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The Violence of Privacy

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THE VIOLENCE OF PRIVACY

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> Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[1]

I. INTRODUCTION

THIS symposium celebrates the anniversary of *Griswold v. Connecticut*.[2] *Griswold* has been heralded for introducing a new era of possibility for the right to privacy. In the years since *Griswold* was decided, protection of a sphere of family privacy from state interference has been viewed as "good." Yet, understood through a lens of gender, and more particularly shaped by the experiences of battered women, the concept of privacy is more complex and ambiguous.

The notion of the family as a sphere of privacy, immune from state interference, is central to *Griswold*. But *Griswold* involved a state law that prohibited contraception and is premised on an idealized vision of marriage as "enduring and intimate," promoting "harmony in liv-

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1. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
2. 381 U.S. 479.

ing." For women in the United States, intimacy with men, in and out of marriage, too often results in violence. The concept of freedom from state intrusion into the marital bedroom takes on a different meaning when it is violence that goes on in the marital bedroom. The concept of marital privacy, established as a constitutional principle in *Griswold*, historically has been the key ideological rationale for state refusal to intervene to protect battered women[3] within ongoing intimate relationships. For this reason, at the same time that we celebrate *Griswold*, we also must examine its underside: the dark and violent side of privacy.

This essay explores the ways in which 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.[4] Historically, male battering of women was untouched by law, protected as part of the private sphere of family life. Over the last twenty years, however, as the battered women's movement in this country has made issues of battering visible, battering is no longer perceived as a purely "private" problem and has taken on dimensions of a "public" issue. There has been an explosion of legal reform and social service efforts: the development of battered women's shelters and hotlines, many state and federal governmental reports and much state legislation. New legal remedies for battered women have been developed which have been premised on the idea of battering as a "public" harm. However, at the same time, there is widespread resistance to acknowledgment of battering as a "public" is-

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3. This essay uses the terms "battered women," "woman-abuse," and "male battering of women" interchangeably, although they have different meanings. I have criticized the term "battered women" as problematic both because it focuses the problem on the woman who is abused, rather than the battering man, and because it is a static term that defines the woman in a totalizing and stereotypical way, and connotes helplessness. *See generally* Schneider, Battered Women: Reflections on Feminist Theory and Feminist Practice (Nov. 19, 1990) (unpublished manuscript, on file with the *Connecticut Law Review*). In contrast, many activists now use the term "survivor" to emphasize the strength and resources of women who have been battered. The term "woman-abuse" is very general but focuses attention on a continuum of physical and verbal abuse. The phrase "male battering of women" is useful because it describes the problem more accurately, but is unwieldy.

Although the problem of gay and lesbian violence is serious and important, this essay focuses on male battering of women. Much of what I discuss is applicable to women who are battered by other women, but lesbians who have been battered face additional problems which make the question of privacy more complex. *See generally* K. LOBEL, NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (1986); Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U.L. REV. 567 (1990).

4. I use the words "private" and "public" in quotes in order to emphasize that there is no single natural meaning to the terms, but several socially constructed meanings.

sue. The ideological tenacity of conceptions of battering as "private" is revealed in the United States Supreme Court's recent decision in *Deshaney v. Winnebago County Department of Social Services*;[5] in the inadequacy of legal reform efforts to date; and in tensions that exist within the battered women's movement.

The concept of privacy poses a dilemma and challenge to theoretical and practical work on woman-abuse. The notion of marital privacy has been a source of oppression to battered women and has helped to maintain women's subordination within the family. However, a more affirmative concept of privacy, one that encompasses liberty, equality, freedom of bodily integrity, autonomy, and self-determination, is important to women who have been battered. The challenge is not simply to reject privacy for battered women and opt for state intervention, but to develop both a more nuanced theory of where to draw the boundaries between public and private and a theory of privacy that is empowering.

This essay is an effort to begin a conversation about the complex role that concepts of privacy do play and might play in work on woman-abuse. It builds on earlier work on the role of law and concepts of public and private,[6] particularly in the area of woman-abuse,[7] and the affirmative potential of privacy.[8] I begin with a brief overview of the meanings of "public" and "private" in American family life. I then move to a discussion of three different dimensions of the way in which notions of privacy affect both theory and practice in this area. First, I explore current legal reform efforts on behalf of battered women and examine the persistence of denial of battering as a "public" issue. Second, I identify shifting parameters of "public" and "private" in reform efforts on woman-abuse. Finally, I return to *Griswold* and argue for the development of affirmative conceptions of privacy linked to autonomy to enhance battered women's empowerment.

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5. 489 U.S. 189 (1989).

6. Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 117 (D. Kairys ed. 1982).

7. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 644-48 (1986) [hereinafter Schneider, *The Dialectic of Rights*]; *See generally* Schneider, *Describing and Changing: Women's Self-Defense Work and The Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986).

8. Schneider, *Commentary: The Affirmative Dimensions of Douglas's Privacy*, in HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 179 (S. Wasby ed. 1991) [hereinafter Schneider, *Commentary*].

II. PRIVACY: THE MEANINGS OF PUBLIC AND PRIVATE

Historically, the dichotomy of "public" and "private" has been viewed as an important construct for understanding gender. The traditional notion of "separate spheres" is premised on a dichotomy between the "private" world of family and domestic life (the "women's" sphere), and the "public" world of marketplace (the "men's" sphere).[9] Nadine Taub and I have discussed elsewhere the difference between the role of law in the public and private spheres.[10] In the public sphere, sex-based exclusionary laws join with other institutional and ideological constraints to directly limit women's participation.[11] In the private sphere, the legal system operates more subtly. The law claims to be absent in the private sphere and has historically refused to intervene in ongoing family relations.[12]

> Tort law, which is generally concerned with injuries inflicted on individuals, has traditionally been held inapplicable to injuries inflicted by one family member on another. Under the doctrines of interspousal and parent-child immunity, courts have consistently refused to allow recoveries for injuries that would be compensable but for the fact that they occurred in the private realm. In the same way, criminal law fails to punish intentional injuries to family members. Common law and statutory definitions of rape in most states continue to carve out a special exception for a husband's forced intercourse with his wife. Wife beating was initially omitted from the definition of criminal assault on the ground that a husband had the right to chastise his wife. Even today, after courts have explicitly rejected the definitional exception and its rationale, judges, prosecutors, and police officers decline to enforce assault laws in the family context.[13]

Although a dichotomous view of the public sphere and the private sphere has some heuristic value, and considerable rhetorical power, the dichotomy is overdrawn.[14] The notion of a sharp demarcation between

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9. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499-1501 (1983).

10. Taub & Schneider, *supra* note 6, at 117.

11. *Id.* at 121.

12. *Id.*

13. *Id.* at 121-22.

14. Kerber, *Separate Spheres, Female Worlds, Women's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9, 17 (1988).

public and private has been widely rejected by feminist and Critical Legal Studies scholars.[15] There is no realm of personal and family life that exists totally separate from the reach of the state. The state defines both the family, the so-called private sphere, and the market, the so-called public sphere. "Private" and "public" exist on a continuum.

Thus, in the so-called private sphere of domestic and family life, which is purportedly immune from law, there is always the selective application of law. Significantly, this selective application of law invokes "privacy" as a rationale for immunity in order to protect male domination. For example, when the police do not respond to a battered woman's call for assistance, or when a civil court refuses to evict her assailant, the woman is relegated to self-help, while the man who beats her receives the law's tacit encouragement and support.[16] Indeed, we can see this pattern in recent legislative and prosecutorial efforts to control women's conduct during pregnancy in the form of "fetal" protection laws. These laws are premised on the notion that women's childbearing capacity, and pregnancy itself, subjects women to public regulation and control. Thus, pregnant battered women may find themselves facing criminal prosecution for drinking liquor, but the man who battered them is not prosecuted.[17]

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15. *See* Freeman and Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987); Minow, *Adjudicating Differences. Conflicts Among Feminist Lawyers*, in CONFLICTS IN FEMINISM 156-60 (M. Hirsh & E. Fox Keller eds. 1990); Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

16. Olsen, *supra* note 9, at 1507 n.39, 1537.

17. The dichotomy of women as private/men as public changes when women are viewed as childbearers. In Muller v. Oregon, 208 U.S. 412, 421 (1908), the Supreme Court emphasized that "as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race."

Several recent cases involving battered pregnant women dramatize the contrast between the treatment of pregnant women and battering men. A pregnant woman in Wisconsin who sought medical care for injuries she sustained as a result of a beating by her partner was subsequently arrested and charged with criminal child abuse for drinking during pregnancy. *Pregnancy Police Active in Wyoming, Michigan, and Massachusetts*, REPRODUCTION RTS. UPDATE, Feb. 2, 1990, at 3-4 (published by the ACLU and the Reproduction Freedom Project, New York, N.Y.), Feb. 2, 1990, at 3-4. Diane Pfannensteil of Laramie, Wyoming was arrested for drinking while pregnant and charged with felony child abuse when she went to the hospital to be treated for bruises suffered from her husband choking and beating her. Goodman, *Being Pregnant, Addicted; It's a Crime*, The Boston Globe, Feb. 11, 1991, at 12. In Massachusetts, Josephine Pellegrini was prosecuted for allegedly taking cocaine while she was pregnant. Ms. Pellegrini, who was charged when she took her six-week-old infant to the hospital for burn injuries on his toes, was described in news reports as "a battered woman who was terrified of [her live-in-boyfriend]," who was also the father of her three children, and a suspect in the abuse of her infant son. Kennedy, *Cloudy Future After Infant-Cocaine Case: DA Rejects Vision of Legal Morass*, The Boston Globe, Aug. 23, 1989, Metro at 1.

The rhetoric of privacy that has insulated the female world from the legal order sends an important ideological message to the rest of society. It devalues women and their functions and says that women are not important enough to merit legal regulation.[18]

> This message is clearly communicated when particular relief is withheld. By declining to punish a man for inflicting injuries on his wife, for example, the law implies she is his property and he is free to control her as he sees fit. Women's work is discredited when the law refuses to enforce the man's obligation to support his wife, since it implies she makes no contribution worthy of support. Similarly, when courts decline to enforce contracts that seek to limit or specify the extent of the wife's services, the law implies that household work is not real work in the way that the type of work subject to contract in the public sphere is real work. These are important messages, for denying woman's humanity and the value of her traditional work are key ideological components in maintaining woman's subordinate status. The message of women's inferiority is compounded by the totality of the law's absence from the private realm. In our society, law is for business and other important things. The fact that the law in general claims to have so little bearing on women's day-to-day concerns reflects and underscores their insignificance. Thus, the legal order's overall contribution to the devaluation of women is greater than the sum of the negative messages conveyed by individual legal doctrines.[19]

Definitions of "private" and "public" in any particular legal context can and do constantly shift. Meanings of "private" and "public" are based on social and cultural assumptions of what is valued and important, and these assumptions are deeply gender-based. Thus, the interrelationship between what is understood and experienced as "private" and "public" is particularly complex in the area of gender, where the rhetoric of privacy has masked inequality and subordination. The decision about what we protect as "private" is a political decision that always has important "public" ramifications.[20]

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18. Taub & Schneider, *supra* note 6, at 122.

19. *Id.* at 122-23.

20. Michelman, *Private, Personal But Not Split:* Radin v. Rorty, 63 S. CAL. L. REV. 1783, 1794 (1990).

In general, privacy has been viewed as problematic by feminist theorists.[21] Privacy has seemed to rest on a division of public and private that has been oppressive to women and has supported male dominance in the family. Privacy reinforces the idea that the personal is separate from the political; privacy also implies something that should be kept secret. Privacy inures to the benefit of the individual, not the community. The right of privacy has been viewed as a passive right, one which says that the state cannot intervene.[22]

However, some feminist theorists have also explored the affirmative role that privacy can play for women.[23] Privacy is important to women in many ways. It provides an opportunity for individual self-development, for individual decisionmaking and for protection against endless caretaking.[24] In addition, there are other related aspects of privacy, such as the notion of autonomy, equality, liberty, and freedom of bodily integrity, that are central to women's independence and well-being. For women who have been battered, these aspects of privacy are particularly important. In the following sections, I explore three dimensions of privacy in work on battered women that are aspects of this broader feminist critique. First, I examine how the legacy of viewing male battering of women as a "private" problem leads to denial of the seriousness of the problem. Second, I explore ways in which views of battering as "private" persist despite growing recognition of battering as a "public" problem. Finally, I speculate on ways that concepts of privacy might be used affirmatively to empower battered women, rather than support abuse.

III. DIMENSIONS OF PRIVACY

A. *The Denial of Power and the Power of Denial*

The battered women's movement grew out of the rebirth of the women's movement in the 1960s, and it is one of the areas in which the women's movement has made an enduring contribution to law. Like sexual harassment, the "problem" of battering and the social and legal construct of a "battered woman" did not exist in this country until the

21. C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Copelon, *Unpacking Patriarchy: Reproduction, Sexuality, Originalism and Constitutional Change*, in A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION 303 (J. Lobel ed. 1988); Minow, *supra* note 15.

22. Copelon, *supra* note 21.

23. A. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY (1988).

24. *Id.* at 70-72.

women's movement named it.[25] The battered women's movement revealed to the public hidden and private violence. Over the last 20 years, the battered women's movement has been involved in efforts to provide services for battered women, to create legal remedies to end abuse, and to develop public education efforts to change consciousness about battering. The battered women's movement saw battering as an aspect of fundamental gender relations, as a reflection of male power and female subordination.[26]

As a result of the battered women's movement during the last two decades, the general problem of domestic violence and the more specific problems of battered women have entered public consciousness in the United States. The severe problems that battered women face have been documented by government reports,[27] legal and social science literature,[28] and media reports, including front-page headlines, coverage of trials and television programs.[29] State[30] and federal[31] legislative

25. For a discussion of the history and development of the battered women's movement, see S. SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISION AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT (1982).

26. *Id.* at 43-52. According to feminist analysis of women battering, violence has traditionally been a means of maintaining control over women as a class by men as a class: "When a husband uses violence against his wife, people often view this as a random, irrational act. In contrast, feminists define wife abuse as a pattern that becomes understandable only through examination of the social context. Our society is structured along the dimensions of gender: Men as a class wield power over women." Bograd, *Feminist Perspectives on Wife Abuse: An Introduction*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 14 (K. Yllo & M. Bograd eds. 1988) [hereinafter FEMINIST PERSPECTIVES].

27. *See generally* ATTORNEY GENERAL OF THE U.S., DEP'T OF JUSTICE, TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT (1984); UNITED STATES COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB; BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE (1982); NATIONAL INST. OF JUSTICE, DEP'T OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES (1986); *The Family Violence Prevention and Services Act: A Report to Congress* (August 1988); P. FINN & S. COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT (U.S. Dep't of Justice, Nat'l Inst. of Justice, March 1990).

28. Examples of recent books on woman-abuse include J. BLACKMUN, INTIMATE VIOLENCE (1989); FEMINIST PERSPECTIVES, *supra* note 26; DOMESTIC VIOLENCE ON TRIAL (D. Sonkin ed. 1987); E. GONDOLF & E. FISHER, BATTERED WOMEN AS SURVIVORS, (1988); L. GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE; L. HOFF, BATTERED WOMEN AS SURVIVORS (1990); E. PLECK, DOMESTIC TYRANNY (1987); L. WALKER, TERRIFYING LOVE (1989).

29. For a discussion of popular media images of woman-abuse, see Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990).

30. For a discussion of the range of state legislation that has been developed to assist battered women, see Schneider, Legal Reform Efforts to Assist Battered Women: Past, Present and Future (1990) (unpublished manuscript, on file with the *Connecticut Law Review*). For an analysis of state legislation regarding restraining orders, see Finn, *Statutory Authority in the Use and En-*

reforms have focused on improving the legal remedies available to battered women, and many battered women's shelters, hotlines, advocacy programs, and support services for battered women have been developed.[32]

Domestic violence is the leading cause of injury to women in the United States.[33] According to FBI statistics, one woman in the United States is beaten every 18 seconds.[34] Between 2000 and 4000 women die every year from abuse.[35] Thirty percent of all women killed every year are slain by their partners.[36] Battering of women by their husbands or men with whom they are in an intimate relationship cuts across racial, class, ethnic and economic lines.[37] Police involvement, nationally, in cases of domestic violence exceeds involvement in murder, rape and all forms of aggravated assault.

Woman-abuse is an aspect of the basic gender inequality built into the very fabric of American family law. Myths concerning battered women, for example, that they provoke and like the violence, are widespread.[38] The police and the courts have historically failed to intervene

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forcement of Civil Protection Orders Against Domestic Abuse, 23 FAM. L.Q. 43 (1989).

31. Major federal legislation on domestic violence includes The Victims of Crime Act of 1989 (VOCA), 42 U.S.C. § 10601 (1989), that offers compensation to victims of domestic violence, and The Family Violence Prevention Services Act, 42 U.S.C. § 10410 (1989) (now The Child Abuse Protection Adoption and Family Services Act of 1988), that assists states in providing services to prevent family violence, and coordinates research, training and clearinghouse activities. Senator Biden has proposed federal legislation on rape and domestic violence in the Violence Against Women Act of 1991, which is presently being debated in Congress. *See* S. 15, 101st Cong., 1st Sess. (1991).

32. For a discussion of the range of services available for battered women, see Schneider, *supra* note 30, at 59-64.

33. *Women, Violence, and the Law: Hearing Before the House Select Comm. on Children, Youth and Families*, 100th Cong., 1st Sess. 3 (1987) (statement of Rep. George Miller).

34. *Report of the Gender Bias Study of the Supreme Judicial Court*, 23 SUFFOLK U.L. REV. 576, 584 (1989)[hereinafter *Gender Bias Study*].

35. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS FOR 1983 (1984).

36. *See Gender Bias Study*, *supra* note 34, at 584.

37. ATTORNEY GEN. OF THE U.S., DEP'T OF JUSTICE, TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 11 (1986). For a discussion of problems faced by women of color who have been battered, see Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 (1991); Crenshaw, *Beyond Patriarchy and Racism: Black Feminism and Violence Against Women of Color*, 43 STAN. L. REV. (forthcoming 1991); Rasche, *Minority Women and Domestic Violence: The Unique Dilemmas of Battered Women of Color*, 2 J. CONTEMP. CRIM. JUST. 4 (1986); and Richie, *Battered Black Women: A Challenge for the Black Community*, 16 THE BLACK SCHOLAR 40 (1985).

38. For a discussion of the historical roots of blaming the victim of domestic violence, see L. GORDON, *supra* note 28, at 281-88.

to protect battered women because battering is perceived as a "private" problem, neither serious nor criminal. When the battered women's movement began, battered women had, effectively, no legal remedies.[39]

Over the last twenty years, there has been considerable change. There are now a wide range of groups and organizations that have emerged around the country to assist battered women. These groups have developed a range of approaches. They have focused their efforts on providing services to battered women, by founding shelters for battered women, setting up telephone hotlines, challenging police practices that fail to intervene effectively to protect battered women, and working to advance legislation that offers legal remedies for battered women. Some groups also have developed programs to work with battering men.[40]

Today there is greater public familiarity with these problems. Federal and state task forces have recommended reforms of legal, social welfare and health care systems.[41] Lawsuits have resulted in improved police and court practices. Lawsuits against the police have compelled police departments to arrest batterers vigorously.[42] Almost all states now have domestic violence legislation providing for orders of protection for women, and legal sanctions for their violation and/or criminal remedies for battering.[43] In short, there has been an explosion of law reform efforts to assist battered women.

Work on issues of battered women is now at a turning point. Some reforms have been institutionalized, and problems of battered women have achieved credibility and visibility. To some degree, a public dimension to the problem is now recognized. However, federal, state and private funding resources put into these reform efforts have been small.

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39. For an overview of the development of the battered women's movement, see S. SCHECHTER, *supra* note 25, at 53-112. For an overview of model advocacy groups across the country, see Schneider, *supra* note 30, at 102-08.

40. For a discussion of batterer's programs and the reasons why men batter, see Ptacek, *Why Do Men Batter Their Wives?* in FEMINIST PERSPECTIVES, *supra* note 26, at 133-56; and Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in FEMINIST PERSPECTIVES, *supra* note 26, at 176-96.

41. *See* Schneider, *supra* note 30, at 20-24.

42. *See, e.g.*, Thurman v. Torrington, 595 F. Supp. 1521, 1527-28 (D. Conn. 1984); Bruno v. Codd, 90 Misc. 2d 1047, 1049, 396 N.Y.S.2d 974, 976 (N.Y. Sup. Ct. 1977), *rev'd on other grounds*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979); Nearing v. Weaver, 295 Or. 702, 704, 670 P.2d 137, 139 (1983); *but see* DeShaney v. Winnebago County Dep't of Social Servs., 409 U.S. 189 (1989).

43. See Finn, *supra* note 30, at 60-73, for an overview of civil restraining legislation enacted across the country.

There has been little change in the culture of female subordination that supports and maintains abuse. At the same time, there is a serious backlash to these reform efforts and many of the reforms that have been accomplished are in serious jeopardy. For the last several years, while writing a report on national legal reform efforts for battered women for The Ford Foundation,[44] I have been amazed at the enormous accomplishments of the battered women's movement over the last 20 years. Indeed, I can think of few recent social movements that have accomplished so much in such a short time.

However, I have also been stunned by the depth of social resistance to change. Although battering has evolved from a "private" to a more "public" issue, it has not become a serious political issue, precisely because it has profound implications for all of our lives.[45] Battering is deeply threatening. It goes to our most fundamental assumptions about the nature of intimate relations and the safeness of family life. The concept of male battering of women as a "private" issue exerts a powerful ideological pull on our consciousness because, in some sense, it is something that we would like to believe.[46] By seeing woman-abuse as "private," we affirm it as a problem that is individual, that only involves a particular male-female relationship, and for which there is no social responsibility to remedy. Each of us needs to deny the seriousness and pervasiveness of battering, but more significantly, the interconnectedness of battering with so many other aspects of family life and gender relations. Instead of focusing on the batterer, we focus on the battered woman, scrutinize her conduct, examine her pathology and blame her for not leaving the relationship, in order to maintain that denial and refuse to confront the issues of power. Focusing on the woman, not the man, perpetuates the power of patriarchy. Denial supports and legitimates this power; the concept of privacy is a key aspect of this denial.

Denial takes many forms and operates on many levels.[47] Men deny

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44. Schneider, *supra* note 30.

45. Bunch, *Global Feminism, Human Rights and Sexual Violence*, in FIRST ANNUAL WOMEN'S POLICY RESEARCH CONFERENCE PROCEEDINGS 74 (Institute for Women's Policy Research, May 1989).

46. For an exploration of the phenomenon of denial and the importance of naming violence generally, see Kelly, *How Women Define Their Experiences of Violence*, in FEMINIST PERSPECTIVES, *supra* note 26, at 114-31.

47. Martha Mahoney's discussion of the problem of denial in Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. (forthcoming 1991), was very helpful to me in writing this section.

battering in order to protect their own privilege. Women need to deny the pervasiveness of the problem so as not to link it to their own life situations. Individual women who are battered tend to minimize the violence in order to distance themselves from some internalized negative concept of "battered woman." I see denial in the attitudes of jurors, who try to remove themselves and say that it could never happen to me; if it did, I would handle it differently.[48] I see denial in the public engagement in the Hedda Nussbaum/Joel Steinberg case which focused on Hedda Nussbaum's complicity, and involved feminists in active controversy over the boundaries of victimization.[49] The findings of the many state task force reports on gender bias in the courts have painstakingly recorded judicial attitudes of denial.[50] Clearly, there is serious denial of the part of state legislators, members of Congress and the Executive Branch who never mention battering as an important public issue. In battering, we see both the power of denial and the denial of power. The concept of privacy is an ideological rationale for this denial and serves to maintain it.

The concept of privacy encourages, reinforces and supports violence against women. Privacy says that violence against women is immune from sanction, that it is permitted, acceptable and part of the basic fabric of American family life. Privacy says that what goes on in the violent relationship should not be the subject of state or community

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48. For a discussion of jury attitudes toward battered women, see Bochnak, Krauss, McPherson, Sternberg & Wiley, *Case Preparation and Development*, in WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE (E. Bochnak ed. 1981); Koonan & Waller, *Jury Selection in a Woman's Self-Defense Case*, CACJ/FORUM May-June 1989 at 18; Note, *Juror Misconduct and Juror Composition*, 18 GOLDEN GATE U.L. REV. 589, 598 (1988).

49. The Joel Steinberg/Hedda Nussbaum case involved the murder of their adopted daughter, Lisa Steinberg, who was beaten to death by Joel Steinberg. This case focused on examination of Hedda Nussbaum as both a victim of abuse and a neglectful mother. *See* Sullivan, *Defense Tries to Show Nussbaum Liked Pain*, N.Y. Times, Dec. 9, 1988, at B2, col. 5. Some feminist response to the case centered on Hedda Nussbaum's "complicity," and not upon Joel Steinberg's terrorization of the family:

> Systematic battering combined with misguided, though culturally inculcated, notions of love is not a sufficient excuse to exonerate Hedda Nussbaum from her share of culpability in Lisa Steinberg's death. . . . When decent, honorable women insist that a piece of Hedda Nussbaum resides us all, they give the Joel Steinbergs of this world far too much credit and far too much power. More insidiously, they perpetuate the specious notion that women are doomed to be victims of the abnormal psychology of love at all cost.

Brownmiller, *Hedda Nussbaum, Hardly a Heroine*, N.Y. Times, Feb. 2, 1989, at A25, col. 1.

50. *See, e.g., Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11 (1986); *First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts*, 9 WOMEN'S RTS. L. REP. 129 (1986); *Report of the Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745 (1990).

intervention. Privacy says that it is an individual, and not a systemic problem. Privacy operates as a mask for inequality, protecting male violence against women.

B. *The Shifting Parameters of Private and Public*

As work on battered women has evolved, social meanings of what is private and public, and the relationship between them, have become more complex. Traditionally, battering has been viewed as within the private sphere of the family, and therefore unprotected by law. Yet, as Martha Minow has suggested, this social failure to intervene in male battering of women on grounds of privacy should not be seen as separate from the violence, but as part of the violence.

> When clerks in a local court harass a woman who applies for a restraining order against the violence in her home, they are part of the violence. Society is organized to permit violence in the home; it is organized through images in mass media and through broadly based social attitudes that condone violence. Society permits such violence to go unchallenged through the isolation of families and the failures of police to respond. Public, rather than private patterns of conduct and morals are implicated. Some police officers refuse to respond to domestic violence; some officers themselves abuse their spouses. Some clerks and judges think domestic violence matters do not belong in court. These failures to respond to domestic violence are public, not private, actions.[51]

Although social failure to respond to problems of battered women has been justified on grounds of privacy, this failure to respond is an affirmative political decision that has serious public consequences. The rationale of privacy masks the political nature of the decision. Privacy thus plays a particularly subtle and pernicious ideological role in supporting, encouraging, and legitimating violence against women. The state plays an affirmative role in permitting violence against battered women by protecting the privileges and prerogatives of battering men and failing to protect battered women, and by prosecuting battered women for homicide when they protect themselves. These failures to respond, or selective responses, are part of "public patterns of conduct and morals."[52]

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51. Minow, *supra* note 29, at 1671-72.
52. *Id.*

Over the last several years, the meaning of what has been traditionally viewed as public and private, concerning issues of battered women, has shifted. In some sense, a public dimension of the problem has increased. There are now legal decisions that have held police forces liable for money damages for failure to intervene to protect battered women, an explosion of state legal remedies to protect battered women, and federal legislation to assist battered women in implementing remedies. All of these approaches suggest a more public dimension to the problem, or at least a recognition by governmental bodies, speaking with a public voice, that they must acknowledge and deal with the problem. Some of the rhetoric surrounding issues of violence against women has shifted from the language of private to the language of public.

However, at the same time, the notion of family violence as within the private sphere has been given additional support by the Supreme Court's recent decision in *DeShaney v. Winnebago County Department of Social Services*.[53] In *DeShaney*, the Supreme Court held that the state had no affirmative responsibility to protect a child who had been permanently injured as a result of abuse committed by his custodial father, even when the state had been investigating the child abuse for several years.[54] The majority opinion reflects a crabbed view of the world that reasserts a bright-line distinction between public and private. Family violence is private and therefore immune from state scrutiny because, implicitly, the state had no business to be there in the first place and no responsibility to intervene at all. *Deshaney* revives the notion that family violence is private and the distinction between public and private action places this violence beyond public control.[55] *DeShaney* is already being interpreted by courts around the country to limit police liability in suits brought by battered women.[56]

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53. 489 U.S. 189 (1989).

54. *Id.* at 200-02.

55. For a thoughtful analysis of *DeShaney*, see Minow, *supra* note 29, at 1666-76.

56. *DeShaney* has made it difficult for victims of woman-abuse to bring section 1983 claims against the state for failure to protect them from battering. Courts are rejecting substantive due process claims, which are typically based on the alleged existence of a "special relationship" between the victims and the state (whether as a result of previous knowledge of the harm they faced at the hands of their abusers or because the state had issued a protective order), as incompatible with *DeShaney*. *See, e.g.*, Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 700 (9th Cir. 1990); Luster v. Price, No. 90-0115-CV-W-8, at 10, (W.D. Mo. July 5, 1990) (LEXIS, Genfed library, Dist. file); Hynson v. City of Chester, 731 F. Supp. 1236, 1239 (E.D. Pa. 1990); Dudosh v. City of Allentown, 722 F. Supp. 1233, 1235 (E.D. Pa. 1989). Only in two cases involving battering men who were arguably more "public" actors, where batterers were either close friends of the police

The tension between public and private also is seen in the issue of what legal processes are available to battered women, and the social meaning of those processes to battered women, in particular, and to society at large.[57] Over the last several years, the range of legal remedies has expanded and there has been an explosion of statutory reforms. For example, there are civil remedies, known as restraining orders or orders of protection. These are court orders with flexible provisions that a battered woman can obtain to stop a man from beating her, prevent him from coming to the house, or evict him from the house.[58] There are also criminal statutes that provide for the arrest of batterers, either for beating or for violation of protective orders.[59] Although there remain serious problems in the enforcement and implementation of these orders, the fact that such formal legal processes exist is evidence of a developing understanding of the public dimension of the problem. By giving battered women remedies in court there is, at least theoretically, public scrutiny, public control and the possibility of public sanction. In addition, some states impose marriage license fees

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chief, Freeman v. Ferguson, 911 F.2d 52, 53 (8th Cir. 1990) (plaintiff alleged that the husband was a close friend of the police chief and the chief in fact directed other police officers not to intervene on behalf of the wife), or a member of the police force himself, Muhammed v. City of Chicago, No. 89-C-6903 (N.D. Ill. Jan. 15, 1991) (LEXIS, Genfed library, Dist. file) have district courts held that plaintiffs should be given the opportunity to prove a duty-to-protect claim. *But see* Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect* DeShaney, 65 N.Y.U. L. REV. 1280, 1314-17 (1990) (arguing that issuance of protective orders should overcome *DeShaney*). One court has held, post-*DeShaney*, that a court's protective order issued pursuant to Pennsylvania's Protection from Abuse Act might create a property interest in police protection. Coffman v. Wilson Police Dep't, 739 F. Supp. 257, 264 (E.D. Pa. 1990).

As a result of the diminishing availability, after *DeShaney*, of section 1983 due process claims based on the notion of a special relationship, battered women may have to turn to alternative theories to sue the state for its failure to protect them. Such theories include equal protection violations, claims that the state has failed adequately to train its agents in domestic violence situations, or claims based on state tort law. Some courts dismissing section 1983 special relationship claims at least have been willing to permit plaintiffs the opportunity to bring such claims. *See, e.g., Balistreri*, 901 F.2d at 701-702; *Freeman*, 911 F.2d at 55 (permitting plaintiff to pursue an equal protection claim); *Hynson*, 731 F. Supp. at 1240-41; *Dudosh*, 722 F. Supp. at 1236 (permitting plaintiff to pursue an equal protection claim based on city's failure to train adequately its police force). *See generally* Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After* DeShaney v. Winnebago County Department of Social Services, 75 CORNELL L. REV. 1393 (1990) (arguing that, post-*DeShaney*, battered women's best chances of suing state actors for failure to intervene lie with due process suits not dependent on a special relationship theory, such as a state failure to train, equal protection challenges, and state tort theories).

57. For a discussion of the social meaning of rights claims, see Schneider, *The Dialectic of Rights*, *supra* note 7, at 623-48.

58. *See* Finn, *supra* note 30, at 43-44.

59. Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 214-15 (1988).

to generate funds to be used for battered women's services, thus making an important statement about the public impact of purportedly private conduct as well as implying an important ideological link between marriage and violence.[60] On the other hand, some of these extensive state statutory provisions have been challenged by battering men on constitutional grounds, including invasion of rights to marital privacy.[61]

At the same time that these remedies have been developing, there has been a move towards more private and informal processes, notably mediation. Most battered women's advocates are critical of mediation, because they believe that informal modes of dispute resolution substantially hurt battered women who are disadvantaged with respect to power, money and resources.[62] Mediation is viewed as signaling that battering is the women's individual and private "problem" that should

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60. MO. REV. STAT. § 455.205 (Supp. 1989) authorizes a surcharge of $10.00 in each marriage dissolution case for domestic violence shelters. ARIZ. REV. STAT. ANN. § 12-284 (1989) provides that 80 percent of monies gathered for marriage licenses shall be deposited in a domestic violence shelter fund. MINN. STAT. § 357.021 (1990) provides that a portion of the marriage dissolution fee shall be used for emergency shelter and support services to battered women.

61. For constitutional challenges to some of the marriage license fee provisions, see Browning v. Corbett, 153 Ariz. 74, 734 P.2d 1030 (1987); Boynton v. Kusper, 112 Ill.2d 356, 494 N.E.2d 135 (1986); Crocker v. Finley, 99 Ill.2d 444, 459 N.E.2d 1346 (1984); Villars v. Provo, 440 N.W.2d 160 (Minn. Ct. App. 1989).

Griswold has been raised as a defense by men to marital rape on the ground that it protects marital privacy. These challenges have been rejected by courts. In Commonwealth v. Shoemaker, 359 Pa. Super. 111, 518 A.2d 591 (1986), the court rejected the defendant's privacy challenge on the ground that the right to privacy should be overridden by the compelling state interest protecting the "fundamental right of all individuals to control the integrity of his or her body." *Id.* at 116, 518 A.2d at 594. Other cases involving privacy challenges to marital rape have taken a stronger position, suggesting that marital privacy was never intended to cover nonconsensual acts. Williams v. State, 494 So. 2d 819, 828-29 (Ala. Crim. App. 1986); People v. Liberta, 64 N.Y.2d 152, 165, 474 N.E.2d 567, 574, 485 N.Y.S.2d 207, 214 (1984), *cert. denied,* 471 U.S. 1020 (1985). Significantly, in rejecting this argument, some courts drew analogies to woman-abuse, with one court suggesting that "[j]ust as a husband cannot invoke a right of marital privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy." *Liberta,* 64 N.Y.2d at 165, 474 N.E.2d at 574, 485 N.Y.S.2d at 214. *See also* Merton v. State, 500 So. 2d 1301, 1304 (Ala. Crim. App. 1986); State v. Rider, 449 So. 2d 903, 906 n.6 (Fla. Dist. Ct. App. 1984). But see People v. Forman, 145 Misc. 2d 115, 121, 546 N.Y.S.2d 755, 760 (N.Y. Crim. Ct. 1989), where the defendant argued that his associational liberty interests protected by *Griswold* were violated by the issuance of a temporary order of protection.

62. *See* M. SUN & L. WOODS, A MEDIATOR'S GUIDE TO DOMESTIC ABUSE (1989); Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation,* 7 MEDIATION Q. 317 (1990); Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women,* 7 HARV. WOMEN'S L.J. 57 (1984). For a more general analysis of the problems with mediation for women, see Grillo, *The Mediation Alternative: Process Dangers for Women,* 100 YALE L.J. 1545 (1991).

be "worked out," and that the state has no role.[63] A general mood in legal circles, in favor of alternative dispute resolution and less adversarial forms of problem solving, has helped to legitimate mediation and obscure its problematic implications in this circumstance.[64] However, it is more accurate to see the move to mediation and more informal processes as a reflection of the low priority accorded family law issues, generally, and battered women's problems, in particular, by the law.[65]

Recently, the importance of criminal remedies for battering, particularly mandatory arrest provisions, has been increasingly recognized.[66] Activists have argued that criminal remedies, generally, and mandatory arrest, in particular, are important remedies that send a clear social message that battering is impermissible, and, because criminal remedies are prosecuted by the state, give more public force to the sanction. However, even civil remedies, such as orders of protection and tort suits against batterers, initiated by individual women against individual men, can send a social message. These lawsuits use formal court process, are subject to public scrutiny, and the legal decisions arrived at in those cases also make a public statement. In particular, the tort action may carry a greater social meaning in light of the demise of the historic bar of interspousal immunity, the social dimension of the claimed harm, and the affirmative nature of the claim for damages.[67] Other examples of alternative procedural frameworks that carry more public meaning include the articulation of battering as a civil rights violation,[68] an international human rights violation,[69] and as involun-

63. Lerman, *supra* note 62, at 84-89.

64. *Id.* at 88-89.

65. *Id.*

66. Buel, *supra* note 59, at 215-16.

67. For analysis of the developing area of domestic violence and torts, see L. Karp & C. Karp, *Spousal Abuse*, in DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE (1989); *DC Court Declines to Recognize Independent Tort of 'Spouse Abuse,'* 15 Fam. L. Rep. (BNA) 1501, 1502 (Aug. 29, 1989); *Victim of Battered Woman's Syndrome Recovers In A Civil Action for Battery and Emotional Distress*, 33 AM. TRIAL LAW. ASS'N L. REP. 314 (Sept. 1990).

68. Lawyers in some states are exploring whether their civil rights statutes can be interpreted to cover domestic violence. *See* MASS. GEN. L. ANN. ch. 265, § 37 (West 1990); N.J. STAT. ANN. § 10:5-1-10:5-42 (West 1976 & Supp. 1991) (the New Jersey Law Against Discrimination). The proposed Violence Against Women Act of 1991, *supra* note 31, also defines gender bias as a civil rights violation in Title III of the Act.

69. For discussion of domestic violence as an international human rights violation, see Baer, *Human Rights at the United Nations: Women's Rights.are Human Rights*, 24 IN BRIEF, Nov. 1989, at 1; Heise, *Crimes of Gender*, WORLD WATCH, Mar.-Apr. 1989, at 12; Sullivan, *Human Rights at the United Nations: The Implementation of Women's Rights: The Effectiveness of Existing Procedures*, 29 IN BRIEF, Oct. 1990, at 1 (INTERNATIONAL LEAGUE FOR HUMAN RIGHTS).

tary servitude.[70]

Indeed, the development of these more formal processes has several important ramifications in promoting public education and helping to redefine violence as a public issue. First, because of the availability of these legal remedies, there are more proceedings in court, and the participants, judiciary, court personnel, and public are educated about the problem of domestic violence. Public participation in these disputes may well have contributed to changing attitudes concerning the acceptability of violence against women.[71] The media frequently focuses on court cases, so there are many articles in newspapers and programs on television about these cases.[72] Analysis of the actual implementation of these legal remedies, and the failure of the courts to enforce these provisions, has been widely publicized in the many state gender bias reports and has further expanded an educational process within the states.[73]

The development of more formal processes also has been important to battered women. A recent empirical study of battered women's experiences in obtaining restraining orders in New Haven, Connecticut, concluded that temporary restraining orders can help battered women in ways other than increasing police responsiveness or deterring violent men; "the process is (or can be) the empowerment."[74] The authors emphasize that "[t]his occurs when attorneys listen to battered women, giving them time and attention, and when judges understand their situation, giving them support and courage."[75] However, they observe that

> as important, although unfortunately less frequent, women's empowerment can occur when men admit to what they have done in a public forum. Such conversations and admissions can transform the violence from a private familial matter, for which many women blame themselves, to a public setting

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70. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM (forthcoming 1992).

71. Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 419 (1987).

72. However, more media has focused on cases involving battered women who have killed their assailants than the "ordinary" case of a battered woman who cannot get into a shelter, cannot get a restraining order, and may risk losing custody of her children for failing to protect them from the batterer. Emphasis on the latter types of situations would squarely focus public attention on the battering man and the failure of social responsibility.

73. *See supra* note 50.

74. Chaudhuri & Daly, *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE (E. Buzawa ed. forthcoming 1992).

75. *Id.*

where men are made accountable for their acts."[76]

This study underscores the importance of legal representation, another issue that reveals the tension between public and private. Although battered women now have remedies that are available to them "on the books," they have no assured access to lawyers to represent them. Many battered women have limited resources and cannot afford to hire a lawyer. Moreover, there are few lawyers who are sensitive to their issues and problems. State statutory schemes do not provide for counsel; indeed many of the protective order statutes specifically provide the option for battered women to represent themselves.[77] Battered women's advocates, formerly battered women or shelter workers, usually without formal legal training, are now the crucial link between battered women and the legal system, and also frequently the child welfare and social service systems. Battered women's advocates help battered women to navigate the legal system, and assist them in every facet of the process.[78] Although battered women's advocacy has played a critical role for battered women and has contributed a woman-centered form of representation, it is necessarily limited. Even the simplest litigation concerning restraining orders may involve complex issues of divorce, support and custody, and the lack of skilled legal representation effectively discriminates against battered women.

These examples illustrate the contradictions posed by more informal processes. The problem of lack of legal representation highlights the dilemma that a more formal process would pose. Because counsel is not provided, and has not been required by any of these statutes, battered women's advocates have been able to assist many battered women who would not otherwise have been represented. If counsel were required, but not provided by the state, those battered women who cannot pay for representation would be severely disadvantaged. Only the provision of free counsel, knowledgeable about these issues, would make a substantial difference. Thus, although in theory we might prefer a more formal legal process for battered women, in practice, under

76. *Id.*

77. Most civil restraining order statutes have no provisions for counsel and are designed for pro se applicants. Though legal advocates are bridging the representational gap in new and creative ways, battered women are still in desperate need of adequate legal representation because civil restraining order litigation inevitably involves issues of custody, support, and visitation. Schneider, *supra* note 30, at 51-52, 56-59. For a discussion of the problem of legal representation in restraining order litigation, see P. FINN & S. COLSON, *supra* note 27, at 19.

78. Schneider, *supra* note 30, at 56-59.

present conditions of scarce legal resources, it may not be realistic.

Finally, the complex interrelationship between private and public can be seen within the battered women's movement itself. Until about fifteen years ago, the terms "woman-abuse" and "battered woman" did not exist. "Linguistically, it was classed with the disciplining of children and servants as a 'domestic', as opposed to a 'political' matter."[79] Feminist activists in the battered women's movement named the problem in a different way; they claimed that battery was not a personal, domestic problem but a systemic, political problem. Battering was not the result of a particular man or woman's difficulties, but part of a larger problem of male domination and female subordination.

Nancy Fraser describes the meaning of this redefinition in the following way:

> Feminist activists contested established discursive boundaries and politicized a previously depoliticized phenomenon. In addition, they reinterpreted the experience of battery and posited a set of associated needs. Here they situated battered women's needs in a long chain of in-order-to relations that spilled across conventional separations of "spheres"; they claimed that in order to be free from dependence on batterers, battered women needed not just temporary shelter but also jobs paying a "family wage", day care and affordable permanent housing.[80]

The battered women's movement began with a clearly political and public agenda. Battered women were not viewed primarily as individual victims but as potential feminist activists. Activists organized battered women's shelters, which were woman-centered refuges and sites of consciousness-raising. The organization of shelters was nonhierarchical and egalitarian; many formerly battered women went on to become counselors or advocates. Many battered women who had blamed themselves developed a more political perspective, and began to identify more with other women, rather than with the men who battered them.[81]

However, as the issue of woman-abuse became a more legitimate

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79. Fraser, *Struggle Over Needs: Outcome of a Socialist-Feminist Critical Theory of Late-Capitalist Political Culture*, in WOMEN, THE STATE, AND WELFARE 199, 213 (L. Gordon ed. 1990).

80. *Id.* at 213-14.

81. *Id.* at 214.

political issue, and battered women's organizations and shelters began to receive government funding, "a variety of new, administrative constraints ranging from accounting procedures to regulation, accreditation and professionalization requirements were imposed."[82] Many organizations began to develop a service, rather than activist, perspective.

> As a consequence, publicly funded shelters underwent a transformation. Increasingly, they were staffed by professional social workers, many of whom had not themselves experienced battery. Thus, a division between professional and client supplanted the more fluid continuum of relations that characterized the earlier shelters. Moreover, many social work staff have been trained to frame problems in a quasi-psychiatric perspective. This perspective structures the practices of many publicly funded shelters even despite the intentions of individual staff, many of whom are politically committed feminists. Consequently, the practices of such shelters have become more individualizing and less politicized. Battered women tend now to be positioned as clients. They are increasingly psychiatrized, addressed as victims with deep, complicated selves. They are only rarely addressed as potential feminist activists. Increasingly, the language game of therapy has supplanted that of consciousness raising. And the neutral scientific language of "spouse abuse" has supplanted more political talk of "male violence against women." Finally, the needs of battered women have been substantially reinterpreted. The very far-reaching earlier claims for the social and economic prerequisites of independence have tended to give way to a narrower focus on the individual woman's problems of "low self-esteem."[83]

Thus, the battered women's movement itself has experienced the tension between a more systemic "public" definition of the problem and an individualistic "privatized" vision. Even within the movement, we see internal tensions and pressures to move to a more privatized definition and experience of battering. Privacy encourages a focus on the individual, and avoidance of collective definition, systemic analysis and social responsibility.

I have described elsewhere how the articulation of rights claims by

82. *Id.*
83. *Id.* at 214-15.

the battered women's movement in both civil and criminal contexts raised important questions for feminists about how to view the state, and sharpened debate over the role of law in modifying the public/private dichotomy.[84] These debates have centered around the ideological importance of criminalization in defining battering as a public harm, and heightened the movement's analysis of reforms. These issues have become more complex as more legal reforms have become available. However, the tensions of privatization within the movement emphasize the need for recommitment to an analysis that links battering to the broader problems of women, and identifies the need for social and economic resources, education, jobs, child care, and housing. Without access to these resources, violence against women will endure.

As work on battered women moves forward the meanings of public and private shift, but each new development reveals the ideological constraints of privacy in a different form. This brings us full circle to where we started.

C. *The Affirmative Potential of Privacy for Battered Women*

To this point, it may seem that *Griswold* has little potential for battered women. The right of marital privacy protected in *Griswold* seems to justify the argument for marital privacy that permits male battering of women. Is *Griswold* significant only as the constitutional articulation of the cloak of privacy that has historically maintained woman abuse?

It is important to remember that the litigation in *Griswold* emerged from a struggle for women's rights.[85] The articulation of a right to privacy in *Griswold* resulted from "the patent suffering imposed by restrictive reproductive laws."[86] I want to suggest that the problematic doctrine of privacy should be redrawn under the shaping influences of the battered women's movement. Influenced by a sensitivity to gender, and informed by experience of woman abuse, privacy can be reconstructed and reformulated.

The evolution of Justice Douglas's own privacy jurisprudence from *Griswold* suggests the affirmative possibilities of privacy.[87] In *Griswold*,

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84. Schneider, *The Dialectic of Rights, supra* note 7, at 642-48.

85. Catherine Roraback, one of the plaintiff's lawyers in *Griswold*, underscored this concept in introductory remarks at the symposium.

86. Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15, 38 (1990-1991).

87. Much of the following discussion of Justice Douglas' jurisprudence that follows from *Gris-*

the Court confronted a constitutional challenge to Connecticut's birth control statute, which prohibited the use of contraceptives and counseling concerning the use of contraceptives, by doctors who had been convicted under the statute. Douglas identified the harm resulting from this statute as intrusion into the privacy and intimacy of the marital relationship.[88] He developed the right of privacy based on the associational aspects of marriage as an important relationship that requires protection, and grounded it in a recognition of human intimacy and connection as an important value.[89] However, it is in his concurring opinion in *Roe v. Wade* and *Doe v. Bolton*[90] that Justice Douglas developed his most expansive articulation of the right to privacy.

In *Roe*, Douglas developed three separate dimensions of these rights of privacy and liberty. First, he described the "autonomous control over the development and expression of one's intellect, interests, tastes and personality"[91] which he saw as absolutely protected by the First Amendment against government interference. Second, he saw "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."[92] Third, Douglas described "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf."[93] These rights, although fundamental, are subject to some control by the police power and are subject to regulation on a showing of a compelling state interest.

Douglas then applied these dimensions of privacy and liberty to the situation of a woman who faces state prohibitions on abortion. He concluded that a woman is free to make the basic decision whether to bear an unwanted child, for "childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future."[94] He described in moving detail the harm that women face:

> [F]or example, rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur

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wold is from Schneider, *Commentary, supra* note 8.

88. *Id.* at 179.
89. *Id.*
90. 410 U.S. 179, 209 (1973) (Douglas, J., concurring).
91. *Id.* at 211.
92. *Id.*
93. *Id.* at 213.
94. *Id.* at 214.

> 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; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.[95]

It is significant that Douglas developed these aspects of privacy and liberty in the context of women's rights to reproductive control. In *Roe*, Douglas expressed a vision of a privacy right as something far more tied to an affirmative concept of liberty than a right to be left alone, or than protection from intrusion into the marital bedroom, as in *Griswold*. This view of privacy, as an aspect of liberty, is an expansive concept that has a number of different dimensions. First, there is the dimension of autonomy over the development and expression of one's "intellect, interests, tastes and personality." Then there is the decisional dimension—"freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, [and] contraception." There is also freedom from intrusion, restraint, and compulsion, and freedom to care for oneself and express oneself. We see the interrelated dimensions of privacy: autonomy, decisional privacy, what some have called restricted access privacy, and affirmative self-expression as aspects of the liberty that Douglas describes as part of the fourteenth amendment. Liberty-freedom is the larger concept, within which these aspects of privacy are subsumed.

Justice Douglas' affirmative view of privacy and liberty in his concurring opinion in *Roe* was a product of the massive educational process concerning a woman's right to abortion that had gone on around the country for several years with the growth of the women's movement. In many cities around the country, women were coming forward in courtrooms and meeting places to tell their stories. Women forced the courts to confront the fact that every year women had abortions at enormous physical and psychic cost. Justice Douglas' opinion directly responded to the range of arguments presented in feminist briefs in *Roe*. Feminist briefs in *Roe* argued broadly that reproductive choice was central to women's equality both in allowing women to become full persons and in achieving full participation in society.[96] The briefs also linked the rights to reproductive control with women's autonomy and

95. *Id.* at 214-15.

96. This description is drawn from Copelon, *supra* note 21, at 314-15.

ability to be sexual, and emphasized the disproportionate impact of criminalization on the poor. They presented to the Court a full factual and legal picture of the range of harms that women suffered as a result of abortion restrictions. For example, the amicus curiae brief submitted by Nancy Stearns of the Center for Constitutional Rights for New Women Lawyers presented arguments concerning the prohibition of abortion as an affirmative infringement of women's liberty, sex discrimination and as cruel and unusual punishment under the eighth amendment.[97] This brief especially focused on the practical impact of criminalizing abortion on women's lives, and was filled with rich, textured descriptions of the harms that women suffered as a result of prohibitions on abortion and the central role that reproductive choice had for women's lives.[98] Douglas' opinion, more specifically than the majority opinion in *Roe*, echoed these themes, in particular, the harms to women's liberty and freedom.

Justice Douglas' concurring opinion goes further than the majority opinion in making an explicit link to liberty and in developing the more affirmative dimensions of autonomy, self-determination, and self-expression. It also presages concerns with privacy as too narrow a grounding for the right to abortion that feminist legal theorists have subsequently expressed. Douglas' affirmative view of privacy as a dimension of liberty and his grounding of the abortion right on liberty in his opinion in *Roe* resonates with critiques developed by feminist legal scholars of the privacy right as the doctrinal basis for the abortion decision.

Feminist theorists have viewed as problematic the articulation of a right to privacy, as opposed to liberty, as the doctrinal basis for the abortion decision in *Roe*.[99] Feminists have argued that the abortion right should have been founded upon the concept of liberty, rather than privacy, as it is women's freedom and autonomy that are at stake. Although feminist theorists have understood that there are many dimensions to privacy, such as decisionmaking, autonomy, self-determination and human and sexual self-expression, privacy has been viewed as problematic for the reasons previously discussed. The right of privacy, a passive right that said the state could not intervene, was viewed in

97. Brief *Amicus Curiae* on behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition 14-24, Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973). I worked on this brief as a law student intern with Nancy Stearns at the Center for Constitutional Rights for New Women Lawyers.

98. *Id.*

99. Copelon, *supra* note 21, at 314-16.

contrast with the right to liberty, that emphasized the harms women suffered if they could not get abortions and seemed to imply that the state had an affirmative obligation to ensure that women can exercise their freedom. Douglas' concurring opinion suggests the radical potential of the concept of privacy—articulating it as not only the right to be let alone, but as affirmatively linked to liberty and the right to autonomy, self-expression and self-determination. The notion of women as agents of their own lives is an important and powerful concept that transcends the common experience of the concept of privacy. Unfortunately, the radical potential of the concept of privacy has not been actualized by more recent decisions of the Court, such as *Bowers v. Hardwick*,[100] where the right to sexual autonomy and personal and emotional self-realization was directly implicated.[101]

The importance of this more affirmative dimension of privacy is underscored by the problem of woman-abuse. The rationale of privacy legitimates and supports violence against women; woman-abuse reveals the violence of privacy. Privacy justifies the refusal of the state to intervene, of judges to issue restraining orders, of neighbors and friends to intervene or to call the police, of communities to confront the problem, and of social workers to act. Yet when we look at the more affirmative dimensions that Douglas articulates in *Roe* we can see the importance of these perspectives in thinking about woman-abuse. 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. We need to begin to articulate these affirmative claims as abortion activists did in *Roe*.

IV. CONCLUSION

The challenge is to develop a right to privacy which is not synonymous with the right to state noninterference with actions within the family,[102] but which recognizes the affirmative role that privacy can play for battered women. Feminist reconstruction of privacy should seek to break down the dichotomy of public and private that has disabled legal discourse and public policy in this area. Male battering of women is a serious public problem for which we need to accept collec-

100. 478 U.S. 186 (1986).

101. Copelon, *supra* note 21, at 319-20.

102. Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287, 292-93 (1987).

tive responsibility; it requires a dramatic program of mass public re-education similar to the drunk driving campaigns over the last several years. At the same time, while claiming woman-abuse as a public problem, we do not want to suggest that state intervention is always the answer. Frank Michelman has observed that even if we understand that the personal is political, this insight does not answer the question of the appropriate boundaries of state intervention.[103] Others have detailed the ways in which state intervention will always be problematic for women,[104] and we can see this in the limitations of legal reforms and the child welfare investigations of battered women on failure to protect grounds.

However, we also do not want to reject the genuine values and benefits of privacy for battered women. Thinking about privacy as something that women who have been battered might want makes us think about it differently. Battered women seek the material and social conditions of equality and self-determination that make privacy possible.[105] Privacy that is grounded on equality, and is viewed as an aspect of autonomy, that protects bodily integrity and makes abuse impermissible, is based on a genuine recognition of the importance of personhood more true to the vision of privacy that Douglas evolved from *Griswold*.[106] Such a notion of privacy could challenge the vision of individual solution, rather than social responsibility, for abuse. Conceived differently, privacy could help keep women safe, not battered.

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103. Michelman, *supra* note 20, at 1794.

104. *See* Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 858-61 (1985).

105. See Copelon, *supra* note 86, at 44-50, for a discussion of privacy and equality.

106. For exploration of the concept of personhood, see Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Frank Michelman's comment on Radin's work, *supra* note 20, made me realize that personhood is the aspect of privacy that I am seeking to preserve for battered women.