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**Jean L. Cohen: Regulating Intimacy**

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## Introduction

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◆ There have been remarkable changes in the “domain of intimacy” over the past four decades.<sup>1</sup> The massive entry of women (married, single, with and without young children) into the labor force and into public life, the declining importance of marriage with regard to the onset and pursuit of intimate relationships, and the shift in society’s view of reproductive sex from a moral imperative to an ethical choice are some of the relevant processes at work here.<sup>2</sup> For the first time in history, women are coming to be recognized as full legal persons and as equal citizens—a change in status of epochal importance. They are also beginning to insist publicly upon their own agency and happiness in the domain of intimacy and elsewhere. Profound shifts in the cultural meaning of sexuality and gender inform and follow from these developments. So does contestation over the forms and ethics of intimate relationships and over the gendered division of labor.

Conventional attempts to determine the appropriate relation between the state, law, and intimate relationships have been undermined by these developments. It is no longer possible to ignore issues of justice arising in “legitimate” intimate association by relegating them to the domestic sphere of the “private” conjugal family, deemed off-limits to legal intrusion. Nor has the corollary of this approach remained acceptable: that state “morals” legislation should control non- or extramarital intimacies through direct regulation or outright prohibition on the assumption that they are, by definition, immoral. The naturalness of the old public/private dichotomy along with the gender assumptions that informed previous strategies of juridification have largely collapsed.

Indeed, the rights revolution that began in the 1960s to address issues of race and class has also had a major impact in the area of sex/gender and intimate association.<sup>3</sup> Controversial national legislation and the much-debated constitutionalization of key rights protecting privacy and equality in that domain are an expression of this trend.<sup>4</sup> Just how intimate relationships (at home, at work, and elsewhere) are to be regulated by law has become a key stake in America’s infamous culture wars. Reconceiving the purpose and appropriate form of juridification in this domain is thus a pressing theoretical and political concern.

The two dominant approaches to this issue leave us with a dilemma. The classical liberal insists that nothing is more personal, more central to the pursuit of happiness, more intrinsic to individuals’ conception of the good, of who they are and how they want to live, than intimate relation-

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ships involving sex.<sup>5</sup> Surely this should be a matter of personal choice, protected by basic privacy rights. Libertarians agree with the substance of this assessment, although some argue against constitutional privacy protection for intimate association, preferring that traditional status-based regulations be replaced by contractual arrangements—in other words, a shift from public to private ordering.<sup>6</sup> According to this approach, provided there is no force or fraud, the less state regulation and legal interference in this domain, the better.

Yet we know, thanks to feminist interventions, that intimacy can involve gendered power relations and that sexuality can be a medium of injustice. The personal is also political. Many feminist egalitarians thus argue that direct, substantive legal regulation in a domain once considered off-limits to state intrusion—the private family—is indispensable to justice between genders.<sup>7</sup> They also call for legal regulation of sexual expression and intimate relationships in the workplace, in order to address the shifting boundaries between private and public, to undo gender hierarchies, and to prevent sexual harassment and related forms of injustice.<sup>8</sup>

This sort of juridification, however, can pose serious threats to personal privacy, autonomy, and freedom of expression and association. It is apparent that both regulation and nonregulation of intimacy creates normative dilemmas. The principle of equal liberty at the center of modern constitutional democracies seems to disintegrate into its component parts in this domain. We are confronted with the following paradox: legal regulation of sexual expression and intimate personal decisions in the name of justice seem to undermine the personal autonomy and privacy crucial to intimate relationships and to interfere with the pursuit of happiness that is, after all, their purpose. Yet nonregulation permits injustice to go undeterred and unpunished.

This paradox has appeared irresolvable in two key areas of innovative juridification: the development of constitutional privacy rights covering certain intimate personal decisions and relationships, and the creation of sexual harassment law out of civil rights legislation aimed at deterring discrimination on the basis of sex. In both these areas, liberty and equality values seem to clash, and an unattractive choice between legal regulation and nonregulation seems unavoidable.

By bringing together feminist theory, political philosophy, and legal analysis, this book attempts to clarify these dilemmas and provide some tentative solutions. I attempt to show that it is possible to avoid some of the most intractable paradoxes involved in the legal regulation of intimacy by shifting to a new theoretical framework. In particular I argue, first, that despite the demise of the old public/private dichotomy, we still need a normatively compelling and analytically cogent conception of privacy and of privacy rights. Otherwise, the issues involved in the regulation of

intimate relationships cannot be addressed fruitfully because privacy is an enabling condition of intimacy. I argue that it is only one certain conception of privacy that puts personal autonomy, equality, and community in an antinomic relationship. That conception, together with flawed justifications of privacy rights and a cavalier attitude toward privacy by its critics, is partly responsible for the unattractive choices apparently facing those striving for gender justice in the domain of intimacy.

But I also defend a second thesis: that these choices are dictated by a deeper problematic. I have in mind the tendency to approach the issue of regulation from within either of two competing paradigms of law—the liberal model and the welfare model—that structure the possible responses in ways that are one-sided and reciprocally blind. Only if we explore this deeper problem will we be able to grasp the dynamics behind the paradoxes in regulating intimacy. Indeed, I argue that the paradoxes arise in large part from anachronistic paradigmatic conceptions of law, of the relation between state and society, and of the forms legal regulation must take. I argue that what has come to be called the “reflexive” legal paradigm is a much better framework within which to conceptualize the normative choices, political stakes, and appropriate legal forms involved in the regulation of intimacy.

It may be helpful to give a working definition of a legal paradigm before I proceed. A paradigm of law is not a scientific theory or a legal doctrine, but an integrated set of cognitive and normative background assumptions informing legislative and juridical interpretations both of the relationship the law should establish between state and society and of the appropriate forms of legal regulation.<sup>9</sup> Legal paradigms can harden into ideologies if these assumptions blind us to the emergence of new facts or situations and, in doing so, screen out innovative interpretations of rights and principles.

I believe this has occurred with the two legal paradigms that dominate discussion of the juridification of intimacy today. Both are guided by the principle of equal liberty, although they construe it differently. Briefly, the liberal paradigm sees threats to liberty from the state. Accordingly, the state should restrict itself to formally guaranteeing the equal liberty of everyone to pursue in the private sphere their particular conceptions of the good. The private sphere, off-limits to state intervention, is construed as the terrain of freedom. Provided there is no force or fraud, what sorts of relationships people create with each other is not the law’s business. To be sure, personal freedoms must be secured by a set of basic rights that construct people as legal persons. To accomplish this and prevent arbitrariness and unfair privilege, the law must be formal—rule bound, general, and concise—and limited to the function of defining the abstract spheres of action, or liberties, for the autonomous pursuit of personal interests. This form of juridification allegedly establishes a structure for fair inter-

personal and contractual relations, acknowledging private orderings established by autonomous legal subjects.

Although it operates with a similar conception of personal autonomy, theorists and advocates of the welfare paradigm reject the core premise of the liberal model: that the universal principle of equal liberty can be guaranteed through the status of the legal subject, formal law, and constitutionalized autonomy rights. On the assumption that state and society are inextricably fused, juridification in the welfare model is regulatory, interventionist, and direct. Law based on the welfare paradigm is materialized—substantive, particularized, and goal-directed. Unlike formal law, it does not take prior distributions of wealth, power, and status as given. Rather, substantive materialized law, especially when it intends to equalize, does so by dictating outcomes.

It should be obvious from this brief description that within both of these legal paradigms, trade-offs appear necessary between state action and individual agency, between formal and material law, and between personal autonomy/privacy and equality. As my analysis of three case studies shows, this conundrum creates problems for legal opinions and political-theoretical debates in very diverse contexts.

But recently influential theorists have begun to articulate the rudiments of a third paradigm of law that enables one to rethink problems in the domain of intimacy. Indeed, a major thesis of this book is that from the perspective of an emergent reflexive paradigm of law, one can reframe the relevant conflicts and discover that other alternatives are available. Using the reflexive paradigm, I attempt to show that it is possible at least to diminish, if not to fully resolve, the conflict among the warring gods in this domain. In particular I argue that the reflexive paradigm leads to a new understanding of legal regulation and of state/society relations, allowing one to see how state regulation can foster autonomy and recognize plurality while still satisfying the demands of justice.

Gleaning insights from the best available sources on the reflexive/procedural paradigm, I try to develop a conception of a specific type of law: reflexive law as a “postregulatory” mode of regulation.<sup>10</sup> Reflexive law applies procedures to procedures (hence its reflexivity), steering and fostering self-regulation within social institutions. Guided by the principle of equal liberty, reflexive law echoes formal law in its support for social autonomy. Unlike formal law, however, it does not simply adapt to “natural private orderings” or “prior distributions,” or posit “natural liberty.” Instead, it creates and protects “regulated autonomy,” ensuring that the bargaining power, voice, and standing of the interacting individuals in the relevant domain are equalized and oriented by the appropriate principles. Provided certain procedural norms and principles of justice are respected, the relevant parties are free to strike whatever substantive agreements they

wish. Thus unlike material law, reflexive regulation does not entail dictating particular substantive outcomes. Accordingly, juridification on this approach can reduce the tension between autonomy and equality that seems so obdurate from the perspective of the other two legal paradigms and their corresponding forms of law. I attempt to show that there are important elements of this mode of juridification already at work in the domain of intimacy and that they should be fostered when appropriate.

But the reflexive procedural paradigm can also be construed as a “meta-paradigm” allowing for a flexible use or combination of the various forms of law in the appropriate circumstances.<sup>11</sup> It thus allows for a new form of law and a new framework within which the choice among all available forms of juridification can be made. My argument is for legal pluralism and cogent choice among legal forms within a coherent paradigmatic framework. This is important because the state and regulatory regimes are indeed always involved in the domain of intimate association even when the autonomy of the individual is acknowledged. Even where constitutional privacy rights are concerned, one must recognize that they do not only protect personal interests of individuals against the state but also actualize a state interest: the interest in fostering responsible ethical choice and equality of personal autonomy.

The book thus operates on two levels simultaneously. The first addresses the normative, political, and legal debates over privacy rights, equality concerns, and the regulation of intimacy (decisions and relationships) in three specific contexts: reproduction (contraceptive and abortion rights), same-sex relationships, and sexual harassment in the workplace. My focus is on reconceptualizing constitutional privacy rights and demonstrating their importance for each domain, although I acknowledge the relevance, indeed indispensability, of equal protection in each case as well.

The second level of analysis discusses the more fundamental assumptions and issues involved in the choice of paradigmatic approaches to legal regulation of intimacy in each context. A great deal hinges on the mode of legal regulation of a particular intimate matter. Superimposing this perspective on the first allows one to develop convincing justifications for existing rights and to envision a new set of alternatives that, as already indicated, mitigates what otherwise appears as an irreconcilable clash of values when it comes to the freedom for and within intimate relationships and the necessary regulation of intimate association.

## OVERVIEW

Initiated by the landmark 1965 decision in *Griswold v. Connecticut*, in which the Supreme Court explicitly recognized a constitutional right to

privacy for the first time (covering the use of contraception), what is commonly referred to as the “new privacy jurisprudence” has developed around matters of reproductive rights, sexuality, and intimate personal relationships.<sup>12</sup> What was new in this jurisprudence was not the application of the concept of privacy to the marital relationship or to the family construed as an entity. Rather, the innovation lay in the Court’s attempt to articulate constitutional grounds for directly protecting the personal privacy and decisional autonomy of individuals in relation to “intimate” personal concerns, whether these arise within the family setting or outside it.<sup>13</sup>

Prior to *Griswold*, the common law doctrine of family privacy protected the authority and prerogatives of the male head of household over everyone within the family unit against outside interference.<sup>14</sup> Accordingly, statutes challenging family autonomy or family privacy in derogation of common law were narrowly construed, while those reinforcing common law by protecting morals throughout civil society were given a wide latitude.<sup>15</sup> Two assumptions underlay this jurisprudence: state legislation could not violate “natural orderings” of intimate relationships in the private sphere; and the regulatory police powers of the states were limited to matters involving an accepted public purpose and what was in the public interest.<sup>16</sup>

This mode of regulating intimacy had a clear logic: the states’ public purpose was to promote heterosexual marriage and, within that institution, to support reproductive sexuality and shield the family unit. The states’ privileging of heterosexual monogamous marriage and the “natural” patriarchal gender order it institutionalized meant that privacy protection was limited to the nuclear family unit. The “civil death” of the married woman—her lack of legal personality and civic equality—fit this model perfectly.<sup>17</sup> Correspondingly, states had considerable freedom to regulate non- or extramarital intimacies or “public morals.”

The new constitutional privacy analysis turns this approach on its head. It articulates the concept of a right to personal privacy as an individual right of ethical decisional autonomy (to pursue one’s conception of the good), control over access and personal information, and a new conception of the scope of individual privacy that now applies to important aspects of the domain of morals, formerly the special preserve (along with health and safety) of state regulation.<sup>18</sup> The Supreme Court’s decisions overturning state laws on reproductive rights and other aspects of intimate association rest on the relatively recent assumption (since the New Deal) that the federal government has wide regulatory powers, and that constitutional amendments articulating fundamental rights apply to the states as well as to the federal government.<sup>19</sup> Previously it was assumed that government should leave individuals alone unless the exercise of state power advanced a valid public purpose. Now the prevailing premise is that the

government's power should be left undisturbed unless it can be shown that the law infringes upon a discrete fundamental right.<sup>20</sup> Accordingly, the Court's new task has become the specification of those discrete "fundamental," "preferred" liberties that deserve to be protected both from unjust state legislation and against an ever-expanding regulatory federal government.<sup>21</sup> Hence the discourse of fundamental rights.

As juridification of important aspects of the domain of intimacy has begun to shift to the national level, tracking deep cultural and social transformations, a trend has emerged toward the individualization and constitutionalization of matters that in the past had been dealt with under the rubric of family law and states' morals legislation. The recognition of claims to full legal personality and civic equality of women informs this trend. Pluralization of the forms of legitimate intimate association is one of its effects. The assumption that there is one morally correct way to form intimate relationships has been undermined along with the *raison d'être* of a large part of the states' morals legislation. The constitutionalization of individualized privacy rights that are construed as fundamental in the domain of intimacy ascribes to the intimate associates themselves the competence to choose both how to pursue happiness and how to realize their conceptions of the good life. This in turn implies that moral monism (based mostly on religious foundations) has essentially given way to ethical pluralism regarding sex and the forms that intimate relationships may take. At the very least, a new rationale for regulation and juridification in this domain is now called for.

The discovery of fundamental privacy rights in the domain of intimacy, however, raises important philosophical and legal/constitutional issues, and it certainly has not gone uncontested. Indeed, it seems paradoxical that privacy and autonomy rights are being asserted as fundamental in American jurisprudence just when their supporting philosophical arguments seem no longer convincing.<sup>22</sup> Notions of natural rights or natural liberty antecedent to and limiting government have an almost quaint air to them after the linguistic turn in philosophy.<sup>23</sup> The argument that there are essentially private, purely individual matters that concern no one else and hence deserve to be shielded from public scrutiny appears antiquated and difficult to defend. So is the sociological image of the natural, private, prepolitical sphere in the epoch of the interventionist state. Many argue that since the state legally constitutes the domains of action subject to its regulatory power, even the decision not to regulate a particular activity is a political decision rather than the expression of a prior fundamental right. The autonomy or privacy that the law claims to recognize is its own creation. The whole discourse of fundamental privacy rights protecting the individual and her negative liberty against state intervention seems anachronistic.



So does the Court's talk about "substantive due process" privacy rights covering intimate association. Since there is no mention of a right to privacy in the Constitution, the Court's revival of substantive due process analysis seems suspect: it appears to be a strategy to regain the jurisdictional power the Court lost over the economy, in a new area.<sup>24</sup> The constitutionalization and individualization of privacy rights in the domain of intimacy simultaneously constructs new legal persons and a new role for the Courts: the protection of each person's equal liberty regarding intensely personal matters through judicial review of legislation. The growth of the Court's power with respect to the states and other branches of the federal government has not gone unnoticed or uncontested. Indeed, some have come to see the Supreme Court's new role in the intimate domain as yet another lamentable example of "government by the judiciary" to the detriment of democratic representative institutions.<sup>25</sup> Others decry the Court's discretionary power over intimate concerns, arguing that it establishes a new, national form of judicial patriarchy.<sup>26</sup>

This book is not about judicial review. While I believe the issue of judicial power is very serious for constitutional democrats, I bracket this problem and focus instead on the forms of legal regulation and the types of reasoning that should orient courts and legislatures actually engaged in the regulation of intimacy. I try, in short, to present a constructive agenda for such regulation by focusing on the substantive assumptions and legal paradigms that should orient the new approach to privacy rights and to the regulation of intimacy generally.<sup>27</sup>

In political philosophy, two theoretical traditions have stressed the importance of privacy, albeit for different reasons: republicanism and liberalism. The former, primarily concerned with public freedom and active citizenship, argues the importance of protecting a sphere of personal liberty and privacy on *instrumental* grounds: without such protection, democratic citizenship would be insecure and the public space for the exercise of political freedom would tend to become both overextended and undermined.<sup>28</sup>

Liberals, by contrast, insist on the *intrinsic* value of a protected sphere of personal privacy and liberty. They do so usually by invoking the centrality of individual choice and judgment to moral autonomy and/or self-realization. They stress the importance of freedom from intrusion and state regulation when moral deliberation and ethical judgment of personal matters are at stake and when no direct harm to others ensues from one's choices.<sup>29</sup>

But both traditions have relied on a set of core assumptions, ranging from foundationalist and metaphysical arguments for personal autonomy associated with the philosophy of the subject and/or natural rights theory, to a stereotypical conception of gender roles and natural orderings, often

mapped onto an understanding of the private (especially the domestic sphere of the family) as a prepolitical sphere of life. These underlying assumptions determined what each deemed to be essentially private and essentially public. For both, the sanctity of private property (attached to the private family) symbolizes the meaning of privacy and what shields it in the domain of intimacy.<sup>30</sup>

Today, however, such anachronistic theoretical presuppositions have been abandoned by most serious philosophers. Few believe it is possible to find an ultimate ground for norms; the sociohistorical construction of gender roles and identities is widely acknowledged, as is the cultural and social meaning of private and intimate matters and relationships. The idea of natural orderings, or that there is one right way to form and conduct intimate relationships, is no longer convincing. Consequently, neither the boundary between public and private nor any particular conception of the core of personal privacy can be determined or justified by invoking their natural or intrinsic character or by gesturing to what is innate, logically speaking, to the concept of the moral person. In short, the philosophical rug has been pulled out from under the two most important political theoretical defenses of fundamental privacy rights. There no longer exists a knock-down theoretical argument that can ground such rights or supply a principle for determining precisely what they cover.

It is nevertheless my thesis that the new discourse of constitutional privacy rights constitutes an important normative advance and can yield indispensable protection to citizens living in globalized societies. By construing privacy in the domain of intimacy as a matter of individual decisional autonomy (already very different from the “right to be let alone”), the relevant Supreme Court decisions have taken an important if inadequate first step in that direction. However, much of the reasoning involved in privacy jurisprudence is deeply flawed.

In Chapters 1 and 2 I take up the theoretical challenge to articulate a coherent conception of privacy and personal autonomy that I believe is implicit in the Court’s new privacy jurisprudence. I also attempt to develop a constructivist justification of this new conception, free of the baggage of anachronistic philosophical and social assumptions often adduced by the Court to justify its decisions. My purpose is to replace the quasi-metaphysical and foundationalist reasoning presupposed both by the defenders and critics of privacy jurisprudence.

Although important changes have certainly undermined the old boundaries, the public/private distinction has not been abolished. Instead, it is being reconstructed around new, highly contested boundaries in relation to and within intimacy: personal intimate relationships and personal intimate decisions. Indeed, the idea of a right to the privacy of intimate relationships and all that this entails is replacing private property as the

cardinal symbol of personal freedom, symbolizing the boundary of the legitimate scope of governmental authority and of appropriate concern by third parties.

That intimacy requires privacy is obvious: all the main dimensions of privacy, from the informational to issues of access and expressive concerns, are, along with autonomy interests, evoked by this idea. Conversely, if a privacy right is to have any meaning at all, it must at the very least shield intimacy. Thus it is well worth the effort to develop a convincing justification for contemporary privacy rights in this domain.

Nevertheless, the revival of the discourse of privacy and of fundamental liberties in the domain of intimacy appears paradoxical. It looks as if the new constitutional right of privacy devoted to marking off a protected sphere of personal autonomy, personal expression, and control—deemed fundamental and construed as a form of negative liberty—simply transfers an older, now defunct property rhetoric along with the anachronistic assumptions of the liberal paradigm into a new area.<sup>31</sup> Even if we can develop a normatively compelling conception of personal privacy that fits “our” intuitions regarding intimate relationships, reviving the discourse of privacy vis-à-vis a doctrine of fundamental rights on the constitutional level may be wrongheaded. How can the charge of archaism or arbitrariness be avoided when there are no agreed upon criteria to determine just what is fundamental to personhood or just which intimate choices, relationships, and modes of expression are to be covered?

Chapter 1 takes up these questions. There I address the controversy over constitutionalized privacy rights triggered by the Supreme Court decisions in *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and especially *Roe v. Wade*. Through the prism of the debates in political and legal theory over the privacy justification for reproductive rights, and by looking at the relevant Court opinions, I attempt to clarify the theoretical issues at stake here.

I focus in particular on two recent challenges to the privacy justification for reproductive rights, both of which target what are taken to be its conceptual and normative presuppositions, albeit from opposite points of view: one articulated by neocommunitarian critics of liberalism, the other by feminist legal theorists favoring equality jurisprudence. Shifts and instabilities in the concept of privacy and privacy rights become apparent in my discussion of the paradoxes of privacy analysis in this context. The main work of this chapter is to explicate the new conception of privacy implicit in the Court’s constitutionalization of individual privacy rights in this area and to provide a constructivist justification for it that does not rely on anachronistic assumptions. Indeed, I argue that the use of a broad concept of privacy by the Court is not just an imprecise, arbitrary, or merely strategic way of establishing a right to sexual autonomy.<sup>32</sup> Rather,

I maintain that the concept of a right to privacy in relation to intimacy is felicitous and hermeneutically cogent precisely because of its diffuseness and breadth: it does indeed ascribe decisional autonomy and control over access and information to the individual regarding certain intimate matters, but it also speaks to our contemporary cultural imaginary about personal identity and the importance of being able to creatively shape and reshape oneself through intimate relations shielded from the conformist pressures and intrusions of public judgment.

While the criticisms of constitutional privacy analysis are certainly not frivolous, I attempt to demonstrate that most derive from a misunderstanding of what the concept of a right to privacy entails regarding the nature of the private sphere and the notion of the individual it allegedly presupposes. In short, the criticisms succeed only against anachronistic justifications for such a right, but not against my constructivist approach.

I attempt to prove that it is possible to acknowledge the (socially and legally) constructed and historically specific dimensions of a conception of privacy, as well as the relational and situated dimensions of personal autonomy, and nonetheless present convincing arguments for privacy rights on the basis of the reflexive and linguistic turn in law and philosophy. In short, one goal of Chapters 1 and 2 is to redeem the insights of republican and liberal theorists regarding the intrinsic and instrumental importance of privacy on a different theoretical terrain than what such arguments have in the past presupposed. We can develop a cogent constructivist concept of privacy without relying on an individualist ontology, without resurrecting philosophical foundationalist arguments, and without resorting to essentialist presuppositions about gender to justify its scope. This, however, requires shifting to the perspective of the paradigm of reflexive law.

Even a theoretically defensible concept/conception of privacy and personal autonomy in relation to intimacy remains vulnerable to the charge of being sociologically obsolete. On this argument, the twentieth-century institutional realities of complex, differentiated, yet quite interdependent features of a modern social structure make any conception of a private sphere of life that is off-limits to state regulation naive and anachronistic. Even the articulation (by the Supreme Court or by Congress) of individual rights concerning intimate matters and protected by the Constitution or by national statute, can be construed as a form of juridification that shifts regulatory power from one level (states) to another (federal courts, legislators, administrators).

Critics of privacy discourse (often drawing on social construction theory) take this to mean that since “the private” is legally and politically constructed, any discourse of privacy rights securing fundamental liberties against the state is meaningless. In this view, the notion of a prepolitical,

naturally private sphere was always a myth, but it took a vast increase in direct and open state intervention and juridification to dispel it. However, the discourse of intervention and nonintervention, of protecting the individual and her freedom (negative liberty) against the state and its regulatory scope, especially with regard to the domain of intimacy, was always ideological.<sup>33</sup>

The new forms of juridification in the intimate domain have indeed shifted the locus of regulation of intimacy. But the fusion of state and society that this shift allegedly entails is itself a myth. The reasoning of both critics and defenders of privacy analysis in the relevant cases is flawed because both operate with the assumptions of the liberal paradigm of law, although they assess them differently and, in some cases, advocate shifting to direct substantive regulation. I argue that the type of juridification developed within that paradigm (formal rules protecting negative liberty) can be defended on new grounds, free of anachronistic presuppositions regarding a prepolitical private sphere or natural liberty.

Absent the defunct theoretical baggage of the liberal paradigm, moreover, I also attempt to show that some of the paradoxes apparently inherent in this line of privacy analysis dissolve. I have in mind in particular the understanding of the state action doctrine that implies that protection of a negative liberty absolves the state from the responsibility of ensuring the worth of that liberty on the grounds that the state is not responsible for inequalities that arise in the prepolitical private sphere.<sup>34</sup> After deciding *Roe v. Wade*, the Court declared that states have no obligation to provide funding for indigent women who exercise their right to choose, invoking the state action doctrine. I maintain that nothing in the first decision compels the second. Rather, the flawed assumptions about state action, about a prepolitical private sphere composed of equally autonomous individuals, and about the limits to state regulation allegedly entailed by negative liberty informing the Court's decision are the artifacts of an inappropriate paradigmatic understanding of law.

Important forms of regulation intrinsic to the welfare paradigm aimed at ensuring the equal worth of negative liberties can and must supplement liberal privacy rights and present no justification problem once one shifts to the perspective of the third theoretical paradigm. From the standpoint of the reflexive paradigm, it becomes possible to relativize both approaches and, as already indicated, to select cogently among the three types of regulation. And from this perspective, the discourse of fundamentality (justifying constitutional privacy rights as liberties against the state) would not involve the absence of regulation or the hopeless task of determining the scope of an individual right of privacy by discovering what is intrinsic to personhood or essential to an identity. Rather, the task would shift to providing a constructivist articulation of the grounds and acceptable

modes of public regulation of intimacy that everyone could accept in a society committed to personal liberty, gender equality, and ethical pluralism. Moreover, on the reflexive paradigm, fundamental rights would not refer to natural but to constructed autonomy: to the legally recognized discretion and competence imputed to adults to devise and pursue their chosen types of intimate relationships provided certain principles of justice and certain procedures are respected. The relational autonomy that is at stake here need not be construed as natural or somehow inherent in the atomistic individual—it is in part constructed by law (the state). In so constructing and shielding personal autonomy, the law does not thereby protect a stereotypical naturalized gender order regulating intimate relations as private. Rather, my thesis provides a way to consider the appropriate forms of regulation of intimate association on the assumption that the state interest in this domain is not to impose one form of intimacy on everyone; it is to foster civic equality, personal autonomy, and responsibility and to acknowledge what Rawls has called the fact of pluralism and the burdens of judgment in this particular domain of ethical life.

The limits of the liberal form of juridification and the paradoxes of privacy analysis seem incontrovertible, however, when it comes to the issues of group difference that emerge with regard to minority sexual orientations and identities. How can negative liberty and personal privacy protect gays and lesbians from being discriminated against because of their intimate choices or sexual identities? How can privacy rights provide public recognition of the ethical integrity of gay and lesbian relationships?

Indeed, many fear that the strategy of privatization as a mode of juridifying tolerance is dangerous. It risks reinforcing the stigma attached to minority sexual identities and exacerbating discrimination against public displays of disdained forms of life. Moreover, the assumption that sexuality defines identity and is fundamental to personhood, underlying many justifications of privacy analysis in this domain, is a double-edged sword. It can be used to reify group identities and impose them on individuals regardless of their own sense of themselves, thereby undermining personal autonomy.

I take up these issues in Chapter 2. I address the argument that gays and lesbians who invoke privacy rights to secure legal protection against persecution trap themselves in what Eve Sedgwick has called the “epistemology of the closet.”<sup>35</sup> The privacy afforded by such a right appears equivocal, for it seems to presuppose that there is something shameful about one’s sexual desires and intimate relationships that should be kept secret. On this terrain, privacy discourse can turn into a Faustian bargain: a duty of privacy (secrecy, concealment, silence, shame) in exchange for benign treatment (being let alone).

The Supreme Court's privacy analysis in the infamous *Bowers v. Hardwick* case and the first Clinton administration's policy on gays in the military—the subject matter of Chapter 2—substantiate such fears.<sup>36</sup> In *Bowers* the Court invoked a traditional conception of privacy in order to deny claims to include same-sex relationships under its protective shield. The new military policy imposed a duty of privacy, of silence regarding gays' and lesbians' sexual orientation in exchange for tolerating their presence in the armed forces.

By analyzing these instances of juridification of “minority” intimate sexuality, relationships, and identities, and the debates they have generated, I show how, on a particular understanding, legal privacy analysis can indeed serve to undermine personal autonomy, ethical pluralism, and civic equality.

But conceptions of privacy, fundamentality, and personhood vary with the mode of incorporation of difference and the relative thickness (or thinness) of our ethical understanding of national identity. Constitutional regimes and legal paradigms influence and are affected by these conceptions.

Accordingly, I attempt to show that when properly conceptualized, constitutional privacy rights could provide an indispensable shield for “difference” and help protect against the inequality and oppression that result from harsh sex laws. Indeed, I argue that the *denial* of privacy protection for same-sex relationships in *Bowers* fostered oppressive privatization, and the epistemology of the closet in the new military policy. But I also show that while the privacy rights are necessary, they are not sufficient. Regulations enforcing equality principles are indispensable when stigmatized forms of intimate association linked to a particular minority are at issue. In the epoch of multiculturalism, it is no longer justifiable to construe a single model of intimate association as intrinsic to our national identity nor to assume that there is only one morally right way to conduct intimate relationships. There is disagreement over how best to realize the general values appropriate to intimacy: love, care, happiness, pleasure, loyalty, mutuality, trust, responsibility, reciprocity. Decoupling these from one ethical model of intimate relations means that they may be realized in a variety of ways. Everyone's equal liberty, everyone's personal autonomy and privacy, must be respected in this domain. Appropriately construed, privacy and equality rights acknowledge that a plurality of types of intimate association can realize the relevant values as long as they do not violate the moral principles that regulate interaction generally. But one must also beware of reifying or essentializing group identities under the guise of protecting their rights. It is thus necessary to develop a complex regulatory regime that can accommodate ethical plurality. Again we come up against the issue of legal paradigms. Clearly a plural approach regarding legal forms is required here, and the reflexive paradigm permits us to develop precisely

that. In other words, the dilemmas of privacy analysis and the false choice between it and equality analysis dissolve from that perspective, allowing for an innovative combination of regulation and autonomy that can provide for both personal autonomy/privacy and civic equality.

A somewhat different set of problems besets the use of equality principles established in national civil rights laws and in the Fourteenth Amendment, to regulate intimate expression (sexual harassment) in the workplace. The same cultural transformations in sexuality and gender are at issue here as in the new privacy jurisprudence. But unlike the concept of a privacy right, the principles of equality and anti-discrimination are clearly present in the Constitution and in federal statute law. Indeed, it seems that the equality approach would avoid the worst difficulties of privacy analysis, for instead of having to discover unenumerated, discrete fundamental rights, the courts need only establish discrimination on the basis of sex, outlawed by Congress and in violation of the Fourteenth Amendment.

But there's the rub. It is by no means obvious which sexual expression in the workplace constitutes harassment and why any of it should be construed as gender discrimination instead of, say, as the individualized abuse of supervisory power actionable as a tort. Intense debates have erupted over just what the harm of harassment is, over the reasoning behind recent Court rulings that construe even same-sex harassment as discrimination on the basis of sex, and over the more general issue of equality analysis in this area.

I address these debates in Chapter 3. The clash between liberty, privacy, and equality values appears especially intense in the arena of sexual harassment law. Here, too, deep cultural conflict and normative disagreements over gender and sexuality call for renewed reflection and justification of legal regulation. Accordingly, in this chapter I provide a brief overview of the development of sexual harassment law in the United States and a discussion of the various positions in the new debate it has triggered. Feminist philosophers and legal theorists now disagree about how to characterize the harm of sexual harassment. Most want to revise the hegemonic "sex-desire/subordination" model informing legal and corporate regulation, because it tends to confuse sex with sexism and to cast women as victims in need of protection with no sexual agency of their own. It thus leads, paradoxically, both to over- and underregulation.

Yet neither the liberal objections to this model that inspire some feminist proposals nor the postmodern theoretical approach that informs others, each of which I analyze, has led to a satisfactory alternative. Instead, the new debate has spawned a set of antinomic positions, each offering remedies to one redescription of the harm while screening out the others.

Part of the problem lies in the monistic character of each approach. But not even the most comprehensive construal of the harms of harassment



will resolve the dilemmas of regulation unless the effects of particular legal forms on the relevant domain of action are also addressed. Law has its own efficacy and the mode of legal regulation matters very much indeed. I thus shift perspective and discuss the paradigmatic conceptions of law presupposed by the various approaches and informing much legal interpretation. The tendency to over- or underregulate, and to turn equality (secured by regulation) and liberty (secured by nonregulation?) into a zero-sum game can be traced back to these sets of background assumptions. I show that on a different understanding of the harms of harassment and of the actual structure of harassment law, creative reforms that could minimize the conflict between equality and liberty values are quite conceivable.

The three substantive case studies point to the necessity to rethink legal regulation not only in light of new cultural orientations and social practices of intimate association and gender, but also from the standpoint of the paradigmatic assumptions informing legal regulation in this domain. There are serious problems and dilemmas plaguing attempts to regulate intimacy that do not stem from conceptual confusion over the meaning of privacy or equality. Nor can they be attributed to the political and strategic discourses deployed by those defending pluralization of forms of intimate association against those seeking to privilege traditional heterosexual marriage as morally best, once again. For even if one gets the normative principles of justice right regarding what equal liberty must entail in this domain, even if the lawmaker's or interpreter's understanding of public purpose is informed by feminist rather than traditional/stereotypical gender expectations, even if tolerant and solidary attitudes toward diversity prevail, the mode of legal regulation itself can nevertheless have negative consequences.

I address this problematic indirectly in the first two chapters, more explicitly in the third. As noted, I seek to show that dichotomies taken to be unavoidable in the regulation of intimacy—liberty versus equality, regulation versus nonregulation, public versus private orderings, status versus contract, diversity and autonomy versus responsibility—do not derive from the intrinsic nature of intimacy or law. Rather, they must be attributed to assumptions about the appropriate relation between state and society and about the forms that legal regulation must take, inherent in certain legal paradigms. Of course, this raises issues that go well beyond the regulation of intimacy. Indeed, the paradigm problematic was first articulated with regard to dilemmas that arose in the areas of economic regulation, labor, and environmental law.<sup>37</sup> It pertains, in my view, to every legally regulated domain. It is thus necessary to consider the concept of a legal paradigm directly. Accordingly, in Chapter 4 I address the theoretical and normative issues involved in the debate over legal paradigms in general and over the reflexive paradigm of law in particular. Legal theorists,

among them Gunther Teubner, Jürgen Habermas, and Philip Selznick, have argued that a new paradigmatic approach involving “reflexive,” “procedural,” and/or “responsive” law, respectively, offers a way to reframe and even resolve many of the old dichotomies and regulatory paradoxes. Recently, however, the “reflexive/procedural” paradigm has itself become the target of criticism. Three charges in particular have been raised: first, that reflexive law is simply a new form of privatization and/or neocorporatism involving the delegation of authority and decision making to ultimately irresponsible powers; second, that the reflexive/procedural paradigm undermines either the rule of law or democracy or both; and third, that the theory of legal paradigms is itself unconvincing because it rests on an untenable evolutionism.<sup>38</sup>

There is also a debate about whether reflexive law is simply a “context-sensitive” form of central political steering (thus, not so new), or a distinct and innovative form of contextualized political law. On the latter approach, local organizations “make law” and literally develop the content of legal norms in response to outside stimuli (legislation, liability, adjudication) instead of applying norms whose content is developed in the political and legal systems, as the former approach implies.<sup>39</sup> These two competing models of the third paradigm rest on distinct conceptions of society and its relation to regulation: the context-sensitive approach still privileges political steering while the “contextualized law” approach sees society as composed of a multiplicity of equal subsystems, each of which can generate internal norms but none of which can steer the others.

In Chapter 4 I revisit the various approaches to the theory of legal paradigms and reflexive/procedural/responsive law in order to parry these charges and clarify my own conception. I argue that the reflexive form of law is not a panacea but one useful type of regulation in certain circumstances. As to the question whether reflexive law is best described as context-sensitive central steering or as the contextual genesis of legal norms, my position is somewhere in between. I construe society as decentered but argue for stronger possibilities of communication between the various subsystems than what the second approach admits to. I favor publicly articulated general legal norms whose content, however, is developed on the local level through institutional (substantive and procedural) innovation oriented toward effective, fair problem solving. Through the help of mediators, recursive learning within and across organizations on the part of the judiciary, and ultimately by political lawmakers (legislators), becomes possible.<sup>40</sup> Accordingly, the judiciary should be seen as a catalyst for innovation, learning, and communication within and between subsystems. The Court’s regulatory purpose should be to guide and supplement local bases of norm generation and local efforts to change behavior, by creating incentives for compliance with general constitutional principles. However,

as Chapter 3 makes clear, a great deal depends upon how the regulation of self-regulation, how reflexive law, is institutionalized. I also argue that it is necessary to shift to the general standpoint of the reflexive legal paradigm suitably reinterpreted: this provides a meta-perspective that allows one to reframe choices and alternatives among legal forms and to resolve regulatory dilemmas in the domain of intimacy, in a fruitful and productive way.

I was thus delighted to come across a first-rate article on employment discrimination and sexual harassment that develops a similar approach, just published by Susan Sturm.<sup>41</sup> While I encountered this piece too late to address it in depth in this book, I mention it here to indicate that work similar in approach to mine is being done by American legal theorists. Although it employs a different language and uses a two-part rather than a three-part framework, this work is focused on developing the new regulatory legal paradigm with which I am concerned. For example, Sturm distinguishes between a “rule-based enforcement” model and a “dynamic structural” approach to regulation. The latter is exactly parallel to the model of reflexive law that I use.<sup>42</sup> Her article analyzes in wonderful detail how what I call the reflexive form of legal regulation already works and could work better with regard to “second generation” sex discrimination, including sexual harassment, in the workplace. Sturm not only makes a very strong case for this form of regulation in such contexts; she also grants that in different areas and for different problems, other forms of regulation remain appropriate. I bring this intuition to the level of theory: reflexive regulation of self-regulation is a particular legal form that suits some aspects of intimate association, while the reflexive paradigm permits reflection on reflexivity and on legal forms generally, enabling one to select other types of regulation, including nonregulation, when appropriate.

Chapter 5 applies the perspective of my revised conception of the reflexive paradigm to the issues raised in the first three chapters. It shows how this approach resolves these and many other problems that arise regarding the regulation of intimacy under the contemporary presumption of gender equality. Indeed, I am not alone in noting the transformation of intimacy and the changes in the legal regimes that regulate intimate association. Many have registered the decline of the old status regime and the profound cultural and social change that the premise of gender equality has performed. The value of personal autonomy to intimate association has been acknowledged, as has the necessity of fostering and shielding the diverse purposes of intimacy: happiness and experimentation on the one side, with solidarity, mutual care, and responsibility on the other.

Yet the debate over how to respond legally to the changes in this domain remains mired in categories and conceptions that preclude adequate responses and unnecessarily dichotomize choices and values. The conclud-

ing chapter takes up this problem from the optic of the increasingly shrill debate over contractualist versus status-based models of intimate association. Although it partly overlaps with the privacy versus equality dichotomy discussed in the first three chapters, this controversy raises distinct issues. Protagonists in this debate assume that we must choose between private ordering or, alternatively, a reconstructed status regime attuned to contemporary conditions, but one that seeks nonetheless to protect marriage, the family, and vulnerable family members from “disintegrative forces” through direct substantive public ordering of intimate association. From this perspective, the dilemma appears as the tension between letting intimate associates choose their forms of intimacy, including entry and exit conditions (the contractual model), or legally imposing a nationally articulated status regime that ensures responsibility within intimate association and hence restricts choice regarding the relational dynamics, dependencies, and issues of care and solidarity that such association entails. In other words, once again the choice appears to be between contract and status, private and public, deregulation and heavy-handed, intrusive state regulation (to ensure relational responsibility and to protect community). Theoretically, this is expressed in the debates between the law and economics school (the contractualists) and neocommunitarians (the regulators).<sup>43</sup>

The tendency to construe recent trends toward the constitutionalization and individualization of key aspects of intimate association as a wholesale switch from status to contract is indicative of the problem.<sup>44</sup> The shift of large areas of what was once the province of state-controlled family law over to private ordering seems to indicate that the contractualists have won. But the communitarian critique invited by this empirical and conceptual shift is gaining ground, as the discourse of family values and pleas for the revival of status to protect marriage reveal.<sup>45</sup> Even feminist critics of privatization seem forced to deploy the language of status, although they of course assume that its revival along with renewed state regulation will occur on the terrain of gender equality.<sup>46</sup> Their hope is that it is possible to sever status from connotations of gender hierarchy, male dominance, and moralism regarding sex.

Because it structures the contemporary debate over how to regulate intimacy, I discuss the arguments and assumptions of the contractualist and the status-oriented communitarian approach in some detail in Chapter 5. I argue that neither the constitutionalization or individualization of family law nor constitutional privacy analysis need entail a wholesale shift to contractual private orderings. This would be unavoidable only on the premises of the liberal legal paradigm construed as the only alternative to the welfare model. My goal is, once again, to shift the terms of the debate and to show that the reflexive paradigm offers a way to recast the

entire problematic and to construct more appropriate responses than either approach has to offer. Postregulatory regulation, as we shall see, provides for regulated autonomy and regulated privacy—each an oxymoron in the other two paradigmatic approaches. On the meta-paradigm level, the reflexive framework allows one to thematize the likely effects of different modes of regulation. In short, it facilitates a flexible combination of the various forms of law in the appropriate circumstances.<sup>47</sup>

This is important since the domain of intimacy is no longer localizable in the domestic sphere of the private family, partly because women have entered the public spheres of work and politics. Intimate relationships now openly form in a multiplicity of sites, from the workplace and the school to the home, and require different forms of regulation. These can range from outright prohibitions (in criminal and civil law, such as rape laws, laws against spousal violence, and laws against quid pro quo harassment), to constitutional guarantees of personal privacy in the form of negative liberties (protection of decisional autonomy regarding contraception, abortion, sexual history of rape victims, wanted consensual adult sex, and so on), to substantive regulations (such as child-support requirements upon divorce and visitation rights), to reflexive laws fostering collective self-regulation when appropriate (as in the case of sexual harassment in the workplace, divorce mediation procedures, and domestic partnerships and marriage). Just which mode of juridification is the most appropriate to the issue at hand has to be determined contextually, but in a principled manner, guided by norms of civic equality, personal autonomy and democratic citizenship.

In sum, the reflexive paradigm would allow us to shift attention away from the fruitless debate over regulation versus deregulation of intimate relationships, and it would suggest possibilities other than the unattractive choice between privacy or equality, autonomy or responsibility.

We should all be aware of how high the stakes really are in the culture and gender wars being fought on the terrain of law and intimate association. If concerns for due process and personal autonomy are not attended to, if wanted consensual intimate relationships are not shielded from intrusion and unwarranted regulation by the state or third parties, if in the name of justice the personal life of even the most powerful figure in the country can be exposed in court and the mass media, if law intended to secure gender equality can be misused in the politics of scandal, then no one's privacy or liberty is safe. On the other side, if the equal citizenship of all women (including the poor) and "sexual minorities" is not vigorously protected so that their liberties have some value and discriminatory practices are deterred or punished, the law will not function justly. The need for a new approach to the regulation of intimacy should be clear.

Needless to say, my project should be seen as an intervention in what has become a highly politicized field. I am convinced that it is now urgent for political as well as theoretical reasons that the reflexive paradigm of law inform legal regulation of intimate relationships. Otherwise, I fear that the hand of those who want to remoralize and retraditionalize the domain of intimacy through the use of law (threatening plurality, equality, *and* personal autonomy) will be strengthened. The 1990s has seen the emergence of a highly active, well-organized, well-funded brand of conservatism, focused squarely on the domain of intimacy, deploying the rhetoric of moral, religious, and cultural decline. The aim of this movement is to remoralize this domain, by imposing ethical uniformity and conventional gender distinctions masked as family values on everyone, everywhere.

The new social conservatives are more than willing to use the central government and direct substantive regulations to accomplish their purposes. In this they mirror feminist egalitarians enamored with the welfare paradigm, even if the substantive values and goals of the former have little to do with gender equality. Surely this accounts for the bizarre alliances between radical feminists and puritanical cultural conservatives on a number of issues in the domain of intimacy (ranging from pornography regulation and censorship to sexual harassment and even divorce law). Indeed, the former's lack of concern for personal privacy and autonomy plays right into the latter's hands: for those focused on eradicating immorality, privacy is immaterial. Yet reversion to the liberal paradigm, the discourse of privacy, and negative liberty will not help here because it is too vulnerable to the charges of ethical blindness and unable to provide adequate guidelines when regulation really is required. Thus, unless we fully embrace and help develop a paradigm shift, I fear that the fundamentalist minority in the culture wars will succeed in using the regulatory state and law to undermine the personal autonomy, equal citizenship, and voice not only of sexual minorities or nontraditional women, but of everyone. If the politicization of intimacy leads to the remoralization of politics, leaving sex cops at liberty to invade home, schools, and the workplace, the future of our secular, relatively tolerant democracy will be uncertain indeed.