Winter 1995

Inviolability and Privacy: The Castle, The Sanctuary, and The Body

Linda C. McClain
Boston University School of Law

Inviolability and Privacy: The Castle, the Sanctuary, and the Body

Linda C. McClain*

This article explores the idea and imagery of inviolability. I use a trilogy of terms—the castle, the sanctuary, and the body—to illuminate different loci of inviolability and to show how notions of sacredness and sanctity undergird the legal protection of inviolability. These images, familiar from privacy jurisprudence, provide a useful lens through which to examine the association between inviolability and gender. Familiar feminist critiques suggest that concepts such as privacy have served to deny, rather than to secure, inviolability for women and women's bodies. I explore the interplay of inviolability and privacy in some prominent feminist accounts of sexuality, and I use the trilogy of castle, sanctuary, and body to offer some thoughts about envisioning inviolability for women, particularity in the contexts of bodily integrity and personal autonomy.

In Part I, I discuss the idea of inviolability and its relationship to privacy. The body, including physical, intellectual, and spiritual aspects of the person and personality, is a familiar location of the law's protection of inviolability. Equally familiar is the locus of the home, or "castle." I develop the image of the sanctuary or temple (although references to "temple" are not common in the jurisprudence of inviolability and privacy, references to "sanctuary" abound). The term sanctuary has a clearly religious root as well as more general associations with refuge and restricted access. Within the image of the sanctuary, I include the generalized meaning of sanctuary and highlight the association of inviolability with sacredness

---

I have benefitted from the suggestions of participants in the conference on "The Sacred Body in Law and Literature" and members of the Yale Journal of Law & the Humanities. Thanks also for constructive comments and criticisms to Jim Fleming, Mary Anne Case, Tracy Higgins, Sandy Levinson, Lisa Merrill, Daniel Ortiz, Wendy Rogovin, and George Rutherglen, and for valuable research assistance to Cathy DiFiglia, Sandra LePriol-Vrejan, and Norma Rotunno. I appreciate the support for this article provided by a Hofstra University School of Law summer research grant.

(particularly the sacredness of the body), immunity, and inaccessibility. To be sure, the principle of inviolability, as translated into law, is not given absolute protection, but privacy does protect or hold inviolate a realm that is a sanctuary and a refuge from the reach of the state and other persons.[1]

I suggest that the ideas of controlling access and of being secure against invasion and violation unify the trilogy of castle, sanctuary, and body. Women's abilities to control access to their bodies and to be free from violation animate feminist reform efforts in law and society and are at the center of many contemporary debates about how best to secure women's sexual autonomy, to achieve reproductive autonomy for women, and to eliminate violence against women. Indeed, as I discuss in Part II, prominent accounts of feminist jurisprudence charge that to be a woman under current social conditions is, by definition, to lack inviolability. On this view, which I shall call the "illusion critique," the legal protection of inviolability, celebrated under the rubric of a right of privacy, yields a "sphere of sanctified isolation" that benefits men at the expense of women.[2]

Yet, while a commitment to naming and to taking seriously the harms and injuries that women experience is an important component of feminist work,[3] such a commitment should lead not to a rejection of the value of inviolability, but instead to a call for closing the gap between the ideal of inviolability and the reality of women's lives under patriarchy. In Part II, I suggest that considering the interplay of loci of inviolability in the history of the legal protection of privacy, and how the legal protection of one form of inviolability may conflict with or yield to the protection of another, usefully illuminates the undeniable limitations of such protection for women and suggests the potential for more adequate protection. Feminist work has exposed those undeniable, unjust, and deeply disturbing limitations but tends to discount the role that the ideals of inviolability and privacy have played and may play in criticizing such limitations as violative of

---

1. A temple historically afforded immunity, refuge, or sanctuary from the normal operations of the law. For example, a fugitive from the law or legal authorities could take refuge in a temple.

2. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) [hereinafter MacKinnon, *Reflections*]; *see also* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 656-57 (1983) [hereinafter MacKinnon, *Toward Feminist Jurisprudence*].

3. *See, e.g.*, BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN (1994). Feminists have observed that one risk of the descriptive project of naming harms is that defining women by what is done to them fails to recognize and value what women do and their acts of agency, creativity, and struggle, as well as their exercises of privilege. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Martha Mahoney, *Whiteness and Women, In Practice and Theory*, 5 YALE J.L. & FEMINISM 217 (1993).

women's bodily integrity and decisional autonomy, even at the expense of the supposed "sanctity" of other loci of inviolability (e.g., the marital relationship or the home).[4]

In Part III, I look more closely at inviolability and gender in the context of women's bodies and sexuality. I begin with a critical analysis of prominent feminist accounts charging that women in contemporary society are defined by reference to their potential for violation and that sexuality is the central site of such violation. I examine assumptions underlying the relationship among inviolability, bodily integrity, privacy, and intercourse in such accounts, and I ask about the roles these critiques assign to the "natural" physical condition of women's bodies as contrasted with the social construction of "woman." Images of body as castle and as sanctuary shed light on these critiques and also capture in part the injury to bodily integrity, personal autonomy, and privacy caused by sexual assault. Finally, I suggest that the images of castle and sanctuary (or temple) may have constructive potential for a feminist account of inviolability. Here I elaborate upon the meanings of those images in privacy jurisprudence suggested in Parts I and II and draw upon scholarship in the area of religion, particularly feminist work on spirituality. I conclude that an elaboration of the imagery of body as castle or temple may make a significant contribution toward developing a vocabulary that can speak of freedom from violation as well as freedom to pursue intimate associations.

I. THE IDEA AND IMAGERY OF INVIOLABILITY

> At the bottom of the heart of every human being, from earliest infancy until the tomb, there is something that goes on indomitably expecting, in the teeth of all experience of crimes committed, suffered, and witnessed, that good and not evil will be done to him. It is this above all that is sacred in every human being.
>
> Simone Weil[5]

---

4. For example, a popular maxim for a number of feminist legal theorists is Audre Lorde's warning that "[t]he master's tools will never dismantle the master's house." AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER 112 (1984). *But see* ANITA ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 180-81 (1988) (concluding that feminist critiques of privacy usefully highlight challenge of "getting rid of unwanted forms of privacy" but sweep too broadly when they appear to reject privacy itself and legal rights to privacy). Elsewhere I have defended the importance of privacy in justifying reproductive rights against feminist criticisms that privacy is too atomistic. *See* Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992) [hereinafter McClain, *"Atomistic Man"*]; Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119 (1992) [hereinafter McClain, *Privacy*].

5. SIMONE WEIL, *Human Personality*, *in* SIMONE WEIL: AN ANTHOLOGY 71 (Sian Miles ed., 1986).

A. Inviolability, Sacredness, and Security

What is inviolability? Common definitions of the quality of being "inviolable" are "not to be violated," "to be kept sacredly free from profanation, infraction, or assault,"[6] and "impregnable to assault or trespass."[7] Such definitions suggest both an association with sacredness and an association with security against violation or other incursions. What is the relationship between these two aspects of inviolability?

Linking inviolability with sacredness may suggest a religious connotation, yet often the usage of the term indicates that the association is not explicitly religious. As a definitional matter, the "sacred" has both an explicit association with religious notions of dedication, consecration, and veneration, and connotations of that which is highly valued and important; is worthy of reverence and respect; or, indeed, is inviolable and unassailable.[8] Thus, in the language of law, one finds strong claims that certain fundamental texts, principles, or rights ought to be "kept sacred" or held inviolate.[9] Some rights are said to be "unalienable" or natural endowments by the Creator, suggesting a divine origin.[10] The broader point in invoking sacredness, as well as inviolability, often seems to be to convey the idea that something merits reverence and should not be violated, infringed, or even altered.[11] (Of course, the synonymous usage of sacredness and inviolability may be circular and tautological and thus may not reveal exactly what it is about something that makes it either sacred or

---

6. 8 THE OXFORD ENGLISH DICTIONARY 51 (2d ed. 1989) [hereinafter OED]. Further meanings include "[t]hat cannot be violated; that does not yield to force or violence; incapable of being broken, forced, or injured." *Id.*

7. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 949 (3d ed. 1992) [hereinafter AMERICAN HERITAGE] (including among definitions of "inviolability": "safe from or secured against violation or profanation").

8. 14 OED, *supra* note 6, at 339 (including among definitions of "sacred": "secured by religious sentiment, reverence, sense or justice, or the like, against violation, infringement, or encroachment").

9. *See, e.g.*, Lehman v. Nakshian, 453 U.S. 156, 173 n.3 (1981) (Brennan, J., dissenting) ("'the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute shall be preserved to the parties inviolate'" (citing FED. R. CIV. P. 38(a))); Boyd v. United States, 116 U.S. 616, 630 (1886) (stating that Fourth and Fifth Amendments secure "sanctity of a man's home and the privacies of life" and protect against "invasion of [a man's] indefeasible [and "sacred"] right of personal security, personal liberty and private property"); Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829) (Story, J.) ("The fundamental maxims of free government seem to require that the rights of personal liberty and private property should be held sacred."); Gatewood v. Matthews, 403 S.W.2d 716, 718-19 (Ky. Ct. App. 1966) ("'We Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate.'" (quoting KY. CONST. § 26)); Johnson v. Duke, 24 A.2d 304, 308 (Md. 1942) ("It is the sacred duty of the Courts to preserve inviolate the integrity of the Constitution.").

10. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11. *See supra* notes 7-9; *see also* 14 OED, *supra* note 6, at 339.

inviolable.) For instance, Ronald Dworkin envisions a close, even synonymous, relationship between sacredness and inviolability in his explication of a shared intrinsic value of the "sanctity" of life.[12] He further suggests that, for some persons, sanctity stems from the idea of a divine creator and the idea of humanity as reflecting the image of God, while for others sanctity is a more secular reverence for nature and the creative process of life.[13]

The common association of inviolability with sacredness or sanctity, along with security, is also evident in the frequent observation that the most basic duty of a government is to protect citizens' rights to life and to the physical security of their persons.[14] Thomas Nagel suggests that the value of inviolability for human beings is in having the moral status that one "may not be violated in certain ways—such treatment is inadmissible, and if it occurs, the person has been wronged."[15] The epigraph from Simone Weil similarly links what is sacred in human beings to the conviction that evil will not be done to them, even in the face of injury. Here it is useful to distinguish between a state of actually being safe against violation and an expectation that one may not, or should not, be violated (backed up, for example, by ethical conviction, social consensus, and law) as being two distinct meanings of inviolability. Along the lines of the second meaning, legal discourse continually uses the vocabulary of invasion and violation to describe harms to persons and their rights to property, privacy, and the like, and to demand redress.

The association of inviolability with sacredness and security appears in the law's protection of inviolability in many areas, particularly under the rubric of a right to privacy or a more general "right to be

---

12. RONALD DWORKIN, LIFE'S DOMINION 25, 68-101 (1993) (analyzing abortion and euthanasia).

13. *Id.* at 75-84; *see Genesis* 1:27 ("So God created man in his own image, in the image of God he created him; male and female he created them.").

14. This is a frequent theme in statements about crime made by politicians. *See, e.g.*, President William Clinton, Remarks at the Swearing-In Ceremony of FBI Director Louis Freeh (Sept. 1, 1993) (transcript available in LEXIS, NEWS Library, FNS file) ("You, the American people, have a right to freedom from fear. Your families have a right to security and to safety."). Courts, however, have rejected claims based on a failure to protect on the basis that duties to protect are owed to the public at large, not to particular individuals, and that the federal Constitution confers no affirmative right to governmental aid, absent a special relationship. *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989); Jackson v. Joliet, 715 F.2d 1200 (7th Cir. 1983). For a critique of such precedents, see Steven J. Heymann, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

15. Thomas Nagel, The Value of Inviolability 11-12 (September 1, 1994) (unpublished manuscript, on file with N.Y.U. Colloquium for the Study of Law, Philosophy, and Social Theory) (English version of *La Valeur de l'inviolabilité*, 1994 Revue de Metaphysiqué et de Morale 149-66); *see also* THOMAS NAGEL, EQUALITY AND PARTIALITY 143 (1991).

let alone."[16] Considerable disagreement exists among privacy theorists over exactly what the core of the right of privacy is, whether such a core holds together its tort law[17] and constitutional law[18] manifestations, and what falls inside and outside of it.[19] A number of commentators argue that inaccessibility, or restricted access, and the values of solitude, secrecy, and anonymity, form the core of privacy.[20] Other privacy theorists maintain, particularly with respect to constitutional privacy rights, that the core is moral personhood and sovereignty in making important intimate decisions;[21] here, inviolability is a principle of moral autonomy and freedom from governmental interference. Still other privacy theorists attempt to meld access and personhood rationales by linking the tort and

---

16. For classic articulations of the "right to be let alone," see Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that the "makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men"); Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193, 195, 213 (1890) (arguing that right to privacy is part of a broader right of the individual, held against the world, "to be let alone") (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (Chicago, Callahan & Co., 2d ed. 1888) [hereinafter COOLEY ON TORTS]). A perhaps less familiar but also influential opinion is Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251 (1891) (describing "sacred" common law right to possession and control of one's person as "right of complete immunity: to be let alone" (quoting COOLEY ON TORTS 29)).

17. The privacy rights protected by tort law limit access to individuals. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 437-43 (1980). Prosser's often-noted definition of privacy in tort law distinguishes four distinct torts: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

18. Constitutional privacy rights involve protection against governmental interference and include spatial and informational privacy (for example, Fourth and Fifth Amendment protection against unlawful intrusions into the home or into the person for purposes of law enforcement or protection and against self-incrimination), as well as decisional privacy (pursuant to Fourteenth Amendment liberty and "penumbral" privacy, protection against unwarranted interference with decision making concerning important areas of life). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-1 to -21 (2d ed. 1988).

19. For helpful summaries of the literature on privacy rights, see Gavison, *supra* note 17; ALLEN, *supra* note 4; JULIE INNESS, PRIVACY, INTIMACY, AND ISOLATION (1991); *cf.* Gary L. Bostwick, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976) (subdividing privacy into three components: privacy of repose, privacy of sanctuary, and privacy of intimate decision).

20. Gavison, *supra* note 17, at 428 (identifying values of secrecy, anonymity, and solitude); *see also* ALLEN, *supra* note 4, at 15 (advocating "restricted-access" definition). Gavison argues that the "decisional" privacy associated with the constitutional right of privacy is not, properly speaking, within the scope of "privacy" at all, but instead implicates liberty of action. Gavison, *supra* note 17, at 438-39; *cf.* TRIBE, *supra* note 18, § 15-10 at 1352 (arguing that "privacy" is misnomer for right of individual autonomy, or personal liberty, with respect to decision making).

21. *See, e.g.*, TRIBE, *supra* note 18, §§ 15-1 to -3 (discussing attempts to ground constitutional privacy rights in personhood); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 37 (1976) (arguing that "right to privacy is fundamentally connected to personhood"); *see also* James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 287-89, 292-95 (1993) (advancing idea of deliberative autonomy as deriving from conception of the person).

constitutional dimensions of the right of privacy to a core idea of intimacy and individual control over intimate access.[22] For present purposes I will not attempt to resolve these debates, but I will suggest that some notion of inviolability, or a realm within which one is free from interference or invasion, links the different forms of privacy[23] and constitutes a prominent normative basis for rights of privacy. My argument is not that privacy and inviolability are synonymous, nor that privacy jurisprudence exhausts the locations of inviolability in the law, but that expectations of inviolability undergird claims of privacy and that legal protection of privacy in turn fosters such expectations.

B. The Loci of Inviolability in Privacy Jurisprudence

The trilogy of body, sanctuary, and castle illuminates the relationship among inviolability, sacredness, and security. One finds references across a number of substantive areas of law, especially in privacy jurisprudence, in support of rights to bodily integrity and decisional autonomy, to the "sacred" right to control one's person, and to the sanctity and the "inviolability of the person" or the body,[24] as well as to the "inviolate personality."[25] The notion of

---

22. INNESS, *supra* note 19, at 116-34; *see also* ALLEN, *supra* note 4, at 33, 52 (responding to Gavison by arguing that decisional privacy should be component of privacy and that it furthers goals of inaccessibility).

23. For the Supreme Court's stated adherence to the line of precedents associated with the constitutional right of privacy and its interpretation of those cases as involving bodily integrity and decisional autonomy, see Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805 (1992) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."). With respect to women's decisions concerning abortion, I have argued elsewhere that the *Casey* joint opinion's omission of explicit language of privacy in describing that realm—in contrast to precedents partially overruled in *Casey*—accompanies its rejection of a right to be "insulated" from others and its recognition of permissible state efforts to persuade pregnant women to continue their pregnancies. *See* McClain, *Privacy*, *supra* note 4, at 128-33. *See also* Thornburgh v. American College of Obstet. & Gyn., 476 U.S. 747, 766 (1986) (characterizing a woman's "decision to terminate a pregnancy" as "intensely private," which "'may be exercised without public scrutiny'" (citation omitted)), *overruled in part by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

24. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251-52 (1891). *Botsford* and its language of sacredness and inviolability have been featured in Supreme Court and other judicial recognitions of protection against both invasions of bodily integrity and interference with decisional autonomy. *See, e.g.*, *Casey*, 112 S. Ct. at 2846 (Blackmun, J., concurring in part and dissenting in part) (citing *Botsford*); Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 269 (1990) (quoting from *Botsford* in support of notion of bodily integrity and requirement of informed consent for medical treatment); *id.* at 287-88 (O'Connor, J., concurring) (citing *Botsford* in support of argument that "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination"); *id.* at 305 (Brennan, J., dissenting) (citing *Botsford* on "sacred" common law right of inviolability of person); *id.* at 342 (Stevens, J., dissenting) (citing *Botsford* for common law tradition underlying constitutional right to bodily integrity); Doe v. Bolton, 410 U.S. 179, 214 (1973) (Douglas, J., concurring) (citing *Botsford*); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (citing *Botsford*); Terry v. Ohio, 392 U.S. 1, 17 (1967) (searching clothing is serious intrusion on sanctity of person and may inflict great indignity and arouse strong resentment; quoting *Botsford* in support of personal security and privacy interest protected by Fourth Amendment); Andrews v. Ballard, 498 F. Supp. 1038, 1045 (S.D. Tex. 1980) (citing *Botsford* and upholding right to seek acupuncture as medical treatment). For cases

belonging to oneself, or of a right to one's person, is a familiar expression of the normative foundation of privacy.[26] For some, it is precisely the sacredness of the body that requires rejecting notions of self-ownership or of a property right in one's person, because they "commingle the sacred with the profane" by equating the body with "the basest commercial commodity"; for others, protecting self-determination in the use of one's body protects and preserves sanctity.[27]

Another locus of sanctity and inviolability is the home, reflecting the common law idea of a man's home as his "castle" or fortress, where he is free from arbitrary intrusion by government or others.[28] Indeed, jurists often use this maxim to explain the historical and political milestone of the Fourth Amendment, stressing the need for the "inviolability of the inside" against invasion from outside and deploying the language of "shelter," "enclave," "insulated enclosure," "inviolate place," and "oasis" to characterize that space.[29] The home as castle appears in defenses of privacy rights sounding in tort law and

---

invoking sanctity, although not citing *Botsford*, see Winston v. Lee, 470 U.S. 753, 760 (1985); Rochin v. California, 342 U.S. 165, 172-73 (1952).

25. Warren & Brandeis, *supra* note 16, at 205. The inviolability of the personality, as well as Justice Brandeis's dissenting invocation in Olmstead v. United States, 277 U.S. 438 (1928), of the "right to be let alone" and its relation to man's "spiritual nature," have been enlisted in many subsequent Supreme Court and other judicial opinions (at times in dissent) in defense of a constitutional right of privacy, not only of the home ("spatial" privacy) and "informational" privacy, but also "decisional" privacy (freedom to make important personal decisions). *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 207 (1986) (Blackmun, J., dissenting) (quoting *Olmstead*, 277 U.S. at 478; *Roe*, 410 U.S. at 152; Stanley v. Georgia, 394 U.S. 557, 564 (1969); *see generally* TRIBE, *supra* note 18, §§ 15-1 to -21.

26. *See Thornburgh*, 476 U.S. at 777 & n.5, *overruled in part by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Stevens, J., concurring) ("concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole'") (citing Charles Fried, Correspondence, 6 PHIL. & PUB. AFF. 288-89 (1977)); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305 (Peter Laslett ed., 2d ed. 1967) ("Every Man has a *Property* in his own *Person*. This no Body has any Right to but himself.").

27. *Compare* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 497 (Cal. 1990) (Arabian, J., concurring) (rejecting conversion claim for removal of cells and use in research and commercially valuable products without informing patient of intent or commercial value) *with id.* at 515 (Mosk, J., dissenting) (arguing that "profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona" and sanctity and dignity of person should permit plaintiff to control commercial exploitation of his body). The relationship between inviolability and inalienability, with respect to the commodification of the body, is outside the scope of this Article, except to note that notions of sacredness and sanctity, as *Moore* suggests, may play a role in the debate. *See generally* Margaret Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987). For a recent critique of Radin's theory of property, see Jeanne L. Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolate Feminine Body*, 79 MINN. L. REV. 55 (1994).

28. *See* Gavison, *supra* note 17, at 464 & n.131 (discussing history of home as sphere of privacy).

29. United States v. On Lee, 193 F.2d 306, 316 & n.19 (2d Cir. 1951) (Frank, J., dissenting). *aff'd*, 343 U.S. 747 (1952); *see also* Payton v. New York, 445 U.S. 573, 591-98 & n.44 (1980) (observing that "zealous and frequent repetition of the adage that a 'man's house is his castle,' made it abundantly clear that both in England and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty"); United States v. Riley, 906 F.2d 841, 847 (2d Cir. 1990) (noting deep American belief in home as "inviolate castle and keep").

in constitutional law, with a common theme of restricting access and keeping others out.[30]

The rhetoric of the inviolability and privacy of the home repeatedly employs images of sanctuary.[31] A sanctuary, of course, may mean a temple or the most sacred part of a religious space, the dwelling place of the presence of God, but it may also connote any place of refuge and protection.[32] This language of sanctuary signals that the home is a refuge for persons and their intimate relationships against invasion and intrusion, either by government or by others. Elaborations of constitutional protection for the privacy of the home stress that the "sacredness" or "sanctity" of the home attends not simply (or even primarily) because of the "sanctity" of property rights, but because of the privacy expectations of persons within the home—"the privacies of life"[33] and the "pre-eminence" of the home "as the seat of family life."[34] There is a strong theme of a proper realm of inaccessibility or secrecy with respect to the world at large, as well as a recognition of the important social dimension of such protected inner space (the intimate relationships and activities therein).[35] Of course, intimacy itself strongly connotes privacy, which in turn may be viewed as a precondition or a "necessary shield" for intimacy.[36]

Images of body, castle, and sanctuary are not mutually exclusive. For example, both castle and sanctuary connote a notion of refuge and haven. Judicial opinions reveal a cluster of spatial images

---

30. One dimension of the idea of the home as castle is the right of a man or woman to protect the home and persons within it against intrusion or attack by using force. *See* State v. Hamric, 151 S.E.2d 252, 270-71 (W. Va. 1966) (Browning, J., dissenting) (discussing numerous authorities). A disturbing recent example of the misapplication of such a right involved an acquittal of a homeowner for fatally shooting a Japanese exchange student who mistakenly approached the home looking for a party. Peter Pringle, *Verdict on Baton Rouge Killing Shocks Japanese*, INDEPENDENT, May 25, 1993, at 10 (reporting defense lawyer's statement in court that "Americans have the absolute legal right to answer everyone who comes to their door with a gun"). In a subsequent civil trial brought by the student's parents, however, a judge found "no justification whatsoever" for the killing and awarded damages. Adam Nossiter, *Judge Awards Damages In Japanese Youth's Death*, N.Y. TIMES, Sept. 16, 1994, at A12.

31. *See* Bostwick, *supra* note 19, at 1448, 1456 (including privacy of sanctuary in taxonomy of privacy).

32. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1040 (1987); *Exodus* 25:8 ("And let them make me a sanctuary, that I may dwell in their midst."). For discussion of the image of the temple in connection with women's bodies, *see infra* Part III.

33. *See* Boyd v. United States, 116 U.S. 616, 630 (1886) ("sanctity of a man's home and the privacies of life").

34. Poe v. Ullman, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting); *see also* Segura v. United States, 468 U.S. 796, 810 (1984) (explaining sacredness of home as based on privacy interests of persons within home).

35. *Cf.* TRIBE, *supra* note 18, §§ 15-1, 15-21 (suggesting that taxonomies of privacy stress such inward-looking connotations of privacy as sanctuary and arguing that important social dimension exists, including sexual autonomy).

36. *See* Gavison, *supra* note 17, at 447; *see also* INNESS, *supra* note 19, at 74-92.

evocative of both images: the home as "sanctuary,"[37] "sacred retreat,"[38] "enclave,"[39] and "the last citadel of the tired, the weary, and the sick."[40] Such formulations suggest a clear link between the inviolability of places and the sanctity of persons and activities within them.[41] The multiple loci of inviolability are manifest in the most famous explication of the constitutional right of privacy, *Griswold v. Connecticut*.[42] Justice Douglas's exposition of the penumbras of privacy touched upon the "'sanctity of a man's home and the privacies of life'" protected by the First, Third, Fourth, Fifth, and Ninth Amendments, the "sacred precincts of marital bedrooms," and the marital relationship itself as "intimate to the degree of being sacred," protected by a right of privacy older than the Bill of Rights.[43]

The vocabulary of inviolability also uses spatial imagery of the castle or the sanctuary to convey the appropriate inaccessibility of the person, the "inviolable citadel" of a person's heart and mind,[44] or the "inner sanctum of individual feeling and thought."[45] Indeed, Joel Feinberg suggests that philosophers use the term "personal autonomy" to label "the realm of inviolable sanctuary most of us sense in our own beings."[46] These images of inner, inviolable space are striking. They raise questions about the relationship between personhood and body, which are relevant to the constructive feminist

---

37. Dow Chem. Co. v. United States, 749 F.2d 307, 314 (6th Cir. 1984), *aff'd*, 476 U.S. 227 (1986) ("The home is fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally feel free to express themselves in intimate ways"; distinguishing privacy expectations at home from those at industrial plant).

38. Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring).

39. United States v. On Lee, 193 F.2d 306, 316 & n.19 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952).

40. Frisby v. Schultz, 487 U.S. 474, 484 (1988) (quoting Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

41. *See Frisby*, 487 U.S. at 484 ("Our prior decisions . . . have recognized that '[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulation of their daily pursuits, is surely an important value.'" (quoting Carey v. Brown, 447 U.S. 455, 471 (1980))).

42. 381 U.S. 479 (1965).

43. *Id.* at 484, 485-86 (citations omitted). Justice Douglas's imagery may evoke the Biblical passage (often included in marriage liturgies) that a man "cleaves to his wife and they become one flesh." *Genesis* 2:24. Elsewhere in this volume, Professor Garet explores the theme of the sacred marriage in *Griswold* from a gnostic perspective. Ronald R. Garet, *Gnostic Due Process*, 7 YALE J.L. & HUMAN. 97 (1995).

44. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963) (stating that "it is not within the power of government to invade" the "inviolable citadel of the individual heart and mind" through which religion occupies exalted place in society); *cf.* John Christman, *Introduction*, *in* THE INNER CITADEL 3 (John Christman ed., 1989) (suggesting that metaphor of "inner citadel" suggestively captures concept of autonomy) (quoting ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958)).

45. Fisher v. United States, 425 U.S. 391, 416 (1976) (Brennan, J., concurring) (explaining roots of Fifth Amendment privilege).

46. Joel Feinberg, *Autonomy*, *in* THE INNER CITADEL, *supra* note 44, at 27.

task of envisioning inviolability for women.[47] Finally, the image of the body as a temple, sanctified and created in the image of God, is familiar from certain religious texts and traditions[48] and is reflected in people's everyday self-descriptions.[49] At times such images accompany legal appeals for protection of the inviolability of the body.[50] In Part III, I elaborate upon the potential of the images of castle and sanctuary for a feminist account of inviolability.

C. Inviolability and Immunity

In considering the translation of the principle of inviolability into law, it is important to comment upon the relationship between inviolability and immunity. As images such as sanctuary and refuge suggest, to the extent that privacy rights protect individuals against governmental interference, they afford immunity. That immunity may consist of an expectation of physical security and inaccessibility as well as the freedom to decide and to act in a manner contrary to the convictions of certain majorities. Rights have social costs, thus the justification for rights generally includes some conviction that society's bearing those costs is preferable to a political regime less protective of human freedom and moral autonomy.[51]

---

47. For example, do we dwell in our bodies or are we our bodies? How does sexual assault injure a woman's body and her personhood? *See infra* Part III.

48. 1 *Corinthians* 6:19-20 is an example: "Do you not know that your body is a temple of the Holy Spirit within you, which you have from God? You are not your own; you were bought with a price. So glorify God in your body." Paul was admonishing against using the body for immorality ("he who joins himself to a prostitute becomes one body with her"). *Id.* at 6:15-18.

49. Sometimes, people who emphasize taking care of their bodies, particularly those engaged in athletic activity, speak of their bodies as temples to explain why they abstain from certain habits such as unhealthy eating, drinking, or smoking.

50. A vivid example linking castle, temple, and body is United States v. Williamson, 15 C.M.R. 320, 335 (1954) (Quinn, J., dissenting), in which the chief judge, dissenting from a ruling concerning the taking of evidence, stated that if a man's home is his castle, "then these inalienable rights, which are implicit in the Law of Nature and of Nature's God, demand that the sanctity of the human body, made in the image and likeness of God—the temple of his immortal soul—be and remain forever sacred and inviolate." Religious beliefs about the sanctity of the body often underlie objections to compulsory immunization, blood transfusions, and other invasive procedures. *See* Berg v. Glen Cove City Sch. Dist., 853 F. Supp. 651, 653, 655 (E.D.N.Y. 1994) (holding that plaintiffs have established likelihood of success on merits of opposition to immunization based upon religious beliefs forbidding violation of sanctity of body); Moody v. Cronin, 484 F. Supp. 270, 274 (C.D. Ill. 1979) (granting injunctive relief to parents who asserted that mandatory participation in physical education program in which other children dressed immodestly threatened their Pentecostal religious belief that body is "temple of the Holy Spirit" and must be modestly attired to preserve its sanctity); Maier v. Good, 325 F. Supp. 1268, 1270 (N.D.N.Y. 1971) (plaintiff asserting religious exemption to compulsory immunization based on religious belief that sanctity of human body must not be violated by injection).

51. For a defense of rights along these lines, in the context of certain communitarian critiques, *see* Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989 (1994); *see also* Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964) (including among "fundamental values and most noble aspirations" underlying Fifth Amendment privilege against self-incrimination "our realization that the privilege, while sometimes a 'shelter to the guilty,' is often 'a protection to the innocent'") (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)).

At the same time, rhetorical flourishes notwithstanding, rights often have limits, and the principle of inviolability does not translate into absolute immunity from the reach of government or of others. It is accurate to say that rights do afford individuals immunity from the consequences of the exercise of their rights, but it is a caricature of the idea of the "right to be let alone" to suggest that it bars all legal restraint upon an individual (not to mention social suasion or sanction) or that we are all at liberty to do whatever we want, regardless of the consequences for others.[52] For example, constitutional jurisprudence teaches that the privacy of the home protected by the Fourth Amendment does not afford an "inviolate sanctuary" from governmental intrusions for the purposes of crime detection and law enforcement.[53] Similarly, the value of the inviolability of the person undergirding the Fifth Amendment privilege against self-incrimination has never been given full scope in the application of the privilege.[54] So, too, while notions of privacy, of inviolability of the person, and of the right to control one's body place constraints upon government, they do not in operation bar all invasions of bodily integrity or privacy, whether for law enforcement[55] or for furthering other interests of society.[56] Moreover,

---

52. *See* McClain, *supra* note 51, at 1038-57 (assessing communitarian claims concerning legal and moral impact of rights and "absolutist" rights talk). For a defense of the "right to be let alone" against caricatured understandings of autonomy, see James E. Fleming, Securing Deliberative Autonomy (unpublished manuscript, on file with author).

53. *See, e.g.*, United States v. Thirty-Seven Photographs, 402 U.S. 363, 381 (1971) (Black, J., dissenting) (stating that police may search private homes and that "their power to do so is unquestioned so long as the search is reasonable within the meaning of the Fourth Amendment"); United States v. Spencer, 684 F.2d 220, 224 (2d Cir. 1981) ("threshold of one's home, however, is not a boundary—like the Yalu River—beyond which a suspect has inviolate sanctuary").

54. Schmerber v. California, 384 U.S. 757, 762, 767 (1966) (upholding blood test for alcohol). *See* Kastigar v. United States, 406 U.S. 441, 462 (1972) (holding that compulsion of testimony from a witness in exchange for immunity from both use and derivative use of that testimony against the witness does not violate Fifth Amendment privilege); Ullmann v. United States, 350 U.S. 422, 439 (1956) (holding that statute providing transactional immunity from prosecution on basis of compelled testimony does not violate Fifth Amendment because "immunity displaces the danger" and "once the reason for the privilege ceases, the privilege ceases"); *but see Kastigar*, 406 U.S. at 463 (Douglas, J., dissenting) (arguing that use immunity is insufficient because Court's prior decisions establish that "transactional immunity" is necessary to afford immunity coterminous with Fifth Amendment privilege (citing Counselman v. Hitchcock, 142 U.S. 547, 586 (1892))); *Ullmann*, 350 U.S. at 440, 449 (Douglas, J., dissenting) (arguing that "right of silence created by the Fifth Amendment is beyond the reach of Congress" and that "Fifth Amendment protects the conscience and the dignity of the individual, as well as his safety and security, against the compulsion of government").

55. *See* Bell v. Wolfish, 441 U.S. 520 (1979) (upholding strip search including visual examination of body cavities of persons held in pretrial detention); *Schmerber*, 384 U.S. at 772 (upholding blood test for alcohol); Blackford v. United States, 247 F.2d 745 (9th Cir. 1957) (upholding border search of male rectum and stomach); *see generally* TRIBE, *supra* note 18, § 15-9 (discussing cases upholding and invalidating intrusive procedures).

56. *See, e.g.*, Breithaupt v. Abram, 352 U.S. 432, 439 (1957) (upholding blood test for alcohol and stating that "against the right of the individual that his person be held inviolable, . . . must be set the interests of society" in protecting against "one of the greatest causes of the mortal

even the fundamental rights of bodily integrity and decisional autonomy associated with the right of privacy protect persons only against "*unwarranted* government intrusion" and may yield to a compelling state interest[57] or even to a merely substantial state interest, provided the state does not impose "undue burdens."[58] Precisely how ideas of inviolability should translate into law and where lines should be drawn in these instances are subjects of considerable disagreement among jurists, scholars, lawyers, and citizens.[59]

II. FEMINIST CRITIQUES OF PRIVACY: THE ILLUSION OF INVIOLABILITY

One feminist response to the striking images of inviolability discussed in Part I is to suggest that the inviolability so celebrated in privacy jurisprudence is an illusion for women, which exists for men at the expense of women, and that rights of privacy imperil rather than secure women's inviolability.[60] In this section, I consider this

---

hazards of the road"). A notorious example involving a woman's bodily integrity is Buck v. Bell, 274 U.S. 200, 203 (1927), in which the Court per Justice Holmes upheld the involuntary sterilization of a woman (wrongly) characterized as an "imbecile," analogizing cutting the fallopian tubes to other appropriate forms of patriotic sacrifice. *But see* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating on equal protection grounds statute providing for sterilization of persons [in that case, a male prisoner] convicted two or more times of "felonies involving moral turpitude" and describing right to reproduce as "one of the basic civil rights of man").

57. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis added).

58. The joint opinion in *Planned Parenthood v. Casey* placed heavy emphasis upon the word "unwarranted" in upholding an informed consent scheme, although it never spoke of a "compelling" state interest, but instead spoke of a "substantial" interest, and adopted an "undue burden" standard for evaluating state regulation of abortion procedures. 112 S. Ct. 2791, 2819-21 (1992).

59. Here I do not attempt to offer my own view on all the examples given in the text. Elsewhere I have addressed some of the questions raised in the text in the context of communitarian critiques of rights and liberal justifications of them, *see* McClain, *supra* note 51, as well as in the context of liberal, feminist, and communitarian analyses of abortion, *see id.* at 1077-87; McClain, *"Atomistic Man," supra* note 4, at 1242-62; McClain, *Privacy*, *supra* note 4. Opponents of legal abortion, for example, would invoke the inviolability of prenatal life as a decisive value, while defenders of legal abortion would speak of a woman's inviolability, her bodily integrity, and her decisional autonomy. For an attempt to defend the morality and legality of abortion in many circumstances through an appeal to a shared value of the sanctity of life (closely tied to inviolability), see DWORKIN, *supra* note 12.

60. Another feminist response, what I have elsewhere called the "atomism" critique, might suggest that such imagery reflects male values of isolation, separation, and freedom from interference, and might reject such concepts as privacy and the "right to be let alone" as peculiarly masculine and atomistic. I have challenged the dichotomies used in the atomism critique and argued for the importance of autonomy. McClain, *"Atomistic Man," supra* note 4 (discussing, *inter alia*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988)). Here I note that such feminists as Robin West, who advocate a greater place in law and society for such values as love, care, and responsibility, also espouse the illusion critique discussed in the text to the extent that they diagnose violence, sexual abuse, and other forms of male domination as barriers to women's well-being and equal citizenship, thus recognizing the importance of inviolability for women. *See infra* text accompanying notes 72-77.

argument (which I shall call the illusion critique) and use the trilogy of castle, sanctuary, and body to assess its persuasiveness and its limitations.[61]

A. The Private as Refuge or "Hellhole"?

> [T]he law of privacy [is] the law that keeps out observing outsiders. Sometimes it has. The problem is that while the private has been a refuge for some, it has been a hellhole for others, often at the same time. In gendered light, the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability.
>
> Catharine MacKinnon[62]

> Domestic violence did not threaten my childhood. Nor did it intrude into my world until ten years ago, when on an assignment for a magazine, I saw a man hit his wife. I was unprepared for his violence. It shattered the belief I had been raised with that home is a refuge from the chaos of life.
>
> Donna Ferrato[63]

Critiques of the law's protection of privacy and of the public/private distinction have been a significant component of feminist jurisprudence. They target not only the legal treatment of privacy, but also an array of beliefs and social practices about privacy and the

---

61. I do not address whether, as some feminists argue, privacy is particularly inapt for protecting women's inviolability with respect to reproductive issues. On this argument, while models of atomistic individuals fail to describe a pregnant women's experience, that a pregnant woman, in the eyes of the law, "cannot be isolated in her privacy" (Roe v. Wade, 410 U.S. 113, 159 (1973)) too easily serves as justification for constraints upon her choice in the name of protecting prenatal life. A cautionary example is *In re A.C.*, 533 A.2d. 611, 615, 617 (D.C. 1987), in which the court invokes *inter alia*, *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891), in support of rights to bodily integrity and to refuse medical treatment, but concludes that the trial court did not err "in subordinating A.C.'s right against bodily intrusion to the interests of the unborn child and the state" and in ordering caesarean section on A.C. to attempt to preserve life of her twenty-six-week-old fetus, where surgery may have shortened her life by a few days. A.C. was a woman with terminal cancer who planned to deliver by caesarean section at twenty-eight weeks. That decision, however, was vacated and remanded. *See* In re A.C., 573 A.2d 1235, 1251-52 (D.C. 1990) (en banc) (holding that, in light of woman's rights to bodily integrity and to refuse medical treatment (citing, *inter alia*, *Botsford*), "it would be an extraordinary case" in which a court "might ever be justified in overriding the patient's wishes and authorizing a major surgical procedure such as a caesarean section," no matter what quality of patient's life might be). There is an extensive feminist literature critically assessing privacy, but for a recent critique of abortion law touching on themes of inviolability, see Drucilla Cornell, "Dismembered Selves and Wandering Wombs," to be published as Chapter 2 of DRUCILLA CORNELL, THE IMAGINARY DOMAIN: A NEW PERSPECTIVE ON ABORTION, PORNOGRAPHY, AND SEXUAL HARASSMENT (forthcoming 1995) (Apr. 2, 1994) (unpublished manuscript, on file with author).

62. MacKinnon, *Reflections*, *supra* note 2, at 1311 (criticizing development of law of reproductive control as branch of law of privacy).

63. DONNA FERRATO, LIVING WITH THE ENEMY 2 (1991) (introducing her book of photographs documenting domestic violence).

private sphere, and the ways in which they construct and constrain women's lives.[64] A significant feminist project has been to question the lines drawn between the public and the private and to suggest the important legal, political, and social implications of designating spheres such as the home or domestic life as private.[65] Here my focus is on the charge that the inviolability that privacy allegedly protects is an illusion for women and that the immunity privacy affords benefits men and imperils women, their bodily integrity, and their decisional autonomy.

What does it mean to say, as feminist theorists who advance the illusion critique do, that women lack inviolability and that privacy rights imperil women's inviolability? How, exactly, has legal protection of the right to be let alone and of privacy contributed to women's oppression and the law's failure to protect women's inviolability and privacy? To encapsulate a familiar formulation of the argument, feminist investigations of the circumstances of women's lives reveal that the locus of privacy's protection—the supposed haven and sanctuary of home and the intimacy of persons and relationships within the home—is central to women's oppression.[66] This very immunity from state interference renders men unaccountable for what is done in private—rape, battery, and other exploitation[67]—and creates "a sphere of sanctified isolation, impunity, and unaccountability."[68] Thus, Catharine MacKinnon charges, "This right to privacy is a right of men 'to be let alone' to oppress women one at a time."[69]

---

64. *See, e.g.*, Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW 151 (David Kairys ed., rev. ed. 1990). For a helpful description and evaluation of such critiques, *see* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

65. One could raise a number of concerns along those lines regarding my analysis of the trilogy of body, castle, and sanctuary—for example, the legacy of separate spheres doctrine and gender role assumptions underlying the image of home as haven or sanctuary. *See* ALLEN, *supra* note 4, at 67 (arguing for importance of values of sanctuary, seclusion, and refuge of home for women but noting that for home to be man's haven, women have paid "social cost" of being cloistered or confined to home with insufficient opportunities for their own privacy). According to the doctrine of "separate spheres" for women and men, women were regarded as properly secluded in or confined to the home and the world of the family, a refuge and haven for men when they returned from the rough and tumble of the world of capitalistic market competition and politics. *See generally* Fran Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497, 1499 (1983). *But see* Dorothy Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 20-21 (1993) ("Black women historically experienced work outside the home as an aspect of racial subordination and the family as a site of solace and resistance to white oppression."). Legal restrictions, justified in the name of women's special duties and responsibilities in the home, also limited women's participation in the public world. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973) (citing as example Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (Bradley, J., concurring)). For feminist arguments on the continuing legacy of separate spheres ideology, *see* Taub & Schneider, *supra* note 64.

66. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 193 (1989).

67. *Id.*

68. MacKinnon, *Reflections*, *supra* note 2, at 1311.

69. MACKINNON, *supra* note 66, at 193-94.

Nor do women possess the goods of privacy, the "inviolable personality"[70] or the "autonomy or control over the intimacies of personal identity" applauded by privacy theorists:

> [W]omen have no privacy to lose or to guarantee. We are not inviolable. Our sexuality, meaning gender identity, is not only violable, it *is* (hence we are) our violation. . . . To confront the fact that we have no privacy is to confront our private degradation as the public order.[71]

The illusion critique, as articulated by MacKinnon, Robin West, and others, includes both a legal and a social attack on privacy. The legal component of the charge suggests that the right of privacy sanctions the violation of women by permitting those with power (men) to act with impunity and unaccountability toward the powerless (women).[72] To recall Nagel's account of inviolability, to say that women are not inviolable suggests that they lack the moral or legal status of persons who may not be violated in certain ways.[73] Thus, MacKinnon claims that women's sexuality is defined in such a way that sexual violation of women is not a legal wrong but instead is viewed as simply what it means to be a woman. MacKinnon lists marital rape and battery as examples of the wrongs shielded by privacy, and these examples are central in many feminist critiques of the problematic history of legal nonintervention in the private sphere.[74]

The illusion critique also attributes the harm of privacy and the violative quality of intimacy to the broader patriarchal ideology, which constructs the social conditions within which the law of privacy operates. Women lack inviolability in part because men do not regard them as moral beings and do not respect their boundaries. Therefore, the most salient problems that privacy both obscures and exacerbates are women's lack of control over men's sexual access to their bodies and the effect on women's lives of the threat of male violence.[75] Women's formal constitutional rights to privacy against

---

70. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 2, at 656 (citing Warren & Brandeis, *supra* note 16, at 205 (discussing "inviolate personality")).

71. *Id.* at 656-57. In Part III, I examine assumptions about the female body found in MacKinnon's equating women's identity with sexual violation.

72. MacKinnon, *Reflections*, *supra* note 2, at 1311; *see also* Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 455-56, 458-61 (1992) (arguing that constitutional rights of privacy themselves, or negative liberty, and concomitant governmental noninterference, protect private sphere within which men oppress and abuse women).

73. *See supra* text accompanying note 15.

74. *See, e.g.*, Taub & Schneider, *supra* note 64, at 155-56. *See infra* text accompanying notes 85-124 for discussion of marital rape exemption.

75. *See* West, *supra* note 72, at 453-56. Thus, MacKinnon charges that grounding women's reproductive freedom in a privacy right wholly obscures the correct point of departure for laws concerning reproduction: women's lack of control over men's sexual access to their bodies or of the reproductive uses of their bodies. MacKinnon, *Reflections*, *supra* note 2, at 1311-13.

the state mean little, the argument goes, if what women really need is protection by the state against men in private. Yet the state does not alter the distribution of power because it does not intrude into intimacy, or men's homes and bedrooms, in the name of privacy.[76] Because women's inequality with respect to men in the "private" sphere has not been recognized, "the doctrine of privacy has become the triumph of the state's abdication of women in the name of freedom and self-determination,"[77] leaving them, as West puts it, under the private sovereignty of men.[78]

Ruth Gavison suggests that such feminist condemnation of privacy "raises a substantive moral and political question" as to whether women have "no interest in the values of privacy and intimacy," or in keeping the state out of their lives in at least some circumstances.[79] It also highlights the need to sort out "dubious uses of the notion of privacy" and to reject the invocation of the values of privacy to "mask exploitation and abuse."[80] My assumption is that the values of privacy and intimacy and the principle of noninterference are vital, however reconstructed by feminist critique. For example, Martha Fineman argues that the concept of a space for families safe from governmental intrusion, absent compelling reasons, is desirable, but that defining the marital relationship and the heterosexual family as the sacred core of privacy, as in *Griswold*, leaves family forms, such as an unmarried mother and her children, vulnerable to state intervention and scrutiny as "public" families.[81] Other feminists (particularly feminists of color) have noted the important role of the

---

76. MACKINNON, *supra* note 66, at 193.

77. MacKinnon, *Reflections*, *supra* note 2, at 1311; *see also* West, *supra* note 72, at 467-68 (calling for constitutional commitment to women's positive liberty).

78. West, *supra* note 72, at 455-56.

79. Gavison, *supra* note 64, at 22. *Cf.* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955 (1993) (arguing for model of constitutional privacy treating family as important political, rather than purely private, institution and subjecting family to doctrine of family justice).

80. Gavison, *supra* note 64, at 36. Allen reaches similar conclusions in her account. *See supra* note 4.

81. Martha A. Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 (1991). For a fuller explication, see MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995). Feminist analyses of the history of welfare regulations and practices illustrate the idea of the "public" family. *See* MIMI ABRAMOWITZ, REGULATING THE LIVES OF WOMEN 324-25 (1988) (describing such practices as "midnight raids" of homes of women receiving AFDC to determine if there was a "man in the house" who would become "substitute father," disqualifying family from benefits). *Cf.* Wyman v. James, 400 U.S. 309, 326 (1971) (upholding home visitations to AFDC recipients pursuant to state statutory scheme as reasonable and not violative of Fourth Amendment or unwarranted invasion of personal privacy).

home and the "private" sphere as a site of refuge, particularly when persons face discrimination and oppression outside the home.[82]

As to Gavison's second point, we should ask whether and how legal protection of privacy hinders women's inviolability by sustaining dubious uses of the notion of privacy. Revisiting the relationship between inviolability and privacy, I will use the trilogy of castle, sanctuary, and body to illuminate how, historically, protecting certain loci of inviolability has impaired the inviolability of women, as well as how certain interpretations of inviolability must be rejected or must yield to the inviolability of women's bodily integrity and decisional autonomy.

B. Inviolability and Spousal Immunity

Let us return to the origins of the right of privacy. In their famous article, "The Right To Privacy," Warren and Brandeis assumed that tort law afforded the man in his castle adequate protection from physical invasion.[83] The Supreme Court in *Union Pacific Railway Co. v. Botsford* spoke of a "sacred" common law right to control one's person (in the case before it, that of a woman).[84] Yet at common law, married women lacked inviolability because doctrines of spousal immunity and of marital exemption from rape law rendered them unprotected against physical assault by and forced sexual relations with their husbands.[85] Indeed, under the law of coverture, a married woman disappeared as a separate legal person, becoming "one person in law," "incorporated and consolidated into that of the husband."[86] Married women's lack of a separate legal identity was

---

82. *See, e.g.*, Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1990) (describing private space in which lesbians are free from patriarchy); Roberts, *supra* note 65, at 20-22 (describing home as "site of solace and resistance" for black women); *but see* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (noting community ethic against public intervention among people of color and function of home as a "safe haven from the indignities of life in a racist society," while concluding that "but for this 'safe haven' in many cases, women of color victimized by violence might otherwise seek help").

83. Warren & Brandeis, *supra* note 16, at 193-94.

84. 141 U.S. 250, 251 (1891). Although feminists sometimes argue the right of privacy is too disembodied, it is interesting to note that both *Botsford*, 141 U.S. 250 (1891), and an even earlier precedent for the right of privacy involved female plaintiffs. *See* DeMay v. Roberts, 9 N.W. 146 (Mich. 1881) (upholding action for invasion of privacy during "sacred" time of childbirth by presence of stranger in plaintiff's home). *Cf.* Christine L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327 (1991) (arguing for right of bodily integrity rather than right of privacy and invoking *Botsford* in support).

85. *See* BALOS & FELLOWS, *supra* note 3, at 185-200. For a helpful and thorough discussion of the history of interspousal tort immunity, as well as the extent to which it either survived or was eroded in light of Married Women's Property Acts, see Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989). *See infra* text accompanying notes 86-129 for discussion of the marital rape exemption.

86. *See* I WILLIAM BLACKSTONE, COMMENTARIES *430 (1765). Here, being one flesh, or one person, took on a legal significance imposing a series of "disabilities" on married women,

used to justify husbands' administering physical chastisement to their wives[87] and the marital rape exemption (since a husband and wife were one person (the husband), he could not rape himself).[88] Perhaps the most egregious failure to recognize women's inviolability was Lord Hale's often-repeated idea that because a woman consented to matrimony, she gave her consent to sexual relations, and therefore could not be raped.[89] Such common law doctrines have had a lingering impact on American law, as well as on American society.[90] Moreover, notwithstanding the formal passing away of such doctrines, there survive some remnants of the idea that the law (and courts) should not invade the privacy of the home or "go behind the curtain" of domestic life.[91]

There can be little argument that legal doctrines like spousal immunity and spousal unity, or coverture, manifest disregard for women's bodily integrity and autonomy and, instead, sanction their vulnerability in marriage.[92] The law's reluctance or refusal to intrude into the private sphere of family life and the sanctity of the marital relationship (as it were, the castle and the sanctuary) also played a part in rationalizing immunity and constructing women's vulnerability.[93]

In light of the history of disregarding the bodily integrity and decisional autonomy of women within marriage, one might concur

---

not incurred by unmarried women, limiting freedom to contract, to own property, to engage in professions, and the like. *Id.* at *430-32.

87. *Id.* at *432-33.

88. *See* Anne C. Dailey, Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1986).

89. *Id.* (citing 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 629 (S. Emlyn ed., 1778)). For judicial criticism and rejection of this rationale, see *infra* text accompanying notes 115-17.

90. *See* Tobias, *supra* note 85 (discussing interspousal tort immunity); State v. Smith, 426 A.2d 38 (N.J. 1981) (noting influence of common law marital exemption from rape law in American states but questioning existence and scope of such exemption).

91. *Compare* State v. Rhodes, 61 N.C. 453 (Phil. Law 1868), *reprinted in* BALOS & FELLOWS, *supra* note 3, at 196, 197, 199 (declining to recognize wife's claim for battery not because of husband's "right to whip his wife" but because "[w]e will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence") *with Patterns of Abuse*, NEWSWEEK, July 4, 1994, at 26, 28 (linking ambivalence in American society about family violence to Americans clinging to "'zone of privacy'—the unwritten code that a man's home is his castle and what happens inside should stay there").

92. Additionally, prior to the abolition of slavery, African women held in slavery lacked protection against violations of their bodily integrity and moral autonomy stemming from rape, forced reproduction, and forced alienation of mothers from children; even after abolition, African-American women were not afforded adequate legal protection against rape. Roberts, *supra* note 65, at 7-10. Former slave Anna Julia Cooper told of the struggle of black women "to keep hallowed their own persons" and, against "fearful and overwhelming odds, that often ended in horrible death, to maintain and protect that which woman holds dearer than life." BLACK WOMEN IN NINETEENTH-CENTURY AMERICAN LIFE: THEIR WORDS, THEIR THOUGHTS, THEIR FEELINGS 329 (Bert James Loewenberg & Ruth Bogin eds., 1976).

93. Tobias, *supra* note 85, at 394.

with feminist critics of privacy that language about inviolability, sanctity, and sanctuary rings hollow for women and that the realm of the private is indeed a sanctuary for men from the normal operations of law. There is a long history of feminist condemnation of the law's complicity in maintaining gender inequality and thwarting women's inviolability. Eighteenth-century American feminists included among their grievances the laws of coverture, which, "to all intents and purposes," made the husband a woman's "master."[94] In the nineteenth century, in *The Subjection of Women*, John Stuart Mill condemned the "yoke tightly riveted on the necks" of women within the institution of marriage, decrying women's lack of recourse against their husbands for physical violence.[95] Mill especially abhorred the fact that the legal fiction of marital unity, or of being "one person," permitted men to force sexual relations upon their wives, thereby subjecting them to "the lowest degradation of a human being."[96]

In criticizing the institution of marriage, and the license it afforded men, nineteenth-century American feminists demanded a woman's right to control her body and her sexual and reproductive life (what feminist historians describe as the call for a "right to self-ownership in marriage" and to "voluntary motherhood").[97] It is notable that what women demanded as a "sacred" right was, in effect, inviolability: control of intimate access, freedom from the sovereignty of another (here compare the contemporary feminist complaint), and respect for bodily integrity.[98] Indeed, some nineteenth-century feminists deployed the image of the female body as a temple, defiled by men's forced sexual access, to condemn marriage as "legalized prostitution."[99]

Yet, in significant part due to feminist challenges, modern courts and legislatures have become more willing to "lift the curtain" on the privacy of the home and marriage and to abandon common law doctrines of unity and immunity for the sake of protecting women's

---

94. *Declaration of Sentiments*, in *History of Women's Suffrage*, *in* THE FEMINIST PAPERS 417 (Alice S. Rossi ed., 1973).

95. John Stuart Mill, *The Subjection of Women* (1869), *in* JOHN STUART MILL AND HARRIET TAYLOR MILL, ESSAYS ON SEX EQUALITY 137, 159-60 (Alice S. Rossi ed., 1970).

96. *Id.* at 159-60. Mill seemed to think that, while wives could not refuse consent to sexual relations, slave women could. *Id.*

97. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 305 (1992); *see also* MARY LYNDON SHANLEY, FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND 187-88 (1989) (describing similar themes in British feminist campaigns). On voluntary motherhood, see Linda Gordon, *Why Nineteenth-Century Feminists Did Not Support 'Birth Control' and Twentieth-Century Feminists Do*, *in* RETHINKING THE FAMILY (Barrie Thorne & Marilyn Yalom eds., 1982).

98. *See* Siegel, *supra* note 97, at 305-08.

99. *Id.* at 308 n.188 (quoting from *Marriage and Maternity*, REVOLUTION, July 8, 1869, at 4).

inviolability, individual autonomy, and the integrity of their bodies.[100] Thus, the joint opinion for the Supreme Court in *Planned Parenthood v. Casey* stated that contemporary constitutional law rejects common law notions of marriage such as the legal fiction of marital unity, and held that "[w]omen do not lose their constitutionally protected liberty when they marry."[101] *Casey* also declared that a state could not constitutionally require notice to a husband, let alone require his consent, with respect to a wife's decision to terminate a pregnancy, because a husband's "deep and proper concern and interest" in her pregnancy and in the fetus does not override a woman's right to bodily integrity or her privacy rights as an *individual* to make decisions concerning reproduction, free from abuses of governmental power.[102] Finally, the *Casey* joint opinion also lifted the veil by citing the alarming rates of violence against women in order to indicate the burden that such a notice provision would impose and to suggest that women have reasons to keep their reproductive decisions private.[103]

C. *Conflicting Loci of Inviolability: Castle, Sanctuary, and Women's Bodies*

Undeniably, there is still much to be done to secure inviolability for women, not merely by changing the law but also by changing law enforcement practices and public attitudes, so that what has been accepted or even legitimated is seen as violative and wrong. In this regard, a key premise of the recently enacted Violence Against Women Act is that women are at particular risk for violence because of their gender and that state laws and law enforcement practices are inadequate.[104] One prominent declared purpose of the Act is to "forg[e] a consensus that society will no longer tolerate violence against women."[105] Let us, then, accept the illusion critique to the

---

100. Interspousal tort immunity has eroded over the last century to the point where a "substantial majority" of states have abolished it. Tobias, *supra* note 85, at 435. On the partial erosion of the marital rape exemption, *see infra* text accompanying notes 108-29.

101. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2830-31 (1992).

102. *Id.* at 2830 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976)).

103. *Id.* at 2826-28.

104. The Violence Against Women Act of 1994, 42 U.S.C.A. § 13931 (1994). *See* S. REP. NO. 138, 103d Congress, 1st Sess. 60-65 (1993), *available on* LEXIS, Committee Reports File. The Act also affords a civil rights remedy for crimes of violence motivated by gender. 42 U.S.C. § 13981 (1994); *see* H.R. CONF. REP. NO. 711, 103d Cong., 2d Sess., 385 (noting that Congress has found that crimes of violence motivated by gender constitute bias crimes in violation of victim's right to be free from discrimination on basis of gender and that "State and Federal criminal law do not adequately protect against the bias element of crimes of violence motivated by gender").

105. S. REP. NO. 138, *supra* note 104, at 65. The legislative history referred to the legacy of societal acceptance of family violence, including the common law right of chastisement and the

extent that it reveals the gap between the ideals of inviolability and privacy and of women's social and legal status.

The more interesting question raised by the critique concerns the affirmative potential of those ideals and whether or not the invocation of such ideals hinders or helps women's status. It is striking that campaigns to end domestic violence not only bring to public attention the fact that the home is too often a dangerous place for women, but also invoke the image of the sanctuary in support of the goal of making the home a sanctuary for women and their families, a haven free from violence.[106] As this attempt to appropriate for women the image of home as sanctuary suggests, the imagery of inviolability familiar from privacy jurisprudence may serve goals helpful to women. The inviolability of the person, or body, and of the personality are preconditions for women's equal and autonomous citizenship.[107]

To assess the illusion critique's claims about the harmful effects of the right of privacy, I use the marital exemption from rape law as an example. The exemption has been wholly eliminated in some states by judicial or legislative action. It has been eliminated or eroded to varying degrees in other states, leaving what some critics have called a "marital rape allowance" so that married women (and, in some cases, unmarried cohabitants) are not fully protected against rape and sexual assault.[108]

Notions of the privacy of the home and the sanctity of marriage may be one reason for the continuation of the marital rape exemption or of an "allowance."[109] Yet it is critical to note, notwithstanding

---

marital rape exemption. In support of the Act, sponsor Senator Joseph Biden stated, "I want to raise the consciousness of this country that women's civil rights—their right to be left alone—is in jeopardy." *"Women's Lives Controlled by Fear," Congress Told in Look Into Domestic Violence*, L.A. TIMES, Oct. 4, 1992, at A13 (quoting Senator Biden).

106. At a benefit held at Fordham University on October 12, 1994, in conjunction with the display of photographs from Donna Ferrato's book, *Living With the Enemy* (1991), activist and actress Linda Lavin stated, "My hope for women is quite simple[:] . . . that every woman's home can be a haven, not a torture chamber." *See supra* text accompanying note 63. One part of the Violence Against Women Act is entitled "Safe Homes for Women." 42 U.S.C.A. § 13951 (1994).

107. *Cf.* Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) (arguing for affirmative conceptions of privacy encompassing ideas of liberty, equality, bodily integrity, and autonomy). Equality arguments and appeals to equal citizenship have played an important role in eroding common law doctrines like the marital rape exemption; however, demands for equal protection are also demands for equal privacy and for the equal application of the underlying principle of inviolability. *See* Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 76-79 (1990) (calling for Married Women's Privacy Act); *cf.* Dailey, *supra* note 88, at 1265, 1266, 1273 (noting potential of privacy arguments but arguing that group-based equality arguments are preferable).

108. *See* Jaye Sitton, Comment, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261 (1993); *see also* Rene I. Augustine, *Marriage: The Safe Haven for Rapists*, 29 J. FAM. L. 559 (1991); Dailey, *supra* note 88.

109. Perhaps the clearest example is *People v. Brown*, 632 P.2d 1025, 1027 (Colo. 1981), in which Colorado's highest court held that the state's interest in family harmony afforded a

the implications of some feminist critiques, that such privacy precedents as *Griswold v. Connecticut*,[110] *Eisenstadt v. Baird*,[111] and *Roe v. Wade*[112] have served primarily to attack, not to defend, immunity for rape and assault within marriage. West states, for example, that such privacy cases as *Roe* and *Griswold* seem to "bolster" an argument that "protection of marital privacy, insularity, and harmony is such an important state interest that protection of the husband against criminal charges of rape substantially furthers that interest."[113] MacKinnon charges that the constitutional right of privacy relied upon in *Roe* sanctions oppression of women in private.[114] Neither West nor MacKinnon offers any examples, and I have not found one, of cases in which a court cited *Griswold*, *Eisenstadt*, or *Roe* to defend immunity for rape within marriage.[115] To the contrary, in rejecting the marital exemption from rape law, courts have stated that the right of privacy and the "sanctity of the marital home" do not shield a husband either from liability for violations of his wife's bodily integrity or from state invasion of such "sanctity" for the purposes of public safety.[116]

In *Pennsylvania v. Shoemaker*, the court rejected a husband's assertion that his right of privacy overrode any state interest in enacting a Spousal Assault Statute:

> The state has a compelling interest in protecting the fundamental right of all individuals to control the integrity of his or her own body. The right to privacy within the marital relationship is not absolute and . . . must be balanced against [that state interest] . . . . "To say that the right to choose one's marriage partner is a fundamental right protected by the right of privacy is not to say that marriage, once entered into, becomes a fortress impervious to any legal action brought by one partner against the other."[117]

---

rational basis for the marital rape exemption. A number of states distinguish between cases in which a couple lives together and those in which they have initiated a legal separation and/or live apart—perhaps because they use the latter as a proxy for the end of marriage and marital harmony. *See* Morse v. Commonwealth, 440 S.E.2d 145 (Va. Ct. App. 1994) (holding that legislature intended to exclude rape achieved through intimidation from rape definition if married couple was not "living separate and apart").

110. 381 U.S. 479 (1965).

111. 405 U.S. 438 (1972).

112. 410 U.S. 113 (1973).

113. *See* West, *supra* note 107, at 67 & n.84.

114. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED 93-102 (1987); *see supra* text accompanying notes 62, 66-78.

115. For cases explicitly rejecting such a claim, see *infra* text accompanying notes 116-23. The Colorado Supreme Court cited no privacy precedents to support its holding in *People v. Brown*, 632 P.2d 1025, 1027 (Colo. 1981).

116. Pennsylvania v. Shoemaker, 518 A.2d 591, 594 (Pa. Super. Ct. 1986).

117. *Id.* at 594 (quoting Attorney General's brief).

Thus, the court rejected an interpretation of home as castle or marriage as sanctuary that would trump a woman's bodily integrity or the inviolability of her body. The court went on to note that the legislation itself signaled a rejection of the view of married women as chattel of their husbands in favor of the right of a married woman to be secure in her own home[118] and, as a later court put it, a willingness to demystify the mantle of spousal immunities.[119]

Similarly, in the often-cited case, *People v. Liberta*, New York's highest court held that no rational basis existed upon which to distinguish between rape committed outside of or within marriage and concluded: "The right of privacy protects consensual acts, not violent sexual assaults."[120] Rejecting the rationale most frequently proffered to account for the exemption, Lord Hale's statement that a married woman gives irrevocable implied consent to sexual intercourse,[121] the Court stated that "a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity."[122] Equally critical of Hale's rationale, an Illinois court stated that implied consent "depriv[es] women of their dignity by refusing to recognize them as whole human beings who are entitled to decide whether or when they will engage in sexual relations."[123]

Not only have privacy rights failed as a defense of the marital rape exemption, but federal and state privacy precedents concerning a realm of bodily integrity and decisional autonomy for married and unmarried women have justified eroding the exemption. In language favorably echoed by other courts, the court in *People v. DeStefano* spelled out the implication of precedents such as *Griswold*, *Eisenstadt*, and *Planned Parenthood v. Danforth*:[124]

> The logical extension of these holdings is that if a wife may unilaterally prevent or terminate a pregnancy does she not also unilaterally possess a right to refuse the physical act which leads to such pregnancy. While recognizing the sanctity of marriage modern decisional law also recognizes that the right of a wife to supremacy over her own body is paramount to her spouse's

---

118. *Id.*

119. Commonwealth v. Hancharik, 565 A.2d 782, 793 (Pa. Super. Ct. 1989) (Tamilia, J. concurring).

120. People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984). *Accord* Williams v. State, 494 So. 2d 819, 828 (Ala. Crim. App. 1986); Merton v. State, 500 So. 2d 1301, 1303 (Ala. Crim. App. 1986).

121. *See* State v. Smith, 426 A.2d 38, 41 (N.J. 1981) (noting that Hale offered no authority for this proposition and observing that "the martial exemption rule expressly adopted by many of our sister states has its source in a bare, extra-judicial declaration made some 300 years ago").

122. 474 N.E.2d at 573. *Accord* People v. M.D., 595 N.E.2d 702, 711 (Ill. Ct. App. 1992).

123. People v. M.D., 595 N.E.2d at 710, 711.

124. 428 U.S. 52 (1976) (invalidating husband-consent requirement in abortion statute).

> desire. Indeed her rights to individual autonomy and to control procreation are but a part of the more comprehensive right to bodily integrity.[125]

Here, like the Supreme Court's disaggregation of marriage into an association of individuals with constitutional liberty in its step from *Griswold* to *Eisenstadt*,[126] the *DeStefano* court reasoned that marital sanctity and a husband's desire must yield to a woman's "supremacy" over her own body, reflecting her right to bodily integrity.[127] Thus, while the illusion critique stresses that women's formal rights to privacy mean little if women have less power than men in private, courts interpret these rights as implying that women should not be subject to abuses of power in private and be without legal protection against such abuse, even if they are married to the person who would exercise that power.

The judicial treatment of the conflict between the marital rape exemption and a married woman's inviolability stresses the violation of her rights to bodily integrity and autonomy (i.e., her right to choose with whom and when to be sexually intimate).[128] The erosion of the exemption signals that the "sacred" precincts of the home and even the bedroom cannot provide complete immunity (for men) from the law's reach. Moreover, it reflects a conclusion that the inviolability of the marital relationship does not trump the inviolability and integrity of a woman's body and her personal sovereignty over it. While feminist critiques of privacy predating the

---

125. People v. DeStefano, 467 N.Y.S.2d 506, 513-14 (Sup. Ct. 1983). *Accord Williams*, 494 So. 2d at 827, 828 ("It would be ludicrous to hold that a marriage license implies consent to such a gross violation of one's bodily integrity.").

126. 405 U.S. 438, 453 (1972). Some critics charge that here the Court made a fateful and problematic turn from the "old" privacy of the home, the family, and marriage to privacy as an individual autonomy right. *See, e.g.*, Michael Sandel, *Moral Argument and Liberal Toleration*, 77 CAL. L. REV. 521, 525-29 (1989); MARY ANN GLENDON, RIGHTS TALK 56-57 (1991). *Cf.* Janet L. Dolgin, *The Family in Transition: From* Griswold *to* Eisenstadt *and Beyond*, 82 GEO. L.J. 1519 (1994) (arguing that move toward envisioning family members as autonomous choosing individuals brings freedom from ancient status hierarchy and simultaneously destroys anchors that once secured responsible connection).

127. *See also* State v. Smith, 426 A.2d 38, 46-47 (N.J. 1981) (rejecting defendant husband's notice claim concerning liability for rape within marriage because, in light of such legal developments as, *inter alia*, *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), which involved "the right of women to make their own choices regarding reproduction and sexual conduct," "[n]o person in this State in 1975 could justifiably claim that a man had a legal right to impose his sexual will forcefully and violently on a woman, even if it was his wife, over her unmistakable objection.").

128. *See* Warren v. State, 336 S.E.2d 221, 224 (Ga. 1985) (quoting Coker v. Georgia, 433 U.S. 584, 599 (1977)). The same language appears in *People v. Liberta*, 474 N.E.2d 567, 575 (N.Y. 1984). The focus upon women's bodily integrity signals a rejection not only of implied consent but also of another rationale offered for the exemption, that forcible sex within an intimate relationship is a lesser injury than other kinds of rape. Susan Estrich argues that this rationale illustrates, in an extreme form, the law's suspicion of women's allegations of rape in instances not conforming to "real rape," or rape by a stranger. SUSAN ESTRICH, REAL RAPE 72-76 (1987).

partial erosion understandably highlighted the gap between privacy's aims and women's lives and properly continue to address that gap, it is striking that feminist critiques even today seem to suggest that marital privacy will inevitably trample women's inviolability and privacy.[129]

III. ENVISIONING WOMEN'S INVIOLABILITY: TOWARD A FEMINIST ACCOUNT

In this section, I offer some thoughts about envisioning women's inviolability. In doing so, I revisit some familiar feminist accounts placing sexuality at the center of women's oppression and lack of inviolability. Although an account of inviolability ultimately must address more than sexuality, the problems of envisioning sexual autonomy for women and of articulating appropriate boundaries between consensual sex and rape or sexual assault receive considerable feminist attention and serve as a source of contentious societal debate.[130] I highlight the themes of inviolability, sacredness, and security in the discourse surrounding those issues, particularly on the topic of the injury to women from rape and sexual assault. Drawing on a range of sources, I develop the images of castle and sanctuary (or temple) to characterize what seem to me to be two key aspects of envisioning sexual autonomy: the legal protection of women's rights to bodily integrity and autonomy against sexual assault and invasion, and the articulation of possibilities of sexual connection compatible with women's inviolability and well-being.[131]

A. Inviolability, Integrity, and Privacy: Sex and Violation

The value of the inviolability of the person and the personality translates into the legal protection of the rights of bodily integrity and autonomy, or moral independence, in decision making. Themes of integrity and autonomy are also applicable to legal protection against sexual assault. But some feminist analyses of sexuality seem to

---

129. *See supra* note 110-14 and accompanying text.

130. Some feminist legal theorists question whether the focus on sexuality obscures other important sources of oppression and distorts feminist theorizing. *See* Mahoney, *supra* note 3, at 222-31. This proposition was discussed at the annual Feminism and Legal Theory Summer Conference held at Columbia University School of Law (June 6-8, 1994), convened by Martha Fineman, "Direction and Distortion: The Centrality of Sexuality in Feminist Legal Theory." My analysis in this section benefitted from my participation in that Conference.

131. I noted at the outset that I am using the images of castle and sanctuary or temple as helpful heuristic or rhetorical devices for thinking about concepts like bodily integrity, decisional autonomy, and sexual agency. I recognize that such images, as they have functioned in law, also may have a constitutive significance, or what postmodernists would call a regulatory role, in shaping a person's experience of body, home, privacy, and the like. *See generally* MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY (Robert Hurley trans., 1990).

suggest that attempting to distinguish sexual assault from consensual sex fails to acknowledge the element of violation in all heterosexuality, particularly sexual intercourse. What, exactly, is the underlying model of bodily integrity and inviolability in such a charge?

1. Intercourse as Violation

The theme of violation features centrally in MacKinnon's account of sex inequality and gender. Indeed, "woman" as a social construct is defined by reference to the potential for violation: women's gender identity is their sexuality, which is violable. Thus, women have no privacy and are not inviolable.[132] MacKinnon's apparent equation of heterosexuality with violation continues to receive considerable attention within and outside of academic circles.[133]

How, exactly, is sex violative of women? MacKinnon stresses that gender is a social construction and disclaims biological determinism, criticizing, for example, feminist accounts of rape that seem to hold that men are natural predators and women their prey because of "structural capacity" and "structural vulnerability."[134] At the same time, her central image of the way male domination shapes women's lives is one of intrusion. She treats the male mind and the penis as instruments of aggression and observes that the male model for knowing (which, not coincidentally, invokes sexual metaphors) has been characterized as penetration, invasion, and the violation of boundaries.[135] Jeanne Schroeder charges that MacKinnon's account of sexuality echoes medieval misogynistic stereotypes which equate

---

132. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 2, at 656-57; *see supra* text accompanying notes 70-78.

133. I cannot offer a full account here of the many defenses and criticisms of MacKinnon's analysis of sexuality within the literature of feminist jurisprudence, but they include charges that her account assumes a uniform or essential female experience, privileges women's experiences of violation and harm but not of pleasure and choice, and leaves no room for women's agency and desire. For a sympathetic critique, see Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761 (1990). For a critique from a nonlegal source that has received considerable media coverage, see KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS 138-60 (1993).

134. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 2, at 636 n.3 ("Male is a social and political concept, not a biological attribute."); Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 17 (1991) (quoting and criticizing SUSAN BROWNMILLER, AGAINST OUR WILL 4, 6 (1976)). Notwithstanding her critique of Brownmiller, MacKinnon's own account of the genesis of sex inequality—"on the first day that matters, dominance was achieved, probably by force"—invites the question of how men's achievement of dominance over women was possible if not by some physical differential. MACKINNON, *supra* note 114, at 40.

135. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 2, at 636-37 & n.4.

women with their sexuality and which treat sex as inherently degrading, defiling, and violating for women.[136]

MacKinnon's co-author and collaborator in antipornography efforts, Andrea Dworkin, is less resistant to locating women's lack of inviolability and consequent vulnerability to male dominance in women's bodies themselves. In her book, *Intercourse*, Dworkin maintains that, either by nature or divine design, women have a lesser privacy, due to the physical design of their bodies and the existence of intercourse.[137] Her case against intercourse is that it is the combination of the configuration of women's bodies and the existence of intercourse in a misogynistic society that denies women the inviolability thought to be characteristic of human beings. She writes:

> A human being has a body that is inviolate; and when it is violated, it is abused. A woman has a body that is penetrated in intercourse: permeable, its corporeal solidness a lie. . . . *Violation* [a term used for penetration in the "discourse of male truth"] is a synonym for intercourse. . . . She is human, of course, but by a standard that does not include physical privacy.[138]

Thus, women lack privacy, with dire and intrinsic consequences for integrity and sense of self:

> There is never a real privacy of the body that can co-exist with intercourse: with being entered. . . .
>
> She, a human being, is supposed to have a privacy that is absolute; except that she, a woman, has a hole between her legs that men can, must, do enter. . . . The slit between her legs, so simple, so hidden . . . that slit which means entry into her—intercourse—appears to be the key to women's lower human status. By definition . . . she is intended to have a lesser privacy, a lesser integrity of the body, a lesser sense of self . . . [and] this lesser privacy, this lesser integrity [of the body], this lesser self, establishes her lesser significance. . . .[139]

How does intercourse damage a woman's self and integrity? To have integrity is to be unimpaired, sound, and complete.[140] On

---

136. Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1189-1213 (1990).

137. ANDREA DWORKIN, INTERCOURSE (1987). For MacKinnon's praise of Dworkin's book, see MacKinnon, *Reflections*, *supra* note 2, at 1285. In elaborating her "connection thesis," Robin West uses some of the passages from Dworkin that I quote in text to argue that, for radical feminists (the "unofficial" story about connection), intercourse is an invasive and threatening form of connection. West, *supra* note 60, at 32-36.

138. DWORKIN, *supra* note 137, at 122. One might question whether Dworkin unintentionally assumes that the male body should be the model for humans.

139. *Id.* at 122-23.

140. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 628 (1987).

Dworkin's account of the female body, its natural state is one of a "lesser privacy." The desired state of the body, on her terms, is to be inviolate and to have integrity, which means never entered, never accessible. Here Dworkin seems to mean that the "inviolate" body is the "intact" or untouched body.[141] Like the violation of that which is sacred, or set apart, any entry of a woman's body is a form of profanation. Here the image of the sanctuary or temple comes to mind.

Yet neither the body as temple nor the body as castle may fully capture Dworkin's view of the female body. While both connote inaccessibility or restricted access, in each instance some forms of entry are not violative and may be permissible and appropriate. In contrast to Dworkin, nineteenth-century feminists invoked the imagery of temple and defilement to support a demand that *women* control access, not to argue that there could never be sex without violation.[142] On Dworkin's view, it would seem that consent is beside the point (particularly since women collaborate in their own diminution and loss of identity through intercourse), which is that a body that can be entered is a body subject to violation and lacking in integrity and privacy:

> In the experience of intercourse, she loses the capacity for integrity because her body—the basis of privacy and freedom in the material world for all human beings—is entered and occupied; the boundaries of her physical body are—*neutrally speaking*—violated. What is taken from her in that act is not recoverable, and she spends her life—wanting, after all to have something—pretending that pleasure is in being reduced through intercourse to insignificance. . . . The transgression of [the] boundaries [of her body] comes to signify a sexually charged degradation into which she throws herself, having been told, convinced, that identity, for a female, is there—somewhere beyond privacy and self-respect.[143]

There is much to ponder here. In an ironic parallel, art historian and controversialist Camille Paglia, a vocal critic of Dworkin and MacKinnon (from a self-identified feminist stance), uses strikingly similar imagery of integrity, inviolability, and even sacredness to suggest that rape reflects women's natural vulnerability and men's natural inclination:

> Woman's body is a secret, sacred space. It is a *temenos*. . . .

---

141. *Cf.* AMERICAN HERITAGE, *supra* note 7, at 949 (including "intact" among definitions of "inviolate").

142. *See supra* text accompanying notes 97-99.

143. DWORKIN, *supra* note 137, at 137-38 (emphasis added).

> Everything sacred and inviolable provokes profanation and violation. . . . Rape is a mode of natural aggression that can be controlled only by the social contract. . . .
>
> Feminism, arguing from the milder woman's view, completely misses the blood-lust in rape, the joy of violation and destruction. . . . Women may be less prone to [fantasies of cruelty and torture] because they physically lack the equipment for sexual violence [and] do not know the temptation of forcibly invading the sanctuary of another body.[144]

Here, a woman's body is a temple, a sanctuary. Yet, for Paglia, the sacred invites violation rather than veneration, and sex, at least for men, is a form of violation and transgression of women's bodies.[145] What is more, Paglia claims that the distinction between rape and heterosexual intercourse is merely one of intensity, coming close to suggesting that, for women, all sex is an assault on inviolability:

> The latent metaphors of the body guarantee the survival of rape, which is a development in degree of intensity alone of the basic movements of sex. A girl's loss of virginity is always in some sense a violation of sanctity, an invasion of her integrity and identity. Defloration *is* destruction. . . . Sperm are miniature assault troops, and the ovum is a solitary citadel that must be breached. . . . Nature rewards energy and aggression.[146]

Here, the female body is not only temple but also castle; even a woman's egg is a citadel inviting conquest by an aggressive sperm.[147] Moreover, as with Dworkin, intercourse impairs, indeed, violates integrity: the destruction of the hymen of the intact, virginal body is

---

144. CAMILLE PAGLIA, SEXUAL PERSONAE 23-24 (1991). A "temenos" is "a piece of ground surrounding or adjacent to a temple; a sacred enclosure or precinct." 17 OED, *supra* note 6, at 743.

145. *Cf.* LINDA GRANT, SEXING THE MILLENNIUM 17 (1994) (characterizing Paglia's view of sex as violation and freedom for sake of rebellion as one strand in history of ideas about sexual freedom). Paglia's theme of the inevitable relationship between the sacred and the profane brings to mind the following verse (although I do not interpret it to be about rape):

> 'A woman can be proud and stiff
> When on love intent;
> But Love has pitched his mansion in
> The place of excrement;
> For nothing can be sole or whole
> That has not been rent.'

WILLIAM BUTLER YEATS, *Crazy Jane Talks With The Bishop*, *in* THE COLLECTED POEMS OF W.B. YEATS 255 (definitive ed., with author's final revisions, 1974).

146. PAGLIA, *supra* note 144, at 23-24. Paglia continues: "[N]ature creates by violence and destruction. The commonest violence in the world is childbirth, with its appalling pain and gore." *Id.* at 24.

147. Recent scientific studies challenge Paglia's model, or gender ideology, of active sperm/passive egg. *See* William Booth, *Human Egg Found Able to Signal Sperm*, WASH. POST, Apr. 1, 1991, at A1.

but a symbol of the general invasion of integrity inherent in sex and intensified in rape.[148]

The accounts offered by Dworkin and Paglia regard intercourse or the entry of a woman's body as inherently a violation of boundaries and emphasize the dramatic impact on her identity of having the status of one who can and will be entered/violated. Both authors suggest a particularly male inclination to aggress and to violate, an association also made by MacKinnon. For Dworkin and Paglia, the spatial imagery of sanctity and violation also suggests that vulnerability to such violation is a unique, or at least, special risk for women because men inevitably expect and will seek access to that space, whether consensually or nonconsensually. Such determinism seems to be a short step from ideas that men are not morally responsible or accountable for sexual assault because they are irresistibly driven to their actions.[149]

2. *The Physical and Social Construction of Violability*

Like many feminists, I find Dworkin's and Paglia's, if not MacKinnon's, accounts problematic because they seem to eviscerate the possibility of a woman's bodily integrity and inviolability coexistent with sexuality and to treat as insignificant whether or not sexual access to a woman's body follows from her exercise of control over such access.[150] Accounts suggesting that women, by nature, have transgressable boundaries such that any access is a form of violation negate female agency and the significance of such goals as inviolability and control over access to one's person.[151] Feminists attempting to secure legal protection of women from sexual violence and to carve out a realm of meaningful sexual autonomy or agency for women seek, on the one hand, to challenge entrenched stereotypes of male aggression and female passivity and, on the other, to acknowledge the extent to which such stereotypes reflect actual practices.[152] In light of popular (mis)understandings of feminism as

---

148. *Cf.* BROWNMILLER, *supra* note 134, at 354-55 (challenging model of "pain as defloration" as exaggerated, linked to idea of women as property and symbolic value of hymen, and describing women's reports of minimal discomfort at loss of virginity). *See infra* text accompanying notes 198-211 (discussing concept of virginity).

149. *See* Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 130-32 (1992) (positing widespread cultural story that men "are not morally responsible for their heterosexual conduct" and are "entitled to act on their sexual passions, which are viewed as difficult and sometimes impossible to control").

150. Dworkin seems to say that if one had a world without misogyny, intercourse might not be so devastating, but that it is highly unlikely that we could reach such a world. DWORKIN, *supra* note 137, at 138-39.

151. *See infra* text accompanying notes 167-70.

152. I have explored these issues elsewhere. *See* Linda C. McClain, Agency, Irresponsibility, and Sexuality: Gender Ideology and Feminist Legal Theory (1994) (unpublished manuscript

holding that "all heterosexual sex is rape,"[153] feminist legal theorists increasingly recognize the need to construct accounts of "good" sex and of a sexuality compatible with authenticity and well-being, while taking seriously the impact of the institution of what Adrienne Rich calls "compulsory heterosexuality."[154]

MacKinnon, Dworkin, and Paglia all raise important questions about women's relationship to privacy and inviolability, and the respective roles of the physical configuration of women's bodies and of the social construction of bodies, gender roles, and sexuality.[155] While I reject the strongest, most physiological reading of Dworkin's analysis, I think it is important to take seriously the question of whether or not having or being a body that can experience intercourse, pregnancy, childbirth, and thus, in a sense, be open, makes inapt models of privacy allegedly premised on male experience.[156] Nonetheless, such claims seem to encompass both a literal physiological point and a broader point about social expectations concerning women's inviolability or lack of it.

The first point concerns whether or not an act like intercourse, or the entry of a woman's body, is, "neutrally speaking" (as Dworkin puts it), an invasion incompatible with an overall sense of privacy and inviolability.[157] Or, as other feminists suggest, can and do women experience entry (or, to challenge gender role and subject/object assumptions, encirclement),[158] either in a heterosexual or lesbian context, as pleasurable, desirable, intimate, intense, fulfilling, fun, and the like, *and* not as harmful or as a threat to identity, integrity, and

---

presented at Feminism and Legal Theory Summer Conference held at Columbia University School of Law, June 6-8, 1994, on file with author).

153. *See* NAOMI WOLF, FIRE WITH FIRE 122 (1993).

154. *See* Ruth Colker, *Feminism, Sexuality and Self: A Preliminary Inquiry Into the Politics of Authenticity*, 68 B.U. L. REV. 217 (1988); Henderson, *supra* note 149, at 166; West, *supra* note 60. On compulsory heterosexuality as an institution, see Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* POWERS OF DESIRE 177 (Ann Snitow et al. eds., 1983).

155. For a postmodern perspective on the social construction of bodies, including their materiality and boundaries, and the role of "sex" as a regulatory norm in that process, see JUDITH BUTLER, BODIES THAT MATTER (1993).

156. West argues that women are not separate selves because of their potential for physical connection with others, a potential that contains the seeds for experiences of both intimacy and invasion through, *inter alia*, intercourse and pregnancy. West, *supra* note 60, at 3, 14, 53.

157. DWORKIN, *supra* note 137, at 137-38. *See, e.g.*, Sallie Tisdale, *Private Matters*, SAN. FRAN. CHRON., Oct. 11, 1992, at 7 ("the most basic of sex acts, the act of reproduction, is an act of invasion as much as love; intercourse opens the body, enters one's self, enters the place where a woman lives"); Luce Irigiray, *This Sex Which Is Not One*, *excerpted in* NEW FRENCH FEMINISMS 100 (Elaine Marks & Isabelle de Courtivron eds., 1981) (suggesting that autoeroticism of two lips of woman's labia touching themselves "is interrupted by a violent intrusion: the brutal spreading of those two lips by a violating penis"); *see also* BUTLER, *supra* note 155, at 45-46 (characterizing Irigiray's theory as a "rigorously anti-penetrative eros").

158. *Cf.* Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn Suppression*, 72 TEX. L. REV. 1097, 1192 & n.458 (1994) (noting absence of vocabulary for women to describe actively "engulfing" men in genital sex, or other sexual activities and feelings).

privacy?[159] Of course, we cannot really speak "neutrally" about sex, and we should grant that society and its institutions importantly shape the contours of sexuality. Particularly when male dominance and an ongoing struggle for female self-determination have been features of our society, an either/or response to these questions may ignore, on the one hand, the constraining role of such factors as gender ideology, sexual violence, and men's attitudes about women and sex, and, on the other, the facilitating role of women's sense of physical security, moral and sexual autonomy, and desire, as well as the reconstructive imagination of women and men.[160]

The broader point about gender and inviolability is the claim that the world creates women's boundaries, or the lack thereof, so that women do not experience a strong sense of privacy because of the risks posed to that privacy from outside, risks to bodily integrity as well as to other aspects of identity.[161] MacKinnon's graphic claim that women experience the world as "a fist in the face"[162] has echoes in feminist work about the many ways in which women are at risk on the street, on the job, and at home for violation, intrusion, and invasion through battering, rape, sexual harassment, street harassment, sexual objectification, and role expectations about parenting.[163] This empirical world intrudes upon such privacy values as solitude, seclusion, bodily integrity, decisional autonomy, and personhood. In this regard, when some feminist legal theorists conclude that women face privacy losses unique to their gender,[164] they are not attributing those risks only or primarily to genital configuration, but to the social

---

159. *See* Henderson, *supra* note 149, at 164-66; *see also* Meyer, *supra* note 158, at 1150-55 (citing sources on range of women's sexual fantasies and experiences and discussing importance of "freewheeling sex talk"). One source for responses to the question in the text is the literature on women's fantasies and experiences, as well as their writings about sex, in both a heterosexual and lesbian context. *See, e.g.*, Meyer, *supra* note 158; LONNIE BARBACH, PLEASURES: WOMEN WRITE EROTICA (1984); EROTICA: WOMEN'S WRITINGS FROM SAPPHO TO MARGARET ATWOOD (Margaret Reynolds ed., 1990); NANCY FRIDAY, MY SECRET GARDEN (1973) [hereinafter FRIDAY, GARDEN]; NANCY FRIDAY, WOMEN ON TOP (1991). *See infra* note 160 for additional sources.

160. *See* Tracy E. Higgins & Deborah L. Tolman, *Feminism, Rape Law, and the Missing Discourse of Desire*, *in* FEMINISM, MEDIA, AND THE LAW (Martha Fineman & Martha McCluskey eds., forthcoming 1995) (unpublished manuscript, on file with author) (arguing for feminist conception of women's sexuality that more fully accounts for threat of sexual violence and for women's experiences of sexual desire). For two feminist collections exploring the issues raised in the text under the rubric of "pleasure and danger," see PLEASURE AND DANGER (Carol S. Vance ed., rev. ed. 1992); POWERS OF DESIRE (Ann Snitow et al. eds., 1983).

161. *See* ELLYN KASCHAK, ENGENDERED LIVES 131-47 (1992) (arguing that women's experiences of boundaries are imposed upon them by men and that pervasiveness of invasion and violation shapes women's perceptions of boundaries and risks).

162. MacKinnon, *Reflections*, *supra* note 2, at 1285.

163. *See, e.g.*, ALLEN, *supra* note 4; Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992).

164. ALLEN, *supra* note 4, at 123-35, 141-42.

construction of what a "woman" is and expectations about women's accessibility.

The interplay of body and society in shaping a woman's experience and expectations of inviolability and privacy is a complex issue that I cannot hope to develop fully here. Thus, while one might argue that a clear gender difference, rooted in physiology, is that women and men have different expectations of inviolability, such a conclusion may ignore the impact upon such expectations of the social construction of "woman" and "man" by reference to their performing an appropriate sexual role (being entered or penetrated versus entering or penetrating) as well as to their potential for sexual violation.[165] This construction sets up heterosexual intercourse as the normal and appropriate form of sex and ignores not only other forms of heterosexual expression, but also the range of experiences in lesbian sexuality[166] and male sexual desire to enter another man's body or to be entered.[167] An attempt to envision inviolability and to reconstruct sexuality should critically assess such construction, as well as the implications of the use of the male-female relationship and presumed sexual roles to describe situations of dominance and victimization.[168] Finally, one may argue that the configurations of

---

165. Judith Butler uses the idea of "performativity" to explore the role of gender norms and the potential to subvert them. *See generally* BUTLER, *supra* note 155; JUDITH BUTLER, GENDER TROUBLE (1990). Even some accounts arguing that the anatomical construction of human bodies contributes (perhaps) inevitably to an association of mastery and subordination with penetration point to the exaggeration or exacerbation of such an association through fantasy and misogyny. Leo Bersani, *Is The Rectum A Grave?*, *in* AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM 197, 216-17 (Douglas Crimp ed., 1st ed. 1988).

166. For lesbian feminist writings challenging the idea that gender-role exploration in lesbian sexuality, including such acts as penetration, merely replicate—rather than challenge and subvert—heterosexual norms, see Amber Hollibaugh & Cherrie Moraga, *What We're Rollin Around in Bed With: Sexual Silences in Feminism*, *in* POWERS OF DESIRE, *supra* note 160, at 394-405; Joan Nestle, *The Fem Question*, *in* PLEASURE AND DANGER, *supra* note 160, at 232-41.

167. Bersani, *supra* note 165, at 217-18 (arguing that phallocentrism, with its emphasis upon mastery and penetration, also involves denial of "the perhaps equally strong appeal of powerlessness, of the loss of control," and of disintegration of self associated with "subordinate" role of woman or man in vaginal or anal intercourse); DWORKIN, *supra* note 137, at 148-61 (discussing impact of sodomy laws in constructing "nature"); *see also* Katharine Franke, Cherchez La Femme: Law, Sexual Identity, and Desire (1994) (unpublished manuscript presented at Feminism and Legal Theory Summer Conference held at Columbia University School of Law, June 6-8, 1994, on file with author) (arguing that law constructs female and male, and wife and husband, as opposite sexes with capacity and desire for intercourse with each other). *Cf.* DWORKIN, *supra* note 137, at 122-23 (arguing that although men have bodily openings, unlike women's genitals, they are not synonymous with entry). It is perhaps illuminating to consider the extent to which men's assumptions about inviolability account for homophobia. Bersani, *supra* note 165, at 221 (suggesting that misogynistic and homophobic attitudes disguise "fearful male response to the seductiveness of the image of sexual powerlessness").

168. Consider the deployment of the categories of "man" and "woman" to mark aggressor and victim in the phenomenon of men raping men in prisons. Such rape is a practice documented as widespread and inadequately prevented. *Cf.* Farmer v. Brennan, 114 S. Ct. 1970 (1994) (interpreting "deliberate indifference" standard in context of Eighth Amendment claim by prisoner, a preoperative transsexual who "projects feminine characteristics," based upon

female and male bodies need not lead inevitably to women's vulnerability, but instead to women experiencing a strong sense of privacy and interiority, and men, a sense of exposure and vulnerability. Indeed, it seems that men's greater expectation of inviolability depends significantly upon social practices and reinforcement and that such expectations can be shaken, as the much publicized case of Lorena Bobbitt and John Bobbitt suggests.[169]

3. *Securing the Inviolability of Body and Personality*

In any event, whether or not physiological configurations, as well as power differentials arising in part from gender roles, explain why violation is possible, they need not dictate limits on the cultural or legal recognition and protection of inviolability.[170] If you will, law and culture should protect both the literal frontier, the physical boundaries of a woman's body, and the "inner citadel" of her autonomy concerning the use of her body. For example, in her classic work on rape, Susan Brownmiller hypothesized that "man's structural capacity to rape and woman's corresponding structural vulnerability

---

placement among general prison population followed by rape by other prisoners). Men who are raped by other men suffer "rape trauma" symptoms, arguably heightened because men "are brought up to expect internal inviolability." Motion and Brief of STOP PRISONER RAPE, *Amicus Curiae* in Support of Petitioner, Appendix at i, Farmer v. Brennan, 114 S. Ct. 1970 (1994) (No. 92-7247). Accounts of why such assaults occur often speak of the need to create a substitute for the "normal" world of heterosexuality (in the absence of available females), and the need to express aggression and establish dominance over other men. The gender imagery of such rape, as well as the typical characteristics of those targeted for rape, clearly mark the aggressor as a "man" and the male who is victimized as a "woman," "gal-boy," or some other appellation connoting femininity. *See, e.g., id.* at 1-10; Wilbert Rideau, *The Sexual Jungle, in* WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 73-107 (1992) (recounting personal observations and citing sources). Another example is other forms of violence in predominantly male environments. *See* Susan Faludi, *The Naked Citadel*, NEW YORKER, Sept. 5, 1994, at 62, 70-81 (reporting use of terms "women," "pussy," "fucking little girl" applied to freshmen subjected by upperclassmen to humiliation and physical abuse at The Citadel and noting that construction of masculinity includes fear of homosexual desire and "ruthless intimacy" counterbalancing physical abuse and affection).

169. Lorena Bobbitt was acquitted by reason of temporary insanity of cutting off her husband's penis some time after he allegedly raped her and after a history of violence against her. John Bobbitt was earlier acquitted of a charge of rape. Some women condemned Lorena Bobbitt's action, while others condoned or supported it. *See* Barbara Ehrenreich, *Feminism Confronts Bobbittry*, TIME, Jan. 24, 1994, at 74 (claiming that, in contrast to "feminist intellectualdom," "the woman in the street is making V signs by raising two fingers and bringing them together with a snipping motion" and concluding that "if a fellow insists on using his penis as a weapon . . . one way or another, he ought to be swiftly disarmed"). Perhaps indicating the attention-grabbing effects upon men of the Bobbitt incident, an article in the men's magazine *Esquire* about a supposed trend toward "do me" or sexual-agency feminism opened and concluded with a concern for "sav[ing] the penis from the grassy field of American history." Tad Friend, *Yes*, ESQUIRE, Feb. 1994, at 47, 48, 56.

170. The appeal to "nature" or anatomical differences may offer an explanation for how rape is possible. For that matter, people are "naturally" capable of hitting and severely hurting each other. But even a stance granting the relevance of "biology" or nature need not abandon the attempt to protect, through criminal laws, nonconsensual physical contact. Indeed, it may make such protection all the more important.

are as basic to the physiology of both our sexes as the primal act of sex itself."[171] At the same time, she called for a challenge to the pervasive gender ideology of male dominance and aggression and of a right of access to female bodies contributing to the incidence of rape.[172] Brownmiller also believed that rape was distinguishable from mutual consensual sex. Many contemporary feminists similarly would insist that the law must give women adequate legal protection against sexual assault and assume that one can draw lines between mutual, consensual sex, and rape or sexual assault, and acts which are not equally violative of integrity.[173]

What is perhaps most striking about the imagery that Dworkin and Paglia use to describe the impact of intercourse, whether consensual or not, upon women's sanctity and integrity is its parallel to the imagery used in some rape cases to describe the consequences of rape and sexual assault:

> They [the victims] experience complete loss of control of the body, complete loss of independence, and the removal of something that is part of them. The inner space is intruded upon and the most sacred and the most private repository of the self has been violated. Forceful access has been into the innermost source of the ego. Rape has been said to be the closest one can come to destroying the ego except for murder. . . . The emotional consequences of sexual assault are acutely disabling and chronically debilitating in many if not most victims.[174]

Here, too, the image of the body as sanctuary or sacred space explains the injury of sexual assault. The spatial image of the temple or cloister, sanctuary or citadel, is literal: access is wrongfully gained into a private, sacred "inner space." It is also metaphorical: that "inner space" is identified with the location of personal identity, a "private repository of the self" ("the envelope of the self") that has been "violated." [175] Indeed, one familiar judicial characterization is

---

171. BROWNMILLER, *supra* note 134, at 4.

172. *Id.* at 325-48, 450-51.

173. My inclusion of the term "mutual" is meant to acknowledge that I leave unaddressed considerable debate over what constitutes consent and what role the law should have in certain gray areas. *See* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988).

174. Mindt v. Shavers, 337 N.W.2d 97, 101 (Neb. 1983) (citing Hicks, *Rape: Sexual Assault*, 137(8) AM. J. OF OBSTET. & GYN. 931, 932-33 (1980)).

175. People v. Karsai, 182 Cal. Rptr. 406, 417 (Cal. Ct. App. 1982). In her highly publicized attack upon "rape hype," Katie Roiphe finds it alarming that women use the language of violation and defilement to describe their reactions to date rape. For Roiphe, such imagery is a throwback to ideas of female chastity and of women as vessels. ROIPHE, *supra* note 133, at 70-73.

that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'"[176] On such accounts, the injury to integrity inheres not only in the physical invasion of the body but also in the disregard of the will. While the will appears to make little difference to a woman's violation for Dworkin, Paglia, and, to some extent, MacKinnon, I believe such rape cases suggest, and many feminists argue, that its disregard is a central part of the violation of sexual assault. Thus, Brownmiller defined rape as "[a] sexual invasion of the body by force, an incursion into the private, personal inner space without consent . . . [that] constitutes a deliberate violation of emotional, physical and rational integrity and is a hostile degrading act of violence . . . ."[177]

Judicial as well as feminist discussions of the wrong of sexual assault link the violation of a woman's integrity to her body, as well as her autonomy and privacy, and echo notions of bodily integrity and decisional autonomy familiar from privacy jurisprudence.[178] (As noted in Part II, a central theme in the erosion of the marital rape exemption is the repudiation of the notion of married women's implied consent to sexual intercourse and the affirmation of women's right to control access to their bodies.[179]) For example, in *State ex rel. M.T.S.*,[180] the New Jersey Supreme Court summarizes feminist work on the origin of rape law in the protection of male property interests and on the need to redefine the crime to stress its assaultive character. Rejecting an interpretation of "force" as requiring anything more than what is necessary to complete the unlawful penetration, the court stresses that the legislature had adopted the concept of sexual assault as "a crime against the bodily integrity of the victim."[181] The court refers to control over intimate access in language reminiscent of constitutional privacy cases:

---

176. Coker v. Georgia, 433 U.S. 584, 597 (1977) (citations omitted). Many courts echo *Coker*'s formulation cited in the text as well as its statement that the crime of rape is "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established." *Id.*

177. BROWNMILLER, *supra* note 134, at 422. (By quoting Brownmiller, I do not mean to take a conclusive stand on the rape-as-violence versus rape-as-sex debate.) In contrast to Brownmiller's account of the injury of rape, Richard Posner analogizes rape to a property crime, a theft of a woman's sexuality, motivated not by a man's hostility toward women or a desire for domination but by the desire for sex. RICHARD POSNER, SEX AND REASON 182-83, 384-85 (1992). The strongly negative reaction of many female students in my feminist legal theory class at Hofstra University to this and other commodity theories of rape supports my view that Posner misses the full injury of rape.

178. People v. Lusk, 216 Cal. Rptr. 544, 548 (Cal. Ct. App. 1985) ("The law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent.").

179. *See supra* text accompanying notes 120-28.

180. 609 A.2d 1266 (N.J. 1992).

181. *Id.* at 1277.

> Today the law of sexual assault is indispensable to the system of legal rules that assures each of us the right to decide who may touch our bodies, when, and under what circumstances. The decision to engage in sexual relations with another person is one of the most private and intimate decisions a person can make. Each person has the right not only to decide whether to engage in sexual conduct with another, but also to control the circumstances and character of that contact. No one . . . has the right or the privilege to force sexual contact.[182]

A dual emphasis upon inviolability of body and will, person and personality, is similarly present in a recent scholarly proposal for the legal protection of sexual autonomy that dispenses with the force requirement.[183] Stephen Schulhofer argues that such autonomy encompasses both moral or intellectual autonomy (the capacity to choose), and physical autonomy (stemming from such core values as bodily integrity and the importance of respect for one's physical boundaries).[184] Feminist reform proposals suggest that the question of the precise scope of legal protection of such autonomy is complex, and that for sexual autonomy to be meaningful and possible for women, it is necessary to challenge not only a number of perceived problems with the existing definitions of rape, force, and consent, but also gender ideology about power, control, and responsibility.[185]

B. Envisioning Women's Inviolability: The Body, the Castle, and the Sanctuary

1. The Female Body and the Castle

In privacy jurisprudence, we have seen the strong theme of the home as castle, fortress, enclave, or sheltered place where the dweller is free from invasion by the outside world. Similarly, the image of the inner citadel as applied to persons signals the inviolability of heart, mind, and autonomy. Motifs of a safe refuge and of defense against assault, translated into the context of women's bodies and sexual autonomy, evoke many associations.

---

182. *Id.* at 1278.

183. Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35 (1992).

184. *Id.* at 70-71.

185. *See* Chamallas, *supra* note 173; Henderson, *supra* note 149. For an exchange raising some of these issues, see Donald Dripps, *Beyond Rape*, 92 COLUM. L. REV. 1780 (1992); Robin West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442 (1993); Donald Dripps, *More On Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply To Professor West*, 93 COLUM. L. REV. 1460 (1993).

The image of the castle and its common law roots may suggest a hierarchical, patriarchal society in which women are under the authority and protection of men. The sense of enclosure of a castle, of a small society within, may also bring to mind married women's lack of separate identity and status as well as their vulnerability to sexual and other physical abuse at the hands of their husbands. In Part II, I suggested that the recognition of women's legal rights of privacy and inviolability has entailed a repudiation of notions of spousal immunity and of the home as complete fortress shielded from law. Moreover, there has been an effort to reclaim the image of home as safe haven for women.

The image of the castle highlights certain problematic features of gender ideology concerning sexuality. Linking a woman's body with a castle suggests a stance of rebuffing or defending against intrusion and conquest. As so many feminist and other cultural commentators have noted, an underlying theme of gender ideology in our society is that of male as sexual aggressor and female as naysayer or passive object of male aggression. On the one hand, such an ideology holds women responsible for defending the fort, maintaining barriers, and preventing access. On the other hand, ideas such as "all's fair in love and war" suggest that sexual interaction between women and men is a form of warfare and that seduction and conquest are appropriate male prerogatives.[186] As we have seen, Paglia revels in the dramatic language of assaulting the fortress to characterize the natural dynamics of male and female sexuality. Variants of such ideas are a staple of artistic and cultural representation, whether their use is ironic, playful, or sincere.[187]

It may be useful to characterize a woman's body as a castle to suggest a woman's entitlement to keep out unwanted outsiders (be they strangers or "intimate" associates). I have suggested that the law should protect, and culture should respect, women's physical and moral boundaries. A central theme in the feminist accounts of sexuality discussed above is that current social arrangements assume male entitlement to sexual access to women. Thus, a critical feminist goal is to end that system of entitlement and to protect women against sexual intrusion (hence such phrases as "no more" and "out

186. *But see* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 379 (1993) (seeking to "redefine the boundaries of sexual coercion by reconceiving seduction as a viable tort").

187. Best-selling romance novels, particularly historical romance, play with such themes, including the idea of the mutinous heart that betrays the fort from within. For a classic analysis of such themes of sex as conquest or war in the work of famous male authors, see KATE MILLETT, SEXUAL POLITICS (1970).

now").[188] Undeniably, this type of feminist analysis makes the valuable point that such protection must be one key element in constructing female sexual autonomy and securing inviolability. Moreover, in linking women's lack of control or meaningful autonomy with respect to the sexual use of their bodies to such problems as unprotected intercourse, unwanted pregnancy, unplanned motherhood, and the incidence of abortion,[189] such an analysis highlights sexual violation as a gateway to other risks to bodily and psychic integrity and suggests the high stakes involved in changing assumptions of male entitlement while strengthening female agency and responsibility.[190]

Nonetheless, the image of the castle may also highlight one problematic implication of feminist accounts stressing the violative nature of sexuality for women: that any act of intercourse is tantamount to a violation of bodily integrity. A recurring feminist concern about MacKinnon's work is its apparent lack of a constructive account of female sexuality.[191] For instance, Drucilla Cornell finds inadequate the image of the fortress in MacKinnon's analysis of female sexuality:

> Under [MacKinnon's] view of the individual or the subject, the body becomes the barrier in which the self hides, and the weapon—the phallus—asserts itself against others. The feminine self, as it is celebrated in myth and allegory, lives the body differently. The body is not an erected barrier, but a position of receptivity. To *be* accessible is to *be open* to the other. To shut oneself off is *loss* of sexual pleasure. . . . If one views the body in this way, then "to be fucked" is not the end of the world. The endless erection of a barrier against "being fucked" is seen for what it "is"—a defense mechanism that creates a fort for the self at the expense of *jouissance*.[192]

Cornell's advocacy of a position of openness is not inattentive to the problems of sexual coercion and sexual assault;[193] rather, she suggests that the defensive posture of the fort is not adequate as a model of sexuality. Her model of the feminine may not speak to all

---

188. MACKINNON, *supra* note 114, at 219.

189. *See, e.g.*, MacKinnon, *Reflections*, *supra* note 2, at 1308-21.

190. I have begun to explore this issue in greater depth elsewhere, focusing on assumptions about agency and responsibility. *See* McClain, *supra* note 152.

191. For a sympathetic critique along these lines, see Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 YALE L.J. 1533 (1994).

192. Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 691 (1990). *Cf.* Bersani, *supra* note 165, at 222 ("Male homosexuality advertises the risk of the sexual itself as the risk of self-dismissal, of *losing sight* of the self, and in so doing it proposes and dangerously represents *jouissance* as a mode of ascesis.").

193. Cornell, *supra* note 192, at 692-94.

women's experiences or ideals, but the openness she describes need not be read as only physical or heterosexual—it suggests a receptivity to connection with other persons and their bodies.[194] One reading of the image of body as castle is that viewing oneself as a castle or fortress and being vigilant about barriers serves defensive purposes and fosters solitude, self-sufficiency, independence, and distance from others.[195] Such a stance has its merits as well as its limits and costs (as Cornell suggests). The image of the temple or sanctuary may add another important dimension to the account.

2. The Female Body and the Sanctuary

In attempting to envision women's inviolability, the image of the body as sanctuary, or even temple, may be useful. In privacy jurisprudence, the sanctuary, like the castle, simultaneously connotes restricted access, sacredness, and sanctity. What takes place within a temple may be sacred, something set apart. The image of a temple may suggest a linking of secrecy, seclusion, and solitude with sacredness—an inner sanctum or space for one's life, whether alone or in relations with others. It may also connote the inner sanctum or sanctuary within a person and suggest intimacy as a significant part of human experience and embodiment. *Griswold*'s characterization of marital privacy stressed the "sacred precincts" of the bedroom along with the "intimate" and "sacred" character of marriage.[196] Here, there is a temple-like quality to the body and to the interactions of bodies, as well as to the space in which sexual intimacy occurs. The very association of temple or sanctuary with sanctity and privacy illuminates the injury of "forced" intimacy as a violation of self. The descriptions above of the injury done to the body by sexual assault referred to wrongful access to a private, sacred, inner space, both a literal inner space and a metaphorical one as the repository of the self.

While Dworkin and Paglia suggest that intercourse impairs integrity, a feminist ideal of inviolability should embrace a broader idea of integrity stressing choice about the use of one's body. Such an ideal should suggest that the sanctity of the body does not require complete rejection of any intimate connection, but insist upon the

194. Thus, one example Cornell offers of a metaphor of such openness is Luce Irigaray's vision of a sexual encounter between two women, painting a picture of intermingling of bodies and a lack of boundaries. *Id.* at 694 (quoting LUCE IRIGIRAY, *When Our Lips Speak Together*, *in* THIS SEX WHICH IS NOT ONE 205 (Catharine Porter trans., 1985)).

195. For a literary expression of this self-conception, where the writer/heroine links her concern with self-possession and autonomy to the themes of "Thresholds. Bastions. Fortresses.," see A.S. BYATT, POSSESSION 549-50 (1990).

196. *See supra* text accompanying notes 42-43.

significance of choice. In doing so, it would reject an equation of abuse of a woman's body with intimacy and privacy.[197]

As with the castle, one possible interpretation of the image of the sanctuary is that inviolability requires complete inaccessibility. Such an image has many associations, some constraining, some empowering, and some evocative of the accounts of Dworkin and Paglia. Consider the symbolism of the virgin body as a temple. In the early Christian tradition, women who embraced virginity and celibacy for religious purposes served as symbols of integrity, intactness, and inviolability.[198] Treatises on virginity contrasted such bodily integrity with the dangers and pains placed upon the bodies of fertile married women.[199] Moreover, in an age of religious persecution, the integrity of the virgin body served as a symbol of triumph over the violation and invasion of the flesh imposed by torture and death. The untouched virgin body also signified the perfect original state of the body in the Garden of Eden prior to the expulsion: virginal, not sexual.[200] Such a repudiation of what appeared to be "natural"—sexual intercourse and procreation—evokes the utopian themes of Dworkin's critique of intercourse as neither necessary nor compatible with freedom.[201] Finally, the virgin body was a temple, a symbol of the Church and of the Christian city,[202] as well as an unbreakable "invisible frontier";[203] it was an enclosed, royal palace hall in which the emperor (God) dwelled.[204] Indeed, as a locus for the divine, both female and male celibate bodies were permeable to, and vehicles for, divine indwelling and possession, expressed in marital images of bonding and maternal images of nurture.[205]

Virginity and celibacy may also symbolize agency, self-sufficiency, and a conscious choice of an identity not dependent upon sexual affiliation.[206] As historians of women's spirituality point out,

---

197. INNESS, *supra* note 19, at 88-90, 108-11.

198. PETER BROWN, THE BODY AND SOCIETY: MEN, WOMEN, AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY 158-59, 186-87, 258-71, 383 (1988).

199. *Id.* at 25.

200. *Id.* at 186-87, 194, 351.

201. DWORKIN, *supra* note 137, at 138-39.

202. BROWN, *supra* note 198, at 271, 355-56, 362-63.

203. *Id.* at 354-56.

204. *Id.* Espousal to Jesus rendered virgin women sacred and unavailable to any other marriage partner. *Id.* at 274.

205. *Id.* at 67-77, 91-92. In a striking appropriation of female fertility, celebrations of the female virgin body spoke of the fertile, creative powers of the virgin. *Id.* at 363, 437.

206. *Cf.* MARILYN FRYE, *Willful Virgin or Do You Have to be a Lesbian to be a Feminist?*, *in* WILLFUL VIRGIN 133 (1992) ("The word 'virgin' did not originally mean a woman whose vagina was untouched by any penis, but a free woman, one not betrothed, not married, not bound to, not possessed by any man. It meant a female who is sexually and hence socially her own person."). In her critique of Radin, Schroeder associates the virgin female body with being self-contained, complete, and untouched (or undefiled by the market). *See generally* Schroeder, *supra* note 27.

choosing religious celibacy afforded women independence, power, and status in a male-dominated religious order, and freedom from marriage and the potentially life-threatening dangers and pains of motherhood.[207] Similarly, one feminist interpretation of the archetype of the virgin goddess is of intactness, independence, and inaccessibility, an archetype that "enables a woman to feel whole without a man."[208] Some contemporary feminists who call for the recognition of celibacy as a legitimate life choice, not a lack of sexuality, also stress themes of autonomy, personal independence, and political empowerment.[209] Martha Fineman challenges the central role of sexuality in personal identity, in definitions of family and privacy, as well as in feminist legal theory.[210] The sanctuary or temple, thus, may support a range of associations including celibacy, solitude, self-sufficiency, and power.[211]

I would also like to use the images of sanctuary and temple to speak about sexuality because of the temple's religious connotations of sacredness and sanctity, human ambivalence about approaching the sacred, and the temple's mediating role as a threshold between realms.[212] What is the connection between "man's spiritual nature"[213] and women's sexuality? As *Griswold* suggests, cultural notions of intimacy suggest recognition of a sacred dimension to sexuality, at least within marriage. There is certainly a rich history of associations between human sexuality and the sacred, including the metaphorical use of sexual imagery to describe spiritual experiences and to envision the divine-human relationship. Such associations may be found within the mystical traditions of Judaism and Chris-

---

207. *See* BROWN, *supra* note 198, at 259-83; CAROLINE WALKER BYNUM, HOLY FEAST AND HOLY FAST 226 (1988); MEDIEVAL WOMEN'S VISIONARY LITERATURE (Elizabeth Elvilda Petroff ed., 1986). *But see* BROWN, *supra* note 198, at 260 (noting that female children given over by parents to be sacred vessels were seldom free agents).

208. JEAN SHINODA BOLEN, GODDESSES IN EVERYWOMAN 49, 69 (1985) (discussing goddess Artemis); *see also* Christine Downing, *Artemis*, *in* WEAVING THE VISIONS: NEW PATTERNS IN FEMINIST SPIRITUALITY (Judith Plaskow & Carol P. Christ eds., 1989) [hereinafter WEAVING].

209. Wendy Kaminer, *No Sex Is Good Sex*, N.Y. TIMES, Apr. 10, 1994, § 7 (Book Review), at 18 (reviewing SALLY CLINE, WOMEN, PASSION & CELIBACY (1994)). For an argument that the law and cultural norms should leave room for celibacy as a positive preference, not simply as failed heterosexuality or repressed homosexuality, see Mary Anne Case, Is "None of the Above" a Deviant Sexual Preference? (unpublished manuscript, on file with author).

210. *See also* FINEMAN, *supra* note 81.

211. Consider the reported trend of virginity as a defiant "counterculture" among teenagers. DeNeen L. Brown, *Virginity Is New Counterculture Among Some Teens*, WASH. POST., Nov. 21, 1993, at A1.

212. *See generally* MIRCEA ELIADE, PATTERNS IN COMPARATIVE RELIGION (Rosemary Sheed trans., 1974) [hereinafter ELIADE, PATTERNS]; MIRCEA ELIADE, THE SACRED AND THE PROFANE (Willard R. Trask trans., 1959).

213. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

tianity,[214] as well as in many other ancient and contemporary religious traditions.[215] At the same time, one can also identify cultural notions of the sexual as carnal, base, and degrading and as the antithesis of the spiritual.

Much feminist work, particularly in the area of religion and spirituality, charges that Western tradition includes a mind-body dualism identifying men with and privileging spirit, mind, and reason, and identifying women with, and thus devaluing, flesh, body, and passion.[216] Such work calls for a view of embodiment that values the body as more than merely a vessel in which the exalted mind dwells and that views sexuality as having a spiritual component or sacred dimension. Audre Lorde called for a bridge between the spiritual and the erotic, describing "the erotic" as a source of power, lying on a "deeply female and spiritual plane," and decrying the denigration of the erotic.[217]

Contemporary exploration by women of goddess (or Goddess) imagery and worship, within and outside of Western traditions, also involves legitimizing female power and the sacredness of the female body.[218] It is striking to note the vigorous controversy and charges

---

214. In the Christian tradition, one finds both female and male religious figures using sexual imagery to characterize mystical union with "the Beloved." *See, e.g.*, BROWN, *supra* note 198, at 66-77, 91-92; MEDIEVAL WOMEN'S VISONARY LITERATURE, *supra* note 207. Within the branch of Jewish mysticism known as Kabbalah, there is a notion of various aspects ("sefirot") of G-d emanating from G-d, which are characterized as male or female, and of a sacred sexual union between certain of those aspects. *See* GERSHOM SCHOLEM, ON THE KABBALAH AND ITS SYMBOLISM (Ralph Manheim trans., 1969); SAFED SPIRITUALITY (Lawrence Fine trans. and intro., 1984). One particular branch of such mysticism stresses the redemptive significance of the traditional emphasis of having marital intercourse on the Sabbath, for such a union is thought to represent and facilitate the union between the aspects of G-d known as the King and the Shekhinah. *Id.* at 33-34.

215. *See, e.g.*, MIRANDA SHAW, PASSIONATE ENLIGHTENMENT: WOMEN IN TANTRIC BUDDHISM (1994). For a nonacademic anthology of erotic spiritual writings from many religious traditions, see ROBERT BATES, SACRED SEX (1993) (book cover states that "[a]ll the writings celebrate the human body as a temple of the divine"). In ancient Near Eastern religious traditions, there was the institution of the "sacred marriage" between a deity (particularly, Innana or Ishtar) and a ruler (some scholars see the biblical *Song of Songs* as a reflection of that tradition). Also, temples were regarded as the homes of particular deities and in the temples resided the "spouse" of the deity, humanly represented by a priest or priestess. Writing of a later period, Herodotus describes the temple of Zeus Belus, at the top of which there was a great bed, and in which no human save for one woman "whom the god has chosen out of all" spent the night. HERODOTUS, THE HISTORY 1.181 at 115 (David Grene trans., 1987). The misnomer "sacred prostitute" or "temple prostitute" also relates to the ritual significance of certain sexual activity associated with temples.

216. WEAVING, *supra* note 208; WOMANSPIRIT RISING (Carol P. Christ & Judith Plaskow eds., 1979) [hereinafter WOMANSPIRIT].

217. Lorde, *The Uses of the Erotic*, *in* LORDE, *supra* note 4, at 53.

218. *See, e.g.*, Carol Christ, *Why Women Need the Goddess*, *in* WOMANSPIRIT, *supra* note 216, at 273, 277 (suggesting that "simplest and most basic meaning of the symbol of Goddess is the acknowledgement of the legitimacy of female power as a beneficent and independent power"); Don Lattin, *Christian Doubters Call Sophia a Pagan Goddess*, SAN. FRAN. CHRON., Mar. 5, 1994, at A1, A8 (describing interest by Christian feminists in Sophia, spirit of wisdom, as "primordial source of female power").

of paganism and heresy surrounding the recent efforts of a group of Protestant women to re-imagine spirituality.[219] One reported chant to Sophia, embodiment of divine wisdom, offers a vivid image of embodiment and of openness and agency: "'Our maker Sophia, we are women in your image. . . . With the hot blood of our wombs we give form to new life. . . . With nectar between our thighs we invite a lover. . . . [W]ith our warm body fluids we remind the world of its pleasures and sensations.'"[220] Here, the physical processes of the female body actively create, invite, remind. Other feminist efforts to envision embodiment and the sexual, including motherhood and generativity, as sacred similarly speak of a woman's "willingness to surrender and to be opened by rhythms of nature flowing through her" and of her body as a gate or an opening to the sacred.[221] These attempts to find positive ways to envision sacredness, openness, and choice in the areas of sexuality and motherhood touch upon aspects of women's lives in which, even in the best of circumstances, they may not be in full control, and may in other circumstances face frightening vulnerability.[222] Similar to Cornell's idea of the feminine, these are attempts to conceive of the self as not completely threatened by the crossing of boundaries.

At the same time, the image of the temple or sanctuary may also suggest an enclosed and safe space within which to experience and explore one's sexuality, a sexuality that may or may not involve other persons. Instead of inviting defilement, as Paglia suggests, such an image may elicit reverence or respect, even an attitude that unauthorized entry is taboo and dangerous.[223] The imagery of sacred space may reflect a conscious religious invocation or it may simply signal importance or value. For example, in her book *Sex*,

---

219. *See* Bill Broadway, *"Re-Imagining" Foments Uproar Among Presbyterians*, WASH. POST, June 4, 1994, at C7; Peter Steinfels, *Presbyterians Try to Resolve Long Dispute*, N.Y. TIMES, June 17, 1994, at A24.

220. Lattin, *supra* note 218, at A8.

221. SHERRY RUTH ANDERSON & PATRICIA HOPKINS, THE FEMININE FACE OF GOD: THE UNFOLDING OF THE SACRED IN WOMEN 73 (1992). *Cf.* BROWN, *supra* note 198, at 153, 154 (discussing Tertullian's description of Eve (and woman) as "the Devil's gateway").

222. *See* BYNUM, *supra* note 207, at 301 (arguing that we need new positive symbols for generativity and suffering and that the female body offers positive, complex, resonant symbols of love and generosity). On women's experiences of pregnancy, particularly unwanted pregnancy, and motherhood, as invasive and threatening, see Twiss Butler, *Abortion Law: "Unique Problem for Women" or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133, 139 (1991); West, *supra* note 60, at 29-32 (giving examples); *see also* Cornell, *supra* note 192 (characterizing risks of pregnancy to individuation and bodily integrity and describing physical and psychic pain of self-abortion); Linda C. McClain, *Equality, Oppression, and Abortion: Women Who Oppose Abortion Rights in the Name of Feminism*, *in* FEMINIST NIGHTMARES: WOMEN AT ODDS 159 (Susan Ostrov Weisser & Jennifer Fleischner eds., 1994) (analyzing treatment of women's experiences of sex, pregnancy, and abortion by Feminists for Life of America).

223. *See* ELIADE, PATTERNS, *supra* note 212, at 15, 371, 384.

Madonna invokes the image of a temple to describe her own genitals.[224] Another pervasive image (also used to characterize the virgin female body) is of a sacred or secret garden.[225] Such images may touch upon feelings of interiority and the desire for solitude, secrecy, inaccessibility, safety, and privacy.[226]

Some skeptics may voice concern that the image of a sanctuary or temple is too inert, since a temple does not move or act and that to compare women with an enclosed building does not sound themes of agency and autonomy. The temple may be physically inert, but it is internally dynamic or full of activity.[227] Another problem with the metaphor of body as temple is that it may echo too closely notions that the female body is a place of sanctuary or refuge for others (noting the common theme of men seeking to return to the womb through intercourse). Like Katie Roiphe, some may fear the gender ideology seemingly underlying the language of purity and defilement, of sanctity and violation, although my own view is that those terms could be deployed without regressive meanings in order to encourage strong taboos against inappropriate access.

Obviously, both castle and sanctuary have their limits as images. I have not attempted to offer a complete account of inviolability or to prescribe new models for bodily integrity and sexual autonomy. Nonetheless, it may be helpful to think about the possible meanings of such images. To be sure, feminist models of sexuality require more than a conception of inviolability, but inviolability is a necessary component, and the language of protection, integrity, and boundaries is crucial. The language of inviolability and inaccessibility may not say enough about agency, desiring, acting as subject, and seeking out other bodies. As with the language of privacy, the vocabulary of the inward-looking dimension of personhood may exceed the outward-looking or social dimension.[228]

---

224. MADONNA, SEX (1992) ("My pussy is the temple of learning."). Madonna's explanation of the image of temple suggests that, for her, it is multivalent, reflecting the risks and rewards of a female body: "I love my pussy, it is the complete summation of my life. It's the place where all the most painful things have happened. But it has given me indescribable pleasure." *Id.*

225. *See, e.g.*, ANDERSON & HOPKINS, *supra* note 221 (using imagery of sacred garden as metaphor for woman's spirituality and embodiment of sacred); FRIDAY, GARDEN, *supra* note 159; LUCE IRIGIRAY, AN ETHICS OF SEXUAL DIFFERENCE 185-217 (Carolyn Burke & Gillian C. Gill trans., 1993) (using imagery of threshold and garden); *Song of Songs* 4:16 ("Let my beloved come to his garden, and eat its choicest fruits."). The reference in the Song of Songs to the female lover's sister as a "garden enclosed" (4:12) came to symbolize especially the Virgin Mary but more broadly female virginity. BROWN, *supra* note 198, at 343.

226. *See* Tisdale, *supra* note 157, at 7 (suggesting that women have strongly developed sense of territory and associate privacy with safety).

227. I thank Mary Anne Case for this formulation.

228. *Cf.* GLENDON, *supra* note 126, at 47-75; TRIBE, *supra* note 18, §§ 15-1, 15-21.

CONCLUSION

I have argued that inviolability is a core, even sacred, value in law and jurisprudence. I have focused upon privacy jurisprudence and used the trilogy of castle, sanctuary, and body to illustrate the idea and imagery of inviolability. I have used these images to suggest that protecting one location of inviolability, for example, the home as castle, may have to yield to protecting another, a woman's body. The themes of bodily integrity and decisional autonomy, or the integrity of a woman's body and will, resonate in the repudiation of notions of privacy threatening to women's inviolability.

I have also drawn upon the trilogy of castle, sanctuary, and body for the purpose of envisioning a feminist account of inviolability. In contrast to some feminist accounts of sexuality questioning the coexistence of inviolability and sexuality, I have attempted to elaborate the images of body as castle and as temple to suggest ways to talk about inviolability, inaccessibility, and intimacy. The goal of restricting access is also about power, the power to control one's body—not only a core premise of the legal notion of inviolability, but also a core feminist goal.[229] Feminist charges that inviolability is illusory for women and that privacy sanctions the violation of women by men offer reasons to look closely at the history and rhetoric of privacy, but such charges do not persuasively argue for abandoning either inviolability or privacy as a goal for women. To the contrary, rights of bodily integrity and decisional autonomy linked to inviolability are critical for women as well as men. Inviolability and privacy are not the only important values or even sufficient for a good life. Yet the supposed debate between "power feminism" and (so-called) "victim feminism" involves finding ways to envision and achieve female agency and power.[230] Like feminist critiques of privacy, such debates illuminate the importance of autonomy for women and the critical significance of women's control both of access to their bodies and of decisions concerning their intimacy.

---

229. *Cf.* ALLEN, *supra* note 4 (advancing restricted access model of privacy for women).

230. *See* WOLF, *supra* note 153; McClain, *supra* note 152. For an insightful critique of Wolf and of internal feminist debates, see BELL HOOKS, OUTLAW CULTURE (1994).