

DOMESTIC TRANQUILITY: THE GOALS OF HOME PROTECTION

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I. INTRODUCTION: LAW AND THE PRIVATE HOME

There exists a kind of “domestic exceptionalism” in many areas of the American legal tradition. American officials have demonstrated great restraint in not extending prevailing norms and policies into private homes. Homes get special tax treatment, robust protection from criminal investigations, and in many municipalities, residential commerce does not adhere to principles of contract law.¹ The militaristic adage that “a man’s home is his castle”² has been widely ratified into law.

On the other hand, much is *not* permitted within the home’s ramparts. It is unlikely that James Otis and any contemporary invokers of the “Castle Doctrine” mean that each citizen may retreat to a fortified enclave, free from the jurisdiction of God and man. Few scholars would go as far as Justice Foster in the fictional case of the Speluncean Explorers.³ Foster argued that the experience of the cannibals trapped in a cave was so markedly different from that of everyday people that the law had ceased to have jurisdiction over them.⁴ “Whatever particular objects may be sought by the various branches of our law,” Foster wrote, “it is apparent on reflection that all of them are

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1. See generally CHI., ILL., MUNICIPAL CODE, ch. 5–12 (2004), available at [http://www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/title5housingandeconomicdevelopment/chapter5-12residentiallandlordsandtenant?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:chicago_il](http://www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/title5housingandeconomicdevelopment/chapter5-12residentiallandlordsandtenant?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il) (providing that landlords and tenants may not waive rights or remedies under chapter 5-12); N.Y.C., N.Y., ADMIN. CODE § 26-408 (2014), available at <http://codes.lp.findlaw.com/nycode/ADC/26/3/26-408> (providing eviction procedures).
2. The well-known quote is variously attributed to Lord Blackstone, Sir Edward Coke, and American patriot James Otis. Coke also noted that “the common law doth prohibit any subject to build any castle, or house of strength embattled . . . , without the king’s license, for the danger that might ensue.” EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 161 (Nabu Press 2010) (1644). The symbolic castle-status provided to ordinary homes clashes with the prohibition of actual castles, with fortifications due to the threat of violence. Already, in 1644, the authorities had recognized the potential for an “Indiana standoff.” See *infra* Part VI. The contemporary invocation of the “Castle Doctrine,” in which everyone enjoys the privileges of a lordly estate and its concomitant right to wield deadly force, appears confused.
3. See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV 616, 620–26 (1949).
4. *Id.*

directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common."⁵ The corollary to this statement of law's purpose is that the life not "in common" with fellows, the life not "in coexistence," is a realm in which law ought not apply.

But such a tidy summary of the limits of jurisdiction is not applicable to our legal scheme. Accordingly, the law recognizes that some activities are impermissible in the home, just as anywhere else. The legal atmosphere is thinner inside the domestic sphere, not because courts have no jurisdiction therein, but because the residents can best flourish when free from interference.

This Article proposes an explanation for the special place of the home by surveying the development of privacy jurisprudence and grounding that development in our political tradition. Legal home protection has evolved beyond a ceasefire between state and citizen. Where before it was enough to stay the government's intrusion into the home, there is today a recognition of the value of the intimate association of free individuals and the trust in government that arises from the respect shown to that intimate association. Legal protections of home that do not advance those values, such as home as commercial entity, or as a haven for gun rights, are not part of the guarantees of the Bill of Rights.

II. OVERVALUING THE HOME: THE PROBLEM WITH "ALCHEMY"

Personal rights exist in every geophysical context but appear to be enhanced in the domestic sphere. It is tempting to describe this unique realm of personal freedom as a cloak that can be taken on and off; perhaps freedoms flourish indoors, and those freedoms are ceded as one leaves home. To Darrell Miller, the home can neatly serve as a bastion of individual rights because it is a physically recognizable container.⁶ According to Miller, "the boundaries of the home help determine that which falls inside the social compact and that which falls outside of it."⁷ In an attempt to fix a spatial limitation of gun ownership rights, Miller looks to instances when rights are amplified when citizens are at home.⁸

Comparing gun-wielding to First Amendment rights in possessing obscene material, Miller recommends an expanded right to home defense while curtailing the usage of guns outside of the home.⁹ To Miller, "[T]his

5. *Id.* at 621.

6. See Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1304-09 (2009).

7. *Id.* at 1305.

8. *Id.* at 1280.

9. *Id.* at 1305.

privilege of the home works a kind of alchemy with the Constitution. Things of no constitutional value outside the home glister with constitutional meaning within it.”¹⁰ Miller acknowledges that his comparison of gun rights to the Supreme Court’s protection of obscenity in the house is designed to stem the ongoing constitutionalization of self-defense rights.¹¹ Miller seeks to avoid the messy contradictions that the Supreme Court has imposed on Fourth Amendment privacy.¹²

The extent to which the home is an automatic guarantor of personal rights is a source of disagreement among scholars. Eugene Volokh rebuts the notion that the Bill of Rights protects homes for the sake of protecting homes.¹³ Volokh points out that the rights to the form of education or the sexual relations of one’s choosing cannot usually be asserted without leaving the home.¹⁴ To Volokh, Miller’s comparison of an unprotected category of speech (obscenity) with a right to self-defense is unwieldy, because, while constrained speech can move through other channels, assailants cannot be persuaded to relocate.¹⁵ It is not enough to consider a rights framework that merely suspends government policies at the top step of the porch. It can’t be that a blatant illegality can transform into an object of constitutional protection when it is inside a home, “alchemy,” after all, is a bogus science.

But it is the supposed domestic alchemy that inspired the Supreme Court’s push towards the constitutional protection of guns in *District of Columbia v. Heller*.¹⁶ The Court put the tradition of home protection in the service of gun rights, relying on a broadened meaning of “militia” to include “all able-bodied men,” so that a single person’s bearing of arms could fall under constitutional protection.¹⁷ Further, the textually explicit purpose of the Second Amendment, “the security of a free state,” was no longer to be used collectively against insurrections, tyrants, and standing armies, but instead as a personal response to an elevated local crime rate.¹⁸ The majority

10. *Id.*

11. *Id.* at 1351–55.

12. *Id.* at 1351.

13. Eugene Volokh, *Guns as Smut: Defending the Home-Bound Second Amendment*, VOLOKH CONSPIRACY (Oct. 28, 2009, 1:16 PM), <http://www.volokh.com/2009/10/28/guns-as-smut-defending-the-home-bound-second-amendment/>.

14. *Id.* Although those activities involve decisions that are probably private and domestic, there must be a respect for citizenship as practiced in public, if this notion of liberty is to thrive. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (where due process liberty includes “not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

15. Volokh, *supra* note 13.

16. 554 U.S. 570 (2008).

17. *Id.* at 596.

18. *See id.*

opinion's alchemy transformed a scheme for democratic distribution of war materiel into a tool for the safety of households.¹⁹

This constitutionalized “Castle Doctrine” supposes a natural antagonism between the free citizen in her home and the rapacious tendrils of government, with the border between brimming with imminent violence. The evolution of the Second Amendment, though, did not deal with the relationship between state and home until *Heller*. Instead, the Supreme Court gradually permitted the incorporation of state militias into the federal military structure,²⁰ and the federal regulation of the interstate transportation of arms.²¹ The Supreme Court departed from this line and relied on Darrell Miller's “alchemy” to fashion domestic exceptionalism into protection for gun rights.²²

Adam Benforado, like Darrell Miller and Justice Scalia, identified the home as a legal haven, as part of an analysis of the “ordering of protected spaces.”²³ Like Miller, Benforado examined *Stanley v. Georgia*'s permission of obscene material in private spaces, while also noting the Alaska Supreme Court's refusal to apply a marijuana prohibition to a private space.²⁴ Sexual privacy to Benforado also appeared predicated on the possession of a protected home space.²⁵ Finally, Benforado noted the state-sanctioned use of deadly force in defense of the home, concluding that “the protections in such laws seem to flow largely from the space of the home itself rather than from property rights enjoyed by owners or inhabitants . . . [B]eing within the micro space of the home may effectively negate the practical effect of being within the macro space of the jurisdiction”²⁶ Like Miller's analysis, we encounter the effects of “alchemy,” and the home-bound intransigence is protected simply because it takes place in a home.

The true spirit of home protection is that the esteem exchanged between the private and public world, the pact of mutual trust, is the genesis of our civil society. When the state demurs from officiating affairs inside the home, it is not because it has been violently beaten back, but because it knows better than to compromise the trust that it has attained. The “right to privacy” or “right to be let alone” represents not a constraint on powerful state actors, but rather a subordination of those state actors to private decisions. In this context, home protection is not a commitment to legal inaction, but rather, a

19. *Id.* at 622 (“The traditional militia was formed from a pool of men bringing arms ‘in common use at the time’ for lawful purposes like self-defense.”).

20. *Cox v. Wood*, 247 U.S. 3 (1918).

21. *See United States v. Miller*, 307 U.S. 174 (1939).

22. *Heller*, 554 U.S. at 635.

23. Adam Benforado, *The Geography of Criminal Law*, 31 *CARDOZO L. REV.* 823, 884 (2010).

24. *Id.* at 882 (quoting *Ravin v. State*, 537 P.2d 494 (Alaska 1975)).

25. *Id.*

26. *Id.* at 883–84.

strategy of self-confidence, reflective of a belief that free people, when given the choice, will choose to assimilate into a free society.

The roots of domestic exceptionalism are ancient. The doctrine was forcefully reasserted during the upheavals of seventeenth century England and again in America's revolutionary period.²⁷ Home protection has taken on a special intensity in the last 100 years. The development of the theories of psychological vulnerability, choice of education²⁸, and sexual privacy²⁹ have led to a broadened home protection, housed in an expanding right to substantive due process.³⁰

In order to respect private citizens so that they may in turn respect the state, it is necessary to recognize the qualities of home that deserve protection and those that do not. To better foster assimilation, the protection of the home should center on mutual trust and intimate association, rather than home as a defense bastion or as a physical possession. Most crucially, the use of home defense as a strategy to broaden self-defense rights and to defeat gun regulation should end because the strategy depends on an erroneous theory of the home's place in the law.

III. THE POSITION OF THE HOME IN THE MODERN STATE: ENGLISH REVOLUTION AND COLONIAL EXPERIENCE

Lord William Blackstone recognized the private interest in the integrity of home as predating English nationhood, predating even the arrival of the species, "[E]ven the brute creation, to whom everything else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds . . . had nests, and the beasts . . . had caverns, the invasion of which they esteemed a very flagrant injustice."³¹ Accordingly, "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."³²

When American patriots argued for the protection of homes from arbitrary government action, they advocated for the qualities of freedom associated with the reign of Edward the Confessor.³³ American revolutionary

27. See CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (Liberty Fund, Inc. 2010), available at <http://www.constitution.org/cmt/mcilw/mcilw.htm>.

28. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that a Nebraska statute prohibiting the teaching of foreign languages violated the Due Process Clause).

29. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that there is a right to privacy in marital relations).

30. See Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

31. 2 WILLIAM BLACKSTONE, *COMMENTARIES* *121, *122 (1867).

32. 4 *id.* at *958.

33. See JAMES OTIS, *RIGHTS OF BRITISH COLONIES ASSERTED AND PROVED* 31 (1764), available at http://lf-oll.s3.amazonaws.com/titles/2335/Otis_RightsBritishColonies1556.pdf.

James Otis opposed the systematic home invasions of the English monarchists, and he found justification for his position in the ancient constitution.³⁴ Otis averred that “liberty was better understood, and more fully enjoyed by our ancestors, before the coming in of the first Norman Tyrants than ever after”³⁵ Ancient constitutionalism strikes against a deviant or arbitrary state action. “The ‘merit’ of the ancient constitution was not in the antiquity of its usage but in the degree of security from governmental whim and caprice . . . in the customary jurisprudence of an unwritten constitution there is no element more essential to liberty than security against arbitrariness.”³⁶

The need for protection against arbitrariness increased as modern militarism began to appear. The civilian population inevitably bore a heavy burden from army activity. The English Petition of Right in 1628 arose as a response to the rights violations of Charles I during the Thirty Years’ War.³⁷ Chief among these abuses was the forced billeting of soldiers within private homes, an outgrowth of the king’s “forced loans” for the war effort without the approval of Parliament.³⁸ The Petition of Right is an important English constitutional document for its affirmation of the rule of law and of civil liberties in the face of a monarch’s arbitrary decisions to resort to martial law, which at the time was seen not necessarily as an invasion but instead as an interruption in the rule of law.³⁹ A new power base was articulating its rights and interests: the merchants and manufacturers, whose clout would, in time, spread throughout much of the world.⁴⁰

Modern rights frameworks were further clarified by late seventeenth century events. The overthrow of James II in 1689 and Parliament’s Bill of Rights stand out as assertions of the autonomy of the private home in the face of concentrated monarchical power.⁴¹ Parliament had in 1679 enacted the

34. *Id.*; see also JAMES OTIS, AGAINST WRITS OF ASSISTANCE (1761), available at <http://www.nhinet.org/ccs/docs/writs.htm> (“Now, one of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle.”).

35. OTIS, *supra* note 33.

36. John Phillip Reid, *The Jurisprudence of Liberty*, in ROOTS OF LIBERTY 181 (Ellis Sandoz ed., 1993).

37. See J. A. Guy, *The Origins of the Petition of Right Reconsidered*, 25 HIST. J. 289 (1982).

38. See generally PAULINE GREGG, KING CHARLES I (1964); RICHARD CUST, CHARLES I: A POLITICAL LIFE (2007); CHARLES CARLTON, CHARLES I: THE PERSONAL MONARCH (2d ed. 1995).

39. See Steve Bachmann, *Starting Again with the Mayflower . . . England’s Civil War and America’s Bill of Rights*, 20 QUINNIPIAC L. REV. 193, 202 (2000).

40. GEORGE L. CHERRY, EARLY ENGLISH LIBERALISM: ITS EMERGENCE THROUGH PARLIAMENTARY ACTION, 1660-1702, at 12 (1962) (“The association of privilege and rights with movable property was the accomplishment of a new social class becoming powerful in England during the seventeenth century.”).

41. A contemporaneous pamphlet summarized the issue: “Posterity will be ashamed to own,/The actions we their ancestors have done,/When they for ancient precedents enquire,/And to the Journals of this age retire,/To see one tyrant banish’d from his home,/To set five hundred traitors in his room.” See MCLWAIN, *supra* note 27.

Anti-Quartering Act, forbidding the King from billeting his soldiery onto the people.⁴² However, James II ignored the Act, which was a major factor in his eventual removal and exile.⁴³ England's Bill of Rights, in addition to constitutionalizing a prohibition on quartering soldiers, also forbade, in the same clause, a peacetime standing army without the consent of Parliament.⁴⁴ The King's incursions into private homes occasioned not just violent resistance, but an organized desire for a government that was physically restrained from the private sphere.⁴⁵ The protections that Britons declared for themselves sounded in the integrity of property-based privacy interests and in the limitations on the ways that a sovereign could marshal armed forces against its own people.⁴⁶ These revolutionaries were the architects of the modern liberal state.⁴⁷

In the American colonies, objections to the quartering of soldiers, the forcible disarming of citizens, and the maintenance of standing armies drew from seventeenth century British revolutionary thought.⁴⁸ In addition to the other forms of monarchical oppression, quartering was criticized early and consistently.⁴⁹

Patriots defended the home and denounced the Quartering Act, a 1765 parliamentary edict that explicitly required colonists to personally provide for an army that they increasingly saw as an occupying force.⁵⁰ This legislation, sibling to the Stamp Act (together they were reviled as "the Intolerable Acts") forced a consideration of the extent to which a distant authority may impose soldiers into private personal zones.⁵¹ In response, six colonies enacted constitutional provisions forbidding quartering.⁵² The specific quality of this tyranny engendered much debate during the crucible period of American politics, both as a specific grievance to a real harm and

42. GERALDINE WOODS, RIGHT TO BEAR ARMS 6 (2005).

43. *Id.*

44. *English Bill of Rights 1689*, THE AVALON PROJECT, http://avalon.law.yale.edu/17th_century/england.asp (last visited Oct. 13, 2014) [hereinafter *Bill of Rights*].

45. See William S. Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195, 197 (1989) (explaining that resistance towards quartering soldiers "became one of the issues propelling the nation toward civil war").

46. See *Bill of Rights*, *supra* note 44. The *Bill of Rights*, broadly speaking, subordinated monarchical power to the authority of Parliament.

47. See STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION (2009) (arguing that the 1688 Glorious Revolution was the first modern revolution, creating a bureaucratic and participatory state).

48. See OTIS, AGAINST WRITS OF ASSISTANCE, *supra* note 34.

49. See Fields, *supra* note 45, at 199 (explaining that complaints against quartering soldiers began as early as 1675).

50. *Id.* at 200–01.

51. *Id.* at 201.

52. See Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The "Living Constitution," The Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769, 781 (2000) (New Hampshire, Massachusetts, Delaware, Maryland, Pennsylvania, and New York).

as a general principle under which free people must live.⁵³ A prohibition on forced quartering was enshrined in the Bill of Rights, mostly at the urging of the Anti-Federalists.⁵⁴

The Boston Pamphlet of 1772 itemized contemporary grievances, and it also operated as a declaration of natural rights.⁵⁵ To eighteenth century revolutionists, the two strategies were intertwined. The Pamphlet joined the right to be free from tampering soldiers with the right not to have unfair taxes imposed, considering both to be general, natural rights.⁵⁶ Colonists took a holistic approach when they spoke up for their property rights and the sanctity of their homes. They were already moving towards an expression of the more basic rights without which property was not possible, the protection from arbitrariness and even the “right to be let alone” that Thomas M. Cooley later identified.⁵⁷

The “Intolerable Acts” permitted invasions of both home and property, and these transgressions fed modern warfare and modern imperialism.⁵⁸ This development led to the articulation of a sense of private autonomy, which denounced the transgressions against private citizens as well as against the principles of self-government that undergird free society.⁵⁹ It was necessary to protect the home in order to protect the health of the whole.

IV. THE DISCOVERY OF PRIVACY: FROM TORT ACTION TO FUNDAMENTAL RIGHT

Although the home may appear to be the most natural location for privacy, the pioneers of a “right to privacy” did not base their new tort on an instance of home invasion. It was the humiliation caused by unwanted publicity from the new technology of photography that led Samuel Warren and Louis Brandeis to articulate the right to privacy in their famous law review article.⁶⁰ The recognition of a need to prevent assaults on privacy came in an age of rapid urbanization and scientific advances about psychological well-being. Years later, privacy would be invoked to protect sexual choice.⁶¹ There arose, in the *Griswold v. Connecticut* line of cases,

53. See Fields, *supra* note 45, at 201–02.

54. U.S. CONST. amend. III (“No soldier shall, in time or place be quartered in any house, without the consent of the owner, nor in any time of war, but in a manner to be prescribed by law.”).

55. BOSTON COMMITTEE FOR CORRESPONDENCE, THE BOSTON PAMPHLET (1772), excerpts available at <http://www.nationalhumanitiescenter.org/pds/makingrev/crisis/text6/bostonpamphlet.pdf>.

56. *Id.*

57. See THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS: OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 29 (Fred B. Rothman & Co. 1993) (1878).

58. See Fields, *supra* note 45, at 201.

59. *Id.* at 202.

60. Brandeis & Warren, *supra* note 30.

61. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

the argument that privacy was a “penumbral” right without which the other rights would not exist.⁶²

These guarantees did not depend on a physical restraint of state power at the boundaries of the private home. Physical incursions by state actors into homes are today mostly limited to the most aggressive sort of criminal investigation, and, even then, the Fourth Amendment imposes serious constraints.⁶³ Rather than beating back arbitrary monarchists, today’s conception of personal liberty aims to protect the tenuous peacefulness that people enjoy when left alone. Privacy law does not focus especially on physical manifestations of state power. It instead valorizes the condition of personal independence that pervades when a person is permitted a zone into which only he or she may enter, regardless of where that zone lies.

At the turn of twentieth century, rapid urbanization and technological advances made citizens newly vulnerable.⁶⁴ Congested cities gave rise not just to physical maladies like typhoid and cholera but to economic displacement and psychological stress.⁶⁵ Mass media and mass migration changed human society, and they also revealed certain qualities of human existence, the disruption of which harmed freedom. Brandeis and Warren observed this process and argued that legal protections had to keep pace with new harms.⁶⁶ In their historical introduction, the authors wrote that while law formerly only protected people from “physical interference with life or property . . . there later came a recognition of man’s spiritual nature, of his feelings and his intellect.”⁶⁷

The boldest assertion of Brandeis and Warren’s argument was to include privacy in the tradition of property rights.⁶⁸ They described property

62. *See id.* at 484 (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.” (citations omitted)); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972); *Roe v. Wade*, 410 U.S. 113, 129 (1973).

63. U.S. CONST. amend IV (“The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.”).

64. *See generally* RUTH SCHWARTZ COWAN, *A SOCIAL HISTORY OF AMERICAN TECHNOLOGY* 166 (1997) (exploring how technological advances in America are related to the country’s social development).

65. WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* (Harvard Univ. Press 1981) (1890). Just across campus from the Harvard Law Review where Brandeis and Warren’s famous article was published, William James founded the first American laboratory for experimental psychology in 1875. The same year that *The Right to Privacy* appeared, James published the influential *Principles of Psychology*. James argued that although people possessed instincts just as lower animals do, their instincts collide with expectations of consequences, out of which collision the human personality is formed.

66. Brandeis & Warren, *supra* note 30, at 195.

67. *Id.* at 193.

68. *Id.* at 219.

as both tangible and intangible, as “every form of possession.”⁶⁹ Brandeis and Warren concluded their denunciation of privacy-violators by insisting that it is not enough to protect homes from government agents, there must additionally be a refuge from aggressive journalism, “The common law has always recognized a man’s house as his castle, impregnable, often, even to his own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?”⁷⁰

As a defense against the constitutionally protected behavior of taking personal photographs, Brandeis and Warren described a privacy tort that was not their own invention but had evolved, keeping pace with the changing nature of human interactions.⁷¹ If assault had grown out of battery, reasoned the jurists, then courts could now affirm that incursions into zones of privacy cause real damage.⁷² Human sensations have legal value, and our society protects thoughts and feelings, as much as it does property and bodies. An earlier, more primitive society could only manage to redress the direct harms from the most egregious, palpable acts (trespassing and battery). Warren and Brandeis wrote in 1890 that courts had begun to recognize symbolic and emotional harm stemming from these privacy invasions.⁷³ Harms no longer had to be bare and literal, argued Warren and Brandeis.⁷⁴ There were other, subtler forms of damage that the law also protected.

“Privacy,” thus constituted, represents an innovation in the understanding of human vulnerability. Protections in the Bill of Rights had heretofore focused on literal intrusions (Second and Third Amendments), political liberty (First Amendment) or appropriate legal procedures (Fifth, Sixth, and Seventh Amendments). Up to this point, the integrity of the home was based on a quality of political liberty, or possibly on a commercial independence (the Fourth Amendment’s “papers”), but this was something else. Warren and Brandeis described their privacy tort as an emanation of “rights as against the world.”⁷⁵ Brandeis and Warren’s formulation supposed a congenital fragility in citizens that opportunists could exploit. This fragility would become a matter of constitutional concern when the opportunists were state actors.

Brandeis got the opportunity to elevate the right to privacy from the realm of tort law into constitutional law in his dissent in *Olmstead v. United States*.⁷⁶ In an unwarranted wiretapping case, Brandeis argued that the

69. *Id.* at 193.

70. *Id.* at 220.

71. *Id.*

72. *Id.*

73. *Id.* at 195.

74. *Id.*

75. *Id.* at 213.

76. 277 U.S. 438, 471–86 (1928) (Brandeis, J., dissenting).

government's incursion violated "the most comprehensive of rights," a sort of *ne plus ultra* of constitutional protections.⁷⁷ Brandeis expanded a police misconduct case from the cubbyhole of Fourth Amendment jurisprudence into the broader context of a right to privacy. Brandeis wrote that:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings[,] and of his intellect. They knew that only a part of the pain, pleasure[,] and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions[,] and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.⁷⁸

Brandeis's view did not prevail in 1928 but would carry the day when *Katz v. United States* constitutionalized criminal investigations.⁷⁹ Furthermore, *Boyd v. United States* extended Fourth and Fifth Amendment protections against police rummaging.⁸⁰

The Brandeis and Warren recognition of "rights as against the world" developed from a recognition of a basic human sensitivity into a constitutional right, linked to the necessity of a restrained government.⁸¹ The difference between their "privacy" and the Boston Pamphlet's iteration of freedom was a certain increased sensitivity to human vulnerabilities.

The *Katz* and *Boyd* doctrines represented a flourishing of the privacy that Brandeis and Warren developed. The *Katz* test, limiting police searches to when suspects have an objectively reasonable expectation of privacy, transcends physical space.⁸² The fact that the investigating officers did not physically interfere with the suspect's person did not mean that there was not an incursion into a zone of privacy.⁸³ This privacy was just more abstract, and it was not contained in the domestic space.

77. *Id.* at 478.

78. *Id.* at 478.

79. See 389 U.S. 347 (1967) (holding that the Fourth Amendment "protects people, not places").

80. See 116 U.S. 616 (1886) (holding that the Fourth Amendment protects against police invasion into a person's private matters and compulsory production of a person's papers).

81. Brandeis & Warren, *supra* note 30, at 213.

82. See *Katz*, 389 U.S. at 352 (holding the defendant had a reasonable expectation of privacy in a telephone booth).

83. *Id.* at 352–53. But *Katz* is still a limited view of property-based privacy interests, since the holding keeps a requirement for subjective and objective expectations of privacy. This caveat is what allows police to obtain information about a private home without "searching," but by observing from a helicopter 400 feet in the sky as in *Florida v. Riley*, 488 U.S. 445 (1989).

Tort privacy and criminal privacy were the forebears of a twentieth century judicial development, substantive due process privacy.⁸⁴ In *Griswold v. Connecticut*, Justice William Douglas picked up where Brandeis left off.⁸⁵ In the criminal prosecution of a married couple that used contraception in violation of a Connecticut state law, Douglas reversed the lower court with a limited but radical assertion of substantive due process rights.⁸⁶ The State could not forbid a married couple from deciding when and whether to have children.⁸⁷ The groundbreaking sexual privacy ruling said that a married couple's decision to use contraceptives could not be taken away by the Connecticut legislature.⁸⁸ The decision drew on "penumbras" of the Bill of Rights, and was ostensibly limited to rights located in the "sacred precincts of marital bedrooms."⁸⁹ *Griswold* also appeared to rely on the legal protections afforded to marriage, "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social project."⁹⁰

Justice Douglas' holding employed a unique method of constitutional analysis. Douglas looked to how the right of association was drawn out from the First Amendment, and offered that example as an analogy for his constitutional right of privacy, which, like "association," did not have an explicit textual basis.⁹¹ Douglas was careful to restrict his holding to cover sexual privacy in the context of marriage, but later decisions broadened the right to sexual privacy. In *Eisenstadt v. Baird*, an unmarried couple was granted the same rights of the married couple in *Griswold*,⁹² and in *Roe v. Wade*, the Court held that the privacy doctrine covered abortion rights.⁹³

By now, the "sacred precincts" of the home had become an ungainly proxy for the meta-right that the Supreme Court was constitutionalizing. Reproductive choice may take place in private to a certain extent, but it also necessarily includes a regulation of medical practice, which today typically occurs outside of homes.

Thomas C. Grey discusses the establishment of rights to sexual freedom, seeing the Supreme Court's constitutional interpretation as, above

84. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

85. *Id.*

86. *Id.* at 485–86.

87. See *id.*

88. See *id.*

89. *Id.* at 485.

90. *Id.*

91. *Id.*

92. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

93. 410 U.S. 113 (1973).

all, enforcing stability.⁹⁴ As social mores became more tolerant of sexual choice and other private activity, the Supreme Court responded not by offering broad protections but by favoring “stability-centered concerns of modern conservative family and population policy.”⁹⁵ Today there are constitutional rights to an abortion and corresponding interests of states to stifle those abortion rights.⁹⁶ The judicial impulse to defer to the status quo, to disarm any political movement to regulate sexuality, continues the tradition of mutual trust between governed and government. Deference to private choice, then, is not a goal in and of itself but a reliable means to protect the status quo.

Jed Rubinfeld writes that the key to privacy is not in whether the law being reviewed infringes on some fundamental right—instead jurists must inspect what the law *imposes* and evaluate whether that imposition is an overreach.⁹⁷ Privacy, then, is a check on a totalitarian state, the kind of place that would impose a one-child policy or root through the desk where your business is conducted.

A home is property, but we must consider a home something more if the law applies so differently to it. Michael Anthony Lawrence, in his argument for a constitutional right to autonomy, points out that the term “property” as found in the two Due Process Clauses includes not just physical things, but also abstract interests, like rights and opinions.⁹⁸ Somewhere in our instinctive protection of the home, there is a sense that without an unperturbed private zone, the premise of a society of self-governing people would collapse. Lawrence sees protection on nonmaterial “property” as largely coterminous with a right of autonomy,⁹⁹ and autonomy is not something that exists *ex nihilo*, it is a strategy and a guiding hope of our legal tradition.

The discovery of a personal freedom of the mind and body has broadened home-protection, but it has done so only as a byproduct of the increased sensitivity to personal privacy and the role of that privacy in a free society. To insist that the home is the natural and exclusive setting of personal privacy is to abrogate the right, and to decontextualize it from the broader dynamic between democratic government and free individual.

94. Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW AND CONTEMP. PROBS. 83 (1980).

95. *Id.* at 90.

96. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Justice O’Connor’s opinion enacts a balance between protecting the rights of women and accommodating the interests of states).

97. Jed Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739–40 (1989) (“The distinguishing feature of the laws struck down by the privacy cases has been their profound capacity to direct and to occupy individuals’ lives through their affirmative consequences. This affirmative power in the law, lying just below its interdictive surface, must be privacy’s focal point.”).

98. Michael Anthony Lawrence, *Reviving a Natural Right: the Freedom of Autonomy*, 42 WILLIAMETTE L. REV. 123, 139–41 (2006).

99. *Id.*

Efforts to contain personal liberty in the home space end by denaturing liberty.

V. THE HOME AS SACRED SPACE: FETISHIZING REAL ESTATE

Margaret Jane Radin argues for two genres of property, fungible and personal, because personal property is bound up with personhood.¹⁰⁰ To support her theory, she marshals Kant and Hegel, then surveys the American legal tradition and underlines instances where property takings are restricted due to the personhood interest.¹⁰¹ Radin is careful to acknowledge “the problem of fetishism,” whereby personal property’s worth becomes exaggerated.¹⁰²

Radin finds most of her support for property as personhood by emphasizing the special solicitude for the home.

Our reverence for the sanctity of the home is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society. Where other kinds of object relations attain qualitatively similar individual and social importance, they should be treated similarly.¹⁰³

It is arguable that homes or any form of property are “inextricably part of the individual”¹⁰⁴ The distinction between “personal and fungible” may be too tenuous to hold, but Radin is right about one thing, protecting physical space is a means to protecting the fabric of society.

John Fee is in step with Radin in his protest over the *Kelo v. City of New London* decision.¹⁰⁵ More than just an expansion of the Takings Clause to allow the “public purpose” of government takings to be any lucrative private enterprise, Fee sees *Kelo* as near-blasphemous.¹⁰⁶ He surveys the special exceptions for the home in the First Amendment (*Stanley v. Georgia*), Third Amendment (*Engblom v. Carey*), Fourth Amendment (*Kyllo v. United States*), and, most of all, in the Fifth Amendment’s Takings Clause.¹⁰⁷ Fee also includes the homestead exemption for debtor-creditor law and criminal law’s Castle Doctrine.¹⁰⁸ The righteousness of the argument is signaled by the chosen epigram from Sir William Pitt:

100. Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

101. *Id.*

102. *Id.* at 968.

103. *Id.* at 1013.

104. *Id.*

105. See John Fee, *Eminent Domain and the Sanctity of the Home*, 81 NOTRE DAME L. REV. 783 (2006).

106. *Id.* at 797–99.

107. *Id.* at 786–88.

108. *Id.* at 787.

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!¹⁰⁹

While it is clear that home protection is a longstanding tradition, Fee does not identify what is valuable beyond the value of homes *qua* homes. The result of emphasizing homes at any cost is a near-fetishization of real estate.

A formalistic focus on protecting the home, subordinating other public priorities to domestic life, is an error. For instance, the Court's Fourth Amendment jurisprudence distinguishes between protected "curtilage" and freely searchable "open fields."¹¹⁰ This formulation has required courts to create finer and finer distinctions around homes. In *United States v. Reilly*, contraband discovered by police was inadmissible because it was found in a *mowed* area near the defendant's house.¹¹¹ The court held that the care given to the homeowner's lawn was enough to assert privacy interests, whereas if he had neglected the grass his privacy would have been relinquished.¹¹²

Limiting rights to the home space is a step towards denying those rights altogether. In *Minnesota v. Carter*, a houseguest had no privacy interest because he did not spend the night.¹¹³ The privacy interests in the home seem all the more fragile after *Hudson v. Michigan*, when the Supreme Court declined to suppress evidence after police had disobeyed a "knock-and-announce" requirement in their warrant.¹¹⁴ The Court acknowledged that the exclusionary rule serves to protect the "privacy and dignity" of the suspects, but that officer safety and law enforcement goals outweighed those values.¹¹⁵ Like *Reilly*'s location of Fourth Amendment privacy some place where the tall grass meets the short grass,¹¹⁶ the *Hudson* decision casts doubt on

109. *Id.* at 783 (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958) (citation omitted)).

110. See Clinton Wayne Marrs, *Criminal Procedure-Search and Seizure-Expectations of Privacy in the Open Field and an Evolving Fourth Amendment Standard of Legitimacy*: *Oliver v. United States*, 16 N.M. L. REV. 129 (1986).

111. 875 F. Supp. 108, 119 (N.D.N.Y. 1994).

112. *Id.*

113. 525 U.S. 83 (1998).

114. 547 U.S. 586 (2006).

115. *Id.* at 593-94.

116. *Reilly*, 875 F. Supp. at 119-20. A federal trial court found that the mowed area of a defendant's lawn qualified as "curtilage," and thus was protected from police intrusion:

The grounds were groomed and well maintained, and although the boundary fencing was down at several locations, it should have been readily apparent to an observer that the groomed area of the property was private. In addition, although the fence was constructed to keep out stray cows, defendant took other affirmative steps to assure the privacy of the grounds, such as the planting of trees along the property's perimeter Viewed as a whole, an observer could reasonably conclude that the area in question harbors the 'intimate activity associated with the sanctity of a man's home and the privacies of life'

Id. (quoting *United States v. Dunn*, 480 U.S. 294, 301 (1987)).

whether the integrity of the home as it is currently understood can prevent police from searching it without a warrant.

Darrell Miller avows that his comparison of gun rights in the home to possession of obscene material is in part to avoid the messy contradictions of Fourth Amendment privacy.¹¹⁷ If only we could figure out where the privacy is *really* in effect, the thinking goes, then the zones could be clearly delineated. But “privacy” ebbs and flows; it finds safe haven in various spaces, and in different contexts. A survey about the violativeness of home searches revealed that the bedroom registers as the area most vulnerable to government penetration.¹¹⁸ This response is probably due to the private sexual relations customarily conducted there, which seems to position a bedroom-occupant into the context of *Griswold*’s substantive due process privacy rights.

Stephanie Stern, on the other hand, argues that the founding generation favored protections over mail and workspaces, because privacy in the business context was a more important spur to the protection of the home against state invaders.¹¹⁹ Stern points out that *Katz* represented a shift in Fourth Amendment jurisprudence from protected places to protected persons.¹²⁰ To Stern, the real interest protected by the Fourth Amendment is against “subjective intrusiveness.”¹²¹ The instinct to protect only the home can be traced to romantic idealizations, and New Deal-era government policy,¹²² more than to authentic notions of security from government interference. “From the perspective of a cultural historian or property scholar . . . this persistent reverence is part of a broader cultural ascendance of the home across the last century—an ascendance that governmental actors and private business interests largely engineered.”¹²³ And, “The modern-day judicial sentiment that all details within the home are intimate details is eerily reminiscent of the Romantic ideal of the home as an idealized and encapsulated private domestic sphere in which to retreat from modern life.”¹²⁴

117. See Miller, *supra* note 6.

118. Stephanie Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 909 (2010).

119. *Id.* at 935–36; see also Benjamin Bratman, *Brandeis and Warren’s “The Right to Privacy and the Birth of the Right to Privacy”*, 69 TENN. L. REV. 623, 633–34 (2002) (explaining that the “sanctity of the mails” doctrine, wherein lawmakers protected private papers and messages sent by telegraph, is rooted in the Fourth Amendment).

120. Stern, *supra* note 118, at 907.

121. See *id.* at 908.

122. *Id.* at 919–20 (citing Ronald Tobey, *Moving Out and Settling In: Residential Mobility, Home Owning, and the Public Enframing of Citizenship, 1921–1950*, 95 AM. HIST. REV. 1395, 1413–19 (1990)).

123. *Id.* at 913.

124. *Id.* at 920.

Stern contends that the immemorial legal tradition of home protection could be based on a misunderstanding, or even a hoax,

Contrary to the claims of some commentators, there is no evidence that residential privacy reflects an innate, biological drive to defend against territorial intrusion. Humans are evolutionarily social beings, and the flexibility of their property arrangements (and defense of territorial property) reflects this pro-social orientation. From prehistoric man to Native-American tribes to modern communes, people have cohabitated in groups, foregone private-property systems and stable settlement bounds, and lived nomadically. In order for social groups to function, individuals must submit at times to various social and physical incursions that are acceptable to the group, or a dominant force within the group, but undesirable to the affected individual.¹²⁵

To Stern, the normative reflex to protect contemporary domestic spaces is not based on any fundamental right, and we should leave open options of nomadism or large-group cohabitation.¹²⁶ She confronts Radin's "property as personhood" head-on when she points out that an American home is not inextricably entwined with personhood at all, but is instead just a commodity that is transferred every five years.¹²⁷ Privacy law has conflated the need for limits on person-to-person relationships with the protection of physical space. "[C]ontrary to the assumption that homes are uniquely vulnerable, the potential for overreaching and harassment appears higher in nonresidential contexts that currently receive more limited protection, such as searches of financial records and computer storage."¹²⁸ Stern would rather see a modernized interpretation of the Fourth Amendment's "papers and effects," protecting cell phones and other digital connections.¹²⁹ Stern concludes that home-protection is an "imperfect proxy" for the defending the values that take place in homes: "substantive privacy and intimate association."¹³⁰

Stern also has written against the contention that the home is a necessary possession in order to achieve psychological flourishing.¹³¹ Stern sees more potential for growth in the American habit of redomiciling.¹³² Neighborhood ties are often overvalued and less important than they have been in the past. The great reverence we have for homeownership and its salutary effects on communities may also be misplaced; homeowners are

125. *Id.* at 925.

126. *Id.*

127. *Id.* at 927.

128. *Id.* at 933–34.

129. *Id.* at 934–35.

130. *Id.* at 955–56.

131. See Stephanie Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1123–24 (2009).

132. *Id.*

only slightly less mobile, and only slightly more community-invested and likely to vote than renters.¹³³ Hence, fracturing neighborhoods may not in fact deplete social capital, contra the arguments of advocates for foreclosure relief. To Stern, public subsidies to remedy the victimization caused by home-loss could be better spent.¹³⁴

Stern is not alone in arguing that home possession is overprotected in the law. D. Benjamin Barros points to an overreliance on a “cliché” ideology of the home.¹³⁵ These scholars are correct to note the confusion that results from protecting the home for the sake of protecting the home, but they mostly ignore the most serious danger in a formalistic approach to home defense.

The necessary corollary of Radin and Fee’s protection of the home at any cost is a robust right to defend private homes from violent onslaught. The common law recognized a duty to retreat from danger, and then a caveat that once one had entered one’s home, there was probably no possibility of retreating further.¹³⁶ This manifestation of home protection is not about the special qualities that homes have in a free society, but only that it is where a marksman ends up when he is finished backing away. The “Stand Your Ground” doctrine has found a champion in the National Rifle Association, which has sought to broker a treaty between criminals and victims by striking a delicate balance of terror.¹³⁷ This is not traditional, but rather a recent innovation, with its current high-water mark symbolized by *District of Columbia v. Heller*.¹³⁸

The Court’s alignment of Second Amendment rights with the “home as sacred space” is the most problematic manifestation of home overprotection. A recent political movement has used home-defense as its most important prong in defeating federal regulations of gun ownership.¹³⁹ *McDonald v. Chicago* broadened the *Heller* holding and asserted an originalist theory that weaponized home-defense is a fundamental right.¹⁴⁰

The home needs to be considered in a new light. Protecting the home should not lead to thwarting police objectives or implicitly approving of

133. *Id.* at 1125–26.

134. *Id.* at 1126.

135. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006).

136. Robert Leider, *Understanding “Stand Your Ground”*, WALL ST. J. (Apr. 18, 2012, 6:58 PM), <http://online.wsj.com/news/articles/SB10001424052702304432704577350010609562008>.

137. See E.J. Dionne Jr., *Why the NRA Pushes “Stand Your Ground”*, WASH. POST (Apr. 15, 2012), http://www.washingtonpost.com/pb/opinions/why-the-nra-pushes-stand-your-ground/2012/04/15/gIQAL458JT_story.html.

138. See 554 U.S. 570 (2008).

139. See Arkadi Gerney, *Never Mind New Gun Laws—the NRA Keeps Weakening the Existing Ones*, DAILY BEAST (Apr. 1, 2013), <http://www.thedailybeast.com/articles/2013/04/01/never-mind-new-guns-laws-the-nra-keeps-weakening-the-existing-ones.html>.

140. 561 U.S. 742 (2010).

genocide,¹⁴¹ it should serve to reaffirm the dignity of free people, and to shore up their capacity to participate in a free society. Brandeis and Warren's article served to transpose an ancient idea of liberty onto modern social arrangements.¹⁴² Our understanding of spaces and places and privacy is denatured when it is explored exclusively through the Second or Fourth Amendments. Property-based privacy interests do not appear when police officers undertake a criminal investigation or when a robbery takes place. They were there all along, and they protect against other, subtler kinds of incursions.

VI. CODA: THE INDIANA STANDOFF, *LUTHER V. BORDEN*, AND JOHN STUART MILL

The atavistic instinct to protect the home from any government action is not a good framework for social progress. The consequences of the instinct were revealed when the Indiana legislature responded to a police incident at the threshold of a private home.¹⁴³ A man accused of domestic assault fought off a police officer but was arrested anyway.¹⁴⁴ The legislature responded to his conviction by announcing rights to physically resisting a policeman from within your home or car.¹⁴⁵ This new protection may have only represented a political gesture, unlikely to be put into practice, but even so, the statute sounds in misapprehension of the reasons for home protection. Meeting law enforcement with a violent response does nothing to burnish the esteem that government and citizens share for one another.

The danger of home-defense as suspension of law enforcement is that we end up treating each home as its own polis, in which violence or any behavior can reign unchecked. The right to domestic tranquility is not an

141. Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood as Property*, 98 VA. L. REV. 635 (2012). Sharfstein goes as far as to say that a conflation of property with personhood could have been the animating emotion behind some of history's worst atrocities, including the chattel slavery practiced in the United States. *Id.* at 676–77.

142. See Brandeis & Warren, *supra* note 30.

143. See Tyler Andersen, *Balancing the Scales: Reinstating Home Privacy Without Violence in Indiana*, 88 IND. L.J. 361 (2013).

144. *Id.*

145. IND. CODE §35-41-3(i) (2013) provides:

(i) A person is justified in using reasonable force against a public servant if the person reasonably believes the force is necessary to:

(1) protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force;

(2) prevent or terminate the public servant's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle; or

(3) prevent or terminate the public servant's unlawful trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's immediate family, or belonging to a person whose property the person has authority to protect.

ultimate right to dominate your house, or to do anything and everything inside of it. Instead, it aligns with the “Domestic Tranquility” of the United States Constitution’s Preamble, i.e., the health of the nation.¹⁴⁶ Unmolested citizens tend to form open and trusting societies, and the recognition of this fact has animated personal rights within homes.

The nineteenth century Supreme Court case *Luther v. Borden*¹⁴⁷ found the balance that Indiana lawmakers did not. Home invasions lead to aggrieved parties, but the agent of the public (here defending the public peace during Dorr’s Rebellion) deserves a corresponding protection:

And if the sanctity of domestic life has been violated, the castle of the citizen broken into, or property or person injured, without good cause, in either case a jury of the country should give damages, and courts are bound to instruct them to do so, unless a justification is made out fully on correct principles. This can and should be done without any vindictive punishment, when a party appears to have acted under a supposed legal right...it shows the beautiful harmony of our system, not to let private damage be suffered wrongfully without redress, but, at the same time, not to let a public agent suffer, who, in a great crisis, appears to have acted honestly for the public, from good probable cause, though in some degree mistaking the extent of his powers, as well as the rights of others.¹⁴⁸

The mutually beneficial esteem shared between enlightened state and free citizen that the *Luther* Court identified is also a central theme of John Stuart Mill’s *On Liberty*.¹⁴⁹ Mill identified a key shift from the old to the new regime,

A time, however, came in the progress of human affairs when men ceased to think it a necessity of nature that their governors should be an independent power, opposed in interest to themselves. It appeared to them much better that the various magistrates of the State should be their tenants or delegates, revocable at their pleasure...by degrees, this new demand for elective and temporary rulers became the prominent object of the exertions of the popular party, wherever any such party existed; and superseded, to a considerable extent, the previous efforts to limit the power of rulers.¹⁵⁰

To Mill, a nation’s advancement is visible in the degree to which individuals and governments cooperate. At the same time, Mill identified a private zone that ought not be subject to state regulation,

146. U.S. CONST., preamble.

147. 48 U.S. 1 (1849).

148. *Id.* at 87–88.

149. JOHN STUART MILL, ON LIBERTY (Currin v. Shields ed., The Bobbs-Merrill Co. 1956) (1859)

150. *Id.* at 4–5.

[T]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation . . . it comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological . . . Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them even though they should think our conduct foolish . . . thirdly, from this liberty . . . mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.¹⁵¹

To Mill, the proper statecraft is not merely a limitation on governmental power. The modern struggle is to ensure a stable arrangement of self-governing individuals. In the classic work's final paragraph, Mill offered a reason why democratic states would limit their own power.

The worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of their mental expansion and elevation, to a little more of administrative skill or that semblance of it which practice gives, in the details of business; a State, which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which in order that the machine might work more smoothly, it has preferred to banish.¹⁵²

In this sense, “domestic tranquility” can become “Domestic Tranquility.”

151. *Id.* at 15–17.

152. *Id.* at 140–41.

