

# THE STATE AS RIGHTS-FACILITATOR: RECONCILING BRANCHES OF PRIVACY DOCTRINE THROUGH CONSENT

KATE KOBRIGER\*

## INTRODUCTION

Scholars broadly acknowledge the tension between privacy’s oppressive and liberative potential: domestic privacy<sup>1</sup> has traditionally hindered gender equality by shielding people from accountability for domestic violence,<sup>2</sup> while decisional privacy<sup>3</sup> can promote gender equality by preserving individuals’ right to make decisions about their sexual and reproductive lives.<sup>4</sup> As this Note later

---

© 2023 Kobriger. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author(s) and source are credited.

\* J.D. 2023, Columbia Law School; M.P.H. 2023, Mailman School of Public Health; B.A. 2014, University of Wisconsin – Madison. I am grateful for Professor Carol Sanger’s expert guidance as I researched and wrote this Note, and for Dorchen Leidholt’s instruction on domestic violence and the law, which inspired it. I extend enormous gratitude to Elias Passas, whose spirit of generosity and change continues to encourage growth in my thinking. Finally, many thanks to the editorial staff of the *Columbia Journal of Gender & Law* for their helpful comments and assistance in preparing this piece for publication.

<sup>1</sup> As discussed in more detail in Part I.A, “domestic privacy” refers broadly to the state’s refusal to interfere in relationships traditionally associated with the home, such as marriages and parenting relationships.

<sup>2</sup> In this Note I use the broader term “domestic violence” to encompass violence against a family member, member of one’s household, or a past, present, or prospective intimate partner.

<sup>3</sup> As discussed in more detail in Part I.C, “decisional privacy” refers broadly to the individual right to make choices about matters of a traditionally personal character, such as using contraception, engaging in sexual activity, consenting to medical treatments, and—at times—obtaining an abortion. The bounds of decisional privacy remain in flux.

<sup>4</sup> See, e.g., Cheryl Hanna, *Behind the Castle Walls: Balancing Privacy and Security in Domestic Abuse Cases*, 32 T. JEFFERSON L. REV. 65 (2009) (hereinafter *Behind the Castle Walls*); Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 570–81, 595 (2006); Daniel Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1134 (2002); Annabelle Lever, *Must Privacy and Sexual Equality Conflict? A Philosophical Examination of Some Legal Evidence*, 67 SOC. RSCH. 1137 (2000); Catharine MacKinnon, *Privacy and Equality: Notes on Their Tension*, 21 THE TOCQUEVILLE REV. 77, 79–80 (2000) (hereinafter *Privacy and Equality*); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991); ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 180–81 (1988); CATHARINE MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED: DISCOURSE ON LAW AND LIFE* 93–102 (1987).

quantifies, this tension allows for the perpetuation of patriarchal ideals, both for people experiencing domestic violence and people seeking to self-determine their reproductive life. Moreover, this tension excludes individuals who do not adhere to those ideals. The tension also yields a system in which progressive arguments under one permutation of privacy may be coopted to become regressive arguments under another permutation of privacy, thereby undermining progressive movements as a whole.

Part I reviews the development of the tension between privacy's simultaneously oppressive and liberative potential. Section I.A discusses domestic privacy's role in providing a safe haven for domestic violence, including how it became fodder for exceptions to progressive legal doctrines and justifies police inaction even when survivors explicitly seek police protection. This section seeks to illuminate how domestic privacy and these attendant patriarchal wrongs became ingrained in the American legal system by examining how courts implicitly Constitutionalized them through references to Fourth Amendment principles. Next, Section I.B analyzes the iterative erosion of domestic privacy through equal protection arguments, which ultimately succeeded in introducing some state support for individuals experiencing domestic violence. Finally, Section I.C compares this evolution of domestic privacy to the line of cases that developed decisional privacy, which is typically considered distinct from domestic privacy. Section I.C finds that courts' decisional privacy opinions, like the early cases involving domestic privacy, are rooted in logics of marital and spatial privacy. In other words, these opinions draw a barrier between the home and the state that simultaneously bolsters adults' autonomy in making decisions about home or family life and obviates state responsibility for harms sustained through traditionally home- or family-based relationships. Thus, Part I concludes that domestic and decisional privacy should be understood not as two distinct doctrines, but rather as two branches growing from the same doctrinal root.

Even if domestic and decisional privacy stem from the same root, implementing them in the context of gender equality generates tension between arguments against domestic violence and arguments for reproductive self-determination. Part II describes three ramifications of that tension. First, Section II.A describes how privacy has antithetical impacts on the domestic sphere and the reproductive rights sphere. Greater privacy in the domestic sphere means less state support for individuals seeking accountability for or escape from domestic violence. Advocates for domestic violence survivors therefore aim to reduce privacy. However, greater privacy in the reproductive rights sphere means less state interference in individuals' self-determination. Advocates for reproductive rights therefore aim to bolster privacy. Less state support for

---

individuals seeking to escape domestic violence is antithetical to the progressive movement, while less state involvement in individuals' ability to self-determine squares with progressive ideals. As advocates in the domestic violence and reproductive rights spheres argue for their clients, they must reckon with the possibility that a successful argument in one sphere risks undermining progressive arguments in the other sphere; an argument that is effective at inviting state support into the "private" zone to protect against domestic violence may also be effective at inviting state interference into the "private" zone to prevent reproductive self-determination. Conversely, an argument that repels state interference in the "private" zone of reproductive self-determination may also permit state non-intervention in the "private" zone of domestic violence. Section II.B then introduces the state's inconsistent application of privacy doctrine to individuals of particular socially salient identities. The inconsistent application of privacy doctrine persists as a result of deference to judges, police officers, and other representatives of the state in their respective determinations regarding which relationships "deserve" to be treated as parcel to the home and whose homes should be considered private.

Part III reconciles the erosion of domestic privacy with the promotion of decisional privacy by finding that in each context, individuals' rights and agency are furthered through a framework that prioritizes consent. Sections III.A and III.B apply a consent framework to domestic violence and reproductive rights cases, respectively. Those Sections find that such a framework positions the state as a rights-facilitator in either setting, requiring the state to make itself available to those who seek assistance in effectuating their Constitutionally-protected decisions. The framework foregrounds welfare programs that combat coercion, provide resources, and empower survivors of domestic violence, while leaving important Constitutional rights intact. Section III.C concludes by exploring how a consent framework is entirely consistent with long-established state interests in health and life, and therefore furthers the interests of both individuals and the state.

Such arguments are unlikely to succeed at the federal level, given current political realities and the composition of the United States Supreme Court. For example, this consent framework runs counter to the United States Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*. Despite this current political reality, this Note seeks to chart a path for policymakers at all levels and for courtroom advocates working to expand self-determination at the state level.<sup>5</sup>

---

<sup>5</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284–84 (2022) (situating reproductive decision-making in state legislatures, rather than the individuals whose bodies, families, and lives are at stake).

## I. Privacy Operates as Both an Impediment to and Source of Gender Equality

Privacy is an amorphous body of law and, as such, defies static definition. “Privacy” has different connotations and contours in a legal setting, compared to lay ideas about the term. In a 1998 article, Professor Jerry Kang referred to privacy as “a chameleon that shifts meaning depending on context.”<sup>6</sup> He went on to define privacy in three clusters. First, “physical space” or “spatial privacy” includes, “in particular, the extent to which an individual’s territorial solitude is shielded from invasion by unwanted objects or signals.”<sup>7</sup> Kang identified spatial privacy with Fourth Amendment protections in areas closely associated with one’s home.<sup>8</sup> Second, “decisional privacy” is “principally concerned with choice, an individual’s ability to make certain significant decisions without interference.”<sup>9</sup> Kang’s definition of decisional privacy was intertwined with the landmark *Roe v. Wade* decision, which found a fundamental substantive due process right to abortion.<sup>10</sup> While the United States Supreme Court later altered the scope of decisional privacy in *Dobbs*,<sup>11</sup> Kang’s words about “significant decisions” remain a guidepost in conceptualizing decisional privacy. Third, “information privacy concerns an individual’s control over the processing—i.e., the acquisition, disclosure, and use—of personal information.”<sup>12</sup> As an illuminating example, Kang offered that information privacy is invaded when someone “obtains sensitive medical data by rifling through confidential files without permission.”<sup>13</sup>

Kang clarified that these three clusters “are not sharply separate. They are functionally interconnected and often simultaneously implicated by the same event or practice.”<sup>14</sup> Kang left space for additional clusters or even “a single

---

<sup>6</sup> Jerry Kang, *Information Privacy in Cyberspace*, 50 STAN. L. REV. 1193, 1202 (1998).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See *Dobbs*, 142 S. Ct. at 2284 (holding that “[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion” and expressly overruling *Roe v. Wade* and *Planned Parenthood v. Casey*).

<sup>12</sup> Kang, *supra* note 6, at 1203.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

abstract cluster,” though he declined to explore the possibilities in that writing.<sup>15</sup> Family law scholars add the cluster of “domestic privacy”—sometimes reconfigured as “family privacy”—which is a historically “marital-based” “sphere of non-intervention and autonomy” that, in more modern reconstructions, can incorporate barriers to state intervention in caretaking relationships.<sup>16</sup>

In its many forms, privacy doctrine has been both enemy and friend to the feminist legal movement. This Part reviews the development of privacy’s dichotomous relationship to the movement, beginning in Section I.A by documenting how domestic privacy was built on and for ideals of patriarchal power. Section I.B then analyzes how equal protection arguments eroded domestic privacy, completing the foundation for a comparison in Section I.C of the doctrinal evolution of domestic privacy to the doctrinal evolution of decisional privacy. Part I ultimately concludes that domestic privacy and decisional privacy are rooted in the same logics, and therefore should be understood not as two distinct doctrines, but rather as two branches growing from the same doctrinal root.

### **A. Domestic Privacy Often Functions as a Legal Tool for Enabling Domestic Violence**

Domestic privacy is the present-day culmination of several ancient doctrines—chastisement, coverture, marital unity, and marital privacy—and the underenforcement of more modern law against domestic violence. Implicit in the logic of domestic privacy is a reverence for the home as a private physical space, protected against state intrusion. But while significant scholarly analysis of these doctrines exists, those analyses infrequently employ a Fourth Amendment lens. The Fourth Amendment establishes an explicit nexus with domestic life by protecting people’s right to security in their “houses.”<sup>17</sup> Some of the most iconic language establishing domestic privacy builds on that nexus, invoking Fourth Amendment sentiments to lend the appearance of Constitutional credence to domestic privacy doctrine. Further, because the Fourth Amendment’s protections extend beyond the physical home, invoking ideas of the Fourth Amendment helps to translate domestic privacy from the home itself to relationships and activities traditionally conceived of as parcel to

---

<sup>15</sup> *Id.*

<sup>16</sup> See Kim, *supra* note 4 at 580–82 (2006) (citing scholars such as Reva Siegel, Barbara Bennett Woodhouse, and Martha Albertson Fineman, among others, in discussing domestic privacy and family privacy).

<sup>17</sup> U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]”).

the home. The following Sections trace this evolution of domestic privacy from the ancient doctrines through today.

### **1. Coverture Rationalized a Corollary Right in Husbands to Chastise Their Wives**

Husbands long enjoyed the power of chastisement over their wives. The doctrine of chastisement—a euphemism for abuse—reaches back to early Roman law, which held that “the marital power of the husband was absolute, and he could chastise his wife even to the point of killing her.”<sup>18</sup> Under English common law, the husband’s right of chastisement was more restrained. Some authorities dictated that husbands could legally beat their wives as long as they used a switch no larger than their thumb,<sup>19</sup> while others described “this power of correction [as] confined within reasonable bounds.”<sup>20</sup> Chastisement was justified through coverture, the common law principle that when a woman married, she was subsumed into the “cover” of her husband.<sup>21</sup> The woman’s legal identity merged into her husband’s. As such, he gained possession of her property and represented her in all legal matters. And, because he was “to answer for her misbehaviour, the law thought it reasonable to entrust him with this power of restraining her.”<sup>22</sup> The United States imported this English doctrine, rule of thumb and all.<sup>23</sup>

### **2. When Social Movements Spurned Chastisement, Marital Unity and Marital Privacy Took Its Place**

In the 1840s, the Married Women’s Property Acts began to afford women some measure of legal identity separate from their husbands.<sup>24</sup> Due to feminist

---

<sup>18</sup> Beime Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REGISTER 241, 241 (1917).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 242; 1 WILLIAM BLACKSTONE, COMMENTARIES \*421, \*432 (1771); see also Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2122–25 (1996).

<sup>21</sup> 1 BLACKSTONE, *supra* note 20, at \*430.

<sup>22</sup> Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 KAN. L. REV. 695, 720–24 (2014); 1 BLACKSTONE, *supra* note 20, at \*432.

<sup>23</sup> Stedman, *supra* note 18, at 243–48; see also Siegel, *supra* note 20, at 2125 n.25 (reviewing American cases recognizing chastisement in the nineteenth century and especially discussing *Bradley v. State*, 1 Miss. (1 Walker) 156 (1824)).

<sup>24</sup> WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 859–64 (4th ed., 1971); see also Carey, *supra* note 22, at 723–24; Lauren M. Gambier, *Entrenching Privacy: A Critique of Civil Remedies for Gender-Motivated Violence*, 87 N.Y.U. L. REV. 1918, 1923 (2012).

efforts to enact these laws and numerous campaigns against corporal punishment generally, chastisement's legal authority slowly became more restrained.<sup>25</sup> As wife beating gained publicity as a social issue, American courts seemed to sense that coverture and chastisement would not last. Courts began turning away from chastisement and coverture as explicit reasons to justify nonintervention in domestic violence cases. Instead, they began using the doctrine of marital privacy as an alternative rationale for refusing to intervene in the home.

In the infamous 1864 case of *State v. Black*, the North Carolina Supreme Court's reasoning mirrored the chronology of the transition of the law itself by justifying physical abuse through coverture, chastisement, and marital privacy in succession.<sup>26</sup> First, coverture: "A husband is responsible for the acts of his wife, and he is required to govern his household."<sup>27</sup> Immediately thereafter, the court invoked coverture's corollary, chastisement: "[A]nd for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself."<sup>28</sup> Finally, the North Carolina court appended an argument for marital privacy: "The law will not invade the domestic forum or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should."<sup>29</sup> The opinion made a careful pit stop to exclude the most egregious abuse, excepting beatings in which "some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify [the husband's] own bad passions."<sup>30</sup>

In the late 19<sup>th</sup> century, other state courts similarly held that chastisement did not permit beatings so severe that they result in death.<sup>31</sup> However, their

---

<sup>25</sup> Siegel, *supra* note 20, at 2124–30. For a thorough history of the development and eventual repudiation of chastisement, see *id.* at 2122–41.

<sup>26</sup> See *State v. Black*, 60 N.C. 266, 267 (1864).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., *Commonwealth v. McAfee*, 108 Mass. 458, 459, 461 (1871) (refusing to instruct a jury on the husband's legal right to chastisement after he killed his wife and holding that "[f]here is no authority in [wife beating's] favor in this Commonwealth").

decisions represented no great change in the law. English chastisement did not include the right to beat one's wife to death, so it was a simple task for an American court to disallow the same. Moreover, when spousal abuse did not result in death, the state was far less likely to enforce the law against the husband or take any action to support the wife:<sup>32</sup>

The courts have been loath to take cognizance of trivial complaints arising out of the domestic relations . . . . Not because those relations are not subject to the law, but because the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government. . . . [W]e will not interfere with or attempt to control it, in favor of either husband or wife, unless in cases where permanent or malicious injury is inflicted or threatened.<sup>33</sup>

This opinion notably concedes that marital relationships are “subject to the law,” even as the court declines to intervene. This paradox foreshadows more than 150 years of invented exceptions to and underenforcement of legal developments, often on the basis of preserving privacy, when those developments would have otherwise enabled increased protection of women.<sup>34</sup>

### 3. Exceptions to Egalitarian Legal Developments Promoted, and Continue to Promote, Domestic Privacy

Examples of exceptions to legal developments that were intended to promote gender equality abound. Though the Married Women's Property Acts of the 1800s permitted women to engage in lawsuits on their own behalf, courts interpreting those acts discussed coverture and a reticence to bring private matters into “public notice” to carve out an exception for interspousal torts.<sup>35</sup>

---

<sup>32</sup> Siegel, *supra* note 20, at 2131; *see also* Gambier, *supra* note 24, at 1923 (“[R]emnants of the doctrine [of coverture] have continued to influence the law. One prominent example of such influence is law enforcement policies of non-intervention in domestic disputes on the basis of marital privacy.”).

<sup>33</sup> *State v. Rhodes*, 61 N.C. 453, 454, 456–57 (1868).

<sup>34</sup> *Id.* at 454; Gambier, *supra* note 24, at 1930–31 (“Despite the fact that the law has enabled greater enforcement of crimes against women, such crimes have not actually been enforced to a meaningful extent. . . . [L]egal changes were insufficient to undo the long-running and deeply-rooted understanding that women and the harms they suffer are not matters of public concern.”).

<sup>35</sup> *See e.g.*, *Thompson v. Thompson*, 218 U.S. 611, 616–18 (1910); *Austin v. Austin*, 136 Miss. 61, 70–73 (1924) (collecting cases with similar interpretations of Married Women's Property Acts in California, Georgia, Iowa, Kentucky, Maine, Minnesota, Montana, Pennsylvania, Tennessee, Texas, Virginia, and Washington; and collecting cases with opposite interpretations in Alabama, Arkansas, Connecticut, New Hampshire, and Oklahoma).



Interpreting the District of Columbia Married Women's Property Act, the United States Supreme Court asserted that allowing spouses to sue each other in tort:

would at the same time open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel, and alleged injuries to property of the one or the other, by husband against wife or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the lawmaking power hesitate to enact it.<sup>36</sup>

The Court thus attempts to position readers in the posture of domestic privacy by reminding them of the purported detriments that would result from bringing spousal complaints into "public notice" and highlighting interspousal tort claims' impact on "domestic harmony." Of course, preserving "domestic harmony" meant offering legal protection to men who caused harm, while women had no recourse from the law. Thus, "harmony" meant simply hiding domestic violence from the public eye and expecting women to endure abuse silently, since they could not avail themselves of legal protections. The Court then asserted that such "considerations are addressed to the legislative, not the judicial branch of the Government. In cases like the present, interpretation of the law is the only function of the courts."<sup>37</sup>

Supposedly free of the bias of such policy considerations, the Court went on to refer to interspousal tort claims as a "radical and far-reaching change [that] should only be wrought by language so clear and so plain as to be unmistakable evidence of legislative intention."<sup>38</sup> A law declaring that "[m]arried women shall have power to . . . sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried," was neither clear nor plain enough to alter the entrenched bounds of domestic privacy.<sup>39</sup> The Court determined that the legislature must

---

<sup>36</sup> *Thompson*, 218 U.S. at 615–16, 617–18 (interpreting D.C. Code, 31 Stat. 1189, 1374, SEC. 1155 Power of Wife to Trade and Sue and be Sued, March 3, 1901).

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

<sup>38</sup> *Id.* at 618.

<sup>39</sup> *Id.* at 615–16, 619.

have contemplated an exception for domestic violence when it legislated on violence against women in general.<sup>40</sup>

Except for a handful of early abrogators, state courts generally adopted the same approach as the Supreme Court in construing their Married Women's Property Acts.<sup>41</sup> For example, the Mississippi Supreme Court, after laying out the basic facts of the case, began its analysis by declaring that "it should be kept in mind of what the common-law disabilities of coverture consisted," and reviewing each tenet of coverture in detail.<sup>42</sup> Then, because "it was necessary to confer a right of action" on wives "in order to remove any disability of coverture," the Mississippi court—like the United States Supreme Court—required statutory language that explicitly granted wives the right to sue their husband in tort.<sup>43</sup> Even against the Mississippi legislature's express declaration that "[m]arried women are fully emancipated from all disability on account of coverture," the court held that "[i]t was not the purpose of the makers of our [State] Constitution nor of the legislature to entirely destroy the unity of man and wife."<sup>44</sup> Domestic privacy—invoked here in terms of marital "unity"—once again survived legislation expressly dismantling coverture, through a court's constructive exception to broadly drafted language.

Interspousal tort immunity was ultimately dismantled state by state.<sup>45</sup> In 1914, Connecticut, the earliest abrogator, interpreted its Married Women's Property Act opposite the United States and Mississippi Supreme Courts.<sup>46</sup> The Connecticut court recognized that other states interpreted similar statutes not to provide a right of action against a spouse in tort, generally because there was no express provision for the right to sue.<sup>47</sup> However, Connecticut found that its

---

<sup>40</sup> *Id.* at 619.

<sup>41</sup> *See supra* note 35.

<sup>42</sup> *Austin*, 136 Miss. at 69–70.

<sup>43</sup> *Id.* at 71.

<sup>44</sup> *Id.*

<sup>45</sup> *See* *Waite v. Waite*, 618 So. 2d 1360, 1361 (Fla. 1993) (abrogating interspousal tort immunity on the grounds that there is no public policy rationale for upholding it and noting that thirty-two states had already abrogated the doctrine); *Waite v. Waite*, 593 So. 2d 222, Appx. (Fla. 3d Dist. Ct. App. 1991) (collecting cases abrogating interspousal immunity, organized by level of abrogation and state).

<sup>46</sup> *Brown v. Brown*, 88 Conn. 42, 46 (1914) ("If a cause of action in her favor arises from the wrongful infliction of such injuries upon her by another, why does not the wrongful infliction of such injuries by her husband now give her a cause of action against him?").

<sup>47</sup> *Id.*

Married Women's Property Act was intended to "change the foundation of the legal status of husband and wife. . . . The statute leaves nothing to implication."<sup>48</sup> The Connecticut court held that such a clear alteration to the status of married people replaced Connecticut common law.<sup>49</sup> In other states, interspousal tort immunity continued to protect husbands from civil liability for their abuses until late in the twentieth century. Mississippi, which staunchly required express statutory language to "entirely destroy the unity of man and wife" when it upheld interspousal tort immunity in 1924,<sup>50</sup> declared in 1988 that

[b]y discarding 'the common law unity concept,' this Court would imply no denigration to the spiritual and emotional unity which is recognized by virtue of marital vows. . . . [T]his concept of legal unity, which constituted a woman a chattel to her husband, that can no longer operate to bar one spouse from suing the other for intentional tortious claims.<sup>51</sup>

The latest abrogators, including Florida, Hawaii, and Delaware, eliminated interspousal tort immunity in 1993.<sup>52</sup>

Similarly, marital rape exceptions long shielded husbands from criminal sexual assault laws, even against constitutional claims: Such exceptions consisted of state criminal statutes that exempted rapists from prosecution for assaulting their spouse.<sup>53</sup> Because marital status involved neither a suspect class nor a fundamental right, the exceptions warranted only rational basis review—which they passed, based on a judicial aversion to probing into the marital relationship: First, marital rape exceptions purportedly prevented sexual assault from becoming a "substantial obstacle to the resumption of normal marital relations" by eliminating the possibility of the criminal system's interference.<sup>54</sup> Second, they "avert[ed] difficult emotional issues and problems of proof . . . ."<sup>55</sup>

---

<sup>48</sup> *Id.* at 47.

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

<sup>50</sup> *Austin*, 136 Miss. at 71.

<sup>51</sup> *Burns v. Burns*, 518 So. 2d 1205, 1209 (Miss. 1988).

<sup>52</sup> *Waite*, 618 So. 2d at 1361; HAW. REV. STAT. § 572-28 (2022); *Beattie v. Beattie*, 630 A.2d 1096, 1098–99 (Del. 1993).

<sup>53</sup> *See, e.g., People v. Brown*, 632 P.2d 1025, 1026–27 (Colo. 1981).

<sup>54</sup> *Id.* at 1027.

<sup>55</sup> *Id.*

Without marital rape exceptions, “juries would be expected to fathom the intimate sexual feelings, frustrations, habits, and understandings unique to particular marital relationships.”<sup>56</sup> Courts began invalidating marital rape exceptions in 1984,<sup>57</sup> but even 35 years later, survivors of marital rape continued to encounter “little loopholes and sub-statutes that hide deep in the books” and block marital rape prosecutions.<sup>58</sup> For example, until a 2019 repeal,

Minnesota prevented someone from being prosecuted [for rape] if they are in a ‘voluntary sexual relationship’ at the time of the alleged offense, or if the complainant is the actor’s legal spouse. . . . Roughly a dozen states shield a spouse from prosecution in a rape case, including South Carolina

and Ohio.<sup>59</sup> These laws may be unenforceable, but their mere presence signals the treatment survivors can expect if they desire to proceed with a prosecution. Coverture was thus “eroded bit by bit. But it has never been fully abolished. The ghost of coverture has always haunted women’s lives and continues to do so.”<sup>60</sup>

---

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

<sup>57</sup> *People v. Liberta*, 474 N.E.2d 567, 571 (N.Y. 1984); see also David Margolick, *Top State Court Rules Husbands Can Be Charged in Rape of Wives*, N.Y. TIMES, Dec. 20, 1984, at A1, <https://www.nytimes.com/1984/12/21/nyregion/top-state-court-rules-husbands-can-be-charged-in-rape-of-wives.html> [<https://perma.cc/U696-4AJG>] (noting that *People v. Liberta* “apparently marks the first time the highest court in any state has invalidated an explicit statutory exemption for marital rape”); but see Briana Bierschbach, *This Woman Fought to End Minnesota’s ‘Marital Rape’ Exception, and Won*, NPR (May 4, 2019), <https://www.npr.org/2019/05/04/719635969/this-woman-fought-to-end-minnesotas-marital-rape-exception-and-won> [<https://perma.cc/8DQZ-WK9P>] (identifying a 1979 Massachusetts case as “the first marital rape conviction in the nation”).

<sup>58</sup> Bierschbach, *supra* note 57.

<sup>59</sup> *Id.* Bierschbach expounded on the South Carolina law, which required a married victim “to prove a threat of physical violence within 30 days of the rape.” *Id.*

<sup>60</sup> Catherine Allgor, *Coverture—the Word You Probably Don’t Know but Should*, NAT’L WOMEN’S HISTORY MUSEUM (Sept. 4, 2014), <https://www.womenshistory.org/articles/coverture-word-you-probably-dont-know-should> [<https://perma.cc/4B8M-2SGF>]; see also Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 101–102 (2016) (“The Married Women’s Property Acts and other legal changes did gradually eradicate the most obvious facets of coverture” but, as in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the United States Supreme Court has nevertheless continued to “invoke[] longstanding tropes that have traditionally been deployed in defense of coverture and marriage defined by gender inequality.”).

#### 4. Even Without Established Exceptions to Egalitarian Legal Developments, Underenforcement of Domestic Violence Survivors' Rights Reinforces Domestic Privacy

Even when no theory of law offers abusers blanket protection from criminal liability, patterns of police underenforcement and selective prosecution nevertheless obstruct justice and safety for survivors of domestic violence. A nationwide survey found that 88% of domestic violence advocates, service providers, attorneys, and people working in membership-based organizations “reported that police ‘sometimes’ or ‘often’ do not believe survivors or blamed survivors for the violence.”<sup>61</sup> Respondents to the same survey reported that “survivors told them they had called police in the past only to find that police took no action, did not believe them, minimized the situation, or threatened the survivor with arrest.”<sup>62</sup> This police response is unsurprising in light of research indicating that police officers themselves are more likely than the general population to abuse family members.<sup>63</sup> “[W]hile all partner abuse is unacceptable, it is especially problematic when domestic abusers are literally the people that battered and abused women are supposed to call for help.”<sup>64</sup> As a practical matter, underenforcement is difficult to quantify, as police do not report each time they turn a blind eye.<sup>65</sup> But a few representative cases made it to the courts.

---

<sup>61</sup> ACLU, *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING* 1, 12 (Oct. 2015), [https://www.aclu.org/sites/default/files/field\\_document/2015.10.20\\_report\\_-\\_responses\\_from\\_the\\_field.pdf](https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf) [<https://perma.cc/VN7B-KBVE>].

<sup>62</sup> *Id.* at 13.

<sup>63</sup> Conor Friedersdorf, *Police Have a Much Bigger Domestic-Abuse Problem Than the NFL Does*, THE ATLANTIC (Sept. 19, 2014), <https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/> [<https://perma.cc/328P-2U5E>] (reporting that “[r]esearch is so scant and inadequate that a precise accounting of the problem’s scope is impossible,” but that “several studies have found that the romantic partners of police officers suffer domestic abuse at rates significantly higher than the general population” and two studies have found that at least 40% of police officer families experience domestic violence, compared to 10% of families in the general population); Alex Roslin & Susanna Hope, *Police Wife: The Secret Epidemic of Police Domestic Violence*, MS. MAGAZINE (Oct. 26, 2015), <https://msmagazine.com/2015/10/26/police-wife-the-secret-epidemic-of-police-domestic-violence/> [<https://perma.cc/T4U7-9VC3>] (reporting that at least one survey found “[t]he abuse rate for cops is up to 15 times higher than among the public”).

<sup>64</sup> Friedersdorf, *supra* note 65.

<sup>65</sup> Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1722–24 (2006).

Consider, for example, *Town of Castle Rock v. Gonzales*.<sup>66</sup> A woman repeatedly asked police to enforce a restraining order against her abusive, estranged husband but, flouting the state's mandatory arrest laws, the police refused.<sup>67</sup> The woman's husband subsequently killed their three children.<sup>68</sup> The United States Supreme Court found that the police did not breach their duty in refusing to carry out the restraining order: It is "simply 'common sense that *all* police officers must use some discretion in deciding when and where to enforce city ordinances,'" and "[t]he serving of public rather than private ends is the normal course of the criminal law . . . ."<sup>69</sup> Put plainly, each individual police officer has enforcement discretion, and they retain that discretion even when applicable statutes imply a mandatory arrest policy for the activity in which the officer prefers not to intervene. According to *Town of Castle Rock*, it is simply a feature of criminal law enforcement that a private individual's well-founded pleas cannot compel an officer to act if that officer believes inaction would better serve public ends.

Even when police do act, they may avoid their full range of responsibilities in domestic violence response. Some departments have been known to omit physical violence from their reports, instead recording a "verbal dispute" to circumvent mandatory arrest laws.<sup>70</sup> Police seem especially reticent to hold individuals accountable for domestic violence when those individuals are police officers themselves: One study found that nearly 30% of police officers accused of domestic violence still worked in the same law enforcement agency one year later.<sup>71</sup> Some departments are more lenient than others. For example, in the Puerto Rico Police Department, a startling 86% of officers remained on active duty even after two or more arrests for domestic violence.<sup>72</sup> In the event that a domestic violence case makes it to prosecutors, the generous leeway of prosecutorial discretion means that domestic violence is often given "little effort

---

<sup>66</sup> *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005); *see also, e.g., Thurman v. Torrington*, 595 F.Supp. 1521 (D. Conn. 1984) (documenting repeated police inaction over the course of more than six months of complaints).

<sup>67</sup> *Town of Castle Rock*, 545 U.S. at 748.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 761, 765 (emphasis in original) (quoting *Chicago v. Morales*, 527 U.S. 41 (1999)).

<sup>70</sup> Dorchen A. Leidholdt, "Testimony in Support of 'Actions by Victims of Gender Motivated Violence,'" New York City Council Hearings, November 30, 2000.

<sup>71</sup> Friedersdorf, *supra* note 63.

<sup>72</sup> Roslin & Hope, *supra* note 63.

or concern.”<sup>73</sup> Regardless of whether prosecution is the right response to domestic violence, police officers and prosecutors alike perpetuate the tradition of treating domestic relationships as exempt from the law even when the law explicitly touches those relationships.

### **5. Language Invoking the Fourth Amendment Implicitly Constitutionalizes Domestic Privacy**

Although this review is not comprehensive,<sup>74</sup> it is sufficient to begin to identify patterns in the language and rhetoric of domestic privacy, such as metaphors to physical features of the home. That language and rhetoric invokes the Fourth Amendment in decisions supporting domestic privacy, which implies some degree of Fourth Amendment protections wherever there is a domestic privacy rationale. As discussed above, decisions meant to safeguard domestic privacy had the result of protecting abusive partners.

The Fourth Amendment guarantees the “right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>75</sup> At the core of the Fourth Amendment is the right of the individual to “retreat into his own home and there be free from unreasonable governmental intrusion.”<sup>76</sup> And so language describing the husband as governor of the household and explaining the court’s reticence to “invade the domestic forum or go behind the curtain”<sup>77</sup> takes on special significance. Though that language refers to a marital relationship, it uses imagery of the physical home. Without explicitly making the connection, the court invites its audience to think of the marriage as equivalent to the home, and therefore untouchable by the state without the husband’s consent.<sup>78</sup> Whatever happened in the home, it was the

---

<sup>73</sup> Anne Tully, *Working Inside the System*, ON THE ISSUES (Winter 1997) (“Only the very small percentage of crimes that make headlines are prosecuted with the fullest extent of the office’s resources, while the many violent crimes that never receive media attention are prosecuted with shamefully little effort or concern. . . . [T]he mocking and victim-blaming continue behind closed doors, and rape and domestic violence cases are quietly dismissed, reduced, or plea-bargained down to insignificant charges.”).

<sup>74</sup> For a more detailed account of the history of domestic violence in the law in the United States through the 20<sup>th</sup> century, see generally Siegel, *supra* note 20.

<sup>75</sup> U.S. CONST. amend. IV, § 1.

<sup>76</sup> *Silverman v. United States*, 365 U.S. 505, 511 (1961); see also *Boyd v. United States*, 116 U.S. 616, 630 (1886) (The Constitution protects against “all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life”).

<sup>77</sup> *State v. Black*, 60 N.C. at 267.

<sup>78</sup> Or without a warrant or exigent circumstances. *But see infra* note 45.

husband's purview—not the state's—because it took “place behind castle walls.”<sup>79</sup> The same held true for the marriage, too.

Of course, the Fourth Amendment only protects against “*unreasonable* government intrusion,”<sup>80</sup> and contemporary advocates can easily find that intrusions to protect against violence are reasonable.<sup>81</sup> But tracing domestic privacy back to its origins, violence that qualified as chastisement met this “reasonableness” standard, by definition; Blackstone only categorized an act as chastisement if it was “within reasonable bounds.”<sup>82</sup> Thus, courts following history's instruction would protect spatial privacy interests above wives' bodily integrity unless the violence rose to a level that risked death.

Though courts did not proffer Fourth Amendment rationales when coverture and chastisement were the law, in 1986 Justice Blackmun recognized the confluence between domestic privacy and spatial privacy in his *Bowers v. Hardwick* dissent. In *Bowers*, the Court addressed Georgia's prosecution of two men under a statute that outlawed “consensual sodomy.”<sup>83</sup> Justice Blackmun argued that:

“Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.” In construing the right to privacy, the Court has proceeded along two somewhat distinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain decisions

---

<sup>79</sup> Hanna, *Behind the Castle Walls*, *supra* note 4; *see also* MacKinnon, *Privacy and Equality: Notes on Their Tension*; *supra* note 4 at 79 (“Home is man's castle and woman's prison”).

<sup>80</sup> U.S. CONST. amend. IV, § 1 (emphasis added).

<sup>81</sup> Domestic violence cases often fit squarely within the doctrine of exigent circumstances. *See* *Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (holding that an officer's warrantless entry into a home was lawful because a domestic disturbance report, signs of violent behavior, and an apparent assault with a deadly weapon founded an objectively reasonable belief in a need for emergency aid); *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (“The ‘exigencies of the situation’ [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.”) (internal citations omitted). The burden of proof is low enough to encompass even the chastisement that Blackstone found “reasonable.” BLACKSTONE, *supra* note 20, at \*444; *see also* *Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (“[O]fficers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception.”). Notably, abuse that is not physically violent—such as financial or emotional abuse—likely does not qualify.

<sup>82</sup> BLACKSTONE, *supra* note 20, at \*444.

<sup>83</sup> *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986), *overruled by* *Lawrence v. Texas* 539 U.S. 558 (2003).



that are properly for the individual to make. Second, it has recognized a privacy interest with reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged.<sup>84</sup>

The Justice further explained that the case “implicate[d] both the decisional and the spatial aspects of the right to privacy” because intimate relationships represent both personal decision-making and, traditionally, the physical home. Though the Court relied solely on the Fourteenth Amendment when it overruled *Bowers* in *Lawrence v. Texas*, it endorsed this aspect of Blackmun’s view, finding that anti-sodomy statutes involved the “liberty of the person both in its spatial and more transcendent dimensions.”<sup>85</sup>

The Fourth Amendment’s protections and influence are not restricted to sexual relationships. Using this lens retrospectively, if coverture held that a woman merged into her husband upon marriage, then interfering with a husband’s access to his wife would be equivalent to breaching the security of his “person.” It was the marital relationship itself, rather than the traditionally sexual nature of the relationship, that triggered domestic privacy. By that logic, the Fourth Amendment can justify deference to privacy in romantic relationships that do not have a sexual component, as well as to former romantic relationships, such as separated or divorced spouses. Though the home itself does not form the boundary in all iterations of domestic privacy, entrenched views about what relationships and behaviors are appropriate for the home allowed domestic privacy to become a safe haven for a range of abusive behaviors.<sup>86</sup>

### **B. Equal Protection Often Functions as a Legal Tool for Dismantling Domestic Privacy**

---

<sup>84</sup> *Id.* at 203–205 (Blackmun, J., dissenting) (internal citations omitted).

<sup>85</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). The *Lawrence* opinion did not refer to or cite the Fourth Amendment. *Id.*

<sup>86</sup> See Gambier, *supra* note 24, at 1925 (“[W]omen themselves operate as a boundary between the public and private spheres.”). Scholars, particularly Reva Siegel, have extensively documented how the criminal legal system has disparately observed domestic privacy depending on class and race. See generally Siegel, *supra* note 20 (“[C]riminal assault law was enforced against wife beaters only sporadically, and it was most often enforced against immigrants and African-American men. . . . A review of the post-chastisement case law also suggests that judicial concerns about privacy were class-salient, invoked to protect propertied men from regulatory oversight in ways they were not invoked to protect the poor.”); see also Stedman, *supra* note 18, at 247 (stating that chastisement is relegated to the “lower rank” of people and has “never gone beyond this unhappy rank”).

Advocates attacked these privacy rationales through equal protection claims. In a New York case, *People v. Liberta*, a man “forcibly raped and sodomized” his wife in the presence of their two-year-old child.<sup>87</sup> Reading like a reincarnation of coverture, the Penal Law at that time defined “female” as “any female person who is not married to the actor”<sup>88</sup>—married women were not even women by the statute’s terms, and this law, like all laws written in biological binaries, erased trans and nonbinary personhood as well. The defendant moved to dismiss the indictment on the basis of the express marital exception<sup>89</sup> but, in a groundbreaking 1984 opinion, the Court of Appeals of New York held that the statute violated equal protection, even against domestic privacy arguments: “Just 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.”<sup>90</sup>

Around the same time as *People v. Liberta*, *Thurman v. Torrington* also addressed an equal protection claim—not against a statute, but against an unwritten policy of nonenforcement at the City of Torrington Police Department in Connecticut.<sup>91</sup> Over the course of more than six months, Tracey Thurman’s estranged husband repeatedly threatened her life and attacked her.<sup>92</sup> Though Tracey consistently reported the incidents and sought aid from the City of Torrington police, they refused to take her complaints, delayed issuing a warrant for her husband’s arrest, and did not restrain her husband even after he stabbed Tracey in the chest, neck, and throat.<sup>93</sup> Tracey argued that the police department used an administrative classification of women in domestic relationships to implement the law in a discriminatory manner—that the department’s “failure to act was pursuant to a pattern or practice of affording inadequate protection, or no protection at all, to women who have complained of having been abused by their husbands or others with whom they have had close relations.”<sup>94</sup> The court agreed, reminding the department that “[i]t is well settled that the equal protection clause is applicable not only to discriminatory legislative action, but

---

<sup>87</sup> *People v. Liberta*, 64 N.Y.2d at 158.

<sup>88</sup> *Id.* at 159.

<sup>89</sup> *Id.* at 159.

<sup>90</sup> *Id.* at 163–65.

<sup>91</sup> *Thurman v. Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1527.

also to discriminatory governmental action in administration and enforcement of the law.”<sup>95</sup> The court went on to specify that

[i]f officials have notice of the possibility of attacks on women in domestic relationships or other persons, they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. Failure to perform this duty would constitute a denial of equal protection of the laws.<sup>96</sup>

The opinion specifically disallowed the City’s justifications of police nonenforcement “as a means of promoting domestic harmony by refraining from interference in marital disputes,” and found no evidence that Ms. Thurman preferred to resolve the violence “privately.”<sup>97</sup>

But when plaintiffs omit an equal protection claim, privacy remains the default in domestic violence cases. In *DeShaney v. Winnebago*, the United States Supreme Court assessed whether Wisconsin’s Winnebago County deprived Joshua DeShaney of his rights under the Due Process Clause of the Fourteenth Amendment.<sup>98</sup> Joshua’s stepmother complained to Winnebago County police that Joshua’s father “hit the boy causing marks and [was] a prime case for child abuse.”<sup>99</sup> Twice, physicians examining Joshua notified the Winnebago County Department of Social Services that they suspected child abuse.<sup>100</sup> State officials interviewed Joshua’s father, initiated monthly follow-up visits, and even recorded “suspicious injuries” during those visits, but otherwise “took no action” to ensure Joshua’s safety while in his father’s care.<sup>101</sup> Four-year-old Joshua’s father subsequently beat him so severely that the boy suffered permanent brain damage and a life of dependency.<sup>102</sup>

---

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1529.

<sup>98</sup> *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 191 (1989).

<sup>99</sup> *Id.* at 192.

<sup>100</sup> *Id.* at 192–93.

<sup>101</sup> *Id.* at 192–193, 208.

<sup>102</sup> *Id.* at 193; Crocker Stephenson, *Boy at center of famous ‘Poor Joshua!’ Supreme Court dissent dies*, MILWAUKEE J. SENTINEL, Nov. 11, 2015, [https://archive.jsonline.com/news/obituaries/joshua12-b99614381z1-346259422.html/\[https://perma.cc/5F24-P4AS\]](https://archive.jsonline.com/news/obituaries/joshua12-b99614381z1-346259422.html/[https://perma.cc/5F24-P4AS]). Joshua found a permanent home with adoptive parents at the age of 12 and remained in their care until he died at the age of 36 in 2015. *Id.*

The Court considered the father to be a “private actor” and his perpetration of domestic abuse to be “private violence,”<sup>103</sup> outside the scope of the state’s responsibility. It found that

the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual . . . [except when a State effects an] affirmative act of restraining the individual’s freedom to act on [their] own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty.<sup>104</sup>

But even under *DeShaney*, a holding rooted in equal protection, like *Thurman v. Torrington*, could stand: “[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”<sup>105</sup> Joshua’s advocates failed to make a *Thurman*-like claim,<sup>106</sup> though they certainly could have argued that the Department of Social Services systematically refused to protect victims of domestic violence like him.

Similarly, the Court’s opinion in *Town of Castle Rock v. Gonzales*, discussed above, makes no mention of equal protection.<sup>107</sup> There, a woman asked police for help at least five separate times after her estranged, abusive husband kidnapped their three daughters.<sup>108</sup> The police refused to act because, the woman later recounted, “Simon was the girls’ father, and the police saw this as a domestic issue.”<sup>109</sup> No matter that she already had a restraining order against her husband or that the state had enacted mandatory arrest laws; the Court declared that the “serving of public rather than private ends is the normal

---

<sup>103</sup> *Id.* at 195, 197.

<sup>104</sup> *DeShaney*, 489 U.S. at 196.

<sup>105</sup> *Id.* at n.3.

<sup>106</sup> *Id.*

<sup>107</sup> *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005).

<sup>108</sup> *Id.*

<sup>109</sup> *Castle Rock v. Gonzales: Making the Court’s Protection Real*, ACLU, <https://www.aclu.org/other/castle-rock-v-gonzales-making-courts-protection-real> [<https://perma.cc/ZXZ7-5KQX>].

course of the criminal law.”<sup>110</sup> And, it would seem, domestic violence is still decidedly private.

*People v. Liberta* and *Thurman v. Torrington* represent momentous rebellions against a legal system that was woefully inadequate for most survivors of domestic violence. Equal protection was seemingly a necessary component to their success: when advocates omit equal protection arguments, domestic privacy wins. Attempts to erode domestic privacy and its ancestors—chastisement, coverture, and marital privacy—have so far failed to eliminate domestic privacy thinking entirely, endangering the safety and autonomy of people who experience domestic violence. But, as Section I.C will explore, domestic privacy was elemental in developing another kind of personal safety and autonomy: decisional privacy.

### **C. Decisional Privacy Grew from the Deeply Rooted Tenets Underlying Domestic Privacy**

Section I.A reviewed how domestic violence found a safe haven in privacy doctrine, and Section I.B demonstrated how advocates used equal protection to erode domestic privacy and incrementally further gender equality in the sphere of domestic violence law. Conversely, around the same time, advocates bolstered privacy to promote gender equality, primarily through rights to sexual expression and reproductive choice. This advocacy generated tension in privacy doctrine and in the movement for gender equality dating back to at least the 1960s.<sup>111</sup> A facial review might lead to the conclusion that these are simply distinct types of privacy. Cheryl Hanna discusses such a distinction, arguing that the “old privacy,” which protected abusers, differs from the “new privacy,” which promotes self-determination, the two types of privacy are “not the same kind.”<sup>112</sup> However, this Note argues that the privacy doctrine invoked in domestic privacy *is* the same kind as the privacy doctrine invoked in sexual expression and reproductive choice. They are simply different branches growing from the same root. The consequences for feminist advocates are dire. Because

---

<sup>110</sup> *Id.*

<sup>111</sup> Hanna, *Behind the Castle Walls*, *supra* note 4 (“Tension between privacy rights and women’s equality has existed in American law since the 1960s.”).

<sup>112</sup> *Id.* (“Privacy that justifies male privilege in the home is not the same kind of privacy that supports individual decision-making in reproduction. The latter concept ensures self-determination for women, the former denies it. Old privacy undermines gender equality. New privacy promotes it. Old privacy is about control. New privacy is about liberty. Old privacy takes place behind castle walls. New privacy is not about a place; it is about freedom from being put in your place. One of the law’s greatest challenges is to shed the old notion of privacy while maintaining the new one.”).

these doctrines share the same root, courts can coopt progressive legal doctrine to reinforce state-sponsored patriarchy.

Although the right to choose procreation, contraceptives, abortion, and sexual partners<sup>113</sup> is often understood as a distinct right to “decisional privacy,” this Note argues that it originated from the same domestic privacy that protected intimate partner violence. In one of the earliest cases discussing a constitutional right to familial privacy, the Supreme Court addressed parental choice in directing the upbringing of one’s children, specifically in the context of selecting foreign language education. The Court found that the Fourteenth Amendment protected “the right . . . to marry, establish a home and bring up children,” and specifically denounced Platonic theories that would rupture the nuclear family.<sup>114</sup> About twenty years later, the Court used stronger language, finding that parental authority in the household is a “sacred *private* interest[.]” and there is a “*private realm of family life* which the state cannot enter.”<sup>115</sup> Although the Court went on to acknowledge that regulation of the family may be permissible if it is in the public interest, it spoke specifically of preserving children’s welfare and carefully outlined how regulations impacting children may infringe constitutional rights if applied to adults.<sup>116</sup> The Court’s reasoning implied that the barrier around this “private realm of family life” especially repels state actions to improve adults’ welfare, which seems to allow a gap in protections for adults who experience domestic violence.<sup>117</sup>

The similarities between domestic privacy doctrine and decisional privacy protections are particularly evident in *Griswold v. Connecticut*, an important decision in the line of cases protecting private choice in the family. There, a licensed physician gave medical information and advice about contraception to married people in violation of state law.<sup>118</sup> It was the first case to consider

---

<sup>113</sup> Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 TEX. L. REV. 1189, 1225 (2017) (“Under the rubric of ‘privacy,’ the Court has safeguarded the right to marry, the right to custody of one’s children, the right to keep the family together, the right of parents to control the upbringing of children, the right to procreate, the right to purchase and use contraceptives, the right to refuse medical treatment, and the right to engage in private, consensual homosexual activity.” (internal citations omitted)).

<sup>114</sup> *Meyer v. Nebraska*, 262 U.S. 390, 401–402 (1923).

<sup>115</sup> *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944) (emphasis added).

<sup>116</sup> *Id.* at 166–69.

<sup>117</sup> This is not to argue that the Court disallowed state action to protect against domestic abuse, but rather to demonstrate that general attitudes about privacy discouraged it. As discussed in Section I.A, it is well within states’ power to prosecute domestic violence cases, offer resources to domestic violence survivors, and permit civil actions against abusers—if they choose to do so.

<sup>118</sup> *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

individuals' right to prevent pregnancy. Though *Roe v. Wade* would later resituate the right in Fourteenth Amendment personal liberty,<sup>119</sup> the *Griswold* Court initially found the right to use contraceptives within the "zones of privacy" emanating from the "penumbras" of the Bill of Rights, and especially of the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>120</sup> To bolster this rationale, the Court asked, "Would we allow the police to search the sacred precincts of the marital bedrooms for signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the relationship."<sup>121</sup> This invocation of domestic privacy may engender special alarm among domestic violence advocates because it is explicitly tied to the Fourth Amendment through its comparison to an unauthorized police search of the home.<sup>122</sup>

Professors Chemerinsky and Goodwin find this focus on searching the marital bedroom to be "totally irrelevant to this case,"<sup>123</sup> but when one considers the implicit import of Fourth Amendment searches to domestic privacy discussed in Section I.A, the Court's focus becomes relevant to understanding the doctrine espoused. Both types of privacy lean heavily on American ideals of protecting the home against intrusion. And when the Court goes on to discuss "a right of privacy older than the Bill of Rights" and marriage as "a coming together . . . a harmony in living,"<sup>124</sup> it becomes especially clear that the newly recognized right to use contraception was not a "new privacy" promoting gender equality,<sup>125</sup> but instead another incarnation of marital unity, signaling that the Court still, in 1965, adhered to domestic privacy. While Professors Chemerinsky and Goodwin read *Griswold* as omitting a doctrinal answer to the critical question of why controlling one's own reproduction is a fundamental right under the Constitution,<sup>126</sup> through the lens of domestic privacy, *Griswold*

---

<sup>119</sup> *Roe v. Wade*, 401 U.S. 113, 153 (1973); see also Erwin Chemerinsky & Michele Goodwin, *supra* note 115, at 1203–04 (describing this evolution in the rationale for the privacy right and noting that Justice Harlan's *Griswold* concurrence did situate the privacy right in the substantive due process clause of the Fourteenth Amendment).

<sup>120</sup> *Griswold*, 381 U.S. at 484.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*; U.S. CONST. amend. IV ("The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated.").

<sup>123</sup> Chemerinsky & Goodwin, *supra* note 113, at 1202.

<sup>124</sup> *Griswold*, 381 U.S. at 486.

<sup>125</sup> See Hanna, *Behind the Castle Walls*, *supra* note 4 and accompanying text.

<sup>126</sup> Chemerinsky & Goodwin, *supra* note 113, at 1202.

simply applies the established doctrine that found a “sacred interest” in individuals’ right to authority within the “castle walls” of their home.

## **II. The Tension Within Privacy Doctrine has Problematic Ramifications**

Domestic and decisional privacy’s shared origin is not a mere historical artifact. These two permutations of privacy doctrine have resulted in tension between arguments against domestic violence and arguments for reproductive self-determination. The following Part explores select ramifications of that tension. Section II.A describes how leading judicial opinions regarding decisional privacy use language and concepts of domestic privacy, operationalizing on behalf of the state the patriarchal ideals that sculpted domestic privacy. The Section demonstrates how a privacy doctrine that abides the boundaries of the historical construction of “private” fails to meet progressive objectives. Section II.B then discusses how the established contours of privacy doctrine have enabled its discriminatory application to individuals who do not conform to the white, cisgender, heterosexual norm, constituting yet another limitation of the established historical “private” category.

### **A. Decisional Privacy Incorporates Domestic Privacy’s History, Making Space for Continuing State-Perpetrated Patriarchy**

Part I demonstrated how decisional privacy incorporates domestic privacy’s history of denying women’s personhood and declining to enforce women’s rights by invoking the language of marital unity. This subtle move operationalizes domestic privacy to perpetuate the same patriarchy that the justice system claimed to abandon as equal protection arguments chipped away at regressive doctrines over time.

As an initial matter, one might argue that the Court used domestic privacy rationales not to endorse domestic privacy, but to help skeptics more readily accept a change in—rather than an application of—the law. In other words, just as the near-beer case would later cleverly set the stage for women’s equality by defending men’s equality,<sup>127</sup> one might argue that the *Griswold* rhetoric chose the path to justice that would be most palatable at the time in order to secure

---

<sup>127</sup> In the “near-beer case” of *Craig v. Boren*, Ruth Bader Ginsburg employed “one of the most effective strategies in the fight for gender equality” by arguing “on behalf of men in order, ultimately, to benefit women too.” Stephanie Buck, *The On the Basis of Sex Story Wasn’t the Only Time Ruth Bader Ginsburg Used Cases About Men to Argue for Women’s Equality*, TIME (Dec. 24, 2018), <https://time.com/5481422/rbg-movie-male-plaintiff-history/> [<https://perma.cc/E6FZ-SQPM>]. Through her win on behalf of male plaintiffs in *Craig v. Boren*, “[m]atters of gender inequality had suddenly been elevated in the eyes of the law.” *Id.*



long-term freedom. But such an argument fails upon consideration of the subsequent development of the right to choose. Rather than evolving to comprehensively protect freedoms in decision-making, cases following *Griswold*—such as *Planned Parenthood v. Casey*, *Gonzales v. Carhart*, and *Maher v. Roe*—reified the barrier that obviated state responsibility for harms inflicted in the home.

Those cases preserved a right to privacy in choosing whether to have children, but they also developed a corollary state right to reach into the so-called private domestic zone to actively discourage decisions the state disapproves of. Individuals who make the “wrong” decision are denied assistance in effectuating their Constitutional rights, while individuals who make the “right” decision are granted full state support in effectuating theirs.<sup>128</sup> In *Planned Parenthood v. Casey*, the Supreme Court allowed states to “take measures to ensure that the woman’s choice [about abortion or childbearing] is informed,”<sup>129</sup> and in *Gonzales v. Carhart* it emphasized that the “State has an interest in ensuring so grave a choice [as abortion] is well informed.”<sup>130</sup>

Though the *Gonzales v. Carhart* Court explicitly “reject[ed] the contention that the congressional purpose of the Act [at issue] was to place a substantial obstacle in the path of a woman seeking an abortion,”<sup>131</sup> writing for the Guttmacher Institute, Rachel Benson Gold and Elizabeth Nash explained that decisions like *Gonzales v. Carhart* implied “that the preabortion counseling process could and perhaps should be used as a forum for dissuading a woman from having [an abortion].”<sup>132</sup> Indeed

many state laws includ[e] specific and detailed requirements for obtaining consent for an abortion on top of the general [informed consent] requirements already existing in the state. Ironically, these mandates often do little to further the underlying values of the consent process, and sometimes are even directly at odds with them.<sup>133</sup>

---

<sup>128</sup> See, e.g., Chemerinsky & Goodwin, *supra* note 113, at 1220 (“The problem is that [*Roe v. Wade*] says both that the state cannot act with the purpose of creating obstacles to abortion and that it can act with the purpose of discouraging abortion and encouraging childbirth.”).

<sup>129</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992).

<sup>130</sup> *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

<sup>131</sup> *Id.* at 160.

<sup>132</sup> Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, GUTTMACHER INSTITUTE (Nov. 8, 2007).

<sup>133</sup> *Id.*

With *Gonzales v. Carhart* as its guide, the state institutionalizes the role of the coverture-era husband. Perhaps the state believes it must “answer for [women’s] misbehaviour,” as coverture-era husbands used to; it seems to believe that it is “entrust[ed] . . . with this power of restraining [women].”<sup>134</sup> And the state does so in accordance with its own morals, as it sees fit, frequently without material regard for the interests of the individuals it seeks to restrain.<sup>135</sup>

If a pregnant person overcomes this initial form of state coercion in the consent process, the state reforms itself into a different domestic privacy posture. Individuals who choose abortion face state-generated exceptions to policies and laws that would otherwise support that individual’s choice. For example, in *Maher v. Roe*, the Supreme Court of the United States considered a Connecticut Welfare Department regulation that limited Medicaid benefits.<sup>136</sup> Though Connecticut’s Medicaid “generally subsidize[d] the medical expenses incident to pregnancy and childbirth,” it did not cover pregnancy care in the form of abortion unless a physician certified the abortion was medically necessary.<sup>137</sup> Two indigent women argued that the regulation violated their Fourteenth Amendment equal protection and privacy rights, among other things.<sup>138</sup> The District Court of Connecticut agreed with them, finding that “abortion and childbirth . . . are simply two alternative medical methods of dealing with pregnancy.”<sup>139</sup> It held that the regulation “infringe[d] upon a fundamental interest” by weighing against exercising a constitutionally protected right, and it further held that Connecticut could not impose requirements for abortion payments that were not equally applicable to payments for childbirth if those requirements had the effect of discouraging effectuating one’s right to choose an abortion.<sup>140</sup>

The Supreme Court disagreed.<sup>141</sup> In its equal protection analysis, it held that financial need alone could not constitute a suspect class for the purpose of equal

---

<sup>134</sup> Quotations from 1 BLACKSTONE, *supra* note 20, \*444 (cited in Subsection I.A.1).

<sup>135</sup> See generally Section III.C for a discussion of how childbirth and especially coerced childbirth are not in the best interests of the pregnant person, the child-to-be, or their community.

<sup>136</sup> *Maher v. Roe*, 432 U.S. 464, 466 (1977).

<sup>137</sup> *Id.* at 467–68.

<sup>138</sup> *Id.* at 467.

<sup>139</sup> *Id.* at 468.

<sup>140</sup> *Id.* at 468–69.

protection analysis,<sup>142</sup> notably addressing a different equal protection question than the cases discussed in Section I.B, which each addressed gender-based equal protection claims. The Court held that decisional privacy only “protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.”<sup>143</sup> The Court found that the regulation, which it had just admitted was an affirmative “value judgment” that the state could “implement,” in fact “place[d] no obstacles—absolute or otherwise—in the pregnant woman’s path to abortion. . . . The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.”<sup>144</sup> The immense emotional, physical, and financial burdens of carrying a pregnancy to term and likely raising a child, this Court decided, does not “in any way affect[]” a woman’s indigency. Just as marital rape exceptions protected rapists from legal responsibility for assaulting their spouse,<sup>145</sup> the *Maier v. Roe* Court generated a Medicaid coverage exception that would shield states from legal responsibility for supporting their people’s privacy rights and their health.

A federal district court would review anti-abortion legislation again not long after *Maier v. Roe*, when advocates brought the case that became *Harris v. McRae*.<sup>146</sup> *Harris v. McRae* assessed whether the Hyde Amendment, which prohibited use of federal funds for nontherapeutic abortions while allowing such use for pregnancy and childbirth, violated equal protection or decisional privacy rights, among other things.<sup>147</sup> Though it analyzed the statute under the Fifth Amendment rather than the Fourteenth, the District Court below in *Harris v. McRae* issued an opinion nearly identical in logic to the District Court below in *Maier v. Roe*.<sup>148</sup> And the Supreme Court would again disagree, essentially

---

<sup>141</sup> *Id.* at 469–70.

<sup>142</sup> *Id.* at 470–71.

<sup>143</sup> *Id.* at 473–74.

<sup>144</sup> *Id.* at 474.

<sup>145</sup> *See, e.g.,* *People v. Brown*, 632 P.2d 1025 (Colo. 1981). *See generally* Subsection I.A.2.

<sup>146</sup> *McRae v. Califano*, 491 F.Supp. 630 (E.D.N.Y. 1980), *rev’d*, *Harris v. McRae*, 448 U.S. 297 (1980).

<sup>147</sup> *Harris v. McRae*, 448 U.S. 297, 300–301 (1980).

<sup>148</sup> *Compare Califano*, 491 F.Supp. at 737 *with* *Roe v. Norton*, 408 F.Supp. 660 (D. Conn. 1974), *rev’d*, *Maier v. Roe*, 432 U.S. 464, 466 (1977). The Fifth Amendment establishes equal

restating its *Maher v. Roe* decision with regard to the Fifth Amendment claim.<sup>149</sup> It then went further, denouncing any construction of decisional privacy that translates to an affirmative Constitutional obligation on states.<sup>150</sup> In so focusing its analysis, the Court failed to address two realities: first, that the Hyde Amendment emerged out of an anti-Black reactionary fear of “the welfare queen,” and second, that by outlawing funds for abortion care, the Hyde Amendment categorically withholds the possibility of abortion from millions of low-income people each year.<sup>151</sup> In a familiar pattern, the state built an exception to progressive legal developments in order to reinscribe traditional patriarchy.

Most recently, in *Dobbs v. Jackson Women’s Health Organization*, the United States Supreme Court eliminated a right to abortion under the United States Constitution, upending decades of privacy doctrine.<sup>152</sup> *Dobbs* dispelled with the idea of state inaction in the private zone of reproduction by overturning *Roe v. Wade* and *Planned Parenthood v. Casey*, the critical cases finding a fundamental right to abortion.<sup>153</sup> In dicta, the majority refers to *Roe v. Wade* as “loose in its treatment of the constitutional text” because *Roe* “held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned.”<sup>154</sup> The *Dobbs* majority implies that there

---

protection and due process rights—and therefore privacy rights—against the federal government. U.S. CONST. amend. V.

<sup>149</sup> See *McRae*, 448 U.S. at 314–15 (citing *Roe v. Norton*, 408 F.Supp. 660 (D. Conn. 1975)).

<sup>150</sup> *Id.* at 318.

<sup>151</sup> See DOROTHY ROBERTS, *KILLING THE BLACK BODY* 17–18 (1997) (“The myths about immoral, neglectful, and domineering Black mothers have been supplemented by the contemporary image of the welfare queen—the lazy mother on public assistance who deliberately breeds children at the expense of taxpayers to fatten her monthly check.”); Alina Salganicoff, Laurie Sobel, & Amrutha Ramaswamy, *The Hyde Amendment and Coverage for Abortion Services*, KAISER FAMILY FOUNDATION (Mar. 5, 2021) <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/> [<https://perma.cc/6TDU-4Z9G>] (If the Hyde Amendment “were to have been lifted in 2019, it could have provided federal support for abortion coverage for 13.9 million reproductive-age women enrolled in Medicaid, as well as millions of others in similarly restricted federal programs. In particular, it would have potentially broadened abortion coverage for 7.7 million women on Medicaid who lived in states that followed Hyde restrictions, which represented over half (56%) of reproductive-age women enrolled in Medicaid in 2019. For many low-income women, the lack of Medicaid coverage for abortion is effectively an abortion ban. A recent study estimated that 29% of pregnant Medicaid-eligible women in Louisiana would have had abortions instead of giving birth if Medicaid covered abortions.”).

<sup>152</sup> *Dobbs*, 142 S. Ct..

<sup>153</sup> *Id.* at 2284.

<sup>154</sup> *Id.* at 2245.

is no constitutional decisional privacy right at all. But even with a hostile federal court, state courts and state constitutions continue to recognize and uphold decisional privacy.<sup>155</sup>

As the state continues to effectuate patriarchal ideologies through domestic privacy and its progeny, decisional privacy, advocates will struggle to effectively argue for progressive feminist outcomes in cases that touch those doctrines. Arguments whose lineage traces back to the “private realm of family life” and “a right of privacy older than the Bill of Rights”<sup>156</sup>—the language of some of most seminal cases to establishing reproductive rights—risk reifying the ideas of “private actors,” “private violence,” and “private ends” that characterize domestic privacy. Which right do we choose when rights to privacy and to gender equality do not agree? And if the domestic privacy that protects abusers is the same privacy that promoted gender equality in other areas, the skeptic wonders, is it less or more privacy that feminists want? This vulnerability already curtailed feminists’ wins in cases concerning reproductive rights. Decisions like those are regressive, oftentimes racist, and opposite to notions of social solidarity that underlie modern public health.<sup>157</sup> If privacy doctrine continues to operate in the bifurcated ways in which it operates now, it may further undermine feminist progress each time it boomerangs as regressive policy.

### **B. Privacy Doctrine’s Historic Public/Private Divide Fails in a Diverse Reality**

In the United States, privacy has always operated differently for people with marginalized identities. Privacy doctrine’s function depends on categorizing which spaces, activities, and relationships are considered “private.” Because the doctrine developed as a technology of patriarchal engineering, that categorization has largely reflected the social imaginary of patriarchy, excluding from “private” the spaces, activities, and relationships that patriarchy does not recognize or value. Continued reliance on categories contoured by patriarchy replicates patriarchy’s exclusion and subjugation of, in particular, people of color, trans and nonbinary people, and queer people; patriarchal definitions had only white, heterosexual, nuclear families in mind. Even when the categories

---

<sup>155</sup> See State Constitutions and Abortion Rights, CENTER FOR REPRODUCTIVE RIGHTS (July 2022), <https://reproductiverights.org/wp-content/uploads/2022/07/State-Constitutions-Report-July-2022.pdf> [<https://perma.cc/AC73-YXTE>].

<sup>156</sup> See generally Section I.C.

<sup>157</sup> For a comprehensive discussion of the social solidarity model, see Deborah Stone, *The Struggle for the Soul of Health Insurance*, 18 J. HEALTH POL., POL’Y, & L. 287 (1993).

themselves definitionally incorporate people with marginalized identities, deference to state actors' discretion facilitates inconsistent application of privacy doctrine. Without further intervention, privacy doctrine will continue to operate in this regressive manner.

For example, relying on categories such as “the marriage” excluded Black people living in the United States from domestic privacy and, in turn, from decisional privacy. The rules of coverture and chastisement cemented white men's dominance and control over their wives from the very moment of the founding of the nation. But before Emancipation, an enslaved Black man had no legal “cover” for his wife to enter into. Indeed, relying on the marital relationship in any form to establish the scope of privacy doctrine is problematic given how little control Black people living in bondage had over their sexual or romantic pairings. In *Killing the Black Body*, Dorothy Roberts analyzes stories of reproduction in bondage.<sup>158</sup> She discusses evidence of “slave-breeding”—a horrific practice of forced reproduction for the purpose of increasing the number of people under the slaveholder's control.<sup>159</sup> Roberts relays the story of a sixteen-year-old girl sent without explanation to live with a man she knew as “a bully;” the girl later learned that she must either become pregnant or face brutal beating.<sup>160</sup> Her story made no mention of marriage. Others' stories document women “mated” with “a hired man” and men “rented . . . to serve as studs” who, in at least one story, would be “mated . . . with about fifteen different women.”<sup>161</sup> White men's sexual violence against Black women further precluded any possibility of a “private” marriage central to privacy doctrine's patriarchal imaginary.<sup>162</sup> Even when people who were enslaved could choose their sexual or romantic partner, “[s]lave marriages were not recognized by law; these were partnerships consecrated by slaves' own ceremonies and customs.”<sup>163</sup> Those partnerships could be broken, disrupted, or modified at the slaveholder's whim.<sup>164</sup> While white women during the same period fought for

---

<sup>158</sup> ROBERTS, *supra* note 153 at 22–55.

<sup>159</sup> *Id.* at 23–24. While the frequency of the practice is disputed, Roberts identifies research on slave narratives that shows 5 percent of woman-writers and 10 percent of man-writers refer to it.

<sup>160</sup> *Id.* at 22.

<sup>161</sup> *Id.* at 28.

<sup>162</sup> *Id.* at 29–31 (describing methods and motives of white men's sexual violence against Black women before and immediately following Emancipation).

<sup>163</sup> *Id.* at 28, 51–54.

<sup>164</sup> *Id.* at 52–53.

legal rights within their marriage, Black people fought for legal rights to marry at all.

Even after progressive modifications to patriarchal categories, the same problems persist in new form. Black people in the United States now have a right to marry the person of their choosing and are protected from intrusions into their homes, at least by the letter of the law. But state actors nevertheless exercise their discretion in a discriminatory manner, intervening in domestic spaces that belong to Black people in a way they do not intervene when those same spaces belong to white people. The United States child welfare system elucidates this phenomenon: Though the child welfare system purports to promote the well-being of children generally, its function is “to police families of African descent in the United States.”<sup>165</sup> A 2022 report from the Office of the High Commissioner for Human Rights traced the origins of that function to “the legal authority enslavers had over enslaved families,” which “permitted the forcible separation of enslaved families[.]”<sup>166</sup> Further:

The power of state agencies to investigate families extends far beyond placing children in foster care and also falls most heavily on people of African descent. . . . Indeed, child welfare authorities can wield *greater* control over families than police while providing fewer legal protections to parents and children. Caseworkers can make multiple unannounced home visits at any time of day or night, interrogate all household members, force children to disrobe, do criminal background checks, and request personal information from teachers, hospitals, therapists, and other service providers. Although the Fourth Amendment of the US Constitution applies to government maltreatment investigations, many agencies and courts have created a child welfare exception to the constitution provisions that pertain to police searches. Family policing expands the government’s power to investigate and regulate Black communities beyond what would be permitted by criminal justice.<sup>167</sup>

---

<sup>165</sup> DOROTHY E. ROBERTS, UN WORKING GROUP OF EXPERTS ON PEOPLE OF AFRICAN DESCENT, PUBLIC SESSION ON CHILDREN OF AFRICAN DESCENT, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (May 24, 2022), <https://www.ohchr.org/sites/default/files/2022-05/Dorothy-Roberts.pdf> [<https://perma.cc/2P7K-2QSC>].

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

The home, staunchly protected in favor of white patriarchy, is regularly invaded when it belongs to a Black family. Kimberlé Crenshaw identified Black people's distinct experience of public versus private spheres and suggested that it explains "why there have been those in the Black liberation movement who aspire to create institutions and to build traditions that are intentionally patriarchal."<sup>168</sup> For some, access to institutions conventionally understood as patriarchal, such as marriage, can represent progress.

Using marriage as a proxy for the private has also been a source of exclusion of trans, nonbinary, and queer individuals. As described in Part I, decisional privacy incorporates domestic privacy's history, including coverture and chastisement. But the hierarchy of coverture and chastisement does not logically apply to romantic partners of the same gender, and it did not legally apply for most of the United States' history, either.<sup>169</sup> Abrogating interspousal tort immunity and eliminating the marital rape exception did little for people who, at the time, could not marry their romantic partner in the first place.

Even for couples that could marry under state law, the legal system applied a different privacy doctrine to trans and nonbinary individuals. Before same-sex marriage was legal in all fifty states, married trans people who accessed the legal system to protect themselves from spousal abuse risked the court invalidating their marriage on the basis of their sex assigned at birth, rather than addressing the abuse that brought them to court in the first place.<sup>170</sup> While privacy doctrine purported to abrogate interspousal tort immunity, gender-based exceptions to legal marriage nevertheless prevented trans people from seeking justice related to interspousal harms.

---

<sup>168</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHICAGO LEGAL F. 139, 155–57 (1989).

<sup>169</sup> Romantic partners who were assigned the same gender at birth could not legally marry anywhere in the United States until 2004, when Massachusetts recognized its first same-sex marriage, and they could not legally marry everywhere in the United States until 2015, when *Obergefell v. Hodges* legalized same-sex marriage in all states. *Same-Sex Marriage, State by State*, PEW RESEARCH CENTER (June 26, 2015), <https://www.pewresearch.org/religion/2015/06/26/same-sex-marriage-state-by-state-1/> [<https://perma.cc/2ZGV-PCVW>] ("2003: The Massachusetts Supreme Judicial Court rules that the state constitution gives gay and lesbian couples the right to marry, making the Bay State the first in the nation to allow same-sex marriage. Weddings begin in 2004."); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>170</sup> Leigh S. Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARVARD C.R.-C.L. L. REV. 51, 83–86 (2013).



However parallel this treatment of trans and nonbinary people may seem to the treatment of women, the legal system's failure to protect and serve trans and nonbinary people arises from differently complicated associations with domestic relationships. Trans and nonbinary people face underenforcement reminiscent of the kind that Tracey Thurman fought in *Thurman v. City of Torrington* and that the United States Supreme Court ultimately upheld in *DeShaney* and *Castle Rock*. The law sometimes treats discrimination against trans individuals as discrimination on the basis of sex, thus analyzing cases of discrimination against trans people under the same framework as cases of discrimination against women.<sup>171</sup> But even if the standard for legal analysis is the same, the motives of underenforcement are quite different. While the underenforcement of laws against domestic violence in the context of heterosexual couples is predicated on ideas of the role and power of the husband, rooted in coverture and chastisement, the underenforcement of laws against domestic violence in the context of queer couples is often predicated on ideas about who is capable of experiencing or perpetrating violence. For example, when trans people seek police assistance, the police are dismissive at best and abusive at worst, especially towards trans women. "Once officers determine they are transgender, [the officers] either simply leave, saying something along the lines of, 'Oh guys, it's a man, forget it,' shift the focus of their investigation to the transgender person, or engage in further abuse."<sup>172</sup> To the extent that queer people's relationships do not align with entrenched views about what relationships and behaviors are appropriate for the home, domestic privacy impacts them differently.

Privacy doctrine's failure to accommodate and protect individuals of marginalized identities indicates a broader failing: The doctrine imagines all people as white, heterosexual, cisgender, and belonging to a family headed by a man. People with identities not imagined by the patriarchal institutions that developed privacy doctrine are nevertheless subjected to privacy doctrine, but in a manner that excludes or subjugates them based on the particular histories of

---

<sup>171</sup> The United States Supreme Court held in *Bostock v. Clayton Cty.* that, under Title VII, sex discrimination includes discrimination against trans identity. 140 S. Ct. 1731 (2020). However, the Court did not explicitly extend its interpretation of "sex discrimination" beyond statutory claims to Constitutional equal protection claims, and the Court later denied certiorari in a Fourth Circuit case that did exactly that. *See id.*; *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), certiorari denied 141 S. Ct. 2878 (2021). Nevertheless, several circuit courts explicitly hold that discrimination against trans individuals is discrimination on the basis of sex under the equal protection clause, and therefore receives intermediate scrutiny—the same level of scrutiny applied to cases of discrimination against women. *See, e.g., Grimm*, 972 F.3d; *Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017).

<sup>172</sup> *Id.* at 54 n.22, 71–76.

their multiple identities.<sup>173</sup> An expansive inquiry into how privacy doctrine functions for each intersection of identities goes beyond the scope of this Note. However, the consent framework that this Note ultimately suggests inherently incorporates space for intersectional solutions by eschewing privacy doctrine's historic reliance on categories constructed by the politically powerful. The consent framework instead centers the agency of individuals, who are most expert and most authoritative on the realities of their own lives. Taken seriously, self-determination can undermine state actors' enforcement of any social category.

### **III. The Branches of Privacy Doctrine Can Be Reconciled through a Consent Framework, Which in Turn Positions the State as a Rights-Facilitator**

Part II discussed some of the problematic results of domestic privacy and decisional privacy's shared root. Decisional privacy arguments routinely use concepts of domestic privacy and operationalize patriarchal ideals of domestic privacy on behalf of the state, such that progress in decisional privacy simultaneously advances regressive ideals of domestic privacy. This poses an obstacle for advocates of autonomy. Additionally, privacy doctrine carries forward the patriarchal norms that initially sculpted the categorization of "public" and "private" in domestic privacy, thus replicating patriarchy's exclusion and subjugation of people who do not conform to the white, heterosexual, cisgender norm that patriarchy contemplates. The next Part argues that a framework of consent resolves these internal inconsistencies and explores how such a framework reconciles the goals of litigants in both domestic violence and reproductive rights cases while preserving long-standing state interests in life and public health.

#### **A. A Consent Framework is a Coherent Solution for Addressing Domestic Violence**

Some courts have definitively addressed the connection between domestic violence, privacy, and consent. In its 1984 decision invalidating the New York marital rape exception, the Court of Appeals of New York held that marital privacy "protects consensual acts, not violent sexual assaults,"<sup>174</sup> refusing to

---

<sup>173</sup> The precise mechanics of privacy doctrine's operation on individuals of particular different or overlapping identities deserves further exploration, especially using Kimberlé Crenshaw's intersectional lens. Intersectionality challenges "single-issue analyses" and defies the assumption that "claims of exclusion must be unidirectional. Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them." Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 168 at 149.

allow privacy to override the importance of consent. The same opinion held that consent is not “incident to marriage”—in other words, marriage does not imply blanket consent to sexual activity.<sup>175</sup> Similarly, the New York Supreme Court overruled a lower court’s refusal to grant an order of protection that would force an abusive partner out of the family home.<sup>176</sup> Despite a long history of protecting the home as “castle,” the court entered the domestic zone by considering whether the survivor of abuse desired state interference.<sup>177</sup> Finding that she had constructively consented to state action in her home by seeking a civil order of protection, the court approved affirmative steps by the state to protect her against future violence.<sup>178</sup> Finally, in Tracey Thurman’s tragic case, the Connecticut court demanded its audience pay attention to what Tracey wanted—what she had consented to: “Rather than evidencing a desire to work out her problems with her husband privately, Tracey pleaded with the police to offer her at least some measure of protection.”<sup>179</sup> What appeared in Section I.B to be an erosion of privacy doctrine in many cases is an increasing recognition of women’s ability to consent to particular activities and courses of action in the domestic violence context. Rather than wearing away privacy doctrine, these cases introduced and expanded consent as a more coherent alternative to the traditional public/private divide.

These three examples pose little complication for a theory of consent because in each case, the survivor sought assistance from the state, making their consent to state action and their nonconsent to their abusers’ actions explicit in the process. Integrating privacy and consent becomes more difficult when consent is contested. Classic criticisms of consent focus on coercion: “Coercion, technically, voids the privilege of the private . . . but in the light of the realities of sex inequality, what is called ‘consent’ often includes what one cannot avoid putting up with, what, under unequal conditions, one has no choice but to tolerate.”<sup>180</sup> This coercion in many cases is bidirectional, working on domestic violence survivors from within the domestic context via their abuser and from outside the domestic context via the justice system, since the mere availability

---

<sup>174</sup> *People v. Liberta*, 64 N.Y.2d at 165 (citing *Griswold v. Connecticut*).

<sup>175</sup> *Id.* at 163.

<sup>176</sup> *V.C. v. H.C.* (In re Proceeding), 689 N.Y.S.2d 447 (App. Div. 1999).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Thurman*, 595 F. Supp. at 1529.

<sup>180</sup> MacKinnon, *supra* note 4, at 83; see also *People v. Liberta*, 64 N.Y.2d at 165 (“Proving lack of consent, however, is often the most difficult part of any rape prosecution[.]”).

of a consent defense to sexual assault allegations can discourage survivors from seeking help.<sup>181</sup> Rather than evaluating consent case-by-case, some laws instead address coercion by drawing a bright line to punish activities that society finds un-consentable, regardless of the particular facts.<sup>182</sup> This logic works well for achieving justice in clear cases, such as violent rape,<sup>183</sup> but does not always prioritize autonomy, such as in cases of consensual sadomasochism.<sup>184</sup>

Instead, adopting a coherent consent framework for privacy doctrine necessitates, as a corollary, conceiving of the state as an active rights-facilitator. In such a role, the state does not start in the “hands off” position characteristic of domestic privacy cases, nor does it automatically insert itself in what we recognize as private spaces or relationships, as domestic privacy proponents feared. Instead, a rights-facilitating state makes itself available to people who desire assistance or other resources—people who consent to state action in their individual circumstances.

This posture makes domestic violence survivors’ needs the primary concern and recognizes their agency. Giving survivors a sense of control increases the likelihood of a good outcome<sup>185</sup> and it can have a positive effect on the survivor themselves, as an expression of their own power<sup>186</sup>—something that abusive relationships often steal from survivors. Conversely, action without the survivor’s consent, such as mandatory arrest and no-drop policies, may subject the survivor to more coercion, in the form of forced cooperation with whatever path the state perceives as preferable.<sup>187</sup> This strips the survivor of their agency

---

<sup>181</sup> Cheryl Hanna, *Rethinking Consent in a ‘Big Love’ Way*, 17 MICHIGAN J. OF GENDER & L. 111, 150 (2010) (hereinafter *Rethinking Consent*).

<sup>182</sup> Importantly, a consent framework can automatically incorporate the impossibility of consent among individuals who are below the age of majority, are incapacitated, or are otherwise unable to consent (as among individuals with certain mental illnesses and disabilities). Violence involving those individuals should be considered un-consentable.

<sup>183</sup> See, e.g., *People v. Liberta*, 64 N.Y.2d at 164 (“To ever imply consent to [rape] is irrational and absurd[.]”).

<sup>184</sup> See, e.g., Hanna, *Rethinking Consent*, *supra* note 181, at 140–149.

<sup>185</sup> Lynn F. Beller, *When In Doubt, Take Them Out: Removal of Children from Victims of Domestic Violence Ten Years After Nicholson v. Williams*, 22 DUKE J. GENDER L. & POL’Y 205, 239 (2015).

<sup>186</sup> Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman’s Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN’S L.J. 183, 189–190 (1997).

<sup>187</sup> See Dorchen A. Leidholdt, *The Reluctant Witness*, N.Y. COUNTY LAWYER’S ASS’N (March 13, 1997) *contra* Raoul Felder, *Yes: It’s Time to Declare War on Spouse Abuse*, ABA J., 76 (May 1996) (advocating forcing domestic violence survivors to testify as “unwanted medicine” to treat the epidemic of spousal abuse).

and in many instances discourages them from seeking help in the future.<sup>188</sup> Instead, law enforcement should be trained to provide dynamic legal advice and services tailored to the survivor they are working with, perhaps through social work and psychoanalytic techniques.<sup>189</sup> Moving toward meaningful, self-driven engagement can increase the survivor's trust in state resources and increase the likelihood that they will seek assistance if they experience future violence.

Such a conception of the state's role also permits fuller consideration of complicating factors such as economic dependence, social dependence, and issues such as the survivor's children in common with their abuser—components largely absent from domestic violence advocacy strategies through the twenty-first century.<sup>190</sup> The rights-facilitating state will make it possible for a domestic violence survivor to persist in whatever path they choose. For example, a survivor who has children may have previously relied on their abuser for childcare while they worked. A rights-facilitating state would assist that survivor with affordable childcare—an outcome that removes a barrier to achieving or maintaining economic independence from their abuser, to retaining social support from their community through their work, and to pursuing prosecution if the survivor chooses, since they will no longer rely on their abuser's childcare assistance. Thus, while a consent framework does not promote explicitly pro-prosecution policies such as no-drop, the range of social services that attend such a framework may facilitate survivors' seeking justice through the traditional law enforcement system if they determine it is right for their situation, in addition to helping them address daily needs.

Requiring consent to state intervention is not without complications. Foremost, it is critical to acknowledge that such a framework does not eliminate

---

<sup>188</sup> Leidholdt, *supra* note 187.

<sup>189</sup> See Mills, *supra* note 186 at 198–199 (making the “radical proposal” to train prosecutors in social work and psychoanalytic techniques).

<sup>190</sup> See Elizabeth Cronin, *Prosecuting a Domestic Violence Case: Looking Beyond the Victims' Testimony*, in *LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM*, 116, 117 (Mary Rothwell Davis, Dorchen Leidholdt, & Charlotte Watson, eds., 2015). But note that a number of domestic violence advocates—especially non-governmental organizations—do now offer wraparound services that aim to address the full range of complicating factors. See, e.g., Neighborhood Legal Services of Los Angeles County, *Wraparound Supports Help Domestic Violence Survivors Overcome the Odds* (July 22, 2021), <https://nlsla.org/wraparound-supports-help-domestic-violence-survivors-overcome-the-odds/> [<https://perma.cc/K482-RU3Q>]; Sanctuary for Families, *Our services* (last visited Feb. 27, 2023), <https://sanctuaryforfamilies.org/our-approach/> [<https://perma.cc/KW4T-S3WS>]; Safe Horizon, *What We Do* (last visited Feb. 27, 2023), <https://www.safehorizon.org/our-services/what-we-do/> [<https://perma.cc/79KJ-JS6X>].

the state's ability to act when there is an emergency.<sup>191</sup> But it does change how law enforcement might respond after resolving such an emergency, for example, by discussing paths forward with the survivor instead of prosecuting without the survivor's consent. The doctrine of exigent circumstances also, to some extent, speaks to the issue of competing consent—when a survivor consents to state action in the home but her abuser, a co-occupant, does not consent.<sup>192</sup> While both the survivor and the abuser retain their fundamental rights to spatial and familial privacy, an objectively reasonable need for emergency aid is enough to override those rights.

### **B. A Consent Framework Can Comprehensively Support Reproductive Rights**

A consent-focused approach is consistent with other assessments of the apparent tension between doctrines of domestic privacy and decisional privacy. Rather than finding that privacy doctrine erects an unassailable barrier between state action and domestic activities, philosopher and political scientist Annabelle Lever argues that it is through incorrect line-drawing that the Court has permitted state inaction and sex inequality.<sup>193</sup> Privacy doctrine may have historically allowed gender inequality, but it does not inherently support it.<sup>194</sup> Instead, when we draw the line so that privacy doctrine fully incorporates consent, the state is positioned in a more flexible, rights-facilitating role.

Writing on privacy and reproductive choice, Lever argues that “basic principles of right suggest that the state has a duty to remove poverty-based constraints on the exercise of fundamental rights so long as it can do so without threatening the rights of others.”<sup>195</sup> In fact, Lever says, statutes that effectively eliminate choice, for example by making an option unavailable to people who

---

<sup>191</sup> See *supra* notes 78, 81, and accompanying text (discussing the doctrine of exigent circumstances).

<sup>192</sup> See Hanna, *Behind the Castle Walls*, *supra* note 4 (discussing impact of *Georgia v. Randolph*, 547 U.S. 103 (2006), on domestic violence advocacy, the Fourth Amendment, and consent).

<sup>193</sup> Lever, *supra* note 4 at 1156–58.

<sup>194</sup> See, e.g., *id.* at 1146, 1152–54, 1163 (arguing that it is possible to reject sexist ideals underlying privacy cases such as *Harris v. McRae* and *Bowers v. Hardwick* without rejecting privacy itself; “privacy and equality are interdependent rights”); *Bowers*, 478 U.S. at 203–205 (1986) (Blackmun, dissenting) (outlining how protecting decisional and spatial privacy is essential to promoting individuals’ freedom to choose who to love or marry, whether to have children, and how to organize their family and household).

<sup>195</sup> Lever, *supra* note 4, at 1149.

are unable to pay for it, deprive people of their constitutional privacy rights.<sup>196</sup> Professors Chemerinsky and Goodwin build out the same line of reasoning in the abortion rights context, finding that the idea

that the state has a valid interest in encouraging childbirth over abortion[ ]cannot be reconciled with abortion being a private choice for each woman. Indeed, recognizing that abortion is a private moral choice for each woman means that no longer will the government have the power to regulate abortion based on its desire to encourage childbirth over abortion.<sup>197</sup>

Reading the cases that obviated state responsibility for making choice accessible to everyone,<sup>198</sup> Professors Chemerinsky and Goodwin arrived at the same conclusion for abortion that I arrive at for domestic violence. Those decisions reflect an assumption

that there is a difference between prohibiting abortion and creating an incentive in favor of childbirth . . . [, which is not] consistent with the view that abortion is a private moral judgement. . . . [T]he distinction between discouraging abortions and prohibiting them is meaningless for many indigent women. The effect of the refusal to pay for abortion is to compel many women to bear and have children.<sup>199</sup>

Under this framework, cases such as *Maher v. Roe*, *Harris v. McRae*, and *DeShaney v. Winnebago*, which reached its conclusion in part by citing *Harris v. McRae*,<sup>200</sup> were wrongly decided. If the justice system is to treat reproductive

---

<sup>196</sup> *Id.* at 1149–51.

<sup>197</sup> Chemerinsky & Goodwin, *supra* note 113, at 1238. In this quote, Professors Chemerinsky and Goodwin emphasize recognizing abortion as a “private moral choice.” Abortion is also a medical choice, and for most individuals is a combination of the two. Individuals obtain abortions for medical reasons despite their own moral opposition to abortion, refuse abortion for moral reasons despite medical indications, or even obtain abortions for moral reasons despite a lack of immediate medical indication.

<sup>198</sup> *See, e.g., Maher*, 432 U.S. (holding state governments may show a preference for childbirth over abortion in their Medicaid programs by funding childbirth and not funding abortions); *McRae*, 448 U.S. (holding the federal government may show a preference for childbirth over abortion through its Hyde Amendment prohibition of use of federal funds for certain, otherwise Constitutionally-protected abortions).

<sup>199</sup> Chemerinsky & Goodwin, *supra* note 113, at 1241–42. *See also id.* at 1243 (discussing the Court’s rejection of “any distinction between prohibiting and discouraging religious conduct” as inherently contrary to its approach to abortion).

<sup>200</sup> *DeShaney*, 489 U.S. at 213 (citing *Harris v. McRae*, 448 U.S. 297, 317–18 (1980)).

choice as a “purely private” decision,<sup>201</sup> it must recognize and effectuate its responsibilities in accordance with an affirmative state duty to facilitate the right to exercise reproductive choice.

Under a framework of consent, an initial and most obvious change is to require state funding for abortion care. But complete access to reproductive and family decision-making demands the same types of wraparound services that would be helpful to domestic violence survivors, described above. Pregnancy, childbirth, and additional children in one’s care are each attended by physical and mental health risks as well as irrevocable impacts on one’s future.<sup>202</sup> Increased access to affordable healthcare, including mental healthcare, nutritional programs, childcare resources, living wages, and workplace protections for pregnant or parenting people would provide more meaningful individual choice about reproduction. The right to choose goes far beyond access to abortion.<sup>203</sup>

In *Dobbs v. Jackson Women’s Health Organization*, however, the United States Supreme Court moved in the opposite direction. The Court called abortion a “question of profound moral and social importance that the Constitution unequivocally leaves for the people.”<sup>204</sup> However, the Court’s decision to overturn *Dobbs* would not leave that question for the people. Instead, it would leave it for state legislatures, which in many states are notorious for their failure to represent the majority desires and beliefs of their constituents.<sup>205</sup> Just sixty days after *Dobbs* was released, five states’ trigger bans

---

<sup>201</sup> Chemerinsky & Goodwin, *supra* note 113, at 1242 (stating that the Supreme Court has not treated abortion as a “purely private” decision thus far).

<sup>202</sup> See, e.g., *Roe v. Wade*, 410 U.S. at 153; Chemerinsky & Goodwin, *supra* note 113, at 1206–1209 (citing to a series of resources detailing the plethora of impacts, including the toll of domestic violence).

<sup>203</sup> See, e.g., JACK M. BALKIN, WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION 39 (2005) (“We called the right of intimate relation recognized in *Griswold* the right of ‘privacy.’ However, this privacy was not simply a right to secrecy; it was the right to engage in deeply personal decisions about whether or not to have a child, a right with which the state should not interfere.”).

<sup>204</sup> *Dobbs*, 142 S. Ct. at 2265.

<sup>205</sup> See, e.g., Ari Berman, *How Gerrymandering and Voter Suppression Paved the Way for Abortion Bans*, MOTHER JONES (May 17, 2019), <https://www.motherjones.com/politics/2019/05/gerrymandering-voter-suppression-abortion-heartbeat-bills/> [<https://perma.cc/FXK6-XDTV>] (describing how gerrymandering yielded counter-majoritarian abortion laws in Georgia and Missouri, among others); David A. Lieb, *Abortion Ruling Puts Spotlight on Gerrymandered Legislatures*, PBS NEWS HOUR (July 3, 2022), <https://www.pbs.org/newshour/politics/abortion-ruling-puts-spotlight-on-gerrymandered->



had taken effect and still more states were enforcing bans on abortion beginning at just six weeks' gestation.<sup>206</sup> *Dobbs* left other forms of decisional privacy in effect, at least by its text,<sup>207</sup> but it is evident that the current United States Supreme Court does not have a consent framework in mind.

### C. A Consent Framework Need Not Abrogate Long-Established State Interests

An approach that includes state support for abortion need not abrogate recognized state interests in preserving life with regard to the fetus, the pregnant person, or their families and communities.<sup>208</sup> With regard to the fetus, Professors Chemerinsky and Goodwin suggest that “the state could set standards to ensure that the fetus is removed in the manner most likely to lead to its survival, and it may take the steps it chooses to keep the fetus alive once removed.”<sup>209</sup> The prospect of gestating a fetus outside the human body—dubbed “ectogestation” by some—raises a range of moral and ethical complications, especially if such ectogestation is nonconsensual.<sup>210</sup> However, the idea remains that life-promoting alternatives to forced pregnancy exist and are ripe for exploration. Further, to the extent that the state’s interest in preserving life

---

legislatures [<https://perma.cc/CUS3-RTSB>] (describing how gerrymandering generated anti-abortion legislatures even in pro-choice states, such as Wisconsin and Michigan).

<sup>206</sup> Larissa Jimenez, *60 Days After Dobbs: State Legal Developments on Abortion*, BRENNAN CENTER FOR JUSTICE (Aug. 24, 2022), <https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion> [<https://perma.cc/U4L7-U2BQ>].

<sup>207</sup> *Dobbs* could be a harbinger of a series of rights-retractions. Justice Thomas’s concurrence asserts that the “resolution of [*Dobbs*] is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion. . . . [I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.” *Dobbs*, 142 S. Ct. at 2300–302 (Thomas, J. concurring).

<sup>208</sup> Such interests are long- and well-established. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (“As a matter of settled law, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”); *Maher*, 432 U.S. at 472 (referring to “the State’s dual interest in the health of the pregnant woman and the potential life of the fetus”); *Planned Parenthood v. Casey*, 505 U.S. at 846 (“[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”).

<sup>209</sup> Chemerinsky & Goodwin, *supra* note 113, at 1233.

<sup>210</sup> *See, e.g.*, Lydia Di Stefano, et al., *Ectogestation ethics: The implications of artificially extending gestation for viability, newborn resuscitation and abortion*, 34 *BIOETHICS* 371 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7216952/> [<https://perma.cc/PD52-LS7T>] (discussing, inter alia, human ectogestation’s prospective impact on the ethics of abortion care).

encompasses a more general interest in increasing its population, providing for abortion may lead to more net births: pregnant people with meaningful access to abortion are more likely to have children after receiving an abortion.<sup>211</sup>

Access to abortion can also promote the state's interests in preserving life with regard to the pregnant people seeking to terminate their pregnancy. Pregnant people who have meaningful access to abortion are more likely to live above the federal poverty level and less likely to report lacking money to pay for basic living expenses.<sup>212</sup> That correlation is crucial in the United States, where the poorest 1% of women die more than 10 years sooner than the wealthiest 1% of women:<sup>213</sup> a measure that can decrease poverty bears the potential to extend life, furthering the government's interest in preserving life. More directly, abortion is one method for individuals to avoid the increasingly high risk of pregnancy- or birth-related death.<sup>214</sup> In 2019, a total of four individuals in the United States died from an abortion,<sup>215</sup> while a total of 754 individuals in the United States died from carrying a pregnancy to term.<sup>216</sup> In terms of case fatality rate, from 2013 to 2019, there was an average of 0.43 abortion-related deaths per 100,000 legal induced abortions<sup>217</sup> while, in 2019, there was an average of 20.1 deaths of a birthing person per 100,000 live

---

<sup>211</sup> DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* 212–14 (2020) (“[W]hether women had a subsequent pregnancy was related to whether they received their wanted abortion—44% of those who received an abortion, compared to 32% of women who were denied, had a subsequent pregnancy. The pregnancy rate was higher among women who received an abortion, and it stayed higher for the full five years of the study.”).

<sup>212</sup> *Id.* at 206 (reporting that, on average, people who give birth after being denied an abortion live at the federal poverty level, while people who obtain an abortion and have a subsequent child live at 32% above the federal poverty level).

<sup>213</sup> Raj Chetty et al., *The Association Between Income and Life Expectancy in the United States, 2001-2014*, 16 *JAMA* 315 (May 13, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4866586/> [<https://perma.cc/67SA-EJGG>].

<sup>214</sup> See Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020*, NCHS Health E-Stats 3 (2022), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/E-stat-Maternal-Mortality-Rates-2022.pdf> [<https://perma.cc/5X9R-EN3Y>] (reporting a year-over-year increase in the rate of maternal mortality in the United States from 2018 to 2020).

<sup>215</sup> Katherine Kortsmitt et al., *Abortion Surveillance—United States, 2020*, Morbidity and Mortality Weekly Report (2022), [https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm#T15\\_down](https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm#T15_down) [<https://perma.cc/7QVW-769U>].

<sup>216</sup> Hoyert, *supra* note 214, at 3.

<sup>217</sup> Kortsmitt et al., *supra* note 215.

births.<sup>218</sup> The health risks increase for individuals who belong to particular socially salient groups: In 2020, the live birth case fatality rate for individuals who identify as “Non-Hispanic Black” was 55.3.<sup>219</sup> For individuals over the age of 40, it was 107.9.<sup>220</sup> Access to abortion does not obviate the state’s responsibility and role in rectifying these too-high rates and disparities; abortion is not a complete solution to pregnancy- and birth-related deaths. But the data do demonstrate how obtaining an abortion can, for at least some pregnant people, save lives.

Finally, access to abortion improves and “preserves” the lives of the families and communities of pregnant people, too. When women are granted sought-after abortions, their children are also less likely to live in poverty.<sup>221</sup> As discussed above, studies show that poverty in the United States is correlated with a more-than 10-year reduction in a woman’s lifespan; that reduction increases to nearly 15 years for men, and the inequality in lifespan between the wealthy and the impoverished is increasing over time.<sup>222</sup> Beyond quantity of life, quality of life may also improve: the children of people who could obtain an abortion when they wanted one experienced an advantage in achieving developmental milestones on time.<sup>223</sup> If the state accepts its responsibility to promote individuals’ right to make private decisions by facilitating individuals’ ability to carry out their choice, it will enjoy the reward of a both freer and healthier country.

## CONCLUSION

I have argued that domestic privacy and decisional privacy share the same legal and rhetorical foundations and, despite seemingly conflicting attitudes toward these two branches of privacy doctrine, feminist movements can promote gender equality in both spheres by prioritizing consent as the

---

<sup>218</sup> Hoyert, *supra* note 214, at 3.

<sup>219</sup> *Id.* at 4.

<sup>220</sup> *Id.* at 5.

<sup>221</sup> FOSTER, *supra* note 211, at 199–215.

<sup>222</sup> Raj Chetty et al., *supra* note 213 (“First, higher income was associated with greater longevity throughout the income distribution. The gap in life expectancy between the richest 1% and poorest 1% of individuals was 14.6 years (95% CI, 14.4 to 14.8 years) for men and 10.1 years (95% CI, 9.9 to 10.3 years) for women. Second, inequality in life expectancy increased over time. Between 2001 and 2014, life expectancy increased by 2.34 years for men and 2.91 years for women in the top 5% of the income distribution, but increased by only 0.32 years for men and 0.04 years for women in the bottom 5% (P < .001 for the difference for both sexes).”).

<sup>223</sup> FOSTER, *supra* note 211.

mechanism that activates state intervention. Under this framework, state action takes the form not of unwarranted interference or indifference to plights in the private sphere, but of a rights facilitator. The state can thus combat sex inequality and coercion without replicating the disempowerment many survivors of domestic violence experience within abusive relationships and without damaging constitutional protections for individual autonomy.

Building on these insights, other scholars might apply a consent framework to prospective welfare programs, reviewing the logistics of how and where a rights-facilitating state can intervene. Further research might also extend this analysis to determine the utility of privacy and equal protection doctrine to future advocacy, and specifically to crafting statutory language. Such an analysis may be particularly useful given the resurgence of the Equal Rights Amendment and rising discussions about affirmative rights in constitutions around the world.