Chapter Three

The Paradox of Privacy for the Battered Women's Movement: Rape, Reproductive Rights, and the Case of *People* v. *Liberta*

Introduction

After several decades of little visible activism against domestic violence in the first half of the twentieth century, the US battered women's movement reemerged in the late 1960s. The movement developed in the midst of the broader struggle for women's liberation, and concurrently with several related social movements, such as the anti-rape,[1] anti-sexual-harassment,[2] and reproductive rights efforts. The influence of (and sometimes coalitions with) these other movements during these formative years helped to determine the nature and goals of the various activist groups that formed to work on this issue. These goals also changed over time. At first, the battered women's movement sought primarily to provide women with physical protection from violence (via shelters). Their agenda quickly progressed, however, to include the more proactive goal of securing legal protections, as well. As it expanded its focus from physical to legal protection, the movement increasingly had to contend with issues of privacy. The anti-rape and reproductive rights movements strongly influenced this trajectory and the ways in which the battered women's movement conceptualized, confronted, and co-opted existing notions of privacy. In many ways, the activism of feminist attorneys in the case of *The People of the State of New York* v. *Mario Liberta*[3] represents a synthesis of these influences. A landmark case overturning the marital rape exemption in New York State, *Liberta* ultimately offered an alternative, empowering model of privacy for battered women. **1**

Feminist scholars and activists working on domestic violence have long recognized that privacy is an essential aspect of the problem. Since *Roe* v. *Wade*[4] was decided, several feminist legal scholars have considered the ramifications of its particular conception of privacy for the issue of domestic violence.[5] Such analyses generally focus on the paradox created by the contrasting potential uses of privacy: in short, the right of privacy that helped to secure the abortion right for women is also used as a justification for the perpetuation of domestic violence. That is, the same right to privacy that ostensibly prevents the state from interfering with a woman's right to choose abortion simultaneously prevents the state from intervening in a violent home. And in both cases, this conception of privacy is rooted in a judicial respect, almost reverence, for "the sanctum of the home"—in particular, the heterosexual, marital home.[6] **2**

Given this paradox, feminist critiques of privacy ask, what is the appropriate response of a feminist scholar to the privacy issue? The answer is significant, for it has not only ideological but also practical implications. Particularly for legal theorists who are involved in feminist litigation, this question is more than simply an academic one. Some scholars resolve this issue by criticizing *Roe* for employing the privacy analysis at all, suggesting that legal privacy is **3**

simply too dangerous a concept for feminists to endorse.[7] Others have suggested that feminists should challenge existing models of privacy, and/or develop alternative models of privacy. Patricia Boling, for example, argues for

> the need for a vantage point that can help us gain some conceptual clarity about (1) what is valuable and worth protecting about privacy and private life; (2) what is dangerous and oppressive about hiding persons or problems in private, depriving them of public significance, and (3) . . . how issues rooted in private life can be made politically recognizable and actionable. . . . Another step might be to think of privacy as a particular kind of political tool used to protect (or suppress) certain interests or aspects of human life. On this view, treating intimate, especially familial, life and personal decision making as private—that is, as off-limits to public scrutiny and government interference—is a political decision, visible in our social values, legal norms, and the fundamental law of our Constitution. Of course, we need to question who decides to value and protect privacy, and whose interests are served by doing so.[8]

In this way, Boling suggests that feminist scholars not reject concepts of privacy altogether, but that they instead consider interrogating, co-opting, and transforming existing models.

Likewise, Dorothy Roberts makes a similar argument, but she goes further by suggesting that such a model is crucial for the empowerment of African-American and poor women.[9] Specifically, she notes, "The definition of privacy as a purely negative right serves to exempt the state from any obligation to ensure the social conditions and resources necessary for self-determination and autonomous decisionmaking."[10] Instead, Roberts champions the notion of an affirmative view of privacy, declaring that

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> this approach shifts the focus of privacy theory from state nonintervention to an affirmative guarantee of personhood and autonomy. . . . This affirmative view of privacy is enhanced by recognizing the connection between privacy and racial equality. The government's duty to guarantee personhood and autonomy stems not only from the needs of the individual, but from the needs of the entire community. . . . It may be possible . . . to reconstruct a privacy jurisprudence that retains the focus on autonomy and personhood while making privacy doctrine effective. Before dismissing the right of privacy altogether, we should explore ways to give the concepts of choice and personhood more substance. In this way, the continuing process of challenge and subversion—the feminist critique of liberal privacy doctrine, followed by the racial critique of the feminist analysis—will forge a finer legal tool for dismantling institutions of domination.[11]

While Roberts's analysis is undertaken specifically to address issues of reproductive rights, her vision of a new model of privacy is equally applicable to the problem of domestic violence.

Like Boling and Roberts, Elizabeth Schneider suggests a feminist re-visioning, rather than rejection, of the privacy paradigm, and she discusses this idea specifically in the context of domestic violence. Schneider maintains that the right of privacy, differently construed, actually contains "radical potential."[12] In order to realize this potential, Schneider suggests, "The

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challenge is to develop a right to privacy which is not synonymous with the right to state noninterference with actions within the family, but which recognizes the affirmative role that privacy can play for battered women. Feminist reconstruction of privacy should seek to break down the dichotomy of public and private that has disabled legal discourse and public policy in this arena."[13] By advocating a feminist appropriation and subversion of the existing right to privacy, these scholars imply that this right need not be detrimental to the interests of battered women. Indeed, their work suggests that such an alternative model would have the potential to advance significantly a variety of women's legal issues. Unfortunately, they often conclude, no such model has yet been articulated.

6 In reality, however, the case of *People* v. *Liberta* represents just such a model. Responding directly to the recent reproductive rights privacy litigation, and demonstrating the influence of the anti-rape movement, *Liberta* serves as a critical case study of one alternative to the privacy paradox. This chapter, therefore, explores the strategies and influences that led to the *Liberta* opinion, as well as its implications for battered women and its potential as a model for a new, affirmative right to privacy.

7 Indeed, this chapter focuses on both the legal and cultural forms of privacy as they have affected the lives of battered women. As discussed in chapter one, both of these approaches to privacy—its formal development as a legal, constitutional right, and its more amorphous existence as a shared cultural value—affect this society's responses to domestic violence. Furthermore, these two forms of privacy are often complementary and mutually reinforcing. In general, while lawyers and judges deal primarily with the legal aspects of privacy, grassroots activists and service providers within the movement confront the more informal, cultural attitudes about privacy. This chapter thus addresses both of these arenas.

8 The chapter begins with an analysis of the early years of the US battered women's movement, during which it primarily focused on providing shelter and other basic services. In this section, I explore some of the major strategies of those early years, noting in particular the ways in which those strategies reflected an awareness of and a challenge to traditional, cultural notions of privacy. In addition, I examine the significant developments and dynamics within the movement, especially its links to and relationship with the anti-rape movement. I also trace the establishment during this era of the major organizations committed to combating domestic violence, including the formation of the first organization devoted solely to promoting the legal rights of battered women, the National Battered Women's Law Project (NBWLP).

9 The chapter next turns to an exploration of the other type of privacy with which the battered women's movement has had to contend: privacy as a legal, constitutional right. For, while the battered women's movement was beginning to take shape, advocates for reproductive rights were increasingly winning significant victories in court and further developing the constitutional right to privacy. This section explores this trajectory, examining the contours of the legal right to privacy that resulted from this line of cases. This discussion also traces the ways in which the

development of this right explicitly privileged marital relationships, often to the exclusion of all others. My analysis considers the implications of this privileging of marriage and the nuclear family home, both for battered women and for the future of the privacy right.

Within the anti-domestic-violence movement, neither lawyers nor activists responded immediately to the model of privacy articulated in the line of reproductive rights cases that culminated in the *Roe* v. *Wade* decision. Throughout most of the 1970s, they remained focused primarily on providing physical shelter for battered women, on raising public awareness of the problem, and on urging police and other state actors to take the problem seriously and respond appropriately. It was not until the 1984 case of *People* v. *Liberta* that the movement directly confronted—and appropriated for its own benefit—the reproductive rights model of privacy. Therefore, the chapter next provides a critical case study of *Liberta*, paying particular attention to the role of feminist lawyer-activists in formulating this alternative model of privacy. Finally, the chapter concludes with a brief analysis of the ways in which the type of privacy advanced by *Liberta* could be successfully applied to benefit the battered women's movement more broadly. **10**

The Early Years of the Battered Women's Movement

The beginning of the battered women's movement is not easily identified by a single event or a specific date. As explained in chapter two, the first half of the twentieth century was relatively quiet with regard to the issue of domestic violence. During the late 1960s and early 1970s, however, activism on behalf of battered women gained momentum, and quickly led to greater social awareness of the problem of domestic violence. This increased public awareness, as well as the advocacy work that generated it, are generally considered to signal the beginning of the US battered women's movement. **11**

Early Activism: Providing Physical Protection

Indications of the burgeoning movement abounded during these formative years. The late 1960s and early 1970s brought a variety of "firsts" for the issue of domestic violence: the first time wife abuse was reported in major newspapers (1974); the first task force on battered women organized by the National Organization for Women (NOW) (1973); the first time an article on domestic violence appeared in a major scholarly journal devoted to the sociology of the family (1969).[14] The first "speakout" on rape, organized by the New York Radical Feminists, took place in 1971 and paved the way for public and private consciousness-raising about all types of violence against women.[15] The first battered women's shelters were also established during the 1970s;[16] the rapid proliferation of such refuges also suggested the beginning of a movement. **12**

The emphasis on service provision predominated in the movement's early years. As Barbara Hart, longtime activist and lawyer within the movement, observed, **13**

> Where we started was not with law, but with shelters, safe houses, support groups, etc. I was, at that point, a social worker, and I don't know that there were any of us that were lawyers, we were all social activists. . . . We just didn't go to law as a solution. . . . So that's the place that we started. . . . My view was not that the law was a particularly useful tool . . . What I saw as much more useful was women's organizing together, women's discourse, women's community.[17]

While the battered women's movement eventually broadened to incorporate legal and legislative initiatives as well, its earliest efforts focused on providing physical protection and basic services to women in crisis, often via the establishment of shelters and safe houses.

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Shelters for other disadvantaged groups of people, such as those facing poverty, joblessness, or alcoholism, had existed in the United States for years. Yet refuges created with battered women in mind did not begin to emerge steadily until the mid-1970s. Instead, early shelters for battered women were initially formed on a more ad hoc basis, either operating informally from within a private residence, or co-opting an existing shelter to aid women seeking refuge from abusive partners. Pasadena, California's Haven House, for example, opened in 1964 by the wives of alcoholic husbands, is sometimes considered the first battered women's shelter in the country.[18] While it was created for victims of alcohol-related violence, Haven House quickly became a refuge for many battered women.[19]

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Many women began to provide shelter very informally and even by chance. Joan Zorza, who would eventually become a feminist attorney litigating on behalf of battered women, recalls some of her earliest contact with victims of domestic violence. She began working with battered women "completely unintentionally and unexpectedly . . . even before much of this had a name. . . . [I] was totally shocked to discover domestic violence."[20] In her job providing military counseling through the American Friends Service Committee, Zorza often worked from her home. Several of the men she counseled would bring their wives or girlfriends to counseling sessions with them,

> because they didn't trust them out of their sight. And then, at ten at night when they were beaten up . . . a number of [the women] found their way—as one of the only places they knew where they could go—onto my doorstep. Being a good soul . . . when someone knocks on your door . . . needing a place to stay . . . I let them in . . . with absolutely no awareness of what it was or what this was about . . . Some of the women stayed for months.[21]

Zorza, who admittedly "kind of backed into" the issue of domestic violence, eventually assisted in the formation of Transition House in Boston, one of the first shelters created explicitly for battered women.[22]

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This trajectory, from ad hoc sheltering to more deliberate service provision, mirrors the growth of the movement overall. As women like Zorza—who had been providing refuge in their homes on an individual basis—came together, they created group shelters specifically for battered women.[23] Rainbow Retreat (founded in Phoenix, Arizona in 1973), Women's Center South

(Pittsburgh, Pennsylvania, 1973), and Women's House (St. Paul, Minnesota, 1974), were among the first of these.[24] Conceived at the individual, community, and grass-roots levels, these early shelters frequently proved richer in ideology than in financial resources. Often founded by women of color and lesbians,[25] several of these shelters, such as Casa Myrna Vazquez (Boston, 1974) and La Casa de Las Madres (San Francisco, 1976) reflected a progressive politics that sought to eliminate hierarchy between staff and residents and to empower residents within their own communities.[26] In most cases, the lack of formal ties to governmental or other funding sources proved beneficial, allowing founders to determine the goals and ideology of the shelter.

Such idyllic visions of shelter life did not always translate into practice, however. As Zorza notes, conflicts among lesbians and heterosexual women, or among staff and residents, inevitably arose when residents felt that they were being pressured to leave their abusive partner, or all men, for good.[27] Likewise, anti-Semitism was a pervasive problem, according to Zorza, who observes that many shelters in New York City originally refused to accept battered Jewish women, referring them instead to the one shelter in the city created specifically for Jewish women.[28] Many shelters in New York also refused to accept battered immigrant women or anyone else without a social-security card.[29] Given the often admirable goals guiding many shelters, but also the very real problems of racism and homophobia, the degree of success shelters achieved in serving diverse populations seem to have varied widely. Notwithstanding this limitation, these early shelters did more than physically protect women from abusive partners. They also served a symbolic purpose that furthered activists' broader goal of taking domestic violence out of the private realm. As the founders of the National Coalition Against Domestic Violence (NCADV) observed, "those shelters symbolize the right of every woman to be physically protected by the society in which she lives."[30]

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Foundations in the Anti-Rape Movement

The twentieth-century anti-domestic-violence movement in the United States was rooted in and strongly linked to the national anti-rape movement. This connection occurred for several reasons. First, both movements developed within the context of the women's rights and women's liberation movements that began in the 1960s. Both grew out of the increased gender consciousness that women's liberation fostered, including that movement's assertion of a woman's right to control her own body. Additionally, both movements addressed forms of violence against women that were often similar and even overlapping; one could not work to combat rape without gaining increased awareness of domestic violence, and vice versa. Likewise, the anti-rape movement's explicit analysis of rape as a crime of violence, rather than sex, created an inevitable link between the two.[31] As a result, many anti-rape activists ultimately became advocates for battered women. At various points, the two movements joined coalitions or worked together against violence against women in general.

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19 The consciousness-raising that characterized the radical feminism of the late 1960s was a critical component in the founding of the anti-rape movement. Within consciousness-raising groups, women discovered that their experiences of physical and sexual assault were far more common than they had suspected. The prevalence of these revelations led to the first public "speakout" on the subject of rape, held by the New York Radical Feminists in 1971. In her chronology of the anti-domestic-violence movement, longtime activist Yolanda Bako traces its origins to consciousness-raising groups and to this first speakout, which "launched the beginning of a continuous movement to change antiquated laws and public attitudes about rape and other assaults against women."[32] In this way, even these early activist efforts to combat violence against women confronted cultural issues of privacy, and deliberately sought to bring this problem out of the private realm. Publicizing the violence offered several benefits: removing the shame associated with rape and domestic violence, decreasing the feeling of isolation often experienced by victims, and increasing public awareness of the problem.

20 As the anti-rape movement progressed, many of its initial strategies lent themselves directly to the creation of a battered women's movement. The rape crisis hotlines that were established in the early 1970s,[33] for example, allowed women an opportunity to seek support and to talk openly and anonymously about the violence they suffered.[34] Furthermore, as Hart explains, the rape crisis hotlines inadvertently engendered, among anti-rape advocates, an increased awareness of the problem of domestic violence:

> In those [reading and consciousness-raising] groups [in which she and others participated during the late 1960s and early 1970s], we discovered that many of the . . . women had been sexually abused by their intimate partners—and some by strangers—but mostly it was the coercion and the violence of their partners. So we began talking about it, and then we decided to open up a hotline, a sexual assault hotline, and that hotline generated more calls about physical violence—as contrasted with sexual violence—than anything else. So the women's center began to talk about, well, so what are we gonna do about this?[35]

As such, the creation of hotlines intended to deal with sexual assault actually initiated some of the earliest anti-domestic-violence activism.

21 In addition, public awareness and media campaigns launched by anti-rape activists took violence against women out of the private sphere and placed it on the national agenda. Likewise, the movement's critique of existing procedures to deal with rape victims in hospitals, police stations, and courtrooms applied equally to the domestic violence context. As Bako observes,

> Each reform of the anti-rape movement . . . set the stage for considering what was to be done with victims of family violence. . . . As the early 70's were spent confronting the problems of women who were assaulted by strangers, the mid seventies tried to address the flip side of the problem: women and children who

> were assaulted by men they could easily identify and the state could readily apprehend.[36]

The anti-rape movement continued to affirm that rape was *always* violence, regardless of who committed it. In this way, the movement's increasingly sophisticated analysis of and emphasis on rape as a crime of intimates as well as strangers also assisted in the inevitable progression toward a closer examination of domestic violence.

22 The many connections between the issues of rape and domestic violence eventually led many activists working on one issue to also work in the other. Yolanda Bako, herself an anti-rape advocate who later helped to found the NCADV, observed that "Many [NCADV] coalition members are long time activists in the areas of rape prevention . . . and . . . other issues that involve self-help and working against the feeling of powerlessness."[37] Likewise, the original Steering Committee members concluded that any group considered for membership in the NCADV "must have an expressed commitment to eliminating violence against women in all its forms."[38] This cross-pollination between movements led to the sharing of ideas and resources among various groups working to end violence against women.

23 The alliance between anti-rape and anti-domestic-violence activists was also one of necessity. Workers in both movements often found that joining forces and forming coalitions afforded them a stronger voice, greater public presence, and increased financial stability. The attempt to found a women's shelter in Brooklyn, New York was a case in point. This process revealed obstacles in the existing state legislation that would effectively prevent such a shelter from ever being established. Specifically, as Bako explains, "In 1977 there was no provision in the not-for-profit incorporation law of [New York State] to allow women and children to be cared for in a public facility together."[39] Only after assembling a coalition of women from "all the major women's groups in Brooklyn," and spending two years planning, lobbying, and waging media campaigns did the coalition succeed in establishing a center dedicated to reforming this legislation.[40]

24 Such coalition strategies had numerous benefits for both movements. Activists quickly learned that by seeking reforms related to violence against women broadly conceived, they could achieve several goals at once (for example, training hospital personnel to respond to all violence against women, rather than just sexual assault). This strategy could effect change on various levels, from local community issues such as hospital intake, to police response, to legislative reform. The compilation of statistics for this purpose also benefited from a coalition perspective: defining rape more broadly to include marital and date rape, rather than solely stranger rape, conveyed a much more accurate picture of the reality of sexual assault and served the goals of both the anti-rape and the battered women's movement, both of which confronted marital rape frequently. In fact, as *People* v. *Liberta* would later demonstrate, marital rape served as a point of common ground and significant struggle for the two movements.

25 Anti-domestic-violence activism also learned several lessons from the anti-rape movement. Battered women's advocates were eager to avoid repeating the mistakes made in anti-rape work, especially with regard to organizational and financial strategies. In particular, the tension between obtaining funding while maintaining ideological purity loomed especially large for these activists. Several of the earliest founders of the NCADV, already active in anti-rape work, critiqued the anti-rape movement from the inside. They condemned "the failure of the anti-rape movement to maintain its feminist philosophy once we created the pressure for government dollars."[41] The position taken by these battered women's advocates toward the anti-rape movement is telling; here, they maintain a critical distance from that movement ("the failure of the anti-rape movement . . .") while simultaneously claiming it ("*we* created the pressure . . ."). This dual stance suggests just how closely the two movements were aligned. Despite the occasional internal tensions, the bonds that existed between the two movements would later prove crucial to their success in the courtroom. Pooling resources and sharing strategies would eventually benefit both movements, most immediately in their efforts to combat marital rape.[42]

Organizational Development

26 The NCADV was one of the most significant and ultimately influential battered women's advocacy groups formed during these years and it continues to provide meaningful support for anti-domestic-violence efforts nationwide. The idea for the NCADV originated at the Houston International Women's Meeting in 1977, where a variety of battered women's advocates agreed to establish a national coalition of groups "to act as a strong political and collective force in working towards ending wife abuse."[43] Resolutions adopted by delegates to the Houston meeting included the following:

> The President and Congress should declare the elimination of violence in the home to be a national goal. . . .
>
> State legislatures should enact laws to expand legal protection and provide funds for shelters for battered women and their children. . . .
>
> Programs for battered women should be sensitive to the bilingual and multicultural needs of ethnic and minority women.[44]

Furthermore, the "Proposed National Plan of Action," that resulted from the conference noted that "Nobody knows how many American wives have been beaten. Most State laws don't give the victims adequate protection or even the right to sue their assailants. Police don't like to intervene in what appears to them to be a private family matter. . . ."[45] Even in its infancy, clearly, the battered women's movement had the problem of privacy on its mind.

27 The original Steering Committee of NCADV included women from across the country, "from diverse backgrounds and experience," who were addressing domestic violence at the grass-roots level.[46] Initial meetings of this group reflected its commitment to empowerment and equality for battered women and to resisting co-optation by more conservative interests or

structures. Committee members established twelve specific objectives for the national coalition, prioritizing such goals as securing resources for member organizations, creating and tracking legislation, and working to reform attitudes about violence both among the general public and within the criminal justice system.[47] The establishment of these goals represented some of the battered women's movement's earliest efforts to expand service provision beyond physical shelter. Moving into legislatures and courtrooms, the movement began to seek legal remedies and protections for battered women.

28 NCADV was by no means the only national organization to develop during the movement's early years, however. Other groups such as the Battered Women's Directory Project and the National Communications Network had earlier paved the way. Led by Betsy Warrior, the Battered Women's Directory Project was a carefully compiled and continuously updated list of programs and projects working on the problem of domestic violence from around the nation. Warrior's compilation proved to be an invaluable resource for activists seeking to build coalitions across regions. It was also quite accessible: interested battered women's advocates could obtain a copy of this directory by mailing one dollar to the Battered Women's Directory Project. In 1976, Warrior had the first edition of the directory published, entitled *Working on Wife Abuse*.[48]

29 In early 1978, in the course of its duty to investigate sex discrimination, the US Commission on Civil Rights held a Consultation on Battered Women.[49] The consultation took place in Washington, D.C., and drew over six hundred attendees. Some of these attendees were attorneys, academics, and shelter workers, who were invited to the consultation in order to present their perspectives on the problem of domestic violence. Yet many of the six hundred in attendance were activists who had not been invited, but came nonetheless—from across the country—to observe the proceedings. The objectives of the consultation included identifying reliable data as well as existing research gaps and strategies; identifying necessary state-level legal reforms; identifying the short- and long-term support services needed by battered women; assessing the role of the federal government in each of these issues; facilitating communication among activists, researchers, and policymakers; and generating public awareness.[50]

30 For commission staffers, Warrior's directory served as a research tool: with it, they identified existing organizations and individuals to participate in and testify at the consultation. Having come together for the consultation, many of these women met the evening before the official proceedings and began to flesh out plans for the formation of the National Coalition. Over the course of the next few days, these approximately sixty women elected steering-committee members, developed regional caucuses, and adopted a statement of purpose.[51] As Hart recalls,

> We knew about a number of us (battered women's advocates) around the country, because we had done some networking, so we said, "OK, let's have a meeting—since we're all coming to these hearings, let's meet the night before." And so we met at [George Washington University]. And then we went to the

> hearings [the next day], and then we met in the bathrooms of the [building where the hearings were held] and decided that we needed to have a national coalition. So that's when we gave birth to the national coalition. And we developed an organizing committee, and we spent some time looking at trying to . . . build the organization, but also to try to get some money . . . So we did some meeting with folks in Congress. . . . So we started at the Civil Rights hearings and then we moved forward.[52]

31 At the same time that the NCADV was forming and Warrior was coordinating the Battered Women's Directory Project, another effort to foster communication among anti-domestic-violence activists nationwide was also afoot. The National Communication Network for the Elimination of Violence Against Women (NCN) published its first newsletter in April 1977. Formed in response to the frustration and isolation expressed by many anti-domestic-violence activists, NCN sought "to generate a national network and to facilitate a dialogue among women working to eliminate male violence against women, particularly domestic violence."[53] In addition to their stated focus on domestic violence, the activists who worked to create NCN also considered the possibility of issuing a joint publication with the Feminist Alliance Against Rape (FAAR), which was already publishing its own newsletter. After much consideration and negotiation, the two groups agreed to produce a publication that, while mailed singly, would consist of two discrete sections, one by FAAR and one by NCN. The newsletter, which often contained information from the recently formed anti-sexual-harassment group, the Alliance Against Sexual Coercion, as well, addressed a wide range of issues related to violence against women.

32 After an arduous struggle to find the proper moniker for this publication, the expanded newsletter became known by November 1978 as *Aegis, the Magazine on Ending Violence Against Women*. Articles in the NCN portion of the magazine covered a wide range of topics, such as "Learning from the Anti-Rape Movement" and "Race and the Shelter Movement," as well as regular features such as "National Coalition Against Domestic Violence News" and "Legal Projects and State Legislation." Hart, a member of the *Aegis* collective, describes it as "a very, very radical, progressive place, in which it was very committed to confronting and eradicating race and class barriers—'smashing racism' is probably what we may have said back then. . . . [these were] folks that were very highly committed to addressing issues of race and class."[54] *Aegis* was published bimonthly and then quarterly until it ceased publication in 1987 due to lack of funding.[55] For shelter workers, lobbyists, and lawyers, *Aegis* served as a national resource through which to communicate and strategize.

Legal Activism

33 Although not created solely as an anti-domestic-violence organization, the National Center on Women and Family Law (NCOWFL), also formed at this time, devoted much of its energy to the legal needs of battered women, via its National Battered Women's Law Project (NBWLP). The NBWLP operated from the premise that "the law . . . can play an integral role in helping battered women and their children to put an end to the violence and rebuild their lives."[56] Unlike NCADV

and the Battered Women's Directory Project, which focused primarily on supporting battered women's shelters and refuges, NCOWFL concentrated its efforts in the legal (and occasionally legislative) arenas. Furthermore, according to NBWLP, "Battered women's advocates need help with their law reform efforts. They need technical assistance on their litigation challenges to improper judicial and police response. They need resources for educating the judiciary and court personnel about battery and why certain policies are harmful to battered women and their children."[57] Providing support and information to lawyer-activists litigating on behalf of battered women, NCOWFL and NBWLP served as the most significant national resource for domestic violence litigation for over twenty years. Before it closed its doors in 1996 due to a lack of funding, NBWLP effected change in countless lawsuits of all sizes across the country, including the most influential domestic violence cases of the late twentieth century. These cases included everything from criminal prosecutions of individual batterers to large-scale, class-action lawsuits aimed at making police departments more responsive to domestic violence calls.[58]

34 The support for individual cases provided by NBWLP ranged from simple provision of information to attorneys to actual participation in the cases through the writing of amicus briefs. At the same time, NBWLP served as a clearinghouse of information about domestic violence litigation to shelters and other grassroots programs, as well as to Legal Aid Societies, legislators, and the media. In addition to producing resource packets and other educational materials on the legal issues related to domestic violence, NBWLP also contributed legal and legislative updates to *The Women's Advocate*, a bimonthly newsletter published by NCOWFL. While a host of other legal advocacy groups, including NOW's Legal Defense and Education Fund (NOW-LDEF), often assisted or participated in domestic violence litigation, NBWLP was the only national organization devoted solely to advancing the legal rights of battered women.

35 During the early years of the anti-domestic-violence movement, therefore, activism by and for battered women took a variety of forms. The earliest efforts quickly progressed from ad hoc protection of abused women within private residences to the establishment of group shelters. Many activists soon recognized the value of coalition building, and a national network of shelters began to take shape. At the same time, activists hosted conferences and other meetings at which they shared ideas and sought solutions to the problems of domestic violence. They quickly recognized that shelter work was "a Band-Aid approach" and often characterized it as such.[59] The increased communication among battered women's advocates across the country, aided by the publication of *NCN* and then *Aegis*, led to a shift in focus from service provision and physical protection to proactivity and legal protection.

36 These two arenas—service provision and legal advocacy—mirror the two ways in which the battered women's movement confronted issues of privacy during the 1970s. First, through media and other publicity campaigns, activists challenged cultural ideas about privacy and domestic violence by seeking to demystify the problem and to encourage public dialogue about it. These campaigns specifically encouraged neighbors and other community members to get involved by speaking up and supporting victims of domestic violence, rather than continuing to

shroud battered women in shame. Similarly, while legislative reforms often focused on obtaining government funding for shelters and other programs, they also pursued tougher sentences for offenders as a means of sending a public message that battering would not be tolerated.

Second, the movement's lawyer-activists quickly began confronting privacy within the legal arena. Led on the national level by NCOWFL and NOW-LDEF, these judicial reform efforts initially had two priorities: 1) educating judges that domestic abuse could no longer be viewed as merely a private, family matter, and 2) holding police forces accountable for refusing to intervene in such cases. Both of these efforts represented the movement's first challenges to privacy within the legal sphere. The movement's activist and judicial strategies, therefore, complemented each other: while activists attempted to disrupt societal conceptions of privacy by refuting the notion that domestic violence was merely an individual problem, lawyers focused on changing judicial interpretations of privacy that prevented the state from intervening in abusive homes. **37**

Legal Privacy and the Movement for Reproductive Rights

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Case Resources
Meyer v. *Nebraska*
Findlaw (http://laws.findlaw.com/us/262/390.html) (full text)
Pierce v. *Society of Sisters*
Findlaw (http://laws.findlaw.com/us/268/510.html) (full text)
Prince v. *Massachusetts*
Findlaw (http://laws.findlaw.com/us/321/158.html) (full text)

This surge of awareness and activity on behalf of battered women occurred just as years of activism and litigation around reproductive rights were coming to fruition. This timing was not coincidental, and its implications were significant. The marital and familial privacy cases of the first half of the twentieth century (including *Meyer*,[60] *Pierce*,[61] and *Prince*)[62] had set the stage for the establishment of a reproductive rights jurisprudence grounded in privacy. Drawing upon these earlier cases, the Supreme Court fashioned a right to privacy that was immediately beneficial to the cause of reproductive rights. The concepts of privacy employed by lawyers and justices in the contraception and abortion cases, however, would inevitably affect domestic violence litigation. An analysis of privacy as developed in the reproductive rights cases is therefore crucial to an understanding of the legal history of domestic violence.

At the root of the cases that eventually led to *Roe* v. *Wade* was a Connecticut statute that had been enacted in 1879. The bill was introduced in the Connecticut legislature at the same time that a very similar one was brought to the Massachusetts legislature under the influence of noted moralist Anthony Comstock. After several revisions, the Connecticut bill became law in 1879. In its final form, this criminal statute prohibited trafficking in "obscene" materials related to **39**

sex or reproduction, and forbade the "use of any drug, medicine, article, or instrument for the purpose of preventing conception."[63] As such, the law implicated both women and doctors, for it made the usage as well as the prescription of contraceptives illegal. The statute, which had been alternately observed and ignored in Connecticut since its inception, ultimately served as the basis for a national debate on the legality of contraception and abortion.[64]

40

Activists in the Connecticut Birth Control League (CBCL) unsuccessfully sought repeal of the law at every biennial legislative session from 1923 through 1935. Frustrated at their lack of progress, they opened a contraceptive clinic in Hartford in spite of the statute in 1935, which operated successfully and with little public attention for the next five years. The CBCL continued to open such clinics throughout the state without any public censure, until the 1938 opening of a clinic in Waterbury. The Waterbury clinic drew the attention of the local media, prompting a critical response from the local Catholic clergy and engendering public debate about its legality. The furor eventually made its way to the courtroom, and the case *State of Connecticut* v. *Roger B. Nelson et al.*,[65] decided in 1940 by the state Supreme Court, effectively closed all Connecticut birth control clinics for the next 25 years.[66] While the criminal statute had not yet been enforced, the threat of prosecution it carried served as an effective deterrent to the provision of contraceptive services.

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Case Resources
Tileston v. *Ullman*
Findlaw (http://laws.findlaw.com/us/318/44.html) (full text)

Once the issue had entered the judicial arena—and because legislative remedies seemed next to impossible—birth control activists began to pursue their goal through the courts. (Primarily, their goal consisted of making contraception available to all women; throughout this era, contraceptive measures had been and continued to be available to wealthy women from their private doctors.) The first of these cases to reach the US Supreme Court was *Tileston* v. *Ullman*.[67] Fritz Wiggin, a lawyer recruited by the CBCL, located the plaintiff, New Haven doctor Wilder Tileston. Tileston easily documented the cases of three local married women for whom, due to various medical conditions, pregnancy could be fatal. New Haven County State's Attorney Abraham Ullman was named as the defendant in the case. Wiggin argued the case on both state and federal constitutional grounds, claiming primarily that the birth control statute violated the Fourteenth Amendment in two ways: first, by potentially depriving the female patients named by Tileston of "life without due process of law"; second, by depriving Tileston of property—namely, his ability to practice his profession—without due process.[68]

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After the Connecticut Supreme Court affirmed the statute, Wiggin and the CBCL appealed to the US Supreme Court. Once the Court accepted the appeal, Ullman responded with an argument that implicitly presaged the debates about privacy that were just about to surface, claiming that "a state has the right to control the marital relations of its citizens."[69] The Court, however, managed to avoid addressing that issue, for it dismissed the case on superficial

grounds. The case of *Tileston* v. *Ullman* did not present a significant case or controversy, the unanimous Court decided, because the arguments about deprivation of life pertained only to the patients (who were not named as plaintiffs), and not to the doctor himself. Additionally, Wiggin's failure to demonstrate any actual threat of prosecution under the statute rendered Tileston's claim of deprivation of property insubstantial.[70]

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)

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Connecticut birth control activists and lawyers learned several lessons from the failure of *Tileston*. Primarily, they needed to bring a case that was technically flawless, thereby allowing the Court to reach the merits of the case. Second, as their new attorney, Yale Law School professor Fowler Harper, suggested, the public debates and controversy that continued to surround the issue of birth control in Connecticut would make it virtually impossible to get the statute repealed in the Connecticut courts. Instead, Harper recommended a strategy that involved planning to lose in Connecticut, so that they could concentrate their energy on getting a case to the US Supreme Court quickly. Lee Buxton, a physician who had previously testified at legislative hearings about the dangers of the 1879 statute, eagerly agreed to participate in the case. Buxton had seen numerous patients who had suffered severe physical and emotional damage as a result of unintended pregnancies, and one of these, a woman who had lost three infants in three years as a result of congenital defects, ultimately became the plaintiff in the case that Harper brought to the US Supreme Court,[71] *Poe* v. *Ullman*.[72]

44

Unlike his predecessor Wiggin, Harper argued his case explicitly on privacy grounds. He criticized the Connecticut statute for "purport[ing] to regulate the behavior of married persons in the privacy of their homes in an arbitrary manner which restricts their liberty and seriously jeopardizes the lives and health of spouses." Referring to "the right to marry [and] establish a home" that the Court had affirmed in *Meyer*, Harper asserted that this right "necessarily implies the right to engage in normal marital relations." He further insisted that "The normal and voluntary relations of spouses in the privacy of their homes is regarded as beyond the prying eyes of peeping Toms, be they police officers or legislators."[73] By claiming the constitutional right to "marital relations" and couching such a right in privacy terms, Harper formulated the origins of a right to marital privacy.

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Despite their presentation of what they believed to be a technically sound case, the efforts of the birth control advocates were frustrated once again. The justices determined, again, that the lack of a sufficient case or controversy prevented them from reaching the merits of the case. This time, the problem lay not with having the wrong plaintiffs. Instead, the utter lack of enforcement of the 1879 statute led the Court to conclude that this case, like *Tileston*, did not present a sufficient case or controversy for adjudication. While the statute and the ensuing

litigation had forced the closure of all of the contraceptive clinics in the state for years, no person had yet been prosecuted under the statute. Justice Frankfurter authored the plurality opinion in *Poe*, noting "[t]he lack of immediacy of the threat" of prosecution, and asserting that "This Court cannot be umpire to debates concerning harmless, empty shadows."[74]

46 This time, however, the Court was far from unanimous. Three other justices joined Frankfurter's opinion, and one concurred. Two of the four dissenting justices filed lengthy and significant opinions. Justice Douglas's dissent argues strenuously that the Court should have reached the merits of the case and recognized the statute as an invasion of the right to privacy, which he locates in the Fourteenth Amendment. Relying upon *Meyer*, he concludes that the familial rights affirmed therein were "said to come within the 'liberty' of the person protected by the Due Process Clause of the Fourteenth Amendment." This liberty, Douglas claims, "includes the right of 'privacy.'"[75] With the 1879 statute, Douglas contends, "the State has entered the innermost sanctum of the home. . . . That is an invasion of the privacy that is implicit in a free society."[76] Justice Harlan's dissent is even more substantial and more powerful; he articulates "these married persons['] . . . right to enjoy *the privacy of their marital relations* free of the enquiry of the criminal law."[77] After a lengthy analysis of substantive due process doctrine,[78] Harlan locates the privacy right in the Fourth and Fourteenth Amendments, contending that "the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character."[79]

47 With regard to future privacy cases, two aspects of Harlan's dissent were particularly significant: first, his reliance on substantive due process, which, by allowing a much broader interpretation of the Fourteenth Amendment, made the right to privacy much easier to locate and justify. Second, Harlan was careful to confine this reading of privacy to the *marital* bedroom. He notes that "a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy."[80] His repeated emphasis on "marital relations," "married persons," "married couples," "lawful marriage," and "marital intimacy" as deserving of privacy implies that people and relationships outside of those parameters might not be so worthy.[81] In fact, Harlan subsequently makes this distinction clear: "I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced."[82] Ultimately, in addition to his privacy argument, much of Harlan's dissent rests on the privileges that should be afforded to people who are legally married:

> Adultery, homosexuality and the like are sexual intimacies which the State law forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.[83]

By tying privacy rights so strongly to the marital relationship, Harlan imbues the right to privacy with meanings that do not necessarily accrue to it, meanings that would have significance both for reproductive rights activists in the short term and for domestic violence activists in the long term.[84]

48 Not altogether surprised by the Court's ruling in *Poe*, the leadership of what had become the Planned Parenthood League of Connecticut (PPLC) had already planned their next course of action. Less than five months after *Poe* was decided, PPLC President Estelle Griswold and Dr. Buxton opened a contraceptive clinic—coupled with a press conference—in New Haven. The media attention had the desired effect: Griswold and Buxton were arrested almost immediately, thereby forcing enforcement of the 1879 statute.[85] The case that resulted from the arrest slowly made its way, as Harper intended, to the US Supreme Court.

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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 Court in *Griswold v. Connecticut*[86] was not nearly as divided as it had been for *Poe*; only two justices dissented. Justice Douglas authored the fairly brief majority opinion. Unlike Harlan's dissent in *Poe*, Douglas's majority opinion in *Griswold* makes the privacy right seem much less tangible. Referring to the *Pierce* and *Meyer* precedents, Douglas argues in terms of "peripheral rights"—those rights that, like the right to choose how to educate one's children (as in *Pierce*), are not explicitly stated in the Constitution, but can be construed therein nonetheless.[87] Such cases, Douglas contends, indicate that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy."[88] He located these "zones of privacy" in no less than five amendments, including the First, Third, Fourth, Fifth, and Ninth, ultimately concluding that "the right of privacy which presses for recognition here is a legitimate one."[89] Despite his reluctance to pin down a single source for the privacy right itself, Douglas's invocation of it is nonetheless strident; he concludes by asserting "a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[90]

50 Having paid careful attention to the *Poe* dissents, the PPLC lawyers stressed the importance of marriage to the privacy right in the materials and arguments they presented for *Griswold*. Douglas's majority opinion echoes this sentiment, citing the importance of the "intimate relation of husband and wife"[91] and concluding with a rousing tribute to the institution of marriage itself:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. . . . Marriage is a coming together for better or for worse, hopefully enduring, intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in

> living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[92]

With this exaltation of marriage, the Court reversed Connecticut's controversial contraception statute.

51 The three written concurrences, while debating the exact constitutional location of the right to privacy, nonetheless acknowledge it, and base their arguments on the concept of marital privacy. Relying heavily on the Ninth Amendment, Goldberg's concurrence (in which two other justices join) asserts the right of privacy as "a fundamental personal right."[93] Goldberg's argument, which draws specifically on Harlan's *Poe* dissent, claims constitutional protection for "a particularly important and sensitive area of privacy—that of the marital relation and the marital home," as well as "the traditional relation of the family—a relation as old and as fundamental as our entire civilization."[94] Thus, as the Court debated the Connecticut statute—from *Tileston* to *Poe* and finally to *Griswold*—the judicial conception of privacy continued to take shape. By the time the Court finally invalidated the 1879 statute in 1965, its members generally agreed that there was, in fact, a constitutional right to privacy. Although the specific source of this right was still being debated, the nature of it was not: the right to privacy pertained to the activities of the home—more specifically, the bedroom, and even more specifically, the marital bedroom. This characterization of privacy as a right enjoyed by married people in their homes would not easily fade.

52 Just two years later, however, a contraceptive case that had nothing to do with married couples began taking shape in Massachusetts. Unlike the Connecticut statutes, which had prohibited contraceptive use by married people, the laws in Massachusetts at this time forbade only the distribution of contraceptives to unmarried individuals. At the urging of Boston University students, contraception activist William Baird gave a public lecture on BU's campus. Baird did not hide his intention to test the Massachusetts statutes by forcing a court case. During his lecture, he denounced the law for "dictat[ing] . . . the privacy of your bodies" and distributed information on vaginal foam contraceptives. Due to the press coverage Baird and BU had successfully attained prior to his visit, police officers were present at the lecture, and Baird was arrested on the spot as he had hoped.[95]

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Case Resources
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)

This case, too, eventually made its way to the US Supreme Court. Writing for the majority in *Eisenstadt* v. *Baird*,[96] Justice Brennan describes the statutes as violative of the Equal Protection Clause of the Fourteenth Amendment. He contends that the distinction that the

statutes made between married and unmarried persons was entirely invidious and could not be supported by any rational relationship to a valid state interest. The Massachusetts statutes simply failed the rational basis test required for equal protection analysis and were therefore unconstitutional. The court invalidated the statutes, allowing contraceptives to be distributed in Massachusetts to people regardless of marital status.

Brennan's opinion, however, also relies heavily on *Griswold*, paying particular attention to the uses of privacy and its relationship to marriage in that case. Toward the end of the opinion, Brennan writes, **54**

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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.[97]

In addition to simply invalidating the statutes on equal protection grounds, the *Eisenstadt* opinion thus offered a deliberate revision of the right to privacy. The marital relationship that had been such an essential component of the privacy right only seven years earlier in *Griswold* was now deemed superfluous: while the privacy right remained intact, its scope was significantly broadened to include both married and single people. At the same time, privacy seemed to be losing its association with a tangible physical location. No longer confined to the bedroom, whether marital or otherwise, privacy was beginning to encompass the far more abstract realm of individual decision-making.

Another defining feature of the *Eisenstadt* opinion was its noticeable lack of concern with the question of where the privacy right was located in the Constitution. Whereas the *Griswold* opinion upon which this case relied had repeatedly struggled to locate and justify this right, *Eisenstadt* simply assumed it to be a given. By the time *Eisenstadt* was decided, *Griswold*'s internal debates about where, how, and to what extent the privacy right existed seemed obsolete. In addition, Brennan's wording—specifically, "the decision whether to *bear* or beget a child"—hinted strongly that the privacy right might be applied to the question of abortion as well. Although *Roe* v. *Wade* was already well underway by the time *Eisenstadt* was decided, this case confirmed that the Court was already beginning to consider the possibility of viewing abortion in terms of the right to privacy. **55**

In 1969, a women's liberation group at the University of Texas sought to provide information on birth control to single women—information that was not readily available to such women under existing Texas law. In the course of providing this information, they received a great number of requests for information on abortion as well. Having learned of fairly reliable abortion providers both in Mexico and in Texas, they began a referral service. Concerned that their efforts might be punishable under Texas's antiabortion statute, they consulted a young lawyer they knew named **56**

Sarah Weddington regarding the legality of providing abortion information and referrals. After researching Texas abortion law, Weddington remained unsure, and the group suggested filing a federal lawsuit to test the constitutionality of the statute.[98] As Weddington further explains,

> When the group here in Austin originally asked me to get involved, it was because they had collected information about the safe places for women to go for abortion—both safe in the sense of going to other states, like California, where it was already legal, . . . or safe as in here in Texas, where it was illegal, . . . but . . . there were better places than the bad ones, and to try to keep [the women] out of the bad ones. So they wanted to know if they could, you know, put [the information] in the campus newspaper, or could they respond to an interview request from the campus newspaper or local press members about the information. Or, whether they could be prosecuted if it became known they had been collecting the information and were happy to make it available to people—could they be prosecuted as accomplices to the crime of abortion? So that was the question I originally started working on, and then [I] found the *Griswold* case, and a lot of other cases that were pending relating to the issue of abortion and abortion regulation.[99]

57 Weddington quickly found several plaintiffs for the test case, including Norma McCorvey, a pregnant, single woman whose search for an abortion was ultimately unsuccessful, and who was therefore forced to carry her unwanted pregnancy to term.[100] For the purposes of the test case, McCorvey would be referred to as Jane Roe. Dallas County District Attorney Henry Wade was named as the defendant in the suit. One of the central arguments of Weddington's initial complaint was that the Texas statute infringed upon Roe's "*right to privacy* in the physician-patient relationship."[101] By implying that the privacy right might exist not only between married couples, but also between a woman and her doctor, this particular emphasis suggested that the privacy right was indeed moving out of the bedroom and away from the marital relationship.

58 Initially, Weddington and her colleagues had no indication that their case would turn out to be so central: "When we decided to file a case, it was really with the thought that we would help get some *other* case to the Supreme Court—because we would be helping to build this mountain of litigation going on around the country, and therefore increase the chances that the Supreme Court would accept some case on the issue. We didn't think it would be ours!"[102] Yet, by the time the Court did agree to hear *Roe*, the momentum that the series of privacy and contraception cases had been gathering, coupled with growing national debates about the legality of abortion, ensured that *Roe* would be a pivotal case.[103]

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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)

The majority opinion in *Roe*, authored by Justice Blackmun and joined by six other justices, is notorious for its length, complexity, and tripartite analysis, in which a woman's right to choose abortion is balanced with the state's interest in protecting potential life. After a lengthy analysis of the legal and medical "history of abortion" in England and the United States,[104] Blackmun asserts that these competing rights vary depending upon the trimester of pregnancy, according the state increasing regulatory power over abortion with each successive trimester.

Before establishing this balancing act, however, Blackmun turns to the privacy issue, noting immediately that "the Constitution does not explicitly mention any right of privacy."[105] Nonetheless, he asserts, "The Court has recognized that a right of personal privacy . . . does exist under the Constitution," and determines that its precise location is not entirely relevant. Ultimately, he concludes, "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[106] Blackmun is also careful, however, to outline the limitations of the privacy right. The opinion notes, "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . The privacy right involved, therefore, cannot be said to be absolute."[107] By extending the privacy right to include abortion, while simultaneously and deliberately acknowledging its limitations, the *Roe* opinion represents both a culmination of privacy jurisprudence as well as a guidepost for future litigation. **60**

Over the course of several decades of reproductive rights litigation, therefore, the Court's definition of the privacy right, which had originated in the recognition of the sanctity of marriage, had expanded to include the individual freedom to make the most personal decisions. The right had broadened significantly, from protecting only married persons to including single persons, and from a tangible, location-specific right (i.e., freedom from interference in the home or in the bedroom) to the more abstract right of freedom of choice. Yet the abstract nature of the right, however carefully Blackmun had attempted to delineate it, was the cause of some concern for legal scholars assessing *Roe*. **61**

In an essay published shortly after *Roe* was decided, Yale law professor (and former clerk to Chief Justice Warren) John Hart Ely published a searing criticism of the opinion in the *Yale Law Journal*. Characterizing *Roe* as simply "a very bad decision," Ely lambastes the opinion for its lack of constitutional grounding.[108] He criticizes the Court's failure to identify a specific constitutional home for the privacy right and its inability to justify abortion as a privacy issue at all as its fatal flaws. Unlike *Griswold* and other privacy cases that had specifically addressed issues of governmental intrusion into the home, *Roe* was clearly not a case about "governmental snooping."[109] The Court's vague characterization of *Roe* as a privacy case, Ely contends, was unconvincing, and the opinion's position as a foundation for the abortion right thereby substantially weakened. **62**

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Future US Supreme Court Justice Ruth Bader Ginsburg, though not as blunt as Ely, was equally critical in her assessment of *Roe*. Focusing on sex-equality issues as well as constitutional ones, Ginsburg maintains that the far-reaching scope of the *Roe* opinion ultimately detracted from its effectiveness. The sheer breadth of the opinion, Ginsburg states, provoked a greater backlash than would have occurred with a more limited decision.[110] Having indicated a lack of enthusiasm for the privacy rationale ("personal privacy, somehow sheltered by due process"), she suggests that the Court would have been wiser to pursue an analysis focused on gender-based classifications.[111] She contends,

> The conflict . . . is not simply one between a fetus's interests and a woman's interests, narrowly conceived, nor is the overriding issue state versus private control of a woman's body for a span of nine months. Also in the balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.[112]

Furthermore, the successful development of sex-equality jurisprudence in the early- to mid-1970s, she asserts, had set the stage for a far less controversial, and more constitutionally solid, resolution to *Roe*.[113] Additionally, the Court's reliance on a doctrine of individual privacy in *Roe* was ultimately detrimental to the effort to seek public funding for abortions. An analysis that emphasized gender equality—along with its attendant class and economic issues—might have proved more hospitable to the notion of public funding.[114]

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Ginsburg recognized that *Roe* was not just about abortion. While her article does not mention domestic violence specifically, her concern for the broader ramifications of *Roe* indicates that the privacy analysis employed by the Court did not necessarily serve the interests of gender equality or of women. Likewise, after *Roe*, as Ely and others suggested, the privacy right itself as well as its potential applications were becoming dangerously malleable. While the outcome of *Roe*—the defense of the abortion right—signaled a definitive victory for women's rights, the shifting and expanding judicial definitions of privacy that culminated in *Roe* cannot be viewed in the same light. At its narrowest, during the *Tileston* and *Poe* years, the right to privacy was an instrument of exclusion, serving the interests of only heterosexual, married men and women, and overtly privileging the nuclear family form. In this iteration, the privacy right was extended to married couples at the explicit expense of homosexual and single people. Those who engaged in "adultery, homosexuality, and fornication"[115] formed a convenient Other against whom the Court defined the parameters of the privacy right. Yet even the apparent broadening of this right with the *Eisenstadt* and *Roe* decisions—to include single people, and to disregard marital status—left women in a tenuous position. The abortion right that had been secured came under legislative attack almost immediately,[116] and the privacy rights of homosexuals still remained unarticulated.[117] Likewise, the implications of this newly expansive approach to privacy for the problem of domestic violence remained to be seen.

Interestingly, in the years that preceded *Roe*, feminist activists fighting for reproductive rights defined those rights and the concept of privacy much more expansively than the Court ultimately did. Dr. Alice Rossi, for example, writing on a woman's "Right . . . to Control her own Reproductive Life," framed reproductive and privacy rights as human rights. In particular, she noted that: **65**

> [T]here are three specific [topics] which are of most concern to the questions of human rights of women and the means to exercise them in the United States in the late 1960s:
>
> 1. The right to decide and the means to achieve it, when and with whom a woman shall engage in sexual intercourse.
>
> 2. The right to decide, and the means to achieve it, whether and when sexual intercourse shall be recreative or procreative.
>
> 3. The right to decide, and the means to achieve it, whether a given pregnancy shall be brought to term or not.
>
> In all three issues, we can argue that these are matters that pertain to the private right of every citizen over his own person, and the social right of access to those means necessary for the care of his own person. . . . So long as no harm is inflicted upon another person, no legislation should apply to the sex lives of Americans, and no barriers imposed to full access to the means necessary to conduct these sexual lives as one wishes in accord with one's values and beliefs.[118]

Rossi concludes by noting that "in defense of the dignity and the privacy of their own person, every woman must fight for the recognition of her right to control her own reproductive processes."[119] By portraying reproductive and privacy rights as a matter of bodily integrity and personal autonomy, Rossi portrays the privacy right in a much broader, more affirmative light than the one developed in the line of cases leading up to *Roe*.

Likewise, when feminist activist Betty Friedan gave the keynote speech at the First National Conference for Repeal of Abortion Laws in Chicago in 1969, she sounded a similar note, describing "the revolution of American women toward full equality, full participation, human dignity and freedom in our society. . . . [T]here is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand a control over our own bodies, over our own reproductive process."[120] Furthermore, she notes, **66**

> The right of woman to control her reproductive process must be established as a basic, inalienable, human, civil right, not to be denied or abridged by the state. Just as in American tradition, in the American Constitution, the right of individual conscience, religious conscience, spiritual conscience is considered an inalienable private right not to be denied or abridged by the state . . .[121]

By invoking the language of the Constitution to discuss reproductive and privacy rights as human rights, Friedan underscores a more expansive understanding of privacy and its links to liberty and self-determination. Four years later, just after the *Roe* decision, Mary-Ann Lupa, president of the Chicago chapter of NOW, described women "demand[ing] the right to control their own lives—the right to make decisions that affect their own health and well-being."[122] Like other activists for reproductive rights, she identified those rights as a broader struggle for autonomy and self-determination.

67 The post-*Roe* years have been marked by deliberate testing of both the abortion right and the privacy right. While the doctrine of stare decisis[123] has been a powerful influence on this series of decisions, the Court has acknowledged that "arguments continue to be made . . . that we erred in interpreting the Constitution"[124] in *Roe* and has often been willing to narrow considerably the scope of both rights. As these rights have continued to contract, the notion of the right to privacy as a tool for securing women's freedom has become increasingly implausible. On the contrary, the Court has been quick to delineate the many freedoms that such a privacy right does *not* entail, such as public funding for abortion.[125]

68 The privacy right as developed in the line of cases leading up to *Roe* would eventually prove critical to the problem of domestic violence. As MacKinnon and other feminist theorists have since observed,[126] the privacy that reproductive rights advocates sought—and that the Court affirmed—was a negative right, one that encouraged the state *not* to interfere in the private realm. While immediately beneficial to the cause of reproductive rights, this was the same idea that battered women's advocates were actively combating when they urged police to intervene in the domestic sphere.

69 Yet the battered women's movement did not respond immediately to this problem presented by *Roe*. The lack of immediate response suggests that the two movements, while certainly sharing some common goals related to advancing women's rights, may not have been sharing or comparing legal strategies; indeed, the problem *Roe* presented may not even have been immediately apparent to anti-domestic-violence activists. Marjory Fields, a lawyer-activist within the battered women's movement from its earliest days, notes that "the [reproductive rights and battered women's] movements really were separate" at that time.[127] Zorza concurs, stating that the relationship between the two movements was simply "not as close as it should have been."[128] Likewise, the archives of the NCOWFL and the NBWLP do not reveal any immediate response within the battered women's movement to the privacy paradox that *Roe* presented.

70 Of course, some activists worked within and were interested in both movements simultaneously. And while the issue of abortion was a politically charged one that some battered women's activists were hesitant to support, others, such as Morgan Plant, viewed it as a priority. In an article for *Aegis* magazine entitled, "Abortion is a Battered Women's Issue,"[129]

Plant urged her fellow activists to join the pro-choice struggle, describing the interdependence of the two issues. Overall, however, the movement did not respond directly to the concept of privacy as it had been articulated in the reproductive rights cases.

71 Instead, throughout most of the 1970s, the battered women's movement continued to work with privacy in the same ways it always had. Activists addressed cultural notions of privacy by raising public awareness of the problem of domestic violence (thereby bringing it out of the private realm), and by providing private (i.e., secret and safe) places for women in danger to live. At the same time, lawyers within the movement addressed privacy within the judicial realm by seeking increased state intervention in violent homes.[130] Eventually, however, as the movement's judicial strategies expanded, battered women's advocates began to consider the implications of *Roe* for domestic violence. When they did, the most obvious response might have been to assume—as feminist legal scholars subsequently have—that the reproductive-rights-style privacy was inherently detrimental to battered women, because it kept the state from interfering in the private sphere (specifically, the home). Such an approach would thus assume that the constitutional right to privacy represented, at best, a double-edged sword for battered women. Instead, the lawyer-activists working on a pivotal domestic violence case of the early 1980s adopted an entirely different approach, one that suggested that such a right—properly construed—might prove beneficial, and even empowering, for battered women.

The Case of *People* v. *Liberta*

72 In the case that would eventually strike down the marital exemption to New York State's criminal rape statute, feminist attorneys responded pointedly to the reproductive rights privacy litigation of the previous decade and used it to their advantage. In so doing, they inverted the legal paradox that privacy is often thought to represent for feminists, and successfully employed concepts of privacy to secure a critical legal protection for women. Because their efforts were largely accepted by the Court—and served as a model for subsequent marital rape decisions—the strategies employed in the case of *People* v. *Liberta* merit careful consideration as an example of pioneering domestic violence privacy theory and litigation.[131]

73 The facts of the *Liberta* case are undisputed. Mario and Denise Liberta were married in 1978. Later that year, Mario began physically abusing Denise. In 1980, Denise obtained a temporary order of protection that ordered Mario to stay away from her and their home but allowed him weekly contact with their 18-month-old son. On March 24, 1981, one such visit between Mario and their son took place at the motel where Mario had been living; Mario, Denise, and their now 2½-year-old son were all present. Inside the motel, Mario viciously attacked Denise and threatened to kill her. He forced her to engage in vaginal and oral sex with him in the presence

of their son, forcing the toddler to watch and take part in several of the sexual assaults. The next day, Denise swore out a felony complaint against Mario, and, after a jury trial, he was convicted in July of that year of both rape in the first degree and sodomy in the first degree.[132]

74 Mario Liberta appealed his conviction on two grounds. First, he contended that New York's rape and sodomy statutes did not apply to him. The existing rape law stated that a man was guilty of first-degree rape "when he engages in sexual intercourse with a female . . . by forcible compulsion," and defined female as "any female person who is not married to the actor."[133] The sodomy statute contained a similar marital exemption, referring to "sexual conduct between persons not married to each other."[134] In light of these marital exemptions, Mario asserted, he had committed no crime, because he was still legally married at the time of the assault. While the trial court agreed with Mario and dismissed the indictment, the Appellate Court disagreed, noting that the order of protection that was in effect at the time of the attack rendered the Libertas legally not married for the purposes of the rape and sodomy statutes. Those statutes defined "not married," in part, as "living apart . . . pursuant to a valid and effective . . . order issued by a court of competent jurisdiction which by its terms or in its effect requires such living apart."[135]

75 Second, Mario suggested that even if the court refused to accept him as legally married (and therefore covered by the marital exemptions), his conviction should nonetheless be overturned on constitutional grounds. He claimed that both laws were unconstitutional violations of the equal protection clause of the Fourteenth Amendment: first, by unfairly burdening only some men (just the unmarried ones), and second, by burdening only men, and not women. While the lower courts all rejected this argument, *Liberta* eventually reached the Court of Appeals, New York's highest-level appellate division. In the opinion written by the Court of Appeals, the constitutional questions would ultimately serve as the basis for the most significant and far-reaching aspects of the decision. In an unusual turn of events, it was the feminist lawyer-activists working on *Liberta* that urged the Court to consider Mario Liberta's constitutional arguments.

76 The lawyers who chose to fight Mario Liberta did so quite purposefully. Rather than viewing *Liberta* as simply another marital rape case, they perceived it as an opportunity to challenge New York's marital rape exemption. Former Acting US Solicitor General Barbara Underwood was working as an assistant district attorney in Brooklyn at the time. Underwood and her boss, Brooklyn District Attorney (and former US Representative) Elizabeth Holtzman, learned of *Liberta* once it had reached the state Court of Appeals level. Underwood and Holtzman had learned that the District Attorney's office in Erie County, New York, where the case originated, planned to argue that the marital exemption to the state statutes was not unconstitutional, and that Liberta's conviction therefore should stand. Already interested in a variety of women's and other progressive legal issues, Holtzman and Underwood had no desire to see Liberta's conviction overturned. At the same time, they were not comfortable with the Erie team's plan to affirm the marital rape exemption. Given this conundrum, they realized that *Liberta* presented

"an interesting legal question . . . We thought, maybe we can make a contribution here. It seemed like a case in which our contribution as a prosecutor's office . . . might make a difference."[136]

77 While Holtzman, Underwood, and Evan Wolfson (another assistant district attorney in Holtzman's office) relished the opportunity to challenge the marital exemption, their colleagues across the state did not share their enthusiasm. In fact, not one other prosecutor's office in the state of New York would join Holtzman's office as amicus curiae (or "friend of the court," for the purpose of writing an informational brief), leaving the Brooklyn District Attorney's office to file its own amicus brief.[137] Other women's rights advocates, however, from both the legal and grassroots arenas were eager to participate as amici. While some briefs, such as the one filed by Marjory Fields of Brooklyn Legal Services, were rejected as the Court attempted to limit the number of amici,[138] one other brief was accepted by the Court. Filed by the NCOWFL and the Center for Constitutional Rights, the brief also represented scores of other organizations: battered women's shelters, rape crisis centers, Women Against Pornography, both state and local chapters of NOW, several branches of Planned Parenthood, and many others signed on.[139]

78 The two briefs made similar arguments, and both urged the Court to take the same two-pronged course of action. First, and in a somewhat unusual rhetorical move, the briefs asked the Court to give serious consideration to Mario Liberta's suggestion that the existing marital rape exemptions were unconstitutional. While the defendant complained of the unfairness that resulted from allowing only married men to rape with impunity, however, these briefs instead pointed to the unfair distinction that the exemption made between married and unmarried rape *victims*. This distinction was indeed a violation of the equal protection clause, they argued, and as such, the marital rape exemption portion of the rape and sodomy statutes should be struck down.

79 Second, these briefs also urged that Mario's conviction should not be overturned. Even if the Court agreed to strike down the marital rape exemption as the briefs suggested, the rape and sodomy statutes under which Mario was convicted would remain intact. Additionally, the briefs argued, Mario was not legally entitled to the marital exemption that was in place at the time of the assault. Because of the order of protection that was in effect at that time, the Libertas were not legally married when Mario attacked Denise. Thus, as an unmarried man, Mario could expect no legal protection from the marital exemption.

80 Compared to simply advocating for the constitutionality of the statute as grounds for upholding the conviction, such an approach would require some complex legal maneuvering. Holtzman's brief, [140] therefore, detailed for the Court the justification for each of the steps that would make such a ruling possible. Given the complexity of their proposal, and knowing that the Court would be reluctant to strike down an existing statute, Underwood recalls, "We thought, 'Let's see if we

can show them a way to do this.'"[141] An important part of the "way to do this," according to Holtzman's office, was to rely on the right to privacy, and specifically on the reproductive rights cases that helped to create it.

81

Prior to *Liberta*, "there [existed] a prevailing notion that law should protect the privacy of the family unit."[142] Holtzman's brief squarely addressed this notion, observing that this privacy had been used as one form of justification for marital rape exemptions nationwide. Her brief quickly dismissed this rationale. Noting the lack of marital exemptions for aggravated sexual abuse and for assault, Holtzman concluded, "Violence is not a protected part of the marital relationship. New York has simply not removed the criminal sanction from the marital bedroom."[143] Additionally, the brief discounted the suggestion that the marital rape exemption itself promotes domestic harmony and reconciliation, stating, "Marital disharmony is created by the sexual violence, not by a subsequent criminal prosecution."[144] In short, "[M]arital privacy cannot be invoked to justify the exemption for marital rape."[145] The NCOWFL brief adopted a similar approach. Citing the US Supreme Court's abandonment of inter-spousal tort immunity, as well as its rejection of a spousal consent requirement for abortion, the brief declared, "Marital privacy is not inviolate."[146] By refusing to acknowledge the home as a site protected from criminal sanctions—or marriage as a relationship protected from government intrusion—these briefs effectively discredited the conception of privacy as a license for domestic abuse.

82

Case Resources
Carey v. *Population Services International*
Findlaw (http://laws.findlaw.com/us/431/678.html) (full text)
Planned Parenthood v. *Danforth*
Findlaw (http://laws.findlaw.com/us/428/52.html) (full text)

Having rejected a construction of privacy that erased legal recourse for domestic violence (and ultimately protected the batterer), Holtzman's brief went on to assert the battered woman's right to privacy. The marital rape exemption, she argued, unconstitutionally deprived women of that right. The location and nature of this privacy right "came out of the *Roe* v. *Wade* litigation and the idea of bodily autonomy."[147] In fact, the brief drew specifically on a number of reproductive rights cases, including *Roe*, *Eisenstadt*, *Carey* v. *Population Services International*,[148] and *Planned Parenthood* v. *Danforth*.[149] The selection of cases—all dealing with the individual woman's right to make decisions regarding her own body[150]—linked the privacy right very deliberately with ideas about individual and bodily autonomy. Noting that "Respect for individual autonomy as protected by the privacy right is the very underpinning of the American constitutional scheme,"[151] Holtzman declared that this right remains intact for all women, whether married or not; this right "does not stop at the threshold she crosses as a bride."[152]

83

At the core of Holtzman's argument was her exploration of two core concepts related to privacy: marriage and individual autonomy. With the marital rape exemption, she argued, "the State forces a woman to choose between two equally fundamental aspects of the right to privacy: the

right to marriage and the right to personal autonomy in sexual matters."[153] Choosing one should not have to mean giving up the other, Holtzman contended. By casting the reproductive rights decisions as pertaining to "personal autonomy in sexual matters"[154]—an interpretation certainly invited by the expansive *Roe* opinion—the brief cogently linked the issues of abortion and marital rape under the rubric of a privacy right that is beneficial to women. Drawing explicitly on *Griswold*, the brief further explained that if a woman has no legal power to resist forcible sex within marriage, she also loses "her constitutionally protected freedom of choice in matters of contraception;" the exemption, therefore, "violates profoundly her most intimate constitutional rights."[155] The characterization of constitutional rights as intimate—and subject to violation—underscored the construction of privacy as an individual, corporeal right.

84 Laurie Woods, in the NCOWFL brief, echoed Holtzman's sentiments. The NCOWFL brief referred to reproductive rights, broadly conceived, as the basis for the right to privacy. Citing cases involving not only abortion[156] and contraception[157] but also sterilization[158] and hysterectomy,[159] Woods contended that these cases share more than a topical similarity. More importantly, each of them affirms the right to make individual decisions about issues affecting bodily integrity.[160] This bodily integrity includes "the right not to be compelled by a third party to use or dispose of one's body or labor against one's will," and enjoys particular recognition in the Thirteenth Amendment, the prohibition against involuntary servitude.[161] This radical revisioning of the privacy right, which affords constitutional protection to notions of individual dignity, personhood, and autonomy, was a substantial departure from the reverence for marital privacy espoused in *Poe* and *Griswold*, the cases that encouraged and initiated the formulation of the privacy right in the latter half of the twentieth century.

85 In another important way, Holtzman's and Woods's briefs represented a complete reversal of a key element of *Griswold*. *Griswold*, like *Poe* before it, delineated a right to privacy by specifically naming what that right did not include: extramarital sex—in particular, adultery, fornication, and homosexuality. Privileging one form of sexuality to the exclusion of others was central to those earlier conceptions of privacy. Subsequently, however, in the 1980 New York case of *People* v. *Onofre*,[162] the privacy right had been used for the opposite purpose: to extend to homosexual and unmarried couples the right to engage in sodomy (and other private, consensual sexual acts) without fear of prosecution. The New York statute, as written, forbade sodomy only among unmarried couples. The *Onofre* case, in which a man was arrested for engaging in consensual oral sex in his home with another man, challenged this statute. The New York Court of Appeals reversed the conviction, finding the criminal sanctions attached to the sodomy statute in violation of the constitutional right to privacy. Despite the fact that, six years after *Onofre*, the US Supreme Court would rule just the opposite with regard to privacy,[163] the *Onofre* opinion, unchallenged at the time of *Liberta*, nonetheless provided a solid foundation for Holtzman's brief.

86

Both the NCOWFL brief and, to a lesser extent, the Brooklyn District Attorney's brief in *Liberta* relied upon *Onofre* as a cornerstone of their construction of the right to privacy. As Woods observed in the NCOWFL brief, the same court that was to decide *Liberta* had, in *Onofre*, characterized the right of privacy as "a right of independence in making certain kinds of important decisions" and concluded that this right pertains to "individual decisions as to indulgence of sexual intimacy . . . so long as the decisions are voluntarily made by adults in a noncommercial, private setting."[164] Holtzman's brief also acknowledged the link between this notion of privacy and the privacy at stake in *Liberta*, placing particular emphasis on the Court's articulation, in *Onofre*, of a "fundamental right to personal decision" with regard to matters of sexuality.[165] In both briefs, *Onofre* served as the critical bridge between the privacy of the early reproductive rights cases (where it was established as a fundamental right, but only because of its protection of the marital home) and the problem of marital rape that was at issue in *Liberta* (which called for a greater emphasis on bodily integrity and personal autonomy). By relying on *Onofre* in this way—a particularly effective strategy, given that the *Onofre* opinion was written by the *Liberta* court—these lawyers were able to retain the fundamental status of the right to privacy, while removing its associations with the marital home.

87

The innovative and powerful privacy arguments contained in the two briefs had far-reaching implications for the issues of privacy and domestic violence. In an effort to strike down the marital rape exemptions, these briefs constructed an alternative vision of the privacy right. Rather than rejecting wholesale the existing judicial conceptions of privacy, they used several important aspects of this right as a foundation for their more progressive conceptualization. Building on the jurisprudence that declared privacy a fundamental right, they nonetheless rejected its characterization as a license for freedom from government intrusion into the marital home, or as a privileging of marital relationships and sexuality. Additionally, the privacy right's development in reproductive rights litigation allowed the attorneys implicitly to link privacy to a broader agenda of women's rights and equality, shifting the focus onto women's individual autonomy and bodily integrity. Making particular use of the *Onofre* opinion, which emphasized personal decision-making while specifically decentering marital sexuality, they created a new vision of privacy that did not depend on marital status, but rather validated and affirmed notions of dignity and personhood. The marital rape exemption itself, the product of common law notions about the supremacy and inviolability of marriage, was quite conceivably defensible under a *Poe*-like privacy argument that centered on protection of the marital home. (This exact approach was, in fact, adopted by the Erie County District Attorney's office, arguing for the People of the State of New York in this case.)[166] By flatly rejecting such conceptions, however, attorneys from the Brooklyn District Attorney's office and from the other amici such as the NCOWFL and the Center for Constitutional Rights used their own radical revisioning of the privacy right to help combat the exemption and serve as the basis for the protection of abused women.

88 The opinion ultimately issued by the Court in *Liberta* confirms that the briefs had a significant impact on this case. Judge Sol Wachtler, writing for the Court, issued the exact disposition recommended by the amici—not the one sought by either the counsel for the state or by Mario Liberta himself.[167] While Liberta's lawyers had argued for the unconstitutionality of the marital rape and sodomy statutes resulting in the overturning of his conviction, the Erie County District Attorney's office, representing the People, asked the Court to uphold Liberta's conviction by affirming the constitutionality of the statutes. Instead, the Court chose the more complex ruling advocated by the amici: it struck down the marital exemption to the existing statutes, while upholding all other aspects of the statutes (and Liberta's conviction).

89 Wachtler's opinion echoed that of the amici with regard to three crucial issues: standing, equal protection, and privacy. First, the Court refused to overturn Liberta's conviction, noting the unique role of standing in this case. As the amici had outlined, the temporary order of protection in effect at the time of the attack rendered Liberta legally not married, and therefore immune to the protection of the marital exemption that existed at the time. At the same time, this status—"statutorily 'not married'" for the purpose of the case—granted Liberta standing to challenge the constitutionality of the marital rape exemptions, just as any other unmarried man would have had.[168] This unique set of circumstances afforded the Court the opportunity to review and strike down the marital rape exemption, while simultaneously leaving Liberta's conviction intact.

90 With regard to Liberta's equal protection claims, the Court's opinion again mirrors that of the amici. Holtzman's brief, for example, had argued that Liberta's constitutional challenge was partially correct: "The State may not lawfully distinguish between married and unmarried men who rape or sodomize women. . . . [M]ore importantly, [the marital exemption] irrationally classifies their victims, thereby denying equal protection to women who are raped or sodomized by their husbands."[169] Noting that a statutory classification based upon marital status must have some rational basis in order to meet equal protection standards, the Court concluded that such a rational basis did not exist in this case.[170] The Court explicitly rejected any such purported rationales, including the suggestion that marriage itself implies consent to all sexual intercourse. The Court here echoes Holtzman's amicus brief (in which she contends that women's rights should continue even beyond "the threshold she crosses as a bride"). Wachtler writes, "[A] marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity."[171] Likewise, Woods's discussion of the "serious physical and psychological injury" suffered by women who are raped by their husbands urged the Court to reject any notion of marriage as implied consent.[172] Wachtler's opinion agrees: "[Rape] is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd."[173]

91

Finally, the conception of privacy advanced by amici was well received by the Court. Responding to the State's suggestion that the right to marital privacy serves as an appropriate justification for the constitutionality of the exemptions, the Court strongly disagreed. Even citing *Griswold* as the basis for this conclusion, Wachtler wrote, "The marital exemption simply does not further marital privacy because this right of privacy protects consensual acts, not violent sexual assaults."[174] Additionally, the *Liberta* Court observed definitively that "[A] husband cannot invoke a right of marital privacy to escape liability for beating his wife [and] he cannot justifiably rape his wife under the guise of a right to privacy."[175] Relying, as amici did, on *Danforth*, the Court observed, "A married woman has the same right to control her own body as does an unmarried woman."[176] The opinion also discarded the notion of maintaining the exemption as a means of promoting marital harmony,[177] using the logic advanced by the Holtzman brief: "Clearly, it is the violent act of rape and not the subsequent attempt of the wife to seek protection through the criminal justice system which 'disrupts' a marriage."[178] Thus, the *Liberta* court endorsed the conception of privacy advanced by the amici briefs and relied upon this model of privacy in the writing of its opinion. Drawing on the reproductive rights cases to affirm notions of a woman's bodily integrity, while simultaneously rejecting the argument that the right to privacy protects violence in the home, the *Liberta* opinion affirmed the amici's revisioning of privacy.

92

The effect of the *Liberta* opinion has been substantial. Other states, striking down their own marital rape and forcible sodomy exemptions, have used *Liberta* as a model. An Alabama court, for example, borrowed liberally from the language, reasoning, and constitutional analysis of *Liberta* when invalidating that state's marital sodomy exemption.[179] Likewise, the Wyoming case of *Shunn* v. *State* deliberately echoed *Liberta*'s equal protection analysis in striking down the state's marital rape exemption.[180] In the midst of a national movement to strike marital rape exemptions from state law books, *Liberta* was a strong judicial voice decrying the existence of such exemptions and advocating for legal recourse for women who were sexually assaulted by their husbands.[181]

93

Through a concerted, deliberate effort, lawyers and activists in the state of New York placed the issue of the marital rape exemption before the state judiciary and were ultimately instrumental in its invalidation. At the same time, they also shaped the future of privacy jurisprudence: by rejecting a construction of privacy that was based on the privileging of the marital relationship—to the exclusion of other sexual relationships and the detriment of battered women—they constructed an alternative model of privacy. The model they presented to the Court was bolstered by the fundamental nature of the privacy right that had been established in the reproductive rights cases, yet it privileged bodily integrity and personal autonomy over marital status. In this way, they inverted the existing privacy paradigm and used it as a source of legal protection for battered women. Indications that the *Liberta* court—and, subsequently, other state courts as well—accepted or were at least influenced by this

revisioning of privacy are plentiful. As feminist legal scholars confronting the problem of domestic violence seek alternative conceptions of privacy, the theoretical strategies and practical successes of *Liberta* may serve as a model for future efforts.

Conclusion

94 During its early years in the early-to-mid-1970s, the US battered women's movement was marked by an emphasis on physically sheltering women from their abusers. As the movement matured through the late 1970s and early 1980s, however, it quickly turned to legislative and judicial remedies as a means of combating domestic violence. The movement's strong ties to the anti-rape effort helped to determine its priorities as well as its strategies, many of them focused on removing domestic violence from the private realm. As in the anti-rape movement, activists used consciousness-raising groups and media campaigns to reduce the shame and stigma of domestic abuse and to raise public awareness about the issue. In these ways, battered women's advocates confronted and challenged cultural notions of privacy. Also, as activists began to organize on regional and national levels, several groups focusing primarily or solely on the legal rights of battered women developed. By encouraging state intervention in violent homes, these groups began challenging concepts of domestic violence and privacy within the judicial realm. These groups would eventually shape the path that domestic violence litigation would take.

95 At the same time, decades of courtroom activity around the issue of reproductive rights were culminating in the decisions of *Griswold*, *Eisenstadt*, and *Roe*. In the process of securing the right to contraception and abortion, these cases and their predecessors developed a right to privacy that shifted with each new decision. Originally rooted in liberal individualism, the right to privacy as developed in the contraception cases of the 1950s and 1960s began to signify a reverence for the marital home and a privileging of marital relationships. By the early 1970s, however, the privacy right seemed to be expanding in some ways to pertain to nonmarried individuals. While the shape of the right continued to change, however, its fundamental nature did not. This fundamental right to privacy, however construed, represents a potential paradox for battered women's advocates. The privileging of the domestic sphere that featured so prominently in some conceptions of privacy, particularly those related to reproductive rights, often creates dangerous conditions for battered women.

96 Feminist legal theorists and battered women's advocates today continue to ponder how best to address this paradox. The 1984 New York case of *People* v. *Liberta* provides one possible answer. The history of *Liberta* reveals a group of feminist lawyers and activists who deliberately used the courts as a mechanism of social change. Sensing an opportunity to effect change, these attorneys (and the activist groups that supported them on their amici briefs) sought to remove the marital exemption from New York's criminal rape statute. Rather than avoiding the potentially problematic issue of the right to privacy, they confronted it directly. Their analysis

simultaneously rejected those aspects of the existing privacy right that privileged the marital relationship, and reshaped the right to emphasize women's bodily integrity and autonomy. Their response to *Liberta*, based on their new construction of the privacy right, was clearly reflected not only in the opinion of the *Liberta* court, but subsequently in the opinions of other state appellate courts striking down marital exemptions as well. Their success in advancing a form of privacy that was empowering to victims of domestic violence suggests that these lawyers' theorizing about *Liberta* could well serve as a model for other battered women's advocates confronting the paradox of legal privacy.

Notes

Note 1: For a detailed history of the anti-rape movement, see Maria Bevacqua, *Rape on the Public Agenda: Feminism and the Politics of Sexual Assault* (Boston: Northeastern University Press, 2000).

Note 2: For a thorough examination of the movement against sexual harassment, see Carrie N. Baker, "Sex, Power, and Politics: The Origins of Sexual Harassment Policy in the United States" (PhD diss., Emory University, 2001).

Note 3: 64 N.Y.2d 152 (1984).

Note 4: 410 U.S. 113 (1973).

Note 5: See Elizabeth Hafkin Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (New York: Oxford University Press, 1987); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989); Martha Albertson Fineman and Roxanne Mykitiuk, eds., *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (New York: Routledge, 1994); Elizabeth Schneider, "The Violence of Privacy," in *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, ed. Martha Albertson Fineman and Roxanne Mykitiuk, (New York: Routledge, 1994): 36–58, and *Battered Women and Feminist Lawmaking* (New Haven: Yale University Press, 2000); Cynthia Daniels, ed., *Feminists Negotiate the State: The Politics of Domestic Violence* (Lanham, MD: University Press of America, 1997); and Reva B. Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1996): 2117–207.

Note 6: *Poe* v. *Ullman*, 367 U.S. 397 (1961): *dissent*, 521.

Note 7: See Catharine A. MacKinnon, "Reflections on Sex Equality Under Law," *Yale Law Journal* 100 (1991): 1281, and *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

Note 8: Patricia Boling, *Privacy and the Politics of Intimate Life* (Ithaca: Cornell University Press, 1996): 34–35.

Note 9: With regard to class, Roberts notes that "the power of privacy doctrine in poor women's lives is constrained by liberal notions of freedom. First, the abstract freedom to choose is of meager value without meaningful options from which to choose and the ability to effectuate one's choice. The traditional concept of privacy makes the false presumption that the right to choose is contained entirely within the individual and not circumscribed by the material conditions of the individual's life." ("Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," *Harvard Law Review* 104 [1991]: 1477–78.)

Note 10: Ibid., 1478.

Note 11: Ibid., 1479–82.

Note 12: Elizabeth Schneider, "The Violence of Privacy," in *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, ed. Martha Albertson Fineman and Roxanne Mykitiuk, 36–58 (New York: Routledge, 1994): 52.

Note 13: Ibid., 53.

Note 14: Elizabeth Hafkin Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (New York: Oxford University Press, 1987): 182–87.

Note 15: Domestic Violence: A National Perspective, 1976, p. 2. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 99-M80, Box 1.

Note 16: Elizabeth Hafkin Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (New York: Oxford University Press, 1987); Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Boston: South End Press, 1982).

Note 17: Barbara Hart, interview by author, May 1, 2002.

Note 18: Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Boston: South End Press, 1982): 55.

Note 19: Linda Gordon has observed the interesting link that alcohol provides between nineteenth- and twentieth-century activism to end domestic violence. Just as temperance advocates took up the cause of domestic violence in the late nineteenth century, the first shelters to house battered women in the twentieth century were founded for wives of alcoholic husbands (*Heroes of Their Own Lives: The Politics and History of Family Violence* [New York: Viking, 1988]: 264).

Note 20: Joan Zorza, interview by author, December 14, 2001.

Note 21: Ibid.

Note 22: Ibid.

Note 23: History of Services Development in Domestic Violence Programs, 1983, p.2. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 99-M80, Box 1.

Note 24: Domestic Violence: A National Perspective, 1976, p. 8–9. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 99-M80, Box 1; Del Martin, *Battered Wives* (San Francisco: Glide Publications, 1976): 196–213; Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Boston: South End Press, 1982): 55–58.

Note 25: Given the informal, grassroots origins of these shelters, no data exist regarding the race, ethnicity, sexual orientation, or other characteristics of their founders. My own interviews with early-movement activists, however, support Schechter's characterization of their diversity in each of these areas. Additionally, while there is no established link between such characteristics and the guiding philosophy of shelters themselves, scholars have noted that members of traditionally marginalized groups are often more likely to reject traditional hierarchical approaches in favor of more innovative and egalitarian models. Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (London: Routledge, 1990); Nancy A. Matthews, *Confronting Rape: The Feminist Anti-Rape Movement and the State* (London: Routledge, 1994).

Note 26: Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Boston: South End Press, 1982): 57.

Note 27: Zorza, interview, 2001. For a discussion of similar tensions in the anti-rape movement at this time, see Nancy A. Matthews, *Confronting Rape: The Feminist Anti-Rape Movement and the State* (London: Routledge, 1994): 115.

Note 28: Zorza, interview, 2001.

Note 29: Ibid.

Note 30: National Coalition Against Domestic Violence Statement, n.d., Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 96-M117–96-M137, Box 1. Paradoxically, however, while the existence of shelters themselves held this symbolic power, shelters' practical needs—for providing safety to women via secrecy and anonymity—also complicated efforts to divorce the problem of domestic violence from issues of shame and invisibility.

Note 31: Maria Bevacqua, *Rape on the Public Agenda: Feminism and the Politics of Sexual Assault* (Boston: Northeastern University Press, 2000): 58–60.

Note 32: Domestic Violence: A National Perspective, 1976, p. 2. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 99-M80, Box 1.

Note 33: There is some disagreement regarding the founding of the first rape crisis hotline. According to Elizabeth Pleck, the first was established in Berkeley, California, in 1972 (*Domestic Tyranny*, 185). Schechter, however, suggests that the first one opened that same year in Washington, D.C. (*Women and Male Violence*, 35).

Note 34: Del Martin, *Battered Wives* (San Francisco: Glide, 1976): 222.

Note 35: Hart interview, 2002.

Note 36: Domestic Violence: A National Perspective, 1976, p. 7. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 99-M80, Box 1.

Note 37: National Coalition Against Domestic Violence Statement, n.d. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 96-M117–96-M137, Box 1.

Note 38: Notes from the National Coalition Against Domestic Violence Steering Committee Meeting, May 12-14, 1978, n. pg. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 96-M117–96-M137, Box 1.

Note 39: History of Services Development in Domestic Violence Programs, 1983, p. 3. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 99-M80, Box 1.

Note 40: Ibid., 3.

Note 41: National Coalition Against Domestic Violence Statement, n.d. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 96-M117–96-M137, Box 1.

Note 42: A more detailed analysis of this effort occurs later in this chapter. See "The Case of *People* v. *Liberta*," *infra*.

Note 43: National Coalition Against Domestic Violence Statement, n.d. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 96-M117–96-M137, Box 1.

Note 44: Resolutions Adopted by Delegates to the National Women's Conference, 1977. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Andrea Dworkin papers, 2001-M196, Box 15.

Note 45: Proposed National Plan of Action, 1977. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Andrea Dworkin papers, M196, Box 15.

Note 46: National Coalition Against Domestic Violence Statement, n.d. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 96-M117–96-M137, Box 1.

Note 47: Notes from the National Coalition Against Domestic Violence Steering Committee Meeting, May 12–4, 1978, n. pg. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 96-M117–96-M137, Box 1.

Note 48: Thereafter, the directory continued to be updated until seven subsequent editions had been issued.

Note 49: Explaining its interest in the issue of domestic violence, the commission noted, in the publication that resulted from the consultation, that its "jurisdictional basis to study the problems of battered women stems from its statutory mandate to study and collect information regarding the denial of the equal protection of the laws on the basis of sex and, in particular, in the administration of justice. Women who complain of abuse often are treated cavalierly by the police, the courts, and other

elements of the criminal justice system. Little effort has been made in most jurisdictions to provide the necessary specialized facilities to serve victims of domestic violence." US Commission on Civil Rights, *Battered Women: Issues of Public Policy* (Washington, DC: January 30–31, 1978).

Note 50: Ibid., iv.

Note 51: History of Services Development in Domestic Violence Programs, 1983, pp. 3–4. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 99-M80, Box 1; Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Boston: South End Press, 1982): 137–38.

Note 52: Hart, interview, 2002.

Note 53: National Communication Network Herstory, 1977, p. 3. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 96-M117–96-M137, Box 2.

Note 54: Hart, interview, 2002.

Note 55: National Communication Network Herstory, 1977. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 96-M117–96-M137, Box 2; *Aegis, the Magazine on Ending Violence Against Women*, 1978, Schlesinger Library, Radcliffe College; Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Boston: South End Press, 1982).

Note 56: National Battered Women's Law Project Proposal, p. 10. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 10.

Note 57: Ibid., 12.

Note 58: A detailed discussion of these class-action suits follows in chapter four.

Note 59: National Coalition Against Domestic Violence Statement, n.d. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Yolanda Bako papers (including papers of the National Coalition Against Domestic Violence), 96-M117–96-M137, Box 1.

Note 60: *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

Note 61: *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

Note 62: *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

Note 63: *Poe,* 519.

Note 64: David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: MacMillan, 1994): 2–3; 15–16.

Note 65: 11 A.2d 856 (1940).

Note 66: Garrow, *Liberty and Sexuality*, 2–78.

Note 67: 318 U.S. 44 (1943).

Note 68: Ibid., 92–95.

Note 69: Ibid., 100.

Note 70: *Tileston*, 45–46.

Note 71: Garrow, *Liberty and Sexuality*, 135–47.

Note 72: 367 U.S. 397 (1961).

Note 73: Garrow, *Liberty and Sexuality*, 166–67.

Note 74: *Poe*, 501, 508.

Note 75: Ibid., 517.

Note 76: Ibid., 521.

Note 77: Ibid., 536; emphasis added.

Note 78: Substantive due process, debated vigorously within the Court during the early decades of the twentieth century, generally refers to the notion that the right to "due process" guaranteed by the Fifth and Fourteenth Amendments is much broader than simply a procedural restraint, and that it instead, as Harlan asserted in *Poe*, "includes a freedom from all substantial arbitrary impositions and purposeless restraints" (*Poe*, 543).

Note 79: Ibid., 550.

Note 80: Ibid., 539; original emphasis.

Note 81: Ibid., 536 and 548; 537; 539; 546; 548. The strength of the link between marriage and privacy in Harlan's dissent is again apparent when he criticizes the Connecticut statute for "punish[ing] married people for the private use of their marital intimacy" (548).

Note 82: Ibid., 552.

Note 83: Ibid., 553.

Note 84: In this same vein, recalling the caveat in *Prince* that "the family . . . is not beyond regulation," he notes that "it would be an absurdity to suggest . . . that the home can be made a sanctuary for crime" (Ibid., 552) thereby placing an important yet often-forgotten restriction on the still-developing right to privacy.

Note 85: Garrow, *Liberty and Sexuality*, 201-207.

Note 86: 381 U.S. 479 (1965).

Note 87: *Griswold*, 483.

Note 88: Ibid., 484.

Note 89: Ibid., 485.

Note 90: Ibid., 487.

Note 91: Ibid., 482.

Note 92: Ibid., 487.

Note 93: Ibid., 494. It is interesting to note that this ostensibly "personal" right was completely dependent upon marital status. *Personal* here can hardly mean *individual*, since individuals only obtained this right via their legal relationship to another individual.

Note 94: Ibid., 495, 496.

Note 95: Garrow, *Liberty and Sexuality*, 320–21.

Note 96: 405 U.S. 438 (1972).

Note 97: *Eisenstadt*, 453.

Note 98: Sarah Weddington, *A Question of Choice* (New York: Putnam, 1992): 35–44.

Note 99: Sarah Weddington, interview by author, November 26, 2002.

Note 100: The other plaintiffs included a married couple, Marsha and David King (referred to in the suit as Jane and John Doe), and a physician, John Hallford, who had two state abortion prosecutions pending against him. Marsha King had just recently suffered an extremely stressful and health-threatening abortion in Mexico due to the lack of availability of abortion in Texas (*Roe*, 113; Weddington, *A Question of Choice*, 50–52, 59; Garrow, *Liberty and Sexuality*, 401).

Note 101: Weddington, *A Question of Choice*, 54; original emphasis.

Note 102: Weddington, interview, 2002.

Note 103: Once the case reached the US Supreme Court, the Does were denied standing because their claim was based on the possibility of future pregnancies, not a pregnancy that actually existed at the time of the filing of the original suit. Dr. Hallford was also denied standing, but Roe was granted standing. At the same time, a companion case, filed in Georgia, was decided alongside *Roe*. (See *Doe* v. *Bolton*, 1973, http://laws.findlaw.com/us/410/179.html [full text].)

Note 104: *Roe*, 129.

Note 105: Ibid., 153.

Note 106: Ibid., 153.

Note 107: Ibid., 153–54.

Note 108: John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*," *Yale Law Journal* 82 (1973): 947.

Note 109: Ibid., 930.

Note 110: Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe* v. *Wade*," *North Carolina Law Review* 63 (1985): 381.

Note 111: Ibid., 380, 377.

Note 112: Ibid., 383.

Note 113: When I interviewed Weddington, we discussed Ginsburg's criticism of the *Roe* opinion, and Weddington noted that while the sex-equality cases were in process as she prepared for *Roe*, they had not yet been decided. Specifically, she pointed out that when she first filed *Roe* in 1970, the landmark sex-equality case *Reed* v. *Reed* (404 U.S. 71 [1971]), http://laws.findlaw.com/us/404/71.html (full text), http://www.oyez.org/cases/case?case=1970-1979/1971/1971_70_4 (audio), had not yet been decided. Thus, she did not feel assured about the potential success of an equal protection argument: "I felt, while I did put in the gender equity argument, that . . . I still don't think we could've gotten the court to go on that basis at that particular time. So if Ruth Bader Ginsburg ends up taking the court in that direction, it would certainly be fine with me, but I don't think we could've won with that at that particular spot in time" (Weddington, interview, 2002). Weddington echoes this idea in *A Question of Choice*, 117.

Note 114: Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe* v. *Wade*," *North Carolina Law Review* 63 (1985): 384–85.

Note 115: *Poe*, 552.

Note 116: See, for example, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), http://laws.findlaw.com/us/428/52.html (full text); *Bellotti* v. *Baird*, 428 U.S. 132 (1976), http://laws.findlaw.com/us/428/132.html (full text); *Beal* v. *Doe*, 432 U.S. 438 (1977), http://laws.findlaw.com/us/432/438.html (full text), http://www.oyez.org/cases/case?case=1970-1979/1976/1976_75_554 (audio); and *Maher* v. *Roe*, 432 U.S. 464 (1977), http://laws.findlaw.com/us/432/464.html (full text), http://www.oyez.org/cases/case?case=1970-1979/1976/1976_75_1440 (audio).

Note 117: The failure to articulate the position of homosexuals with regard to this privacy right was not merely an oversight. This right was explicitly denied to homosexuals by the Court in 1986 in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), http://laws.findlaw.com/us/478/186.html (full text), http://www.oyez.org/cases/case/?case=1980-1989/1985/1985_85_140 (audio). The implications of this decision are discussed in greater detail in chapter five.

Note 118: Dr. Alice Rossi, "Sociological Argument in Support of Effect of Denial of Right to a Woman to Control her own Reproductive Life," 1967, p. 1–2. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Organization for Women records, MC 496, Box 49, Folder 16.

Note 119: Ibid., 13.

Note 120: Betty Friedan, "Abortion: A Woman's Right," Keynote Speech, First National Conference for Repeal of Abortion Laws, Chicago, Illinois, February 14, 1969. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Organization for Women records, MC 496, Box 49, Folder 16.

Note 121: Ibid.

Note 122: Press Release, August 16, 1973. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Organization for Women records, MC 496, Box 49, Folder 27.

Note 123: Latin for "to stand by that which is decided," the doctrine of *stare decisis* states that courts apply the same reasoning when deciding cases as has been used in previous, similar cases.

Note 124: *City of Akron* v. *Akron Center for Reproductive Health, Inc., et al.*, 462 U.S. 416 (1983), 419, http://laws.findlaw.com/us/462/416.html (full text), http://www.oyez.org/cases/case?case=1980-1989/1982/1982_81_746 (audio).

Note 125: See, for example, *Maher* v. *Roe*, 432 U.S. 464 (1977), http://laws.findlaw.com/us/432/464.html (full text), in which the court held that Connecticut's state Medicaid program was constitutionally justified in excluding nontherapeutic abortions, and that this regulation "does not impinge on the fundamental right of privacy recognized in *Roe*. . . . That right implies no limitation on State's authority to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds" (471–74).

Note 126: See, e.g., Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989); Dorothy Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," *Harvard Law Review* 104 (1991); Elizabeth M. Schneider, "The Violence of Privacy," in *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, ed. Martha Albertson Fineman and Roxanne Mykitiuk (New York: Routledge, 1994): 36–58.

Note 127: Marjory Fields, interview by author, January 22, 2002.

Note 128: Zorza, interview, 2001.

Note 129: Morgan Plant, "Abortion is a Battered Women's Issue," *Aegis* 33 (1982): 32–35.

Note 130: Chapter four provides a thorough discussion of these legal efforts.

Note 131: The *Liberta* model, while undeniably innovative, bears some significant limitations. Given that the case itself pertains to a marital rape exemption, the successful strategies here apply to and assume a heterosexual, marital definition of domestic violence. Vast numbers of battered women, of course, fall outside the scope of this definition. The limitations and implications of such assumptions will be discussed in greater detail in chapter five.

Note 132: *Liberta*, 158–59.

Note 133: Ibid., 159.

Note 134: Ibid., 159.

Note 135: Ibid., 159–60.

Note 136: Barbara Underwood, interview by author, December 20, 2001.

Note 137: Elizabeth Holtzman, interview by author, December 21, 2001.

Note 138: Fields, interview, 2002.

Note 139: Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 33. While this brief is the product of a collaborative effort, for the purpose of consistency, I will refer to this brief as "the NCOWFL brief" and will attribute its authorship to Laurie Woods, executive director of the NCOWFL.

Note 140: Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 32. Although both Holtzman and Underwood acknowledge that Underwood and Wolfson are responsible for primary authorship of the

brief, it was submitted in Holtzman's name as the District Attorney of Brooklyn. Holtzman, who was in full agreement with the theory and approach of the brief, authorized its preparation and fully supported the efforts of Underwood and Wolfson. The brief is referred to in the NCOWFL files as "Holtzman's brief," and this is the usage I employ. Likewise, for the sake of consistency, I attribute its authorship to Holtzman.

Note 141: Underwood, interview, 2001.

Note 142: Ibid.

Note 143: *Brief Amicus Curiae* of Elizabeth Holtzman, Kings County District Attorney, October 30, 1984: 23 [hereafter referred to as Holtzman Brief]. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 33.

Note 144: Ibid., fn 18.

Note 145: Ibid., 23.

Note 146: *Brief Amicus Curiae* of National Center on Women and Family Law, Inc., and Center for Reproductive Rights, et al., September 18, 1984: 34 (hereafter referred to as NCOWFL Brief). Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 33.

Note 147: Holtzman, interview, 2001.

Note 148: 431 U.S. 678 (1977).

Note 149: 428 U.S. 52 (1976).

Note 150: *Eisenstadt*, for example, affirmed "the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (*Eisenstadt*, 453). *Carey* protected "individual decisions in matters of procreation and contraception" and "the freedom to choose contraception" (*Carey*, 688). And *Danforth* declared parental- and spousal-consent provisions to be unconstitutional, asserting instead the primacy of the pregnant woman's decision, "inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy" (*Danforth*, 81).

Note 151: Holtzman Brief, 28. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 33.

Note 152: Ibid., 30.

Note 153: Ibid., 29.

Note 154: Ibid., 29.

Note 155: Ibid., 29.

Note 156: *Danforth*, *supra*.

Note 157: *Zagarow* v. *Zagarow*, 105 Misc. 2d 1054 (1980); *Griswold*, *supra*.

Note 158: *Ponter* v. *Ponter*, 135 N.J. Super. 50 (1975).

Note 159: *Murray* v. *Vandevander*, 522 P.2d 302 (1974).

Note 160: NCOWFL Brief, 20–21. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 33.

Note 161: Ibid., 21–22.

Note 162: *People* v. *Onofre*, 51 N.Y. 2d 485 (1980).

Note 163: *Bowers* and its implications for the right to privacy will be discussed in further detail in chapter five.

Note 164: *Onofre,* 486, 488; qtd. in NCOWFL Brief, 19–20. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 33.

Note 165: *Onofre,* 486; qtd. in NCOWFL Brief, 27. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 33.

Note 166: *Liberta*, 164–65.

Note 167: Of the six other justices on the court, five concurred with Wachtler's opinion, and one did not participate.

Note 168: Ibid., 161.

Note 169: Holtzman Brief, 3–4. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 33.

Note 170: *Liberta*, 163–64.

Note 171: Ibid., 164.

Note 172: NCOWFL Brief, 25. Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, National Center on Women and Family Law records, 96-M105, Box 33.

Note 173: *Liberta*, 164.

Note 174: Ibid., 165.

Note 175: Ibid., 165.

Note 176: Ibid., 164.

Note 177: The "marital harmony" argument, popular since at least the nineteenth century, had found expression in cases such as *Bradley* v. *State*, 1 Miss. (1 Walker) 158 (1824); *State* v. *Black*, 60 N.C. (Win.) 268 (1864); *State* v. *Rhodes*, 61 N.C. (Phil. Law) 453 (1868); and *State* v. *Oliver*, 70 N.C. 60 (1874), discussed in chapter two.

Note 178: *Liberta*, 165.

Note 179: *Williams* v. *State*, 494 So.2d 819 (1986).

Note 180: 742 P.2d 775 (1987).

Note 181: For more on the state-by-state reversals of marital rape exemptions, see Jill Elaine Hasday, "Contest and Consent: A Legal History of Marital Rape," *California Law Review* 88 (2000): 1373.

