

At Home in the Law

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Introduction

Charity and beating begins at home.

--Francis Beaumont and John Fletcher, *Wit without Money*

On or about June 18, 2002, Americans woke to discover that we had a “homeland” that would be the focus of the newly proposed Department of Homeland Security. The nation had undergone a profound change in its sense of safety and comfort in the world since September 11, 2001, the first foreign attack on United States soil in almost two centuries. Official talk of “securing our homeland” entered awkwardly into the language.¹ The word “homeland” was not theretofore completely unknown,² but commentators soon remarked that it was odd and out of place in the American lexicon.³ It had a foreign, “vaguely Teutonic ring.”⁴ It was unfamiliar and uncomfortable. Some even called it “creepy.”⁵

Why? Peggy Noonan, the Reagan-Bush speechwriter known for her linguistic acuity, related a friend’s discomfort “any time this sort of home-and-hearth language is used by people who are essentially police.”⁶ Home evoked the distinctive intimate

¹ See Strategic Plan: Securing Our Homeland, http://www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf; Eugene Robinson, *A War of Words*, Wash. Post., Sept. 12, 2006, at A23 (“‘Homeland’ is one of the burdens left to us by the trauma of Sept. 11, 2001.”).

² For accounts of the advent of “homeland” in the U.S., see Maggie Burns, *The Strange Career of “Homeland Security,”* Online Journal, June 29, 2002; William Safire, *Every Conflict Generates its Own Lexicon*, N.Y. Times, Sept. 30, 2001; William Safire, *Homeland: It Takes a Heap of Defining*, N.Y. Times, Jan. 20, 2002.

³ See Mickey Kaus, *The Trouble with “Homeland,”* Slate, June 14, 2002, <http://www.slate.com/?id=2066978>; Peggy Noonan, *Rudy’s Duty, Plus: Homeland ain’t no American word*, WSJ Opinionjournal, June 14, 2002, <http://www.opinionjournal.com/columnists/pnoonan/?id=110001838>. Before 9/11, “homeland” was most commonly used to refer to the country of origin or native land of persons who came from outside the U.S., and this is still a common usage of the term. See Oxford English Dictionary (defining “homeland” “[t]he land which is one’s home or where one’s home is; one’s native land”).

⁴ Noonan, *supra* note xx.

⁵ Kaus, *supra* note xx; Noonan, *supra* note xx.

⁶ Noonan, *supra* note xx.

freedom of private interior spaces. Now the concept of home was justifying the most public of imperatives.⁷ The sentimental associations of home were being conscripted into the service of coercive state power.

For most people, the idea of home has formative cultural and psychic significance. In the Anglo-American legal tradition, the home and its correlate, the house, have long been associated with security against violent invasion. Though domestic space is a familiar trope for nation, the old adage, “an Englishman’s house is his castle,” is usually invoked with respect to a person’s dwelling. Blackstone wrote that “the law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle, and will never suffer it to be violated with impunity.”⁸ Burglary of a man’s house, a cause for “abundant terror,” was “a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature.”⁹

In American law, the idea of home has retained significance, informing legal conceptions of crime, violence, sex, family, privacy, liberty, and property. In particular, home has played a defining role in the criminal law of burglary, self-defense, and domestic violence. Home has also been central to the definition of constitutional rights, including the Fourth Amendment’s prohibition of unreasonable search and seizure, and the Fourteenth Amendment’s guarantee of due process.

In Blackstone’s characteristically insightful formulation quoted above, home is simultaneously the place of unique security and comfort, and the place of unique potential for terror and vulnerability. The strange duality of sensation in the home brings to mind Freud’s famous discussion of the role of home in the psyche. Analyzing the German word for “homely” (*heimlich*), Freud noticed that “on the one hand it means what is familiar and agreeable, and on the other, what is concealed and kept out of sight.”¹⁰ He observed that oddly, the word’s meaning -- home-like, intimate, friendly, comfortable, secure -- “develops in the direction of ambivalence, until it finally coincides with its opposite, *unheimlich*” – literally unhomely, but standardly translated as “uncanny.”¹¹ The quietly horrifying anxiety, “that class of the frightening which leads back to what is known of old and long familiar,” was the creepy feeling of the homely becoming its opposite, the safe becoming scary, the familiar becoming strange.¹² It was that process of change that captured the particular deep ambivalence of home. We must have the idea of a man’s home as his castle, the ultimate inviolable, in order to experience the terror at the thought of its invasion.

⁷ Cf. Hendrik Hertzberg, *Too Much Information*, THE NEW YORKER, Dec. 9, 2002 (describing the invocation of home as an “Orwellian” campaign to rationalize dismantling the sanctity and privacy of home); William Safire, *You are a Suspect*, N.Y. TIMES, Nov. 15, 2002.

⁸ 4 William Blackstone, Commentaries *223.

⁹ *Id.*

¹⁰ Sigmund Freud, *The Uncanny*, in 17 The Standard Edition of the Complete Psychological Works of Sigmund Freud 224-25 (James Strachey et al. trans. & ed. 1955).

¹¹ *Id.* at 226.

¹² *Id.* at 220.

Times when home is undergoing transformation are prime moments of the emergence of the unhomely.¹³ Discourses of home have become distinctively fraught in our time as Americans have grappled with what it means for the secure house of the U.S. to be insecure. Against that backdrop, myriad legal debates that implicate the idea of home have seen resurgent prominence.

Home marks the literal delineation between private and public space. At the same time, the home represents the metaphorical boundary between private and public spheres. On both the literal and metaphorical planes, then, the home raises the most basic questions about the relation between individuals and state power.

In areas of great importance to individuals' relations to the state and to each other, home is often invoked as though its significance were self-evident. But the meaning of home is intensely contested today. It is a site of struggle over the basic ideas that frame and construct our evolving legal universe.

Before the new global threats, the most significant historical transformation in the notion of home in American life grew from the feminist challenge to the received nineteenth-century bourgeois idea, the apotheosis of the close association of home with women. In 1903, the writer Charlotte Perkins Gilman, as much a child of late Victorian domesticity as Freud, observed women trapped in the home, cut off from public life and not free to develop their mental and physical capabilities. She saw "a repulsive horror in the mass of freakish ornament on walls, floors, chairs, and tables, on specially contrived articles of furniture, on [the woman's] own body and the helpless bodies of her little ones, which marks the unhealthy riot of expression of the overfed and underworked lady of the house."¹⁴ The protection of women in private space, away from public intercourse, was a madness-making technique of female subjugation. Insofar as the home was a man's castle, it was also a woman's prison. The cultural image of women enclosed in the home evoked a legal analogue -- coverture, the gradually superseded common law of marital status wherein married women's legal identities were "covered" by their husbands' and had no existence of their own.

If to Gilman's eye, the home was "the least evolved of all our institutions,"¹⁵ it is striking, more than a century later, to see how much it is evolving still. The epochal legal reform of the home in the late twentieth century has concentrated on violence. The cultural idea of subordination that has driven this legal reform is not merely the paternalistic relegation of women to the private sphere. It is, rather, assaults, rape, and threats against women in the home. Just as the protective walls of the home became sinister to a nineteenth-century observer,¹⁶ the domestic privacy ensured by law turned

¹³ On the "unhomely," see Homi K. Bhabha, *The Location of Culture* 9-11 (1993).

¹⁴ CHARLOTTE PERKINS GILMAN, *THE HOME* xx (reprinted 1970).

¹⁵ *Id.* at 23.

¹⁶ *Cf.* Charlotte Perkins Gilman, *The Yellow Wallpaper*, in *THE CHARLOTTE PERKINS GILMAN READER* 3-20 (ed. Ann. J. Lane, 1980).

out to shield violence from public intervention.¹⁷ The home was revealed as a place of “terrifying love,” as named in the title of Lenore Walker’s classic work.¹⁸

Seeing the home not primarily as a place where a woman is protected from the world by the man of the castle, but rather where a man inflicts violence on her, involves a gestalt shift in the legal culture’s vision of home. This transformation works through themes already present in Blackstone, namely the nexus of house, security, terror, and violence. And what is more unhomey than such a shift in the meaning of home, in which the safe and familiar becomes visible also as violent, terrifying, and ultimately, criminal?

The last forty years have been marked by profoundly influential feminist argument and advocacy to transform the way that the home as an institution is treated, particularly by the criminal justice system. The ideas that drive the social movement for reform are no longer new or radical to us. They are now at home in the law. They have established more than a foothold in legal doctrine, theory, and practice.

Yet close examination shows how these ideas are discomfited and vexed in the law, how they seem at once long-established there and yet incongruent with what we have thought home – and law -- to be. Legal materials produced today by judges, lawyers, and scholars of all political stripes reflect, but also contest, these shifted conceptions, and reveal inconsistencies and excesses. From routine arraignment in the lowest courts in the land – local misdemeanor courts – to constitutional adjudication in the Supreme Court of the United States, the concept of home has particular urgency today. The uses of the concept are characterized by a sense of the unsettled and unsettling, as the shifted meanings work their way through the legal system.

The work of this book is to illuminate the changing legal meanings of home by unpacking a range of contemporary legal issues connected variously to the criminal law. My focus is the relation between home and the police. Consider two basic ways of looking at the relation:

On the one hand, there is a traditional view of the home as the ultimate place of security from other people. This is the view originally captured in the adage that a man’s home is his castle. If a man’s home is his castle, the police are the army deputed to ensure that it remains inviolate and safe from attack.

On the other hand, there is the idea that we are most free in the home, indeed that the home is the exemplary site of individual liberty. We worry about intrusion, regulation, and control by government. In the words of the Supreme Court in *Lawrence*

¹⁷ See, e.g., Reva Siegel, “*The Rule of Love: Wife Beating as Prerogative and Privacy*,” 105 Yale L.J. 2117 (1996).

¹⁸ LENORE WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989).

v. Texas, a watershed constitutional case for the times, “In our tradition the State is not omnipresent in the home.”¹⁹

The first means “police protect the home,” and the second means “police stay out of the home.” The first sounds primarily in security, and the second sounds primarily in liberty. On the surface it might appear that the principles of security and liberty apply in different situations: for example, the police should protect the home in instances of violence, and the police should stay out of the home in contexts of privacy, such as search and seizure and consensual sex. But reflecting on the way that discourses of home emerge in the legal landscape, we can see each paradigm working its way into the other’s space. As the cultural image of the home as the exemplary place of coercion and abuse gains ascendance, the notion of home privacy is criticized as merely shielding that violence. We worry not about government intrusion but about government failure to intervene in the home.

By the same token, the imperative that the police protect the home no longer primarily refers to protection from intruders but rather protection from family members. It becomes increasingly natural to expect police presence in the home. Its purpose is to ensure that the home is indeed the place of ultimate security, by preventing insidious closed-door harm from husbands, boyfriends, and fathers. The obvious need for protection from home violence itself raises profound concerns about practices whereby the state comes to control home space and private decisions. The issues have become increasingly interpenetrated and difficult to cabin into separate legal spheres or political commitments.

In tandem with the contestation and transformation of the idea of home, we can discern a corresponding shift in notions of what constitutes crime. If one way crime was imagined was as the crossing of a boundary – whether physical or legal – it is now increasingly understood as the subordination of a person by another in one space. The legal boundary surrounding the home has eroded at the same time that rights based on home metaphors have expanded.

What is the idea of home that today most powerfully shapes the law? It is not “home sweet home,” or “home is where the heart is,” or even “Home is the place where, when you have to go there, / They have to take you in.”²⁰ The rising legal vision of the home today is that of actual or potential violence in private space. Home is where the crime is.

Legal doctrine, practice, and discourse are coalescing around this idea of the home as a place of subordination that portends abuse. This is the growing common sense notion of legal actors. It increasingly constructs the way the law conceives of domestic intimacy as well as the relationship between the state and the private space, in surprising ways. We see legal reasoning that reflects the hardening and generalizing of the home-

¹⁹ 539 U.S. 558, 562 (2003).

²⁰ Robert Frost, “Death of the Hired Man.”

as-violence idea, with a range of unexpected consequences. We see practices that make public and private more legally similar spaces than they were in the past, even as the discourse of home abounds.

Though my immediate intent is not to provide directives for outcomes in the legal debates featured here, my project is unavoidably normative, as I present interpretations of the values and ideals that are in play when we invoke the concept of home in legal discourse. Reflection on what “home” has become and what we want it to be will enable us to protect those values and ideals as we continue to build the legal structures that house us as citizens in the polity.

Chapter 1 focuses on burglary, the archetypal home crime, and shows how courts have translated domestic violence into the paradigm crime of home invasion. Chapter 2 considers practices in the quotidian world of misdemeanor domestic violence enforcement whereby the criminal law reorders and controls intimate relationships in the home through what I call state imposed de facto divorce. Chapter 3 contextualizes and explicates the contemporary expansion of self-defense law driven by a powerful NRA-driven reform movement that marries the traditional legal rhetoric of the “castle” with the need to protect of women against subordination. Chapter 4 dwells on the idea of home property, and considers the relation between several recent Supreme Court decisions on takings and due process, through the lens of state deprivation of the home. Chapter 5 is a reflection on the figure of the woman in the legal imagination of home privacy, exploring the judicial articulation of privacy through and around the notion of shielding women from men.

Chapter 5

Is Privacy a Woman?

(adapted version also forthcoming Georgetown Law Journal)

Of a green evening, clear and warm,
She bathed in her still garden, while
The red-eyed elders, watching, felt
The basses of their beings throb
In witching chords, and their thin blood
Pulse pizzicati of Hosanna.

In the green water, clear and warm,
Susanna lay.
She searched
The touch of springs,
And found
Concealed imaginings.

--from Wallace Stevens, *Peter Quince at the Clavier*

Sex and Gadgets

In the penultimate scene of the James Bond movie, *The World is Not Enough* (1999), M (played by Judi Dench) and her team deploy a thermal-imaging satellite device to try to find Bond, who is with Dr. Christmas Jones, a nuclear physicist with whom he has just completed a mission. As they home in on Bond's location, the screen displays a red thermal image of his body lying on a bed. Then they discern an additional pair of legs in the bed. The image gets redder, signifying increasing heat. The accidental voyeurs come to realize that the thermal image is revealing Bond and Dr. Jones . . . in a compromising position! At M's prudish exclamation, Q (played by John Cleese) abruptly shuts off the image, sheepishly blaming a "premature form of the millennium bug."

At the turn of the millennium, forty years after Justice Stewart offhandedly mocked a futuristic fantasy of "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society,"¹ the Supreme Court in *Kyllo v. United States* considered the government's use of a thermal-imaging device to detect the amount of heat emanating from a home.² The Court held that this use constituted a "search" within the meaning of the Fourth Amendment and thus was subject to the Amendment's

¹ *Silverman v. United States*, 365 U.S. 505, 509 (1961).

² 533 U.S. 27 (2001)

prohibition against unreasonable searches.³ Suspecting that Danny Kyllo was growing marijuana in his home using heat lamps, the police, parked on a public street, scanned his house using a thermal imager that “operate[d] somewhat like a video camera showing heat images.”⁴ Based in part on the image of hot spots on the roof and wall, the police got a warrant to search his house and found a marijuana-growing operation.⁵

Writing for the Court, Justice Scalia thought the broad question was “what limits there are upon th[e] power of technology to shrink the realm of guaranteed privacy.”⁶ The realm of privacy here was “the prototypical” interior of the home.⁷ Freedom from unreasonable government intrusion into the home, of course, lay at the core of the Fourth Amendment’s guarantee of privacy, and it was well established that a warrantless search of a home was presumptively unreasonable in violation of that amendment.⁸ But the issue here was whether the government’s use of a thermal imager to detect heat being emitted from the home was a “search” at all. The Court had previously held that naked-eye visual surveillance of a home in plain public view was not a search.⁹ But what about observations of a home aided by “sense-enhancing technology”?¹⁰

Faced with that thought, the Court feared to “leave the homeowner at the mercy of advancing technology – including imaging technology that could discern all human activity in the home.”¹¹ It anticipated a world in which the police might be equipped with the functional equivalent of x-ray vision in conducting surveillance without a warrant, which would render the home totally transparent. The most basic means of hiding private activity -- the walls of a home -- might be undone.¹² The Court thus held: “Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”¹³

³ The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV.

⁴ *Kyllo*, 533 U.S. at 29-30. For a concise overview of the parameters of modern search doctrine, see William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1267-70 (1999). See also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757-800 (1994) (critically assessing the evolution of the doctrine).

⁵ *Kyllo*, 533 U.S. at 30. *Kyllo* was indicted for manufacturing marijuana, in violation of 21 U.S.C. § 841(a)(1). See *id.*

⁶ *Id.* at 34.

⁷ *Id.* See also *id.* at 40 (“We have said that the Fourth Amendment draws ‘a firm line at the entrance to the house.’ That line, we think, must be not only firm but also bright-which requires clear specification of those methods of surveillance that require a warrant.”) (citing *Payton v. New York*, 445 U.S. 573 (1980)),

⁸ See *id.* at 31 (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

⁹ See *id.* at 32 (citing *Dow Chem. Co. v. United States*, 476 U.S. 227, 234-35, 239 (1986)).

¹⁰ *Id.* at 34.

¹¹ *Id.* at 35-36.

¹² For recent discussions of tensions between Fourth Amendment privacy and technology, see Renee McDonald Hutchins, *Tied Up In Knots? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409 (2007); Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531 (2005); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH L. REV. 801 (2004); Jonathan Zittrain, *Searches and Seizures in a Networked World*, 119 HARV. L. REV. F. 83 (2005).

¹³ *Kyllo*, 533 U.S. at 40.

Lady in Heat

But wait a minute. In *Kyllo*, the only detail the device was capable of detecting was the amount of heat emanating from the house. Writing in dissent, Justice Stevens dismissed “the notion that heat emissions from the outside of a dwelling are a private matter implicating the protections of the Fourth Amendment.”¹⁴ But according to Justice Scalia, “the Fourth Amendment sanctity of the home” meant that “[i]n the home, . . . *all* details are intimate details, because the entire area is held safe from prying government eyes,” including “how warm . . . *Kyllo* was heating his residence.”¹⁵ Home privacy thus did not depend on whether the particular details observed were to be considered intimate. Even “the officer who barely cracks open the front door and sees nothing but the non-intimate rug on the vestibule floor” performed a search of a home that was unconstitutional without a warrant.¹⁶

In any event, Justice Scalia speculated, the heat-sensing device at issue might well disclose intimate information – such as “at what hour each night *the lady of the house takes her daily sauna and bath.*”¹⁷ This far-fetched figure of the imagination is apparently intended to evoke private acts that people care to hide from public view. What is striking about this particular detail is its anachronism. If people today do anything daily in their home, it is shower, not bathe. Moreover, Justice Scalia does not imagine merely any detail of the home, but a woman, specifically a “lady.” And speaking of “the lady of the house” implies a master of the house. Presumably what this anachronistic language calls to mind is the privacy interest of the man entitled to see the lady of the house naked, and his interest in shielding her body from prying eyes. Privacy is figured as a woman, object of the male gaze.

The lady in the bath thus pits old against new, anachronism against futuristic technology. She is a figure for old-fashioned privacy under threat. Privacy is a woman -- not just a woman, but a lady -- imagined as domesticity in a well-ordered bourgeois marital home. Justice Scalia invites us to “see” a thermal image of this lady. We cannot read his words without visually outlining her body. We become invited voyeurs. Her sybaritic form is revealed to show the need to keep her hidden from view.

In the Bond film with which I began, the meaning of the heat image – sex – is revealed as increasing heat is sensed by the thermal imager. What is the meaning of *Kyllo*’s detection of old-fashioned heat-generation? Justice Scalia invites us to gaze at the forbidden. He does not state crudely that frightening paraphernalia might one day reveal people at home engaged in a sex act. But the suggestive revelation of the lady in the bath is innuendo (metonymy) of the private space contiguous to the bath. We hear the ironic echoes of Justice Douglas’ rhetoric in *Griswold v. Connecticut*, “Would we

¹⁴ *Id.* at 43 (Stevens, J., dissenting).

¹⁵ *Id.* at 37-38.

¹⁶ *Id.* at 37.

¹⁷ *Id.* at 38 (emphasis added).

allow the police to search the sacred precincts of marital bedrooms for telltale signs of . . . well, marital sex. And of course the “very idea” of which is “repulsive to notions of privacy surrounding the marriage relationship.”¹⁸ We are conscripted into witnesses of “repulsive” conduct – the snooping, and perhaps also the sex.¹⁹

The surreptitious gaze on a naked woman bathing is of course a Western trope whose greatest source is the biblical story of Susanna and the Elders. While two judges are at a rich man’s house where they meet for legal proceedings, they secretly observe his beautiful wife bathing in the walled garden. They threaten that if she does not have sex with them they will publicly accuse her of adultery.²⁰ Having refused them, she is arrested, tried, and convicted, but ultimately the accusation is proven false. The accusers are put to death by the law and her virtuous reputation is restored. This is a legal story about forbidden desire, surveillance, and punishment. The visual image of this wife is projected into our mind’s eye by innumerable works of art since the Renaissance, among them paintings by Titian, Tintoretto, Veronese, Annibale Caracci, Artemisia Gentileschi, Rubens, Van Dyke, Guido Reni, and Rembrandt, whose depictions of Susanna range from chaste nude to erotic temptress.

Kyllo’s lady in the bath draws on a complex of cultural associations that emanate from this canonical story: The prying lustful eyes of legal elders who violate the private boundary of a home and lust after a man’s wife. The predication of well-ordered domesticity on the wife’s virtue, gravely threatened by the suggestion of sexual infidelity, even rape, enacted in the voyeur’s secret observation of her naked body. The restoration of domestic order qua legal order by the cutting off, even punishment, of the gaze.

The rhetorical power of the old adage, a man’s house is his castle, lies in its comparison of the ordinary man to the king. A man is like the king in being a man in the home constructed by a common law in which a wife’s legal identity was subsumed by that of her husband “under whose wing, protection, and cover, she performs every thing,” to quote Blackstone.²¹ If the home is a barrier against intrusion, the entailment of anxiety about intrusion, expressed as anxiety about female sexual virtue, is also anxiety about usurpation by another man. This meaning of being the man of the castle is also suggested by the myth of Gyges, the other exemplar of the surreptitious male gaze in the Western canon. As told by Herodotus, King Candaules wants to show his beautiful queen to Gyges, his royal guard and confidant, and arranges for him to hide in her bedroom to see her naked. But the queen sees him, becomes enraged, and puts to him the choice of killing the king or being killed himself. Gyges slays the king, takes the crown, and marries the queen.²²

¹⁸ 381 U.S. 479, 485-86 (1965).

¹⁹ Cf. David Allen Sklansky, “*One Train May Hide Another*”: Katz, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 U.C. Davis L. Rev. 875, 916-18 (2008) (suggesting that the reaction of disgust at the policing of gay sex may be transference of disgust at gay sex).

²⁰ Book of Daniel, Chapter 13.

²¹ Blackstone.

²² Herodotus, *The Histories*.

What it means for a man's home to be his castle then is to shield his wife's body from other men's desire. To neglect or decline to do so is to prove himself unworthy to be the man of the castle, unworthy of that domain of privacy to which a man in his home is entitled. But recapitulating the age-old paradox attending the visual representation of voyeurism, Justice Scalia's *Kyllo* reveals the woman's body to illustrate the imperative to hide it.

Penetrating the Home

But perhaps we are getting carried away. After all, the device in *Kyllo* detected merely heat on the external walls of the house, not people inside. Justice Stevens, so down to earth here, thus reminds us: "In fact, the device could not, and did not, enable its user to identify either the lady of the house, the rug on the vestibule floor, or anything else inside the house"²³ It was not actually x-ray -- or x-rated -- vision. Justice Stevens found it significant that the device could not perform "through-the-wall" surveillance.²⁴ That is, the device only detected heat from the *exterior* surfaces of the home; the police would have to *infer* details about the *interior* of the home from information that was already exposed to the public. Justice Stevens wrote: "It would be quite absurd to characterize their thought processes as 'searches,' regardless of whether they inferred (rightly) that petitioner was growing marijuana in his house, or (wrongly) that 'the lady of the house [was taking] her daily sauna and bath.'"²⁵ An inference, Justice Stevens thought, could not amount to a Fourth Amendment search.²⁶

This distinction between a "search" and an "inference" tracks the difference between inside and outside. If technology were to give the police "[t]he ability to 'see' through walls and other opaque barriers,"²⁷ what would that mean? Here po-mo Justice Scalia performed an impressive take-down of the distinction between searching and inferring, between inside and outside. Short of "an 8-by-10 Kodak glossy that needs no analysis (i.e., the making of inferences)," he said, even "through-the-wall radar or ultrasound technology" requires inference to make conclusions about activities inside a home.²⁸ The heat must be interpreted to suggest details of the inside of the home. It is interpretive inference then that effectively penetrates the wall.

Ultimately, the Court's test of whether a Fourth Amendment search occurred was whether the device revealed "details of the home that would previously have been unknowable without physical intrusion."²⁹ Justice Stevens objected that the heat-sensor "did not accomplish 'an unauthorized physical penetration.'"³⁰ The crux of the

²³ *Id.* at 50 (internal citations omitted).

²⁴ *Id.* at 47.

²⁵ *Id.* at 44.

²⁶ *See id.*

²⁷ *Id.* at 36 n.3.

²⁸ *Id.* at 36.

²⁹ *Id.* at 40.

³⁰ *Id.* at 43 (quoting *Silverman v. United States*, 365 U.S. 505, 509 (1961)).

disagreement was thus whether interpretation that produces knowledge about the inside of a home was tantamount to . . . penetration.

The lady in the bath, a figure for privacy at the mercy of advancing technology, embodies anxiety about penetration. As if to perform her danger, Justice Scalia invites us to view her in her private nighttime ritual. The use of voyeurism as a device in *Kyllo* associates penetration of women with interpretive inference that amounts to penetration of walls. As the image of the lady in the bath becomes visible, the specter of “unauthorized physical penetration” – rape – arises. Voyeuristically “seeing” the lady in the bath through opaque barriers – through inference – thus suggests the physical penetration of the home that is the prototypical Fourth Amendment violation. Juxtaposed to the figure of privacy as a lady whose body might be violated by being seen, the rhetoric of penetration underscores the Court’s conviction that obtaining knowledge of the inside of a home through inference aided by technology is indeed a search. The lady in the bath underscores that when the walls of the home become penetrable by technology, the castle becomes penetrable like the woman’s body.

The Disordered Home

If *Kyllo*’s lady in the bath evokes both the sanctity of the home and the anxiety about intrusion by the government, the notion of privacy is wrapped up in the idea of shielding the woman in the home. But this presupposes the orderliness of the bourgeois marital home with husband and wife playing proper roles. But what about when the home is not so orderly?

In the 2006 case of *Georgia v. Randolph*, the idea of protecting a woman played a more explicit and elaborated role in the Supreme Court’s consideration of Fourth Amendment privacy.³¹ This time the woman was not the lady of an old-fashioned, well-ordered domesticity, but rather, a wife in a home disordered by domestic violence. The question in *Randolph* was the reasonableness of a warrantless entry and search of a home when an occupant gives the police consent and another occupant expressly refuses entry. The Court held that such a search as to the unconsenting occupant was unreasonable.

Warrantless entry of a home is presumptively unreasonable, of course, except when the police have the voluntary consent of a person possessing authority. The question thus appeared simple. When two people who live in the same home disagree on whether the police may enter and search, which one should prevail – the consenting occupant or the objecting occupant? A previous decision by the Court had held that the police may enter with an occupant’s consent in the other occupant’s absence.³² But in *Randolph*, the physical presence of the objecting occupant was a distinction that made a difference.

³¹ 547 U.S. 103 (2006).

³² See *United States v. Matlock*, 415 U.S. 164 (1974).

Randolph produced six separate opinions by the Justices that revealed the fault-lines in the modern meaning of home privacy. The case featured conflict between feuding spouses whose intentions with respect to the continuation of their marriage were unclear. All was not well in Scott and Janet Randolph's home. Janet had called the police about a domestic dispute in which her husband took their son to a neighbor's house.³³ When the police arrived, she told them of marital troubles, a spousal separation, a foray with her son to Canada, and her recent return to the marital home.³⁴ Scott told of taking their son to a neighbor to prevent his wife from taking him out of the country again.³⁵ Janet then revealed that her husband used drugs. Over Scott's objection, Janet led the police to Scott's bedroom, where they found a straw with cocaine residue.³⁶ On that basis, the police got a search warrant and found further drug evidence with which to indict Scott for cocaine possession.³⁷ The marital disunity and disorderliness in their home seemed borne out in the couple's division over consent to search their home and willingness to display their conflict to the police.

Calling

At oral argument, Justice O'Connor started off questioning of counsel for Georgia by asking whether letting in a stranger "against the express wishes of your spouse or co-habitant" was "socially acceptable."³⁸ Counsel answered that he thought it was "common," to which O'Connor retorted, "Well, it might be common, but I'm not sure that's an acceptable kind of performance."³⁹ O'Connor's immediate distinction between the socially common -- with its double valence of widespread and lower class -- and the socially acceptable proved important indeed.

Justice Souter writing for the Court emphasized "the great significance given to widely shared social expectations" in the determination of what is reasonable under the Fourth Amendment.⁴⁰ Applying this notion of social expectations to the situation where people who share a house disagree, Justice Souter asserted that "a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying 'stay out.' Without some very good reason, no sensible person would go inside under those conditions."⁴¹

The reference to a visitor to a house as a "caller" bears remark. When juxtaposed with the concept of "social expectations," the effect of the deliberately anachronistic term "caller" is to evoke the social context in which that term was regularly used. With his

³³ See *Randolph*, 547 U.S. at 107.

³⁴ *Id.* at 106-07.

³⁵ *Id.* at 107.

³⁶ *Id.*

³⁷ See *Randolph*, 547 U.S. at 107.

³⁸ Transcript of Oral Argument at 3-4, *Georgia v. Randolph*, 547 U.S. 103 (2006) (No. 04-1067).

³⁹ *Id.* at 4.

⁴⁰ *Georgia v. Randolph*, 547 U.S. 103, 111 (2006).

⁴¹ *Id.* at 113.

word choice, Justice Souter, himself known to be partial to the manners of previous generations of gentlemen,⁴² calls to mind the social world of the Gilded Age when the norms of calling upon others in their homes were codified in shared rules of etiquette.⁴³ In this world, social manners and conduct in society were conceived and practiced as a system of rules akin to a legal code.⁴⁴

A person would pay a call by arriving at the home of a lady, during an hour designated as a time when she was “at home,” which was to say, prepared to receive callers.⁴⁵ It was the prerogative of the lady of the house to choose whether or not to receive a particular caller.⁴⁶ The caller would present a calling card engraved with his name.⁴⁷ The entire process was steeped in formality, and implied the existence of a servant to field the enquiry at the door and to bear the message of arrival.⁴⁸ The acceptability of the caller might be secured by the “style of a gentleman’s card, the hour of his visit, and his address,” in addition to the person arranging the introduction.⁴⁹ The caller was told that the lady was “at home,” and unacceptable callers were told that she was not at home.⁵⁰

⁴² Cf. William H. Freivogel, *Courtly: Souter is Formal But Relaxed*, ST. LOUIS POST-DISPATCH, July 26, 1990, at 1C (“[Friends] portray [Souter] as a 19th-century man fond of tradition . . .”); David Margolick, *Bush’s Court Choice; Ascetic at Home but Vigorous on Bench*, N.Y. TIMES, July 25, 1990, at A1 (quoting a friend describing Souter as “‘in the 18th-century mold.’ He has ‘magnificent handwriting that looks like calligraphy,’ and is courtly and unfailingly polite”); Margaret Carlson Washington, *An 18th Century Man*, TIME, Aug. 6, 1990 (“Souter’s social activities resemble those of an 18th century gentleman . . .”).

⁴³ The portrayal of society in the American novel of manners, such as in the works of Edith Wharton and Henry James, could hardly be lost on Justice Souter. E.g., Henry James, *The Ambassadors*; Henry James; *The American*; Edith Wharton, *The Age of Innocence*; Edith Wharton, *House of Mirth*.

⁴⁴ See, e.g., A WOMAN OF FASHION, ETIQUETTE FOR AMERICANS 5 (1898) (“[T]here is no ordinance in the social legislation which does not confer comfort for obedience, and no well-established usage that has not been founded for that reason.”); *id.* at 11 (“Manners, like everything else in life, have to be learned by rule.”); SOCIAL ETIQUETTE OF NEW YORK 5 (1892) (describing the social etiquette of New York as “a law unto itself”); KAREN HALTTUNEN, CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830-1870, at 102, 112 (1982).

⁴⁵ See ETIQUETTE FOR AMERICANS, *supra* note xx, at 52 (“You announce that you will be at home between certain hours; your friends, in walking costume, wait upon you.”); SOCIAL ETIQUETTE OF NEW YORK, *supra* note xx, at 92-93 (describing customary forms of invitation to tea and coffee using the “at home” formulation).

⁴⁶ See ETIQUETTE FOR AMERICANS, *supra* note xx, at 48-49 (“A man in this country must be asked to call, before he may venture to do so. . . He then calls as soon as possible after the invitation is given”); *id.* at 49-50 (“[T]he receiving party is always a woman, of course. . . It is always the wife who receives, not the husband.”); SOCIAL ETIQUETTE OF NEW YORK, *supra* note xx, at 78-79 (indicating that “[a]fter a gentleman has been presented to a lady,” “[h]e must bide his time until an acquaintance through mutual friends disposes the lady to open the doors of her home to him,” and that “[h]e is permitted at first to call upon formal receiving days”).

⁴⁷ See SOCIAL ETIQUETTE OF NEW YORK, *supra* note xx, at 78-89 (describing calling card etiquette for gentlemen).

⁴⁸ See ETIQUETTE FOR AMERICANS, *supra* note xx, at 47 (“Put your card on a convenient place in the hall, or on the tray the servant holds out for you, and mention your name to the manservant, if there is one. A man or a maid usually takes the card on a tray, and stands holding the curtains (perhaps) aside, for you to enter, speaking your name audibly at the same time.”).

⁴⁹ SOCIAL ETIQUETTE OF NEW YORK, *supra* note xx, at 82.

⁵⁰ Hattunen, *supra* note xx, at 112.

The system of calling and receiving callers was a privilege of the high bourgeoisie. A late nineteenth-century book on etiquette, which purports to “furnish a report or a description of our customs as taught and practiced by the superior families of New York city,”⁵¹ characterizes the system of calling as “a wall of defense against strange and unwelcome visitors. However unpleasant the result may be of an attempt to make a lady’s acquaintance, every true gentleman will recognize the necessity of barriers across the sacred threshold of the home.”⁵² The system of calling was a code within “[a] common formula of courtesies, which is known as our own social etiquette, which should be the thoroughly understood method of communicating our regard for each other.”⁵³ Etiquette “is like a wall built up around us to protect us from disagreeable, under-bred people, who refuse to take the trouble to be civil.”⁵⁴ This etiquette thus “serves as a guard and preserver of our household sanctities.”⁵⁵ Drawing on the trope of home as barrier against intrusion, the social code governing the practice of calling could itself be imagined as the maintenance of walls to protect the bourgeois gentility against “the intrusion of the impertinent, improper, and the vulgar,”⁵⁶ in the literal form of rules regulating entry into the home.

For Justice Souter to invoke this vanished world in which social expectations must needs be different from Georgia of the 2000s was to introduce by suggestion a figure of privacy as distinctive as *Kyllo*’s lady in her bath. For Justice Souter, the figure too was a lady, in the nineteenth-century sense that associated being a lady with high-bourgeois status. But if Justice Scalia’s lady of the house was to be protected in her home from the penetrative male gaze, Justice Souter’s was the lady “at home,” determining whether to receive or decline visitors – especially those gentlemen whom the word “caller” even today conjures. Indeed, the lady at home is the woman determining social access to her home. This lady, too, is a figure of privacy as much as the lady in the bath, but brings to mind a different type of home privacy, one that accentuates her authority to exclude those deemed socially unacceptable.

The idea of a lady regulating access to her home in conformity with well-understood social codes presupposes orderly knowledge of social codes. According to the author of the nineteenth-century etiquette text:

Intimate acquaintance with the refined customs and highest tones of society insures harmony in its conduct, while ignorance of them inevitably produces discords and confusion. Fortunate are those who were born in an atmosphere of intelligent refinement, because mistakes to them are impossible. They know no other way than the right ones in the management of their social affairs.⁵⁷

⁵¹ *Id.*, at 6.

⁵² *Id.* at 82.

⁵³ SOCIAL ETIQUETTE OF NEW YORK, *supra* note xx, at 14.

⁵⁴ *Id.* at 9.

⁵⁵ *Id.*

⁵⁶ CHARLES WILLIAM DAY, HINTS ON ETIQUETTE AND THE USAGES OF SOCIETY; WITH A GLANCE AT BAD HABITS 11 (1844).

⁵⁷ SOCIAL ETIQUETTE OF NEW YORK, *supra* note xx, at yy.

Social etiquette prevents the “agony of uncertainty.”⁵⁸ Justice Souter’s confidence that “no sensible person would go inside” in the face of a “disputed invitation”⁵⁹ assumes a shared certainty. But this reference to social etiquette also draws attention to the comparative uncertainty of “social expectations” today, when it can no longer be assumed that people conform to a standard set of expectations.⁶⁰ In the context of the recalled social codes of a bygone world, Justice Souter’s anachronistic confidence only accentuates that today in general we have little clarity on what is or is not socially acceptable.

Recognizing Justice Souter’s invocation of the lost world of formal social codes, Chief Justice Roberts wasted no opportunity to dismiss the approach as hopelessly irrelevant to the case at hand. Whether or not it is obvious that a social guest simply would not enter when faced with the conflict over consent, the social convention to which Justice Souter alluded was not, according to Chief Justice Roberts, on point, because “Mrs. Randolph did not invite the police to join her for dessert and coffee; the officer’s precise purpose in knocking on the door was to assist with a dispute between the Randolphs – one in which Mrs. Randolph felt the need for the protective presence of the police.”⁶¹

With the mention of dessert and coffee, Roberts set out to deflate the notion of social convention. The point was not simply that the decorous practice of invitations and callers is inapposite to a situation where a wife calls the cops on her husband and reveals his drug stash. It is rather that the model of social convention is the wrong one to use in ascertaining the meaning of constitutional privacy: “A wide variety of subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private, and those conventions go by a variety of labels – courtesy, good manners, custom, protocol, even honor among thieves. The Constitution, however, protects not these but privacy.”⁶² With this Roberts opened up a competing account of privacy, in a strikingly different sociological frame.

Abusing Wives

If for Souter privacy is the figure of the high bourgeois woman, for Roberts, a man of a later generation, it turns out that the nexus between the concepts of privacy, home, and women is altogether different. In place of the lady of the house, Roberts introduces us to another kind of woman who has become familiar to us: the battered woman, trapped in her home, oppressed by her husband under the guise of an outmoded

⁵⁸ *Id.* at 7.

⁵⁹ *Georgia v. Randolph*, 547 U.S. 103, 113 (2006).

⁶⁰ *See, e.g.*, Daphne Merkin, *Behind Closed Doors: The Last Taboo*, N.Y. TIMES, Dec. 3, 2000, § 6 (Magazine), at 117 (“Ours is the Age of Un-innocence. . . . These days, the classic codes of social behavior no longer apply.”).

⁶¹ *Randolph*, 547 U.S. at 139 (Roberts, C.J., dissenting).

⁶² *Id.* at 131.

privacy that enables him to dominate her while the state does not intervene.⁶³ This figure is in its way as familiar and evocative as the lady in the bath. She is the battered woman whose situation is a primary focus of legal feminism, which understands her abusive marriage as an embodiment of the patriarchal ideology of the family.⁶⁴ The educated legal reader immediately understands that her plight is, according to received wisdom, a product of a common law that gave the husband legal authority over his wife, purporting to protect her while immuring her in the prison of marital privacy.⁶⁵

In his dissenting opinion, Roberts played out this alternative figuring through an account of how the majority's rule shields domestic abusers and fails to protect battered women: "Perhaps the most serious consequence of the majority's rule is its operation in domestic abuse situation, a context in which the present question often arises. . . . The majority's rule apparently forbids police from entering to assist with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects."⁶⁶

Two factors draw our attention to Roberts's battered women rhetoric. First, on the facts, Mrs. Randolph was not alleged to have been beaten,⁶⁷ any more than she was alleged to have invited the police over for dessert and coffee. With respect at least to these facts, Roberts's move is at least as figurative as Souter's, if decidedly more *au courant*. Second, as Souter points out in replying to Roberts, no part of the majority's holding suggests that a husband's lack of consent would bar the police from entering if they were responding to a domestic violence call.⁶⁸ In *Randolph*, there were no such circumstances.

In other words, Roberts's invocation of battered women to support the view that police entry into the home was reasonable took a position in a familiar ongoing legal conversation regarding the enforcement of domestic violence laws. In that debate, "privacy" is normally described as an outmoded rhetoric that operates to deny women the protection of law in favor of their husbands' privacy.⁶⁹ Roberts assimilated that position into the meaning of the Fourth Amendment. He did this by emphasizing the consequences of the Court's rule for police protection of battered women and enforcement of domestic violence law. Privacy then was figured, not as a lady, but as a battered woman.

⁶³ See, e.g., ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 7-9 (1987); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117 (1996). .

⁶⁴ See, e.g., DOBASH, R. & DOBASH R., *VIOLENCE AGAINST WIVES: A CASE AGAINST PATRIARCHY* (1979); DEL MARTIN, *BATTERED WIVES* (1976).

⁶⁵ See, e.g., Siegel, *supra* note xx.

⁶⁶ *Randolph*, 547 U.S. at 139.

⁶⁷ See *id.* at 118 ("No question has been raised . . . about the authority of the police to enter a dwelling to protect a resident from domestic violence . . .").

⁶⁸ *Randolph*, 547 U.S. at 118 ("No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists . . .").

⁶⁹ See, e.g., Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 *Ohio St. L.J.* 1081 (2004); Elizabeth Schneider, *The Violence of Privacy*, 23 *Conn. L. Rev.* 973 (1991).

Justice Souter, though, insisted that domestic violence was a “red herring.”⁷⁰ This was because police had an “undoubted right” to enter a dwelling to protect a domestic violence victim even where the abuser refused the police entry.⁷¹ Recognizing that “domestic abuse is a serious problem in the United States,” and reassuringly citing a long string of statistics on violence against women in the home,⁷² Justice Souter was confident that under the Court’s rule, “there is no danger that the fearful occupant will be kept behind the closed door of the house simply because the abusive tenant refuses to consent to a search.”⁷³

Justice Breyer, in his concurring opinion, took even greater pains to explain that the result in this case does not hamper enforcement of domestic violence, because domestic abuse is a special circumstance that would make police entry reasonable under a totality of the circumstances inquiry.⁷⁴ He explained:

If a possible abuse victim invites a responding officer to enter a home or consents to the officer’s entry request, that invitation (or consent) itself could reflect the victim’s fear about being left alone with an abuser. It could also indicate the availability of evidence, in the form of an immediate willingness to speak, that might not otherwise exist. In that context, an invitation (or consent) would provide a special reason for immediate, rather than later, police entry. And, entry following invitation or consent by one party ordinarily would be reasonable even in the face of direct objection by the other.⁷⁵

Justice Breyer, who joined the Court’s holding and opinion “with these understandings,”⁷⁶ appeared to have wrung his hands quite a bit about the implications of the Court’s ruling. If domestic violence drove the rhetoric of Chief Justice Roberts’s dissenting opinion, it managed to rattle Justice Breyer so much that he wrote separately to explain how the Court’s holding was in fact perfectly compatible with strong domestic violence enforcement. Forced to consider the conflict between the protection of home privacy and the protection of battered women, Justice Breyer insisted there was no conflict, and that battered women were well protected by the Court’s rule.

Dividing the Home

What is the relation between the two figures, the anachronistic lady of the house and the contemporary battered woman, in the nexus of constitutional privacy and the legal idea of the home? Justice Stevens’s concurring opinion tells a story of the relation grounded in the historical demise of coverture and the rise of gender equality:

⁷⁰ *Randolph*, 547 U.S. at 120.

⁷¹ *Id.* at 118-19.

⁷² *Id.* at 117-18.

⁷³ *Id.* at 119.

⁷⁴ *Id.* at 125-26 (Breyer, J., concurring).

⁷⁵ *Id.* at 127.

⁷⁶ *Id.*

In the 18th century, when the Fourth Amendment was adopted, . . . [g]iven then-prevailing dramatic differences between the property rights of the husband and the far lesser rights of the wife, only the consent of the husband would matter. Whether “the master of the house” consented or objected, his decision would control.⁷⁷

Under the law of coverture, the lady of the house was a wife whose rights were subsumed into the rights of her husband.⁷⁸ Her property rights were “covered” by that of her husband, and as such her legal privacy right in the home was reducible to her husband’s. Today, however, “it is now clear, as a matter of constitutional law, that the male and the female are equal partners.”⁷⁹ The consequence of this equality and the individuation of spouses’ legal identities is that neither spouse can decide for the other one to waive a constitutional right. Today, “neither [spouse] is a master possessing the power to override the other’s constitutional right to deny entry to their castle.”⁸⁰ Thus a spouse’s consent to give up privacy in the home can only be effective as to himself or herself.

The figure of privacy as the lady of the house evokes the norms of coverture in which the right encapsulated in the adage that “a man’s house is his castle” is the right of the master of the house. A consequence of the demise of coverture and the division of the legal identities of husband and wife, then, is the division of the privacy associated with the home. If the spouse’s privacy right in the home is now individuated and spouses are equal, then, according to Justice Stevens, a spouse cannot consent to entry over the objections of the other spouse. Stevens presented modern sex equality as determining the content of modern privacy: for spouses to be equal as a matter of constitutional law, each must be able to preserve privacy in the home through the right to exclude outsiders.

But Justice Scalia, in a separate dissenting opinion, was not to be outdone on gender equality. He was unwilling to concede that equality demands that each spouse be able to exclude the police from the marital home, since spouses would be just as equal if *neither* could exclude the police in the face of the other’s consent:

Justice Stevens’ panegyric to the equal rights of women under modern property law does not support his conclusion that . . . “neither [spouse] is a master possessing the power to override the other’s constitutional right to deny entry to their castle.” . . . Men and women are no more “equal” in the majority’s regime, where both sexes can veto each other’s consent, than on the dissent’s view, where both sexes cannot.⁸¹

⁷⁷ *Id.* at 124 (Stevens, J. concurring).

⁷⁸ *See, e.g.,* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) (“For centuries the common law of coverture gave husbands rights in their wives’ property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or holding property in their own names.”).

⁷⁹ *Randolph*, 547 U.S. at 124-25.

⁸⁰ *Id.* at 125.

⁸¹ *Id.* at 144-45 (Scalia, J., dissenting).

The core of Scalia's disagreement of Stevens lay in a redirection of the meaning of marital equality in the home, to focus it not on home privacy as the right to exclude outsiders, but on the equal right to override the other spouse's privacy.

Justice Scalia's redirection mimics the influential move within legal feminism that critiques home privacy as an enabler of sex inequality, specifically its role in male violence against women in the marital home:

Given the usual patterns of domestic violence, how often can police be expected to encounter the situation in which a man urges them to enter the home while a woman simultaneously demands that they stay out? The most common practical effect of today's decision, insofar as the contest between the sexes is concerned, is to give men the power to stop women from allowing police into their homes . . .

⁸²

The view to which Justice Scalia gave voice is not merely formal equality but substantive equality. We see the curious spectacle of Justice Scalia parroting a view worthy of Catharine MacKinnon that an equal right to exclude the police will have the inevitable effect in the world of enabling the men to keep out the police while they beat their wives into submission.⁸³

Is this picture of a piece with the privacy right, imagined in *Kyllo*, of the master of the house to see his wife naked and protect her from prying government eyes? Perhaps so. In both, Justice Scalia imagined privacy to be invoked by a man in the marital home with respect to government access to his wife, be she a naked lady or a battered woman. The master of the house and the (male) state are the agents who fight to protect the woman in the home from the other.

Herein lay the beginnings of an answer to the question of the relation between the two female figures in the nexus of privacy and the home. If Justice Scalia's object of privacy was a woman in a man's castle, Justice Souter's emphasis was rather on the respectable woman in her home who, pursuant to social convention, determines which callers are acceptable to her. Justice Stevens updated this emphasis by explaining that sex equality demands that the wife have the same authority as her husband to exclude persons from the home.

Roberts and Scalia, however, emphasized the figure of the battered woman and moved polite society out of the frame. According to the received wisdom of legal feminism, a battered woman's domination by her husband and dire circumstances

⁸² *Id.* at 145.

⁸³ *Cf.* Catherine A. MacKinnon, *Feminism, Marxism, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 643 (1983) ("Liberal strategies entrust women to the state. Left theory abandons us to the rapists and batterers.").

severely limit her autonomy to leave the home or the relationship.⁸⁴ What the battered woman needs, therefore, is not home privacy but rather protection from the home.

The difference between respectability, positively associated with privacy, and domestic abuse, negatively associated with privacy, also marks a difference of social status. Justice Souter's implied figure of the high bourgeois woman underscored the way in which the notion of "social expectations" implies social conventions associated with the upper reaches of society. In attributing those norms, however anachronistically, to the wife of a cocaine user, Souter drew on the image of a high-born bourgeois allowing some callers and excluding others from her home.

It was this ennobling move that attracted the ridicule of Chief Justice Roberts, who pointed out that Janet Randolph's call to the police was not an invitation for dessert and coffee. Assimilating her instead to the figure of the battered woman – again, a move not indicated by the facts in this particular case – suggested at least by implication lower social status in which the idea of decorum seemed inapposite, even ridiculous. He imagines that the poor battered woman – poor in both senses – has little interest in privacy in the home; instead her overriding interest is in police protection. To be a battered woman, then, is simultaneously to be without social status and to be without privacy. One could even say that to be a woman is to be at least potentially battered, and so to be a woman is to lack privacy.

The odd man out in this configuration is Justice Breyer, who, the oral argument transcript reveals, repeatedly voiced his worries about domestic violence scenarios in which a woman tells the police to enter and her abuser objects. Meanwhile, the available signs are just too ambiguous for the police either to enter the home on grounds of exigent circumstances or to claim probable cause to get a warrant. At oral argument Breyer told defendant's counsel that his concern was "that if you win this case, in those ambiguous situations, where the wife wants the policeman in, and she's afraid to tell him why, until she gets him up to the room – she wants him in – and he, now under your rule, . . . could not go in."⁸⁵

In the same Term, the Court also decided *Hammon v. Indiana*,⁸⁶ a case with facts actually involving domestic violence that required the Court to determine whether the Confrontation Clause of the Sixth Amendment applies to statements made to the police at a crime scene.⁸⁷ That case tested the constitutionality of the increasingly common phenomenon of victimless prosecution, in which statements to law enforcement officials

⁸⁴ See, e.g. LENORE WALKER, *THE BATTERED WOMAN* (1979); Sarah M. Buel, Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay, 28 *COLO. LAW.* 19 (1999) ("Domestic violence victims stay for many valid reasons that must be understood by lawyers, judges, and the legal community if they are to stem the tide of homicides, assaults, and other abusive behavior.")..

⁸⁵ Transcript of Oral Argument at 39, *Georgia v. Randolph*, 547 U.S. 103 (2006) (No. 04-1067).

⁸⁶ *Hammon* was decided as a companion to *Davis v. Washington*, 126 S.Ct. 2266 (2006).

⁸⁷ The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

by a domestic violence victim is introduced at trial but the victim herself is absent at trial, because the victim refuses to cooperate with the prosecution.⁸⁸

The facts presented in *Hammon* largely resembled the scenario that Justice Breyer worried about in *Randolph*. The police responded to a report of domestic disturbance, and when they arrived at the home they were assured by both husband and wife that nothing was wrong, though the wife looked frightened and gave the police permission to enter.⁸⁹ When the police questioned the wife in a different room from her husband, the wife said her husband shoved and hit her.⁹⁰ The Court in that case held that the wife's statements to police at the crime scene, the home, were "testimonial" and thus subject to the Confrontation Clause because they were given in an interrogation whose purpose was to investigate past criminal events after they were over, rather than to stop an emergency in progress.⁹¹

In *Randolph*, Breyer worried about precisely the domestic violence scenario in which no emergency justifies police entry, and the wife is nervous and wants police presence, but the husband tells the police to stay out. Breyer resolved this worry by suggesting that in each individual instance, the police could determine whether the woman who gives consent to enter is a battered woman. If she is a battered woman, then her consent would permit a search over her husband's objection. If she is not battered – as apparently was the case in *Randolph* – then her husband's refusal keeps the police out.

Domestic abuse is the crucial element of the home on which turns the Fourth Amendment unreasonable search. Breyer was not prepared to join Roberts in implying that every home should be treated as a site of domestic violence and the battered woman as the exemplary woman. But neither was he wholly satisfied with Justice Souter's framework in which the home was enmeshed in an aura of respectability so that the battered woman becomes the exceptional woman. Breyer rather saw the constitutional rule turning upon the status of the woman as battered or not battered. Breyer's opinion, therefore, reveals perfectly what is at issue between the different opinions in the case. Privacy in the face of split consent depends on whether one imagines the home and the woman in it as respectable and thus needing privacy, or alternatively, as disordered and the woman in the home as battered.

At oral argument, counsel for the United States, as amicus curiae, told the Justices: "Many of these cases arise not among couples who are harmonious, but among couples in which there is some degree of tension, and the spouse who consents in these situations has an independent interest in ensuring that she can call upon the protection of the law."⁹² *Randolph* was in multiple senses about a house divided. In the first instance, there is the factual scenario, in which husband and wife expressly disagree about

⁸⁸ See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1856 (1996) (exploring "the implications of mandated victim participation in the context of the criminal prosecution of batterers").

⁸⁹ *Davis*, 126 S.Ct. at 2272.

⁹⁰ *Id.*

⁹¹ *Id.* at 2278.

⁹² Transcript of Oral Argument at 17, *Georgia v. Randolph*, 547 U.S. 103 (2006) (No. 04-1067).

permitting entry. The decision records that the couple had marital troubles; that Janet had taken her child away from her husband; and that Scott took the child away in response. Calling upon the protection of the law was yet another move in this ongoing domestic dispute, one that undeniably ratcheted up and intensified the dispute. Janet got the police to help retrieve the child and then actively led the police to her husband's drugs, quite possibly in retaliation for her husband taking the child from her. She also withdrew her consent to search shortly thereafter. The couple's division over consent to enter is represented in this case as but one manifestation of the lack of harmony in the marriage. At the same time, their division over the role of state should play in their home is performed through each person's deployment of the police as part of their marital struggle. Calling on the police in to retrieve the child and reporting on her husband's drug use are the specific ways in which Jane invited the police into not only her home but into her marriage. The police were recruited to flex her muscles against her husband and became a means of furthering the marital division.

This aspect of marital division is in interesting dialogue with the dissenting opinion of Chief Justice Roberts. Roberts's theory of the permissibility of police entry in this case is that a person who shares a home with another is best analogized to a person who shares secret information with another. Just as the sharer of the secret cannot object when the other person chooses to turn around and share the private information with the government, the home resident cannot object when the co-habitant allows the police access to the shared private space. This is a vision in which privacy between two people is always subject to the possibility that the state is present too because one of the parties could ally with the state at any time.

Telling is Roberts's reliance on *Trammel v. United States*, a case in which the Court held that the privilege against adverse spousal testimony can be waived by the testifying spouse.⁹³ Like Roberts in *Randolph*, the Court in *Trammel* explained its desire to discard the old patriarchal rules of coverture: "Chip by chip, over the years those archaic notions have been cast aside so that '[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.'"⁹⁴ And similarly, *Trammel*'s rhetoric was about the disordered home, in implicit contrasts with the well-ordered one: "When one spouse is willing to testify against the other in a criminal proceeding . . . their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." And once the disrepair of the home was made plain by a spouse's willingness to turn against her spouse, protecting a subordinated wife from a husband's coercion was the goal: "It hardly seems conducive to the preservation of the marital relation to place a wife in jeopardy solely by virtue of her husband's control over her testimony."⁹⁵

In the disordered home, privacy wholly depends on the other person – family member, friend -- choosing not to let the police in on the secret. At any time the government may have access to things one considers private because one may be

⁹³ 445 U.S. 40 (1980).

⁹⁴ *Id.* at 52 (citing *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)).

⁹⁵ *Id.* at 52-53.

betrayed by one's intimates. Making it easy for people to expose their intimates' criminal activity is an important government interest. In Roberts's vision, the possibility of one party compromising interpersonal privacy is thought to be inherent to a marriage. Hence marriage is a paranoid state in which each spouse can always report on the other spouse to the police. That potential means that the state is present in the marriage and the marital home is already divided. Roberts's focus on domestic violence – in which the spouses are configured as criminal and victim, with their respective relationships to the state -- brings home that division, which is as profoundly statist as it claims to be feminist.

The division of the home also manifests itself in the reminder of the demise of coverture, invoked by both Justice Stevens and Justice Scalia. Coverture was a doctrine of marital unity, insofar as the household had a single legal personality, that of the husband. The consideration of the question of divided consent is only possible because of the formal disunity of the personalities of husband and wife. Stevens embraces this division of the marital home, since it is necessary to the modern egalitarian conception of the home. Yet as Justice Scalia correctly notes, equality itself produces a divisive uncertainty, since two equal partners could each have the power either to refuse entrance or to grant entrance over the other's objection. Modern gender equality is associated with undetermined legal rules.

What Kind of Woman?

The feminist vision of the home visible in Justice Stevens's opinion becomes half of a further division in this case – a division within feminism. The formal egalitarian view that each spouse should have a right to exclude is mocked by Chief Justice Roberts's subordination feminism, in which the home is ground zero of male domination, a space that the (male) state must enter to protect a woman from the master of the house.

The profound division between these two feminisms has, of course, a contested history of its own.⁹⁶ In *Randolph*, the jurisprudence of the Fourth Amendment and its characteristic debates over privacy and consent are reconstructed through the structure of feminism divided. What appears on the surface to be a rather ordinary Fourth Amendment case, with the Court's liberal members excluding the police and its conservative members permitting them to enter, is in fact a stage for the performance of distinctive feminist debates on the legal idea of home.

The consequence is that privacy -- the concept at the core of the Fourth Amendment – is indeed figured as a woman. The privacy debate operates on one level, I have shown, as a debate about what sort of woman we have in mind – respectable or battered, high status or low, in need of privacy or in need of protection. On another level, the privacy debate is about which feminist idea of the woman will shape constitutional doctrine. Should it be equality, with emphasis on equal rights to home privacy, or subordination, with emphasis on the home as a site of violence in which privacy would be

⁹⁶ See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

an anachronistic shield for male domination? Fourth Amendment doctrine became a tableau of these contested visions of the home.

The debate over privacy as a woman, namely what sort of woman she is, seems to reflect a familiar sexist world in which men determine women's reputations. But alongside that debate, the Justices' debate in *Randolph* over the meaning of Fourth Amendment privacy is in effect a debate between different sorts of feminism -- a triumph of feminism. Yet we must bear in mind that feminism itself is a house divided.

What does it mean, then, to figure privacy as a woman? As the feminist impact on our law has reached a certain maturity, we have seen discourses in major areas of constitutional jurisprudence shaped by idea of protecting women in the home. The Fourth Amendment would be one area in an emerging pattern that includes, for example, the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause. Domestic violence enforcement in particular has not only been recognized as an important legal issue, but is structuring the way the Court conceives of and talks about constitutional rules. Indeed, only several years after the Court in struck down under the Commerce Clause provisions of the federal Violence Against Women Act in *United States v. Morrison*,⁹⁷ which some feminist scholars took to be about as open a repudiation of women in our constitutional framework as could be imagined,⁹⁸ the issue of violence against women is becoming a powerful shaping influence in constitutional law, in far-reaching ways.

The first time the Supreme Court addressed at length the issue of spousal abuse was at a crucial moment in the development of the right to privacy, *Planned Parenthood v. Casey*,⁹⁹ which reaffirmed the core holding of *Roe v. Wade*.¹⁰⁰ One of *Casey*'s holdings was that the provision of the Pennsylvania abortion law requiring husband notification imposed an undue burden on the woman's abortion decision. In this context, the Court explicitly drew the connection between domestic violence and marriage, which we also saw emerge in the debate over Fourth Amendment privacy in *Randolph*. After reciting extensive statistics on domestic violence in the United States, the Court in *Casey* reasoned, consistent with "what common sense would suggest":

In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good

⁹⁷ 529 U.S. 598 (2000).

⁹⁸ See, e.g., Catharine A. MacKinnon, Comment, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000); Judith Resnik, YALE L.J. 619, 657 (2001) ("[A]n overview on gender equality elsewhere makes plain how much at odds the *Morrison* majority's response is with lawmaking in other countries, acknowledging the links among women's safety, equality, family roles, and economic capacity.").

⁹⁹ 505 U.S. 833 (1992). Cf. *Hodgson v. Minnesota*, 497 U.S. 417, 450-51 (1990) (holding unconstitutional a two-parent notification requirement for minors seeking abortions in part because notification of an abusive parent might lead to child or spousal abuse).

¹⁰⁰ 410 U.S. 113 (1973).

reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse¹⁰¹

Because many married women were victims of domestic violence, fear would prevent them from discussing the abortion decision with their husbands and thus prevent them from having abortions, “as surely as if the Commonwealth had outlawed abortion in all cases.”¹⁰²

With respect to the potential impact of the husband notification provision, the battered woman was to be taken as the exemplary woman. Though the husband notification provision “impose[d] almost no burden at all for the vast majority of women seeking abortions,” and might in reality affect “fewer than one percent of women seeking abortions,”¹⁰³ the Court thought that the provision was invalid on its face: “The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.”¹⁰⁴ The battered woman then was the woman whose conduct the abortion law affected, thus who exemplified women whose protected liberty was at stake.

Like Justice Stevens’s concurring opinion in *Randolph, Casey* featured a reflection on changes in the legal meaning of marriage. Reasoning from the scenario of abusive husbands preventing wives from seeking abortions, whether through “physical force or psychological pressure or economic coercion,”¹⁰⁵ the Court in *Casey* did not believe the Constitution would “permit the State to empower [the husband] with this troubling degree of authority over his wife.”¹⁰⁶

Thus the Court in *Casey* described its striking down of the husband notification provision as a feminist implementation of the legal equality of wives in marital relationships – not allowing states to “give to a man the kind of dominion over his wife that parents exercise over children.”¹⁰⁷ The sexism of the husband notification provision reflected an outdated conception of marriage consistent with coverture, in which women’s legal identities were not separate from their husbands.

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. . . . Only one generation has passed since this Court observed that “woman is still regarded as the center of home and family life,” with attendant “special responsibility” that precluded full and independent legal status under the Constitution.”¹⁰⁸

¹⁰¹ *Casey*, 505 U.S. at 892-93.

¹⁰² *Id.* at 894.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 897.

¹⁰⁶ *Id.* at 898.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 896-97 (citing *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)).

The husband notification provision thus “embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage, and of the nature of rights secured by the Constitution.”¹⁰⁹ Striking down the provision was to give effect to changed legal understandings of marriage and the status of women.

The marker of the changed understanding of the family and of the Constitution was the figure of the battered woman. By presenting her as the exemplary woman, the Court foregrounded understandings of marriage as a relationship in which women fear abuse by their husbands. The woman we have after the demise of coverture is the battered woman. The modern status of woman is exemplified by domestic violence. The husband’s “troubling degree of authority” over his wife arises from this violence threat. It is the recognition of women’s potential to be “victims of regular physical and psychological abuse at the hands of their husbands” that remakes the family in the constitutional world where coverture has been formally dismantled.

If *Kyllo*’s lady in the bath is a lingering trace of the common law woman of coverture, then the battered wife – who appeared first in *Casey*, and then in *Randolph* and *Hammon* -- is the contemporary woman of legal feminism. The privacy of coverture is the privacy of the master of the house. It is of course no coincidence that *Roe v. Wade*, which conceptualized the abortion right as a privacy right, was also famously paternalistic, imagining the privacy as that of the male doctor at least as much as that of the woman.¹¹⁰ The battered woman revamps that kind of privacy and stands instead for the protection of a woman by the state against a husband’s coercion. Both of these figures for privacy – figures of the woman at home -- shape the law of privacy and the home.

The Absent Woman

Indeed, the Supreme Court’s privacy line of cases has been prominently charted through issues that unavoidably involve women’s bodies – sex, contraception, procreation, abortion.¹¹¹ If women have necessarily been a presence in the Court’s privacy jurisprudence, in this respect *Lawrence v. Texas*,¹¹² which struck down a law prohibiting private consensual gay sex, stands as an anomalous climax. If modern substantive due process privacy cases in one way or another involved, at core, sex and

¹⁰⁹ *Id.* at 899.

¹¹⁰ *See* *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“[P]rior to this ‘compelling’ point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”).

¹¹¹ *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (abortion); *Carey v. Population Services*, 431 U.S. 678 (1977) (minors’ access to contraception); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of unmarried couples to possess contraception); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception).

¹¹² 505 U.S. 558 (2003).

women, *Lawrence* involved the constitutional status of sex in which no woman was a participant.¹¹³

The opening words of *Lawrence* immediately placed the home in the foreground as the structure that housed the concepts of liberty and privacy: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition, the State is not omnipresent in the home.”¹¹⁴ Thus Justice Kennedy in *Lawrence* began with a conspicuous echo of *Casey*. But *Casey*’s liberty, which finds “no refuge in a jurisprudence of doubt,”¹¹⁵ is in need of refuge. In *Lawrence*, liberty is an active agent that provides refuge in the home, the archetypal private place. Liberty does the protecting.

What does it protect? Justice Kennedy insisted that more than merely a right to perform particular sex acts was at stake. Framing it that way would “demean” the claim of the gay couple “just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”¹¹⁶ Never naming the protected conduct more specifically than the circumlocution of “certain intimate sexual conduct,”¹¹⁷ Justice Kennedy proposed instead that the issue was the freedom to form intimate relationships that include, but are not reducible to, erotic acts. The route to constructing this broad conception of the right ran explicitly through the home: “the most private human conduct, sexual behavior, and in the most private of places, the home.”¹¹⁸ Not coincidentally, Kennedy located the sex act within a “personal relationship” that “adults may choose to enter . . . in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”¹¹⁹

The privacy of the home, then, shields private erotic acts from public view. But it also accentuates the possibility of an intimate relationship (nonexistent in the facts of the case) comparable to marriage that, it seems, ennobles the sex act and makes it worth protecting. We might perhaps map this dual function of the home in *Lawrence* – foregrounding a relationship approximating marriage while obscuring the gay sex act actually protected – onto a social geography that the sociologist Erving Goffman has called “front regions” and “back regions.”¹²⁰ These regions correspond to the public rooms of the house – such as the parlor where one might display respectability and observe social rules, and the private rooms – such as the bedroom or bathroom where one

¹¹³ Cf. Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 812 (2006) (arguing that *Lawrence*, which “moved a sexual relationship from the genus of illicit sex into the genus of licit sex noting precisely that the relationship made no claim to marriage,” represented a “final repudiation” of the “marriage cure”).

¹¹⁴ *Lawrence*, 539 U.S. at 562.

¹¹⁵ See *id.* at 577 (citing *Casey*, 505 U.S. at 844).

¹¹⁶ *Lawrence*, 539 U.S. at 567.

¹¹⁷ *Id.* at 562.

¹¹⁸ *Id.* at 567.

¹¹⁹ *Id.*

¹²⁰ ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE xx (1959).

could relax such polite performance. Marriage-like domestic performance – the “personal bond that is more enduring” -- is *Lawrence*’s front region behavior, and constitutionally protected gay sex – “certain intimate sexual conduct” -- is *Lawrence*’s back region behavior (so to speak).

The social geography of privacy evinces concern about intrusion into private space, and intrusion on a woman has been a distinctive anxiety of privacy jurisprudence, whether expressed as the visual cum physical intrusion into the home of the lady in the bath, or the impertinent intrusion on the lady “at home” to callers.¹²¹ The privacy in *Lawrence*, though, is that of two gay men engaged in a sex act. But the imperative to protect the home against intrusion, whether from technological equipment or the unwelcome caller, still apply. Within the bourgeois demands of social discipline and expressive control, back region behavior needs be confined to the back regions and not intrude into the front regions. To return for a moment to the topic of calling, it was important that a caller invited to partake of the polite performance of the front regions not intrude into the back regions, to avoid disrupting the lady of the house engaged in activities properly kept concealed: “You may find her washing, or dressing, or in bed, or even engaged in repairing clothes, -- or the room may be in great disorder, or the chambermaid in the act of cleaning it”¹²² Keeping back region behavior at bay in the well-ordered home meant that the polite caller did not enter those private rooms.

Recalling Laurence Tribe’s statement that the relevant question for *Bowers v. Hardwick* “is not what Michael Hardwick was doing in the privacy of his own bedroom, but what the State of Georgia was doing there,”¹²³ one is tempted simply to assimilate *Lawrence*’s overruling of *Bowers* into Professor Tribe’s critique of *Bowers*, as a decision disallowing state intrusion into the bedroom. It must also be noticed, however, that within Justice Kennedy’s hetero-normative discourse in *Lawrence*, it was really as if a front region performance of marriage-like intimacy were intruding on the back region conduct of private gay sex. Thus echoing Professor Tribe with a difference, we might suggest that the relevant question here is not what *Lawrence* was doing in the privacy of his own bedroom, but what . . . a woman was doing there.

Searching *Lawrence* for an answer leads to the opinion’s quotation of the words of *Casey* that described the privacy right at its most transcendent and elusive: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹²⁴ Justice Scalia in his *Lawrence* dissent, which called this the “famed sweet-mystery-of life passage,” intuited what the “mystery

¹²¹ This point regarding *Lawrence* was performed during a public Q & A session with Justice Scalia at New York University School of Law in 2005 when a law student asked him, “Do you sodomize your wife?” In a letter to classmates, the student explained that he “asked him if he sodomizes his wife to subject his intimate relations to the scrutiny he cavalierly would allow others – by force, if necessary. Everyone knew at the moment how significant the interest is.” See *Debriefing Scalia*, THE NATION, April 18, 2005, www.thenation.com/doc/20050502/berndt.

¹²² ELIZA LESLIE, MISS LESLIE’S BEHAVIOR BOOK: A GUIDE AND MANUAL OF POLITENESS; BEING A COMPLETE GUIDE FOR LADIES 4 (1857).

¹²³ LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21, at 1428 (2d ed. 1988).

¹²⁴ *Id.* at 574 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

of life” was, in calling it “sweet.”¹²⁵ *Casey*, of course, was about abortion, and so unavoidably about a woman’s body. If liberty in *Lawrence* provides a person refuge in his home and private life, perhaps what upset Justice Scalia so was the incongruity of the unavoidable invocation of woman, the sweet mystery at the center of the home in this case precisely involving sex with no woman.

To theorize privacy in the home is to imagine a woman, and the way she is imagined is bound up with the theory of privacy articulated. Privacy is the lady of the house in her bath, the lady at home receiving callers, the battered wife in the disordered home, and ultimately she embodies the sweet mystery of life, the essence of that privacy which the Constitution protects. Her absent presence in *Lawrence* reminds us how intertwined the woman is with the home itself. At home in the law, she is the wife of ambiguous virtue, the matron of bourgeois society, the victim of domestic violence. She represents the contestation of the very meaning of privacy.

¹²⁵ *Id.* at 588 (Scalia, J., dissenting).