

2009 RUTH BADER GINSBURG LECTURER**BEHIND THE CASTLE WALLS:
BALANCING PRIVACY AND SECURITY
IN DOMESTIC ABUSE CASES**

Cheryl Hanna*

INTRODUCTION

Ruth Bader Ginsburg was appointed to the Supreme Court just after I graduated from law school. I recall attending one of her speeches, expecting to hear about legal issues, but instead she shared with us personal stories. I particularly remember her describing the experience of attending law school as a mother with a young child, often rocking her baby to sleep as she read her law books. I was so inspired by her openness about both the challenges and the possibilities to be a professional working mother. I always try to channel Justice Ginsburg whenever I am having a hard time keeping it all together.

I really appreciate all the kindness the Thomas Jefferson School of Law has extended to me on this trip. In particular, I would like to thank Professor Claire Wright for helping me balance my work and family by making arrangements so that I could bring my five-year-old daughter with me. I also want to extend warm greetings to my good friend Professor David Steinberg. David and I taught at Vermont Law School many years ago. It is so wonderful to be back here. This is my second trip to Thomas Jefferson School of Law, and I applaud all of you for all the wonderful things that are happening here.

* Professor of Law, Vermont Law School. This is an edited transcript of the Ruth Bader Ginsburg keynote address given at the Ninth Annual Women and the Law Conference, Confronting Domestic Violence Head On: The Role of Power in Domestic Relationships at Thomas Jefferson School of Law on February 27, 2009. The author thanks everyone at TJSL, especially Professor Claire Wright for her generosity of spirit. Thanks also to my assistant Ginny Burnham and my research assistant Clare Cragan for their edits. The author can be reached at channa@vermontlaw.edu.

I might characterize being here today as a “professional homecoming” for me. The first time I visited San Diego, back in 1993, I had just started working as a prosecutor in Baltimore City—at one of the first specialized domestic violence units in the country. I came here to hear Casey Gwinn¹ speak about prosecuting domestic violence cases. The idea that you could prosecute these cases seemed so radical at the time! Back then, I never imagined all the legal reforms we have accomplished, thanks in large part to the tremendous work so many of you are doing. Some think that conferences on domestic violence can be depressing. But I always feel uplifted. I feel particularly uplifted today because there are so many of you—mostly non-lawyers to my surprise and delight—committed to ending intimate violence.

I want to ask a couple of questions as we begin. First, how many of you have ever been in a romantic relationship? Don’t be shy about it. There is no statute of limitations. It looks like just about everyone is raising a hand. Second, how many of you have been in a romantic relationship that ended? That’s a lot of you! Third, in hindsight, how many of you stayed in that relationship longer than you wish you had? So why did you stay? Tell me why you stayed. Just shout out the reasons and I will repeat it for everyone to hear.

You had children.

You were familiar with him.

You were too old to start over.

He wasn’t hitting you.

He was hot.

You were hopeful.

You leased an apartment together in New York, and you can’t break a lease in New York.

I always like to start my talks by asking these questions because they remind us that we are not talking about anyone different from ourselves when we talk about intimate partner abuse or domestic violence. We are talking about us. For most of us, it can be really easy to get into a romantic relationship, and also really hard to get out of it. When you consider all of the factors you listed—the financial factors and emotional needs—and on top of those you add coercion,

1. Casey Gwinn was the Head Deputy in the San Diego City Attorney’s Domestic Violence Unit before being elected San Diego City Attorney in 1996.

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physical, sexual, and emotional abuse, and threats, getting out of some relationships can be very tough. Considering that most of us think that our private relationships should stay private, breaking up becomes even harder to do. We must be reminded not to be judge those who struggle to end a bad relationship. To some extent, we have all been there.

The idea of privacy, that relationships are about me and my partner and nobody else, wreaks terrible havoc on our psyches. The truth is, we often need a little, and sometimes a lot, of help to get out of a relationship—be it from family or friends, or from the state. That is the premise on which I base my remarks today: we often need help to end a relationship. Thus, the question I want to explore is how we balance our need for privacy and intimacy with our need for help in staying safe and moving on with our lives.

Myra Bradwell and the Building of the Castle

When Professor Wright asked me to talk about the question of privacy, she raised the concept of “behind the castle walls.” This is a great topic because the desire to have private, intimate, and loving relationships is nearly universal. Moreover, the courts, particularly the United States Supreme Court, have had a lot to say about what happens “behind the castle walls,” both historically and in recent years.² What I hope to do today is to walk you through a bit of that history, talk about some current cases, and offer some modest thoughts on the future of privacy and the law as they relate to intimate relationships.

Let me start by acknowledging that I am somebody who believes that the law can transform our lives. Even if many of us here today have had negative experiences with the judicial system, the history of the law has ultimately been one of progress. I come here optimistically because we are moving in the right direction. One way we continue to move forward is to get rid of, once and for all, the legal doctrine that “a man’s home is his castle.” After today’s talk, the next time you hear that phrase, I hope you will say, “Wait a minute! That’s not right.” It is time for us to evolve from the old notion of privacy, embedded in that adage, toward a new concept of privacy that embraces each person’s right to make decisions on his or her behalf. Each of us must be free from the kinds of private and

2. See *infra* pp. 72–85.

public restraints that hinder our ability to be in relationships where each partner retains personal autonomy and dignity.

How many of you know of Myra Bradwell? Myra Bradwell wanted to be a lawyer. She apprenticed under her husband, a practicing attorney, and passed the Illinois bar exam. Though state law permitted anyone of good character and sufficient training to be admitted as a member of bar, the Illinois State Bar denied her petition for admittance because she was a woman. Bradwell appealed to the Supreme Court of Illinois and represented herself. And while that court seemed impressed by her skills, it nevertheless refused to grant her a license, stating, “That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth.”³ The United States Supreme Court agreed with the state, and in a concurring opinion, Justice Bradley said:

The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.⁴

This quote reminds us of how far we have come as a gender, and the hurdles we have cleared along the way. It also suggests that the rule proclaiming “a man’s home is his castle” is rooted in a premise that because women are biologically different, and hence inferior, men had to be able to control their wives. This is known as the doctrine of coverture. Once a woman married, she had few legal rights of her own. She could not own property, make contracts, work, or receive an education without the permission of her husband. In Myra’s case of *Bradwell v. Illinois*, the doctrine of coverture was upheld by the U.S. Supreme Court.⁵ This doctrine gave rise to legal justifications for men to chastise their wives. I should note, by the way, that Myra Bradwell ultimately became a member of the bar after the Illinois legislature changed the law to allow women be admitted. Eventually, she was even allowed to practice in the U.S. Supreme Court.

3. In re Bradwell, 55 Ill. 535, *3 (1869).

4. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 142 (1872) (Bradley, J., concurring).

5. *Id.* at 142.

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From Coverture to Chastisement

The next case I want to introduce is *Bradley v. State*.⁶ At issue was whether a husband used “reasonable chastisement” when disciplining his wife. The court said, “[i]t is true, according to the old law, the husband might give his wife moderate correction, because he is answerable for her misbehavior [Some] might think proper to use a whip or a rattan, no bigger than my thumb, in order to inforce [sic] the salutary restraints of domestic discipline.”⁷ The court continues, “I think his lordship might have narrowed down the rule in such a manner, as to restrain the exercise of the right, within the compass of great moderation, without producing a destruction of the principle itself.”⁸

What does that mean? In American law, until the early 20th century, husbands were responsible for crimes committed by their wives. So, if I stole something from my neighbor, my husband would be punished because the law assumed that I acted under his control. Because married women were not regarded as responsible for their actions, the law often turned a blind eye when a husband used moderate, physical force to control his wife. Thus while the court in *Bradley* found that the defendant had gone too far in his discipline, it nevertheless upheld the right of a husband to *reasonably* chastise his wife.⁹

The Right to be Held Accountable for Crimes

Let’s now turn to the Declaration of Sentiments. This document, principally authored by Elizabeth Cady Stanton, was signed by 100 people who attended the first women’s rights convention in Seneca Falls, New York in 1848. One Sentiment stated:

He has made her, morally, an irresponsible being, as she can commit many crimes with impunity, provided they be done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.¹⁰

6. 1 Miss. (1 Walker) 156 (1824).

7. *Id.* at 157.

8. *Id.* at 157–58.

9. *See id.* at 158.

10. Declaration of Sentiments and Resolutions, Seneca Falls Convention (July 19, 1848).

Thus, one of the very first rights that feminists demanded in America was the right to be held accountable for their own crimes, removing any legal justification for chastisement.

A generation after the Declaration of Sentiments, state courts began to abandon the doctrine of chastisement.¹¹ But as many scholars before me have noted, particularly Reva Siegel,¹² courts continued to allow the physical abuse of women by their husbands even though the doctrine was no longer embraced. The development of what we know today as the doctrine of privacy, the idea that a man's home is his castle, began around this period. Despite the fact that husbands lacked legal support for physically chastising their wives, courts refrained from addressing conflicts in intimate relationships out of fear that state intervention would disrupt the harmony of marriage. In order to protect marriage and promote privacy, the law held that a man's home was his castle even though he used physical force against his wife.¹³

Challenges to Privacy: Tracey Thurman

The legal system continued to turn a blind eye to the physical abuse of women until the 1960's and 1970's when feminists and activists pressed the state to recognize the legal rights of women. One strategy was to undermine the notion of privacy by arguing that what happens inside the castle walls is not private. It's public. When men

11. See, e.g., *Fulgham v. State*, 46 Ala. 143, 146–47 (1871) (“The wife is not to be considered as the husband’s slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.”); *Commonwealth v. McAfee*, 108 Mass. 458, 461 (1871) (“Beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent.”).

12. See generally Reva B. Siegel, “*The Rule of Love: Wife Beating as Prerogative and Privacy*,” 105 *YALE L.J.* 2117, 2122–29 (1996), for a discussion the doctrine of chastisement in relation to civil rights reform.

13. See, e.g., *Thompson v. Thompson*, 218 U.S. 611, 618 (1910) (holding that a wife had no cause for action for assault and battery charges against her husband because it would “open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assaults, slander and libel . . .”); *State v. Oliver*, 70 N.C. 60, 61 (1874).

[F]rom motives of public policy,—in order to preserve the sanctity of the domestic circle, the [c]ourts will not listen to trivial complaints. If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.

Id.

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can abuse women with legal immunity, the rights of women are denied. Activists argued that denying women legal protection violated the Constitution's promise of equal protection of the laws.

Let me share with you the Tracey Thurman story because it will give you a sense of how the law responded to domestic violence and how a legal strategy is used to improve that response. Though this case did not reach federal court until the mid-1980s, much legal groundwork had already been laid to demonstrate that policies of non-intervention, justified on the preservation of marital privacy, violated the rights of women.¹⁴

Tracey Thurman was a victim of domestic violence. Her husband Charles Thurman had beaten her on numerous occasions. The police came to her house many, many times and had done nothing to help her. On June 10, 1983, Mrs. Thurman's husband came to her home, causing her to call the police. Her husband then stabbed her repeatedly, around the chest, neck, and throat. A police officer arrived twenty-five minutes later but did not arrest her husband, despite evidence of the attack. Three more police officers arrived. Mr. Thurman went into the house, brought out their child and threw him down on his bleeding mother. The officers still did not arrest him. While his wife was on the stretcher, waiting to be placed in the ambulance, he came at her again. Only then did the police take him into custody. Mrs. Thurman later sued the city of Torrington claiming she was denied equal protection under the law because the police had a policy of treating assault cases differently when they involved a spouse or boyfriend.¹⁵ The federal district court agreed, holding:

A man is not allowed to physically abuse or endanger a woman merely because he is her husband. Concomitantly [sic], a police officer may not knowingly refrain from interference in such violence, and may not "automatically decline to make an arrest simply because the assaulter and his victim are married to each other." Such inaction on the part of the officer is a denial of the equal protection of the laws.¹⁶

14. *See Thurman v. Torrington*, 595 F. Supp. 1521, 1528 (D. Conn. 1984).

15. *Id.* at 1526.

16. *Id.* at 1528 (quoting *Bruno v. Codd*, 396 N.Y.S.2d 974, 976 (N.Y. Sup. Ct. 1976), *rev'd on other grounds*, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978), *aff'd*, 393 N.E.2d 976 (N.Y. 1979)) (citations omitted).

A jury found in favor of Tracey Thurman and awarded her \$2.3 million in damages.¹⁷ This verdict gave police departments across the country an increased incentive to do away with any notion that domestic disputes were private. This prompted a significant shift in the law. Police began providing better protection for victims by developing pro-arrest policies and eliminating officer discretion in domestic abuse cases.

Rethinking Privacy in the Context of Reproductive Rights

As activists and as lawyers chipped away at the doctrine of privacy that justified non-intervention in intimate relationships, others were trying to promote a doctrine of privacy around women's reproductive rights. The U.S. Supreme Court had held that parents have the right to direct their children's upbringing, including the right to decide if their children received a parochial education,¹⁸ and if their children learned a foreign language.¹⁹ Relying on these and other cases, lawyers argued that liberty interests under the Fourteenth Amendment included the right of individuals to make decisions about their own reproduction. This liberty interest extends a "zone of privacy," into which the state could not intrude. Ultimately, the Supreme Court expanded this zone of privacy by holding that married couples,²⁰ and then single women,²¹ have the right to use birth control. Eventually, the right of privacy, described as a penumbra of implied rights under the Bill of Rights, served as the basis for *Roe v. Wade*, in which the Court held that women had a qualified right to terminate a pregnancy.²²

Tension between privacy rights and women's equality has existed in American law since the 1960s.²³ Historically, the idea that

17. "At trial, a jury awarded Tracey Thurman \$2.3 million in damages against individual police officers, but not against the City of Torrington, to compensate Tracey Thurman for the brutal stabbing that resulted from the police's repeated refusal to arrest her battering husband. The parties settled for \$1.9 million." Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 Yale L.J. 788, 795 n.31 (1986) (citing *Thurman*, 595 F. Supp. 1521 (D. Conn. 1984)).

18. See *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925).

19. See *Meyer v. Nebraska*, 262 U.S. 390, 391 (1923).

20. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

21. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

22. 410 U.S. 113, 153 (1973).

23. See Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 979 (1991).

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a man's home is his castle was just a proxy for male power in the household. Early cases about parental rights were, at their core, about the rights of fathers to decide what was best for their children, much like the cases upholding coverture and chastisement permitted husbands to control their wives.

In contrast, the notion of privacy that is the basis for reproductive rights is theoretically distinct from the privacy notion upheld in *Bradwell*.²⁴ 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.

In recent years, the U.S. Supreme Court has begun clarifying the distinction between old and new privacy. Let me share with you two examples. First, in *Planned Parenthood v. Casey*, a Pennsylvania statute placed many restrictions on a woman's right to abortion.²⁵ One restriction required a married woman to notify her husband before terminating the pregnancy. Justice Sandra Day O'Connor co-authored the Court's opinion, showing reservations about abortion generally, but no tolerance for what she saw as paternalism in the law. She correctly noted that spousal notification was really about preserving a husband's control over his wife. She moves away from privacy questions and toward ensuring liberty and equality of women, stating:

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State* [the case we started with], three Members of this Court reaffirmed the common-law principle that "a woman has no legal existence separate from her husband, who was regarded as her head and representative in the social state Only one

24. See *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872). In *Bradwell*, the Court held that a citizen's privileges and immunities under the Fourteenth Amendment did not include a right to be admitted to practice law under the state bar. This holding essentially confirmed the doctrine of coverture. See *infra* text accompanying notes 3–5.

25. 505 U.S. 833, 844–45 (1992).

generation has passed since this Court observed that “woman is still regarded as the center of home and family life,” with attendant “special responsibilities” that precluded full and independent legal status under the Constitution. These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution. In keeping with our rejection of the common-law understanding of a woman’s role within the family . . . the Constitution does not permit a State to require a married woman to obtain her husband’s consent before undergoing an abortion.²⁶

Central to the Court’s holding was a concern for the impact that spousal notification would have on victims of domestic violence. Statistics and studies on the incidence and prevalence of domestic violence are cited at length.²⁷ The Court described how abusive relationships affect a woman’s sexual autonomy as well as her physical safety.²⁸ Justice O’Connor asserted a privacy interest that ensures women decide their own destiny regardless of their marital status, with particular concern for women in abusive relationships. She rejected the notion of privacy encompassed in the “a man’s home is his castle” doctrine—which was exactly the interest that the state of Pennsylvania was attempting to assert by requiring spousal notification.

The distinction between the old and new privacy concepts is highlighted again in Justice Ginsburg’s recent dissent in *Gonzales v. Carhart*, a case involving a federal ban on a certain late-term abortion procedure.²⁹ While the Court upheld the ban,³⁰ Justice Ginsburg writes in dissent, “legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her own life’s course, and thus to enjoy equal citizenship and stature.”³¹ Justice Ginsburg continued to diffuse old notions of privacy and reframed the issue around autonomous rights, much like Justice O’Connor did in *Casey*.³² This concept of privacy is rooted in individual liberty.

26. *Id.* at 896–97 (internal citations omitted).

27. *Id.* at 891.

28. *Id.* at 893.

29. *Gonzales v. Carhart*, 550 U.S. 124, 169–70 (2007) (Ginsburg, J., dissenting).

30. *Id.* at 132.

31. *Id.* at 171.

32. 505 U.S. at 891–98.

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Let me just drop a footnote. I think there has been too much disconnect between those of us who work in the area of domestic violence and those of us who work in the area of reproductive rights. Our conflicted notions of privacy have a lot to do with that disconnect. Those of us in the domestic violence field have not been very good at documenting the kinds of deprivations to sexual autonomy that happen in abusive relationships. These harms go beyond just sexual abuse that women experience in the context of an intimate relationship.³³ For example, studies show that female victims of domestic violence suffer much higher rates of sexually transmitted diseases.³⁴ They are battered during pregnancy, resulting in miscarriages, stillbirths, preterm labor and delivery, and fetal injury.³⁵ Their partners often interfere with birth control methods.³⁶ Victims of domestic violence also suffer unintended pregnancies and coerced abortions.³⁷ There is enormous opportunity for law students considering paper topics or fellowships to explore how a woman's right to self-determination, including her right to sexual self-determination, is undermined in abusive relationships. My own sense is that the greatest threat to reproductive freedom, in the broadest sense, is not necessarily the unavailability of safe and legal abortions, but the threat that comes from within the home. If we are serious about reproductive rights, then we have to acknowledge that the

33. See generally Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465 (2003).

34. See, e.g., Jacquelyn C. Campbell, *Health Consequences of Intimate Partner Violence*, 359 THE LANCET 1331, 1332 (2002), <http://download.thelancet.com/pdfs/journals/0140-6736/PIIS0140673602083368.pdf>; Pauline Freedberg, *Health Care Barriers and Same-Sex Intimate Partner Violence: A Review of the Literature*, 2 J. FORENSIC NURSING 15 (2006).

35. Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 672-73 (2006).

36. See, e.g., CENTER FOR IMPACT RESEARCH, DOMESTIC VIOLENCE AND BIRTH CONTROL SABOTAGE: A REPORT FROM THE TEEN PARENT PROJECT (2000), <http://www.impactresearch.org/documents/dvandbirthcontrol.pdf>; Mary Ellsberg & Barbara Shane, *Violence Against Women: Effects on Reproductive Health*, 20 OUTLOOK 1, 1-4 (2002), http://www.path.org/files/EOL20_1.pdf; Gina M. Wingood & Ralph J. DiClemente, *The Effects of an Abusive Primary Partner on Condom Use and Sexual Negotiation Practices of African American Women*, 87 AM. J. PUB. HEALTH 1016, 1017 (1997), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1380941/pdf/amjph00505-0130.pdf>.

37. See ELIZABETH M. SCHNEIDER, CHERYL HANNA, JUDITH G. GREENBERG & CLARE DALTON, DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 179-80 (Foundation Press 2d ed. 2008) (overview of literature on battering and abortions).

outdated concept of privacy keeps such abuses hidden behind the castle walls.

Georgia v. Randolph: *Castle Walls Revisited*

I want to share with you another case in which the U.S. Supreme Court talked about castle walls. When we think about privacy, we often think about privacy as freedom from state intrusion. It is the kind of privacy that prohibits the state from eavesdropping on your conversations or searching your home without a warrant. But new privacy is not simply about an individual's relationship with the state. It is about two individuals and what their relationship to the state ought to be when one person is prohibiting the rights of another. That is the essence of *Georgia v. Randolph*.³⁸

This dialogue is from Dan Solove's blog *Concurring Opinions*,³⁹ and sums up the case beautifully:

Wolf: "Hello, little pig, let me come in."

Pig: "No, no! Not by the hair of my chinny chin chin!"

Wolf: "Well, then I'll huff and I'll puff and I'll blow your house in."

Pig's Wife: "That won't be necessary, Wolf, come in, come in."⁴⁰

The case involves a woman named Janet Randolph. She and her husband shared a home together. She eventually leaves the relationship and goes to live with her family in Canada, taking her son with her. It is not clear from the record if there was domestic violence in the relationship, but I think it is pretty clear that there was a lot of discord. Janet comes back with her son a few months later, though we do not know whether she intended to reconcile with her husband or to retrieve her belongings. She calls the police to report that her husband has taken her son. The husband shows up after the police arrive, and admits he took the child to a neighbor's house. He claims he did this out of fear that his wife is going to leave the country with their son again. The police go with Janet and bring the child back. Janet then tells them that her husband uses drugs and that the police ought to search the house. Her husband is standing right

38. 547 U.S. 103 (2006).

39. Daniel Solove, *Concurring Opinions*, http://www.concurringopinions.com/archives/2006/03/georgia_v_rando.html (last visited Dec. 11, 2009).

40. *Id.*

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there and tells the police they cannot come in the house. The police search anyway and find drug paraphernalia. The question before the Court is whether the police can search a house when one co-occupant consents but the other co-occupant refuses consent.⁴¹

The Justices discuss numerous interpretations of the adage “a man’s home is his castle” and its application to this case. Justice David Souter, writing for the majority, states that the police should not have searched the home because Mr. Randolph did not consent.⁴² Justice Souter writes:

Since we hold to the centuries-old principle of respect for the privacy of the home, it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people. We have, after all, lived our whole national history with an understanding of the ancient adage that a man’s house is his castle to the point that the poorest man may in his cottage bid defiance to all the forces of the Crown.⁴³

While I agree with the Court’s holding, I think it was a mistake for Justice Souter to use this old notion of privacy as a basis for the decision. This case is not about protecting a single man from unwarranted state intrusion. Rather, it is about how the state ensures that both parties in a relationship enjoy equal privacy and equal protection and safety. Justice Souter sees the relationship between the defendant and the state as unilateral. But it is multi-lateral, involving two individuals and the state. Souter’s opinion misses this complexity, and, unwittingly, he re-introduces a notion of privacy whose applicability is too simplistic for the question before the Court. Souter’s reference to the castle, I believe, was not intended to reassert male privilege in the home. But it was an unfortunate reference that undermines the strength of the opinion and repeats a phrase that, in this context, has the opposite implication of that which the Court intended.

Justice John Paul Stevens, in a concurring opinion, looks more carefully at the underlying question of autonomy presented in the case.⁴⁴ Understanding the more complex question of the power dynamic between the parties and the historic problems with the

41. *Randolph*, 547 U.S. at 106–108.

42. *Id.* at 106.

43. *Id.* at 115 (citations omitted).

44. *See id.* at 123–25 (Stevens, J., concurring).

“man’s home is his castle” rationale, Justice Stevens addresses the question of gender equality directly.

In the 18th century, when the Fourth Amendment was adopted, the advice would have been quite different from what is appropriate today. Given the then-prevailing dramatic differences between the property rights of the husband and the far lesser rights of the wife, only the consent of the husband would matter. Whether “the master of the house” consented or objected, his decision would control. Thus if “original understanding” were to govern the outcome of this case, the search was clearly invalid because the husband did not consent. History, however, is not dispositive because it is now clear, as a matter of constitutional law, that the male and the female are equal partners. In today’s world the only advice that an officer could properly give should make it clear that each of the partners has a constitutional right that he or she may independently assert or waive. Assuming that both spouses are competent, neither one is a master possessing the power to override the other’s constitutional right to deny entry to their castle.⁴⁵

Stevens understands the issue is that each person “in the castle” has autonomous rights, clarifying some of Justice Souter’s simplistic rationale.

In Chief Justice John Roberts’ dissent, joined by Justice Antonin Scalia, he argues that one co-occupant should be able to consent even if the other objects to the search.⁴⁶ Addressing Justice Souter’s argument that a man’s home is his castle, Justice Roberts suggests that the majority’s ruling will hinder the ability of law enforcement to respond to domestic abuse situations.⁴⁷ He argues:

The majority reminds us, in high tones, that a man’s home is his castle, but even under the majority’s rule, it is not his castle if he happens to be absent, asleep in the keep, or otherwise engaged when the constable arrives at the gate. Then it is his co-owner’s castle. And, of course, it is not his castle if he wants to consent to entry, but his co-owner objects. Rather than constitutionalize such an arbitrary rule, we should acknowledge that a decision to share a private place, like a decision to share a secret or a confidential document, necessarily entails the risk that those with whom we

45. *Id.* at 124–25 (citation omitted).

46. *Id.* at 128 (Roberts, J., dissenting).

47. *Id.* at 139.

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share may in turn choose to share—for their own protection or for other reasons—with the police.⁴⁸

At first, this might sound right. You might think to yourself, doesn't Janet Randolph have the right to have the home searched because she is concerned about her husband's drug use? She may be in danger and so, as Chief Justice Roberts suggests, shouldn't we treat her consent as an invitation for help?⁴⁹ Why should the police have to go get a warrant? Why can't she invite the police into her home for her own protection? It is hard to know whether Justice Roberts' concern for domestic violence victims is, in fact, genuine, or whether it is pretext for the expansion of state power and an erosion of privacy rights.

But the problem is that Chief Justice Roberts conflates the two issues. The police do have a right to enter the home when it is for the protection of an individual regardless of consent. That is the doctrine of exigent circumstances, where the police do not need a warrant to enter if they have reason to believe that there is violence or the threat of violence occurring inside the home. The more important question is what individual rights do individuals have relative to others.

Finally, there is the dissenting opinion of Justice Scalia who, granted, sounds like a feminist.⁵⁰ But just like a wolf in sheep's clothing, one should beware anytime Justice Scalia starts to sound like a feminist. Agreeing with Chief Justice Roberts that the majority got it wrong, he focuses his argument on the impact of the ruling on domestic abuse victims. Taking particular aim at Justice Stevens' concurrence, he argues:

The issue at hand is what to do when there is a *conflict* between two equals. Now that women have authority to consent, as Justice Stevens claims men alone once did, it does not follow that the spouse who *refuses* consent should be the winner of the contest. Justice Stevens could just as well have followed the same historical developments to the opposite conclusion: Now that "the male and the female are equal partners," and women can consent to a search of their property, men can no longer obstruct their wishes. Men and women are no more "equal" in the majority's regime, where both sexes can veto each other's consent, than on the dissent's view, where both sexes cannot.

48. *Id.* at 142.

49. *Id.* at 139.

50. *See id.* at 143–45 (Scalia, J., dissenting).

Finally, I must express grave doubt that today's decision deserves Justice Stevens' celebration as part of the forward march of women's equality. Given the usual patterns of domestic violence, how often can police be expected to encounter the situation in which a man urges them to enter the home while a woman simultaneously demands that they stay out? The most common practical effect of today's decision, insofar as the contest between the sexes is concerned, is to give men the power to stop women from allowing police into their homes—which is, curiously enough, *precisely* the power that Justice Stevens disapprovingly presumes men had in 1791.⁵¹

I suspect that Justice Scalia's concern for domestic violence victims is not entirely genuine. No domestic violence organizations filed amicus briefs in the case. Rather, the interests of domestic violence victims were addressed in one paragraph in the brief filed by the United States as amicus curiae.⁵² Yet, the Court itself finds domestic violence to be a major issue in the case. To some extent, Justice Scalia and Justice Stevens agree that each partner, regardless of gender or other status, may assert a right on their own behalf. The question becomes which right the Constitution should preference: the right to privacy in an autonomous sense or the right to government intervention in the absence of concern that there is injury or the threat of violence?

I acknowledge that this is a tough case, but let's reverse the facts. Should we allow Janet Randolph to say no, you can't search the house even if her husband says that the police can? I think on balance, it is really Justice Stevens who gets this case right because only his opinion promotes what I see as the new kind of privacy right—the right to make autonomous decisions free from interference from either the government or another individual. The Constitution preferences liberty and privacy over intervention and, thus, appropriately balances privacy and safety.

By suggesting that the Court reached the right result, I am not suggesting that the decision does not create problems when the police encounter a situation where there is domestic violence and the abuser refuses to allow the police to enter. Regardless of the motives of Justices Roberts and Scalia, *Georgia v. Randolph* will likely have a

51. *Id.* at 144–45.

52. Brief for the United States as Amici Curiae Supporting Petitioner, *Georgia v. Randolph*, 547 U.S. 103 (2006) (No. 04-1067), 2005 WL 1453877, at *22.

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significant impact on the ability of law enforcement to enter a home based solely on the victim's consent.

The Court's holding in *Georgia v. Randolph* is not the problem, however. As Professor Deborah Tuerkheimer has pointed out, the real problem is that the law defines exigency without a complete understanding of domestic violence.⁵³ Courts often apply the doctrine of exigency too narrowly; while intending to protect privacy, they undermine victim safety. But this narrow view of exigency can be remedied without resorting to the idea that one spouse has control over the other spouse's decision. Thus, I'm heartened by *Randolph*. The Court is moving in the right direction when it stands firm to the idea that no partner can dictate the decisions of the other.

Castle Rock v. Gonzales and the Rebuilding of the Wall

Now let us turn to a case involving questions of privacy and police intervention in which the Court reached an arguably bad result and discuss some opportunities that the case presents. In *Castle Rock v. Gonzales*,⁵⁴ Jessica Gonzales, a mother with three daughters, was in the process of divorcing her abusive husband.⁵⁵ As part of the divorce proceedings, the court grants a restraining order against her husband, ordering him to stay away from Jessica and their daughters. The back of the restraining order says the police *shall* use every reasonable means to enforce the restraining order.⁵⁶

One afternoon when her three daughters are outside playing, her husband takes the girls and drives off with them. Jessica Gonzales calls the police, but they tell her to wait. She calls the police again. They tell her they can't do anything, and she should wait to see if her husband returns the girls. She tells them he has taken the girls to an amusement park, and asks that they send someone out to get them. They do nothing. She goes down to the police station and tries to get them to do something. They do nothing. The police adopt this old "Tracey Thurman" notion of privacy that, regardless of the restraining order, the father has the right to be with his children and that they

53. See Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801, 809 (2007) (arguing that *Georgia v. Randolph* places added prominence on the doctrine of exigency and that exigency must be more accurately defined within the domestic violence context).

54. I find it a bizarre coincidence that the case name is "Castle Rock." I picture a big castle sitting high on a rock, with women and children trapped inside.

55. 545 U.S. 748 (2005).

56. *Id.* at 752.

should not interfere in a domestic dispute. Many hours later, the husband shows up at the police station and starts shooting with a semi-automatic weapon he had purchased earlier that evening. Ultimately, he is shot and killed by the police and the three girls are found dead in the vehicle.⁵⁷ It is a terrible, tragic, tragic case.

Jessica Gonzales sued the City of Castle Rock, claiming that the police violated her civil rights.⁵⁸ In a prior Supreme Court case, the Court had already decided that the state has no affirmative duty to intervene in a private relationship even if it knows that there is a possibility that someone could be harmed. In *DeShaney v. Winnebago County Dep't of Soc. Servs.*, also a case with tragic facts, the Court, in a 5-4 decision, ruled that the Constitution does not require the state to protect the life, liberty, or property against harms inflicted by private citizens.⁵⁹

In the *Castle Rock* case, Gonzales argued that when the court granted her a restraining order, it created an entitlement that the order would be enforced. Further, she argued that the word “shall” means that the police have no choice but to enforce the order. If the police were not going to enforce it, they should have given her notice so that she could have done other things to protect herself and her children.

The Court disagreed. In an opinion by Justice Scalia, the majority held that, regardless of the language “shall,” the police maintain discretion in deciding whether to enforce the order, and therefore the state had no constitutional duty to enforce the order.⁶⁰ While states can decide to avail themselves to liability for failure to enforce the order, citizens have no due process right in police enforcement of such orders. *Castle Rock* re-embraces “a man’s home is his castle” privacy, rather than the notion of privacy that ensures safety and autonomy. While the case is not *per se* about privacy in a doctrinal sense, it certainly implicates those conflicting privacy concerns.

In the dissent joined by Justice Ginsburg, Justice Stevens quotes Professor Emily Sack, whom you will hear from this afternoon.⁶¹ He

57. *Id.* at 754.

58. *Id.*

59. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

60. *Castle Rock*, 545 U.S. at 760.

61. *Id.* at 780–81, (Stevens, J., dissenting) (quoting Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis. L. REV. 1657, 1662-63 (2004)).

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argues that the Colorado law was precisely created to overcome the idea that domestic violence was a private family matter. The language of the word “shall,” suggests Justice Stevens, was intended by the legislature to remove police discretion that had been exercised to deny women the due process of the law.⁶² Think back to Tracey Thurman. Justice Stevens is not able to convince the rest of the Court there was a violation of due process rights, however.

This is an extremely sad result, but the case is not resolved yet. After the Court denied her recovery, Gonzales appealed to the Inter-American Commission on Human Rights with the help of the Human Rights Clinic at Columbia Law School and the American Civil Liberties Union. They put forth the theory that it is a human rights violation for the state to fail to provide protection to victims of domestic violence. They argued that law enforcement has affirmative obligations to respond to domestic violence and to protect victims, and the United States has a responsibility to provide a remedy when those obligations are not fulfilled.⁶³

The Commission heard the case in October 2008. It was the first time that Jessica Gonzales—now Jessica Lenahan—was able to tell her story, as the original case never proceeded to trial. While it is not clear what impact a positive decision will have for victims of domestic violence, the case has already started to change the conversation. In the future, we should deliberately frame the state response to domestic violence as a human rights issue because private violence inhibits the basic human right of autonomy and self-determination. As Ms. Lenahan stated:

Before this case, I never knew this regional system existed and never thought of my private issues as human rights violations. I am the first survivor of domestic violence to bring an individual complaint against the United States for international human rights violations. I want other people like me out there to know that this system exists to protect all of us, and that our government cannot just turn its back on us and get away with it. Although the U.S. is always pointing its finger at other countries for their human rights violations, there are plenty of violations occurring right here at home.⁶⁴

62. *See id.* 773–92.

63. *See* http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS (last visited Dec. 12, 2009) (providing general information about *Gonzales v. United States*).

64. Jessica Lenahan, Protection from Domestic Violence is a Human Right, <http://>

Lawrence v. Texas: *Privacy and Equality*

Let me finish by talking briefly about *Lawrence v. Texas*, a case from 2003, in which the police entered the home of two men who were engaging in a private, intimate act.⁶⁵ The police arrested them, and charged them under the Texas sodomy law, which forbade homosexual sodomy. The U.S. Supreme Court ultimately struck down the Texas law holding that intimate, adult consensual conduct was a protected liberty interest.⁶⁶ Relying in part on the reproductive cases we discussed earlier, the Court held that consensual sexual activity, because of its private, intimate nature, could not be dictated by the state because doing so would violate the liberty interests in the Fourteenth Amendment.⁶⁷

Many of you might be asking, what does this case have to do with domestic violence? I think it has everything to do with domestic violence. *Lawrence v. Texas* is really about equality in relationships. The Court holds that this new notion of privacy, enshrined in the language of liberty in the due process clause of the Fourteenth Amendment, prevents the state from intervening into a private, consensual relationship. The decision turns on the concept of consent. The Court further makes clear that not all sexual privacy is protected. Rather, in cases of injury or abuse of an institution, the state would have a legitimate interest to intervene.⁶⁸

Consent is ultimately about the right of people to engage in relationships in which the partnership is an equal one. If consent means anything, it means making an autonomous decision about your relationship. True consent means that one is free of coercion, intimidation, or threats of violence. It is in this context in which privacy and liberty rights should be upheld. But in those relationships in which one party inhibits the ability of the other party to make self-determined decisions, then there are no privacy and liberty interests at stake at all. Rather, the state, I would argue, has some duty to intervene to ensure that one's basic human rights are not infringed upon by the acts of another, nor justified under the theory that the state should do nothing because "a man's home is his castle."

blog.aclu.org/2008/10/22/protection-from-domestic-violence-is-a-human-right (Oct. 22, 2008, 9:44 EST).

65. 539 U.S. 558, 562–63 (2003).

66. *Id.* at 578.

67. *Id.* at 578.

68. *See id.* at 567.

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Over the years, many people have suggested that if you do domestic violence work, then you must be against relationships. I say no; we are for relationships. We are for autonomous relationships in which each person gets to decide his or her own path. We're not for relationships in which one partner has control over the other partner. There have been some cases in the lower courts in which defendants have argued that *Lawrence v. Texas* prohibits the state from intervening in relationships that have involved some physical abuse. But courts have held that *Lawrence v. Texas* does not give you the right to physically abuse someone in the context of an intimate relationship.⁶⁹ *Lawrence v. Texas* does not give you the right to hit somebody or to exploit somebody. What *Lawrence v. Texas* focuses on is the kind of privacy that promotes liberty and equality, and that is the ultimate goal when we seek to eradicate domestic violence.

CONCLUSION

So let's just burn down the castle, at least in the context where there are two people in the castle who don't enjoy equal power. If we can burn down the castle, we can rebuild the home in a way that focuses on equality and autonomy in relationships. To the extent that relationships are consensual and where there is no physical or emotional abuse, then the state has no interest in intervening. At the same time, we have to acknowledge for many us of, state intervention—whether it be through the criminal justice system, through a divorce, through providing health insurance, or through employment training—is often necessary for us to get out of those unequal relationships and reassert our own autonomy. All of us, as a community, have the responsibility to help each other achieve autonomous, equal relationships. To the extent that the law and our society are moving in that direction, I have enormous hope for the future.

I often go to these conferences and hear people say, "I was really inspired, but I don't know what to do." I always tell people that if you really care about autonomy and equality in relationships, and you really care that there are men and women out there whose autonomy is compromised because they are in an abusive relationship—there is a lot you can do. You can always contribute money. For those law students who might be thinking, "I really just want to do private

69. See, e.g., *State v. Van*, 688 N.W.2d 600, 615 (Neb. 2004) (holding *Lawrence v. Texas* did not give defendant a right to engage in sadomasochistic beatings).

bankruptcy practice,” that’s what I want you to do! We need philanthropists. You can volunteer. You can donate old cell phones and clothes. All of us can do something, and every gesture, no matter how small, is meaningful.

But if you really want to make a difference, the most important thing you can do is not be the silent witness. Professor Wright spoke about why we have these conferences. Even as depressing as they might be, we have them to bear witness to the truth. Think about how many times we have not borne witness even when the truth is right in front of us. I know I have been at dinner parties and I don’t want to be the party-pooper when people start making derogatory comments or doing terrible things. I don’t want to seem “not fun,” so I say nothing. But there are so many opportunities to just stop and say, “You know, that is not right.” Professor Wright talked this morning about speaking with her dad. You can say to your friend, “I don’t think the way your boyfriend speaks to you is right.” You can tell a neighbor, “I’m worried you may not be safe.” Or you can drop an e-mail to a police officer saying, “thank you for doing the right thing,” because we need to bear witness to the positive as well as the negative. Collectively, by bearing witness to the truth, by being smart about legal strategy, by accepting our setbacks and figuring out the next steps, there is enormous potential for the kind of privacy and equality that we envision under the Constitution, in memory of Myra Bradwell and all other people who just wanted their own voice.