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Response to Beth Richie's *Black Feminism, Gender Violence and the Build-Up of a Prison Nation*

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Response to Beth Richie's "Black Feminism, Gender Violence and the Build-up of a Prison Nation"

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I would like to thank Professor Richie for such a provocative and inspirational address. With respect to the violence against women movement, Professor Richie has always been a voice for those women who generally do not have a voice, specifically poor women, women of color, and immigrant women. Her insight today that the mainstream feminist theorization of domestic violence continues to leave them voiceless is a particularly important one.

I would like to continue her conversation by focusing on the concept of privacy. I use this term in the same sense that liberal theorists use it, as a representation of a sphere that is inappropriate for government intrusion.[1] As other scholars have noted, this concept has been somewhat complicated in the context of women's rights.[2] On the one hand, the concept of decisional privacy—or what some prefer to call liberty—is the foundation for such rights as contraceptive use and abortion.[3] On the other hand, privacy historically was also used to justify inaction on the part of the police, judges, and prosecutors in response to women who would seek intervention from the criminal justice system in order to stop the violence that they were experiencing in their homes.[4] In other words, the privacy of the patriarchal head of the household to run his home as he saw fit was valued over the bodily integrity of the wife.

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1. *See* ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 33–34 (1983).

2. *See* KRISTEN S. RAMBO, "TRIVIAL COMPLAINTS": THE ROLE OF PRIVACY IN DOMESTIC VIOLENCE LAW AND ACTIVISM IN THE U.S. 4 (2009); JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 5–6 (2009).

3. *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Griswold v. Connecticut, 381 U.S. 479, 514 (1965).

4. *See* RAMBO, *supra* note 2, at 22–23.

Arguing that "the personal is political," feminists in the 1960s and 1970s rejected the notion that violence in the home was a private matter.[5] Instead, they argued that the reason women could be victims in their own homes was because of the political subordination of women as a class in society.[6] Furthermore, by not intervening when women experienced violence in the home, the state was actually complicit in this violence and subordination.[7] Therefore, for many feminists the notion of a dichotomy between a public sphere where government regulation was appropriate and a private sphere where it was not was a false one because these spheres are actually interrelated.[8] Other feminists such as Catharine MacKinnon argued that the private sphere needed to be completely destroyed because the notion of privacy was really something that applied to men to the detriment of women.[9]

The problem with destroying the private, however, is that the more governmental intrusion that occurs in one's life, the less decisional privacy one has. This often leads to serious negative consequences. This particularly has been the story of poor women and women of color who historically have had very little privacy, and this phenomenon can be illustrated by what happened in the battered women's movement. By arguing that violence against women in the home was actually a public issue, feminists justified the need for intervention from the criminal justice system.[10] But they encountered police officers, prosecutors, and judges who still viewed violence in the home as a private matter and refused to enforce the law against batterers.[11] In response, mandatory arrest and prosecution policies were created and police and prosecutors were strongly encouraged or

5. Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1260 (2010) (quoting Carol Hanisch, *The Personal is Political*, *in* NOTES FROM THE SECOND YEAR: WOMEN'S LIBERATION: MAJOR WRITINGS FROM RADICAL FEMINISTS 76 (SHULAMITH FIRESTONE ed., 1970)).

6. *Id.* at 1261.

7. *Id.*

8. *See id.* at 1262–63.

9. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191 (1989).

10. *See* Bailey, *supra* note 5, at 1265.

11. *See id.* at 1270.

required to arrest and to prosecute if there was probable cause of domestic abuse.[12] Now, I do not believe that these policies were instituted because of mainstream feminist theorization on privacy. Instead, I believe that they were implemented because they fit in with the conservatization of the criminal justice system that was already occurring in the 1980's and 1990's that created a heavy focus on arrest and prosecution. Nevertheless, many feminists still justify these policies based on this idea that domestic violence is a public issue.[13]

I do not want to minimize the importance of improving the institutional response of the criminal justice system to domestic violence. But when the concept of privacy is completely ignored, one finds greater governmental intrusion, less decisional privacy, and serious consequences. This is exactly what has occurred under mandatory policies. The reality is that poor women and women of color are already more likely to be on the radar of the criminal justice system because they often live in cramped conditions with thinner walls that make it impossible to hide what is going on inside or because they are receiving government benefits that subject them to greater state scrutiny. As a result, these women are more apt to experience these negative consequences. First, when women have no voice in whether their batterer is arrested or prosecuted, they risk serious economic consequences. It is estimated that when a woman leaves her batterer, there is a fifty percent risk that she will live below the poverty level.[14] A significant number of those in the homeless population are domestic violence victims and their children.[15] In addition, it is not clear that arresting abusers makes the victims safer; there is some research that suggests that it may make the abuse worse for some victims.[16] And currently, there is a horrible phenomenon happening where once the criminal justice system becomes aware of

12. *See id.* at 1268–71.
13. *See id.* at 1271.
14. *Id.* at 1281.
15. *See id.* at 1281–82.
16. *See id.* at 1292–93.

abuse in the home, the victim can be punished for neglect and may have her children taken away.[17]

As a result, more theorization is needed to explain why women are entitled both to state intervention, should they want its assistance to stop the violence in their lives, and some decisional privacy in deciding how best to extricate themselves from a violent relationship. Some feminists have argued for an affirmative right of privacy in the domestic violence context that justifies state intervention on the basis of a victim's affirmative right to bodily integrity.[18] But I am making a normative plea for an affirmative right to choose how to deal with the violence in one's life, including limiting the involvement of the criminal justice system.[19] In order to ensure women's safety, however, limiting the intrusiveness of the criminal justice system means that we are going to have to come up with creative grassroots alternatives reminiscent of the early battered women's movement, which focused on providing shelter and material support to victims. In addition, to the extent that these alternatives are based on state funding, we need to make sure that these methods do not result in the same level of intrusiveness that occurs when individuals seek state help.

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17. *See* Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1088–90 (1995).

18. *See, e.g.*, Elizabeth Schneider, *The Violence of Privacy*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 53 (Martha Alberston Fineman & Roxanne Mykitiuk eds., 1994).

19. I plan to explore this affirmative right to privacy in future articles.