

At Home in the Law

Jeannie Suk

Forthcoming Yale University Press, fall 2009

Introduction

Charity and beating begins at home.

--Francis Beaumont and John Fletcher, *Wit without Money* (1639)

On or about September 20, 2001, Americans woke to discover that we had a “homeland” that would soon be protected by a Department of Homeland Security.¹ Being attacked on our own soil had profoundly changed America’s sense of safety and comfort in the world. Official talk of “securing our homeland” entered the language.² “Homeland” was not theretofore unknown, but commentators soon remarked on its oddness in the American lexicon. The word had a foreign, “vaguely Teutonic ring.”³ Some even called it “creepy.”⁴

Why? Peggy Noonan, the Reagan-Bush speechwriter known for her linguistic acuity, described discomfort “any time this sort of home-and-hearth language is used by people who are essentially police.”⁵ “Home” evoked the intimate freedom of private interior space. Now it was as if the concept of home were being conscripted to help make legitimate the most public of imperatives.⁶ The special affective resonances of home were openly being appropriated in the service of coercive state power.

Few concepts are as ubiquitous in ordinary human experience as the home. For most people, the home has formative cultural, emotional, and psychic significance.⁷ The idea of “home” emerged in the nineteenth century as a bourgeois ideal of domesticity and privacy, closely associated with the affective private life of the family.⁸ This still

evolving concept deeply informs our sense of who we are, and our feelings of safety and belonging.

In the Anglo-American tradition, the home and its historical correlate, the house, have long been associated with security against violent invasion. The ancient idea of the house as a castle once referred to the entire island of England, but in most legal usages throughout history the adage has referred to the security of a person's dwelling.⁹ As Coke put it, "the house of every one is to him as his castle and fortress, as well as his defence against injury and violence."¹⁰ Blackstone wrote that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity."¹¹ Thus burglary, a cause for "abundant terror," was "a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature."¹²

In these formulations, the house is simultaneously the place of unique security and comfort, and the place of unique potential for terror and vulnerability. This strange duality brings to mind Freud's famous discussion of home in the psyche. Analyzing the German word *heimlich*, Freud noticed that "on the one hand it means what is familiar and agreeable, and on the other, what is concealed and kept out of sight."¹³ He observed that oddly, the word's meaning--home-like, intimate, friendly, comfortable, secure--"develops in the direction of ambivalence, until it finally coincides with its opposite, *unheimlich*," literally unhomey, but standardly translated as "uncanny."¹⁴ The quietly horrifying anxiety, "that class of the frightening which leads back to what is known of old and long familiar," was the creepy feeling of the homely becoming its opposite, the safe becoming scary, the familiar becoming strange.¹⁵ It was this juxtaposition that characterized the

particular deep ambivalence of home. We must have the idea of a man's home as his castle, the ultimate inviolable, in order to experience such terror at the thought of its invasion.

The sensation of uncanniness most emerges when the home is undergoing transformation.¹⁶ As Americans have grappled with what it means for the secure house of the U.S. to be insecure, discourses of home have been fraught with distinctive anxiety. Against that backdrop, a range of legal debates implicating the home have become prominent.

The modern home marks the literal boundary between private and public space. The home also represents the metaphorical boundary between private and public spheres. In terms of both literal space and metaphorical sphere, the home is where some of the most basic questions about the relation between individuals and state power arise. In American law, the home as an idea has significantly shaped legal conceptions of crime, violence, sex, family, privacy, liberty, and property. Home has traditionally played a defining role in the criminal law of burglary, self-defense, and domestic violence. Home has been central to the articulation of constitutional rights, including the right against unreasonable search and seizure, the right to due process, the right to privacy, and (recently) the right to bear arms.

In areas of utmost importance to individuals' relations to the state and to each other, the home is often invoked as though its significance were self-evident and contained axioms from which legal results follow. But the legal meaning of home is ambivalent and contested. The home is a site of struggle over the most basic concepts that frame and construct our evolving legal universe.

Before our era, the most significant transformation in the notion of home in American life grew out of the feminist challenge to the received nineteenth-century bourgeois ideal of home -- the apotheosis of the association of domestic space with women.¹⁷ In 1903, the writer Charlotte Perkins Gilman, as much a child of late Victorian domesticity as Freud, observed women trapped in the home and not free to develop their capabilities. She saw “a repulsive horror, in the mass of freakish ornament on walls, floors, chairs, and tables, on specially contrived articles of furniture, on [the woman’s] own body and the helpless bodies of her little ones, which marks the unhealthy riot of expression of the overfed and underworked lady of the house.”¹⁸ In this revision, the protection of women in private space, away from public life, was a technique of subjugation that drove women mad.¹⁹ Insofar as a man’s home was his castle, it was also a woman’s prison.²⁰ The image of women thus enclosed in the home evoked a legal analogue: coverture, the common law of marital status wherein married women’s legal identities were “covered” by their husbands.’ Marital status law was gradually reformed in the nineteenth century, but its indelible traces associate the wife with the home.²¹

The epochal reform movement connected to the home in the late twentieth century has concentrated on the problem of violence. The target of this legal reform is subordination within the home -- not merely in the form of paternalistic relegation of women to the private sphere, but assaults, rape, and threats in the home. Just as Gilman and other feminists construed the protective walls of the home as sinister, late twentieth-century feminists showed how the domestic privacy ensured by law shielded violence from public intervention.²² The walls kept the police out while women were harmed. The home was a place of “terrifying love,” to quote the title of a feminist classic.²³

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

Over the last forty years feminists have advocated transforming the way that the home as a legal institution is perceived and treated, particularly by the criminal justice system. With the great success of this movement, the ideas that drive the reform are no longer new or radical to legal actors. They have laid down roots in legal doctrine, theory, and practice, as intellectual and ideological forces in lawmaking, adjudication, and legal culture.²⁴ They are now at home in the law.

But being at home is not the same as being fully comfortable. These ideas seem established, but also incongruent with what we still imagine home – and law -- to be. Ideas of the home as inviolate space of privacy have given ground but have by no means been defeated. Legal actors--judges, lawyers, and scholars of all political stripes--who use the concept of home both accept and contest the feminist changes of the last four decades. From daily routine arraignments in the lowest courts in the land--local misdemeanor courts--to constitutional adjudication in the Supreme Court of the United States, the home is in play today. The uses of the concept are unsettled and unsettling, as the changing meanings work their way through the legal system.

This book is an exploration of the home. The chapters that follow reflect on the changing legal meanings of home in a range of contemporary problems connected to

criminal law. My aim is to reveal the ideas of the home that are being translated and engrained into legal culture and their consequences. My chapters are juxtaposed case studies on the developing relation between the home and the police. At least two related visions provide a foundation on which the legal architecture of the home rests:

On the one hand, there is a traditional view of the home as the ultimate place of security from others. This view is captured in the home as a castle. If a man's home is his castle, the police are the army deputed to ensure that it remain inviolate and safe from attack, never to "suffer it to be violated with impunity."²⁵ On the other hand, the castle metaphor also refers to the home as the exemplary site of personal liberty from state intrusion and control.²⁶ In the words of the Supreme Court in *Lawrence v. Texas*, a signal constitutional case for our times, "In our tradition the State is not omnipresent in the home."²⁷

Both views are concerned with intrusion, but they depict the state's relation to it differently. The first view, "the police protect the home," envisions state protection from intruders, while the second, "the police stay out of the home," envisions the state as the intruder. The first sounds primarily in security, and the second sounds primarily in liberty. On the surface it might appear that the principles of security and liberty apply in different situations: for example, the police should protect the home from violence, and the police should stay out of the home in contexts of privacy, such as consensual sex.

But reflection on the way that discourses of home have evolved in the legal landscape over the last forty years reveals the first paradigm working its way into the space of the second. The image of the home as the exemplary place of coercion and abuse is gaining cultural ascendance. The notion that the home merely shields

subordination within its walls is becoming a kind of legal default understanding. Here, the standard worry is not about government intrusion but about government failure to intervene in the home. By the same token, the imperative that the police protect the home no longer primarily refers to protection from intruders but rather from family members. It becomes increasingly natural to expect police presence in the home--or at least the homes of poor minorities on whom police presence disproportionately falls. The purpose is to ensure that the home is indeed the place of ultimate security, by preventing insidious closed-door harm from husbands, boyfriends, and fathers.

The need for protection from violence leads to practices whereby the state comes to control home space, in turn raising deep concerns about the autonomy and privacy of those whom the state aims to protect. The version of feminist critique according to which home privacy is coterminous with violence is being successfully woven into our legal system. Nevertheless, even after the assimilation of this critique, privacy remains a value that is difficult to give up in our constitutional framework and in many people's intuitions about the home.

Along with the contestation and transformation of the home, there are corresponding shifts in notions of what crime is. If crime could once be imagined as the crossing of a boundary – whether literal or metaphorical, physical or legal – it is now increasingly understood as subordination of a person by another within private space. As a consequence, even while individual rights based on home metaphors have expanded, the legal boundary surrounding the home has eroded.

What is the concept of home that today most powerfully shapes the law? It is not “home sweet home,” “home is where the heart is,” or “Home is the place where, when

you have to go there, / They have to take you in.”²⁸ The legal vision of the home in ascendance is that of actual or potential violence in domestic space. Home is where the crime is.

Legal doctrine, practice, and discourse are coalescing around the notion of the home as a place of subordination that portends abuse. This developing legal common sense increasingly constructs the way the law conceives of intimacy as well as the relationship between the state and private space, in surprising ways. Legal reasoning increasingly reflects the hardening and generalizing of the home-as-violence idea, with some unexpected consequences. Legal practices make public and private more legally similar spaces than they have been in the past, even as the discourse of home abounds.

In this book, I present interpretations of the values and ideals that are at work when the law invokes the concept of home. I demonstrate the remarkable practical (not only theoretical) advance of feminist critique in the law, and I do not shrink from identifying its real-world consequences. These include not only the protection of some women but also substantial reductions in the autonomy of some women and men vis-à-vis the state – particularly in racial and economic communities already subject to disproportionate state control. The time is ripe to question seriously whether these developments advance women’s interests. While most will agree with the reforms that aim to ensure that criminal punishment of violence does not stop at the threshold of the home, perhaps upon a closer examination many will also find that persistent logical (though not inexorable) extensions of ideas motivating those reforms have begun to create a legal reality that seems untenable and incompatible with valuable autonomy, privacy, and even security.

Like every legal reform, the developments I describe affect the distribution of actual and symbolic power in the home and in the world. Reflection on what “home” has become will enable us to identify and evaluate those effects and what they may become. It should also help us understand the values and ideals on which we continue to build the legal structures that house us as citizens. Boundaries between the home and the public sphere are being eroded, and not only in the abstract. Are we happy with the concrete direction this is actually taking? This book is intended as an effort to focus the lens so that we can begin to see what is necessary to answer that question.

Chapter 1 focuses on the common law crime of burglary, the archetypal home crime, and shows how courts have translated domestic violence into the paradigm crime of home invasion. Chapter 2 considers practices in everyday misdemeanor domestic violence enforcement whereby the criminal law reorders and controls intimate relationships in the home through what I call “state-imposed de facto divorce.” Chapter 3 explicates the expansion of self-defense law driven by a powerful NRA-driven movement that marries the traditional notion of the “castle” with protecting women against violent subordination and the homeland security metaphor. Chapter 4 takes up home property and explores the relation between several recent Supreme Court decisions on takings and due process through the lens of state deprivation of the home. Chapter 5 reflects on the figure of the woman in the legal imagination of home privacy, interpreting the judicial articulation of privacy through the idea of the shielding of women.

The aim of these chapters, alone or together, is not to produce an armored structure that exhaustively covers the possible meanings of home, with catalogues and caveats. It is, rather, to present focused and textured interpretations of the idea of home

within several time-slices of legal culture in motion, through close reading of a range of material—from common law cases to routine criminal court practice to reformist legislation to Supreme Court opinions. These case studies are chosen for their capacity to illuminate legal change, for the inherent interest of their subject matter, and in a few instances, to show that some things that dwell in the periphery of our consciousness can contain troves of meaning bearing on preoccupations of our legal culture.

Finally, this book works at the cross-roads of legal studies and the humanities. It takes as its object of study the cultural discourse of the law--the revealing ways in which legal actors use language to describe and perform the law's rationales and justifications. Ideas that find expression in legal texts do not ineluctably indicate or cause particular legal results; nor do they coherently match predictable political agendas. Sometimes the legal texts have discernible rhetorical character that makes them worth *reading*. But regardless, legal language and legal practice are filled with embedded conceptions of who we are, what we think is important, and how we should live. It is crucial to understand these constructs through which the law regulates our lives. The road to them lies in close interpretation of the law's varied and uneven modes of expression. I do not hide my fascination with what the law as a cultural product might tell of the ideas with which we are governing ourselves, beyond (but certainly not apart from) the puzzles of legal doctrine or the march of ideological goals. The home is a rich vein for this legal study, because it is the focus of such intense imaginative human investment beyond law's borders. At the same time, the law makes the home. The home makes us. And of course, we make the law.

Notes

Introduction

¹ See Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1142 (Sept. 20, 2001); Address to the Nation on the Proposed Department of Homeland Security, 1 PUB. PAPERS 937 (June 6, 2002); Message to the Congress Transmitting Proposed Legislation To Create the Department of Homeland Security, 1 PUB. PAPERS 1006 (June 18, 2002).

² See U.S. DEP'T OF HOMELAND SEC., SECURING OUR HOMELAND: U.S. DEPARTMENT OF HOMELAND SECURITY STRATEGIC PLAN (2004); Eugene Robinson, Editorial, *A War of Words*, WASH. POST, Sept. 12, 2006, at A23 (“‘Homeland’ is one of the burdens left to us by the trauma of Sept. 11, 2001.”).

³ Peggy Noonan, *Rudy's Duty, Plus: Homeland Ain't no American Word*, WALL ST. J. OPINION J., June 14, 2002, <http://www.opinionjournal.com/columnists/pnoonan/?id=110001838>. For accounts of the advent of “homeland” in the U.S., see Margie Burns, *The Strange Career of “Homeland Security,”* ONLINE J., June 29, 2002, http://www.onlinejournal.com/archive/06-29-02_Burns.pdf; William Safire, *Words at War: Every Conflict Generates its Own Lexicon*, N.Y. TIMES MAG., Sept. 30, 2001, at 26; William Safire, *Homeland*, N.Y. TIMES MAG., Jan. 20, 2002, at 12.

⁴ See Mickey Kaus, *The Trouble with “Homeland,”* SLATE MAG., June 14, 2002, <http://www.slate.com/?id=2066978>; Noonan, *supra* note xx (quoting a friend).

⁵ Noonan, *supra* note xx.

⁶ Cf. Hendrik Hertzberg, *Too Much Information*, THE NEW YORKER, Dec. 9, 2002, at 45 (describing the invocation of home as an “Orwellian” campaign to rationalize dismantling the sanctity and privacy of home); William Safire, Op-Ed, *You Are a Suspect*, N.Y. TIMES, Nov. 14, 2002, at A35; *but cf.* Richard D. Parker, *Homeland: An Essay on Patriotism*, 25 Harv. J. L. & Pub. Pol’y 407, 407-08 (2002) (arguing that “with our homeland under violent foreign attack for the first time in almost two centuries,” teaching patriotism to law students is “essential to the vitality of our democratic politics,” but that legal educators tend to consider patriotism “inappropriate,” “dangerous,” or “beneath them.”).

⁷ Cf. MARJORIE GARBER, *SEX AND REAL ESTATE* (2000) (exploring the role of houses in the cultural imagination).

⁸ See Tamara K. Hareven, *The Home and the Family in Historical Perspective*, in *HOME: A PLACE IN THE WORLD* 227, 232-34 (Arien Mack ed. 1993); *see also* NANCY COTT, *THE BONDS OF WOMANHOOD* (2d ed. 1997).

⁹ See HENRI ESTIENNE, *THE STAGE OF POPISH TOYES* 88 (George North comp., London, Henry Binneman 1581) (“God in his government, hath made a brazen wal about you: his earley rising and late watching . . . preserves you, keepes you, defendes and protects you from all perill, you neede not languishe in uncertaintie of life, *as other nations do: youre house is youre Castell*, your Beds your Bulwarks, your goods your glorye, your wives your worship and comfort, your daughters not ravished, and your selves not slaved at the tyrannous pleasure of straungers”) (emphasis added); *see also* RICHARD MULCASTER, *POSITIONS* 225 (London, Thomas Vautrollier 1581) (“He is the appointer of his owne circumstance, and his house is his castle.”); 3 WILLIAM BLACKSTONE,

COMMENTARIES *288 (1768) (“Every man's house is looked upon by the law to be his castle.”); WILLIAM TUDOR, *THE LIFE OF JAMES OTIS* 67 (Boston, Wells and Lilly 1823) (“A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle.”).

A survey of English and American legal sources reveals that in the adage that began as a man’s house is his castle, “home” has come nearly to supplant “house”—a man’s home is his castle—with “home” occurring roughly twice as frequently as “house” since the twentieth century. *See, e.g.*, *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (“We have, after all, lived our whole national history with an understanding of ‘the ancient adage that a man’s home is his castle.’”) (citing *Miller v. United States* 357 U.S. 301, 307 (1958)).

¹⁰ *Semayne’s Case*, (1604) 77 Eng. Rep. 194, 195 (K.B.).

¹¹ 4 BLACKSTONE, *supra* note 7, *223.

¹² *Id.*

¹³ 17 SIGMUND FREUD, *The Uncanny*, in *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 217, 224-25 (James Strachey et al. eds. & trans. 1955) (1919).

¹⁴ *Id.* at 226.

¹⁵ *Id.* at 220.

¹⁶ On the “unhomely,” see HOMI K. BHABHA, *THE LOCATION OF CULTURE* 9-11 (1994).

¹⁷ On the Victorian ideology equating women with the home, see COTT, *supra* note 8; Barbara Welter, *The Cult of True Womanhood 1829-1860*, 18 *AM. Q.* 151 (1966).

¹⁸ CHARLOTTE PERKINS GILMAN, *THE HOME* 220 (AltaMira Press 2002) (1903).

¹⁹ Cf. CHARLOTTE PERKINS GILMAN, *The Yellow Wallpaper*, in THE CHARLOTTE PERKINS GILMAN READER 3 (Ann. J. Lane ed., Univ. Press of Va. 1999) (1892); SUSAN M. GUBAR & SANDRA GILBERT, THE MADWOMAN IN THE ATTIC (1984).

²⁰ Sixty years later, Betty Friedan's *The Feminine Mystique* (1963), a classic of the women's movement, presented a similar critique of the home as women's prison.

²¹ See HENDRIK HARTOG, MAN AND WIFE IN AMERICA 193-135, 287-308 (2000);

²² See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 93, 99-102 (1987); Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

²³ LENORE L. WALKER, TERRIFYING LOVE (1989).

²⁴ See JANET HALLEY, SPLIT DECISIONS 20-22 (2006) (describing "governance feminism").

²⁵ 4 BLACKSTONE, *supra* note 7, at *223.

²⁶ See *Miller v. United States*, 357 U.S. 301, 307 ("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!") (quoting remarks attributed to William Pitt).

²⁷ 539 U.S. 558, 562 (2003).

²⁸ ROBERT FROST, *The Death of the Hired Man*, in COLLECTED POEMS, PROSE, & PLAYS 40, 43 (Richard Poirier & Mark Richardson eds. 1995) (internal quotation marks omitted).