University of Richmond Law Review

Volume 33 | Issue 4 Article 3

2000

Privacy and Celebrity: An Essay on the Nationalization of Intimacy

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ESSAY

PRIVACY AND CELEBRITY: AN ESSAY ON THE NATIONALIZATION OF INTIMACY

Robert F. Nagel *

I.

I start from the rather obvious proposition that in recent years the American public has placed a high value on the right of privacy. This general commitment to privacy was what kept Robert Bork, despite his qualifications, off the Supreme Court, and more recently it was what kept William Clinton, despite his behavior, in the White House. Bork's nomination was a threat to the constitutional right to use contraceptives and to choose abortion, while the impeachment charges against Clinton were a threat to the moral distinction between public political life and private sexual behavior. The power that the idea of privacy holds in contemporary society is, as everyone knows, evident in many other events and trends as well. It fuels the dramatic changes now underway in the cultural and legal status of homosexuality. It underlies challenges to ingrained assumptions about appropriate conduct within the military. Of course, it also sustains the right-to-die movement.

Just as obvious, but more odd, is the fact that our society's high valuation of privacy coexists with an almost equally widespread passion for celebrity status and other forms of public exposure. Indeed, these two apparently opposite commitments often are expressed simultaneously. Clinton, for instance, has always used his prodigious energy and skill to personalize the presidency. Thus it was Clinton, the same man who successfully claimed that his sexual encounters in the oval office were part of his private life, who years earlier in a televised "town meeting" blithely answered one young woman's teasing question about the kind of underwear he wore. The public that revels in the personal quality of its relation-

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ship with President Clinton also insists that his private life is off limits. Conversely, some of those who condemned Bork as a threat to the right to privacy rummaged through his video records to find indications about his personal life.

This simultaneous demand for privacy and publicness is not some peculiarity specific to the American people's admiration for Clinton or their hostility toward Bork. Consider the fact that those who favor the right of access to abortion in professionalized medical settings often believe that states should be precluded from requiring minor females to discuss the abortion decision with parents in the seclusion of the home. Or think about how gay-rights advocates occasionally combine a belief in private sexual liberty with support for the involuntary "outing" of closet homosexuals and, indeed, often demand that school children be exposed to highly public programs about homosexuality.

The very ambivalence of the public's attitude toward privacy contains a certain explanatory potential. Thus, it is often thought that the current popularity of the right to privacy is a reaction against the constant demand for exposure that characterizes modern life. At least since the famous article by Warren and Brandeis in the 1890 *Harvard Law Review*, observers have urged that important moral considerations underlie the individual's need to control the extent to which "thoughts, sentiments, and emotions shall be communicated to others."[1] "Privacy" in this sense is commonly believed to be at special risk under modern conditions chiefly because technological advances provide unprecedented opportunities for gathering and disseminating information. The administrative state compounds these risks because of its prodigious capacity to collect and store information about the lives it regulates and services so pervasively.

Paradoxically, however, this kind of privacy, as much as it seems threatened today, has not found much favor with the public or the courts. Indeed, it is public exposure, the *opposite* of privacy in this conventional sense, that is hungrily sought throughout our culture and is energetically protected by the courts as an aspect of freedom

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890). For more recent, related themes, see Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980), and Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968).

of speech.[2] What the constitutional right to privacy actually protects and what the public apparently wants is not privacy in the conventional sense of insulation or concealment, but a set of personal liberties that are thought to be especially important.[3] These include, of course, the right to sexual freedom (because, some say, sexuality is crucial to individual identity), the right to reproductive freedom (because that freedom, say others, is crucial for preventing the government from asserting totalitarian control over people's lives), the right to refuse medical treatment (because of the importance of bodily autonomy), and so on. Once the right to privacy is understood to refer to certain favored liberties, the paradox of the populace's simultaneous commitments to privacy and publicness dissolves into a single strong commitment to personal liberty. Americans expect to know about President Clinton's underwear because we have a robust tradition of free speech. Similarly, Americans believe Clinton's sex life should be private because we also have a robust tradition of sexual freedom. The issue, conceived in this way, is the familiar one of reconciling two competing strands of a single, overriding commitment to liberty. And in the instance of Clinton's impeachment, that reconciliation is easy: Clinton is not to be sanctioned for his sexual conduct, and people are free to read everything they can about that conduct. Admittedly, the reconciliation is not always so easy. Two liberties, obviously, can be in direct competition, as when the right to picket competes with the right to abortion. But even in these more difficult circumstances, it seems that multiple aspects of a commitment to individual liberty are exposed, not two deeply contradictory impulses that may be feeding on one another.

Under this view of privacy-as-liberty, the development rather late in this century of a constitutional right to privacy tends to be

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2. *See, e.g.*, Reno v. American Civil Liberties Union, 521 U.S. 844, 855 (1997); Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 487-89 (1975); Time, Inc. v. Hill, 385 U.S. 374, 381-82 (1967). The occasional small effort to confine the wild race for publication serves mainly to emphasize how far we have gone as a society in favoring disclosure over privacy. How, for example, did it become an accepted practice for police to invite along private television crews to record forced entries and arrests? *See* Wilson v. Layne, 119 S. Ct. 1692 (1999). For an account of how, in general, the Fourth Amendment has come to stand as a bureaucratic process that authorizes invasions of privacy with insufficient regard for the nature of the information at issue, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761-63, 800-07 (1994).

3. *See generally* Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737 (1989); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445 (1983).

explained on the basis of the new and dangerous opportunities for oppression that were opened up by the regulatory state. For example, Bruce Ackerman explains the right to use contraceptives by posing this question: "Given New Deal activism, what remained of the Founding values of individual self-determination formerly expressed in the language of property and contract?"[4] His answer is that in *Griswold v. Connecticut*,[5] Justice Douglas "mark[ed] out marriage as an appropriate context for re-presenting the continuing constitutional value of liberty inherited from the Founding."[6] In a similar, but even more dramatic vein, Jed Rubenfeld traces the rise of the right to privacy to the fact that "now governmental power has so expanded that it affirmatively shapes our lives with the potential for total control."[7] Interestingly, jurists and free speech theorists have made similar claims about why the right to publish should be given wide protections under the First Amendment. Thus, the images of systematic repression that drove the civil libertarian proposals of thinkers like Thomas Emerson were based on the excesses of mobilized wartime governments here or totalitarian governments abroad.[8]

The notion that the personal liberties called "privacy" and "speech" need special protection because of the broad regulatory powers of modern government is apparently self-evident, possibly because of background influences like George Orwell's *Nineteen Eighty-Four*.[9] We are now far enough past that ominous date to at least consider the possibility, which one would have expected to be congenial all along to supporters of the New Deal and the subsequent expansion of governmental power, that personal liberties may have been enhanced by government activism. Some glaring facts must be taken into account. For example, during significant periods in our history, laws against adultery and homosexuality were widespread and at times severely enforced; today, they are rare or largely unenforced. For most of our history, marital relationships were rigidly defined; today, not only is marriage more easily begun and ended, but a wider range of roles are viewed as compatible with being a spouse or parent. Much the same can be said of the right to publish. Obscenity prosecutions, commonplace only a few decades

4. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 152 (1991).
5. 381 U.S. 479 (1965).
6. ACKERMAN, *supra* note 4, at 155.
7. Rubenfeld, *supra* note 3, at 807.
8. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 205-15 (1970).
9. *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

ago, are now rare. Profanity, fighting words, group vilification, and other forms of speech that were once suppressed are now as routine as bumper stickers. In short, on a historically comparative basis, we are a country awash in the liberties called "privacy" and "speech." The judiciary's efforts to protect individuals from the administrative state have no doubt played some part in causing this flowering (or decay, as you like). But those efforts are also a reflection of the mores of the times. And the high valuation of personal freedoms that is so central a part of those mores might be, at least in part, a political and cultural consequence of the material wealth and economic security generated during the era of the administrative state.

It is understandable, perhaps, that the public, including jurists and legal scholars, might believe that privacy and speech are precarious under modern conditions even if the expansion of these rights is, in fact, being spawned by those same conditions. The abundance and popularity of these liberties mean that people are aware of them, and awareness itself is a precondition to fearing loss. Moreover, not only is it true that the modern state is powerful, but it is also true that within recent memory some of these currently favored liberties were relatively scarce. Still, the easy and largely unexamined belief that the administrative state presents a severe threat to privacy and speech tends to deflect attention from the fact that, to a considerable degree, those liberties have been successfully established and have become widely popular during the era of affirmative government.

In sum, while a misnamed but naturally flourishing version of privacy-as-liberty is honored everywhere as an essential right, "privacy" in its conventional sense is subordinated to an overwhelming demand for unrestrained publication. As the simultaneous insistence on privacy and publicness that is so dramatically embodied in President Clinton illustrates, modern American society energetically protects what may be secure and wantonly tosses away what is probably at risk. From this perspective, it seems possible that the legal prominence of "personal rights" is a consequence of the conditions of modern life as much as it is a protection against those conditions. If so, one question that arises is whether constitutional privacy and public intimacy are related in any way other than as dual aspects of devotion to liberty.

My answer to this question is straightforward. I propose that one aspect of modern life that gives rise to the simultaneous demand for

personal liberty and public intimacy is centralization, both political and cultural. Moreover, I suggest that the expansion of the personal liberty called "privacy" generates a need for more public intimacy, and that, in turn, the growth of public intimacy generates a need for more personal liberty. Finally, I describe how personal liberty and public intimacy produce even greater centralization, thus fueling an implosive cycle.

II.

These are rather grand and, perhaps, improbable claims, but I can begin to explain them with an everyday observation. If you walk down hallways in the buildings of the University of Colorado, where I work, sooner or later you will pass an office with a small sign visible through a glass partition. The sign announces that the office is a "Hate-Free Zone." One might expect that this somewhat self-satisfied declaration would create a stir. On the one hand, it is a proud statement about a very serious matter; on the other, it implies that the rest of the building, no matter how quiet and apparently benign at the moment, is hate-filled. Most people, however, seem to ignore the sign; at least, I have never observed anyone showing a reaction one way or another. This kind of sign, along with others announcing smoke-free zones, drug-free zones, and gun-free zones, are such common occurrences around the country that they seem a natural and unremarkable part of the cultural landscape. They are worth a moment's reflection.

Part of what makes the announcement in the "hate-free" office at the University of Colorado so odd, and almost forlorn, is its extreme localization. This little, glassed-in space–surrounded by so many other offices, and then by other buildings, and then by an unruly town, and then by a vast state and a looming nation–is hate-free. If the jurisdiction is tiny, however, the claim is large. Implicit in the word "free," repeated elsewhere for so many different causes, is a claim of perfection. Hate is not discouraged, not penalized, not minimized, not even regretted. Hate, if only in this little domain, is absent. Herein lies another source of the oddness of these everyday signs, for, in fact, there are drugs and guns in many schools, including those announcing otherwise, and even the good people who work in those hate-free offices cannot all be completely innocent of hatred. As specific as their pronouncements of perfection may be, the signs are not descriptive, but utopian.

The perfectionist impulse, narrowed and localized as it is in a small "hate-free" office, is nevertheless traceable, in part, to national decision-making. Not many years ago, for instance, the Supreme Court invalidated the Colorado anti-gay-rights initiative called "Amendment 2," declaring that the only imaginable explanation for it was the animosity that hundreds of thousands of voters must have felt for homosexuals.[10] Because of this decision and a complex array of other factors, including the successful nationalization of antidiscrimination policies on race, gender, and disability, discrimination against homosexuals has become a prominent item on the agendas of Congress and the President. A national law signed by President Clinton now protects the authority of states to restrict marriage to heterosexual relationships.[11] A range of laws prohibiting employment and housing discrimination against homosexuals has been proposed, but, so far, has not been enacted.[12] Thus, with the three branches of the national government partially fueling and partially frustrating the political program of the gay-rights movement, it was only natural that reformist energy should be redirected at different and smaller jurisdictions. That this energy should eventually be localized in a forlornly small hate-free office is itself partly a reflection of the fact that intermediate state institutions had been rendered morally suspect by the nation's highest court.

As the size of the jurisdiction diminished, however, the scale of reformist aspiration could grow. Large, diverse populations, after all, inevitably contain prejudices and hatreds. It would simply never occur to anyone to label the United States as a whole "hate-free" with respect to homosexuals or virtually any other group. Even at the less utopian level of antidiscrimination policy, the national government has resisted the moral claims of gay-rights advocates. But gay-rights advocates could realistically pursue a more morally ambitious program (including, for instance, the provision of a social center, sensitivity training, etc.) within the much smaller and more homogeneous community of the University. And, at the level of a single office, even the banishment of hatred can be imagined and proclaimed. Thus, to the extent that the

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10. *See* Romer v. Evans, 517 U.S. 620, 634-35 (1996).

11. *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). *See generally* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997).

12. *See, e.g.*, Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997); Civil Rights Amendments Act of 1997, H.R. 365, 105th Cong. (1997).

reformist impulse behind the "hate-free zone" sign is perfectionist, extreme localism is a natural consequence.

If, as I have suggested, the "hate-free" office at the University of Colorado can be seen as a strikingly small jurisdiction aspiring to limited perfection, it has much in common with the constitutional right to personal liberty that has come to be called the "right to privacy." These rights, too, represent the radical localization–in a couple, a family, a school, an individual, or a doctor's office–of a limited set of important matters, such as sexuality, marriage, child-raising, education, contraception, or abortion.[13] Moreover, this localization is at least in part a function of perfectionism, which is evident, for example, in the argument that the right to engage in sexual intimacies is "'central to . . . the development of human personality'"[14] and in the even more exalted argument that the right to abortion enables individuals to define their "own concept of existence, of meaning, of the universe, and of the mystery of human life."[15] The theme in the privacy cases is not that all radically localized decisions will be perfect but that only in extreme localization is there any possibility of personal completion or fulfillment. The right allows for control of a relatively narrow range of behaviors, but the aspiration is utopian.

There is, of course, nothing distinctively modern about the aspiration for personal fulfillment. But, as De Tocqueville foresaw, the availability of material wealth increases the range and scale of human desires.[16] By the second half of this century, masses of Americans could afford to travel, to become educated, to enjoy leisure, and to live in comfort. It is surely no coincidence that it was during this period of unprecedented material well-being that the Supreme Court began announcing and developing the constitutional right to privacy. In earlier less-heady days it was only natural for state and local governments to be considered appropriate settings

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13. One commentator revealingly compared the concept of autonomy in the privacy cases with the idea of sovereignty or nationhood. *See* Feinberg, *supra* note 3, at 446-57. In this scheme, each individual is "a domain or territory in which the self is sovereign." *Id.* at 452. This area includes not only the body itself, but an area of control around the body "analogous perhaps to offshore fishing rights." *Id.* at 453. Thus individuals are conceived of as small sovereign countries that are separated from one another, not by armies, but by a legal right to privacy.

14. Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

15. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

16. *See* ALEXIS DE TOCQUEVILLE, MEMOIR ON PAUPERISM 48-50 (Seymour Drescher trans., Ivan R. Dee, Inc. 1997) (1968).

for decisions about sexual behavior, education, abortion, and so on. The assumption was that individuals' choices and goals should be limited and structured through law and by the political deliberations that went into shaping law. Some, like those forced to bear unwanted children because of prohibitions against abortion, would find their lives changed profoundly, but frustration and imperfection were expected. Collectively-imposed moral constraints were simply one more limitation in a world full of limitations. As aspirations for self-fulfillment grew, however, imperfections created by decision making within these larger jurisdictions began to seem intolerable. The utopian localization inherent in the constitutional right to privacy reflects this broader change in attitude.

The policy of radical localization, established through the Supreme Court's constitutional interpretations, requires individuals to make certain crucial decisions about their identity and moral purpose in relative isolation from the people who make up nearby political communities. Because the most obvious effect of this policy is the allocation of decision-making authority to the individual, it is possible to miss the extraordinary centralization on which this privacy jurisprudence depends. The paradoxical, if obvious, fact is that these decisions to disqualify larger jurisdictions were made by an institution of the national government, itself the largest available jurisdiction. In order for federal judges to determine the appropriate role of state and local governments in decisions that are central to self-definition and self-fulfillment, it is necessary for them to decide matters of, to say the least, considerable intimacy. Thus, the cases routinely contain discussions about the nature of marriage, the basis of the parent/child bond, the experience of dying, the psychological significance of homosexual acts, and the impact of abortion on women and their families. While in some instances the privacy decisions result in radical localization of decision making, in all instances they represent the nationalization of discussion about highly personal matters.

The judiciary's nationalization of intimacy is intellectually possible only as a part of a much broader shift in the public's understanding of the role of the federal government. This shift is a consequence of a complex but familiar set of legal and cultural factors, including the rise and maturation of the regulatory state, the existence of a national electronic media, high mobility rates, secularization, and a reduction in participation in private associations. Because of these and other massive social changes, it has gradually come to seem normal for Congress and the Executive

Branch to take responsibility for matters such as the safety and education of children, the structure of family life, the morality of homosexual conduct, the quality of medical care, and sexual relations at the job site. These specific shifts in policy-making responsibility have been part of a fundamental change in popular assumptions and expectations. It is now widely thought that the central government is responsible not only for material welfare but also for psychic gratification.[17] The Court's policy of radical localization presupposes this centralization of attention and responsibility because it assumes that the federal judiciary has competence and responsibility to evaluate what personal decisions are necessary for individual self-definition and personal fulfillment and also what degree and kind of government control is consistent with those lofty objectives.

It is a sign of how accomplished this centralization is that, while the intermediate jurisdictions represented by state and local governments are perceived as a threat to the utopian aspirations animating the right to privacy, the fact that the national government is asserting jurisdiction over these matters seems a normal fact of life. In fact, the inevitable effect of the Court's policy of extreme localization is to redirect attention and political action on intimate matters to all three institutions of the central government. Constitutionalizing the right to privacy has meant that matters of personal self-fulfillment are now debated and decided when the Senate gives "advice and consent" on the President's nominees to the courts, when Congress takes up proposals to expand or roll back the Court's decisions, and when amendments to the Constitution are proposed.

To summarize, the Court's privacy jurisprudence would be unthinkable except as a part of a more general centralization of power over intimate matters. The effect of the Court's decisions is both to localize and nationalize decisions thought to be deeply personal and pivotal. To a significant degree, then, public consideration of a range of sensitive issues takes place either at the national stage, where even rough reformist aspirations seem threatened, or at some radically localized setting, where the perfectionist impulse runs free within small arenas.

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17. *See generally* JAMES L. NOLAN, JR., THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END (1998).

It is, of course, not possible to be certain about the consequences of this bifurcation of control over intimate issues. But perhaps something can be learned from the strikingly parallel bifurcation created by Americans' simultaneous devotion to privacy and celebrity. As suggested at the outset of this article, these dual commitments have meant that the most intimate aspects of our leaders' lives are exposed at the remote level of national media attention even while it is widely believed that everyone, including those leaders, has a right to make decisions about intimate matters within the isolation of their families. What have been the consequences of this bifurcation of control over personal matters? And what do those consequences imply about the Court's policy of simultaneously nationalizing and localizing our decision making on issues like abortion, sexual behavior, and family life?

III.

The phenomenon of celebrity, like the constitutional right to privacy, represents a form of centralization. Celebrity is a nationalized discourse on highly personal, even intimate matters.[18] The purpose of this discourse is to create an impression of familiarity with individuals who are actually remote figures on the national stage. Ordinary people identify with these celebrities and through them try to achieve some sense of visibility and significance.

Despite the intense identification that can exist between the members of the general public and celebrities, there cannot be, of course, any intimate relationship between them. In fact, the only sources of information about celebrities are printed articles, televised appearances, and the like. The celebrity must create a false appearance of intimacy. The personalized relationship between famous figures and the public, then, is fundamentally a fiction. The fiction is maintained by the scripting and staging of what Daniel Boorstin calls "pseudo-events"–by the use of false and manipulative language that purports to reveal private facts about the celebrity, by displays of public emotionality, and by symbolic acts, such as reaching out to touch members of an audience, that

18. Celebrity is discussed as an aspect of nationalization in C. WRIGHT MILLS, THE POWER ELITE 71-84 (1956), and more recently in RICHARD SCHICKEL, INTIMATE STRANGERS: THE CULTURE OF CELEBRITY 183, 265-75 (1985).

suggest closeness and availability.[19] These tactics keep public attention on the celebrity and establish a superficial sense of common understanding about the celebrity's subjective state. The public can enjoy a sense of connection and significance even while recognizing that the information allowing this experience not only is abstract and false but also is controlled by unseen advisors and publicists. That is, in order to achieve a sense of intimacy at great distance, the public must treat as emotionally significant information that they know to be untestable and essentially contrived.[20] In short, to get the psychic benefits that celebrities can provide, people must suspend their capacity for critical thought and even some of their autonomy.[21] When this submission to a staged narrative is limited and self-aware, it has the quality of playfulness; however, when participants fully lose themselves, their submission seems pathetic, degraded, or even insane.[22]

No matter how false and unsatisfactory the discourse of celebrity may be, it produces a kind of national culture, for even scripted fictions can provide common identifications, aspirations, and understandings.[23] But celebrity, like the national right to privacy, also leads to radical localization or, as it might be called in the cultural context, atomization. Celebrities, after all, remain distant. While people are allowed to view and discuss staged versions of celebrities' private lives, the real celebrity remains largely unknown to the public, and individual members of the public are completely unknown to the celebrity. Even the relationships among members

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19. *See* DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA (1975). On the inherent falseness of celebrity culture, see also SCHICKEL, *supra* note 18, at 7, 9, 18, 25, and P. DAVID MARSHALL, CELEBRITY AND POWER: FAME IN CONTEMPORARY CULTURE 219-40 (1997).

20. *See* MARSHALL, *supra* note 19, at 17-18.

21. Boorstin puts it this way:

> The American citizen thus lives in a world where fantasy is more real than reality, where the image has more dignity than its original. We hardly dare face our bewilderment, because our ambiguous experience is so pleasantly iridescent, and the solace of belief in contrived reality is so thoroughly real.

BOORSTIN, *supra* note 19, at 37.

22. *See id.* The sacrifice of autonomous intellectual judgment is part of what characterizes mass society, where attention is fixated on nationalized issues that are distant from daily life and must be evaluated without either personal experience or the influence of intermediate groups. *See* WILLIAM KORNHAUSER, THE POLITICS OF MASS SOCIETY 43-46, 75 (1959). It is now recognized that, at the extreme, the urge to relate to public personalities and the closely related need to achieve personal exposure can lead to horrific crimes. An early insight into the possible connection between celebrity culture and criminal acts can be found in SCHICKEL, *supra* note 18, at 3-9.

23. *See* SCHICKEL, *supra* note 18, at 141, 265, 275.

of the public that are built on the culture of celebrity are thin, for the saner, more playful participants in that culture understand the fictional quality of their discourse. Hence, the individual remains essentially alone while contemplating the lives of celebrities. The culture of celebrity divides consideration of intimate matters between an unsatisfactory national stage and people's private imaginings.

Indeed, the centralized culture of celebrity tends to deplete other, nearby communicative resources, increasing the isolation of private life. As Richard Sennett points out, because celebrities inevitably remain distant and essentially unknowable, the public demands ever more refined signals about what the famous are "really like."[24] The dismaying result, he claims, is that each display of intimate information leads to further displays, a potentially endless process from which people eventually withdraw into the characteristic passivity of the modern audience.[25] Moreover, Richard Schickel has described how the constant glamorization and excitement surrounding celebrities distracts attention from more immediate real-world events and relationships by making them seem dull and uninteresting.[26] Because what is remote and essentially unverifiable seems central, what can be understood through direct experience or contacts comes to seem less important. The more life is lived through private imaginings about the unconstrained and romanticized opportunities available for celebrities, the less tolerable are the inevitable imperfections of ordinary social existence. Thus, the culture of celebrity diminishes the public life that is available in nearby associations. To revert to my earlier terminology, nationalization produces radical localization.

Because identification with famous figures can compensate for a depleted sense of social connection, moral direction, and even

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24. *See* RICHARD SENNETT, THE FALL OF PUBLIC MAN 195-97 (1977); *cf.* BOORSTIN, *supra* note 19, at 14.

25. *See* SENNETT, *supra* note 24, at 196.

26. *See* SCHICKEL, *supra* note 18, at 63.

> By the time the 1920s ended, our world had not so much changed as it had bifurcated. Or had begun to bifurcate. Our immediate, physical surroundings had not changed, and our immediate personal concerns had not changed–not radically at any rate. We were even still permitted public life of a sort in our communities. But there was this trouble with it: it seemed to be very small potatoes. Its rewards and recognitions seemed paltry compared to what was going on elsewhere, where the images were made, where the truly glamorous made work seem like play and fame was the spur.

Id.; *see also* SENNETT, *supra* note 24, at 183.

political efficacy, this isolation produces powerful needs that increase fascination with celebrities and thus promotes further centralization.[27] Indeed, the paradoxical effect of radical localization is to nurture utopian aspirations. The more existence is private and self-centered, the more perfection seems attainable, and if life should be perfect for each individual, it should be perfect for all. This, of course, is the very egalitarian utopianism that finds a practical outlet in the culture of celebrity.[28] Radical localization produces nationalization.

If celebrities were politically dangerous, this kind of bifurcated culture–at once increasingly atomized and increasingly fixated on national symbols–would bring to mind the ruthless mobilizations that periodically have lead to authoritarian suppression in the modern era.[29] But the main influence of celebrities has to do with the individual's search for validation, excitement, and pleasure in private life, not politics and public policy.[30] Celebrities may draw their power from a weak or even unhealthy culture, but they are not potential tyrants. Except for some special cases (notably the Hitlerian spectacles used to whip up the crowds watching professional wrestling), nothing seems further from authoritarianism than the generally frivolous culture of celebrity. However, to the extent that the bifurcated discourse on the right to privacy entails an implosive dynamic, the possible implications are more troubling because that discourse does involve public policy and political power.

Is there reason to think that the nationalized discourse on intimate matters created by the right to privacy might, like the culture of celebrity, be operating to set up an implosive cycle? At first glance, such a comparison between celebrity and privacy seems

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27. *Cf.* KORNHAUSER, *supra* note 22, at 32, 109. A sense of understanding is projected onto celebrities, like in public opinion polls, when people have become so undifferentiated and disconnected that they have only a weak sense of themselves. *See* MARSHALL, *supra* note 19, at 210.

28. The "perfection" that celebrity holds out is not a perfection of condition but a perfection of excitement and choice—the same ideal of endless psychic potential that underlies the rhetoric of the therapeutic state. *Compare* NOLAN *supra* note 17, at 20, *with* BOORSTIN, *supra* note 19, at 4-5, 118.

29. *See generally* KORNHAUSER, *supra* note 22, at 42 (discussing the relationship between mass society and totalitarianism).

30. Celebrities do, of course, influence politics to a degree. *See* David S. Meyer, *The Challenge of Cultural Elites: Celebrities and Social Movements*, 65 SOC. INQUIRY 181 (1995). It is also true that the line between politician and celebrity is increasingly blurred. *See* MARSHALL, *supra* note 19, at 203-40; Suzanne Keller, *Celebrities and Politics: A New Alliance*, 2 RES. POL. SOC. 145 (1986). Still, the celebrity's main attraction has to do with private pleasure seeking, not national identity and public power.

far-fetched. For one thing, discourse on privacy does not center on personalities in the way that discourse about celebrity does, and, consequently, would not seem to involve the same kinds of emotional investments. Even without identification with specific personalities, however, the national stage can be a potent forum for personal affirmation if devoted to highly personal issues. For instance, the Supreme Court's depiction of the motive behind Colorado's Amendment 2 as "animus" against homosexuals[31] has had profound psychic and symbolic importance for many members of the gay-rights movement who see in that word a vindication of their sexual behavior.[32] A correlative sense of invisibility and rejection has been keenly felt by many who see in that same opinion a repudiation of their own sense of normalcy and morality.[33] Similarly, part of the significance of the Court's emphatic refusal to overrule *Roe v. Wade*[34] was to provide psychological support for the millions of women who in recent decades have forsaken traditional domestic roles in favor of a place in the working world.[35] As for the

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31. *See supra* note 10 and accompanying text.

32. Consider this reaction:

> What was shocking about *Bowers* was the tone of it; the opinion drips with contempt for lesbians and gay men. The disdain and scorn was as raw and uninhibited as it is on the most dangerous American street after dark. . . .
>
> . . . But . . . *Bowers* . . . is dead. It is dead because of the tone of *Romer*. *Romer* treats lesbians and gay men with respect . . . .
>
> . . . .
>
> . . . To explain what I mean, I want to tell you about the first time I read the *Romer* opinion.
>
> It was May 26, 1996, a date I suspect I will always remember. I was sitting on my shabby little couch in my seedy little office . . . .
>
> . . . [T]he Court was speaking not to lawyers, but to the country as a whole. . . . I choked up when I read [the quote from Justice Harlan's dissent in *Plessy*] because I never really believed I would read them in a U.S. Supreme Court opinion. The message could not have been clearer. . . . [S]exual orientation discrimination . . . is just plain wrong, and good people in a civilized society do not countenance it.

Matthew Coles, *The Meaning of* Romer v. Evans, 48 HASTINGS L.J. 1343, 1357-61 (1997) (footnotes omitted).

33. Contributors to the famous symposium, *The End of Democracy? The Judicial Usurpation of Politics*, reacted to *Romer* by saying that the Court "made what used to be its most loyal citizens–religious believers–enemies of the common good," Russell Hittinger, *A Crisis of Legitimacy*, 67 FIRST THINGS 25, 28 (1996), "pronounce[d] the traditional moral teaching of Judaism and Christianity as empty, irrational, and unjustified," Hadley Arkes, *A Culture Corrupted*, 67 FIRST THINGS 30, 32 (1996), and "branded [as] a bigot any citizen who considers homosexuality immoral," Charles W. Colson, *Kingdoms in Conflict*, 67 FIRST THINGS 34, 34 (1996).

34. 410 U.S. 113 (1973).

35. Or so the Court itself seemed to say. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 855-56 (1992).

psychic impact on traditionalists of *Roe* itself, consider the words of one woman, a homemaker, who believed that her own birth had resulted from an unwanted pregnancy, remembering the day she read about the decision in her newspaper: "'And it was [my son] Jamie's birthday. And I sat down, I was very upset. . . . I wanted to cry in a way. . . . All these things in my personal life . . . all came together in one.'"[36]

Because the process of formulating and imposing policies on highly intimate matters inevitably requires that the institutions of the central government make some people feel noticed and validated and others ignored and rejected, national decision makers–like celebrities–can come to be seen as larger than life. Robert Bork was invested by some with devilish traits and intentions and by others with a superhuman intellect. Harry Blackmun was alternatively shot at in his home and hugged in public. One sophisticated journalist said that to thank President Clinton for keeping abortion legal, she would be willing to provide him with sexual gratification.[37] Such intensely personal reactions, growing out of official stands on privacy issues, surely confirm that those issues are significant not only as substantive matters of public policy, but also as symbolic matters of psychic affirmation. Indeed, these reactions indicate that policies on the right to privacy have such psychic meaning that the discourse on privacy and the discourse on celebrity are sometimes indistinguishable.

Nevertheless, the declaration and enforcement of privacy rights at the national level does not at first seem to involve a submission to manipulation and unreality in the way that the culture of celebrity does. Indeed, the debate over the constitutional right to privacy is often couched in philosophical terms. What could be more different, one might wonder, than an essentially trivial and false public fascination with celebrities and a profound constitutional

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36. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 137-38 (1984). Luker quoted another woman as follows:

> While I was pregnant, somebody said something about abortions [being performed] at five months, and I was about four and a half months pregnant at the time, and I thought, "*Five months*! I can feel this baby kicking and moving inside of me and I just heard the heart begin to beat, what do you mean they're giving abortions at five months!"

Id. at 148.

37. *See* Howard Kurtz, *A Reporter with Lust in Her Hearts*, WASH. POST, July 6, 1998, at C1. The statement was made by Nina Burleigh, a former White House correspondent for *Time* magazine. *See id.*

discourse on issues like abortion, homosexuality, and the right to die?

On closer inspection, however, the high political discourse on privacy does seem to involve fictionalized narratives contrived by unseen professionals. For instance, while the American public knows that there are federal rules governing sexual behavior in the workplace, the source of these rules is largely mysterious. They were authorized through an arcane process of statutory interpretation by the federal judiciary; their specific content has been generated largely in various federal administrative agencies that are run by faceless experts who are themselves influenced by lawyers and more experts. The government's rules involve immediate and highly intimate matters, but the authorities who produce these rules, as well as the intellectual processes used by these authorities, are distant and unseen. Most people, of course, accept the rules and try to live by them without much thought about their specific sources. But this submission involves a degree of fictionalization because the rules treat intimate matters in ways that do not accord with ordinary experience. Some of their main premises–for example, that the workplace is an inappropriate place for sexual flirtation or that sexual advances toward women with subordinate status are inherently exploitative–are wildly improbable to most Americans, as was emphatically demonstrated by the success of President Clinton's argument that any sexual improprieties between him and a female intern in his offices were a private matter. Millions of Americans in workplaces across the country nevertheless submit to regulations that must seem to them strange, a mysteriously scripted national account of human sexuality that has intense psychic significance but that is, in important respects, unreal.

Even when privacy rights have a visible author, they have a disconnected, dreamlike quality. Americans, of course, know that the justices of the Supreme Court, especially the late Harry Blackmun, are the source of the constitutional right to abortion. Moreover, the public can read accounts of how these jurists explain the existence of the right. But those accounts are famously and profoundly confusing, accessible–if at all–only to professionals who make claims to specialized understandings about constitutional interpretation, *stare decisis*, and the like. Even where the judicial opinions appeal to kinds of knowledge that should be generally available, as when they describe fundamental American political traditions, the source of the right to abortion remains remote and

obscure. At the extreme, the Court's depictions of those traditions read less like verifiable history than like calculated myth-building. Indeed, the *Casey* decision combines inaccuracy and grandiosity in a way that is not far different from, say, the filmed accounts of the lives of presidential nominees now routinely shown at national political conventions.[38]

More generally, now that the abortion debate has been nationalized, the dominant political rhetoric is increasingly fictionalized. Most people in their daily lives do not see abortion as a mere medical procedure or an exalted attribute of citizenship, but they do not see it as the exact equivalent of murder either. Yet these are the defining polar positions of the national debate.[39] One side defends even partial-birth abortions while the other imagines a constitutional right to life from the moment of conception. Americans live, numbed but morbidly fascinated, under a scripted

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38. Political biographies, of course, take grains of truth and exaggerate them into self-serving melodrama. One part of the melodrama is the depiction of the candidate, whose policy positions have, of course, been deeply compromised and varied through the years, as having been consistently devoted to inspiring ideals. Similarly, in *Casey* the Court describes its privacy decisions by first quoting from a few cases involving such matters as the right to use contraceptives and to educate children; it then depicts these cases as involving "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Id.* at 851. Building quickly to a crescendo, the justices conclude that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* As if this were not enough exaggeration and self-importance for one opinion, the Court then declares that, "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Id.* at 852.

A second component of the propagandistic biography is the portrayal of the candidate's life story as heroic–showing the candidate rising from humble circumstances, overcoming enormous adversity, and standing as a bulwark against social and political disintegration. A similar, if not more grandiose, institutional biography of the Supreme Court's role in the abortion controversy is offered in *Casey*. The Court in *Roe*, say the *Casey* justices, called "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Id.* at 867. This brave endeavor was then threatened by "political pressure," even "fire." *Id.* In response, the Court remained "steadfast" to those who had accepted the "rule of law." *Id.* at 868. This "promise of constancy," the "obligation of this promise," binds the justices still, for a "willing breach of it would be nothing less than a breach of faith." *Id.* Like any hero, of course, the Court is not concerned that such a breach of faith would affect self-interest. "The Court's concern with legitimacy is not for the sake of the Court . . . ." *Id.* No! What is at stake is nothing so mundane as the power of the judiciary to enforce its will. On the contrary, what is at stake is the American people's belief in themselves as "a Nation of people who aspire to live according to the rule of law." *Id.*

39. *See* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 160-70 (1991) (describing and attempting to explain "the eclipse of the middle").

national account of abortion that does not accord with ordinary experience and moral intuition.

There are many reasons why national policies on issues like sexual behavior and abortion do not track common understandings. For one thing, a discourse carried on at that distance is inevitably funneled through national opinion leaders whose lives have been dominated by intense interest in a narrow set of issues. Moreover, these leaders are influenced by the relatively extreme demands of the energized components of their membership, and this energetic component is likely to be seeking in national policy not only substantive results but also a personalized symbolism. Like public relations advisors to celebrities, these leaders and the experts on whom they rely contrive events and manipulate language to produce a script that calls attention to their issues in an exaggerated way. Even as the terms of this debate become more intimate and extreme, they mean less and so must be inflated yet again. In 1991, the nation was shocked by the allegations, made and explored in nationally televised confirmation hearings, that Clarence Thomas used explicit sexual language in conversations with Anita Hill, an employee of his agency. By 1999, the same shock value could not be produced by Independent Counsel Kenneth Starr's lengthy and detailed account of specific sexual acts committed by President Clinton with White House intern Monica Lewinsky, an account made available to all in interminable televised reports, in book form, and on the Internet. Or, to use a different kind of illustration, in 1992, Congress debated whether to reinstate the so-called "trimester scheme" imposed on the nation by *Roe v. Wade* and then abandoned by the Court in *Casey*.[40] This debate required public consideration of the consequences and wisdom of restricting abortions prior to approximately the sixth month of pregnancy. By 1996, Congress was debating the Partial-Birth Abortion Ban Act,[41] a debate that required both an explicit description and a moral defense of a procedure whereby the fetus's head is crushed while the fetus is emerging from the birth canal.[42] People cannot help, of course, but pay attention to information about Clinton's sexual behavior or the gruesome details of late-term abortions, but intimate policy issues, like the intimate details of celebrities' lives, remain essentially

40. *See* Freedom of Choice Act of 1992, S. 25, 102d Cong. (1992).
41. H.R. 1833, 104th Cong. (1996).
42. *See id.*

distant and abstract so that more detail is constantly needed. Even as they watch, people withdraw in embarrassment and dismay.

They tend, however, not to withdraw into more localized political and associational settings where privacy issues might be debated with more moderation and more sense of reality. The glamour and excess of nationalized policy-making delegitimizes intermediate decision makers either directly (by limiting their jurisdiction) or indirectly (by making the terminology of immediate experience seem common, dull, or even prejudiced). While watching the national debate, therefore, people turn away from nearby social interactions toward the seclusion of their own private lives.

These private lives, of course, cannot be lived as if there were no national debate on intimate matters. They are inevitably influenced by the unconstrained ideological standards set by the national debate on privacy. The greater this influence, the less tolerable are the remaining compromises imposed by society. The process of utopian withdrawal builds on itself. Just as fascination with celebrity increases in response to the atomization that celebrity causes, the withdrawal caused by the nationalization of privacy policy unleashes a perfectionism that builds back toward the grand stage of national policy-making.

In promoting and, indeed, romanticizing the term "privacy," the institutions of the national government promote the illusion that individuals are sovereign jurisdictions,[43] entitled to and able to exercise the most significant personal liberties without concern for others. Under this illusion, each person lives in a separate glassed-in space, freed from frustration and compromise in a jurisdiction so small that it is possible to imagine a costless perfection. And this utopianism eventually finds its outlet again in the coercive rules mandated by the central government.

Americans, therefore, increasingly understand intimate matters from the vantage points of two opposite dream states–one where standards are impersonally scripted and collective, the other where autonomous individuals are free to pursue their happiness without consequences for others. Both of these states are false and inevitably dissatisfying, and the danger is that the oscillation between them is implosive, that atomized individuals will increasingly try to realize their utopian aspirations by subjecting their most personal needs

43. *See generally* Feinberg, *supra* note 3.

and understandings to the ungrounded scripts of national regulation.

IV.

Notwithstanding the bleak depiction just offered, I recognize that the bifurcation of discourse about private matters can be–and in influential circles generally is–viewed as a healthy development. In fact, there is virtual unanimity in our culture that individuals, along with those closest to them, are the right venue for immediate control over personal decisions. Moreover, even if the extent to which centralized regulation shapes and constrains those personal decisions is not fully appreciated, a national forum on privacy issues is widely accepted as appropriate. Indeed, the consensus, at least in most intellectual circles, is that discourse at that level is likely to be more enlightened and less parochial than the discourse available at the state and local levels. Even the exaggeration, the posturing, and the abstraction of nationalized debate can be seen as advantages because they allow for the kind of vividness and inspiration necessary for high moralism and intense politics. And I do not deny that centralized discourse can have these advantages. Just such advantages, for example, characterized the civil rights movement of the 1960s, a movement that undoubtedly produced great social advances on issues, like marriage and education, that have profoundly personal aspects. When nationalized moral direction of this kind is combined with a strong legal commitment to cordon off areas for autonomous personal decision-making, the combination is powerfully attractive. It is not hard to see why American political culture so highly values both the nationalization of intimacy and what it calls the right to privacy.

Like any complex social phenomenon, our nationalized discourse on intimate matters can have great advantages at the same time that it poses dangers. Indeed, the advantages may create the dangers. Confident, realistic, self-reliant individuals–the kind who can make good personal decisions and also keep the excesses of centralized political discourse in perspective–tend to emerge from the intermediate terrain that bifurcation gradually consumes. Perhaps more than its many advocates appreciate, then, the successes of currently dominant model might depend on the degree to which it has so far triumphed only incompletely.

The implosive dynamic that I have tried to describe is, therefore, troubling. Already there are obvious signs of political passivity,

selfishness, and moralistic collectivism. To some degree the citizenry is now an audience, submitting its sense of reality to a national discourse while withdrawing into private dreams of perfect satisfaction. Worse, as I have tried to explain, there are reasons to think that this is a process that builds on itself. Needless to say, American society remains amazingly varied, layered, and healthy. The danger, then, is real but limited by the rich experiential resources still available to people in their immediate social interactions. Efforts to create national solutions to the problems of personal life, as powerfully attractive as they can be, deplete those resources.