

Chapter Six

Conclusion: Toward a New Model of Privacy

The Historical Development of Privacy and Domestic Violence

The problem of domestic violence in the United States has been inextricably linked with cultural and judicial constructions of privacy. The history of privacy in this country—as it has been recognized, understood, and continually reinterpreted by both state actors and the general public—has had significant and lasting implications for the issue of domestic violence. Specifically, the various ways in which courts, police, and battered women's advocates have understood privacy have determined the extent of civil and criminal protection afforded to victims of intimate partner violence—and, concurrently, the extent of punishment meted out to batterers. An understanding of the historical development and application of the privacy right is therefore crucial to understanding the history of domestic violence in this country. The preceding chapters have examined the many ways that shifting meanings of privacy have shaped responses to the issue of domestic abuse, from condoning the problem to ignoring or minimizing it to recognizing it as an infringement on women's rights. 1

Rooted in liberal individualism, privacy has most often been construed as a negative right: the freedom of individuals from state intervention in the home. Historically, however, this right has been imbued with two powerful assumptions, both of which have significantly affected the application of the right to privacy. First, the home has generally been presumed to be the haven of a traditional, nuclear (and often white, middle-class) family. Second, this family is presumably headed by a man who can do as he pleases—the "king of his castle." As a result of these underlying assumptions, the privacy right has primarily served the interests of such men and privileged the patriarchal and heterosexual family form. 2

The judicial implications of these assumptions for battered women became clear in the late nineteenth century. When state appellate courts began to hear domestic violence cases at this time, they considered the privacy implications of these cases first, and the violence second. Thus, even when courts did condemn the abusive acts, they often refused to punish the perpetrators out of respect for the privacy of the domestic sphere. Interestingly, when judges finally, unequivocally repudiated the right of chastisement—and punished batterers—they often did so in cases involving batterers whose claim to a right of privacy was diminished as a result of their racial identity and/or class status.¹ In this way, courts were able to condemn domestic violence without fundamentally altering the hierarchical implications of the right to privacy. 3

The uneasy relationship between privacy and domestic violence continued throughout the twentieth century and into the twenty-first. After several decades of relative silence from courts and activists around this issue, domestic violence garnered public attention in the early 1970s via the consciousness-raising efforts of the second-wave women's movement. The battered 4

women's movement emerged just as another goal of the women's rights movement was nearing fruition: the securing of reproductive rights. Judicial and activist debates about the legality of contraception and abortion helped shape the evolution of the privacy right from the 1950s through the 1970s, and the resulting judicial construction of privacy proved significant for battered women and their advocates as well. The privacy right established in this line of reproductive rights cases continued to follow the rhetoric of liberal individualism, prohibiting state interference in the domestic sphere (and, by extension, in a woman's right to choose). This construction of the privacy right, however, had potentially dangerous implications for battered women, whose safety often depended upon state intervention in the home. Nonetheless, one case initiated during this era suggested another, very different version of privacy. Perhaps because the unusual circumstances of the case necessitated a creative approach, the lawyer-activists working on *People v. Liberta*² developed an innovative model of privacy that the court then accepted. The *Liberta* briefs acknowledged and relied on the reproductive rights cases, but simultaneously transformed that concept of privacy into a positive right for battered women. By focusing on issues of personal autonomy and bodily integrity in their articulation of the privacy right, these lawyer-activists provided the first key component to an alternative model of privacy.

Case Resources

DeShaney v. Winnebago County

Findlaw (<http://laws.findlaw.com/us/489/189.html>) (full text)

Oyez (http://www.oyez.org/cases/case?case=1980-1989/1988/1988_87_154) (oral arguments)

Castle Rock v. Gonzales

Findlaw (<http://laws.findlaw.com/us/000/04-278.html>) (full text)

Oyez (http://www.oyez.org/cases/case?case=2000-2009/2004/2004_04_278) (oral arguments)

5

The type of privacy advocated in *Liberta*, however, did not become the prevailing model. Despite tremendous legislative advances made by the battered women's movement, police and judicial attitudes towards domestic violence continued to support notions of privacy that enshrined even an abusive man as the unchallenged head of the patriarchal household. In practice, such attitudes resulted in police ignoring or mishandling domestic violence calls, and judges and other state entities often supporting such inaction by further minimizing the seriousness of the abuse. During the 1980s, many battered women and their advocates brought civil lawsuits against police and other government bodies for their often willful failure to respond appropriately—or at all—to reports of domestic abuse. These civil suits achieved increasing success throughout the early 1980s, culminating in several significant and highly publicized financial awards to plaintiffs in the cases of *Thurman v. Torrington*³ and *Sorichetti v. New York*.⁴ As the decade progressed, however, similar suits faced increasing judicial resistance, until the notorious 1989 case of *DeShaney v. Winnebago County*⁵ rendered future such litigation nearly impossible. Holding that the state has no affirmative duty to protect private

citizens from violence, the *DeShaney* court effectively closed this era of battered women's litigation and reinforced the notion of privacy as a negative right. Sixteen years later, the case of *Castle Rock v. Gonzales*⁶ provided further confirmation that the era of successful civil suits was indeed long over.

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)

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)

6

While most domestic violence court cases have focused primarily on heterosexual relationships, some activists within the battered women's movement have observed for years that domestic abuse occurs between same-sex couples as well. Victims of homosexual partner violence have faced additional obstacles in the pursuit of safety and justice. The challenges that gay and lesbian victims continue to face in the courtroom often result from the troubled relationship that has historically existed between homosexuals and the legal right to privacy. Specifically, as part of their refusal to acknowledge the legitimacy of same-sex relationships, courts have often been unwilling to extend the right of privacy to them. While it was eventually overturned in 2005, the 1986 Supreme Court case of *Bowers v. Hardwick*⁷ exemplified this disregard for the privacy of same-sex partnerships. Likewise, in cases of same-sex domestic violence, courts have accorded these relationships neither privacy nor justice, but an excessive and inappropriate focus on the homosexual nature of the union. Judges, juries, and lawyers have often used these cases to promulgate the view of homosexual relationships as inherently pathological, therefore minimizing the violence at issue and denying justice to victims. As a result, the right of privacy has, in very different ways, served as a barrier to effective legal protection for victims of intimate partner violence, both homosexual and heterosexual.

A New Model of Privacy

Considering this historical development of the right to privacy, its influence on state responses to domestic violence, and its role in reinforcing heterosexist norms, the influence of privacy on American judicial discourse in this arena is clear. Privacy's roots in liberal individualism and its continued evolution throughout the nineteenth, twentieth, and twenty-first centuries have secured it a place in our nation's judicial lexicon. In addition, two recent developments have ensured that the right to privacy remains the focus of ongoing concern. First, the proliferation of internet usage has generated substantial debate about the extent to which private lives and

7

personal information may be shielded from unwanted scrutiny. Second, the ever-increasing power of the federal government to monitor the lives of its citizens in the name of "homeland security" has engendered concern about the limits of state power in relation to individual privacy rights. The pervasiveness and immediacy of both of these issues have thus placed the right of privacy at the center of much current debate.

Given that privacy remains so thoroughly ingrained in our national consciousness, ignoring or downplaying its relevance is not an option. Alternatively, some feminist scholars, such as Catharine MacKinnon, have suggested that feminists reject privacy altogether as too detrimental to women, and focus instead on issues of nondiscrimination.⁸ This suggestion, however, is an equally unfeasible response, given the prevalence of notions of privacy in American culture. For those seeking to end domestic violence, such an approach would be particularly dangerous, for several reasons. First, privacy has continued to play such a crucial role in defining the state's response to the problem of domestic violence that it cannot be rejected outright. In addition, the concept of privacy is so deeply embedded in our culture that it carries legitimacy and power that, constructed differently, could benefit victims of domestic violence. Finally, to reject privacy altogether would be to ignore its implications for gay men and lesbians, for whom privacy poses ongoing challenges.

8

Instead of refusing to engage with issues of privacy, therefore, addressing the problem of intimate partner violence requires confronting privacy directly. Understanding its origins and historical development, as well as its ongoing impact on domestic violence, are critical steps in this process. Having fully apprehended the dangers inherent in prevailing models of privacy, one may then begin to articulate an alternative vision of privacy. Feminist scholars such as Patricia Boling,⁹ Dorothy Roberts,¹⁰ and Elizabeth Schneider¹¹ have called for the development of just such a model. In particular, Boling has called for a critical reevaluation of privacy that resists jettisoning the concept altogether. Instead, Boling urges feminist scholars to assess the negative aspects of existing models of privacy, but also to consider the potential utility of privacy as a "political tool" for women.¹² She further suggests that feminists consider "how issues rooted in private life can be made politically recognizable and actionable."¹³ Roberts critiques the formulation of privacy as a purely negative right, advocating instead the development of a model that provides an "affirmative guarantee of personhood and autonomy."¹⁴ Roberts's ideal model promotes the needs of the individual as well as the needs of the community, paying particular attention to issues of race and class. Such a model, she suggests, could conceivably "forge a finer legal tool for dismantling institutions of domination."¹⁵

9

Similarly, Schneider also promotes a critique and revisioning of privacy, and she applies her argument specifically to the issue of domestic violence. Like Roberts, Schneider advocates a revisioning of privacy as an affirmative right, one that holds "radical potential" for battered women. Schneider suggests that feminists continue to critique the public/private dichotomy, and develop a new form of privacy that is not "synonymous with the right to state

10

noninterference with actions within the family."¹⁶ Like Boling and Roberts, Schneider sees the positive potential of a new form of privacy, but she does not specifically articulate what it might look like.

Case Resources

Doe v. Bolton

Findlaw (<http://laws.findlaw.com/us/410/179.html>) (full text)

Oyez (http://www.oyez.org/cases/case?case=1970-1979/1971/1971_70_40) (oral arguments)

11

I begin the process of outlining a new model of privacy here by synthesizing and expanding upon some preliminary formulations already advanced by both scholars and judges. For example, Schneider has suggested that Justice Douglas's concurrence in the 1973 case of *Doe v. Bolton* (the companion case to *Roe v. Wade*)¹⁷ provides an exemplar for a new model of privacy. In that opinion, Douglas elaborated on three aspects of liberty closely related to the privacy right, each of which provides rich potential for an alternative form of privacy: first, "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality;" second, the "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children;" and third, "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."¹⁸ Each of these three components centers on affirmative notions of privacy and autonomy that include decision-making but also involve bodily integrity. Instead of focusing on protecting individuals from the state, these principles focus on allowing people to fulfill their potential. As such, they contain significant possibilities for the empowerment of battered women.

Case Resources

Olmstead v. United States

Findlaw (<http://laws.findlaw.com/us/277/438.html>) (full text)

Oyez (http://www.oyez.org/cases/case?case=1901-1939/1927/1927_493) (oral arguments)

12

Interestingly, a similar precedent for this model of privacy comes from none other than the often-cited *Olmstead* dissent of 1928.¹⁹ Justice Brandeis's characterization of privacy as "the right to be let alone" has been quoted frequently by judges and legal scholars writing about the right to privacy as a negative right.²⁰ Despite the popularity of this phrase, however, the context in which he wrote it has been significantly overlooked. In fact, the right of privacy that Brandeis envisioned was much more comprehensive than the well-known phrase would suggest. Specifically, Brandeis wrote:

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and

satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.²¹

The ideal that Brandeis asserted in *Olmstead*, therefore, was not simply as one-dimensional as "the right to be let alone." Certainly, Brandeis did position privacy as the right to be free from government intrusion. Yet he valued this right primarily as a means of asserting affirmative principles of self-fulfillment and the pursuit of happiness. Far more than simply a protection from state intrusion, Brandeis delineated a right that supported the development and expression of citizens' "spiritual nature, . . . feelings, . . . intellect" as well as "beliefs, . . . thoughts, . . . emotions and . . . sensations." Thus, while privacy was framed here as a negative right—protection from government interference—the context of the familiar quote reveals this protection to be primarily a means of safeguarding the more significant, affirmative rights: to pursue fulfillment and happiness in a variety of areas. When Brandeis spoke of privacy in this context, it was those aspects of human life that he was seeking to elevate and protect.

Drawing on the ideals articulated by these jurists, as well as those suggested by feminist scholars, my conclusions here outline some key elements that I believe are essential to a successful, alternative model of privacy. In particular, a version of privacy that could empower victims of domestic violence must contain the following components. First, it must be an affirmative right articulated within the context of a liberty interest. Second, it must be premised on notions of equality and reflect an awareness of gender, race and ethnicity, class, sexuality, and physical ability. Third, it must promote autonomy and bodily integrity, and the related ideals of self-expression and self-determination. And finally, it must accrue to all individuals equally and not be dependent upon marital, familial, or relationship status.

13

For privacy to become a tool of empowerment for battered women—rather than an instrument of their continued oppression, as it has so often served in the past—several fundamental changes must occur in the ways that courts, activists, and all of us think about privacy. Writing about privacy in the context of domestic violence, Schneider asserts that "[t]he challenge is to develop a right to privacy which is not synonymous with the right to state noninterference with actions within the family . . . but which recognizes the affirmative role that privacy can play for battered women."²² In taking up this challenge, I believe that the first and most critical step in this process is to re-examine our understanding of privacy as freedom. The traditional model of privacy construes it as a *negative* freedom—the freedom *from* state intervention in the home. An alternative model would also view privacy as a freedom, but not in a negative sense. Instead, the model I propose here constructs privacy as an *affirmative* right and a critical aspect of personal liberty: the freedom to control one's own life. This freedom encompasses the freedom to choose what happens to one's own body and the freedom to decide how to conduct

14

intimate relationships. Thus drawn, the right of privacy inherently engages individual autonomy, bodily integrity, self-expression, and self-determination, while not entirely excluding the concept of freedom from state interference. These principles are already well-entrenched within American constitutional and judicial discourse; what is new here is their application to a new understanding of the right to privacy. In fact, as this discussion will show, kernels of these ideas already exist within our judicial tradition, and a revisioning of privacy would only require recalling and further advancing these ideas.

The notion of privacy as an affirmative right—a freedom *to* rather than a freedom *from*—contains substantial possibilities. Justice Stevens, registering his dissent in the *Bowers* case, highlighted this important distinction in his discussion of privacy. Recalling words he had written in an earlier case, he noted that many cases involving privacy "do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation," but rather "the individual's right to make certain unusually important decisions."²³ The first type of privacy described by Stevens—the negative formulation, the "protection from"—lends itself quite readily to protecting batterers and preserving the immunity of the patriarchal home from state intervention. The second type of privacy he cites—the "right to"—sharply contrasts the negative model, however, and suggests a right that battered women themselves might easily invoke. 15

Expanding upon this latter model, Stevens further appeals to "the American heritage of freedom—the abiding interest in individual liberty."²⁴ The invocation of liberty is significant here, for liberty is a critical element in the formulation of an affirmative right to privacy. From its earliest expression in the nation's founding documents,²⁵ liberty has connoted both individual and collective empowerment, reinforcing the affirmative aspects of freedom. As Rebecca Brown has observed, 16

[T]he emphasis on liberty in the founding period was not accidental. To a generation of revolutionaries who wished to rouse a population to rebellion in the name of clear and passionately held visions of a better life, a clamor for liberty sounded a stirring call to action. . . . [T]he very feature that made liberty a . . . rousing revolutionary cause [was] its powerful promise of better lives for citizens. . . . [L]iberty constraints seem to tell legislatures that there are certain important human interests that they cannot impair . . .²⁶

Ultimately, these associations of independence and the "right to" implied by the rhetoric of liberty provide a solid foundation for an alternative model of privacy as an affirmative right.

An alternative model of privacy that would empower battered women must also be informed by an awareness of and sensitivity to gender inequality. According to Schneider, Douglas's innovative interpretation of the privacy right in his *Roe* concurrence was influenced by the women's rights activism that surrounded that case.²⁷ Clearly informed by the amicus briefs submitted by feminist organizations, Douglas's concurrence described the far-reaching effects of unwanted pregnancy on women's well-being: 17

[Women denied abortion] are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care . . .²⁸

I agree with Schneider's implication that Douglas's sensitivity to gender issues was critical to his formulation of an affirmative privacy right, and I would add that this awareness should be further expanded to include issues of race and ethnicity, class, sexuality, and physical ability. In her discussion of the prosecution of crack-addicted mothers, Dorothy Roberts suggests that a form of privacy informed by such awareness would entail affirmative governmental responsibilities; for example, "Under this post-liberal doctrine, the government is not only prohibited from punishing crack-addicted women for choosing to bear children; it is also required to provide drug-treatment and pre-natal care."²⁹

Similarly, the same-sex domestic violence case of *State v. Linner*³⁰ suggests another manifestation of such a right. The *Linner* court, recognizing the particular hardships faced by lesbian and gay male victims of domestic abuse, concluded that these challenges rendered homosexuals all the more deserving of access to and protection by domestic violence laws. As these examples suggest, a right to privacy conceived within an affirmative liberty context promotes equality among citizens, ensuring that *all* citizens have the right to control their own lives. An awareness of social identity categories such as gender, race, and sexuality only enhances this drive toward equality. Furthermore, sensitivity toward identity issues directly contradicts the traditional model of privacy as the freedom *from* state intervention, which historically has protected only those already privileged by their gender, race, class, or sexuality.

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)

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)

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)

19

Conceived as an affirmative right with a sensitivity toward identity issues, an alternative model of privacy would also emphasize autonomy and bodily integrity. As the right of privacy evolved through the line of reproductive rights cases that led up to *Roe*, it leaned increasingly toward this formulation. While *Griswold*³¹ had focused explicitly on locational privacy—specifically, that of the home, and particularly of the marital bedroom—the *Eisenstadt*³² opinion spoke of

decisional privacy, regarding "matters . . . fundamentally affecting a person."³³ Blackmun's majority opinion in *Roe* advanced this notion further, asserting "a right of personal privacy" that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."³⁴ As the privacy right thus progressed from the strictly locational formulation to include decisional aspects as well, it became increasingly associated with notions of individual autonomy. Likewise, Douglas's emphasis on privacy as autonomy in his *Roe* concurrence, articulated in part as "the freedom to care for one's health and person, freedom from bodily restraint or compulsion," further strengthens the links between privacy, autonomy, and bodily integrity.

Applied to the domestic violence context, the privacy right thus construed could become a tool for the empowerment of battered women. In contrast to the traditional formulation of privacy that has served to protect batterers from state censure, this alternative model centered on personal autonomy could serve to protect the victims of intimate partner violence themselves. The assertion of a privacy right on behalf of battered women, rather than on behalf of their abusive partners, also finds support in the *Liberta* opinion. No doubt influenced by the amicus briefs submitted by the feminist lawyer-activists working on the case, the court's opinion specifically referenced "the bodily integrity of the victim" and relied upon several reproductive rights cases to affirm a woman's "right to control her own body."³⁵ Furthermore, *Liberta* emphasized that the presumed right of "marital privacy" asserted on behalf of the abuser could not, in fact, protect him; instead, the court contended, "this right of privacy protects [only] consensual acts."³⁶ This inversion of the traditional privacy paradigm, citing the primacy of autonomy and bodily integrity, creates a rhetorical tool that enables the right of privacy to serve as a vehicle for battered women's justice.

20

Related to the ideals of autonomy and bodily integrity are self-expression and self-determination, which recall the first two components of Douglas's description of liberty: freedom to control the development of one's own personality, and freedom to make the most basic and important life decisions. These two related values also suggest the freedom to choose the nature and character of intimate relationships, a critical component of the alternative model of privacy. Justice Blackmun's dissent in *Bowers* emphasized self-definition as a central characteristic of the right to privacy and invoked "the fundamental interest all individuals have in controlling the nature of their intimate associations with others."³⁷ This freedom to determine the nature and direction of one's life—and, particularly, one's intimate relationships—could prove a significant source of protection for battered women. By focusing on privacy as the affirmative ability to control one's life, such a right would expand to protect battered women's liberty, rather than protecting their abusers from punishment.

21

An emphasis on privacy as an *egalitarian* right is also central to the alternative model. The traditional construction of privacy, which often translated into a protection of the presumed "head of the household," created implicit hierarchies based upon familial and marital status. An alternative model of privacy, by contrast, would respect a diversity of intimate partnerships—as

22

demonstrated by the *Linner* opinion—but it would not require such relationships as a condition of access to the right. Such a right would not depend upon marital or heterosexual relationships, nor would it privilege traditional, patriarchal family forms. Instead, this version of the privacy right would emphasize self-fulfillment, whereby individual interests are valued equally and not subordinated to the perceived interests of the marital or familial relationship.

This emphasis on self-fulfillment and autonomy would not, however, assert the primacy of the individual at the expense of the community. As Julie Mertus has observed, 23

The liberal recognition of individual worth does not negate the importance of communal life. Individuals are not free floating entities; they exist and gain meaning through social relationships and communal responsibilities and duties. . . . Thus, a liberal feminist agenda may very well incorporate a communal orientation along with recognition of the rights of individuals within communities.³⁸

This type of privacy would thus subvert the presumed hierarchy of the marital or familial relationship by championing the rights of individuals equally, regardless of their roles in intimate relationships. This emphasis on the consistent application of individual rights is crucial for a new understanding of privacy, for it undermines one of the most damaging facets of the traditional right to privacy: the notion that a victim's rights are contingent upon her relationship to her abuser.

The model I have proposed raises the questions: How would this understanding of the privacy right operate? How might it affect the lives of victims of intimate partner violence? To understand the potential of this type of privacy, we have only to look at the ways in which domestic violence cases have been affected by the traditional model of privacy. The late-nineteenth-century cases discussed in chapter two would have been resolved far more fairly with the application of an alternative model of privacy. Instead of a privacy right that protects batterers even in the commission of an acknowledged crime of violence, this alternative model could have been invoked on behalf of the victims, whose right to bodily integrity and autonomy has been violated. The same would have applied to the civil cases of the 1980s, when battered women brought numerous lawsuits against police and other government bodies for privileging the sanctity of the home over women's physical safety. In each of these cases (ranging from *Bruno*³⁹ and *Scott*,⁴⁰ to *Torrington* and *Sorichetti*, up to *DeShaney* and *Gonzales*), an alternative model of privacy would have relieved plaintiffs from the burden of having to prove themselves worthy of state protection. Rather than having to establish a "special relationship" with the state in order to merit that protection, plaintiffs instead could have claimed that the harm they suffered violated their *own* rights to privacy by diminishing their control over their own bodies and intimate relationships. 24

Finally, an alternative model of privacy would go a long way toward protecting victims of same-sex domestic violence. With its emphasis on autonomy and equality and its attendant sensitivity toward issues of gender and sexual orientation, the new model of privacy could be invoked by victims of same-sex domestic violence as readily as by their heterosexual counterparts. While 25

such a model would not rid this culture of homophobia, it would serve as a tool for ensuring that the problem of same-sex domestic violence is not exacerbated within the courtroom, as it so often is currently. In particular, courts would be unable to refuse to extend a right of privacy to gay men and lesbians based on the perceived illegitimacy of their relationships under this new model, which specifically claims a right of privacy for *all* citizens as individuals, regardless of the nature of their intimate relationships or family forms.

While this proposed model represents a departure from the privacy right as it is most often construed by courts today, the seeds of this vision have already been sown—not just by feminist scholars seeking to protect battered women, but also by jurists, addressing subjects from abortion (the *Roe* concurrence) to wiretapping (the *Olmstead* dissent) to sexuality (the *Bowers* dissents, the *Lawrence* majority, and the *Linner* majority) to marital rape (the *Liberta* majority opinion). Such judicial precedents point the way toward the revisioning of the right to privacy as it is currently understood. Indeed, given the proliferation of debates within contemporary media about the nature and extent of the privacy right, such a project may be a necessary undertaking in the near future. The relationship of privacy to the problem of domestic violence is open to much future work, both scholarly and activist. Feminist scholars such as Schneider and Boling began this work by suggesting that we consider a new model of the privacy right, and I have offered here some key components and potential applications of such a right. A future study would do well to propose a strategy for bringing such a model to fruition in the courts for the direct benefit of battered women.

26

Conclusion

The story of the right to privacy and its impact on intimate partner violence is still being written. As I write today in 2006, the issues of "homeland security"—and the attendant focus on civil liberties—as well as growing concern about protecting individual privacy over the internet are at the forefront of our national consciousness. With concerns about privacy on the minds of citizens and scholars alike, the issue is currently the subject of regular debate and scrutiny. This level of dialogue focused on issues of privacy suggests that the old models are ripe for reevaluation, and that this may be a particularly good time for proposing and introducing new models. While no one can predict exactly how these issues will unfold, what is clear is that the development of the privacy right has historically played and will continue to play a crucial role in the judicial response to domestic violence. It is, therefore, imperative that feminist scholars, activists, and lawyers seize this moment to shape the future of the right to privacy.

27

Notes

- Note 1:** See, for example, *Fulgham v. State*, 46 Ala. 143 (1871), in which the batterer was a former slave.
- Note 2:** *People of the State of New York v. Mario Liberta*, 64 N.Y.2d 152 (1984).
- Note 3:** *Thurman v. Torrington*, 595 F. Supp. 1521 (1984).
- Note 4:** *Sorichetti v. City of New York*, 65 N.Y.2d 461 (1985).
- Note 5:** *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).
- Note 6:** *Castle Rock v. Gonzales*, 125 S. Ct 2796 (2005).
- Note 7:** *Bowers v. Hardwick*, 478 U.S. 186 (1986).
- Note 8:** See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).
- Note 9:** Patricia Boling, *Privacy and the Politics of Intimate Life* (Ithaca: Cornell University Press, 1996): 34.
- Note 10:** Dorothy Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," *Harvard Law Review* 104 (1991).
- Note 11:** Elizabeth Schneider, "The Violence of Privacy," in *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, ed. Martha Albertson Fineman and Roxanne Mykitiuk (New York: Routledge, 1994): 36–58.
- Note 12:** Patricia Boling, *Privacy and the Politics of Intimate Life* (Ithaca: Cornell University Press, 1996): 34.
- Note 13:** *Ibid.*, 34.
- Note 14:** Dorothy Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," *Harvard Law Review* 104 (1991): 1477–78.
- Note 15:** *Ibid.*, 1479–82.
- Note 16:** Elizabeth Schneider, "The Violence of Privacy," in *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, ed. Martha Albertson Fineman and Roxanne Mykitiuk, 36–58 (New York: Routledge, 1994): 53.
- Note 17:** 410 U.S. 113.
- Note 18:** *Ibid.*, 211–13.
- Note 19:** *Olmstead et al. v. U.S.*, 277 U.S. 438.
- Note 20:** See, for example, *U.S. v. Grunewald*, 233 F.2d 556 (1956); *Silverman et al. v. U.S.*, 365 U.S. 505 (1961), <http://laws.findlaw.com/us/365/505.html> (full text), http://www.oyez.org/cases/case?case=1960-1969/1960/1960_66 (audio); *Tehan v. U.S.*, 382 U.S. 406 (1966), <http://laws.findlaw.com/us/382/406.html> (full text); *Katz v. U.S.*, 389 U.S. 347 (1967), <http://laws.findlaw.com/us/389/347.html> (full text), http://www.oyez.org/cases/case?case=1960-1969/1967/1967_35 (audio); *Stanley 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); and *Winston v. Lee*, 470 U.S. 753 (1985), <http://laws.findlaw.com/us/470/753.html> (full text), http://www.oyez.org/cases/case?case=1980-1989/1984/1984_83_1334 (audio).
- Note 21:** *Olmstead*, 478.
- Note 22:** Elizabeth Schneider, "The Violence of Privacy," in *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, ed. Martha Albertson Fineman and Roxanne Mykitiuk (New York: Routledge, 1994): 36–58; see esp. p. 53.
- Note 23:** *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716 (1975): 719–20, qtd. in *Bowers*, 217.

Note 24: Ibid.

Note 25: See, e.g., The Declaration of Independence, para. 2 (U.S. 1776) and the Preamble to the U.S. Constitution.

Note 26: Rebecca L. Brown, "Liberty, The New Equality," *New York University Law Review* 77 (2002): 1495.

Note 27: Elizabeth Schneider, "The Violence of Privacy," in *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, ed. Martha Albertson Fineman and Roxanne Mykitiuk, 36–58 (New York: Routledge, 1994): 53.

Note 28: *Roe*, 214–15.

Note 29: Dorothy Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," *Harvard Law Review* 104 (1991): 1479.

Note 30: 665 N.E.2d 1180 (1996).

Note 31: *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Note 32: *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Note 33: Ibid., 453.

Note 34: *Roe*, 152–53.

Note 35: *People v. Liberta*, 64 N.Y.2d 152 (1984): 573.

Note 36: Ibid., 574.

Note 37: *Bowers*, 205–6.

Note 38: Julie Mertus, "Turning a Liberal Feminist Lens on Post-Agreement Kosovo: The Radical Future of Liberal Feminism?" unpublished paper, 2003, p. 5.

Note 39: *Bruno v. Codd*, 419 N.Y.S.2d 901 (1979).

Note 40: *Scott v. Hart*, No. C-76-2395 (N.D. Cal., filed Oct. 28, 1976).