# 9. *WHAT HAVE YOU DONE FOR ME LATELY?* Reflections on Redeeming Privacy for Battered Women

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*The dichotomy between the private and the public is central to almost two centuries of feminist writing and struggle; ultimately, it is what the feminist movement is about.*[1]

## INTRODUCTION: PRIVACY IN ACTION, PRIVACY IN THEORY

Gillian Hadley was granted a protection order against her abusive estranged husband, Ralph. When Ralph breached the terms of the protection order by trespassing on Gillian's property and harassing her, Gillian's numerous calls for assistance were repeatedly given low priority by police in Durham, Ontario, with some going unaddressed for more than 24 hours. Ralph Hadley broke into Gillian's home, shot her dead, and killed himself.[2] In Colorado, Jessica Gonzales's

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1. Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (Stanford: Stanford University Press, 1989), 118.

2. See Jim Coyle, "Officer Saw Risk to Gillian Hadley," *Toronto Star*, November 8, 2001, Toronto Star Online, http://www.fact.on.ca/news/news0111/ts011108.htm. The 2002 inquest that followed Gillian Hadley's death—the third such inquest in Ontario between 1998

estranged husband, Simon, kidnapped their three young children in violation of a restraining order barring him from contact with the family. The police refused to enforce the order and retrieve the children despite Jessica's multiple requests for them to do so. Simon Gonzales eventually went to the police station and was killed in a gunfire exchange with officers, following which police found his three daughters dead in his truck. Each had been shot in the head at close range.[3]

I first faced the tragic, all-too-common realities of stories like Gillian Hadley's and Jessica Gonzales's while working at a shelter for battered women.[4] I bore witness, time and again, to the ferocity of woman abuse and the inadequacies of existing social and legal mechanisms designed to combat violence against women by their intimate partners or former partners.[5] I came to understand the

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and 2002—resulted in more than 50 recommendations on providing better protection and services to battered women. The majority of these recommendations have yet to be implemented in the province.

3. In *Gonzales v City of Castle Rock* 545 US 748 (2005), Jessica Gonzales sued the town of Castle Rock, Colorado, for failure to enforce the restraining order, alleging that she had a property right to have the order enforced and that the police's failure to do so was an actionable deprivation. The District Court dismissed the matter. On appeal, The 10th Circuit Court of Appeals reversed the dismissal and held that the Colorado law under which the restraining order was issued mandated police enforcement and that Ms. Gonzales had a protected property interest in the enforcement of her order. Castle Rock appealed to the United States Supreme Court, and on June 27, 2005, a 7–2 opinion found that there is no property right to enforcement of a restraining order under the United States Constitution. Ms. Gonzales decided to appeal that ruling to the Inter-American Commission on Human Rights, and issues of admissibility were dealt with in *Jessica Gonzales* et al. *v United States* Case 1490–05, Report No. 52/07, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007), heard on March 2, 2007, at the Inter-American Commission on Human Rights, the first hearing on domestic violence to be heard in that forum.

4. The language used to describe male violence against women is incredibly problematic, as highlighted by authors including Nancy Berns, "Degendering the Problem and Gendering the Blame: Political Discourse on Women and Violence," *Gender & Society* 15, no. 2 (2001): 262–281. The gender-free terms "domestic violence" or "partner abuse" are often used to describe violence against women in the home; however, they willingly erase the gendered nature of woman battering, see note 6. In this chapter, the terms "woman battering" or "woman abuse" will be used interchangeably, and should be understood to include systematic abuse, whether physical, sexual, psychological, emotional, financial, or other, of a woman by her intimate partner who, in the vast majority of cases, is a man. For excellent analysis of the particularities and inadequacies of the language of woman battering see Ann Jones, *Next Time She'll Be Dead: Battering and How to Stop It* (Boston: Beacon Press, 2000).

5. Even with the monumental progress made in recent decades by the feminist and antiviolence communities on the issue of domestic violence, woman battering persists at an unacceptably high rate. Measuring the prevalence of intimate violence is next to impossible as a result of exceptionally low levels of reporting. Statistics Canada reports that just over one third of spousal assaults are reported to police. Even considering

perils of attempting to escape an abusive relationship, and I saw, first-hand, how the maintenance of a sphere of privacy became a near-absolute requirement for the physical and emotional integrity of the women our shelter served: If an abusive partner or former partner could not locate a woman at our shelter, he could not stalk, harass, or kill her.[6] In attempting to secure a bubble of privacy around a woman as against her battering partner, shelter clients were not required to give their real names when seeking services at the shelter, nor were they required to disclose any other personal information. Based on my experience of "privacy in action" at the shelter, I believed that privacy equaled safety, and safety equaled life for battered women, and as a result, I became a constant advocate for quantitatively *more* privacy protections for battered women.

Some time later, I found myself steeped in the academic world of law school, where I discovered the theoretical dimensions of many of the concrete phenomena I had witnessed in my work at the shelter—theories about violence, about policing, about relationships between men and women, between individuals and the state, and theories, of course, about privacy. I dove into all of this theorizing, certain that I would uncover a wealth of literature endorsing my "more is better" stance on privacy for battered women, and doubly certain that I would discover such support among feminist scholars. What I found instead was that "privacy in theory" looked very different from the privacy that I had seen in action at the women's shelter. I discovered that the relationship between privacy and much

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that the available statistics underestimate the extent of intimate violence in Canada, the numbers are startling. Statistics Canada reports that 7% of women living in a common law or marital relationship reported that they had been physically or sexually assaulted by a spousal partner at least once in the past five years. This number represents approximately 653,000 women. Holly Johnson, Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006* (Ottawa: Minister of Industry, 2006). It is notable that the surveys used to generate statistical profiles of abuse may focus on common law or marital relationships and thereby exclude women who are battered by boyfriends or former partners. Such surveys are also likely to focus on physical or sexual abuse, and do not capture the full ambit of woman abuse, which may include psychological, emotional, and mental abuse, as well as other mechanisms of coercion employed by batterers including economic control and threats. See Evan Stark, "Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control," *Albany Law Review* 58, no. 4 (1995): 973–1026.

6. Gender specificity is intended throughout this discussion and reflects the overwhelming rate at which women are battered by male partners. Although the vast majority of intimate violence is perpetrated by men against women, intimate violence does occur between partners of the same sex, and individuals who identify as transsexual, transgender, or gender queer are also subject to violence at the hands of their intimate partner. On intimate violence in same-sex relationships and the legal response to violence between same-sex partners, see e.g. Janice L. Ristock, "And Justice for All? The Social Context of Legal Responses to Abuse in Lesbian Relationships," *Canadian Journal of Women and the Law* 7 (1994): 415–430.

feminist theory is fraught with difficulties to such an extent that some feminist scholars[7] contend that privacy is not only *useless* for women, but is *detrimental* to women's lives, and should be rejected outright as antithetical to the feminist project of achieving equality for women. Catharine MacKinnon, one of the most well-known voices in feminist legal scholarship, is a leader in the "privacy-rejection" camp, arguing that privacy has never done anything for women, and there are no signs that this will change anytime soon.[8] I learned that the feminist rejection of privacy is grounded in large part on the relationship between privacy and woman battering[9]—the very context that founded my belief in the utility of privacy for women escaping situations of battering. Feminist theorizing arguing for quantitatively *less* privacy for women and *more* state intervention in the private sphere to prevent violence against women seemed incongruous with my experience at the shelter, where I saw women as requiring more privacy in order to secure their physical and emotional safety against abusive partners.

The unsettling disconnect that I encountered between much, though certainly not all, feminist theorizing on privacy and my own experience with privacy in the context of woman battering forms the inspiration for this project. In this chapter, I offer some thoughts on the connections between privacy and woman battering informed by my experiences both with "front-line" activism and work in this area, as well as "back-line" academic theorizing on privacy. My goal is to critically examine, from a feminist perspective, one particular feminist stance on privacy—that which has traditionally rejected privacy as antithetical to the project of women's lived equality—and to illuminate some of the pitfalls I see with rejecting privacy, in light of the realities of woman abuse. I do not have an answer to the problem of woman abuse, but, contrary to many feminists, I do believe that, at least in the short term, privacy may be an important part of the solution.

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7. Rejecting privacy is only one of many responses feminists have advanced to address the problems with privacy. At the opposite end of the spectrum, a number of feminists have provided important arguments for the utility or potential utility of privacy in women's lives, including Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (New Jersey: Rowman & Littlefield, 1988); Ruth Gavison, "Privacy and the Limits of Law," *Yale Law Journal* 89, no. 3 (1980): 421–455; and Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991), 164.

8. Catharine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs* 8, no. 4 (1983): 635–658 at 656–57. See also Martha C. Nussbaum, "Is Privacy Bad for Women? What the Indian Constitutional tradition can teach about sex equality," *Boston Review*, (April/May 2000), Boston Review http://bostonreview.net/BR25.2/nussbaum.html.

9. See Catharine MacKinnon, "Reflections on Sex Equality under Law," *Yale Law Journal* 100 (1991): 1281–1328 at 1311, who describes the legal inviolability of the home, celebrated under the rubric of privacy, as yielding a "sphere of sanctified isolation" that benefits men at the expense of women.

I begin by briefly reviewing the concept of privacy itself. In the second section, I examine the connections between privacy and woman battering that have historically formed the crux of the feminist rejection of privacy. The third section reevaluates the traditional relationship between privacy and woman battering by proposing a different way in which we might understand woman abuse that situates women's privacy interests at the forefront. This third section then argues that, given this new understanding of the relationship between privacy and woman abuse, the feminist position that rejects privacy outright must be reconsidered. Finally, in the fourth section, I consider the problematic ways in which privacy is deployed within the existing confines of inequality, and argue that in this context, privacy should be understood as a "stop-gap" measure to ensure battered women's safety while we work toward feminism's long-term goal of equality.

## I. PRIVACY

Philosophers, legal scholars, and jurists continue to debate the definition, function, and value of privacy and to deliberate on how best to ensure and protect a right to privacy in law while striking an appropriate balance between privacy and competing interests.[10] Although the subtleties of its definition remain conflicted, privacy is perhaps most frequently described as "the right to be let alone."[11] Implied by, and encompassed within, "the right to be let alone," is the right to create and enforce boundaries[12] around the self in order to "keep out" arbitrary or unwanted intrusions by both state and nonstate actors so as to preserve a sphere of personal privacy. As such, privacy is generally understood as a negative right—a right *not* to have outside parties interfere arbitrarily in one's private life.

10. A full consideration of these debates is beyond my scope here; however, for philosophical explorations, see e.g. Steven Davis, "Privacy, Rights and Moral Value," *University of Ottawa Law & Technology Journal* 3, no. 1 (2006): 109–131; William Prosser, "Privacy: A Legal Analysis," *California Law Review* 48, no. 3 (1960): 338–423; Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967); and Judith Jarvis Thomson, "The Right to Privacy," *Philosophy and Public Affairs* 4, no. 4 (1975): 295–314. In a recent pronouncement on privacy by the Supreme Court of Canada, Binnie J. characterized privacy as a "protean concept," and noted the difficulties inherent in balancing privacy with countervailing considerations like "safety, security and the suppression of crime." *R. v Tessling*, [2004] 3 S.C.R. 432 at paras. 25 and 17.

11. Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, (1890): 193–220.

12. The idea of privacy as a boundary between the self and others has been enunciated by "restricted access" privacy theorists including Gavison, "Privacy and the Limits of Law," 428, (n. 7); and Allen, *Uneasy Access*, 43, (n. 7) describing privacy as a "condition or set of social practices constituting, creating or sustaining boundaries that should be drawn between ourselves and others in virtue of our status or potential as persons."

Preserving a personal sphere of inviolability against the outside world is doubtless a valuable goal, and many privacy theorists have usefully highlighted the important role that privacy and related ideals can, in theory, play in women's lives. Privacy can contribute to providing "the literal and metaphorical space or opportunity for self-development as well as for revision of self,"[13] it may present opportunities for women to exercise their creative and intellectual capacities,[14] and can offer relief from the endless caretaking duties for which women are often responsible. Privacy can contribute to "fostering self-development and affording a space in which persons prepare themselves for roles, relationships and responsibilities, while allowing the realization of goods such as solitude, chosen intimacy and retreat."[15] At face value, then, privacy seems like it could be a pretty good idea for women—assuming women really *have* meaningful access to privacy's benefits. In actuality, however, privacy is rarely available to women in service of such worthwhile ends as self-development and personal growth, and despite its seemingly "neutral" nature, men and women do not "have" privacy, nor enjoy its benefits, equally.[16] This differential access to privacy is perhaps nowhere more evident than within the realities of woman battering.

## II. THE PROBLEMS WITH PRIVACY

### A. The Privacy–Woman Battering Connection

The privacy at stake in the context of woman battering is generally understood to be that that inheres in the familial home, where the "right to be let alone" is protected as sacred by law. Images of the "private" home are associated with

13. Linda McClain, "Reconstructive Tasks for a Liberal Feminist Conception of Privacy," *William & Mary Law Review* 40, no. 3 (1999): 759–794.

14. In attempting to explain why Western women have not contributed more to art, literature, and philosophy, Simone de Beauvoir argued that women need liberty and opportunities for privacy if they are to exercise their creative and intellectual capacities to the fullest. See Simone de Beauvoir, *The Second Sex*, trans. and ed. by H. M. Parshley (New York: Alfred A. Knopf, 1952), 670.

15. McClain, "Reconstructive Tasks," 771, (n. 13). Some theorists have made bold claims for personal privacy, arguing that a fundamental requirement of respect for persons presupposes conditions of privacy sufficient for personhood. See Jeffrey Reiman, "Privacy, Intimacy and Personhood," *Philosophy and Public Affairs* 6, no. 11 (1976): 26–44.

16. Differential access to privacy is also drawn along lines of race, class, disability, and sexual orientation, which interlock with and inform gender-based access to privacy. For further analysis of interlocking oppressions generally, see Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998), 12; and Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour," *Stanford Law Review* 43, no. 6 (1991): 1241–1299.

inviolability, and reflect the ". . . idea of a man's home as his 'castle' or fortress, where he is free from arbitrary intrusion by government or others."[17] Indeed, the common law tradition upholds the home as the domain of the family and of the personal, "an environment whose privacy has consistently and insistently been designated by the courts as worthy of the state's highest respect."[18] Privacy thus functions as a shield, keeping the government out of the "sanctuary" of the "private" home, and rendering the relationships and activities within virtually immune from legal scrutiny.[19] For this reason, many have charged that the "rhetoric of privacy . . . has been [and continues to be] the most important ideological obstacle to legal change and reform" on the issue of woman battering,[20] operating to make violence against women "legally and politically invisible."[21]

The "remnants of the idea that the law (and courts) should not invade the privacy of the home or 'go behind the curtain' of domestic life"[22] are used to justify state nonintervention in the private home, resulting in a lack of reliable

17. Linda C. McClain, "Inviolability and Privacy: The Castle, the Sanctuary and the Body," *Yale Journal of Law and the Humanities* 7, no. 1 (1995): 195–241, 202. See also Gavison, "Privacy and the Limits of Law," 464, (n. 7).

18. *R. v Tessling* (2003), 63 O.R. (3d) 1 at para. 33 (Ont. C.A.), rev'd 2004 SCC 67. The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) 1982 c 11 (Canada), s. 8 guarantees, "[e]veryone has the right to be free from unreasonable search and seizure" and is understood in a broad fashion "to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments." Section 8 has been interpreted to include a hierarchy of territorial privacy interests with the home at the top. See *R. v Tessling*, para.22, (n. 10) and *R. v Silverira*, [1995] 2 S.C.R. 297 at para.144.

19. As recently as 1983, men who sexually assaulted their intimate partners were granted legal immunity from prosecution in Canada "in order to protect the privacy of the family and to promote 'domestic harmony.'" See Reva Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105, no. 8 (1995-96): 2117–2207 at 2118. The spousal rape immunity provision, formerly section 143 of the Criminal Code, RSC1970, c C-34 (Canada), s. 143, read: "[a] male person commits rape when he has sexual intercourse with a female person who is not his wife, without her consent." The marital rape exemption was repealed in 1983 by Bill C-127, An Act to Amend the Criminal Code (Sexual Offences), SC 1980–81–82–83 c 125 (Canada), s. 6.

20. Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (New Haven: Yale University Press, 2000), 87–91 details the ways in which privacy functions to shield men's violence against women in the home, stating, "[p]rivacy says that violence against women is immune from sanction, that it is acceptable and part of the basic fabric of . . . family life. Privacy says that what goes on in the violent relationship should not be the subject of state or community intervention. Privacy says that woman battering is an individual problem, not a systemic one. Privacy operates as a mask for inequality, protecting male violence against women."

21. Sally Goldfarb, "Violence Against Women and the Persistence of Privacy," *Ohio State Law Journal* 61, no. 1 (2000): 1–87 at 2.

22. McClain, "Inviolability and Privacy," 212, (n. 17).

state protection for women subjected to violence at the hands of their partners. Even when state machinery does become involved in a "private" situation of abuse between intimate partners in the home—for instance, when a battered woman seeks a protection order[23] against an abusive partner—privacy may be used to justify police unwillingness to enforce a protection order in a serious manner. Indeed, there is an acknowledged pattern of police unwillingness to respond effectively to violence against women in the home,[24] including a marked lack of rigor when it comes to the enforcement of battered women's protection orders against abusive men,[25] resulting in tragedies like those of Gillian Hadley and Jessica Gonzales, whose stories opened this chapter.[26]

### B. The Feminist Rejection of Privacy

Based on the foregoing, the rejection of privacy by some feminists is certainly justifiable. In the context of woman battering, it is evident that the ostensibly "neutral" privacy ascribed to the domain of the home is not enjoyed equally by men and women within.[27] The legal protection of privacy in the home in fact amounts to the safeguarding of men's privacy such that state nonintervention functions to preserve

23. Protection orders are the primary means whereby a battered woman may call upon police to protect her from an abusive partner. There are different kinds of legal orders that can include police enforcement, including a recognizance (also known as a "peace bond"), a restraining order, and conditions on bail bonds or probation orders. See George S. Rigakos, "Situational Determinants of Police Responses to Civil and Criminal Injunctions for Battered Women," *Violence Against Women* 3, no. 2 (1997): 204–216.

24. See George S. Rigakos, "The Politics of Protection: Battered Women, Protection Orders, and Police Subculture," in *Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada*, ed. Kevin D. Bonnycastle & George S. Rigakos (Vancouver: Collective Press, 1998), 82.

25. See Rigakos, "The Politics of Protection," (n. 23); and Joanne Belknap, "Law Enforcement Officer's Attitudes about the Appropriate Responses to Woman Battering," *International Review of Victimology* 4 (1995): 47–62.

26. Studies in which battered women were interviewed on their experiences with police showed that an overwhelming proportion of these women would never report to police again. See Shoshana Pollack, Melanie Battaglia, and Anke Alspach, *Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies* (Toronto: The Women Abuse Council of Toronto, 2005), 23. In one study, women identified the reasons they would not report abuse to police as including: delayed police response, feeling that police did not see domestic abuse as a serious issue, insensitivity, and feeling like they were being blamed for staying in an abusive relationship. See Joseph Roy Gillis et al., "Systemic Obstacles to Battered Women's Participation in the Judicial System," *Violence Against Women* 12, no. 12 (2006): 1150–1168 at 1159.

27. Privacy in the home attaches not as a result of the sanctity of property rights, but because of the privacy expectations of persons (read: men) *within* the home. See *Canada (director of Investigation & Research, Combines Investigation Branch) v Southam Inc. (sub. nom Hunter v Southam)* [1984] 2 S.C.R. 145 at para. 24.

the sanctity of the home as a reality for men at the expense of women. The law's failure to go behind the "curtain" of the private home permits the home to continue to be a site of "domestic tyranny marked by violence and coercion."[28]

In light of the realities of woman abuse, feminists have argued that it is almost meaningless to speak about a woman's right to privacy in the home at all, as privacy is employed to shield the actions of men who batter women from public scrutiny so that it "imperil(s) rather than secure(s) women's inviolability."[29] Indeed, privacy's role in masking violence against women in the home confirms the general feminist charge against privacy,[30] which contends that privacy does nothing for women because it is defined and employed according to men's needs and desires. How can feminists knowingly support, in theory or practice, a concept that privileges men's needs over women's with such injurious consequences? A concept that disguises violence against women and provides justification for the ongoing victimization of women at the hands of men behind closed doors? The short answer to the question of whether privacy can be good for women is, for many feminists, a resounding "no." It is my contention here, however, that this is not the only answer possible, nor, perhaps, is it the most desirable answer in the context of woman battering. The feminist critique and ultimate dismissal of privacy that emerges from the relationship between privacy and woman battering presents an "important but incomplete" analysis of the connections between privacy and woman battering that merits further consideration.[31]

## III. PUTTING WOMEN FIRST: RECONCEPTUALIZING THE PRIVACY—WOMAN BATTERING CONNECTION

### A. Whose Privacy and Against Whom? Battering as an Invasion of Women's Privacy

The feminist critique of privacy detailed above clearly demonstrates that in the context of woman battering, men's privacy interests are concealed behind the misleading, seemingly "neutral" rhetoric of protecting privacy in the home, and that the legal protection of this particular "brand" of privacy serves to disguise

28. Heather Strang & John Braithwaite, eds., *Restorative Justice and Family Violence* (New York: Cambridge University Press, 2002), 130.

29. McClain, "Inviolability and Privacy," 207, (n. 17).

30. Feminist critiques of privacy are numerous and multifaceted. Feminists have rejected privacy for reasons including the fact that privacy is grounds for preserving private property, status, and privilege that is contrary to economic justice, and the fact that individualist privacy is antithetical to the collective values of connection and caretaking that women often value. For a comprehensive survey of these and other feminist critiques of privacy, see Allen, *Uneasy Access*, 52, (n. 7).

31. Strang & Braithwaite, *Restorative Justice and Family Violence*, 131 (n. 28).

violence against women. What remains "incomplete" on this account of the privacy–woman battering relationship, I contend, is that it fails to cast a critical gaze on the assumption upon which it is based—that is, that the only privacy interests at stake are those of men and their "right to be let alone" against state intrusion into their homes. As feminists, it is incumbent upon us to ask: What about women's privacy interests in the context of woman battering? Although some in the privacy-rejection camp of feminism might claim that women's privacy is so marginalized in the context of woman abuse as to be virtually non-existent, I believe that if this is the case, we must endeavor to reconceptualize the privacy interests at stake in woman battering so as to put women's privacy needs front and center. In doing so, we must understand woman battering itself as an infringement of women's privacy.

At an intuitive level, it is clear that physical, sexual, and emotional abuse, as well as other forms of woman battering[32] infringe a woman's right to be "let alone" as against her battering partner, such that woman abuse may, indeed must, be understood as a violation of a woman's privacy interests. This account is further supported by an understanding of "the right to be let alone" that is concerned with the creation and maintenance of boundaries between the self and others. Clearly the coercive, abusive behaviors of woman battering, including, for example, stalking, amount to infringements of a woman's right to create and maintain privacy boundaries between herself and her batterer.[33] If we understand

32. Studies and statistics generally focus on physical or sexual abuse, and do not capture the full ambit of woman abuse, which includes psychological, emotional, and mental abuse, as well as other mechanisms of coercion employed by batterers including economic control and threats. See Stark, "Re-Presenting Woman Battering," (n. 5).

33. Studies estimate that 50% of women who experience domestic violence also experience stalking and harassment. M.B. Mechanic et al., "Intimate Partner Violence and Stalking Behaviour: Exploration of Patterns and Correlates in a Sample of Acutely Battered Women," *Violence and Victims* 15, no. 1 (2000): 55–72. The majority of cases involve a male accused who harasses a former female partner, with 56% of Canadian women who reported being stalked in 2002 identifying current or former partners as their stalkers. Karen Hackett, "Criminal Harassment," *Juristat: Canadian Centre for Justice Statistics* 20, no. 11 (2000) at 8, online: Statistics Canada <http://www.statcan.ca/bsolc/english/bsolc?catno=85-002-X20000118384>. This is particularly troubling since ex-intimate partner stalking is considered the most dangerous form of this crime. R.E. Palarea et al., "The Dangerous Nature of Intimate Relationship Stalking: Threats, Violence, and Associated Risk Factors," *Behavioural Sciences & the Law* 17, no. 3 (1999): 269–283. There were nine stalking-related murders in Canada between 1997 and 1999, and in *every case*, a woman was killed by a partner from whom she had recently separated. Hackett, "Criminal Harassment," 2, (n. 33). Isabel Grant, Natasha Bone, & Kathy Grant, "Canada's Criminal Harassment Provisions: A Review of the First Ten Years," *Queen's Law Journal* 29, no. 1 (2003): 175–241 at 179, note that because it is only recently that criminal harassment can form the foundation for a first-degree murder charge, it is possible that this is an underestimation of the connection between harassment and murder. Other charges, like

woman abuse as a violation of women's privacy, state nonintervention and police reluctance to seriously and reliably enforce protection orders must be seen as a privileging of men's right to be "let alone" from state interference over a woman's right to be "let alone" from a battering partner, so that for battered women, the home may be the place where they are afforded the *least* amount of privacy as a result of invasive abuse by a partner. In her landmark decision in *R. v. Lavallee*, Wilson J. for the Supreme Court of Canada noted the illusory nature of the home as a "sanctuary" for battered women, remarking, "[a] man's home may be his castle but it is also the woman's home even if it seems to her more like a prison in the circumstances."[34] A reading of woman battering that understands it as a violation of women's privacy interests invites an important reassessment of the feminist rejection of privacy in the context of woman abuse.

### B. Rethinking the Feminist Rejection of Privacy

If we understand woman battering as an infringement of women's privacy by their battering partners, it follows that to combat woman abuse, women require meaningful privacy boundaries so as to be "let alone" by their violent partners.[35] Battered women must be able to draw and enforce chosen boundaries around their lives in order to "keep out" battering partners. In the context of woman battering, the simple fact of the matter is that a woman cannot be abused, raped, harassed, or stalked if she cannot be accessed or located by her batterer,[36] a truth I have seen demonstrated in practice time and again. My claim here, then, is that

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sexual assault, break and enter, or forcible confinement might have been more common precipitators of homicide, even though there was overlap with criminal harassment.

34. *R. v Lavallee*, [1990] 1 S.C.R. 852 at para. 63. *Lavallee* was a landmark case because it was the Supreme Court of Canada's first acknowledgment of Battered Women's Syndrome and its utility for battered women accused of killing an abusive spouse or partner. In her decision, Wilson J. found that evidence of prior abuse and the effects of the abuse on a battered woman may be heard by a judge and jury when this information contributes to an argument that a woman acted in self-defense.

35. The fact that we so rarely consider the question of who we are "keeping out" with privacy boundaries is evidence of the patriarchal privileging of the relationship between the state and the individual citizen.

36. This is not to say that the abuse will necessarily end, because a partner could still be able to exert coercive control over a woman without knowing where she is physically located. Such coercive measures may include cutting off her finances, denying her access to her children, or cyberstalking. Criminal harassment is prohibited by s. 264 of the Criminal Code, s.264, (n. 19) Prohibited conduct under 264(2) includes:

(a) repeatedly following from place to place the other person or anyone known to them; (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them; (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business, or happens to be; or (d) engaging in threatening conduct directed at the other person or any member of their family.

if woman battering is a privacy invasion, a battered woman may require both quantitatively *more* privacy as against an abusive partner, and qualitatively more *effective* means to create and enforce those privacy boundaries so as to ensure her safety and that of her family. Privacy is therefore fundamental to a battered woman's safety and well-being, and on these grounds, it is my contention that feminists cannot reject privacy outright. After decades of opposing privacy's role in concealing violence against women in the home, feminists may now have to fight *for* privacy rights for battered women on the understanding that privacy can be a tool to protect women from their batterers.

This assertion stands in contrast to the privacy-rejection theories advanced by many feminists as a result of the different "players" implicated in the two analyses: Although some feminists have rejected privacy on the basis that it is deployed to disguise men's violence against women in a contest between the privacy of a "man's castle" and the state, understanding woman battering as a violation of women's privacy instead sees the key privacy interests worthy of protection as those of battered women, not as against the state, but as against their battering partners. Feminists who reject privacy often assert that in order to combat woman battering, the state must intervene reliably and effectively in the private sphere of the home,[37] and indeed this strategy may have an important role to play in putting an end to woman abuse; however, if we understand woman battering as an invasion of women's privacy, then any kind of state intervention must recognize and engage with the preservation of a *woman*'s privacy boundaries as against her batterer, instead of seeing only the abstract contest between the state and the privacy of the domestic home.

Even more important than increasing the effectiveness of state intervention, perhaps, battered women must have the means necessary to access privacy in meaningful ways so that they can create and enforce their own privacy boundaries against a battering partner instead of relying on the state to do so on their behalf. The realization of true privacy for battered women may therefore involve more than simply a negative "right to be let alone."[38] Ensuring only a negative right to be free from outside scrutiny is premised on the false presumption that "the right to choose is contained entirely within the individual and is not circumscribed by the material conditions of the individual's life."[39] Although it is true that

37. See Jones, *Next Time She'll Be Dead*, (n. 4). But see Evan Stark, "Insults, Injury and Injustice: Rethinking State Intervention in Domestic Violence Cases," *Violence Against Women* 10, no. 11 (2004): 1302–1330.

38. Feminist critiques have emphasized the ways in which a privacy that simply proscribes state intervention exempts the state from any obligation to provide the conditions and resources necessary for privacy to be accessed, employed, and enforced by women. See, e.g., Dorothy Roberts, "Punishing Drug Addicts who have Babies: Women of Colour, Equality, and the Right of Privacy," *Harvard Law Review* 104, no. 7 (1991): 1419–1482 at 1477.

39. Roberts, "Punishing Drug Addicts," 1479, (n. 38).

nonintervention may be a necessary aspect of the "right to be let alone," in many instances, merely shielding a sphere of decision-making from coercion by outside forces will be insufficient to ensure that all women can access, create, and enforce the privacy boundaries they require in situations of battering.[40] The abstract freedom to create privacy boundaries "is of meager value without meaningful options from which to choose and the ability to effectuate one's choice,"[41] and so ensuring that battered women can access privacy and create and enforce privacy boundaries requires first that women enjoy the conditions necessary to do so.

In the context of woman abuse, it is clear that certain prerequisites must be in place for a woman to realize meaningful privacy boundaries as against a battering partner, including "educational, economic and sexual equality [as] a requirement of meaningful choice."[42] Under current conditions, however, where women's access to goods like economic security and educational or employment opportunities is circumscribed by the realities of systemic inequality, a battered woman may make the choice to leave an abusive partner only to find herself without opportunities to make significant life choices that would allow her to create and enforce effective privacy boundaries against her batterer.[43] A woman's decision to leave an abusive partner is seriously constrained by her available options once she exits the relationship, options that are limited by ". . . women's subservient position within society and the family structure, sex discrimination in the

40. Roberts, "Punishing Drug Addicts," (n. 38) has explored negative privacy as it relates to racialized women, concluding that a new approach to privacy must include positive obligations on the government and recognition of the connection between the right of privacy and racial equality.

41. Roberts, "Punishing Drug Addicts," 1478, (n. 38).

42. Anita Allen, "Coercing Privacy," *William & Mary Law Review* 40 (1999): 723–757 at 754.

43. Systemic factors limiting a woman's ability to exit an abusive situation may include: lack of affordable housing and available employment opportunities, concerns about child care, a deficiency in social services including women's shelters and inadequate protection from police, societal pressure and women's cultural training to "see things through" and keep the family together, fear of losing children, and conflicting personal, family, religious, and cultural loyalties. See, e.g., Ontario Association of Interval and Transition Houses, "Locked In, Left Out. Impacts of the Budget Cuts on Abused Women and Their Children" in *Violence Against Women: New Canadian Perspectives*, eds. Katherine M.J. McKenna & June Larkin, (Toronto: Ianna Publications, 2002), 413. A woman's ability to leave a battering relationship may be further constrained by intersecting oppressions of race, class, sexuality, language, and (dis)ability that "often converge in these women's lives, hindering their ability to create alternatives to the abusive relationship . . ." Crenshaw, "Mapping the Margins," 1245, (n. 16). See also Anne McGillivray & Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999) addressing these issues as they impact upon the lives of Aboriginal women in Canada.

workplace, economic discrimination, problems of housing and a lack of child care, lack of access to divorce, inadequate child support, problems of single motherhood, [and] lack of educational and community support."[44] Recognition that women require the material and social conditions of autonomy and equality to make real privacy possible is an important first step toward ensuring that battered women are able to exercise and employ privacy and to "police" their own privacy boundaries as against a battering partner.

Beyond recognition, creating and ensuring privacy-promoting conditions for battered women in particular, and for *all* women generally, within the current confines of our society is a daunting task. The restrictions imposed by systemic inequality continue to impede women's access to meaningful privacy. Understood within this broader context, the feminist critique and dismissal of privacy may be seen as stemming less from the particulars of the concept of privacy itself and more as a result of the conditions within which privacy is experienced and employed—that is, within the social, economic, political, and legal realities of a society that systematically privileges men and undervalues women. This analysis casts further doubt on the utility of the feminist rejection of privacy, and begs the question of whether privacy is really the problem that feminists seek to address by rejecting privacy.

## IV. IS PRIVACY THE PROBLEM?

The systems of patriarchy and its interlocking systems of oppression,[45] including racism, classism, ableism, heterosexism, and neo-colonialism, dictate whether and how privacy is accessed (or rendered inaccessible), experienced (or not experienced), valued (or undervalued), and protected (or not). In the case of woman battering, it is clear that the patriarchal positioning of privacy informs the determination of whose privacy "counts," such that men's privacy rights "trump" women's, as demonstrated in the preceding section. Patriarchy situates men as the dominant, defines the "right to be let alone" with reference to men's needs and desires, and employs privacy to accomplish patriarchy's goals, which include the subordination of women. Patriarchy and its interlocking oppressions thereby permit those with power (men) to act with impunity toward those with less power (women),[46] in accordance with the systemic privileging of men that is foundational to patriarchy in all spheres of society.

Privacy is deployed along the fault lines of patriarchy to solidify existing hierarchies and bolster the project of patriarchy and its interlocking oppressions. We thereby find ourselves in a situation where "[t]o the extent that the government

44. Schneider, *Battered Women and Feminist Law Making*, 72, (n. 20).
45. Razack, *Looking White People in the Eye*, (n. 16).
46. See Robin West, "Reconstructing Liberty," *Tennessee Law Review* 59 (1992): 441.

is infused with patriarchal, heterosexual ideals, men's and women's privacy rights are likely to reflect patriarchal, heterosexual ideals of [privacy],"[47] which quite simply are not attuned to the needs and desires of women. The consequences are predictably detrimental to women, and include the privileging of men's privacy in the home such that woman abuse is concealed from sight. The problem, however, is not privacy itself, but the fact that privacy exists within a "constricted referential universe"[48] where existing lines of power defined by gender, race, class, disability, and sexuality dictate the form privacy will take and the ways it will be employed.

Accepting that the source of the privacy problem is not the concept of privacy itself, but the ways in which privacy is accessed, employed, and enforced within the confines of a system circumscribed by patriarchy and its interlocking oppressions leads privacy-rejection feminists to conclude that within the limits of a society characterized by inequality, it makes no sense to devote time or resources to privacy. Faced with the immensity of the ubiquitous obstacle of patriarchy, privacy-rejection feminists halt their analyses and discard privacy outright, apparently concluding that privacy might be redeemed for women only when it can be employed and accessed in the context of real equality. Conversely, I remain hopeful about privacy's present potential as a tool for the protection of battered women, even within the confines of inequality. Feminists must continue to challenge the particular limits of patriarchy that circumscribe privacy for women, and work toward affecting the kinds of systemic change required to realize equality in the long term; however, we must keep women safe and alive in order to do so. Equality may be the long-term goal, but as a "stop-gap" measure to ensure battered women's safety *right now*, privacy is worthy of our time and resources.

Feminist critiques of privacy have recognized the limits of privacy as it is currently defined and employed. Acknowledging these limits does not, however, automatically mandate a blanket negation of privacy itself, and doing so risks implied acceptance of the status quo. More importantly, perhaps, rejecting privacy simply does not reflect the realities of women's lives, for whether we love or hate it, reject or accept it, privacy matters. It can and does play an important role in battered women's lives, as demonstrated in theory and confirmed in reality by my experience working in a battered women's shelter. If and when systemic equality is realized, woman battering itself may become a relic of history, doing away with the need for strong privacy protections behind which battered women may "hide" in order to secure their safety. Ultimately, of course, this is the world I want to live in—one where systemic equality dictates that woman battering is simply unthinkable. In the meantime, however, I am willing to use all available

47. Allen, "Coercing Privacy," 749, (n. 6).
48. Williams, *Alchemy of Race and Rights*, 159, (n. 7).

resources, including imperfect privacy, to keep battered women safe from violent partners.

## CONCLUSION

I remain committed to the belief that theory matters most when it is accessible as a tool of transformation in people's lives. This is most likely to be the case when theory is alive to the lived realities of those upon whose experiences it is based. Feminists have justifiably charged privacy with a number of offenses, among the most serious of which is its role in shielding woman abuse from public scrutiny and serving as justification for state nonintervention in the private home to prevent and protect women from abuse. The subsequent blanket rejection of privacy that has followed this critique, however, is no answer to the problem of woman battering, nor does it reflect the lives of women who may require privacy to protect themselves from a battering partner. Despite the existing limits of our patriarchal society, feminist theory and practice must remain alive to privacy's potential and work to reclaim and conscript privacy as a tool to be used in the fight against woman battering. When battered women, indeed when all women, can establish and defend boundaries in accordance with their needs and desires, privacy becomes a tool for empowerment, as opposed to an instrument of oppression.