

Is Privacy a Woman?

JEANNIE SUK*

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*¹

TABLE OF CONTENTS

I. SEX AND GADGETS	486
II. LADY IN HEAT	487
III. PENETRATING THE HOME	491
IV. THE DISORDERED HOME	493
V. CALLING	494

* Assistant Professor of Law, Harvard Law School. Harvard, J.D. 2002; Oxford, D.Phil 1999; Yale, B.A. 1995. © 2008, Jeannie Suk. Innumerable colleagues in many fora generously offered discussions, comments, and insights for which I am grateful. They include Kerry Abrams, Gary Bass, Homi Bhabha, Rachel Brewster, Mary Anne Case, Ed Cheng, Glenn Cohen, Dick Fallon, Noah Feldman, Jody Freeman, Tara Grove, David Gray, Aya Gruber, Lani Guinier, Adil Haque, Bernard Harcourt, Howell Jackson, Lisa Kelly, Duncan Kennedy, Adriaan Lanni, Ken Mack, John Manning, Dan Meltzer, Frank Michelman, Martha Minow, Melissa Murray, Richard Parker, Eve Brensike Primus, Darren Rosenblum, Emily Sack, Elizabeth Schneider, Joe Singer, Jed Shugerman, David Sklansky, Dan Solove, Carol Steiker, Matt Stephenson, Simon Stern, Alan Stone, Sonja Starr, and Bill Stuntz. For superb research assistance I thank Andrew Childers, Jonathan Cooper, Joseph Fishman, Greta Gao, Ilan Graff, Brett Hartman, Adam Lawton, Amy Mendenhall, and Ming Zhu. I thank Vernon Cassin for exceptional editorial assistance. As always, Janet Katz and the staff of the Harvard Law School Library provided valuable research support.

1. WALLACE STEVENS, *Peter Quince at the Clavier*, in *THE COLLECTED POEMS OF WALLACE STEVENS* 90 (1954).

VI. BATTERING	498
VII. DIVIDING THE HOME	500
VIII. WHAT KIND OF WOMAN?	506
IX. THE EXEMPLARY WOMAN?	506
X. THE ABSENT WOMAN	509

I. SEX AND GADGETS

In the penultimate scene of the 1999 James Bond movie, *The World Is Not Enough*,² 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 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,"³ 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.⁴ The Court held that this use constituted a "search" within the meaning of the Fourth Amendment and thus was subject to the Amendment's prohibition against unreasonable searches.⁵ 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."⁶ 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.⁷

2. *THE WORLD IS NOT ENOUGH* (Metro-Goldwyn-Mayer 1999).

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

4. *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

5. 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.

6. 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).

7. 533 U.S. at 30. Kyllo was indicted for manufacturing marijuana, in violation of 21 U.S.C. § 841(a)(1). *Id.*

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.”⁸ The realm of privacy here was “the prototypical” interior of the home.⁹ Freedom from unreasonable government intrusion into the home, of course, lies 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.¹⁰ 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.¹¹ But what about observations of a home aided by “sense-enhancing technology”?¹²

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.”¹³ It anticipated a world in which the police might enjoy 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 physical walls of a home—might be undone.¹⁴ 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.”¹⁵

II. 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.”¹⁶ 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

8. *Id.* at 34.

9. *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.” (citation omitted) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980))).

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

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

12. *Id.* at 34.

13. *Id.* at 35–36.

14. For recent discussions of tensions between privacy and technology, see generally JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004); Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531 (2005); Jonathan Zittrain, *Searches and Seizures in a Networked World*, 119 HARV. L. REV. F. 83 (2005).

15. 533 U.S. at 40.

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

. . . Kyllo was heating his residence.”¹⁷ 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.¹⁸

In any event, Justice Scalia speculated, the heat-sensing device might well disclose intimate information—such as “at what hour each night *the lady of the house takes her daily sauna and bath.*”¹⁹ This far-fetched figure of the imagination is apparently intended to evoke private acts that people care to hide from public view. This particular detail is striking in its anachronism. Most people today shower rather than 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 her counterpart, the master of the house.²⁰ This anachronistic language thus calls to mind more than the privacy interests of a lady bathing. It also evokes 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, an object of the male gaze.

The lady in the bath thus pits old against new, anachronism against futuristic technology. She is a figure for values of old-fashioned privacy under threat.²¹ Privacy is a woman—not just a woman, but a lady—imagined as domesticity in a well-ordered traditional marital home.²² Justice Scalia invites us to “see” a

17. *Id.* at 37–38 (Scalia, J., majority opinion).

18. *Id.* at 37.

19. *Id.* at 38 (emphasis added).

20. See, e.g., THE HABITS OF GOOD SOCIETY 836 (New York, Carleton 1869) (“[I]n leaving cards you must thus distribute them: one for the lady of the house . . . one for the master of the house . . .”); THE SUCCESSFUL HOUSEKEEPER 473 (Detroit, M.W. Ellsworth & Co. 1882) (“[T]he lady of the house . . . takes the head of the table, and the master of the house the same.”).

21. For a useful discussion of the “multiple and contingent values” in the construction of legal privacy, see Peter Galison & Martha Minow, *Our Privacy, Ourselves in the Age of Technological Intrusions*, in HUMAN RIGHTS IN THE “WAR ON TERROR” 258, 268–73 (Richard Ashby Wilson ed., 2005); see also *id.* at 268 (describing legal privacy as “[p]redicated on plural and at times inconsistent social values”).

22. On reading the discourse of Supreme Court opinions, see Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1289 (2001) (“A Supreme Court opinion is not merely a statement of the law. It is a written intervention, addressed to particular audiences, and designed to accomplish particular ends.”). See also PETER BROOKS, *TROUBLING CONFESSIONS* 4 (2000) (“[A] result of the recent cross-disciplinary infiltration of interpretive theory from literary studies into legal studies has been a questioning of the law’s internal definitions of some of its terms of art: a challenge to the notion that any act of interpretation is unproblematic, that it can refer to any principles that are not themselves products of acts of interpretation, that it does not reveal preferences, exclusions, unexamined assumptions that need testing against ordinary language and belief.”); CATHERINE GALLAGHER & STEPHEN GREENBLATT, *PRACTICING NEW HISTORICISM* 9 (2000) (“[A]ny attempt at interpretation . . . bears a certain inescapable tinge of aggression The notion of culture as text . . . vastly expands the range of objects available to be read and interpreted [including] texts that have been regarded as altogether nonliterary, that is, as lacking the aesthetic polish, the self-conscious use of rhetorical figures, the aura of distance from the everyday world, the marked status as fiction that separately or together characterize belles lettres.”); cf. Robert L. Caserio, *Supreme Court Discourse vs. Homosexual Fiction*, 88:1

thermal image of this lady. 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 in *Griswold v. Connecticut*, on allowing “the police to search the sacred precincts of marital bedrooms for telltale signs of” . . . well, marital sex.²³ And of course the “very idea” is “repulsive to notions of privacy surrounding the marriage relationship.”²⁴ We are conscripted as witnesses of repulsive conduct.²⁵

Kyllo's soft-core innuendo also hints at *Stanley v. Georgia's*²⁶ home privacy right to look at images of sex and naked women, free from government intrusion. Recall that in *Stanley*, police searching for bookmaking evidence looked in “a desk drawer in an upstairs bedroom” and “found three reels of eight-millimeter film. Using a projector and screen found in an upstairs living room, they viewed the films,” whereupon the police “concluded that they were obscene.”²⁷ Then, “a further examination of the bedroom indicated that appellant occupied it.”²⁸ All that trouble to reach the shocking conclusion that what is going on in the home is sexual arousal (raising the specter of masturbation) aided by sense-enhancing depictions of women.

Far from obscene, the gaze on a beautiful woman bathing is a familiar Western trope. The prophet Teiresias comes upon Athena bathing in a fountain and is struck blind by the sight.²⁹ Ovid tells the story of Actaeon coming across Diana in her bathing pool and being turned into a deer and killed by his own

S. ATLANTIC Q. 267, 272, 277 (1989) (“[T]he all-suspecting method of ideological narrative poetics is well suited to reading Supreme Court discourse—even though this is to admit that the ideological study of fictional narrative is most fruitful when, oddly enough, it is applied elsewhere—to non-narratives or to antinarrative discourses that are not novelistic or fictional.”) (analyzing *Bowers v. Hardwick*, 478 U.S. 186 (1986)); cf. also DEBORAH NELSON, PURSUING PRIVACY IN COLD WAR AMERICA (2002) (closely analyzing the concept of privacy in Supreme Court opinions alongside readings of confessional poetry).

23. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”).

24. *Id.* at 486.

25. The “repulsive” conduct is of course the snooping, but perhaps also by association, the sex. Cf. David Alan 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).

26. *Stanley v. Georgia*, 394 U.S. 557 (1969).

27. *Id.* at 558.

28. *Id.*

29. According to the Greek poet Callimachus, Athena would forgive the violation but cannot because the injury was against the law of her father. See CALLIMACHUS: THE FIFTH HYMN 99–103 (A.W. Bulloch ed. & trans., 1985).

hounds.³⁰ King David spies on Bathsheba, another man's wife, bathing on her roof.³¹ He sends for, has sex with, and impregnates her, then has her husband killed and marries her, whereupon God punishes him by killing their son and imposing a curse on the House of David.³²

The bathing woman who has perhaps inspired the most visual representation in Western art is drawn from the biblical story of Susanna and the Elders.³³ While two judges are at a rich man's house where they meet for legal proceedings, they secretly observe the man's beautiful wife bathing in the walled garden.³⁴ They threaten that if she does not have sex with them they will publicly accuse her of adultery.³⁵ Having refused them, she is arrested, tried, and convicted, but ultimately the accusation is proven false.³⁶ The accusers are put to death by the law, and her virtuous reputation is restored.³⁷ This is a legal story of punishment for incursion on the marital home in the form of the visual observation of the forbidden—the bathing woman. Her image 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.³⁸

Kyllo's lady in the bath draws on a complex of cultural associations that emanate from this canonical story: the prying 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 woman's virtue, gravely threatened by the suggestion of sexual infidelity, even rape, enacted in the voyeurs' observation of her naked body;³⁹ the restoration of domestic order qua legal order by punishment of the gaze.

Men secretly watching women prepare for nighttime sleep is a related

30. See OVID, *METAMORPHOSES* 55–58 (A.D. Melville trans., 1986).

31. See 2 *Samuel* 11:2–3.

32. *Id.* at 11:4–27.

33. See *Daniel* 13:1–64 (New American Bible). The Roman Catholic Church includes the story in the canon. However, Protestants consider the story apocryphal. See JOHN J. COLLINS, *DANIEL* 28 (1984); *DICTIONARY OF THE BIBLE* 315 (David Noel Freedman et al. eds., 2000). Likewise the rabbinic canonization of the Hebrew Bible excludes the story. See *DICTIONARY OF THE BIBLE*, *supra*.

34. *Daniel* 13:15–18.

35. *Id.* at 13:20–21.

36. *Id.* at 13:23–61.

37. *Id.* at 13:61–63.

38. The subject of Susanna and the Elders, which “has a long and venerable history, beginning with catacomb paintings,” “enjoyed particular popularity after the mid-cinquecento.” Edward J. Olszewski, *Expanding the Litany for Susanna and the Elders*, 26.3 *SOURCE: NOTES IN THE HISTORY OF ART* 42, 42, 46 (2007); see also Susanne Dunlap, *Susanna and the Male Gaze: The Musical Iconography of a Baroque Heroine*, 5 *WOMEN & MUSIC* 40, 40 (2001) (“The apocryphal story of Susanna has long been a popular subject for artistic treatment in a variety of media.”).

39. Cf. Babette Bohn, *Rape and the Gendered Gaze: Susanna and the Elders in Early Modern Bologna*, 9 *BIBLICAL INTERPRETATION* 259, 261, 265 (2001); Kathryn A. Smith, *Inventing Marital Chastity: The Iconography of Susanna and the Elders in Early Christian Art*, 16 *OXFORD ART J.* 3, 3 (1993).

theme.⁴⁰ The myth of Gyges, told by Herodotus, is another exemplar of the surreptitious male gaze in the Western canon.⁴¹ Rather than forbidding the gaze, however, King Candaules wishes 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 Gyges, 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.

The adage, “a man’s home is his castle,” represents an idea with which “[w]e have . . . lived our whole national history.”⁴² The adage has been invoked in dozens of Supreme Court cases on privacy, and “has become part of our constitutional tradition.”⁴³ The rhetorical power of the home as castle lies in its comparison of the ordinary man to the king. If in the adage the home is envisioned as a barrier against intrusion, we have seen that anxiety about intrusion can be expressed as anxiety about female sexual virtue. A meaning of a man’s home as his castle that emerges here is the need 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.

In *Kyllo*, the technology that would make the home accessible to prying eyes thus comes up against the technology of the castle. Recapitulating the age-old paradox attending the visual representation of voyeurism,⁴⁴ Justice Scalia’s *Kyllo* reveals the lady in the bath to illustrate the imperative to shield her. The result in turn reveals the idea of the home from which the home privacy in mind is derived.

III. 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 reminded 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”⁴⁵ It was not

40. See, e.g., JOHN KEATS, *The Eve of St. Agnes*, in *THE POEMS OF JOHN KEATS* 299–318 (Jack Stillinger ed., Belknap Press 1978) (1820).

41. See HERODOTUS, *THE HISTORIES*, Book 1, chs. 8–12 (A.D. Godley trans., 1920).

42. *Georgia v. Randolph*, 547 U.S. 103, 115 (2006).

43. *Minnesota v. Carter*, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring); see also, e.g., *Wilson v. Layne*, 526 U.S. 603, 609–10 (1999); *Carter*, 525 U.S. at 94 (Scalia, J., concurring); *Payton v. New York*, 445 U.S. 573, 596 (1980); *Miller v. United States*, 357 U.S. 301, 306–08 (1958); *Harris v. United States*, 331 U.S. 145, 164 (1947) (Frankfurter, J., dissenting); *Weeks v. United States*, 232 U.S. 383, 389–91 (1914).

44. Cf. Clare L. Costley, *David, Bathsheba, and the Penitential Psalms*, 57 *RENAISSANCE Q.* 1235, 1265 (2004) (noting that “depictions of a male voyeur and a woman taking a bath assumed an extraordinary prominence across the conflicting visual cultures of a divided Christendom”).

45. *Kyllo v. United States*, 533 U.S. 27, 50 (2001) (Stevens, J., dissenting) (internal citations omitted).

actually x-ray—or x-rated—vision. Justice Stevens found it significant that the device could not perform “through-the-wall” surveillance.⁴⁶ 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.’”⁴⁷ An inference, Justice Stevens thought, could not amount to a Fourth Amendment search.⁴⁸

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,”⁴⁹ 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.⁵⁰ 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.”⁵¹ Justice Stevens objected that the heat-sensor “did not accomplish ‘an unauthorized physical penetration.’”⁵² The crux of the 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 castle 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 language of penetration underscores the Court’s conviction that obtaining knowledge of the

46. *Id.* at 41.

47. *Id.* at 44.

48. *See id.* at 44 n.3.

49. *Id.* at 36 n.3 (Scalia, J., majority opinion).

50. *Id.* at 36.

51. *Id.* at 40.

52. *Id.* at 43 (Stevens, J., dissenting) (quoting *Silverman v. United States*, 365 U.S. 505, 509 (1961)).

inside of a home through inference aided by technology is indeed a search. The upshot: When the home becomes penetrable like the woman's body, the castle is breached.

IV. 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 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 elaborate role in the Supreme Court's consideration of Fourth Amendment privacy.⁵³ This time the woman figured was not the lady of an old-fashioned, well-ordered domesticity but rather a wife in a home disordered by domestic violence.⁵⁴ The question in *Randolph* was the reasonableness of a warrantless entry and search of a home when one occupant gives the police consent and another occupant expressly refuses entry.⁵⁵ The Court held that such a search as to the unconsenting occupant was unreasonable.⁵⁶

Warrantless entry of a home is presumptively unreasonable except, of course, when the police have the voluntary consent of a person possessing authority or when exigent circumstances exist. 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 held that the police may enter with an occupant's consent in the other occupant's absence.⁵⁷ But in *Randolph*, the physical presence of the objecting occupant was a distinction that made a difference.

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.⁵⁸ 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.⁵⁹ Scott told of taking their son to a neighbor to prevent his wife from taking the child out of the country

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

54. *Id.* at 107.

55. *Id.* at 108.

56. *Id.* at 122–23.

57. *United States v. Matlock*, 415 U.S. 164, 166, 177 (1974).

58. *See* 547 U.S. at 107.

59. *Id.* at 106–07.

again.⁶⁰ Janet then revealed that her husband used drugs. Over Scott's objection, Janet led the police to his bedroom, where they found a straw with cocaine residue.⁶¹ On that basis, the police got a search warrant and found further drug evidence with which to indict him for cocaine possession.⁶² 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 expose their conflict to the police.

V. CALLING

We know a man imperfectly until we know his society, and we but half know a society until we know its manners.

—Henry James⁶³

At oral argument, Justice O'Connor began by asking counsel for Georgia whether letting in a stranger "against the express wishes of your spouse or co-habitant" was "socially acceptable."⁶⁴ Counsel answered that she 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."⁶⁵ 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.⁶⁶ 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."⁶⁷

The language of "shared premises" and "fellow tenant," which implies roommate living, takes us away from the facts here, which involved a husband-wife relationship and a marital home. But the reference to a visitor to a house as a "caller" bears special remark. When juxtaposed with the concept of "social expectations," the anachronistic term "caller" evoked the social context in which that term was regularly used. With his word choice, Justice Souter, known to be partial to the manners of previous generations,⁶⁸ brought to mind

60. *Id.* at 107.

61. *Id.*

62. *See id.*

63. HENRY JAMES, *Emerson*, in *THE AMERICAN ESSAYS OF HENRY JAMES* 51, 53 (Leon Edel ed., Princeton Univ. Press 1989) (1887).

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

65. *Id.* at 4.

66. 547 U.S. at 111.

67. *Id.* at 113.

68. *See, e.g.*, 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 . . .");

the social world of the Gilded Age when the norms of calling upon others in their homes were codified in shared rules of etiquette. In this world, social manners and conduct in society were conceived and practiced as a system of rules akin to a legal code.⁶⁹

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.⁷⁰ It was the prerogative of the lady of the house to choose whether or not to receive a particular caller.⁷¹ The caller would present a calling card engraved with his name.⁷² 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.⁷³ The acceptability of the caller might be secured by the “style of the gentleman’s card, the hour of his visit, and his address,” in addition to the person arranging the introduction.⁷⁴ The caller was told that the lady was

David Margolick, *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, at 19 (“Souter’s social activities resemble those of an 18th century gentleman . . .”). 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 the famously literate Justice Souter. *See, e.g.*, HENRY JAMES, *THE AMBASSADORS* (1909); HENRY JAMES, *THE AMERICAN* (Riverside Press 1907) (1877); Edith Wharton, *The Age of Innocence* (1920); Edith Wharton, *House of Mirth* (1905).

69. *See, e.g.*, CHARLES WM. DAY, *HINTS ON ETIQUETTE AND THE USAGES OF SOCIETY; WITH A GLANCE AT BAD HABITS* 11 (Boston, William D. Ticknor & Co. 1844) (“Etiquette is the barrier which society draws around itself as a protection against offences the ‘law’ cannot touch . . .”); KAREN HALTTUNEN, *CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830–1870*, at 102, 112 (1982) (describing the rules of etiquette and social relationship); *SOCIAL ETIQUETTE OF NEW YORK* 5 (New York, D. Appleton & Co. 1892) (describing the social etiquette of New York as “a law unto itself”); *A WOMAN OF FASHION, ETIQUETTE FOR AMERICANS* 5 (Chicago & New York, Herbert S. Stone & Co. 1898) [hereinafter *ETIQUETTE FOR AMERICANS*] (“[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.”).

70. *See ETIQUETTE FOR AMERICANS, supra* note 69, at 52 (“You announce that you will be at home between certain hours; your friends, in walking costume, wait upon you.”); *see also SOCIAL ETIQUETTE OF NEW YORK, supra* note 69, at 92–93 (describing customary forms of invitation to tea and coffee using the “at home” formulation).

71. *See ETIQUETTE FOR AMERICANS, supra* note 69, at 48 (“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. . . . [I]t is always the wife who receives, not the husband.”); *see also SOCIAL ETIQUETTE OF NEW YORK, supra* note 69, 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”).

72. *See SOCIAL ETIQUETTE OF NEW YORK, supra* note 69, at 78–89 (describing calling card etiquette for gentlemen).

73. *See ETIQUETTE FOR AMERICANS, supra* note 69, 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.”).

74. *SOCIAL ETIQUETTE OF NEW YORK, supra* note 69, at 82.

“at home,” and unacceptable callers were told that she was “not at home.”⁷⁵

The formal system of calling and receiving callers was a privilege of the urban high bourgeoisie.⁷⁶ 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,”⁷⁷ 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.”⁷⁸ The system of calling was a code within “a common formula of courtesies, which is known as our own social etiquette, should be the thoroughly understood method of communicating our regard for each other.”⁷⁹ 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.”⁸⁰ This etiquette thus “serves as a guard and preserver of our household sanctities.”⁸¹ 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 “shield against the intrusion of the impertinent, the improper, and the vulgar,”⁸² in the literal form of rules regulating entry into the home.

To invoke this vanished world was to introduce by suggestion a rhetorical figure 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.⁸³ 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 class-inflected authority

75. See EMILY POST, *ETIQUETTE IN SOCIETY, IN BUSINESS, IN POLITICS AND AT HOME* 84–86 (1922) (“When a servant at the door says, ‘Not at home,’ this phrase means that the lady of the house is ‘Not at home to visitors.’ This answer neither signifies nor implies—nor is it intended to—that Mrs. Jones is out of the house.”); see also HALTTUNEN, *supra* note 69, at 112.

76. A nineteenth-century English travelogue writer comments: “No one dreams of fastening a door in Western America . . . I was thus exposed to perpetual, and most vexatious interruptions from people whom I had often never seen . . .” FRANCES TROLLOPE, *DOMESTIC MANNERS OF THE AMERICANS* 100 (Donald Smalley ed., 1949).

77. *SOCIAL ETIQUETTE OF NEW YORK*, *supra* note 69, at 6.

78. *Id.* at 82.

79. *Id.* at 14.

80. *Id.* at 9.

81. *Id.* at 14.

82. DAY, *supra* note 69, at 11.

83. Callers were not exclusively gentlemen, however. See *SOCIAL ETIQUETTE OF NEW YORK*, *supra* note 69, at 77 (describing calling etiquette for ladies).

to exclude those deemed socially unacceptable.⁸⁴

The idea of a lady regulating access to her home in conformity with well-understood social codes presupposes orderly knowledge of them. According to the author of the nineteenth-century etiquette text: “[I]ntimate 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.”⁸⁵ Social etiquette prevents the “agony of uncertainty.”⁸⁶ Justice Souter’s confidence that “no sensible person would go inside” in the face of a “disputed invitation”⁸⁷ assumes a shared social 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.⁸⁸ In the context of the recalled social codes of a bygone world, Justice Souter’s anachronistic confidence only accentuates that today, for the most part, 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.*” Instead, “the officer’s precise purpose in knocking on the door was to assist with a dispute between the Randolphs—

84. By contrast, in characterizing *United States v. Matlock*, 415 U.S. 164 (1974), which previously held that the police may enter with one occupant’s consent in the other occupant’s absence, the Court reasoned:

When someone comes to the door of a domestic dwelling *with a baby at her hip*, as Mrs. Graff did, she shows that she belongs there, and that fact standing alone is enough to tell a law enforcement officer or any other visitor that if she occupies the place along with others, she probably lives there subject to the assumption tenants usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another.

Georgia v. Randolph, 547 U.S. 103, 111 (2006) (emphasis added). The contrast between the woman who answers the door with a baby at her hip and the one at home to callers subtly underscores the class difference between the kind of home the police enter and the kind they may not. *Matlock* apparently featured a domestic situation that did not immediately imply a well-ordered nuclear family in a conventional marital home. See 415 U.S. at 166 (“The home was leased from the owner by Mr. and Mrs. Marshall. Living in the home were Mrs. Marshall, several of her children, including her daughter Mrs. Gayle Graff, Gayle’s three-year-old son, and respondent.”).

85. SOCIAL ETIQUETTE OF NEW YORK, *supra* note 69, at 7.

86. *Id.* at 8.

87. *Randolph*, 547 U.S. at 113.

88. See, e.g., Daphne Merkin, *Behind Closed Doors: The Last Taboo*, N.Y. TIMES MAG., Dec. 3, 2000, at 116 (“Ours is the Age of Un-innocence. . . . These days, the classic codes of social behavior no longer apply . . .”).

one in which Mrs. Randolph felt the need for the protective presence of the police.”⁸⁹

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 often 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”⁹⁰ With this, Roberts opened up a competing account of privacy, in a strikingly different sociological frame.

VI. BATTERING

Concepts of privacy permit, encourage, and reinforce violence against women.

—Elizabeth Schneider⁹¹

For Roberts, a man of a later generation, it turns out that the connotations of privacy, home, and women are altogether different from the figure of the high bourgeois woman. In place of the lady of the house, Roberts introduces 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 privacy that enables him to dominate her while the state does not intervene.⁹² 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 abuse as an embodiment of the patriarchal ideology of marriage.⁹³ 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.⁹⁴

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 situations, a context in which the present question often arises. . . . The majority’s rule apparently forbids police from entering to assist

89. 547 U.S. at 139 (Roberts, C.J., dissenting) (emphasis added).

90. *Id.* at 131.

91. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 87 (2000).

92. See, e.g., ELIZABETH PLECK, DOMESTIC TYRANNY 7–9 (1987); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2150–70 (1996).

93. See, e.g., R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY (1979); DEL MARTIN, BATTERED WIVES 36–37 (1976); SCHNEIDER, *supra* note 91, at 15.

94. See, e.g., Siegel, *supra* note 92, at 2120–23.

with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects.⁹⁵

Two factors pique our interest in Roberts's battered women discourse. First, on the facts, Mrs. Randolph was not alleged to have been beaten,⁹⁶ any more than she was alleged to have invited the police over for dessert and coffee. With respect 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, the majority explicitly did not hold that the police could not enter in such circumstances.⁹⁷ 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 sometimes described as a construct that operates to deny women the protection of law in favor of their husbands' privacy.⁹⁸ Roberts assimilated that position into the meaning of Fourth Amendment privacy. He did so 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.

Justice Souter, though, insisted that domestic violence was a "red herring,"⁹⁹ because police had an "undoubted right" to enter a dwelling to protect a domestic violence victim even where the abuser refused the police entry.¹⁰⁰ 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,¹⁰¹ 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."¹⁰²

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.¹⁰³ He explained:

95. 547 U.S. at 139.

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

97. *Id.*

98. *See, e.g.,* Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1089 (2004); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 977–79 (1991); *cf.* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 1 (1992) (characterizing the public/private distinction as a "villain" for feminism). For a discussion of women's home privacy, including a defense against MacKinnon's critique, *see, for example,* ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 58–81 (1988).

99. 547 U.S. at 120.

100. *Id.* at 118–19.

101. *Id.* at 117–18.

102. *Id.* at 119.

103. *Id.* at 125–26 (Breyer, J., concurring).

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.¹⁰⁴

Justice Breyer, who joined the Court's holding and opinion only "with these understandings,"¹⁰⁵ appeared to have wrung his hands quite a bit about the implications of the Court's ruling. If domestic violence shaped 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.

VII. DIVIDING THE HOME

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

In the 18th century, when the Fourth Amendment was adopted, . . . [g]iven the then-prevailing dramatic differences between the property rights of the husband and the far lesser rights of the wife, only the consent of the husband would matter. Whether "the master of the house" consented or objected, his decision would control.¹⁰⁶

Under the law of coverture, the lady of the house was a wife whose rights were "covered" by that of her husband.¹⁰⁷ Today, however, "it is now clear, as a matter of constitutional law, that the male and the female are equal partners."¹⁰⁸ 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

104. *Id.* at 127.

105. *Id.*

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

107. See, e.g., Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127-29 (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.").

108. 547 U.S. at 124-25.

other's constitutional right to deny entry to their castle."¹⁰⁹ Thus a spouse's consent to give up privacy in the home can only be effective as to himself or herself.

Stevens thereby 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. The lady of the house evokes the norms of coverture in which the right encapsulated in the adage that "a man's home is his castle" is the right of the master of the house. A consequence of the division of the legal identities of husband and wife, then, is the division of the privacy of the home such that a spouse cannot consent to entry over the objections of the other spouse.

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, because 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.¹¹⁰

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

Justice Scalia shadowed 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 homes¹¹¹

We see the spectacle of Justice Scalia parroting a view worthy of Catharine MacKinnon that an equal right to exclude the police will have the inevitable

109. *Id.* at 125.

110. *Id.* at 144–45 (Scalia, J., dissenting).

111. *Id.* at 145.

effect in the world of enabling men to keep out the police while they beat their wives into submission.¹¹² The idea of the man's home as his castle here is tarred with the same brush that has tarred privacy in feminist critiques of marriage.¹¹³

Can we reconcile this picture with the home as castle imagined in *Kyllo*, of the right of the master of the house to see his wife naked and protect her from prying government eyes? Perhaps. 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 state are the agents who fight to protect the woman in the home from the other.

If *Kyllo*'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 severely limit her autonomy to leave the home or the relationship.¹¹⁴ 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. The high bourgeois woman nicely underscored the implicit association of the notion of "social expectations" with the upper reaches of society. In attributing those norms, however unfittingly, to the wife of a cocaine user, Souter drew on the image of a high-born woman 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

112. For an informative discussion of the embrace of the domestic violence agenda by tough-on-crime political conservatism, see Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 791–800 (2007).

113. Nancy Cott characterizes this feminist move thus: "If domestic violence was going to be prosecuted and if a husband's exemption from rape charges for coercing his wife into sex was going to be eliminated, then the zone of domestic privacy had to be opened up and the notion that 'a man's home is his castle' unseated." NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 210 (2000).

114. See generally LENORE E. 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:").

decorum seemed inapposite, even ridiculous. He imagined 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 is to be without social status, and thus she does not have, need, or enjoy the kind of privacy associated with the bourgeois home.

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. He was concerned that the available signs would be too ambiguous to allow the police to enter the home. 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."¹¹⁵

Justice Breyer's hackles may have been raised by another case that Term. In the same Term, the Court also considered *Hammon v. Indiana*,¹¹⁶ 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.¹¹⁷ That case tested the constitutionality of the increasingly common phenomenon of victimless prosecution, in which statements to law enforcement officials by a domestic violence victim are introduced at trial but the victim herself is absent at trial, because the victim refuses to cooperate with the prosecution.¹¹⁸

Hammon's facts 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.¹¹⁹ When the police questioned the wife in a different room from her husband, the wife said her husband shoved and hit her.¹²⁰ The Court held that the wife's statements to the police were subject to the Confrontation Clause because they were given in an interrogation whose purpose was to investigate past criminal events, rather than to stop an emergency in progress.¹²¹

Breyer worried about just that scenario—in which no emergency justifies police entry, and the wife is nervous and wants police presence, but the husband

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

116. *Hammon* was consolidated with *Davis v. Washington*, 547 U.S. 813 (2006).

117. 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.

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

119. *Davis*, 547 U.S. at 819.

120. *Id.* at 819–20.

121. *Id.* at 825–26, 829.

tells the police to stay out.¹²² 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.

For Breyer, domestic abuse was the crucial element of the home on which turned the reasonableness of the search.¹²³ He was not prepared to join Roberts in the implication 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 Souter's aura of bourgeois respectability in the home so that the battered woman became the exceptional woman. Breyer rather saw the constitutional rule as turning upon whether the woman was battered. His 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 thus needing police protection from privacy.

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."¹²⁴ *Randolph* was, in multiple senses, about a house divided. In the factual scenario, husband and wife expressly disagreed about permitting entry. The decision records that the couple had marital troubles. Calling upon the police was yet another move in their ongoing domestic dispute that intensified it. Janet actively led the police to her husband's drugs, quite possibly in retaliation for her husband taking her child from her. The couple's division over consent to enter is represented in this case as a manifestation of the lack of marital harmony. Each spouse's deployment of the

122. Later in the same Term, in another Fourth Amendment case about entry into a home, the Court held that the police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with injury. *Brigham City v. Stuart*, 547 U.S. 398 (2006). Here, the police were responding to a call about a loud party where, it turned out, teenagers were in a violent altercation. *Id.* at 400–01. The Court's opinion did not explicitly highlight domestic violence implications, but the briefs and oral argument did. *See, e.g.*, Transcript of Oral Argument at 10, *Brigham*, 547 U.S. 398 (No. 05-502) ("[T]his Court's recent decision in *Georgia v. Randolph* contains a clear expression of concern for the need for the police to take prompt action to prevent harm in domestic violence cases."); Brief for the United States as Amicus Curiae Supporting Petitioner at 20, *Brigham*, 547 U.S. 398 (No. 05-502) ("[D]omestic violence calls are 'one of the most common and volatile settings for serious injury or death.' Not surprisingly, almost all deaths and serious injuries suffered as a result of domestic relationships—*i.e.*, intimate partner and child abuse—occur inside homes, where the victims' ability to obtain the assistance of anyone other than intervening police is remote." (citation omitted)).

123. An analogous debate among Justices about constitutional rights in light of the need to protect women from domestic violence emerged in *Giles v. California*, 128 S. Ct. 2678 (2008).

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

police became a means of furthering the marital division.

This aspect of marital disunity corresponds to Chief Justice Roberts's analogy of a person who shares a home with another to a person who shares secret information.¹²⁵ According to Roberts, just as the sharer of the secret cannot object when the other person then turns around and shares it with the government, the home resident cannot object when the cohabitant allows the police into the shared private space.¹²⁶ This is a vision of relationships in which privacy and private space are always legitimately subject to possible state presence, because one person could ally with the state against the other at any time.

Telling is Roberts's reliance on *Trammel v. United States*, in which the Court held that the privilege against adverse spousal testimony can be waived by the testifying spouse.¹²⁷ Like Roberts in *Randolph*, the Court in *Trammel* explained its desire to discard the old patriarchal rules of marriage: "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.'"¹²⁸ And similarly, *Trammel*'s language implicitly contrasted the disordered home 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."¹²⁹ 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."¹³⁰

In the disordered home, privacy wholly depends on the other person choosing not to let the police in. At any time, the government may have access to things one considers private because one may be betrayed by one's intimates. In Roberts's vision, the possibility of one party compromising privacy characterizes the disordered marriage. Hence the disordered 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 that 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.¹³¹

125. See *Georgia v. Randolph*, 547 U.S. 103, 142 (2006) (Roberts, C.J., dissenting).

126. *Id.*

127. *Trammel v. United States*, 445 U.S. 40 (1980).

128. *Id.* at 52 (quoting *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975)).

129. *Id.*

130. *Id.* at 53.

131. Cf. Catherine A. MacKinnon, *Feminism, Marxism, Method, 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.").

VIII. WHAT KIND OF WOMAN?

The feminist visions of the home that emerge in *Randolph* become visible as divisions within feminism.¹³² 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.

In *Randolph*, the jurisprudence of the Fourth Amendment and its characteristic debates over privacy and consent are reconstructed through the manifestation 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, over the dissent of its conservative members who would permit them to enter, is in fact a stage for the performance of distinctive feminist debates on the legal idea of home.

Privacy—the concept at the core of the Fourth Amendment—is figured as a woman. The privacy debate operates on one level as a debate about what sort of woman we have in mind—respectable or battered, high- or low-status, 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 an anachronistic shield for male domination? In *Randolph*, 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 over the meaning of Fourth Amendment privacy is in effect a debate between different sorts of feminism—a triumph of feminism itself is a house divided.

IX. THE EXEMPLARY WOMAN?

Defining wife-beating as a social problem, not merely a phenomenon of particular violent individuals or relationships, was one of the great achievements of feminism.

—Linda Gordon¹³³

As the feminist impact on our law has reached a certain maturity, we have seen discourses in major areas of constitutional jurisprudence shaped by the

132. The divisions within feminism have, of course, a contested history. See generally JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006). See also FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER (Nancy E. Dowd & Michelle S. Jacobs eds., 2003); FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Rosanne Kennedy eds., 1991); MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 30–52 (1992); NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY* (2006).

133. LINDA GORDON, *HEROES OF THEIR OWN LIVES* 251 (1988).

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 also is structuring the way the Court conceives of and talks about constitutional rules. Indeed, only several years after the Court struck down under the Commerce Clause provisions of the federal Violence Against Women Act in *United States v. Morrison*,¹³⁴ which some feminist scholars took to be an open repudiation of women in our constitutional framework,¹³⁵ the influence of the issue of violence against women in constitutional law comes into its own.

The Supreme Court's first thorough discussion of the issue of spousal abuse was at a crucial moment in the development of the right to privacy, *Planned Parenthood v. Casey*,¹³⁶ which reaffirmed the core holding of *Roe v. Wade*.¹³⁷ 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.¹³⁸ In this context, the Court explicitly drew the connection between domestic violence and marriage,¹³⁹ which we also saw emerge in the debate over Fourth Amendment privacy in *Randolph*.¹⁴⁰ 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 reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse¹⁴¹

Because many married women were victims of domestic violence, fear would

134. *United States v. Morrison*, 529 U.S. 598 (2000).

135. See, e.g., Catharine A. MacKinnon, Comment, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000); see also, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 113 (2d ed. 2003) (noting that "feminists in the United States are still smarting from the United States Supreme Court's invalidation of the key provisions of the federal Violence Against Women Act").

136. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); cf. *Hodgson v. Minnesota*, 497 U.S. 417, 438–40, 450–51, 455 (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).

137. *Roe v. Wade*, 410 U.S. 113 (1973).

138. *Casey*, 505 U.S. at 893–95.

139. *Id.* at 888–93.

140. See *Georgia v. Randolph*, 547 U.S. 103, 117–18 (2006).

141. 505 U.S. at 892–93.

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.”¹⁴²

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,”¹⁴³ 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.”¹⁴⁴ The battered woman then was the woman whose conduct the abortion law affected, and as such exemplified women’s liberty threatened.

Like Justice Stevens’s concurring opinion in *Randolph*,¹⁴⁵ *Casey* featured a reflection on changes in the legal meaning of marriage.¹⁴⁶ Reasoning from the scenario of abusive husbands preventing wives from seeking abortions, whether “through physical force or psychological pressure or economic coercion,”¹⁴⁷ 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.”¹⁴⁸

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 marriage—not allowing states to “give to a man the kind of dominion over his wife that parents exercise over children.”¹⁴⁹ 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.¹⁵⁰ “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 responsibilities’ that precluded full and independent legal status under the Constitution.”¹⁵¹

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 the rights secured by the Constitution.”¹⁵² Striking down the provision was to give effect to changed

142. *Id.* at 894.

143. *Id.*

144. *Id.*

145. *See Randolph*, 547 U.S. at 123–25 (Stevens, J., concurring).

146. *See generally Casey*, 505 U.S. 833.

147. *Id.* at 897.

148. *Id.* at 898.

149. *Id.*

150. *See id.*

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

152. *Id.* at 898.

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 formal 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 threat of violence.¹⁵³ 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 is formally dismantled.¹⁵⁴

If *Kyllo's* lady in the bath is a 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.¹⁵⁵ 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.

X. THE ABSENT WOMAN

Suppose privacy is a woman—what then?¹⁵⁶

In the decades since the Supreme Court declared that "woman is still regarded as the center of home and family life,"¹⁵⁷ constitutional privacy has been prominently charted through issues that unavoidably involve women's bodies—sex, contraception, procreation, abortion.¹⁵⁸ Even *Stanley v. Georgia*, prototype of First Amendment home privacy, involved the right to observe women's

153. *Id.*

154. *Id.* at 893.

155. 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.").

156. Cf. FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 6 (Helen Zimmern trans., Wilder 2008) (1886) ("Supposing that Truth is a woman—what then?"); cf. also BARBARA JOHNSON, *Women and Allegory*, in *THE WAKE OF DECONSTRUCTION* 52, 52–61 (1994) (asking "Is Theory a Woman?").

157. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (rejecting a Fourteenth Amendment challenge, by a defendant charged with killing her husband with a baseball bat, to a statute providing for jury service by women only if they register their desire to serve on a jury).

158. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

bodies and sex in the form of pornography.¹⁵⁹ In *Casey*, quoting *Stanley*'s statement, Justice Stevens's separate opinion declared: "'Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.' The same holds true for the power to control women's bodies."¹⁶⁰ Men's minds and women's bodies. The move from rejecting government control of men's minds (the classic preoccupation of which is women's bodies) to rejecting government control of women's bodies is in sum a heroic story of privacy's progress, orthogonal to the heroic story depicting the change from coverture to women's equality under the Constitution.¹⁶¹

Women have been a crucial presence in the Court's privacy jurisprudence, and in this respect *Lawrence v. Texas*,¹⁶² which struck down a law that prohibited gay sex, represents an anomalous culmination. In other words, although sex and women are embedded in the core of the modern substantive-due-process-privacy line of constitutional law, *Lawrence* involved the constitutional status of sex in which no woman was a participant.¹⁶³ But *Lawrence*'s holding, language, and constitutional import, were of course broader than gay sex.¹⁶⁴

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."¹⁶⁵ 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,"¹⁶⁶ is in need of refuge. In *Lawrence*, liberty is an active agent that provides refuge in the home, the archetypal private place.

So what does liberty protect? Justice Kennedy insisted that more than merely a right to perform particular sex acts was at stake.¹⁶⁷ 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

159. *Stanley v. Georgia*, 394 U.S. 557, 558 (1969). The films seized by the police from the home in *Stanley* were described in the government's brief to the Court as "depicting sodomy, nudity and sexual intercourse." Brief for Appellee on the Merits at 3, *Stanley*, 394 U.S. 557 (No. 293).

160. *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part) (citation omitted) (quoting *Stanley*, 394 U.S. at 565).

161. See my discussion of *Randolph* above.

162. *Lawrence v. Texas*, 539 U.S. 558 (2003).

163. Cf. Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 812 (2006) (arguing that *Lawrence v. Texas*, 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").

164. See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1937 (2004) ("*Lawrence* eschewed such isolated point-plotting. . . . [It] instead suggests the globally unifying theme of shielding from state control value-forming and value-transmitting relationships, procreative and nonprocreative alike . . .").

165. 539 U.S. at 562.

166. See *id.* at 577 (quoting *Casey*, 505 U.S. at 844).

167. See *id.* at 562 ("The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.").

intercourse.”¹⁶⁸ Justice Kennedy proposed instead that the issue was the freedom to form intimate relationships that include, but are not reducible to, erotic acts.¹⁶⁹ 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.”¹⁷⁰ 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.¹⁷¹

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 case¹⁷²) comparable to marriage that, it seems, ennoble 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 sex act actually protected—onto a social geography that the sociologist Erving Goffman has called “front region” and “back region.”¹⁷³ These regions, “illustrated everywhere in our society,” 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 could relax such polite performance.¹⁷⁴ Marriage-like domestic performance then—*Lawrence*’s “personal bond that is more enduring”¹⁷⁵—is front-region performance, and sex—“certain intimate sexual conduct”¹⁷⁶—is back-region behavior.

The social geography of privacy evinces anxiety about intrusion into private space identified with women, whether expressed as penetration of the home of the lady in the bath or the impertinent intrusion on the lady “not at home” to

168. *Id.* at 567.

169. *See id.* at 567.

170. *Id.*

171. *Id.*

172. *See* Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1478 (2004).

173. *See* ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 107 (Anchor Books 1959) (describing a person’s performance in a “front region” as “an effort to give the appearance that his activity in the region maintains and embodies certain standards” such as “politeness” and “decorum”); *id.* at 111–12 (referring to a “back region” as a place where “suppressed” activities and facts that “might discredit the fostered impression . . . make an appearance”).

174. *See id.* at 123 (noting that the front-region/back-region divide exists “in all but lower-class homes”).

175. *Lawrence*, 539 U.S. at 567.

176. *Id.* at 562.

callers.¹⁷⁷ The privacy in *Lawrence*, though, is that of two *men* engaged in a sex act. But the imperative to protect the home against intrusion, whether by technology or unwelcome callers, still applies. Within the Victorianized 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.”¹⁷⁸ 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*¹⁷⁹ “is not what Michael Hardwick was doing in the privacy of his own bedroom, but what the State of Georgia was doing there,”¹⁸⁰ one is tempted simply to assimilate *Lawrence*’s overruling of *Bowers*¹⁸¹ into Professor Tribe’s critique of *Bowers*, as a decision disallowing state intrusion into the bedroom. It must also be noticed, however, that within *Lawrence*’s famously hetero-normative home discourse of domesticity and relationships,¹⁸² it was as if a front-region performance of marriage-like intimacy were intruding on the back-region conduct of private gay sex. 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. After all, even the holding, which struck a statute against “homosexual sodomy” by announcing a constitutional right covering private consensual adult sex,¹⁸³ seemed bent on moving heterosexual sex into the frame.

Searching *Lawrence* for an answer leads to Justice Kennedy’s quotation from *Casey* describing 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

177. This point with respect to *Lawrence* was performed during a large 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 subsequent 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 that moment how significant the interest is.” See *Debriefing Scalia*, THE NATION, Apr. 18, 2005, available at <http://www.thenation.com/doc/20050502/berndt>.

178. MISS LESLIE, THE BEHAVIOR BOOK: A MANUAL FOR LADIES 47–48 (Philadelphia, Willis P. Hazard 1855).

179. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

180. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15–21, at 1428 (2d ed. 1988).

181. *Lawrence*, 539 U.S. at 578.

182. See, e.g., Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004).

183. *Id.* at 559–60.

meaning, of the universe, and of the mystery of human life.”¹⁸⁴ Justice Scalia in his *Lawrence* dissent, which ridiculed the “famed sweet-mystery-of-life passage,” intuited what the “mystery of life” was, in calling it “sweet.”¹⁸⁵ *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 disturbed 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. Her absent presence in *Lawrence* underscores how intertwined the woman is with the home itself.

To theorize privacy in the home is to imagine a woman, and the way she is imagined is bound up with the conceptions and the stakes of privacy both articulated and unspoken. Privacy is the lady of the house in her bath, the lady at home receiving callers, the battered wife in the disordered home. She embodies the sweet mystery of life, the imaginative essence of the privacy that the Constitution protects. Her body takes shape as privacy’s object and subject, its fantasy and physicality. At home in the law, she is the wife of ambiguous virtue, the matron of bourgeois society, the victim of domestic violence. She represents contestation and conflict over the meanings and consequences of privacy in our legal tradition and evolving legal present.

184. 539 U.S. at 574 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

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