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"A Man's Home is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries

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"A MAN'S HOME IS HIS CASTLE?": REFLECTIONS ON THE HOME, THE FAMILY, AND PRIVACY DURING THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES

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The maxim that a "man's house is his castle" is one of the oldest and most deeply rooted principles in Anglo-American jurisprudence.[1] It reflects an egalitarian spirit that embraces all levels of society down to the "poorest man" living "in his cottage."[2] The maxim also forms part of the fabric of the Fourth Amendment to the Constitution,[3] which protects people, their homes, and their property against unreasonable searches and seizures by the government.[4] Despite the continuing erosion of this protection in other places,[5]

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1. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 390 (1914) (discussing the influence of the common-law maxim on the Supreme Court).

2. William Pitt wrote:

> 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!

William Pitt, Speech on the Excise Bill (1763) (quoted in Miller v. United States, 357 U.S. 301, 307 (1958)).

3. *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 365 (Law Book Exchange 1998) (1868) (stating the common law maxim that "every man's house is his castle," which "secures to the citizen immunity in his home against the prying eyes of the government," has been incorporated into the Fourth Amendment); *see also* Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting) (relying on maxim in stating that Fourth Amendment incorporates common law requirement that police officers "knock and announce" before executing a warrant at a private home absent narrow exceptions).

4. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

5. *See, e.g.*, Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1174 (1988) (noting that recent "Supreme Court decisions have steadily reduced the scope of the privacy and liberty rights that the fourth amendment protects"); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 383 (1988) (noting that the Supreme Court has maintained "a semblance of coherent fourth amendment analysis only by resorting to exceptions or an ill-defined balancing test ... merely render[ing] fourth amendment analysis more makeshift, lacking continuity in design and purpose").

including on streets,[6] in automobiles,[7] at airports,[8] and in schools,[9] the home retains a special place in search and seizure law,[10] and continues to symbolize a zone of privacy often beyond the reach of the modern regulatory state.[11]

The home has traditionally received the greatest protection in criminal cases and less protection in civil or regulatory matters.[12]

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6. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (establishing the less stringent reasonable suspicion standard for warrantless "stop and frisk" searches by police).

7. *See, e.g.*, Florida v. White, 526 U.S. 559, 563-64 (1999) (upholding warrantless seizure of automobile from public place where police had probable cause to believe it was forfeitable contraband but lacked probable cause to believe that the car contained contraband); Michigan v. Long, 463 U.S. 1032, 1049 (1983) (extending less stringent reasonable suspicion standard to the passenger compartment of an automobile); *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 54 (2001) ("This is because '[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls.'") (citing South Dakota v. Opperman, 428 U.S. 364, 368 (1976)).

8. *See, e.g.*, United States v. Place, 462 U.S. 696, 710 (1983) (upholding the warrantless search of a passenger's luggage at an airport based on a reasonable suspicion that it contained narcotics).

9. *See, e.g.*, Vernonia School District v. Acton, 515 U.S. 646, 649-50, 653, 661-63 (1995) (permitting suspicionless drug testing of public school students participating in interscholastic athletics); New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985) (applying reasonable suspicion standard to warrantless search of a student by school authorities).

10. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038, 2041 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'") (citing Silverman v. United States, 365 U.S. 505, 511 (1961)); Payton v. New York, 445 U.S. 573, 586 (1980) (stating that it has long been "a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable") (internal quotation marks omitted); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) ("[T]he sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection."); Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429, 444-45 (1993) (discussing the continuing vitality of the warrant requirement with respect to searches of the home; contrasting the Court's treatment of the home to that of outdoor searches); *see also* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) ("[The Fourth Amendment] gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people. A man loses that privacy of course when he goes upon the streets or enters public places."); *cf.* Illinois v. McArthur, 531 U.S. 326, 331 (2001) (upholding seizure of defendant outside his home based on probable cause where police prevented defendant from entering his home while they sought a warrant to search his home for drugs; emphasizing that police "avoid[ed] significant intrusion into the home itself").

11. *Cf.* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (defendant asserted "the right to read or observe what he pleases – the right to satisfy his intellectual and emotional needs in the privacy of his own home.... Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.").

12. *See, e.g.*, Frank v. Maryland, 359 U.S. 360, 365 (1959) (holding the Fourth Amendment's warrant requirement did not apply to municipal housing inspection because, *inter alia*, it was not a criminal investigation), *overruled by* Camara v. Mun. Ct., 387 U.S. 523, 534, 539 (1967). The Court rejected the argument that administrative housing and fire inspections were outside the warrant requirement; holding, instead the standard for obtaining such warrants was not the traditional standard of probable cause based on individualized suspicion, but rather a lower standard of reasonableness based on a weighing of the

Scholars have explained this distinction in terms of the history of the Fourth Amendment,[13] the fear of hampering public health and safety inspections,[14] and the less intrusive nature of non-criminal searches.[15] A simple civil-criminal dichotomy, however, only partly explains the varied treatment of the home over time.

This Article addresses a lacuna in the extensive literature on privacy and search and seizure law by examining how the interplay of social factors such as gender, class, and race[16] have helped shape legal doctrines affecting the home and influenced the home's treatment by courts, legislatures, public officials, and private agencies. To do so, this Article explores the treatment of the home from the 1870s through the 1920s, the period of American history roughly encompassed by the Gilded Age and Progressive Era.[17] On the one hand, this period saw the elevation of the home in cases involving threats to domestic privacy, and in seminal constitutional search and seizure cases. On the other hand, it witnessed highly invasive and discretionary treatment of the home in connection with

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governmental and individual interests. *Id.*; *see also* Wyman v. James, 400 U.S. 309, 323 (1971) (holding a home visit by welfare official was not a search within the meaning of the Fourth Amendment; distinguishing the home visit from a criminal investigation); *cf.* United States v. Janis, 428 U.S. 433 (1976) (holding under certain circumstances the exclusionary rule does not bar the federal government's use of illegally seized evidence in a civil tax proceeding); Sundby, *supra* note 5, at 389 (noting that where the Fourth Amendment governed, "it provided the full protections of the warrant clause — but the protections generally did not apply to government intrusions other than criminal investigations"); Ronald F. Wright, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1127 (1984) (noting courts "have applied a stricter, more rule-oriented 'probable cause' analysis in criminal cases, but have resorted to a more flexible and less rule-bound 'balancing' methodology in civil cases") (footnote omitted).

13. *See Frank*, 359 U.S. at 365 (stating that "it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that ... were the historic impulses behind the Fourth Amendment and its analogues in state constitutions").

14. *See id.* at 372.

> Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts.

Id.; *see also* Sundby, *supra* note 5, at 388-89 (noting the Supreme Court's concern that "requiring a warrant based on probable cause would have precluded suspicionless government inspections").

15. *See* Wright, *supra* note 12, at 1135-39.

16. For the sake of simplicity, use of the term "race" in this Article includes the concept of both race and ethnicity. *See, e.g.*, Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 570 n.23 (2001).

17. The Gilded Age describes the period from the Civil War to the 1890s. The Progressive Era describes the period from the 1890s to 1920.

various social reforms aimed at society's more marginal members, such as the poor, immigrants, and single mothers. By comparing the home's treatment in these different contexts, this Article describes some of the tensions and contradictions behind the idea of a man's home as his castle. It also suggests why, even today, a court's willingness to protect the home turns in part on the social context of a given intrusion.[18]

The late nineteenth and early twentieth centuries experienced a dramatic expansion in regulatory activity at all levels of government. Goaded by various reform groups, states and cities rejected the traditional laissez-faire model of government to address the mounting social problems associated with industrialization, urbanization, and immigration.[19] For example, states enacted legislation to provide assistance to single mothers and to regulate hours and working conditions, while cities established housing codes and mandated public health inspections.

There was always tension, however, between the goals and the means used to achieve them. Reformers, predominantly middle class, native-born Protestants,[20] often sought to control those — the poor, single mothers, and immigrants — whom they believed most threatened the social order. Reforms, like financial aid to single mothers, involved extensive intervention into the homes and private lives of recipients. Likewise, intervention in the homes of poor families expanded through child neglect and abuse investigations, and frequently led to the removal of children to institutions.

These developments occurred against the backdrop of sweeping proclamations about the sanctity of the home in seminal federal constitutional criminal procedure cases. Faced with the prospect of increasing government intrusion through regulatory enforcement, the Supreme Court drew the Fourth Amendment's protections around "the sanctity of a man's home and the privacies of life."[21] Meanwhile, state courts blocked potential intrusions into the

18. *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1369 (1992) (arguing that the extent to which privacy is protected in recent Supreme Court cases has depended on their context that the Court has been less likely to call reasonable an expectation of privacy where "the individual's claim to secrecy or solitude collides with the government's war on drugs and alcohol"); *cf.* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding constitutionality of Georgia's sodomy statute in case where defendant was prosecuted for having homosexual relations with another man in bedroom of his own home).

19. *See generally* SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALISM, 1885-1914 (1957); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955); ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967).

20. *See* SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT 173-255 (1984).

21. Boyd v. United States, 116 U.S. 616, 630 (1886).

privacy of domestic relations by resisting punishment of marital violence, establishing interspousal tort immunity, and providing new justifications for common law spousal evidentiary privileges. In these instances, the home was not to be a laboratory for social reform, but rather the bedrock of personal liberty and domestic harmony.

Part I describes the privileged status of the home and its close association with private property, domestic privacy, and prevailing Victorian era ideals about gender and class. First, it briefly summarizes the origin of the maxim that a "man's home is his castle" and its influence on the Framers of the Constitution. Second, it examines how the existence of criminal penalties and the availability of civil remedies protected the home against physical intrusion during the nineteenth century. It also explores how courts secured the home from perceived threats to its peace and privacy by resisting prosecution of marital violence and interspousal tort suits during the late nineteenth and early twentieth centuries. Third, it explores the expansion of constitutional protection of the home, from the rise of modern Fourth Amendment litigation in regulatory actions of the early 1880s through its rapid growth in the 1920s following the advent of national Prohibition.

The remainder of the Article presents a very different picture of the home's treatment during this period. Part II focuses on the child protection movement, exploring how private agencies, reformers, and newly formed juvenile courts responded to a perceived social crisis by intervening in the homes of poor families, single mothers, and immigrants to address issues like child welfare and custody. While child welfare agents and reformers often maintained the long-term goal of increasing individual privacy, they sought to achieve it by restructuring existing family relations along lines dictated by their own prevailing middle-class norms and paid little, if any, heed to how their efforts eroded privacy in the home of other social groups.

Part III turns to mothers' pensions — social welfare programs adopted by most states in the first decades of the twentieth century to provide assistance to single mothers and the forerunner of subsequent federal welfare programs. Here, the invasion of domestic privacy reached its apex, as concerns about gender, class, and national origins dramatically shaped the programs' design and implementation.

Part IV examines tenement housing reform for another perspective on how social factors influenced the treatment of the

home, the family, and privacy. It describes the use of detailed housing codes and broad inspections to improve housing conditions, combat disease, promote assimilation of immigrants, and reduce poverty. It then compares tenement housing reform with other social reforms to draw conclusions about the complex, and sometimes surprising, interplay of factors shaping the home's treatment during this period.

I. THE HOME IN THE CRIMINAL AND REGULATORY CONTEXT

A. Roots of the Common Law Maxim that "A Man's Home is His Castle."

The maxim that "a man's home is his castle" has deep roots in the Anglo-American legal tradition.[22] The home's privileged legal status traditionally derived from the sanctity of private property,[23] and applied only to a person in his own home.[24] Many considered the right to exclude others[25] — one of the "bundle of property rights"[26] — essential to "the safety and repose to [a man] and [his] family."[27]

The common law gave meaning to the maxim in various ways, including protecting a man's right to repel intruders from his

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22. *See* Thomas Y. Davies, *Rediscovering the Original Fourth* Amendment, 98 MICH. L. REV. 547, 642 n.259 (1999) (tracing the origin of the maxim to at least the early sixteenth century); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES 223 ("[The law 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."); Davies, *supra* at 642 ("The domicile was a sacrosanct interest in late eighteenth-century common law, as evidenced by the doctrine that 'a man's house is his castle.'"); *cf.* Minnesota v. Carter, 525 U.S. 83, 94-95 (1998).

23. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES 139 ("So great moreover is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the community.").

24. *See id.* at 287 ("[I]t is the defendant's own dwelling which by law is said to be his castle; for if he be in the house of another, bailiff or sheriff may break and enter it to effect his purpose....").

25. *See* Int'l News Serv. v. Assoc. Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.").

26. *See, e.g.*, John Lewis, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 64, at 55 (William S. Hein 1997) (1888) ("The dullest individual among the people knows and understands that his property in anything is a bundle of rights.").

27. State v. Armfield, 9 N.C. 246, 246 (1822). Courts broadly interpreted the right, extending it not only to family members but also to those with a legal right to be present in the home, such as a boarder or servant. *See* Oystead v. Shed, 13 Mass. 520 (1816) (addressing trespass action against a deputy sheriff who pursued a boarder into the plaintiff's house to make an arrest).

home,[28] and to bring an action in trespass for damages.[29] In criminal cases, a sheriff could not forcibly enter a man's home without signifying the cause of his coming and requesting to enter.[30] The common law also did not recognize a broad doctrine of official immunity that might otherwise limit the home's protection.[31]

Criminal sanctions further underscore the home's importance. Sanctions were imposed not only for offenses such as burglary, arson, and nuisance,[32] but also for unlawful entries by public officials like sheriffs or bailiffs who might break down doors to execute civil process.[33] Furthermore, criminal penalties for eavesdropping addressed the intrusions that did not involve a physical trespass but which nonetheless threatened domestic privacy.[34]

Many also tied the home to the idea of political rights. Owning a house — being a "freeholder" — was the basic standard for membership in the political community in England,[35] and it continued to determine political rights during the colonial period[36] and through the first half of the nineteenth century in America.[37]

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28. Davies, *supra* note 22, at 643-44 (discussing authorities); Craig Hemmens, *I Hear You Knocking: The Supreme Court Rejects the Knock and Announce Rule*, 66 U.M.K.C. L. REV. 559, 562 n.27 (1998) ("If any person attempts ... to break open a house in the nighttime ... and shall be killed in such attempt, the slayer shall be acquitted and discharged.") (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 180); *see also* Semayne's Case, 77 Eng. Rep. 194, 195 (1603) (explaining that while a homicide committed in self-defense was still a felony, a killing in defense of one's home was not).

29. *See* Davies, *supra* note 22, at 625 (noting the requirements for the common law action of trespass were "the invasion was a direct result of the defendant's act and interference with plaintiff's interest in the exclusive possession of his land"); Page Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457, 464-65 (1959).

30. *See* Semayne's Case, 77 Eng. Rep. at 195 ("[I]n all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors."); *see also* 1 HALE, PLEAS OF THE CROWN 583 (1736) ("A man, that arrests upon suspicion of felony, may break open doors, if the party refuse upon demand to open them.").

31. *See* Davies, *supra* note 22, at 625.

32. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 223.

33. *Id.*

34. *See id.* at 168 ("Eavesdroppers, or such as listen under walls or windows or eaves of house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales.").

35. Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 340 (1989).

36. *See id.* at 339 ("By the middle of the eighteenth century all American colonies save [South Carolina] had adopted election laws which denied the colony franchise to those who owned no property.").

37. *See id.* at 353 ("During [the 1820s, '30s, and '40s,] the overwhelming majority of states replaced their property owning qualifications either with taxpaying qualifications (with or without pauper exclusions), or with provisions for white manhood suffrage (with pauper exclusions).").

Scholars linked property ownership to the idea of family government, with the father, as head of the household, "commanding the loyalty" of those dependent on him, such as wife, child, and propertyless wage earners, in return for their maintenance, care and protection.[38] As John Adams stated, those without property are "to all intents and purposes as much dependent upon others, who will please to feed, clothe, and employ them, as women are upon their husbands, or children on their parents."[39]

Most importantly, the idea that "a man's home is his castle" influenced the adoption and development of the Fourth Amendment to the Constitution,[40] and the limits it places on the government's power to conduct searches and seizures.[41] The link between the Fourth Amendment and searches of private homes dates to a trio of famous cases from the late colonial era:[42] *Entick v. Carrington,*[43] *Wilkes v. Wood,*[44] and the *Boston Writs of Assistance Case.*[45] Only the *Boston Writs of Assistance Case* occurred in the American colonies (in Boston), but all three were well-known to the Framers as well as to the colonial population, and proved influential in the drafting of various provisions of the Bill of Rights, particularly the Fourth Amendment.[46]

Entick and *Wilkes* involved damage suits by authors of political pamphlets whose homes officials of the Crown had ransacked, and whose books and papers the officials seized.[47] The *Boston Writs of Assistance Case* involved a challenge to the virtually unlimited power of British customs officials to search for and seize goods imported in violation of the customs laws.[48] In these cases, the

38. *Id.* at 344-45.

39. 9 J. ADAMS, THE WORKS OF J. ADAMS § 376-77 (C. Adams ed., 1864) (letter from John Adams to James Sullivan, May 26, 1776); Steinfeld, *supra* note 36, at 341.

40. *See supra* note 4; *see also* Gormley, *supra* note 18, at 1358 (stating the notion "carried over [from England] with a nearly-sacred resolve to the American colonies"). The Framers also safeguarded the home through the Third Amendment. *See* U.S. CONST. amend. III ("No soldier shall, in time of peace be quartered in any house, without consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

41. *See* Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) ("It is axiomatic that 'physical entry' of the home is the chief evil against which the wording of the Fourth Amendment is directed.") (quoting United States v. District Court, 407 U.S. 297, 313 (1972)).

42. *See,* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396-97 (1993).

43. 19 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1029 (T.B. Howell ed., 1813) [hereinafter *Howell's State Trials*].

44. *Id.* at 1153.

45. *See generally* M.H. SMITH, THE WRITS OF ASSISTANCE CASE (1978).

46. *See* Stuntz, *supra* note 42, at 396-97.

47. *See id.* at 397-98.

48. *See* SMITH, *supra* note 45, at 51-59.

conception of the home as a man's castle formed the basis of opposition to overreaching executive authority. As James Otis argued in the *Boston Writs of Assistance Case*:

> 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 while 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 every thing in their way — and whether they break through malice or revenge, no man, no court can inquire — bare suspicion without oath is sufficient.[49]

While these seminal cases had little if any practical impact on contemporary law enforcement or on typical criminal cases,[50] they not only solidified the link between the home and common law trespass,[51] but also tied the home to domestic privacy and harmony.

> Every English[man] ... takes a Pride and he glories justly in that strong Protection, that sweet Security, that delightfull tranquility which the Laws have thus secured to him in his own House ... [and to deprive him of this would be to treat him] not like an Englishman, not like a Freeman but like a slave.[52]

As described below, the connection between the home, private property, and domestic privacy would influence the later development of constitutional search and seizure law.[53]

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49. *Id.* at 344 (*reprinting* James Otis, *Address*); *see also Howell's State Trials*, *supra* note 43, at 1063 (Pratt, C.J.) (warning that if warrantless searches of private papers were permitted "the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger").

50. *See* Stuntz, *supra* note 42, at 400.

51. *See* William C. Heffernan, *Foreword* to *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 828 (2000) ("Common law cases that influenced the drafters of the Fourth Amendment unequivocally identified trespass as a prerequisite to establishing the search and seizure liability of government officials.").

52. Davies, *supra* note 22, at 642-43 n.260 (quoting Adams' notes of his argument in the 1774 case *King v. Stewart*, in 1 LEGAL PAPERS OF JOHN ADAMS 137 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

53. *See infra* Part I.C.

B. Treatment of the Home in the Nineteenth Century

During the nineteenth century, the imposition of criminal penalties and the availability of civil remedies helped ensure the "sanctity and inviolability" of the family home.[54] Judicial doctrines concerning marital violence, interspousal tort suits, and spousal evidentiary privileges helped shield the family from legal interference and the glare of unwanted publicity. Insofar as there was a "right of privacy" during the nineteenth century, it was closely tied to the four walls of a man's home.[55]

1. Criminal Penalties

Courts continued to impose severe criminal sanctions for offenses, like burglary, that threatened the "peculiar sanctity" of the private dwelling, "the family abode ... [and] the place of family repose."[56] Courts also continued to administer criminal sanctions for trespass by officials seeking to execute civil process.[57] Criminal eavesdropping statutes provided some protection in instances where there was no actual physical trespass.[58] The legislature intended sanctions for eavesdropping to protect private discourse in the home by punishing those caught "hanging about a dwelling house of another, hearing tattle, and repeating it to the disturbance of the neighborhood."[59] Indeed, some thought eavesdropping could cause

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54. Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1895-96 (1991) (quoting Christian v. State, 96 Ala. 89, 91 (1892)).

55. *See* Pavesich v. New Eng. Life Ins., 50 S.E. 68, 69 (Ga. 1905) ("It is to be conceded that prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property...."); Sanford E. Pitler, Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 521 n.320 (1986) (describing the scope of nineteenth century privacy protection as "any physical trespass against the person or into the sanctity of the home") (citing *Howell's State Trials, supra* note 43); *cf.* Ives v. Humphrey, 1 E.D. Smith 196, 201-02 (N.Y. Ct. C.P. 1851) (imposing liability for "injury, insult, [and] invasion of privacy").

56. Mitchell v. Commonwealth, 11 S.W. 209, 210 (Ky. 1889) (construing broadly the relevant burglary statute in holding that the cellar, which was part of the house where the occupant and his family slept, fell within the scope of the statute).

57. *See* State v. Armfield, 9 N.C. 246 (1822) (affirming conviction of officer who broke open an outer door to execute civil process).

58. *See* City of Grand Rapids v. Williams, 112 Mich. 247, 248-50 (1897) (affirming conviction for violating an ordinance prohibiting "indecent, insulting, or immoral conduct" where defendant had been "peeking into the windows of an occupied, lighted residence, and especially at the hours of night when people usually retire").

59. State v. Pennington, 40 Tenn. 299, 300-01 (1859) (calling it "an indictable offence to clandestinely hearken to the discourse of a private family") (quoting 2 BISHOP'S CR. LAW 174).

a "great terror and disturbance of the family, to the annoyance and inconvenience of the inhabitants of [the] house."[60] Additionally, courts continued to adhere to the "castle doctrine," which permitted a man attacked in his own home to use deadly force against an assailant rather than "give up the possession of his house to his adversary by flight."[61]

2. *Civil Remedies*

Civil remedies for trespass also continued to provide an important means of deterring unwanted intrusions in the home.[62] The common law presumed a search or arrest to be an unlawful trespass unless otherwise justified.[63] During the nineteenth century, individuals could bring trespass actions for unlawful entries by officials to attach property[64] or levy process.[65] Individuals were most likely to bring trespass actions (and to succeed) where the officer attempted an arrest or search without a warrant, an action the officer undertook "at his peril."[66] While the frequency

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60. State v. Davis, 51 S.E. 897, 897 (N.C. 1905). In practice, however, indictments for eavesdropping were never numerous and might be quashed for various deficiencies. *See* Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*. 39 CATH. U. L. REV. 703, 706 (1990); *see, e.g.*, *Davis*, 51 S.E. at 897 (affirming lower court's decision to quash an eavesdropping indictment for failure to charge that such conduct was habitual).

61. People v. Tomlins, 213 N.Y. 240, 243 (1914) (Cardozo, J.) (quoting 1 HALE'S PLEAS OF THE CROWN 486); *see also* Beard v. United States, 158 U.S. 550, 563 (1894):

> A man may repel force by force in the defense of his person, habitation, or property against any one or many who manifestly intend and endeavor to commit a known felony by violence or surprise or either. In such case he is not compelled to retreat, but may pursue his adversary until he finds himself out of danger, and if, in the conflict between them he happen to kill him, such killing is justifiable.

Id. Some form of the castle doctrine still remains in force today in every state. *See, e.g.*, State v. Gartland, 694 A.2d 564, 569 (N.J. Sup. Ct. 1997).

62. *See* Note, *supra* note 54, at 1894; *see also* Stuntz, *supra* note 42, at 441, 447 n.111 (citing damage suits by individuals for searches of their homes; noting the general rule that a valid warrant usually absolved the individual performing the search of any civil liability).

63. *See* Davies, *supra* note 22, at 624; *see also* Stanford v. Nichols, 13 Mass. (1 Tyng) 286, 289 (1816) (recognizing that revenue officers who searched a home for goods without a valid warrant could be held liable for trespass; stating "every one [sic] is presumed to know that the dwellinghouse of another cannot be lawfully forced, unless for purposes especially provided for by law").

64. *See, e.g.*, Ilsley v. Nichols, 29 Mass. (12 Pick.) 270, 271 (1831) (discussing well-established principle that an action for trespass lies where a sheriff breaks the door of a home to execute a writ for the seizure of property). As Chief Justice Shaw observed, "[T]he protection of a debtor's effects from attachment in his house is not the design of the law, but only an incidental protection, resulting from the provision, that a man's house is his castle." *Id.* at 273-74.

65. *See, e.g.*, Snydacker v. Brosse, 51 Ill. 357, 359 (1869).

66. Davies, *supra* note 22, at 627 (citing Wakely v. Hart, 6 Binn. 316, 317-18 (Pa. 1814)).

with which individuals brought such trespass actions is uncertain,[67] they appear to have been more common in civil cases.[68] Unlawful arrests or searches also exposed the officer to lawful resistance by bystanders or by the target of his intrusion.[69] In broadly protecting against invasion of the property by others, common law trespass provided one of the "[b]asic kernels of privacy."[70]

In addition to preserving the sanctity of private property, civil liability also provided a means for enforcing prevailing sexual norms. For example, a Vermont court held a private lodger could recover against the house's owner where the owner had stealthily entered her room at night and made unwanted sexual advances upon her.[71] The court explained, "when a married man breaks into the bedroom of a chaste and honest woman at midnight, and proposes to her sexual and criminal commerce with her, the act is wholly wrongful; the aim and purpose is wrongful...."[72]

3. The Home and the Veil of Privacy

Judicial resistance to prosecutions of marital violence, the establishment of interspousal tort immunity, and new justifications for spousal evidentiary privileges demonstrated the desire to preserve the sanctity of the home. The treatment of these issues reveals some of the values associated with the home and underscores the link between domestic privacy and traditional (male) social prerogatives.

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67. *Compare* Commonwealth v. Kennard, 25 Mass. (8 Pick.) 133, 135 (1829) (describing actions against officers, including claims of misfeasance or nonfeasance as well as malfeasance in the execution of writs in civil cases, as "among the most common actions in our courts") (quoted in Davies, *supra* note 22, at 626 n.206), *with* Stuntz, *supra* note 42, at 420 (describing "a scattering of early nineteenth-century trespass suits against sheriffs for illegal searches or arrests that arose out of ordinary investigations").

68. *See* Davies, *supra* note 22, at 625 n.205.

69. *See id.* at 625 (describing the "relatively robust understanding of a citizen's right to resist an officer who exceeded his authority"). Use of force to prevent an officer from making an unlawful arrest was not a crime unless the officer was killed or seriously injured, and forcible resistance to constables was not uncommon. *See id.* at 750 n.204 (citing cases).

70. Gormley, *supra* note 18, at 1343.

71. *See* Newell v. Whitcher, 53 Vt. 589 (1880).

72. *Id.* at 592; *cf.* Moore v. N.Y. Elevated R.R. Co., 130 N.Y. 523, 527-28 (1892) (allowing recovery under theory of damages to easements against elevated railway company due to "loss of privacy" occasioned by the ability of company's passengers and employees to look into plaintiff's upper-story windows from the platform and stairs of its station).

a. Marital Violence and Resistance to Intervention

Traditionally, the state could not prosecute a husband for inflicting corporal punishment or "chastisement" upon his wife for failure to obey his commands as long as he did not cause her permanent injury.[73] A husband could use force "within reasonable bounds" against his wife, just as a father traditionally could "correct his apprentices or children."[74] During the middle of the nineteenth century, the doctrine of marital chastisement came under increasing fire, leading to its repudiation by the end of the Civil War.[75] The demise of marital chastisement did not, however, lead to widespread criminal prosecutions for marital violence but, as Reva Siegel has persuasively argued, saw the emergence of an "affect-based conception" of the marital relationship, with the wife magnanimously yielding to her husband's desires in place of their former patriarchal, "authority-based" relationship.[76]

As Siegel observes, fear of "raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence" replaced a husband's right to chastise his wife.[77] Courts feared that interfering in such domestic disputes would endanger the ideal of the home as a refuge of "[d]isinterested love" and "affection" that provided sanctuary from the harsh world outside.[78] As one court stated:

> Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive.... But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to justify himself or herself by

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73. *See*, Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2123-24 (1996) (discussing the English common law origins of the husband's right); *see also* Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640-1980*, *in* FAMILY VIOLENCE 19, 29-30 (Michael Tonry & Norval Morris eds., 1989) (noting that "[n]o laws against family violence were passed from the time of the Pilgrim statute against wife beating in 1672 until a law against wife beating was enacted in Tennessee in 1850"; explaining that "[t]he general lack of interest in family violence can be attributed to the growing distrust of government interference in the family, the increasing respect for domestic privacy, and the waning zeal for state enforcement of private morality").

74. 1 WILLIAM BLACKSTONE, COMMENTARIES 444.

75. *See, e.g.*, Fulgham v. State, 46 Ala. 143 (1871); *see also* Commonwealth v. McAfee, 108 Mass. 458, 461 (1871) ("Beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent.").

76. Siegel, *supra* note 73, at 2144. As a well-known family law treatise noted, the decline of the right of chastisement signaled that "[t]he rule of love has superceded the rule of force." *Id.* at 2143 (quoting JAMES A. SCHOULER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 59 (Boston; Little, Brown, & Co. 1870)); *see also Fulgham*, 46 Ala. at 144 (citing this principle).

77. State v. Rhodes, 61 N.C. 453, 459 (1868).

78. *See* Siegel, *supra* note 73, at 2147-48.

> criminating the other, that which ought to be forgotten in a day, will be remembered for life.[79]

Absent threat of "permanent or malicious injury," the court concluded, these matters were better left instead to "family government."[80]

In creating a new protective sphere around the privacy of domestic relations, courts, while speaking in formal, neutral terms, acted to shield middle- and upper-class men from risking the evils of publicity merely for the inevitable "frailties of [their] nature" and "the mysteries of [human] passion."[81] "What could be more harassing to [the middle class], or injurious to society, than to draw a crowd around their seclusion," or what could be more harmful to the upper-class for whom "an indignity is disgrace and exposure is ruin."[82] This fear of public shame and harm to reputation resonates with social concerns about manners, status, and the proper code of behavior for a gentleman.[83] Similar concerns about protecting against a loss of privacy at the hands of the emerging mass media of newspapers would eventually lead to the development of an independent privacy tort.[84]

The practices of special domestic relations courts established by cities during the late nineteenth century to handle complaints of marital violence also suggest resistance to lifting the veil of privacy to protect traditional male prerogatives.[85] These courts attempted to decriminalize physical and sexual violence in families and instead urged reconciliation,[86] providing counseling where possible.[87]

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79. *Rhodes*, 61 N.C. at 457.

80. *Id.* at 459.

81. Siegel, *supra* note 73, at 2157-58.

82. *Rhodes*, 61 N.C. at 458-59.

83. *See* Siegel, *supra* note 73, at 2158-59 (stating that "[a] new kind of embarrassment and sense of shame emerged [in the nineteenth century] ... one that fed upon uncertainties of status, of belonging, of living up to often ambiguous standards of social performance in a society in which all claims of rank were subject to challenge") (quoting JOHN F. KASSON, RUDENESS & CIVILITY, MANNERS IN NINETEENTH-CENTURY URBAN AMERICA 115 (1990)).

84. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890) (stating how newspapers and photographers had "overstepp[ed] in every direction the obvious bounds of propriety and of decency" and had spread "the details of sexual relations ... in the columns of the daily papers"); *see also* Kramer, *supra* note 60, at 715-20 (describing the development of an independent privacy tort in the wake of the famous Warren and Brandeis essay).

85. *See* Siegel, *supra* note 73, at 2170.

86. *See* ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 137-38, 142 (1987).

87. *See* Siegel, *supra* note 73, at 2170; *see also* Pleck, *supra* note 73, at 44-45 (discussing the increasing application of social casework methods to problems of family violence instead of criminal law enforcement methods).

Caseworkers tried to dissuade women from filing charges against their husbands, often blaming the women for any problems at home.[88] Agents investigating allegations of wife beating generally sided with husbands.[89] As one New York City judge stated, the whole premise of specialized domestic relations courts was that "domestic trouble cases are not criminal in a legal sense."[90] Any efforts that tended to increase the availability of separation, divorce, child custody for women, or court-ordered support, were defeated.[91]

When the state took action against marital violence, investigations tended towards the homes of poor and working-class immigrants. When an agent *did* investigate a middle-class home, he or she usually did so with greater respect for the privacy of the inhabitants.[92] Actual criminal prosecutions of alleged wife beaters, though infrequent, generally targeted immigrants and black men.[93] Similarly, the surge of interest around the turn of the twentieth century in punishing wife beating with the whipping post targeted poor whites and blacks.[94]

b. Interspousal Tort Immunity

Just as courts resisted criminal prosecutions of wife beating in the name of safeguarding domestic privacy, they also sought to preclude tort suits by married wives against their husbands for assault. The traditional common law doctrine of *feme covert* — that a woman's legal identity merged with the husband's at marriage[95]

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88. *See* PLECK, *supra* note 86, at 38-39 (noting example of one such women who was instructed by caseworkers to keep her home and children clean in order to command the respect of her husband); Michael D. Rosenbaum, *To Break the Shell Without Scrambling the Egg: An Empirical Analysis of the Impact of Intervention into Violent Families*, 9 STAN. L. & POL'Y REV. 409, 412 (1998) (noting agencies devoted to providing assistance to women in abusive relationships were criticized for breaking up marriages).

89. *See* PLECK, *supra* note 86, at 84-85.

90. *Id.* at 137 (quoting Judge Bernhard Rabbino of the Philadelphia Court of Domestic Relations).

91. *See id.* at 107. For example, a defeated Massachusetts bill would have given an assaulted wife the right to apply at a neighborhood police court for a legal separation. *See id.* at 102-03.

92. *See id.* at 85.

93. *See* Siegel, *supra* note 73, at 2139-40.

94. *See id.* at 2137-38 (noting supporters of the whipping post believed it would "deter wife beating because it was a mode of punishment to which even the most socially depraved would respond," and it was therefore an "efficacious means of controlling the vicious classes") (internal quotation marks omitted).

95. 1 WILLIAM BLACKSTONE, COMMENTARIES 441:

> By marriage, the husband and wife are one person in law: that is, the being of the legal existence of the woman is suspended during the marriage or at least incorporated and consolidated into that of the husband under whose wing,

— precluded a wife from filing any suit without her husband's consent and joinder.[96] The doctrine of marital unity eroded during the middle and latter half of the nineteenth century as states passed married women's property acts allowing married women to own and control various kinds of property (including wages), gave them the right to sue and be sued, and generally granted them a separate legal identity.[97] Such statutes made it plausible to argue that women's independent legal status had replaced coverture, thereby paving the way for interspousal tort litigation.[98]

No nineteenth century court, however, granted a battered woman the right to sue her husband for damages for assault.[99] Instead, state courts effectively closed the door to such suits[100] by transforming the common law fiction of coverture into a substantive common law rule of interspousal tort immunity; then concluding, as a matter of statutory interpretation, the married women's property acts had not abrogated that rule.[101]

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protection and cover, she performs every thing, and is therefore called ... a feme-covert; ... and her condition during her marriage is called her coverture.

For a description of the common-law doctrine of coverture, see generally Marylynn Salmon, *Equality or Submersion?: Feme Covert Status in Early Pennsylvania, in* WOMEN OF AMERICA: A HISTORY (Carol Berkin & Mary Beth Norton eds., 1979).

96. *See, e.g.*, Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 364-65 (1989) ("Unitary legal status prevented one spouse from acquiring a tort cause of action against the other for harm perpetrated. Even if a claim could have been stated, the husband, would have been plaintiff as well as defendant in any litigation pursued.").

97. NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 51-55 (1982); *see* Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 478 (1999). Although the married women's property acts and earnings statutes of the nineteenth century mitigated the brutal inequalities of the common law doctrine of coverture, they did not completely free wives from their common-law marital status. *See* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127-28 (1994).

98. *See* Tobias, *supra* note 96, at 373 (noting the married women's property acts "figured prominently in nearly every judicial determination regarding immunity until the mid-twentieth century").

99. *See* PLECK, *supra* note 86, at 100; *see also* Tobias, *supra* note 96, at 383 ("Between 1863 and 1913, judges unanimously rejected interspousal personal injury claims.").

100. Siegel, *supra* note 73, at 2163-66. Husbands likewise were barred from bringing tort actions against their wives. *See* Drake v. Drake, 177 N.W. 624, 625 (Minn. Sup. Ct. 1920) (barring action by husband against wife for cruel and inhuman treatment). Judicial treatment of other immunities during this period, including parent-child immunity, paralleled that of interspousal immunity. *See* Tobias, *supra* note 96, at 398 (noting that no jurisdiction allowed intrafamily litigation).

101. *See* Tobias, *supra* note 96, at 385-92 (discussing approaches adopted by courts); *see also* Thompson v. Thompson, 218 U.S. 611, 618 (1910) (interpreting the married woman's property act of the District of Columbia as not allowing a tort action by a wife against her husband because "such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention"). For example, a New York court interpreted the State's 1860 statute giving a married woman the right to her earnings and the capacity to sue in contract and tort as not including a cause of action by

As with criminal prosecutions of interspousal assault, courts reasoned that to allow tort actions by wives for assaults by husbands would jeopardize treasured domestic privacy and harmony.[102] The Tennessee Supreme Court warned that to construe a 1913 act removing the "disabilities of coverture from married women" as allowing a cause of action by a wife against her husband for assault would "mak[e] public scandal of family discord, to the hurt of the reputation of husband and wife, their families and connections."[103] Maine's supreme court adopted a similar rationale in denying an action by a wife against her husband for forcibly carrying her to an insane asylum, declaring "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."[104] For similar reasons, state courts precluded contract actions by wives against their husbands.[105] As with marital violence prosecutions, courts feared undermining the prerogatives of middle- and upper-class men who, with wealth, property, and reputation at stake, were particularly vulnerable to these types of suits.[106]

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a wife against her husband for assault and battery. Longendyke v. Longendyke, 44 Barb. 366, 366-67 (N.Y. Sup. Ct. 1863).

102. *See* Siegel, *supra* note 73, at 2165-66.

103. Lillienkamp v. Rippetoe, 179 S.W. 628, 629 (Tenn. Sup. Ct. 1915); *see also Drake*, 177 N.W. at 625 (barring action by husband against wife for cruel and inhuman treatment; stating that such an action would jeopardize "the welfare of the home, the abiding place of domestic love and affection, the maintenance of which in all its sacredness, undisturbed by a public exposure of trivial family agreements, is so essential to society").

104. Abbott v. Abbott, 67 Me. 304, 307 (1877) (quoting State v. Oliver, 70 N.C. 60, 61-62 (1874)); *see also* State v. Fulton, 63 S.E. 145, 145 (N.C. Sup. Ct. 1908) (quashing an indictment against a husband for slandering his wife; stating while "the harsh and cruel word that sends a pang to the sensitive heart may be recalled, and relations that should never have been interrupted by an unkind or unwarranted expression again restored," the "unnumbered mischiefs that might flow from making an unguarded and false imputation upon the wife's chastity the subject of a criminal proceeding are so obvious that we cannot think the [legislature] intended such a possible result").

105. *See, e.g.*, Foxworthy v. Adams, 124 S.W. 381, 383 (Ky. Ct. App. 1910) (holding it would be contrary to public policy to permit a husband and wife to contract for the provision of such services — here, the provision of nursing services by the wife to her husband during his illness — that "should be the natural prompting of that love and affection which should always exist between husband and wife"); *see also* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1181 (1994) ("To emancipate any significant part of a wife's household labor within a regime of separate property would be to recognize husband and wife as economic agents having distinct and possibly antagonistic interests in marriage.").

106. *See* Siegel, *supra* note 73, at 2162-63; *see also* Tobias, *supra* note 96, at 395-96:

> [An] important reason[] for the courts' resolution of the interspousal immunity issue pertain[s] to prevailing societal images of females, wedlock, wives, and the family. These images — of a world split into a superior, public, legalized sphere occupied by males and an inferior, private realm without law to which women were relegated; of females as weak, inferior beings who needed men's protection; of marriage and the family as private, altruistic and sacred — often were articulated expressly in the cases.

Courts only gradually began to allow interspousal tort actions, and were initially more likely to do so where the plaintiff alleged an act of unusual violence or severe injury by his or her spouse,[107] or where the alleged conduct egregiously violated prevailing social norms, such as where a wife sued her husband for infecting her with a venereal disease.[108] Only later did courts begin to recognize interspousal tort claims,[109] after the emergence of a less patriarchal view of marriage and of greater numbers of women in middle-class professions and reform organizations.[110]

c. *Spousal Evidentiary Privileges*

The importance of protecting domestic privacy from the public exposure associated with judicial proceedings was also cited as a basis for maintaining the common law rules of evidence that barred the testimony of one spouse for or against the other,[111] and testimony about confidential communications between spouses. Many thought these privileges favored marital unity and the sanctity of the home,[112] and that each was based ultimately on the husband's

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107. *See, e.g.*, Fiedeer v. Fiedeer, 140 P. 1022, 1025 (Ok. Sup. Ct. 1914) (stating that neither "the sanctity of the home, [n]or the sacred relations of marriage, is better protected by denying [the wife] a reasonable compensation for injuries maliciously and feloniously inflicted upon her by a husband with a shotgun loaded with buckshot").

108. *See* Crowell v. Crowell, 105 S.E. 206, 210 (N.C. Sup. Ct. 1920):

> [N]o principle of justice can maintain the proposition in law, or in morals, that a debauchee, as the defendant admits himself to be can marry a virtuous girl, and, continuing his round of dissipation, keep up his intercourse ... contracting ... venereal disease, communicate it to his wife ... subjecting her to humiliation, and ruining her physically for life, and seeking to run off with all his property, abandoning her to utter indigence; yet be exempted from all liability by the assertion that he and his wife are one....

109. *See* Tobias, *supra* note 96, at 383 (noting that "[f]rom 1914 until 1920, jurists in seven states allowed such actions, and a comparable number denied them. During the ensuing half century, immunity slowly eroded. Finally, since approximately 1970, the doctrine [of interspousal tort immunity] has been converted to a minority rule.") (footnote omitted).

110. *See id.* at 415-17.

111. *See* Margaret J. Chriss, Note, *Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Roles*, 12 LAW & INEQ. 225, 230, 246-47 (1993). Testimony against the other spouse was barred by the adverse testimony privilege; testimony for the other spouse was barred under the spousal disqualification doctrine. *See id.* at 230-31; *see also* Trammel v. United States, 445 U.S. 40, 43-44 (1980) (describing "ancient roots" of the privilege).

112. *See* Chriss, *supra* note 111, at 247; *see also Trammel*, 445 U.S. at 52:

> The ancient foundations for so sweeping a privilege [barring a spouse from testifying adversely] have long since disappeared. Nowhere in the common-law world — indeed in any modern society — is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.

authority to silence his wife.[113]

Like the bar on interspousal tort suits, the bar on testimony for or against one's spouse was rooted in the single legal identity of husband and wife under the common law principle of coverture[114]: a wife could not testify against her husband because it would be like testifying against herself.[115] Conversely, courts deemed the wife incompetent to testify for her husband because her interests were thought to be identical to his, and no witness could testify on his or her own behalf due to the disqualification of interest.[116] During the latter half of the nineteenth century, many courts increasingly justified these privileges in terms of domestic privacy and harmony,[117] the "principles of public policy which lie at the basis of civil society."[118] Even as statutes eliminated the disqualification of interest in witnesses, courts continued to bar a spouse from testifying on behalf of the other to protect the sanctity of marital relations, which might be jeopardized by forcing a wife to choose between "her duty to her God and the requirements of, not to say her duty to, her husband."[119] Similar rationales were offered for excluding the testimony by one spouse against the other. In *Owen v. State*,[120] for example, the Alabama Supreme Court excluded the testimony of the defendant's wife in a burglary prosecution to avoid "embarrassing questions" that might "tear[] away the veil, which hides from public gaze the sacred confidences which subsist between husband and wife."[121] There was, however, a limit to the bar on testimony against one's spouse: a wife could still testify about a husband's violence against her and to protect her "life and liberty."[122]

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113. *See* Chriss, *supra* note 111, at 247.

114. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 431.

115. Chriss, *supra* note 111, at 230.

116. Kelley v. Proctor, 41 N.H. 139, 140 (1860) ("[Husband and wife] cannot be witnesses *for* each other, because their interests are absolutely the same, and thus both are alike excluded on the ground of interest....").

117. *See* John T. Hundley, *"Inadvertent Waiver" of Evidentiary Privileges: Can Reformulating the Issue Lead to More Sensible Decisions?*, 19 S. ILL. U. L.J. 263, 265 n.9 (1995) (noting that the privilege "sought to preserve domestic tranquility, to assure that nothing shall be extracted from the bosom of the wife which was confided there by the husband") (internal citations, emphasis, and quotations omitted); *see also* Note, *supra* note 54, at 1902-03 ("The common law rule of evidence that excluded spousal testimony and confidential communications between husband and wife, though rooted in antiquated notions of the couple's single legal identity, acquired a new justification in the nineteenth century: preserving 'the sacred privacy of domestic life.'") (footnote omitted).

118. *Kelley*, 41 N.H. at 145.

119. *Id.* at 143.

120. 78 Ala. 425 (1885).

121. *Id.* at 429-30.

122. Hundley, *supra* note 117, at 265 n.9 (internal quotation marks and citation omitted).

Similarly, courts justified maintaining the confidentiality of communications between husband and wife on the ground it was necessary to preserve the "peace of the household."[123] Courts vested the confidential communications privilege in the husband,[124] which largely functioned to prevent a witness-wife from testifying against her defendant-husband.[125] An influential treatise described the social significance of the privilege:

> [I]t is essential to the happiness of social life that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence.[126]

Only when these "sacred confidences" were themselves violated might a court find the confidential communication privilege did not apply. For example, in *People v. Hayes*,[127] the court held the privilege had been waived where a husband gave letters to his mistress who in turn gave them to his wife because the husband's conduct violated "honor and decency" — an egregious breach of social convention that trumped the court's desire to protect private communications between husband and wife.[128] Thus, like courts' response to marital violence prosecutions and interspousal tort suits, their justification of spousal evidentiary privileges suggests how the law reflected the moral sentiments of the age and helped ensure that a man's home remained his castle.[129]

A series of landmark Supreme Court search and seizure decisions beginning in the late 1880s also expressed the link between the home and privacy. In defining the limits on the scope

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123. Stanford v. Murphy, 63 Ga. 410, 416 (1879).

124. *See* Chriss, *supra* note 111, at 252.

125. *See id.* at 226.

126. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §§ 334-35 (1899).

127. 140 N.Y. 484 (1894).

128. *Id.* at 496; *see also* State v. Wallace, 78 S.E. 1, 3-4 (N.C. Sup. Ct. 1913) (explaining rule that privilege was waived where the confidential communication had been disclosed to a third party to avoid causing "implacable discord and dissension between the husband and wife, and a means of great inconvenience") (internal citations and quotations omitted).

129. *Cf.* Trammel v. United States, 445 U.S. 40, 51-52 (1980) (noting Jeremy Bentham's criticism that the confidential communications privilege went far "beyond making every man's house his castle," enabling a person to "convert his house into a den of thieves") (internal quotation marks omitted). Although the Supreme Court in *Trammel* modified the adverse testimony privilege by making it the witness spouse's choice alone whether to testify adversely, it did not disturb its previous recognition of the confidential communications privilege. *See id.* at 45 n.5, 53.

of law enforcement activities, the Court issued sweeping proclamations about the home's unique place in law and society.

C. *The Development of Fourth Amendment Law and the Home*

In the late nineteenth century, the Supreme Court expanded the home's constitutional protection under the Fourth Amendment. For most of the nineteenth century, federal search and seizure law was not that significant.[130] Federal prosecutions were rare, and were the only ones in which the Fourth and Fifth Amendments applied.[131] Moreover, the search incident to arrest doctrine and pretrial questioning helped ensure the government could obtain evidence from the accused in most criminal cases without raising substantial constitutional issues.[132] As the scope of economic regulation increased, and as law enforcement developed new, more intrusive methods of investigation, Fourth Amendment litigation increased, requiring the Court to resolve conflicts between individual liberty and the needs of law enforcement.[133] Property rights and principles of common law trespass, which traditionally provided an important basis for protecting the home against unlawful intrusions by public officials,[134] helped shape the development of Fourth Amendment jurisprudence,[135] and strengthened the historic tie between the home and privacy.[136]

1. *Boyd and the Expansion of Constitutional Criminal Procedure*

The Supreme Court's 1886 decision in *Boyd v. United States*[137] marked the beginning of judicial resistance to increased federal

130. *See* Stuntz, *supra* note 42, at 419.

131. *See id.*; *see also* Kramer, *supra* note 60, at 705 (arguing that initially "the [F]ourth [A]mendment applied only to a small percentage of privacy invasions and did not secure an individual's right to be let alone []") (internal quotation marks omitted).

132. *See* Stuntz, supra note 42, at 420.

133. *See* Brian S. Schultz, *Electronic Money, Internet Commerce, and the Right to Financial Privacy: A Call for New Federal Guidelines*, 67 U. CIN. L. REV. 779, 787 (1999).

134. *See supra* notes 23-31 and accompanying text.

135. *See* Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038, 2042 (2001) ("[W]ell into the 20th century, [the Supreme Court's] Fourth Amendment jurisprudence was tied to common-law trespass."); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 998 (1982) ("The [F]ourth [A]mendment historically was thought of in terms of protecting property."); *see also supra* note 51 and accompanying text.

136. *See* Gormley, *supra* note 18, at 1357-60 (describing the link between privacy and the Fourth Amendment).

137. 116 U.S. 616 (1886).

regulation.[138] The government permitted Boyd, a contractor supplying glass used in the construction of federal buildings, to import some of the glass duty free. Boyd claimed that some initial shipments suffered considerable breakage and brought in later shipments duty free to compensate. The government disagreed and commenced forfeiture proceedings.[139] The Court held that enforcement of a subpoena ordering the production of Boyd's business records — the invoices for the glass shipments — violated the Fourth Amendment.[140] The Court stated for a search and seizure to be reasonable under the Fourth Amendment, the government's title to the property seized had to be superior to that of the person from whom the government took the property.[141] Because Boyd's papers were his "dearest property,"[142] the government could not justify its trespass onto that property.[143] This principle, stated the Court, applied to all invasions by the government into "the sanctity of a man's home and the privacies of his life."[144] In sweeping language, the Court linked the protection of property and privacy under the Fourth Amendment,[145] suggesting the powerful pull of property rights on constitutional jurisprudence during this period.[146]

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138. *See* Davies, *supra* note 22, at 726.

139. *See Boyd*, 116 U.S. at 617-18.

140. *See id.* at 633-34. The Court also held that the Fifth Amendment's privilege against self-incrimination precluded the government from seizing and using as evidence books and papers that might incriminate their owner. *See id.*

141. *See id.* at 623.

142. *Id.* at 627-28 ("Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection....") (quoting *Howell's State Trials*, *supra* note 43, at 1066).

143. *See id.* at 627-29. The idea that only the fruits and instrumentalities of a crime were subject to seizure, and not an individual's property that was merely evidence of a crime, later would become known as the "mere evidence rule." *See, e.g.*, Gouled v. United States, 255 U.S. 298, 309 (1921); *see also The Supreme Court, 1966 Term: Highlights of the Term*, 81 HARV. L. REV. 112, 113 (1967) (discussing the origins of the "mere evidence rule"). Under later development of the doctrine, the degree of the government's property interest determined what items were lawfully subject to seizure. *See* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy*, 90 HARV. L. REV. 945, 951 n.48 (1977). The "mere evidence" rule was not officially overruled until 1967. *See* Warden v. Hayden, 387 U.S. 294 (1967).

144. *Boyd*, 116 U.S. at 630.

145. *Id.*

> It is not the breaking of [a man's] 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,... which underlies the essence of Lord Camden's judgment [in *Entick v. Carrington*].

Id.

146. *See* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 221-22 (1993); Note, *supra* note 143, at 948-49 ("The Supreme Court's [F]ourth and [F]ifth [A]mendment[s] decisions in the late nineteenth and early

Although the Court limited the potential scope of *Boyd*'s application in subsequent decisions involving the regulation of businesses and corporations,[147] it nonetheless reaffirmed the connection between the Fourth Amendment and private property insofar as the issue involved an allegedly unlawful search and seizure of an individual's home.

In *Weeks v. United States*,[148] the Court held the Constitution mandated the exclusion of personal papers seized in a warrantless search of the home of a defendant convicted of transporting gambling materials through the mails.[149] Thus, the exclusionary rule in federal cases was born in the search of a home. In *Gouled v. United States*,[150] the Court held the seizure of papers by a government agent who gained admission to defendant's office by pretending to make a "friendly call" violated the Fourth Amendment.[151] In *Olmstead v. United States*,[152] the Court held electronic surveillance did not violate the Fourth Amendment because there was no "actual physical invasion of [the defendant's] house or curtilage,"[153] nor any property interest in intangible conversations.[154]

After *Olmstead*, the Court gradually moved away from this mechanical, property-based conception of the Fourth Amendment,[155] eventually jettisoning it for a more fluid approach based on an

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twentieth century can best be understood in light of the prevailing currents of legal thought during that era, an era which has become known as the formalist period of American legal thought.").

147. *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 75-76 (1906) (holding that corporations do not have a Fifth Amendment privilege against self-incrimination because the right applies only to natural persons; however, permitting the corporation to challenge the government's seizure of corporate records on Fourth Amendment grounds); *see* Note, *supra* note 143, at 956. Limiting *Boyd*'s scope was necessary if the growing efforts to regulate business were to have any hope of success. *See also* Stuntz, *supra* note 42, at 422-23, 433, 445.

148. 232 U.S. 383, 390-92 (1914) (describing the connection between the sanctity of private property and the Fourth Amendment in adopting the exclusionary rule for unlawful searches and seizures by federal officials).

149. *See id.* at 393.

150. 255 U.S. 298 (1921).

151. *Id.* at 305-06.

152. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

153. *Id.* at 466 (internal quotations omitted); *cf. id.* at 487 (Butler, J., dissenting) (agreeing case should be decided on property rights grounds; but concluding that there are property rights in both intangible conversations and telephone wires).

154. *See id.* at 464.

155. *See* Note, *supra* note 143, at 964-65 (noting that by the 1930s, the legal realism approach based on social policy had largely displaced the formalist approach to the Fourth Amendment). The Supreme Court's formalist approach to the Fourth Amendment had been previously attacked by Justice Brandeis in his dissent in *Olmstead*. 277 U.S. at 478 (Brandeis, J., dissenting) (maintaining that the Fourth Amendment protects personal privacy over private property; extolling "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men").

individual's reasonable expectation of privacy.[156] While the home would eventually protect "people, not places,"[157] the sanctity of property rights has continued to underlie the home's privileged status under the Fourth Amendment to this day.[158]

Ultimately, the home would come to embody not only the sanctity of private property, but also a "unique combination of values" expressed in the exercise of protected individual liberties in marriage and marital relations, family and childbearing, and education and school.[159] This was a far broader range of activities than *Boyd's* vision of private business correspondence embodying the "sanctity of a man's home and the privacies of life."[160] The incorporation of the maxim that a "man's home is his castle" into the fabric of constitutional search and seizure doctrine demonstrated

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156. Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) (establishing test later adopted by the majority); *see also* Gormley, *supra* note 18, at 1362 ("[I]t was not until the events of history coalesced to make [new technological inventions used in police investigations] a matter ... of fundamental concern on a societal scale ... that Fourth Amendment privacy took shape in American jurisprudence."). The view that the Fourth Amendment should be tied to property rights still attracts support. Minnesota v. Carter, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) (stating that law of arrest and trespass underlying the Fourth Amendment made "every man's house ... his own castle," but not "the castle of another man") (internal quotation marks omitted).

157. *Katz*, 389 U.S. at 351.

158. *See* United States v. United States Dist. Ct. E.D. Mich., 407 U.S. 297, 313 (1972) ("Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.") (citing *Katz v. United States*); Mary B. Spector, *Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home*, 31 CONN. L. REV. 547, 568 (1999) ("Although it is clear that the [First] Amendment "protects people, not places,' the individual's expectation of privacy is generally greater the more closely related it is to the home.") (footnote omitted); *see also* Soldal v. Cook County, 506 U.S. 56, 62 (1992) (holding that removal of a mobile home from a rented lot could constitute "seizure" under Fourth Amendment because that Amendment "protects property as well as privacy"). *See generally* Radin, *supra* note 135, at 999-1000 (noting the continuing influence of private property on the Fourth Amendment, particularly the sanctity of the home, even after the Court's decision in *Katz*).

159. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (invalidating a state statute forbidding the sale, distribution, and use of contraceptives because it unconstitutionally intruded upon the right of marital privacy); *see* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (invalidating statute prohibiting the mere private possession of obscene materials in one's home; noting that "[w]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home"); Spector, *supra* note 158, at 567 (citing landmark Supreme Court decisions); *see also* Radin, *supra* note 135, at 997 ("[The] home is a place where intimate things are kept from prying eyes and intimate relationships are carried on away from prying ears."); *cf.* Gormley, *supra* note 18, at 1340 (stating that "privacy in the United States has led a similar vine-like existence, creating a variety of different offshoots depending upon the particular climate of American life").

160. Boyd v. United States, 116 U.S. 616, 630 (1886); *see also* Kramer, *supra* note 60, at 705 (noting that at the time of *Boyd* the Fourth Amendment "actually protected very few privacies").

the sanctity of property rights, as well as the seeds of a more far-reaching development that recognized "the significance of man's spiritual nature, of his feelings and of his intellect."[161]

Prohibition era cases also demonstrate the privileged treatment of the home. While the power of government officials to conduct searches and seizures expanded rapidly with the passage of Prohibition laws beginning in the states and culminating in the ratification of the Eighteenth Amendment, efforts by law enforcement officials to root out the evils of alcohol did not deprive the home of its traditional protection.

2. Prohibition and the Privacy of the Home

The passage of Prohibition laws in various states, and the ratification of the Eighteenth Amendment in 1919,[162] sparked an explosion of litigation over the scope of legitimate searches and seizures of private homes and businesses.[163] The sharp rise in litigation challenging searches and seizures promopted much comment and debate in legal journals.[164] It also led to increased judicial scrutiny of law enforcement activity, including searches of private homes by government agents.[165] These cases not only reflect how the home largely retained its unique status, but also suggest how assumptions about gender shaped courts' understanding of the home and privacy.

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161. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

162. The Eighteenth Amendment prohibited the manufacture, sale, or transportation of intoxicating liquors for beverage purposes. *See* U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. The Volstead Act, which implemented the Eighteenth Amendment, prohibited the manufacture, sale, barter, transport, import, export, delivery, or possession of an intoxicating liquor except for medicinal or religious purposes. *See also* National Prohibition Act, Volstead Act, ch. 85, § 1, 41 Stat. 305 (1919), *repealed by* ch. 740, tit. 1, § 1, 49 Stat. 872 (1935).

163. *See, e.g.*, Glenn D. Roberts, *Does the Search and Seizure Clause Hinder the Proper Administration of the Criminal Justice?*, 5 WIS. L. REV. 195, 198 (1929) (discussing the frequent challenges to the enforcement of Prohibition in Little Italy); *see also id.* at 197 (noting in certain areas as many as thirty warrants were issued in single day to undercover the illegal sale of liquors).

164. *See* Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 602 n.218 (1996) (citing numerous scholarly commentary).

165. *See, e.g.*, Rayman L. Solomon, *Regulating the Regulators: Prohibition Enforcement in the Seventh Circuit*, *in* LAW, ALCOHOL AND ORDER 93-94 (David E. Kyvig ed., 1985) (stating that a study of decisions by the United States Court of Appeals for the Seventh Circuit shows the "lawlessness and irresponsibility of these Prohibition agents challenged the integrity of the regulatory process itself, and the judges intervened and refused to sanction it").

a. Constitutional Litigation

Federal Prohibition law treated the home with particular deference. The Volstead Act, which implemented national Prohibition,[166] not only barred issuance of a warrant to search "any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor,"[167] but also provided for criminal sanctions against any officer who conducted such an unlawful search.[168] Many cases invalidating liquor seizures involved "private dwellings,"[169] defined by statute to include rooms "occupied not transiently but solely as a residence."[170]

Even when courts initially upheld Prohibition searches and seizures against legal challenges,[171] they reaffirmed the sanctity of the home and distinguished searches for illegal liquors in private homes, from those in open fields[172] and automobiles.[173] The majority of state courts that adopted a rule excluding unconstitutionally seized evidence — a rule required under the Constitution only in federal cases at the time[174] — did so in Prohibition cases involving searches of private homes (or businesses).[175] The growing unpopu-

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166. *See supra* note 162.

167. Volstead Act § 25, 41 Stat. at 315; *see also* United States v. Maggio, 51 F.2d 397, 398 (W.D.N.Y. 1931) (contrasting the act's treatment of possession of liquor in a private dwelling with its treatment of the transportation of liquor in large quantities in a truck).

168. *See* Supplemental Act to National Prohibition Act, 134, § 6, 42 Stat. 222, 223 (1923).

169. *See, e.g., Maggio*, 51 F.2d at 398.

170. Volstead Act § 25, 41 Stat. at 315.

171. *See, e.g.*, United States v. Two Soaking Units, 48 F.2d 107, 110 (2d Cir. 1931) (upholding warrantless seizure of beer where officers had the permission of the owner "to enter and inspect the premises"), *cert. denied*, 284 U.S. 626 (1931); People v. 100-Gallon Stills, 197 N.Y.S. 882, 883 (N.Y. Sup. Ct. 1922) (refusing to dismiss forfeiture proceeding because of technical defect in warrant); *see also* Paul L. Murphy, *Societal Morality and Individual Freedom*, *in* LAW, ALCOHOL, AND ORDER 74 (David E. Kyvig ed., 1985) ("By accepting surreptitious trespass on the property of private citizens as a natural incident of the effective enforcement of the Eighteenth Amendment, the [Supreme Court] indicated that it — like the general public — had not yet developed serious reservations about techniques of Prohibition enforcement.").

172. *See* Hester v. United States, 265 U.S. 57, 59 (1924) (holding "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields" surrounding one's home; noting that "[t]he distinction between [open fields] and the house is as old as the common law").

173. *See* Carroll v. United States, 267 U.S. 132, 153 (1925) (upholding a warrantless search of an automobile for illegal liquor; distinguishing such searches from those of the home, which were entitled to greater constitutional protection).

174. *See* Weeks v. United States, 232 U.S. 383, 398 (1914); *see also* Adams v. People, 192 U.S. 585, 595-96 (1904).

175. *See, e.g.*, Atz v. Andrews, 84 Fla. 43 (1922) (finding warrantless seizure of several bottles filled with liquor from the defendant's home); Youman v. Commonwealth, 189 Ky. 152, 153 (1920) (noting seizure of "several gallons of whiskey" from a small house near the defendant's residence); People v. Marxhausen, 204 Mich. 559 (1919) (noting seizure of liquor

larity of Prohibition,[176] strongest among the immigrant underclass,[177] and concern about overzealous law enforcement, helped lead to the appointment of a presidential commission,[178] and to the closer judicial scrutiny of law enforcement. Courts became more willing to invalidate Prohibition searches and seizures,[179] at least where the violation was not flagrant or commercialized.[180]

b. Prohibition, Gender, and Privacy

Prohibition enforcement cases also suggest that prevailing notions about gender influenced courts' treatment of the home. One issue courts confronted was whether a wife's consent waived her

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from the defendant's home); Tucker v. State, 128 Miss. 211 (1922) (noting warrantless seizure of "a still and a quantity of distilled whisky" from the defendant's home and premises); State v. Andrews, 91 W. Va. 720, 721 (1922) (noting arrest for "one quart of red whiskey and one pint of moonshine whiskey"); *see also* Sanford E. Pitler, Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 472 n.78 (1986) (noting the majority of cases in which state courts adopted the exclusionary rule involved alleged violations of the Prohibition laws.

176. *See, e.g.*, People v. Wade, 214 N.Y.S. 187, 190 (N.Y. Crim. Ct. 1926) ("[Prohibition] is branded unpopular. All classes — statesman, scholar, merchant, and workman — have joined without cover or concealment in its violation."), *rev'd on other grounds*, 217 N.Y.S. 486 (N.Y. App. Term. 1926); Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613, 624 (1994) ("By craving an outlawed drug, almost the entire country engaged in illicit behavior."). Additionally, liquor taxes provided a major source of federal revenue by the late nineteenth century, thus complicating the efforts to eliminate the production and sale of alcohol. *See* W.J. Rorabaugh, Book Review, *Reexamining the Prohibition Amendment*, 8 YALE J.L. & HUMAN. 285, 290 (1996) (noting that by the 1890s, liquor taxes constituted approximately forty percent of all federal revenue).

177. *See* William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3, 17-18 (1995).

178. *See* ALAN DAWLEY, STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE 355 (1991) (discussing how widespread flouting of Prohibition caused President Hoover to appoint the Wickersham Commission to study the problem).

179. *See* KENNETH M. MURCHISON, FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION 74 (1994) ("As public opposition to Prohibition grew, the Court increasingly construed the Fourth Amendment to impose strict limits on those charged with enforcing the Eighteenth Amendment."); Paul L. Murphy, *supra* note 171, at 76 (noting that courts demonstrated an increasing concern for the rights of the individual); *see also* O'Brien v. United States, 51 F.2d 674, 677-78 (7th Cir. 1931) (reversing conviction where evidence indicated that the government agents had entrapped the defendant; stating that "[i]f the conduct of [the government] be unconscionable, if it be intentionally deceptive and designed to induce, and does induce another to do something which he would not otherwise have done, the wrongdoer is not and should not be permitted to profit thereby"); Miucki v. United States 289 F. 47 (7th Cir. 1923) (reversing conviction where agents entered defendants' business, a "soft-drink parlor," without a warrant and remanding the case for a determination of admissibility of evidence seized from a cash drawer in light of the possibility that the defendants' alleged consent to the warrantless search was obtained by pointing a gun at them).

180. *Cf.* Olmstead v. United States, 277 U.S. 438 (1928) (holding wiretapping of office of defendant, a rogue police lieutenant who had accumulated a fortune as a bootlegger, did not violate the Fourth Amendment).

husband's privilege from a warrantless search.[181] In *Amos v. United States*,[182] the Supreme Court held the presence of government officials created a situation of implied coercion, invalidating any purported waiver by a wife. It declined to reach the issue of whether a wife could ever waive her husband's Fourth Amendment right against a warrantless search.[183] A number of state courts subsequently invalidated warrantless searches based on a wife's purported consent.[184] The mere fact government agents had been polite, one court reasoned, did not eliminate the coercion inherent in these searches.[185] Several federal courts went further, holding in Prohibition cases that, as a matter of law, a wife could not waive her husband's constitutional right to be free from warrantless searches.[186]

Thus, while Prohibition era cases generally reinforce the home's privileged status in constitutional search and seizure law, they also suggest how closely tied notions of domestic privacy were to male prerogatives, including the ownership of property. The remainder of this Article explores in greater detail how gender, as well as class and race, shaped the home's treatment.

II. CHILD WELFARE AND THE REGULATION OF THE HOME AND FAMILY

In America, the traditional view of the family had been as an autonomous and self-regulating institution, a community in its own right,[187] insulated from state interference absent some deviation

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181. *See generally Searches and Seizures: Effect on Husband of Wife's Consent to an Unreasonable Search of their Home in Husband's Absence*, 9 TENN. L. REV. 64 (1930) (discussing the strict construction of the voluntariness of waiver in Prohibition-era search and seizure cases).

182. 255 U.S. 313 (1921).

183. *See id.* at 317. The view of a wife's inability to consent to a search predates Prohibition era cases. *See, e.g.*, Humes v. Taber, 1 R.I. 464, 473 (1850) (stating that a wife's authority extended to "rendering the ordinary civilities of life" but not to consenting to a search by government officials, because "[a]n artful man might impose on the wife in the absence of her husband, and thus, for malicious and unlawful purposes obtain from her a license to search the desk and private papers of her husband").

184. *See, e.g.*, Meredeth v. Commonwealth, 215 Ky. 705 (1926) (holding the mere presence of officers is enough to imply coercion); Duncan v. Commonwealth, 198 Ky. 841 (1923); State v. Bonolo, 270 P. 1065 (Wyo. Sup. Ct. 1928).

185. *See* Byrd v. State, 30 S.W.2d 273 (Tenn. Sup. Ct. 1930) ("The force of a demand by one plainly in a position to enforce it is not weakened by being given the form of an invitation.").

186. *See* Cofer v. United States, 37 F.2d 677 (5th Cir. 1930); United States v. Rykowski, 267 F. 866 (S.D. Ohio 1920) (stating that a wife had no implied authority in the absence of her husband).

187. *See* JOHN DEMOS, PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY 28 (1986).

from the republican ideal.[188] Nevertheless, the great social changes of the late nineteenth and early twentieth centuries altered this conception of the home. Urbanization, industrialization, and mass immigration transformed the nation's landscape,[189] sparking fears its homes and families were being undermined and endangering the entire social order.[190] There was a growing consensus that the era's main social problems, including crime, poverty, and disease, could be addressed at the level of the family. Reformers expressed increasing concern about divorce, desertions, permissive child rearing, and the increasing "restless[ness]" of women in their role as homemakers.[191] Scholars even discussed concerns about prostitution in terms of changes in family life.[192] Many saw the home — "the sacred, the holy word Home"[193] — as both the primary source of social problems and the key to their solution.

As a result, government regulation of the home expanded into areas previously considered exclusively within the bounds of a family's autonomy,[194] such as the institution of various controls on marriage[195] and the regulation of reproductive

188. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 25-29 (1985); *see also* State v. Rhodes, 61 N.C. 453, 457 (1868) ("Every household has and must have, a government of its own, modeled to suit the temper, disposition and condition of its inmates."); JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 67-70 (1970) (describing how in colonial Plymouth, Massachusetts, the home was viewed as "a little commonwealth" in which the master — the husband — ruled the members — his wife, children, and servants — while also representing them in the outside world); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 108, 109 (describing the family as something more than a mere contract).

189. *See, e.g.*, David Donald, *Foreword* to WIEBE, *supra* note 19, at vii-viii; CASHMAN, *supra* note 20, at 103; *see also* JOHN A. GARRATY, THE NEW COMMONWEALTH, 1870-1890, at 179-80 (discussing the rapid expansion in cities and in the numbers of foreign immigrants during this period); HOFSTADTER, *supra* note 19, at 175 ("The age resounds with the warnings of prophets like Josiah Strong that the city, if not somehow tamed, would bring with it the downfall of the nation."). Between 1890 and 1914, the nature of the immigration shifted; whereas before a majority of immigrants came from northern and western Europe, during this period a majority came from southern and eastern Europe. CASHMAN, *supra* note 20, at 87 (noting that by the early twentieth century, "the 'old' immigration was ... much smaller than the 'new'").

190. *See* Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1900*, 28 IND. L. REV. 273, 275 (1995) (describing the "moral panic" over the family).

191. DEMOS, *supra* note 187, at 30.

192. *See* RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918, at 44-45 (1982).

193. STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 132 (1992) (quoting a reformer).

194. *See* Grossberg, *supra* note 190, at 276.

195. *See* GROSSBERG, *supra* note 188, at 103-09 (describing states' attempts to institute minimum age requirements, term fraudulent those marriages where one party was impotent, and prevent marriages on grounds of kinship ties, disease, mental incompetence, and the interracial background of the prospective spouses).

freedom.[196] The traditional notion of the family as an independent, autonomous, and self-regulating entity, ruled by a patriarch and free from outside interference,[197] was gradually supplanted by a new image of the family as constellation of individuals ruled directly by the state.[198]

This changing view of the home is demonstrated powerfully by the design and administration of several major social reform initiatives, such as the child welfare movement, financial assistance to single mothers or "mothers' pensions," and tenement housing regulation. Although women, the poor, and immigrants never had been entirely free from outside intervention by reformers, the intervention became more extensive, formalized, and specialized during the late nineteenth and early twentieth centuries.[199] In the process, gender, class, and race influenced the conception and treatment of the home, presenting a stark contrast to the vision of man's home that permeated other areas of law during this time. This Article turns first to the rise of the child protection movement.

A. State Regulation of Children and the Family

In the late nineteenth century, children and the family became a predominant focus of social reformers.[200] The passage of compulsory education laws,[201] and laws regulating the hours and conditions of child labor,[202] increased the role of the government in affairs previously considered within the exclusive domain of the family.

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196. *See id.* at 193.

197. *See id.* at 25-29.

198. *See id.* at 304-05.

199. *See* COONTZ, *supra* note 193, at 127-28.

200. *See, e.g.*, LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880-1960, at 27-28 (1988) (describing the increasing focus on children as a potential threat to maintaining the social order).

201. *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 130 (1986) (noting that by 1900, almost two-thirds of all states had such laws).

202. *See id.* at 131; *see also* GARRATY, *supra* note 189, at 173 ("Poverty compelled many parents to put children to work in violation of child-labor laws."). Courts, however, were reluctant to regulate work, including child labor, in homes, because "no matter how squalid the tenement, the home was still a man's castle." Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1017 (1999); *cf. In re* Jacobs, 98 N.Y. 98, 99 (N.Y. 1885) (declaring unconstitutional an act "prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses"). As a result, those who sought regulation of labor in the home justified it "on the ground that conditions in the homes were a menace to public health." Goldstein et al., *supra* note 202, at 1017 n.117 (quoting FREDERICK SMITH HALL, FORTY YEARS, 1902-1940, THE WORK OF THE NEW YORK CHILD LABOR COMMITTEE 83-84 (1943)).

Efforts aimed at reducing neglect, dependency, and delinquency represented an even more direct and dramatic incursion into familial privacy and autonomy. While the emphasis shifted towards ensuring the best interests of the child and keeping families intact despite poverty, caseworkers and newly created juvenile courts sought to achieve these ends through highly intrusive forms of intervention and supervision. Meanwhile, the number of children removed from their homes and placed in institutions continued to grow.

1. *The Early Child Protection Movement and the Removal of Children from their Homes*

States, acting under their *parens patriae* power,[203] historically could place poor, orphaned, delinquent or abandoned children — particularly delinquent children — in almshouses, and place poor families in poorhouses.[204] During the 1870s and 1880s, there was a growing emphasis on placing children in institutions. Newly created Societies for the Prevention of Cruelty to Children (SPCCs), along with local officials and private charity organizations like New York's Children's Aid Society (CAS), sought to remove children from "unfit homes" and place them in orphan asylums or foster homes.[205] While the state was initially motivated in these efforts by a desire to prevent crime and delinquency,[206] they focused increasingly on

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203. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (internal quotes and citations omitted):

> [*Parens patriae*] refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents. It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc.

The *parens patriae* power was often codified by statute. *See, e.g.*, *In re* Knowack, 158 N.Y. 482, 485 (1899) (discussing section of New York State's penal code providing that any child under the age of sixteen years may be committed if that child is found "[n]ot having any home or other place of abode or proper guardianship; or who has been abandoned or improperly exposed or neglected, by its parents or other person or persons having it in charge, or being in a state of want or suffering; or ... destitute of means of support").

204. *See* GROSSBERG, *supra* note 188, at 32; PLECK, *supra* note 86, at 74-75; *see also* GORDON, *supra* note 200, at 55 (discussing how "child-savers" traditionally focused their efforts on those children reliant on the public or community for support); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 702 (1998) (noting that American colonies "specifically authorized magistrates to 'b[i]nd out' or indenture children of the poor over parental objections") (citation omitted).

205. *See generally* PLECK, *supra* note 86, at 74-75; KATZ, *supra* note 201, at 106.

206. Corinne Schiff, Student Research, *Child Custody and the Ideal of Motherhood in Late Nineteenth Century New York*, 4 GEO. J. FIGHTING POVERTY 406, 412-13 (1997); Pleck, *supra*

poverty, abuse, and neglect by parents.[207] The targets of this new interventionist zeal were usually poor and immigrant families. This new child protection movement reflected a dramatically different approach and conception of the home than that previously described.

a. Development and Growth of SPCCs

Members formed the first SPCC in New York in 1874 following public outcry over the story of a physically and emotionally abused foster child named Mary Ellen Wilson.[208] The next year, New York enacted legislation "that authorized cruelty societies to file complaints for the violation of any laws affecting children and required law enforcement ... of these laws,"[209] thereby creating the first statutory child protective services system in the country.[210] By 1880, members established thirty-three SPCCs;[211] by 1914, that number had grown to 494.[212] Although SPCCs were private agencies that did not operate institutions, they possessed enormous power. They could investigate allegations of child abuse and neglect, arrest and prosecute parents, and either turn children over to the appropriate authority[213] or be appointed guardian over children themselves.[214] SPCCs also commanded the assistance of the police and possessed standing to sue in court.[215]

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note 73, at 36 (describing the growing perception that family violence was linked to the rise in violent crime); *see also* Schiff, *supra*, at 412 (noting that the CAS's president Charles Loring Brace focused on the "dangerous classes" of 20,000 to 30,000 homeless and vagrant children in New York City, whom he blamed for rising crime) (quoting CHARLES LORING BRACE, THE DANGEROUS CLASSES OF NEW YORK 372 (1872)).

207. Schiff, *supra* note 206, at 413.

208. *See* Susan Vivian Mangold, *Challenging the Parent-Child State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1424-27 (1999). The evidence at trial demonstrated that Mary Ellen had been beaten, routinely locked in a bedroom, forced to sleep on the floor, and prohibited from playing with other children. *See* Jill D. Moore, Comment, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063, 2066-67 (1995) (finding the "mother" caretaker of the child was convicted and sentenced to one-year hard labor but the "father" caretaker was not prosecuted); Mangold, *supra*, at 1426-27.

209. Act for the Incorporation of Societies for the Prevention of Cruelty to Children, ch. 130, 1875 N.Y. Laws 65, *quoted in* Moore, *supra* note 208, at 2068.

210. *See* Moore, *supra* note 208, at 2068.

211. *See* Mangold, *supra* note 208, at 1427.

212. *See* PLECK, *supra* note 86, at 69.

213. *See* KATZ, *supra* note 201, at 108-09; Rosenbaum, *supra* note 88, at 411.

214. *See* GORDON, *supra* note 200, at 50-51 (describing the powers of the Massachusetts Society for the Prevention of Cruelty to Children); Schiff, *supra* note 206, at 414 (noting that by 1890, the New York Society for the Prevention of Cruelty to Children had substantial control over the "reception, care, and disposition" of approximately 15,000 children).

215. *See* KATZ, *supra* note 201, at 109.

The activities of the New York Society for the Prevention of Cruelty to Children (NYSPCC) demonstrate the dramatic impact these agencies had on families. In its first eighteen years, the NYSPCC investigated almost 70,000 complaints of ill treatment of 209,000 children; it pursued prosecution in 24,500 of these cases, leading to nearly 24,000 convictions and to the removal of 36,300 children from their parents.[216] Elbridge T. Gerry, NYSPCC's influential founder and president, described the law enforcement spirit that imbued the NYSPCC and other such societies:

> The SPCC was simply created as a hand affixed to the arm of the law, by which the body politic reaches out and enforces the law. The arm of the law seizes the child when it is in an atmosphere of impurity, or in the care of those who are not fit to be entrusted with it, wrenches the child out of these surroundings, brings it to the court, and submits it to the decision of the court — unless, on the other hand, it reaches out that arm of the law to the crueliest[sic], seizes him within its grasp, brings him also to the criminal court and insures his prosecution and punishment. These are the functions of our societies.[217]

Partly because of the NYSPCC's efforts, the number of children removed from their homes and placed in institutions in New York between 1875 and 1900 increased 139 percent.[218]

The drive to break apart families represents a dramatic shift from the traditional view of the family — even poor or immigrant families — as largely free from outside interference. SPCCs and other child protection agencies believed to end the suffering of "poor and unfortunate" children, and to prevent their becoming "mature criminals,"[219] such children would have to be separated permanently from their parents[220] and placed in institutions where they would

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216. William Pryor Letchworth, *The History of Child-Saving Work in the State of New York*, *in* HISTORY OF CHILD SAVING IN THE UNITED STATES 154, 199 (Report of the Comm. on the Hist. of Child-Saving Work, 1893), *cited in* Schiff, *supra* note 206, at 413.

217. Mangold, *supra* note 208, at 1428 (quoting speech of Elbridge Gerry at the Thirty-first Annual Meeting of the American Humane Society in 1907).

218. *See* Schiff, *supra* note 206, at 414. The SPCCs' power to place children in institutions led one leader of the child protection movement to deride them as "feeders of institutions." *Id.* (quoting Homer Folks).

219. NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, ANNUAL REPORT 8 (1895) (statement of president Elbridge T. Gerry), *quoted in* Schiff, *supra* note 206 at 413; *see also* Candace Zierdt, *The Little Engine that Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 405 (1999) (discussing the Gerry speech).

220. *See* KATZ, *supra* note 201, at 106.

receive "the proper instruction."[221] According to the author of a study on the supposed heredity of pauperism: "I would make almshouses in which there should be a separation of families. I would say to a man and woman, if you cannot support your family, you must be kept separate, that there shall be no more children born."[222]

The activities of the SPCCs and similar agencies also reflected a social clash between native-born, middle-class reformers[223] and the "dangerous classes" of poor immigrants[224] who prompted fears of social fragmentation,[225] even race suicide.[226] For example, investigators for the Massachusetts Society for the Protection of Children (MSPCC) frequently lamented the drunkenness and cultural inferiority of immigrants and the inability of immigrant mothers to bring up their children "according to American standards."[227] Even if reformers did not intend to repress poor immigrants,[228] they often did so inadvertently by imposing their own norms of family life on them.[229]

The accomplishment of the goals of the child protection movement led to an acceptance of the kind of sweeping investigations of private homes that were fundamentally at odds with the judicial exaltations of the home's sanctity in other settings. The relevant statutes allowed SPCCs wide discretion in their enforcement[230] because they authorized removal on ambiguous grounds, such as the

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221. *Id.* at 108 (quoting one county official).

222. *Id.* (quoting R. L. Dugdale).

223. *See* Schiff, *supra* note 206, at 413 (noting that the members of the NYSPCC were mainly "humane persons of social position" and its leadership consisted largely of wealthy, white Protestant males such as Cornelius Vanderbilt and Peter Cooper) (quoting the NYSPCC's president, Elbridge Gerry).

224. *See* WIEBE, *supra* note 19, at 62 ("All the great problems..., the liquor question, the public school question..., are tied up with the one great question of foreign immigration.") (quoting nativist Robert DeCourey).

225. *See, e.g.*, CASHMAN, *supra* note 20, at 114 ("Immigration was beginning to divide the American society. A great gulf was opening between a predominantly native plutocracy and a predominantly foreign working class.").

226. *See, e.g.*, HOFSTADTER, *supra* note 19, at 178-79 (describing view of Edward A. Ross that immigrants, especially those from southern and eastern Europe "bred in such numbers that they were increasingly dominant over the native stock and thus threatened to overwhelm 'American blood' and bastardize American civilization").

227. GORDON, *supra* note 200, at 47.

228. *See, e.g.*, Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1195 (1970); *see also* PLECK, *supra* note 86, at 70 (stating SPCCs were motivated not merely by a humanitarian desire to protect children from cruelty, but also by the fear among the wealthy, native-born urban elite of social disorder caused by the immigrant, largely Catholic, poor).

229. *See* COONTZ, *supra* note 193, at 128, 320 n.14.

230. *See* Schiff, *supra* note 206, at 413-14.

failure to provide "proper guardianship."[231] For example, MSPCC agents would act as:

> [D]etectives, looking for absconded fathers, finding runaway or lost children, verifying addresses, checking marriage, death, birth, and divorce certificates.... Agents [of the MSPCC] visited homes late at night or early in the morning — at times calculated to find wrongdoing. Unable to gain entry, they climbed in windows. They searched without warrants. Their case notes frequently revealed that they made their judgments first and looked for evidence later.[232]

In their zeal, MSPCC agents often showed little respect for the privacy of poor families,[233] or even for the law when it stood in their path.[234] Although they purported to act as "friendly visitors," MSPCC agents more accurately served as police officers.[235] Not surprisingly, SPCCs — labeled "the Cruelty" by the poor in Philadelphia[236] — sparked fear and resistance among the families they targeted.[237]

b. Dependency, Separate Spheres, and the Dynamics of Intervention by Child Protection Agencies

The investigations and removal of children by child protection agencies like the SPCCs demonstrate how the home's privacy diminished in a climate of poverty and dependency. Child protection workers attributed the plight of poor parents to a lack of the cardinal virtues of "will, work ethic, thrift, responsibility, and honesty,"[238] and believed that the government should place children in homes that "most closely approximated the republican ideal of a socially beneficial family."[239] Thus, the poor, by virtue of their poverty, forfeited the general presumption of parental authority, the

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231. 1877 N.Y. Laws, ch. 428 § 3.

232. GORDON, *supra* note 200, at 48.

233. *Id.* (citations omitted).

234. *See id.* at 54 ("If 'indiscrete zeal,' which is made such a bugbear, occasionally leads us into mistakes, the public will condone the error.") (quoting an MSPCC agent).

235. *See id.* at 48, 55 ("[MSPCC agents] called people to their office with letters that sounded like legal summonses...[,] threatened families with arrest or with taking custody of children...[,] searched homes, confiscated unacceptable objects, such as liquor bottles, and ejected 'unwholesome' visitors").

236. *See* KATZ, *supra* note 201, at 109.

237. *Id.* One SPCC tactic that poor families found particularly troubling was that of encouraging neighbors to spy on one another. *See id.*

238. GORDON, *supra* note 200, at 62.

239. GROSSBERG, *supra* note 188, at 267.

right to exclude others from their homes, and the right to raise their children as they saw fit.[240] Courts regularly found for the public authority in adjudicating allegations of abuse and neglect.[241] One reformer underscored the connection between dependency and the lack of parental rights by explaining that "[i]mprudent and indolent parents often make their large family the pretext for out-door aid. When such parents fail to discharge their duty to their children their right of possession terminates and the children become wards of the state."[242]

The poor were more vulnerable to intervention by child protection workers not only because of economic conditions, but also because changing views of gender roles. The late nineteenth century saw a growing belief in the notion of separate spheres, dividing women, children, and the home on the one hand, and men and work on the other. The mother, now the primary parent, also became the guardian of domestic virtue, while the father, once an important parental figure, saw his role reduced to the breadwinner and provider[243] who alone sustained his wife and children by earning the "family wage."[244] While the new ideal of motherhood and of women's roles dramatically shifted the balance of power to women in custody disputes,[245] it also opened the door to greater

240. *See generally* KATZ, *supra* note 201, at 108.

241. *See* GROSSBERG, *supra* note 188, at 267.

242. KATZ, *supra* note 201, at 108 (quoting Proceedings of the Convention of the Superintendents of the Poor ... held at Poghkeepsie June 8-9, 1875 (Albany, N.Y.) (statement of Charles Hoyt)).

243. *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("Man is, or should be, women's protector or defender.... The constitution of the family organization, founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere properly belongs to the domain and functions of womanhood."); DEMOS, *supra* note 188, at 50-51; *see also* COONTZ, *supra* note 193, at 138-39 (asserting that the conception of the patriarchal breadwinner and maternal caregiver was not traditional but rather arose with the rise of the child welfare movement); Grossberg, *supra* note 190, at 285-87 (describing growing belief that women were more nurturing than men and so more suited to providing for a child's welfare).

244. *See* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935, at 53 (1994) ("[T]he sex/gender/family system that prescribes earning as the sole responsibility of husbands and unpaid domestic labor as the only proper long-term occupation for women."); *see also* Joellen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*. 51 UCLA WOMEN'S L.J. 103, 216 n.32 (1994) (describing the link between the politics of domesticity and female subordination). *See generally* Gwendolyn Mink, THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942, at 151-73 (1995).

245. *See* GROSSBERG, *supra* note 188, at 251 (noting mothers won custody of their children in over ninety percent of all contested cases and they probably were also named custodial parents as frequently through informal agreements); *see also id.* at 248-49 (noting how courts adopted doctrines like the "tender years rule," which stated that because infants and small children needed their mother's care, the mother should have custody). This reversed the

intervention into women's homes and lives, especially those of single mothers, for failing to meet certain prescribed standards of expected behavior, including adherence to conventional sexual norms.[246]

From the child welfare worker's point of view, the image of a drunken immigrant father as the central villain was replaced by that of the incompetent, insensitive, and untrained mother who was in need of professional guidance in order to feed, clothe, and clean her children.[247] Child welfare agents tended to believe the worst about women, who were more likely to be labeled immoral than men,[248] and more likely to be condemned when neglect was alleged against both parents.[249] "Sexual immorality or intemperance" alone provided grounds for child neglect charges in a mother, but not in a father.[250] "When a mother had adulterous relations with a boarder, she was immoral; when a father did so with a housekeeper, she [the housekeeper] was the menace to household morality."[251] Agencies justified the double standard by contending the mothers exert greater moral influence over children than the father.[252]

Ironically, despite the development of the idea of separate spheres and the family wage, women's participation in the labor force rose sharply during this period. The number of women entering the labor force doubled between 1880 and 1900; it increased approximately another fifty percent between 1900 and 1919.[253] The disconnect between the idealized view of a middle-class woman able to devote herself fully to mothering, thanks to the support of a husband, and the reality that more and more women, especially single mothers, were entering the workforce — often

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traditional pro-paternal bias in custody law. *See* Schiff, *supra* note 206, at 406 (describing the traditional presumption in favor of granting a father custody of children following divorce or separation unless he was grossly immoral, physically abusive to his wife or children, or incapable of supporting himself and his children).

246. *See* GROSSBERG, *supra* note 188, at 288; Schiff, *supra* note 206, at 412 (noting that "mothers were held to a high standard of sexual morality and the lives of poor single mothers were clearly exposed to social workers").

247. *See* GORDON, *supra* note 200, at 61, 73.

248. *See id.* at 92. In cases of equal severity, as defined by the MSPCC, children were removed from seventy-five percent of single-mother homes compared with fifty-four percent of two-parent homes. *Id.* at 94; *see also* Schiff, *supra* note 206, at 414 (noting investigations by SPCCs were more likely to be based on charges of neglect by the mother than physical abuse by the father). Only poverty was a better predictor of removal than single-motherhood, though single mothers were generally poorer than other parent groups. *See id.*

249. *See* GORDON, *supra* note 200, at 93-94.

250. *See id.* at 93.

251. *Id.*

252. *Id.* at 93-94.

253. *See* STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 111 (1988).

without any real choice[254] — made poor women particularly vulnerable to outside intervention in their homes. Indeed, many of the activities single mothers needed to do to support their children, such as taking in (male) boarders, prostitution, bootlegging, or simply leaving their children home alone to go to work, were precisely those activities that aroused the suspicion of agents, opened the door to investigations, and exposed them to a heightened risk of child neglect charges.[255]

B. Child Welfare Reform in the Progressive Era: Continuity and Change

The child welfare reform movement exhibited both considerable continuity and change during the first decades of the twentieth century, the period also known as the Progressive Era.[256] Acting under the *parens patriae* doctrine,[257] state legislatures promulgated various child welfare reforms including aid to single mothers, improvements in public health, and stronger child labor laws.[258] At the same time, courts gradually replaced the traditional parental bias of custody law with a standard based on the "best interests of the child" and increasingly saw parental authority as a power in trust, subject to state regulation, rather than a natural or absolute right.[259] Intervention by agencies and courts in the homes of poor families nevertheless continued apace.

1. From Removal to Preservation

By the late nineteenth century, child welfare advocates increasingly abandoned their beliefs in "child rescue" and the superiority of foster care in favor of policies — such as assistance to

254. *Cf.* GORDON, *supra* note 200, at 83-84 (discussing how single mothers were placed in a "double bind, as they struggled to meet the contradictory expectations of raising and providing for children in a society organized on the premise of male breadwinning and female domesticity").

255. *See id.* at 97-98.

256. *See, e.g.*, HOFSTADTER, *supra* note 19, at 3.

257. *See supra* text accompanying note 203.

258. *See* WIEBE, *supra* note 19, at 119; *see also* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 474 (1987) ("Many Progressive programs shared a unifying child-centered theme, and the changing cultural conception of childhood affected the Progressives' policies embodied in juvenile court legislation, child labor laws, child welfare laws, and compulsory school attendance laws.") (citations omitted).

259. *See* GROSSBERG, *supra* note 188, at 236-38.

single mothers[260] — that prevented removal and enabled children to remain at home.[261] The SPCCs, once virtual "adjunct[s] to the police force," increasingly provided preventative services.[262] The influential White House Conference of 1909,[263] whose famous first recommendation charted a course away from institutionalization and towards family preservation on the theory that homes should never be broken up for poverty, but only for immorality and cruelty, crystallized this shift.[264] Courts echoed similar sentiments.[265] This change was due to: the growing influence of scientific charity, which advocated "personal service, supervision, continuous oversight, and care;"[266] the increasing professionalization of the child welfare field;[267] and the continuing exaltation of a woman's role in the home

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260. *See* Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 270-71 (2000) ("Around the turn of the century.... The Child Savers no longer supported removal of children on grounds of poverty if the mother was otherwise fit and proper; instead, the preferred solution was to provide support to such worthy mothers.") (citations omitted); *see also infra* Part IV (describing the growth of mothers' pensions programs to assist single mothers).

261. *See* Mark H. Leff, *Consensus for Reform: The Mothers' Pension Movement in the Progressive Era*, 47 SOC. SERV. REV. 397, 410 (1973).

262. SUSAN TIFFIN, IN WHOSE BEST INTEREST?: CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 116 (1982); *see also* GORDON, *supra* note 200, at 69 (discussing the increasing emphasis on the professional guidance of caseworkers and on the link between poverty and the social environment).

263. *See, e.g.*, ROY LUBOVE, THE STRUGGLE FOR SOCIAL SECURITY 1900-1935, at 97-98 (1968) (noting that the Conference's recommendations embodied the most advanced child welfare principles of the day).

264. *Id.* at 98.

> Home life is the highest and finest product of civilization. It is the great molding force of mind and of character. Children should not be deprived of it except for urgent and compelling reasons. Children of parents of worthy character, suffering from temporary misfortune and children of reasonably efficient and deserving mothers who are without the support of the normal breadwinner, should, as a rule, be kept with their parents, such aid being given as may be necessary to maintain suitable homes for the rearing of the children.... Except in unusual circumstances, the home should not be broken up for reasons of poverty, but only for considerations of inefficiency or immorality.

Id.; see also GROSSBERG, *supra* note 188, at 185 ("Reformers at the turn of the century sought to preserve the family as an economically private unit of breadwinning fathers and home-centered mothers.... The state intervened not to undermine the family, but, rather, to foster economic independence and its functional interdependence").

265. *See, e.g.*, *In re* Knowack, 158 N.Y. 482, 487-93 (1899) (noting, *inter alia*, the advantages of returning children to their parents from the charitable institutions to which they had previously been committed if their parents could properly discharge their "moral and financial" duties).

266. *E.g.*, Mary Richmond, *in* SELECTED ARTICLES ON MOTHERS' PENSIONS 58, 70 (Edna D. Bullock ed., 1915).

267. *See* J. Robert Shull, Note, *Emotional and Psychological Child Abuse: Notes on Discourse, History, and Change*, 51 STAN. L. REV. 1665, 1688 (1999) (noting, *inter alia*, the increasing emphasis on having professional expertise in the child welfare field between the White House conferences of 1909 and 1919).

and a mother's love as panaceas to the evils of orphanages.[268]

While the paradigm of the child welfare movement may have shifted from removal to preservation, the emphasis on direct intervention in the homes of poor families persisted.[269] Agents freely "enter[ed] into the privacy of every family, to carefully investigate the manner in which the children [we]re provided for, physically, morally, and intellectually, and in every case where the requirements f[e]ll below a certain prescribed standard, to remove the children and place them within the control of the state."[270] The principles of scientific charity emphasized the ability of experts to conduct close and frequent supervision of families. As one social worker said, casework meant "leaving no stone unturned to find the trouble which drags a person down."[271] Caseworkers might even contact an applicant's relatives or neighbors to verify a household's character.[272] Consequently, the number of children removed from their homes and placed in institutions continued to rise until the 1930s.[273]

2. *Juvenile Delinquency and Juvenile Courts*

Growing concerns about juvenile delinquency led to an increase in the government's *parens patriae* powers to intervene directly in troubled families through newly created juvenile courts.[274] In 1899,

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268. *See* Leff, *supra* note 261, at 410.

269. *See* PLECK, *supra* note 86, at 128-29 (noting the ideal of creating an idealized, autonomous home in the long-run provided the basis for intervention in the short-run); *see also* GROSSBERG, *supra* note 188, at 298 ("[T]he state must be in its legislation and its political operation a supplement to the integrity and moral righteousness of the home, or it will inevitably disintegrate and become a destroyer of the home.") (quoting Lucinda Chandler, vice-president of National Women's Suffrage Society).

270. GROSSBERG, *supra* note 188, at 279-80 (internal quotation marks omitted).

271. FRANK J. BRUNO, TRENDS IN SOCIAL WORK AS REFLECTED IN THE PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORKER 1874-1946, at 184 (1948).

272. *See, e.g.*, BEVERLY STADUM, POOR WOMEN AND THEIR FAMILIES: HARD WORKING CHARITY CASES, 1900-1930, at 15 (1992); *see also id.* at 147 (describing how one caseworker enlisted a neighborhood woman as a lookout to check for men's union suits on clotheslines of unmarried or deserted women).

273. *See* KATZ, *supra* note 201, at 118-20; *see also* PLECK, *supra* note 86, at 131 (noting that the number of children in institutions grew from 60,981 in 1890 to over 200,000 in 1923, before declining by around thirty percent during the next decade).

274. *See* KATZ, *supra* note 201, at 134 ("Progressive era reformers still confounded crime and poverty. For, by confounding dependency with delinquency, they erected a new institution with unprecedented power to intrude into the lives of children and their families."); *see also* Feld, *supra* note 258, at 474 ("The Progressives introduced a number of criminal justice reforms at the turn of the century: probation, parole, indeterminate sentences, and the juvenile court. All emphasized open-ended, informal, and highly flexible policies to rehabilitate the deviant.").

Illinois established the first juvenile court in the United States.[275] By 1930, all states except two had created juvenile court systems.[276] Juvenile courts were paternalistic in the way they stressed rehabilitation over punishment,[277] and judges tended to perpetuate patriarchal models of family governance and sought "to promote and protect the republican family and its constellation of economic, social, cultural, and class interests."[278]

Juvenile courts did not restrict parties by procedural rules, such as the rules of evidence, and freely inquired into the life of a juvenile and his or her family because the courts were designed to meet children's needs and avoid the problems associated with criminal courts.[279] Juvenile courts gave probation officers extensive powers to investigate allegedly unfit families. Probation officers visited homes and spoke with family members as well as neighbors.[280] They not only responded to complaints of child delinquency and neglect, but also decided which cases to prosecute.[281] Probation officers investigated charges of delinquent behavior and made recommendations to juvenile court judges. Furthermore, probation officers supervised the activities of those sentenced to probation.[282]

Not surprisingly, many immigrant families complained that probation officers were usurping their traditional parental prerogatives.[283] Although juvenile courts ultimately sought to avoid breaking up families, they did so through extensive — and often unwelcome — intervention in the home and increased governmental

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275. *See* Act of April 21, 1899, § 21, 1899 Ill. Laws 137 (providing that "the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents"). The Act also reflected a preference for removing juveniles from their homes and placing them in a better family. *See* Zierdt, *supra* note 219, at 406.

276. *See* Caroline T. Trost, Note, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 190 (1998).

277. *See* Zierdt, *supra* note 219, at 408 ("Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?") (quoting juvenile court judge Julian Mack, of Cook County, Illinois). For example, the 1899 Illinois act prohibited the placement of any child in a jail or police station. *See id.*

278. GROSSBERG, *supra* note 188, at 293; *see also* Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1067 (1979) (noting judges often spoke in terms of money and class when defining a child's "best interests").

279. *See* PLECK, *supra* note 86, at 127.

280. *See* Schiff, *supra* note 206, at 414.

281. *See* KATZ, *supra* note 201, at 135; *see also* COONTZ, *supra* 193, at 139 (noting that court officials were empowered to determine whether a youth was "predelinquent" and a family was "decent").

282. *See* KATZ, *supra* note 201, at 135-36.

283. *See* PLECK, *supra* note 86, at 130-31.

power over the family.[284] Thus, like SPCCs and other agencies in the child protection movement, juvenile courts discarded the ideal of the home as an impenetrable castle when they deemed poor, often immigrant, families to be in need of state supervision and assistance. The pervasive suspicion and monitoring that characterized child welfare casework and the juvenile court system also accompanied the administration of mothers' pensions programs.

III. MOTHERS' PENSIONS PROGRAMS AND THE ABANDONMENT OF THE NOTION OF THE HOME AS A CASTLE

Beginning with Illinois in 1911, states enacted mothers' pensions laws to provide financial assistance to single mothers. In fact, targeting single mothers for assistance was not new; throughout the nineteenth century, mother-only families were consistently the largest group receiving public and private aid.[285] With the possible exception of workers' compensation, no other social welfare initiative demonstrated a better legislative record during this period than mothers' pensions programs.[286] By 1922, forty-two states had adopted some form of mothers' pensions.[287] By 1931, 90,000 families received mothers' pensions, amounting to a total expenditure of thirty-three million dollars.[288]

A. A New Approach to Social Welfare

A central goal of mothers' pensions was to enable families to stay together by providing financial assistance. Supporters tended to emphasize child welfare concerns and contended that aid to single mothers would avoid the institutionalization of large numbers of

284. *See* COONTZ, *supra* note 193, at 132 (describing the views of influential juvenile court judge Ben Lindsay); *see also* Pleck, *supra* note 73, at 46 (noting that more families were placed under supervision in cases involving alleged abuse and neglect of children — cases that also fell under the authority of juvenile courts). Although juvenile courts were supposed to provide an "affectional mode of treatment," they often were the source of punitive authority. KATZ, *supra* note 201, at 137 (citing a study of Milwaukee, Wisconsin).

285. *See* Joanne L. Goodwin, *'Employable Mothers' and 'Suitable Work': A Re-Evaluation of Welfare and Wage-Earning for Women in the Twentieth-Century United States*, 29 J. SOC. HIST. 253, 254 (1995). These programs had their roots in the overlapping areas of child protection and social welfare reform. *See generally* GORDON, *supra* note 244.

286. *See* Leff, *supra* note 261, at 397.

287. *See* Ann Vandepol, *Dependent Children, Child Custody, and the Mothers' Pensions: The Transformation of State-Family Relations in the Early 20th Century*, 29 SOC. PROBS. 227, 231 (1982).

288. *See* Leff, *supra* note 261, at 397.

children.[289] Although mothers' pensions were limited initially to widows — indeed, some referred to them as "widows' pensions"[290] — many states gradually expanded them to cover divorced and separated women.[291] Nevertheless, eligibility restrictions remained in place in various states.[292]

From the outset, overt efforts at social control beset mothers' pensions programs. Moralistic considerations, such as whether the recipient's children were legitimate, eclipsed a developing appreciation of how the social environment contributed to poverty.[293] Advocates attempted to establish mothers' pensions as an entitlement, distinguishing them from traditional public assistance in that the pensions were a payment in return for a mother's service to society.[294] They deliberately invoked the image of Civil War veterans, stressing the government should reward a mother's service to the state with a pension, just like a soldier's service in battle.[295]

Inadequate funding, stringent eligibility requirements, and discretionary enforcement plagued mothers' pensions programs throughout their existence.[296] Whereas the state had traditionally accomplished supervision of public assistance recipients in connection with "indoor relief" — providing assistance at institutions such as the almshouse or workhouse — the state administered mothers'

289. *See* GORDON, *supra* note 244, at 38-40.

290. *See* TIFFIN, *supra* note 262, at 130 (1982); *see also* Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 419 (1999) ("To deflect moral criticism, the campaign emphasized the provision of aid to widows rather than deserted, divorced or unmarried mothers.").

291. *See, e.g.*, BLANCHE D. COLL, PERSPECTIVES IN PUBLIC WELFARE: A HISTORY 80 (1979) (stating that by 1926, only five states limited mothers' pensions to widows, while eight states had more general eligibility provisions that referred to mothers with a dependent child or children).

292. *See* TIFFIN, *supra* note 262, at 131 (pointing out that even by 1931 the only families eligible in all states offering mothers' pensions were those in which the father was dead and that widows constituted eighty-four percent of those receiving such pensions); Joanne L. Goodwin, *An American Experiment in Paid Motherhood: The Implementation of Mothers' Pensions in Early Twentieth-Century Chicago*, 4 GENDER & HIST. 323, 333 (1992) (noting that Illinois continued to exclude deserted women from mothers' pensions until 1923).

293. *See* MOLLY LADD-TAYLOR, MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890-1930, at 145 (1994).

294. *See* William Hard, *Pensions for Mothers: General Discussion*, 3 AM. LAB. LEG. REV. 231-33 (1913) ("[A] mother should not be supported because she is dependent ... [but] is paid because [she is] an employee...."), *quoted in* Ann Shola Orloff, *Gender in Early U.S. Social Policy*, 3 J. POL'Y HIST. 249, 257 (1991); *see also* Sophonisba P. Breckinridge, *Neglected Widowhood in the Juvenile Court*, AM. J. SOC. 67 (1910) (arguing mothers' pensions should be "available, sufficient in amount, regular in payment, dignifying in its assurance of the community's concern for the well-being of her group").

295. *See* LADD-TAYLOR, *supra* note 293, at 144.

296. *See* GORDON, *supra* note 244, at 63.

pensions through "outdoor relief" — providing assistance at the home[297] — thanks to principles of scientific charity and social casework. States not only went to great lengths to ensure all single mothers met financial and moral eligibility requirements, but they also subjected them to continual and often intense scrutiny.

The central figure in the administration of mothers' pensions was the "friendly visitor," the caseworker who was supposed to uplift the poor through investigation and control.[298] Caseworkers were urged to collect and interpret "any and all facts as to personal or family history, which, taken together, indicate the nature of a given client's difficulty and the means for [its] solution."[299] These friendly visitors were, however, "anything but unmeddlesome good friends."[300] While initially designed to allow a social worker to get to know and assist a family on an individual basis, social casework often degenerated into "snooping."[301] For example, the case records of the New York Charity Organization Society (NYCOS)[302] suggest how "friendly visitors" scrutinized recipients for deceit,[303] "extravagant" expenditures,[304] claims of entitlement,[305] and association with "male company."[306] Eventually, the rhetoric about mothers' pensions as a right "virtually disappeared — except among poor mothers themselves."[307] Meanwhile, the numbers of poor children

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297. HELEN ZNANIECKA LOPATA & HENRY P. BREHM: WIDOWS AND DEPENDENT WIVES: FROM SOCIAL PROBLEM TO FEDERAL PROGRAM 13 (1986).

298. *See* Muriel W. Pumphrey & Ralph E. Pumphrey, *The Widows' Pension Movement, 1900-1930: Preventative Child-Saving or Social Control?*, *in* SOCIAL WELFARE OR SOCIAL CONTROL: SOME HISTORICAL REFLECTIONS ON REGULATING THE POOR 51, 58 (Walter I. Trattner ed., 1983).

299. JOHN H. EHRENREICH: THE ALTRUISTIC IMAGINATION: A HISTORY OF SOCIAL WORK AND SOCIAL POLICY IN THE UNITED STATES 64 (1985) (quoting influential casework theorist Mary Richards).

300. Leff, *supra* note 261, at 412.

301. BRUNO, *supra* note 271, at 184-85; WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 204 (1984) (describing casework as a "device for snooping" or a means to "control the needy").

302. The NYCOS case records are on file at Butler Library, Columbia University, New York.

303. *See* NYCOS Case No. 167944 (1912) (calling woman a "schemer"); NYCOS Case No. 2910 (1910) (charging a woman with under-reporting the amount of insurance available on her husband's death).

304. *See* NYCOS Case No. 148059 (1913) (noting a woman's good furniture and demanding that she "readjust her manner of living").

305. *See* NYCOS Case No. 140210 (1913) (stating that the "woman seemed to feel she had a right to demand assistance").

306. *See* NYCOS Case No. 147671 (1913) (stating that the woman had encouraged male company and was intemperate).

307. GORDON, *supra* note 244, at 63.

in institutions — which the state intended to reduce through mothers' pensions awards — continued to rise.[308]

B. Predicates for Intervention into the Home

Despite supporters' descriptions of "the inviolability of the relation of mother and child,"[309] mothers' pensions programs reified only *certain* homes and the inviolability of *certain* mother-child relationships. Determining precisely which homes and which mother-child relationships merited state assistance led to the great paradox of mothers' pensions: to preserve the home and the mother-child relationship, states intervened directly in the home, without any real concern for the privacy of recipients and their families.

1. Dependency, Inadequate Funding, and Lack of Entitlement

The state inadequately funded mothers' pensions programs throughout their existence.[310] Inadequate funding led to intense scrutiny to determine whether a mother met strict financial eligibility requirements,[311] contributed to the substitution of behavioral supervision for economic criteria,[312] interjected social caseworkers into the lives of recipients,[313] and increased caseworkers' discretion to decide which mothers should receive assistance.[314] This helped undermine the notion that any single mother had a

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308. After the passage of mothers' pension laws, the number of institutions and children in institutions increased from 1,151 and 120,000, respectively, in 1910, to 1,558 and 142,971, respectively, in 1923. *See* Eve P. Smith, *Characteristics of Social Welfare Stasis and Change: A Comparison of the Characteristics of Two Child Welfare Agencies in the 1920s*, 20 J. SOC. & SOC. WELFARE 105, 106 (1993); *see also supra* note 273 and accompanying text.

309. MARY F. BOGUE, ADMINISTRATION OF MOTHER'S AID IN TEN LOCALITIES, CHILDREN'S BUREAU REPORT No. 184, at 5 (1928) (quoting a 1912 Children's Bureau study).

310. *See, e.g.*, ROBERT H. BREMNER, FROM THE DEPTHS: THE DISCOVERY OF POVERTY IN THE UNITED STATES 223 (1956) (observing that the rapidity with which mothers' pensions legislation was passed may be explained in part by the fact that "the program hurt no interests and cost very little"); Stanley H. Howe, *Adequate Relief to Needy Mothers in Pennsylvania*, NAT'L CONF. CHARITIES AND CORRECTIONS 447 (1914), *reprinted in* SELECTED ARTICLES ON MOTHERS' PENSIONS 14 (Edna D. Bullock ed., 1915) (describing funding as "ludicrously inadequate").

311. *See* EDITH ABBOTT & SOPHONISBA P. BRECKINRIDGE, THE ADMINISTRATION OF THE AID-TO-MOTHERS LAW IN ILLINOIS, CHILDREN'S BUREAU REPORT NO. 82, at 27 (1921) (noting that in Cook County, Illinois, a recipient's spending was closely monitored and that she was required to keep "full and accurate accounts"); TIFFIN, *supra* note 262, at 131; Vandepol, *supra* note 287, at 231 (arguing that officials sought to compel adherence to economic eligibility criteria and to prevent "reckless expenditures" by examining recipients' expense records).

312. *See* LUBOVE, *supra* note 263, at 108; TIFFIN, *supra* note 262, at 133.

313. *See* Leff, *supra* note 261, at 412.

314. *See* LADD-TAYLOR, *supra* note 293, at 149.

claim to privacy once she applied for or received a pension; it suggested instead the mother-applicant herself was in some sense public property. According to one state legislative committee:

> A *public charge is public property* ... the public is entitled to the most *intimate acquaintance to every item of expenditure* in the administration of the law. Taxpayers have no respect for family privacy or prejudices when they are being paid for out their taxes and no power of sentiment will alter that attitude.[315]

To qualify for a mothers' pension award, applicants had to undergo time-consuming[316] and often humiliating investigations.[317] After obtaining an award, administering officials, who considered regular home visits indispensable[318] and who rarely demonstrated any concern for the privacy of recipients, subjected recipients to frequent and extensive supervision. The qualification standards required mothers to maintain detailed records of family expenses, which caseworkers reviewed monthly to "prevent reckless expenditures."[319] Caseworkers often noted whether mothers were "economical" in their purchase of groceries or use of coal.[320] One case record describes a woman forced to show a caseworker a "shirt full of holes" to prove she needed assistance; the caseworker, after noting the "good furniture" in the mother's house, told her that she "ought not need charity" and instructed her to "readjust [her family's] manner of living."[321]

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315. REPORT OF LEG. COMM., OR. FED. OF WOMEN'S CLUBS, 1914-15 (emphasis added); *see also* GORDON, *supra* note 244, at 56-57 (describing the opposition to making mothers' pensions an entitlement).

316. *See, e.g.*, LADD-TAYLOR, *supra* note 293, at 151 (observing that in Cook County, Illinois, initial verification of need took from two to four months).

317. *See* COLL, *supra* note 291, at 79; *see also* BOGUE, *supra* note 309, at 6 (noting a social-history sheet generally required facts about residence, property, the father's death, commitment, divorce, dates of children's birth, marriage, and often citizenship). One study reports half of the mothers' pensions agencies studied required that the children and mothers be given a physical examination and that the investigating official have access to the school's medical inspection record). *See id.* at 11, 13. This often caused great hardship to women and their children without revealing any new information. *See* ABBOTT & BRECKINRIDGE, *supra* note 311, at 23-24.

318. *See* ABBOTT & BRECKINRIDGE, *supra* note 311, at 27; *see also* LADD-TAYLOR, *supra* note 293, at 151 (noting that over eighty-five percent of families who received aid for longer than two years were visited more than once a month).

319. Vandepol, *supra* note 287, at 231.

320. LADD-TAYLOR, *supra* note 293, at 153 (noting one caseworker's description of a recipient's attitude as "quite hopeless").

321. NYCOS Case No. 172737.

2. *Suitable Home Requirements*

So-called "suitable home" requirements represented an even more dramatic incursion into recipients' homes and lives.[322] Most mothers' pensions laws contained suitable home requirements, which meant assistance had to be denied or terminated if an agent believed a mother failed to measure up to standards.[323] Although premised on the purportedly objective principles of scientific charity[324] originally associated with private charities,[325] suitable home requirements were in fact highly subjective and gave caseworkers wide latitude in administering grants.[326] Moreover, suitable home requirements made possible tight limits on funding and enabled administrators and caseworkers to maintain traditional distinctions between the "deserving" and "undeserving" poor.[327]

Suitable home requirements were purportedly adopted to determine whether a mother was a "fit and capable person to bring up her children, and whether the inmates and surroundings of her household [were] such as to render it suitable for her children to reside at home."[328] In fact, suitable home requirements offered a means of controlling the behavior of mothers.

> The public can make adequate relief a *powerful lever to lift and keep mothers to a high standard of home care....* If we grant the aid to any woman whose care of her children will just pass muster, we throw away a chance to make these women improve. If, on the contrary, we make relief under this law conditional on

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322. *See* GORDON, *supra* note 244, at 45 (arguing suitable home provisions "gave relatively unfettered discretion to social work administrators and judges as to what constituted proper family life").

323. *See id.* at 43, 46-48.

324. *Supra* notes 266-68 and accompanying text; *see Pensions for the Widows of New York*, 34 SURVEY 1 (1915), *in* SELECTED ARTICLES ON MOTHER'S PENSIONS 57-58 (Edna D. Bullock ed., 1915) (noting the close connection between public welfare authorities and private charities in the administration of mothers' pensions).

325. *See, e.g.*, COLL, *supra* note 291, at 78 (discussing the spread of private charity agencies' conceptions of social work to public welfare agencies); LADD-TAYLOR, *supra* note 293, at 147 (arguing the passage of the New York mothers' pensions law reflected the triumph of the individual casework perspective).

326. *See* Susan D. Bennett, *"No Relief But Upon the Terms of Coming into the House" – Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157, 2184 (1995) ("[I]n the early 1900's, practitioners of 'scientific charity' made an ongoing relationship between agent and applicant necessary to a determination of need. This intense personalization of relief required the repeated physical presence of the agent, the 'friendly visitor' in the recipients' homes, and in their lives.").

327. *See* COLL, *supra* note 291, at 44.

328. Pumphrey & Pumphrey, *supra* note 298, at 58 (describing Maine's "suitable home" requirement).

> a fairly high standard of home care, we shall find that the mothers will rise to this standard.[329]

Such catchall moral requirements sought to influence a wide range of behavior, including personal hygiene,[330] avoidance of tobacco smoking,[331] and religious instruction for children.[332] In large cities, where immigrants constituted the majority of mothers' pensions recipients,[333] the government used suitable home requirements to force immigrants to conform to so-called "American" standards.[334] The government used the same standards to exclude applicants based on race.[335]

By far the most intrusive requirements concerned sexual norms.[336] Not only did numerous states deem non-widows ineligible for assistance,[337] particularly those with illegitimate children,[338] but they also subjected recipients' personal lives to continual surveillance. Much was made of male lodgers, whose "presence ... in the same home with a full pay envelope may offer an overwhelming temptation,"[339] and who were "likely to be an influence making towards an unfit home."[340] For example, in Pennsylvania and Massachusetts the presence of male lodgers in the home made mothers ineligible to receive assistance.[341] Additionally, caseworkers who perceived sexual transgressions as the result of bad

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329. A.E. Sheffield, *Administration of the Mothers' Aid Law in Massachusetts*, 31 SURVEY 644 (1914), *in* SELECTED ARTICLES ON MOTHER'S PENSIONS 73 (Edna D. Bullock ed., 1915) (quoting a founder of the Massachusetts mothers' pension law) (emphasis added).

330. *See, e.g.*, LADD-TAYLOR, *supra* note 293, at 153 (noting a social worker's description of a recipient's home initially as "very nice and clean" but later as "very dirty").

331. *See* Leff, *supra* note 261, at 412.

332. *See* TIFFIN, *supra* note 262, at 132.

333. *See, e.g.*, GORDON, *supra* note 244, at 47.

334. *See id.* at 45; *see also* Brito, *supra* note 290, at 420 ("Progressive reformers intended for white, immigrant women to benefit from these new programs in order to alleviate poverty and socialize them to the American way of life.").

335. *See* Brito, *supra* note 290, at 421 ("Mothers' aid programs almost entirely excluded black women, some of whom were overwhelmingly poor.").

336. *See, e.g.*, STADUM, *supra* note 272, at 113 (noting inappropriate sexuality was the most common charge made against women according to Minnesota case records).

337. *See supra* note 290 and accompanying text.

338. *See* LADD-TAYLOR, *supra* note 293, at 149.

339. TIFFIN, *supra* note 262, at 132.

340. Sheffield, *supra* note 329, at 75; *see also* ABBOTT & BRECKINRIDGE, *supra* note 311, at 39-40 (noting in thirty-eight percent of the cases in Cook County, Illinois, where mothers' pensions were terminated, the reason was not a change in income or marital status, but rather a charge that the mother was "untruthful," "keeping boarders," or "refusing to cooperate").

341. *See* STADUM, *supra* note 272, at 54. There were also objections on medical or scientific grounds to the practice of keeping boarders, which was associated with the spread of disease, especially among immigrant families in tenements. *See id.*

housekeeping encouraged women to maintain their husbands "in reasonable fidelity" by improving their home economics and household management skills.[342] Juvenile courts administered many mothers' pensions programs,[343] thus making mothers open to the same extensive and paternalistic social controls as juvenile delinquents.[344]

Evidence suggests there was considerable resistance to suitable home requirements. For example, a study of mothers' pensions in Cook County, Illinois, describes the receipt of aid as a "demoralizing process," observing that:

> Many of the women feel that it is a great hardship to be obliged to tell a public officer how they have spent their money, and they complain that asking for such accounting is a needless prying into their affairs. It is not easy for anyone who has spent money foolishly to tell about it, and it must be very hard to give an account of unwise expenditures to be presented to an official committee.[345]

Other studies suggest women frequently resisted pressures to assimilate,[346] lectures about maternal responsibilities,[347] allegations of alcohol use and theft,[348] and the imposition of sexual norms prohibited even going out at night with men.[349] In general, women resisted when they felt a caseworker assumed the right to know too much about them, asserted agency direction over family affairs, or sought additional information about them from relatives or neighbors, without any respect for their privacy.[350]

Mothers' pensions programs thus show how the notion of separate spheres and economic dependency undermined privacy in the home. Administrators divided non-wage-earning women into good and bad classes of dependency: "a 'good,' household dependency predicated of children and wives, and an increasingly 'bad' (or at least dubious) charity dependency, predicated recipients of relief."[351]

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342. *Id.* at 113.

343. *See supra* Part II.B.2.

344. *See* GORDON, *supra* note 244, at 45.

345. ABBOTT & BRECKINRIDGE, *supra* note 311, at 20.

346. *See* SOPHONISBA BRECKINRIDGE, FAMILY WELFARE WORK IN A METROPOLITAN COMMUNITY: SELECTED CASE RECORDS 490 (1924).

347. *See id.* at 633. (discussing resistance to lectures about not spoiling children).

348. *See, e.g.*, STADUM, *supra* note 272, at 10 (discussing a study of social worker case records from Minneapolis, Minnesota).

349. *See id.* at 6-7.

350. *See id.* at 135-38.

351. Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the*

Women receiving mothers' pensions were burdened with the stigma of dependency and were forced to endure, and indeed complained about, infantilizing supervision, a loss of privacy, and a maze of bureaucratic rules that limited their decision making power over such basic matters as housing, employment, and sexual relations.[352]

C. Influence of Mothers' Pensions on the Administration of Federal Welfare

The design and implementation of mothers' pension programs had a significant influence on subsequent federal welfare programs.[353] Like mothers' pensions, the federal welfare programs that followed — Aid to Dependent Children (ADC) and its successor, Aid to Families with Dependent Children (AFDC) — relied on the idea of the "friendly visitor" and often involved overt attempts at social control.[354] Although not specifically required by either federal regulations or legislation, home visits, suitable home requirements, and the application of scientific analysis to a recipient's private home life played an important role in federal welfare administration.[355] Individual states had the latitude to set the conditions for relief.[356] Many imposed "man in the house" rules during the 1940s and 1950s that allowed social workers to make unannounced visits to homes, and then eliminate from the welfare rolls any woman

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U.S. Welfare State, 19 J. WOMEN IN CULTURE & SOC'Y 309, 320 (1994). The term "dependency" itself had taken on a new, highly gendered, and negative meaning following the rise of industrial capitalism in the nineteenth century in response to the growing division between the wage-earning, independent, dominant male and the non-employed, dependent, subordinate female. *See id.* at 315, 318-19.

352. *Cf. id.* at 330 (describing the belief that the line between deserving and undeserving dependents needed to be maintained by careful vigilance).

353. *See generally* GORDON, *supra* note 244, at 1-13 (discussing the development of federal assistance programs). Mothers' pension statutes, still on the books in some states, have also provided the basis, more recently, for expanded state welfare benefits won through litigation. *See* Nancy Morawetz, *Welfare Litigation to Prevent Homelessness*, 16 N.Y.U. REV. L. & SOC. CHANGE 565, 570 (1989) (discussing New York and Massachusetts statutes).

354. *See id.* at 275-76 (noting that the model state law distributed by the Social Security Board for ADC described as eligible "'any dependent child who is living in a suitable family home'"); *see also* Betsy Ledbetter Hancock & Leroy H. Pelton, *Home Visits: History and Function*, 70 J. CONTEMP. SOC. WORK 21 (1989) (noting that the reliance on home visits under mothers' pensions became "a firmly established practice" in the administration of ADC). ADC provided payments to needy children but not their caretakers; the program was changed in 1962 to provide aid to needy families, and was renamed AFDC. *See also* Brito, *supra* note 290, at 422 n.41.

355. *See, e.g.*, Brito, *supra* note 290; Note, *Rehabilitation, Investigation, and the Welfare Home Visit*, 79 YALE L.J. 746, 747 (1970).

356. Bennett, *supra* note 326, at 2185.

found living with a man.[357] These rules infringed on individual privacy, as "[v]ague definitions of 'substitute fathers' encouraged caseworkers to conduct invasive interviews in which they probed widely for the most intimate details of the mothers' personal lives," making the welfare process "a humiliating and dehumanizing ordeal."[358] For example, one state's welfare administration determined how much "proof of weekly sex was sufficient indication of the presence of a substitute father relationship," and denied or terminated benefits on that basis.[359] Suitable home requirements also sanctioned discriminatory policies by enabling caseworkers and officials to exclude applicants based on race.[360]

Eventually, the intrusive, discretionary nature of home visits aroused opposition and generated constitutional concerns.[361] It was not until the advent of the welfare rights movement of the 1960s,[362] however, that traditional beliefs about the privacy of the home were first applied in the public assistance context. During the 1960s and 1970s, a legal-bureaucratic model emphasizing fixed, formal rules of eligibility and legal entitlement to benefits replaced the more discretionary, professional social casework model that originated with mothers' pensions programs.[363] Central to the creation of legal

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357. *See, e.g.*, Brito, *supra* note 290, at 422-23.

358. Bennett, *supra* note 326, at 2186. *See generally* FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 166 (1971).

> A central feature of the recipient's degradation is that she must surrender commonly accepted rights in exchange for aid. AFDC mothers, for example, are often forced to answer questions about their sexual behavior ("When did you last menstruate?"), open their closets to inspection ("Whose pants are those?"), and permit their children to be interrogated ("Do any men visit your mother?"). Announced raids, usually after midnight and without benefit of warrant, in which a recipient's home is searched for signs of 'immoral' activities, have also been part of life on AFDC.

Id.

359. *See* Bennett, *supra* note 326, at 2186 n.116.

360. *See* WINFRED BELL, AID TO DEPENDENT CHILDREN 32-39 (1965); GORDON, *supra* note 244, at 298-99.

361. *See, e.g.*, Note, *supra* note 355, at 760-61 (advocating that home visits be limited to the provision of services, such as public health information, and prohibiting any investigation of the recipient in her home); *see also* Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1355 (1963) (arguing midnight welfare searches violate the Constitution); Joel F. Handler & Ellen Jane Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1, 12 (1969) (noting the potential sense of stigma attached to home visits); Note, *Warrantless Welfare Searches Violate Recipient's Constitutional Rights*, 19 SYRACUSE L. REV. 95, 97-98 (1967) (arguing also that midnight welfare searches violate the Constitution).

362. *See generally* Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1016-19 (1999).

363. *See* Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1126, 1137-38 (2000).

protections for welfare recipients was the changing understanding of welfare as a form of property articulated in Charles Reich's famous law review article.[364] In *King v. Smith*,[365] the Supreme Court invalidated a state's "substitute father" regulation that precluded welfare benefits where a man was found to have had sexual relations with the child's mother, determining that the purported state interest of discouraging immorality and illegitimacy was no longer valid under federal welfare laws.[366] The Court acknowledged the history of using suitable home provisions to disqualify children on the basis of the alleged immoral behavior of their mothers,[367] but concluded that "federal public welfare policy now rests on a basis considerably more sophisticated and enlightened than the 'worthy-person' concept of earlier times."[368] Numerous other decisions contributed to the development of welfare rights during this period.[369]

Courts also sought to extend the scope of the Fourth Amendment to protect welfare recipients against warrantless home searches, particularly against those searches intended to enforce "man in the house" rules.[370] While the Supreme Court held in *Camara v. Municipal Court*[371] the Fourth Amendment's warrant requirement extended to non-criminal, administrative inspections such as municipal housing code inspections,[372] it soon limited

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364. *See* Joel F. Handler, *Dependent People, The State, and the Modern / Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1019 (1988) (discussing the influence of Charles Reich's *The New Property*).

365. 392 U.S. 309 (1968).

366. *See id.* at 320.

367. *See id.* at 321.

368. *Id.* at 324-25.

369. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (holding a welfare recipient is entitled to a pre-termination evidentiary hearing); Shapiro v. Thompson, 394 U.S. 618 (1969) (finding unconstitutional a one-year residency requirement for the receipt of welfare benefits). *See generally* Brito, *supra* note 290, at 424 ("Welfare became a statutory 'right' and a uniform means test was implemented for determining eligibility"); Bennett, *supra* note 326, at 2184:

> [A]n astonishing burst of regulatory liberalization ... empower[ed] the recipient to set the terms: of how, when, and where she would apply for assistance; of what she would reveal of the physical and emotional interior of her life; and of how she would demand an accounting and justification from the state of any adverse action.

370. *See* Parrish v. Civ. Serv. Comm'n, 425 P.2d 223, 267 (Cal. 1967) (holding that mass early morning raids had to comply with the same standards governing searches for criminal evidence). The court reasoned that a welfare agent's "unlimited power" over the livelihood of recipients nullified any apparent consent to such raids. *Id.* at 229-31. *Parrish* essentially made such searches unconstitutional in California. *See* Note, *supra* note 361, at 97-98.

371. 387 U.S. 523 (1967).

372. *See id.* at 534. "Even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the *sanctity of his home* may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious

Camara's potential application in the welfare context. In *Wyman v. James*,[373] the Court rejected the extension of the Fourth Amendment's warrant requirement to welfare searches, holding a home visit by a caseworker was not a search within the meaning of the Fourth Amendment.[374] The Court relied on the traditional distinction between criminal and non-criminal searches,[375] contrasting the housing search in *Camara* as criminal in nature.[376] It also emphasized a number of other factors, many of which had previously justified the invasive practices used in administering mothers' pensions: the need to protect the welfare of the child;[377] the public's interest in sound financial management of resources;[378] the rehabilitative purpose of home visits;[379] the well-established practice of home visits;[380] and the analogy of welfare searches to the work of the "friendly visitor" rather than the detective.[381]

The seemingly inconsistent treatment of the home in the public welfare context was attacked by Justice Douglas, who, dissenting in *Wyman*, observed "[i]t is a strange jurisprudence indeed which safeguards the businessman at his place of work from warrantless searches but will not do the same for a mother in her *home*."[382] In an era of expanding government regulation, Justice Marshall believed restricting "the Fourth Amendment to 'the traditional criminal law context' trample[d] the ancient concept that a man's home is his castle."[383]

The 1996 federal welfare reform act,[384] which replaced an individual entitlement to welfare benefits with block grants to

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threat to personal and family security." *Id.* at 530-31 (emphasis added).

373. Wyman v. James, 400 U.S. 309 (1971).

374. *See id.* at 326. The Court refused to reach the issue of early morning mass raids at issue in *Parrish*.

375. *See id.* at 324-25.

376. *See id.* at 325.

377. *See id.* at 319.

378. *See id.* at 318-19.

379. Wyman v. James, 400 U.S. 309, 319-20 (1971).

380. *See id.* at 320 n.7.

381. *See id.* at 322-23.

382. *Id.* at 331 (Douglas, J., dissenting). Indeed, compared to home visits by welfare agents, the state's interests in administrative searches, such as housing inspections, seem greater, and the invasion of privacy less significant. *See* Note, *supra* note 355, at 757 (comparing the frequency and broad scope of home visits by welfare agents with the infrequent and narrowly defined visits by housing inspectors; contending that the state's interest in safeguarding public health and safety through housing inspections trumps that of "keeping down the welfare roles") (citation omitted). For a discussion of housing inspections, see *infra* Part IV.

383. *Wyman*, 400 U.S. at 339 (Marshall, J., dissenting).

384. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of the U.S.C.).

states,[385] revived many of the tactics of mothers' pensions, including using financial assistance as a means of social control and limiting a recipient's privacy and autonomy.[386] Indeed, the new welfare law reflects a striking attempt to control and modify the behavior of single women by imposing strict work requirements,[387] implicitly encouraging states to implement "family caps" that require the denial of an incremental increase in benefits following the birth of an additional child,[388] and placing restrictions on teenage mothers seeking public assistance.[389] The increased scrutiny of recipients to enforce measures like work requirements has led to a rebirth of unannounced home visits in come states.[390]

The history of mothers' pensions suggests how economic dependency and Victorian era gender-based stereotypes helped sanction and promote a view of the home not as a castle but rather as a laboratory for social control. It should also serve as caution to those who have advocated a return to a social work model characterized by discretionary decision-making rather than adherence to strict formal rules of eligibility and administration.[391]

IV. TENEMENT HOUSING REFORM, CLASS, AND PRIVACY

Tenement housing reform provides another window into social class and privacy during the late nineteenth and early twentieth

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385. *See* 42 U.S.C. § 603.

386. *See, e.g.*, Brito, *supra* note 260, at 234 ("The Personal Responsibility Act permits and encourages states to implement a number of measures that are designed to pressure women on welfare into conforming to these prescribed marital, childbearing, and parenting norms."); James W. Fox, Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workfare*, 74 WASH. U. L.Q. 103, 107-21 (1996) (criticizing the theories behind the recent welfare reforms and the return of a paternalistic response to poverty).

387. *See* 42 U.S.C. § 607.

388. *See* Wendy Chavkin et al., *Sex Reproduction, and Welfare Reform*, 7 GEO. J. ON POVERTY L. & POL'Y 379, 381-82 (2000) (discussing increase in family caps since the passage of the PRWORA); *see also* Erin Meehan Richmond, Note, *The Interface of Poverty and Violence Against Women: How Federal and State Welfare Reforms Can Best Respond*, 35 NEW. ENG. L. REV. 569, 581 n.77 (2001).

389. *See* 42 U.S.C. § 608(a)(4) (2001) (requiring any unmarried individual under eighteen years of age and caring for a child of more than twelve weeks of age must be working towards a high school diploma or participating in an alternative education or training program to qualify for assistance).

390. *See, e.g.*, American Civil Liberties Union, *ACLU Challenges Invasive Home Searches of Welfare Recipients in San Diego Area*, July 24, 2000, *available at* http://www.aclu.org/news/2000/n072400b.html (last visited Mar. 6, 2002) (describing legal challenge to eligibility verification procedures in San Diego). Moreover, the use of welfare to promote marriage has emerged as a central issue in the debate over the reauthorization of the 1996 act. *See* Robin Toner, *Welfare Chief is Hoping to Promote Marriage*, N.Y. TIMES, Feb. 19, 2002, at A1.

391. *See, e.g.*, William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

centuries. This Part describes the origins of tenement housing reform and explores the factors that shaped its design and implementation, focusing on New York City, the leader in the tenement housing reform movement. It then compares the home's treatment in tenement housing reform to its treatment in other reforms during this period.

A. Development of Tenement Housing Reform

Around the turn of the nineteenth century, numerous cities and towns adopted stricter housing codes for tenements.[392] Tenements were the buildings in working-class districts that landlords subdivided and partitioned so that whole families could crowd into single rooms.[393] By 1900, there were 82,000 dwellings in tenements in New York City, and the social conditions there were "too miserable to describe."[394]

In contrast to previous legislation designed to protect cities from fire and disease, these later codes were in good part to protect tenants.[395] Like other regulatory efforts of the Progressive Era, tenement housing reform sought to control the use of property for the general social and economic well being[396] and to remedy a century of "lax enforcement of the law and unrestrained and unimaginative building."[397] Tenement housing reform also sought to take advantage of advancements in scientific knowledge, particularly the recent discovery of the bacterial origins of disease, to prevent outbreaks of typhoid, malaria, cholera, diphtheria, and,

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392. *See* BREMNER, *supra* note 310, at 209.

393. *See* GARRATY, *supra* note 189, at 187-88 (describing conditions where, inter alia, interior rooms might lack ventilation and entire buildings might lack toilets); *see also* Tenement House Act of 1901, ch. 334, § 2(1) (defining tenement as "any house or building, or portion thereof, which is rented, leased, let or hired out, to be occupied, or is occupied, as the home or residence of three families or more living independently of each other, doing their cooking upon the premises").

394. JOSEPH D. MCGOLDRICK ET AL., BUILDING REGULATION IN NEW YORK CITY: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 81 (1944); *see also* CASHMAN, *supra* note 20, at 123 (noting immigrant communities living in tenements were "prone to outbreaks of cholera, typhus, and typhoid").

395. *See* Judah Gribetz & Frank P. Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1259-60 (1966).

396. *See id.*; *see also* Scott M. Reznick, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 854 (1973) ("When ... the problems of urbanization became increasingly severe, the governmental power necessary to meet them was produced by broadening the traditional concept of common law nuisances into a general legislative authority, predicated on the police power, to regulate property in order to protect public health and safety.").

397. MCGOLDRICK ET AL., *supra* note 394, at 81.

above all, tuberculosis,[398] the leading cause of death in the United States in 1916.[399] Armed with such scientific discoveries, housing reformers focused on the connection between disease and the often-deplorable conditions in tenements, such as overcrowding, primitive waste disposal facilities, and inadequate lighting and ventilation.[400]

New York emerged as the leader in promulgating tenement reform legislation, and other states and cities soon emulated its landmark Tenement House Act of 1901.[401] The Act imposed minimum standards on all tenement houses erected after its passage, while also requiring numerous improvements in existing tenements, such as cutting new windows into interior rooms, adding fire-prevention measures, curtailing occupancy of basements and cellars, installing toilets, and maintaining the cleanliness of buildings and apartments.[402] The Tenement House Act also provided for substantial enforcement measures, breaking with the past pattern of weak enforcement.[403] The Act required monthly inspections for tenements whose average rents totaled twenty-five dollars or less.[404] It created the Tenement House Department, a citywide department dedicated to enforcement, and provided for stricter sanctions by authorizing the imposition of fines and imprisonment after a hearing by a magistrate.[405] It also attempted to eliminate loopholes

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398. *See* ROY LUBOVE, THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY, 1890-1917, at 88 (1963); Reznick, *supra* note 396, at 859 ("Mortality statistics indicated that death rates [from disease] rose in proportion to the degree of urban congestion.").

399. LILIAN BRANDT, FACTS ABOUT TUBERCULOSIS 7 (1916). Tuberculosis was responsible for nearly fourteen percent of all deaths in New York City in 1913. *See id.* at 8. Attempts to eradicate tuberculosis eventually proved effective; by 1965 it had been reduced to twentieth on the list of causes of death. *See* ANTHONY M. LOWELL, TUBERCULOSIS: TUBERCULOSIS MORBIDITY AND MORTALITY AND ITS CONTROL 71 (1969).

400. *See* 1 THE TENEMENT HOUSE PROBLEM 447 (Robert W. De Forest & Lawrence Veiller eds., 1970); *see also* CASHMAN, *supra* note 20, at 123 (discussing steps to address the pressing problem of human sewage and industrial waste); LUBOVE, *supra* note 398, at 84.

401. *See* BREMNER, *supra* note 310, at 209 (noting in the next fifteen years, eleven states and more than forty cities enacted new tenement housing codes or revised existing building and sanitary regulations modeled on New York's 1901 law); *see also* EDNA TRULL, THE ADMINISTRATION OF REGULATORY INSPECTIONAL SERVICES IN AMERICAN CITIES 92 (1932) (discussing the expansion of building codes until 1931); Comment, *State Health Inspections and "Unreasonable Search": The* Frank *Exclusion of Civil Searches*, 44 MINN. L. REV. 513, 530 n.61 (1960) (noting by 1953 every state empowered local health officers or boards of health to make sanitary investigations and inspections).

402. *See* TRULL, *supra* note 401, at 82.

403. *See* Judith A. Gilbert, *Tenements and Takings:* Tenement House Department of New York v. Moeschen *as a Counterpoint to* Lochner v. New York, 18 FORDHAM URB. L.J. 437, 448 n.77 (1991).

404. *See* LUBOVE, *supra* note 398, at 160.

405. *See* Gilbert, *supra* note 403, at 447.

such as zoning variances.[406] If a tenement contained numerous or severe violations of the law, the Tenement House Commissioner could declare it unsafe for occupancy and order that it be vacated.[407] The Tenement House Act intended to give "enforcing officials in their fight against unsanitary conditions every weapon known to modern or ancient warfare."[408] To ensure compliance, inspectors possessed a right of access at "all reasonable times" and to all parts of the tenement, "free of hindrance."[409] Numerous other cites emulated the Tenement House Act's enforcement provisions.[410]

Tenement housing reform illustrates how many viewed administrative solutions to housing and public health problems in terms of broad executive mandates. The mayor held full general authority and his subordinates exercised virtual autonomy in their respective areas of expertise.[411] Such broad investigative mandates fit squarely within the muckraking tradition of the Progressive Era.[412] Indeed, it was Jacob Riis's 1877 exposé of slum conditions in the *New York Tribune* that helped spark the appointment of the city's Tenement Housing Commission.[413] As one reformer said, "Light is a very effective moral disinfectant."[414]

The Tenement House Act marked a significant intrusion into the rights of property owners.[415] Like previous housing code legislation,[416] however, the Tenement House Act and its successor, the Multiple-Dwelling Law, withstood constitutional challenges in

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406. *See* TRULL, *supra* note 401, at 82.

407. *See id.*; *see also* CITY OF NEW YORK, CODE OF ORDINANCES art. 10, § 185 (1915) (describing the power of the Board of Health to abate nuisances).

408. LAWRENCE VEILLER, A MODEL HOUSING LAW 230 (1914).

409. *Id.* at 240.

410. *See, e.g.*, TRULL, *supra* note 401, at 93-94 (noting the extensive power of housing inspectors in numerous cities); SCHYLUR C. WALLACE, STATE ADMINISTRATIVE SUPERVISION OVER CITIES IN THE UNITED STATES 110 (1928) (discussing the broad scope of housing inspection in other cities); *see also* VEILLER, *supra* note 408, at 227-28 (proposing that other cities adopt sanctions for both owners and tenants who violated the local housing law).

411. *See* WIEBE, *supra* note 19, at 169-70.

412. *See generally* HOFSTADTER, *supra* note 19, at 185 ("The fundamental critical achievement of American Progressivism was the business of exposure...."); *cf.* ROSEN, *supra* note 192, at 14-15 (describing muckraking exposés to uncover the "evils" of prostitution).

413. CASHMAN, *supra* note 20, at 129. Riis's exposé *How the Other Half Lives*, his first in a series about the tenements, offered suggestions to alleviate the poverty and degradation of the tenements and utilized the new medium of photography for documentation. *See id.* at 129-30.

414. BREMNER, *supra* note 310, at 205 (quoting reformer Charles R. Henderson of the University of Chicago).

415. *See* Gilbert, *supra* note 403, at 440.

416. *See* Comment, *supra* note 401, at 528 n.57 (observing that courts consistently upheld the broad delegation of regulatory powers in response to new developments in medical knowledge or techniques).

the courts.[417] In general, courts accepted that housing conditions, when related to the health and general welfare of the community, were a public nuisance and thus subject to state regulation, including actual physical destruction.[418] Notably, many violations under the Tenement House Act were not tantamount to the common-law definition of nuisance.[419] Acceptance of increasingly broad tenement housing reforms thus signaled greater tolerance of legislative and administrative classification of nuisances,[420] and a belief that private property was not completely sacrosanct.[421] In short, tenement housing reformers did not consider those targeted homes impregnable castles, but rather open to regulatory intervention for the greater social good.

B. Social Factors Shaping Intervention and Enforcement

While tenement housing reformers sought to improve living conditions, moralistic judgments about the inhabitants of the tenements themselves pervaded their efforts. Lawrence Veiller, the architect of the Tenement House Act and the nation's leading housing expert,[422] believed the evils of the tenements degraded the individual, thwarted his moral and physical growth, and unleashed

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417. MCGOLDRICK ET AL., *supra* note 394, at 542-43. For example, the New York Court of Appeals rejected the claim that a provision of the Tenement House Act requiring that all "school sinks" and privy vaults in existing tenement houses be removed and replaced by individual water closets was an unconstitutional taking of property. *See* Tenement House Dep't v. Moeschen, 179 N.Y. 325 (1904), *aff'd*, 203 U.S. 583 (1906); *see also* Gilbert, *supra* note 403, at 440 (emphasizing that *Moeschen* was recognized in its time "as an extraordinarily significant case"). Similar regulations already had been upheld in Rhode Island and Massachusetts. *See id.* at 485-86. Provisions of New York City's Building and Fire Prevention Codes also were upheld against substantive due process challenges. *See* MCGOLDRICK ET AL., *supra* note 394, at 542-43 (citing cases).

418. *See* Metro. Bd. of Health v. Heister, 37 N.Y. 661 (1868); *see also* Hubbell v. Higgens, 148 Iowa 36 (1910); Keiper v. City of Louisville, 152 Ky. 761 (1913); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 554 (1981) (observing that where a house is "imminently dangerous to the safety, or offensive to the morals, of the community," it may be treated as a nuisance *per se*, and destroyed). *But see* Matter of Jacobs, 98 N.Y. 98 (1895) (declaring unconstitutional an act prohibiting the manufacture of tobacco in a tenement house because it was not a health law); FREUND, *supra*, at 139 (discussing how courts distinguished legislation affecting health and safety from that affecting labor and economic interests).

419. *See* VEILLER, *supra* note 408, at 197.

420. *See* MCGOLDRICK ET AL., *supra* note 394, at 60 n.127; *see also* LUBOVE, *supra* note 398, at 94 (observing that support among conservatives for laws authorizing expropriation of tenements was a "premonition of things to come").

421. *See* Gilbert, *supra* note 403, at 462 (discussing the significance of the jury's determination at trial in *Tenement House Department v. Moeschen*).

422. *See* LUBOVE, *supra* note 398, at 140.

his worst animal instincts.[423] He thought the tenement bred not only sickness and death, but also a host of social ills such as crime, immorality, drunkenness, and family demoralization,[424] and described tenement housing reform as an attempt to "cleans[e] the Augean stables."[425] The *New York Times* was even more blunt, characterizing tenements as "rotten hives of poverty, vise, and misery ... [that] reeked with psychological and moral disease."[426]

Such views dovetailed with the conservative economic philosophy espoused by leading reformers who favored regulation of existing housing over the construction of new public housing.[427] Many did not consider public housing, like financial assistance to single-mothers, a matter of entitlement. While the government might need to connect tenements to public water and sewers, it could not solve the problems of sub-standard housing by constructing new homes. Veiller cautioned:

> How delightful it would be to be able to believe that all that is needed to bring about the proper housing conditions is a change in the economic status of working people! That given enough wages, slums would vanish. But alas, it is not to be done so easily. City slums cannot by wave of a necromancer's wand become gardens of delight.[428]

Part of the problem, Veiller and others believed, lay with the inhabitants of the tenements themselves; the inhabitants' needed to change their behavior before social conditions would improve. As the New York Association for Improving the Condition of the Poor put it: "[T]he homes of the New York City poor must be provided with sunlight, fresh air and the moral safeguard of real domesticity."[429]

Thus, the same moral judgments about poor and immigrant families that "justified" broad intervention in the home under the banner of social improvement also marked tenement housing reform.[430] The health inspectors who implemented tenement housing legislation were given "general 'drag-net' power" to achieve

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423. *See id.* at 130.
424. *See id.*
425. *Id.* at 158-59.
426. Editorial, N.Y. TIMES, July 18, 1896, *quoted in* LUBOVE, *supra* note 398, at 94.
427. *See* BREMNER, *supra* note 310, at 211.
428. VEILLER, *supra* note 408, at 3.
429. Gribetz & Grad, *supra* note 395, at 1262 n.30.
430. *See id.*

effective reform.[431] Meanwhile, many viewed social caseworkers as "deputy housing and sanitation inspectors," and frequently reported evidence of unsanitary conditions to officials.[432]

Besides granting wide powers to inspectors, housing reformers sought to give owners a "club to hold over the delinquent tenant's head" by authorizing the summary eviction of those tenants who failed to comply with the law.[433] Reformers also believed the threat of fines might pressure owners into inspecting tenants' apartments themselves. Thus, the state granted owners a right of access to prevent the owners from avoiding compliance by hiding behind the privacy of tenants.[434] Not surprisingly, tenement housing reform could be unpopular,[435] and tenants frequently resisted.[436] Individual housing inspectors were reluctant to order poor families to vacate sub-standard homes when they could not afford any other place to live.[437]

Reformers also attempted to eradicate the social ills associated with tenements — especially prostitution and gambling — they believed had a negative effect on the tenement child.[438] Prostitution and gambling were considered nuisances at common law, and thus provided grounds for closing an establishment or otherwise suppressing this practice.[439] In many cities, state and local govern

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431. VEILLER, *supra* note 408, at 197; *see also supra* notes 403-09 and accompanying text.

432. LUBOVE, *supra* note 398, at 159, 201 (observing that these inspectors, who were mostly women, "found romance and excitement in defective plumbing, vermin-filled bedrooms, and cracked plaster"); *see also* VEILLER, *supra* note 408, at 241 (proposing that health inspectors in New York City have the right to delegate inspection authority to private individuals who would "be given practically all of the powers of a city employee so far as inspection is concerned").

433. VEILLER, *supra* note 408, at 232.

434. *See id.* at 241-42.

435. *See* Gilbert, *supra* note 403, at 497 ("[T]he tenants of the Lower East Side did not rally around the Tenement House Act any more than upstate New Yorkers cheered the Adirondack Park Act.").

436. *See* LUBOVE, *supra* note 398, at 160-61; *see also* WALLACE, *supra* note 410, at 112 (citing the increasing frequency with which citizens lodged complaints against health officials in New Jersey).

437. *See* BREMNER, *supra* note 310, at 210.

438. *See* COONTZ, *supra* note 193, at 136 (describing action by the government not only to regulate slum lords but also to end the "promiscuous" socializing of the lower classes in tenements and streets); LUBOVE, *supra* note 398, at 137-38.

439. *See* FREUND, *supra* note 418, at 230-31; *see also* Davis v. State, 10 Ohio Law Abs. 550 (1931) (holding that warrant was not required for forcible entry where evidence established beyond doubt that the house was being used for purposes of prostitution); ROSEN, *supra* note 192, at 28-29 (describing procedures under state anti-abatement acts, which enabled any private citizen to file a complaint against a particular building used for prostitution); *cf.* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851) (Shaw, C.J.) (defining police power as the power to "make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances ... not repugnant to the constitution, as they shall judge to be for the

ments attempted to give police increased power to search premises like "gaming houses" and "houses of ill repute" where such activities were believed to take place.[440] Legislatures also placed attention on "public areas" within tenements, where "numbers of lewd persons, men and women" assembled.[441] By analogizing these areas to "a public street," as opposed to the more protected space of a private dwelling, reformers sought to extend the police power and eradicate prostitution from the "public part of the tenement house."[442] While the Tenement House Act provided for strict sanctions against prostitutes — a six-month prison term — and fined landlords who knowingly rented their premises for prostitution, courts sought to limit the liability of owners and lessees of property where prostitution occurred.[443] The treatment of prostitution by courts and tenement housing reformers reflected the way in which middle-class Victorian sexual values imbued the social reforms of the period.[444]

The treatment of private dwellings further suggests how homes were treated differently based on socio-economic factors. The Tenement House Act initially did not apply to private dwellings. Some reformers, including Veiller, proposed extending the law to private dwellings,[445] but faced political opposition based on the

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good and welfare of the commonwealth").

440. *See* Phelps v. McAdoo, 94 N.Y.S. 265, 268 (N.Y. Sup. Ct. 1905) (citing Charter for City of New York, c. 466, § 315 (1901)). But given the widespread existence (and acceptance) of prostitution, police were themselves sometimes loath to enforce the city charter. *See, e.g.*, People v. Glendon, 74 N.Y.S. 794, 795 (N.Y. Sup. Ct. 1902) (describing prosecution of a police officer for neglect for failure to detect and arrest the "woman keeper of a certain house of ill fame").

441. James B. Reynolds, *Prostitution as a Tenement House Evil*, *in* 2 THE TENEMENT HOUSE PROBLEM 19 (Robert W. De Forest & Lawrence Veiller eds., 1970).

442. *Id.*

443. *See, e.g.*, Tenement House Dep't v. McDevitt, 215 N.Y. 160, 166 (1915) (Cardozo, J.) (stating a 1913 amendment to the Act did not make an owner civilly liable for a single act of prostitution committed without his knowledge); Tenement House Dep't v. Whitney, 145 N.Y.S. 1011, 1014 (N.Y. App. Div. 1914) (holding the lessee of a tenement not liable for an act of prostitution committed without his knowledge); People v. Rankin, 155 N.Y.S. 86, 96 (N.Y. Gen. Sess. 1915) (overturning the conviction of a hotel owner because there was insufficient evidence that he knew about acts of prostitution within the hotel). *But see* People v. McKinley Realty & Constr. Co., 169 N.Y.S. 751, 754-55 (N.Y. App. Div. 1918) (holding that a tenement house landlord may be found civilly liable for acts of prostitution committed in the tenement without his knowledge provided that it was not an isolated act).

444. *See, e.g.*, People *ex rel.* Eisen v. Flynn, 74 N.Y.S. 740, 741 (N.Y. Sup. Ct. 1902) (stating that the Tenement House Act meant "to protect honest and virtuous women and children who inhabit tenement houses from the intrusion of prostitutes, and [that] full enforcement should be given thereto"); *cf.* ROSEN, *supra* note 192, at 52-53 (noting that both male and female reformers linked eradication of prostitution to protecting the home, though often for different reasons).

445. *See* VEILLER, *supra* note 408, at 13-14 ("[H]ousing reform to be effective must in most cities concern itself not merely with the tenement house but with the private dwelling."); *see*

stigma associated with housing regulation.[446] Courts meanwhile seized on the ambiguity in the statutory definition of a "tenement house"[447] to exclude private dwellings from the Act's coverage.[448] In 1912, the New York Court of Appeals held that the Act did not apply to "apartment houses," as opposed to "tenement houses."[449] Moreover, regulatory inspections of private homes, unlike those of tenements, remained firmly within the protection of the Fourth Amendment's prohibition of warrantless searches.[450] Whereas a criminal search looked for concealed property, a housing or health inspection "look[ed] at property exposed to public view," which, at least in the public spaces of tenements, was generally accessible without a violation of Fourth Amendment rights.[451]

While housing inspections by health officials may have been a "time honored procedure,"[452] inspectors conducted relatively few of the "thousands upon thousands" of inspections within a private home.[453] At least through the first decades of the twentieth century, private homes remained constitutionally protected from routine housing and health inspections.[454] The sanctity of private homes

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also TRULL, *supra* note 401, at 111 (arguing that electrical inspections should, but do not, extend to private dwellings where they are most needed).

446. *See* VEILLER, *supra* note 408, at 13-14.

447. *See supra* note 393 and accompanying text.

448. *See* MCGOLDRICK ET AL., *supra* note 394, at 83.

449. *See* Grimmer v. Tenement House Dep't, 204 N.Y. 370 (1912).

450. *See generally* FREUND, *supra* note 418, at 42-43.

451. *Id.* at 42. The Supreme Court first considered the constitutionality of warrantless health inspections in *District of Columbia v. Little*, 339 U.S. 1 (1950). The United States Court of Appeals for the District of Columbia Circuit had held that such inspections violated the Fourth Amendment. *See* District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949) ("To say that a man suspected of a crime has a right to protection against search of his home without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity."); *see* Recent Cases, *Constitutional Law — Searches and Seizures — Inspection of Private Dwelling by Public Health Official Held Unreasonable Search under the Fourth Amendment*, 63 HARV. L. REV. 349, 350 (1949) (suggesting the broader inquiry of investigations by health inspectors may be more dangerous to privacy and security than a traditional search for evidence of a crime). The Court affirmed the appeals court's decision, but did so solely on the ground the statute prohibited warrantless public health inspections, and thus did not reach the constitutionality of such inspections. *See Little*, 339 U.S. at 6-7. The D.C Circuit's view was later rejected by the Supreme Court, when it held the warrant requirement did not include administrative inspections. *See* Frank v. Maryland, 359 U.S. 360 (1959); *infra* note 456. The Court later overturned *Frank*, holding administrative searches of homes were subject to the warrant requirement, but concluding that a more relaxed standard requiring less than probable cause was required for such searches. Camara v. Mun. Ct., 387 U.S. 523 (1967).

452. *Frank*, 359 U.S. at 370.

453. Comment, *supra* note 401, at 530 n.60.

454. *See* FREUND, *supra* note 418, at 43.

> [I]t would seem that administrative officers cannot be vested with general power to enter private premises at any time, except to abate actually existing public

would, however, change over the coming decades as such regulatory searches grew increasingly frequent[455] and came to be accepted by the courts.[456]

C. *Assessment of Tenement Housing Reform*

In certain respects, tenement housing reform was similar to other reforms of the period directed at the poor: inspectors were given broad powers of access without concern for the privacy of the purported beneficiaries, regulations were used as a vehicle for broader social change, and the approach of reformers reflected deeply rooted assumptions about class and race.

In several important respects tenement housing reform differed from its contemporary reforms in its conceptualization and treatment of the home. To begin with, tenement housing reformers emphasized adherence to formal procedures, such as sufficient notice and service of process in the event of a violation,[457] and to record-keeping, which became increasingly standardized.[458] In addition, tenement housing reformers often had a specific target. Rather than emphasizing the role of general structural forces to explain poverty, they tended to isolate a specific villain — the landlord or owner:

> The state has not only a right but a duty to perform and must say to private individuals: "Thus far you may go, but no farther. You shall not be permitted to build a house in which people ought not to live; you shall not be permitted to so mismanage

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> nuisances, and that every such inspection against the will of the owner should be based on judicial authority complying with the constitutional requirements with regard to searches.

Id.

455. *See Frank*, 359 U.S. at 372 n.16 (noting that cities increasingly authorized their officials to enter and inspect private homes for health code violations); *see also* Comment, *Health Inspection of Private Dwelling Without Search Warrant*, 17 U. CHI. L. REV. 733 (1950) (suggesting the infrequency with which health inspectors met opposition helps explain the lack of direct authority on this issue).

456. *See Frank*, 359 U.S. at 366-67 (holding that the Constitution's warrant requirement did not apply to health inspections of private dwellings; distinguishing such inspections from criminal searches). The Supreme Court determined that an orderly, afternoon visit by health inspectors, without power to force entry, "touch[es] at most upon the periphery of the important interests" embodied in the constitutional protection against unreasonable searches and seizures. *Id.* The Court subsequently overruled *Frank*, concluding the Constitution's warrant requirement applied to administrative searches of private premises, but also holding that less than probable cause needed to be shown. *See* Camara v. Mun. Ct., 387 U.S. 523 (1967).

457. *See* VEILLER, *supra* note 408, at 235-36.

458. *See* TRULL, *supra* note 401, at 39-40.

> your house that it is unhealthful or dangerous for people to live in it...."
> The state can most appropriately extend the strong arm of the law toward those weaker members of the community who are unable to protect themselves. It is clearly within its duties to protect the community to the fullest degree from the consequences of lack of foresight and from the willingness on the part of individuals to exploit their weaker brothers.[459]

In tenement housing reform, the main interference was not with the privacy of tenants, but rather with the property rights of landlords, who the government expected to bear the economic brunt of the new regulations.[460] Moreover, while reformers displayed a paternalistic sense of protecting helpless and passive tenants from exploitative landlords,[461] they also articulated a sharp critique of the unequal distribution of wealth and power in society.

Finally, although tenement housing reformers sacrificed privacy in the short-run, they sought to increase it in the end. For example, they sought to eliminate airshafts not only because they "convey[ed] of smells and noise," but also because they presented "one of the greatest elements in *destroying privacy* in the tenement house."[462] Through airshafts, one could both hear and see into other apartments in the tenement, which led to "grave immorality" in numerous instances.[463] Similarly, reformers instituted zoning laws and building codes that prohibited working-class families from sharing quarters.[464] As one commentator observed: "The housing reformer accepted the tenement as a fact of life only grudgingly and reluctantly. His ideal was the privacy of the detached single-family home, in contrast to the 'promiscuity in human beehives, rendering

459. LAWRENCE VEILLER, HOUSING REFORM 85-86 (1910), *quoted in* Gribetz & Grad, *supra* note 395, at 1262 n.31; *see also* Health Dep't v. Dassori, 47 N.Y.S. 641, 643 (N.Y. App. Div. 1897), *appeal dismissed*, 159 N.Y. 245 (1899) ("The condition of these houses arose not alone from the habits of the inmates, but principally and largely from the construction, plans and location of the buildings themselves.").

460. *See* Gilbert, *supra* note 403, at 450 (noting the cost for replacing school sinks alone was an estimated eight to nine million dollars).

461. *See* BREMNER, *supra* note 310, at 204 ("You are liable to arrest if you allow your stable to become filthy and a nuisance. The landlord may do pretty much what he pleases with his tenements.") (quoting a writer in *Scribner's Magazine*); Gribetz & Grad, *supra* note 395, at 1262.

462. 1 THE TENEMENT HOUSE PROBLEM 14 (Robert W. De Forest & Lawrence Veiller eds., 1970).

463. *Id.*

464. *See* COONTZ, *supra* note 193, at 136.

independence and isolation of the family impossible.'"[465] Or, as a reformer envisioned, "[t]here must be a separate house, and as far as possible, separate rooms, so that at an early period of life the idea of rights to property, the right to things, to privacy, may be instilled."[466]

One may also explain the difference between tenement housing reform and other reforms, such as child protection and mothers' pensions, partly in terms of gender. The object of tenement housing reform was not single-mothers, as in the case of mothers' pensions programs, but generally two-parent families because sub-standard housing conditions threatened their privacy.[467] Indeed, in many respects the tenement was the antithesis of the idealized home of the period: the planned suburb and garden city.[468] Reformers stressed the importance of the whole tenement neighborhood, advocating the construction of parks and playgrounds as well as the improvement of schools.[469]

Reformers ultimately envisioned the movement of the urban masses from crowded cities to the country, where planned suburbs would have a transformative social effect by "reestablishing the primary group controls of the village or small town which had disintegrated in the modern city."[470] In the process, the state would magically transfer the values of middle-class Americans to the teeming masses of immigrants and workers presently crowded into the nation's cities.[471] Tenement housing reform did not eradicate the slum or provide decent homes to all who needed them, but it nonetheless had a significant impact on housing construction and conditions.[472] While its means were intrusive, its approach paternalistic, and its vision largely nostalgic, tenement housing reform

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465. LUBOVE, *supra* note 398, at 110 (citation omitted); *see also* Gilbert, *supra* note 403, at 449 ("[T]he thrust of the [tenement housing] reforms was to discourage the continuation of the 'tenement evil' and to encourage more expensive apartment buildings, and, ideally, single-family homes."); JACOB RIIS, THE BATTLE WITH THE SLUM 85 (1902) ("The double-decker [house] is doomed, and the twenty-five-foot-lot has had its day.... We are at last in a fair way to make the slum unprofitable, and that is the only way to make it go."), *quoted in* Gilbert, *supra* note 403, at 450.

466. COONTZ, *supra* note 193, at 135-36 (quoting Charles Neill, Commissioner of Labor, 1905).

467. *See, e.g.*, Adler v. Deegan, 251 N.Y. 467, 484 (1929) (Cardozo, J.) (upholding the constitutionality of the Multiple Dwelling Act; stating that eradicating slums is the duty of the whole state, and has as its end the "quality of men and women").

468. *See generally* VEILLER, *supra* note 408, at 220-23.

469. *See* LUBOVE, *supra* note 398, at 68-69.

470. *Id.* at 252.

471. *See id.*

472. *See* Gilbert, *supra* note 403, at 494-95.

ultimately strived to increase the privacy of poor families — headed, it was generally assumed, by men.

V. CONCLUSION

As this Article makes clear, the sanctity of the home is deeply embedded in American law and tied to beliefs about private property, privacy, and limits on government power. During the late nineteenth and early twentieth centuries, the home became the center of important legal and political debates and the subject of increasing regulation. How courts, public officials, and reformers treated the home turned partly on whose home the party supervised or investigated. While the home largely remained a man's castle in areas affecting traditional rights and privileges, it provided less security to those singled out for social reform, such as the poor, immigrants, and women, particularly single mothers.

Throughout the nineteenth century, severe criminal sanctions for offenses like burglary and the availability of civil remedies for trespass helped protect the home from unwanted intrusion. Prosecutors and state courts resisted a tough approach to marital violence because they believed intervening in domestic disputes would threaten the ideals of domestic privacy and tranquility. Similarly, courts barred interspousal tort suits and solidified spousal evidentiary privileges to secure the peace of the household and shield it from public scandal. Such efforts to safeguard the home against outside interference supported the interests and concerns of middle- and upper-class men, as matters of domestic discord were left to be resolved, as they traditionally had been, by the autonomous, patriarchal institution of "family government," and not in a public forum.

In the area of federal crimes, the growing power of law enforcement in business regulation and later in Prohibition cases threatened the home's privileged status and sparked an explosion of constitutional litigation concerning the boundaries of lawful searches and seizures. Courts in turn secured the protection of the home by making sweeping and far-reaching proclamations about the home's sanctity while linking the home with privacy in a series of landmark constitutional criminal procedure cases beginning in the 1880s.

A much different picture of the home emerged in connection with important social reforms of the period. The dramatic changes brought by urbanization, immigration, and industrialization led to a wave of reforms that sought to address social problems like crime, poverty, disease, and family disintegration through intensive

regulation of the home. The child protection movement, mothers' pensions programs, and tenement housing reform brought unprecedented intervention into the homes and lives of society's more marginal members, such as the poor, immigrants, and single mothers. There, the response to social change was not to seek refuge in the physical boundaries of the home and moral security of domestic privacy, but rather to expand government power and renounce traditional values of property and family autonomy.

In the child protection context, local officials, social workers, and private agencies like the various SPCCs intervened directly in homes to investigate allegations of abuse and neglect by parents. For these parents, many of whom were immigrants, poverty itself was often a basis for police-like investigations of their homes and for the eventual removal of their children to institutions. The growing acceptance of the idea of separate spheres, which linked women to children and the home, and made them the guarantors of domestic harmony, meant that women, particularly single mothers, were often the ones deemed morally unfit to raise their children. Even after the emphasis changed during the first decades of the twentieth century from breaking up to preserving families, the homes and private lives of poor families continued to be subjected to close scrutiny.

The administration of mothers' pensions likewise reflected significant interference in the homes and lives of the women the programs intended to assist. Single mothers endured invasive, highly subjective, and often humiliating investigations that sought to determine their financial and moral fitness and uncover any misdeed, ranging from bad hygiene to having sexual relations with men. The experience of mothers' pensions programs shows how prevailing views about proper gender roles and financial dependency on the public combined to deny single mothers' any claim to privacy. Mothers' pensions also foreshadow the role of suitable home requirements and racially discriminatory policies in subsequent federal welfare programs.

Tenement housing reform further illustrates how well-intentioned reforms ignored or disregarded concerns for the privacy of the intended beneficiaries and exhibited moral assumptions based on class and race. Here, however, the interference was more with property than privacy, as reformers forced owners to make changes to the squalid and often unsafe conditions in tenements. Their goal was to increase privacy in the end, and tenement housing reform served as a step towards the ideal of the detached single-family home. In addition, unlike the child protection movement and

mothers' pensions programs, class, not gender, predominantly influenced tenement housing reform. It ultimately sought to square the circle between closely regulating the home and realizing the vision of the home as an entity unto itself, the virtually impregnable castle romanticized in other areas of the law.