Chapter One

Introduction

> The courts have been loth [sic] to take cognizance of trivial complaints arising out of domestic relations—such as . . . husband and wife. . . . [B]ecause the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government. . . . For, however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism the nursery and the bed chamber.[1]

The problem of domestic violence[2] is one that has persisted in the United States from the country's inception to the present day.[3] And the history of domestic violence in the United States has been inextricably linked with the concept of privacy: legal and cultural understandings of privacy have long influenced the ways in which judges, legislators, activists, victims, perpetrators, and the general public have viewed and responded to this issue. This book examines the history of domestic violence law and activism in the United States from the late nineteenth century to the present day, particularly as they have been affected by various conceptions of privacy. Specifically, it seeks to understand the complex relationship between privacy and domestic violence through a historically situated and contextualized analysis of domestic violence litigation. **1**

While the notion of privacy has acquired a variety of meanings in both legal and nonlegal contexts, it has undoubtedly been a central factor in the development of American political and legal theory. Having been applied to a wide range of issues, from education[4] to pornography[5] to homosexuality[6] to reproduction,[7] privacy has been seen by feminist scholars as both a blessing and a curse for women's rights in the United States. Regardless of the issue being addressed, however, a common factor in the application of privacy has historically been its reinforcing of the traditional, nuclear family. Nowhere has this link been stronger than in the case of domestic violence, in which noninterference by the state into supposedly "private" family matters has, until recently, been the rule rather than the exception—to the great detriment of battered women. **2**

Specifically, privacy has pervaded the issue of domestic violence in the United States in two ways. First, privacy as a legal and constitutional principle with a specific history in Western liberal political thought underlies much of the litigation history. Second, this legal conception of privacy is supported by broader cultural notions about the importance of privacy, a more amorphous, general societal belief that government should not interfere in "private" (i.e., family) matters. While courts and legal advocates have concerned themselves primarily with the first of these conceptualizations of privacy, service providers and victims deal more directly with the second. **3**

4 In both senses, however, the discourse of privacy as it relates to domestic violence has incorporated specific presumptions about race, class, and sexuality. The concept of privacy has proven to be anything but egalitarian: access to privacy can signify the relative status of individuals in a given society. The Western liberal political tradition that enabled only certain privileged groups of male citizens to move freely between public and private spheres[8] has engendered a legacy in which the privacy of some is valued more highly than that of others.[9] Today, treatment of domestic violence cases and the accompanying emphasis on privacy often presume a white, nuclear (male-headed) family, thereby erasing the experiences of people of color,[10] same-sex couples,[11] and immigrants or nonresidents.[12] As such, the overarching emphasis on privacy that pervades domestic violence litigation contains problematic implications that extend beyond gender lines to encompass a wide range of interlocking issues. This book examines the extent to which concepts of privacy have been imbued with assumptions about race, class, and sexuality and considers their ramifications both for victims of partner violence and for activists within the battered women's movement.

5 It is important to note that, in addition to service provision and legal advocacy, the battered women's movement has concentrated many of its energies on legislative work. Much of the law governing domestic violence has developed via legislative rather than judicial means (and, in fact, the legislative efforts of the battered women's movement could be the focus of an entirely different study). While this policy-making work has resulted in critical legal protections for women, however,[13] it has not been primarily concerned with issues related to privacy.

6 Yet conceptions of privacy have proven central to the problem of domestic violence and to the battered women's movement. Notions of privacy have been so influential in shaping this society's ideas about domestic violence—and therefore the movement itself—that an exploration of privacy is essential to a fuller understanding of the subject. Passage of laws has been an important, yet a partial step—as when, for example, courts and service providers have been confronted with non-enforcement of these laws based on conceptions of privacy that keep police from intervening in domestic disputes. This study foregrounds judicial rather than legislative activity, paying particular attention to the role of privacy and the relationship between courts and activists. Legal discourse and judicial narratives, simultaneously reflecting and shaping societal beliefs, provide useful insights into this relationship and various conceptions of privacy.

7 The late nineteenth century provides a useful context for analysis of more recent anti-domestic-violence efforts for several reasons. First, a review of the case law reveals that it was not until 1871 that state courts began to repudiate the right of chastisement (adopted from English common law, the right of a husband to inflict corporal punishment on his wife for her "misbehavior"). This was a pivotal year in the legal history of domestic violence, for it saw two landmark cases in which the right to chastisement was expressly repudiated.[14] The nineteenth-century cases reveal that when US courts were first confronted with the issue of domestic violence, they grounded their analyses of the problem and their responses in notions of privacy.

This early link between privacy and domestic violence in the judicial sphere has continued to influence courts' decisions throughout the history of the battered women's movement, even to the present day.

8

At the same time that these significant early cases were being decided, the temperance movement was gaining unprecedented momentum. The Woman's Christian Temperance Union (WCTU), which gained prominence as "both the leading temperance organization and the leading women's organization in the United States" in 1873, quickly became a forum for women's activism around a variety of social issues, including domestic violence.[15] From the perspective of the largely middle- and upper-class women able to do activist work at this time, alcohol was very much a woman's problem. Situated so firmly in the domestic domain, women bore the brunt of their husbands' abuse of alcohol.[16] It seemed only natural, therefore, that women would emerge as leaders and workers in the temperance movement, approach the issue from a "woman's perspective," and focus on related issues such as domestic violence. The temperance movement's willingness to address the problem of domestic violence, combined with women's activism on several other fronts—including suffrage and social purity—converged in the early 1870s to form a heightened climate of activism. In this environment, increased public awareness of and discourse about domestic violence engendered the first real public censure of batterers in the United States.[17]

9

Nonetheless, the first half of the twentieth century saw relatively little activity with regard to combating the problem of domestic violence.[18] The reasons for this decline in activity have been the source of some speculation; what is undeniable, however, is that the early 1970s generated a renewed burst of activism on behalf of battered women that has continued to some degree until the present day.[19] As an outgrowth of the numerous social justice movements of the 1960s, including the civil rights movement and the second wave of the women's movement, the battered women's movement was established in the early 1970s primarily as a means of providing shelter to women in danger.[20] As the movement grew, however, activists expanded the scope of their efforts to include not only the provision of services, but also legal and legislative work to benefit battered women.[21] As a result of this multifaceted approach, activist work increased the visibility of the issue within the public consciousness, therefore ultimately affecting judicial response to the problem of domestic violence.

10

Case Resources
Roe v. *Wade*
Findlaw (http://laws.findlaw.com/us/410/113.html) (full text)
Oyez (http://www.oyez.org/cases/case/?case=1970-1979/1971/1971_70_18) (oral arguments)

It is significant that this movement emerged on the heels of the hard-fought battle to secure abortion rights. The progression of reproductive rights cases that led to the landmark *Roe* v. *Wade*[22] decision in 1973 ultimately grounded the right to abortion in legal notions of privacy.

Characterizing abortion as a highly personal decision, pro-choice legal advocates urged the state *not* to interfere in this private realm. In *Roe*, the US Supreme Court agreed, and this protection of the private sphere played a central role in securing this important right for women.

11 The decision by courts and activists to frame reproductive rights in terms of privacy, however, has had serious consequences for battered women's advocates. The concept of state noninterference in the private realm that was so critical to the success of the abortion rights movement has also been used to protect batterers within the same private realm. That these two movements emerged almost contemporaneously highlights an important legal paradox, as courts and activists have had to reconcile these contrasting effects upon women's rights of the use of the concept of privacy. This book explores the extent to which concepts of privacy, as articulated within the reproductive rights movement, have informed the judicial strategies of the battered women's movement and influenced judicial opinions in domestic violence cases.

12 Overall, the book contextualizes the legal history of domestic violence by exploring the ways in which feminist activism has responded to—and shaped—judicial responses to this problem. Using the notion of privacy as a unifying theoretical concept, this book examines the history of domestic violence in this country, both in the courts and on the streets. In other words, the book traces the legal history of domestic violence as well as the ways in which activists responded to and shaped that history. Having examined the significance of the role of privacy in both judicial and activist responses to domestic violence, the book explores recent alternative visions of privacy as an affirmative right, one that is potentially beneficial to battered women.

A Brief History of Privacy

13 Privacy, a key theoretical component of this study, is a concept that has received a great deal of attention among feminist legal theorists, in part because the legal right to privacy served as the foundation upon which the right to abortion developed.[23] Generally heralded by these scholars for its pivotal role in securing reproductive freedoms for women, the notion of privacy has also been viewed as a double-edged sword because of its role in perpetuating domestic violence.[24] The same privacy that has allowed women control over their bodies with regard to reproductive rights, feminists suggest, has also left them vulnerable to domestic abuse because of the state's reluctance to interfere in the private realm of the home, even to prevent violence. While these theoretical insights have laid the foundation for an exploration of the relationship between privacy and women's rights in the United States, it is important to take the analysis a step further by unpacking the notion of privacy itself. In order to resist oversimplification, an understanding of a variety of shifting and sometimes competing conceptions of privacy is critical.

14 The notion of privacy has long played a central role in the development of American political theory. The abstract nature of the concept, however, has made it difficult to define, and the term has acquired a variety of meanings that shift widely according to context. For the purposes of this book, three such meanings are significant. First, the concept of privacy is an essential component of traditional liberal political thought, linked as it is to the individualism that underlies that philosophy. Individualism (with its related ideals of autonomy, self-sufficiency, and self-fulfillment) necessarily posits the individual in relation to the state. From this perspective, privacy essentially means the freedom of an individual from state interference. Individual privacy in this sense is an essential component of personal fulfillment: a citizen cannot define, much less pursue, her or his own goals when hampered or restricted significantly by state intervention. This type of privacy is therefore conceived as a negative right, one that does not guarantee benefits, but instead ensures relief from the burden of intrusion by the state.

15 In fact, two themes related to privacy predominate in the liberal political theory developed by Western philosophers. First, this philosophical tradition prizes individualism and the development of autonomous, self-sufficient, rational actors operating independently. In *The Citizen*, for example, Thomas Hobbes entreats his readers to "consider men as if but even now sprung out of the earth, and suddenly, like mushrooms, come to full maturity, without all kind of engagement to each other."[25] This emphasis on autonomy and self-sufficiency—and rejection of principles of interdependence—forms the basis for much of Hobbes's political theory. As feminist theorist Christine DiStefano observes, Hobbes's mushroom analogy epitomizes his overall presentation of "a thoroughly atomistic subject . . . whose individual rights . . . clearly precede any obligation to belong to a civil society."[26] Similarly, Jean-Jacques Rousseau, who views humans in a more favorable and less selfish light, nonetheless ascribes to them the principle of self-preservation, first and foremost.[27] Furthermore, while Rousseau concedes that humankind's other basic principle is one of pity, he maintains that sociability is not an inherent value for humans, claiming simply that "Man is weak when dependent."[28]

16 John Stuart Mill, another theorist of political liberalism, also views the individual as the central unit through which to understand human relationships: "Men, however, in a state of society, are still men; their actions and passions are obedient to the laws of individual human nature. . . . Human beings in society have no properties but those which are derived from and may be resolved into the laws of the individual man."[29] Further, Mill addresses the concept of individualism within the context of liberty and personal freedom. As DiStefano notes, Mill's subject "requires a protected zone of thought, expression, and action for his survival and well-being;" this subject is "a self-sufficient and sovereign entity."[30] In particular, Mill emphasizes that individuals must be left alone in the pursuit of their own interests: "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection."[31] For Mill, as for Hobbes and Rousseau, notions of

individualism are inextricably linked with principles of autonomy, self-sufficiency, self-preservation, and freedom from interference, all of which suggest the importance of privacy for the success of individual actors.

17 The second and related theme that pervades much of Western political theory is the establishment of distinct public and private spheres of action. The delineation of these spheres can be traced back at least to Plato and Aristotle. In his *Republic*, for example, Plato describes an ideal society in which the patriarchal family unit is abolished in favor of more communal relations and communally held property—at least, for the highest (Guardian) class. Yet in his subsequent work, the *Laws*, Plato reintroduces the patriarchal family structure as well as the holding of private property. In so doing, he creates discrete zones of activity: the public, which constitutes political and civic interaction and power, and the private, which concerns domesticity, nurturing, and reproductive work. In his reinforcement of patriarchal family forms, Plato relegates women in the *Laws* to the private sphere, while assigning the public sphere to men.[32]

18 Likewise, Aristotle, who adopts a different philosophical approach from Plato's in many other ways, espouses a very similar (and similarly gendered) divide between public and private spheres. Separating the polis, or political life, from the household, or family life, Aristotle determines that each exists as a separate part of the "natural" order, and each is a central unit of civil society. Furthermore, his functionalist approach determines that women's "natural" reproductive role limits them to the private sphere, while men's "naturally" higher intellectual capacity equips them for both the public and private spheres.[33] Subsequent political philosophers have continued to reiterate and reinforce this division, as in, for example, John Locke's assertion that "these two *Powers*, *Political* and *Paternal, are so perfectly distinct* and separate; are built upon so different Foundations, and given to so different Ends . . ."[34] As feminist scholar Jean Bethke Elshtain observes, this distinction between public and private—as well as its implications for gender roles—has persisted throughout much of Western political theory.[35]

19

Case Resources
Griswold v. *Connecticut*
Findlaw (http://laws.findlaw.com/us/381/479.html) (full text)
Oyez (http://www.oyez.org/cases/case/?case=1960-1969/1964/1964_496) (oral arguments)

The second form of privacy, as a significant constitutional and legal principle in the United States, follows readily from its centrality to liberal political thought. While a right of privacy is not explicitly mentioned anywhere in the US Constitution, courts and constitutional scholars have found this right implied throughout the document in several places. The Third Amendment, which prohibits the quartering of soldiers "in any house, without the consent of the Owner," and the Fourth Amendment, which protects citizens from "unreasonable searches and seizures,"

are just two examples. One of the best known articulations of this position was made by Justice William O. Douglas, who, in writing the Supreme Court's opinion in the 1965 contraception case *Griswold* v. *Connecticut*, found the right of privacy implied in no less than six amendments.[36]

Case Resources
Boyd v. *U.S.*
Findlaw (http://laws.findlaw.com/us/116/616.html) (full text)

20

This undercurrent of respect for privacy within the US Constitution was likely influenced by judicial reasoning of the colonial period. The 1765 case of *Entick* v. *Carrington*[37] in England considered the issue of search (of a private home) and seizure (of private papers), roundly denouncing both practices and asserting the right to the securing of private property. In the 1886 US Supreme Court case of *Boyd* v. *U.S.*,[38] Justice Bradley characterized the *Entick* opinion as "one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country . . . [I]t may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution."[39] Extrapolating from the *Entick* opinion, Bradley outlined an even more emphatic right of privacy in *Boyd*:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . [I]t is the invasion of this sacred right which underlies and constitutes the essence of [the *Boyd*] judgment.[40]

In this way, Bradley espoused a right to privacy far more expansive in scope than the Fourth Amendment upon which it drew.

Case Resources
Olmstead v. *U.S.*
Findlaw (http://laws.findlaw.com/us/277/438.html) (full text)

21

A few decades later, Justice Brandeis cited *Boyd* while articulating a right to privacy in the 1928 US Supreme Court case *Olmstead* v. *U.S.*[41] In his dissenting opinion in *Olmstead*, Brandeis characterized the privacy right with a phrase often cited by both judges and legal scholars since then: "The makers of our Constitution . . . conferred, as against the government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men."[42] This phrasing and the notion of privacy as, fundamentally, "the right to be let alone" have been crucial to subsequent legal formulations of privacy as a negative right—the freedom from state intervention in the home.[43]

22

Case Resources
Paris Adult Theatre v. *Slaton*
Findlaw (http://laws.findlaw.com/us/413/49.html) (full text)
Oyez (http://www.oyez.org/cases/case/?case=1970-1979/1972/1972_71_1051) (oral arguments)

Throughout the twentieth century, the Supreme Court continued to develop privacy as a negative right, a right strongly rooted in (and applicable to) domestic and family issues. In a series of early-twentieth-century decisions, the Court interpreted the Fourteenth Amendment to protect various aspects of marital, parental, and domestic rights and relationships,[44] concluding that it has thereby "respected the private realm of family life which the state cannot enter"[45] and that "[t]his privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."[46] Furthermore, the Court recognized "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,"[47] as well as "the right of each individual 'to a private enclave where he may lead a private life.'"[48] The gendered ramifications of this series of decisions was revealed most tellingly in the 1973 case of *Paris Adult Theatre* v. *Slaton*, in which Chief Justice Burger blithely acknowledged that "the 'privacy of the home'" previously asserted by the Court "was hardly more than a reaffirmation that 'a man's home is his castle.'"[49] As anti-domestic-violence advocates would soon learn, this formulation of privacy—as a negative right protecting "the king of his castle" from state intrusion—could be exceedingly dangerous for women.

23

Case Resources
Poe v. *Ullman*
Findlaw (http://laws.findlaw.com/us/367/497.html) (full text)
Oyez (http://www.oyez.org/cases/case/?case=1960-1969/1960/1960_60) (oral arguments)
Eisenstadt v. *Baird*
Findlaw (http://laws.findlaw.com/us/405/438.html) (full text)
Oyez (http://www.oyez.org/cases/case/?case=1970-1979/1971/1971_70_17) (oral arguments)

At the same time, however, the right to privacy was proving—rather paradoxically—to be an invaluable tool for securing women's reproductive rights. In fact, the arena in which the right of privacy has perhaps been most fully developed is that of reproductive rights. In 1961, Justice Harlan's powerful dissent in the contraception case *Poe* v. *Ullman* recognized the plaintiffs' "right to enjoy the privacy of their marital relations free of the enquiry of the criminal law."[50] Four years later, in *Griswold*, the Court's majority opinion referred to "the notions of privacy surrounding the marriage relationship" and "a right of privacy older than the Bill of Rights."[51] This right was quickly expanded beyond the confines of the marital bedroom, however; the Court's opinion in the 1971 case of *Eisenstadt* v. *Baird* asserted that "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted

governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[52] Finally, in the landmark 1973 *Roe* v. *Wade* opinion, the privacy right was construed to include, specifically, the abortion right: "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[53] Over several decades of reproductive litigation, therefore, the Court's definition of the privacy right, which began by protecting the sanctity of the marital home, expanded to include the individual freedom to make the most personal decisions.

24 Finally, it is useful to consider the concept of privacy as it has been engaged by many feminist theorists. Primarily, feminist analyses of the concept of privacy or private life have focused on its dichotomous relationship with the concept of public life. While acknowledging its many centuries as a firmly entrenched facet of Western political theory, feminist scholars in this century have begun to question the utility of this dichotomy as a theoretical paradigm. First, they have asserted that the public/private dichotomy is essentially a false construct, especially when viewed through the lens of gender. The fragility of the paradigm is apparent, they contend, when one considers that actions within the private sphere always have consequences with the public sphere, and vice versa. Feminist legal theorist Catharine MacKinnon raises this issue in her discussion of abortion:

> The private is public for those for whom the personal is political. In this sense, for women there is no private, either normatively or empirically. Feminism confronts the fact that women have no privacy to lose or to guarantee.[54]

Viewed in this light, the line separating the public and private spheres is blurred, if not erased altogether.

25 Second, feminist scholars have observed that the public/private dichotomy has been instrumental in excluding women from participating in public life, because the dichotomy itself is gendered, with men traditionally being identified with the public sphere of government, paid labor, and so on, and women being relegated to the private sphere of home and family.[55] Furthermore, feminist theorists have argued that the concept of privacy plays a crucial role in perpetuating gender inequality. MacKinnon, for example, has argued that "[w]hen the law of privacy restricts intrusions into intimacy, it bars changes in control over that intimacy through law. The existing distribution of power and resources within the private sphere are [sic] precisely what the law of privacy exists to protect."[56] The legal concept of privacy, she suggests, falsely presumes an equality between the sexes, to women's great danger. In other words, "abstract privacy protects abstract autonomy, without inquiring into whose freedom of action is being sanctioned, at whose expense."[57]

26 The notion that privacy perpetuates inequality is particularly true in the case of domestic violence, as many feminist scholars have observed. Elizabeth Schneider asserts, "The concept of privacy encourages, reinforces, and supports violence against women. . . . Privacy says that what goes on in the violent relationship should not be the subject of state or community

intervention. . . . Privacy operates as a mask for inequality, protecting male violence against women."[58] While Schneider's comment refers specifically to domestic violence in the late twentieth century, her critique hints at a problem rooted in traditional Western political thought. In short, the feminist critique of the concept of privacy calls into question both its falsely dichotomous relationship with the public sphere and its role as a justification for the continued subordination of women.

27

Each of these concepts of privacy has affected the issue of domestic violence in both legal and social contexts. Entering the US legal system with a strong foundation in political liberalism, the notion of privacy conferred a degree of privilege upon individual, male citizens. Within political liberalism, the citizen is conceptualized as the male head of a household, and therefore as the representative of that household within the public and political arenas.[59] Thus, the protection afforded to individual citizens by virtue of privacy has also been accorded to the male heads of nuclear families. Indeed, two types of privacy have developed this way: individual privacy, granted to individual citizens, and familial privacy, granted to traditional, nuclear families.[60] Both courts and the larger society have emphasized each of these types of privacy at different times, with varying implications for women. As the following chapters will show, the concept of individual privacy, while not without its flaws, has the potential to be useful and empowering for women, as, for example, in the case of the struggle for reproductive rights. Privacy rooted in marital or familial status, on the other hand, has too often had devastating consequences for battered women seeking safety.

28

The following excerpts of judicial opinions in domestic violence cases of the nineteenth century provide a fairly representative illustration of the extent to which judges' respect for this familial privacy effectively erased the notion of legal recourse for battered women:

> Family broils and dissentions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy. To screen from public reproach those who may thus be unhappily situated, let the husband be permitted to exercise the right of moderate chastisement . . . without being subject to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.[61]

> In order to preserve the sanctity of the domestic circle, the Courts will not listen to trivial complaints. If no permanent injury has been inflicted, nor malice, cruelty, nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.[62]

In cases such as these, the duty to protect marital privacy was clearly a much higher priority for judges than protecting women from abusive husbands.

Central Issues

29 The value of the legal notion of privacy has been highly contested, yet some feminist scholars have suggested that, properly conceived, it has the potential to empower women. Feminist scholars such as Elizabeth Schneider,[63] Patricia Boling,[64] and Dorothy Roberts[65] have called for a new, alternative vision of privacy: one that, in Schneider's words, "encompasses liberty, equality, freedom of bodily integrity, autonomy, and self-determination."[66] This book answers that call in part by exploring alternative models of privacy that are potentially empowering for battered women.

30 The book illuminates the ways in which concepts of privacy (both in the legal sense and in the broader, social sense) have influenced domestic violence litigation and activism, and, therefore, the lives of battered women themselves. In so doing, it provides insight into the ways that judges have historically viewed the construct of the traditional, nuclear family, as well as the notion of privacy and the problem of domestic violence. Additionally, this study examines how the concept of privacy has been subverted and transformed through feminist activism, and envisions the next step in this process—that is to say, where do we go from here? Given that privacy is undeniably entrenched in our legal system, the book explores how it might be used to provide more, rather than fewer, options for victims of domestic violence. The way that advocates for reproductive rights were able to co-opt the notion of privacy in the service of women's rights is instructive here. Likewise, the arena in which privacy is being contested and negotiated most vigorously in recent years, that of sexual orientation, also provides useful context for this discussion.

31 The book addresses these questions: What, historically, have been the ramifications of the legal and cultural emphasis on privacy for the lives of battered women? In what ways have notions of privacy reinforced the primacy of the traditional, male-headed household? To what extent has the discourse of privacy presumed a heterosexual victim, and what have been the implications of those assumptions for victims and activists? How have the limitations of domestic violence law influenced the rhetoric and strategies of battered women's advocates? How have the advocacy strategies of the battered women's movement shaped the meaning of domestic violence law in the courts?

32 Furthermore, the book also considers the ways in which early (nineteenth-century) efforts to combat domestic violence served as a precursor to subsequent (late-twentieth- and early-twenty-first-century) activism. What have been the most pressing issues for these later battered women's advocates, and in what ways have those issues been addressed in the courtroom? To what extent has the reproductive-rights movement's usage of legal concepts of privacy influenced activists and courts with regard to domestic violence? In what ways and to what extent has the battered women's movement been successful in securing safety for women and changing societal notions of privacy and domestic violence through its use of the courts? To

what extent have these reconceptualizations challenged or reinforced stereotypical views about race, class, and sexuality? Finally, is the concept of legal privacy inherently detrimental to women's rights, or does it contain the potential for liberation?

In the course of this exploration, the book explores feminist developments of alternative models of privacy that are both innovative and potentially powerful. Drawing upon these feminist contributions as well as more traditional approaches, this analysis seeks a state response to domestic violence that is based on empowerment, rather than paternalism or indifference. 33

Methodology

The book relies primarily upon three types of sources and three related methodologies. Sources include significant court cases addressing issues of domestic violence and privacy, literature of the US battered women's movement, and interviews with lawyers and activists. I have employed three methodologies—archival research, content analysis, and semi-structured interviews—to gather and analyze this information. 34

Archival research is critical to the book in several ways. First, an examination of the literature of the battered women's movement has helped to ascertain the goals of feminist activists at particular junctures, both within the courtroom and in society at large. This literature encompasses a range of materials, including published books and articles (from both mainstream and scholarly presses as well as law reviews), pamphlets and promotional materials, and internal publications such as memoranda, newsletters, and more. For early activist writings on domestic violence, I have undertaken archival research of *The Lily*, *The Revolution*, and the *Woman's Journal*, three national women's journals of the late nineteenth century. For research into the battered women's movement of the late twentieth century, I have mined the archives of numerous organizations within the movement, including the National Organization for Women Legal Defense and Education Fund (NOW-LDEF), the National Coalition Against Domestic Violence (NCADV), the Battered Women's Directory Project, and the National Council on Women and Family Law and its National Battered Women's Law Project (NCOWFL, NBWLP), housed in the Arthur and Elizabeth Schlesinger Library on the History of Women in America. In addition, I have also consulted the personal papers of battered women's movement activists, as well as the full collection of *Aegis* (the former national magazine of the battered women's movement published by the National Communications Network), also housed in the Schlesinger Library. For legal briefs and other case-specific materials, I drew upon the archives of the United States Supreme Court and the National Center on Poverty Law (NCPL; formerly National Clearinghouse for Legal Services). 35

This archival research also helped to determine the legal cases upon which this study focused. The criteria for choosing cases were twofold: cases were selected based upon their jurisprudential significance and their importance to battered women's activists. In most instances, these criteria overlapped, as activists are generally most concerned with cases that 36

will have the most far-reaching ramifications. While searches of the LEXIS database indicated cases of jurisprudential significance, examination of the movement's literature was helpful in identifying those cases that were of most concern to (and therefore received the most attention from) feminist activists.[67] Feminist participation in these cases is broadly conceived and took a variety of forms, including, but not limited to, legal representation of battered women, organizing and finding plaintiffs for class-action lawsuits, collective financial support of litigants, publicizing cases in local and/or national media, and the submitting of amicus briefs by feminist organizations.

I then undertook content analysis of these cases, focusing specifically on the facts of the case as presented by both parties, the court's decision, and the court's reasoning. Because issues of race, class, or sexuality (of both victims and perpetrators involved in the case), as well as the political orientation of victims' counsel (i.e., whether feminist activist or not) often played a critical role in the presentation and outcome of the case, these factors were examined for relevance as well. Often, the role of amicus briefs was also examined. Within the cases, judicial attitudes toward privacy, families, and gender relations are of particular importance for this study. Judicial opinions, including decision and reasoning, provided fertile ground for this inquiry. Contemporaneous popular media (e.g., newspapers, television, etc.) representations of notable cases were also examined, primarily as a means of determining activists' strategies in bringing particular cases to the attention of the general public. 37

Finally, I conducted interviews with ten current and former activists and lawyers who have addressed problems of domestic violence and privacy in their work. These semi-structured interviews took place over the course of thirteen months. Most interviews lasted between an hour and an hour and a half, with the shortest lasting thirty minutes and the longest lasting over two and a half hours. When permission was granted, I tape-recorded the interviews and selectively transcribed them afterward. 38

Additionally, secondary sources in feminist legal theory and women's history such as those mentioned above provided historical and contextual breadth for this analysis. By examining the issue from each of these perspectives concurrently (judicial, activist, and scholarly discourses), the book illuminates the relationship between activists and the courts around the problem of domestic violence and privacy. 39

Chapter Outline

In the second chapter, I examine the judicial paradigm of privacy and domestic violence that developed prior to the emergence of the battered women's movement in the 1970s. Focusing primarily on the late nineteenth century, this chapter explores landmark domestic violence court cases of this era, examining jurisprudential developments and the ways in which judges applied 40

notions of privacy to the problem of domestic violence. Early activist efforts on behalf of battered women are also explored as a means of illuminating the relationship between courts and activists at this time.

The third chapter explores the battered women's movement that developed in the late 1960s and early 1970s, in the midst of the anti-rape and reproductive rights movements. I begin this chapter by examining the influence of these two movements on the battered women's movement. In terms of activism, the anti-rape movement brought experiential wisdom and synergy (as well as some internal conflicts) to the battered women's movement. And, being grounded so firmly in cultural and judicial notions of privacy, the reproductive rights movement had serious implications for the burgeoning anti-domestic-violence movement, as well. This chapter also discusses those implications, first by tracing the reproductive rights movement's conceptualization and usage of concepts of privacy, and then by exploring the legal paradox that resulted from the two movements' contrasting uses of privacy. Ultimately, I conduct a critical case study of a landmark domestic violence case, *People* v. *Liberta*,[68] a case that drew on both anti-rape- and reproductive rights movement strategies. Most significantly, the lawyer-activists working on *Liberta* developed an innovative theory of privacy which, I suggest, could serve as a model for future battered women's litigation, and I explore the nuances and possible ramifications of that model here.

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Case Resources
DeShaney v. *Winnebago County Department of Social Services*
Findlaw (http://laws.findlaw.com/us/489/189.html) (full text)
Oyez (http://www.oyez.org/cases/case/?case=1980-1989/1988/1988_87_154) (oral arguments)
Castle Rock v. *Gonzales*
Findlaw (http://laws.findlaw.com/us/000/04-278.html) (full text)
Oyez (http://www.oyez.org/cases/case?case=2000-2009/2004/2004_04_278) (oral arguments)

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Throughout the 1970s and 1980s, the battered women's movement was quickly expanding its initial focus on service provision, as feminist lawyers and activists increasingly pursued legal advocacy as a means of achieving justice for battered women and changing societal notions about partner violence. The fourth chapter focuses on this legal advocacy of the 1980s. The movement's legal efforts at this time took creative approaches to the privacy issue, such as mounting class-action civil lawsuits against police departments for their failure to protect battered women. This chapter explores this era of litigation, paying particular attention to the landmark cases of *Bruno* v. *Codd*,[69] *Scott* v. *Hart*,[70] *Thurman* v. *Torrington*,[71] *Sorichetti* v. *City of New York*,[72] *DeShaney* v. *Winnebago County Department of Social Services*,[73] and, most recently, *Castle Rock* v. *Gonzales*,[74] among others.

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Case Resources
Lawrence v. *Texas*
Findlaw (http://laws.findlaw.com/us/539/558.html) (full text)
Oyez (http://www.oyez.org/cases/case/?case=2000-2009/2002/2002_02_102) (oral arguments)

In the fifth chapter, I consider how the issue of legal privacy has always proven particularly problematic when applied to intimate same-sex relationships. In direct contrast to the state's ongoing reluctance to intervene in the heterosexual home, gay and lesbian relationships have historically been subject to intense levels of state interference and scrutiny, often via the application of criminal sodomy laws. Here, I explore the historically contentious relationship between the law and homosexuality as a context for examining the often-overlooked problem of same-sex domestic violence. After critical case studies of the homosexual privacy cases *Bowers* v. *Hardwick*[75] and *Lawrence* v. *Texas*,[76] I trace the history of the relatively small number of published cases of same-sex domestic violence. Viewed through the lens of sexuality in this way, the problem of domestic abuse further highlights the necessity for a re-visioning of the legal concept of privacy.

44

Finally, in the conclusion to the book, I briefly discuss some of the most recent developments in law and activism related to domestic violence and privacy. Drawing on both feminist and more traditional approaches to privacy, I conclude by outlining an alternative model of privacy and some ways in which it might effectively be applied to the problem of domestic violence.

Toward a New Vision of Privacy

45

As I trace the historical development of privacy and domestic violence in the following chapters, I critique the ways in which the concept of privacy has been detrimental and dangerous for battered women. At the same time, however, I explore the ways in which it has been conceptualized and used to more promising ends (by theorists, judges, activists, and others), and assess its potential as a tool of liberation. Drawing on this history, I ultimately propose an alternative vision of privacy that could empower rather than constrain. Instead of the traditional conception of privacy as a negative right, this model, which focuses on individual rather than familial privacy, suggests an affirmative right to bodily integrity and autonomy. Available to all individuals equally, it would operate independent of relationship status, and would be grounded in an awareness of equality along lines of sex, race/ethnicity, class, sexuality, and ability. As the complex history of privacy and domestic violence reveals, such a re-visioning of the privacy concept is not only possible, but necessary.

Notes

Note 1: *State* v. *Rhodes*, 61 N.C. (Phil. Law) 453, 454, 456–57, 459 (1868).

Note 2: In this book, the terms "domestic violence," "domestic abuse," "woman battering," and "intimate partner violence" are all used to refer specifically to abuse against women by their intimate partners. The book does not address issues of elder abuse, child abuse, or sibling abuse, which are sometimes considered within the rubric of domestic abuse. US Department of Justice statistics indicate that women remain the overwhelming majority of victims of this crime (US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Factbook, *Violence by Intimates*, 1998). This book does not address the issue of male victims of domestic violence. The book refers more often to batterers as men, abusive men, or abusive husbands, because the vast majority of perpetrators are men (*Violence by Intimates*, 1998). However, while much of the historical and legal discourse about domestic violence assumes a heterosexual relationship, this book does not. The problem of homosexual domestic violence, which appears to be as widespread as heterosexual domestic violence, has long been ignored and has only recently begun to receive the serious attention that it deserves in academic, popular, and legal contexts. Domestic violence within homosexual relationships is discussed in greater detail in chapter five.

Note 3: For a more thorough examination of domestic violence in colonial America, see Elizabeth Pleck, *Domestic Tyranny* (New York: Oxford University Press, 1987), and Christine Daniels and Michael V. Kennedy, eds., *Over the Threshold* (New York: Routledge, 1999).

Note 4: See, for example, *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), http://laws.findlaw.com/us/262/390.html (full text); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), http://laws.findlaw.com/us/268/510.html (full text).

Note 5: See, for example, *Stanley* v. *Georgia*, 394 U.S. 557 (1969), http://laws.findlaw.com/us/394/557.html (full text), http://www.oyez.org/cases/case/?case=1960-1969/1968/1968_293 (audio); *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49 (1973).

Note 6: See, for example, *Bowers* v. *Hardwick*, 478 U.S. 186 (1986).

Note 7: See, for example, *Poe* v. *Ullman*, 367 U.S. 497 (1961); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Roe* v. *Wade*, 410 U.S. 113 (1973).

Note 8: See note 56, below.

Note 9: For one recent example, contrast the US Supreme Court's utter deference to the privacy of "marital bedrooms" in determining the landmark contraception case, *Griswold* v. *Connecticut*, in 1961, with their utter disregard for the bedrooms of same-sex couples in upholding a sodomy law in *Bowers* v. *Hardwick*, in 1986. See also Patricia Boling, *Privacy and the Politics of Intimate Life* (Ithaca: Cornell University Press, 1996): 35 (noting that welfare recipients, for example, are generally granted less privacy than nonrecipients).

Note 10: See, for example, Patricia Hill Collins, *Black Feminist Thought* (London: Routledge, 1990), especially pp. 187–89.

Note 11: See, for example, Ruthann Robson, "Lavender Bruises," *Golden Gate University Law Review* 20 (1990): 567.

Note 12: See, for example, Tien-Li Loke, "Trapped in Domestic Violence," *Boston University Public Interest Law Journal* 6 (1997): 589.

Note 13: See, for example, Susan Schechter, *Women and Male Violence* (Boston: South End Press, 1982): 140–50, 159, 192–202.

Note 14: *Fulgham* v. *State*, 46 Ala. 143 (1871); *Commonwealth* v. *McAfee*, 108 Mass. 458 (1871). See also *Knight* v. *Knight*, 31 Iowa 451 (1871).

Note 15: Ruth Bordin, *Woman and Temperance* (Philadelphia: Temple University Press, 1981): xviii.

Note 16: Ibid., 7.

Note 17: Pleck, *Domestic Tyranny*, 88–97.

Note 18: Ibid., 3–7.

Note 19: Ibid.; Schechter, *Women and Male Violence*.

Note 20: Schechter, *Women and Male Violence*, 29–43.

Note 21: Ibid., 157–84.

Note 22: 410 U.S. 113 (1973).

Note 23: See *Poe* (1961); *Griswold* (1965); *Eisenstadt* (1972); *Roe* (1973).

Note 24: See, for example, Cynthia Daniels, *Feminists Negotiate the State* (Lanham, MD: University Press of America, 1997); Martha Albertson Fineman and Roxanne Mykitiuk, eds., *The Public Nature of Private Violence* (New York: Routledge, 1994); and Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

Note 25: Thomas Hobbes, *De Cive* (Chapter 8, Section 8.1., in *Selections*, computer version of selected works of Thomas Hobbes, transcribed principally from the Molesworth ed. of 1843, http://chaucer.library.emory.edu/htprop/beck.html.

Note 26: Christine DiStefano, *Configurations of Masculinity* (Ithaca: Cornell University Press, 1991): 84.

Note 27: Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourse*, ed. Susan Dunn (New Haven: Yale University Press, 2002): 84.

Note 28: Ibid., 106.

Note 29: John Stuart Mill, *Logic*, quoted in Martin Hollis, *Models of Man* (Cambridge, England: Cambridge University Press, 1977): 23–24.

Note 30: DiStefano, *Configurations of Masculinity*, 72.

Note 31: John Stuart Mill, *On Liberty*, ed. Edward Alexander (Peterborough, Ontario: Broadview Press, 1999): 223.

Note 32: Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (Princeton: Princeton University Press, 1981): 20–41; Susan Moller Okin, *Women in Western Political Thought*, revised ed. (Princeton: Princeton University Press, 1992): 43–49.

Note 33: Elshtain, *Public Man, Private Woman*, 41–49; Okin, *Women in Western Political Thought*, 73–80.

Note 34: John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, England: Cambridge University Press, 1960): 332; original emphasis.

Note 35: Elshtain, *Public Man, Private Woman*.

Note 36: Specifically, Douglas identifies the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments as those that create "zones of privacy" (*Griswold*, 484).

Note 37: 19 Howell's State Trials 1029 (1765).

Note 38: 116 U.S. 616 (1886).

Note 39: *Entick*, 626–27.

Note 40: *Boyd*, 630.

Note 41: 277 U.S. 438 (1928).

Note 42: Ibid., 478; original emphasis.

Note 43: See, for example, *U.S.* v. *Grunewald*, 233 F.2d 556 (1956); *Silverman et al.* v. *U.S.*,365 U.S. 505 (1961), http://laws.findlaw.com/us/365/505.html (full text); *Tehan* v. *US*, 382 U.S. 406 (1966), http://laws.findlaw.com/us/382/406.html (full text); *Katz* v. *U.S.*, 389 U.S. 347 (1967), http://laws.findlaw.com/us/389/347.html (full text), http://www.oyez.org/cases/case/?case=1960-1969/1967/

1967_35 (audio); *Stanley* (1969); and *Winston* v. *Lee*, 470 U.S. 753 (1985), http://laws.findlaw.com/us/470/753.html (full text), http://www.oyez.org/cases/case/?case=1980-1989/1984/1984_83_1334 (audio).

Note 44: See, for example, *Meyer*, 399 (in which the Court interpreted the Fourteenth Amendment to include "the right . . . to marry, establish a home and bring up children"); and *Pierce*, 534–35 (in which the Court recognized "the liberty of parents and guardians to direct the upbringing and education of children under their control").

Note 45: *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944), http://laws.findlaw.com/us/321/158.html (full text).

Note 46: *Paris Adult Theatre*, 49.

Note 47: *Silverman*, 511.

Note 48: *Tehan*, 414, citing *Grunewald*, 581–2.

Note 49: *Paris Adult Theatre*, 66.

Note 50: *Poe*, 536.

Note 51: *Griswold*, 486.

Note 52: *Eisenstadt*, 453.

Note 53: *Roe*, 153.

Note 54: Catharine MacKinnon, *Toward a Feminist Theory of the State*, 191.

Note 55: As Elshtain notes in her discussion of ancient Greek society, "Some categories of human subjects—in Greek society slaves and women were the most important—were confined to private realms of discourse. Truly public, political speech was the exclusive preserve of free, male citizens. Neither women nor slaves were public beings. Their tongues were silent on the public issues of the day" (*Public Man, Private Woman*: 14).

Note 56: Ibid., 193.

Note 57: Ibid., 193.

Note 58: Elizabeth Schneider, "The Violence of Privacy," in *The Public Nature of Private Violence*, ed. Martha Albertson Fineman and Roxanne Mykitiuk, 36–58 (New York: Routledge, 1994): 43.

Note 59: See DiStefano, *Configurations of Masculinity*.

Note 60: Feminist legal theorist Martha Fineman draws the important distinction between familial or marital privacy and individual privacy. She notes that familial privacy, from its earliest incarnations in the United States, was based on family form. In other words, the concept of family was defined by its members (husband, wife, and children), and it was this collection of people living in the same house that earned the right to privacy. A newer form of privacy, she notes, is individual privacy, in which privacy rights accrue to individuals, sometimes regardless of their membership in a family—so that privacy rights are available to single people, for example, as well as married people. This type of privacy is based on the principle of nonintervention, the aforementioned "right to be let alone" by the state. For more on Fineman's formulations of privacy, see Fineman, Martha Albertson, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2005).

Note 61: *Bradley* v. *State*, 1 Miss. (1 Walker) 158 (1824).

Note 62: *State* v. *Oliver*, 70 N.C. 60, 61–62 (1874).

Note 63: Elizabeth Schneider, "The Violence of Privacy."

Note 64: Patricia Boling, *Privacy and the Politics of Intimate Life*.

Note 65: Dorothy Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," *Harvard Law Review* 104 (1991): 1419.

Note 66: Elizabeth Schneider, "The Violence of Privacy," 37.

Note 67: For a more detailed description of the case selection method for each chapter, see the appendix to the book.

Note 68: 64 N.Y.2d 152 (1984).

Note 69: 419 N.Y.S.2d 901 (1979).

Note 70: *Scott* v. *Hart*, No. C-76-2395 (N.D. Cal., filed Oct. 28, 1976).

Note 71: 595 F.Supp. 1521 (1984).

Note 72: 65 N.Y.2d 461 (1985).

Note 73: 489 U.S. 189 (1989).

Note 74: 545 U.S. 748 (2005).

Note 75: 478 U.S. 186 (1986).

Note 76: 539 U.S. 558 (2003).

