



Celebrating the 100th Anniversary of Louis D. Brandeis' Appointment to the U.S. Supreme Court

## The Declining Significance of Home Privacy “Whilst Quiet” and of No Use to Artists or Anyone

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Which is more important, privacy or art? In New York City, home to many artists and aspiring artists from around the world, the answer is clear: art. One enters juridical public spaces—say, Times Square—potentially objectified as someone’s art subject (so, the modest or reserved had best go about veiled). Despite traces of “home is castle” discourse throughout American law, under New York state law, one’s actual home—say, the Zinc Building in Tribeca—is insecure and non-exclusive, open to artists by legal rules that elevate voyeuristic, contemporary, fine art photography and videography above what Louis Brandeis called the “inviolable personality.”

Arne Svenson is a fine arts photographer. His photographs have been exhibited in the US and in Europe. According to New York state court documents, in 2012 a friend who was a bird watcher gave Svenson a telephoto camera lens.<sup>1</sup> Svenson used the lens to photograph the people living near him in the Zinc Building in Tribeca.<sup>2</sup> The Zinc Building has a largely glass facade, and each apartment has large windows. The vertical and horizontal arrangement of rectangular windows is reminiscent of the iconic paintings of modernist Piet Mondrian. Hiding in the shadows of his residence, for about a year Svenson photographed Zinc Building residents of all ages without their knowledge. He

eventually selected some of the pictures he shot for display in Los Angeles and New York galleries: “The Neighbors” first opened in 2013 at the Julie Saul Gallery in New York.

One might suppose that such a project raised major privacy concerns for the artist. But instead, “the exhibit’s promotional materials on the artist’s website stated that for his ‘subjects there is no question of privacy; they are performing behind a transparent scrim on a stage of their own creation with the curtain raised high.’”<sup>3</sup> Discounting ordinary expectations of privacy in this mythic, intellectualized disclaimer of voluntarism, Svenson further explained in his own defense that his “performing” subjects did not know they were being photographed, and that he took care to remain in the shadows within his apartment as he shot into theirs. Apparently a reporter for the *New Yorker* joined Svenson as he surreptitiously photographed some people, including a “little girl, dancing in her tiara; half naked.”<sup>4</sup>

### **Home as Castle**

Though no guarantor of repose, an American’s home is often at the center of their intimate lives. It is a domain culturally marked for the enjoyment of the highest expectations of physical privacy from strangers. The idea of a household whose physical walls define political limits and opportunities came to North America as a transplant of English law, only to be used as ammunition against British colonial authority. A Massachusetts lawyer and inspiration for patriots of the American Revolution, James Otis is chiefly remembered for a five-hour speech he delivered in Boston in February 1761. It was an oration in *Paxton’s Case*, against the issuance of certain “writs of assistance.”<sup>5</sup> When issued, the writs that Otis objected to would allow British officials broad and long-term authority to enter and search the colonists’ private homes and businesses. Otis asserted in the famous speech that “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.”

Louis D. Brandeis is famous as the first Jewish member of the United States Supreme Court and for his intellectual role in shaping the jurisprudence of privacy. An 1890 *Harvard Law Review* article persuasively made the case for a common law “right to privacy.” This rhetorically powerful article, coauthored with his legal colleague Samuel D. Warren, warned against “intrusion upon the domestic circle” through business methods and technologies that lead to publication of intimacies and secrets.<sup>6</sup> Warren and Brandeis urged the courts to deter publication in newspapers of gossip and photographs of the sort that “invaded the sacred precincts of private and domestic life” and thereby injured “inviolable personality.”<sup>7</sup> The successful article inspired many twentieth-century state courts to adopt the privacy rights against unwanted, highly offensive publications and intrusions, especially those that open up home life to scrutiny. And while New York’s high court has never embraced the full panoply of common law privacy states that most other states have adopted, it was the very first to enact a right to privacy statute, New York Civil Law 50 and 51, creating civil liability for appropriation of name or likeness for trade or commercial purposes.<sup>8</sup>

When it came to articulating the significance of a private sphere in association with the home, no one in the last century except Justice Louis Brandeis himself in *Olmstead v United States*,<sup>9</sup> surpassed political philosopher Hannah Arendt in insight about the “sanctity of the hearth.”<sup>10</sup> In *The Human Condition*, Arendt narrates an ancient history of the Western world, still relevant today, in which we are driven together behind the walls of the *oikos* by biological wants and needs, our escape into the *polis* depending upon mastery of households of our own that are materially grand enough to define us as persons worthy of participation in civic governance.<sup>11</sup> A refugee to America from Hitler’s Europe, for a time Arendt went so far as to oppose mandatory public school integration in Little Rock because she thought the privacy of families meant the federal government should not interfere with racist educational preferences.<sup>12</sup> Brandeis never thought the privacy of the home was as expansive as all that.

### *Quiet*

History remembers James Otis's venerated pronouncement that "a man's house is his castle." But it has tended to forget the qualifier: that a person in his castle is "well-guarded" (only) "whilst he is quiet." That is, Otis interprets "freedom of one's house" as both essential and as not absolute. For once a man (or woman) at home fails to be "quiet," they cannot expect to be let alone by others. They invite entry and intrusion.

As a general matter, this analysis of the privacy of the home makes sense. Imagine that I lean out of an open window at my house and for hours shout obscenities at passers-by. Well, then passersby may shout back, throw things at me, or call the police. Who could much blame them? If I persist, authorities are justified in coming into my house to investigate the cause of my anti-social behavior, even taking me to a jail or a hospital. I am not being quiet. I have therefore forfeited the freedom of my house; I have called attention to myself, signaling that I do not want the privacy homes afford.

Or suppose that I throw a party, blasting loud music far into the night. Here, too, the authorities may penetrate the curtilage, come inside my dwelling to check things out. The police would be warranted in coming inside a rowdy house to issue a warning or to break things up for the night. Why is the interference warranted? It is warranted because the occupants are not quiet. By being noisy, one has forfeited the "freedom of one's house" to which one was presumptively entitled.

But the failure to be quiet in the literal, aural, sense is not the only condition that qualifies the privacy of the home. Otis was surely making a more general point that our Anglo legal tradition calls for strong protection of the home (hence his castle metaphor) but that protection is subject to our cooperative self-concealment, our not being a nuisance to others, and our being otherwise law-abiding (hence the quietude qualifier).

In a free society everyone should be able to expect the freedom of their houses—meaning the privacy of their homes, and privacy while at their home. The Fourth Amendment warrant requirement enshrines such an ideal. Moreover, an international "home is castle" ideal is symbolized by the influential Article 12 of the United Nations Declaration of Human Rights (1945); Article 17 of the International Covenant on Civil and Political Rights (1966); Article 8 of the Council of Europe's Convention for the

Protection of Human Rights and Fundamental Freedoms; and Article 7 of the Charter of Fundamental Rights of the European Union. These decry arbitrary interference with or attacks on privacy, family, home, correspondence and communications, along with attacks on honor and reputation. “Everyone has the right to the protection of the law against such interference or attacks.”

As in the United States, in Europe a person’s home is supposed to be a “castle.” Parties have appealed to Article 8 in European Court of Human Rights cases to defend a wide range of interests related to homes and intimate life. In the case law of the Court of Human Rights, the term “home” applies to houses, apartments, and other residences. In *Buckley v. UK* (1996), the Court’s majority recognized the mobile trailer of a Roma family as a “home” protected under Article 8 of the European Convention. The Court concluded, though, that Article 8 had not been violated when permission was denied to the assembly of a large caravan.<sup>13</sup> In *Camenzind v. Switzerland* (1997), a leading case concerning search and seizure, the European Court of Human Rights recognized that home searches may be “in accordance with the law,” pursued for aims consistent with the Convention’s tolerance of measures necessary for “prevention of disorder or crime” and proportionate.<sup>14</sup> In a striking judgment of a completely different variety, in *Lopez Ostra v. Spain* (1994), the Court of Human Rights extended the right to the privacy of the home to freedom from environmental pollution caused by a waste treatment plant.<sup>15</sup> The essence of the judgment was that severe environmental pollution may adversely affect the enjoyment of private lives and family health.

While accepting the “home is castle” principle, most people in the US, Europe and the UK simultaneously embrace a pragmatic “quietude qualifier.” The quietude qualifier is a cornerstone of the way American law and the judges who interpret it have tended to think about the privacy of the home. Under the qualifier, one no longer merits privacy protection against “interference or attacks” when one either (1) breaches the peace in some way and one’s privacy becomes a danger to society (kill someone and try to hide the body in the basement); or (2) one exposes one’s self, voluntarily, signaling to others

that one is willing to be known, seen, heard, smelled, or felt (host a lively holiday party and invite the whole neighborhood).

### *Not Useful*

So far it sounds like all anyone has to worry about if they want legally protected privacy at home is whether they are “quiet.” But this is not so. In a suggestive analysis, Ken I. Kersch has argued that the American state—different from both the “rural and agricultural” and the “urban and industrial” state—is now a “corporate-administrative” capitalist state, whose success depends on detailed knowledge of who and what it must manage and control.<sup>16</sup> According to his theory, anything invisible or in a dark corner is a potential threat or impediment. Granular access to personal life is in the interest of the state; thus we could expect the quietude qualifier to be subject to expansive, permissive interpretations that free the hands of industry and government. What gets defined as harmful to society could come dangerously close to knowing no bounds. What counts as a voluntary waiver or forfeiture of privacy could come perilously close to being considered just about anything anybody does that increases accessibility to another human being, such opening a curtain to get a bit of natural light.

If I want privacy, I have to worry not only whether I am quiet enough, but also whether I am useless enough. No matter how quiet I am, in today’s world, I cannot expect privacy if knowledge about me may be *useful* to others. In an article in the June 28, 2015, *New York Times* about US national security laws, the Foreign Intelligence Surveillance Court, and the Obama administration, the author pointed to what he felt is a trend in thinking about surveillance: anything useful to government has come to be fair game; in particular, “because massive sets of metadata are useful . . . they are relevant [to public order], even though they draw almost exclusively on the private lives of innocent people.”<sup>17</sup>

Is it as bad all that? If my private life is useful to others, does it matter whether I am law-abiding and self-concealed? Does the presumptive status of home-as-castle yield whenever breaching our walls is useful to a government agency, a business, or a fellow

citizen with clout? If so, the James Otis of today would be reduced to saying that “A man’s house is his castle; and whilst he is quiet *or of no use to government or big business or important people*, he is as well guarded as a prince or princess in their castle.” I will come back to this.

### *A Popular Metaphor in the Law*

The home-as-castle trope is both in old law and in new law: homes are exclusive, secure, and private. (They are also sentimentalized as warm and nurturing.) In the United States, our Supreme Court has issued many important decisions in which the Court stresses the importance of the privacy of the home and the measures that individuals and the state may take to protect it. Justice Louis Brandeis was among the first jurists to emphasize the importance of limiting access to the home and to telephonic communications because of the value of privacy to civility. In 1928 in *Olmstead v. US*, he warned of the technologies that threatened the home then, and would threaten it in the future: “Discovery and invention have made it possible . . . to obtain disclosure . . . of what is whispered . . . Ways may someday be developed by which . . . it will be enabled to expose . . . the most intimate occurrences of the home.”<sup>18</sup> The Fourth Amendment, he felt, was an important constraint on official uses of technology to invade the home. Brandeis is aptly considered a parent of American privacy for his generative role in articulating the need for a common-law right to privacy to protect what he referred to as the “sacred precincts of private and domestic life.” The language Justice Brandeis used in 1928 to describe privacy as a constitutional value in his *Olmstead* dissent, attacking warrantless wiretapping, strongly echoes the language he used to describe privacy as a general common-law value in the opening paragraphs of “The Right to Privacy” in 1890. In both places he speaks of the importance of “man’s spiritual nature” and of regard for “his feelings and his intellect.” In the *Harvard* article he observed that: “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.” And now

we see in the New York law of privacy and art, which I address herein, judges effectively blowing the roofs off of our houses, so that all can freely see what is inside.

### *Without Castles, without Constitutional Liberty*

The opinion of Judge Andrew Jackson Cobb, in the first US state supreme court case to recognize a common law right to privacy in 1906, compared the privacy invasion of using someone's photograph without their permission in an advertisement to enslavement. Imagine a merciless master dragging his slave into the public streets against the fibers of his will.<sup>19</sup> Why does privacy matter? The answer could be put in the form of a counter question: Why does liberty itself matter?

Although the US Supreme Court has emphasized that the right to privacy is not limited to the home as such—it even applies to conversations in a phone booth<sup>20</sup>—its justices have continued into the twenty-first century in rhetoric and holdings to the elevate the home as the place where the strongest privacy rights obtain as against the state and private actors.<sup>21</sup> And the concerns about technology, which worried Justice Brandeis, remain salient worries for our contemporary Supreme Court justices. Thus the Court concluded in *Kyllo v. United States* (2001) that when the government uses a technology, such as thermal imaging devices not in general public use, to “explore details of the home that would previously not have been knowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”<sup>22</sup> Justice Scalia feared thermal imaging might reveal details of the “lady in her bath.”<sup>23</sup> (Recall how privacy got its gender.<sup>24</sup>) Justice Scalia later opined in the *Heller* decision, striking down gun control laws in the District of Columbia, that the Second Amendment elevates “above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>25</sup>

Looking back, the variety of contexts in which the Supreme Court historically has drawn upon the privacy-of-the-home ideal is remarkable. Viewing adult obscenity, unlawful outside the home, is lawful inside the home under the Court's ruling in *Stanley v. Georgia* (1968), the opinion delivered by Justice Thurgood Marshall.<sup>26</sup> In explaining



why abortion protesters' free speech rights cannot immunize them from a local ordinance, the Court wrote in *Frisby v. Shultz* (1988): "The type of picketers banned . . . intrude upon the targeted resident, and do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy . . ." <sup>27</sup>

In the Court's historic *Obergefell* decision in 2015, legalizing same-sex marriages nation-wide, the home was a central and sentimental image—respect for equal dignity of marriage allows same-sex couples to create and enjoy homes of their own. <sup>28</sup> Wrote Justice Kennedy, quoting precedent: "The Court has recognized . . . as a unified whole": "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." <sup>29</sup>

Before *Obergefell*, Professor Carlos Ball argued that "The Court's 'geographization' of sexual liberty has resulted in the protection of sexual conduct that takes place in the home (and, presumably, in analogous sites such as hotel rooms) while leaving unprotected sexual conduct that occurs in public sites" such as restrooms. <sup>30</sup> His point was that for gay men neither sex at home nor sex outside of the home was deemed legitimate and worthy of legal protection. Progressive critics notice that *Obergefell* confers marriage and domesticity to homosexual couples without doing anything to end the "geographization" of sexual privacy, represented by its continued association of proper sex within hearth and home.

### *Realism About Homes*

Now, we all know that the ideal of the privacy of the home is at odds with reality. Too many people do not have homes at all (look around the streets of Paris or Washington DC), and the condition for people inside the home is not a condition of meaningful solitude or security as a result of sharing, caregiving, or even domination and control. Marriage is considered a private relationship, yet governments require licenses and medical tests, impose age limits, and prohibit polygamous and incestuous marriages. Procreation and childrearing are considered private, but government child-abuse and

neglect laws regulate, if at times inadequately, how parents and guardians must exercise their responsibilities. The private sphere can only be understood as a set of entitlements to be relatively free of the most direct forms of outside intrusion, interference and constraint.

In late nineteenth century intellectual E. L. Godkin offered a dose of realism and reminded his audiences that privacy of the home is a distinctive product of modernity and a luxury at that. Private homes do not deliver privacy in fact, but that has done little to curb the romance: As Godkin observed, and it is still true today, “To have a house of one’s own is the ambition of nearly all civilized men and women, and the reason which most makes them enjoy it is the opportunity it affords to decide for themselves how much or how little publicity should surround their daily lives.”<sup>31</sup> In an 1898 book, *Women and Economics*, the utopian feminist Charlotte Perkins Gilman, took on the myth of homes as intimate havens. She explained that how much privacy and intimacy a person is able to enjoy at home depends not only on the architecture of the home and the ability to avoid the attention of newspapers and gossips, but also on the responsibilities, personalities, needs, ages, and genders of a home’s co-inhabitants. But rather than reject the home, Gilman proposed changes in domestic organization and the status of women to better realize the “fond ideal” of the family home. Her beef was not with “loving home” but with the perpetuation of a certain “kind of a home and in the kind of womanhood that it fosters.”

### **Declining Significance of the Home**

We may need the “fond ideal” more than ever. Government and private sector surveillance cameras line the street. The internet-linked cameras of friend, foe, and stranger are ubiquitous. Employers monitor us, online and offline, throughout the workday. Group life is all about homogenizing consumerism and celebrity. If not privacy at home, then where can the inviolate personality grow and renew itself?

The castle metaphor and myth lives on in constitutional jurisprudence and ordinary life. And so does the quietude qualifier. But there are important questions, suggested by

recent legal disputes implicating state privacy law, about how we understand the condition of quietude that should protect us from interference or attack. When is a person in her home really protected from assaults on privacy? In the age of social media, revenge porn, meta-data collection, big data and the “internet of things” that even has our thermostats, televisions, and refrigerators online and speaking to the outside world—what kinds of privacy of the home have we not forfeited?

### *Useful to Others*

State privacy law is telling us that *being quiet* doesn't matter if we are *useful* to business, government, or other people. A family, the Borings, lost a tort case in which they claimed that Google Street View, by coming onto their secluded private road to photograph their house and post the image on its popular website, invaded their privacy. They eventually won a pitiful \$1 award on a trespass claim against Google, but they lost their privacy case and an appeal.<sup>32</sup> With respect to the Boring's privacy intrusion claim, the court found that: “No person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her ungated driveway and photographing the view from there. . . . Indeed, the privacy allegedly intruded upon was the external view of the Borings' house, garage, and pool—a view that would be seen by any person who entered onto their driveway, including a visitor or a delivery man. Thus, what really seems to be at the heart of the complaint is . . . the photographic image captured at that time. The existence of that image, though, does not in itself rise to the level of an intrusion that could reasonably be called highly offensive.” Though engaging in lawful activity, the Borings are no more entitled to privacy with respect to the curtilage of their Pennsylvania home than would be the pot growers whose marijuana garden is visible to police from an airplane.

We are at the mercy of what our courts will deem highly offensive to a person of ordinary sensibilities. Who is that person? It could be the opportunistic straight guy in an intolerant community. In a Mississippi state law case from the late 1990's a gay woman brought an invasion of privacy suit against the ex-husband of her lover. The ex-husband

crept up to her home, peered in her bedroom window, retrieved a camera from his car, and took photos of her intimate contact with his ex-wife. Remarkably the lesbian in her supposed castle lost to the peeping Tom. The judge wrote: “In the present case, Michael did want to file for modification of child custody. However, he had no proof that there actually was lesbian sexual relationship, which could be adversely affecting his minor child. In order to obtain such proof, he went to the cabin, peered through the window and took pictures of the two women engaged in sexual conduct. Three pictures were actually developed which were of Plaxico in a naked state from her waist up in her bed. Michael believed that he took these pictures for the sole purpose to protect his minor child. Although these actions were done without Plaxico’s consent, this conduct is not highly offensive to the ordinary person which would cause the reasonable person to object. In fact, most reasonable people would feel Michael’s actions were justified in order to protect the welfare of his minor child. Therefore, the elements necessary to establish the tort of intentional intrusion upon solitude or seclusion are not present.”<sup>33</sup>

These two cases illustrate that that even when we are *being quiet*, our castles are not necessarily protected by law. A big company like Google, or our lover’s small-minded ex, can get away with using us for their own purposes. Artists can use us for their purposes, too, a point illustrated by *Foster v. Svenson*.

### *Appropriated for Art*

Some of the Zinc Building neighbors, the Fosters, brought a law suit against Svenson, on the ground that their family members’ privacy rights under a Brandeis era New York law had been violated. New York Civil Law Sections 50 and 51 make persons civilly liable for the appropriation of others’ names or likeness for commercial or trade purposes. The Fosters managed to convince Svenson remove certain photos of their children from his exhibition. But they lost their court case completely, and lost again on appeal. The judges ruled against them on the law, unanimously. Neither taking the pictures, exhibiting the pictures in a gallery, nor advertising the exhibition and availability of the pictures for sale was an invasion of privacy under the statute:

Defendant's use [sic] of the photos falls within the ambit of constitutionally protected conduct in the form of a work of art. . . . Indeed, plaintiffs concede on appeal that defendant, a renowned fine arts photographer, assembled the photographs into an exhibit that was shown in a public forum, an art gallery. Since the images themselves constitute the work of art, and art work is protected by the First Amendment, any advertising undertaken in connection with the promotion of the art work was permitted. Thus, under any reasonable view of the allegations, it cannot be inferred that plaintiffs' images were used "for purpose of advertising" or "for purpose trade" within the meaning of the privacy statute. . . . [D]efendant's conduct, however disturbing it may be, cannot properly, under the current state of the law, be deemed so "outrageous" that it went beyond decency and the protections of Civil Rights Law sections 50 and 51. To be sure, by our holding here—finding no viable cause of action for violation of the statutory right to privacy under these facts—we do not, in any way, mean to give short shrift to plaintiffs' concerns. Undoubtedly, like plaintiffs, many people would be rightfully offended by the intrusive manner in which the photographs were taken in this case.<sup>34</sup>

Other voyeuristic artists have turned neighbors into objects for their own purposes in violation of common privacy expectations. Video artist Michel Auder has captured images that include a woman emerging from her bath<sup>35</sup>—the very thing Justice Scalia marked as a special concern in *Kyllo*. Auder has likened himself to one of those nature documentarians shooting beasts in the wild.<sup>36</sup> Privacy just is not a meaningful concern when you can get some really interesting shots of apes, lions or zebras living naturally unaware of observation. The same is true of putting a camera on people. Yet people are animals with inviolate personalities, spiritual natures and religion.

Artist Philip-Lorca DiCorcia prevailed in a suit against a religious Hassidic Jewish man photographed as he walked through New York's Times Square between 1999 and

2001.<sup>37</sup> Mr. Nussenweig's captivating photograph had been included without his knowledge or consent in an exhibition, "Heads." In an amended complaint, Mr. Nussenweig explained how the display and sale of his photograph violated his religious faith and the Biblical ban against graven images. But the court utterly dismissed the considerations of the photographic subject's religion or personal values as irrelevant under Sections 50 and 51. Under the court's interpretation of the law, the central issue was whether the photograph was used without permission for trade or commercial purposes not incidental to its status as art.

I know that many people who hear about the Svenson case will side with the artist and the court. The point of the work is to interrogate the public-private distinction, some will argue in defense of the artist. Yet, Van Gogh interrogated that distinction a hundred years ago by painting pictures of his bed. And artists have been painting and sculpting and plasticizing vaginas for centuries. We get it. The private is beautiful, interesting, dangerous, nasty, depressing, forbidden. Do the ends of art justify the means of using living breathing people? Does every ethical boundary have to be crossed?

Another line of defense has weaknesses, too. You can't have an expectation of privacy if you stand in an open the window, it is argued. The Zinc Building neighbors chose to appear in front of open windows, albeit, above street level, where they knew they and their children might in theory be observed standing squatting, reclining, running, caregiving, and so on. By this analysis, the residents were not "quiet"; they called attention to themselves. The social norms that they assumed would confer castledom on their glass houses proved illusory. A graduate student I encountered at Cornell's School of Criticism and Theory last summer offered a twist on the argument that the Fosters brought this problem on themselves. She observed that the "privileged, rich" people living in this chic glass apartment building purchased the right to be seen conspicuously consuming Manhattan. The joke is on them that someone dared to take the photographs they assumed no one would dare to take of people like them, the non-slave class. Why should we (or the law) care about an affront to such privilege? Why should we care that the rich can be exploited, used, dominated like the rest of us?

The graduate student's clever write-off cannot be correct, though. Glass architecture and big windows are indeed luxury items. But acquiring them does not in fairness end the purchaser's entitlement to residential privacy, sunshine and fresh air. Enjoying light from within an apartment in a city cannot be deemed an utter forfeiture of expectations of privacy. When was that made the social or ethical norm? That it is *not* the social or ethical norm is what makes Svenson the kind of "bad boy" artist willing to exercise power over others to gain the edge the art world loves.<sup>38</sup> We might do well to focus on the ethics of power grabs rather than the ethics of standing in front of a window in one's residence.

The Foster neighbors lost their case against Svenson because they were *useful* to Svenson. The neighbors were useful to Svenson in the production of art qua art and art qua commodity. Mr. Erno Nussenweig was useful, too; but then, it seems to matter that he was photographed in Times Square and not spied on at home.<sup>39</sup> The Borings were useful to Google in the production of a commodity, Google Street View. Plaxico was useful to Michaels in the preservation of heterosexual privilege. Home-as-castle says homes are private, exclusive secure. But homes are not private, not exclusive, not secure if the lives inside are deemed not quiet and are quite useful to the right people and institutions.

People like the Neighbors, the Heads, the Borings, and Plaxico are to differing degrees dragged out of their homes and made subject to the gazes of others. Privacy invasions can feel like and be coercive limits on liberty. The victim of a commercial appropriation of likeness is like a slave to a merciless master. Why does privacy matter? It is the opposite of slavery. The characteristic activities of the household (Hannah Arendt offered an enlightening account) carry the aura of appropriately private activities, even though the modern state can respect no impervious boundary at the threshold. Collective welfare, sometimes justifies incursions into home life.

Yet opportunities for privacy are vital for personality, character, reputation, relaxation, creativity, reflection, civility, and intense intimate relationships.<sup>40</sup> Privacy affords groups of like-minded individuals the opportunity to plan undertakings and live in

harmony with their own preferences and traditions.<sup>41</sup> Respect for privacy is, in many ways, respect for human dignity itself.<sup>42</sup> Moreover, because self-governing communities benefit from the psychological wellbeing and independent judgments of their members, privacy is distinctly a social good.<sup>43</sup> The liberal democratic way of life requires public policies that are mindful of the subtle and cumulative threats to privacy—including fine art photography.

In an increasing variety of ways, our lives are being emptied of privacy, especially physical and informational privacy.<sup>44</sup> Liberal government will have to proscribe and regulate data collection, disclosure, publication, and retention in the interest of preventing cumulatively harmful diminutions of the taste for or the expectation of privacy. If we care about Brandeis' inviolate personality and meaningful liberal democracy, our courts are well advised to make sure that the excuses for interfering with the privacy of the home identified in this essay—the “unquiet” excuse and the “useful to others” excuse—are kept in check.

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## Notes

1. *Foster v. Svenson*, 2015 NY Slip Op 03068, Decided on April 9, 2015, New York Supreme Court, Appellate Division, First Department, Renwick, J.

2. The Zinc Building at 475 Greenwich Street, New York, New York, is a triangular loft, luxury residential apartment building in lower Manhattan.

3. See overview of the *Foster* litigation and website quotation: <http://grossmanllp.com/art-law-blog/2015/04/appellate-court-upholds-dismissal-invasion-privacy-claims-photographer-arne-svenson/>.

4. *Foster* at 2.



5. James Otis, Oration in *Paxton's Case* Against writs of Assistance (Boston, February 1761): "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. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court may inquire. Bare suspicion without oath is insufficient."

6. Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193.

7. Anita L. Allen, "Privacy Torts: Unreliable Remedies for LGBT Plaintiffs," *California Law Review* 98 (2010): 1711.

8. New York's Civil Rights Law §§ 50 and 51:

§50. Right of privacy. A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§51. Action for injunction and for damages. Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article. . . .

9. *Olmstead v. US*, 277 U.S. 438 (1928).

10. Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958 edition), 19, 29–30.

11. *Ibid.*

12. I allude to Arendt’s infamous essay “Reflections on Little Rock,” in which she argued against mandatory school desegregation on ground that schools are extensions of the private family. Cf. <https://lapa.princeton.edu/content/hannah-arendt-and-little-rock>

13. *Buckley v. UK*, 7 Hum. Rts. Case Dig. 833 (1996).

14. *Camenzind v. Switzerland*, 136/1996/755/954 (16 December 1997).

15. *Lopez Ostra v. Spain* (1994), App no 16798/90, A/303-C, [1994] ECHR 46, (1995) 20 EHRR 277, IHRL 3079 (ECHR 1994).

16. Ken I. Kersh, “The Reconstruction of Constitutional Privacy Rights and the New American State,” *Studies in American Political Development* 16, nos. 61, 62 (2002).

17. Mattathias Schwartz, “The Rabbit-Hole of Relevant,” *New York Times*, June 23, 2015.

18. Kirsh, 61.

19. *Pavesich v. New England Life Insurance Co*, 122 Ga. 190 (1905).

20. *Katz v. US*, 389 US 347. Harlan, concurring: “I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, . . . a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic, as well as physical, intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment, and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.”

21. *US v. Karo*, 468 U.S. 705 (1984). “At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.”

22. *Kyllo v. US*, 533 U.S. 27, 40 (2001).

23. *Kyllo*, 533 US at 40. “The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider “intimate”; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on.”

24. Anita Allen and Erin Mack, “How Privacy Got Its Gender,” *Northern Illinois University Law Review* 10 (1990): 441–78.

25. *District of Columbia v. Heller*, 554 US 570 (2007). In *McDonald v. Chicago*, 130 S.Ct. 3020 (2010) (Alito, J.), the Supreme Court held that the 14th Amendment makes the 2nd Amendment right to bear arms as articulated in *Heller* fully applicable to the States.

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

27. *Frisby v. Shultz* 487 U.S. 474 (1988).

28. *Obergefell v. Hodges*, 576 U.S. (2015).

29. *Ibid.*

30. Carlos Ball, “Privacy, Property, and Public Sex” *Columbia Journal of Gender and Law* 18, no.1 (2008).

31. E. L. Godkin (1890), “Privacy is a distinctly modern product, one of the luxuries of civilization, which is not only unsought for but unknown in primitive or barbarous societies. The savage cannot have privacy, and does not desire or dream it. To dwellers in tents and wigwams, it must have been unknown. The earliest houses of our Anglo-saxon ancestors in England, even among the Thanes, consisted of only one large room in which master and mistress, and retainers, cooked, ate and slept. The first sign of material progress was the addition of sleeping rooms, and afterward of “withdrawing-rooms” into which it was possible for the heads of the household to escape from the noise and publicity of the outer hall. One of the greatest attractions of the dwellings of the rich is the provision they make for the segregation of the occupants. All of the improvements, too, of recent years to the dwellings of the poor, have been in the direction, not simply of more space, but of separate rooms.”

32. See *Boring v. Google, Inc.*, 362 F. App’x. 273, 280 (3d Cir. 2010) *cert. denied*, 09–1475, 2010 WL 2242740 (U.S. Oct. 4, 2010):

33. *Plaxico v. Michael*.

34. *Foster v. Svenson*, 2015 NY Slip Op 03068, Decided on April 9, 2015, New York Supreme Court, Appellate Division, First Department, Renwick, J.

35. Michel Auder, “Untitled” (I was looking back to see if you were looking back at me to see me looking back at you), three-channel video. Color. Sound, 15:12 minutes (2012). Cf.

<http://whitney.org/Exhibitions/2014Biennial/MichelAuder>

36. Cf. <http://www.martosgallery.com/michel-auder/> (“Auder, who would describe himself as an untrained anthropologist, shows in his films both the beautiful and the terrifying sides of daily life and looks at people coming together in situations ranging from the banal to the extreme, as painful and real as in our own lives.”)

37. *Erno Nussenzweig v. diCorcia*, 38 AD3d 339 (1st Dept 2007), Tom, J.P., concurring, *affd* 9 NY3d 1184 (2007).

38. In a piece in the *Village Voice*, art critic Peter Schjeldahl wrote about the “bad boy” who becomes an artist to continue, without shame, to make transgressive depictions of women: “The transgression momentarily relieves the boy’s woe at being short, all ways, on power.”

39. I have elsewhere defended the concept of privacy in public. Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, NJ: Rowman and Littlefield, 1988). Erno Nussenweig was photographed while voluntarily walking in the most public of public spaces, Times Square. He may have been going to work or shopping. But the invasion of privacy there was paying attention to Nussenweig whose dress and manners ought to have suggested that he would not wish to have especial attention called to him.

40. See Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York, NY: Random House, 2000). Cf. Erving Goffman, *The Presentation of Self in Everyday Life* (New York, NY: Doubleday, 1959). And see Robert Post, “The Social Foundations of Privacy: Community and Self in the Common Law” *California Law Review* 77 (1989): 957. Cf. James Q. Whitman, “Two Western Cultures of Privacy: Dignity v. Liberty” *Yale Law Journal* 113 (2004): 1151.

41. See Ferdinand Schoeman, *Privacy and Social Freedom* (Cambridge: Cambridge University Press, 1992).

42. See Edward Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” *New York University Law Review* 39 (1967): 34; see also Stanley I. Benn, “Privacy, Freedom and Respect for Persons,” in *Nomos VIII: Privacy*, edited by J. Roland Pennock and John W. Chapman (New York: Atherton Press, 1971).

43. See C. Keith Boone, “Privacy and Community” *Social Theory and Practice* 9 (1983): 1, 6–24.

44. See Anita L. Allen, *Unpopular Privacy: What Must We Hide* (New York: Oxford University Press, 2011).

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