 (1976).

118. *Id.* at 11.

119. *Id.* at 22-23.

and to be flogged; sentence executed."¹²⁰

The continuity between the seventeenth-century experience and homophobic violence in our own time is startling. A report issued by Community United Against Violence, an organization that monitors incidents of homophobic violence, offers a picture of the violent face of homophobia in contemporary America:

One man's body was discovered with his face literally beaten off. Another had his jaw smashed into eight pieces by a gang of youths taunting "you'll never suck another cock, faggot!" Another had most of his lower intestine removed after suffering severe stab wounds in the abdomen. Another was stabbed 27 times in the face and upper chest with a screwdriver, which leaves a very jagged scar. Another had both lungs punctured by stab wounds, and yet another had his aorta severed.¹²¹

Some months before the Supreme Court rendered its judgment in *Hardwick*, the *New York Daily News* printed the story of a homeless gay man in that city who "had his skull crushed by three men who beat him unconscious with two-by-fours while screaming anti-gay epithets"; the same article recounted an incident in which a motorist "who saw a lesbian standing on a sidewalk in [Manhattan] stopped his car, got out and beat her so badly (while shouting anti-lesbian epithets) that she suffered broken facial bones and permanent nerve damage."¹²² Two years after the *Hardwick* decision, the coordinator of a victim assistance program at a New York City hospital reported that "attacks against gay men were the most heinous and brutal I encountered."¹²³ The hospital routinely treated gay male victims of homophobic violence, whose injuries "frequently involved torture, cutting, mutilation, and beating, and showed the absolute intent to rub out the human being because of his [sexual] orientation."¹²⁴

One would be mistaken to view these stories as aberrant, isolated instances of violence perpetrated by the psychologically imbalanced against individual gay men and women. They are not.¹²⁵ All the evi-

120. *Id.* at 23.

121. David F. Greenberg, *The Construction of Homosexuality* 467 (1988) (quoting Ron Wickliffe, *Queerbashers Meet Resistance in the Streets of San Francisco*, WIN, Aug. 31, 1981).

122. Bob Herbert, *War Against Gays: Stories from the Battlefield*, N.Y. Daily News, Jan. 30, 1986, at 42.

123. Violence Project, *National Gay and Lesbian Task Force, Anti-Gay Violence, Victimization and Defamation in 1988*, at 8 (1988).

124. *Id.*

125. A survey of anti-gay violence and harassment in eight major cities revealed some remarkable figures. 86.2% of the gay men and women surveyed stated that they had been attacked verbally; 44.2% reported that they had been threatened with violence; 27.3% had had objects thrown at them; 34.9% had been chased or followed; 13.9% had been spit at; 19.2% had been punched, hit, kicked, or beaten; 9.3% had been assaulted with a weapon; 18.5% had been the victims of property vandalism or arson; 30.9% reported sexual harassment, many by members of their own families or by the

dence suggests that there are hundreds, if not thousands of such stories, most of them untold.¹²⁶ Violence against gay men and lesbians—on the streets, in the workplace, at home—is a structural feature of life in American society. A study commissioned by the National Institute of Justice (the research arm of the U.S. Department of Justice) concluded that gay men and women “are probably the most frequent victims [of hate violence today].”¹²⁷ We may never know the full story of the violence to which gay men and gay women are subjected. In spite of their frequency, it is estimated that a full 80% of bias violence against gay men and women is never reported to the police.¹²⁸ This under-reporting is not surprising, since victims of anti-gay violence have reason to be fearful that the response of state and local officials may be unsympathetic or openly hostile, or that the disclosure of their sexual orientation may lead to further discrimination.¹²⁹

Indeed, government officials and agencies are themselves often complicit in the phenomenon of homophobic violence. Governmental involvement ranges from active instigation to acquiescent indifference.

police. National Gay Task Force, *Anti-Gay/Lesbian Victimization*, 24 (June 1984) (on file with the Columbia Law Review).

126. For a summary of this evidence, see Gary O. Comstock, *Violence Against Lesbians and Gay Men* 31–90 (1991); *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (Gregory M. Herek & Kevin T. Berrill eds., 1992) [hereinafter *Hate Crimes*].

127. Peter Finn & Taylor McNeil, *The Response of the Criminal Justice System to Bias Crime: An Exploratory Review* 2 (1987). Because of media reports regarding the conclusion reached in this study regarding the incidence of homophobic violence, this report was suppressed by the Department of Justice. See Kevin T. Berrill & Gregory M. Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, in *Hate Crimes*, supra note 126, at 292.

128. See *Anti-Gay Violence: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 2, 35 (1986) (testimony of Kevin Berrill, Director, Violence Project, National Gay and Lesbian Task Force).

129. Richard Mohr has argued that this condition demands passage of state and federal legislation forbidding certain forms of discrimination on the basis of sexual orientation:

[C]ivil rights for gays can be ethically grounded as being necessary preconditions for gays having equitable access to civic rights. By civic rights I mean rights to the impartial administration of civil and criminal law in defense of property and person. In the absence of such rights there is no rule of law. An invisible minority historically subjected to widespread social discrimination has reasonably guaranteed access to these rights only when the minority is guaranteed non-discrimination in employment, housing, and public services.

...

In being *de facto* cast beyond the pale of civic procedures, gays, when faced with assaults on property and person, are left with only the equally unjust alternatives of the resignation of the impotent or the rage of man in a state of nature. Societies may remain orderly even when some of their members are denied civic procedures. Many tyrannies do. But such societies cannot be said to be civil societies which respect the rule of law.

Richard Mohr, *Invisible Minorities, Civic Rights, Democracy: Three Arguments for Gay Rights*, 17 *Phil. F.* 1, 2, 5 (1985).

A recent survey of violence against gay men and lesbians cites a 1951 case study of police practices in which a patrolman describes his typical treatment of homosexuals:

Now in my own cases when I catch a guy like that I just pick him up and take him into the woods and beat him until he can't crawl. I have had seventeen cases like that in the last couple of years. I tell the guy if I catch him doing that again I will take him out to the woods and I will shoot him. I tell him that I carry a second gun on me just in case I find guys like him and that I will plant it in his hand and say that he tried to kill me and that no jury will convict me.¹³⁰

At October 1986 hearings on homophobic violence convened by the House of Representatives Committee on the Judiciary, Subcommittee on Criminal Justice, the district attorney of New York County noted that "at times, [lesbians and gay men] have been, and in many areas of the country continue to be, taunted, harassed, and even physically assaulted by the very people whose job it is to protect them."¹³¹

Even if we were able to document every instance of homophobic violence in America, our understanding of its effects would still be incomplete. To be sure, many men and women in the gay and lesbian communities have escaped direct physical attack by perpetrators of homophobic violence. However, the horror and sinister efficacy of homophobic violence are in many ways like those of racist violence. Like people of color, gay men and lesbians always and everywhere have to live their lives on guard, knowing that they are vulnerable to attack at any time. As one observer has noted, "being gay means living with the reality that although you may not personally be the victim of outright homophobic attacks every day, at any moment you *could* be attacked—walking down the street, going to work, on the job, shopping, or in a restaurant."¹³² Indeed, much of the efficacy of homophobic violence lies in the message it conveys to those who are not its immediate victims.

In this respect, homophobic violence bears many of the characteristics associated with terrorism. As in the case of terrorism, much of the force of violence against gay men and lesbians lies in its randomness: individuals may know that the assertion or ascription of gay or lesbian identity marks them as potential targets of homophobic violence, but

130. Comstock, *supra* note 126, at 153. A recent summary of several studies of homophobic harassment and violence reports that some 20% of the lesbians and gay men surveyed reported victimization at the hands of the police. See Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in *Hate Crimes*, *supra* note 126, at 31-32 (summarizing studies conducted between 1977 and 1991).

131. *Anti-Gay Violence: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 2, 108 (1986)* (statement of Robert M. Morgenthau).

132. Mary Fridley, *Homophobia and the Rise of Neo-Fascism in the United States*, 3 *Prac.* 35, 40 (1985).

they cannot know until too late whether or when they will actually be hit. Like the terrorist, the perpetrator of homophobic violence strikes without giving warning.¹³³ A second characteristic common to terrorism and homophobic violence is its utter impersonality. Like perpetrators of terrorist acts, those who attack gays and lesbians do not know, and are most often unknown to, their victims.¹³⁴

Another feature that homophobic violence shares with terrorism is its "communicative" thrust.¹³⁵ Although attacks on gays and lesbians might be random and impersonal, such attacks are far from meaningless. The communicative dimensions of homophobic violence may be seen on a number of levels. Survivors of homophobic violence have reported that their attackers verbally expressed hatred of homosexuality, boasted of heterosexuality, or otherwise taunted them.¹³⁶ However, in most instances, perpetrators of violence against gays and lesbians have no need to resort to language to communicate: the expressive force of the violence itself makes verbal communication unnecessary. One of the most salient features of homophobic violence is its excessive brutality. In hearings before the San Francisco Board of Supervisors, a physician at a hospital in that city testified that the "vicious" nature of injuries sustained by the victims of homophobic violence he had treated left no doubt that "the intent is to kill and maim":

Weapons include knives, guns, brass knuckles, tire irons, baseball bats, broken bottles, metal chains, and metal pipes. Injuries include severe lacerations requiring extensive plastic surgery; head injuries, at times requiring surgery; puncture wounds of the chest, requiring insertion of chest tubes; removal of the spleen for traumatic rupture; multiple fractures of the extremities, jaws, ribs, and facial bones; severe eye injuries, in two cases resulting in permanent loss of vision; as well as severe psychological trauma the level of which would be difficult to measure.¹³⁷

One study of homophobic murders found that in most instances, the victims were not just killed, but were "more apt to be stabbed a dozen or more times, mutilated, *and* strangled, . . . [and] [i]n a number of instances, . . . stabbed or mutilated even after being fatally shot."¹³⁸

133. For a discussion of randomness as a value in the general economy of terrorism, see Jan Narveson, *Terrorism and Morality*, in *Violence, Terrorism, and Justice* 116, 119 (R.G. Frey & Christopher W. Morris eds., 1991).

134. See Comstock, *supra* note 126, at 57-58.

135. For a discussion of the "communicative purposes" of terrorism, see R.D. Crellin, *Terrorism as Political Communication*, in *Contemporary Research on Terrorism* 3, 6-14 (Paul Wilkinson & Alasdair M. Stewart eds., 1987).

136. See Comstock, *supra* note 126, at 67-69.

137. *Id.* at 46.

138. *Id.* at 47 (quoting Brian Miller & Laud Humphreys, *Lifestyles and Violence: Homosexual Victims of Assault and Murder*, 3 *Qualitative Soc.* 169, 179 (1980)). Miller and Humphreys further found that although stabbing was the chief cause of death in

The characteristic "overkill and excessive mutilation"¹³⁹ of attacks on gay men and lesbians suggest that this is a species of violence whose form conveys its expressive content: the medium *is* the message.

The terroristic dimensions of homophobic violence compel us to understand it as a mode of power. To put the point in slightly different terms, homophobic violence is a form of "institution," in the sense that John Rawls elaborates that concept.¹⁴⁰ Homophobic violence is a social activity "structured by rules that define roles and positions, powers and opportunities, thereby distributing responsibility for consequences."¹⁴¹ Viewed systemically, the objective and outcome of violence against lesbians and gays is the social control of human sexuality. Homophobic violence aims to regulate the erotic economy of contemporary American society,¹⁴² or more specifically, to enforce the institutional and ideological imperatives of what Adrienne Rich has termed "compulsory heterosexuality."¹⁴³ Insofar as homophobic violence functions to prevent and punish actual or imagined deviations from heterosexual acts and identities, it carries a determinate political valence and value.

In order to grasp the relations of political power that underlie the phenomenon of homophobic violence, we may draw on Elaine Scarry's analysis of the practice of torture in *The Body in Pain*.¹⁴⁴ Her remarks regarding the politically instrumental functions of torture are especially

only 18% of all homicides during the period they studied, in murders involving gay or lesbian victims, stabbing was the main cause of death in 54% of the cases. See id.

139. Id.

140. See John Rawls, *A Theory of Justice* 55 (1971) (defining "institution" as "a public system of rules which defines officers and positions with their rights and duties, powers and immunities and the like").

141. I take this language from Claudia Card, *Rape as a Terrorist Institution*, in *Violence, Terrorism, and Justice*, supra note 133, at 297-98. Although she does not deal directly with the phenomenon of homophobic violence, I have found Professor Card's analysis of rape as a terrorist practice very helpful in developing my argument about the political significance of violence against gay men and lesbians.

142. In this respect, the experience of gay men and lesbians is like that of countless African-Americans tortured and murdered by Euro-American lynching parties. Studies of the practice have noted the perverted eroticism at its core. The archetypal lynching was often justified by charges that the (usually black male) victim had raped a white woman. "The fear of rape was more than a hypocritical excuse for lynching; rather, the two phenomena were intimately intertwined. The 'southern rape complex' functioned as a means of both sexual and racial suppression." Jacquelyn Dowd Hall, "The Mind That Burns in Each Body": Women, Rape and Racial Violence, in *Powers of Desire*, supra note 77, at 335. Hall quotes from the testimony of a member of a 1934 lynch mob: "After taking the nigger to the woods . . . they cut off his penis. He was made to eat it. Then they cut off his testicles and made him eat them and say he liked it." Id. at 329 (quoting Howard Kester, *The Lynching of Claude Neal* (1934)).

143. See Rich, supra note 77, at 178-81; see also Gary Kinsman, *Men Loving Men: The Challenge of Gay Liberation*, in *Beyond Patriarchy* 103, 104-05 (Michael Kaufman ed., 1987) (development of heterosexuality as an institutional norm serves as an important means of social regulation).

144. Elaine Scarry, *The Body in Pain* (1985).

relevant in this context. Scarry contends that "the display of final product and outcome of torture" is "the fiction of power."¹⁴⁵ She suggests that a central component of torture inheres in its

translation of all the objectified elements of pain into the insignia of power, the conversion of the enlarged map of human suffering into an emblem of the [torturer's] strength. This translation is made possible by, and occurs across, the phenomenon common to both power and pain: agency. The electric generator, the whips and canes, the torturer's fists, the walls, the doors, the [victim's] sexuality, the torturer's questions, the institution of medicine, the [victim's] screams, his wife and children, the telephone, the chair, a trial, a submarine, the [victim's] eardrums—all these and many more, everything human and inhuman that is either physically or verbally, actually or allusively present, has become part of the glutted realm of weaponry, weaponry that can refer equally to pain or power. What by the one is experienced as a continual contraction is for the other a continual expansion, for the torturer's growing sense of self is carried outward on the prisoner's swelling pain.¹⁴⁶

The purpose of torture is quite literally to embody relations of domination and subjugation. It is precisely this feature of the practice that requires us to view torture as a "political situation."¹⁴⁷

Scarry's observations about the political character of torture provide a useful framework for analyzing the political dimensions of homophobic violence. To extrapolate from Scarry's analysis, the body of the victim of homophobic violence is an environment for the practice of brutal "bio-politics."¹⁴⁸ The terrorization of gay men and lesbian women through homophobic violence dramatizes two intersecting political relationships. The first is the internal relation between perpetrators of homophobic violence and their victims. The second is the external relation in which both victims and torturers stand to the political regime that variously incites, aids or allows homophobic violence to take place. This latter relation forces the recognition that homophobic violence at one and the same time expresses the power of the perpetra-

145. *Id.* at 57. I am not quite sure what the use of the term "fiction" to describe the relationship between the torturer and his/her victim adds to Scarry's understanding of power. The "physical fact" of torture must surely be seen to entail objects and outcomes that are all too real.

146. *Id.* at 56.

147. A stunning literary evocation of torture as a corporealized "graphics" of political power may be found in Franz Kafka's 1919 short story, "In the Penal Colony." Kafka describes an elaborate death machine that simultaneously enacts and inscribes its "sentence." The colony punishes the individual who has disobeyed one of its commandments by mechanically writing the law on the flesh of the transgressor's body until he dies. See Franz Kafka, *The Metamorphosis, The Penal Colony, and Other Stories* 191 (Willa Muir & Edwin Muir trans., 1948).

148. I take this term from Michel Foucault. Michel Foucault, *The History of Sexuality* 140-41 (Robert Hurley trans., 1980).

tor of that violence and the power of the regime that the perpetrator represents. The person of the torturer (and the torturer's weapon) is the agency through which the strategy of the regime finds its substantive shape and force. If we were to use the conventional language of American constitutional law, we might say then that violence inscribed on the bodies of gay men and lesbians constitutes an extra-legal exercise of police power.

I have argued that homophobic violence is an exercise of political power. I have suggested that the purpose of this violence is to terrorize the population to whom its victims belong. I have also referred to the record of state instigation of, and acquiescence in, the phenomenon of homophobic violence. I want now to explore more fully the constitutional implications of the connection between governmental instigation of and acquiescence in criminal attacks on gay men and lesbians on the one hand, and criminal statutes against homosexual sodomy on the other. It might be said that the coincidence of the law of homosexual sodomy and the lawlessness of homophobic violence by itself presents a question with which a constitutional analysis of these statutes must reckon.

However, I hope by now to have said enough to clear the ground for a somewhat stronger claim. I contend that the involvement of the state in the phenomenon of homophobic violence is in fact no coincidence at all. A close examination of the political terror directed against gay men and lesbians suggests that the relationship between homosexual sodomy law and homophobic violence is not merely coincident, but coordinate: the criminalization of homosexual sodomy and criminal attacks on gay men and lesbians work in tandem. My task, of course, is to specify the terms of their coordinational interaction. How should we think about the role the state plays in permitting, promoting or participating in homophobic violence?

I have already begun to indicate the direction such an analysis might take. Given the brute physical fact that homophobic violence aims to deform, and often utterly destroy, its targets, I believe that the Eighth Amendment prohibition against "cruel and unusual punishments"¹⁴⁹ provides the most appropriate constitutional and conceptual

149. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Textually, although I anchor constitutional analysis of homosexual sodomy statutes in the language of the Eighth Amendment, I am not unmindful of alternative constitutional provisions—most notably the Due Process Clauses of the Fifth and Fourteenth Amendments or the Fourteenth Amendment's Equal Protection Clause—on which the body-based model developed in this Article might be based. I do not mean to suggest that these other constitutional concepts could not profitably be employed as a framework for discussing the connections between homophobic violence and laws criminalizing homosexual sodomy.

I have chosen, however, to focus on the implications that the bar against "cruel and unusual punishments" holds for the constitutional analysis of homosexual sodomy

foundation for specifying the nature of the relationship between homophobic violence and the laws against homosexual sodomy, and for stating the grounds on which a judicial invalidation of those laws might be justified.

The point of departure for my Eighth Amendment analysis of the constitutional problems posed by the relationship between crimes of homophobic violence and the criminalization of homosexual sodomy is the text of *Hardwick* itself. Accordingly, the next section begins with a critical discussion of Justice Powell's and Justice Blackmun's remarks in *Hardwick* regarding the relevance of the Eighth Amendment. Drawing on what I have demonstrated about the political meaning of the relationship between the crime of homophobic violence and the criminalization of homosexual sodomy, I go on to offer a third, very different account of the Eighth Amendment, from which a post-*Hardwick* case against homosexual sodomy laws might be launched.

B. *Politics and Punishment: The Relevance of the Eighth Amendment*

An Eighth Amendment analysis of the intersection between homosexual sodomy statutes and homophobic violence can take its starting point from language in Justice Powell's opinion in *Bowers v. Hardwick*. Although he concurs in the judgment of the *Hardwick* majority, Justice Powell suggests that he might have been more sympathetic to *Hardwick's* constitutional claim had the attack on the Georgia statute been framed in different terms. According to Justice Powell, the constitutional privacy argument against the Georgia sodomy statute by itself fails to provide sufficient warrant for striking down the law. In Powell's view, *Hardwick* should have staked his case against the constitutionality of the Georgia law on the express language of the Eighth Amendment's prohibition of "cruel and unusual punishments." Justice Powell begins by noting that Georgia's sodomy statute permits a court to imprison a person for up to twenty years. He then specifies the potential constitutional problem raised by this aspect of the Georgia law:

"In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, first-degree arson, and

statutes. In my view, the term "punishment" more precisely captures the nature of the force that inheres in the relation between homophobic violence and the criminal law of homosexual sodomy than do the terms "due process" and "equal protection." I fear that the latter terms unacceptably sanitize the political use of terror against gay men and lesbian women that homophobic violence represents. Indeed, because it derives from a formal criminal justice model, there is a sense in which even the language of "punishment" threatens to confer a presumptive legitimacy on state involvement in the politics of homophobic violence. In this respect, I can only emphasize that it is precisely this legitimacy that I wish to deny.

robbery.”¹⁵⁰

The implication is clear enough. Justice Powell in effect proposes what might be called a constitutional “systems analysis,” whose task would be to compare the sanctions provided for under Georgia’s sodomy law with those criminal statutes that carry similar punishments. If this comparative inquiry shows that the substantive conduct criminalized under these other statutes is more “serious” than the consensual sexual acts proscribed by the sodomy law, then the sanction provided under the sodomy statute may be deemed disproportionately excessive, thus rendering the law itself constitutionally suspect.

Although Justice Powell provides a useful starting point for articulating how criminal laws against homosexual sodomy implicate the Eighth Amendment, his analysis misses another, more important issue. For Justice Powell, the pivotal question that an Eighth Amendment-based analysis of the Georgia sodomy statute must answer is whether the law imposes on individuals sanctions that are disproportionate to the conduct for which they have been convicted.¹⁵¹ Yet the fatal constitutional flaw of the Georgia statute and of statutes like it resides not so much in the fact that they allow courts to impose excessive or disproportionately harsh penalties on those convicted under them, but that they subject individuals to arrest, prosecution, and conviction at all.¹⁵²

150. 478 U.S. at 197–98. Justice Powell’s argument regarding an Eighth Amendment-based challenge to anti-sodomy statutes clearly rests on a view that the meaning of the amendment is an evolving one, and thus should not be interpretively constrained by the original understanding of its framers.

This would have to be Powell’s position, given the historical fact that a number of the early statutes of which Georgia’s is a contemporary version provided for whipping, burning with a hot iron, banishment and even capital punishment. See John D’Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 30–31 (1988); Katz, *supra* note 4, at 90–91, 111–18. In 1776, for example, a number of prominent Virginians, among them Thomas Jefferson, proposed a revision of their state’s law, which stated that anyone found guilty of sodomy, rape or polygamy “shall be punished, if a man, by castration, if a woman, by cutting thro’ the cartilage of her nose a hole of one half inch diameter at the least.” Katz, *supra* note 4, at 24. The proposed revision was never adopted. It bears noting that the genealogies of homosexual sodomy law offered by Justice White and Chief Justice Burger conveniently overlook these historical facts.

151. In this connection see Powell’s opinions in *Solem v. Helm*, 463 U.S. 277, 290–92 (1983) and *Rummel v. Estelle*, 445 U.S. 263, 288–93 (1980) (Powell, J., dissenting). For a derivative post-*Hardwick* extrapolation of Justice Powell’s views on the Eighth Amendment, see Claude Millman, Note, *Sodomy Statutes and the Eighth Amendment*, 21 *Colum. J.L. & Soc. Probs.* 267, 284–307 (1988). For an argument that the Eighth Amendment does not require invalidation of sodomy statutes, see J. Drew Page, Comment, *Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown of the Solem v. Helm Test*, 56 *U. Chi. L. Rev.* 367, 377–90 (1989). Both these discussions ignore the power relations, and more importantly, the raw violence associated with sodomy statutes. As I argue, one cannot understand how and why homosexual sodomy laws violate the Eighth Amendment prohibition of “cruel and unusual punishments” without an appreciation of the brutal “realpolitik” at work beneath their surface.

152. Moreover, in a strict sense, the disproportionality argument by no means

Justice Powell implies that because Hardwick was not actually indicted, the facts of the case would not justify invalidation of the Georgia sodomy law on Eighth Amendment grounds. What Justice Powell neglects to note is that the Eighth Amendment can be and has been read to embrace cruel and unusual *stigma* and *classification* as well as cruel and unusual *punishments*.¹⁵³

This understanding of the Eighth Amendment prohibition finds support in the Court's 1962 decision in *Robinson v. California*.¹⁵⁴ There, the Court invalidated a California statute that criminalized individuals for the status or condition of *being* a drug addict. Writing for the Court, Justice Stewart observed that the sanction—ninety days imprisonment—“is not, in the abstract, a punishment which is either cruel or unusual.”¹⁵⁵ He went on to say, however, that the Eighth Amendment question should not be considered in the abstract. “Even one day in prison would be a cruel and unusual punishment for the crime of having a common cold.”¹⁵⁶

Justice Blackmun explicitly adopts this position in *Bowers v. Hardwick*. Citing *Robinson*, Blackmun notes that while the Court's failure to explore the Eighth Amendment implications of the Georgia statute “makes for a short opinion, [it] does little to make for a persuasive one.”¹⁵⁷ He then goes on to quote language from the concurring opinion of Justice White in a case subsequent to *Robinson*, *Powell v. Texas*:¹⁵⁸

logically forecloses retention of “sodomy” statutes as part of the substantive criminal law. For example, one cannot tell from Justice Powell's opinion whether, and if so why, a statute imposing ten months in prison would pass constitutional muster and one imposing ten years would not. At this level, Powell's position arguably relies more on intuition than objective analysis. For a jurisprudential defense of the validity of disproportionality thinking and the law of punishment, see H.L.A. Hart, Prolegomenon to the Principles of Punishment, in *Punishment and Responsibility: Essays in the Philosophy of Law* 1, 24–27 (1968).

153. See *Trop v. Dulles*, 356 U.S. 86, 99–103 (1958) (deprivation of citizenship destroys an individual's status in organized society; its use as a punishment is thus barred by Eighth Amendment).

154. 370 U.S. 660, 666–68 (1962). As Kent Greenawalt has noted:

Robinson is the first square holding that the eighth amendment's protection against cruel and unusual punishment is made applicable against the states by the fourteenth amendment. Why the point is assumed rather than discussed is not clear. Perhaps the Justices wished to avoid interminable theoretical disputations about the precise relationship between the fourteenth amendment and the Bill of Rights; perhaps they simply regarded it as self evident that the imposition of cruel and unusual punishment would be a denial of due process of law.

Kent Greenawalt, “Uncontrollable” Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 Colum. L. Rev. 927, 928 n.10 (1969). I do not propose to join here the now “theoretical disputation” on whether the Eighth Amendment is indeed “incorporated” in the text of the Fourteenth, and thus-binding on the states.

155. 370 U.S. at 667.

156. *Id.*

157. 478 U.S. at 203 (Blackmun, J., dissenting).

158. 392 U.S. 514 (1968). *Powell* involved a constitutional attack by a chronic

In *Robinson*, the Court dealt with 'a statute which makes the "status" of narcotic addiction a criminal offense. . . . ' 370 U.S. at 666. By precluding criminal conviction for such a 'status' the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. . . . If it were necessary to distinguish between 'acts' and 'conditions' for purposes of the Eighth Amendment, I would adhere to the concept of 'condition' implicit in the opinion in *Robinson*. . . . The proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition'.¹⁵⁹

Presumably, extrapolation from Justice White's views in *Powell* would provide a basis for the Eighth Amendment analysis of "sodomy" statutes that Justice Blackmun faults the majority for failing even to

alcoholic on a conviction under a Texas statute that imposed criminal sanctions for public drunkenness.

159. 478 U.S. at 202 n.2. Although it might be argued that *Powell* overruled *Robinson*, this view of the two cases would be incorrect. *Powell* stands only for the proposition that there is a constitutionally significant distinction between the criminalization of a condition and the criminalization of conduct arguably related to that condition. In the *Hardwick* context, *Robinson* may be read as barring a state from criminalizing gay or lesbian identity; *Powell* may be read as permitting a state to criminalize homosexual acts.

Two points are pertinent in this connection. The first point is simply to reiterate that the facts in *Hardwick* support an inference that had he not first been ascribed a homosexual identity, Hardwick would probably not have been arrested under the Georgia sodomy statute for engaging in private homosexual acts. Janet Halley has proposed that "[s]omething has to happen to mark an individual with the identity 'homosexual.'" Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915, 946 (1989). It should be remembered that even before Officer Torick discovered Hardwick in his bedroom, he had already "marked" Hardwick as a homosexual. This process of "marking" can be seen in Hardwick's initial encounter outside his place of employment, and in the beating Hardwick received outside his home. As I have already insisted, these events are not severable from Hardwick's arrest, but should be seen as sanctions imposed on Hardwick prior to his discovered violation of Georgia's criminal law against homosexual sodomy.

My second point follows from the first. The factual background of the *Hardwick* case warrants the inference that Georgia's sodomy statute is a *Robinson*-like statute dressed in a *Powell*-like statutory shell. Viewing the case from this perspective, we can say that Hardwick's real crime was the assertion of (or rather the refusal to deny) his homosexual identity. I would suggest that this interpretation of the statute goes some way toward explaining the prosecutorial decision not to indict Hardwick. Formal prosecution of the charge against Hardwick was not necessary. The public-drinking ticket, Torick's harassment of Hardwick, the physical attack, the arrest, Hardwick's treatment after he was taken into police custody, and his continuing vulnerability to prosecution for some time to come were sanction enough for the "crime" he had committed—"being" homosexual—which of course, as a formal matter, was no crime at all.

consider: namely, the relationship between sexual orientation and sexual acts. Justice Blackmun goes on to state how a consideration of the relationship between act and orientation informed by White's *Powell* analysis would play out in the context of homosexual sodomy law:

Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a "disease" or disorder. . . . But, obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality. Consequently under Justice White's analysis in *Powell*, the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of circumstances. An individual's ability to make constitutionally protected "decisions concerning sexual relations," *Carey v. Population Services International*, [. . .] is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.¹⁶⁰

Justice Blackmun takes the analysis much further than Justice Powell in arguing that the unconstitutionality of the Georgia statute resides not only in the disproportionality of the sanctions it imposes to the conduct it criminalizes, but in its mere criminalization of certain protected conduct. For Blackmun, sexual identity (understood as involuntary orientation rather than voluntary preference) and sexual activity are so closely wed that when the conduct in question is undertaken consensually and in private (at least between unmarried adults), states may be barred from including it on their criminal calendars.

Although Justice Blackmun's view goes some way toward the Eighth Amendment theory I propose here, it is subject to criticism on at least two counts. First, Justice Blackmun's position is anchored—problematically so—in a view of the conduct proscribed by the Georgia statute as the behavioral expression of something like an unalterable condition or uncontrollable urge. Justice Blackmun is careful to note that current medical knowledge no longer views homosexuality as a pathological condition. Nonetheless, his view that homosexuality is part of the mental structure or "personality" of gay men and lesbians does inadvertently perpetuate a psycho-medical conception of the origins and nature of sexual identity. In this respect, Blackmun's argument would seem to leave the door open for effective regulation simply by substituting a medical response to homosexual conduct—punishment by involuntary treatment—for a legal one. The memory of coerced lobotomies and other violent "therapies" aimed at "curing" gay men and lesbian women is still too vividly and painfully inscribed on the minds and bodies of untold gay and lesbian citizens for us to accept the "unalterable condition" model of human sexuality as the basis for

160. 478 U.S. at 203 n.2.

invalidation of homosexual sodomy statutes.¹⁶¹

Justice Blackmun's understanding of the relevance of the Eighth Amendment is incomplete in a second important respect. Justice Blackmun subscribes to a version of the personhood thesis, which informs his claim that homosexuality may be a part of the "very fiber of an individual's personality."¹⁶² The precise facts of *Hardwick*, however, suggest that the Eighth Amendment case against homosexual sodomy statutes should begin from another, more fundamental concern: to limit the state's power to invade the simple physicality of the individual, without which the project of constructing an individual personality cannot even begin.

From this perspective, to describe the relevant interest in *Hardwick* as a constitutional right to engage in homoerotic acts or to assert a homosexual identity is to miss the crucial prior concerns present in the phenomenon of homophobic violence. One need look no further than the facts of *Hardwick* to appreciate that homosexual sodomy statutes are constitutionally suspect because they legitimize acts of homophobic violence that threaten the very existence of the human beings who are caught within their statutory net. The Eighth Amendment framework urged here understands homosexual sodomy statutes as one of a number of political practices whose object is not merely to confine or to categorize, but to deform and destroy the very bodies of those to whom they are directed. Although the Eighth Amendment analyses offered by Justices Powell and Blackmun in *Hardwick* come up to the edge of an account of the corporal interests invaded by criminal laws against homosexual sodomy, they stop short. It seems that the formal criminal model to which Powell and Blackmun appear to adhere simply presupposes that the punitive dimensions of homosexual sodomy statutes are restricted to those expressly set forth in the challenged statute. It should be clear by now that the homophobic violence that radiates from the criminalization of homosexual sodomy forces us to abandon this formalistic assumption.

Accordingly, I would submit that the substance of the Eighth Amendment account of the constitutional case against homosexual sodomy statutes can and should be more precisely formulated. After *Hardwick*, we would do better to characterize the core interest violated by the law of homosexual sodomy as an interest in corporal integrity. Judicial invalidation of the homosexual sodomy statutes would recognize and protect the right to be free from state-legitimized homophobic

161. Historian Jeffrey Weeks has argued that "the psychoanalytic institution . . . has played a vital part in that repressive categorisation of homosexuality as an illness or condition, which is increasingly seen as the core of the oppression of homosexuality." Jeffrey Weeks, *Sexuality and Its Discontents* 151 (1985). A useful social history of this unholy alliance between law and medicine is Ronald Bayer, *Homosexuality and American Psychiatry* (1981).

162. 478 U.S. at 203 n.2.

violence, on the grounds that such violence is a constitutionally impermissible infliction of cruel and unusual punishment upon the bodies of those who belong, or are believed to belong, to the class addressed by the statutory prohibition.¹⁶³ This understanding of the Eighth Amendment does not deny the local validity of the formal criminal justice model that informs Justices Powell and Blackmun's interpretations of the "cruel and unusual punishments" clause. Homosexual sodomy statutes do indeed raise serious constitutional questions about the imposition of disproportionate sanctions and the ascription of criminal status to those who simply assert homosexual identity. However, a constitutional account of the relationship between homosexual sodomy statutes and the politics of homophobic violence must take a more expansive view of the Eighth Amendment than the formal criminal justice model adopted by Justices Blackmun and Powell permits. As I argue in the next section, the Eighth Amendment concept of "cruel and unusual punishments" incorporates a distinctive normative vision of both law and politics that, properly understood, leaves little doubt that the historical and contemporary relationship between homosexual sodomy law and homophobic violence offends one of our most basic constitutional commitments.

C. *"Keep Your Laws Off My Body": Homophobic Violence, Homosexual Sodomy Laws and the Right of Corporal Integrity*

To appreciate the ways in which the relationship between homosexual sodomy law and homophobic violence presents constitutional

163. Language in a recent decision by the Canadian Supreme Court may be read as an instance of the body-based constitutional jurisprudence I advocate here. In *Mortgentaler v. The Queen*, 1 S.C.R. 30 (1988), the Court was asked to decide whether § 251 of the Criminal Code of Canada, outlawing all except "therapeutic" abortions, unconstitutionally infringed or denied rights and freedoms guaranteed by § 7 of the Canadian Charter of Rights and Freedoms. That section provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Can. Const. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms, § 7). The Court held that the provision in question was indeed unconstitutional. Chief Justice Dickson describes the unconstitutionality of § 251 in terms that place the corporal interests at stake in the foreground of his analysis. "Section 251," he writes, clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person.

Mortgentaler, 1 S.C.R. at 56-57.

Language in the U.S. Supreme Court's decision in the recent Pennsylvania case suggests a willingness among some members of the Court to squarely confront the corporal interests that privacy doctrine implicates. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2816 (1992) (acknowledging the "urgent claims of the woman to retain the ultimate control over her destiny and her body").

analysis with a "political question,"¹⁶⁴ we might recall Seneca's claim that the body politic "can be kept unharmed only by the mutual protection" of its parts.¹⁶⁵ I take this principle to mean that one of the first duties of the state is to protect the citizens from whom its powers derive against random, unchecked violence by other citizens, or by government officials.¹⁶⁶

For gay men and lesbians, the state has honored this fundamental obligation more in the breach than in the observance. As I have shown, few members of our body politic are more vulnerable to violent terrorist attack than the gay or lesbian citizen. This violence takes two forms. One form is violence at the hand of state officials such as the police. This official violence is an important part of the political history of the criminalization of homosexual sex.¹⁶⁷ The second form of homophobic violence is that perpetrated by private individuals. Although this type of violence is of lower visibility than that committed by public officials, the available evidence suggests that it is even more extensive.¹⁶⁸ Both involve the unlawful use of state power as a tool of law enforcement. With respect to homophobic violence perpetrated by state officials, no one would deny that a court can and should forbid a state from using terror and random violence as a standard tactic for enforcing homosexual sodomy law. Accordingly, I shall focus my discussion on the hidden constitutional dimensions of the brutal violence inflicted on gay men and lesbians at the hands of other citizens.

164. The scare quotes here are intended to avoid any confusion of this term as I use it with the political question doctrine.

165. Seneca, *De Ira* 2.31.7, quoted in Leonard Barkan, *Nature's Work of Art: The Human Body as Image of the World* 66 (1975).

166. David Strauss has recently made a similar point in much the same language. He writes: "Whatever else the government is supposed to do, it is supposed to protect citizens against violence by other citizens. Whatever else the social contract requires, it at least requires this much." David A. Strauss, *Due Process, Government Inaction and Private Wrongs*, 1989 *Sup. Ct. Rev.* 53, 53.

The more limited terms of Professor Strauss' claim may be explained by the fact that the textual occasion for this proposition was the decision in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). *DeShaney* was a suit under 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment. Four-year-old Joshua DeShaney and his mother alleged that Winnebago County, its Department of Social Services, and a number of county employees and officials had unlawfully failed to protect the boy from violence perpetrated by his father. The Supreme Court upheld a grant of summary judgment against the plaintiff on the grounds that governments generally owe no duty to individuals to protect them from private violence.

As his discussion of *DeShaney* indicates, Professor Strauss simply assumes (and rightly so) that government is indeed generally obliged to protect citizens against brutal attacks perpetrated by state officials. This obligation is, after all, the whole thrust of § 1983.

167. See *supra* notes 116–120, 129–131 and accompanying text; Comstock, *supra* note 126, at 12–25.

168. See Berrill, *supra* note 130, at 29–30.

In order to understand why this latter species of homophobic violence must be reckoned into the constitutional case against homosexual sodomy statutes, one first must understand the nature of political power in the modern state. As a general matter, American constitutional theory has viewed political power as something that is "concentrated in the state and exercisable only through the instrumentality of law."¹⁶⁹ These twin conceptions of political power have deprived students of American constitutionalism of the conceptual framework needed in order to comprehend the political realities of the present era, and the real relationship between homosexual sodomy law and homophobic violence in particular.

First, we must make some place in our analysis for the difference between state power and the state apparatus. The distinction between actual state power and its institutional formation has a long theoretical pedigree. Marxist theory uses the conception of a separation of state power and the state apparatus to explain how the latter can survive intact in spite of radical changes in the former (i.e., how one class can seize the reins of state power without a resultant change in its formal structure).¹⁷⁰ I use the distinction in a slightly different sense here. American constitutional theory has been hampered by a conception that sees power in terms of possession. Thus, we speak of Congress "having" the power to regulate interstate commerce, of the President "having" the power to appoint members of the Supreme Court, of the Supreme Court "having" the power to hear cases arising under the Constitution. This, of course, betrays a highly formalistic conception of power. Recent theoretical work on the question of power, however, suggests that a formalist framework is too crude a conceptual resource for understanding the actual operation of political power in contemporary societies. A number of writers have argued for an alternative analytical model that sees power as much more open and mobile, as a mechanism of devious, dispersed and supple energies.

One such alternative can be found in the work of Michel Foucault. Foucault is best known for his theoretical attack on what he calls the "repressive hypothesis," which holds that the mechanisms of power are primarily negative, prohibitive and interdictive. Foucault insists that "[w]e must cease once and for all to describe the effects of power in negative terms: it 'excludes,' it 'represses,' it 'censors,' it 'abstracts,' it 'masks,' it 'conceals.'"¹⁷¹ Foucault attends instead to the "productivity" of power and proffers an analysis aimed to show that power is not

169. Anne Barron, *Legal Discourse and the Colonisation of the Self in the Modern State*, in *Post-Modern Law* 107, 107 (Anthony Carty ed., 1990).

170. See Louis Althusser, *Lenin and Philosophy and Other Essays* 140-41 (1971).

171. Michel Foucault, *Discipline and Punish: The Birth of the Prison* 194 (Alan Sheridan trans., 1977).

something that "just says no."¹⁷² "In fact," argues Foucault, the most salient characteristic of modern power is that it "produces; it produces reality; it produces domains of objects and rituals of truth."¹⁷³ In its sustained focus on the productive or generative dimensions of power, Foucault's project marks a decisive break with traditional method.¹⁷⁴

Foucault's contribution to the theory of power is innovative in at least two additional respects. Both are particularly pertinent in the present context, since they provide a conceptual vocabulary for mapping the political domain in which homophobic violence and homosexual sodomy statutes are located. First, Foucault invites us to view political power in *relational* rather than institutional terms:

By power, I do not mean "Power" as a group of institutions and mechanisms that ensure the subservience of the citizens of a given state. . . . It seems to me that power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses [these force relations]; as the support which these force relations find in one another, thus forming a chain or a system, or on the contrary, the disjunctions and contradictions which isolate them from one another; and lastly, as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation of the law, in the various social hegemonies. Power's condition of possibility, or in any case the viewpoint which permits one to understand its exercise . . .

172. See Nancy Fraser, *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory* 27 (1989).

173. Foucault, *supra* note 171, at 194.

174. Jed Rubenfeld draws on Foucault's "productive" theory of power as a critical model with which to assess the analytical and philosophical foundations of the right of privacy. See Rubenfeld, *supra* note 7, at 770-82. I discuss Rubenfeld's use of Foucault *infra* at notes 228-242 and accompanying text. For an insightful if somewhat overdrawn attack on the value of Foucauldian social theory for feminist legal analysis, see Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. Chi. Legal F. 59. Professor West argues that legal feminists should reject the Foucauldian invitation to shift our critical attention to the productive effects of power because "[w]omen's experiences of patriarchal power . . . are unlike anything imagined in Foucault's philosophies." *Id.* at 61. In West's account, "patriarchal power is experienced by modern women as intensely non-discursive, as utterly unimaginative, as profoundly negating, and, in short, as frighteningly and pervasively *violent*." *Id.* West rightly insists on the need to attend to the undeniable brutality directed toward women in American society. However, I believe her call for a return to an unalloyed negative conception of power is as misguided as an overemphasis on power's productivity. For three instances in which Foucault's theoretical framework has been put to stunning use in feminist analysis, see Sandra Lee Bartky, *Foucault, Femininity, and the Modernization of Patriarchal Power*, in *Femininity and Domination: Studies in the Phenomenology of Oppression* 63 (1990); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990); Jana Sawicki, *Disciplining Foucault: Feminism, Power, and the Body* (1991).

must not be sought in the primary existence of a central point, in a unique source of sovereignty from which secondary and descendent forms would emanate; it is the moving substrate of force relations which, by virtue of their inequality, constantly engender [local and unstable] states of power.¹⁷⁵

Power, on this understanding, "is not something that is acquired, seized, or shared, something that one holds on to or allows to slip away."¹⁷⁶ More crucially, in Foucault's analysis, power is not a possessory interest. It is a rather more complex network of practices that make up the "general matrix of force relations at a given time, in a given society."¹⁷⁷

Second, Foucault urges us to abandon a *unitary* conception of power as that which is concentrated in the state. For Foucault, reliance on a statist model can never yield more than a partial understanding of the mechanisms through which power operates: "One impoverishes the question of power if one poses it solely in terms of legislation and constitution, in terms solely of the state and the state apparatus. Power is quite different from and more complicated, dense and pervasive than a set of laws or a state apparatus."¹⁷⁸ As should be clear from this passage, Foucault's theory of power denies neither the importance nor the efficacy of state institutions. His is a rather more modest claim: "[I]f one insists too much on its role, on its exclusive role, one risks missing all the mechanisms and effects of power which do not pass directly by the State apparatus, but which often support it, transmit it, give it its maximum effectiveness."¹⁷⁹ For Foucault, this broader conception permits a perspective from which it becomes possible to see that power proceeds not only from the state, but "from innumerable points, in the interplay of nonegalitarian and mobile relations."¹⁸⁰ The dispersed, pervasive origins and effects of power relations require those who would understand them to rethink the historical identification of power with the state.¹⁸¹ Foucault's rejection of a state-centered

175. Foucault, *supra* note 148, at 92-93.

176. *Id.* at 94.

177. Hubert L. Dreyfus & Paul Rabinow, Michel Foucault: Beyond Structuralism and Hermeneutics 186 (2d ed. 1983).

178. Michel Foucault, *The Eye of Power*, in *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, 146, 158 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

179. Quoted in Paul Patton, *Of Power and Prisons*, in Michel Foucault: *Power, Truth and Strategy* 109, 146 (Meaghan Morris & Paul Patton eds., 1979).

180. Foucault, *supra* note 148, at 94.

181. Some have taken Foucault's claim that power is not "centered" in the institution of the state but rather dispersed across the social field as a categorical rejection of the very notion of "state power." Zillah Eisenstein, for example, has framed what she takes to be a critique of Foucault's theory of power in these terms: "[P]ower may not be centered in a state, but it may be concentrated in a state defined by the relations of power that are dispersed . . . [Foucault's] fuller notion of politics, which recognizes the extrastate dimensions of power, must, however, take the state into

orientation to the question of power entails a radical shift in the terms of reference that predominate in conventional constitutional analysis. Such a shift is necessary if we are to move beyond our impoverished conceptions of state power.¹⁸²

Recent scholarship on the theory of power thus represents a powerful challenge to traditional understandings. The central proposition established in contemporary work on power is that the effective exercise of state power in the modern period does not require a formal apparatus or agency. This is not to say that the forms in which the political is clothed are utterly illusory and without ideological consequence. It is to suggest that the substantive operation and effects of state power cannot always be determined solely (or even primarily) by reference to its formal agency; the state power in contemporary American society can be seen not only in the force relations involving public officials and private citizens, but in those among citizens as well. As Nicos Poulantzas writes: "[A] number of sites of power which [appear] to lie wholly outside the State . . . are all the more sites of power in that they are included in the strategic field of the state." "[R]elations of power go far beyond the State."¹⁸³ In consequence, any adequate analysis of the political technologies of the modern state must attend not only to the form power takes, but to its function as well. Power relations do not have to be localized within the formal institutions of the state in order to serve the substantive interests of the state.

Taking these theoretical lessons about state power as a point of reference, one may now specify precisely why the relationship between homosexual sodomy statutes and homophobic violence is constitutionally suspect. In assessing the constitutionality of these laws, I would argue that violence against gays and lesbians perpetrated by other citi-

account." Zillah R. Eisenstein, *The Female Body and the Law* 18-19 (1988). My discussion in the text ought to leave no doubt that this critique misrepresents Foucault's unambiguously articulated position. Foucault has argued that power is not "localized" in the institution of the state. At the same time, he has made it clear that the analysis of power cannot ignore the ways in which the state apparatus represents a "concentrated form" or "instrument of a system of powers, which goes far beyond it, so that, looked at in practical terms, neither the control nor the destruction of the state apparatus can suffice to bring about the disappearance or the change of a definite type of power." Michel Foucault, *Power and Norms: Notes, in Power, Truth and Strategy*, supra note 179, at 60.

182. Another theoretical account of power that departs from conventional analytic frameworks is that of feminist legal theorist Carol Smart, who elaborates the notion of "refraction" as a useful analytical tool for mapping the power of law over women. Smart uses the concept to specify the proliferating effects for law of its alliance with other disciplines such as medicine, psychiatry, social work, and the like. One consequence of this ideological and institutional fusion is that law has extended its field of asserted authority and now exercises control over matters that once escaped its jurisdiction. The idea of refraction further serves to point up the increasingly disjointed and dispersed character of legal regulation, as against historical conceptions of law as an ideological and institutional unity. See Carol Smart, *Feminism and the Power of Law* 97 (1989).

183. Nicos Poulantzas, *State, Power, Socialism* 36-37 (1978).

zens represents the states' *constructive delegation* of governmental power to these citizens. As a constitutional matter, the covert, unofficial character of this violence does not render it any less problematic than open, official attacks against gay men and lesbians. To state the point in slightly different terms, the fact that homophobic violence occurs within the context of "private" relations by no means implies that such violence is without "public" origins or consequence. The apparently private character of homophobic violence should not blind us to the reality of the state power that enables and underwrites it. The functional privatization of state power that structures the triangular relationship among victim, perpetrator, and state does not render the phenomenon of homophobic violence any less a matter of constitutional concern.

In order to see why the private lawlessness of homophobic violence is very much a problem for constitutional law, we must turn from considering *who* perpetrates this violence to considering *how* the state responds to the fact of its occurrence. The sheer difficulty of writing about the role of government in private homophobic violence may be traced in part to the insidious hidden forms state involvement takes. The political sociology of homophobic violence reveals that more often than not, the complicity of the state in private attacks on gay men and lesbians may be characterized as complicity through a consistent and calculated pattern of inaction.¹⁸⁴ To paraphrase Justice Brandeis, the

184. For the development and application of a two-level action/inaction power model, see Matthew Crenson, *The Un-Politics of Pollution: A Study of Non-Decisionmaking in the Cities* (1971). For a critique and extension of the model, see Steven Lukes, *Power: A Radical View* 36-45 (1974).

This statement is subject to obvious qualification. First of all, the state *has* adopted homosexual sodomy statutes. Further, even if these statutes are underenforced, or not enforced at all, they provide the juridical premise for other state acts—e.g., discharging gay and lesbian teachers, disallowing gay and lesbian adoptions, and the like. In the context of the legal profession, it may lead to the denial of counsel, since a lawyer may not assist a client to engage in a crime, and in several states, must disclose a client's communications concerning a future crime. See, e.g., Model Rules of Professional Conduct Rule 1.2(d) (1983) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ."); Rules Regulating the Florida Bar Rule 4-1.6(b) (West 1992) (lawyer "shall reveal" information the lawyer believes "necessary . . . to prevent a client from committing a crime"). Gay and lesbian lawyers might be vulnerable (assuming they are sexually active) under codes of professional conduct to provisions requiring attorneys to report certain crimes by other lawyers to the authorities. See, e.g., Model Code of Professional Responsibility DR 1-102(A)(3) (1980) (a lawyer shall not "engage in illegal conduct involving moral turpitude"); Model Code of Professional Responsibility DR 1-103(A) (1980) ("A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."). The stated rationale for these additional, inarguably affirmative state actions is that the individuals discriminated against belong to an act-based criminal class. Conceivably, a statute criminalizing homosexual sodomy might bring this whole complex of rules into operation. Thus, my remarks should be understood accordingly.

most important thing state governments do with respect to homophobic violence is to do nothing.¹⁸⁵

State officials seem unwilling or unable to use the criminal justice system to reach crimes of homophobic violence.¹⁸⁶ In this respect, the response to private violence against gays and lesbians apparently mirrors the reaction of state governments to private violations of homosexual sodomy law. However, in the case of homophobic violence, the practical and ideological effects of government indifference are not at all the same. This difference lies in the very nature of the crime.

When political pressures or the persistence of victims have forced state officials to prosecute perpetrators of homophobic violence, those accused have very often been acquitted. The relatively few individuals who have been convicted of criminal violence against gay men or lesbians have often received reduced sentences or been granted a mitigation in the degree of criminal offense. These outcomes result from the emergence of two curious defenses, which are termed "homosexual panic" and "homosexual advance." The "homosexual panic" defense permits individuals accused of attacking or murdering a gay man or lesbian to assert that their acts stemmed from a violent reaction to their own "latent" homosexual tendencies, triggered after the accused was homosexually propositioned. The "homosexual advance" defense allows the accused to claim that he was the subject of a homosexual overture. The "homosexual advance" defense differs from the "homosexual panic" defense insofar as it does not require the defendant to introduce evidence about his "latent homosexual tendencies."¹⁸⁷ The critical point is that the effect of both of these defenses is to create a doctrinal space within the criminal justice system that permits the perpetrators of violent crimes against gay men and lesbians to lay the blame for their brutality at the feet of their victims.¹⁸⁸

185. Quoted in Alexander M. Bickel, *The Least Dangerous Branch* 71 (1962).

186. A Texas judge justified his leniency in sentencing the convicted murderer of two men on the grounds that "I put prostitutes and queers on the same level. . . . And I'd be hard put to give somebody life for killing a prostitute." Berrill & Herek, *supra* note 127, at 294. In another case involving the murder of a gay man, the presiding judge asked the prosecuting attorney whether it was "a crime now, to beat up a homosexual." The prosecutor responded, "Yes, sir. And it's also a crime to kill them." The judge rejoined, "Times have really changed." *Id.* In addition to the forms of inaction internal to the criminal justice system, it should be observed that the overwhelming majority of state legislatures have resolutely refused to define homophobic violence as a species of "hate-crime." This legislative resistance is telling when one considers that these proposals simply seek to include homophobic violence within already existing laws providing increased penalties for persons convicted of crimes motivated by gender, racial, or religious bias. See *Developments in the Law—Sexual Orientation and the Law*, 102 *Harv. L. Rev.* 1508, 1549 (1989).

187. For a critical discussion of these defenses, and the cases in which they have figured, see *id.* at 1542–48.

188. In the words of a staff attorney with the National Gay Rights Advocates, the fundamental injustice of the "homosexual advance" and "homosexual panic" defenses

Thus, the problem faced by those who have sought to place private violence against gay men and lesbians on the public agenda is not simply that state officials seem all too capable of either shutting their eyes to homophobic violence or looking the other way. The problem runs much deeper. Because gay men and lesbians are seen as members of a criminal class,¹⁸⁹ it is almost as though state governments view prosecution of those who commit crimes of homophobic violence as an invasion of the perpetrator's rights.¹⁹⁰

The constitutional implications of this deliberate policy and practice of government indifference will likely elude us so long as we cling to the impoverished understanding of state power reflected in the regnant doctrine of state action. It bears remarking, however, that this doctrine does not represent the only plausible understanding of state power:

[The state action doctrine] does not *have* to be construed as ruling out affirmative governmental duties to protect citizen against citizen. While insisting that the fourteenth amendment does not apply to private conduct *per se*, and that such conduct does not become state action merely because the state has chosen not to prohibit it, the doctrine can be understood as leaving open the substantive constitutional question whether the state's own failure to control certain types of pri-

becomes clear when we realize that variations on these doctrines would almost certainly not be available to defendants accused of bias-motivated violence against women or people of color: "Just as our society will not allow a defendant to use racial or gender-based prejudices as an excuse for his [sic] violent acts, a defendant's homophobia is no defense to a violent crime." Joyce Norcini, NGRA Discredits "Homosexual Panic" Defense, N.Y. Native, June 19, 1989, at 12, quoted in Sedgwick, *supra* note 92, at 19. David Wertheimer, former director of the New York City Gay and Lesbian Anti-Violence Project, has remarked that "[i]f every heterosexual woman who had a sexual advance made to her by a male had the right to murder the man, the streets of this city would be littered with the bodies of heterosexual men." Peter Freiberg, Blaming the Victim: New Life for the "Gay Panic" Defense, *Advoc.*, May 24, 1988, at 12, quoted in Sedgwick, *supra* note 92, at 19.

189. I believe that the perception of gay men and lesbians as a criminal class holds true even in those jurisdictions that have judicially invalidated or legislatively repealed the laws against homosexual crime. It might be argued that those homosexual sodomy laws that are still on the books have something of a jurisdictional "spill-over" effect. Thus, the sodomy statutes that remain on criminal calendars in some states might be said to carry a symbolic dimension of a different order than instrumental legal force, a symbolic dimension whose effects are not confined within state borders. While this understanding collides with that embodied in classical conceptions of the police power, I would contend that this view of the actual significance of sodomy statutes is closer to the realities of federalism and interstate relations in our time.

190. This last feature of state response to the phenomenon of homophobic violence shares a strong ideological resemblance to the administration of rape law: like rape, "queer bashing" belongs to the system of male, heterosexual privilege. For a discussion of rape as the "all-American crime," see Susan Griffin, *Rape: The All-American Crime*, in *Feminism and Philosophy* 313 (Mary Vetterling-Braggin et al. eds., 1977).

vate conduct (whether that failure be called "action" or "inaction") violates the amendment. The constitutional enforcement of a citizen's natural right to affirmative governmental protection against victimization by fellow citizens can thus be squared with the state action doctrine through a holding that nonprovision of such protection is unconstitutional state action.¹⁹¹

The point here is that government may effectively exercise its powers in a variety of forms, of which positive, affirmative state action is only one, and not always the most efficient means.¹⁹²

In the instant context, this more nuanced understanding of the combined force of the private action and state inaction that are so violently brought to bear on the bodies of gay men and lesbians clears the ground for clearer specification of the cordinal relationship between criminal laws against homosexual sodomy on one side, and criminal acts of homophobic violence perpetrated by private citizens on the other. It will be recalled that the question I posed and proposed to address was this: How ought we to think about the role state governments play in the phenomenon of homophobic violence? I believe my preceding discussion of the political sociology of power permits two inferences regarding this question, one general and one more specific. Broadly speaking, homosexual sodomy statutes express the official "theory" of homophobia; private acts of violence against gay men and lesbians "translate"¹⁹³ that theory into brutal "practice." In other words, private homophobic violence punishes what homosexual sod-

191. Frank I. Goodman, Comment, Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone, 130 U. Pa. L. Rev. 1331, 1335 (1982) (commenting on Paul Brest, State Action and Liberal Theory: A Casenote on *Flagg Bros. v. Brooks*, 130 U. Pa. L. Rev. 1296 (1982)). Goodman offers as an example Justice Bradley's intimation in the *Civil Rights Cases* that "individuals may have an 'essential right' of nondiscriminatory access to places of public accommodation, that the states are obligated by the fourteenth amendment to implement that right, and that their failure to do so would amount to unconstitutional state action." *Id.* (quoting the *Civil Rights Cases*, 109 U.S. 3, 19 (1883)).

I might note that nothing of theoretical consequence for my argument flows from the Court's decision in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). I have already mentioned David Strauss' corrosive and compelling critique of *DeShaney*. Strauss, *supra* note 166. Professor Strauss goes so far as to argue that government action, at least as the Court understood the concept in *DeShaney*, "exists every time an individual is the victim of private violence." *Id.* at 54. I need not, and do not, make any such global theoretical claim.

192. The Supreme Court's jurisprudence in the state action cases reflects a singular unwillingness or inability to grasp this idea. See, e.g., *DeShaney*, 489 U.S. at 196 (Due Process Clause's "purpose was to protect the people from the State, not to ensure that the State protected them from each other."); *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978) (holding that a state's statutory acquiescence in a private action does not convert such action into one of the state).

193. See Scarry, *supra* note 144, at 56 (through torture, pain is translated into the insignia of power); *supra* notes 144-148 and accompanying text.

omy statutes prohibit.¹⁹⁴ When situated within this framework, the terms and target of my Eighth Amendment-based account of the criminal laws against homosexual sodomy become clear: one might call it an “anti-terrorist” case for judicial invalidation of homosexual sodomy laws, whose textual grounding is a *functional*, rather than *formal* interpretation of the prohibition against the infliction of cruel and unusual punishments.¹⁹⁵

194. I have been careful to avoid asserting a direct causal connection between homosexual sodomy laws and homophobic violence. A causal link of this kind would by the nature of the case be very difficult to prove. Given the character of governmental non-decisionmaking with respect to violations of homosexual sodomy statutes and incidents of homophobic crime, these exercises of state power evade apprehension under the crude lens of linear causal analysis. Accordingly, to paraphrase an argument David Strauss has made in another context, I believe “it would be better to adopt an approach that avoids assessing [the] causal connection” between private action and state inaction. Strauss, *supra* note 166, at 63. There is no reason to demand that the interpretation of the Cruel and Unusual Punishments Clause urged here be able to negotiate its way through the thorny thicket of conventional common-law notions of causality. See *id.* This is particularly true in view of the fact that the application of classical causation doctrine in this context would necessarily rest on “a rather hasty analogy between the regularities of physical and of social systems, an analogy that has seldom been explicitly justified or even updated as the physical sciences have questioned their own epistemological foundations.” Catherine A. MacKinnon, Not a Moral Issue, in *Feminism Unmodified*, 271–72 n.53 (1987).

Nonetheless, when one looks at the issue from a broader systemic perspective, it is hard to avoid the conclusion that homosexual sodomy laws do not simply passively reflect, but rather actively produce and perpetuate the homophobia that motivates the perpetrators of violence against persons who are (or are thought to be) gay or lesbian. That is, I believe that homosexual sodomy laws have a “constitutive” effect. For an elaboration of the constitutive theory of law, see Robert W. Gordon, Legal Thought and Legal Practice in the Age of American Enterprise, in *Professional Ideologies in America* 70, 70–71 (Gerald L. Geison ed., 1983); Karl Klare, Law-Making as Praxis, 40 *TELOS* 123, 128–33 (1979). On the particular question of the constitutive role of legislatively adopted common-law categories see Cass R. Sunstein, Lochner’s Legacy, 87 *Colum. L. Rev.* 873 (1987).

Having said this, I want in passing to address and dispose of an obvious objection, namely, that any specific instance of homophobic violence may be motivated by beliefs, attitudes, and ideologies that are the creations of social institutions other than the state, such as the church, the media, and so forth. I hope I have said enough to show why this objection mistakes my argument. The constitutionally relevant question here is not whether criminalization of homosexual sodomy *causes* homophobic violence. From my perspective, the issue of causal responsibility is irrelevant. I mean rather to insist that the criminalization of homosexual sodomy *legitimizes* homophobic violence. These are obviously two very different assertions, which ought not be confused.

195. Thus, I reject the notion that the term “punishment” may properly be used to refer only to statutorily authorized sanctions imposed by official state actors following an official adjudicative determination of guilt. This definition of punishment possesses a certain conceptual neatness, but it has little value in understanding the actual infliction of pain with which I am concerned. Moreover, given the structural tendency toward privatization of penal power, one may wonder whether traditional formalist conceptions of punishment have not run their course. For a discussion of these recent developments, see generally John Wildeman, When the State Fails: A Critical Assessment of Contract Policing in the United States, in *Crimes by the Capitalist State*

I read the Eighth Amendment as a constitutional reflection of an important political principle. This principle presupposes a constitutive conceptual connection between the legitimacy of a government and the methods that government employs to enforce its commands.¹⁹⁶ In other words, the reason our Constitution prohibits the infliction of cruel and unusual punishments is because we cannot countenance the practices the Eighth Amendment forbids without doing violence to the very concept of governmentality, or at least to the liberal conception of legitimate government that underlies our constitutional tradition. If we accept the view that under our political system, a state may not resort to terror or random violence as a standard tool of governmental control, a functional interpretation of the Eighth Amendment permits us to make two claims about the constitutionality of laws against homosexual sodomy. The Eighth Amendment prohibition against cruel and unusual punishments may be construed not only to forbid open and official government use of violence to enforce the criminal laws against homosexual sodomy, but also to bar a state from effecting the enforcement of these laws by instigating, encouraging, or permitting private attacks on gay men and lesbians.

Turning to the question of the judicial role, we see that the Eighth Amendment may thus be interpreted as empowering constitutional courts to invalidate homosexual sodomy statutes on the grounds that the actual, concrete effect of these laws is to *legitimize* the lawless infliction of homophobic violence. After *Hardwick*, the starting point of the constitutional case against homosexual sodomy statutes is a recognition that the Court's reasoning and result in *Hardwick* necessarily presupposed certain "constitutional facts"¹⁹⁷ about the actual operation of the

219 (Gregg Barak ed., 1991) (arguing that the proliferation of private security firms has substantially augmented the state's conventional power of social control).

196. In this respect, the Eighth Amendment can be deemed a local instance of a broader precept that Alan Ryan has described in terms similar to my own: "Governments do not wish to leave their citizens in the dark about what is going to happen next. Indeed, there is something like a conceptual connection between purporting to be a *government* and attaching fixed sanctions to known demands." Alan Ryan, *State and Private; Red and White, in Violence, Terrorism and Justice*, supra note 133, at 245.

197. I adopt the definition of Professors Bishin and Stone, who describe "constitutional facts" as those facts whose "determination is 'decisive of constitutional rights'." William Bishin & Christopher Stone, *Constitutional Facts, in The Judicial Process* 703, 703-04 (1976). A detailed examination of the cases and literature on the treatment of constitutional facts is beyond the scope of this essay. Two very helpful discussions are Rachel N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655 (1988), and Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985). Professor Monaghan attributes the first use of the term to John Dickinson. See *id.* at 231 n.17. Following Kenneth Culp Davis, Professor Monaghan propounds a division between litigation-specific "adjudicative" facts on the one hand, and more generic statutory or "legislative" facts on the other. See *id.* at 230 n.16. Having drawn this distinction, he argues that only the former are properly implicated in the practice of constitutional fact

Georgia law.¹⁹⁸ It is plausible to think that among the assumptions on which the *Hardwick* Court based its decision was a belief that the methods employed by the State of Georgia to enforce its criminal sodomy laws did not entail violation of other, independent constitutional rights. That is, whatever the *Hardwick* Court may have thought about the existence of "a fundamental right to engage in homosexual sodomy,"¹⁹⁹ it could not have upheld the Georgia law in the face of evidence that the *actual administration* of the criminal sodomy statute violated other constitutional rights, such as those protected by the Eighth Amendment.

Because of the procedural posture of the case, the *Hardwick* Court possessed relatively little information regarding the actual application of the challenged law.²⁰⁰ Moreover, nothing in the *Hardwick* decision warrants a reading of the Court's judgment regarding the right of privacy as foreclosing invalidation of the Georgia sodomy law on alternative constitutional grounds. Thus, if it can be shown that the "real effect" of the Georgia statute is to inflict cruel and unusual punishment on individuals who engaged in the conduct prohibited by the statute, a court could properly declare the statute constitutionally invalid.²⁰¹

review. *Id.* Although I adopt the definitional distinction drawn between adjudicative and legislative facts, I shall argue that depending on the context, an "as applied" analysis of homosexual sodomy statutes may properly take account of both.

198. One such factual supposition informs Justice Powell's analysis of the Eighth Amendment implications of the Georgia statute. As we have seen, it appears from his concurring opinion that Justice Powell believed that, as a factual matter, it was highly unlikely that Georgia would punish a defendant convicted for violating its law criminalizing homosexual sodomy to the extent permitted under the law. This factual premise appeared to be critical to Justice Powell's decision to uphold the statute, notwithstanding his view that in other circumstances such statutes might raise serious constitutional concerns. See *Hardwick*, 478 U.S. at 197-98 (Powell, J., concurring).

199. *Hardwick*, 478 U.S. at 191.

200. The only relevant fact noted by the Court in *Hardwick* was that the Fulton County District Attorney "decided not to present the [charge against *Hardwick*] to the grand jury unless further evidence developed." *Id.* at 188. As I have shown, the District Attorney's inaction was only one piece of a larger pattern of inaction. Had the case gone to trial, the Court might have had before it a record of totality of the factual circumstances, which would have allowed it to probe further. Careful review of the broader factual context of *Hardwick* would have revealed that the District Attorney's decision not to go forward was not politically insignificant. The considered inaction of the state in *Hardwick*'s case was one piece of a larger whole, which my proposed "as applied" argument would reckon into the constitutional analysis of the sodomy statute itself.

201. As I noted at the outset of this article, a fully operational argument against the invalidation of homosexual sodomy statutes on Eighth Amendment grounds is beyond my concerns. However, it should be noted that the facts in *Hardwick* would seem to satisfy the requirements that the Court has elaborated in the relevant case law regarding the circumstances in which a federal court may issue a declaratory judgment that a state criminal statute impermissibly infringes upon individual rights protected by the Constitution. For our purposes, the relevant line of cases commences with *Younger v. Harris*, 401 U.S. 37, 46 (1971) (injunction permitted in cases when prosecution creates a great and immediate danger of irreparable injury to defendant's federally protected rights that cannot be eliminated by the defendant's defense against the prosecution,

I hope by now to have justified the claim that there is a firm factual

such as when the prosecution has been guilty of harassment or bad faith), and its companion decision *Samuels v. Mackell*, 401 U.S. 66, 69–73 (1971) (a declaratory judgment will ordinarily be governed by the *Younger* standard).

Most pertinent in the instant context is the Court's decision in *Steffel v. Thompson*, 415 U.S. 452 (1974); like *Hardwick*, *Steffel* emerged from the Georgia criminal justice system. In *Steffel*, the Court held that federal courts were empowered to grant declaratory relief against unconstitutional state action if, at the time the federal complaint was filed, there was no pending state criminal proceeding against the party seeking relief in which the federal question might be raised. Under the rule in *Steffel*, a party may be granted declaratory relief where criminal prosecution is merely *threatened*. 415 U.S. at 475. The *Steffel* Court also held as a preliminary matter that the existence of such a threat constituted a justiciable case or controversy. *Id.* at 459–60. *Steffel* thus settled a question left open in *Younger* and *Samuels*, and in intervening decisions. But see *Hicks v. Miranda*, 422 U.S. 332, 348–50 (1975) (*Younger* and *Samuels* foreclose injunctive as well as declaratory relief where state criminal proceedings are begun against a party after she has filed a federal complaint but before “proceedings of substance” on the merits have taken place in federal court).

To return to the facts of *Hardwick*, recall that *Hardwick* had been arrested and charged, but not indicted, for violating Georgia's homosexual sodomy law. Recall, too, that although the District Attorney declined to go forward with the case “unless further evidence developed,” 478 U.S. at 188, the governing statute of limitations permitted *Hardwick*'s indictment and prosecution at any time within the following four years. Moreover, *Hardwick*'s complaint asserted that the Georgia sodomy law “placed him in imminent danger of arrest.” *Id.* Indeed, “as applied” to him, *Hardwick*'s experience while in police custody indicated that an arrest might well entail sexual or other kinds of assault. In addition, there was some factual basis to believe that the Georgia sodomy statute as actually applied exposed *Hardwick* to the threat of serious bodily harm, whether or not he planned to engage in the prohibited conduct at all. It bears remarking once more that *Hardwick* was attacked well before his arrest for violation of the sodomy statute, by a group of men who knew him by name, and in circumstances that led him to believe the police were involved.

In *Hardwick*, the Court declined to consider the Eighth Amendment implications of the Georgia sodomy law on the grounds that *Hardwick* had not relied on that amendment to defend the appellate court judgment under review. See *id.* at 196 n.8. But as Justice Blackmun argued in his dissent, this fact did not prevent the Court from addressing the Eighth Amendment question if a fair interpretation of the text provided an alternative basis for sustaining the judgment in favor of *Hardwick* handed down by the lower appellate court. See *id.* at 201–02 (Blackmun, J., dissenting). Had *Hardwick* introduced specific evidence regarding his treatment while in police custody or the beating which took place before his arrest, adoption of the model urged here would have placed the issue of the actual effects of the Georgia statute squarely before the Court. The relevant constitutional facts here would be “adjudicative,” since they are particular to *Hardwick*'s case.

However, it might be argued that my analytical model would sustain a federal complaint by *Hardwick* seeking a declaratory judgment on the Eighth Amendment implications of the challenged statute even had he not himself been arrested or beaten. A court might properly grant declaratory relief on the basis of broader empirical evidence in the way of “legislative” facts, if these constitutional facts suggested a correlation between homophobic violence and homosexual sodomy law. To adapt a phrase from *Steffel*, “it is not necessary that [a party] first expose himself [sic] to actual . . . arrest or prosecution to be entitled to challenge a statute that he [sic] claims deters the exercise of his [sic] constitutional rights.” 415 U.S. at 459.

Both actions represent “operational challenges” to the laws against homosexual

basis on which a post-*Hardwick* court could so hold. The factual premises regarding the enforcement of sodomy laws on which *Hardwick* appears to have been based do not comport with past or present realities. As I have shown, it is not only possible to argue, but difficult to deny, that the criminalization of homosexual sodomy and crimes of homophobic violence mutually reinforce one another.

A state government's refusal to prevent, prosecute and punish the private torture, mutilation and murder of gay men and lesbians (and those to whom gay or lesbian identities are ascribed) breaches the most basic term of the social compact: the affirmative obligation of the state to use the lawful authority of government to protect citizens from lawless violence. The state's acquiescence in the "civic terrorism"²⁰² directed against gays and lesbians represents the effective transfer of state power to private actors. We must view the state's inactivity with respect to crimes of homophobic violence in the context of the other mentioned forms of state inaction. Government inaction toward incidents of homophobic violence effectively accords a low visibility privilege to perpetrators of bias crimes that parallels the privilege granted to the mobs that lynched African-Americans well into this century.²⁰³

sodomy. They differ in the nature of the facts on the basis of which declaratory relief is sought. I take the term "operational challenge" from Pine, *supra* note 197, at 698-712. For Pine, an "operational challenge" to a statute has three components: (1) it must be an "across-the-board" constitutional attack on a working statutory scheme; (2) it must be based on empirical evidence about the application of the challenged statute "drawn from the totality of statutory applications"; and (3) it must have been held facially valid. See *id.* at 703. It should be clear that I am using the term here in a much more open-textured and evocative way. For my purposes, the term "operational challenge" simply refers to one of two broad types of "as applied" challenges to homosexual sodomy statutes, which vary according to context and category of constitutional fact.

202. Cornel West, *The Ethical Dimensions of Marxist Thought* xi (1991).

203. One might well draw a number of parallels between the political histories of these two forms of political violence. There is a resonant resemblance between the condition of gay men and lesbians under the current legal regime and the condition of African Americans in the era of racial segregation. Although his subject was the lawfulness of the Court's decision in *Brown v. Board of Education*, Charles Black's classic analysis of the structural character of racial domination yields a number of useful comparative insights into the institutional significance of homosexual sodomy law. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421 (1960). It can be said that we must examine "the whole tragic background" of homosexual sodomy statutes if we are fully to understand why and how they are constitutionally suspect. *Id.* at 423. The laws subjugate and confine an entire group "within a system which is set up and continued for the very purpose of keeping it in an inferior station." *Id.* at 424. The combined force of homosexual sodomy law and homophobic violence is to impose invisibility on gays and lesbians, to make it as difficult as possible for gays and lesbians to enter "the common political life of the community," and to restrict as much as possible their access to political power. *Id.* at 425. Professor Black's summary of the pervasive character of racial subjugation led him to conclude that a court could advise itself of the condition of Americans of African descent "as it advises itself of the facts that we are a 'religious people.'" *Id.* at 426. Twenty years ago, Professor Black insisted that a court could take notice of the "plain fact about the society

That is, the private citizens who commit acts of terrorist violence against gays and lesbians can be said to do so under color, or more precisely, under cover of law.²⁰⁴

Viewed in structural terms, the "applied law" of homosexual sodomy is an important component of a broader pattern of state inaction toward homophobic violence. Functionally, the criminalization of homosexual sodomy and the effective decriminalization of violence against gays and lesbians represent a simultaneous withdrawal and exercise of state power. The complexity of the state's involvement in the institution of homophobic violence should not obscure its character. As a practical matter, the mediatory role of the state in the power relationship between perpetrator and victim inures to the benefit of the state itself. In constitutional terms, the state's deliberate indifference to the phenomenon of homophobic violence permits state governments to lend their endorsement to a brutal and barbaric arsenal of punishments on gay men and lesbians that the Eighth Amendment clearly would not allow the states themselves to inflict.²⁰⁵

The fact that the intersection of homosexual sodomy law and homophobic violence overruns the abstract legal and political rationality of American constitutionalism ought not blind us to its real and practical effects. To be sure, as a formal matter, private violence against gays and lesbians defies conventional understandings of the concept of punishment. Formally, moreover, the modes of government power that legitimize the occurrence of homophobic violence elude standard conceptions of the unitary state and the rule of law. Strictly speaking, the fact that we cannot accommodate the terror of homophobic violence within the existing vocabulary of constitutional analysis is, strictly speaking, irrelevant. It simply means that traditional

of the United States" that the social meaning of segregation was racist domination of the Negro. *Id.* at 427. I would submit that a similar case can be made with equal urgency about another people and another system of domination today. For other connections see Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 *Yale L.J.* 145 (1988) (arguing that the invidious racism embodied in miscegenation laws violated the Eighth Amendment, and that sodomy laws embody equally objectionable invidious sexism).

204. It need hardly be said that governmental instigation, encouragement, and acceptance of private homophobic violence are practices that by their very nature state officials would want to keep secret and hidden.

205. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (barring imposition of the death penalty for rape on the grounds that it is excessive punishment in violation of the Eighth Amendment). See generally Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 *Cal. L. Rev.* 839 (1969) (arguing that the historical background of the Eighth Amendment indicates that it should bar any type of excessive punishment); Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 *U. Pa. L. Rev.* 989, 991-92 (1978) ("evolving standards of decency" that give meaning to the Eighth Amendment should be drawn from a "deeper moral consensus" about punishment, rather than from objective indicia).

conceptual models of power and punishment no longer comport with modern realities. My project here has been to suggest a set of terms for thinking about a state of affairs which, to my mind, is cruel, unusual, and obviously unconstitutional.

It bears remarking that my case against the "applied law" of homosexual sodomy does not, by its terms, challenge the power of a state to criminalize certain forms of private consensual sexual practice. I freely concede, however, that my view that the real effects of homosexual sodomy statutes require their invalidation will certainly have that indirect consequence. That is, if one accepts the view defended here that criminal laws prohibiting homosexual sodomy and homophobic violence are inextricably linked, one necessary incident of a judgment aimed at ending state legitimization of bias crimes against gay men and lesbians will be to deprive the state of its power to police private, consensual gay and lesbian sex.

Nonetheless, conceding its consequences for state regulation of sexual conduct, I would still want to insist on the importance of the conceptual and constitutional difference here between outcome and object. The express target at which my discussion has been directed is the state's unconstitutional use of the police power to practice or permit the use of violence and terror against gay men and lesbians to enforce a formally legitimate criminal law. Thus, my case for declaring homosexual sodomy laws invalid does not rely in any way on the claim of constitutional privacy pressed and rejected in *Hardwick*. Indeed, I would press further and say that the issue of sexual freedom under American constitutionalism *as such* is outside my field of concern. The argument I have elaborated is informed by a rather different claim about the requirements of constitutional politics. That is, it should be taken as a specific constitutional argument that builds on a more general political proposition: namely, that *all* citizens have an equal right to demand that a state not permit its laws to be used to legitimize terror and violence directed against them by other members of the body politic.²⁰⁶

206. I should note in concluding this section that I am not suggesting that judicial invalidation of homosexual sodomy statutes on constitutional grounds will automatically end, or even necessarily reduce, the practice of homophobic violence. Quite probably, the incidence of attacks on gay men and lesbians would continue even after a judgment that its connections with the criminalization of homosexual sodomy rendered the latter unconstitutional. As I have argued, however, a judicial declaration that the "applied" law of homosexual sodomy laws cannot be constitutionally countenanced would deprive homophobic violence of one official source of ideological legitimacy. The legitimization of that violence is, from this perspective, itself a harm. In my view, judicial invalidation of homosexual sodomy laws would redress this independent injury without regard for the persistence of the more violent harm that attends it.

III. POLITICS WITHOUT PAIN: A CRITIQUE OF TWO RIVAL ACCOUNTS

In previous sections, I have argued that the constitutional problem presented by the consistent convergence of homosexual sodomy law and homophobic violence is best explained and attacked as a species of political terrorism. I do not claim that the political perspective developed here is the only such approach to the constitutional issues raised by homosexual sodomy laws. I do believe that it reflects a more precise account of the politics of these statutes than two of its major rivals.

In order to make this argument, I turn in this section to two recent scholarly efforts to elaborate a political model for constitutional interpretation of *Bowers v. Hardwick*, developed in works by Professors Frank Michelman and Jed Rubenfeld. The *Hardwick* decision provides both the occasion and the object for two very different accounts of the political implications of privacy doctrine. However, these two efforts are limited by their common failure to appreciate and offer an account of the political significance of homophobic violence. This analytic oversight leads Michelman and Rubenfeld to ignore one of the most crucial components of the political constellation to which sodomy statutes belong. The result, I argue, is that Rubenfeld and Michelman are unable to offer a sufficiently deep understanding of the political stakes involved in *Bowers v. Hardwick*. Because these scholars neglect the political significance of homophobic violence, their constitutional arguments against the law challenged in *Bowers v. Hardwick* are ultimately inadequate to their stated task.

A. *The Anti-Authoritarian Case Against Bowers v. Hardwick*

In "Law's Republic," Frank Michelman pursues a critical reading of the republican tradition in American constitutional thought.²⁰⁷ Michelman builds on this interpretation of republican constitutionalism to develop an "anti-authoritarian" case against the reasoning and result in *Bowers v. Hardwick*.²⁰⁸ For Michelman, American constitutionalism

207. See Michelman, *supra* note 7.

208. Professor Michelman does not use the term "anti-authoritarian," but it is clear from the beginning of his argument that the authoritarian impulse in constitutional jurisprudence is his chief target. He writes:

What ought chiefly to alarm liberals about the *Bowers* decision . . . is the decision's embodiment of an excessively detached and passive judicial stance toward constitutional law. The devastating effect in *Bowers* of a judicial posture of deference to external authority appears in the majority's assumption, plain if not quite explicit in its opinion, that public values meriting enforcement as law are to be uncritically equated with either the formally enacted preferences of a recent legislative or past constitutional majority, or with the received teachings of an historically dominant, supposedly civic, orthodoxy. I will call such a looking backward jurisprudence *authoritarian* because it regards adjudicative actions as legitimate only insofar as dictated by the prior normative utterance, express or implied, of extra-judicial authority.

Id. at 1496.

derives from two anchoring premises about the content of political freedom. The first precept of our constitutional system is that "the American people are politically free inasmuch as they are governed by themselves collectively."²⁰⁹ This principle of collective self-government is joined to a second precept regarding the relationship between political freedom and the rule of law, which holds that "the American people are politically free inasmuch as they are governed by laws and not men [sic]."²¹⁰

Taken together, these two principles produce a distinctive vision of republican politics as such. Under Michelman's definition, politics is "the process of popular law-making";²¹¹ in America, that process is constrained by law, at the level of both "outcome and input, both product and prior condition."²¹²

Professor Michelman goes on to propound the theoretical and practical consequences that flow from his republican understanding of the relation between law and politics. The chief implication that Professor Michelman draws from his reading of American republican thought is that politics in America is a "jurisgenerative"²¹³ politics. In Michelman's analysis, the exercise of political power always also entails the elaboration of legal principle. Rather than rehearse all the details of Michelman's analysis of the jurisgenerative character of American political culture, I want to go straight to the concept around which his more specific arguments revolve. This is the notion of "dialogic constitutionalism."²¹⁴

For Michelman, one can make the most sense of constitutional adjudication if one views it as an institution which "always proceed[s] from within an on-going normative *dialogic* practice."²¹⁵ The object of this national conversation is nothing less than the creation and re-creation of the collective civic identity of the American body politic. The political lexicon that makes this constitutive conversation is a "fund of public normative references conceived as narratives, analogies and other professions of commitment."²¹⁶ As Michelman describes it, we draw on this semiotic source to represent our "identity 'as' a people or political community, that is, as individuals in effectively persuasive, dialogic relation with each other."²¹⁷

209. *Id.* at 1500.

210. *Id.*

211. *Id.* at 1501.

212. *Id.*

213. See *id.* at 1502. Michelman takes the term from Robert Cover. See Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 11 (1983) (arguing that "the creation of legal meaning—'jurisgenesis'—takes place always through an essentially cultural medium").

214. Michelman, *supra* note 7, at 1524–32.

215. *Id.* at 1524 (emphasis added).

216. *Id.* at 1513.

217. *Id.*

In its best moments, dialogic constitutionalism serves as an arena and instrument for fundamental transformations in our collective self-understanding of the content of republican political freedom. For Professor Michelman, the judiciary plays an important “prophetic”²¹⁸ role in this jurisgenerative political process. Michelman faults the Court for abdicating this dialogic responsibility in *Bowers v. Hardwick*. As Michelman sees it, instead of boldly assuming a forward-looking prophetic perspective on the claim pressed by Michael Hardwick, the *Hardwick* Court retreated to the safety of a backward-looking, authoritarian stance.²¹⁹ Had the Court been guided by the principles of jurisgenerative politics, it would have realized that the question of constitutional privacy posed in *Hardwick* was at base a question about the nature of republican citizenship. In short, the *Hardwick* decision might have been decided differently had the Court not betrayed its “prophetic” charge. Instead, the *Hardwick* Court resorted to the authoritarian judicial method. Had the Court remained faithful to the call of republican constitutionalism, it would have comprehended (and communicated to the American body politic) that Michael Hardwick’s appeal to the right of privacy was an assertion of a “political right.”²²⁰

The principles of republican jurisgenesis enable Michelman to offer a political account of the harm the *Hardwick* court was unsuccessfully “enlisted” to redress. The substance of Hardwick’s claim was that he had been unjustly denied due citizenship “by reason of denial of liberty, and specifically of that aspect of liberty we have come to know as privacy.”²²¹ In Michelman’s view, what renders homosexual sodomy statutes constitutionally impermissible is their “meaning” on the one hand, and their “purpose” on the other: “[t]he meaning is to brand and punish as criminal the engagement by homosexual partners, but not heterosexual partners, in certain forms of sexual intimacy, and the

218. See *id.* at 1524. Professor Michelman uses this term to describe the Supreme Court’s intervention in the “political argument” initiated by African-Americans on the question of racial justice. On Michelman’s argument, the Court was “enlisted” by the civil rights movement to act as a jurisprudential prophet in the series of decisions beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954). Using this interpretive model, Michelman writes:

If we imagine the *Brown* Court acting in accordance with the understanding . . . of constitutional adjudication as always proceeding from within an on-going normative dialogic practice, then that Court’s willingness to be [enlisted in the transformative politics of the civil rights movement] must signify its grasp of the enlists and their work as lying within the bounds, if away from the center, of our then constitutional practice. Thus informed, the *Brown* Court spoke in the accents of invention, not of convention; it spoke for the future, criticizing the past; it spoke for law, creating authority; it engaged in political argument.

Michelman, *supra* note 7, at 1524.

219. See *id.* at 1496–99, 1524.

220. *Id.* at 1535.

221. *Id.* at 1532. Michelman finds the textual grounding for the right of privacy in § 1 of the Fourteenth Amendment. See *id.*

purpose is to give expression and effect to a legislative majority's moral rejection of homosexual life."²²² When viewed through the lens of modern republican constitutionalism, neither the meaning nor the purpose of laws criminalizing homosexual sodomy can survive close scrutiny. In rejecting *Hardwick's* claim, the Supreme Court dialogically ratified a political regime in which homosexual sodomy statutes deprive persons "for whom homosexuality is an aspect of identity"²²³ of equal citizenship. The *Hardwick* Court thus gave its constitutional countenance to continued exclusion of gay men and lesbian women from "full and effective participation in the various arenas of public life."²²⁴ For Michelman, both the reasoning and the result in *Hardwick* collide with republican constitutional understandings. On that ground, argues Michelman, *Hardwick* should be overruled.

B. *The Anti-Totalitarian Case Against Bowers v. Hardwick*

In "The Right of Privacy,"²²⁵ Jed Rubenfeld seeks to build an "anti-totalitarian" case against the constitutionality of the homosexual sodomy law upheld in *Hardwick*. Like Michelman, Professor Rubenfeld argues that the right to privacy is best viewed as a "political" right.²²⁶ However, Rubenfeld offers a very different conception of the political field from which the right emerges.

As I have shown above, Professor Michelman traces the political source of privacy doctrine to American republican thought and its commitment to strong citizenship. For Rubenfeld, the political character of the constitutional right to privacy derives from American democratic thought and its commitment to weak statism. In Rubenfeld's view, privacy doctrine is the constitutional expression of a democratic, anti-totalitarian impulse: it seeks to check "the extent of control and direction that the state exercises over the day-to-day conduct of individual lives."²²⁷

The crucial step in Rubenfeld's argument is a methodological claim. He argues that the assumptions that inform most discussions of the right of privacy "[have] invariably missed the real point."²²⁸ Rubenfeld contends that privacy analysis has mistakenly placed undue emphasis on what the laws with which the doctrine is concerned forbid or prohibit. Rubenfeld sets out to discredit this methodology. He takes his theoretical bearings from the critique of the "repressive hypothesis" of Michel Foucault, whose outlines I have already

222. *Id.* at 1533.

223. *Id.*

224. *Id.*

225. Rubenfeld, *supra* note 7, at 799-802.

226. See *id.* at 804 ("The right to privacy is a political doctrine.").

227. *Id.* at 805.

228. *Id.* at 739.

sketched.²²⁹ Adapting Foucault, Rubenfeld argues that the privacy analysis must abandon its formalist obsession with the superficial “negative aspect” of the laws to which the doctrine has traditionally been applied and attend instead to their “positive aspect.”²³⁰ For Rubenfeld, this methodological shift requires a careful micrological account of the “real,” quotidian effects that flow from the law in question.²³¹ As Rubenfeld conceives it, “[t]his affirmative power in the law, lying just below its interdictive surface, must be privacy’s focal point.”²³²

Proceeding within this “positivist” framework, Rubenfeld goes on to offer a revisionist account of several contexts in which privacy doctrine has been applied.²³³ It is Rubenfeld’s discussion of the terms in which an “anti-totalitarian” case for invalidation of homosexual sodomy laws might be cast, however, that interests me here.

Not unexpectedly, it is the productive rather than the prohibitive force of the law challenged in *Bowers v. Hardwick* that makes it constitutionally suspect for Rubenfeld. If obeyed,²³⁴ laws criminalizing homosexual sex “forcibly channel” the individuals to whom they are addressed “into a network of social institutions and relations that will occupy their lives to a substantial degree.”²³⁵ That is, compliance with homosexual sodomy statutes leaves gay men and lesbians no alternative for the expression of their sexuality other than the “reproductive outlets”²³⁶ of child-bearing, marriage and the compelled adoption of heterosexual identity and existence. The “living” or “real force” of these laws is that “they enlist and redirect physical and emotional desires that we do not expect people to suppress.”²³⁷ Rubenfeld argues that as a political matter, the clear and coercive “conditioning effects”²³⁸ of homosexual sodomy statutes may fairly be deemed “totalitarian,” since they involve the use of state power to forcibly, affirmatively occupy and direct individuals’ lives.²³⁹ Understood in these terms, the criminaliza-

229. See *id.* at 770–82. I discuss Foucault’s account of the “productive” theory of power *supra* notes 171–181 and accompanying text.

230. *Id.* at 783.

231. See *id.*

232. *Id.* at 740.

233. See *id.* at 783–92 (discussing the implications of the “productive” account in the privacy case law dealing with reproduction, marriage, education, and residential regulation).

234. The assumption that individuals will conform their conduct to the criminal laws against homosexual sodomy is central to Rubenfeld’s analysis. Rubenfeld emphatically rejects the notion that actual or anticipated refusal to abide by homosexual sodomy laws is a relevant consideration in assessing their constitutionality, since “[a]ll laws . . . are disobeyed.” *Id.* at 800 n.221.

235. *Id.* at 799–800.

236. *Id.* at 800.

237. *Id.*

238. *Id.* at 806.

239. See *id.* at 805–07.

tion of gay and lesbian sex collides with "our commitment to democracy—to a set of political values."²⁴⁰ For Rubinfeld, the right of privacy was designed to protect against this totalitarian state of affairs, in which every aspect of an individual's daily existence becomes an affair of the state.²⁴¹ In Rubinfeld's view, the case against *Hardwick* specifically, and homosexual sodomy statutes generally, derives from what he takes to be the most fundamental precept of American constitutional democracy: namely, that "government must exist for the people, and the people must not become mere instruments of the state."²⁴²

C. A Critique of "Pure" Politics

"Law's Republic" and "The Right of Privacy" both stress the need to accord the question of politics a central place in our thinking about the law challenged in *Bowers v. Hardwick*. By reorienting our attention toward the domain of the political, Rubinfeld and Michelman rightly recognize that the case for constitutional privacy necessarily presupposes some theoretical position regarding the scope and limits of constitutional government, whose terms should be made explicit. However, Michelman's "republican constitutionalism" and Rubinfeld's "democratic constitutionalism" are unable to yield a sufficiently concrete understanding of the political practices that intersect the law of homosexual sodomy. Indeed, one might go further and say that the accounts offered by Rubinfeld and Michelman are in fact not "political" at all.

My reservations about the value of the politico-constitutional accounts of homosexual sodomy law developed in "Law's Republic" and "The Right of Privacy" derive from the three basic concerns that have guided my own discussion. In my view, all three are crucial components of a constitutional analysis of *Hardwick* and the politics of homosexual sodomy law. First, I believe that an adequate political understanding of the constitutional issues at stake in *Hardwick* must bear some recognizable relation to the actual political practices in which laws criminalizing homosexual sodomy are nested. Second, I suggest that a concern to align political theory with political practice in this context requires close attention to the concrete political impact homosexual sodomy laws have on the real, live, flesh-and-blood bodies of the empirical individuals to whom those laws are addressed. Third, and consequently, I submit that a serviceable theoretical account of the precise political dimensions of homosexual sodomy law must provide the

240. *Id.* at 804.

241. See *id.* at 802-05. Although the article concludes with a discussion of the "constitutional grounding of the right to privacy," Rubinfeld in fact never explicitly identifies the constitutional provision that warrants recognition of the right. I take it that he construes the right to privacy as part of the "liberty" interest protected by the due process clauses of the Fifth and Fourteenth Amendments.

242. *Id.* at 807.

terms for elaborating a descriptive account and a normative understanding of the politics of homophobic violence and its constitutional implications.

With these ideas in mind, I want now to discuss what I take to be the most marked flaws in the interpretive models defended in "Law's Republic" and "The Right of Privacy." One of these limitations is methodological, and the other more substantive.²⁴³ A first problem

243. I see a third problem, which should not go unremarked, with the political accounts of constitutional privacy offered by Michelman and Rubinfeld. Michelman and Rubinfeld both insist on framing the substance of the right implicated by homosexual sodomy laws as a right of *privacy*. Since Professor Rubinfeld's analysis simply assumes without argument that the concept of privacy correctly captures the nature of the interests implicated by sodomy law, I will focus my remarks on the more explicit discussion of the privacy rationale in Professor Michelman's discussion of *Hardwick*.

Michelman acknowledges the view that the privacy paradigm "would be a poor basis on which to ground judicial invalidation of laws, such as Georgia's, penalizing homosexual sex." Michelman, *supra* note 7, at 1534. As Michelman summarizes it, this objection to privacy principle makes three main claims. First, the defense of homosexual rights as privacy rights gives credence to the notion that homosexuality involves only the pursuit of sexual pleasure, rather than pursuit of individual identity. Second, the privacy paradigm would not permit gay men and lesbians to assert their sexual identities in the public sphere. Third, the constitutional protection of homosexual sex on privacy grounds would not address the broader discrimination gays and lesbians face, or allow them to engage openly in a transformational politics aimed at bringing the needs and concerns of gay and lesbian citizens into the full light of public consciousness. See *id.*

Michelman concedes that these arguments against the privacy principle possess a certain force "as long as privacy stands for an attitude of hostility towards public life and a need for refuge from and protection against public power." *Id.* Michelman's response to the case against privacy is that it is driven by too narrow and negative an understanding of the concept's political import. A jurisgenerative political account of *Hardwick* in terms of the right of privacy, argues Michelman, embraces a broader and more positive conception. From Michelman's perspective, the whole aim of privacy is to safeguard the right of intimate association in which individuals find and sustain their own meanings of what it means to be a citizen. When viewed within the framework of republican constitutionalism, privacy is a right that "bridge[s] the personal and the political." *Id.* at 1535.

Although it is forcefully argued, the semantic and conceptual reformulation of the right of privacy offered in "Law's Republic" cannot overcome an inherent, and for our purposes decisive, ambiguity. Michelman first urges us to recognize the mediate "link between privacy and citizenship." *Id.* The republican connection between privacy and citizenship permits us to see why the case against the law challenged in *Hardwick* is best framed in the language of privacy. The Georgia sodomy law "[denies] or [impairs] citizenship by exposing to the hazards of criminal prosecution the intimate associations through which personal moral understandings and identities are formed and sustained." *Id.* at 1535-36.

Everything turns, of course, on one's understanding of the concept of "intimate association." Does "intimate association" refer simply to the private sexual conduct prohibited by the law attacked in *Hardwick*? Or is the term intended to refer to other, more public associations that differ from private sexual practice, but that are nonetheless crucial components of the overall process by which homosexual "understandings and identities are formed and sustained"? Michelman never clearly distinguishes between these two, very different forms of personal engagement. It

with the two projects is what might be called their methodological globalism. Michelman and Rubinfeld seem to think that an adequate political model for evaluating the constitutionality of homosexual sodomy law must not only provide a framework for mounting an attack against the result in *Bowers v. Hardwick*, but must also be able to generate a broader principle within which other privacy cases can be brought. Thus, Professor Michelman suggests that a republican conception of politics not only offers a conceptual resource for a constitutional discussion of *Hardwick*; in his view, a grasp of republican jurisgenerative politics "is one that good, contemporary constitutional explanation and analysis cannot do without."²⁴⁴ This perspective leads Professor Michelman to seek a common thread between his account of *Hardwick* and the abortion rights decisions. In Michelman's interpretation, both involve claims for protection of "the privacies of personal refuge and intimacy" that underpin "the independence and authenticity of the citizen's contributions to the collective determinations of public life."²⁴⁵

The commitment to methodological globalism is even more pronounced in Rubinfeld's discussion of "The Right of Privacy." Professor Rubinfeld expends considerable energy explaining and defending the "anti-totalitarian" understanding of constitutional privacy in a wide range of cases other than *Hardwick*.²⁴⁶ For Rubinfeld, judicial invalidation of laws governing such disparate practices as abortion, artificial contraception, interracial marriage, public education, and residential occupation can all be justified on the "general principle[]"²⁴⁷ that they "tend to *take over* the lives of the persons involved: they occupy and preoccupy."²⁴⁸

In arguing that their interpretive models can be used to generate an alternative political account of constitutional privacy with respect to legislation other than the laws against homosexual sodomy, Rubinfeld

should be plain enough, however, that the term "privacy" in fact fails to capture the "public" activities in which many gays and lesbians participate, and which contribute in important ways to their personal and civic identities. In short, it seems odd to extend the language of privacy to apply to membership in gay and lesbian rights organizations, professional societies, student groups and other social networks, or mere patronage of a gay or lesbian bar or coffeehouse. I agree with Michelman that these apparently non-political affiliations are central to the forging of gay and lesbian identities. I am simply insisting that the use of the term "privacy" to describe these activities introduces an avoidable analytical ambiguity, and ultimately confuses as much as it clarifies.

244. *Id.* at 1504.

245. *Id.* at 1535. Indeed, Michelman's account of republican jurisgenerative politics takes him far beyond the constitutional privacy cases. As I have already noted, in the course of developing his argument against *Bowers v. Hardwick*, Michelman offers republican constitutionalist interpretations of judicial decisions regarding racial segregation laws, see *id.* at 1523-24, and anti-pornography ordinances, see *id.* at 1532 & n.161.

246. See Rubinfeld, *supra* note 7, at 787.

247. *Id.* at 788.

248. *Id.* at 784.

and Michelman follow methodological strategies with which all lawyers are familiar. Both authors assume that the force of their theoretical accounts of the right to privacy depends on the success with which they are able to bring the line of decisions to which *Hardwick* presumably belongs within the ambit of a single, comprehensive principle—republican constitutionalism in Michelman's case, democratic constitutionalism in Rubenfeld's. Plainly, the necessity to build their accounts on a theoretical foundation that is expansive enough to justify constitutional privacy doctrine outside the context of *Hardwick* shapes the analysis that Rubenfeld and Michelman offer of the politics of homosexual sodomy law.

Given the sheer taken-for-grantedness of this methodological strategy in American constitutional argument, its hold on the work of Michelman and Rubenfeld is not surprising. However, the globalizing reach of the interpretive models elaborated by Rubenfeld and Michelman leads them to overlook the possibility that the political dimensions of homosexual sodomy law may in fact be discontinuous with the political character of other privacy cases. If the particular political practices that intersect laws against homosexual sodomy diverge from the politics of laws against abortion, contraception, interracial marriage and the like, a theoretical account that aims to further our political understanding of what makes the criminalization of homosexual sodomy constitutionally illegitimate must either take that difference into account, or demonstrate its constitutional irrelevance.

Do the boundaries of the political field in which homosexual sodomy statutes are embedded embody a sectoral specificity that militates against their annexation to the same political domain as the other laws with which the right of privacy has historically been concerned? If they do, what is the nature of this specificity? What consequences does that specificity hold for the terms in which the constitutional defense of the political interests invaded by sodomy law is framed? Rubenfeld and Michelman neither ask nor address these questions. Their failure to do so may be ascribed in part to their methodological commitments.²⁴⁹

249. In Rubenfeld's case, the impulse to analyze privacy cases within a single political context derives in great measure from his very simplistic views of the very notions of "identity" and "difference." Rubenfeld's rather truncated understanding of these two concepts is most vividly illustrated in his discussion of the nature of gay and lesbian sexuality, or more precisely, of the links between sexuality and identity. One of the main critical burdens of Rubenfeld's article is to deconstruct what he terms the "personhood" thesis of privacy. As Rubenfeld develops the thesis, proponents of the personhood theory of constitutional privacy hold that sexuality is so central to individual identity and self-definition that it should be immune from state regulation on privacy grounds. See, e.g., Rubenfeld, *supra* note 7, at 754–55. Rubenfeld devotes considerable attention to the personhood theory of privacy, with the aim of demonstrating its incoherence.

Most notable in this connection is his critique of "personhood's arguments for homosexual rights." *Id.* at 779. In an argument that I will not rehearse here, Rubenfeld contends that personhood's case against the result in *Hardwick* rests on an inadvertent,

But this indifference to the particularity of the politics of homosexual sodomy laws springs from other, more substantive sources.

but nonetheless insidious, claim that “the particularly homosexual aspect of homosexual sex” makes it crucial to the identity of those who practice it. *Id.* at 778–79. Drawing on the theory of Michel Foucault, Rubinfeld accuses those who embrace this view of “[pinning] those who engage in homosexual sex into a fixed identity specified by their *difference* from ‘heterosexuals.’” *Id.* at 779 (emphasis added). Rubinfeld acknowledges that this defense of homosexual rights reflects “the highest degree of respect for those on behalf of whom [it is] made.” *Id.* Nonetheless, he maintains that the assertion that homosexuality is an indispensable part of a gay or lesbian person’s identity is “simply the flip side of the same rigidification of sexual identities by which our society simultaneously inculcates sexual roles, normalizes sexual conduct, and vilifies ‘faggots.’” *Id.* at 781. Rubinfeld concedes that “differences of sexuality, gender and race exist among us,” but insists, relying on Foucault, that these are not differences of identity “until we make them so.” *Id.* In Rubinfeld’s view, homosexual sex should be protected “because it is no different” from heterosexual sex. *Id.*

One might take this claim simply to mean that Rubinfeld does not believe that homosexuality and heterosexuality are or should be deemed different *as a matter of substantive constitutional law*. In my view, however, Rubinfeld wants to make a different and stronger claim about identity and difference as such: that sexual difference does not create identity. Indeed, he goes so far as to urge us to “give up the image of ‘the homosexual’” in favor of that of the more abstract, expansive category of the individual. *Id.* at 801.

This position can be sustained only if it ignores what I take to be a crucial distinction between two very different types of claims about sexual difference. Like Rubinfeld, one could understand the assertion of homosexual difference as an ontological claim: there is a physical difference between homosexual and heterosexual acts that produces a difference in sexual identity. However, one could rest the argument for homosexual difference on a very different ground, and argue that there is a historical difference between the societal treatment and consequences of homosexual acts, which has in turn created a different identity. This assertion of homosexual identity does not necessarily appeal to some common characterological essence that sets those who embrace that identity apart from those who do not; rather, this assertion of homosexual identity derives from a common historical experience of oppression. To state the point another way, the assertion of homosexual identity does not revolve around a claim that homosexuals are *different*, but that they have been treated *differently*.

The argument I have offered against the constitutionality of homosexual sodomy statutes locates one of the chief historical roots of this difference in the phenomenon of homophobic violence. Unlike Rubinfeld, I do not believe that “we” can simply “give up” the idea of homosexual identity. Rubinfeld is certainly correct to say that the idea of a “homosexual” identity is an ideological category and thus false; it by no means follows from this observation, however, that “homosexual” identity is therefore not real. The material reality of homosexual identity has been too forcibly inscribed on the bodies of the individuals to whom it is attached to bear out this latter claim. The hierarchical differentiation or “scaling” of homosexual and heterosexual bodies (in Iris Young’s words) is an undeniable historical fact. See Iris M. Young, *Justice and the Politics of Difference* 122 (1990). To my mind, this history is one that a critical constitutional account of the politics of homosexual sodomy law ought not ignore. Rubinfeld’s discussion of these issues of identity and difference is another instance of the dangers of globalizing logic. Because of his methodological commitments, Rubinfeld’s discussion of *Hardwick* overlooks the *sectoral specificity* of the power relations in which homosexual sodomy law is inscribed. In my view, this specificity can be appreciated only through an analysis that does not ignore or underplay the political and historical fact of sexual difference.

This brings us to a second problem that limits the utility of the interpretive models developed by Michelman and Rubinfeld. "Law's Republic" and "The Right of Privacy" presume a curiously restricted conception of politics. I have already discussed Professor Michelman's jurisgenerative definition of politics as "the process of popular law making."²⁵⁰ Recall that the pivotal term in the constitutional politics elaborated in "Law's Republic" is "dialogue"; Michelman locates the "normative character of politics" in "independence of mind and judgment" and in "authenticity of voice."²⁵¹ Although Michelman admits that some may believe his vision of republican constitutionalism "is just not possible any more, or for us,"²⁵² it is clear that he does not share such an agnostic outlook. The whole goal of Michelman's project is to demonstrate that his republican-inspired constitutional account of *Bowers v. Hardwick* is a faithful rendering of our deepest political aspirations and of much of our actual experience.

Professor Rubinfeld's sense of what constitutes the political is much more difficult to discern. Apart from a few scattered references to "democracy" at the end of his discussion,²⁵³ Rubinfeld never assays a positive definition of politics. To the extent that one can glean a substantive conception of politics from "The Right of Privacy," it is encapsulated in the overwhelmingly negative notion of centralized "state power." For Rubinfeld, it would seem that the very possibility of political agency in the modern period begins and ends with the state.²⁵⁴

To my mind, neither Michelman nor Rubinfeld is sufficiently sensitive to the complex realities of modern politics generally, or to the politics of homosexual sodomy law in particular. In this connection, it is important to remember that the most prominent and persistent feature of the political landscape to which homosexual sodomy law belongs is the phenomenon of homophobic violence. The conceptual vocabularies Rubinfeld and Michelman use to describe the political concerns implicated in *Bowers v. Hardwick* give us no terms with which to understand the political or constitutional significance of the virulent

250. Michelman, *supra* note 7, at 1501.

251. *Id.* at 1504.

252. *Id.* at 1506.

253. See Rubinfeld, *supra* note 7, at 804-06.

254. I find it remarkable that an analysis which relies so heavily on the ideas of Michel Foucault remains wedded to such a restricted statist model of political power. For Rubinfeld, politics seems to be a state-owned monopoly, in which the structural tendency of government power is to expand its reach into every aspect of the lives of its subjects. As has been seen, this state-centered view of the nature of political power finds no support in Foucault's work. See *supra* notes 175-182 and accompanying text. Unlike Rubinfeld's "anti-totalitarian" understanding of constitutional privacy, Michelman's "anti-authoritarian" model expressly insists on a "non-state-centered notion" of republican jurisgenerative politics that occurs "in various arenas of what we know as public life in the broad sense, some nominally political and some not." Michelman, *supra* note 7, at 1531.

violence to which gay men and lesbians have been subjected in America.

This is not to say that Michelman and Rubinfeld are utterly indifferent to the presence of domination as an historical or contemporary fact of American political life. Michelman takes care to note that the dialogic conception of republican politics as a process of popular law-making must confront the possibility that politics will become "a theater of power in which some people stand always in danger of abuse by others."²⁵⁵ However, having alluded to this threat to republican juris-generative politics, Michelman proceeds to ignore its implications for the validity of his dialogic interpretation of American constitutionalism.

In my view, Michelman's neglect of the question of domination seriously impairs his political account of the constitutional stakes involved in *Hardwick*. The political practices in which the criminalization of homosexual sodomy is nested cannot simply be deemed an aberrant, authoritarian betrayal of republican voice and virtue. The politics of homosexual sodomy law is a politics of terror, which cannot be subsumed without remainder under Michelman's dialogic model. The experience of gay and lesbian citizens in American political society teaches us that, as has been noted in another context, "[all] politics is a struggle for power," and that "the ultimate form of power is violence."²⁵⁶ I do not assert that the aspirational impulse that underlies Michelman's treatment of *Hardwick* has no value at all. I do insist, however, that a constitutional scholarship that appeals to a conception of politics in order to build a normative account of what "'our' law"²⁵⁷ might be must start from a sober assessment of what our politics actually is, here and now. Because it lacks an image of the violent backdrop of homosexual sodomy law, the picture Michelman paints of the political regime under which gay men and lesbian women live is fundamentally flawed.

In "The Right of Privacy," the question of domination receives more sustained attention and thus requires more detailed treatment here. As a constitutional critique of political domination, the two central moments in Rubinfeld's "anti-totalitarian" defense of the right of privacy are his discussions of the decisions dealing with legal proscriptions against abortion and interracial marriage. Rubinfeld offers a

255. Michelman, *supra* note 7, at 1501.

256. C. Wright Mills, *The Power Elite* 171 (1956). For an emphatic, but ultimately unpersuasive, rejection of this view regarding the connection between political power and violence, see Hannah Arendt, *On Violence*, in *Crisis of the Republic* 105 (1972). Arendt attempts to make the case for a communicative conception of politics, which resembles the dialogic account articulated by Michelman. A thoroughgoing critique of the Arendtian understanding of political practice may be found in Jürgen Habermas, *Hannah Arendt's Communications Concept of Power*, in *Power* 75 (Steven Lukes ed. 1986).

257. Michelman, *supra* note 7, at 1502.

vivid analysis of the horrors such laws entail,²⁵⁸ of a power that, in Foucault's terms, "seeps into the very grain of individuals, reaches right into their bodies, permeates their gestures, their posture, what they say, how they learn to live . . . with other people."²⁵⁹

However, when Rubinfeld turns to consider how homosexual sodomy statutes affect gays and lesbians, his discussion loses its critical edge. Rubinfeld's references to homosexual sodomy as legal commands that "operate on and put to use an individual's most elemental bodily faculties"²⁶⁰ remain merely citational or gestural. That is, they bear little substantive relation to the real "bio-politics" in which the criminalization of homosexual sodomy is actually lodged. In this connection, it may be useful to recall that for Rubinfeld, the "real force" of these laws is that they direct gays and lesbians into the institutions of compulsory heterosexuality.²⁶¹

In my view, this characterization of the "living force" of homosexual sodomy law is not borne out by actual experience. Close attention to the lived experience of gays and lesbians both before and after the decision in *Hardwick* indicates that the "real force" of the criminaliza-

258. Consider in this connection Rubinfeld's description of the relentless discipline that anti-abortion laws impose on women's bodies:

[A]nti-abortion laws produce [an] affirmative and pronounced bodily intervention: the compulsion to carry a fetus to term, to deliver the baby, and to care for the child in the first years of its life. All of these processes, in their real daily effects, involve without question the most intimate and strenuous exercises of the female body. The woman's body will be subjected to a continuous regimen of diet, exercise, medical examination, and possibly surgical procedures. Her most elemental biological and psychological impulses will be enlisted in the process. In these ways, anti-abortion laws exert power productively over a woman's body and, through the uses to which her body is put, forcefully reshape and direct her life.

Rubinfeld, *supra* note 7, at 789-90.

Rubinfeld articulates the consequences of the laws against interracial marriage in similarly strong terms:

[Anti-miscegenation laws] drive individuals into invidiously differentiated racial identities and normalize the permissible relations between the "superior" and "inferior" groups thus defined. Furthermore, anti-miscegenation laws work on our bodies at a level even deeper perhaps than sexual pleasure: they work on our "blood," looking ultimately to the production of untainted, lily-white issue. Here also, through the enforced creation of distinct genetic types to be raised in equally distinct communities, such laws predispose and form individuals' lives from within.

Id. at 791-92.

259. Foucault, *Prison Talk*, in *Power/Knowledge*, *supra* note 178, at 37, 39 (translation modified by author).

260. Rubinfeld, *supra* note 7, at 800-01.

261. [C]hild-bearing, marriage, and the assumption of a [heterosexual] identity are undertakings that go on for years, define roles, direct activities, operate on or even create intense emotional relations, enlist the body, inform values, and in sum substantially shape the totality of a person's daily life and consciousness.

Id. at 801-02.

tion of homosexual sodomy cuts considerably deeper into the bodies of the men and women to whom they are addressed.²⁶²

Perhaps Rubinfeld is correct to point out that compliance with the laws against homosexual sodomy would force some individuals down the path of compulsory conjugal heterosexuality. But this is not the only or even most likely result of laws against homosexual sodomy. It is not difficult to imagine or document another quite different response to the criminalization of homosexual sex. A first step toward an alternative account of a gay or lesbian life lived in obedience to homosexual sodomy law would be to recognize that "there need be no necessary relationship between sexual practice and sexual identity."²⁶³ The history of gay men and lesbians offers abundant evidence that for many of the individuals who have embraced it, homosexual identity is not primarily erotic, but social and political. Lillian Faderman, for example, has found that the actual historical record indicates that "women who identify themselves as lesbian generally do not view lesbianism as a sexual phenomenon first and foremost."²⁶⁴ Similarly, in her pioneering "Compulsory Heterosexuality and Lesbian Existence," Adrienne Rich has persuasively argued that lesbian identity embraces a broad range of "woman-identified experience."²⁶⁵ On Rich's argument, the central component of this "lesbian continuum" is not a determinate sexuality, but a distinctive sensibility.²⁶⁶

262. Two additional points may be raised in this connection. The first point goes to Rubinfeld's description of the law challenged in *Hardwick*. Rubinfeld asserts (without citation or analysis) that the statute at issue in *Hardwick* was "a proscription of homosexual sex." *Id.* at 778 (emphasis omitted). Strictly speaking, this characterization of the Georgia law is misleading. By its terms, the statute did *not* criminalize some forms of sexual conduct—such as mutual masturbation and kissing—practiced by any number of gay men and lesbians.

A second and more basic point has to do with Rubinfeld's views regarding the nature of the proscription embodied in the Georgia statute. In the sentence from which I have just quoted, Rubinfeld goes on to say that the law challenged in *Hardwick* was "not [a proscription] of homosexual intimacy." *Id.* (emphasis omitted). I believe that this understanding of the Georgia homosexual sodomy law can be sustained only if one clings to a formalist interpretation of the statute, and refuses to delve (in Rubinfeld's words) "below its interdictive surface." *Id.* at 740.

As my discussion of the factual background of *Hardwick* has already indicated, I am persuaded that an understanding of the actual application of the Georgia law does not warrant such a narrow interpretation. Viewed in the light of its political history, a law like that challenged in *Hardwick* may fairly be understood as a proscription not only of homosexual acts, but of homosexual intimacy, whose socio-political form is homosexual solidarity.

263. Jeffrey Weeks, *Questions of Identity*, in *The Cultural Construction of Sexuality* 31, 47 (Pat Caplan ed., 1987).

264. Lillian Faderman, *Surpassing the Love of Men* 142 (1981).

265. Rich, *supra* note 77, at 192.

266. *Id.* at 192 (emphasis omitted). The positions outlined by Faderman and Rich find further support in a recent biography of Harry Hay. Hay was the founder of the Mattachine Society, which gave rise to the modern gay and lesbian rights movement. One of the first tasks of the Mattachine Society was to find a word other than

I have dwelt on the disjunction between sexual acts and sexual identities, because I believe the failure to appreciate the difference between the two provides the best explanation for the curiously truncated hypothetical account Rubinfeld gives of the likely consequences that would flow from adherence to the laws against homosexual sodomy. Rubinfeld's rather speculative claim that the main result of homosexual sodomy laws is that they leave individuals no option outside of compulsory heterosexuality leads him to ignore a very different, and much more likely, scenario. As I read the actual historical record, three alternative possibilities should be considered. First, it is quite likely that something like a "homosexual" identity might continue to be embraced even by individuals who chose to obey the laws criminalizing homoerotic acts. Second, it is not unreasonable to think that the same might be said about the ascription of "homosexual" identity that figured so centrally in the facts of *Hardwick* itself. Individuals would most probably continue to be "marked" as homosexuals even if they fully complied with the proscriptions against homosexual sex. Third, there is good warrant to believe that individuals who either asserted a homosexual identity, or to whom such an identity was imputed, would continue to be vulnerable to the political terror of homophobic violence.

Rubinfeld's account of the political rights implicated by homosexual sodomy law does not help us apprehend or address the likely persistence of homophobic violence even in the face of full compliance with the statutory command. This difficulty in Rubinfeld's analysis is compounded by a limited understanding of the character of the political agency that gives homosexual sodomy laws their brutal force. As I have noted, Rubinfeld seems to think that the workings of the state exhaust the field of the political. I have argued to the contrary that the political constellation in which homosexual sodomy statutes are ensconced involves a much more complex division of labor between public officials and private citizens. It is precisely this network of power relations that forms the backdrop against which the political and constitutional meaning of both homosexual sodomy statutes and homophobic violence must be examined. Because he fails to appreciate the extent to which politics overruns the formal boundaries of the state, Rubinfeld offers too impoverished an account of the concrete political stakes that the criminalization of homosexual sodomy entails for the bodies of real, living individuals.

"homosexual" to describe the nature of the bonds among its members. After an exhaustive search of the extant history, the Mattachine Society settled on the term "homophile." "This term was derived from the New Latin *philia*, meaning friendship, which was in turn from the Greek *philos*, which means loving." Stuart Timmons, *The Trouble with Harry Hay* 149 (1990). This act of linguistic self-determination provides further evidence that gay men and lesbian women have long understood that "homosexual" intimacies are not exclusively, or primarily, erotic, but affiliative and emotional.

Rubinfeld's overlapping conceptions of sexuality, politics, and the state lead his analysis of homosexual sodomy law into debilitating difficulties. Since he overlooks the political violence that surrounds the criminalization of homosexual sodomy, Rubinfeld places undue emphasis on the degree to which the most likely effect of the law challenged in *Hardwick* will be to force gay men and lesbians to assume heterosexual identities, as opposed to simply hiding their homosexual identities. That is, Rubinfeld's political account locates the constitutional illegitimacy of homosexual sodomy laws in the fact that they "enlist and redirect physical and emotional desires that we do not expect people to suppress."²⁶⁷ Rubinfeld would declare such laws invalid because they drive an individual into a certain "way of life." My account of the terror of homophobic violence finds these laws constitutionally invalid neither because they force gay men and lesbians into heterosexual lives, nor because they lead gay men and lesbians to cloak their homosexual lives in secrecy. My analysis finds homosexual sodomy laws constitutionally infirm in that they legitimize the violent deformation and destruction of life itself.

I have shown that the brute fact of homophobic violence is not simply incidental to, but rather utterly absent from the politics of homosexual sodomy statutes depicted in "Law's Republic" and "The Right of Privacy." Michelman's dialogic model and Rubinfeld's disciplinary model ignore the political terror aimed at gay men and lesbians, an oversight that blunts the force of both accounts. Ultimately, the divergence between Michelman's "anti-authoritarianism" or Rubinfeld's "anti-totalitarianism" and the "anti-terrorist" account of homosexual sodomy laws developed here flows from our radically different understandings of the constitutional interests that are at stake. In the final instance, homosexual sodomy laws should be deemed constitutionally suspect not so much because they represent a threat to *individual desires* (Rubinfeld) or *civic identity* (Michelman). Rather, homosexual sodomy laws should be invalidated on constitutional grounds because they legitimize violent acts that pose a clear and present danger to the *physical existence* of those to whom they are addressed.

I am persuaded that the politics of homosexual sodomy statutes is much less "pure," and more routinely "dirty," than Rubinfeld and Michelman seem able to imagine. The most characteristic gesture of the political world in which gay and lesbian citizens live is that of the homophobe's fist bashing in his victim's face. No successful descriptive or normative account of the politics of homosexual sodomy statutes can afford to ignore this bloody reality. Indeed, attention to the pervasive violence that surrounds the applied law of homosexual sodomy must be a first task of critical constitutional analysis. Careful investigation of the terrorist violence that has accompanied homosexual sodomy statutes

267. Rubinfeld, *supra* note 7, at 800.

from their inception permits a deeper understanding of the political implications of these laws than is reflected in "Law's Republic" and "The Right of Privacy." In the final instance, sensitivity to the constitutive links between homophobic violence and the laws against homosexual sodomy produces a firmer foundational understanding of these laws than the discussed rival accounts.

IV. FROM PRIVACY TO POLITICS

Although it has taken a different path than arguments couched in the language of privacy, the account proffered here of homosexual sodomy statutes has ultimately arrived at the same destination. Like the proponents of the right of privacy, I firmly believe that homosexual sodomy laws like the statute upheld in *Bowers v. Hardwick* are illegitimate as a matter of constitutional law. My discussion has broken most markedly with the privacy model by placing greater accent and emphasis on a problem that is anterior to the issue of individual rights, a problem that has traditionally provided an important, but characteristically undertheorized, frame of reference for proponents of privacy. That is, I have chosen a theoretical framework in which the first and focal question for constitutional analysis is not the problem of individual or personal rights, but the question of political power.

I have adopted this approach for four reasons. First, in general, I believe a "political power" model best comports with my own understanding that the chief object of constitutional law in America is to define the scope and limits of legitimate political power. On this view, the primary function of constitutional adjudication is to identify and check unconstitutional uses of political power.

A second reason I have emphasized the question of power rather than that of privacy is because current realities demand such emphasis. Contemporary political developments in the United States have produced nothing short of a "paradigm" shift in the very meaning of the political. The recent history of constitutional politics in America (the women's movement most readily comes to mind) represents a powerful challenge to the strict division between "public" and "private" spheres on which the privacy principle depends. The implications of this challenge are both ideological and institutional. By insisting that the "personal" and "private" are the "public" and "political," feminist theory and practice have forced us to question long-held assumptions about the relations among gender, sexuality, power, and politics. As Iris Marion Young observes, feminism "expresses the principle that no social practices or activities should be excluded as improper subjects for public discussion, expression, or collective choice."²⁶⁸

The rethinking of these assumptions has produced a distinctive

268. Young, *supra* note 249, at 120.

"sexual politics"²⁶⁹ whose influence on the national political consciousness cannot be denied. Discussions of issues regarding sexuality that were conducted in the rhetoric of privacy have increasingly come to be posed as public issues about relations of power and domination.²⁷⁰ Struggles over sexuality and its social meaning are now firmly fixed on our national political agenda. The state, of course, is a key arena of contest over the terms and understandings that inform and determine decisions of public law and policy with respect to sexuality.

It has become increasingly clear that to frame the public issues presented by homosexual sodomy statutes in the language of "privacy" rights is to grasp only one side of the constitutional problem. The stakes, however, are not merely conceptual. As I have argued, reliance on the language of privacy as a framework for constitutional analysis of the intersection of homosexual sodomy statutes and homophobic violence carries other and deeper dangers.²⁷¹ I suggested earlier that the history of the concept of sexual privacy is not the history of a neutral principle. Much as feminist theorists have demonstrated that the concept of privacy is "gendered," I have called attention to the degree to which the concept of privacy is "sexuated":²⁷² for gay men and lesbians, privacy has always represented privation. In short, the rhetoric of privacy has historically functioned to perpetuate the oppressive politics of the "closet": privacy is the ideological substrate of the very secrecy that has forced gay men and lesbians to remain hidden and underground, and thus rendered them vulnerable to private homophobic violence. There is no reason to think that we can rid privacy of its sedimented history.

In my view, these considerations force the recognition that we lose something by continuing to treat the questions of public law and politics posed by the existence of homosexual sodomy statutes exclusively, or even primarily, as a matter of private rights. The issue here is not simply that the categories "[p]ublic and private [have developed] *together*."²⁷³ It is rather a question of exposing the ways in which the violent subjugation of gay men and lesbians in America has been made

269. See Kate Millet, *Sexual Politics* 25 (1970) (describing "sexual politics" as a term which refers to the "relationship of dominance and subordination" between men and women, "whereby males rule females").

270. See, e.g., Catharine A. MacKinnon, *Privacy v. Equality*, in *Feminism Unmodified* 93 (1987) (criticizing privacy doctrine in context of abortion); Adrian Howe, *The Problem of Privatized Injuries: Feminist Strategies for Litigation*, in *At the Boundaries of Law* 148 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991) (arguing that women's "private" injuries be redefined as social injuries); Susan M. Okin, *Gender, the Public and the Private*, in *Political Theory Today* 67 (David Held ed. 1991) (criticizing assumption in mainstream political theory that public and private spheres are readily distinguishable).

271. See discussion *supra* at notes 92-95 and accompanying text.

272. I adapt this term from Rosi Braidotti, *Patterns of Dissonance* 7-8 (1991).

273. Alvin Gouldner, *The Dialectic of Ideology and Technology* 101 (1976) (emphasis supplied).

possible by an exercise of public power cloaked as private prejudice. I have tried to set forth a conceptual vocabulary in which that political interaction, and its constitutional dimensions, can be described.

This brings me to a third reason for my choice of a decidedly political framework for analysis of homosexual sodomy law. Premature emphasis on rights discourse tends to give unnecessary ground to a claim often made in debates about the privacy rights (if any) to be accorded the consensual intimate conduct of gay and lesbian Americans. This argument warns that challenges against the constitutionality of "sodomy" statutes are disguised but aggressive demands for "endorsement" of "their lifestyle." I have framed the issue as involving the use and limits of political power to preempt such a reading of my project in these pages. As I see it, recourse to the *courts* by gay and lesbian Americans is driven not so much by a desire to seek new privileges, as by a desire to end the complicity of the state in old persecutions.

My approach thus partially converges with the view of those legal scholars who have insisted on the importance in constitutional analysis and adjudication of the distinction between a "state power" and an "individual rights" framework.²⁷⁴ Clearly, attention to this distinction carries important implications, not only for the interpretation of particular instances of judicial review, but for the assessment of its institutional legitimacy under our form of government. At the same time, however, I am rather more skeptical than these scholars about the possibility or desirability of any absolute separation of questions of individual rights and state power. In the final instance, assertion of a limit on the use of state power necessarily implies some position regarding the rights of the individuals on whom that power is brought to bear.²⁷⁵ On this un-

274. For a representative statement of the position, see Louis Lusky, *Sidestepping the Principle of Judicial Restraint: Use and Abuse of Taboo in Constitutional Law*, 8 *Cardozo L. Rev.* 219, 221-25 (1986). Professor Lusky faults contemporary judicial review on the grounds that it fails to respect the difference between an "individual rights" and a "state power" model of constitutional jurisprudence. In Professor Lusky's view, the legitimacy of the institution of judicial review itself turns on the degree to which it confines itself to pronouncements about the latter. He states the position in the following terms:

The Court's new constitutional rules commonly take the form of defining new individual rights rather than prescribing new limitations on state or federal power, and the Court now frequently reframes power limitations by declaring that they imply the existence of related individual rights. Recognition of an individual right involves significantly greater judicial intervention than a corresponding limitation on governmental power.

Id. at 221. But see Susan Bandes, *The Negative Constitution: A Critique*, 88 *Mich. L. Rev.* 2271, 2282-87 (1990). Professor Bandes carefully deconstructs the metaphysical infrastructure that subtends the sharp separation between positive and negative rights, and the more general view that our constitution is a charter of negative liberties.

275. This is particularly true in the case of the Eighth Amendment. See Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 *Colum. L. Rev.* 1667, 1677 (1980).

derstanding, positive rights of the individual and negative limitations on state power are the *recto* and *verso* of the same constitutional charter.²⁷⁶ Thus, while my discussion has stressed the degree to which constitutional analysis of homosexual sodomy statutes can be cast as a question of the use and abuse of "state power," I am by no means indifferent to the relation between this body of law and the rights of the individuals whose bodies it aims to contain, coerce or control. To the contrary, my argument has been aimed throughout at building the constitutional case for an individual right of corporal integrity generally, and a right to be free from homophobic violence in particular. Ultimately, however, I remain convinced that neither the "state power" nor the "individual rights" framework, standing alone, can begin to address the tangled cluster of descriptive and normative issues that the existence, operation, and effects of homosexual sodomy statutes present for constitutional law. In order to grasp the complex intersection of homosexual sodomy law and homophobic violence, we must closely attend to the constitutional consequences these practices entail for political power as well as personal rights.

Fourth and finally, one lesson I draw from *Hardwick* is that debates about the rights of gay men and lesbians will continue to take place at the level and in the language of politics, both in and outside the courts. Most particularly, it seems likely that the constitutional case for invalidation of homosexual sodomy laws will continue to meet with objections rooted in claims about our federalism, or more particularly, states' rights. This much is apparent from the language of *Hardwick* itself. In his opinion for the Court, Justice White seemed anxious to avoid "the imposition of the Justices' own . . . values on the States."²⁷⁷ White's stated concern about the consequences that invalidation of the Georgia statute might entail for the balance of power between the states and the federal government is implicitly underscored by his review of the "ancient roots"²⁷⁸ of state laws criminalizing sex between

276. Perhaps the most significant difference between the two approaches lies in the style of reasoning each promotes—it is a difference, as I suggest in the text, of accent and emphasis. However, to the extent that style shapes substance in deep and decisive ways, I must insist that the distinction under discussion is not simply semantic, but embodies different normative orientations.

277. 478 U.S. at 191. White's deferential attitude toward state interests determines the very language in which he frames the issue. This can be seen in the passage from which I quoted in the opening paragraph of this article:

[This case] raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.

Id. at 190.

278. Id. at 192.

persons of the same gender. Inasmuch as the Supreme Court's refusal to declare homosexual sodomy laws invalid derives from a political theory of the relation between federal courts and state legislatures, it would seem after *Hardwick* that this political argument should be met on its own terms.

As I have shown, the argument from privacy is predominantly an axiological case against the legal regulation of private, consensual sexual conduct. It draws on concepts of moral and ethical theory to make claims about sexuality and personhood. The corporal paradigm developed here differs from the privacy framework in that its case against homosexual sodomy laws relies first and primarily on concepts about power and the state taken from political theory. This is so in at least two senses. First, the corporal model elaborated here proceeds from the recognition that like the criminal law generally, sodomy statutes necessarily presuppose a political conception regarding the relationship between the arm of the state and the body of the individual. Second, the corporal model permits us to apprehend the unique way in which homosexual sodomy law has historically promoted and reflected illegitimate power relationships among the citizens who make up the body politic. In my view, close attention to the politics of sodomy statutes illuminates aspects of these laws that will be indispensable to future debate and discussion about their constitutionality after *Hardwick*.

CONCLUSION

Some years ago, Thomas Grey predicted that the Supreme Court would eventually be forced to accord the protections granted under the constitutional right to privacy to gay and lesbian Americans. Professor Grey wrote:

I expect that within a few years fornication and sodomy laws will be found unconstitutional, on something like the very dogma of the right of consenting adults to control their own sex lives that the Court has until now so rigorously avoided. But the real reasons for the decisions will have little to do with any notion in the justices' minds that sexual freedom is essential to the pursuit of happiness. . . . Rather the decisions will respond to the same demands of order and social stability that have produced the contraception and abortion decisions.

. . . [T]he homosexual community is becoming an increasingly public sector of our society. For that community to be governed effectively, it must be recognized as legitimate.²⁷⁹

In *Bowers v. Hardwick*, the Supreme Court broke its silence regarding the constitutional limits of "public" power over the "private" intimacies of consenting adults of the same gender. When it spoke to this question, the Court proved Professor Grey wrong.

279. Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 *Law & Contemp. Probs.*, Summer 1980, at 83, 97.

Nonetheless, Grey's broader observations about the structural social consequences of the legal regime under which gay and lesbian citizens live still hold true. Gay and lesbian Americans continue to be denied full membership in our body politic. The social cost of their exclusion from the corporate life of the American polity has been collected in blood at the hands of those individuals for whom homosexual sodomy statutes are a sign of the state's implicit and effective endorsement of homophobic acts of criminal violence. That price has been paid by the gay and lesbian victims of that violence in the currency of their very bodies.

What lessons are to be drawn from the puzzling persistence of this bloody state of affairs? It may be that American political culture "needs" a gay and lesbian sub-culture of "sexual outlaws"²⁸⁰ in order to "police" the boundaries drawn around those of its citizens whose acts and identities conform to the law.²⁸¹ Perhaps "the homophobia

280. I take this phrase from John Rechy. See John Rechy, *The Sexual Outlaw* (1978).

281. For a similar argument, see Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *Va. L. Rev.* 451 (1974): "It is possible that 'we' want crime. Criminals provide huge positive returns to non-criminals. Nor am I thinking only of trivial cases involving magistrates who gamble, smoke pot, and use prostitutes. Even theft, even murder, helps to establish, by contrast, our rectitude." *Id.* at 465. An earlier theoretical treatment of the idea that "society creates a demand for crime which is met by a corresponding supply" may be found in Friedrich Engels' 1843 work, "Outlines of a Critique of Political Economy." See Marx and Engels on Law 176 (Maureen Cain & Alan Hunt eds., 1979).

For a defense of the constitutionality of laws criminalizing homosexual conduct along these lines, see J. Harvie Wilkinson III and G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 *Cornell L. Rev.* 563 (1977):

The most threatening aspect of homosexuality is its potential to become a viable alternative to heterosexual intimacy. This argument is premised upon the belief that the practice of an alternative mode of sexual relations will inimically affect the predominant mode. Thus, any recognition of a constitutional right to practice homosexuality would undermine the value of heterosexuality and the institutions and practices—conventional marriage and childrearing—associated with it.

This state concern, in our view, should not be minimized. The nuclear, heterosexual family is charged with several of society's most essential functions. . . . Preserving the strength of this basic, organic unit is a central and legitimate end of the police power. The state ought to be concerned that if allegiance to traditional family arrangements declines, society as a whole may well suffer.

Id. at 595.

There is something particularly ominous in the use made in this argument of the word "viable." Etymologically, "viable" comes from the French *vie* or life (itself derived from *vita*, the Latin word for life). In English, its ordinary language meaning is "capable of living." Webster's Third New International Dictionary 2548 (Philip B. Gove ed., unabridged ed., 1986). No great leap of logic is required to see that Wilkinson and White's case for the constitutionality of state efforts to prohibit the homosexual "threat" to heterosexuality could easily support a penalty of death for those whose intimate sexual conduct embodies that "threat." If a state can constitutionally take steps to

directed against both males and females is not arbitrary or gratuitous, but tightly knit into the texture of family, gender, age, class, and race relations."²⁸² It may be, finally, that contemporary American society "could not cease to be homophobic and have its economic and political structures remain unchanged."²⁸³ But the perceived benefit to the law-abiding heterosexual "center" of maintaining a lawless homosexual "margin" exacts additional costs. These costs are not borne by gay and lesbian Americans alone. It takes no special insight to see that the disease that deforms and disfigures the hearts and minds of those who perpetrate homophobic violence is not limited to the agents of that violence. Homophobic violence stunts and cripples the body politic as a whole. As the institutional organ most responsible for adjudicating the line between legitimate and lawless violence, courts are of course not immune to the political pathology that has ravaged our body politic.

The late Robert Cover once wrote that no successful effort to understand legal discourse can fail to come to terms with the non-discursive structures of violence in which the production of legal meaning is imbedded. Every instance of legal interpretation, argued Professor Cover, "takes place in a field of pain and death."²⁸⁴

[T]he normative world-building which constitutes "Law" is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line. . . . [T]he interpretive commitments of officials are realized, indeed, in the flesh.²⁸⁵

In my view, these words do not go far enough. The Supreme Court's failure to appreciate the Eighth Amendment implications of "sodomy" statutes in *Hardwick* requires a further and more damning recognition. After *Hardwick*, it may be said that legal interpretation is more than an occasion for the justification of violence that has occurred or is about to occur. Legal interpretation can and does itself function as an agency, accessory and instrument of violence. From this perspective, *Bowers v. Hardwick* can be read as a graphic contemporary sign of the vengeance with which the language of the law is inscribed or "written" on the bodies of gay and lesbian Americans.

Unless and until we are able to fashion a basis for constitutional protection of the integrity of the bodies of gay men and lesbians, our collective social body will continue to bleed from this senseless, self-

eliminate homosexuality as a "viable alternative to heterosexual intimacy," there is no logical reason to prevent it from literally rendering homosexuals "incapable of living." The most recent Western instance of a legal system that justified precisely this treatment of homosexuals on the basis of arguments quite close to those offered by Wilkinson and White was of course Hitler's Germany. See Richard Plant, *The Pink Triangle* (1986).

282. Eve Kosofsky Sedgwick, *Between Men: English Literature and Male Homosocial Desire* 3-4 (1985).

283. *Id.* at 4.

284. Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1601 (1986).

285. *Id.* at 1605.

inflicted wound. From its inception, homophobia has disfigured our body politic. That is no reason, however, to keep its wounds fresh and festering in the body of our constitutional law. It is my hope that the corporal constitutional analysis of homosexual sodomy statutes offered here may provide a useful conceptual instrument for stanching the continued complicity of law in homophobia's violent flow.