

LIBERALISM AND FUNDAMENTAL CONSTITUTIONAL RIGHTS

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In their comments on Jeffrie Murphy's discussion of Legal Moralism and Liberalism, Jean Hampton and Herbert Morris focus primarily on Murphy's claim that there is deep conflict between the harm principle and the retributive theory of punishment. If such conflicts exist, they are especially important since many liberal scholars have defended both of these principles.¹ But Murphy claims that there is yet another important tension in liberal theory, between the harm principle and the doctrine of "fundamental rights constitutionalism," which places certain central rights beyond the direct reach of the democratic process by embedding them deeply in our legal system's most fundamental rule of recognition.

Murphy argues that liberals can provide an adequate defense of fundamental constitutional rights only by focusing on the substantive content of such rights. For example, in reference to the Supreme Court case *Bowers v. Hardwick*,² he writes that the dissenting judges, whose arguments in this case are praised by many liberal scholars, see sexual freedom as deeply significant, and akin to religious freedom. Conversely, the majority viewed sex as a relatively trivial recreational liberty. Murphy argues that the individual right to privacy in consensual sexual choices should be defended in terms of the fundamental value that such choices have to individuals, and that this right is based on the central personal and moral significance of sexuality.

Such a strategy for the defense of fundamental constitutional rights requires a fairly determinate account of what is of value in a human life, since the content of these rights is to be determined by the content of a broader theory of value. Many liberal theorists have been reluctant to offer such an account. Incorporating a completely articulated value theory risks parochialism, since members of a pluralistic society like ours do not agree about many central

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1. Among those who defend both is Joel Feinberg, in whose honor this symposium was arranged. See especially Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING* (1974); and JOEL FEINBERG, 1 THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1985) [hereinafter HARM TO OTHERS]; JOEL FEINBERG, 2 THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985) [hereinafter OFFENSE TO OTHERS]; JOEL FEINBERG, 3 THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF (1986) [hereinafter HARM TO SELF]; JOEL FEINBERG, 4 THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988) [hereinafter HARMLESS WRONGDOING].

2. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

moral questions. It would be inappropriate for the courts to impose the moral views of some, on others who do not share them.³ For similar reasons, liberal theorists have argued, the courts should not refer to such values in articulating the foundations of fundamental rights and liberties. But critics of liberalism have urged that some important rights and liberties cannot be effectively defended on morally neutral grounds. If not, then a liberal theory of fundamental rights will need to refer to a substantive moral theory. Unlike political liberties like freedom of political speech, sexual liberty cannot be defended in terms of its constitutive importance for free and democratic political institutions. Thus, argues Murphy, if we wish to support constitutional protections for non-political rights and liberties, we must speak of the important role that these liberties play in people's lives.

My deep respect for Murphy's work prompts me to wonder how he can have arrived at such an unappealing understanding of the philosophical underpinnings of fundamental constitutional rights. Even if one is not optimistic about the possibility that such rights could be derived from neutral fundamental principles of constitutional law,⁴ there are other alternatives to be considered before it will be appropriate to retreat to Murphy's view that fundamental rights should be defended in terms of the particular human values these rights protect. Liberal legal theorists have often strived to occupy a middle place between the impotence of radical moral neutrality on the one hand, and the dogmatism of legal moralism on the other.⁵ Murphy does not argue for ordinary legal moralism, but I will argue that the view he defends here leans perilously far in that direction.

LIBERAL THEORIES OF FUNDAMENTAL RIGHTS

It is well, however, to begin with points of agreement. As Murphy insists, it may indeed be necessary for liberal political theorists to offer at least a minimal account of morality and the human good if they hope to provide an adequate defense of fundamental constitutional rights.⁶ But most traditional liberals, even so-called "neutrality liberals" like Ronald Dworkin and John Rawls, recognize this and incorporate such a theory. Rawls, for example, insists that his index of primary goods constitutes a "thin theory of the good."⁷ The primary goods, he believes, comprise a list of all-purpose means needed by each member of any society, regardless of his or her particular comprehensive

3. John Rawls offers a version of this argument in *POLITICAL LIBERALISM*, Lectures I, II, and III (1993) [hereinafter *POLITICAL LIBERALISM*]. See also, JOHN RAWLS, *A THEORY OF JUSTICE* ch. III (1971) [hereinafter *A THEORY OF JUSTICE*].

4. See HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS* 3, 3-48 (1961). Cass Sunstein argues against a "neutral" theory of constitutional law in *CASS SUNSTEIN, THE PARTIAL CONSTITUTION* (1993). For a discussion of different senses in which laws and policy might be neutral, see JOSEPH RAZ, *THE MORALITY OF FREEDOM*, ch. 5 (1986).

5. See, e.g., H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

6. Others who have argued for this claim include Jeremy Waldron, in *Legislation and Moral Neutrality*, in *LIBERAL NEUTRALITY* 61-83 (Robert Goodin & Andrew Reeve eds., 1989); Martha Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 *POL. THEORY* 202 (1992), and Jean Hampton, *Should Political Philosophy Be Done Without Metaphysics?*, 99 *ETHICS* 791 (1989).

7. RAWLS, *POLITICAL LIBERALISM*, *supra* note 3, at 178.

understanding of what is of value in human life.⁸ Dworkin, who insists that every individual in society possesses a fundamental right to equal concern and respect, also relies to some extent on a view of human well being that presupposes that individuals have an interest in possessing such a right.⁹ Some theorists entirely reject the notion that liberal jurisprudence should be morally neutral: Joel Feinberg's elegant defense of liberalism in *The Moral Limits of the Criminal Law* draws on quite a determinate conception of the moral value of individual autonomy.¹⁰

However, in giving an account of fundamental rights, the theorists mentioned above sharply distinguish between two classes of moral obligations. Some obligations, like the obligation not to harm others, can legitimately be enforced with legal sanctions. Others, like the obligation to be polite or charitable, cannot legitimately be enforced.¹¹ This distinction effectively defines the scope of a liberal conception of fundamental rights. Individuals have the ability, within broad limits, to make their own choices and determine the shape of their own lives without legal interference. According to Feinberg, for instance, the harm and offense principles define this distinction.¹² According to Rawls, the fundamental constitutional liberties are among the primary goods.¹³ And according to Dworkin, fundamental liberties flow from the basic individual right to equal concern and respect.¹⁴

Allen Buchanan offers yet another liberal defense of fundamental rights: in an important early paper Buchanan claims that all rational individuals possess a higher-order interest in maintaining conditions in which rational revision and critical self reflection on their fundamental evaluative conception is possible.¹⁵ According to Buchanan, the fundamental constitutional rights are necessary constituents of any political society that hopes to allow its members the liberty to form, and to rationally revise and pursue a conception of the good. Liberties of thought and discussion are necessary conditions, without which individuals will not be epistemically justified in settling on an evaluative conception. Liberties of movement and other civil liberties are necessary for people who wish to enact their critically-refined values, and to pursue the ends they come to regard as choiceworthy. Like Mill's earlier argument against autonomy-

8. See RAWLS, POLITICAL LIBERALISM, *supra* note 3; and RAWLS, A THEORY OF JUSTICE, *supra* note 3.

9. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

10. FEINBERG, HARM TO SELF, *supra* note 1.

11. Politeness and charity are uncontroversial members of this set, since it is impossible to compel others to be polite or charitable. It is possible, of course, to compel others to perform polite and charitable acts. But one hesitates to call such acts truly polite or charitable if they are done under threat of sanction. When we train children by compelling them to perform polite acts, this is done in the hope that they will eventually become polite people. Aristotle clearly describes the distinction between virtuous behavior and the possession of a moral virtue. See ARISTOTLE, THE NICHOMACHEAN ETHICS (Terrance Irwin trans., 1985).

12. FEINBERG, 1-4 THE MORAL LIMITS OF THE CRIMINAL LAW, *supra* note 1.

13. RAWLS, POLITICAL LIBERALISM, Lecture V, *supra* note 3, at 173-211.

14. DWORKIN, *supra* note 9.

15. Allen E. Buchanan, *Revisability and Rational Choice*, 5 CANADIAN J. OF PHIL. 395 (1975). This early articulation of Buchanan's view provides a stark and articulate defense of this liberal conception of rights. Buchanan has since qualified his acceptance of the argument advocated in this early paper, but one finds a similar argument in Rawls' recent work. See RAWLS, POLITICAL LIBERALISM: Lecture V, *supra* note 3, at 178-95.

restricting legislation in *On Liberty*,¹⁶ the logic of Buchanan's argument implies that liberty must be in place *first*, else we will not have adequate epistemic justification for the values we come to accept. Defense of these liberties as constituents of a theory of virtue may then provide reinforcement, but not initial justification for fundamental rights.

There is an important difference between such theories of fundamental rights and Professor Murphy's alternative: rather than focusing on the specific good to be protected by constitutionally guaranteed rights, as Murphy recommends, liberal theorists have focused on the more general value for individuals of the liberty, within reasonable limits, to pursue their conception of the good life. Different people will rationally arrive at different values, and will accordingly adopt different plans and practices. Liberals have traditionally argued that it is simply wrong to enforce a single way of life on all members of pluralistic societies.¹⁷ Such arguments are not agnostic, nor truly neutral in their evaluative underpinnings,¹⁸ but neither do they focus on the specific value of particular virtues. Nor do such arguments base claims of fundamental right on their constitutive importance to free democratic institutions. Instead, many liberals have argued that it is restrictions on liberty, not liberties themselves, that must be justified. This point is powerfully articulated by Joel Feinberg as a *presumption in favor of liberty*.¹⁹

THE PRESUMPTION IN FAVOR OF LIBERTY

A "*presumption in favor of liberty*" implies that when lawmakers consider legislation that would limit individual liberty, the burden lies on the state to show that there is a legitimate purpose to be achieved by such restriction. It is then a task for legislators and jurists, but also for philosophers and political theorists, to determine which state purposes are sufficiently weighty that they justify such a limitation on individual liberty. As a general strategy, the presumption in favor of liberty could be accepted as a procedural assumption by both liberals and at least some conservatives. While "Feinbergian" liberals are distinguished by the fact that they will countenance the infringement of liberty only when this is necessary to prevent harm or serious offense to others, more conservative jurists could agree with the general presumption, while arguing that a wider range of state interests may justify limitations on liberty. For example, legal paternalists or moralists might argue that the state has a legitimate interest in protecting individuals from their own imprudence, or in preventing harmless vices. Paternalist and moralist views are

16. JOHN STEWART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., 1978). See also Immanuel Kant, *On The Common Saying: "This May Be True in Theory, but It Does not Apply in Practice,"* reprinted in *KANT'S POLITICAL WRITINGS* 61 (Hans Reiss ed., 1970).

17. The argument as stated here closely resembles Rawls' version in *RAWLS, POLITICAL LIBERALISM*, *supra* note 3, at 4-22. One may, however, accept this portion of the argument without investing in other features of Rawls' view.

18. This is true even of Rawls supposedly neutral and free-standing view. Many, I believe, have taken Rawls at his word when he claims that the liberal theory of justice he articulates is "free-standing," and that it "excludes ideals," and have not recognized Rawls' frank acknowledgment that his view does involve, and on several levels, a theory of the human good. See especially Lecture V in *RAWLS, POLITICAL LIBERALISM*, *supra* note 3. Perhaps, however, Rawls himself has not recognized the degree to which the substantive commitments of liberalism compromise the neutrality and free-standingness of his view.

19. FEINBERG, *HARM TO OTHERS*, *supra* note 1, at 14-16, 206-14.

hardly liberal, but need not imply the rejection of a presumption in favor of individual liberty.

A *presumption* in favor of liberty represents a far less radical commitment than a claim that liberty has absolute or lexical priority whenever it comes in conflict with competing values. Some libertarian theorists have argued that liberty does have categorical priority, so that whenever liberty comes in conflict with other values, it will always override or "trump" them.²⁰ Starting with a Feinbergian presumption, one might arrive, after consideration of alternate principles, at the conclusion that liberty has overriding value, as these authors assert. But the claim that liberty has such priority cannot be the starting point for deliberation of this sort. Such a claim must be given supporting arguments of its own. To assert from the start that there are no values sufficiently weighty that their protection could ever justify the infringement of liberty would inappropriately shut off the crucial question before it could even be addressed.²¹

It matters a great deal where the burden of proof lies: Is it up to the state to demonstrate that there is an overriding *state* interest at stake, or is it up to the individual to show that the human values protected by individual rights are of overriding importance? Murphy's proposal that fundamental rights should be defended in terms of the particular human values they protect may be taken to favor the state's claim to limit liberty over the individual's claim to be left alone. It is not enough that the activities I cherish are harmless to others: it may still be necessary, Murphy implies, to demonstrate that they are truly valuable and worthy of respect. My possession of a right may consequently depend on my ability to articulate and explain the fundamental value it protects.

CONSTITUTIONAL PRESUMPTIONS: COMPETING VIEWS

This aspect of Murphy's view has several noteworthy proponents, including Robert Bork.²² Because it places the burden of proof on the individual rather than on the state, such a strategy sharply restricts the sphere of constitutionally protected liberty. For example, Bork argues that there is no general First Amendment protection for freedom of expression, but rather a very narrow protection for political speech:

Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of

20. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); and JAN NARVESON, *THE LIBERTARIAN IDEA* (1988).

21. Some libertarians might stipulate that no values except the prevention of harm to others can justify state restriction of liberty. See NARVESON, *supra* note 20, and NOZICK, *supra* note 20. While John Stewart Mill *seems* to adopt this radical alternative in the early chapters of *On Liberty*, MILL, *supra* note 16, it is clear that he is willing to consider soft paternalist, and even offense based restrictions. In the last chapter of *On Liberty*, Mill writes "Again, there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners and, coming thus within the category of offenses against others, may rightly be prohibited." MILL, *supra* note 16, at 97. Feinberg's careful examination of the varieties of offensive behavior makes Mill's claim difficult to resist. See, FEINBERG OFFENSE TO OTHERS, *supra* note 1.

22. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.²³

Only political speech, according to Bork, has the characteristic value that merits constitutional protection: only the protection of *political* speech is necessary for the maintenance of democratic institutions. The possession of ordinary liberties of conversation and expression depends on their relative value weighed against other competing interests—in Bork's own view, the interests of the current popular majority as expressed by the legislators they elect.²⁴ Bork does carefully consider what specific benefits are to be derived from speech, as Murphy would apparently recommend,²⁵ but he argues that none of these benefits is guarded by the First Amendment. One may, of course, question whether Bork is correct to claim that only political speech is constitutively valuable for the maintenance of free democratic institutions. But it would be an entirely different *kind* of disagreement to insist on a general presumption against legislative infringement of liberty, with the burden on the state to show that a compelling interest justifies such restriction. Bork assumes instead that there is a presumption in favor of the state's (that is, the majority's) claim to limit liberty, requiring the individual to demonstrate what claim or interest rebuts or overrides that presumption.

How are we then to take Professor Murphy's suggestion that liberals need to defend fundamental rights like those at stake in *Bowers v. Hardwick* in terms of the specific values that these rights protect? Surely Murphy is right in his observation that sexual liberty is not trivial, no mere freedom to pursue a hobby. But should such liberties be defended in terms of the particular value they have for individuals, or rather in terms of the general absence of any legitimate state interest in proscribing private, mutually consensual activities? Writing for the majority in *Bowers v. Hardwick*, Justice White declares that he is unable to discover any specific constitutional guarantees for what he calls a "right to homosexual sodomy," and he is unable to imagine any significant human value that would be guarded by such a right. When his imagination fails him in this way, he is led to conclude that no constitutional guarantees protect privacy interests of this sort, even in the context of harmless, voluntary sexual conduct between consenting adults.²⁶

But there is a stark contrast between this overall strategy and the initial strategy of Justice Blackmun writing for the dissenting minority: rather than asking whether there is any fundamental human value to be protected by Justice White's "right to homosexual sodomy," Blackmun quotes a famous dissent of Brandeis', arguing:

23. *Id.* at 20.

24. *See id.* at 11. Bork quotes Justice Peckham, who wrote in *Lochner v. New York*, "[A]re we all... at the mercy of legislative majorities?". Bork responds, "The correct answer, where the Constitution does not speak, must be 'yes.'" *Id.*

25. *See id.* at 28-29.

26. *Bowers v. Hardwick*, 478 U.S. 186 (1986). White writes "...and if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." *Id.* at 195.

This case is no more about "a fundamental right to homosexual sodomy," as the court purports to declare,...than *Stanley v. Georgia*,²⁷ was about a fundamental right to watch obscene movies, or *Katz v. United States*,²⁸ was about a fundamental right to place interstate bets from a telephone booth. Rather this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."²⁹

While Blackmun does go on to discuss the value of privacy rights, and the moral importance of close personal and sexual relationships, this appeal to a general right to be left alone is a keystone of his argument. This right is the foundation of his later assertion that "The concept of privacy embodies the 'moral fact that a person belongs to himself and not to others nor to society as a whole.'"³⁰ Brandeis's and Blackmun's "right to be let alone" seems functionally equivalent to Feinberg's presumption in favor of liberty.

These two competing views about where constitutional presumptions lie can be correlated with two different understandings of the nature of political liberty:³¹ is the liberty of citizens "owned" by citizens themselves, or do they possess it at the whim of their political institutions?³² Thomas Hobbes maintains that people relinquish all their liberties to a Sovereign when they leave the state of nature to form a civil society.³³ The Sovereign may restrict the liberty of subjects at will, since their liberty is the Sovereign's property. John Locke, on the other hand, argues that in leaving the state of nature individuals relinquish only as much liberty as is necessary for the creation of civil society.³⁴ Thus on Locke's view, individuals have rights against their government, and it is legitimate for political institutions to restrict individual liberty only where people can be understood to have relinquished these rights.³⁵ Murphy's view that individuals must defend the overriding value of particular liberties surely

27. 394 U.S. 557 (1969).

28. 389 U.S. 347 (1967).

29. *Bowers v. Hardwick*, 478 U.S. at 199 (Justice Blackmun, dissenting). Blackmun is here quoting Brandeis' dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

30. *Bowers v. Hardwick*, 478 U.S. at 204 (Justice Blackmun, dissenting). Blackmun is here quoting from *Thornburg v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 (1986).

31. See also ISAAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969).

32. One might understand this question as asking whether people's liberties are accompanied by claims. On Feinberg's view, "bare liberties" cannot constitute rights unless they are guarded by Hohfeldian claims. See JOEL FEINBERG, *SOCIAL PHILOSOPHY*, ch. 4 (1973). See also, George Rainbolt, *Rights as Normative Constraints on Others*, 53 *PHIL. & PHENOMENOLOGICAL RES.* 93 (1993), for a similar account.

33. THOMAS HOBBS, *LEVIATHAN* 87-113 (Michael Oakeshott ed., MacMillian Publishers 1962) (1651).

34. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 374-94 (1980) (Peter Laslett ed., Cambridge University Press 1963) (1690).

35. Most of us have not, in fact, voluntarily relinquished our rights. To accommodate his theory to this fact, Locke introduced the idea of 'tacit consent' as a foundation for political obligation. But see A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* ch. 4 (1981), for a classic discussion of the failure of "tacit consent". The failure of tacit consent as a foundation for political obligation, however, does not undermine the Lockean argument that individuals have liberty rights against their political institutions. If anything, it would seem to imply that individuals have more extensive rights than Locke acknowledges.

implies that they possess these liberties at the pleasure of their government, as Hobbes claims. But it was Locke much more than Hobbes who inspired our constitutional Framers, and few still accept Hobbes' Monarchical conception of liberty, even among those who still defend other portions of the Hobbesian project in political theory.³⁶

INDIVIDUAL LIBERTY AND THE NINTH AMENDMENT

One might go further, and find a presumption in favor of liberty implicit in the Ninth Amendment's insistence that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Such an interpretation of the Ninth Amendment is, of course, controversial. Some scholars, including Robert Bork, worry that a liberal interpretation of this amendment would lead the Supreme Court to create or discover new constitutional rights willy nilly.³⁷ Bork's opponents might point out that such an interpretation protects individuals against state encroachment on individual liberty. Further, there is evidence that many of the framers whose acceptance of the Bill of Rights was expressly contingent on the inclusion of this amendment, did indeed intend it to articulate a general presumption protecting the liberty of individuals against encroachments by the legislature, or the prejudices of the popular majority.³⁸ James Madison regarded the latter as the more serious of these twin dangers:

...I confess that I do conceive, that in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.³⁹

Madison's aim was to protect the liberty of individuals against the potential encroachment of the institutions of government. He did not believe

36. See, e.g. DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); GREGORY S. KAVKA, *HOBBESIAN MORAL AND POLITICAL THEORY* (1986); JEAN HAMPTON, *HOBBES AND THE SOCIAL CONTRACT TRADITION* (1986).

37. See Robert Bork, *The Senate's Power Grab*, N.Y. TIMES, June 23, 1993 at 23. Bork writes

If a [Supreme Court] nominee were to say, as many jurists would, that the Court is entitled to strike down legislation on the basis of unenumerated rights, we should know that the potential Justice is not bound by the actual law of the Constitution and would feel free to override it on the basis of provisions she wishes the Founders had had the wisdom to adopt.

Id.

38. See Randy Barnett's remarkable two-volume collection, 1-2 *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (1993). Barnett's own essays in these volumes are among the most interesting and helpful: see Barnett, *James Madison's Ninth Amendment*, 1 BARNETT, *supra*; Barnett, *The Ninth Amendment and Constitutional Legitimacy*, 2 BARNETT, *supra*. For other sources, see *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* (Ralph Ketcham, ed., 1986), and *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 1961). John E. Nowack and Ronald D. Rotunda provide a list of scholarly writings on the Ninth Amendment in *CONSTITUTIONAL LAW: FOURTH EDITION* 389, n.10 (1991).

39. James Madison, "Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech," reprinted in BARNETT, *supra* note 38, at 51.

that this could be done by reserving all unenumerated liberties to the states. The notes from Madison's speech of June 21, 1787 at the Philadelphia Convention make this clear:

[Mr. Madison] was of the opinion that there was 1. Less danger of encroachment from the General Government than from the State Governments. 2. That the mischief from encroachments would be less fatal if made by the former, than if made by the latter.⁴⁰

Madison believed that state governments constituted a far more serious threat to individual liberty than did the federal government. According to Madison (here following Locke), the only powers the government possesses are those that have been explicitly granted in the Constitution. All other rights and liberties are reserved as *individual* rights retained by the people.⁴¹ These considerations constitute strong support for the view that Madison intended the Ninth Amendment to articulate a general presumption in favor of individual liberty.

Interpreting the Ninth Amendment in this way may be consistent with the expressed intentions of at least some of the Framers, but these intentions are hard to reconcile with the insistence that the constitution protects only those rights that are strictly enumerated. Perhaps Bork's advocacy of the doctrine of strict enumeration came in conflict with his theory that we should look to the intentions of the framers, in his testimony before the Senate Committee on the Judiciary in 1989. This may partly explain his response when he was asked about the Ninth Amendment by Senator DeConcini:

...I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.⁴²

Given available evidence concerning the "framers' intentions," combining the doctrine of strict enumeration with Bork's originalism may indeed render it necessary to interpret the Ninth Amendment as an ink blot. Many of the framers seem to have insisted on inclusion of the Ninth Amendment expressly to avoid the possibility that courts might adopt a strict enumerationist approach. Madison writes:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I

40. James Madison, notes from a speech at the Philadelphia Convention, June 21, 1787, reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 79 (Marvin Meyers ed., 1981).

41. For a careful discussion of Madison's political views, see JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY*, (1990).

42. Quoted in 2 BARNETT, *supra* note 38, at 441. Later in his testimony, Judge Bork claimed that one could only speculate on what Madison and other of the framers might have had in mind when they drafted this amendment. *Id.* at 441.

have ever heard urged against the admission of a bill of rights into this system; but I conceive that it can be guarded against.⁴³

Madison's intent in framing the Ninth Amendment as he did was to guard against this eventuality, and to protect the rights of individuals against such encroachments. It remains to be seen whether his effort can eventually be successful.

Until quite recently, the Ninth Amendment was rarely referred to by the Courts, and was not widely discussed by scholars. While recent scholarship has refocused attention on the Ninth Amendment,⁴⁴ there is still widespread skepticism about unenumerated rights. The implications of this state of affairs for constitutional interpretation would be stunning if they weren't so frequently instantiated by our own court: Instead of a general "right to be let alone" provided that our behavior neither harms nor seriously offends others, we are left to defend the particular value of those forms of behavior we wish to be let alone to pursue. Rather than a general presumption that unenumerated rights are "retained by the people," possession of these rights depends on the courts judgment that the value of the practices such rights protect outweighs other competing values. But if constitutional rights are intended to protect minorities against the potential tyranny of the majority, as Madison and others insisted, then the practices most in need of constitutional protection are just those that the majority, and the courts are least likely to recognize as valuable and worthy of toleration.

To whom do we need to defend the value of our practices, and what will such a defense entail? If dissenting minorities must effectively persuade the majority of the value of their practices and choices, then we are indeed back to a radically illiberal view like that of Bork. But this does seem to be the effect, though surely not the intent, of Murphy's claim that fundamental rights should be defended in terms of the particular human values they protect. It is difficult to reconcile this with the framers' concern that an intolerant majority might tyrannize dissenting minorities. Such a proposal would, in effect, leave constitutional protections only for those who possess the talents necessary to articulate and effectively defend their fundamental values to others. Such a burden will be especially onerous for members of political and cultural minorities. As the Supreme Court demonstrated so clearly in the majority opinion of *Bowers v. Hardwick*,⁴⁵ it is difficult to defend even the most fundamental of values to a group of judges who do not share them.

CONCLUSION

The main points of my argument here can be conveniently summarized in two central claims: First, if we accept a presumption in favor of liberty, then the defense of fundamental rights will not require a demonstration that the activities these rights protect have value, nor will it require demonstration to others that our private behavior is worthy of toleration and respect. Second, a presumption in favor of liberty articulates a conception of political liberty that is (i) legally and philosophically defensible, (ii) accepted by at least some of the

43. James Madison, "Speech to the House," reprinted in BARNETT, *supra* note 38, at 60.

44. See 1, 2 BARNETT, *supra* note 38.

45. 478 U.S. 186 (1986)

Constitutional Framers, and (iii) guaranteed by an appropriate interpretation of the Ninth Amendment. I have focused attention on the view of Robert Bork as well as on Murphy's view, so it is appropriate to note that Murphy's view is different from Bork's in important ways.⁴⁶ But the notion that fundamental liberties should be defended in terms of the specific value they have for individuals brings the two views perilously close in a crucial respect.

In most contexts I would regard the fact that "Murphy claims X" as a strong presumptive reason to believe that X is true. But in his recent discussion of Legal Moralism and Liberalism,⁴⁷ Murphy does not argue against, or even explicitly discuss the common liberal arguments for fundamental constitutional rights. Rather he notes that the right to sexual privacy cannot be defended in terms of its constitutive value for free democratic institutions, and then presents his own theory as the relevant alternative without carefully reconsidering the more traditional liberal accounts of fundamental rights. At the minimum therefore, we are justified in withholding assent to his view pending a more thorough defense. We may agree that liberalism cannot really be morally neutral and that a liberal defense of fundamental rights will involve the articulation of a more substantive conception of the human good than many liberals have acknowledged. But we need not follow Murphy in his recommended strategy for the defense of fundamental rights in terms of the specific values they protect. Possession of the right privately to engage in those harmless activities we cherish must not be made contingent on our ability to convince others that these activities have significance and value. It is enough that we value them ourselves.

46. In particular, I have no reason to believe that Professor Murphy adopts Bork's strict enumeration doctrine, his conservative moral views, his views concerning the limits on First Amendment protection of free expression, or that Murphy accepts the view that legislative majorities hold sway wherever the Constitution is silent.

47. Jeffrie G. Murphy, *Legal Moralism and Liberalism*, address at the Symposium in Honor of Regents Professor Joel Feinberg at the University of Arizona (Oct. 1, 1994), in 37 ARIZ. L. REV. 73 (1995).

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