Chapter Five

Privacy and Domestic Violence in Same-Sex Relationships

Introduction

1

The history of battered women's civil litigation, explored in the previous chapter, demonstrates the extent to which women's safety has been linked to the state's willingness—or refusal—to intervene in the violent home. Those civil suits of the 1980s underscored the fact that the characterization of the domestic sphere as inherently private—and therefore impermeable by the state—often results in danger or death for victims of domestic violence. Yet these cases, like many of the criminal cases that preceded them, dealt almost exclusively with heterosexual relationships. Even when an alternative vision of privacy was articulated in the courts with regard to domestic violence—for instance, in the *Liberta*[1] case—it too emerged from within the context of a marital relationship, and reflected that heterosexual model. As a result, both the positive and negative conceptions of domestic privacy that have emerged thus far have related primarily to married couples, and almost exclusively to heterosexual relationships.

2

Yet the problem of domestic violence is not confined to marriage or to heterosexual relationships. In fact, available statistics[2] suggest that rates of intimate partner violence in same-sex relationships parallel those within "straight" relationships.[3] Likewise, as numerous scholars have demonstrated, battered gay men and lesbians experience the same types of domestic violence as those that emerge in heterosexual relationships (including physical, verbal, sexual, emotional, and economic abuse).[4] At the same time, however, victims of same-sex battering are often subject to additional dimensions of abuse not encountered by their heterosexual peers, such as threats of "outing" by their batterer, the stress of revealing their sexual orientation when seeking services, social stigma from within as well as outside of LGBT communities, and, frequently, a lack of social services and/or legal recourse should they decide to report the abuse.[5] For these reasons, the analysis presented in this chapter takes as its starting point the recognition that same-sex violence, despite sharing some important similarities with heterosexual battering, is not its equivalent, and requires different analytical frameworks.

3

The paucity of legal options is a particularly significant factor compounding the problem of same-sex domestic violence. As of 2005, six states still explicitly exclude victims of same-sex domestic violence from civil legal protection, while another 14 states refuse this protection unless the couple has cohabitated.[6] As Pam Elliott suggests, "All battering victims perceive isolation, but gays and lesbians who have no hope of asking for help because of a lack of civil rights protection, and because of having no access to the legal system by definition, are the

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most isolated victims in society."[7] While this lack of legal recourse is certainly complicated by other categories of identity such as class and race, Elliot highlights the general isolation and invisibility that victims of same-sex violence experience within the judicial system.

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Furthermore, the issue of legal privacy has always proven particularly problematic when applied to intimate same-sex relationships. As each of the previous chapters have demonstrated, concepts of privacy, both judicial and popular, have been critical to American society's understandings of and responses to domestic violence. At the most immediate level, notions of privacy and the sanctity of the home often determine whether and to what extent police provide protection to victims. Inside the courtroom, judicial formulations of privacy establish whether or not grievances are addressed, victims are compensated, and perpetrators are punished. For heterosexual relationships, as chapters one through four have demonstrated, this model has been well established. When violence occurs between intimate partners of the same sex, however, the role of privacy becomes more complicated, for privacy has particular and unique implications for lesbians and gay men.

5

In direct contrast to the state's ongoing reluctance to intervene in the heterosexual home, gay and lesbian relationships have historically been subject to intense levels of state interference and scrutiny. Criminal sodomy laws, in particular, have codified a government view of same-sex intimate relationships as deviant and even felonious. State criminal codes from the nineteenth century that prohibited sodomy[8] and other "crimes against nature"[9] generally excluded married couples from their reach, whether officially or in practice.

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When confronting the problem of same-sex domestic violence, all of these issues converge: the existence of domestic violence within homosexual relationships, the overall lack of legal recourse for its victims, and the tension between the LGBT community and legal notions of privacy. In fact, the confluence of these issues only serves to highlight the ways in which the state's construction of privacy rights has played such a critical role in the reinforcing of patriarchal family forms, its reverence for the "traditional," nuclear family home only matched by its disregard for families and people outside of that model. The implications of this situation for gay and lesbian victims of domestic violence have been profound. As this chapter demonstrates, the legal response to same-sex domestic violence has been particularly shaped by the concept of privacy. An examination of the problem of same-sex domestic violence (and the legal response to it) thus provides additional insight into the limitations of the existing privacy model. In particular, this analysis reveals the exclusionary nature of the right to privacy as currently understood and, as such, highlights the need for a new model of privacy.

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I begin this chapter, therefore, by discussing and building upon two theoretical concepts that are particularly relevant to the problem of same-sex domestic violence: Kendall Thomas's analysis of privacy as secrecy,[10] and Ruthann Robson's concept of hetero-relationizing.[11] I then trace the implications of the historical relationship between judicial privacy and sodomy laws for lesbians and gay men. This section, which culminates in a critical case analysis of the

two US Supreme Court cases that have addressed this issue, *Bowers* v. *Hardwick*[12] and *Lawrence* v. *Texas*,[13] explores criminal sodomy laws as a locus for judicial homophobia. It is this judicial homophobia that has served as the basis for denying a right of privacy to homosexuals.

8

After tracing the unique history and implications of privacy for homosexuals, I then examine the issue of same-sex domestic violence. I first discuss the activism that has been undertaken to address this problem, including the factors that have inhibited these efforts. Next, I trace the outcomes of same-sex domestic violence cases in state courts; my analysis focuses on published, appellate-level opinions.[14] These cases not only illustrate the limitations of the current model of privacy for same-sex victims of domestic violence, but also highlight the need for a new vision of privacy more broadly. The chapter concludes with an analysis of the implications of privacy for the issue of same-sex domestic violence, and an exploration of the potential for an alternative model of privacy.

Privacy as Secrecy and the Problem of Hetero-Relationizing

9

For gay men, lesbians, transgendered people, and others whose sexual relationships are not represented within the dominant heterosexual paradigm, privacy has traditionally been a double-edged sword. Instead of invoking the sanctity of the marital home, privacy in this context often invokes both the safety and the restriction of the closet. The privacy of not revealing one's sexual orientation to a hostile public can signify a survival strategy in light of the hegemonic structures that enforce compulsory heterosexuality. As Kendall Thomas has observed,

> for [gay men and lesbians], the claim of privacy always also structurally implies a claim to secrecy. Under the existing legal and political regime, gay men and lesbians are aware that the chief value of the language of privacy is that it can be used not so much to provide a space for self-discovery, but to provide against the dangers of disclosure.[15]

Those "dangers of disclosure" are all too real in a society in which homosexual relationships are rendered invisible by the state or even criminalized. Indeed, laws such as the Defense of Marriage Act[16] and criminal sodomy statutes codify this invisibility and criminality. Furthermore, as Janet Halley has observed, the secrecy of the closet also results in a social and political invisibility that renders gay men and lesbians unable to assert their political claims. Within this paradigm, when members of the LGBT community do become visible, it is often in the most unusual (and negative) circumstances—thus reinforcing homophobic stereotypes within the dominant culture.[17]

Thus, from the perspective of a community where secrecy is, by necessity, employed strategically, privacy is quite a loaded concept. This idea has two important implications for privacy as it relates to the problem of domestic violence. First, any study of same-sex domestic violence must recognize that the state's reverence for the privacy of the marital home does not generally apply to homosexual relationships. Indeed, when the concept of privacy is applied by the state to these relationships, it is to render them invisible and disempowered. Instead, privacy in this context often refers to individual efforts to shield personal relationships from state scrutiny. Second, the mainstream battered women's movement's urgent call for increased state intervention in the home during violent incidents carries significantly increased danger for gay men and lesbians, whose desire or need for secrecy (or at least, greater control over their exposure to public scrutiny), particularly from the state, is often paramount. It is critical, therefore, to understand the nuanced ways in which privacy shapes the problem of same-sex domestic violence, often operating quite differently than it does in the context of violent heterosexual relationships. **10**

A related problem occurs when researchers, activists, advocates, judges, or juries attempt to apply heterosexual models of domestic violence to homosexual relationships. Ruthann Robson has coined the term "hetero-relationizing" to describe these attempts to force problems that occur across a wide range of intimate relationships into a strictly heterosexual mold.[18] The inclination to do so may arise because both types of violent relationships share some similarities, including similar types and rates of violence, as noted above. Nevertheless, as several scholars have argued, the unique issues faced by victims of same-sex violence merit more specific analytical approaches.[19] Robson has observed that judges and juries seeking to understand and assess a case of lesbian domestic violence will often attempt to designate one partner as the "male" of the relationship, and the other as the "female."[20] This assignation of binary gender roles in order to determine the aggressor often obscures and oversimplifies the reality of the violence that occurs between partners of the same sex. **11**

In the same way that such hetero-relationizing can seriously distort a trial, it can also impede scholarly research into same-sex domestic violence. As Mary Eaton has suggested, theorizing that attempts to equate intra-lesbian violence with heterosexual violence can be offensive, inaccurate, and unproductive: **12**

> [F]eminist theory of this sort feeds general heterosexist stereotypes about lesbians in which fulfilling sexual connection is deemed impossible in the absence of gender alterity, at best a bad copy and unfulfillable attempt to simulate the "real thing." This imposition of a heteronormative framework upon lesbian relationships is not only insulting, it is especially dangerous as a cognitive device for understanding lesbian battering, because it feeds the common myth about abusive lesbian relationships that "butches" are batterers and "femmes" their victims.[21]

In addition to reinforcing misconceptions about same-sex relationships, research that imposes heterosexual models on all domestic violence also renders invisible the particular challenges confronted by lesbian and gay male victims and the skills they have developed for confronting these challenges.

Responding to the falsely universalizing tendency of heteronormative research models, Eaton further contends that such attempts are inherently inadequate. While such models have done much to increase our understanding of intimate violence within heterosexual relationships, they cannot claim to be—nor should they attempt to be—all-encompassing. Instead, she suggests that research on heterosexual battering simply clarify its parameters and acknowledge its applicability only to heterosexual relationships—thereby narrowing its focus and increasing its utility. Likewise, she suggests that new theories and research must be developed that focus exclusively and specifically on intra-lesbian violence in order to begin to understand its nuances. While I concur with Eaton's caution about the dangers of universalizing, as well as her call for new scholarship that specifically addresses same-sex violence, I would go one step further. I believe that examining the problem of same-sex domestic violence, particularly given its unique relationship to the issue of privacy, sheds important light on the issues of domestic violence and privacy more broadly, and helps us to understand some of the deficiencies within the existing frameworks for understanding heterosexual domestic violence, as well. Thus, my research yields two critical results: first, it helps to illuminate the still vastly understudied problem of same-sex domestic violence. At the same time, applying the lens of sexual orientation to the problem of intimate partner violence provides significant insights about the complexity of the interaction between domestic violence and privacy in general. Ultimately, my approach seeks to initiate the articulation of an alternative, affirmative vision of privacy that is both inclusive and proactive in its protection of all victims of intimate partner violence. **13**

Privacy and Sodomy

Introduction

Courts and legislatures have considered issues of homosexuality in many aspects of life, from employment to military service to freedom of speech to immigration.[22] These issues generally pertain to civil law and have specific applications (subject to military or immigration status, for example). Sodomy statutes, by contrast, exist in the criminal arena, and could potentially apply to almost all lesbians and gay men at some point in their lives. While some criminal sodomy statutes have been directly aimed at homosexuals, or have specifically exempted married couples,[23] many have simply addressed the act of sodomy itself and not the sexual orientation of those committing the "crime against nature."[24] In practice, however, regardless of whether the language of the statute is neutral with regard to sexual orientation, sodomy laws over the **14**

last century have been enforced primarily against lesbians and gay men.[25] As a result, these statutes have created an inherent tension between the LGBT community and the law, a dynamic that has significant implications for the issue of same-sex domestic violence.

Like other criminal laws, sodomy laws might be presumed to target a particular behavior or action. Since the late nineteenth century, however, while people of all sexual orientations have engaged in sodomy, heterosexuals—particularly married couples—have been exempt from state punishment for the behavior, whether as a matter of law, or in practice, or both. This exemption has occurred because, in its effort to protect and exalt heterosexual marriage, the state has often conflated homosexual identity with the act of sodomy. Seeking to circumscribe the limits of acceptable intimate relationships, courts and legislatures have sought to penalize those who do not conform to the heterosexual model. In so doing, they have, as Janet Halley has observed, "treat[ed] sodomy as a metonym for homosexual personhood,"[26] thereby attempting to criminalize homosexuality itself. By conflating the action of sodomy with the identity of homosexuality, sodomy laws in recent memory have seemed uniquely targeted at a category of people rather than at a specific form of conduct. **15**

Yet this emphasis on identity instead of behavior as the locus of punishment did not occur until the turn of the twentieth century, according to William Eskridge. Prior to that time, he notes, sodomy laws—also known as buggery, carnal knowledge, or crime-against-nature laws—focused on behavior rather than identity, and prohibited "unnatural" sexual relations between men and women, as well as between two men. Often deliberately vague, such laws were nonetheless generally understood to refer to anal intercourse, and did not apply to sexual acts between two women.[27] Eskridge cites late-nineteenth-century American society's preoccupation with the enforcement of strict gender roles as the basis for the increasing societal focus on the moral implications of homosexuality. In particular, the rise of urbanization and the visibility of prostitution—along with the corresponding social purity movement and emphasis on true womanhood—led to the usage of sodomy laws as an instrument of social control.[28] During this era, both courts and legislatures added the crime of oral sex to sodomy statutes. This addition, according to Eskridge, served several purposes. First, the more widespread practice of oral sex by both women and men allowed for more arrests. In addition, the fact that oral sex was committed by female couples allowed for the criminalization of lesbian relationships.[29] **16**

After the amendment of many state sodomy laws to include oral sex, arrests for sodomy—particularly homosexual sodomy—rose dramatically. This wave of arrests continued, with various ebbs and flows, throughout the first half of the twentieth century.[30] After the beginning of the gay rights movement in the late 1960s,[31] activists increasingly turned their attention toward repealing sodomy laws. In fact, by the mid-1980s, 37 states had either legislatively repealed or judicially nullified their sodomy laws pertaining to consenting adults, or reduced the offense of consensual sodomy from a felony to a misdemeanor.[32] Concurrently, however, a backlash trend was occurring that specifically targeted gay men and lesbians. Some state **17**

legislatures, while relaxing their proscriptions of heterosexual sodomy, simultaneously enacted new laws criminalizing same-sex sodomy.[33] Similarly, courts in two states found sodomy statutes written in gender-neutral language to be inapplicable to consensual heterosexual sodomy—and therefore applicable only to homosexual sodomy.[34]

18

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)

From within this complex political climate emerged a landmark case regarding consensual homosexual sodomy, entitled *Doe* v. *Commonwealth's Attorney for Richmond*.[35] In this 1975 case, two gay men challenged Virginia's criminal sodomy statute in federal district court, seeking a declaratory judgment that the statute was unconstitutional and injunctive relief against its enforcement. (The statute made consensual sodomy a felony; the gender-neutral wording included both oral and anal sex.) Their claim was rooted in numerous constitutional bases, including the due process clauses of the Fifth and Fourteenth Amendments, the First Amendment right of freedom of expression, the right to privacy (which they located in the First and Ninth Amendments), and the prohibition of cruel and unusual punishment in the Eighth amendment.[36] Primarily, the plaintiffs relied on the construction of the fundamental right to privacy, as articulated in *Griswold* v. *Connecticut*,[37] as the source of their assertion that the statute was unconstitutional.

19

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)

The district court hearing the case disagreed, emphasizing instead the fact that *Griswold* bestowed the right to privacy on married couples specifically. The opinion then recalled Justice Harlan's dissent in the contraception case prior to *Griswold*, *Poe* v. *Ullman*.[38] In that opinion, Harlan had articulated a right to privacy that was defined, in part, by its limitations; he stated clearly that only marital relationships deserved this right to privacy, while all other sexual relationships simply did not. In addition, he noted, "[L]aws forbidding adultery, fornication and homosexual practices . . . , [and] confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."[39] Relying heavily on this construction of the privacy right, the *Doe* court concluded that state proscription of sodomy was a perfectly legitimate enterprise. Here again, however, the court conflated homosexuality and sodomy, asserting that "homosexuality . . . is obviously no portion of marriage, home or family life—the next question is whether there is any ground for barring Virginia from branding it as criminal."[40] The "it" in the latter half of the sentence clearly refers to homosexuality, not to sodomy. As with other state formulations of

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sodomy, this court substituted the identity of homosexuality for the practice of sodomy, disregarding the fact that the statute could also be applied to heterosexual sodomy. By singling out for punishment only one class of people engaging in an activity, the *Doe* court, in effect, affirmed Virginia's right to penalize its citizens based on their identity rather than their actions. When, upon appeal, the US Supreme Court summarily affirmed the district court's decision, the *Doe* opinion gained significant judicial weight and remained the last word on the subject for more than a decade. Yet, as the next section will demonstrate, judicial homophobia and its implications for the right of privacy reached even greater proportions in the case of *Bowers* v. *Hardwick*.

***The Case of* Bowers *v.* Hardwick**

20

The US Supreme Court had the opportunity to consider the issues of privacy, sodomy, and homosexuality again eleven years later in the landmark case of *Bowers* v. *Hardwick*.[41] While the facts of the *Bowers* case differed greatly from those in *Doe*, the outcome was very similar. Ultimately, in *Bowers*, as in *Doe*, the court's disapproval of homosexuality and desire to condemn homosexual relationships overrode its concern for privacy rights. In a plurality opinion characterized primarily by its homophobia and roundly criticized by legal scholars for both its erroneous representation of history and its faulty reasoning,[42] the Supreme Court flatly refused to consider the case as a matter of privacy. Instead, the Court chose to reflect on whether or not the US Constitution confers a fundamental right to engage in homosexual sodomy. Formulated this way, the question was easily answered by the Court in the negative, and the privacy rights of homosexuals remained unrecognized.

21

As a challenge to a state sodomy law, the facts of *Bowers* could not have made for a more promising test case. In August 1982 in Atlanta, Michael Hardwick, a 29-year-old employee of a gay bar, was holding a beer as he left work and was subsequently arrested under a recently enacted city ordinance prohibiting the possession of open containers of alcohol in public places. Having been issued a citation, Hardwick initially failed to appear for his court date, but went to the courthouse the following day and paid the fine. Hardwick's failure to appear had nonetheless triggered an arrest warrant and, days later, a police officer arrived at Hardwick's house to serve the warrant. Hardwick's roommate allowed the officer to enter the house. The officer found Hardwick's bedroom door ajar and witnessed the young man engaging in consensual oral sex with another man. The officer subsequently arrested Hardwick for violation of Georgia's criminal sodomy statute.[43]

22

At the time, local gay rights activists had been looking for a test case with which to challenge the sodomy statute. After hearing of Hardwick's arrest, several of these activists—in addition to Hardwick's mother, who was in town visiting him at the time—convinced him to allow the case to go forward, although the authorities did not seem to be pursuing it vigorously.[44]

While the Georgia chapter of the American Civil Liberties Union (ACLU) was not immediately willing to become directly involved in the case, one of its board members, John Sweet, was. He asked one of his staff members, attorney Kathleen Wilde, to take the case.[45] At the time, the case hung in a kind of legal limbo: the district attorney's office, which had not dropped the charges, had also decided not to present the case to a grand jury "unless further evidence develop[ed]."[46] Because an employee in the DA's office suspected that to pursue a prosecution might open the door for a test case, Hardwick was not prosecuted on the sodomy charge. With no criminal indictment to appeal, Wilde instead brought a civil suit under Section 1983 against Michael Bowers, the Attorney General of Georgia.[47] Because the sodomy statute was written using gender-neutral language, a married couple (known in the suit as Jane and John Doe) also joined the suit as plaintiffs. **23**

Despite the fact that, as Wilde observed, "We had the best facts anyone could hope for,"[48] the district court dismissed the suit immediately. The court concluded that the married couple failed to present a justiciable controversy, for they had not demonstrated that they or any other married couples were in danger of prosecution under the existing statute. Next, they rejected all of Hardwick's constitutional arguments by relying exclusively on *Doe* v. *Commonwealth's Attorney*.[49] **24**

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Case Resources
Carey v. *Population Services International*
Findlaw (http://laws.findlaw.com/us/431/678.html) (full text)
Oyez (http://www.oyez.org/cases/1970-1979/1976/1976_75_443/) (opinion announcement)
New York v. *Uplinger*
Findlaw (http://laws.findlaw.com/us/467/246.html) (full text)
Oyez (http://www.oyez.org/cases/case?case=1980-1989/1983/1983_82_1724) (oral arguments)

Wilde began the appeals process at once, and *Hardwick* v. *Bowers*[50] received a much warmer reception in the Eleventh Circuit appellate court. Considering two recent actions taken by the US Supreme Court, the circuit court concluded that *Doe* was no longer controlling. In particular, the circuit court noted the Supreme Court's assertion, in *Carey* v. *Population Services*,[51] that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults . . . and we do not purport to answer that question now."[52] In addition, the *Hardwick* court observed that the US Supreme Court had granted, although subsequently dismissed, a writ of certiorari to hear the case of *New York* v. *Uplinger*,[53] which urged review of that state's consensual sodomy statute. In light of these developments, the circuit court concluded that the constitutional issues presented by *Hardwick* had not been resolved, and *Doe* could no longer be seen as controlling in this area.

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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)
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)

The circuit court thus viewed Hardwick's constitutional claims more favorably than the district court had, and considered the statute a violation of his right to privacy. This opinion, written by Judge Johnson, adopted a view of privacy that privileged neither the home itself nor the marital relationship. Instead, Johnson's articulation of the privacy right emphasized personal autonomy and decision making, particularly with regard to intimate relations. Relying heavily on reproductive rights cases such as *Roe* v. *Wade*[54] and *Eisenstadt* v. *Baird,*[55] he wrote:

> The Constitution prevents the States from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society. . . .
>
> While the constitutional source of these limitations of the power of the State has been termed the "right to privacy," it is not limited to conduct that takes place strictly in private. Some personal decisions affect an individual's life so keenly that the right to privacy prohibits state interference even though the decisions could have significant public consequences. . . .
>
> The Supreme Court has indicated in *Griswold* . . . and *Eisenstadt* . . . that the intimate associations protected by the Constitution are not limited to those with a procreative purpose. . . . The intimate association protected against state interference does not exist in the marriage relationship alone. . . . For some, the sexual activity in question here serves the same purpose as the intimacy of marriage.[56]

Thus, the Circuit Court found the Georgia statute unconstitutionally violative of the Ninth Amendment (echoing *Griswold*) and the Fourteenth Amendment right to due process.

27

While this decision was a solid victory for the Hardwick team, they knew the battle was far from over; Wilde notes that "it was pretty clear from the beginning that the case was going all the way up [to the United States Supreme Court]."[57] Indeed, Bowers quickly appealed the circuit court's ruling to the US Supreme Court. By this time, a groundswell of support for the case had developed among activists and attorneys both locally and nationally. An ad hoc group devoted to working on legal issues for the gay community met regularly to discuss the direction of the case. The Lambda Legal Defense Fund, the Georgia ACLU, the New York ACLU, and many prominent attorneys endorsed Hardwick's position and provided support for the case.

Renowned attorney Laurence Tribe offered to serve as counsel at the Supreme Court level; Wilde and another attorney, Kathleen Sullivan, served as co-counsel. Assessing the composition of the Court at that time, the coalition of lawyers and activists supporting Hardwick were cautiously optimistic, figuring that "this was the best court we'd have for the next ten years."[58]

28 At the Supreme Court level, the Hardwick camp continued to highlight the privacy argument that had served them well in the circuit court. The language they adopted echoed that of the circuit court's opinion, as they referred to Hardwick's "fundamental constitutional right to personal autonomy and privacy."[59] In so doing, Hardwick's attorneys made two significant rhetorical moves. First, they framed the issue as being primarily about the right to privacy, rather than about sexual orientation or particular sexual practices. Second, the assertion of a fundamental right to "personal autonomy and privacy"—rather than just "privacy"—drove a wedge between the association of privacy with the marital relationship, replacing it instead with notions of individual autonomy and independence.

29 These two rhetorical strategies were essential in the Hardwick team's effort to portray the case as primarily a matter of privacy. In fact, while the amicus briefs that were written for Hardwick came from a wide range of groups, they all adopted these two strategies, to varying degrees. Citing many of the contraceptive and family privacy cases from earlier in the twentieth century,[60] several of the amicus groups observed that the Supreme Court had previously recognized a right of privacy related both to location (i.e., the home itself) and to the realm of personal decision making. This case, they noted, implicated both of those types of privacy.[61] These briefs deliberately echo the Court's own language in earlier privacy cases, while broadening it to include all citizens, not just married couples. Thus, the briefs refer to "[t]he fundamental sanctity of a *person's* home,"[62] and "private consensual sexual conduct,"[63] rather than to the marital home and marital intimacy.

30 The amicus groups accomplished this move toward inclusion by first invoking Douglas's impassioned conclusion to the *Griswold* opinion, a fitting reference given the facts of *Bowers*: "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 . . ."[64] They then applied the logic of *Eisenstadt* to this scenario: "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."[65] In this way, amici suggested that the unequal application of the privacy right would contradict the Court's previous rulings.

31 Several amicus groups took this argument one step further, pointedly observing that *Bowers* had as much to do with discrimination as with privacy. Noting the trend of disproportionate enforcement of sodomy laws against gay men and lesbians and the fact that "Hardwick represents an oft-despised and heavily stereotyped sexual minority,"[66] these briefs contended

that the sodomy law in question denied privacy rights to homosexuals as a matter of discrimination.[67] Indeed, several amici linked this discrimination explicitly to the history of judicial bias against women and people of color.[68] Together with the briefs that demonstrated scientific, religious, and public support for homosexual lifestyles,[69] these briefs powerfully declared the right of privacy to be the defining issue in the *Bowers* case, and the unequal application of that right to be a severe injustice.

32 The oral argument that Tribe presented to the Court on behalf of Hardwick echoed this reasoning. Tribe framed the case as a privacy issue from the outset, beginning his argument with the simple assertion that "this case is about the limits of governmental power."[70] Describing the contours of the fundamental right to privacy invoked on behalf of Hardwick, Tribe stated that "with respect to the intimacy decision, we rely heavily on *Griswold* and on *Eisenstadt* to show that *Griswold* cannot be limited to married couples."[71] Furthermore, Tribe's concept of privacy reflected the dual approach adopted in the amicus briefs: the privacy of the home, and the privacy of intimate (adult, consensual, and noncommercial) relationships. Grounding the fundamental right to privacy in these two areas, Tribe characterized it as a negative right—a freedom from state interference—but one that is no longer based on marital status.

33 The attorneys for Bowers, on the other hand, rejected the notion that the case—or the sodomy statute itself—involved a right to privacy. The contrast between their framing of the case and Tribe's is clear in Attorney Michael Hobbs's opening statement during oral argument: "This case presents the question of whether or not there is a fundamental right under the Constitution of the United States to engage in consensual private homosexual sodomy."[72] Sidestepping the privacy issues almost completely, Hobbs instead focused on homosexual sodomy, characterizing it as a societal danger akin to "polygamy; . . . consensual incest; prostitution; fornication; adultery; and . . . [possession of] illegal drugs."[73] When questioned by the Court, Hobbs conceded that the Georgia statute would be unconstitutional if applied to a married couple, because of "the right of marital intimacy" and "[t]he right of marital privacy."[74] For the Bowers attorneys, then, the case involved Hardwick's search for a constitutional right to engage in homosexual sodomy. Furthermore, from this perspective, the privacy right was irrelevant, for the intimacy it protected applied only to marital relationships.

34 The amicus briefs for Bowers elaborated on this stance, claiming that the constitutional right to privacy was grounded in a "fidelity to family interests"—and homosexual relationships most certainly fall far outside this definition of family. Likewise, each of these briefs suggested, as Hobbs did at oral argument, that Hardwick had claimed a fundamental right to engage in homosexual sodomy;[75] the brief submitted by the Catholic League for Religious and Civil Rights keenly observed that there was no judicial precedent to support "a privacy right for totally unrelated people to engage in homosexual sodomy."[76] Thus, by linking this activity with other

"private consensual activities—including incest, polygamy, bestiality, etc.,"—and, in effect, criminalizing the identity of homosexuality itself—these amicus groups were able to rationalize the exclusion of gay men and lesbians from a right to privacy.[77]

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Case Resources
Bowers v. *Hardwick*
Findlaw (http://laws.findlaw.com/us/478/186.html) (full text)
Oyez (http://www.oyez.org/cases/case/?case=1980-1989/1985/1985_85_140) (oral arguments)

The majority of Supreme Court justices deciding the *Bowers* case agreed with this perspective. In an opinion authored by Justice White, the Court wrote that "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[78] Having accepted Bowers's formulation of the case as presenting a "right-to-sodomy" question, White's opinion concluded, not surprisingly, that the Constitution guarantees no such right. The Court's opinion, like the briefs submitted on behalf of Bowers, invoked notions of traditional morality in order to justify its logic, claiming that "Proscriptions against [homosexual sodomy] have ancient roots"[79] and referring to "the many States that still make such conduct illegal and have done so for a very long time."[80] This disapproval of homosexual sodomy translated quickly, in White's opinion, into a rejection of homosexuality itself. Discussing the "presumed belief" of a majority of Georgia voters, the Court conflated the act of sodomy with the identity of homosexuality and concluded that "majority sentiments about the morality of homosexuality" were an adequate basis for upholding the sodomy statute.[81] Furthermore, the opinion vilified homosexual relationships by casting them in direct contrast to traditional family forms: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[82] In so doing, the Court reinforced the notion of homosexual relationships as unnatural and unacceptable family forms.

36

In a dissenting opinion, Justice Blackmun—joined by three other justices—rejected the idea that the case implicated a right to sodomy, claiming instead that the right to privacy was the central issue, and that "the majority has distorted the question this case presents."[83] Harshly critiquing the majority's "almost obsessive focus on homosexual activity," Blackmun's dissent agreed with the proposition advanced by Hardwick's attorneys that this case implicated "both the decisional and the spatial" aspects of the fundamental right to privacy.[84] The dissent also dismissed the majority's characterization of homosexual relationships as deviant, instead asserting their legitimacy as a type of family:

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.[85]

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Conceding that the privacy right had developed primarily in cases pertaining to traditional families and childrearing, Blackmun contended that "we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households."[86] Ultimately, by addressing the privacy issues at stake in *Bowers*, and by viewing homosexual people and relationships as deserving of privacy rights equal to those of heterosexuals, Blackmun envisioned an inclusive right to privacy that is not contingent upon marital status or sexual orientation.

37 The *Bowers* majority, however, was unable to conceive of privacy in this way, because their view of privacy was predicated upon notions of exclusion. In other words, privacy as perceived by the majority Court was defined by its privileging of "family, marriage, or procreation," all construed narrowly to exclude nonheterosexual relationships. Thus, despite the expansion of the privacy right in cases such as *Roe* and *Eisenstadt* to encompass nonmarital relationships, the *Bowers* majority remained unable to apprehend an inclusive form of privacy that they could apply to same-sex relationships. The Court's reliance on a model of privacy that privileges marital status (or, the potential for marriage and procreation in heterosexual couples) suggested that it still understood the right of privacy to be fundamentally exclusionary. Furthermore, the majority's insistence upon this model indicated that the right of privacy would continue to be enforced in ways that support that ideology.

38 In addition to the Court's "willful blindness" regarding the possibility of an inclusive right of privacy,[87] the sheer force of its homophobia overrode the central concern of the *Bowers* case. As Kathleen Sullivan observed,

> The majority rewrote the case as if it was just about homosexual sodomy . . . And yet the law itself referred to any oral- or anal-genital contact, so we litigated it as if it were a prohibition on the privacy of any consenting adults. . . . Certainly if it were a married couple that were [involved in the case], the court would've been in a real bind trying to say that there's no right to practice the sexual intimacy of one's choice, and so I thought that what the court did was in a sense rewrite the statute to make it politically easier for it to rule the way it did. So that was the surprise and disappointment of the case.[88]

Indeed, the majority's insistence on reinforcing traditional family forms (to the neglect of other, critical issues within a case) is a problem that also plagues gay men and lesbians seeking justice in cases of same-sex domestic violence. Likewise, the Court's justification for discrimination against homosexual relationships—in particular, its reliance on religion and supposedly traditional morality—is echoed in cases of same-sex domestic violence. As such, *Bowers*, which had such liberatory potential for the rights of the LGBT community, became a vehicle for their continued discrimination instead.

For the next fourteen years, *Bowers* stood as the definitive word on the issue—a fairly brief shelf life for a Supreme Court opinion. In June of 2003, the Court issued an opinion in *Lawrence* v. *Texas*[89] that overruled *Bowers* quite emphatically. It was a sea change for same-sex privacy rights. **39**

The Case of Lawrence *v.* Texas

The facts of *Lawrence* bore some resemblance to those that initiated the *Bowers* case. Just as in *Bowers*, *Lawrence* involved police entry into a private residence on a different matter, where police witnessed a consensual sex act taking place between adults. Specifically, in the *Lawrence* case, police in Houston, Texas responded to a call from a neighbor who claimed that "a black male was going crazy in the apartment and he was armed with a gun."[90] Upon arriving at the scene to investigate the alleged weapons disturbance, the neighbor directed officers to the apartment in question, where they "observed the defendant engaged in deviate sexual conduct[,] namely, anal sex, with another man."[91] John Geddes Lawrence, a 55-year-old white male, and Tyron Garner, a 31-year-old black male, were both arrested and convicted of violating Texas Penal Code Ann. §21.06(a), which prohibits "deviate sexual intercourse with another individual of the same sex," and defines deviate sexual intercourse as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object," §21.01(1).[92] **40**

At trial, Lawrence and Garner challenged the statute on equal protection grounds, citing both the Fourteenth Amendment and the Texas Constitution. When their arguments were rejected, they pled nolo contendere and were fined two hundred dollars and court costs.[93] They appealed to the Court of Appeals for the Texas Fourteenth District, where they again raised their equal protection arguments. In a 7-2 decision, the appellate court rejected those claims and affirmed the judgment of the trial court.[94] In so doing, the majority applied a rational basis standard of review and relied heavily on *Bowers*, noting that "homosexual conduct has historically been repudiated by many religious faiths. Moreover, Western civilization has a long history of repressing homosexual behavior by state action."[95] Focusing on homosexual conduct and claiming a historical basis for discrimination against homosexuals, the appellate court echoed the spirit as well as the reasoning of *Bowers*. **41**

The two dissenting justices criticized "the majority's Herculean effort to justify the discriminatory classification" represented by the Texas statute,[96] and argued for a heightened standard of judicial scrutiny of the law in question. Heightened or intermediate scrutiny would be appropriate, they reasoned, given that the statute in question was based on a gender-based classification. The dissent claimed that the statute failed the intermediate scrutiny test, and concluded that "[t]he Legislature's removal of the prohibition on heterosexual sodomy while **42**

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retaining it for homosexual sodomy cannot . . . be explained by anything but animus toward the persons it affects."[97] The dissent further addresses the issue of "private morality" versus "public morality," noting that the majority opinion fails to explain

> how government interference with the practice of adult only, consensual personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of "public morality" or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State.[98]

In posing the question of public versus private morality, the dissenting justices here expose the privacy paradox as it pertains to same-sex couples: the imposition of a state-sponsored "private morality" enforces the privacy of the closet by marking homosexual conduct as immoral, while simultaneously denying them the right of privacy that would protect their relationships from state intrusion.

Having lost their appeal, Lawrence and Garner appealed their case again, this time to the United States Supreme Court. Once the case was accepted by the Supreme Court, the amicus briefs submitted in support of both sides bore a strong resemblance to those advanced on behalf of Bowers and Hardwick over a decade before. The briefs for the petitioners, Lawrence and Garner, focused primarily on the issues of equal protection, liberty, and privacy. A brief submitted on behalf of multiple organizations, including the Human Rights Campaign and the National Gay and Lesbian Task Force, argued that the Texas statute in question violated both the Due Process and Equal Protection clauses of the Fourteenth Amendment. Furthermore, amici noted, "Sodomy laws today serve no function other than to reinforce the vestiges of a noxious history of discrimination."[99] While the brief mentioned the right to privacy, it argued that the case should turn on the more pressing issues of due process and equal protection as viewed within the context of the historical pattern of discrimination against homosexuals. **43**

Other briefs, such as that submitted by the National Gay and Lesbian Law Association and other legal organizations, echoed this focus on the history of discrimination. Like the Texas appellate court dissent, their brief suggested that this history required the application of heightened scrutiny to the equal protection analysis. The brief also focused on homosexuality as an immutable characteristic as further justification for proposing that the law be subjected to heightened scrutiny.[100] Adopting a slightly different approach to equal protection analysis, the brief for the Republican Unity Coalition claimed that while the statute should properly be considered under the rational basis standard, it would not survive even that review. Citing the many indications of "a pervading animus toward gays as a class," this brief concluded that Texas failed to offer a legitimate justification for its discriminatory law. [101] **44**

The most influential of the amicus briefs submitted on behalf of petitioners, however, was that of the Cato Institute, which, according to its mission statement, "seeks to broaden the parameters of public policy debate to allow consideration of the traditional American principles **45**

of limited government, individual liberty, free markets and peace."[102] Like the others, this brief found the Texas statute to be a clear violation of the Equal Protection clause. But, it declared, "There is a deeper problem with the . . . law." This deeper problem, according to the Cato Institute, had everything to do with privacy. In their brief, privacy is construed broadly, and described as both a positive and a negative right:

> America's founding generation established our government to protect rather than invade fundamental liberties, including personal security, the sanctity of the home, and interpersonal relations. So long as people are not harming others, they can presumptively engage in the pursuit of their own happiness.[103]

Here, the government's affirmative duty to "protect . . . fundamental liberties" stands side-by-side with the traditional notion of "the sanctity of the home."

46 The Cato Institute brief further alleged that the *Bowers* ruling, upon which the lower court had relied so heavily, demonstrated both an "incomplete reading of history" (with its reference to the "ancient roots" of proscriptions against homosexual sodomy) and an "inconsistency with . . . this Court's privacy precedents." Specifically, the brief noted, the *Bowers* opinion incorrectly read the Court's previous privacy rulings as limited to decisions regarding pregnancy, thereby ignoring those cases that "assur[ed] a right of bodily integrity outside of pregnancy."[104] Furthermore, the *Bowers* opinion provided only a partial understanding of "American traditions of liberty," because it failed to see that "[t]he fundamental freedoms Americans enjoy have included choices involving the deployment of the body, intimate relationships, and the home."[105] As a result, the brief concluded, the *Bowers* decision should be overruled. In addition, while detailing the failures of *Bowers* and arguing for its overruling, the Cato Institute brief provided a compelling roadmap for the Court of what an affirmative privacy right, based on notions of liberty and bodily integrity, might look like.

47 The amicus briefs for the State of Texas had a very different tone. When Justice Blackmun criticized the majority's opinion in *Bowers* for its "almost obsessive focus on homosexual activity," he could not have predicted that it would pale in comparison with the same obsession in the briefs submitted on behalf of Texas in the *Lawrence* case. Several of these briefs lingered much longer on specific sexual acts, or the particular circumstances surrounded the sex act at issue in the case, than on the arguments surrounding equal protection, due process, or privacy. The brief submitted by the American Center for Law and Justice, for example, suggested that the petitioners were asking the court "[t]o recognize extramarital sex acts as 'fundamental rights,'" but insisted that "the Constitution . . . neither does nor ought to enshrine the Sexual Revolution."[106] After expressing some frustration with the lack of detail in the arrest records, the authors speculated about many different scenarios surrounding the act in question:

> The record does not reflect whether the sodomy was coerced or consensual, performed for pay or not, displayed to members of the public (e.g., done in full view of others in the room or in front of an unobstructed picture window) or not,

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> incestuous or not, part of a long-standing practice or simply a one-time anonymous tryst in response to an internet solicitation.[107]

The brief provides no basis for these queries or suppositions, and virtually no explanation regarding why their answers would be significant. As a result, these musings appear as little more than voyeuristic imaginings, far removed from the constitutional issues in question. When the brief does take up the constitutional questions, it strays from them rather quickly, with declarations such as, "A crucial unspoken premise of petitioners' argument is that the election of anal sodomy, as opposed to vaginal intercourse, is merely a matter of 'preference,' like selecting what wine to have with dinner. . . . This completely ignores human anatomy and biology,"[108] and "Anal sodomy is an abusive act, i.e., a misuse of the organs involved."[109]

48 A brief submitted by the Pro-Family Law Center, the Traditional Values Coalition, and others, took these musings much further. Also noting the lack of some detail in the record, they wondered "whether Petitioners engage in what might be characterized by them as 'safe' sodomy," and focused on the issue of HIV/AIDS.[110] After suggesting that the petitioners were asking the Court to "sanctify[y] sodomy as a jewel in the crown of Constitutional liberty,"[111] they asserted, "In assessing obligations to the Constitution, it does not matter that Petitioners have the strongest of desires, whether genetic or intentional, to place each other at the risk of contracting deadly diseases, in the Petitioners' ill-defined interest in 'privacy.'"[112] Quoting liberally from Web sites devoted to HIV-positive men who engage in unprotected anal sex, they find that a subset of homosexuals includes "persons who wantonly act towards spreading and receiving AIDS."[113] By focusing on the furthest fringes of homosexual behavior, the authors sought to pathologize all same-sex couples as potentially dangerous. The existence of these websites therefore provided the basis for their conclusion that the statute passes the equal protection test: the state has a legitimate interest in promoting public health, and criminalizing same-sex sodomy is rationally related to that goal.

49 The briefs for the respondent also claimed that to invalidate the statute and overrule *Bowers* would be a threat to marriage itself. The Center for Marriage Law filed a brief to this effect, claiming that such a ruling would undermine existing state laws regulating marriage.[114] The American Center for Law and Justice avowed that "the distinction between heterosexual and homosexual unions is the hallmark of marriage law"[115] and that if the Court ruled in favor of the petitioners, it should be "prepared to announce the unconstitutionality of marriage."[116] Echoing the public policy debates over same-sex marriage, these and other briefs for Texas suggested that to end discrimination against same-sex couples would dismantle the foundations of the institution of marriage itself.

50 This focus on marriage was closely linked with the way that the amici for respondents conceptualized the right to privacy. A brief submitted on behalf of Texas legislators stated flatly that "the right of privacy is not absolute," and perceived that right to be circumscribed quite clearly by subject matter. Citing the line of reproductive rights cases from *Griswold* to *Casey*,

the brief concluded, "Decisions regarding marriage and procreation receive special protection from this Court. Other individual choices among consenting adults do not."[117] By focusing narrowly on the subject matter of these cases, the brief deliberately set aside the recognition of decisional autonomy and bodily integrity as components of that right that these opinions developed. In the brief of the Pro-Family Law Center, the concept of privacy itself is repeatedly vilified, as when the brief claims that "Health consequences are not an easily perceived concern of Petitioners, or their supporters, as privacy and fulfillment of Dionysian self-interest are the ultimate moral ends by which they live, and expect all others to live,"[118] or disparagingly references, as noted above, "the Petitioners' ill-defined interest in 'privacy.'"[119]

51

Case Resources
Lawrence v. *Texas*
Findlaw (http://laws.findlaw.com/us/000/02-102.html) (full text)
Oyez (http://www.oyez.org/cases/case/?case=2000-2009/2002/2002_02_102) (oral arguments)

The *Lawrence* court, however, perceived and applied the right of privacy quite differently. The Court's opinion, authored by Justice Kennedy and joined by four other justices, situated the right to privacy clearly within a liberty framework and used it as the foundation for the opinion. The very first paragraph of the opinion establishes the Court's vision of the privacy right unequivocally; the closing lines of that paragraph read as follows: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."[120] Framing the case in terms of liberty and privacy, Justice Kennedy takes *Griswold* as his starting point. He notes that in *Griswold*, the Court "described the protected interest as a right to privacy," and that "After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."[121] Moving on to *Eisenstadt*, *Roe*, and *Carey*, he notes that the Court in those cases confirmed that *Griswold*'s reasoning was not confined solely to the rights of married adults.[122]

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The state of Texas in this case argued for a right of privacy demarcated by a "line at the bedroom door of the heterosexual married couple."[123] Given the development of the privacy right through the reproductive rights cases, the Court rejected that assessment, instead describing a right of privacy that extends beyond the bounds of marriage, and that protects not only spatial but decisional freedom. Applying the privacy right in this way to the facts of the case, Kennedy declared that

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[124]

With this statement, the Court not only provided significant clarity regarding the scope of the right to privacy, but also made a powerful statement about the rights of those who engage in same-sex sexual conduct.

53

In fact, the *Lawrence* opinion is unabashedly clear regarding the rights of homosexuals. Justice Kennedy describes homosexual relationships as being "within the liberty of persons to choose without being punished as criminals."[125] His opinion demonstrates an understanding of the role of the state in perpetuating discrimination against homosexuals, and the complicated relationship between privacy and shame for this population: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. . . . The stigma this criminal statute imposes, moreover, is not trivial."[126] Noting the important role that sexuality plays in forming intimate relationships, he makes a sweeping yet pointed statement: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. *The liberty protected by the Constitution allows homosexual persons the right to make this choice*."[127] Instead of claiming, as Justice White did in the *Bowers* opinion, that this case was asking the Court to consider a constitutional right to engage in sodomy, Kennedy presents a more nuanced analysis of the links between sexuality and liberty. And by framing expressions of sexuality in terms of decisional autonomy, Kennedy establishes a logical platform from which to argue that homosexuals clearly have the right to engage in this decision-making.

54

Much of the *Lawrence* opinion, not surprisingly, responds quite directly to the *Bowers* opinion. Kennedy's extensive critique of *Bowers* notes that the opinion revealed a flawed (or at best, incomplete) understanding of the history of sodomy laws. Relying heavily on the amicus brief submitted by the Cato Institute, he concludes that the extensive history of proscriptions against homosexual sodomy upon which the *Bowers* opinion rested is actually much more complex than that Court acknowledged. Noting that the central holding of Bowers "demeans the lives of homosexual persons," he states unequivocally that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled."[128] With that statement, the already much-maligned *Bowers* opinion ended its short-lived reign as judicial precedent in matters of same-sex privacy rights.

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It is worth noting that, in overruling *Bowers*, the Court does not stop at the formulation of same-sex rights. Instead, by referring to the European Court of Human Rights, the majority invokes the notion of human rights. Specifically, Kennedy cites a 1981 decision by that court that laws proscribing homosexual conduct violated the European Convention on Human Rights. In so doing, he refutes the claim in *Bowers* that Western civilization has roundly decried such conduct.[129] He also cites several of that court's decisions after *Bowers* that continued to protect, rather than deny, the rights of homosexuals to engage in such conduct. Citing the line of cases developed in the European Court of Human Rights, as well as several from other

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nations, he observes, "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[130] By employing this language, and citing the line of human rights cases, the Court establishes the framework for understanding these rights as human rights. As we continue to consider the possibility of an alternative vision of the right to privacy—an affirmative right that emphasizes personal autonomy and bodily integrity—this formulation may provide quite a useful framework. The particular way in which the right to privacy has been constructed for and denied to LGBT individuals has had a significant impact on the issue of same-sex domestic violence, as the next section will demonstrate.

Same-Sex Domestic Violence

Activism against Same-Sex Domestic Violence

To understand the problem of same-sex domestic violence, it is helpful to consider its treatment both within the courtroom and outside of it; namely, by activists. Primarily, activism directed at eliminating same-sex domestic violence has come from the battered women's movement and the LGBT community. These efforts, however, have been somewhat slow to start and have not achieved nearly the visibility as those efforts targeting heterosexual domestic violence. Activism confronting the problem of battering in lesbian and gay male relationships has been hampered by a variety of ideological and practical constraints. Specifically, both the gay rights and the mainstream battered women's movements have been hesitant to address this problem, each for very different reasons. **56**

From the perspective of the gay rights movement, raising the issue of same-sex battering poses significant hazards. As the movement seeks to gain rights and opportunities for lesbians and gay men that equal those afforded to heterosexuals in this society, it has combated various forms of homophobia—including the pernicious myth, discussed throughout this chapter, that homosexuality itself is a pathological and deviant condition. In so doing, the movement has also worked to demonstrate that same-sex relationships are not pathological, but rather expressions of mutual love and affection that are at least as healthy and natural as heterosexual relationships are perceived to be. Within this context, the movement has been reluctant to publicize the problem of intimate partner violence, fearing the homophobic culture that would exploit this problem as evidence of the inherent deviance of same-sex relationships. As Elliott observes, **57**

> The gay and lesbian community shares responsibility for keeping same-sex domestic violence in the "closet." Though well-known as a significant problem for years, the community sought to keep this issue quiet due to shame and the reluctance to provide ammunition for the homophobic majority who would use such problems to demonstrate supposed inferiority. Gays and lesbians, even as they themselves were beaten, maintained the illusion that they were more

> enlightened than heterosexual society and, therefore, not subject to the same uncivilized behaviors.[131]

The battered women's movement has also failed to confront the problem of homosexual domestic violence with the same vigor it has applied to violence in straight relationships. This can be attributed, in part, to homophobia within the movement itself.[132] Additionally, the problem of same-sex domestic abuse complicates the analysis, central to the movement, of domestic violence as primarily a manifestation of gender inequality. As such, the movement's limitations in addressing same-sex domestic violence probably also stem at least in part from its reluctance to disrupt this powerful yet heterocentric analytical framework.[133] Ironically, as Barbara Hart has observed, lesbians have constituted much of the movement's leadership since its earliest days. Nonetheless, the problem of same-sex battering took a long time to surface within the movement, as some lesbians within the movement found the problem difficult to believe or to confront. In an interview, Hart recalled that **58**

> Much of the leadership of any number of these [early] organizations [was held by lesbians] . . . There were many lesbians that were very powerful . . . [S]o . . . we had that first sort of national meeting on battering in lesbian relationships at NCADV [National Coalition Against Domestic Violence]. It was an incredibly difficult meeting, because some people didn't want to believe that it was happening, that women could assault other women. But this was almost ten years after we started NCADV. The reason that lesbians came to the work was not because they wanted to deal with lesbian battering. They came to the work because they were seeking justice [for women more broadly], and because they were able, as lesbians, even if they were closeted, to understand I think in profound ways that justice-seeking requires organizing.[134]

Finally, the battered women's movement, like the gay rights movement, has sought legitimacy within mainstream culture. Particularly when attempting to secure funding for shelters and other programs, the movement has often sought to reassure the public that it is not—despite some suggestion to the contrary from conservative quarters—seeking to dismantle the family unit. In its efforts to appear nonthreatening to traditional families, the mainstream battered women's movement has sometimes distanced itself from homosexuals, and lesbians in particular, often in response to overtly homophobic rhetoric from funders and others. In 1985, for example, the NCADV applied for grant money from the Justice Department. When conservative activist Patrick McGuigan learned that the group was scheduled to receive $625,000 to fund battered women's shelters, he appealed to then-Attorney General Edwin Meese, as well as to conservative congressional representatives, to block the grant. In his letter to Meese, Republican House Representative Mark Siljander implored Meese not to award the money to "pro-abortion, pro-lesbian, anti-Reagan radical feminists."[135] Sharon Parker, then-Executive Director of the NCADV, noted that Siljander's letter "had unfairly tagged her group with 'a boilerplate label,' radical lesbians."[136] Assistant Attorney General Lois Herrington, who had originally approved the grant, characterized the NCADV as "pro-family," noting, "I certainly don't **59**

see that the percentage of lesbians [in NCADV] is any greater than the national norm."[137] In this case, while the mainstream movement did not disown its lesbian members altogether, it certainly distanced itself from them and their interests for the sake of political expediency.[138]

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The activism that has occurred on behalf of battered lesbians and gay men, therefore, has happened in spite of all of these constraints—a fact which perhaps speaks to the prevalence and the urgency of the problem of same-sex domestic violence. Indeed, efforts to combat the problem of same-sex domestic violence have been undertaken in increasing numbers, especially in recent years. This work has mirrored the efforts to combat heterosexual domestic abuse, but goes further, including attention to issues particularly germane to LGBT communities. For example, programs serving LGBT victims often explore the problem of domestic violence in relationship to HIV/AIDS—examining how public perception of the disease affects cultural attitudes toward same-sex domestic violence and the implications for activists working on both problems simultaneously.[139] In addition, LGBT domestic violence programs also focus on peer support, shelter, crisis lines, provision of basic services, and legal and legislative advocacy.[140] The expansion of services available to lesbian and gay male victims of battering provides a hopeful indication that, while such services are still far from plentiful, awareness of this problem is continuing to grow.

Privacy and Same-Sex Domestic Violence in the Courts

61

The brief of the Lesbian Rights Project, et al., submitted in support of Hardwick in the *Bowers* case, has proven to be quite prescient with regard to the issue of domestic violence.

> [T]he denial of any right of privacy to gay and lesbian persons represents an approval, however tacit and sublimated, of . . . related forms of discrimination. . . . Criminalization translates readily into permission to discriminate, to malign, to stigmatize and to multiply the harms already suffered by gay and lesbian persons in this culture, society, and legal system. . . . [A] determination by this Court that states are free to criminalize gay/lesbian sexual activities *per se* would reinforce the homophobic elements of . . . the anti-gay legal decisions that are proliferating at the present time.[141]

Indeed, this excerpt alludes to several critical aspects of the right to privacy as it relates to same-sex relationships. First, the acknowledgment of the stigma surrounding these relationships recalls the link between privacy and the shame of the closet for LGBT people as described by Kendall Thomas. In addition, the excerpt calls attention to the negative power the *Bowers* opinion held to serve as a kind of judicial endorsement for other homophobic rulings. As this section's analysis of state appellate domestic violence cases will show, the courtroom homophobia exhibited by judges, attorneys, jurors, and litigants has often served as a significant barrier to justice for victims and their families.

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The types of abuse experienced by victims of same-sex domestic violence are much the same as those experienced within heterosexual relationships, as noted at the beginning of this chapter. Likewise, victims of same-sex domestic violence face many of the same challenges to addressing the problem as do their heterosexual counterparts. Often, however, those challenges are exacerbated for LGBT victims as a result of their sexual orientation. For example, the failure of law enforcement officers to respond appropriately to domestic violence calls in straight relationships was pervasive enough to warrant the civil cases of the 1980s discussed in the previous chapter. In the context of lesbian and gay male partner violence, however, the problem of nonresponse can be complicated by police amusement, contempt, or failure to recognize the relationship as one of intimate partners. These negative attitudes, lack of awareness, and subsequent failure to act on the part of police officers can result in extreme danger for battered lesbians and gay men. **62**

In addition, like many victims of domestic violence, gay and lesbian victims often find that their problem is not taken seriously by the courts. Continuing to view domestic violence as a private matter, some courts send the message that such matters are trivial and a waste of their time. When the victim is the same sex as the batterer, however, courts may be even more dismissive, expressing anything from disgust to amusement that such a problem is even possible. Last, just as some courts have suggested that domestic violence is more expected or acceptable within some relationships than others (based on the race or socio-economic status of the people involved), they may also minimize the severity of same-sex domestic violence by implying that these victims are only experiencing the natural outcome of an inherently deviant relationship. **63**

The following study of same-sex domestic violence cases at the appellate level reveals that homophobia often operates on several levels in the courtroom. First, the problem of hetero-relationizing may occur in these cases, as courts insist on identifying who served in the "male" or "female" role in the relationship, as a means of resolving the case. In addition, in some cases, lawyers, judges, or juries become overly preoccupied with the homosexual nature of the relationship itself, often to the point of obscuring or diminishing the violence at issue. Furthermore, the homosexual nature of the relationship may be submitted or viewed in some courts as an indication of the deviance or bad character of one or both parties. In any and all of these scenarios, victims of domestic violence are denied fair treatment by the justice system as a result of their sexual orientation. **64**

The tendency of courts to hetero-relationize can manifest in several ways in same-sex domestic violence cases. The Oklahoma case of *Allen* v. *State*,[142] for example, was an appeal from a lesbian who had been convicted of murdering her girlfriend. One of the bases for her appeal was her contention that "the trial court erred in allowing in evidence Appellant was the 'man' in her homosexual relationship with the decedent . . ." which "was used to show Appellant was the aggressive person in the relationship, while the decedent was more passive."[143] The appellate court rejected this claim, concluding instead that "[t]he evidence would help the jury **65**

understand why each party acted the way she did both during events leading up to the shooting and the shooting itself."[144] By rejecting this claim, the court implicitly accepted this hetero-relationizing, despite its inherent inaccuracy as a means of understanding same-sex relationships.

66 Hetero-relationizing can also result when judges have difficulty envisioning intimate violence outside of the context of heterosexual relationships. As a result, they often blame both parties equally for the violence, even when the evidence suggests otherwise. In *Annette F.* v. *Sharon S.*,[145] a California case relating to libel and custody, the court's own description of the facts noted two separate incidents of violence in which only Sharon suffered injuries, one in which Annette admitted to provoking the physical contact. The court also noted that, when Sharon sought a protective order against Annette, a lower court made a finding that Annette had perpetrated domestic violence against Sharon.[146] Still, the court did not identify either party as victim or perpetrator, noting only in its initial characterization of the relationship that "[t]heir relationship was volatile, and each ultimately accused the other of engaging in physical and verbal abuse."[147] With no evidence whatsoever to suggest that Sharon was the primary aggressor, it is noteworthy that the court described the relationship in such neutral terms. That they did so indicates an interesting reluctance to recognize this as an abusive relationship with only one perpetrator.

67 In other cases, the judicial system's preoccupation with same-sex relationships takes precedence over the other aspects of the case. A court's view of same-sex relationships as illegitimate, combined with its insistence on pathologizing homosexual litigants, often serves to justify the violence in question. The homophobia of the judge, jury or attorneys frequently plays a central role in the case, at the expense of the facts.

68 In the 1973 case of *Perez* v. *State*,[148] for example, a Texas appeals court rejected Maria Perez's appeal from her conviction for the murder of her ex-girlfriend. Despite the serious nature of the issue before the court, the proceedings focused primarily on the sexual nature of the relationship between the two women. In fact, well over half of the text of the court's three-page opinion was devoted to establishing that Perez is indeed a lesbian, citing testimony from a witness who claimed that Perez "always dressed like a man; kept her hair cut like a man; wore men's clothing, including men's shoes; had never [had] a date with a man; and '. . . always takes a man's place.'"[149] This witness's testimony was further corroborated by "State's Exhibit No. 2, a photograph of [Perez], showing her with a short haircut. He stated it depicted the way appellant looked during the twenty years he had known her."[150] The court only briefly mentioned previous incidents of violence between Perez and her ex-girlfriend and the facts surrounding the murder in question, but devoted most of its efforts to identifying Perez as a lesbian. Here, the gravity of the act that occurred and the significance of the charges against Perez were both overshadowed by the court's homophobic insistence on establishing Perez as a lesbian first and a murderer second.

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Similar instances of inappropriate and often demeaning emphasis on the sexual orientation of defendants in lesbian domestic violence cases are also revealing. In *Wiley* v. *Florida*,[151] Queen Wiley appealed her murder conviction in part on the basis that the prosecution inappropriately attacked her character by describing her as "a 'bull dagger'—a lesbian that assumes the male role during sexual intercourse."[152] The court dismissed this assertion, arguing that Wiley herself had used the epithet in her testimony (when quoting a threat her girlfriend had made to her), and then commenting snidely that "the State's only crime here was to try to explain to the jury exactly what a 'bull dagger' is."[153] Likewise, Ruthann Robson recounts an unpublished case of lesbian murder in Florida, in which two potential jurors discussed a desire to be chosen for the jury "in order to 'hang that lesbian bitch.'"[154] While focusing on, commenting on, or trying to prove the parties' sexual orientation, courtroom participants in these cases did a serious disservice to those seeking justice. **69**

Evidence of homosexuality itself is often presented or seen in courts as proof of the deviance of one or both parties or of their relationship. In the case of domestic violence, this line of thinking can be particularly dangerous. In the California case of *People* v. *Beasley*,[155] for example, a man appealed his conviction for murder partly on the grounds that the prosecution had unfairly introduced evidence of his homosexuality. In particular, he observed that the prosecutor said, in his closing argument, **70**

> We, who are in law enforcement work, . . . see homosexuals, sex perverts and criminals . . . sometimes we don't understand why an average, normal citizen, who doesn't come in contact with them the way we do, is at a loss to understand the motives or reasons that cause them to act the way they do. . . . Passions and jealousies between homosexuals are even more exaggerated than they are in normal people.[156]

The appellant claimed that the prosecution's attempt to show him as a homosexual was intended solely to prejudice the jury. The court, noting that the prosecution never did prove Beasley's homosexual relationship with the deceased, agreed, noting that, "[h]omosexuality is a subject upon which the public generally looks with disfavor. It is a disgusting subject to some and a distasteful subject to others."[157] To introduce it, therefore, particularly without proving it, was an error the court could not allow.

Because the *Beasley* case took place in 1958, some might be tempted to attribute this overt homophobia to that particular era. Yet the case of *Tennessee* v. *Herron*,[158] decided over thirty years later, finds these prejudices still solidly in place, providing further evidence that courts and juries often do see homosexuality itself as evidence of bad character. In this same-sex murder case, the court noted that there was "an unusual relationship"[159] between the victim and the perpetrator of the murder (i.e., a homosexual one). The court also noted that for the trial court to have allowed evidence of the victim's homosexuality would have been, in effect, to "assassinate the victim's character."[160] Likewise, in the Texas case of *Rotondo* v. *State*,[161] the defendant admitted to the crime of murder, but objected to the admission of evidence that he **71**

had engaged in homosexual conduct. The appellate court disagreed, stating that it was relevant as one of the facts surrounding the murder he committed. Yet the fact that Rotondo confessed to murder but did not want the jury to know he had engaged in homosexual activity says much about the way in which homosexuality has been received by the justice system.

72 In other same-sex domestic violence cases, defendants have objected to the introduction of evidence regarding their homosexuality, and courts have properly found such information admissible only for a specific reason related to that case.[162] In particular, *Gilpin* v. *State*,[163] a 1991 Texas case, helpfully clarified the particular uses to which evidence of sexual orientation could be put in a same-sex domestic violence case. In this case, the appellant had objected to the introduction of photos of himself and the deceased engaged in sadomasochistic activities. The court conceded that there was the potential for such photos to be used solely to inflame the jury, but that given the particular circumstances of this case (including some allegedly consensual violence in the relationship), they provided important evidence related to motive. Explaining its reasoning, the court noted:

> The sexual orientation and fetishes of the accused in a murder prosecution are not *per se* relevant, and such information cannot be admitted solely to prejudice and inflame the minds of the jurors. However, where evidence regarding a sexual relationship between the accused and the deceased is relevant, it will not be excluded merely because the relationship in question was homosexual in nature.[164]

Given the history of courtroom homophobia against which these cases are set, the notion that sexual orientation should only be used for specific evidentiary purposes, rather than inflammatory ones, is a refreshing departure.

73 In each of these cases of same-sex domestic violence, the sexual orientation of the parties involved played some role in the progression of the case. Regardless of the ultimate disposition of the case, the sexual orientation of the defendant/appellant at the very least preoccupied the court, and, at worst, influenced or determined the outcome. Thus, while cases of heterosexual domestic violence are often mishandled by courts' unwillingness to interfere in the domestic sphere, the opposite is true for their LGBT counterparts. Too often, in cases involving same-sex domestic violence, courts are all too eager to invade the private lives of the parties, even when the details sought are entirely irrelevant to the case itself. In this way, courts have, in effect, denied lesbians and gay men the right of privacy that they readily bestow upon heterosexual couples in the context of domestic violence.

74 Privacy thus takes on an entirely different meaning within the context of same-sex domestic violence. As a result, lesbian and gay male victims are compelled to use different strategies than those of straight battered women when seeking legal refuge from violence. The civil litigation brought by the battered women's movement in the 1980s, for example, encouraged increased state intervention in the home at particular moments. By contrast, gay and lesbian victims must, in the course of seeking legal redress, also attempt to keep the court out of their

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bedrooms, for the purposes of keeping the trial focused on the issues at hand. Not surprisingly, therefore, the kinds of civil cases brought by battered straight women that proliferated during the 1980s (such as *Bruno* or *Thurman*) have been quite rare in the realm of same-sex domestic violence.

75 Nevertheless, a few courts have successfully rejected homophobic attitudes in cases of same-sex domestic violence and, in so doing, have pioneered new frameworks for other courts to follow. In some cases, this has meant taking the somewhat unusual step of treating these cases just like other cases, without focusing unnecessarily on the details of the sexual relationship, or concluding that both parties must be depraved in order to engage in a homosexual relationship at all.[165] In other cases, courts have deliberately chosen to extend to lesbians and gay men the same protection from domestic violence as their heterosexual counterparts receive. Just as the *Liberta* court had, in 1984, moved dramatically away from contemporary judicial treatments of marital rape laws, the 1991 case of *Ohio* v. *Hadinger*[166] was the first to explicitly grant legal protection to gay and lesbian victims of domestic violence. The *Hadinger* opinion was brief and simple, yet powerful. In this case, the Court of Appeals of Ohio reviewed a case of lesbian domestic violence in which a lower court had dismissed the criminal charges simply because both the victim and the perpetrator were women. The lower court had determined that because two women could not be legally married in Ohio, the victim could not be considered to be "living as a spouse" with the defendant, as was required in order to be protected by the state's domestic violence statute.

76 The appeals court disagreed with this construction, noting the gender-neutral language of the statute and concluding that "to read the . . . statute otherwise would eviscerate the efforts of the legislature to safeguard, regardless of gender, the rights of victims of domestic violence. We decline to adopt such a restrictive position and therefore conclude that [the statute] . . . does not in and of itself exclude two persons of the same sex."[167] With this simple conclusion, the court granted legal protection to victims of same-sex domestic violence, while simultaneously providing judicial recognition of the problem itself.[168] Since that time, several other state courts have clarified that their domestic violence statutes apply to same-sex couples as well as heterosexual couples.[169]

77 Five years later, another Ohio court relied on *Hadinger* as the basis for an even stronger and more forceful assertion of the rights of gay men and lesbians to state protection from domestic violence. Citing *Hadinger*, the court deciding *State* v. *Linner*[170] went on to assert that "assaults between homosexuals are just as worthy of protection as assaults between heterosexuals."[171] In a remarkable display of judicial sensitivity, the opinion, written by Judge Timothy Black, also evinced an awareness of one of the problems unique to lesbian and gay victims of domestic violence; namely, the additional threat of public "outing" for the victim who presses criminal charges against his or her batterer. As a result of this additional peril, Black suggested, homosexual victims may have an even greater need for the protection of domestic violence laws than do heterosexuals.[172] Expressing a clear desire to achieve "the twin goals of ensuring

the victim's safety and holding the batterer accountable,"[173] the opinion also relies heavily on an equal protection analysis. Declaring that the statute would be unconstitutional if applied only to heterosexuals, the court even cites the 1984 case of *People* v. *Liberta* to bolster its equal protection argument.

78

This equal protection argument was echoed two years later in a Kentucky appellate court addressing the same issue—that is, whether that state's domestic violence statute should apply to same-sex couples. Like the *Hadinger* court, the judges deciding *Ireland* v. *Davis*[174] also relied on the statute's broad, gender-neutral language to conclude that it should cover gay men and lesbians as well as heterosexuals. In addition, while the *Ireland* court did not ultimately decide their case on equal protection grounds, they referenced its applicability, noting that "to exclude same-sex couples [from the scope of the statute] would be to deny them the same protection that other couples are afforded."[175] Thus, while *Hadinger* had taken the formidable, initial step of including gay men and lesbians in a state domestic violence statute, *Linner* and *Ireland* strengthened that position by undergirding such decisions with the logic and weight of the equal protection clause. In so doing, they sent a message to courts and legislatures that to exclude victims of same-sex domestic violence from the protection of such laws would be not only unconscionable, but unconstitutional.

79

Furthermore, by including members of homosexual couples within the scope of a state's domestic violence statutes, courts implicitly acknowledge these couples as legitimate family forms. Cases such as *Hadinger* and *Linner* grapple with the meaning of such phrases as "person living as a spouse"[176] and respond by constructing new and inclusive definitions of family. The *Linner* court, for example, found the heterosexual model to be only one possible family form, noting that, for the purpose of the statute, "cohabitation as a spouse" could include consideration of such factors as shared expenses, jointly owned property, joint socializing, and shared parenting responsibilities.[177] Applying this analysis to the couple involved in the case before them, the court found the two women to be indeed "cohabiting as spouses"—as the opinion explained, "living as lovers in an intimate relationship, sharing in the support of children and of each other."[178] By allowing for the decentering of the heterosexual model, these cases promoted a broader view of family, one that provides gay men and lesbians full access to the protection of the law in this area.

80

In cases such as *Hadinger*, *Linner*, and *Ireland*, judicial recognition of same-sex families provides the critical step in securing the equal protection of domestic violence laws. Conversely, it is the censuring of gay and lesbian relationships that often provides a barrier to legal relief for victims of same-sex domestic violence. The role of privacy is also significant here, for it has failed, in very different ways, both straight and gay victims of domestic violence. The state's reverence for the domestic sphere inhabited by heterosexual couples has meant, in practice, a reluctance to intervene in it—at the expense of battered women's safety. This attitude found judicial expression in the early contraceptive cases such as *Poe* and *Griswold*, which extolled "the sacred precincts of marital bedrooms."[179] Even in those early cases, this

exalting of marital relationships was predicated upon the devaluing of other relationships—most notably, homosexual ones. As Justice Harlan observed in *Poe*, "The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced."[180] The right to privacy promised in those cases, therefore, was not accorded to same-sex couples in the same measure.

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In fact, just the opposite has been the case. As a result, the state's eagerness to invade the private lives of homosexual couples has often meant that instead of legal protection, victims of same-sex domestic violence receive only condemnation from the state about the nature of their relationship. A new model of privacy is needed; one that, like *Hadinger*, *Linner*, and *Ireland*, neither exalts nor demeans particular family forms based on sexual orientation. Furthermore, this new model must reject principles of secrecy, which, while sometimes useful as a survival strategy in a homophobic culture, nonetheless encourage the invisibility of lesbians and gay men. Instead of being exclusionary, an alternative model of privacy should be inclusive and empowering for victims of domestic abuse, regardless of sexual orientation. In the next chapter, I will propose a model that incorporates each of these elements.

Conclusion

82

Intimate violence within same-sex relationships is a problem requiring particular solutions. While this chapter has begun to examine the treatment of this issue in the judicial and activist arenas, the subject merits further study. As is the case with heterosexual domestic violence, privacy is a central component of legal and societal formulations of this problem. The role that privacy plays, however, differs significantly in each context. While courts have consistently granted married and other heterosexual couples a right of privacy that often prevents state intervention into a violent home, they have denied that kind of privacy to homosexual couples. Instead, courts and other state actors have freely intruded into the private activities of gay men and lesbians—most often for the purpose of condemning them. The stigma imposed upon these relationships, by courts and by the larger society, has significantly complicated the meaning of privacy in this context. Instead of an implicit right recognized by the state in heterosexual relationships, privacy within homosexual relationships often represents either a mechanism of legal invisibility or a strategy used to shield individuals from the disapproval of the state—and often, from criminal sanctions.

83

In fact, criminal sodomy laws have often served to codify homophobic attitudes and legitimize discrimination against gay men and lesbians. The history of the 1986 Supreme Court case of *Bowers* v. *Hardwick*, "an exemplar of legal homophobia,"[181] reveals the extent to which such judicial homophobia can determine the outcome of a case. The majority opinion in *Bowers* denied a right of privacy to gay men and lesbians by characterizing homosexual relationships as illegitimate family forms. While the implications of *Bowers* were profound, the homophobic

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tone of the opinion was not unique. By casting homosexuals and their intimate relationships outside of the boundaries of acceptable families, *Bowers* echoed decades of judicial opinions that had employed similar biases. This judicial bias against same-sex relationships—combined with the not-uncommon courtroom practice of using homosexuality as a proxy for bad character—has served as a justification for denying lesbians and gay men access to a wide range of legal protections. The implications of the recent *Lawrence* opinion, which definitively overruled *Bowers*, remain to be seen. As a watershed case for same-sex privacy rights, it laid the foundation for a more expansive understanding of the right to privacy as well as equal treatment for same-sex couples in other arenas as well.

84 The traditionally unequal application of the laws has been particularly pronounced for homosexuals in the arena of family law, especially in cases of same-sex domestic violence. In these cases, judges, jurors, and attorneys have persistently focused on the sexuality of the parties involved to the detriment of the other aspects of the case. Likewise, courtroom homophobia has, until recently, generally resulted in the exclusion of gay men and lesbians from the protection of state domestic violence laws. While a few courts (and more legislatures) have extended such laws to protect same-sex relationships, it is nevertheless clear that with regard to domestic violence, gay men and lesbians are still not receiving equal treatment under the law.

85 Furthermore, while being treated equally to victims of heterosexual violence would arguably be an improvement for victims of same-sex violence, such a response would hardly bring them justice. As the previous chapters have demonstrated, battered straight women often remain in danger even after seeking protection from the state, because the right to privacy has proven to be a consistent barrier to their safety. At the root of this privacy right—interpreted by courts as the right to freedom from state intervention—is a reverence for the heterosexual domestic sphere. At the same time, this privileging of heterosexual relationships has provided the justification for the state's failure to extend such a right to homosexual relationships. Predicated on a premise of exclusion, therefore, this model of privacy has been applied unevenly and has proved dangerous to victims of domestic violence.

86 An affirmative model of privacy, on the other hand, based on notions of bodily integrity, would apply to individuals regardless of race, sexual orientation, ability, or other categories of identity or relationship status, and would prove empowering to victims of domestic violence. In the concluding chapter, I will outline what such a model might look like, and how it could be fruitfully applied to assisting all victims of domestic violence.

Notes

Note 1: *People* v. *Liberta*, 64 N.Y.2d 152 (1984).

Note 2: As several scholars have observed, studies attempting to discern the prevalence of violence within same-sex intimate relationships have yielded widely varying results (Claire M. Renzetti, *Violent Betrayal: Partner Abuse in Lesbian Relationships* [Newbury Park, CA: Sage, 1992]: 17–19; Pam Elliott, "Shattering Illusions: Same-Sex Domestic Violence," in *Violence in Gay and Lesbian Domestic Partnerships*, ed. Claire M. Renzetti and Charles Harvey Miley, 1–8 [New York: Haworth Press, 1996]: 2–3; Paula B. Poorman, "Forging Community Links to Address Abuse in Lesbian Relationships," in *Intimate Betrayal: Domestic Violence in Lesbian Relationships*, ed. Ellyn Kaschak, 7–24 [New York: Haworth Press, 2001]: 8–11). Discrepancies among findings result from numerous factors, including varying definitions of violence (which may include any combination of physical, sexual, verbal, and emotional abuse); varying forms of measurement (diverse survey instruments, surveys versus interviews, etc.); and the necessity of using self-selected and therefore nonrandom samples. Despite these obstacles, however, such studies tend to agree that domestic violence is a very real problem for same-sex couples as well as their heterosexual counterparts, often at similar rates (see, for instance, P. A. Brand and A. H. Kidd, "Frequency of Physical Aggression in Heterosexual and Female Homosexual Dyads," *Psychological Reports* 59 [1986]: 1307–13, which found roughly equivalent rates of physical abuse and rape among their sample of lesbian and heterosexual couples).

Note 3: The terminology I use in this chapter reflects the language adopted by courts as well as the language employed by gay rights activists. As such, I use the words "heterosexual" and "straight" to refer to people who are involved in intimate relationships with members of the opposite sex. Those terms, as well as "different-sex," are also used to characterize the relationships themselves. I use the words "gay" and "homosexual" to refer to people who are involved in intimate relationships with members of the same sex. Those terms, as well as "same-sex," are also used to characterize the relationships themselves. When referring specifically to homosexual men and their intimate relationships, I specify "gay men" or "gay male," and I refer to homosexual women and their intimate relationships as "lesbian." When referring to gay men and lesbians collectively as a social group, I often employ the phrase "LGBT community," which refers to lesbian, gay male, bisexual, and transgender individuals. While this chapter does not address concerns specific to bisexual and transgender individuals, the discrimination they experience under the law often parallels that of lesbians and gay men. Finally, usage of these terms and categories is not in any way meant to refute or disregard the insight provided by feminist theorists that gender and sexual orientation are not fixed categories, but are instead fluid and shifting modes of identity (see, for instance Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* [London: Routledge, 1990/1999]). Instead, this chapter by necessity addresses human relationships as perceived by the state, which generally leaves little room for fluidity and proceeds according to categories of identity that are perceived to be static.

Note 4: See, for example, Kerry Lobel, ed., *Naming the Violence: Speaking Out About Lesbian Battering* (Seattle: Seal Press, 1986); Beth Leventhal and Sandra E. Lundy, eds., *Same-Sex Domestic Violence: Strategies for Change* (Thousand Oaks, CA: Sage, 1999); Claire M. Renzetti, *Violent Betrayal: Partner Abuse in Lesbian Relationships* (Newbury Park, CA: Sage, 1992); Pam Elliott, "Shattering Illusions: Same-Sex Domestic Violence," in *Violence in Gay and Lesbian Domestic Partnerships*, ed. Claire M. Renzetti and Charles Harvey Miley, 1-8 (New York: Haworth Press, 1996); Paula B. Poorman, "Forging Community Links to Address Abuse in Lesbian Relationships," in *Intimate Betrayal: Domestic Violence in Lesbian Relationships*, ed. Ellyn Kaschak, 7–24 (New York: Haworth Press, 2001).

Note 5: See, for example, Charlene Allen and Beth Leventhal, "History, Culture, and Identity: What Makes GLBT Battering Different," in *Same-Sex Domestic Violence: Strategies for Change*, ed. Beth Leventhal and Sandra E. Lundy, 73–82 (Thousand Oaks, CA: Sage, 1999); Claire M. Renzetti, *Violent*

Betrayal: Partner Abuse in Lesbian Relationships (Newbury Park, CA: Sage, 1992); Pam Elliott, "Shattering Illusions: Same-Sex Domestic Violence," in *Violence in Gay and Lesbian Domestic Partnerships*, ed. Claire M. Renzetti and Charles Harvey Miley, 1–8 (New York: Haworth, 1996).

Note 6: National Gay and Lesbian Task Force, "Domestic Violence Laws in the U.S." http://www.thetaskforce.org/downloads/reports/issue_maps/domesticviolencelawsmap.pdf

Note 7: Pam Elliott, "Shattering Illusions: Same-Sex Domestic Violence," in *Violence in Gay and Lesbian Domestic Partnerships*, ed. Claire M. Renzetti and Charles Harvey Miley, 1–8 (New York: Haworth, 1996): 5.

Note 8: Throughout this chapter, I refer only to consensual sodomy between adults, generally defined as anal and/or oral sex. "Sodomy" in this chapter does not refer to behavior involving minors or any type of sexual assault or commercial practice, and laws proscribing those behaviors are not at issue here.

Note 9: This wording comes from William Blackstone, *Commentaries on the Laws of England* v.1 (Oxford: Clarendon Press, 1765): 215.

Note 10: Kendall Thomas, "Beyond the Privacy Principle," *Columbia Law Review* 92 (1992): 1431.

Note 11: Ruthann Robson, "Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory," *Golden Gate University Law Review* 20 (1990): 567–91.

Note 12: 478 U.S. 186 (1986).

Note 13: 539 U.S. 558 (2003).

Note 14: For a more detailed description of the case selection method for each chapter, see the appendix.

Note 15: Kendall Thomas, "Beyond the Privacy Principle," *Columbia Law Review* 92 (1992): 1455.

Note 16: The Defense of Marriage Act (DOMA), enacted in 1996, defines the term "marriage" for federal purposes as "a legal union between one man and one woman as husband and wife" (104 P.L. 199). The DOMA was created for the purpose of refusing legal legitimacy to same-sex unions. Specifically, the act was generated in response to the emerging possibility that Hawaii, through its judicial system, might be on the verge of granting legal recognition to same-sex marriages. By the time the Hawaii court ruled against legalizing gay marriage (*Baehr* v. *Miike*, 994 P.2d 566 [1999]), the DOMA was already in place to ensure that no other state would be obligated to recognize such a union.

Note 17: Janet E. Halley, "Reasoning About Sodomy: Act and Identity in and After *Bowers* v. *Hardwick*," *Virginia Law Review* 79 (1993): 1721.

Note 18: Ruthann Robson, "Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory," *Golden Gate University Law Review* 20 (1990): 572. Of course, the problem of hetero-relationizing is not unique to the arena of domestic violence. Courts, scholars, and the general public often apply heterosexual models to many aspects of same-sex relationships—as, for example, in the custody decisions discussed later in this chapter.

Note 19: See, for example, Kerry Lobel, ed., *Naming the Violence: Speaking Out About Lesbian Battering* (Seattle: Seal Press, 1986); Ruthann Robson, "Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory," *Golden Gate University Law Review* 20 (1990): 567–91; Beth Leventhal and Sandra E. Lundy, eds., *Same-Sex Domestic Violence: Strategies for Change* (Thousand Oaks, CA: Sage, 1999); Claire M. Renzetti, *Violent Betrayal: Partner Abuse in Lesbian Relationships* (Newbury Park, CA: Sage, 1992); Mary Eaton, "Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence," in *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, ed. Martha Albertson Fineman and Roxanne Mykitiuk (New York: Routledge, 1994): 195–223; Pam Elliott, "Shattering Illusions: Same-Sex Domestic Violence," in *Violence in Gay and Lesbian Domestic Partnerships*, ed. Claire M. Renzetti and Charles Harvey Miley (New York: Haworth

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Press, 1996): 1–8; Paula B. Poorman, "Forging Community Links to Address Abuse in Lesbian Relationships," in *Intimate Betrayal: Domestic Violence in Lesbian Relationships*, ed. Ellyn Kaschak (New York: Haworth Press, 2001): 7–24.

Note 20: Ruthann Robson, "Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory," *Golden Gate University Law Review* 20 (1990): 571–74.

Note 21: Mary Eaton, "Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence," in *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, ed. Martha Albertson Fineman and Roxanne Mykitiuk (New York: Routledge, 1994): 195–223; see esp. p. 207.

Note 22: For a more thorough discussion of these issues, see Rhonda R. Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States," *Hastings Law Journal* 30 (1979): 799–955.

Note 23: For further information on consensual sodomy statutes targeting homosexuals specifically and/or exempting married or heterosexual couples from their reach, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, MA: Harvard University Press, 1999): 328–37.

Note 24: Ibid.

Note 25: For further information on the enforcement of sodomy laws against homosexuals, see ibid., 63–66.

Note 26: Janet E. Halley, "Reasoning About Sodomy: Act and Identity in and After *Bowers* v. *Hardwick*," *Virginia Law Review* 79 (1993): 1747.

Note 27: William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, MA: Harvard University Press, 1999): 157–58.

Note 28: Ibid., 19–20.

Note 29: Ibid., 158–59.

Note 30: Ibid., 159–60.

Note 31: As with most social movements, the gay rights movement cannot be said to have an exact starting date, but many scholars have identified the Stonewall riot of 1969 as one major signal of its inception. (See, for instance, ibid., 99.)

Note 32: Ibid., 160.

Note 33: These states were Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, and Texas (for more information, see ibid., 150, fn a.).

Note 34: These states were Oklahoma and Maryland (for more information, see ibid., 150, fn a.).

Note 35: 403 F. Supp. 1199 (1975).

Note 36: Ibid., 1200.

Note 37: 381 U.S. 479 (1965).

Note 38: 367 U.S. 497 (1961).

Note 39: Ibid., 546.

Note 40: *Doe*, 1202.

Note 41: 478 U.S. 186 (1986).

Note 42: See, for example, Anne Goldstein, "History, Homosexuality, and Political Values: Searching for the Hidden Determinants of *Bowers* v. *Hardwick*," *Yale Law Journal* 97 (1988): 1073; Janet E. Halley, "Reasoning About Sodomy: Act and Identity in and After *Bowers* v. *Hardwick*," *Virginia Law Review* 79 (1993): 1721; Kendall Thomas, "Beyond the Privacy Principle," *Columbia Law Review* 92 (1992): 1431.

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Note 43: George Brenning, interview by author, November 3, 2002; Peter Irons, *The Courage of Their Convictions* (New York: Free Press, 1988).

Note 44: Brenning, interview, 2002.

Note 45: Kathleen Wilde, interview by author, October 30, 2002; Brenning, interview, 2002.

Note 46: Letter from District Attorney Lewis Slaton, January 7, 1983.

Note 47: Brenning, interview, 2002.

Note 48: Wilde, interview, 2002.

Note 49: Order of District Court, April 18, 1985.

Note 50: 760 F.2d 1202 (1985).

Note 51: 431 U.S. 678 (1977).

Note 52: Ibid., fn. 17, qtd. in *Hardwick* v. *Bowers*, 1209.

Note 53: 464 U.S. 812 (1983).

Note 54: 410 U.S. 113 (1973).

Note 55: 405 U.S. 438 (1972).

Note 56: *Hardwick*, 1211–12.

Note 57: Wilde, interview, 2002.

Note 58: Ibid.

Note 59: Brief of Respondents in Opposition to Petition for Writ of Certiorari, September 12, 1985.

Note 60: The list of cases cited in the briefs is extensive, but some examples of often-cited cases include *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), http://laws.findlaw.com/us/268/510.html (full text), *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), http://laws.findlaw.com/us/316/535.html (full text), *Stanley* v. *Georgia,* 394 U.S. 557 (1969), http://laws.findlaw.com/us/394/557.html (full text), http://www.oyez.org/cases/case/?case=1960-1969/1968/1968_293 (audio), *Poe*, *Griswold*, *Eisenstadt*, *Roe*, and *Carey*.

Note 61: Brief for Respondent, January 31, 1986; Brief of the New York City Bar Association, January 27, 1986.

Note 62: Brief of the New York City Bar Association, January 27, 1986; emphasis added.

Note 63: Brief of Attorneys General of New York and California, January 31, 1986.

Note 64: *Griswold*, 485–86; cited in Brief of the New York City Bar Association, January 27, 1986.

Note 65: *Eisenstadt,* 453; cited in Brief of Attorneys General of New York and California, January 31, 1986; emphasis in original.

Note 66: Brief of Lesbian Rights Project, et al., January 29, 1986.

Note 67: Brief of National Gay Rights Advocates et al., January 31, 1986; Brief of Lambda Legal Defense and Education Fund et al., January 31, 1986; Brief of Lesbian Rights Project, et al., January 29, 1986.

Note 68: Brief of Lesbian Rights Project, et al., January 29, 1986; Brief of the National Organization for Women, January 31, 1986.

Note 69: See Brief of the American Psychological Association and American Public Health Association, January 31, 1986; Brief of the Presbyterian Church et al., January 31, 1986; and the Brief of the American Jewish Congress, January 31, 1986.

Note 70: Oral Argument of *Bowers* v. *Hardwick*, *Landmark Briefs and Arguments of the Supreme Court of the United States* vol. 164 (Washington: University Publications of America): 642.

Note 71: Ibid., 652.

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Note 72: Ibid., 633.

Note 73: Ibid., 641.

Note 74: Ibid., 636.

Note 75: See Brief of the Rutherford Institute et al, Amicus Curiae, December 19, 1985; Brief of Concerned Women of America, Amicus Curiae, December 19, 1985; Brief of the Catholic League for Religious and Civil Rights, Amicus Curiae, December 13, 1985.

Note 76: Brief of the Catholic League for Religious and Civil Rights, Amicus Curiae, December 13, 1985.

Note 77: Brief of the Rutherford Institute et al., December 19, 1985.

Note 78: *Bowers* v. *Hardwick*, 190.

Note 79: Ibid., 192.

Note 80: Ibid., 190.

Note 81: Ibid., 196.

Note 82: Ibid., 191.

Note 83: Ibid., 200.

Note 84: Ibid., 204.

Note 85: Ibid., 205; original emphasis.

Note 86: Ibid., 205.

Note 87: Ibid., 205.

Note 88: Kathleen Sullivan, interview by author, November 19, 2002.

Note 89: 539 U.S. 558 (2003).

Note 90: Probable cause affidavits authored by Officer Quinn, qtd. in Brief of Amici Curiae Texas Legislators, February 18, 2003.

Note 91: Ibid.

Note 92: *Lawrence* v. *Texas*, 539 U.S. 558 (2003), 563.

Note 93: Ibid., 563.

Note 94: *Lawrence* v. *Texas*, 41 S.W.3d 349 (2001).

Note 95: Ibid., 361.

Note 96: Ibid., 366.

Note 97: Ibid., 375.

Note 98: Ibid., 375.

Note 99: Amicus Brief of Human Rights Campaign; National Gay and Lesbian Task Force; Parents, Families and Friends of Lesbians and Gays; National Center for Lesbian Rights; Gay and Lesbian Advocates and Defenders; Gay and Lesbian Alliance Against Defamation; Pride at Work, et al., January 16, 2003, p. 2.

Note 100: Brief of the National Lesbian and Gay Law Association, the Asian American Legal Defense and Education Fund, Action Wisconsin, the Bay Area Lawyers for Individual Freedom, the Bay Area Transgender Lawyers' Association, et al. as Amici Curiae, January 16, 2003.

Note 101: In its brief, the Republican Unity Coalition describes itself as "a national organization of conservative Republicans committed to making sexual orientation a 'non-issue' within the Republican Party and throughout the Nation." Brief of Amici Curiae Republican Unity Coalition and the Honorable Alan K. Simpson, January 16, 2003, p. 1.

Note 102: http://www.cato.org/about/about.html

Note 103: Brief of the Cato Institute as Amicus Curiae, January 16, 2003, p. 2

Note 104: Ibid., 23

Note 105: Ibid., 24.

Note 106: Amicus Brief of the American Center for Law and Justice, February 18, 2003, p. 1.

Note 107: Ibid., 4.

Note 108: Ibid., 9.

Note 109: Ibid., 19.

Note 110: Brief of Amici Curiae, Pro-Family Law Center, Traditional Values Coalition, Traditional Values Education and Legal Institute and James Hartline, February 18, 2003, p. 4.

Note 111: Ibid., 5.

Note 112: Ibid. 6.

Note 113: Ibid., 4, 11.

Note 114: Brief Amici Curiae of the Center for Marriage Law, February 18, 2003, p. 3.

Note 115: Brief of the Center for Law and Justice International as Amicus Curiae, February 18, 2003, p. 3.

Note 116: Ibid., 13.

Note 117: Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, et al., February 18, 2003, p. 8.

Note 118: Brief of Amici Curiae, Pro-Family Law Center, Traditional Values Coalition, Traditional Values Education and Legal Institute and James Hartline, February 18, 2003, p. 3.

Note 119: Ibid., 6.

Note 120: *Lawrence* v. *Texas*, 539 U.S. 558 (2003), 562.

Note 121: Ibid., 565.

Note 122: Ibid., 565–66.

Note 123: Oral Argument of *Lawrence* v. *Texas*, Alderson Reporting Company, available at U.S. Supreme Court Online: http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-102.pdf, p. 35.

Note 124: *Lawrence* v. *Texas*, 539 U.S. 558 (2003), 578.

Note 125: Ibid., 567.

Note 126: Ibid., 575.

Note 127: Ibid., 567; emphasis added.

Note 128: Ibid., 578.

Note 129: Ibid., 573.

Note 130: Ibid., 576.

Note 131: Pam Elliott, "Shattering Illusions: Same-Sex Domestic Violence," in *Violence in Gay and Lesbian Domestic Partnerships*, ed. Claire M. Renzetti and Charles Harvey Miley (New York: Haworth Press, 1996): 1–8; see esp. pp. 6–7. See also L. Kevin Hamberger, "Intervention in Gay Male Intimate Violence Requires Coordinated Efforts on Multiple Levels," in *Violence in Gay and Lesbian Domestic Partnerships*, ed. Claire M. Renzetti and Charles Harvey Miley (New York: Haworth Press, 1996): 83–92; see esp. pp. 86–87.

Note 132: See Pam Elliott, "Shattering Illusions: Same-Sex Domestic Violence," in *Violence in Gay and Lesbian Domestic Partnerships*, ed. Claire M. Renzetti and Charles Harvey Miley (New York: Haworth Press, 1996): 1–8; see esp. p. 6.

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Note 133: Ibid., 6.

Note 134: Barbara Hart, interview by author, May 1, 2002. See also Barbara Hart, preface, in Kerry Lobel, ed., *Naming the Violence: Speaking Out About Lesbian Battering* (Seattle: Seal Press, 1986): 9–16; see esp. p. 12.

Note 135: Howard Kurtz, "Meese Delayed Grant When Conservatives Balked; Decision on Coalition Against Domestic Violence Indicates Split in Ranks," *Washington Post*, August 9, 1985, p. A8.

Note 136: Ibid.

Note 137: Howard Kurtz, "Meese Clears Disputed Grant for Aid to Battered Women; Group is 'Pro-Family,' Conservative Critics Told," *Washington Post*, August 10, 1985: p. A2.

Note 138: This tendency within the battered-women's movement unfortunately mirrors several points within the mainstream feminist movement in which women from marginalized communities (whether lesbians, women of color, or poor women) were disowned in some way for similarly political reasons.

Note 139: See Curt Rogers, "Six Steps: Organizing Support Services and Safe-Home Networks for Battered Gay Men," in *Same-Sex Domestic Violence: Strategies for Change*, ed. Beth Leventhal and Sandra E. Lundy (Thousand Oaks, CA: Sage, 1999): 111–23.

Note 140: Ibid., 113. See also Beth Crane et al., "Lesbians and Bisexual Women Working Cooperatively to End Domestic Violence," in *Same-Sex Domestic Violence: Strategies for Change*, ed. Beth Leventhal and Sandra E. Lundy (Thousand Oaks, CA: Sage, 1999): 125–34; Jennifer Grant, "An Argument for Separate Services," in *Same-Sex Domestic Violence: Strategies for Change*, ed. Beth Leventhal and Sandra E. Lundy (Thousand Oaks, CA: Sage, 1999): 183–91; L. Kevin Hamberger, "Intervention in Gay Male Intimate Violence Requires Coordinated Efforts on Multiple Levels," in *Violence in Gay and Lesbian Domestic Partnerships*, ed. Claire M. Renzetti and Charles Harvey Miley (New York: Haworth Press, 1996): 83–92; and Robb Johnson, "Groups for Gay and Bisexual Male Survivors of Domestic Violence," in *Same-Sex Domestic Violence: Strategies for Change*, ed. Beth Leventhal and Sandra E. Lundy (Thousand Oaks, CA: Sage, 1999): 111–23.

Note 141: Brief of Lesbian Rights Project, et al., January 29, 1986.

Note 142: 871 P.2d 79 (1994).

Note 143: Ibid., 95.

Note 144: Ibid., 95.

Note 145: 119 Cal. App. 4th 1146 (2004).

Note 146: Ibid., 1155–56.

Note 147: Ibid., 1154.

Note 148: 491 S.W.2d 672.

Note 149: Ibid., 673.

Note 150: Ibid., 673–74.

Note 151: 427 So.2d 283 (1983).

Note 152: Ibid., 285.

Note 153: Ibid., 285.

Note 154: Ruthann Robson, "Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory," *Golden Gate University Law Review* 20 (1990): 575.

Note 155: 328 P.2d 834 (1958).

Note 156: Ibid., 839.

Note 157: Ibid., 839.

Note 158: 1985 Tenn. Crim. App. LEXIS 3087

Note 159: Ibid., 2.

Note 160: Ibid., 12–13.

Note 161: 860 S.W.2d 575 (1993).

Note 162: See, for example, *Bailey* v. *Texas*, 1993 Tex. App. LEXIS 1253, in which the court allowed evidence of a prior abusive same-sex relationship as a means of establishing motive for the murder.

Note 163: 1991 Tex. App. LEXIS 1396.

Note 164: Ibid., 3–4.

Note 165: See, for instance, *In Interest of Jones*, 429 A.2d 671 (1981), *People* v. *Woodhull*, 481 N.Y.S.2d 749 (1984), *People* v. *Newbern*, 579 N.E.2d 583 (1991), and *In re Lowe*, 130 Cal. App. 4th 1405 (2005).

Note 166: 573 N.E.2d 1191 (1991).

Note 167: Ibid., 1193.

Note 168: The long-term effects of this case remain to be seen, given a development in that state's constitutional history. In 2004, Ohio voters agreed to amend their state constitution to deny the right of marriage and other related benefits to same-sex couples. In particular, the constitution now requires that the state deny any legal recognition "that intends to approximate the design, significance or effect of marriage" to relationships between unmarried individuals. One consequence of this development has been the defense—raised by those accused of domestic violence—that the state domestic violence statute does not apply to them if they are not married to their accuser. This development has sweeping implications for both straight and LGBT victims of domestic violence. Trial and appellate courts in Ohio have produced conflicting rulings, and the issue is currently under consideration by the Ohio Supreme Court.

Note 169: See, for example, *Bryant* v. *Burnett*, 624 A.2d 584 (1993), *Cusseaux* v. *Pickett*, 652 A.2d 789 (1994), and *Peterman* v. *Meeker*, 855 So. 2d 690 (2003).

Note 170: 665 N.E.2d 1180 (1996).

Note 171: Ibid., 1184.

Note 172: Ibid., 1184.

Note 173: Ibid., 1185.

Note 174: 957 S.W.2d 310 (1997).

Note 175: Ibid., 312.

Note 176: *Hadinger*, 1192.

Note 177: Ibid., 1184.

Note 178: Ibid., 1184.

Note 179: *Griswold*, 485.

Note 180: *Poe*, 553.

Note 181: William N. Eskridge Jr, *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, MA: Harvard University Press, 1999): 150.

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