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# The Synergy of Equality and Privacy in Women's Rights

Elizabeth M. Schneider<sup>†</sup>

In a series of different civil rights and constitutional contexts, litigators and scholars have argued about the merits of equality versus privacy as the superior legal foundation for judicial decision-making.<sup>1</sup> Whether in the area of reproductive freedom, gay rights, or women's rights, this debate has generated considerable scholarly interest.<sup>2</sup> The nominal organizing principle of this Symposium panel, whether equal protection claims should be advanced instead of privacy rights in cases of women's rights and gay rights, was premised on this debate.<sup>3</sup> But I, like some of my co-panelists, have chosen to "fight the hypo."<sup>4</sup> Although my scholarship, most particularly my recent book, *Battered Women and Feminist Lawmaking*,<sup>5</sup> has argued for the critical role of equality in legal advocacy concerning intimate violence, and criti-

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<sup>†</sup> Rose L. Hoffer Professor of Law, Brooklyn Law School. This essay is based on a presentation at *The University of Chicago Legal Forum* Symposium, "The Scope of Equal Protection," in October 2001. Thanks to Susan Herman, Nan Hunter, Pamela Karlan, and Sylvia Law for comments on an earlier draft, to and Frank Michelman for helpful discussion of the South African Constitutional Court. Special thanks to Rachel Braunstein for superb research assistance and to the Faculty Research Program at Brooklyn Law School for support.

<sup>1</sup> See, for example, William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L Rev 1183, 1185–1211 & n 7 (2000) (arguing that both equal protection and due process theories are capable of destabilizing long-standing tradition, but that due process protects individual rights more effectively, while equal protection better guards group rights); Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun*, 26 Hastings Const L Q 59, 61–70 & nn 11, 14 (arguing that "liberty can serve to backstop equality"); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U Chi L Rev 1161, 1170–78 (1988) (arguing that equal protection is independent from, and may be superior to, a claim under due process principles in the context of gay rights).

<sup>2</sup> See note 1.

<sup>3</sup> The title of the panel was "Equal Protection and Privacy Rights: Should Equal Protection Be Used to Advance Privacy Rights?" My co-panelists were Professors Richard Epstein, Andrew Koppelman, and Sanford Levinson.

<sup>4</sup> See Richard A. Epstein, *Liberty, Equality and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U Chi Legal F 73; Sanford Levinson, *The Warren Court Has Left the Building: Some Comments on Contemporary Discussions of Equality*, 2002 U Chi Legal F 119.

<sup>5</sup> Elizabeth M. Schneider, *Battered Women And Feminist Lawmaking* (Yale 2000).

cized concepts of privacy that have immunized intimate violence from state intervention, it also suggests the importance of looking at concepts of privacy and equality in relation to each other.<sup>6</sup> In this essay I further develop these ideas and examine how equality and privacy must be viewed as inextricably linked and mutually dependent in women's rights cases.<sup>7</sup> I argue that concepts of equality are necessary for a robust understanding of privacy, and concepts of privacy are necessary for the full realization of equality.

My work in the area of women's rights and domestic violence—in which I have argued that understandings of gender equality can shape a more affirmative right of privacy, and that understandings of privacy must be shaped by recognition of the problems of inequality and unequal access—is the backdrop for this discussion. This essay begins with a brief overview of the juxtaposition of privacy and equality in women's rights cases, then suggests how looking at equality and privacy in tandem can deepen our thinking about each in isolation.

## I. GENDER, PRIVACY, AND EQUALITY

Scholars have debated the merits of privacy versus equality in women's rights cases extensively, particularly with respect to issues of reproductive rights.<sup>8</sup> *Roe v Wade*<sup>9</sup> was decided by the Su-

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<sup>6</sup> *Id.* at 87–90.

<sup>7</sup> Anita L. Allen, in *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender and the Constitution*, 18 Harv J L & Pub Pol 419 (1995), uses the terms “mutual dependence” and “co-dependency.” See *id.* at 421 n 5 (“Privacy and equal protection are mutually dependent, in my view, inasmuch as privacy rights can promote equality and equal protection can promote privacy and privacy-related liberties.”). Pamela Karlan has recently examined the interplay between due process and equal protection, which she describes as “bidirectional.” Pamela S. Karlan, *Equal Protection, Due Process and The Stereoscopic Fourteenth Amendment*, \_\_\_ McGeorge L Rev \_\_\_ (forthcoming). She suggests, and I agree, that “sometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself.” *Id.*

<sup>8</sup> See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 184–94 (Harvard 1989) (criticizing the privacy right as the underpinning of abortion rights); Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in *Feminism Unmodified* 93, 96 (Harvard 1987) (arguing that the reasoning of *Roe v Wade*, 410 US 113 (1973), “translates the ideology of the private sphere into the individual woman’s legal right to privacy as a means of subordinating women’s collective needs to the imperatives of male supremacy”); Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age and Class*, 1991 Duke L J 324, 356–57 (1991) (asserting that “the privacy approach is no longer superior to the equal protection approach” because the Court has “watered down the privacy standard,” but concluding that “the development of the equal protection doctrine might be politically and legally advantageous”); Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 Conn L

preme Court under a right to privacy framework,<sup>10</sup> although arguments based upon equality and broader issues such as involuntary servitude,<sup>11</sup> were advanced in *Roe* and in early cases revolv-

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Rev 955, 955-56 (1991) (criticizing the constitutional doctrine of privacy as applied to rights of single mothers and arguing that an emphasis on privacy obscures the usefulness of other legal doctrines); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L J 1281, 1311 (1991) ("[W]hile the private has been a refuge for some, it has been a hellhole for others. . . . Everyone is implicitly equal in there. If the woman needs something—say equality—to make these assumptions real, privacy law does nothing for her, and even ideologically undermines the state intervention that might provide the preconditions for its meaningful exercise. The private is a distinctive sphere of women's equality to men."); Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 Colum L Rev 1118, 1120 (1986) (critiquing the public-private divide as it relates to maternity and the workplace and proposing a new constitutional equality theory); Ruth Bader Ginsburg, *Some Thoughts On Autonomy and Equality in Relation to Roe v. Wade*, 63 NC L Rev 375, 386 (1985) (criticizing the predominance of privacy ideology in reproductive rights cases and arguing that "the Court's *Roe* position is weakened . . . by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective"); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U Pa L Rev 955, 1020 (1984) ("The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied. . . . The rhetoric of privacy also reinforces a public/private dichotomy that is at the heart of the structures that perpetuate the powerlessness of women.").

<sup>9</sup> 410 US 113 (1973).

<sup>10</sup> The Court, in *Roe*, framed the right to abortion in terms of a right to privacy. Specifically, the Court found the right to privacy implicit in the Due Process guarantee of the Fourteenth Amendment, "broad enough to encompass a women's decision whether or not to terminate her pregnancy." 410 US at 153. The formulation of the reproductive right in *Roe* was preceded by the recognition of penumbral privacy rights. *Griswold v Connecticut*, 381 US 479, 483-86 (1965) (finding the right of married couples to obtain contraceptives within the constitutional zones of privacy in the penumbra of the Bill of Rights, which encompassed reproductive autonomy). The *Roe* Court acknowledged that framing the right to abortion in terms of constitutional privacy was appropriate in part because that rights rhetoric was "broad." 410 US at 153. However, the privacy right was not absolute. Rather, the court concluded "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Id.* at 154. Scholars, such as those cited in note 8, have critiqued the application of the doctrine of constitutional privacy as insufficient to fully protect women's reproductive rights.

<sup>11</sup> See Brief Amici Curiae on Behalf of Organizations and Named Women in support of Appellants, *Roe v Wade*, No 70-18 & 70-40, \*6-19, reprinted in Roy M. Mersky & Gary R. Hartman, *2 A Documentary History of the Legal Aspects of Abortion in the United States: Roe v. Wade* 223, 240-53 (Rothman 1993) (arguing that the Thirteenth Amendment protects women from the involuntary servitude imposed on them by unwanted pregnancy, which may be the result of failed contraception or their impeded ability to refuse sexual intercourse). See also Brief Amici Curiae on Behalf of Women's Organizations and Named Women in Support of Appellants, *Roe v Wade*, No 70-18 & 70-40, \*25, reprinted in Mersky & Hartman, *2 Documentary History* at 405, 439 ("A woman whom the law would force to carry an unwanted pregnancy to term is, quite plainly, restricted and imposed upon to a greater degree than by any other action the state could take, save execution of a sentence of death or possibly long term imprisonment."). The argument against unwanted pregnancy as involuntary servitude was later adopted by judges. See *Roe v Rampton*, 394 F Supp 677, 689 (D Utah 1975) (Ritter dissenting) (arguing that compelling women to re-

ing around reproductive freedom. Gendered ideas about reproduction as central to women's equality were presented to courts in the early litigation context of reproductive freedom, although courts, for the most part, ignored them.<sup>12</sup> Much of the feminist debate that developed after *Roe* about the problematic nature of the decisional framework, that privacy was individualistic as a negative right—the right “to be let alone”—versus equality, often did not distinguish between the Supreme Court's choice of privacy as *Roe*'s decisional framework, and the equality arguments that had been advanced by feminist advocates.<sup>13</sup> Arguably, aspects of these early equality perspectives have been integrated into later reproductive rights rulings.<sup>14</sup>

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main pregnant is a form of involuntary servitude). More recently, this position has been invoked in the abortion context. See *Jane L. v Bangerter*, 794 F Supp 1537, 1548–49 (D Utah 1992) (granting defendant's motion for summary judgment on the issue of whether the Utah Abortion Act violated the Thirteenth Amendment in imposing on women a condition of involuntary servitude).

<sup>12</sup> Amici argued that the Connecticut law at issue in *Griswold* violated women's equality under the Equal Protection Clause. See Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae, *Griswold v Connecticut*, No 496, \*16, reprinted in Roy M. Mersky & Jill Duffy, *A Documentary History of the Legal Aspects of Abortion in the United States: Griswold v. Connecticut* (Rothman 2001) (“In contemporary times, the liberty of ‘establishing a home’ encompasses . . . the wife's right to order her child-bearing according to her financial and emotional needs, her abilities, and her achievements . . . . Thus, the equal protection clause protects the class of women who wish to delay or regulate child-bearing effectively.”). Then, in *Roe*, amici argued that the Texas law at issue infringed upon women's right to equality. In Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc, National Abortion Action Coalition, *Roe v Wade*, No 70-18 & 70-40, \*25–33, reprinted in Mersky & Hartman, 2 *Documentary History* at 143, 187–95 (cited in note 11) (arguing that laws forcing women to carry pregnancies to term violate women's right to equal protection). Amici also argued that Texas' anti-abortion law at issue in *Roe* arbitrarily excluded a class of women—including women who became pregnant as a result of rape or incest and women for whom bearing another child would pose substantial financial hardship—from receiving therapeutic abortions and thus violated the right to equality for those women. Brief Amici Curiae National Legal Program on Health Problems of the Poor, National Welfare Rights Organization, American Public Health Association, *Roe v Wade*, No 70-18 & 70-40, \*37-42, reprinted in Mersky & Hartman, 2 *Documentary History* at 89, 137–42. In addition to arguing that anti-abortion laws violated women's right to equal protection, amici in *Roe* asserted that the laws transgressed the equality rights of poor and non-white women. *Id.* at \*33–37, reprinted in Mersky & Hartman, 2 *Documentary History* at 133–37; see also Supplemental Brief for Amici Curiae Planned Parenthood Federation of America, Inc and American Association of Planned Parenthood Physicians, *Roe v Wade*, No 70-18 & 70-40, \*8–9, reprinted in Mersky & Hartman, 2 *Documentary History* at 331, 346–47; Brief for State Communities And Association as Amici Curiae, *Roe v Wade*, No 70-18 & 70-40, \*4–12, reprinted in Mersky & Hartman, 2 *Documentary History* at 371, 380–88.

<sup>13</sup> See note 8.

<sup>14</sup> See *Thornburgh v American College of Obstetricians and Gynecologists*, 476 US 747, 772 (1986) (“A woman's right to make that choice freely [to end her pregnancy] is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.”), overruled by *Planned Par-*

One can see some analogues to this history in the context of gay rights litigation, where privacy and equality arguments have intersected as well. In *Bowers v Hardwick*,<sup>15</sup> the Court based its decision on privacy rather than equality,<sup>16</sup> despite the fact that arguments concerning equality were advanced there by advocates

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*enthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992); *Cleveland Board of Education v LaFleur*, 414 US 632, 651–57 (1974) (Powell concurring) (arguing that policy requiring public school teachers to take unpaid maternity leave violated the Equal Protection Clause); *Eisenstadt v Baird*, 405 US 438 (1972) (holding that state law prohibiting distribution of contraceptives to unwed persons violated the Equal Protection Clause). See also text accompanying notes 47–59 (discussing *Casey*).

<sup>15</sup> 478 US 186 (1986).

<sup>16</sup> In *Bowers*, the Court held that there was no fundamental right to privacy encompassing the right for homosexuals to engage in sodomy. *Id.* at 195–96. The Court analyzed respondent's challenge to a Georgia law that criminalized sodomy under the privacy precedent regarding family or marriage issues and under the privacy protection traditionally afforded activity within the home. *Id.* at 190–91, 195–96. Significantly, the Court characterized the right that respondent urged it to recognize as a right to engage in homosexual sodomy. *Id.* at 190. Not surprisingly, the Court did not find an applicable right to privacy either in the text of the Constitution regarding matters of reproduction or family, or in the cases finding a right to residential privacy. *Bowers*, 478 US at 190–91, 195–96. The Court thus avoided applying strict scrutiny to the right before it and lowered the bar on review of state legislation in this area.

Although the *Bowers* ruling was fatal to the advancement of gay rights under the constitutional privacy doctrine, the decision does have import with respect to the connection of the privacy and equality doctrines. In his majority opinion, Justice White concluded that moral concern was sufficient to form the rational basis necessary to uphold the law. *Id.* at 196. Justice White also noted that the respondent in the case did not defend the appellate court's judgment in his favor on equal protection grounds. *Id.* at 196 n 8. In his dissent, Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, reasoned that even though the respondent did not make an equal protection argument, equality was relevant to the analysis of his privacy challenge. *Id.* at 202. In a separate dissent, Justice Stevens argued that the Georgia statute was unequally applied to homosexuals' conduct in light of the equivalent liberty interests of heterosexual and homosexual individuals. *Bowers*, 478 US at 218–19.

The Supreme Court has now granted certiorari in a case that may overrule *Bowers*. In reviewing *Lawrence v State*, 41 SW3d 349 (Tex App 2001), cert granted as *Lawrence v Texas*, 123 S Ct 661 (2002), the Supreme Court will consider the convictions of two men under the Texas "homosexual conduct law" which makes it a crime to engage in "deviate sexual intercourse"—defined as oral and anal sex—with another person of the same sex. *Id.* at 350. Unlike the statute upheld in *Bowers*, the Texas statute criminalizes same-sex sexual activity but does not criminalize the same opposite sex activity. *Id.* The case also presents two equality claims: whether the Texas statute impermissibly discriminates on the basis of sexual orientation, *id.* at 353 and whether it discriminates on the basis of sex. *Lawrence*, 41 SW3d at 357. Ruth Harlow, Legal Director of Lambda Legal Defense and Education Fund, who represents the two defendants, has said, "We're looking forward to making a powerful and convincing case that these laws are an affront to equality, invade the most private sphere of adult life and harm gay people in so many ways." James Vicini, *Supreme Court to Decide Texas Sodomy Law*, Reuters (Dec 2, 2002), available online at <<http://news.findlaw.com/news/s/20021202/courtsodomydc.html>> (visited on Dec 12, 2002) [on file with U Chi Legal F]. See also Kenji Yoshino, *Can the Supreme Court Change Its Mind?*, NY Times A45 (Dec 5, 2002).

as well.<sup>17</sup> However, in *Romer v Evans*,<sup>18</sup> the Court incorporated aspects of the equality framework argued in earlier decisions.<sup>19</sup>

Despite the fact that courts have relied on privacy in these cases in problematic ways, it is important to move beyond the notions that equality should always trump privacy and that equality is the superior framework upon which the Court should

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<sup>17</sup> See Amicus Curiae Brief on Behalf of the Respondents by Lambda Legal Defense and Education Fund, Inc, et al, *Bowers v Hardwick*, No 85-140, Point II (filed Jan 31, 1986) ("This Court should assure that all are given equal protection of this right [to sexual privacy] to make those private decisions free of overbroad and unjustified government intrusion."); Brief of Amicus Curiae the Presbyterian Church (U.S.A.), et al, *Bowers v Hardwick*, No 85-140, (filed Jan 31, 1986) (arguing that the Georgia statute contravenes homosexuals' entitlement to the equal protection of the laws); Brief of the National Organization for Women as Amicus Curiae in Support of Respondents, *Bowers v Hardwick*, No 85-140, (filed Jan 31, 1986) (arguing that Georgia law violates equal protection rights of Hardwick and homosexuals generally); Brief Amicus Curiae for Lesbian Rights Project, et al, *Bowers v Hardwick*, No 85-140, (filed Jan 31, 1986) (arguing that the Georgia law violates the rights of gays to equality). All of these briefs are available on Lexis by searching for "name (Bowers AND Hardwick)" in the US Supreme Court Briefs database. See also Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 Am U L Rev 77, 146 n 354 (1995) (arguing that the Court's choice in *Bowers* of a privacy framework as opposed to an equality theory dictated the level of scrutiny given the right in question). Courts have generally preferred a privacy right to an equality argument when both were advanced in cases such as *Dronenberg v Zech*, 741 F2d 1388, 1391 (DC Cir 1984) (holding that homosexual appellant's privacy right trumped his equal protection challenge to the Navy's dismissal policy). The *Bowers* decision, although based on a privacy framework, implicated equality concerns for gay rights activists. See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 209-11 (Harvard 1999) (arguing that although *Bowers* did not address equal protection principles, in light of *Romer v Evans*, the distinction made by the Court between criminalizing "homosexual" and "heterosexual" sodomy might not withstand constitutional challenge); William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 Fordham L Rev 1721, 1745 (2001) ("One can read the Supreme Court's decision in *Bowers v. Hardwick* for the proposition that, because Congress and the states can make consensual sodomy a serious crime, they can also treat presumptive sodomites as second-class citizens.").

<sup>18</sup> 517 US 620 (1996).

<sup>19</sup> *Id* at 631-36 (holding that an amendment to the Colorado State Constitution which denied gays and lesbians any civil rights protection against discrimination on the basis of sexual orientation failed rational basis equal protection scrutiny). Scholars have criticized *Romer* as a convoluted or incomplete application of the equal protection doctrine to gay rights. See, for example, Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 Ky L J 885, 886 (2001) (arguing that *Romer* was an "incomplete" decision).

However, *Romer*, along with *Bowers*, demonstrates the applicability of the doctrines of privacy and equality to gay rights. Doctrines of privacy and equality have been dually implicated in the context of same-sex marriage. The plaintiffs in *Baehr v Lewin*, 852 P2d 44 (Haw 1993), argued that the denial of a marriage license to them as a same-sex couple violated their rights to privacy and to equal protection under the state constitution. *Id* at 50. The Court denied the plaintiffs' privacy challenge, *id* at 57, but remanded the case for strict scrutiny review of the equal protection claim, *id* at 68. In other words, where the privacy doctrine has failed to advance gay rights, equal protection analysis becomes a relevant constitutional theory.

base its decisions. Instead, we should look at privacy and equality in tandem. This is particularly important because both equality and privacy have been interpreted in deeply flawed ways.

Constitutional frameworks of equality have been inadequate to grapple with many core issues of gender discrimination.<sup>20</sup> The Supreme Court has perceived how the application of traditional stereotypes can harm untraditional women, such as recognizing that Virginia's all-women alternative was "distinctly inferior" to its state-run elite military institute for men,<sup>21</sup> but the application of an intermediate standard of scrutiny has often reinforced gender stereotypes.<sup>22</sup> Equal protection has failed to include pregnancy,<sup>23</sup> and the requirement of discriminatory purpose from *Personnel Administrator of Massachusetts v Feeney* has immunized and perpetuated gender discrimination.<sup>24</sup> As a constitutional matter, equal protection has not reached many of the areas that are most central to women's lives: pregnancy, reproductive rights,

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<sup>20</sup> See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan L Rev 1111, 1129-46 (1997) (arguing that the "discriminatory purpose" doctrine of the Equal Protection Clause perpetuates gender discrimination).

<sup>21</sup> *United States v Virginia*, 518 US 515, 566 (1996).

<sup>22</sup> Laws infringing constitutional privacy rights have typically been afforded strict scrutiny. See, for example, *Griswold*, 381 US at 485 (holding that a "governmental purpose . . . may not be achieved by means which sweep impermissibly broadly and thereby invade the area of protected freedoms"). However, courts analyzing equal protection issues with respect to gender apply intermediate scrutiny. *Virginia*, 518 US at 532-33. Scholars dispute the significance of this distinction for framing constitutional rights claims. See Daly, 45 Am U L Rev at 78 & n 3 (cited in note 18) (noting arguments that "abortion laws deny equal protection, at least as much as they impinge on personal privacy"). See also Elizabeth M. Schneider, *A Postscript on VMI*, 6 Am U J Gender L 59, 60-62 (1997) (arguing that the notion of "inherent differences" between men and women as a "cause for celebration" is still problematic). But see Scott M. Smiler, *Justice Ruth Bader Ginsburg and the Virginia Military Institute: A Culmination of Strategic Success*, 4 Cardozo Women's L J 541, 577-83 (1998) (concluding that Justice Ginsburg's opinion in *Virginia* strategically heightened the scrutiny for gender classifications under equal protection jurisprudence).

<sup>23</sup> In *Geduldig v Aiello*, 417 US 484 (1974), the Court held that California's disability insurance system, which excluded pregnancy as a disability, was constitutional under the Fourteenth Amendment's Equal Protection Clause. *Id.* at 497. The Court found no evidence of invidious gender discrimination and stated that "while it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." Pregnancy is merely an "objectively identifiable physical condition" and "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Id.* at 496 n 20.

<sup>24</sup> 442 US 256, 273-74 (1979) (holding that a facially gender-neutral statute does not violate the Equal Protection Clause absent gender-based discriminatory purpose or intent). See also Siegel, 49 Stan L Rev at 1111, 1134-41 (cited in note 20).



and violence.<sup>25</sup> While the notion of replacing privacy and its limitations with a broader framework of equality might not be problematic under an ideal vision of equality, it is far more problematic under the Rehnquist Court's actual interpretations of equality.<sup>26</sup> Similarly, conventional notions of privacy, as reflected in *Roe*, have been weak, and focused more on doctors' privacy than women's. In domestic violence, privacy rationales have supported violence.<sup>27</sup> Thus, in application, judicial interpretations of both equality and privacy have been flawed.

Some commentators who have considered this comparative perspective have argued that there is no necessary preference between the two, particularly when one evaluates them in practice. Bill Eskridge, for example, describes a "destabilizing due process" and an "evolutive equal protection," focusing on the way in which privacy concepts have a destabilizing impact in terms of individual rights, and equal protection has only a partial impact in terms of group rights.<sup>28</sup> Eskridge emphasizes that in the area of gay rights, equality claims have been limited.<sup>29</sup> He notes that in the area of women's rights, privacy and due process claims have been more effective in establishing new laws for women in cases like *Cleveland Board of Education v La Fleur*<sup>30</sup>, dealing with maternity leave, and *Roe*.<sup>31</sup> In contrast, under equality claims, cases like *Feeney* and *Geduldig v Aiello*<sup>32</sup> have posed substantial obstacles.<sup>33</sup> Yet, even where the either/or choice is rejected theoretically, it may still operate pragmatically. Indeed, Pamela Karlan argues that

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<sup>25</sup> The Court's recent decision in *United States v Morrison*, 529 U.S. 598, 613–27 (2000) (rejecting Congress's findings that gender-motivated violence substantially affects interstate commerce, thus concluding that Congress lacked authority under its Commerce Clause power to enact the civil rights remedy of the Violence Against Women Act and to provide federal civil remedies under Section 5 of the Fourteenth Amendment), striking down the civil rights remedy of the Violence Against Women Act, is another example.

<sup>26</sup> See Siegel, 49 Stan L Rev at 1111, 1143 (cited in note 20) ("The governing equal protection framework identifies race- and gender-conscious remedies as pernicious 'discrimination,' while deflecting attention from the many ways that the state continues to regulate the status of minorities and women").

<sup>27</sup> See generally Elizabeth M. Schneider, *The Violence of Privacy*, 23 Conn L Rev 973 (1991).

<sup>28</sup> Eskridge, 47 UCLA L Rev at 1183–1219 (cited in note 1).

<sup>29</sup> Id at 1200.

<sup>30</sup> 414 US 632 (1974).

<sup>31</sup> Eskridge, 47 UCLA L Rev at 1199–1200 (cited in note 1).

<sup>32</sup> 417 US 484 (1974).

<sup>33</sup> Eskridge, 47 UCLA L Rev at 1199–1200 (cited in note 1).

[a]lthough much of the existing scholarship assumes, at least as a theoretical matter, that “the rhetorics of rights and equality do not pose an ‘either-or’ choice [and that] both are needed in the defense of constitutional values,” it does not really apply that principle to concrete cases. Instead, it usually argues that a court faced with a constitutional challenge should apply one clause rather than the other, either because the claim is intrinsically better addressed under one rubric or because, as a tactical matter, precedent forecloses resort to the other clause.<sup>34</sup>

As Karlan suggests, the challenge is to “apply [the] principle” that both privacy and equality are necessary “to concrete cases.”

## II. INTERSECTIONS OF PRIVACY AND EQUALITY

In this section I argue for the importance of viewing privacy and equality in tandem and examine the synergy between the two doctrines in women’s rights cases. Inequality plays a critical role in determining whose privacy counts. We need a richer concept of privacy, shaped by understandings of equality, and we need to shape and deepen our understanding of equality through examination of aspects of privacy.

My scholarship has examined the meaning of claims of privacy and equality in a number of different areas relating to issues of gender, including reproductive freedom<sup>35</sup> and intimate violence.<sup>36</sup> I have argued that privacy was the major ideological rationale for state refusal to intervene to protect battered women, and that notions “of marital privacy have been a source of oppression to battered women and have helped to maintain women’s subordination within the family.”<sup>37</sup> I have examined “ways that concepts of privacy permit, encourage and reinforce violence against women, focusing on the complex interrelationship between notions of ‘public’ and ‘private’ in our social understandings of woman-abuse.”<sup>38</sup> But, at the same time, I have argued for

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<sup>34</sup> Karlan, \_\_\_ *McGeorge L Rev* at \_\_\_ (forthcoming) (cited in note 7), citing Kenneth Karst, *Why Equality Matters*, 17 *Ga L Rev* 245 (1983).

<sup>35</sup> See Elizabeth M. Schneider, *The Affirmative Dimension of Douglas’s Privacy*, in Stephen L. Wasby, ed., *“He Shall Not Pass this Way Again”: The Legacy of Justice William O. Douglas* 179 (Pittsburgh 1990) (advocating a conception of privacy as an affirmative right to autonomy and self-expression).

<sup>36</sup> Schneider, 23 *Conn L Rev* at 973 (cited in note 27).

<sup>37</sup> *Id.* at 975.

<sup>38</sup> *Id.* at 974.

the development of affirmative conceptions of privacy, based on Justice Douglas's opinion in *Griswold v Connecticut*,<sup>39</sup> linked to liberty and the right to self-expression and self-determination, as crucial aspects of battered women's empowerment. "Battered women seek autonomy, freedom of choice with respect to the basic decisions of life concerning intimate association, freedom from battering and coercion, and freedom to be themselves. They seek the freedom to survive free from violence."<sup>40</sup>

Anita Allen's work has offered a nuanced framework for thinking about gender and privacy. The problem has been, to use Allen's words, that women had both the "wrong kinds of privacy" and "too much privacy in the sense of imposed modesty, chastity, and domestic isolation," and not enough of the right kind of privacy "in the sense of adequate opportunities for individual modes of privacy and private choice."<sup>41</sup> Gender and inequality are key here. Allen suggests that "women are particularly vulnerable to privacy problems because they are perceived as inferiors, ancillaries, and safe targets and that women's privacy is sometimes probed by others who implicitly assume that daughters, pregnant women, mothers, and wives are more accountable for their private conduct than their male counterparts."<sup>42</sup>

These are important dimensions of privacy that are not fully developed in contemporary doctrine. Applying these more affirmative concepts of privacy linked to autonomy and liberty to the domestic violence context, for example, would mean that a right to shelter and confidentiality of battered women's disclosures to counselors would be protected. Remedies for intimate violence would have to preserve opportunities for safety, for seclusion, for intimacy, and for individual decision-making.<sup>43</sup>

Issues of whose privacy counts and what privacy they are afforded thus raise fundamental issues of equality. Arguments that welfare recipients should be guaranteed rights to privacy that were made fifteen years ago, have now virtually disappeared both from the law and from the scholarly literature.<sup>44</sup> In a sense,

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<sup>39</sup> 381 US 479 (1965).

<sup>40</sup> Schneider, 23 Conn L Rev at 998 (cited in 27).

<sup>41</sup> Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 Stan L Rev 1175, 1177 (2000).

<sup>42</sup> Id at 1178.

<sup>43</sup> See Anita L. Allen, *Coercing Privacy*, 40 Wm and Mary L Rev 723, 746 (1999).

<sup>44</sup> See *Wyman v James*, 400 US 309 (1971) (rejecting plaintiff's argument that home visits mandated by New York law as part of AFDC assistance program violated her right to privacy under the Fourth Amendment); Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy?*, 8 Harv Blackletter J 181 (1991) (arguing that the poor

there is no longer an argument that poor people even have privacy rights. In gay rights, the failure of the Court's decision in *Bowers* to recognize privacy led gay rights activists and scholars to raise equality concerns.<sup>45</sup> Critics have argued that unless we look at equality as a primary framework for gay rights, and see heterosexual and homosexual families as equal, courts (and the public) will not be able to address and remedy problems that are most fundamental for gays and lesbians: issues of family life, such as gay marriage and adoption.<sup>46</sup>

In reproductive freedom we can see the important intersection of privacy and equality as well. *Roe v Wade* recognized a right to privacy, although largely in the context of medical decision making, and it did not acknowledge the central role of reproductive choice to women's equality. *Planned Parenthood of Southeastern Pennsylvania v Casey*<sup>47</sup> is understood as the case that, by a narrow margin, kept reproductive rights in some protected category.<sup>48</sup> But *Casey* was decided under the substantive due

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are entitled to stronger privacy rights); Douglas Q. Wickham, *Restricting Home Visits: Toward Making the Life of the Public Assistance Recipient Less Public*, 118 U Pa L Rev 1188 (1970) (arguing that public assistance programs should do more to respect privacy rights of the recipient). See also Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv L Rev 1419 (1991) (advocating for the affirmative rights of equality and privacy for women facing criminal charges for using drugs during pregnancy). Although Roberts does not exclusively focus on welfare recipients, she does argue that criminal laws in this area disproportionately affect poor, black women who "are in closer contact with government agencies," through welfare and similar programs. *Id.* at 1432.

<sup>45</sup> See *Pruitt v Cheney*, 963 F2d 1160 (9th Cir 1991) (finding that plaintiff stated claim that the Army violated her right to equal protection when it discharged her because she was homosexual). See also Hunter, 89 Ky L J at 893-94 (cited in note 19) (noting that equal protection arguments based on *Romer* are more effective in gay rights litigation); Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick—Romer v. Evans, Recent Development*, 32 Harv CR-CL L Rev 225, 229-30 (1997) (asserting that advocates after *Bowers* raised equal protection issues in the context of gay rights, although acceptance of this rights framework has not been entirely successful); Sunstein, 55 U Chi L Rev at 1163-64 (cited in note 1) (arguing that because due process analysis, so limited by the *Bowers* decision, is independent from equal protection analysis, the latter may offer constitutional protection to gays against sexual orientation discrimination). Litigators framed their claims as equal protection claims after the *Bowers* decision limited the reach of the privacy doctrine to gay rights.

<sup>46</sup> See *Baehr v Lewin*, 852 P2d 44 (Haw 1993) (denying gay appellants' privacy challenge to the denial of a same-sex marriage license, but remanding the case for strict scrutiny review of their equal protection claim); William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 Albany L Rev 853 (2001) (reviewing the framework of "equality practice" inherent in *Baker v State*, 744 A2d 864 (Vt 1999), and Vermont's enactment of legislation granting same-sex civil unions).

<sup>47</sup> 505 US 833 (1992).

<sup>48</sup> *Id.* at 876-79 (adopting an "undue burden" standard).

process guarantee of liberty in the Fourteenth Amendment,<sup>49</sup> and the Court began its plurality opinion in *Casey* by redefining the right recognized in *Roe* as a right to liberty,<sup>50</sup> a right to autonomy with respect to intimate decisions, such as reproductive choice.<sup>51</sup> The Court seems to formulate a right to self-determination implicit in the right to reproductive autonomy: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>52</sup> And it has been argued that by discussing the right to abortion secured for women in *Roe* as grounded in a right to liberty, as distinct from a right to privacy, the Court in *Casey* integrated aspects of equal protection analysis.<sup>53</sup>

The Court, in *Casey*, appears to employ some measure of equality analysis, an equal participation or social equality argument, in recognizing that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>54</sup> An

<sup>49</sup> *Id.* at 846.

<sup>50</sup> *Id.* at 844.

<sup>51</sup> *Casey*, 505 US at 851.

<sup>52</sup> *Id.*

<sup>53</sup> Daly, 45 Am U L Rev at 118–26 (cited in note 17).

<sup>54</sup> *Casey*, 505 US at 856. In *Casey*, the Court explicitly acknowledged the significance of abortion as guaranteeing women social equality as equal participants in society: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Id.* at 856. Justice Stevens also noted the relationship between abortion rights and equality: “*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.” *Id.* at 912 (Stevens concurring in part and dissenting in part). Stevens later notes, “[P]art of the constitutional liberty to choose is the equal dignity to which each of us is entitled.” *Id.* at 920. In his opinion, Justice Blackmun suggests,

A State’s restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they might otherwise terminate. . . . This assumption—that women can simply be forced to accept the “natural” status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause.

*Casey*, 505 US at 928 (Blackmun concurring in part and dissenting in part).

Referring to such citations from *Casey* as reflecting dimensions of equality, some scholars argue that the Court undertook equal protection analysis in dicta. Daly, 45 Am U L Rev at 118–26 (cited in note 17); see also David B. Cruz, “*The Sexual Freedom Cases? Contraception, Abortion, Abstinence, and the Constitution*,” 35 Harv CR-CL L Rev 299, 357–58 (2000) (“[M]any commentators insist that [the gender equality] approach nonetheless provides the best justification for the Court’s actions.”); Stephanie S. Gold, Note, *An Equality Approach to Wrongful Birth Statutes*, 65 Fordham L Rev 1005, 1026–27 (1996) (noting the emphasis in *Casey* on the equality implications of pregnancy and family planning for women); David H. Gans, Note, *Stereotyping and Difference: Planned Parenthood*

equality argument appears to underlie the Court's constitutional invalidation of the spousal notification provision of the Pennsylvania law.<sup>55</sup> The Court reviewed the district court's findings of fact with respect to the provision's implication of domestic violence, concluding that the provision would impose a substantial obstacle to women who could not safely consult their husbands for fear of violence.<sup>56</sup> The Court recognized that the spousal notification provision reflected the subordination of wives to their husbands,<sup>57</sup> and suggested that the provision discriminated against some married women by imposing a more substantial burden on their abortion choice than on their single counterparts. The Court's analysis of the spousal notification provision evinces consideration of aspects of equality along with privacy and liberty principles, and suggests the interrelationship between privacy, liberty and equality.<sup>58</sup>

At the same time the *Casey* Court's larger ruling, that states could constitutionally regulate in ways that clearly express hostility to the choice to have an abortion, or in ways that impose increased costs upon, and barriers to, abortion, so long as the constraints do not place an "undue burden" upon a women who wants to exercise her right, and the reflects a gross insensitivity to equality. The Court's failure to see Pennsylvania's twenty-four-hour waiting period and "informed consent" provisions as undue burdens suggests the Court's failure to understand the link between equality and women's liberty in practice. As Chris Whit-

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v. *Casey and the Future of Sex Discrimination Law*, 104 Yale L J 1875, 1875-76 (1995) (noting that the joint opinion in *Casey* raised principles of sex equality and arguing that this has implications for future equal protection analysis of reproductive difference); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L Rev 1185, 1199 (1992) (noting the *Casey* court's important recognition of the connection between a woman's control over her reproductive destiny and her equal opportunities to participate in social and economic life).

<sup>55</sup> *Casey*, 505 US at 888-91.

<sup>56</sup> *Id* at 895.

<sup>57</sup> *Id* at 896-97. The Court bolstered its constitutional analysis of the spousal notification provision by invoking equality principles. It asserted that a requirement amounting to a husband's veto over his wife's choice was found unconstitutional in *Planned Parenthood of Central Missouri v Danforth*, 428 US 52, 69 (1976). *Id* at 897. The Court relied not only on the traditional privacy framework invoked in reproductive rights (here, an undue burden standard), but also on constitutional principles of equality and non-discrimination.

<sup>58</sup> Daly argues that the Court failed to "honestly" handle the spousal notification provisions of the Pennsylvania law by adopting a liberty argument to the exclusion of an explicit equal protection argument. Daly, 45 Am U L Rev at 147-48 (cited in note 17). While this is a persuasive argument, Daly's later point that scholars should study the shadow "rhetoric" of *Casey* along with its "holdings," see *id* at 148, is more pertinent to this essay.

man has recently observed, only total barriers to abortion in concrete contexts are, in fact, recognized as undue by *Casey*.<sup>59</sup>

Another example of the intersection between concepts of privacy and equality, although not in the constitutional equal protection context, is a recent case from the Western District of Washington that has received much public attention, *Erickson v Bartell*,<sup>60</sup> which involves the issue of contraceptive equity—the failure of insurers to cover contraception and prescription contraceptives such as birth control pills, Norplant, Depo-Provera, intrauterine devices and diaphragms under its prescription benefit plan, while covering other medications and procedures that impact male reproduction.<sup>61</sup> In *Erickson*, the court held that the employer's decision to categorically exclude prescription contraceptives available only to women from its employee health benefits violated the Pregnancy Discrimination Act amendment to Title VII of the Civil Rights Act of 1964.<sup>62</sup> The Act prohibits discrimination on the basis of “pregnancy, childbirth, or related medical conditions”<sup>63</sup> as sex-based discrimination. In *Erickson*, the court reasoned that contraceptives are of “immediate importance” to the health of women throughout much of their lives<sup>64</sup> and that Title VII requires employers to provide “equally comprehensive coverage” which may include benefits for women only.<sup>65</sup> Furthermore, the court in *Erickson* recognized “that the availability of affordable and effective contraceptives is of great importance to the health of women and children because it can help to prevent a litany of physical, emotional, economic, and social consequences.”<sup>66</sup> This acknowledgment reflects the pronouncement in

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<sup>59</sup> Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 Mich L Rev 1980, 1987 (2002).

<sup>60</sup> 141 F Supp 2d 1266 (W D Wash 2001).

<sup>61</sup> Erickson argued that her employer's insurance coverage policy violated Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, by excluding prescription contraceptives and covering other preventive medicines. *Id.* at 1268. The Act prohibits sex-based discrimination on the basis of “pregnancy, childbirth, or related medical conditions.” *Id.* at 1269. Finding for the plaintiff, the district court reasoned that Title VII requires employers to provide “equally comprehensive coverage” which may include benefits for women only. *Id.* at 1277. The court made the link between contraception and women's full citizenship by acknowledging that “the availability of affordable and effective contraceptives is of great importance to the health of women and children because it can help to prevent a litany of physical, emotion, economic, and social consequences.” *Erickson*, 141 F Supp 2d at 1273.

<sup>62</sup> *Id.* at 1269–71.

<sup>63</sup> *Id.* at 1269, citing 42 USC 2000e(k) (2000).

<sup>64</sup> *Id.* at 1274.

<sup>65</sup> *Erickson*, 141 F Supp 2d at 1277.

<sup>66</sup> *Id.* at 1273.

*Casey* of the costs of unwanted pregnancy to women's full and equal participation in society.<sup>67</sup> The equality argument detectable in *Casey* and explicit in *Erickson* indicates that, with respect to the right to control their reproductive or parental destinies, women and men are similarly situated. It is understood that "equal means equivalent, not identical, making women's and men's situations commensurable and therefore subject to meaningful equal protection scrutiny."<sup>68</sup> This ruling has important implications for the application of a gender equality challenge to limitations on reproductive rights.

For twenty years, reproductive rights advocates have argued that the issue of insurance coverage raises serious problems of equality.<sup>69</sup> But, a result of the traditional emphasis on privacy in the context of contraception is that the equality theme has been lost. Equality arguments, which raised gender-based perspectives on unequal insurance coverage for contraception, were dormant for many years and then reemerged recently.<sup>70</sup> *Erickson* is a good example of a decision in which both privacy and equality are implicated. The Court held that the employer's plan was invalid, albeit under Title VII, but nonetheless, using an inequality framework. Of course, the company could decide to restrict insurance to everyone, leveling down, as it were, as opposed to leveling up. But it is the intersection of both privacy and equality concepts that does the job here.

It is important not to think simplistically about replacing privacy with equality. Rather, we should recognize ways in which each doctrine is flawed, and look to ways in which privacy and equality strengthen each other. In *Erickson*, the right of contraception, historically protected as a privacy interest, is looked at more closely in an equality and equal access framework.<sup>71</sup> In the area of gay and lesbian rights, the move toward equality is crucial because we cannot reach issues of same-sex family privacy in the homosexual context while a fundamental inequity exists be-

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<sup>67</sup> 505 US at 856.

<sup>68</sup> Daly, 45 Am U L Rev at 140 (cited in note 17).

<sup>69</sup> See, for example, Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 Tul L Rev 451, 461-62 (1978).

<sup>70</sup> See, for example, Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash L Rev 363 (1998) (arguing that the exclusion of prescription contraceptives from private insurance plans violates Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act).

<sup>71</sup> The right to reproductive choice in *Erickson* is framed in terms of gender equity as protected by Title VII law. See note 61.



tween the treatment of heterosexuals and homosexuals.<sup>72</sup> Similarly, in the domestic violence context, it is critical for equality issues to form the primary framework of understanding subordination in order to develop a more critical and nuanced perspective on privacy. These privacy problems inextricably flow out of, and are linked to, fundamental inequality.

### III. PRIVACY AND EQUALITY, EQUALITY AND PRIVACY

My work on privacy, equality and intimate violence emphasized the connections between equality and privacy. Battered women seek the material and social condition of equality and self-determination that make privacy possible. An equality perspective deepens our understanding of the way in which privacy is applied. An equality perspective has led me to argue for a more affirmative understanding of privacy in the women's rights context, and has shaped my understanding of the way in which gender and privacy are linked. Privacy that is grounded in equality and is viewed as an aspect of autonomy, protecting bodily integrity and making abuse impermissible, is based on a genuine recognition of dignity and personhood.

As the previous section illustrates, litigation in the area of women's rights and gay rights has raised some of these arguments. Other scholars have recognized this important relationship between privacy and equality claims. Anita Allen has described "co-dependency" and "mutual dependence" as apt characterizations of the relationship between privacy and equality.<sup>73</sup> She observes that "[p]rivacy and equal protection are mutually dependent, in my view, inasmuch as privacy rights can promote equality and equal protection can promote privacy and privacy-related liberties."<sup>74</sup> Bill Eskridge has written about the connection between equal protection and privacy in the context of gay rights and women's rights litigation.<sup>75</sup> Pamela Karlan has examined Justice Blackmun's "integrated understanding of liberty and equality for gays and lesbians,"<sup>76</sup> and emphasized the importance

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<sup>72</sup> See generally Andrew Koppelman, *The Right to Privacy?*, 2002 U Chi Legal F 105.

<sup>73</sup> Allen, 18 Harv J L & Pub Pol at 421 n 5 (cited in note 7).

<sup>74</sup> Id.

<sup>75</sup> See Eskridge, 47 UCLA L Rev at 1186-1211 (cited in note 1); see also Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va L Rev 1695, 1716 (1993) (arguing that the concepts of privacy and equality are inextricably linked with respect to gays' self-identifying speech and the legal debate over homosexuality as status or conduct).

<sup>76</sup> Karlan, 26 Hastings Const L Q at 67 (cited in note 1).

of a “synergistic” and “double-barreled” interrelationship between privacy and equality, in which due process and equality claims create the foundation for and strengthen each other.<sup>77</sup> Karlan uses the example of voting rights, where “[t]he suspect-classification arguments of early Warren Court voting rights cases contributed to the Court’s adoption of a fundamental rights perspective [in later voting rights cases]—the importance of protecting the right to vote was driven home by the invidiousness of the distinction that kept some citizens from the polls.”<sup>78</sup> Karlan examines this synergy—what she calls the “stereoscopic” dimensions of equality and privacy—more closely in a recent article, where she details the ways in which equality and privacy can expand, but also limit each other.<sup>79</sup> But this synergy has operated in other areas as well.

A similarly broad view of the link between privacy and equality has been recognized by the South African Constitutional Court. In that Court’s decision in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>80</sup> the Court struck down provisions that criminalized sexual activity between men on both equality and privacy grounds.<sup>81</sup> The Court declared that the plaintiffs’ claim “illustrates how, in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy.”<sup>82</sup> The Court held:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. . . . We should not deny the importance of a right to privacy in our new constitutional order, even while we acknowledge the importance of equality. In fact, emphasising the breach of both these rights in the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been. The offence which lies at the heart of the discrimination in this case constitutes at the same time and independently a breach of the rights of privacy and dignity which, without

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<sup>77</sup> Id at 64. See also Karlan, \_\_ McGeorge L Rev at \_\_ (forthcoming) (cited in note 7).

<sup>78</sup> Karlan, 26 Hastings Const L Q at 64 (cited in note 1).

<sup>79</sup> Karlan, \_\_ McGeorge L Rev at \_\_ (forthcoming) (cited in note 7).

<sup>80</sup> 1998 SACLR LEXIS 36 (Const Ct).

<sup>81</sup> Id at \*59.

<sup>82</sup> Id at \*63.

doubt, strengthens the conclusion that the discrimination is unfair.<sup>83</sup>

Justice Albie Sachs's concurring opinion makes the connection even more explicit. The challengers had emphasized equality-based arguments, but Justice Sachs emphasized the importance of liberty- and privacy-based arguments as well.

The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and becomes the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly.<sup>84</sup>

This more integrated understanding of constitutional rights of privacy and equality is important. Emphasizing the breach of both of these rights and their impact on each other can offer new insights. We need to detail legal arguments of privacy, liberty, and equality together, and examine more closely the way in which both claims support and reinforce each other in specific constitutional contexts. As in the area of intimate violence, the equality framework can shape our understanding of lack of privacy, and deepen our perspectives on the importance of that privacy. Understanding the problematic dimensions of privacy can enrich our understanding of equality. Equality shapes our appreciation of the dimensions of women's privacy and autonomy that need affirmative protection. Looking at privacy and equality in tandem can move us beyond a comparative framework and towards recognition of the synergy of privacy and equality in concrete contexts.

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<sup>83</sup> *Id.* at \*65–66.

<sup>84</sup> *National Coalition*, 1998 SACLR LEXIS 36, at \*139–40.