

WE, THE WATCHERS

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A man's home is his castle, the expression goes. It is a place where he can retreat from intrusion or prying eyes, including from the state, at least without a warrant or extenuating circumstances. At least this is what we tell ourselves.

This Essay shows the falsity of this belief. A man's home may still be his castle, but his castle may as well be made of glass. The state has entered the home. And we, too, have become watchers.

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INTRODUCTION

Increasingly, I find myself thinking about home. Not my home necessarily, but rather the concept of home, especially as that concept is understood in law. Part of my interest is attributable to two of the subjects that I teach—Criminal Law and Criminal Procedure—since the home figures prominently in both. But my interest goes beyond this. I'm also interested in the way we have mythologized the home. We tell ourselves the home is sacrosanct. That a man's home is his castle. Even as against the state, we can find sanctuary in the home. That is the story we tell ourselves. But is it really true?

Here is the argument I want to make in this symposium Essay: What we tell ourselves about the home—that it is free from the prying eyes of the state—is a fiction. It may have been true at some point, but it is hardly true today.

To follow through on this argument, it makes sense to begin with the fiction. I do this in Part I, showing how the home as sacrosanct is a

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recurring motif not only in criminal law and criminal procedure, but in other areas of the law as well. Part II shows the falsity of the fiction, especially in the area of the Fourth Amendment—our notional bulwark against state intrusion in the home. As Part II details, this purported bulwark exists more in theory than in practice, especially as technology increasingly embeds itself in the home. Indeed, the story of the U.S. Supreme Court allowing the state access to the home is in part the story of the growth of technology and our acquiescence to such access.

Next, Part III turns to the argument that drives much of my recent thinking about the home. The problem with the current state of affairs, I argue, is not only that we've weakened Fourth Amendment protections and allowed the state into the home. The problem is that in a host of ways, we ourselves have become the watchers, conscripted and willing volunteers into the state's surveillance apparatus. We have become the state. We have become the watchers.

I began this Essay by mentioning that I increasingly find myself thinking about the home. Maybe because I'm a cinephile, I also find myself thinking about those thrillers where someone keeps receiving threatening, menacing phone calls, only to learn that the calls are coming from within the house.¹ In many ways, it's the same with the state. The state is already in the house. We've let it in through technology. And we've let it in through our own actions.

All of this drives two of the questions at the heart of Part IV. The first question is: "What now?" The second question is more introspective: "What's so bad about the erosion of privacy?"

I. A MAN'S CASTLE

It makes sense to begin with the fiction we tell ourselves, that the home is sacrosanct. Even those not versed in the law are likely to believe that the home is special, a place where one can retreat from others, including the state. And for those well-versed in the law, the law is replete with examples where the home is valorized and marked as special, as "his castle."² (In the conventional telling, of course, it is always a man's castle.) The concept of the home as a castle is part of our common law tradition. As William Blackstone remarked, the "[l]aw of England has so particular and tender a regard to the immunity of a man's house, that it st[y]les it his castle, and will never suffer it to be violated with

1. For more on this trope, see *The Calls Are Coming from Inside the House*, TVTROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/TheCallsAreComingFromInsideTheHouse> (last visited Feb. 9, 2026).

2. *Semayne's Case* (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91 a, 91 b (KB) ("[T]he house of every one is to him as his . . . castle and fortress, as well [as] his defence against injury and violence . . .").

impunity.”³ Edward Coke made a similar observation, noting that the law recognizes the home as a place for repose, and as a fortress against the outside world, “for where shall a man be safe, if it be not in his house?”⁴

Indeed, this protection of the home is so fundamental to the law that it might even seem transsubstantive. It is at the heart of the Third Amendment (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”)⁵ and central to the Fourth Amendment (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).⁶

The idea of the home as sacred permeates other areas of the law as well. Consider just a handful of examples. The sanctity of the home helps explain the due process and equal protection rights that undergird everything from *Meyer v. Nebraska*⁷ to *Griswold v. Connecticut*⁸ to *Lawrence v. Texas*.⁹ The sanctity of the home also graces the First Amendment in cases like *Stanley v. Georgia* (“If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”).¹⁰ It is in the Second Amendment and *District of Columbia v. Heller* (the right to possess a gun in the home).¹¹ In short, there is reason why Justice Harlan wrote in *Poe v. Ullman*¹²:

[T]he safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to

3. 4 WILLIAM BLACKSTONE, COMMENTARIES *223.

4. EDWARD COKE, THIRD INSTITUTE 162 (1644).

5. U.S. CONST. amend. III.

6. U.S. CONST. amend. IV.

7. 262 U.S. 390, 399–400 (1923) (linking the right to educate one’s children to the sanctity of the home). *Griswold* defines liberty to include “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.” *Id.* at 399.

8. 381 U.S. 479, 484–85 (1965) (linking the right to use contraceptives to the privacy of the home).

9. 539 U.S. 558, 567 (2003) (striking down a law criminalizing same-sex sex and noting that two men have the right to engage in “the most private human conduct, sexual behavior, and in the most private of places, the home”).

10. 394 U.S. 557, 564 (1969).

11. 554 U.S. 570, 635 (2008).

12. 367 U.S. 497 (1961).

its protection the principles of more than one explicitly granted Constitutional right.¹³

Nor is this veneration of the home limited to constitutional law. Consider criminal law, where courts have treated the “interest of safe and private habitation of one’s home with reverence,”¹⁴ permitting occupants to use deadly force to defend the home.¹⁵ More broadly, the common law permitted a home-dweller to use deadly force so long as he reasonably believed such force was necessary “to prevent an imminent and unlawful entry of his dwelling.”¹⁶ It has even been said that the right to defend the home with deadly force is “broader than the right to kill in self-defense” since under the common law, an occupant can use deadly force whether or not they believe their life is in danger; indeed, the right to defend the home is so valued that it overrides any duty to retreat.¹⁷ The sanctity of the home is also evident in what we criminalize and what we do not. There have been a host of laws prohibiting certain acts in public—for example sex,¹⁸ nudity,¹⁹ intoxication,²⁰ and certain drug use²¹—which by implication draw a protective shield to permit such acts in private places, ideally the home.

Allow me to return to the Fourth Amendment. After all, it is the Fourth Amendment that, in theory at least, is the most protective of the home.²² Indeed, the primary remedy for a Fourth Amendment violation

13. *Id.* at 551–52 (Harlan, J., dissenting).

14. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 262 (3d ed. 2001).

15. *Id.* at 263.

16. *Id.* (footnote omitted).

17. *Id.* at 266. This is also the view under the Model Penal Code. *See* MODEL PENAL CODE § 3.06(3) (A.L.I., Official Draft 1985); *see also* Comment, *The Use of Deadly Force in the Protection of Property Under the Model Penal Code*, 59 COLUM. L. REV. 1212, 1213 n.7 (1959) (citing MODEL PENAL CODE § 3.04(2)(b)(iii) for the proposition that the general duty to retreat, conditioning the use of force in self-defense, does not apply “to the extent that one [is] attacked in his dwelling”).

18. *See, e.g.*, N.Y. PENAL LAW § 245.00 (McKinney 2025) (criminalizing public lewdness).

19. *Id.*

20. One has only to think of two staples of criminal law: *see generally Powell v. Texas*, 392 U.S. 514 (1968) (examining a law that made public intoxication a crime), and *Martin v. State*, 17 So. 2d 427 (Ala. Ct. App. 1944) (addressing whether the act requirement was satisfied in a case where the defendant was charged with being intoxicated in public after the police removed him from his home).

21. N.Y. PENAL LAW § 221.10 (McKinney 2019) (repealed 2021) (criminalizing possession of marijuana in public).

22. As Judge Cooley observed in *Constitutional Limitations*, “[t]he maxim that ‘every man’s house is his castle’ is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.” THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 364 (6th ed. 1890) (footnote omitted).

traces its origin to the home. At the center of *Weeks v. United States*,²³ the case in which the Supreme Court first announced the exclusionary rule, was the “sanctity of a man’s home.”²⁴ The Court held that introducing evidence seized during a warrantless search of the defendant’s home was inconsistent with the Fourth Amendment.²⁵ After *Weeks*, evidence resulting from an illegal search or seizure would be excluded from trial, at least in federal cases over which the Court had direct supervision.²⁶ More importantly, it was because of another warrantless search of a home, this time the home of Dollree Mapp in 1957, that the Court in *Mapp v. Ohio*²⁷ ruled it was time for the federal exclusionary rule to become a national exclusionary rule, and time to “close the only courtroom door remaining open to evidence secured by official lawlessness.”²⁸ There is a reason why *Mapp v. Ohio* has been described as “the most important search-and-seizure decision in history.”²⁹ It was in this case that the Fourth Amendment ceased to be “an empty promise . . . revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.”³⁰ It is telling that at the center of the case was, again, “the sanctity of [the] home.”³¹

This veneration of the home is in decision after decision. Consider *Silverman v. United States*,³² decided the same year as *Mapp*. In *Silverman*, the Court was confronted with whether law enforcement eavesdropping, accomplished by placing a microphone under a baseboard so that it made contact with the heating duct that ran through the house, amounted to a search under the Fourth Amendment, and thus presumptively required a warrant.³³ The Court ruled that it did, focusing on the “intrusion into a constitutionally protected area,” *i.e.*, the home.³⁴ As the Court intimated, any physical invasion of the structure of the

23. 232 U.S. 383 (1914).

24. *Id.* at 386–87, 391.

25. *Id.*

26. *See id.* at 393–98; *see also Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (holding that the exclusionary rule announced in *Weeks* was not binding on the states).

27. 367 U.S. 643 (1961).

28. *Id.* at 644, 654–55. The Court went on to hold that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.” *Id.* at 655.

29. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1368 (1983).

30. *Mapp*, 367 U.S. at 660.

31. *Id.* at 646 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

32. 365 U.S. 505 (1961).

33. *Id.* at 506–07, 509.

34. *Id.* at 512.

home, by even a fraction of an inch, was too much.³⁵ “At the very core” of the Fourth Amendment, the Court stressed, “stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”³⁶

Consider too *United States v. United States District Court*,³⁷ the 1972 case in which the Court stated that the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”³⁸ Additionally, in *Florida v. Jardines*,³⁹ which involved the issue of whether the use of a narcotics detection dog to sniff the periphery of a home was a search requiring a warrant, even in the absence of physical entry.⁴⁰ Per the Court, it was.⁴¹ The Court also noted that though the language of the amendment protects “persons, houses, papers, and effects,” in fact “when it comes to the Fourth Amendment, the home is first among equals.”⁴² Indeed, “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,” the Court noted, is “[a]t the Amendment’s ‘very core.’”⁴³ “‘Freedom’ in one’s own ‘dwelling,’” the Court added in another case, “is the archetype of the privacy protection secured by the Fourth Amendment.”⁴⁴

One could go on. The cases valorizing the home are numerous and have a long lineage. One can see it as far back as 1886 in the case *Boyd v. United States*.⁴⁵ And we see this in recent cases too. In 2018, in *Collins v. Virginia*,⁴⁶ the Court extended the home protection to the curtilage, saying that authority to search an automobile under the automobile exception must give way when the automobile is near the home; it does not extend to searching an automobile on the curtilage.⁴⁷ Just a few years

35. *Id.*

36. *Id.* at 511.

37. 407 U.S. 297 (1972).

38. *Id.* at 313.

39. 569 U.S. 1 (2013).

40. *Id.* at 3.

41. *Id.* at 11–12.

42. *Id.* at 6.

43. *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

There’s also *Kyllo*, and Justice Scalia’s invocation of the lady of the house taking her daily sauna and bath to buttress his conclusion that the use of a thermal imaging device to detect heat coming from the home requires a warrant. *Kyllo v. United States*, 533 U.S. 27, 38–40 (2001).

44. *Lange v. California*, 141 S. Ct. 2011, 2018 (2021) (quoting *Payton v. New York*, 445 U.S. 573, 587 (1980)).

45. 116 U.S. 616, 630 (1886) (“It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence . . .”).

46. 138 S. Ct. 1663 (2018).

47. *Id.* at 1670.

ago, the Court in *Caniglia v. Strom*⁴⁸ rejected a blanket “community caretaking” exception for warrantless home entries.⁴⁹ And of course, one of the cases before the Court this term, *Case v. Montana*,⁵⁰ is again about the home and whether the police, claiming an emergency, can breach the home without a warrant on less than probable cause that the emergency in fact exists.⁵¹

I will say a few more things on the supposed sanctity of the home. It’s not just the language I’ve recited. This claimed protection of the home also explains why we have so many special rules about the home under the Fourth Amendment. It explains the knock-and-announce requirement.⁵² It explains the separate requirement for a warrant to arrest someone in the home.⁵³

Again, the home is sacred. A man’s castle. This is what we tell ourselves. Except exceptions abound. For starters, only certain homes receive the Fourth Amendment’s full protection. If you have a home, but are on public assistance, the state can come into your home without a warrant as a condition of your receiving benefits.⁵⁴ If you have a home, but the state gets a tip about the welfare of a child in your home, the state can come to your home without a warrant and essentially coerce their way into searching the home.⁵⁵ If you have a home, but are on probation, the state may include unfettered access to your home as a condition; indeed, Kate Weisburd, in her study of court supervision rules, found that the majority of rules include access to, and a search of, the home.⁵⁶ If you have a home, but that home is in a jail or prison, the Court has made clear that you have no cognizable expectation of privacy at all, and that the state can conduct random searches as it sees fit.⁵⁷ And if you are

48. 141 S. Ct. 1596 (2021).

49. *Id.* at 1599.

50. 145 S. Ct. 2749 (2025) (mem.) (granting cert.).

51. Petition for a Writ of Certiorari at i, *Case v. Montana*, No. 24-634 (U.S. Dec. 4, 2024).

52. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995) (observing that the “common-law ‘knock-and-announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment”).

53. *Payton v. New York*, 445 U.S. 573, 589–90 (1980).

54. *Wyman v. James*, 400 U.S. 309, 312–13, 326 (1971).

55. See generally Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Irony Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413 (2005) (critiquing what the author terms the “child abuse exception” to the Fourth Amendment’s presumptive requirements of a particularized warrant and probable cause).

56. See Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1, 10 (2023). Weisburd found that only a small percentage of the conditions included search limitations. *Id.* A full 70 percent had no limitations at all. *Id.*

57. *Hudson v. Palmer*, 468 U.S. 517, 525–36 (1984).

houseless but have made a home out of a cardboard box, tent, or piece of tarp, there is a good chance the state can search your box or tent, too.⁵⁸

And of course, even for “everyday” Americans with homes, privacy is not distributed equally. In a 1762 speech before the British Parliament, the Earl of Chatham, William Pitt, proclaimed:

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!⁵⁹

While that might have been the rule in England at the time, and even the understanding adopted here at the time the Fourth Amendment was ratified, it is far from true now. A more honest assessment would acknowledge that the Fourth Amendment provides more protection to those with means than to those without, more to those with large homes and garages and curtilages than to those living in government-subsidized apartments with thin walls, where police routinely patrol the hallways.⁶⁰ There is a reason why Christopher Slobogin speaks of a poverty exception to the Fourth Amendment.⁶¹ Add to this that entry into the

58. See, e.g., *People v. Thomas*, 45 Cal. Rptr. 2d 610, 613 (Ct. App. 1996) (finding no Fourth Amendment violation where officers searched the cardboard box where defendant lived); *People v. Nishi*, 143 Cal. Rptr. 3d 882, 890–91 (Ct. App. 2012) (similar); *State v. Tegland*, 344 P.3d 63, 64 (Or. Ct. App. 2015) (similar). But see *State v. Pippin*, 403 P.3d 907, 909 (Wash. Ct. App. 2017) (finding a Fourth Amendment violation for a warrantless search of tent). For more on the searches of the houseless, see generally Carrie Leonetti, *The Wild, Wild West: The Right of the Unhoused to Privacy in their Encampments*, 56 AM. CRIM. L. REV. 399 (2019).

59. *Miller v. United States*, 357 U.S. 301, 307 (1958) (attributing the quote to William Pitt).

60. For a discussion of the police patrols of public housing buildings in New York City, see Dorielle E. Obanor, Note, *Dismantling Discrimination in the Stairways and Halls of NYCHA Using Local, State, and National Civil Rights Statutes*, 6 COLUM. J. RACE & L. 169, 172–74 (2016).

61. See generally Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003) (arguing that Supreme Court Fourth Amendment doctrine affords lesser search and seizure protections to poorer individuals); see also William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (1999) (“Fourth Amendment law makes wealthier suspects better off than they otherwise would be, and may make poorer suspects worse off.”); KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 5 (2017) (discussing how poor mothers are systematically denied constitutional privacy rights independent of their receipt of public assistance). Much of this disparity is attributable to the Fourth Amendment’s protection of the curtilage, the private area immediately around the home. See generally *United States v. Dunn*, 480 U.S. 294 (1987) (holding that a barn located sixty yards from a ranch house lay outside the home’s protected curtilage because the resident had not taken sufficient steps to shield it from observation); see also Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban*

home can be obtained through consent, yet the Supreme Court has made clear that officers need not inform individuals of their right to refuse consent.⁶² It should go without saying that this disadvantages people unaware of their right to refuse, or who are afraid to assert their right to refuse, which likely coincides with class.

But the point I want to make here is that, even setting aside the unequal distribution of privacy in the home, the story we tell about the sanctity of the home is not true. Or it seems like an overstatement. In theory, the home seems to function as a barrier between us and the state, but just in theory. In reality, we've let the state in.

II. INSIDE THE HOUSE

In my introduction, when I mentioned that the state is already in our homes, I made an analogy to movies where the victim receives menacing phone calls, only to discover the calls are coming from inside the house. My reference to a telephone call was deliberate. It was deliberate because our modern day understanding of the reach of the Fourth Amendment stems from a telephone call, albeit a call made from outside the home. In *Katz v. United States*,⁶³ Charles Katz was convicted of gambling offenses after the government introduced, as evidence against him, recordings of phone calls Katz had made from a public telephone booth.⁶⁴ The problem was that the government had bugged the telephone booth without first obtaining a warrant.⁶⁵ The government insisted no warrant was necessary, since the phone booth was public and not a constitutionally protected area, like the home.⁶⁶ But the Court rejected the idea that the Fourth Amendment should be limited to constitutionally protected areas.⁶⁷ Instead, the Court introduced the “reasonable expectation of privacy test” to determine whether there was a privacy right the state had

and *Suburban Areas*, 15 GEO. MASON U. C.R.L.J. 297, 310–11 (2005) (“One of the difficulties in the application of the *Dunn* factors to urban areas is their epistemological reliance upon a suburban conceptual framework.”). But part of this disparity also extends from the reasonable expectation of privacy test announced in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). For example, a poor person with thin walls could not have the same reasonable expectation of privacy as a wealthy person with thick walls. For an engagement with how *Katz* furthered a poverty exception and how it could have been decided differently, see generally Bennett Capers, *Katz v. United States*, in *CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW* 403 (Bennett Capers, Devon W. Carbado, R.A. Lenhardt & Angela Onwuachi-Willig eds., 2022).

62. *Schneckloth v. Bustamonte*, 412 U.S. 218, 233–34 (1973).

63. 389 U.S. 347 (1967).

64. *Id.* at 348–49.

65. *Id.* at 348–56.

66. *Id.*

67. *Id.* at 351–52.

to respect, *i.e.*, a right triggering Fourth Amendment protections and a requirement of a warrant.⁶⁸ Under this test, when Charles Katz entered the phone booth and closed the door behind him, he expected his call would be private and that expectation was reasonable.⁶⁹ In other words, the recordings were obtained in violation of Katz's Fourth Amendment rights, and should not have been admitted against him.

I've described the facts of *Katz* at length for two reasons. First, the *Katz* test is still the predominant test for determining whether there has been a Fourth Amendment violation.⁷⁰ And second, it happens to be another telephone case, *Smith v. Maryland*,⁷¹ where the privacy of the home began to erode.

In *Smith v. Maryland*, the Court used *Katz*'s reasonable expectation of privacy test—a test that had protected Katz's private call within a public telephone booth from government scrutiny—to allow the government to scrutinize what phone calls a person makes to and from the phone, even when the phone is in a home.⁷² Specifically, the government, without first securing a warrant, installed a pen register device in the phone company's office to track the phone numbers Smith was calling and the numbers calling him.⁷³ But this “search,” the Court held, was not a “real” search warranting Fourth Amendment protection.⁷⁴ The Court reached this conclusion by noting that Smith could not possibly have a “legitimate expectation of privacy in information he voluntarily turn[ed] over to third parties”; after all, when someone uses the phone, “they voluntarily convey[] numerical information to the telephone company.”⁷⁵ The home might be sacrosanct, but no longer were the phone numbers dialed from, or to, the home. The erosion of privacy had begun. And that was just beginning.

Although the focus of *Smith* was phone calls—it was decided in 1979—the same rationale arguably applies to newer technology, permitting state access to browsing activity and emails on the internet under the theory that we have no reasonable expectation of privacy in the

68. *Id.* at 361–62 (Harlan, J., concurring).

69. *Id.* at 360–61 (Harlan, J., concurring).

70. Largely in response to new technologies, the Court has expanded the Fourth Amendment test, adding a trespass theory and a mosaic theory as bases for finding a Fourth Amendment violation. See *United States v. Jones*, 565 U.S. 400, 407–09, 413 (2012) (finding that the warrantless placement of a GPS tracker on a vehicle violated the Fourth Amendment under the trespass theory); *Carpenter v. United States*, 138 S. Ct. 2206, 2216–18 (2018) (establishing that a person has a “reasonable expectation of privacy in the whole of their physical movements” documented by cell-site location information).

71. 442 U.S. 735 (1979).

72. *Id.* at 740–46.

73. *Id.* at 737.

74. *Id.* at 743–44.

75. *Id.* Never mind that the third party is now a computer—an algorithm.

web addresses we visit or the email addresses to which we send emails, since this information is accessible by a third party, the internet services provider.⁷⁶ Indeed, the same rationale suggests that when we make our homes smart—with Alexa, with Ring cameras—we may be “voluntarily” conveying information to third parties, and thus surrendering some of our Fourth Amendment protection.⁷⁷ There is a reason why a scholar argued twenty years ago, that “technology will lead to an expectation of no privacy, and police practice will incorporate that technology to create a reality of no privacy.”⁷⁸

And of course, the third-party doctrine announced in *Smith* is just one means by which the privacy of the home has been diminished. Since *Smith*, the Court has given its blessing to other government incursions around the home, and even into the home. In *California v. Greenwood*,⁷⁹ the Court ruled that no Fourth Amendment violation had occurred when the police rummaged through garbage bags Greenwood had left out for collection.⁸⁰ “[R]espondents exposed their garbage to the public sufficiently to defeat their claim of Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.”⁸¹ In a series of cases, the Court further gave its blessing to the admission of evidence obtained from the government conducting aerial surveillance over someone’s home.⁸² If a member of the public could rent a helicopter and spy into someone’s backyard, the government could do so without a warrant as well. And even before *Smith* was decided, the Court had permitted the government to gather information from within the home through undercover agents and “false friends.” As the Court put in *Hoffa v. United States*,⁸³ when Hoffa invited to his room a local union official whom he mistakenly thought was a friend—in fact, the official was an informant for the

76. See *United States v. Jones*, 565 U.S. 400, 418 (2012) (Sotomayor, J., concurring).

77. Grace Manning, Note, *Alexa: Can You Keep a Secret? The Third-Party Doctrine in the Age of the Smart Home*, AM. CRIM. L. REV. ONLINE, Winter 2019, at 1, 3–6, <https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2019/02/56-O-Alexa-Can-You-Keep-a-Secret-The-Third-Party-Docctrine-in-the-Age-of-the-Smart-Home.pdf>.

78. Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 562 (2005).

79. 486 U.S. 35 (1988).

80. *Id.* at 37–41.

81. *Id.* at 40 (footnotes omitted).

82. See *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986); *Florida v. Riley*, 488 U.S. 445, 448–50 (1989).

83. 385 U.S. 293 (1966).

government—he could claim no Fourth Amendment protection.⁸⁴ The risk that a friend will prove false “is the kind of risk we necessarily assume whenever we speak,” including when we speak in the home.⁸⁵

And these are only some of the ways in which the supposed sanctity of the home has been diminished. Increasingly, the danger is not “false friends,” but the “false devices” we bring into the home. There are the devices we bring into the home on our own, from smartphone fitness monitors to fertility trackers to pacemakers.⁸⁶ But there are also devices that originate from others. In many professions, it has become routine for employers to provide devices for employee use, or to finance the acquisition of such devices. Consider *City of Ontario v. Quon*,⁸⁷ in which a police sergeant used his work pager to send sexually explicit texts, which were discovered when the department, without first securing a warrant, reviewed his text messages.⁸⁸ The Court in effect found that, even if the sergeant believed he had a legitimate expectation of privacy in the pager provided to him by his employer, the warrantless search of the pager was reasonable, given workplace needs and that the police department issued the device to its employees with a “no expectation of privacy” warning⁸⁹—language that seemed to come directly from *Katz*.

The clear take away is that the employer-distributed devices we bring into the home, so long as they come with a “no expectation of privacy” warning, can also function as “false devices.” This principle applies in both public and private sector contexts, permitting the warrantless tracking of how we use employer-distributed devices: what social media sites we visit, what emails or texts we send, our browsing activity, and more. For example, in *Walker v. Coffey*,⁹⁰ the Third Circuit found that a university employee could claim no reasonable expectation of privacy in emails sent through the university server where the university had reserved the right to access all accounts; as such, the

84. *Id.* at 296, 302; see also *United States v. White*, 401 U.S. 745, 746–47, 751–53 (1971) (reaffirming *Hoffa* in a case where a wired informant recorded conversations with the defendant, including four conversation that took place in the defendant’s home).

85. *Hoffa*, 385 U.S. at 303 (quoting *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting)).

86. For more on the Fourth Amendment implications of such devices, see generally Ashleigh Elizabeth Draft, Comment, *Pacemakers, Fitbits, and the Fourth Amendment: Privacy Implications for Medical Implants and Wearable Technology*, 2019 MICH. ST. L. REV. 511; Cynthia Conti-Cook, *Surveilling the Digital Abortion Diary*, 50 U. BALT. L. REV. 1 (2020).

87. 560 U.S. 746 (2010).

88. *Id.* at 752–53.

89. *Id.* at 758.

90. 905 F.3d 138 (3d Cir. 2018).

university's voluntary disclosure of the emails to law enforcement did not infringe upon the employee's Fourth Amendment rights.⁹¹

Add to this that employers are increasingly using employee monitoring software to surveil how employees use devices, whether it's to monitor their productivity or to receive alerts if the software detects certain keywords, such as "interview."⁹² Indeed, as I write this Essay, I am writing at home on a university-provided laptop, knowing that I have surrendered some privacy in the home by doing so. Nor are children necessarily protected from this diminution in privacy. Children are increasingly bringing home tablets issued by schools—tablets that are often monitored for social media use.⁹³

And of course, this surveillance of the home is even greater for those caught up in the criminal justice system and those around them.⁹⁴ As Zina Makar has pointed out, while digital tablets in correctional facilities may make staying in touch with loved ones easier, their use comes with a privacy cost: The tablets capture the data and information of those with whom prisoners communicate back home.⁹⁵ Mariam Hinds makes a similar observation with respect to defendants who are on parole or probation—their status not only subjects them to digital surveillance in the home, but also subjects individuals who share the home with them to surveillance.⁹⁶

In the old days, it was often enough to draw the curtain over a window to demonstrate a reasonable expectation of privacy.⁹⁷ These days, curtains are beside the point. Every curtain, door crack, and

91. *Id.* at 148.

92. Gow Chiew Ton, *Employee Surveillance Is on the Rise — and That Could Backfire on Employers*, CNBC: MAKE IT (Apr. 25, 2023, at 20:42 ET), <https://www.cnbc.com/2023/04/24/employee-surveillance-is-on-the-rise-that-could-backfire-on-employers.html> [<https://perma.cc/8Q5X-JY6Y>].

93. Barbara Fedders, *The Constant and Expanding Classroom: Surveillance in K-12 Public Schools*, 97 N.C. L. REV. 1673, 1690–91 (2019).

94. Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 155–56 (2022); Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 669–70 (2019); Prithika Balakrishnan, *Mass Surveillance as Racialized Control*, 71 UCLA L. REV. 478, 480–81 (2024).

95. Zina Makar, *The Datafication of Incarceration*, 135 YALE L.J. (forthcoming 2026) (manuscript at 3) (on file with author).

96. Mariam A. Hinds, *The Surveillance of System-Adjacent Individuals*, 103 WASH. U. L. REV. 577, 580–81 (2026).

97. *United States v. Fields*, 113 F.3d 313, 318, 321–22 (2d Cir. 1997) (no Fourth Amendment violation where officers observed contraband by peering through a gap beneath venetian blinds; “although the defendants could easily have shielded their activities from public view, they failed to take the simple and obvious steps necessary to do so”); see also *Minnesota v. Carter*, 525 U.S. 83, 104–05 (1998) (Breyer, J., concurring) (no Fourth Amendment violation where an officer peered through a gap in blinds, since the precautions the dwellers took to maintain their privacy were insufficient).

crevice could be sealed and still we would be exposed to surveillance. The home may still be, at least notionally, a man's castle. But now that castle may as well be made of glass.

III. WE THE WATCHERS

Beyond technology, we've acquiesced. We've become watchers. We've become the state. Some of this is through the brute force of law. Consider parental liability statutes. Starting in the 1980s, we created a rash of parental liability laws, making parents responsible for the criminal acts of their children.⁹⁸ Around the same time, we created a one-strike policy for residents of federal public housing; residents could now be evicted if anyone in their household engaged in criminal behavior.⁹⁹ Consider *Department of Housing and Urban Development v. Rucker*.¹⁰⁰ There, the Court upheld a one-strike policy in a case where a tenant's mentally disabled adult daughter was caught with cocaine a few blocks from the premises.¹⁰¹

Along the same lines, cities have adopted crime-free ordinances to mandate that landlords include eviction clauses in their leases—authorizing eviction when a tenant, family member, guest, or other person engages in criminal conduct on the premises.¹⁰² One official put it this way: “We want tenants to understand that if they don't control members of their families, they are going to lose their housing.”¹⁰³ In short, through parental liability laws and the government's one-strike policy, we “coerce friends and family members into serving as ‘intimate handler[s]’ and into becoming part of ‘networks of security production.’”¹⁰⁴ Put differently, surveillance within the home has become the new normal. Add to this the trend towards mandatory reporting statutes, requiring teachers, medical professionals, and others not only to

98. For an excellent discussion of these laws, see Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 837–44 (2015).

99. For a discussion of such policies, see Benjamin Kamelhar & Sarah Miller, *The Criminalization of Public Housing Residents*, GEO. J. ON POVERTY L. & POL'Y BLOG (Mar. 29, 2020), <https://www.law.georgetown.edu/poverty-journal/blog/the-criminalization-of-public-housing-residents/> [<https://perma.cc/NA57-4P7Y>]; Regina Austin, “*Step on a Crack, Break Your Mother's Back*”: *Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273, 274–77 (2002).

100. 535 U.S. 125 (2002).

101. *Id.* at 127–28, 136.

102. Swan, *supra* note 98, at 844–48.

103. See Lisa Weil, Note, *Drug-Related Evictions in Public Housing: Congress's Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 171 (1991).

104. Swan, *supra* note 98, at 829 (alteration in original) (quoting Marcus Felson, *Routine Activities and Crime Prevention in the Developing Metropolis*, 25 CRIMINOLOGY 911, 912 (1987)).

say something if they see something, but indeed to inquire, often about what is happening inside the home.¹⁰⁵ Is there a gun in the home?¹⁰⁶ “Do you feel safe at home?”¹⁰⁷ All of this contributes to what Lorraine Mazerolle and Janet Ransley, borrowing from Michel Foucault, call “technologies for governance.”¹⁰⁸ We are tasked with governing one another, the first step of which is watching one another—including in the home.

Allow me to make another point. It is not only that we have been watching one another, even in the home. It is also that we have been conscripted, slowly but surely, into becoming watchers. Some years ago, I wrote an article, titled “Criminal Procedure and the Good Citizen,” about the explicit and implicit messages in the Supreme Court’s jurisprudence about what it means to be a good citizen.¹⁰⁹ Consider, as just one example, this language from *Miranda v. Arizona*¹¹⁰: “It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.”¹¹¹ As another example, consider *Illinois v. Lidster*,¹¹² in which the Court gave its blessing to suspicionless roadblocks so police could seek help from drivers about a recent crime.¹¹³ “These cases,” I observed, “tell us that the good citizen is willing to aid the police and to consent to searches. The good citizen, at times, willingly waives their right to silence, and at other times their

105. See FAM. & YOUTH SERVS. BUREAU, MANDATORY REPORTING AND KEEPING YOUTH SAFE 1–2 (2022), <https://teenpregnancy.acf.hhs.gov/sites/default/files/resource-files/MandatoryReporting.pdf> [<https://perma.cc/DV3A-UF3W>].

106. Arwa Mahdawi, *Why Did the Doctor Ask if We Have a Gun in the House at My Toddler’s Checkup? Because This is America*, GUARDIAN (May 31, 2022, at 08:50 ET), <https://www.theguardian.com/commentisfree/2022/may/31/why-did-the-doctor-ask-if-we-have-a-gun-in-the-house-at-my-toddlers-check-up-because-this-is-america> [<https://perma.cc/HME7-KXTM>].

107. Brian McDonough, *Medical Report: Do You Feel Safe at Home? Your Physician Might Ask*, AUDACY (Sep. 10, 2024, at 03:00 CT), <https://www.audacy.com/kywnradio/news/local/do-you-feel-safe-at-home-your-physician-might-ask> [<https://perma.cc/P59Y-LPGL>].

108. LORRAINE MAZEROLLE & JANET RANSLEY, THIRD PARTY POLICING 7 (2005) (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 1st ed. 1979)).

109. I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 654–55 (2018) [hereinafter Capers, *Criminal Procedure and the Good Citizen*].

110. 384 U.S. 436 (1966).

111. *Id.* at 477–78.

112. 540 U.S. 419 (2004).

113. *Id.* at 427–28 (concluding that an information-seeking roadblock to ask drivers about a recent hit-and-run incident “fit important criminal investigatory needs” and was reasonable under the Fourth Amendment, and did not require individual suspicion or probable cause).

right to speak. *The good citizen, having nothing to hide, welcomes police surveillance.*"¹¹⁴

It is the last point that I want to emphasize here and expand upon. When I wrote "Criminal Procedure and the Good Citizen," I was focused, myopically I now realize, on Supreme Court decisions. But the demands that we watch each other, even in the home, come too from the criminal laws we've enacted, from the mandatory reporting requirements we've imposed, from the conditions we impose on anyone seeking government benefits, from the requests that we link our Ring cameras to local police stations,¹¹⁵ and the requests for help from the public, facilitated by toll-free hotlines. Consider the pleas for assistance after Charlie Kirk, the conservative political activist, was assassinated.¹¹⁶ Was anyone surprised that it was a family member who turned him in?¹¹⁷ And finally by the culture. "If you see something, say something." Even returning to the family, to the home, some of the most ardent watchers are neighbors and friends. In New York, for example, a study showed the state's child abuse hotline received an average of 150,000 reports a year, 7 percent of which were made anonymously.¹¹⁸ There is a reason why Melissa Murray has written about the "Panopti-mom."¹¹⁹ To be

114. Capers, *Criminal Procedure and the Good Citizen*, *supra* note 109, at 655 (emphasis added).

115. According to Ring, over 400 police agencies use Ring's Neighbors Portal app, which allows police to "view[] and comment[] on public posts as a verified law enforcement officer [and ask] for help on active investigations by submitting requests for video recordings." Jamie Siminoff, *Working Together for Safer Neighborhoods: Introducing the Neighbors Active Law Enforcement Map*, BLOG: RING (Aug. 28, 2019), <https://blog.ring.com/2019/08/28/working-together-for-safer-neighborhoods-introducing-the-neighbors-active-law-enforcement-map/> [https://perma.cc/GB6D-ZDQJ]. And in October 2025, Amazon announced it would "allow approximately 5,000 local law enforcement agencies to request access to Ring camera footage via surveillance platforms" from the technology company Flock Safety. Sharon Harding, *Ring Cameras Are About to Get Increasingly Chummy with Law Enforcement*, ARS TECHNICA (Oct. 17, 2025, at 16:50 CT), <https://arstechnica.com/gadgets/2025/10/ring-cameras-are-about-to-get-increasingly-chummy-with-law-enforcement/>.

116. Matthew Cullen, *The F.B.I. Asked for Help Finding Charlie Kirk's Killer*, N.Y. TIMES (Sep. 11, 2025), <https://www.nytimes.com/2025/09/11/briefing/manhunt-charlie-kirk-inflation-data.html>.

117. NBC Chi. Staff & Associated Press, *Suspect ID'd in Charlie Kirk Killing, Was Turned in by Family Member, Sources Say*, NBC CHI. (Sep. 12, 2025, at 08:30 CT), <https://www.nbcchicago.com/news/suspect-idd-in-charlie-kirk-assassination-was-turned-in-by-family-member-sources-say/3823172/>.

118. Susanti Sarkar, *New York May Soon End Anonymous Calls to the State's Child Abuse Hotline*, IMPRINT (June 16, 2025, at 12:42 CT), <https://imprintnews.org/child-welfare-2/new-york-may-soon-end-anonymous-calls-to-the-states-child-abuse-hotline/261911>.

119. Melissa Murray, *Panopti-Moms*, 4 CALIF. L. REV. CIR. 165, 168 (2013), <https://www.californialawreview.org/online/panopti-moms> [https://perma.cc/9DN2-XG8E]. For more on the surveillance of mothers in particular, see generally I. Bennett Capers, *Policing "Bad" Mothers*, 136 HARV. L. REV. 2044 (2023) (book review).

sure, I am not suggesting that we turn a blind eye to crimes inside the home, such as abuse or domestic violence. But nor should we blind ourselves to the role we have come to play in policing our neighbors and policing each other.¹²⁰

In recognizing the role we play in watching our neighbors and each other, we should also recognize the role we are playing in allowing the government to bypass rights. After all, the Fourth Amendment protects the people against unreasonable searches and seizures executed *by the state*. It is the state that must comply with the Fourth Amendment's warrant requirement, and when a warrant is excused, it is the state that must satisfy the requirements we've erected, such as proving probable cause and exigent circumstances. In short, the Fourth Amendment provides protection "only against the government and those acting in conjunction with it."¹²¹ But now, instead of the state needing probable cause, reasonable suspicion, or a warrant, instead of the state risking the suppression of evidence if it violates the Fourth Amendment, the state can sit back while we act as surrogate watchers. And surrogate searchers. This is what we've come to. And it is time, indeed past time, that we recognize this.

All of this brings to mind a public service announcement video that Eric Adams, New York City's most recent mayor, made when he was still a state senator.¹²² In the video, Adams begins by encouraging parents to join him in a "crusade" to remove illegal handguns from the streets and from their homes, but then immediately pivots to marijuana use.¹²³ "Please come and join me inside my house as I show you how simple items such as bamboo paper can be an indicator of marijuana use"¹²⁴ As the camera follows him into his house, he instructs

120. All of this points to an odd disconnect. In general, we owe no duty of care to one another. However, we do frequently have a duty to surveil and report. Here is another curiosity. The Fourth Amendment only regulates searches conducted by the state. Put differently, a search conducted by a private citizen is not a search within the meaning of the Fourth Amendment. In *Burdeau v. McDowell*, for example, a private citizen broke into a safe and desk, stole papers, and gave those papers to the government, which then presented them to the grand jury to secure an indictment. 256 U.S. 465, 473–74 (1921). To be sure, had a law enforcement officer broken into the safe to steal papers without a warrant, this would have violated the Fourth Amendment. But because the government wasn't involved in the search, there was no violation. *Id.* at 475. However, these days the line between state action and private action is increasingly blurred as we are encouraged to surveil and report one another.

121. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE* 36 (10th ed. 2014); *see also Burdeau*, 256 U.S. at 475–76 (search conducted by private party not subject to Fourth Amendment).

122. N.Y. DAILY News, *Sen. Eric Adams: Combating Gun Violence* (YouTube, Jan. 31, 2011), <https://www.youtube.com/watch?v=sk2Wc4Y5CxE> (on file with the Wisconsin Law Review).

123. *Id.* at 00:00–00:50.

124. *Id.* at 00:29–00:39.

parents on how to search their children's rooms for guns, drugs, and other contraband. For example, he instructs parents to search their children's bookbags and knapsacks: "Look through it to see what exactly is your child carrying in addition to a book. Something as simple as a crack pipe, a used crack pipe . . . this is a discussion piece where you should start speaking with him to find out what is he doing with it" ¹²⁵



Photo 1.

He tells parents that they need not worry about the Constitution. "You write the constitution" inside your home.¹²⁶ "There are no [Fourth] Amendment rights inside your household."¹²⁷

At the gathering that brought together contributors to this symposium issue, I played the Eric Adams video for laughs. It has certainly been ridiculed.¹²⁸ There's something "cringe" about it, if I may borrow some Gen Z slang. But maybe it is cringe because it hits so close to home, both literally and literarily. We may not go through our family

125. *Id.* at 02:24–02:43.

126. *Id.* at 01:05–01:07.

127. *Id.* at 01:07–01:11. Although Adams says First Amendment rights, presumably he meant Fourth Amendment rights. Katherine Mangu-Ward, *NY State Senator Not Quite Sure Which Constitutional Amendment Doesn't Apply When Parents Go Looking for Guns in their Daughters' Jewelry Boxes*, REASON (Aug. 3, 2011, at 17:20 CT), <https://reason.com/2011/08/03/ny-state-senator-not-quite-sur/> [https://perma.cc/W9QP-YNWX].

128. See, e.g., Drew Schwartz, *We Interviewed the Guy Who Made Eric Adams' Bizarre 'Contraband' Video*, VICE (Apr. 15, 2021, at 13:43 CT), <https://www.vice.com/en/article/nyc-mayoral-candidate-eric-adams-bizarre-contraband-video-interview/> [https://perma.cc/5B9V-HKX7].

members' bags, or pat down their pillows looking for contraband. But many of us do watch each other.

IV. THE WAY WE LIVE NOW

As most students of the law know, there is a certain convention to law review articles and essays. Having introduced and laid out a "problem," the conventional article or essay then proffers a possible "solution." This Essay is different. It resists the expectation of an easy fix. Instead, it takes to heart an observation recently made by Jocelyn Simonson and Sabeel Rahman: "Liberating ourselves from the straightjacket of the Part IV requirement means expanding the possible species of our interventions."¹²⁹ In other words, far from being a cop-out, a law essay without an easy fix can be more powerful. And do more good. At least that is my hope.

Resisting the temptation to offer a solution makes particular sense here. As Parts I and II have hopefully demonstrated, we may tell ourselves the home is special—a place where one can retreat from state interference and surveillance, that the home is "our castle"—but reality tells a different story. The home too has become a site of surveillance and control. This change has happened gradually, but it has happened. And not only did we watch it happen. We all contributed to it happening, even becoming watchers ourselves. Allow me to put this differently. Just as we became acclimated to seeing surveillance cameras everywhere, just as we sensed that almost all of our movements were traceable through our smartphones, we also became used to the state in the home. In ways large and small, we let the state in. To be sure, sometimes the state may not come in as "the state." It might come in as Meta, Google, Netflix, or some other private actor. But the state is never far behind, and through the third-party doctrine also has access to the home. To further complicate matters, the policing of the home is multifaceted and transubstantive, crossing boundaries of constitutional law and statutory law, private law and public law, state action and private action, criminal law and civil law.

And maybe that is this Essay's contribution. It makes visible the way we live now. We live with surveillance all around us, including in the home. And we live as surveillers; we too are the watchers. Perhaps the first step in changing things is coming to terms with where we are. Perhaps.

But even as I write this, I am realizing that even more important than reckoning with how we live now is asking questions. If we no longer

129. Jocelyn Simonson & K. Sabeel Rahman, *The Part IV Problem in Legal Scholarship*, 126 COLUM. L. REV. F. (forthcoming 2026) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5534318.

enjoy privacy in the home, where can we enjoy privacy? And what is lost when we have less privacy? What is gained?

It is the last question that suddenly gives me the most pause. Privacy law scholars tend to lament the loss of privacy and the rise of the surveillance state. They warn against “the death of privacy.”¹³⁰ They invoke the specter of George Orwell’s “Big Brother” run amok.¹³¹ They channel Louis Brandeis and worry that we are losing the “right to enjoy life—the right to be let alone.”¹³²

But of course, everything comes with trade-offs. And here, the trade-offs range from the mundane to the consequential. On the mundane side, in exchange for letting companies into our homes, we benefit from the “personal” recommendations that Netflix makes of what we should watch next, Spotify’s recommendations for what music we should listen to next, and Amazon’s recommendations for what we should read next, with reminders of other items that we have bought and may want to buy again before we check out. One can even imagine a consumer thinking, “they ‘know’ me, they really know me.” Turning to the more consequential, there is something to be said for how surrendering privacy has contributed to the ready apprehension of criminals, whether it’s a rapist in Central Park,¹³³ January 6 insurrectionists,¹³⁴ Luigi Mangione,¹³⁵ or more quotidian cases.¹³⁶ And as I have written previously, we could

130. See, e.g., A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1465 (2000); CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT IX* (2007) (describing mass surveillance as “an insidious assault on our freedom”).

131. GEORGE ORWELL, 1984, at 5 (New Am. Libr. 1961) (1949). The specter of “Big Brother” has not escaped the Court. In *Florida v. Riley*, a case holding that helicopter surveillance of an individual’s backyard was not a “search” within the meaning of the Fourth Amendment, Justice Brennan quoted a passage from 1984 in his dissent. 488 U.S. 445, 466 (1989) (Brennan, J., dissenting). For an interesting discussion of the Big Brother metaphor, see Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1413–19 (2001).

132. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

133. Associated Press in N.Y., *Homeless Man Arrested for Central Park Rape of a 73-Year-Old Woman*, GUARDIAN (Sep. 14, 2012, at 10:22 ET), <https://www.theguardian.com/world/2012/sep/14/new-york-central-park-rapist-arrested-73-year-old-woman> [<https://perma.cc/7AYA-YMZJ>].

134. Darrell M. West, *Digital Fingerprints Are Identifying Capitol Rioters*, BROOKINGS INST. (Jan. 19, 2021), <https://www.brookings.edu/articles/digital-fingerprints-are-identifying-capitol-rioters/> [<https://perma.cc/FQA4-DN2D>].

135. Maria Cramer, *A City of Cameras: How New York Police Are Hunting a Killer*, N.Y. TIMES (Dec. 4, 2024), <https://www.nytimes.com/2024/12/04/nyregion/brian-thompson-shooting-gunman-cameras.html>.

136. Thaddeus L. Johnson, Natasha N. Johnson, Volkan Topalli & Denise McCurdy, *Police Facial Recognition Applications and Violent Crime Control in U.S. Cities*, 155 CITIES 1, 9–10 (2024) (finding, in a study of 268 U.S. cities, that facial recognition technology has reduced the rate of felony violence).

imagine even more benefits if we were all willing to surrender even more privacy.

Given the fact that “soon it will be feasible and affordable for the government to record, store, and analyze nearly everything people do,” and that technology exists to allow all of us to “be known—not simply identified by name,” but also “revealed through a web of facts involving criminal records, personal history, and past location data,” it is easy to imagine that [in the near future] the ability to commit crime in public without detection will be close to nil.¹³⁷

I went on to posit that the future could include “the widespread collection of DNA from newborn babies to further deter criminal activity and improve apprehension,” and even the implanting of microchips “in arrestees and other at-risk individuals to allow the state to trace the individuals to deter recidivism and to obviate the need for pre-trial detention.”¹³⁸

But to think through the trade-offs of letting the state into the home, one doesn’t even need to think of technology. As Jeannie Suk reminds us, there were always consequences to the home being a man’s castle.¹³⁹ He could do as he wished without the intervention of the state. The history of the home as man’s castle is also the history of the state’s indifference to violence in the home, namely violence against women and children.¹⁴⁰ It was the place that enabled abuse, assault, and rape, the “exemplary place of coercion.”¹⁴¹ Now, the home has become a place “where what occurs between ‘a man and wife’ is no longer solely a private matter, but also a matter for the state.”¹⁴² In other words, in exchange for some privacy, we have received a measure of protection from abuse in the home. At least in theory.

137. I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 41 (2019) (footnotes omitted) (first quoting Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL’Y REV. 15, 15–16 (2016); and then quoting Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 351 (2015)).

138. *Id.* at 41–42.

139. See generally JEANIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* (2009) (discussing the legal impacts of the American home being regarded as a man’s castle).

140. See Reva B. Seigel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

141. SUK, *supra* note 139, at 5.

142. I. Bennett Capers, *Home Is Where the Crime Is*, 109 MICH. L. REV. 979, 980 (2011) (book review).

Yet, I have a nagging suspicion that none of this fully answers the questions. What *is* lost when we have less privacy? What *is* gained? And are those even the right questions? So much of this Essay has started from the premise that we have surrendered our privacy, that we have become watchers, and that we should be troubled by this state of affairs. But when I think of my ideal world, the state is far from absent. The state still has a role to play. And when I think of my ideal world, we are still watchers, but with a difference. The state, instead of being a Big Brother who watches and polices us, is instead a “Big Brother” who watches over us. And we, the people, instead of simply being watchers, are watchers who watch out for one another. In my ideal world, we still think of home as in *The Wizard of Oz* and Dorothy’s famous “There’s no place like home.” We still think, “there’s no place like home” and “home is where the heart is.” But we also think of home more expansively, as a place where all of us live, and where all of us matter. And we think of home as including the larger community. Where all of us are brothers and sisters. And all of us are home.

CONCLUSION

The goal of this brief Essay has been simple: to show that even in our homes, our supposed castles, we are not free from surveillance. We may think we are free, but we are not. We have let the state in. And we, too, have become watchers, conducting surveillance on behalf of the state.

Perhaps all of this serves to lay the groundwork for the real question: What should we do now? And maybe that is the real task. To envision a world where the issue is not how much privacy we have, or how much surveillance exists, but how much we care for each other. Perhaps that is an odd thought for a law review. But so be it.