

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

3-1999

Reconstructive Tasks for a Liberal Feminist Conception of Privacy

Linda C. McClain

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Civil Rights and Discrimination Commons](#)

Recommended Citation

Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, in 40 *William & Mary Law Review* 759 (1999).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/2887

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



RESPONSES

RECONSTRUCTIVE TASKS FOR A LIBERAL FEMINIST CONCEPTION OF PRIVACY

LINDA C. McCLAIN*

INTRODUCTION

If liberal conceptions of privacy survive appropriately vigorous feminist critique and re-emerge in beneficially reconstructed forms, then why haven't more feminists gotten the message and embraced, rather than spurned, such privacy? If liberal privacy survives feminist critique, does it face an even more serious threat if contemporary society has both diminishing expectations of and taste for privacy? Does the transformation of the very notion of "private life," due in part to the rise of such new technologies as the Internet and its seemingly endless possibilities for making oneself accessible to others and gaining access to others, suggest the need for liberal and feminist defenders of privacy to rethink the value of privacy and whether it is, indeed, indispensable for citizenship and a good life? Finally, if privacy is indispensable, is it consistent with liberal principles to force people not to surrender their privacy, even if they wish to, just as liberal governments force people not to surrender their freedom?

* Professor of Law, Hofstra University School of Law. This Essay is a revised version of a paper presented at the conference "Reconstructing Liberalism," sponsored by The Institute of Bill of Rights Law and the William and Mary Department of Philosophy, held at The College of William & Mary School of Law, April 3-4, 1998. I am indebted to conference participants for helpful comments, and especially to Cynthia Ward, Kathryn Abrams, Katherine Franke, and my co-panelists Anita Allen and Neal Devins. Jim Fleming gave valuable comments on several drafts. I also benefited from helpful discussion with my colleagues Eric Freedman and Norm Silber. Thanks to Suzanne Mikos, Bram Weber, and law librarian Connie Lenz for valuable research assistance, and to Hofstra University School of Law for generous research support.

These are important and intriguing questions raised by Professor Anita Allen's elegant essay, *Coercing Privacy*,¹ to which it is a pleasure to respond. In this Essay, I state my substantial agreement with Allen's proposition that "[f]eminist critiques of privacy leave the liberal conceptions of privacy" (or the idea that government should respect and protect a degree of inaccessibility to persons and personal information) and "private choice" (or the idea that government ought to promote decisional privacy concerning important decisions with regard to friendship, sex, marriage, reproduction, religion, and political association) "very much alive," and that various forms of privacy and private choice, appropriately reconstructed, are beneficial to women and are helping women gain greater control over their lives.² Elsewhere, I have defended privacy against feminist and civic republican attacks, as an important principle and value, and I have maintained that liberal feminism is a tenable and attractive position.³

In Section One, I ponder why the critique of privacy continues to be a staple of feminist legal scholarship, notwithstanding the valuable work done by Allen and other liberal feminists to engage constructively with such feminist critiques and point to the possibility of an egalitarian, liberal feminist conception of privacy. I conclude that, to strengthen the case for such a conception of privacy, liberalism and liberal feminism should carry forward three reconstructive projects, each of which follows from Allen's defense of privacy. These three reconstructive tasks are enriching liberalism's normative account of the value of privacy, defending some form of a public/private distinction, and arguing

1. Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999).

2. *Id.* at 750.

3. For arguments supporting the viability of a liberal feminist jurisprudential approach, see Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992); Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19 (1998) [hereinafter McClain, *Toleration*]. For defenses of privacy against civic republican and feminist critiques, see James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic*, 76 TEX. L. REV. 509 (1997); Linda C. McClain, *Inviolability and Privacy: The Castle, The Sanctuary, and The Body*, 7 YALE J.L. & HUMAN. 195 (1995) [hereinafter McClain, *Inviolability*]; Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119 (1992) [hereinafter McClain, *Privacy*].

for governmental responsibility to engage in a formative project to secure the preconditions for enjoying privacy and exercising "private choice" (or what I will also call autonomy or decisional privacy). I sketch the contours of these three projects, considering the resources available for their realization (including the legacy of the Reconstruction Amendments⁴).

I agree with Allen that reconstructed liberal privacy survives feminist critique.⁵ I am less persuaded, however, by her suggestion that it may not survive society's reduced "expectations" of and "tastes" for privacy⁶ and that, accordingly, government may need to shore up this erosion and "impos[e] privacy norms to undergird the liberal vision of moral freedom and independence."⁷ She defends such regulation as "consistent both with liberalism and with the egalitarian aspirations of feminism,"⁸ and suggests that all of us—liberals, feminists, and nonfeminists—should be worried "by the optional and challenged character taken on by personal privacy."⁹ Of particular interest to Allen, as a feminist, is that some women have little taste for privacy and engage in self-exposure or objectification, offering up their privacy for consumption by others.¹⁰

By raising these concerns, Allen, a scholar thoroughly steeped in the intricate moral and legal debates over privacy, signals her eagerness to move on to a new set of issues about privacy. Her exploration of these new questions is valuable, potentially ground-breaking, and convincing to a point. At the conclusion of Section One, I raise some questions about Allen's claims that privacy, like freedom, is indispensable and a precondition for participation in liberal democratic society, and I suggest the need for some further thinking about what role privacy plays in a liberal or liberal feminist formative project.¹¹

4. The inspiration for invoking Reconstruction comes from Peggy Davis's argument that a focus on Reconstruction and the principle of autonomy, rather than penumbral privacy, would better justify the Supreme Court's due process liberty jurisprudence. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 214-49 (1997).

5. See Allen, *supra* note 1, at 743.

6. See *id.* at 728, 732, 751.

7. *Id.* at 729.

8. *Id.*

9. *Id.* at 752.

10. See *id.* at 730-32, 737, 751.

11. See *id.* at 754-55; see also MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT:*

In Section Two, I offer some further responses to Allen's call to shore up privacy. First, I concur somewhat with her diagnosis of an erosion of tastes for and expectations of privacy. I read the ongoing debates over the proper social and legal regulation of information technologies, however, as evincing not the demise of privacy, but the desire to retain such core values of privacy as restricted access and anonymity while taking advantage of the unprecedented possibilities for forms of community, education, exploration, and, yes, self-exposure. In that context, I offer some preliminary thoughts about cyberspace and gender; for example, the potential of cyberspace to foster women's sexual agency, or what one feminist legal theorist calls "Cybersexual Possibilities."¹² Second, I suggest that, to the extent that Allen is correct regarding a diminished taste for privacy, this may not be entirely a bad thing, much less grounds for forcing people to be private. Sometimes, the repudiation of privacy may foster equal citizenship and facilitate social and legal change.¹³ I interpret this development as a necessary step in solving what Allen elsewhere describes as women's "privacy problem"—"the problem of getting rid of unwanted forms of privacy" and "acquiring the privacy and decisional privacy they do not have."¹⁴

I. THREE RECONSTRUCTIVE TASKS FOR A LIBERAL FEMINIST CONCEPTION OF PRIVACY

Allen economically sets out the main features of common feminist critiques of privacy: privacy connotes female seclusion and subordination, leading to women's underparticipation in society and vulnerability to violence in the home, and privacy emphasizes negative liberty, precluding any robust conception of affirmative governmental obligations.¹⁵ I believe, as Allen's present essay and her other writings addressing feminist criticisms illus-

AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 6 (1996) (referring to civic republicanism's "formative project" of inculcating in citizens the qualities of character and civic virtues necessary for self-government).

12. See Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1974-77 (1995).

13. See *infra* notes 90-112, 151-88, and accompanying text.

14. ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 180-81 (1988).

15. See Allen, *supra* note 1, at 741-49.

trate, that liberal privacy, properly clarified, can meet these charges.¹⁶ Why, then, does privacy continue to draw such feminist criticisms? Further, why have more feminist theorists not concurred with Allen that privacy can play an important part in helping women gain more control over their lives? To be sure, some feminist theorists (and here I include myself) do share Allen's assessment of the potential of privacy, if properly reconstructed.¹⁷ Feminist work, however, often expresses an acute suspiciousness about and uneasiness over privacy and links it directly to the failure of law and society to afford women equal protection of the law and to promote their well-being.¹⁸ Indeed, privacy continues to feature prominently in feminist work as a barrier to these ends.¹⁹

16. In addition to her book, *Uneasy Access*, *supra* note 14, see Anita Allen, *Privacy*, in A COMPANION TO FEMINIST PHILOSOPHY 465 (Alison M. Jaggar & Iris Marion Young eds., 1998) [hereinafter Allen, *Privacy*] (acknowledging that feminist skepticism about applications of privacy is justified, but arguing that "appropriate forms of physical, informational, and decisional privacy" are allowing women to have greater control over their lives); Anita L. Allen, *The Jurispolitics of Privacy*, in RECONSTRUCTING POLITICAL THEORY: FEMINIST PERSPECTIVES 68, 73-75, 79 (Mary Lyndon Shanley & Uma Narayan eds., 1997) [hereinafter Allen, *The Jurispolitics of Privacy*] (arguing that privacy-based reproductive rights benefit many poor women and that a progressive interpretation of privacy may support an affirmative governmental obligation to subsidize women's reproductive rights; also discussing how privacy "[t]ort law has helped to vindicate some of women's many interests in informational privacy and confidentiality").

17. See McClain, *Inviolability*, *supra* note 3, at 207-20; McClain, *Privacy*, *supra* note 3, at 150-72; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1462-81 (1991); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 996-99 (1991).

18. See, e.g., ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 58-65, 118-21 (1994) (discussing the marital rape exemption and arguing that the modern liberal conception of "ordered liberty" under the Constitution protects the sphere of liberty and privacy in which violence against women takes place); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311-24 (1991) (critiquing the realm of constitutionally-protected privacy as often a "hellhole" for women instead of a refuge); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2154-74 (linking rhetoric of marital privacy to lack of protection of women against spousal assault). For an important early feminist critique of privacy along these lines, see Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 328, 331-35 (David Kairys ed., 3d ed. 1998) (discussing how the state's failure to regulate the "private," domestic sphere contributes to male dominance).

19. See generally Siegel, *supra* note 18 (providing a historical examination of the use of the rhetoric of "affective" (or marital) privacy to immunize violence against

Feminist resistance to privacy likely has several sources. First, as Allen suggests, liberal privacy survives "appropriately" strenuous critique: feminists correctly attack deployments of notions of privacy that have created and perpetuated women's unequal citizenship.²⁰ Where liberal feminists such as Allen and myself may differ with privacy's feminist critics is not over the need to reject those harmful and unjust deployments of privacy and their legacy, but over the possibility of holding on to some core of privacy that is worthy of reconstruction or clarification. Second, the origins and imagery of the right of privacy may fail to capture feminists' imaginations and may instead alienate or offend them. At best, there is the image conjured up by Warren and Brandeis's famous article—a propertied, privileged white male in need of shelter from the prying eyes of the press²¹—or the equally gendered image of the modest, secluded female, conjured up by such early privacy precedents as *De May v. Roberts*²² and *Union Pacific Railway Co. v. Botsford*.²³ At worst, there is the legacy of judicial refusal to "rais[e] the curtain" around the home and the marital bedchamber to "expos[e] [them] to public curiosity and criticism,"²⁴ leaving women injured within such private places largely without remedy.²⁵ Third, feminists associate liberal privacy with negative liberty (and the "negative constitution"), and too readily conclude that such privacy cannot sustain a conception of affirmative governmental responsibilities.²⁶

women from legal redress and suggesting parallels with the contemporary challenges to the Violence Against Women Act).

20. See Allen, *supra* note 1, at 741-42.

21. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-97, 204-06 (1890).

22. 9 N.W. 146 (Mich. 1881) (upholding action for invasion of privacy by presence of stranger in plaintiff's home during "sacred" time of childbirth).

23. 141 U.S. 250 (1891) (referring to the "sacred" common law right to control one's person and refusing to order a female litigant to submit to a medical examination). For a discussion of these and other gendered images of privacy, see Anita Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441 (1990).

24. *State v. Rhodes*, 61 N.C. (Phil. Law) 349, 352 (1868).

25. See *id.* at 353 ("We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."); Siegel, *supra* note 18, at 2151-70 (offering an extensive discussion and critique of the role of marital privacy in the case law).

26. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON*

To strengthen the case for privacy, liberalism and liberal feminism should carry forward three reconstructive projects that relate to these reasons for feminist resistance to privacy: (1) bolster liberalism's normative account of the value of privacy and the human goods that it helps to secure; (2) offer a persuasive argument for the continuing importance of some form of the public/private distinction; and (3) explore how best to conceive of privacy not merely as a negative liberty, but as requiring a conception of governmental responsibility to secure the preconditions for enjoying privacy and exercising autonomy (or "private choice"). Allen's essay helpfully suggests these three projects; moreover, her normative theorizing about privacy makes a substantial contribution to them.²⁷ I also draw on some of my own recent work on liberal justifications for toleration to suggest ways to fortify the case for privacy. Finally, taking the project to be reconstruction, I suggest valuable lessons from the Reconstruction era for contemporary imagery and understandings of privacy.

A. Articulating the "Goods" of Privacy and Private Choice

Allen usefully distinguishes "[t]he liberal conception of privacy," or governmental respect for and protection of interests in physical, informational, and proprietary privacy, from "[t]he liberal conception of private choice,"²⁸ or governmental protection of decisional privacy—what I will at times call decisional privacy or autonomy. At the outset, I would caution against her term "private choice," because it unwittingly may trigger feminist criticisms of an atomistic model of the self, which assumes an unrealistic degree of isolation and independence in the decisionmak-

LIFE AND LAW 93, 96-97 (1987) (arguing that the logic of the constitutional right of privacy leads to the conclusion that because government has no duty to intervene to remove nongovernmental obstacles to a woman's exercise of reproductive choice, "government has a duty *not* to intervene" in the private sphere, in which women suffer harm because of sex inequality); WEST, *supra* note 18, at 120-21 (characterizing modern liberal understanding of "ordered liberty" as that of "negative liberty" and noninterference with privacy).

27. See Allen, *supra* note 1, at 739-40, 749, 753-54. For examples of Allen's normative work on privacy, see ALLEN, *supra* note 14; Allen, *Privacy*, *supra* note 16; Allen, *The Jurispolitics of Privacy*, *supra* note 16.

28. Allen, *supra* note 1, at 723-24.

ing process. Allen, however, embraces a version of liberalism that sensibly “understands persons as shaped partly and substantially by social forces not of their own choosing, but also and importantly by their own choices—their own decisions, commitments, and compromises.”²⁹ Accordingly, I understand her to use the modifier “private” to mean independence from government, rather than from the inevitable influences of culture and other persons. Thus, in this Essay, I will employ Allen’s privacy/private choice distinction, but at times I will use the formulation “privacy in its various dimensions” to capture both privacy and private choice.

In any event, this distinction between privacy and private choice is useful because it suggests that when we use the term “privacy” to refer to “private choice,” “privacy” really is a stand-in for decisional privacy, or deliberative autonomy, which is a fundamental aspect of personal self-government.³⁰ Allen’s conception of “private choice” thus seems compatible with, for example, Ronald Dworkin’s argument that liberalism is premised on ethical individualism and moral independence;³¹ on such an account, government “must not dictate what its citizens think about matters of political or moral or ethical judgment.”³²

Put this way, arguments for private choice likely will bear an obvious and close resemblance to arguments in support of liberal toleration; that is, arguments for a principle of restraint from coercive governmental action within a realm of individual liberty of belief, choice, and conduct.³³ Elsewhere, I have advanced a liberal feminist model of toleration as respect (as contrasted with a model of “empty” toleration) that rests upon three justifications: the anti-compulsion rationale, the jurisdictional ratio-

29. *Id.* at 753-54.

30. For the formulation of “deliberative autonomy” as an interpretation of the right to privacy, see James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 2, 7-16 (1995) (advancing a constitutional theory with two fundamental themes of securing the preconditions for democratic self-government, or deliberative democracy, and personal self-government, or deliberative autonomy).

31. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 25-26, 250-54 (1996).

32. *Id.* at 26.

33. Allen herself notes this connection between liberal toleration and governmental protection of private choice. See Allen, *supra* note 1, at 732-33.

nale, and the diversity rationale.³⁴ In brief, these three rationales are, respectively: the idea that compulsion or coercion corrupts belief or choice and violates autonomy;³⁵ the idea that there is a realm of personal belief, choice, and conduct that is not the proper "business" of government to regulate;³⁶ and the idea that it is inevitable that people freely exercising their moral powers will choose and pursue different or diverse ways of life, and that achieving orthodoxy would require an objectionable level of governmental coercion.³⁷ I think that liberalism readily supports these justifications for toleration, although they can and should be clarified and fortified in ways that I suggest below.

Do these rationales offer any guidance concerning the goods of privacy? All of them ultimately rest on a normative conception of personhood that includes an entitlement to autonomy and moral independence.³⁸ The paradigmatic case for liberal toleration stems from the cautionary tale of religious intolerance and persecution, and Europe's wars of religion.³⁹ Some liberal scholars use the backdrop of religious intolerance to argue that liberty of conscience undergirds our constitutional order and, specifically, the right of privacy concerning a range of significant personal decisions.⁴⁰ Constitutional jurisprudence concerning the protection and scope of such decisional privacy, or autonomy, also deploys all three rationales.⁴¹

The evil of religious intolerance is, undeniably, a powerful paradigm that should continue to inform arguments about the value of private choice. However, one way to fortify liberal arguments about the value of privacy and private choice is to look to other paradigms. One potentially powerful paradigm is the legacy of slavery's denial of privacy and private choice to enslaved

34. See McClain, *Toleration*, *supra* note 3, at 42-131.

35. See *id.* at 42-65.

36. See *id.* at 65-100.

37. See *id.* at 100-31.

38. See *id.* at 132.

39. See JOHN LOCKE, A LETTER CONCERNING TOLERATION 13-17 (Patrick Romanell ed., 2d ed. 1955) (1689); JOHN RAWLS, POLITICAL LIBERALISM xxiv-xxviii (1993).

40. See generally DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 261-80 (1986) (discussing the relationships between privacy and abortion, and between privacy and sexual autonomy).

41. See McClain, *Toleration*, *supra* note 3, at 42-131.

men and women.⁴² Recent scholarship on the Reconstruction Amendments suggests significant commonality among abolitionism, feminism, and the struggle for gay and lesbian rights.⁴³ Another related, but underdeveloped, paradigm (as Allen's work suggests) is the legacy of the denial of meaningful forms of privacy to free women.⁴⁴ Both of these "roots" of privacy would enrich our conceptual understanding of its origins and importance.

The first paradigm suggests that we might better understand the normative value of privacy in its various dimensions in light of the fundamental contrast between slavery and liberty. Professor Peggy Davis, for example, argues that the Supreme Court's articulation of the right to privacy (i.e., the Court's appeal to "penumbras" of privacy in the constitutional text⁴⁵) always has seemed rather thin and unsatisfying, and that what is missing is the "neglected stories" of enslaved families and the motivational effect of such stories upon the adoption of the Reconstruction Amendments.⁴⁶ Put another way, a central feature of slavery was "social death,"⁴⁷ and the denial to enslaved persons of rights of moral autonomy and self-definition, including the rights to marry, to bear or not bear children, to rear children, and to bodily integrity.⁴⁸ Invoking Orlando Patterson's argument that people in Western societies "came to value freedom [and] to construct it as a powerful shared vision of life, as a result of their experience of, and response to, slavery," Davis argues that "[t]he presence of the unfree was a profound argument for recognition of human autonomy."⁴⁹ So reconstructed, deliberative autonomy, or private choice, underwritten by the Fourteenth Amendment, finds a potent undergirding in the experiences of slavery and antislavery.

In an illuminating new book, liberal constitutional theorist David Richards links the legacy of religious intolerance and the

42. See DAVIS, *supra* note 4, at 214-49.

43. See DAVID A. J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW* 11-13 (1998).

44. See Allen, *supra* note 1, at 741-46.

45. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

46. DAVIS, *supra* note 4, at 214-49.

47. *Id.* at 236-37 (invoking the work of Orlando Patterson).

48. See *id.* at 226-27, 236-37.

49. *Id.* at 236 (quoting ORLANDO PATTERSON, *1 FREEDOM* xiii (1991)).

legacy of slavery by deploying the central themes of an inalienable right to conscience and of "moral slavery" to analyze the injustice of the denial of rights to enslaved men and women, free women, and gay men and lesbians.⁵⁰ Abolitionist feminists condemned as "moral slavery" the "laws, institutions, conventions, practices, and attitudes that illegitimately abridged the human rights of conscience, speech, association, and work, and rationalized a servile status on that basis."⁵¹ Using this "interpretive analogy between race and gender" illuminates that the Reconstruction Amendments affirm the "equal status of all persons as bearers of human rights" and condemn "both slavery and rights-denying subjugation on that basis."⁵²

In delineating the harms flowing from the denial of personal self-government, both Davis and Richards offer a helpful conception of the self that holds promise for a liberal—and liberal feminist—account of the value of privacy and private choice: they speak of persons as social beings, both shaped by and shaping culture. Slavery, Davis argues, denied to enslaved persons a right to participate in civil society, or in the dialectic of cultural constraint and change, and the opportunity to make meaning.⁵³ Abolitionist feminists, Richards contends, condemned moral slavery based on race or sex as subjecting persons to the will of others and stripping persons of "the human and cultural resources through which we acknowledge persons, as persons, capable of freedom and reason in private and public life."⁵⁴

Similarly, intolerance of gay men and lesbians, manifested in discriminatory laws and the denial of same-sex marriage, rests on an unjust gender orthodoxy that denies such persons access to cultural resources necessary to the free development of moral personality and "the right to name, let alone claim, the intimate life that is the basic human right of all other persons."⁵⁵ Constitutional protection of deliberative autonomy in such matters as marriage, parenting, and procreation are "measures that confer

50. See RICHARDS, *supra* note 43, at 3, 352-53.

51. *Id.* at 261.

52. *Id.* at 262-63.

53. See DAVIS, *supra* note 4, at 234-38.

54. RICHARDS, *supra* note 43, at 261.

55. *Id.* at 353.

social agency.⁵⁶ This model of the self also seems to resonate with liberal conceptions of revisability—or the capacity to form, act on, and revise a conception of the good—and with postmodern feminist notions of social construction and “partial” agency.⁵⁷

Looking to the legacy of slavery helps to undergird the value of private choice and of privacy in the sense of seclusion, restricted access, and the like. As Allen has noted, and as such feminist scholars as Patricia Hill Collins and Adrienne Davis have examined, African-American women have suffered the denial of both private choice and privacy: slavery involved the commodification and expropriation of their labor, sexuality, and reproductive capacity; the failure to afford them protection of their bodily integrity against rape and forced reproduction; and the treatment of their bodies as items of public (indeed, pornographic) display.⁵⁸ Against such a history, as feminist scholar Dorothy Roberts has argued, privacy, in the sense of governmental noninterference, is an important precondition for protecting the personhood of African-American women.⁵⁹ Further, against

56. DAVIS, *supra* note 4, at 236.

57. For a discussion of liberal revisability, see WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989); STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990); Nancy L. Rosenblum, *Pluralism and Self-Defense*, in *LIBERALISM AND THE MORAL LIFE* 207 (Nancy L. Rosenblum ed., 1989). For postmodern feminist models of partial agency, see Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999) [hereinafter Abrams, *From Autonomy to Agency*]; Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997).

58. See, e.g., PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 163-80 (1991) (discussing the “sexual politics,” rooted in slavery and sexual violence, that has oppressed African-American women); Adrienne D. Davis, *Commodification and Coercion: Enslaved Women and the Antebellum Sexual Economy* (unpublished manuscript, on file with author) (examining antebellum sexual economy) [hereinafter Davis, *Commodification and Coercion*]; see also ALLEN, *supra* note 14, at 64 (describing how many slave masters considered sexual favors part of a slave woman’s normal duties). Against this backdrop of commodification and coercion, Adrienne Davis explores how the antebellum private law of wealth transmission dealt with attempts by white slave owners to transfer wealth to formerly enslaved women with whom they had sexual relationships and their children. See Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. (forthcoming 1999).

59. See Roberts, *supra* note 17, at 1481. Roberts also argues, however, for a con-

this history of "commodification and coercion"⁶⁰ and the backdrop of the representation of African-American women as unchaste, promiscuous, and animalistic, the goods of privacy—with its protection of restricted access and secrecy—and of private choice hold powerful appeal.⁶¹

The second, related paradigm begins with the legacy of the denial of meaningful privacy to women (especially within marriage). Notwithstanding feminist critiques of privacy, Allen's important work on the normative value of privacy and private choice for women suggests that we might enlist women's experiences with "bad" forms of privacy and the absence of "significant opportunities" for privacy and private choice to argue for the goods of privacy.⁶² She persuasively argues that an adequate account of privacy should rid itself of the legacy of domestic life as the sphere of confinement, subordination, and sacrifice of self.⁶³ One part of women's privacy problem has been too much of the wrong kind of privacy—unwanted isolation, the legacy of separate spheres and of norms of maternal self-sacrifice, the brutal injustice of the law's drawing the curtain on private life, and leaving married women largely unprotected against intimate violence.⁶⁴ As Allen has argued, women have not had enough of the right kind of privacy.⁶⁵ "Privacy" can play a significant role in fostering self-development and affording a space in which persons prepare themselves for roles, relationships, and

ception of privacy that includes affirmative governmental obligations. *See id.* at 1478-79.

60. Davis, *Commodification and Coercion*, *supra* note 58 (manuscript at 32).

61. *See* COLLINS, *supra* note 58, at 67-78, 163-80 (describing such depictions of African-American women). Conversations with Professor Adrienne Davis, who is working on an article about black women's sexuality, were helpful on this point. For example, this history may help explain black women's comparative reticence about sexuality. *See, e.g.*, Rosemary L. Bray, *Taking Sides Against Ourselves*, N.Y. TIMES, Nov. 17, 1991, § 6 (Magazine), at 56 (suggesting that Anita Hill's self-presentation evoked African-American women's vigorous fight for respectability and propriety).

62. *See* ALLEN, *supra* note 14, at 180-81.

63. *See id.* at 54-55 (contending that the "privacy" women historically have had within the home largely has been illusory due to their maternal duties and dependence on their husbands).

64. *See id.* at 54-55; Siegel, *supra* note 18, at 2153-61 (explaining how the concept of marital privacy replaced chastisement as a legal justification for the state's failure to prosecute those who physically abused their wives).

65. *See* ALLEN, *supra* note 14, at 181.

responsibilities, while allowing the realization of goods such as solitude, chosen intimacy, and retreat.⁶⁶ "Private choice," or decisional privacy, can allow women the development and exercise of their moral powers.⁶⁷

In effect, what privacy affords is the literal and metaphorical space or opportunity for self-development or self-constitution, as well as for revision of the self. I believe (as does Allen) that this idea of privacy is compatible with a dialectical model of the self as shaped by, but also shaping, culture.⁶⁸ As Allen humorously expresses this important facet of privacy: "Surely my privacy means more than that others should let me alone to be the best darn African-American, Methodist, suburban wife and mother I can be. Privacy is also a matter of freedom to escape, reject, and modify such identities."⁶⁹ Given feminism's interest in women's freedom to re-evaluate and escape oppressive connections,⁷⁰ this facet of privacy should be attractive.

Of course, one vulnerability of sorting out "good" and "bad" kinds of privacy is that such a process might suggest that privacy is so indeterminate and unruly a conception that it is neither stable nor useful.⁷¹ Liberals and liberal feminists might appear to be saying to their critics, "Oh, but we don't mean *that* kind of privacy. Trust us, we mean *this* kind of privacy." To this, I have three basic responses. First, as with any legal and cultural concept subject to evolving understandings (e.g., liberty and equality), although we need to subject the various deployments of privacy in law and culture and its role in our social practices to critical scrutiny, it does not follow that we should abandon the concept completely.⁷² Second, to equate deployments of privacy

66. See Allen, *supra* note 1, at 744-45; see also ALLEN, *supra* note 14, at 75 (describing "a degree of personal privacy" as "an important underpinning of female personhood," but as not "preclud[ing] concern for others").

67. See ALLEN, *supra* note 14, at 82-122.

68. See, e.g., Allen, *supra* note 1, at 753-54.

69. *Id.* at 754.

70. See Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in FEMINISM & COMMUNITY 193-99 (Penny A. Weiss & Marilyn Friedman eds., 1995); Susan H. Williams, *A Feminist Reassessment of Civil Society*, 72 IND. L.J. 417, 440-46 (1997).

71. See Fleming, *supra* note 30, at 1, 41 (criticizing claims that privacy is too unruly or undomesticated a notion to be useful in constitutional law and theory).

72. See, e.g., *id.* at 57-59 (arguing for an approach to due process liberty that

that have legitimated patriarchy and impaired women's equal citizenship with liberalism ignores the extent to which fundamental liberal principles, and certainly liberal feminist principles, should serve instead as an indictment of those deployments (as discussed below concerning the problem of "private" violence).⁷³ Third, related concepts such as autonomy (or self-determination), self-development, and self-constitution may help get at the goods that privacy helps to secure without carrying all the negative associations.⁷⁴

Feminist condemnation of privacy raises the "substantive moral and political question" of 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.⁷⁵ Allen's normative work on the value of privacy for women moves a considerable distance toward answering that question. I am in general agreement with her two-fold conclusion: feminists have good reason to be critical of "what the privacy of the private sphere has signified for women in the past and what the rhetoric and jurisprudence of privacy rights can signal for the future."⁷⁶ "At the same time, there is little doubt that women seeking greater control over their lives already have begun to benefit from heightened social respect for appropriate forms of physical, informational, proprietary, and decisional privacy."⁷⁷ Both privacy and private

evaluates traditions not only by reference to historical practices but also in light of aspirational principles).

73. See *infra* notes 90-103 and accompanying text.

74. Some other feminists share this view. See, e.g., Elizabeth Schneider, *The Violence of Privacy*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 49-54 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) [hereinafter *PUBLIC NATURE*] (using such terms as "the right to autonomy, self-expression, and self-determination" to capture the affirmative potential of privacy). Some constitutional theorists view the right of privacy as a misnomer, and suggest that autonomy is really at the core of Fourteenth Amendment liberty. See DAVIS, *supra* note 4, at 238; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10, at 1341-45 (2d ed. 1988) (discussing constitutional protection of a woman's choice regarding abortion).

75. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1, 36 (1992). As Allen answers this question, "[t]he longing for personal time and personal decisionmaking can linger long after the grip of patriarchy over women's bodies and lives is loosened." Allen, *supra* note 1, at 750.

76. Allen, *supra* note 1, at 750.

77. *Id.*; see also ALLEN, *supra* note 14, at 70-72 (arguing that the fact that male hegemony and female inequality have residual effects on women's full enjoyment of privacy and private choice does not warrant the complete rejection of privacy and

choice are important to the goal of women being free, equal, safe, and intimate.

In grappling with the question of the best vocabulary for expressing some of these ideals, it might be useful to look to the history of feminism for analogues to what Professor Peggy Davis calls "Motivating Stories"⁷⁸—that is, to see how women's accounts of experience with bad forms of privacy that denied them autonomy and rendered them vulnerable to violence and abuse (such as the law of coverture and the ideology of separate spheres⁷⁹) motivated legal and social steps toward securing better forms of privacy for them. For instance, one plausible interpretation of nineteenth-century feminist demands for "a right to self-ownership in marriage"⁸⁰ and a "voluntary marriage"⁸¹ is to view them as demands, in effect, for privacy and private choice—i.e., for control of intimate access, freedom from the sovereignty of another, and respect for bodily integrity. As Richards's work suggests, abolitionist feminism would be a rich resource for such "motivating stories."⁸² Richards characterizes the legacy of abolitionist feminism's indictment of "moral slavery" for more contemporary rights-based feminism in terms of its call for basic, inalienable rights of conscience, speech, intimate life, and work, and its indictment of injustice in women's intimate lives.⁸³ These basic rights, some of which find embodiment in contemporary constitutional rights of privacy and private choice, are "culture-creating rights" (consistent with the dialectical

private choice). As Professor Allen has argued elsewhere, even if the origins of the privacy tort rest in part on "outmoded conceptions of female modesty and domesticity," contemporary judicial vindication of women's privacy interests need not rest on such conceptions. See Allen & Mack, *supra* note 23, at 473-77.

78. DAVIS, *supra* note 4, at 213.

79. For a helpful discussion of the influence of the common-law doctrine of coverture and of separate spheres ideology upon women's social and legal status in the early American republic and in the nineteenth century, see *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* 3-80 (Barbara Babcock et al. eds., 2d ed. 1996).

80. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 305 (1992).

81. MARY LYNDON SHANLEY, *FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND 187-88* (1989).

82. See RICHARDS, *supra* note 43, at 63-124 (describing features of abolitionist feminism).

83. See *id.* at 19-24.

account of the self advanced above): they afford "appropriate space for the free exercise of our powers of moral personality," including "responsibly creating, forging, and sustaining" cultural and institutional forms.⁸⁴ They also call for the repudiation of conceptions of private life that have contributed to the oppression of women.⁸⁵ Similarly, some recent feminist legal scholarship on the problem of intimate violence against women suggests that women's experience of that problem, and of their lack of meaningful privacy and autonomy, should undergird the reconstruction of conceptions of privacy and autonomy in a way that attends to the material and social preconditions for their enjoyment.⁸⁶

Ultimately, feminist critiques of privacy highlight the need to sort out "dubious uses of the notion of privacy"⁸⁷ and to reject the invocation of the values of privacy to "mask exploitation and abuse."⁸⁸ The reconstructive task is to build the normative case for privacy and autonomy as valuable, and perhaps indispensable, elements in a conception of free and equal citizenship for women as well as men. By appealing to liberal toleration, abolitionism, and feminism, as well as to the creative resonances among them, we may be able to reconstruct the roots of privacy and offer some alternative images of it. In so doing, we can better express why the right to be let alone may be the right most valued by "civilized" women as well as men.⁸⁹

84. *Id.* at 234. Richards also addresses the important history of how certain abolitionist feminists compromised their original antiracist stance and of how some of the most radical feminist demands for gender equality narrowed to a focus upon suffrage. *See id.* at 125-98.

85. *See id.* at 253 (describing how, for second wave feminists, "[t]he privatization of women was . . . the basis for their oppression. Work in the public sphere became a metaphor for the legitimate entrance of women into public culture on equal terms as bearers of inalienable human rights.").

86. *See* Schneider, *supra* note 74, at 49-54 (proposing to reconstruct privacy in light of battered women's experiences); Wendy Webster Williams, *Fixing Locke: Liberal Orthodoxies and the Feminist Challenge to Intimate Violence* (1998) (unpublished manuscript, on file with author) (exploring reconstruction of liberal autonomy in light of the needs and goals of battered women).

87. Gavison, *supra* note 75, at 35.

88. *Id.* at 37.

89. I refer, of course, to Warren & Brandeis, *supra* note 21, at 195; *see also* *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (noting that "the right to be let alone [is] . . . the right most valued by civilized men").

B. *The Public/Private Distinction: Avoiding Misconceptions*

An adequate liberal account of privacy requires a persuasive articulation, rather than abdication, of a public/private distinction. To use Allen's formulation, this is the important task of rescuing the public and the private,⁹⁰ which requires a liberal framework within which "public and private are contingent, transformable conceptions of how power ought best to be allocated among individuals, social groups, and government."⁹¹ Perhaps the most forceful and pervasive feminist criticism of privacy—and of the public/private distinction—stems from its role in allowing unjust and hierarchical distributions of power between men and women that have left women subject to the "private sovereignty" of men.⁹² For example, Professor Reva Siegel's historical analysis of the evolving legal treatment of violence against women in the home powerfully demonstrates how, even after the law's formal repudiation of the idea of coverture and a husband's right to administer "chastisement" to his wife, and even after the evolution from a model of authoritarian marriage to companionate marriage, courts continued to use the concept of "affective" or marital privacy to shield the home from public exposure, leaving women without a remedy against intimate violence.⁹³ An adequate account of governmental noninterference with private choice and private life must condemn this invocation of privacy to immunize private violence.

As the work of Siegel and other feminist theorists amply illustrates, it is undeniable that historical doctrines of family privacy and the sanctuary of the marital bedroom have contributed to the unequal protection of women in their homes and sanctioned enormous injustices to women and children within the family.⁹⁴ As I have explained elsewhere, however, a liberal commitment to a principle of personal sovereignty, or a realm of autonomy, does not entail an unqualified jurisdictional principle of govern-

90. See Allen, *supra* note 1, at 749.

91. *Id.* at 750.

92. See WEST, *supra* note 18, at 45-72.

93. See Siegel, *supra* note 18, at 2142-70.

94. See ALLEN, *supra* note 14, at 117; Siegel, *supra* note 18, at 2153; Taub & Schneider, *supra* note 18, at 328-39.

mental noninterference with "private" life.⁹⁵ With the notable exceptions of John Stuart and Harriet Taylor Mill, liberal political theorists historically have paid inadequate attention to the problem of unequal power in the "private" sphere. I believe these are sins of omission rather than fatal flaws of liberalism.⁹⁶ As John Rawls has said of political liberalism, in response to Susan Moller Okin's critique of its apparent stance of toleration of injustice within the family,⁹⁷ "[i]f the so-called private sphere is alleged to be a space exempt from justice, then there is no such thing," for "[t]he equal rights of women and the basic rights of their children as future citizens are inalienable and protect them wherever they are."⁹⁸ Nor do constitutional privacy rights, contrary to some feminist arguments, plausibly support the notion of a private sphere within which government abdicates any responsibility for protecting women against abuses of power by men.⁹⁹

Liberal feminists' internal critiques of liberalism have an important ongoing role to play in reconstructing liberal conceptions of the public/private distinction and insisting upon application of liberal principles in ways that are consistent with feminist commitment to ending subordination on the basis of sex. For example, the home and "domestic" relations are, indeed, proper subjects of legal regulation and implicate institutions of civil society in which government has considerable interest.¹⁰⁰ Governmental responsibility to protect women against violence in their homes should follow readily from a liberal state's core commitment to protect its citizens against private aggression.¹⁰¹ Accordingly, in

95. See McClain, *Toleration*, *supra* note 3, at 73-76.

96. I am indebted to John Rawls for suggesting this line of response.

97. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 90-93 (1989).

98. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 791 (1997).

99. For discussion, see McClain, *Inviolability*, *supra* note 3, at 215-20; McClain, *Toleration*, *supra* note 3, at 73-76; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992) (striking down spousal notification requirement because it gave husband "troubling degree of authority over his wife," and stating that in keeping with the rejection of the common-law understanding of women's role within the family, "[w]omen do not lose their constitutionally protected liberty when they marry"); Schneider, *supra* note 74, at 57 n.21 (discussing male defendants' unsuccessful invocation of constitutional privacy precedents to support marital rape exemption).

100. See Allen, *supra* note 1, at 749-50; Rawls, *supra* note 98, at 791.

101. See Jane Maslow Cohen, *Private Violence and Public Obligation*, in *PUBLIC*

the case of violence against women within the family, liberal feminists correctly indict the ways in which earlier liberal political theory about the marriage contract and family governance contributed to the failure to keep this "most fundamental promise of the social contract."¹⁰² Liberals and liberal feminists vehemently oppose unjust status hierarchies, such as those based on sex and race, which undermine self-development, the exercise of moral powers, and free and equal citizenship.¹⁰³

All of this probably sounds familiar, perhaps even too familiar. Reconstructing privacy requires moving beyond restating such rebuttals to feminist critiques of privacy. If they have not already done so, liberals should readily grant that an adequate conception of privacy in its various dimensions must clearly reject privacy's legacy of confinement and subordination, as well as the immunity of private aggression from the law's reach. The reconstructive task for an adequate liberal—and liberal feminist—model of privacy requires a normative argument as to why society should honor some form of public/private distinction and some limiting principles that admit of an appropriate role for governmental regulation of "private" life, "private" places, and "private" relationships.

Setting those limiting principles is, of course, a formidable challenge: many of us probably recoil from judicial rhetoric used to justify not "raising the curtain"¹⁰⁴ on the bedchamber to subject intimate violence to public exposure (and legal redress),¹⁰⁵ but warm to the judicial defense of privacy against the specter of police enforcement of sexual and reproductive norms in the bedchamber.¹⁰⁶ The correct answer to Professor Ruth Gavison's

NATURE, *supra* note 74, at 364-66, 370-71; Williams, *supra* note 86; see also EILEEN L. McDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT (1996) (arguing that this central liberal commitment requires government to aid women in terminating pregnancies to which they do not consent).

102. Williams, *supra* note 86.

103. See RICHARDS, *supra* note 43, at 67-70, 250-52; see generally Cynthia V. Ward, *The Radical Feminist Defense of Individualism*, 89 NW. U. L. REV. 871 (1995) (arguing that gender-based hierarchies are antithetical to many of the basic tenets of liberalism).

104. *State v. Rhodes*, 61 N.C. (Phil. Law) 349, 352 (1868).

105. See Siegel, *supra* note 18, at 2150-75 (discussing *Rhodes* and other cases).

106. I refer here to Justice Douglas's famous language in *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) ("Would we allow the police to search the sacred pre-

question as to whether there are any "contexts in which women would want to keep the state out of their lives"¹⁰⁷ should be, emphatically, yes! Moreover, a careful reading of much feminist work supports that conclusion.¹⁰⁸ We need liberal, and liberal feminist, arguments properly "clarified" to avoid absolutist misconceptions equating privacy with complete immunity and governmental abdication of responsibility. As Siegel's work suggests, such a reconstruction should repudiate the idea that "where love is, law need not be. Intimacy occurs in a domain having no bearing on matters of citizenship."¹⁰⁹ To the contrary, feminist reform efforts correctly target violence in the home as an impediment to women's equal citizenship and redefine it as a matter of public concern warranting governmental responses.¹¹⁰ Those efforts have borne fruit, such as changed state laws and the federal Violence Against Women Act.¹¹¹ There must be ongoing vigilance over use of conceptions of privacy and the public/private distinction, however, to guard against blunting the scope of those reforms.¹¹²

cincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."), as well as to Justice Blackmun's dissent in *Bowers v. Hardwick*, 478 U.S. 186, 208 (1986) (Blackmun, J., dissenting) ("[T]he right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.").

107. Gavison, *supra* note 75, at 37.

108. See, e.g., ALLEN, *supra* note 14, at 57-59, 97-122 (discussing importance to women of privacy of the home and of freedom from governmental interference with reproductive liberty); DAVIS, *supra* note 4, at 213-49 (advancing argument for governmental noninterference with moral autonomy in matters of intimate association, family, and reproduction). In contrast, feminist legal theorist Martha Fineman highlights the desirability of privacy in the sense of protection against state intervention in family life by showing the absence of such protection for certain "public" families (i.e., those headed by single mothers), but concludes that existing privacy doctrine premised upon the "sexual" family (i.e., the marital bond) is unlikely to afford single mothers such protection. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 177-93 (1995).

109. Siegel, *supra* note 18, at 2205-06 (characterizing assumptions regarding love and intimacy undergirding nineteenth-century interspousal immunity).

110. See Cohen, *supra* note 101, at 370-79; Sally F. Goldfarb, *Public Rights for "Private" Wrongs: Sexual Harassment and the Violence Against Women Act*, in *SEXUAL HARASSMENT* (working title) (Catherine A. MacKinnon & Reva B. Siegel eds., forthcoming 2000).

111. Violence Against Women Act of 1994, Pub. L. 103-322, tit. IV, 108 Stat. 1902 (codified in various sections of 8, 16, 28, and 42 U.S.C.).

112. See Goldfarb, *supra* note 110, at 16; Siegel, *supra* note 18, at 2201-07.

C. Beyond Negative Liberty: Government's Responsibility for a "Formative Project"

Finally, an adequate liberal and feminist conception of privacy and private choice requires more than a defense of negative liberty. As Allen helpfully suggests, we should not give up on privacy as "freedom to" (or "claim to") rather than simply "freedom from."¹¹³ Liberalism correctly insists that governmental respect for negative liberty is a necessary condition for autonomy, or personal self-government.¹¹⁴ But perfectionist work, emanating not only from feminist and civic republican sources, but also from within liberalism itself, suggests that merely leaving persons alone may not be sufficient to ensure meaningful self-government.¹¹⁵ Perfectionists usefully direct attention to the need for a conception of governmental responsibility to secure the preconditions for enjoying privacy and exercising private choice.¹¹⁶ Civic republican political theorist Michael Sandel speaks of the importance of a "formative project" or "formative politics," whereby government inculcates in citizens the qualities of character and the virtues necessary for self-government.¹¹⁷ As I have written elsewhere, a common theme in civic republican, feminist, and liberal perfectionism is a call for a formative project that involves governmental responsibility to help citizens live good, self-governing lives.¹¹⁸

113. Allen, *supra* note 1, at 748.

114. See, e.g., Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419, 443-44 (1995).

115. By perfectionism, I refer to the idea that government has a responsibility to shape or steer citizens pursuant to a vision of human virtue, goods, or excellence. For example, Joseph Raz, who rejects liberal "neutrality" concerning the good life in favor of a pluralistic perfectionist liberalism, argues that it is a proper function of government to promote morality and that personal autonomy is a central moral principle that government should promote. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 407-18 (1986). Political liberalism, as advanced by John Rawls, aims to develop a political conception of justice in order to establish fair terms of social cooperation among citizens on the basis of mutual respect and trust, without government embracing or attempting to secure agreement upon any comprehensive moral doctrine. See RAWLS, *supra* note 39, at 173-76. For a more detailed comparison of perfectionist liberalism and political liberalism, see McClain, *Toleration*, *supra* note 3.

116. See RAZ, *supra* note 115, at 417-18 (arguing for governmental responsibility to foster the conditions of autonomy).

117. See SANDEL, *supra* note 11, at 6, 305.

118. See McClain, *Toleration*, *supra* note 3, at 33-40.

How can liberal conceptions of privacy and private choice be reconstructed to yield governmental commitment to securing preconditions for their enjoyment? What role might privacy in its various dimensions play in a liberal/liberal feminist formative project? Allen offers some helpful clues while raising some challenging questions about the proper scope of such a project. In her book, *Uneasy Access*, she repeatedly refers to the importance of women having "meaningful opportunities for personal privacy"¹¹⁹ and concludes by pointing to the need to seek to understand the legal, economic, and social bases of meaningful privacy and private choice.¹²⁰ In her present article, she envisions government's formative project largely in terms of the education of persons "who understand human capacities for choice and the limits of those capacities."¹²¹ Allen's conception of privacy and private choice posits an affirmative governmental responsibility because of her "egalitarian and feminist" assumption that "a background of educational, economic, and sexual equality is a requirement of meaningful choice": "In a just and liberal democracy, one's ability to choose how one shall live will be constrained through taxation and regulation so that others can achieve a comparable palette of choices."¹²²

Allen poses some intriguing quandaries over government's formative project that relate not only to the value of privacy but also to important questions over the desirability of "neutral" liberalism versus perfectionist liberalism. She expresses concern over Jenni and Sara, young women who have established websites from which paying customers can observe them in their homes, and their voluntary exposure of self and "private" space for consumption.¹²³ For example, Allen suggests that Jenni

119. ALLEN, *supra* note 14, at 80.

120. *See id.* at 80-81, 181.

121. Allen, *supra* note 1, at 754.

122. *Id.*; see also RAZ, *supra* note 115, at 417-18 (supporting government's entitlement to redistribute resources to promote citizens' autonomy). This egalitarian, feminist, and redistributive rendering of liberalism has some resonance with postmodern feminist arguments that, while everyone is subject to the forces of social construction, "some groups of people systematically and structurally have more power to do the constructing than do others." Nancy J. Hirschmann, *Toward A Feminist Theory of Freedom*, 24 POL. THEORY 46, 57 (1996). Accordingly, an adequate conception of freedom requires giving those with less power the material and cultural resources needed to enhance their ability to participate in the processes of self-construction.

123. *See* Allen, *supra* note 1, at 731-32.

should turn off the camera "so that, free from the gaze of others, she can live a more genuinely expressive and independent life."¹²⁴ In effect, Allen concludes that this is not a good way for Jenni to live and that Jenni is not making appropriate use of her opportunities for privacy and private choice. Allen makes even stronger claims concerning the link between privacy and citizenship, suggesting that Jenni's degree of self-disclosure may be incompatible with her capacity for citizenship.¹²⁵

What are the parameters of a formative project that is to foster the preconditions for democratic and personal self-government, while also showing respect for the exercise of individual autonomy (or private choice)? If Jenni and Sara do not understand their own best interests,¹²⁶ perhaps it is due to norms of sexuality or femininity, which they may be powerless, individually, to change. Some feminists and liberals show considerable interest in government engaging in "norm management" to shape and change social norms and meanings, and to alter preferences.¹²⁷ Allen's article suggests, in addition, that privacy should be among those goods (like equality and autonomy—or, as some feminists prefer, "agency"¹²⁸) that are so important to society that government should not be neutral about them.¹²⁹ Instead, Allen argues, government should seek to educate persons that privacy is an indispensable component of a good life, and even steer them toward privacy when they appear to discard it.¹³⁰

Allen recognizes the apparent tension between a liberal commitment to freedom and a liberal regulation aimed at "forcing" people to choose and value private life. She attempts to reconcile this affirmative obligation by analogizing the surrender of too much privacy to the consumption of harmful drugs.¹³¹ To the extent that doing each activity exceeds rational capacity, liberal

124. *Id.* at 753.

125. *See id.* at 750-53.

126. Put another way, they may fail to understand their own "critical interests." *See generally* Ronald Dworkin, *Foundations of Liberal Equality*, in XI THE TANNER LECTURES ON HUMAN VALUES 1, 44-46 (Grethe B. Peterson ed., 1990) (formulating a distinction between volitional and critical interests).

127. *See, e.g.*, Higgins, *supra* note 57, at 1700-03; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

128. *See, e.g.*, Abrams, *From Autonomy to Agency*, *supra* note 57.

129. *See* Allen, *supra* note 1, at 755.

130. *See id.* at 752-53.

131. *See id.* at 740.

government may seek to prohibit or at least strongly discourage it. I do not find the self-disclosure/drug analogy wholly persuasive, however, for it is not clear how relinquishing privacy harms rational capacity and citizenship. I concur that privacy, in the sense of private choice, or autonomy, is fundamental for liberal or liberal feminist citizenship; some accounts of liberalism, indeed, treat autonomy as a basic moral good that government should foster.¹³² I support a governmental formative project aimed at fostering the capacity for, and addressing barriers to, responsible self-government. A proper target of such a project would be obstacles to the enjoyment of privacy (in the sense of solitude, seclusion, and "down time"), such as women's disproportionate burden for domestic labor, child care, and lack of leisure time.¹³³ What, then, if people exercise their autonomy, or private choice, by choosing not to be private?

Is Jenni incapable of being a good citizen? What if someone offers up her privacy for consumption and profit, and uses the money for her education or her family or donates it for progressive political causes?¹³⁴ Further, what if Jenni herself does not believe she is giving up her privacy because, in her own words, "[a]s long as what goes on inside my head is still private, I have all the space I need."¹³⁵ What if Jenni uses her web site as a bully pulpit to preach for or against privacy?

132. See *supra* notes 117-18 and accompanying text; see also Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1920 (1997) (endorsing Raz's liberal argument that the state should "promote and encourage personal autonomy . . . because it is a moral good").

133. On women's "double burden" of domestic and market labor, see ARLIE HOCHSCHILD, *THE SECOND SHIFT* (1989).

134. See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1266 (1998) (arguing against prohibiting a person from knowingly disclosing information for monetary compensation or other reasons).

135. *JenniCam: Frequently Asked Questions* (visited Oct. 16, 1998) <<http://www.jennicam.org/faq/general.html>>. The full text of the answer to the question, "Why are you giving up your privacy like this?" is:

Because I don't feel I'm giving up my privacy. Just because people can see me doesn't mean it affects me—I'm still alone in my head, no matter what. And as long as what goes on inside my head is still private, I have all the space I need. On the other hand, if someone invented a TelepathyCam where you could hear everything I was thinking, I must admit I'd be a bit more squeamish. *wink*

Thus, although I doubt *JenniCam* renders Jenni incapable of citizenship, I also grant that it is hard to link *JenniCam* with core values of citizenship, or to find any relationship between playing "name that curve" (of her body)¹³⁶ and responsible self-government. Nonetheless, some of the justifications for privacy and private choice are of special relevance here. Allen speaks of the value of some sort of governmental neutrality concerning the good life.¹³⁷ One could think of privacy as affording a symbolic as well as literal space for diversity, wherein people could pursue their different conceptions of the good life. Of course, this means that privacy also protects people's right to be a layabout or to spend time on pursuits that others deem trivial.¹³⁸ Is a "layabout" or a "couch potato" more capable of self-government than someone like Jenni, who transforms her daily life, with all its trivia, into an internet sitcom?¹³⁹ If phenomena like *JenniCam* do warrant governmental regulation, I suspect that the reasons for such regulation would less likely be concerns for preserving the capacity for human citizenship than concerns for preserving dignity or decency, or even social order.¹⁴⁰

Even if not wholly persuasive, Allen's refreshing propositions about shoring up privacy point to the need for further thinking

136. See Patricia J. Williams, *Name that Curve*, NATION, July 20, 1998, at 9 (discussing a recent contest on *JenniCam* involving the identification of a displayed body part).

137. See Allen, *supra* note 1, at 752.

138. See ALLEN, *supra* note 14, at 75-78; MACEDO, *supra* note 57, at 227.

139. Research for this article included two visits to *JenniCam*, which are the basis of my characterization of *JenniCam* as a sitcom. In addition to questions and answers and photos of Jenni or, when she is absent, her empty apartment, there is also Jenni's journal, in which she shares with website visitors the often trivial details of her daily life (somewhat like a letter to a pen pal). The mixture of trivial detail and the occasional weightier matters (e.g., reflecting upon a past abusive relationship) reminded me of the hugely popular journal entries of the fictional young woman Bridget Jones. See HELEN FIELDING, BRIDGET JONES'S DIARIES (1996).

140. In a recent article expressing alarm that the public airing of details of politicians' sexual conduct has become commonplace, philosopher Thomas Nagel warns that American society "has lost its grip on a fundamental value" on which civilization depends, i.e., honoring the "distinction between what an individual exposes to public view and what he conceals or exposes only to intimates." Thomas Nagel, *The Shredding of Public Privacy*, TIMES LITERARY SUPPLEMENT, Aug. 14, 1998, at 15; cf. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 248-61 (1996) (describing moralist arguments against such practices as surrogacy contracts, public nudity, dwarf bowling, and dwarf tossing rooted in concern for dehumanization, degradation, moral offensiveness, and exploitation).

about government's formative project. For example, which is indispensable: being private itself, or having the freedom to make the decision to be private? Is "privacy," in the sense of solitude and restricted access, a precondition for private choice? Is a threshold level of privacy indispensable to a well-ordered society? Should governmental responsibility to foster conditions for meaningful opportunities for privacy take the form of steering citizens between better and worse uses of privacy, and between embracing and rejecting privacy? It is important not just that people choose, but that they "choose well," and that government foster their ability to do so.¹⁴¹ How does government tell who is choosing well and who is not? Allen notes that "[a] plurality of notions of and opportunities for privacy must be permitted to flourish."¹⁴² Will this include notions of the good life in which privacy, in the sense of private life, plays a lesser role and self-disclosure a greater role? Here we might remember Mill's argument that society benefits from allowing different "experiments of living" to flourish.¹⁴³ Allen herself views Jenni as a rather extreme case, and makes clear that not every act of privacy impairs citizenship.¹⁴⁴ She notes that younger persons seem to live good lives without as much privacy as older generations.¹⁴⁵ She also recognizes that variables such as class and generational status may shape one's "taste" for privacy,¹⁴⁶ and that paternalistic restrictions against offering up one's privacy for consumption may fall more harshly on some persons than on others.¹⁴⁷

Delineating a formative project concerning privacy involves addressing significant prudential questions. Allen recognizes that "bad" forms of privacy have hindered women's opportunities for equal citizenship.¹⁴⁸ As I suggest in Section Two, rejecting privacy sometimes is a good thing and may foster a capacity for

141. See Martha Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD* 203, 229 (R. Bruce Douglass et al. eds., 1990).

142. Allen, *supra* note 1, at 755.

143. JOHN STUART MILL, *ON LIBERTY* 54 (Elizabeth Rapaport ed., 1978) (1859).

144. See Allen, *supra* note 1, at 752.

145. See *id.* at 736.

146. See *id.*

147. See *id.* at 734, 755.

148. See *id.* at 755.

meaningful participation in society.¹⁴⁹ For these reasons, as well as ones that I set out elsewhere, a commitment to the core rationales for toleration, as well as liberal and feminist respect for diversity and recognition of a morally pluralistic polity, may commend a feminist form of political liberalism more than a feminist form of perfectionist liberalism.¹⁵⁰ Such a hybrid, like Allen's vision of liberalism, would focus upon fostering the capacities for democratic and personal self-government. Without a stronger showing that choosing self-exposure over privacy impairs the capacity for democratic and personal self-government and the achievement of equal citizenship, or threatens important public values, we should be cautious about governmental moralizing in favor of privacy.

II. THE "TASTE" FOR PRIVACY IN AN ERA OF NEW COMMUNICATION TECHNOLOGIES

An intriguing part of Allen's article is her proposition that, despite the high esteem in which liberalism holds privacy, there is "[a]n erosion of privacy-related tastes and expectations."¹⁵¹ She proposes that a governmental formative project that shores up privacy and imposes privacy norms would be compatible with liberal principles.¹⁵² In Section One, I sketched a normative account of privacy in its various dimensions that gave a central place to the capacity for revising and choosing, as well as rejecting, forms of connection.¹⁵³ I also suggested the importance of a conception of privacy that allows for repudiating certain forms of privacy and embracing others.¹⁵⁴ This way of thinking about pri-

149. See *infra* notes 164-78 and accompanying text.

150. It is unnecessary to adopt an explicitly perfectionist model of government to hold that government has a responsibility to secure the preconditions for a person's exercise of their moral powers necessary for democratic and personal self-government. This may include not only facilitative measures but also persuasion, to the extent that such persuasion fosters self-government or furthers public values (such as racial equality and the equal citizenship of women). My resistance to perfectionism has to do with implementing it in a morally pluralistic society, e.g., identifying whose account of the preconditions for a good life is to prevail. See McClain, *Toleration*, *supra* note 3, at 115-31.

151. Allen, *supra* note 1, at 730.

152. See *id.* at 752-53.

153. See *supra* notes 28-86 and accompanying text.

154. See *supra* notes 87-112 and accompanying text.

vacy may offer a helpful framework for considering issues related to self-exposure in cyberspace and, in particular, the related issues of gender, privacy, and cyberspace. There, I raised questions about such a project. Here, I offer two brief responses to Allen's diagnosis of a decreased taste for privacy. First, I question whether privacy is yet a seriously eroded taste. Second, I suggest that, even if it is eroded to a certain degree, that may be less cause for alarm than Allen suggests.

I will venture an interpretation of the ongoing debate over the new communication technologies that is slightly at odds with Allen's view. Far from having a diminished expectation of and taste for privacy, people seem to have considerable concern over threats to privacy posed by cyberspace and a continuing desire for certain aspects of privacy. For example, there is a keen consumer interest in protecting personal information and maintaining anonymity in cyberspace, an interest also evident in scholarly and legislative efforts to protect privacy.¹⁵⁵ It is precisely the possibility of anonymity and of restricting access to information about oneself that makes communications in cyberspace so appealing to some.¹⁵⁶ While Allen raises concern that some women have little taste for privacy, poll data suggest that among users of the World Wide Web, privacy is the most important issue, and is even more important to female users than to male users.¹⁵⁷

A better reading may be that cyberspace provides new possibilities for privacy as well as self-disclosure, and for connection and community as well as isolation. Indeed, it is the ability to engage in selective disclosure of personal information that "in-

155. See, e.g., Encryption Protects the Rights of Individuals from Violation and Abuse in Cyberspace (E-Privacy) Act, S. 2067, 105th Cong. (1998); Identity Theft and Assumption Deterrence Act, S. 512, 105th Cong. (1997); Kang, *supra* note 134, at 1267-94 (proposing Cyberspace Privacy Act to protect individuals' informational privacy); William J. Fenrich, Note, *Common Law Protection of Individual Rights in Personal Information*, 65 *FORDHAM L. REV.* 951, 961 (1996) (arguing for common-law protection against unauthorized dissemination of personal information).

156. See Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 *EMORY L.J.* 869, 876-82 (1996); George P. Long, III, Note, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 *U. PITT. L. REV.* 1177, 1182-84 (1994).

157. Censorship is the most important issue to male users. See *Graphics, Visualization & Usability Center, Gvu's 8th WWW User Survey* (visited Jan. 20, 1999) <http://www.gvu.gatech.edu/user_surveys/survey-1997-10> (reporting survey of over 10,000 web users conducted from October 10, 1997 through November 16, 1997).

vites and affirms intimacy"; loss of such control would hinder the ability to construct "deep social relationships."¹⁵⁸ What could be a more isolated act than surfing the web in the privacy of one's own home? What act, though, could be more potentially self-disclosing than communicating anonymously with others on the web? For the lonely and isolated gay teenager, such an act may provide an important source of community and connection.¹⁵⁹ We might think about cyberspace as affording new ways of exercising private choice and decisionmaking about self-disclosure and concealment, as well as new opportunities voluntarily to play with one's identity. Recent scholarly work on gender and cyberspace, for example, stresses women's efforts to create networks of support, which often follow different values than those prevalent in male-dominated spaces in cyberspace, as well as to play with and construct oppositional identities.¹⁶⁰ With this development come new and different forms of association and connection.

Perhaps the contemporary interest in restricted access and anonymity on the Internet shows the continuing appeal to privacy, but reconstructed for a new technological form. Perhaps what consumers want—access to information and restricted access to their own person and personal information—poses a hopelessly conflicted task for privacy rules. If, as some contend, these technologies threaten the very idea of and possibility of privacy and "private life" to a degree unrecognized by many who use them and in ways not addressable by current privacy rules, they may trigger serious regulatory questions.¹⁶¹ There are important

158. Kang, *supra* note 134, at 1212-13.

159. See Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 272 n.16 (1996).

160. A full treatment of this fascinating topic is outside the scope of this Essay. For a helpful introduction, see Susan Herring, *Posting in a Different Voice: Gender and Ethics in Computer-Mediated Communication*, in PHILOSOPHICAL PERSPECTIVES ON COMPUTER-MEDIATED COMMUNICATION 115-45 (Charles Ess ed., 1996) [hereinafter PHILOSOPHICAL PERSPECTIVES]; Nina Wakeford, *Networking Women and Grrrls with Information / Communication Technology*, in PROCESSED LIVES: GENDER AND TECHNOLOGY IN EVERYDAY LIFE 51-66 (Jennifer Terry & Melodie Calvert eds., 1997). For an influential feminist "cyborg manifesto" about the potential of the new communication technologies to break down boundaries and construct new identities, see DONNA J. HARAWAY, *SIMIANS, CYBORGS, AND WOMEN* 149-81 (1991).

161. See John M. Broder, *F.T.C. Opens Hearings on Computers' Threat to Privacy*

questions about the implications for participation in democratic and civic life, particularly whether anonymous communication fosters or hinders democracy and civil society. For example, frank and blunt exchanges about race take place on the Internet, and the very anonymity of these exchanges appears to foster this dialogue.¹⁶² To the extent anonymity brings with it a sense of unaccountability for one's "anonymous" speech acts, though, it may contribute to such problems as cyber-stalking, harassment, and "virtual" sexual assault.¹⁶³

What if Allen is correct that there is an erosion of privacy-related tastes and expectations? Focusing on the implications for feminism and women's well being, a decreased expectation of and taste for privacy may be a good development, at least as it relates to "bad" or debilitating kinds of privacy. It is good, for example, that women have less taste for "privacy" with respect to keeping silent about domestic violence, sexual abuse, child abuse, and incest.¹⁶⁴ Although critics charge feminists with making everything private a matter of public concern, it is proper to repudiate a conception of privacy that allowed courts routinely to immunize abusive husbands from liability in the name of protecting family life (and men's prerogatives) against exposure to the public gaze. As discussed in Section One, it is good that violence in the home is no longer regarded as just a private matter, and that citizens do not have reasonable expectations that acts of abuse within the home will be protected behind the shield of privacy.¹⁶⁵ This is exactly the type of bad privacy that Allen and

and Liberty, N.Y. TIMES, June 11, 1997, at A22; James Gleick, *Big Brother Is Us*, N.Y. TIMES, Sept. 29, 1996, § 6 (Magazine), at 132. For a detailed discussion of the threat that cyberspace poses to privacy, see David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Kang, *supra* note 134, at 1220-46.

162. See Jonathan I. Edelman, Note, *Anonymity and International Law Enforcement in Cyberspace*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 231, 248-50 & n.90 (1996) (discussing the use of Internet anonymity to transmit racist speech).

163. See, e.g., Carol J. Adams, "This Is Not Our Fathers' Pornography": *Sex, Lies, and Computers*, in PHILOSOPHICAL PERSPECTIVES, *supra* note 160, at 147, 162-66 (arguing that the possibility of anonymity in cyberspace brings a lack of accountability that intensifies women's experience of objectification).

164. See, e.g., Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1306 (1994) (noting that women who have been raped believe they need to "tell their stories").

165. For discussion, see *supra* Sections I.A and I.B.

feminist critics of privacy rightly reject. Legal reformers similarly identify such matters as public concerns and encumbrances to citizenship.¹⁶⁶

In contrast to secrecy and silence, we have the metaphor of women (and other victims of abuse) finding their voices and breaking their silence about such crimes.¹⁶⁷ In the self-exposure manifest in the plethora of talk shows, public confessions, and various recovery movements, including their cyberspace variants, there is a variation upon the feminist theme that the personal is political. As with women "coming out" with stories about illegal abortions and unwanted pregnancies, the private is made public so that victims do not suffer in silence, so that public consciousness about intimate injuries grows, and so that, hopefully, cultural consensus shifts, prompting legal reform.¹⁶⁸ Perhaps one prominent reason for women's use of narrative and feminist emphasis upon "storytelling" is the conviction that it will address ignorance and incomprehension of women's injuries and lead to remedies.¹⁶⁹ As some critics point out, these types of self-disclosures and confessions can lead to a therapeutic model that substitutes for meaningful social and systemic change.¹⁷⁰ Yet such disclosures and waivers of privacy might also be viewed as parts of attempts to recreate the home as a place in which women can be private, intimate, and safe.

A decreased taste for bad kinds of privacy is also illustrated by the rejection of the "closet" by gay men and lesbians and their courageous entry into the cultural debate over same-sex relationships and sexuality.¹⁷¹ Here, disclosure of self and of

166. See *supra* notes 100-12 and accompanying text; see also Nancy E. Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 369-70 (1995).

167. See Stefan, *supra* note 164, at 1306.

168. See, e.g., Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1515, 1539 (1998) (noting that feminists' legal reform in the last 20 years has transformed domestic violence from a private matter to a public concern).

169. See ROBIN WEST, CARING FOR JUSTICE 207-15 (1997).

170. See WENDY KAMINER, A FEARFUL FREEDOM: WOMEN'S FLIGHT FROM EQUALITY 192 (1990); WENDY KAMINER, I'M DYSFUNCTIONAL, YOU'RE DYSFUNCTIONAL: THE RECOVERY MOVEMENT AND OTHER SELF-HELP FASHIONS 70 (1992).

171. See, e.g., Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 FORDHAM URB. L.J. 927, 948 (1994) (noting the difficulties same-sex couples face, but nevertheless encouraging such couples to "come out").

one's sexuality serves to shift society's understanding of what it means to be a gay man or a lesbian, to inform the moral debate over affording protection to same-sex marriage, and to transform the culture as well.¹⁷² Women and men who have been harmed by being forced to be silent about their sexuality and who have had to keep their lives private, and yet could have no reasonable expectation of privacy about their intimate life, may welcome a decreased expectation that they will keep silent, as well as an increased freedom to engage in more self-disclosure (in contrast, for example, to the "world of fear and deceit" created by the military's "Don't ask, Don't tell" policy¹⁷³). The simultaneous coming out of the television sitcom character Ellen and the actress portraying her became an occasion for other acts of coming out.¹⁷⁴ And when rock singer Melissa Etheridge invited the cameras of *People* magazine into the kitchen of the home she shares with her female companion,¹⁷⁵ she offered up her privacy for public view and consumption, but in doing so, she facilitated more positive public attitudes about same-sex relationships.

As discussed in Section One, recent scholarship on the import of Reconstruction suggests that part of citizenship is the right to participate in culture and the right to use society's cultural resources to make meaning.¹⁷⁶ Perhaps this scholarship would recommend not moralizing against Jenni and Sara, but facilitating *MelissaCam* or *Adam and SteveCam*, if you will, so that more voices or conceptions of the good will be available for view and critical evaluation.¹⁷⁷ At the same time, Allen rightly points out,

172. See Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil Rights Era*, 110 HARV. L. REV. 684, 687-717 (1997) (book review) (observing that a theme in recent gay and lesbian work is the vital role of cultural transformation and the importance of reflecting gay and lesbian difference and diversity).

173. Jennifer Egan, *Uniforms in the Closet*, N.Y. TIMES, June 28, 1998, § 6 (Magazine), at 26.

174. In particular, there were "Come out with Ellen" parties. See *The Week That Was*, J. RECORD (Okla. City), Apr. 27, 1998, available in 1998 WL 11960908; see also Leah Rosch, *A Change of Heart*, AM. HEALTH FOR WOMEN, June 1, 1997, at 66, available in 1997 WL 10067070 (suggesting that pop culture may be influencing women's decisions to come out).

175. Peter Castro & John Griffiths, *A House in Harmony: Singer Melissa Etheridge Hits Just the Right Note with Partner Julie Cypher*, PEOPLE, Sept. 5, 1994, at 57.

176. See *supra* note 42-57 and accompanying text.

177. Thanks to Katherine Franke for this observation. My reference to Adam and

using Madonna as an example, that today the personal may be less political than profitable, implicating a vexing debate over commodification that I will not take up here.¹⁷⁸

The ability to retain certain core values of privacy—such as restricted access and anonymity—while simultaneously engaging in some degree of self-disclosure may be especially valuable in women's exploration of sexuality. Feminist theorist Carlin Meyer provocatively argues for "Cybersexual Possibilities."¹⁷⁹ She suggests that the very anonymity of cyberspace may afford persons exploring their sexuality, particularly women, a relatively safe space to experiment with identity, desire, and relationship.¹⁸⁰ Dare we say that some women may welcome this as a good kind of privacy, in contrast to the silence about sexuality associated with norms of female modesty and propriety and the suppression of honest talk about sexuality? Meyer, who champions the importance of "free-wheeling" sex talk,¹⁸¹ argues not that pornography as presently constituted is liberatory or liberating, but that women can engage in a cultural battle for reconstituting and reconstructing sexuality along less misogynist, racist, and homophobic lines.¹⁸²

Steve comes from a slogan I once saw on a placard opposing gay rights: "God created Adam and Eve, not Adam and Steve."

178. See Allen, *supra* note 1, at 737. The impact on not only women's own privacy and private choice but also that of other women must be considered because of the social meaning of being a woman as being sexually available to men. On commodification, see MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

179. Meyer, *supra* note 12, at 1969.

180. See *id.* at 1994-2008; see also Lee Tien, *Who's Afraid of Anonymous Speech?*; McIntyre *and the Internet*, 75 OR. L. REV. 117, 173-75 & n.285 (1996) (discussing importance of anonymity to women's identity). For example, some women have written about the pleasure that they experienced through role playing in "chat rooms" in which they took on alter egos or dramatic personae. The stage names or assumed names gave them a security that they might not have felt in "real life." See *id.* at 170-73, 182-84.

181. See Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1154 (1994). For a discussion of the importance of "free-wheeling" sex talk to women's liberation, see *id.* at 1146-57.

182. See Meyer, *supra* note 12, at 1976. I recognize that there is vigorous feminist debate over pornography and whether it has liberatory potential; some feminists argue that pornography has such a silencing effect that the "more speech" remedy is ineffective. Compare Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 36 (1985), with Meyer, *supra* note 181, at 1146-57.

If, through exploring such cybersexual possibilities, women might participate in the cultural construction of sexuality and educate and inform themselves and others about female desire (and the lack thereof), fantasies, fears, and the like, this seems to be an important step toward a society in which misogynistic and merely male-centered views of sexuality hold less sway.¹⁸³ Like Meyer, I do not mean to ignore that problems of male domination and sex inequality in “real life” also carry over into “virtual reality.”¹⁸⁴ So too, while there is some encouraging evidence that women are “fast closing the Web gender gap,”¹⁸⁵ for cyberspace to realize its potential to foster more equality and agency, much remains to be done to expand access and inclusion across barriers of sex, race, and class.¹⁸⁶ Nonetheless, Meyer’s feminist argument that cyberspace could offer a place for sexual reconstruction “in the safety of anonymity and privacy” suggests the continuing appeal of good kinds of privacy—that is, privacy that allows persons to form and revise their identities and to form associations.¹⁸⁷ Indeed, the ability to enter into (and exit) many different types of conversations and encounters in cyberspace, and to experiment with identity and act with varying degrees of self-disclosure, may facilitate new forms of self-consti-

183. See Gina Kolata, *Women and Sex: On This Topic, Science Blushes*, N.Y. TIMES, June 21, 1998, § 15, at 3 (reporting an absence of research concerning female sexual desire (and lack thereof) and Dr. Julia Heiman’s comments that, for society to sanction research on sexual dysfunction in women, “[p]eople would have to view women’s sexual desire as an important issue”).

184. See, e.g., Adams, *supra* note 163, at 147-62 (noting the presence of the “real life” problems of male domination and exploitation of women in cyberspace). There are also, undeniably, some shocking stories of violence that follow when persons who meet on the Internet meet and date in real life. See, e.g., *Man Convicted of Assaulting Woman He Met on Internet*, DALLAS MORN. NEWS, Apr. 16, 1998, at 8A, available in 1998 WL 2528572.

185. Nina Teicholz, *Women Want It All, and It’s All on Line*, N.Y. TIMES, Oct. 22, 1998, at G10.

186. For a helpful discussion, see CYBERSPACE DIVIDE: EQUALITY, AGENCY AND POLICY IN THE INFORMATION SOCIETY 35-56 (Brian D. Loader ed., 1998); Meyer, *supra* note 12, at 2007 (arguing against censorship of sexually explicit material on the Internet and in favor of expanding Internet access to women and across class boundaries).

187. See Meyer, *supra* note 12, at 2008. In contrast to walking down a city street (certainly my experience in New York City), it is unusual that a person “traveling” in cyberspace accidentally or unwillingly encounters explicit sexual material. If a “conversation” one is either participating in or following becomes offensive, one can, so to speak, leave the room.

tution and self-revision, and may lead to greater fluidity in thinking about the meaning and boundaries of gender and sexual identity.¹⁸⁸

CONCLUSION

Reconstructing privacy is a worthwhile task. I concur in Professor Allen's steadfast insistence that privacy is salvageable and eminently worthy of feminist embrace. In this Essay, I suggest the contours of three reconstructive projects vital to an adequate liberal feminist conception of privacy. If, as Allen concludes, "[w]e are very much at the beginning, not the end, of a fresh line of thinking about privacy, culture, and regulative norms,"¹⁸⁹ attending to those reconstructive projects is important. There will likely be an ongoing debate over the relationship of privacy to citizenship and whether and how government might, as Allen prescribes, shore up privacy norms as part of a formative project, as the new information technologies make new forms of self-exposure possible. I have raised some questions about the justification for and the contours of such a project. In pursuing these issues further, it is important not to ask too much of privacy, because one value alone cannot provide us with a complete account of the good life or the preconditions for free and equal citizenship.

188. To be sure, acts of self-exposure that take place within a patriarchal culture assigning them meaning may be read as having a meaning quite different from the meaning intended by the person doing the exposing.

189. Allen, *supra* note 1, at 757.