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Property, Privacy and Power: Rethinking the Fourth Amendment in the Wake of *U.S. v. Jones*

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PROPERTY, PRIVACY AND POWER: RETHINKING THE FOURTH AMENDMENT IN THE WAKE OF *U.S. V. JONES*

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ABSTRACT

This Article seeks to uncover invisible gender, race, and class biases driving modern Fourth Amendment discourse. Unlike traditional theories, which tend to view the Fourth Amendment through the lens of either privacy *or* property, *this Article advances a theory focusing on the real issues*

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of power and control that fuel Fourth Amendment jurisprudence. Specifically, the Article exposes the private/public and home/market dichotomies that are central to the Supreme Court rhetoric as arbitrary and artificial. It finds that current Fourth Amendment discourse protects the interest of white, privileged men and perpetuates male ideology as well as male domination. That focus leaves women, people of color, and those less privileged, unprotected. In opposition to that discourse, this Article offers a re-reading of the historical sources of the Fourth Amendment in a way that re-emphasizes the amendment's core: curbing subordinating power. It broadens the traditional focus on power abuses of one's privacy or property and arguse that we need to conduct Fourth Amendment inquiries through a prism of multiple, web-like hierarchies. To that end, the Article explores several possibilities of modeling an alternative, feminist Fourth Amendment, including articulating the Fourth Amendment around an anti-subordination principle, employing a multi-focal approach to Fourth Amendment adjudication, and infusing search and seizure law with multiple perspectives in the form of personal narratives.

I. INTRODUCTION

In its landmark 2012 decision *United States v. Jones,*[1] regarding the government's use of a Global Positioning Satellite ("GPS") tracking device to monitor the movement of a private vehicle, the Supreme Court put into question close to five decades of Fourth Amendment jurisprudence revolving around privacy interests and resurrected a seemingly abandoned property-based framework. While scholars no doubt will engage in much discussion on the meaning of the *Jones* decision and the future of search and seizure law, this article suggests that we should take the opportunity to rethink Fourth Amendment jurisprudence as a whole. Rather than viewing the Fourth Amendment as intended to specifically protect either privacy or private property interests, we should focus on the real issues of power and control that fuel searches and seizures.

The Fourth Amendment and its analogs in state constitutions have spawned a huge and complex body of case law, described as "a labyrinth of rules built upon a series of contradictory and confusing rationalizations and distinctions."[2] As recent events demonstrate, the battle over the meaning of the Fourth Amendment has only intensified, touching all our lives. The question is whether there is a new way to look at the Fourth Amendment—a way out of its

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[1] 132 S. Ct. 945 (2012).

[2] State v. Hygh, 711 P.2d 264, 271-72 (Utah 1985) (Zimmerman, J., concurring). Even Professor Daniel Solove, a leading Fourth Amendment scholar, who for a long time believed Fourth Amendment jurisprudence can be rationalized with a nuanced technologically-adept understanding of privacy, has recently declared he was wrong and called for abandoning the reasonable expectations of privacy text altogether. *See* Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1512 (2010).

current entangled state. I have previously suggested that a critical reexamination of the Fourth Amendment and its jurisprudence through feminist lenses can shed new light and add to its understanding.[3]

While there is no one theory that unifies feminist legal scholars, and while feminist theories join other critical schools of thought in the struggle against social and legal structures of subordination and alienation, this Article suggets that certain facets of feminist epistemology and feminist methodology are particularly suited to advance that inquiry.[4] In general, feminist jurisprudence is

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[3] *See, e.g.*, Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 155 (2008). Generally, there has not been a fundamental and comprehensive feminist challenge to the Fourth Amendment. The few examples of a feminist critique of the Fourth Amendment include Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 453-54 (1992) (arguing that the Fourth Amendment neither gives women security in their homes from their husbands nor ensures that the government treat marital rape like other rapes and assaults, as part of a more general argument that the Bill of Rights does less to solve the problems of women and non-propertied men than to solve the problems of men of property, especially white men of property); Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1596-1600 (1987) (advocating a relational approach to the Fourth Amendment doctrines of "standing" and "third-party consent searches"); Rosa Ehrenreich, *Privacy and Power*, 89 GEO. L.J. 2047 (2001) (arguing that e-mail monitoring in the workplace or disclosure of medical information should be regarded as issues of power and control rather than privacy); Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861 (2001) [hereinafter Miller, *Cross-Gender Prison Searches*]; Teresa A. Miller, *Sex & Surveillance: Gender, Privacy, and the Sexualization of Power in Prison*, 10 GEO. MASON U. C.R. L.J. 291 (2000) [hereinafter Miller, *Sex and Surveillance*].

There is some critical race and class oriented scholarship that can significantly inform a feminist exploration of the Fourth Amendment. *See, e.g.*, Judith G. Greenberg & Robert V. Ward, *Teaching Race and the Law Through Narrative*, 30 WAKE FOREST L. REV. 323 (1995) (using narratives to question and contextualize color-blind reasonableness in police-minority encounters); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79 (1998) (advocating the elimination of consent searches during a traffic stop in light of the inherent power disparities in police-initiated encounters, especially concerning minority drivers); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271; David D. Troutt, Screws, Koon, *and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999); Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 HOWARD L.J. 239 (1993).

[4] My feminist critique of the Fourth Amendment, however, is not limited to exposing the implications of search and seizure law for women as women. It is an integral part of my feminist commitment to address racism, class-bias, heterosexism, and other forms of oppression as well as male domination. I see the multi-dimensional webs of power and powerlessness that connect all forms of social and legal subordination, and I believe that only a femi-

concerned with the gendered underpinnings of legal doctrines and legal reasoning, with the male standard implicit in the norms that are central to legal reasoning, and with the epistemological standpoint from which the law operates, i.e., its purported "point-of-viewlessness."[5] Following feminist inquiries in other areas of the law, this Article seeks to flesh out the invisible biases that underlie the facially objective and neutral legal standards of search and seizure law. In particular, this Article argues that current Fourth Amendment jurisprudence embodies traditionally male values, and specifically reflects a male-white-elitist perspective. Such a male perspective is evident in the formulation of Fourth Amendment jurisprudence around several meta-narratives (pervasively utilized in many other areas of the law as well) including those of reasonableness and objectivity,[6] of the reasonable person,[7] and of free choice and consent.[8]

Such a male-white-elitist perspective is first and foremost evident in the formulation of Fourth Amendment scope and discourse around *privacy* and *private property*. As much controversy as the application of the "expectations of privacy" standard has generated inside and outside the Court, the formulation of Fourth Amendment analysis in terms of privacy interests remained largely uncontested in the cases that followed *Katz v. United States*.[9] Even the *Jones*

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nist theory that aims to acknowledge and dismantle these multiple web-like structures of domination can improve women's lives and the lives of other oppressed members of society.

[5] Dana Raigrodski, *No Reason for the Reasonable Person: Feminist Lessons from the Fourth Amendment*, 1 DISORIENT: CRITICAL LEGAL J. PAC. NORTHWEST (2009), http://students.washington.edu/dislaw/index.php?issue=1&mode=article&section=all&article_id=6591. The phrase "point-of-viewlessness" was coined by Catharine MacKinnon. *See, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989). Such unmasking of male norms at the core of purportedly gender-neutral standards is the focus of most of the feminist scholarship reviewed and advanced in this article.

[6] *See* Raigrodski, *supra* note 3, at 156-57.

[7] *See* Raigrodski, *supra* note 5.

[8] *See* Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L.J. 37 (2005).

[9] *See* Katz v. United States, 389 U.S. 347 (1967). The dominant narrative of privacy and the public-private divide in search and seizure law resurfaces in most of the Supreme Court's Fourth Amendment cases, and determines the course of its jurisprudence. *See also, e.g.*, Cardwell v. Lewis, 417 U.S. 583, 589 (1974) ("[T]he primary object of the Fourth Amendment . . . [is] the protection of privacy."); *id.* at 591 ("[I]nsofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry."). *See also* New Jersey v. T.L.O., 469 U.S. 325, 335, 361-62 (1985); Oliver v. United States, 466 U.S. 170, 177 (1984); *id.* at 187 (Marshall, J., dissenting); United States v. Knotts, 460 U.S. 276, 280–81 (1983); United States v. Place, 462 U.S. 696, 706-07 (1983); Rakas v. Illinois, 439 U.S. 128, 160 (1978); Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978); United States v. Chadwick, 433 U.S. 1, 7 (1977). On the other hand, several prominent Fourth Amendment scholars have criticized the Court's focus on privacy interests as the essence of Fourth Amendment protections. *See* Part III *infra*.

decision continues to tie together property and privacy interests.[10] To the extent that the dominant narrative of the Court's Fourth Amendment jurisprudence has been framed in terms of privacy and the public-private divide, it is ripe for feminist critique of privacy in general, and the public-private, home-market dichotomies in particular.

Parts Two and Three address the public-private discourse in search and seizure law, as well as the home-market and intimate-commercial dichotomies that animate it. These parts examine the gap between the Court's rhetoric, which values the private sphere, and its practice, which narrowly construes the private sphere and limits the protections of the Fourth Amendment. Consequently, this Article argues that current Fourth Amendment discourse and the public-private dichotomy are construed to protect the interests of white, privileged men and to perpetuate male ideology and domination.

Part Four begins examining Fourth Amendment jurisprudence through the lens of power hierarchies and oppression. Rather than viewing the protection of private property and privacy interests as the end-goal of the Fourth Amendment, this Article suggests that both are mere proxies to the core of the Fourth Amendment. This Article offers a feminist re-reading of the historical sources of the Fourth Amendment to argue that the focus on manifestations of power in the form of privacy or property violations as the paradigm of the Fourth Amendment represents the lived experiences and interests of a particular group of people—white, privileged men. By perpetuating a male-centered perspective as the norm, that focus leaves women, people of color, and those less privileged unprotected. Instead of a partial and elitist privacy and property discourse, this Article argues, we need to conduct our Fourth Amendment inquiries through a prism of multiple, web-like power hierarchies.

Finally, in Part Five, this Article proposes an alternative feminist Fourth Amendment—one that will actually keep its promise to provide protection and security to all of us. The proposal includes adopting a constantly shifting, multi-perspectival jurisprudence—both as a matter of substance and as a matter of form. Primarily, this Article re-articulates Fourth Amendment jurisprudence around an anti-subordination principle. It also calls for employing a multi-focal approach to Fourth Amendment adjudication and discourse, an approach that transcends our current way of determining a constitutional violation and of determining whose voices should be heard and given preference. Methodologically, it suggests we infuse search and seizure law with multiple perspectives of Fourth Amendment scenarios in the form of personal narratives, so as to expand our bases of knowledge and understanding of multiple, 'other' perspectives. Such a commitment to anti-subordination and empowerment is especially suited for the newly envisioned power-centered Fourth Amendment.

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[10] *See infra* Part II.A; United States v. Jones, 132 S. Ct. 945, 945-54 (2012).

II. The Multi-Layered Meanings of Privacy and the Public-Private Divide in Fourth Amendment Law

The concept of privacy and the public-private distinction within Fourth Amendment jurisprudence resonate in multiple dimensions. This could be expected, considering the multi-layered and complex construction of *privacy* in law and society in general. This is especially so, I would argue, in light of the ideology inherently embedded in the notion of *privacy* and the public-private dichotomy. "Privacy is not a coherent concept and it does not lead to any indisputable policy choices,"[11] writes Frances Olsen. Elsewhere she explains that "'[p]rivate' is not a natural attribute nor descriptive in a factual sense, but rather is a political and contestable designation;"[12] a normative designation of how things should be treated.[13] The Court's Fourth Amendment jurisprudence illustrates as much.

A. *Protecting the Private Sphere—The Paradigm of the "Home" and Private Property*

The Fourth Amendment articulates the right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."[14] The text evidently reflects a close connection to private property in enumerating houses, papers and effects,[15] and, consequently, until the second half of the twentieth century Fourth Amendment cases took primarily a property-based, common-law trespass approach.[16] At the same time, the recognition that something else is at stake beyond the encroachment on private property rights surfaced early on.

In his oft-quoted dissent in *Olmstead v. United States*,[17] Justice Brandeis concluded that

> [t]he makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable

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[11] Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J.L. Reform 835, 862 n.73 (1985).

[12] Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 Const. Comment. 319, 319 (1993).

[13] Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 Const. Comment. 319, 319 n.2 (1993); *see also* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 Stan. L. Rev. 1, 4 (1992) ("[T]he terms 'private' and 'public' occur in various senses, which are distinct though interrelated . . . these terms typically have both descriptive and normative meanings.").

[14] U.S. Const. amend. IV.

[15] *Jones*, 132 S. Ct. at 949 (relying on Lord Camden's opinion in Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.)).

[16] *Id.*

[17] 277 U.S. 438 (1928).

> intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[18]

Similarly, in *Wolf v. Colorado*[19] the Court had stated that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is at the core of the Fourth Amendment,"[20] but it was not until *Katz v. United States*[21] that privacy directly shaped Fourth Amendment jurisprudence by reorienting the constitutional inquiry around a person's "reasonable expectation of privacy."[22] Recently, the Court essentially reaffirmed the *Katz* doctrine in *United States v. Jones*, stating that we must "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[23]

Central to its reconstruction of the Fourth Amendment's core meaning in *Katz* was the Court's declaration that "the Fourth Amendment protects people, not places."[24] This idea suggested that the Court would abandon its former property-based standard of trespass and physical intrusion. However, as the Court held in *Jones*,[25] *Katz* did not repudiate the historical trespass framework; it merely established that it is not the exclusive measure of Fourth Amendment violations.[26] In fact, while the Court's cases over the years seem to suggest the primacy of the privacy-based analysis in lieu of property-based analysis, the determination of privacy interests in post-*Katz* cases continued to be inextricably bound up with private property and particular places.[27] As Justice Harlan noted, answering the question of what protection the Fourth Amendment af-

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[18] *Id.* at 478 (Brandeis, J., dissenting).

[19] 338 U.S. 25 (1949).

[20] *Wolf*, 338 U.S. at 27. *rev'd on other grounds*, 367 U.S. 643 (1961); *see also* Camara v. Mun. Court, 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."); Schmerber v. California, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

[21] 389 U.S. 347, 351-53 (1967); *see also* Warden v. Hayden, 387 U.S. 294, 304 (1967) ("We have recognized that the principal object of the Fourth Amendment is the protection of privacy. . . .").

[22] *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

[23] United States v. Jones, 132 S. Ct. 945, 950 (2012) (citing Kyllo v. United States, 533 U.S. 27, 34 (2001)).

[24] *Katz*, 389 U.S. at 351.

[25] 132 S. Ct. 945 (2012).

[26] *Jones*, 132 S. Ct. at 950-51. Hence, the Court emphasized, "the *Katz* 'reasonable-expectation-of-privacy' test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 952 (emphasis in the original).

[27] *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 88 (1998) ("[T]he extent to which the Fourth Amendment protects people may depend upon where those people are."); California v. Carney, 471 U.S. 386, 395 (1985) (Stevens, J., dissenting) ("The character of 'the place to be searched' plays an important role in Fourth Amendment analysis.").

fords generally "requires reference to a 'place.'"[28] Paradigmatically, that place is one's home.

The sanctity of the home and its prototypical place at the center of the private sphere is uncontroversial. Thus, the Court early on declared that 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,"[29] and that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[30] Similarly, in *Payton v. New York*,[31] the Court stated that "[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment."[32] The Court explained that

> [t]he Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms. . . . In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.[33]

In sum, the home stands as "the most essential bastion of privacy recognized by the law."[34] Hence, under the *Katz* standard, one's expectation of privacy in

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[28] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[29] Silverman v. United States, 365 U.S. 505, 511 (1961) (citing Entick v. Carrington, (1765) 19 St. Tr. 1029, 1066 (K.B.)); Boyd v. United States, 116 U.S. 616, 626-30); *cited with approval in, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 192 (1990) (Marshall, J., dissenting), and more recently in Kyllo v. United States, 533 U.S. 27, 31 (2001).

[30] United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972); *see also Rodriguez*, 497 U.S. at 191 (Marshall, J., dissenting).

[31] 445 U.S. 573 (1980).

[32] *Id.* at 587 (citation omitted).

[33] *Id.* at 589-90.

[34] Minnesota v. Carter, 525 U.S. 83, 106 (1998) (Ginsburg, J., dissenting); *see also id.* at 99-100 (Kennedy, J., concurring) ("[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people. . . . The axiom that a man's home is his castle . . . has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition."); Griffin v. Wisconsin, 483 U.S. 868, 883 (1987) (Blackmun, J., dissenting) ("The search in this case was conducted in petitioner's *home*, the place that traditionally has been regarded as the center of a person's private life, the bastion in which one has a legitimate expectation of privacy protected by the Fourth Amendment."); Oliver v. United States, 466 U.S. 170, 178 (1984) ("The Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the republic.'" (quoting *Payton*, 445 U.S. at 601); Welsh v. Wisconsin, 466

one's home is generally *per se* reasonable and deserves the most protection. As the Court noted in *United States v. Karo*,[35] "private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable."[36]

Another *place* often referred to in the Court's jurisprudence in determining the extent of privacy protected under the Fourth Amendment is the "curtilage" of the home. However, the protection of the curtilage does not exist independently from the protection afforded to the home, but is rather inextricably tied to it and stems from the similarity of the curtilage to the paradigm of the home. Hence, since "[t]he curtilage is an area to which the private activities of the home extend,"[37] it follows that "the protection afforded to it is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[38]

To embrace the private sphere under the protective umbrella of the Fourth Amendment is, consequently, to exclude that which is *public* from its protection. Therefore, "[w]hat a person knowingly exposes to the public, even in his

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U.S. 740, 754 (1984) ("The Supreme Court of Wisconsin let stand a warrantless, nighttime entry into the petitioner's home to arrest him for a civil traffic offense. Such an arrest, however, is clearly prohibited by the special protection afforded the individual in his home by the Fourth Amendment."); United States v. Knotts, 460 U.S. 276, 282 (1983) ("The right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance.") (citing Johnson v. United States, 333 U.S. 10, 13-14 (1948)); *see also* Hudson v. Michigan, 547 U.S. 586, 621 (2006) (citing Georgia v. Randolph, 547 U.S. 103, 115 (2006)); Georgia v. Randolph, 547 U.S. 103, 115 (2006) (citing *Carter*, 525 U.S. at 99 (Kennedy, J., concurring)); Kentucky v. King, 131 S. Ct. 1849, 1865 (2011) (Ginsburg, J., dissenting).

[35] 468 U.S. 705 (1984).

[36] *Id.* at 714; *see also* Gooding v. United States, 416 U.S. 430, 462 (1974) (Harlan, J., concurring) ("[T]here is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night.").

As I will demonstrate later in discussing the Court's treatment of a mobile home, the Court's view of what is one's "home" may also prove problematic. While the Supreme Court has yet to hear a case regarding the applicability of the Fourth Amendment to residents of homeless shelters, several lower courts have struggled with the applicability of the privacy and home-public space analysis to homeless shelters. *See* Steven Morrison, *The Fourth Amendment Applicability to Residents of Homeless Shelters*, 32 HAMLINE L. REV. 319 (2009). The article argues that while residents of homeless shelters have a certain level of privacy in these shelters as "homes," the unique structure of most shelters requires a different approach—one based on the balancing framework of *Terry v. Ohio*.

[37] Florida v. Riley, 488 U.S. 445, 452-53 (1988) (O'Connor, J., concurring).

[38] California v. Ciraolo, 476 U.S. 207, 212-13 (1986).

own home or office, is not a subject of Fourth Amendment protection."[39] As with the physical embodiment of the private sphere in the home and curtilage, so does the public sphere find its physical manifestation in the Court's "open fields" and "plain view" doctrines. And in the same way that the private and the public are dichotomously paired, so too are open fields and things in plain view treated as the opposition of the home. In *Hester v. United States*,[40] for example, the Court held that open fields are not protected by the Fourth Amendment since "distinction between the latter and the house is as old as the common law."[41] Justice Scalia, writing for the majority in *Jones*, similarly noted that an open field, unlike the curtilage of a home, is not one of the protected areas enumerated in the Fourth amendment.[42]

The designation of other places or objects as *private* or *public*, and the extent of Fourth Amendment protection consequently afforded, has been accordingly determined by measuring them against the paradigmatic dichotomy of the *private* home and curtilage versus the *public* open fields and plain view. Hence, since a telephone booth resembles a home rather than an open field,[43] it is designated to the private sphere. On the other hand, garbage bags left for collection on the public street outside the curtilage of the home,[44] or open areas of an industrial plant complex,[45] fall within the public sphere and are not accorded protection.

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[39] Katz v. United States, 389 U.S. 347, 351 (1967); *see also id.* at 361 (Harlan, J., concurring) ("[A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.").

[40] 265 U.S. 57 (1924).

[41] *Id.* at 59; *see also* Oliver v. United States, 466 U.S. 170, 180 (1984) ("[T]he common law distinguished 'open fields' from the 'curtilage,' the land immediately surrounding and associated with the home. . . . The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home.").

[42] United States v. Jones, 132 S. Ct. 945, 953 (2012).

[43] *Katz*, 389 U.S. at 360 (Harlan, J. concurring).

[44] California v. Greenwood, 486 U.S. 35, 37, 40-41 (1988) ("The issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude . . . that it does not. . . . It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. . . . Accordingly, having deposited their garbage 'in an area particularly suited for public inspection,' . . . respondents could have had no reasonable expectation of privacy. . . .") (citations omitted).

[45] Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986) ("We conclude that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the 'curtilage' of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace. . . .") (footnote omitted).

The classification of motor vehicles for Fourth Amendment purposes especially occupies the Court and demonstrates the limits of both the privacy-based analysis and the property-based analysis. Until recently, the Court employed only *Katz*'s "reasonable expectation of privacy" analysis to effectively allow the government to freely monitor the movement of private citizens. In *Cardwell v. Lewis*,[46] the Court held that a person has a lesser expectation of privacy in a motor vehicle because "it seldom serves as one's residence or as the repository of personal effects."[47] A car cannot escape public scrutiny; it travels on public roads where both its occupants and its contents are in plain view.[48] In *Rakas v. Illinois*,[49] the Court reaffirmed the idea that one's expectation of privacy in an automobile is significantly different from the traditional expectation of privacy and freedom in a residence, emphasizing that automobiles operate on public streets, are serviced and usually parked in public places, and their interiors are highly visible from outside the vehicle.[50] Consequently, one has no expectation of privacy whatsoever in the car's external Vehicle Identification Number ("VIN")[51] or in one's movements on public roads from one place to another, thus allowing the government to track the location of individuals by placing beepers in containers the individuals later placed in their cars.[52]

But when the government then took the liberty and for nearly a month tracked the comings and goings of Antoine Jones, a suspected drug dealer, by attaching a GPS tracking device to the underside of his vehicle, the Supreme Court decided to finally constrain the government's surveillance powers.[53] Unable to regulate the government's conduct under its established privacy analysis, the Court resorted to the long-disfavored, property-based trespass analysis and held that a Fourth Amendment search did occur when the government physically intruded on protected (enumerated) private property.[54] As the concurring judges pointed out, however, the majority's property-based analysis is less than satisfactory[55] and, this Article argues, not much better than its priva-

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[46] 417 U.S. 583 (1974).

[47] *Id.* at 590.

[48] *Id.* at 590; *aff'd*, United States v. Knotts, 460 U.S. 276, 281 (1983); Wyoming v. Houghton, 526 U.S. 295, 303 (1999); New York v. Class, 475 U.S. 106, 112-13 (1986).

[49] 439 U.S. 128 (1978).

[50] *Id.* at 153-54. *See also* Virginia v. Harris, 130 S. Ct. 10, 12 (2009) (Roberts, J., dissenting).

[51] *Class*, 475 U.S. at 114 ("[I]t is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile. The VIN's mandated visibility makes it more similar to the exterior of the car than to the trunk or glove compartment. The exterior of the car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.'").

[52] *Knotts*, 460 U.S. at 281-82; United States v. Karo, 468 U.S. 705, 712-13 (1984).

[53] *See* United States v. Jones, 132 S. Ct. 945, 948 (2012).

[54] *Id.* at 949, 952.

[55] *Id.* at 955 (Sotomayor J, concurring) and 958 (Alito J., concurring).

cy-based analysis in regulating government conduct.

The *Jones* scenario, this Article suggests, caused unease amongst the Justices and beckoned visions of future governmental abuse of its unabridged discretion to monitor the movement and location of any citizen using suspicion-less dragnet operations and novel surveillance technologies. However, rather than focusing on curbing police power as the core of the Fourth Amendment,[56] the Court struggles to maintain its focus on privacy and property interests.

B. *Intimacy and the Family-Market Dichotomy*

Of course, *privacy* and the *private sphere* encompass much more than mere physical or geographical zones of privacy. More than anything, privacy connotes emotional, mental, and physical intimacy and seclusion; the private sphere is accordingly associated with family life and a place of retreat from the harsh public sphere. As the Court observed in *Silverman v. United States*, "[a] sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."[57] In contrast, the *public sphere* has come to be identified with the marketplace, and with commercial rather than personal and intimate relationships and activities. These dichotomous notions of the market and the workplace versus the intimate home and the family play a central role in the Court's Fourth Amendment "expectation of privacy" analysis. Thus, time and again the Court has held that expectations of privacy in commercial premises or in one's workplace differ from, and are far less than, one's expectations of privacy in one's home.[58] Privacy, home, and the family are closely intertwined with intimacy, and the Court focuses on intimacy as a particular distinguishing

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[56] *See infra* Part IV.

[57] Silverman v. United States, 365 U.S. 505, 511 n.4 (1961) (citation omitted).

[58] *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 90 (1998) ("Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. 'An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home.'" (quoting New York v. Burger, 482 U.S. 691, 700 (1987))); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) ("[T]he privacy interests of government employees in their place of work . . . are far less than those found at home or in some other contexts."); City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (following *Ortega* and assuming employee had limited expectation of privacy in text messages sent on employer-issued pager); Donovan v. Dewey, 452 U.S. 594, 598-99 (1981) ("The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home. . . ."); Lewis v. United States, 385 U.S. 206, 211 (1966) (holding that while a private home is normally "accorded the full range of Fourth Amendment protections, . . . [where a] home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street.").

aspect of the private sphere that warrants special protection from governmental intrusion. For example, in *Dow Chemical Co. v. United States*,[59] the Court concluded that "[t]he intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas . . . of a manufacturing plant,"[60] despite Dow's elaborate 24/7 security around the perimeter of the complex to prevent ground-level public views of these areas and its efforts to preclude low-level flights by aircraft over the facility. Likewise, in *Oliver v. United States*,[61] the majority focused on the fact that "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference. . . ."[62]

In contrast, Justice Marshall's focus on intimate activity led him to characterize privately owned secluded open woods and fields as part of the protected private sphere.[63] Similarly, in *California v. Greenwood*,[64] he joined Justice Brennan in criticizing the majority for focusing on the location of trash bags on the public street and their *exposure* for prying eyes, rather than on their highly intimate and personal content. The *Greenwood* dissent emphasized that a trash bag

> "is a common repository for one's personal effects" and . . . is "therefore . . . inevitably associated with the expectation of privacy." . . . A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" which the Fourth Amendment is designed to protect.[65]

While the Justices often disagree about the extent of intimacy involved in a particular case, they do agree on the appropriateness of intimacy as a constitu-

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[59] 476 U.S. 227 (1986).

[60] *Id.* at 236.

[61] 466 U.S. 170 (1984).

[62] *Id.* at 179.

[63] *Id.* at 192 (Marshall, J., dissenting) ("Privately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy. Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor.") (footnote omitted).

[64] 486 U.S. 35 (1988).

[65] *Id.* at 50-51 (Brennan, J., dissenting) (citations omitted).

tionally relevant, even central factor.[66] For example, in *Wilson v. Layne*,[67] a case dealing with media presence during the execution of an arrest warrant in petitioners' home, the privacy and intimacy associated with the home are explicitly relevant to the Court's conclusion that the media's presence in this case violated the Fourth Amendment.[68] Furthermore, beyond the physical boundaries of the home, intimacy is even more so intertwined with one's "effects" and "persons." On several occasions the Court declared that purses are special containers because they are typically repositories of highly personal items and inevitably associated with an expectation of privacy.[69] In another frequently litigated area—the testing of urine samples for drugs—the Court reiterated the extremely private nature of excretory functions.[70]

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[66] A lone voice of criticism of the Court's emphasis on intimacy as deserving special protections by the Fourth Amendment is found in Justice Marshall's dissenting opinion in *Florida v. Riley*:

> Perhaps the most remarkable passage in the plurality opinion is its suggestion that the case might be a different one had any "intimate details connected with the use of the home or curtilage [been] observed." What, one wonders, is meant by "intimate details"? If the police had observed Riley embracing his wife in the backyard greenhouse, would we then say that his reasonable expectation of privacy had been infringed? Where in the Fourth Amendment or in our cases is there any warrant for imposing a requirement that the activity observed must be "intimate" in order to be protected by the Constitution?

488 U.S. 445, 463 (1988) (Brennan, J., dissenting) (citation omitted).

[67] 526 U.S. 603 (1999).

[68] *Id.* at 614. In reviewing the facts of the case, the Court particularly notes that the officers and the media entered the house in the early morning hours, when petitioners were still in bed, Charles Wilson thereafter confronting the police dressed only in a pair of briefs, and Geraldine Wilson next entering the living room wearing only a nightgown. *Id.* at 607.

[69] *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 308 (1999) (Breyer, J., concurring) ("Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times. So I am tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both."); New Jersey v. T.L.O., 469 U.S. 325, 355 n.1 (1985) (Brennan, J., concurring in part and dissenting in part) ("A purse typically contains items of highly personal nature. Especially for shy or sensitive adolescents, it could prove extremely embarrassing for a teacher or principal to rummage through its contents, which could include notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene."); *id.* at 375 (Stevens, J., concurring and dissenting) ("The search of a young woman's purse by a school administrator is a serious invasion of her legitimate expectations of privacy. A purse is a common repository for one's personal effects and therefore is inevitably associated with the expectation of privacy.") (citing Arkansas v. Sanders, 442 U.S. 753, 762 (1979)).

[70] *See, e.g.*, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 617 (1989) ("There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation." (citing Nat'l Treasury Employees Union v. Von

Similarly, in a decision concerning a 'strip search' of a 13-year-old female student by two school officials on suspicion that she brought forbidden prescription and over-the-counter medications to school,[71] both the majority and the minority opinions (with the exception of Justice Thomas) emphasized the patent intrusiveness into the privacy of the student by requiring her to pull her bra and underpants away from her body, thus exposing her breasts and pelvic area to some degree.[72] Consequently, the Justices held the search unreasonable and in violation of the Fourth Amendment, but disagreed on whether to extend qualified immunity to the school officials in the § 1983 suit.[73] The discussion surrounding the issue of qualified immunity, this Article will argue later,[74] sheds light on the real issue in this case: unbridled discretion and abuse of authority rather than intrusion of one's privacy or proprietary interests.

C. *Constructing Privacy—Conflating the Dichotomies*

The Court's cases reveal a multilayered construction of privacy under the Fourth Amendment: privacy as a substantive right to be left alone from governmental intrusions; privacy as denoting a zone of physical and psychic seclusion

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Raab, 816 F.2d 170, 175 (5th Cir. 1987))); *id.* at 625 ("We recognize . . . that the procedures for collecting the necessary [urine] samples . . . require employees to perform an excretory function traditionally shielded by great privacy. . . ."); *id.* at 645-47 ((Marshall, J., dissenting) ("Urination is among the most private of activities. It is generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of personal seclusion. . . . As [Professor Fried] has written: '[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem.'" (citing Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968))); *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 672-73 (1995) (O'Connor, J., dissenting).

[71] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009).

[72] *Id.* at 379-81 (Stevens, J., concurring in part and dissenting in part); *id.* at 381-82 (Ginsburg, J., concurring in part and dissenting in part). *But cf.* Florence v. Bd. of Chosen Freeholders of County of Burlington, 132 S. Ct. 1510 (2012).

In *Florence,* the Court addressed a more intrusive strip search (involving close observation of private areas of a person's body) of an individual arrested for a minor offence during the processing into the corrections facility. The majority did not discuss the individual's privacy interest or the search's intrusiveness and held that the search procedures at the detention facility struck a reasonable balance between the inmate's privacy and the institutional security needs. *Id.* at 1523. The four dissenting Justices, on the other hand, viewed that search as constituting a serious invasion of the individual's privacy, which is "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive, signifying degradation and submission." *Id.* at 1526 (Breyer, J., joined by Ginsburg, Sotomayor and Kagan, JJ., dissenting) (citing Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983)).

[73] *Safford*, 557 U.S. 364 (2009).

[74] *See infra* Part III.

and intimacy and excluding that which is beyond its boundaries as public and impersonal; and the home and the family as sites of privacy in contrast to the public sphere of the marketplace and commercial relationships. These concepts often conflate, inextricably construing and being constructed by each other. For example, the Court's analysis in *Kyllo v. United States*,[75] a case condemning the warrantless thermal imaging of petitioner's home, explicitly tied together all the noted dichotomies. First, the Court observed that "in the case of the search of the interior of homes—the prototypical . . . area of protected privacy—there is a ready criterion . . . of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*."[76] Second, "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."[77] In contrast, the *Kyllo* Court distinguished *Dow Chemical* because the latter case involved a non-private industrial complex.[78]

III. DECONSTRUCTING PRIVACY AND THE PUBLIC-PRIVATE DICHOTOMY

A. *The False Dichotomization of the Public and the Private Spheres*

Framing Fourth Amendment protections in terms of private property and privacy interests is problematic not only as applied but on a conceptual level. In light of the predominance of the public-private dichotomy and of privacy in legal and social discourse, it not surprising that the public-private dichotomy has been central to feminist writing and political struggle.[79] The line between the private and the public has several distinct meanings within feminist theory.[80] While this article focuses on deconstructing the public-private dichotomy altogether, it is worth briefly mentioning other lines of feminist critique of privacy that carry potential implications to Fourth Amendment jurisprudence.

One line of feminist critique focuses on the "state action" doctrine. In this context, the public-private distinction denotes the scope of constitutionally relevant exercise of power so that public actions trigger constitutional inquiry and private actions do not.[81] Moreover, the state action doctrine embodies the view that the government best promotes freedoms when it does not intervene (inaction) in the status quo,[82] and therefore the government is under no affirmative

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[75] 533 U.S. 27 (2001).

[76] *Id.* at 34.

[77] *Id.* at 37.

[78] *Id.*

[79] Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, *in* PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 281 (S. I. Benn & Gerald Gaus eds., 1983).

[80] *See generally* Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847 (2000).

[81] *Id.* at 848.

[82] *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 548-52 (3d ed. 2009). As Louis Michael Seidman notes, "[i]n our tradition of negative constitutionalism, the Constitu-

duty to guarantee one's enjoyment of constitutional liberties.[83] In fact, as Fourth Amendment cases demonstrate, if the government tries to intervene in the private conduct, it will itself be regarded as violating the constitutional mandate.[84] Feminist scholars have challenged the two ways in which the state action doctrine defines the public-private boundary. Some focus on the *state* component of the state action doctrine and criticize the lack of constitutional constraints on the exercise of private power.[85] Other scholars focus on the *ac-*

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tion constrains the governmental sphere, but never the private sphere. When the government acts, it thus risks violating constitutional norms. The Constitution, however, virtually never regulates private conduct or requires that the government act." Louis Michael Seidman, *Making the Best of Fourth Amendment Law: A Comment on the Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1296, 1296-97 (1999).

[83] Thus, for example, the Court has strongly rejected the argument that the Constitution provides a positive right to police protection. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (finding no responsibility on the part of the state child protection agency for a permanent injury caused by abuse of a child of which it was aware).

[84] This ideology is central for the construction of privacy in general and in search and seizure law in particular. As Justice Brandeis put it, the right to be let alone is "the most comprehensive of rights and the right most valued," and hence, in order to protect that right "every unjustifiable intrusion by the Government . . . must be deemed a violation of the Fourth Amendment." Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting). The Court in *Wolf* similarly emphasized that one's privacy is secured from police intrusion, so that security in, and of, the private sphere is achieved through non-intervention by the state. Wolf v. Colorado, 338 U.S. 25 (1949), *rev'd on other grounds*, Mapp v. Ohio, 367 U.S. 643 (1961).

[85] *See e.g.* Becker, *supra* note 3 (arguing that the Fourth Amendment neither gives women security in their homes from their husbands nor ensures that the government treat marital rape like other rapes and assaults, as part of a more general argument that the Bill of Rights does less to solve the problems of women and non-propertied men than to solve the problems of men of property, especially white men of property). Higgins, *supra* note 80, at 858-59 (arguing that women should also be protected against private violence and that the state should have a duty to protect women against such violence); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 58 (1994) (using marital rape exemptions to advance a reinterpretation of the Fourteenth Amendment Equal Protection Clause as encompassing the state's denial of protection to women from private violence); *Cf.* Paul Ohm, *The Fourth Amendment in a World without Privacy*, 81 MISS. L.J. 1309 (2012) (exploring the rise of private surveillance and the police ability to simply obtain such data from private actors in a word of declining Fourth Amendment privacy).

MacKinnon's critique of the state provides a particularly enlightening challenge to the entire distinction between state power and private power. According to MacKinnon, the state institutionalizes male power over women through institutionalizing the male point of view as law. Consequently, state (legal) power is male power, and the social power of men over women gains legitimacy as the power of the state. Once we recognize that state power and (private) male power are indistinguishable, the normative and analytical usefulness of

tion requirement and argue that ignoring inaction reinforces private power.[86] Finally, others challenge the public-private distinction altogether, arguing that the state actually determines what is public and what is private.

Rather than focusing on where and how we draw the public-private line, some feminist scholars, including myself, question the public-private dichotomy altogether and reject the notion of sharp demarcation between public and private. Elizabeth Schneider states: "There is no realm of personal and family life that exists totally separate from the reach of the state. The state defines both the family, the so-called private sphere, and the market, the so-called public sphere. 'Private' and 'public' exist on a continuum."[87] Similarly, Deborah Rhode argues that empirically, the dichotomy of *separate spheres* has always been illusory.[88] The state determines what counts as private and what forms of intimacy deserve public recognition. Public opportunities and policies concerning tax, welfare, and childcare shape private choices just as private family considerations constrain public participation in the workplace.[89]

Frances Olsen has consistently argued that the public-private dichotomy is false and that the state is constantly implicated in the *private* sphere.[90] She illustrates this point by focusing on state intervention in the family, arguing that the terms *intervention* and *nonintervention*, are largely meaningless.[91] Because the state is implicated in the formation, functioning, and distribution of power within the family, it is meaningless to ask whether the state does or does not

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the state action requirement no longer exists, since state action can be characterized as private action and *vice versa*. *See* MACKINNON, *supra* note 5, at 169-70.

[86] Tracy Higgins, for example, argues that the notion that the state promotes freedom when it does not intervene in the status quo entrenches "existing hierarchies of private power while simultaneously reinforcing the equation of private action with freedom." Higgins, *supra* note 80, at 860-61; *see also* MACKINNON, *supra* note 5, at 187 ("It is apparently a very short step from that in which the government has a duty *not* to intervene, to that in which it has *no* duty to intervene.").

In the context of search and seizure law, Louis Michael Seidman similarly argues that negative constitutionalism constrains redistribution and reinforces the status quo of wealth and power. He offers the example of a drug- and violence-ridden public housing project, and suggests that to truly make the residents "secure" the government must act, such as through random police searches of apartments for weapons and drugs authorized by a majority vote of the housing project residents. Hence, it is "the *failure* of police to conduct searches and seizures that [should be] constitutionally problematic." Louis Michael Seidman, *The Problems with Privacy's Problems*, 93 MICH. L. REV. 1079, 1093 (1995).

[87] Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 977 (1991).

[88] Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1187 (1994).

[89] *Id.*

[90] *See* Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 113 (1988) [hereinafter Olsen, *Unraveling Compromise*]; Olsen, *supra* note 11, at 842-44, 862; Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter, Olsen, *The Family and the Market*].

[91] Olsen, *supra* note 11, at 842.

intervene in the family.[92] On the other hand, the use of the terms intervention and nonintervention masks the policy choices the state is making.[93] According to Olsen, the state is not a neutral arbiter when dealing with the family; whichever family status quo the state chooses to support, its choice is a political choice that impacts the family power dynamics.[94]

Consequently, after exposing the malleability of the public-private distinction, one comes to the realization that the state should not be allowed to justify unjust actions and policies based on an imaginary public-private line,[95] in the context of the Fourth Amendment or otherwise.

B. *The False Dichotomy of the Marketplace versus Home and Family*

The different lines of feminist critique of the state action doctrine and the public-private dichotomy tie in with feminist critique of the conception of privacy in general, as demarcating a substantive zone of personal privacy protected from state regulation. This type of critique mostly focuses on two variations of privacy doctrine: *decisional privacy* in a sense of agency and personal autonomy,[96] and *spatial privacy* related to the sanctity of home and family.[97] The latter, as we have seen, is central to Fourth Amendment jurisprudence.

Feminist critics have challenged the use of the public-private divide to dichotomize the home and the family against the marketplace. This critique is particularly significant to Fourth Amendment cases, where the outcome often turns on this latter dichotomy. Olsen, for example, focuses on the distinction between the privateness of families (*women's* sphere) and the publicness of markets (*men's* sphere).[98] The dichotomization of market and family pervades our discourse and our culture to the extent that we tend to forget that our family and market arrangements are a human creation.[99] Thus, we must reject the family-market dichotomy in order to resolve real conflicts.[100]

Some recognition of the falsity of the home/market dichotomy and a step towards the dismantling of the private sphere versus public sphere dichotomy is reflected in Justice Blackmun's dissenting opinion in *O'Connor v. Ortega*.[101]

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[92] *Id.* at 837, 842.

[93] *See id.* at 985 ("Although social failure to respond to problems of battered women has been justified on grounds of privacy, this failure to respond is an affirmative political decision that has serious public consequences. The rationale of privacy masks the political nature of the decision.").

[94] *Id.* at 843.

[95] Olsen, *supra* note 12, at 324-25.

[96] The issue of agency and personal autonomy is discussed in Raigrodski, *supra* note 6.

[97] *See infra* notes 145-157 and accompanying text.

[98] *See, e.g.*, Olsen, *The Family and the Market*, *supra* note 90.

[99] *Id.* at 1569.

[100] *Id.* at 1577.

[101] O'Connor v. Ortega, 480 U.S. 709, 733-48 (1987) (Blackmun, J., dissenting) (citations omitted).

In *Ortega*, the Court acknowledged that the legitimate privacy interests of public employees in the private objects they bring to the workplace may be substantial,[102] but went on to hold that the employee can simply leave personal belongings at home.[103] By treating work and home as fully separate the Court thus assumed a bright line demarcating the private sphere from the market. In contrast, Justice Blackmun, in his dissent, portrayed a different reality. He observed that:

> It is, unfortunately, all too true that the workplace has become another home for most working Americans. . . . Consequently, an employee's private life must intersect with the workplace, for example, when the employee takes advantage of work or lunch breaks to make personal telephone calls, to attend to personal business, or to receive personal visitors in the office. As a result, the tidy distinctions (to which the plurality alludes) between the workplace and professional affairs, on the one hand, and personal possessions and private activities, on the other, do not exist in reality. . . . Thus, the plurality's remark that the "employee may avoid exposing personal belongings at work by simply leaving them at home" reveals on the part of the Members of the plurality a certain insensitivity to the "operational realities of the workplace" they so value.[104]

Not surprisingly, the complexity of women's lives and the challenge women's lives pose to traditional boundaries play a central role in exposing the myth of the separate private and public spheres. Justice Blackmun went on to acknowledge this in an elaborate footnote:

> Perhaps the greatest sign of the disappearance of the distinction between work and private life is the fact that women—the traditional representatives of the private sphere and family life—have entered the work force in increasing numbers. . . . "The myth of 'separate worlds'—one of work and the other of family life—has been effectively laid to rest. Their inseparability is undeniable, particularly as two-earner families have become the norm where they once were the exception and as a distressing number of single parents are required to raise children on their own. The import of work-family conflicts—for the family, for the workplace, and, indeed, for the whole of society—will grow as these demographic and social transformations in the roles of men and women come to be more fully clarified and appreciated."[105]

The malleability of the public-private distinction and the patriarchal ideology that drives it are exposed in cases manifesting attributes of both spheres. In

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[102] *Id.* at 721.

[103] *Id.* at 725.

[104] *Id.* at 739-40 (Blackmun, J., dissenting).

[105] *Id.* at 740 n.6 (quoting BUREAU OF NAT'L AFFAIRS, SPECIAL REPORT: WORK & FAMILY: A CHANGING DYNAMIC 217 (1986) (remarks of Professor Phyllis Moen)).

these cases, this Article argues, the fact that the Court is making a conscious ideological choice in relegating the issue at hand to one sphere over the other becomes apparent. These choices are not mandated by some inherent logic of the dichotomies. Yet, the Court in these cases consistently emphasizes the public sphere attributes over the private sphere attributes, and in doing so it perpetuates male ideology. To demonstrate this argument, let us take a closer look at *Dow Chemical Co. v. United States*,[106] *Minnesota v. Carter*,[107] *California v. Carney*,[108] and *Vernonia School District v. Acton*.[109]

In *Dow Chemical*, the Court declared that open industrial areas fall between open fields and curtilage.[110] On the one hand, a "commercial facility enjoys certain protections under the Fourth Amendment,"[111] and "Dow plainly ha[d] a reasonable . . . expectation of privacy within the interior of its covered buildings. . . ."[112] Indeed, Dow took significant measures not to expose the inner manufacturing areas to the public (at least from the ground).[113] On the other hand, the Court found it important that the disputed area was not "immediately adjacent to a private home,"[114] but rather to a commercial property.[115] The Court emphasized the area's exposure to public viewing from the air,[116] and the failure of surveillance photographs to reveal intimate details.[117] The Court summarily concluded that,

> [T]he open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.[118]

Why the area was more comparable to an open field than to the home's curtilage is not clear. However, it is clear that the Court chose at the end to emphasize the *public sphere* attributes of the case rather than the *private sphere* ones it observed earlier.[119] This choice was not mandated by the facts of the

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[106] 476 U.S. 227 (1986).
[107] 525 U.S. 83 (1998).
[108] 471 U.S. 386 (1985).
[109] 515 U.S. 646 (1995).
[110] *Dow Chem. Co.*, 476 U.S. at 236.
[111] *Id.* at 235 (citations omitted).
[112] *Id.* at 236.
[113] *Id.*
[114] *Id.* at 237 n.4.
[115] *Id.* at 237-38.
[116] *Id.* at 238.
[117] *Id.*
[118] *Id.* at 239.
[119] Indeed, Justice Blackmun, concurring in part and dissenting in part, found that the

case or by any inherent logic of the public-private dichotomy. Once relegated to the public sphere, however, it naturally followed that "the taking of aerial photographs of an industrial plant complex from navigable airspace [was] not a search prohibited by the Fourth Amendment."[120]

Carter[121] presented a direct clash between the home and the market. This clash required the Court to manipulate the public-private dichotomy in order to exclude a particular home from the protections of the Fourth Amendment. The home, which is otherwise treated as the paradigmatic private sphere, is suddenly, in *Carter*, characterized as a public marketplace and denied the protections of the Fourth Amendment.[122] The respondents, Carter and Johns, were sitting with Kimberly Thompson in the kitchen of her ground-floor apartment, bagging cocaine.[123] While so engaged, they were observed by a police officer, who looked through a gap in a closed window blind, based on an informant's tip.[124] While Thompson, who was not a party in the case, was the lessee of the apartment, "Carter and Johns lived in Chicago and had come to the apartment for the sole purpose of packaging the cocaine."[125] They had never been to the apartment before and were only in the apartment for approximately 2 1/2 hours. In return for the use of the apartment, they gave Thompson 1/8 of an ounce of the cocaine.[126] Absent any suggestion that Carter and Johns had a previous relationship with Thompson, or that there was any other social purpose to their visit, the Court characterized their conduct as purely commercial, thus holding that "[w]hile the apartment was a dwelling place for Thompson, it was for these respondents simply a place to do business."[127] Consequently, they had no expectation of privacy in the apartment and no Fourth Amendment right.[128] However, the facts can as easily be read to support an assertion of some social relationship between the woman and the two men. Absent further testimony from Kimberly Thompson, we cannot know the nature of her relationships with either one or both men. Maybe she received the cocaine as a friend, or even as a sexual partner.

The Court's precedents acknowledge that private social relationships deserve Fourth Amendment protection, especially if the home is involved. In contrast, the public marketplace does not involve similar privacy considerations, so the

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Dow facility resembled neither an "open field" nor a "curtilage," and criticized the Court for applying these doctrines without any convincing explanation. *Id.* at 250-51 (Blackmun, J., concurring in part and dissenting in part).

120 *Id.* at 239.

121 525 U.S. 83 (1998).

122 *Id.* at 90-91.

123 *Id.* at 85.

124 *Id.*

125 *Id.* at 86.

126 *Id.*

127 *Id.* at 90.

128 *Id.* at 91.

protections of the Fourth Amendment do not apply. The Court's dichotomized public-private discourse allows only for these two opposite choices. Hence, in order to justify the denial of Fourth Amendment protection in *Carter*, the Court had to artificially impose market attributes on the relationships and on the home. Consequently, the home lost its special protection as the ultimate zone of privacy.

In *California v. Carney*,[129] the search of a parked mobile home presents a unique example of the conflation and falsity of the public-private and the home-market dichotomies. Moreover, these dichotomies also conflate with the concept of intimacy, which itself turns out to be malleable by the Court. In this case, not only does the home—the paradigmatic zone of protected privacy—take on attributes of the market, but sex—the paradigmatic zone of protected intimacy—also presents a commercial façade. As in *Carter*, the home was used for a drug transaction, in which marijuana was exchanged for sexual contact between Charles Carney and a male youth.[130] However, neither the commercial function of the home nor the commercial aspect of the sex figured explicitly into the Court's analysis. Instead, both the majority and the dissent analyzed the case under the vehicle exception to the warrant requirement, disagreeing on whether a mobile home is more like a home or more like a vehicle.

The majority conceded that respondent's vehicle possessed some, if not many, of the attributes of a home.[131] Nonetheless, for the majority, it clearly fell within the scope of the vehicle exception.[132] Respondent's motor home was readily mobile, and it "was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle."[133] As with the dual-faced open industrial area in *Dow*, nothing inherent in the public-private dichotomy required the Court to relegate the motor home to the public (vehicular) sphere rather than to the private (home) sphere or *vice versa*. And as in the previous two cases, by placing the motor home within the public domain the Court prevented the applicability of the Fourth Amendment.

Alternatively, rather than focusing on these *vehicular* attributes to determine that the motor home was not being used as a *home*, the majority could have emphasized the commercial nature of the transaction as it did in *Carter*. However, unlike *Carter*, here it was the homeowner himself, not the visitor, whose privacy interest was implicated. Consequently, the home-market dichotomy could not provide the Court with the normative justification it needed. Moreover, the use of the home for commercial purposes rather than as a residence is not clear cut, since the activity taking place inside the home was sex and not drug distribution. Of course, the Court could have resolved that ambiguity by

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[129] 471 U.S. 386 (1985).

[130] *Id.* at 388.

[131] *Id.* at 393.

[132] *Id.* at 393.

[133] *Id.* at 393.

emphasizing the apparent commercial nature of the sexual conduct under the circumstances. However, this would have required the Court to collapse the divide between the intimate/personal and the public/commercial. Again, the Court would have been left without supposedly normative grounds to justify a value-laden political choice. The dissent also chose to ignore the presence of the most private and intimate activity typically occurring in one's home, relying, instead, on the parking location and interior design of the mobile home to regard it as a *home* rather than a vehicle.[134]

Finally, in *Vernonia School District v. Acton*,[135] the Court highlighted the unavoidable public aspects of an otherwise extremely private intimate activity, rather than following its own rhetoric of valuing privacy and intimacy. First it concluded that,

> [s]chool sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. . . . there is "an element of 'communal undress' inherent in athletic participation."[136]

Next the Court declared that "[w]e recognized in *Skinner* that collecting the samples for urinalysis intrudes upon 'an excretory function traditionally shielded by great privacy.'"[137] However, the conditions under which male students and female students produced the urine samples were nearly identical to those typically encountered in public restrooms.[138] Hence, the privacy interests compromised by the process of obtaining the urine samples were negligible, in the Court's opinion.[139] Yet again, when faced with a choice between the private sphere and the public sphere, the Court chose to limit the scope of the private sphere, and consequently to prevent the protections of the Fourth Amendment from applying where they are most needed and theoretically justified.

Ironically, while the *Acton* Court utilized the public aspect of the school's locker rooms to undermine the otherwise extreme privacy and intimacy associated with undress and excretory functions, it recently opted to differentiate the

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[134] *Id.* at 406-07 (Stevens, J., dissenting).

[135] 515 U.S. 646 (1995).

[136] *Id.* at 657 (citation omitted).

[137] *Id.* at 658 (citation omitted).

[138] Male students produced samples at a urinal along a wall. They remained fully clothed and were only observed from behind, if at all. Female students produced samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. *Id.*

[139] *Id.*

experience of nakedness or near undress when changing for gym, from the exposure of one's body during a search.[140] Privacy analysis and the public-private distinction cannot explain that shift; rather, as we shall see, the Court focuses on the frightening and degrading experience by the student as compared to unchecked discretion and authority of the school officials.

C. *The Devaluation of the "Female" Private Sphere*

The Court's privacy rhetoric in its Fourth Amendment cases treasures the private sphere. In practice, however, the Court constructs both the private sphere and the public sphere in a way that eventually marginalizes the private sphere. In *Carter*, the Court faced a conflict between the private sphere, represented by the home, and the public sphere, manifested in commercial activity.[141] The Court chose to relegate the entire scenario to the public sphere and thereby to negate the private sphere attributes of the case.[142] The Court could have easily gone the opposite direction, as in *Dow*, emphasizing the private sphere characteristics and negating the public sphere aspects. This would have certainly been more true to the Court's overall Fourth Amendment rhetoric of the superiority of the private sphere over the public sphere. *Acton* and *Carney* expose similar choices. In *Acton*, the conflict between the private sphere, as represented in the intimate activities such as urination or undressing, and the public sphere, as represented by the plain view of others in the locker rooms and bathrooms, is resolved in favor of the public sphere.[143] In *Carney*, the conflict between the private sphere, doubly represented by the home and by sexual intercourse, and the public sphere, represented by the commercial nature of the sex-for-drugs exchange, is again resolved in favor of the public sphere, without even examining the conflict between the spheres.[144]

From a feminist perspective, the results of these four cases and the denigration of the private sphere they exemplify are not surprising. The public-private divide is deeply associated with the meaning of gender itself—the public being ascribed to the realm of men, and the private to women.[145] On its face, the private sphere—embodied in the home, family, and intimacy—is valued and treasured, both in general and in Fourth Amendment jurisprudence. However, feminists have long argued that the legal rhetoric of preferring the private sphere is disingenuous, and serves only as an attempt to pacify women to prevent their rebellion against their marginalization and oppression in the private

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[140] *See* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375 (2009).

[141] *See supra* notes 121-128 and accompanying text.

[142] Minnesota v. Carter, 525 U.S. 83, 90-91 (1998).

[143] *See Vernonia Sch. Dist.*, 515 U.S. at 658.

[144] *See supra* notes 129-134 and accompanying text.

[145] Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 61 (1997).

sphere of home and family.[146] The private sphere is elevated only as long as it serves male interests.

Even more so, the division of the world into separate public and private spheres facilitates the oppression of women.[147] The constitutional protection of the home and the family maintains the relegation of women to the (protective) private sphere. At the same time, the parallel exclusion of women from the public sphere makes them dependent on men, both diminishing women's power and amplifying men's power within the private sphere.[148] Thus, "privacy functions as a veneer that obscures the sexual oppression of women by protecting and simultaneously disempowering them in an isolated sphere."[149] Especially with regards to the embodiment of the private sphere in the home and the family, feminists have argued that privacy doctrine "shelters from state regulation a domain in which women have unequal power and are physically vulnerable."[150] As MacKinnon observed: "The law of privacy treats the private sphere as a sphere of personal freedom. For men, it is. For women, the private is the distinctive sphere of intimate violation and abuse,"[151] including battery, rape, and exploited labor.[152] Therefore, women should recognize that invocations of the value of privacy as good for women may in fact perpetuate their oppression and isolation.[153]

At the same time, some feminist scholars, especially African American feminists, have criticized the feminist tendency to portray the private sphere as a locus of subordination for all women, regardless of race and class.[154] Joan Williams argues that some feminists' imagery of the family as the locus of subordination seems most convincing to women otherwise privileged by class and race; to working-class women, the family may seem as a haven against the injuries of class.[155] Similarly, many African American women do not share some white feminists' assumptions about the oppressiveness of the family or about the homemaker role, but rather see the family and unpaid domestic work as a form of both protection from and resistance to the oppressions of racism.[156]

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[146] *See* Gavison, *supra* note 13, at 25-27.

[147] Miller, *supra* note 3, at 882.

[148] *Id.*

[149] *Id.*

[150] Higgins, *supra* note 80, at 850.

[151] MACKINNON, *supra* note 5, at 168.

[152] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES IN LIFE AND LAW 101 (1987).

[153] *Id.* at 101-02.

[154] *See, e.g.*, Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42 (1988); Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn Into Race and Class Conflict*, 15 HARV. BLACKLETTER L.J. 41 (1999).

[155] Williams, *supra* note 154, at 55-57.

[156] *Id.* at 68-69.

Deborah King further observes that while domesticity has been viewed as oppressive from the standpoint of white middle-class feminists, the option not to work outside of the home may be desired and viewed as a privilege by black low-income women.[157] The question therefore becomes how to separate *good* privacy from *bad* privacy.

IV. From Privacy to Power

Even assuming we can meaningfully distinguish private power from state power, action from non-action, and the private sphere from the public sphere—the question remains how to separate good privacy from bad privacy. Rather than simply favoring state power over private power, or vice versa, we need to "recognize their differences and to theorize more carefully about the kind of threats each may pose,"[158] which may or may not have anything to do with *privacy*. Moreover, designating something as either private or public, or allocating it either to the private sphere or to the public sphere, does not solve the core issues. It does not guarantee security against unreasonable searches and seizures. Hence, two fundamental and interrelated questions present themselves within the context of the Fourth Amendment. First, should a feminist theory of the Fourth Amendment try to reclaim *privacy* or should we shift our focus elsewhere? And second, is the Fourth Amendment really all about *privacy*?[159]

This Article argues that the core issue underlying the Fourth Amendment is *power*—power that within our current jurisprudence is "everywhere therefore nowhere, diffuse rather than pervasively hegemonic."[160] The concept of privacy and the public-private split are merely instrumental to the fundamental issues of patriarchal power and social control that underlie them. As Frances Olsen writes, "[s]truggles over power inform, fuel, and permeate the debate over the public/private dichotomy."[161] Rosa Ehrenreich further observes how *power* and *privacy* not only overlap but construct one another and are intimately bound up with each other.[162] In fact, "without privacy, power could not sustain itself; and without power, privacy could not exist."[163] Consequently, the

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[157] King, *supra* note 154, at 71 ("[T]he option not to work outside of the home is a luxury that historically has been denied most black women.").

[158] Higgins, *supra* note 80, at 864.

[159] *Cf.* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?* 94 Colum. L. Rev. 1751, 1754 (1994) ("Might reliance upon privacy as the standard weight of the Fourth Amendment no longer provide, by itself, an adequate measure for assessing the propriety of government intrusions? Is making privacy the centerpiece of the debate over the 'reasonableness' of a specific intrusion skewing the very values the Amendment is designed to protect?").

[160] MacKinnon, *supra* note 5, at 131.

[161] Olsen, *supra* note 12, at 320.

[162] Ehrenreich, *supra* note 3, at 2058.

[163] *Id.*

private sphere is intertwined with social power: "Power constructs privacy and, to maintain itself, power also destroys privacy."[164]

In particular, the public-private dichotomy is fueled by the power hierarchy between men and women. Olsen argues that the reasons we value privacy are deeply related to the subordination of women: "Privacy is most enjoyed by those with power. To the powerless, the private realm is frequently a sphere not of freedom but of uncertainty and insecurity."[165] It is not that men are the only ones in the family who enjoy privacy,[166] but that the enjoyment of privacy depends on hierarchy.[167] I would go further to say that with respect to search and seizure in the United States, it is gender, race and class that animate the intersection of privacy and power.[168] In general, those who have power control what is and what is not private. It is no accident, observes Ehreneich, that "absolute power demands absolute privacy for itself and zero privacy for others, for this is a crucial part of how those with power maintain their power and destroy that of others."[169] While not as apparent as in totalitarian regimes, even societies built upon respect to human rights resort to denial of privacy as a means of social control.[170]

When the ideology and rhetoric of privacy are exposed as an ideology of male power and social control, we may see that the protections of the Fourth Amendment are directed against the exploit of such power and abusive manifestations of control. Within this broader scheme, violations of one's property rights and privacy interests are only two of many manifestations of the web of social powers against which we seek protection.[171] Neither intrusion on one's property interests or privacy interests are the exclusive ways in which the government can exert power and control over an individual. Nonetheless, this Article argues, it is these power abuses that have received so much attention in

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[164] *Id.*

[165] Olsen, *supra* note 12, at 325.

[166] *Id.* at 325-26.

[167] *Id.* at 325-26.

[168] Ehrenreich, *supra* note 3, at 2059.

[169] *Id.* at 2060 (citing Louise Marie Roth, *The Right to Privacy Is Political: Power, the Boundary Between Public and Private, and Sexual Harassment*, 24 L. & SOC. INQUIRY 45, 68 (1999) ("The more powerful are always more able to define and defend the boundary between public and private in their lives.")).

[170] *Id.* at 2060 (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977).

[171] *Cf.* Courtney E. Walsh, *Surveillance Technology and the Loss of Something a Lot Like Privacy: An Examination of the "Mosaic Theory" and the Limits of the Fourth Amendment*, 24 ST. THOMAS L. REV. 169, 177-78 (2012) (observing that the Court in *Boyd v. United States*, an 1886 case considered to begin the modern era of Fourth Amendment jurisprudence, viewed governmental invasion on one's home to be only one concrete manifestation of the real danger—the use of state power to infringe on individual liberties).

Fourth Amendment jurisprudence because (and when) they implicate the interests of white, educated men.

Hence, in envisioning a feminist Fourth Amendment we need to acknowledge the multiple ways in which the state manifests power over individuals beyond notions of property, privacy or physical force. We need to focus on the power webs of gender, class, and race that enable the police and the state to subordinate individuals in seemingly non-abusive ways. In a nutshell, Fourth Amendment jurisprudence should shift from a paradigm of *privacy* or *property* to a paradigm of *power* and *domination*.

A. *Criticizing the Exclusivity of the Fourth Amendment Privacy and Property Discourse*

The dominant paradigms of the Fourth Amendment have focused on the ability of individuals to preserve their proprietary interests and to shelter some aspects of their lives from the government, especially within the confines of their homes. However, neither the Court's privacy analysis nor its resurrected property-based trespass analysis are able to keep up with advances in electronic or other novel modes of government surveillance. Governments are increasingly capable of monitoring individuals without any physical intrusion on property interest, and by doing so, ironically, are impacting and shaping expectations of privacy in society as well.[172] But are we really willing to allow the state to freely infringe on our security just because it may not involve our property or implicate perceived privacy interests? As Justice Sotomayor observed in her concurring opinion in *Unites States v. Jones*, unrestrained governmental power to collect data on the individual's private comings and goings is prone to abuse.[173] If we allow the government at its own discretion to track its citizens, it may "alter the relationship between citizen and government in a way that is inimical to democratic society."[174]

Moreover, in reality, most of what the police do does not entail intruding on one's property or informational privacy with house searches or wiretaps.[175] Street encounters and traffic stops, for example, may involve other sorts of harm, such as physical security and personal dignity, which may not be cap-

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[172] *See* United States v. Jones, 132 S. Ct. 945, 955 (Sotomayor, J., concurring); *id.* at 962-63 (Alito, J., concurring).

[173] *Id.* at 955 (Sotomayor, J., concurring).

[174] *Id.* at 956 (Sotomayor, J., concurring) (citing United States v. Cuevas-Perez, 640 F.3d 272, 285 (7th Cir. 2011)).

[175] *See* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1061 (1995). *See also* John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 660 (2008) (arguing that privacy alone does not capture several core values that underlie the Fourth Amendment, primarily human dignity); Thomas Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 7 (2009) (critiquing the exclusive focus on privacy in Fourth Amendment jurisprudence and suggesting we re-orient our focus on protecting interpersonal liberty).

tured by the law's focus on property and informational privacy.[176] Ironically, Justice Scalia, writing for the majority in *Jones*, seems to suggest that in order for it to be a "search," the government must be seeking information or trying to find something: "A trespass on 'houses' or 'effects,' or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy."[177] And yet, if government agents merely ransack someone's house to achieve submission and silence opponents, regardless of what information they would find, I doubt that Justice Scalia or the framers of the Fourth Amendment wouldn't find this a prohibited search.[178]

The Court's jurisprudence includes partial acknowledgement that something else is at stake beyond informational privacy interests. In *Terry v. Ohio*, for example, the Court emphasized that

> it is simply fantastic to urge that [a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.[179]

Consequently, even a limited search of the outer clothing "constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[180] Hence, it would seem that securing the individual's bodily integrity and personal dignity from unreasonable governmental intrusion is also at stake and within the parameters of the Fourth Amendment. Nonetheless, these important interests occupy only an ancillary place in search and seizure law, which continues to focus on privacy in general and informational privacy in particular.

A sample from the Court's cases exemplifies the inability of either the property-based or privacy-based frameworks, and particularly the treatment of an

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[176] As William Stuntz observes, in reality, "[h]ouse searches turn out not to be so paradigmatic after all." Stuntz, *supra* note 175, at 1062.

[177] *Jones*, 132 S. Ct. at 951 n.5.

[178] It is reported that James Otis in his argument in the 1761 Writs of Assistance Case referenced a case by the name of *Walley v. Ware*. As described, in *Walley v. Ware*, a magistrate questioned Ware, a customs official, on several suspected charges. In retaliation, Ware demanded to search the magistrate's home for uncustomed goods without even pretending there was suspicion of contraband goods to justify the search. *See* Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 994 (2011) (citing JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772 476 n.29, 490 (1865)).

[179] 392 U.S. 1, 16-17 (1968).

[180] *Id.* at 24-25.

intrusion to one's home as the paradigmatic Fourth Amendment violation, to redress and curb police conduct that inherently involves exertion of coercive state power: *Illinois v. Caballes* dealt with a dog "sniff;"[181] *Arizona v. Gant* concerned a search-incident-to-arrest of a motor-vehicle;[182] *Georgia v. Randolph* dealt with a warrantless search of a home despite the express objection of the resident;[183] and lastly, *Los Angeles County v. Rettele* examined the execution of a valid search warrant to search a home.[184] This Article argues, instead, that a focus on the power hierarchies between the police and the individual would have better explained the outcomes of those cases and may have even altered the results.[185]

In *Caballes*,[186] the encounter began with a road-side traffic stop for speeding conducted by one state trooper; the traffic stop then evolved into a dog "sniff" of the vehicle for narcotics conducted by a state police drug interdiction team officer arriving on the scene upon overhearing the radio transmission.[187] From an implicated privacy interest standpoint, using a dog to detect illegal narcotics as opposed to other personal hidden items does not implicate legitimate privacy interests, and therefore does not rise to a constitutional violation of the Fourth Amendment to begin with.[188] Since the first instance of police conduct—seizure of a person—was constitutionally justifiable (the speeding provides probable cause), and the second instance of police conduct—warrantless search of a vehicle—does not amount to a search within the meaning of a Fourth Amendment concerned with privacy, the majority had no difficulty in rejecting the constitutional claim.[189]

In contrast, the dissenting justices pointed out that such jurisprudence leaves unchecked "suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks,"[190] which can in fact be viewed by most people as quite intrusive and as a hallmark of totalitarian regimes. As Justice Ginsburg pointed out, a drug-detection dog is quite intimidating, and injecting it into a traffic stop "*changes the character of the encounter between the police and the motorist*," which becomes more adversarial, embarrassing and intimidating.[191]

In the 2009 *Gant* decision,[192] the search of the interior of the car by the

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[181] 543 U.S. 405, 405 (2005).

[182] 556 U.S. 332 (2009).

[183] 547 U.S. 103 (2006).

[184] 550 U.S. 609, 609 (2007).

[185] *See infra* notes 325-349 and accompanying text.

[186] 543 U.S. at 405.

[187] *Id.* at 405-06.

[188] *Id.* at 409 (citing United States v. Place, 462 U.S. 696, 707 (1983)).

[189] *Id.* at 410.

[190] *Caballes*, 543 U.S. at 411 (Souter, J., dissenting); *see id.* at 422 (Ginsburg, J., dissenting).

[191] *Id.* at 421 (Ginsburg, J., dissenting) (emphasis added).

[192] 556 U.S. 332, 344-45 (2009).

officers did implicate a legitimate privacy interest. The Court reiterated that although the privacy interest in the vehicle is less substantial that in the home, it is "nevertheless important and deserving of constitutional protection."[193] Constrained by its own privacy jurisprudence however, the Court struggled to reclaim that important privacy interest in the car with the prior sanctioning of searches-incident-to-arrest.

In *Gant*, a home visit based on an anonymous drug tip revealed that Gant (not the owner of the home) had an outstanding arrest warrant for driving with a suspended license. Later that evening, after observing Gant driving and parking in the driveway, the four officers arrested Gant, handcuffed him and locked him in the back of the patrol car.[194] Two officers searched Gant's car and found a gun and a bag of cocaine in the pocket of a jacket on the backseat.[195] One officer testified that they searched the car based on the search-incident-to-arrest exception to the warrant requirement "[b]ecause the law says we can do it."[196]

The Court was obviously troubled by the police conduct, as it held the search unreasonable.[197] The Court held that the original rationale of the search-incident-to-arrest exception does not apply if the arrestee has been secured and cannot access the interior of the vehicle.[198] At the same time, the Court introduced a new justification to the exception, allowing a search of the vehicle for evidence related to the crime.[199] The Court pointed out that even under the new justification a search of the vehicle such as the one here will likely be unreasonable when incident to an arrest for a traffic violation.[200] This new justification, however, cannot be explained based on a privacy analysis, since presumably the motorist's privacy interest in the personal artifacts inside the car does not change based on the type of offense one is arrested for.

In fact, the Court's reasoning emphasizes the need to curb police power. Constructing the rule broadly would merely provide "a police entitlement"—an anathema to the Fourth Amendment:[201]

> A rule that gives police the power to conduct such a search [of passenger compartment as well as every purse or container within that space] whenever an individual is caught committing a traffic offense . . . creates a serious and recurring threat . . . [that] implicates the central concern underlying the Fourth Amendment—the concern about giving police officers

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193 *Id.* at 345.
194 *Id.* at 335.
195 *Id.* at 336.
196 *Id.* at 337.
197 *Id.* at 335.
198 *Id.*
199 *Id.* at 343.
200 *Id.*
201 *Id.* at 347.

unbridled discretion to rummage at will among a person's private effects.[202]

This Article's proposed framework of analysis would have confronted those issues head on, while likely reaching the same result as the Court in this case.

Similarly, the lack of focus on the power relations between the police and the individual in the context of home searches forces the Court in *Georgia v. Randolph* to draw a *fine line*. This fine line exists somewhere between a constitutionally permissible warrantless search of a home based on a co-tenant's consent, where the individual is not actually there to object, and the unconstitutionality of such a search, where the individual is there objecting to it.[203] Since there is no difference in the scope of the legitimate privacy expectation that the individual has in his home, there must be something else at play to explain the different treatment and the drawing of the *fine line*. The Court, however, offers no such explanation.

Focusing on protected privacy interests at the home was also insufficient to address the scenario in *Los Angeles County v. Rettele*.[204] In that case, police officers executed a valid search warrant of a home, not knowing that it was sold to Rettele, his girlfriend, and her 17-year-old son, none of whom was involved in or suspected of any criminal activity for which the search warrant was issued. Around 7 a.m., seven officers knocked on the door and announced their presence. The police ordered the teenager who opened the door to lie face down on the ground while they entered. The officers then went into Rettele's bedroom, waking him and his girlfriend up. With guns drawn, police ordered the couple to get out of bed and show their hands—despite the fact that neither was dressed. Retelle and his girlfriend stood there naked for about two minutes before they were allowed to put on robes and go into the living room to sit on the couch.Within a few more minutes the officers realized their mistake, apologized, and left. Rettele, his girlfriend, and the teenager filed a § 1983 suit claiming a violation of their constitutional rights.[205]

In a fairly brief opinion, the Court acknowledges that officers executing search warrants on occasion enter a house when residents are engaged in private activity, leading to real frustration, humiliation and embarrassment, as was the case here.[206] Nonetheless, when the officers execute a valid warrant (which will occasionally authorize the search of the innocent, and people like Rettele and his companions unfortunately bear the cost) and act reasonably to protect themselves (in this case, by drawing their weapons against the innocent and preventing movement until premises were secure), the Fourth Amendment is

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[202] *Id.* at 345.

[203] 547 U.S. 103, 121 (2006).

[204] 550 U.S. 609, 609 (2007).

[205] *Id.* at 611-12.

[206] *Id.* at 615-16.

not violated.[207] Here as well, privacy analysis alone should have justified the utmost protection and recognition of the petitioners' constitutional rights; but the justices may have rightfully sensed that this is not the kind of police conduct that the Fourth Amendment intended to curtail.

Leading Fourth Amendment scholars have indeed criticized the nearly exclusive attention of search and seizure law on the protection of privacy, and particularly informational privacy. Advocating "reasonableness" as the touchstone of Fourth Amendment analysis, Akhil Reed Amar has emphasized that "[r]easonableness must focus not only on privacy and secrecy but also on bodily integrity and personal dignity."[208] He argues that privacy and secrecy interests are not the only Fourth Amendment interests at stake; the Fourth Amendment must also be concerned with "public humiliation of 'the citizen on the streets of our cities'."[209] Along the same lines, Tracey Maclin, who otherwise strongly disagrees with Amar over the reasonableness model of the Fourth Amendment, argues that the underlying vision of the Fourth Amendment is the need to control the arbitrary exercise of police discretionary power.[210]

According to Maclin, when the Framers spoke of the privacy and security of a man's castle and the evils of British customs searches, they envisioned forcible intrusions into private homes authorized by general warrants and writs of assistance.[211] In the Framers' era, the Amendment's underlying purpose was to control the discretion of government officials to invade the privacy and security of citizens—the homes and offices of political dissidents, illegal smugglers, or ordinary criminals alike.[212] Today, argues Maclin, that same purpose of controlling discretionary authority can and should be applied to the various types

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[207] *Id.* at 616.

[208] Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1098 (1998) ("Cops act unreasonably not just when they paw through my pockets without good reason, but also when they beat me up for fun or toy with me for sport."). *See also* Castiglione, *supra* note 175, at 694 (similarly arguing that human dignity captures Fourth Amendment values that privacy does not and therefore should be incorporated directly into the "reasonableness" inquiry); Crocker, *supra* note 175, at 3 (arguing that suspicionless monitoring of what we reveal to others undermines our liberty and the "conditions of ordinary personal life.").

[209] Amar, *supra* note 208, at 1123 (citing Terry v. Ohio, 392 U.S. 1, 9 (1968)).

[210] *See, e.g.*, Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?* 3 U. PA. J. CONST. L. 398, 414 (2001) [hereinafter Maclin, *Vagueness Doctrine*]; *id.* at 442 ("The purpose of the Amendment, along with the rest of the Bill of Rights, is to limit police power."); Tracey Maclin, *Informants and the Fourth Amendment*, 74 WASH. U. L.Q. 573, 584-85 (1996) [hereinafter Maclin, *Informants*]; Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 24-25 (1994) [hereinafter Maclin, *Cure for the Fourth Amendment*]; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201, 228-29 (1993) [hereinafter Maclin, *Central Meaning*].

[211] Maclin, *Vagueness Doctrine*, *supra* note 210, at 414, 418.

[212] *Id.*

of common contemporary police search and seizure conduct, like street encounters and *Terry* stops.[213] It follows that restraining police discretion should be the crucial consideration when deciding whether intrusive activities are subject to constitutional scrutiny, because "[i]f police are permitted to intrude at their leisure, we no longer live in a free society,"[214] but rather in a "Big Brother" regime envisioned by George Orwell in his book *1984*.[215]

Similarly, for Scott Sundby, the Fourth Amendment is about guaranteeing a "free society."[216] Sundby would characterize the jeopardized constitutional value underlying the Fourth Amendment as that of a democratic reciprocal trust between the citizenry and the government that the citizenry will exercise its liberties responsibly.[217] In contrast, totalitarian governments most often resort to the use of police power to control their populaces, to convey a message of distrust and to reinforce the message that the government is superior: "Measures such as identification checkpoints, random searches, the monitoring of communications, and the widespread use of informants not only are means of keeping track of the citizenry, but also act as continuous symbolic reminders that the citizenry is dominated by the government."[218] Such a message of distrust and assertion of governmental power and control over its citizens is, Sundby argues, the core problem in the Court's handling of garbage searches[219] or suspicionless urine testing.[220] Indeed, Sundby realizes that it is, perhaps, the subtle acts of power and control that have the more lasting and pernicious ef-

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213 *Id.*

214 *Id.* at 428-29.

215 *See also* Eric F. Citron, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072, 1098-99 (2007) (arguing that rather than emphasizing the individual's right to privacy, Fourth Amendment analysis should focus on responsible police behavior, and that only the idea that police power must be deployed in a responsible manner can address what is problematic with pretext).

216 Sundby, *supra* note 159, at 1754.

217 *Id.* at 1777.

218 *Id.* at 1778.

219 *Id.* at 1792 ("Viewed from a privacy angle, [*California v. Greenwood*, 486 U.S. 35 (1988)] almost seems silly. Do I have a great privacy interest in the Hefty bag full of fruit rinds and coffee grinds that I groggily haul out in the early morning, stubbing my toe on the curbside in the process? Of course not. . . . Most people would react strongly to such government behavior, but not because the individual has an overarching privacy interest in his or her garbage. The reaction would arise because of what is revealed about the government–citizen relationship where the government has the power to engage in an intrusion like the searching of one's garbage without any need to justify its actions.").

220 *Id.* at 1798-99 ("[A] difference in kind does exist between voluntarily giving a urine sample for medical purposes and the government demanding a sample for urinalysis because it wishes to randomly check whether its citizens are obeying the law. The former context does not remotely implicate the government-citizen relationship, whereas in the latter setting, the intrusion's very purpose is the government's assertion of its power over the citizenry to ensure that the law is not being violated.").

fects on the fabric of government-citizen relations:[221]

While these scholars correctly observe that we should be concerned with controlling arbitrary exercise of police discretionary power, whether that power is manifested through intrusion upon privacy interests, property rights or human dignity, neither scholar offers a way to evaluate such discretionary police conduct outside the scope of the existing Fourth Amendment jurisprudence.[222] This Article suggests that directly focusing on the power webs at play in the relations between the police and the individual in any given situation, while paying close attention to structural hierarchies of power along axes of gender, race, class, and the like, can offer us much needed guidance.

B. *Acknowledging "Power Webs"*

Other Fourth Amendment scholars criticize the Court's analytical framework by focusing directly on police coercion and violence.[223] William Stunz criti-

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[221] *Id.* at 1806, 1810.

Granted, I agree with Sundby that we should focus our inquiry on state/police power and control over individuals rather than on privacy. However, Sundby grounds his re-conceptualization of the Fourth Amendment in Liberal political theory, in which the democratic state is legitimized by the free consent of the governed, as opposed to a totalitarian state, which relies on power and coercion to maintain its existence. Feminists such as MacKinnon have challenged this assumption and exposed the ways in which the Liberal State reifies power, coercion, and male domination in the perpetuation of the ideology of patriarchy. *See, e.g.*, MACKINNON, *supra* note 5, at 157-70. The liberal state thus differs from a totalitarian regime only in that the state systematically exerts invisible power and control over some of its citizenry more than others, leaving those at the top—white privileged men—both oblivious to and beneficiaries of gender, class, and racial domination. Consequently, while Sundby's model contributes to an analytical framework of power and control in general, its liberal tradition leaves male domination and the subordination of women intact.

[222] In his recent article *The Fourth Amendment in a World Without Privacy*, Paul Ohm laments that while many scholars have correctly criticized the shortcomings of a Fourth Amendment jurisprudence anchored in a privacy analysis in a world with increasingly diminished privacy, they have not provided a way forward. Ohm, *supra* note 85, at 1329-30. Ohm also identified power (and liberty) as the core and essence of the Fourth Amenmdnet, unlike both property and privacy, which served us so far as imperfect proxies for what the Amendment actually protects. *Id.* at 1337-38. In articulating a Fourth Amendment aimed at preserving the balance of power between the citizens and the police, Ohm focuses on ways of leveling the playing field between the police and criminals based on how new technological developments may alter the metrics of crime fighting. *Id.* at 1339-47. While technological developments no doubt affect the power imbalances between the state and the individual, my focus in this article is on conceptualizing power disparities that inherently exist in the state—individual relations aside from any enhancement by advanced investigative tools. As such, my critique complements that offered by Ohm, and offers insights into power imbalances that are often obscured by the focus on technology.

[223] *See, e.g.*, Seidman, *supra* note 82, at 1305-06; Seidman, *supra* note 86; William Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265

cizes the anomaly of Fourth Amendment jurisprudence that is concerned more with what the police can see or hear than with how much force the police can use.[224] He argues that the real problem of police misconduct is not information gathering but violence, and that search and seizure law should therefore refocus its attention on police violence and coercion.[225] Louis Michael Seidman, on the other hand, argues that the law already focuses on violence and coercion,[226]

(1999) [hereinafter Stuntz, *Distribution of Privacy*]; Stuntz, *supra* note 173, at 1016; William Stuntz, *Reply*, 93 MICH. L. REV. 1102 (1995) [hereinafter Stuntz, *Reply*]; William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995) [hereinafter Stuntz, *Substantive Origins*].

[224] *See, e.g.*, Stuntz, *supra* note 175, at 1023-24; *id.* at 1062-66 (discussing Florida v. Jimeno, 500 U.S. 248 (1991), and Terry v. Ohio, 392 U.S. 1 (1968)); Stuntz, *Reply*, *supra* note 223, at 1102-03 ("The Fourth Amendment regulates street stops, but it pays little attention to how coercively the police behave in those stops—instead, the law concerns itself with whether and when the police can look in suspects' pockets. So too, the law limits police officers' ability to enter people's houses but turns a blind eye to how violently the cops behave once inside . . . . Searches are a bigger deal in Fourth Amendment law than seizures, even seizures of people. This is a consequence of courts thinking primarily about privacy, about people's ability to keep secrets, instead of about what makes the police a potential danger in a free society—the fact that they have guns and clubs and can use them."); Stuntz, *Substantive Origins*, *supra* note 223, at 393-94 ("Consider the following anomaly: The law of criminal procedure closely regulates when a police officer can look in the glove compartment of my car or ask me questions about a crime, but it pays almost no attention to when (or how often or how hard or with what weapon) he can strike me. We have very detailed law governing a host of evidence-gathering issues, but surprisingly little—and surprisingly lax—legal regulation of police coercion and violence. This state of affairs is both strange and wrong.").

[225] *See* Stuntz, *Distribution of Privacy*, *supra* note 223, at 1273 ("[T]he law would have to focus not on the interest in keeping things secret or being free of observation, but on the interest in being free from humiliation or indignity, or the interest in avoiding the stigma that comes from being publicly identified as a criminal suspect, or the interest in avoiding police harassment or discrimination."); Stuntz, *supra* note 175, at 1061, 1062-77; Stuntz, *Reply*, *supra* note 220, at 1102 ("It would be better if the law were to emphasize the one thing that most distinguishes the police from other government officials: the police use force, sometimes violent force, on individual citizens.").

[226] *See generally* Seidman, *supra* note 86, at 1086-92. *See id.*, at 1086-87 ("Modern Fourth Amendment law focuses on what might be called the 'collateral damage' imposed by searches and seizures rather than on informational privacy. . . . [T]he primary focus of the collateral damage requirement is not informational privacy. What, then, is the focus? Oddly, the focus is precisely where Stuntz says it should be: on violence, disruption, and humiliation."); *id.* at 1087-89 ("What [Stuntz] fails to recognize, however, is that even legitimate police house searches necessarily entail considerable violence and disruption and that Fourth Amendment protections attach precisely because of this collateral damage imposed by legitimate police activity . . . He overlooks the fact that the probable cause and warrant requirements exist in part to prevent the prospect of the violence and disruption inherent in searches unless a magistrate is satisfied that the violence and disruption are cost-justified. Because of

although he agrees with Stuntz that further measures are needed to regulate illegitimate police violence.[227]

Both Stuntz and Seidman, however, approach the core problem of Fourth Amendment protections as embodying linear externally-visible power relations between the police and individuals, rendering the underlying power web of the patriarchal state invisible and intact. In contrast, feminist theory recognizes that power operates in a direct and indirect web-like manner. Mustafa Kasubhai argues that rather than being linear and direct, power flows in multiple directions.[228] A linear power model does not account for the ways in which social institutions allocate power to individuals, perpetuate the exercise of such power, and facilitate others' role in these power webs.[229] Hence, power manifests itself as a social web in which "people, institutions, and language shape the relationship between a dominant acting agent and a subordinate receiving agent."[230]

A linear model assumes "that there are two primary agents"—a dominant agent and a subordinated agent; that there is "one primary use of [direct] force" by the former over the latter (or at least "an ongoing exercise of force"); and that there is one resulting effect.[231] The problem with this linear power model

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the risk of this damage, and not because of violations of informational privacy, Fourth Amendment law requires a warrant and probable cause before the process begins."); *id.* at 1089 & n.53 ("[S]earches on the street . . . also amount to a species of violence. A typical search requires the police to delay a suspect who is going about his business, force him to assume a vulnerable and uncomfortable position, embarrass him before others, and touch all parts of his body. . . . It is precisely because street stops typically require this use of force that the Fourth Amendment regulates them."); *id.* at 1090 ("Of course, if the suspect voluntarily acquiesces to the request, the Fourth Amendment does not speak to it. To say that the suspect does not voluntarily acquiesce is to say that he submits because of the fear of legalized violence. The suspect empties his pockets only because he knows that if he does not, the officer is authorized to use force to empty them for him. The Fourth Amendment regulates the officer's ability to threaten this force, not because of its concern with informational privacy, but because threats of violence are, themselves, a form of violence."); Seidman, *supra* note 82, at 1301 ("The Fourth Amendment is not solely about informational privacy. It also speaks to humiliation, inconvenience, embarrassment, and violence.").

[227] *See* Seidman, *supra* note 82, at 1302 ("I agree that the law should offer greater protection, especially with regard to the kinds of stops and frisks that are daily occurrences for many young African American males."); Seidman, *supra* note 86, at 1087-89 ("I share Stuntz's concern that the Fourth Amendment does too little to regulate illegitimate police violence. . . . Stuntz may well be right that Fourth Amendment protection should go beyond this point. Perhaps we should impose more stringent limitations on police violence even when there is probable cause and a warrant to justify the initial entry.").

[228] Mustafa K. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law Is Turned on Its Head*, 11 WIS. WOMEN'S L.J. 37, 42 (1996).

[229] *Id.*

[230] *Id.*

[231] *Id.* at 43 (Kasubhai refers "to this model as 'dyadic linear' because it sequentially

is that it does not acknowledge the social relations and privileges which pave the way for the dominant agent to achieve his goal.[232] It "can only recognize who [directly] wields power and who is subordinated."[233] As long as a linear power model treats gender dynamics as independant from society, the model does not account for social powers and oppressive structures that enable men to systematically subordinate women.[234]

On the other hand, explains Kasubhai, "[a] situated conception of power necessarily recognizes that agents in any power model are contextually and structurally situated in a social web."[235] "Other agents, which may [not be directly related] to the actual dynamic between the primary actor and subordinate, comprise the social web which supports the actor's actions, and reifies the subordinate's oppressive experience."[236] In the context of Fourth Amendment searches and seizures, I have suggested elsewhere that such power webs empower the police to manifest control and domination over the individual, in multiple nuanced and invisible ways—consensual police-citizen encounters or searches based on *consent* being but two examples.[237]

Furthermore, both Stuntz and Seidman remain within traditional liberal boundaries by focusing on overt police abuse and brutality, similar to the Court's distinction between *coerced* and *voluntary* consent.[238] Their focus on physical violence or threat thereof has the same effect of masking structural coercion and systems of oppression behind the notion of *consent*.[239] We need to focus on police coercion and abuse not in terms of physical violence or overt force, but in terms of control and domination based on situated multifaceted social power webs.

This is not to say that police brutality is no longer relevant or troubling.

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describes a causal relationship between two agents (dyadic) from which the dominant agent's intended action effectuates his desired result.").

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.* Thus, for example, MacKinnon suggests that sexuality itself is a power web in which heterosexual relations *per se* are infused with violence and control. *See generally* MACKINNON, *supra* note 152, at 126-54; *see also* MacKinnon, *supra* note 152, at 1-17, 46-61.

237 *See* Raigrodski, *supra* note 8, at 49-50.

238 *Id.*

239 *Id.* In that Article I argued that "by holding consent to a search as *per se* involuntary when coerced by a claim of authority . . . or by a preceding unlawful seizure, . . . and distinguishing these instances of coercion from all other consensual police encounters, the Court is able to maintain the fiction that police encounters typically are consensual and that consent to a search given under such circumstances is voluntary. . . . The individual is thus presumed to possess the power and choice to resist the police, [resulting] in the erosion of the Fourth Amendment protections for most individuals."

Nonetheless, like invasions of one's home or *privacy*, police brutality is a particular form of exerting state power over the individual. Some individuals are most in need of protection against physical violence on the streets. Others are most vulnerable with regard to their homes or personal effects. And others are subject to abuse and subjugation by many other power webs which we must now expose and eradicate. Unfortunately, Fourth Amendment jurisprudence focuses exclusively on invasions of privacy and property, and to a lesser extent on physical violence, as the prototypical display of abuse of police power. While providing much needed protection to some, the normative exclusivity of this narrow paradigm results in little or no protection for many others and perpetuates the power web of male domination through the State.

C. *Re-reading* Entick *and* Wilkes*—Toward a Paradigm of Power Webs*

Much has been written about the "mischief which gave . . . birth"[240] to the Fourth Amendment—the British King's unbridled search and seizure power—manifested primarily through aggressive customs enforcement, general warrants, and writs of assistance.[241] This historical context supports the view that the Fourth Amendment is more broadly intended to curb government discretion and power.[242] So why is it that Fourth Amendment jurisprudence has been so narrowly focused on the government's ability to infringe on property or privacy rights, particularly on the encroachment of informational privacy? This Article has suggested that these types of governmental abuse of power have been viewed as paradigmatic because they often implicate the interests of white privileged men. In order to fully demonstrate this argument, this article reexamines the two English cases that historians agree were the source of the Fourth Amendment: *Entick v. Carrington*[243] and *Wilkes v. Wood*.[244] *Entick* in particu-

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[240] Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

[241] *See e.g.* Amar, *supra* note 208; Maclin, *Central Meaning*, *supra* note 210; Clancy, *supra* note 178; The Honorable M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. REV. 905 (2010).

[242] *See* Michael, *supra* note 241, at 906; *see generally* Clancy, *supra* note 176, at 999-1000 (Clancy's article provides a detailed review of the historical origins of the Fourth Amendment, as envisioned and phrased by John Adams. In addition to the *Entick* and *Wilkes* cases which will be discussed in detail *infra*, Clancy offers a detailed account of James Otis' argument, and its deep impact on John Adams, in the 1761 Writs of Assistance case. Much of Otis' argument focused on the way in which the writs of assistance place every person in the hands of unaccountable petty tyrants with "one arbitrary exertion provok[ing] another, until society be involved in tumult and in blood." (citing 2 THE WORKS OF JOHN ADAMS, app. A at 524-25 (1850)).

[243] (1765) 19 St. Tr. 1029, 95 Eng. Rep. 807 (K.B.). Note that the version reported in Howell's State Trials presents a lengthier judgment written by the Lord Chief Justice Camden, as compared to the shorter per curiam opinion printed in the English Reporter. It is the Howell's version that has been used in support of the Fourth Amendment history and that is used here as well.

lar was at the basis of the Court's recent landmark decision in *United States. v. Jones*,[245] with Justice Scalia, writing for the Court, referring to it as "the true and ultimate expression of constitutional law with regards to search and seizure."[246]

Entick authored political pamphlets critical of the King's ministers, which authorities thought libelous.[247] In response, Lord Halifax, the British secretary of state, issued a warrant authorizing the seizure of Entick and all his books and papers.[248] The executing agents used force and arms to break into and enter Entick's home, and over a four-hour period pried open all the locked rooms, chests, and drawers; searched through his private papers; and carried away many of them.[249] Entick sued them in trespass and won.[250]

Lord Camden held that the Secretary of State had no authority to order the search and seizure of Entick's papers.[251] He pointed out that "[t]his power so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession. . . . This power . . . is not supported by one single citation from any law book extant."[252]

Consequently, he held not only that "every invasion of private property . . . is a trespass," but that

> [p]apers 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; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.[253]

The facts in *Wilkes* were even more egregious. John Wilkes was a well-

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[244] Wilkes v. Wood, (1763) 19 St. Tr. 1153, (1763) 98 Eng. Rep. 489 (K.B.) [Howell's version used]. The historical importance of a third case called the *Writs of Assistance Case*, (*see* M.H. Smith, THE WRITS OF ASSISTANCE CASE (Univ. of Cal. Press 1978)), is more controversial. *Compare* Amar, *supra* note 208, at 772 (describing the writs of assistance dispute as "almost unnoticed in debates over the federal Constitution and Bill of Rights"), *with* Maclin, *Central Meaning*, *supra* note 210, at 223-28 (finding disputes over writs of assistance key to colonial understanding of unreasonable searches and seizures), *and* Clancy, *supra* note 178 (arguing that in envisioning and phrasing the Fourth Amendment, John Adams was deeply impacted by James Otis's argument in the Writs of Assistance case).

[245] 132 S. Ct. 945 (2012).

[246] *Id.* at 949 (internal quotation marks omitted).

[247] *Entick*, 19 St. Tr. at 1031.

[248] *Id.*

[249] *Id.* at 1029-30.

[250] *Id.* at 1036.

[251] *Id.* at 1064.

[252] *Id.*

[253] *Id.* at 1066.

known Member of Parliament.[254] He anonymously authored a pamphlet called *The North Briton, No. 45* that sharply criticized the King's speech to Parliament.[255] Consequently, Lord Halifax again initiated proceedings for seditious libel.[256] The warrant in this case was a general warrant, directing the agents to search and seize any of the authors, printers, and publishers of the seditious and treasonable *North Briton, No. 45*, and their papers.[257] The agents arrested Wilkes and many others, and hauled away all of Wilkes's papers in a large sack, after searching the house for several hours and forcing locked drawers in his office.[258] Wilkes won his trespass suit.[259] Most importantly, Chief Justice Pratt (soon to be Lord Camden) instructed the jury as follows:

> The defendants claimed a right, under precedents, to force persons' houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.[260]

Both decisions emphasized the importance of the privacy interest in homes and papers. Although tied to notions of property, the chief emphasis was on the fact that the items seized were *papers*, which are of such a private nature that "'so far from enduring a seizure . . . they will hardly bear an inspection.'"[261] In addition, both decisions express concern with abuse of official discretion. Against this context, from the standpoint of the men who later drafted the Fourth Amendment, it was the combined concern of governmental abuse and ensuring the privacy of one's home and papers that necessitated the Fourth Amendment.[262] This, in turn, explains the traditional focus of the Court's jurisprudence on privacy, especially private papers, effects, and homes.

In contrast, a feminist reading of the Fourth Amendment is essentially concerned with power webs and forces us to realize that neither *Entick* or *Wilkes* needs to be treated as paradigmatic, or that any such paradigm is achievable or desirable. Indeed, Stuntz notes that

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254 Wilkes v. Wood, (1763) 19 St. Tr. 1153, 1156 (U.K.).

255 *Id.* at 1156.

256 *Id.*

257 *Id.* at 1156-57.

258 *Id.*

259 *Id.* at 1168.

260 *Id.* at 1167.

261 *See* Stuntz, *Substantive Origins*, *supra* note 223, at 399 (quoting Entick v. Carrington, (1765) 19 St. Tr. 1029, 1066 (U.K.)).

262 *Id.* at 399-400.

> [T]he part of criminal procedure that concerns evidence gathering rests on a paradigm—the ransacking of a home, with an emphasis on rummaging through the occupant's private papers. That paradigm looks like a police misconduct problem, but historically it has more to do with the kinds of things government tries to regulate [such as free speech]. . . . The real problem of police misconduct is best captured by another paradigm: the Rodney King beating.[263]

This alternate paradigm offered by Stuntz highlights the partiality of the privacy and property paradigms to encompass modern day governmental abuse. The Rodney King beating—the most notorious incident of police brutality of our times[264]—surely serves for many of us, especially members of urban minority communities, as a vivid and typical example of modern-day abuse by the state and the police. It evokes similar emotions in our day as *Entick* and *Wilkes* did in their period. More significantly, for many individuals, the threat of being subjected to police violence on the streets is potentially far more real than the threat of the government coming into their homes and uncovering personal information. From their perspective, the Rodney King paradigm better addresses their primary concerns.

From a feminist stance, however, this paradigm of police violence is also partial and represents a particular perspective. As any other perspective cloaked as universal and paradigmatic, it cannot capture the multiple and inextricable power webs through which state power is exerted over the individual. Rather than fixate on one way or another in which the government and the police can abuse their power, we should attempt to curb all kinds of governmental oppression, keeping in mind the multiple power webs that construe the ways we relate to each other. Some governmental conduct will immediately strike us as egregious, such as the conduct in *Entick* and *Wilkes* or in the Rodney King case. Other instances will require a close scrutiny of the power hierarchies that structure the relations between the government and the individual in the particular case. Hence, in each case the courts must evaluate the government's and the individual's conduct in light of any overt and covert power imbalances that enable the police to subordinate the individual by exploiting his particular vulnerabilities.

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[263] *Id.* at 447.

[264] Rodney King is an African American who, on March 3, 1991, was severely beaten by Los Angeles police officers following a police chase. A bystander videotaped much of the incident from a distance. The footage showed police officers repeatedly striking King with their batons. The footage aired around the world, causing public outrage that raised tensions between the African American community and the Los Angeles Police Department and increased anger over police brutality and social inequalities. Four officers were later tried in a state court for the beating but were acquitted. The announcement of the acquittals sparked the 1992 Los Angeles riots. Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1; *see generally* Greenberg & Ward, *supra* note 3 for further resources and analysis.

We all have our facets of powerlessness, which make us vulnerable to abuse and subordination to a lesser or greater degree. It is these vulnerabilities that the powerful invoke and exploit in order to subordinate another to his domination and control in any given situation. As "Frederick Douglass said: 'Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them.'"[265] Members of a non-white race, female gender or sexual orientation, and the underclass have been throughout the ages especially prone to exploitation and subordination by the white heterosexual male elite based on these attributes. But even those in the position of power and privilege are vulnerable to abuse by the threat itself that could undermine their power, and hence invalidate their identity. It is the threat to privileged identity that, this Article suggests, is the crux of *Entick* and *Wilkes*. In the case of *Entick* and *Wilkes*, their attributes of vulnerability and powerlessness in relation to the state seem to have been their social and political status. Not surprisingly, having otherwise belonged to a privileged race, gender, and class, they were primarily vulnerable to governmental abuse of that which they valued most—their identity as free men and political actors and the privacy and sanctity of their homes and personal belongings. Their defining attributes as valued human beings—their political and social identities—were exactly the ones the state was most likely to abuse and invalidate in order to send a clear message that Entick and Wilkes were subordinate to the State. These cases are free speech cases in disguise,[266] and are also classic examples of Sundby's liberal theory of citizen-government trust in a free society.[267]

A modern equivalent to *Entick* and *Wilkes* can be seen in the case of Dr. Magno Ortega.[268] Dr. Ortega was a physician, psychiatrist, and longtime Chief of Professional Education at Napa State Hospital.[269] Upon suspicion of misconduct towards the residents in his program, hospital administrators thoroughly and on several occasions searched his office, file cabinets, and desk in his absence.[270] Both State and non-State property was seized, including personal correspondence, billing documentation of private patients, teaching aids, and notes.[271] All the papers in Dr. Ortega's office were boxed together without taking any formal inventory.[272] Dr. Ortega sued the Hospital alleging violation of

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[265] *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 329 (1987) (citing Frederick Douglass, Speech at Rochester (July 5, 1852)).

[266] *See* Stuntz, *supra* note 175, at 1061 n.164 ("There is another common thread to *Entick*, *Wilkes*, and *Mapp*: all are free speech cases in disguise.").

[267] *See supra* notes 214-219 and accompanying text.

[268] O'Connor v. Ortega, 480 U.S. 709 (1987).

[269] *Id.* at 712.

[270] *Id.* at 713.

[271] *Id.* at 713-14.

[272] *Id.* at 714.

his Fourth Amendment rights.[273] To an esteemed physician and teacher it surely was a disempowering and subordinating experience that sent an unmistakable message about the employer's power and control. This message did not escape the notice of the Court, although its interpretation remained cloaked in terms of privacy.[274]

The resemblance of this case to the *Entick-Wilkes* paradigm is clear. For example, Justice Blackmun observed: "[A]s the plurality itself recognizes, the 'investigators' never made a formal inventory of what they found in Dr. Ortega's office. Rather, they rummaged through his belongings and seized highly personal items later used at a termination proceeding."[275] I would speculate that the Court sympathized with Dr. Ortega's sense of powerlessness and violation because, as in *Entick* and *Wilkes*, the display of power hit close to home and potentially posed a threat to the Justices' own similar vulnerabilities.

In contrast, Gail Atwater did not "fit" within the Court's privacy paradigm or violence paradigm.[276] Atwater was driving her pickup truck in Lago Vista, Texas, with her two young children in the front sit, unbuckled.[277] Officer Turek pulled her over for the seatbelt violations.[278] Approaching the truck he yelled "we've met before" and "you're going to jail," and called for backup.[279] Atwater failed to provide the officer with her papers, alleging "her purse [was] stolen the day before," to which the officer replied that he had "heard that story two hundred times."[280] "Atwater asked to take her frightened, upset, and crying children to a friend's house nearby, but [the officer] told her, 'you're not going anywhere,' and apparently threatened to take the children into custody as well."[281] After Atwater's friend, who learned from the neighborhood children

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[273] *Id.*

[274] *Id.* at 719 (holding that Dr. Ortega had a reasonable expectation of privacy at least in his desk and file cabinets).

[275] *Id.* at 736 (Blackmun, J., dissenting); *accord.* Stuntz, *supra* note 175, at 1060-61 ("The dominant paradigm in search and seizure law has always been the ransacking of a private home, with an emphasis on rummaging around through the homeowner's books and papers. This image fits the pair of eighteenth-century cases that had the most to do with the Fourth Amendment's creation: [*Entick* and *Wilkes*] . . . . It also fits *Mapp v. Ohio*, the most famous Fourth Amendment case of this century: the officers in *Mapp* did a top-to-bottom search of a boarding house, and the evidence they found consisted of a few dirty books that belonged to the house's owner. Focusing on cases like *Entick* and *Wilkes* and *Mapp*, one can see why courts would use Fourth Amendment law to protect informational privacy . . . . It is no surprise that when officers rummage through suspects' dresser drawers, read their correspondence, or listen to their conversations, courts care deeply about individuals' ability to keep some aspects of their lives secret from the government.").

[276] Atwater v. City of Lago Vista, 532 U.S. 318, 355 (2001).

[277] *Id.* at 323.

[278] *Id.* at 324.

[279] *Id.* (internal quotation marks omitted).

[280] *Id.* (internal quotation marks omitted).

[281] *Id.* (citations omitted).

what was going on, arrived and took the children, the officer handcuffed Atwater and drove her in his squad car to the local police station, where "booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets."[282] Her mug shot was taken and she was placed in a jail cell for an hour prior to being released on a $310 bond.[283] Atwater ultimately pled no contest to misdemeanor seatbelt offences, paid a fifty-dollar fine, and sued for violation of her Fourth Amendment right against unreasonable seizure.[284]

The Court noted that Atwater—a well-known established resident of Lago Vista "would almost certainly have buckled up as a condition of driving off with a citation. . . . [T]he physical incidents of arrest were merely gratuitous humiliations imposed by a police officer, who was (at best) exercising extremely poor judgment."[285] It then went on to hold that Atwater's arrest was surely humiliating, but it was no more harmful to privacy or physical interests than the normal custodial arrest.[286] "The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment."[287]

Measured against notions of privacy or physical safety interests, it is possible to accept the Court's characterization of the harm to Atwater as *mere humiliation* and of the officer's conduct as *poor judgment*. But if we focus on the gender-based power disparities between the officer and Atwater and her vulnerability as a mother, which the officer specifically exploited, an alarming picture of abuse of state power and male domination emerges. Officer Turek was loud and accusatory from the beginning, he threatened to arrest Atwater in front of her young children, he refused to allow her to ensure her children were taken care of, and he even threatened to take the children to jail as well.[288] From the perspective of a woman and a mother, the officer's conduct is not simply poor judgment and the harm to Atwater was not mere humiliation.[289]

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[282] *Id.*

[283] *Id.*

[284] *Id.* at 324-25. Amazingly, this description of the facts is taken from the Court's opinion, and does not differ significantly from the facts recited by the dissent. Nonetheless, the Court reaches its astonishing conclusion.

[285] *Id.* at 346-47.

[286] *Id.* at 354 (citing Whren v. United States, 517 U.S. 806, 818 (1996)).

[287] *Id.* at 355.

[288] *Id.* at 324.

[289] *Cf. id.* at 368-70 (O'Connor, J., dissenting) ("The record in this case makes it abundantly clear that Ms. Atwater's arrest was constitutionally unreasonable. . . . There is no question that Officer Turek's actions severely infringed Atwater's liberty and privacy. Turek was loud and accusatory from the moment he approached Atwater's car. Atwater's young children were terrified and hysterical. Yet when Atwater asked Turek to lower his voice because he was scaring the children, he responded by jabbing his finger in Atwater's face and saying 'You're going to jail.' . . . Atwater asked if she could at least take her children to a friend's house down the street before going to the police station. But Turek—

The dissent in the recent case of *Florence v. Bd. of Chosen Freeholders*[290] emphasized that the intrusion on privacy interests signifies degradation and submission of the individual to the state agents.[291] Recall that the Court's consciousness to race-based power disparities in *Terry v. Ohio* led it to conclude that rather than being a "petty indignity," a pat-down frisk performed in public by a policeman while the citizen stands helpless is a "serious intrusion" that inflicts "great indignity . . . and it is not to be undertaken lightly."[292]

Had the Court entertained in *Atwater* a similar consciousness of gender hierarchies, it might have been more open to accept the idea that Atwater was subjected to a serious intrusion and suffered, at least, great indignity. The Court might have also seen that these harms were specifically enabled by the officer's ability to subordinate and disempower her as a woman and as a mother. It is because of such an exertion of power so as to subordinate the individual that we should hold the officer in violation of the Fourth Amendment.

While gender hierarchies may have contributed significantly, or even primarily, to the power disparities between the officer and Atwater, gender may not be the only or the most relevant axis of social power for other people. As feminist scholars of color point out, privileged white feminists tend to see gender as the main hurdle to full access to social power because they are not impeded by class or race.[293] On the other hand, Angela Harris suggests that other women "are oppressed not only or primarily [by their] gender, but [because] of race, class, sexual orientation, and other" factors that matter in the creation of inextricable power webs.[294] In sum, for each individual, but especially for members of traditionally subordinated groups, the point of most powerlessness, and hence most vulnerability to abuse, arises from other power structures, which have been obscured by the discourse of privacy. Rather than envisioning any particular display of power as the essence of the Fourth Amendment harm, this Article suggests the need to accept the multiplicity and complexity of pow-

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who had just castigated Atwater for not caring for her children—refused and said he would take the children into custody as well. . . . Atwater's children witnessed Officer Turek yell at their mother and threaten to take them all into custody. Ultimately, they were forced to leave her behind with Turek, knowing that she was being taken to jail. . . . Both of Atwater's children are now terrified at the sight of any police car. . . . Arresting Atwater [ ]taught the children . . . that the bad person could just as easily be the policeman as it could be the most horrible person they could imagine.").

[290] 132 S. Ct. 1510 (2012).

[291] *Id.* at 1526 (Breyer, J., dissenting) (addressing strip search, involving close observation of private areas of a person's body, of an individual arrested for a minor offence during the processing into the corrections facility).

[292] Terry v. Ohio, 392 U.S. 1, 17 (1968) (internal quotation marks omitted).

[293] *See* Williams, *supra* note 154.

[294] *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587 (1990).

er, and structure the protections of the Fourth Amendment around a broader concept of power.

For example, feminist scholarship about cross-gender prison searches,[295] electronic monitoring in the workplace,[296] and hostile housing environments[297] highlight the conflation of privacy with power and control, and provides enlightening examples of multiple web-like manifestations of power imbalances. These examples underscore both the need for a broader understanding of power and domination and the need for a power-based jurisprudence. Teresa Miller discusses how prison guards, officials, or other prisoners exploit a prisoner's sexuality in order to assert control over that prisoner, and how power is sexualized in prison.[298] At the same time, cross-gender searches in prison are also perceived in light of the class and race identities of both guards and prisoners.[299] Consequently, Miller suggests an analysis of the multiple oppressions of prisoners who challenge cross-gender searches.[300]

For instance, are women prisoners who challenge cross-gender searches only concerned with physical security? Miller suggests that a broader concept of dignity is at stake. Prison life in America is dehumanizing.[301] For many of the poor, mostly African American female inmates "this dehumanization by the state echoes similar experiences of personal devaluation in the welfare, foster care, and juvenile justice systems. . . ."[302] In light of such experiences of subordination, the women's privacy-based challenges to cross-gender searches should be understood as claims to human dignity and personhood. Thus, Miller argues, "a contextualized concept of privacy that stresses both the value of personhood and protects against the totalitarian abuse of power is needed."[303]

While Miller's analysis is highly illuminating and important, her focus on power and control within a continued discourse of privacy is problematic. As

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[295] *See* Miller, *Cross-Gender Prison Searches*, *supra* note 3; Miller, *Sex and Surveillance*, *supra* note 3.

[296] *See* Ehrenreich, *supra* note 3.

[297] *See* Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who Is the Reasonable Person?*, 38 B.C. L. REV. 861 (1997).

[298] *See generally* Miller, *Sex and Surveillance*, *supra* note 3; *See also* Miller, *Cross-Gender Prison Searches, supra* note 3, at 867-68 ("The power disparity that exists between men and women in society is magnified within the rigidly hierarchical and closed prison apparatus. Power is sexualized in prison. Because prison guards exercise near total authority over prisoners, the potential for male guards to abuse their legitimate access to women's bodies to conduct bodily searches of women and to visually monitor them nude or only partially dressed in ways that are overtly sexual is great.").

[299] Miller, *Cross-Gender Prison Searches*, *supra* note 3, at 873.

[300] *Id.* at 884.

[301] *Id.*

[302] *Id.*

[303] *Id.* at 884-85.

Rosa Ehrenreich observes, the privacy rubric tends to mask certain harms that have different impacts on people based on their social and economic status.[304] Ehrenreich argues, on the other hand, that some of the issues we think of and speak of as privacy issues, such as e-mail monitoring in the workplace, would be better described and analyzed as issues of power.[305] She speculates that perhaps one reason that we speak of power issues as privacy issues has to do with the ways in which gender, race and class play a role in constructing both power and privacy.[306] Fundamentally, what is important is for us to "squarely [ ]confront the issues of power that lie at the heart of privacy."[307] Such direct confrontation of complex power imbalances distinguishes Deborah Zalesne's work on the intersections of class and gender in hostile housing environment claims.[308] Like other feminist scholars,[309] Zalesne argues that sexual harassment, both in the workplace and in rental housing, "is predicated on the imbalance of power."[310] First, tenants, especially poor tenants, are often at the mercy of their landlords.[311] Second, socialized norms further subordinate poor women, who are the ones often victimized as tenants by sexual harassment."[312] People are socialized to equate power with whiteness and masculinity. As a result, black women often experience a feeling of powerlessness, leading to

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[304] *See* Ehrenreich, *supra* note 3, at 2049.

[305] *Id.* at 2052-54, For example, she states, "When we think about issues such as [ ] workplace e-mail monitoring, what really bothers many of us, I think—or what certainly *should* bother us—may or may not have much to do with privacy, [in] either the information control sense or the dignitary sense but it has a great deal to do with power. More specifically, what should bother us are balances of power [between employees and employers] that are damaging or inequitable." The problem, suggests Ehrenreich, is that "most American workers have very little power in relation to their employers." When an employer monitors his workers' e-mail he is saying: *Nothing is yours. All that you think is yours is really mine.* The fundamental problem is not that the boss is likely to find out something about the employee that is private and that will cause intense humiliation and shame if discovered. The problem is that in an employment-at-will context this can lead to the employee getting fired for a wide range of reasons. Depending on the context, it may or may not make sense to construe this as a privacy issue. Yet regardless of whatever else it is, it is surely a power issue that stems from the structure of American employment law and from the larger economic and social framework of our society. *Id.* at 2052-54. (emphasis added) (internal quotation marks omitted).

[306] *Id.* at 2058-62.

[307] *Id.* at 2062.

[308] Zalesne, *supra* note 297, at 861.

[309] *See, e.g.*, MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1 (1979) ("Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power.").

[310] Zalesne, *supra* note 297, at 861.

[311] *Id.* at 882.

[312] *Id.* at 884.

increased vulnerability to sexual harassment.[313] Moreover, a power imbalance between a man and a woman often leads to sexual harassment.[314] Thus, the unequal power relationship involving a dominant male landlord facilitates the sexual harassment of his women tenants.[315]

The power matrix between a landlord and tenant is not limited to gender. A landlord's power also derives from economic dominance or from other factors, such as race or class.[316] In employment discrimination cases, the victim of sexual harassment is usually a woman of color.[317] When sexual harassment occurs in the housing context, in comparison, the typical victim is a *poor* woman of color.[318] In addition to the problem of subordination of women by men and discrimination based on race, sexual harassment in a rental housing context also involves exploitation of poor people by those in positions of economic power. These subordinated people come from a cross-section of society that often need protection on the multiple grounds of sex, race and class discrimination.[319]

If power in multiple forms is the root of sexual harassment, then, according to Zalesne, "the law should focus on relations between the oppressor and the oppressed and question the defendant's actions in light of the power differentials between the parties."[320] Similarly, Fourth Amendment jurisprudence should focus on abusive exertion of state power that goes beyond notions of privacy or physical force. It should acknowledge the multitude and complex ways in which the state manifests power over individuals beyond violation of one's security by means of intrusion into one's house, papers, effects and persons. It should focus on embedded power imbalances—the power webs of gender, class, race and other subordinating and socializing mechanisms—that enable the police and the state to intrude on the individual in seemingly non-abusive, and hence constitutional, ways. And it should focus on empowering the individual by means that truly guarantee personal security as well the security of our society.

V. Towards a Feminist Theory of the Fourth Amendment

A. *Re-imagining Power*

Power, observes Martha Minow, is at its peak "when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from

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313 *Id.*

314 *Id.* at 882.

315 *Id.* at 861-62.

316 *Id.* at 882.

317 *Id.* at 886.

318 *Id.*

319 *Id.* at 886.

320 *Id.* at 885.

discussion or even imagination."[321] Thus, only when we scrutinize the power webs surrounding us, will we be able to forge strategies to dismantle them.[322] The goal of such feminist scrutiny is to change the historic use of power as a mechanism of exclusion, marginalization and degradation and to change the status of that exclusion and marginalization as *natural and objective* judgments about what is true and valuable.[323] Hence, this Article's feminist vision of the Fourth Amendment confronts power substantively, epistemologically, methodologically and doctrinally. Moreover, this vision redefines and transforms the concept of *power*. Instead of conceptualizing power in a negative, oppressive manner, my vision substantively and epistemologically reclaims power as an inclusive, liberating and equalizing concept.

It seems especially appropriate to urge such an all-out feminist theorization of power within the context of the Fourth Amendment, because, as this Article argued thus far, this field of law has always been about power and subordination. The core vision of the Fourth Amendment, however, has been narrowly construed and for the most part obscured because it is envisioned from a particular socially-privileged perspective while presented as being universally applicable and as having no perspective at all. Envisioned from the particular perspective of white male property-owners, the Fourth Amendment ensures that they will not be subordinated by the state and will maintain their social power in relation to the state and to other less privileged individuals. Because it is imagined from a white, male, privileged viewpoint, only the state is seen as imposing a real threat of disempowerment and subordination. Because it is imagined from a white, male, privileged viewpoint, the individual is seen as best served by being let alone. Because it is imagined from a white, male, privileged viewpoint, the battle for power and control is forged around issues of property, privacy and free speech. These issues, in turn, are also narrowly conceptualized to reflect the extent to which they shape a white, male, privileged identity.

The Fourth Amendment, as currently construed, is blind not only to power structures among individuals along race, gender and class lines. It is also blind to its own perspectivity. The white, male, privileged perspective regards its own portrayal of the issues as exclusive and as universally applicable. Hence, state power is the only power to be feared, because no other social power oppresses white privileged men. Hence, only invasions of privacy, interference with property, or silencing of speech are viewed as acts that subordinate one's identity and encroach upon one's autonomy. On the one hand, white, privileged heterosexual men are generally not threatened by sexual or racial violence; on the other hand, white, privileged heterosexual men are among the

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[321] Martha Minow, *The Supreme Court, 1986-Forward: Justice Engendered*, 101 HARV. L. REV. 10, 68 (1987).

[322] Kasubhai, *supra* note 228, at 72-73.

[323] Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 120 (1989).

elite that indeed possess the privacy, the property and the political speech to be taken away from them by the state. Theoretically, from its unaware stance, the Fourth Amendment strikes the appropriate constitutional balance and provides ample and adequate protection to the individual.

Once its particular perspective is exposed, and other excluded perspectives are taken into consideration, we realize that a much broader conceptualization of the Fourth Amendment is needed. For example, we need a Fourth Amendment that would protect women from so-called private abuse and violence by men. We need a Fourth Amendment that truly protects racial and ethnic minorities on the streets. We need a Fourth Amendment that pays respect to the *public* lives of the poor. In sum, the Fourth Amendment must focus on domination and disempowerment instead of privacy and property. This is not to say that privacy issues will no longer be relevant. But invading one's privacy must be understood as only one, non-exclusive form of domination over the individual. Domination manifests itself in multiple complex webs and being let alone does not always necessarily empower different individuals or best serve the community as a whole.

To a very limited extent, modern Fourth Amendment jurisprudence has paid attention to exertions of power beyond privacy and property by infusing search and seizure law with notions of consent and coercion. Nonetheless, as construed from the viewpoint of white, privileged men, only overt traditional manifestations of force and coercion are acknowledged doctrinally as being *real*, while the basic assumption of free will and agency remains unchallenged. To the extent that experiences of racial and ethnic minorities can be accommodated within that traditional framework of power, as when they are brutally beaten or shot dead by the police, the Fourth Amendment is supposed to protect them. But since broader social oppressive forces are unaccounted for within our current jurisprudence, a great number of people are left unprotected when their exchanges with the police are deemed non-coercive or as not implicating any legitimate (privacy) interests. Thus, the current paradigm of power within the Fourth Amendment may have actually contributed to the exclusion of alternative conceptualizations of power that would truly eradicate the oppression of those at the bottom of the social hierarchies.

In conceptualizing domination and disempowerment, a feminist Fourth Amendment theory must acknowledge and represent our social formation and social situation. We need to recognize that "human beings are formed in their preferences, abilities, and capacities to respond to coercion, by material circumstances, and relationships or affiliations with others."[324] We particularly need to expose the ways in which inequalities of power shape and impact us.[325] The law must acknowledge how we are socialized, especially along lines of gender

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[324] Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 845 (1999).

[325] *Id.*

and race, to submit to those in power. It also needs to understand how different power webs make us vulnerable to different things, at different places and at different times. We should grasp these power webs as perpetually shifting and reforming, as do our abilities to cope and resist them.

Women's experiences are living proof of such shifting power webs. Women experience their lives both as victims of oppression and as agents resisting it; as both subordinated by privacy and empowered by it. One lesson for feminist jurisprudence lies in the rejection of simple dichotomies and the abandonment of the either/ors that characterize our current jurisprudence. On many occasions the police dominate the encounter with the individual. In contrast, in some instances particular individuals successfully resist the oppressive power of the state and may even dominate the encounter. A simplistic and dichotomized approach to free will and coercion, agency and victimization, power and powerlessness, cannot ensure that both the individual and the police officers will be secured, respected and valued as human beings. We need to learn to accept contradiction, ambiguity and ambivalence in our lives and explore more "grays" in our conceptions of our own or others' experiences.[326]

B. *A Jurisprudence of Anti-Subordination and Multi-Perspectivity*

By focusing on polymorphous power webs and multiple interlocking systems of subordination as the substantive core of the Fourth Amendment, a feminist transformation of the Fourth Amendment has only begun. Our substantive commitment to focus on power webs and interlocking systems of subordination, and our commitment to redistribute and share social power, may inform our Fourth Amendment inquiry in multiple ways. It better captures the harm of oppression that is at the core of the Fourth Amendment; it explains the plausibility and even likelihood of competing realities of harm, especially injurious realities; and it enables us to choose among these competing realities. Specifically, this Article argues, it calls for embracing the values of anti-subordination and empowerment to guide us in resolving power struggles within the context of the Fourth Amendment.

A principle of anti-subordination and empowerment may help guide us through the circumstances of *Illinois v. Caballes*,[327] for example, where the privacy-based analysis left us wanting more. A paradigmatic shift to anti-subordination and empowerment will take head on the dissent's concern with allowing "suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks"[328] which are associated with totalitarian regimes.

During the initial traffic stop for speeding, both the officer and the individual are aware that observable external behavior by the individual (speeding) gave

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[326] Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 397 (1993).

[327] 543 U.S. 405, 405 (2005).

[328] *Id.* at 411 (Souter, J., dissenting); *see id.* at 422 (Ginsburg, J., dissenting).

rise to the encounter (the 'seizure') and that the officer is performing his expected duties. True, while there is an inherent level of power disparities and submission to state power in most every police-individual encounter, that scenario itself does not suggest that the officer is "taking advantage" of his privileged position to single out and disempower the individual. However, as the dissent points out, the injection of an additional officer and a drug-detecting dog into a traffic stop without any seemingly known reason "*changes the character of the encounter between the police and the motorist*," which becomes more adversarial, embarrassing and intimidating.[329] To the extent that police-individual relations are based on trust, we may not want to leave this discretionary expansion of the power imbalances unchecked.

Whereas most people may not necessarily feel intimidated or subordinated when being surrounded by bomb-detecting dogs at the airport for instance, they may feel quite differently when they are being singled out and targeted on the roadside. It is also possible of course that the outcome in this particular case would not change even under the anti-subordination paradigm. In this case, the dog sniffed the outside of the car, while the individual was inside waiting for the speeding ticket to be issued. At the same time, if this became general practice, as the dissent suggests may soon be the case, we may all feel subordinated by the state and living with constant fear that big brother is watching. A true confrontation of oppressive power requires a new legal discourse—one explicitly committed to seek out multiple perspectives other than our own. It requires us to examine the behavior of the police officer and of the individual in light of the overt and covert power hierarchies between them. The paradigm of anti-subordination does not offer us a 'one-size-fits-all' solution but rather exposes and contextualizes the power webs in which we all operate.

The advantage of such a flexible framework, committed to examining the particular relations between the officers and the individual under the circumstances of the case and in light of broader social structures and constrains, can also help us re-examine *Georgia v. Randolph*[330] and *L.A. County v. Rettele*.[331] This Article argues that the difference between the case of a co-tenant's consent to a search of a home when the individual is absent and the case when the police is expressly refused consent to search by the individual on premises and yet continues to do so nonetheless, must focus on the conduct of the police in relation to the individual rather than on the privacy interest in the home. In the latter, as was the case in *Randolph*, the conduct of the police sends the message to the individual that the police are in control and that there is nothing in the individual's power to stop them from entering. The individual has no choice but to submit to the authority of the state. Recall that the police had no search warrant or other authority to search the premises, and they therefore sought the

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[329] *Id.* at 421 (Ginsburg, J., dissenting) (emphasis added).

[330] 547 U.S. 103 (2006).

[331] 550 U.S. 609 (2007).

consent of the tenants. Being able to search the premises even in the absent of such consent (which conceptually at least puts the individual in control or at least on an equal footing with the police) is only possible in a power matrix in which the individual is inferior to the police or the state and must submit.

Similar dynamics, in comparison, are at play in the many cases where the court and scholars have struggled with curbing police pre-text and invidious subjective intent based on race, nationality or class.[332] As long as our jurisprudence treats such police conduct as irrelevant to the constitutional inquiry, officers will continue to take advantage of power hierarchies along axes of race and ethnicity. And the individual involved, as well as the community as a whole, will continue to lack power exactly for the same reasons that historically relegated racial and ethnic minorities and women to the bottom, to disempowerment, to subordination.

In contrast, such analysis may justify the outcome of *L.A. County v. Rettele*.[333] The occupants of the house no doubt suffered grave indignation and fear, as they were woken up to multiple officers, drawn weapons and orders to remain undressed with their hands up for several minutes.[334] At the same time, officers presumably acted in good faith concern for their safety when executing a valid search warrant. Factually, the occupants had no other choice but to submit to the show of force and to the authority of the state though they were innocent of any wrongdoing or suspicion. Nonetheless, when all is said and done, is this similar to *Entick* and *Wilkes*? Is this the kind of police conduct that the Fourth Amendment intends to curtail? In fact, the Court's cases regarding innocent mistakes articulate an exception to what otherwise may be viewed as an egregious violation of the individual's right. It is exactly because the police did not abuse or benefit, overtly or indirectly, from a position of power over the individual that we can justify the outcome of the case.

It is also the underlying recognition of and concern with abuse of police power that animate the remedial aspect of the Fourth Amendment: the application of the exclusionary rule in a criminal trial or the defense of qualified immunity in a civil § 1983 suit. Suppression of the evidence under the exclusionary rule is not an automatic consequence of a Fourth Amendment violation;[335] it depends on the culpability of the police and likelihood of deterring future police misconduct.[336] As the Court recently confirmed in *Herring v. United States*.[337] and *Davis v. United States*,[338] " 'an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus' of applying the

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[332] Raigrodski, *supra* note 3, at 213-26.

[333] *Rettele*, 550 U.S. at 609.

[334] *Id.* at 611.

[335] Herring v. United States, 129 S. Ct. 695, 698 (2009); Davis v. United States, 131 S. Ct. 2419, 2426 (2011).

[336] *Herring*, 129 S. Ct. at 698; *Davis*, 131 S. Ct. at 2426-28.

[337] 129 S. Ct. 695 (2009).

[338] 131 S. Ct. 2419 (2011).

exclusionary rule."[339] Indeed, the abuses that gave rise to the exclusionary rule involved conduct very similar to *Wilkes* and *Entick*.[340] In contrast, when no such abuse of police power is present, such as in cases of innocent or negligent mistakes, the exclusionary rule has not been applied.[341]

While direct examination of police conduct is often limited only to instances where the individual has been charged with a crime and suppression of incriminating evidence is sought under the exclusionary rule, much of the problematic police/state conduct with which this article is concerned never goes beyond that encounter and may continue unexamined. On occasion, § 1983 suits raise similar inquiries. This Article suggests that power dynamics inform the qualified immunity doctrine. For example, in *Safford Unified Sch. Dist. No. 1 v. Redding*,[342] while holding that the school officials' conduct was an unreasonable search in violation of the student's Fourth Amendment right and yet finding that the assistant principal was entitled to qualified immunity because it was not clearly established that a school strip search in unconstitutional,[343] the majority notes that it "mean[s] to cast no ill reflection on the assistant principal" because there is no doubt that his motive was benevolent.[344] Justice Ginsburg, in contrast, emphasized that the assistant principal not only subjected the student to a humiliating strip search but also made her sit on a chair outside his office for over two hours after the search and at no point attempted to call her parents.[345] For Justice Ginsburg, "[a]buse of authority of that order should not be shielded by official immunity."[346]

Rettele demonstrates, however, the challenges that may be posed by employing an anti-subordination analysis. A commitment to anti-subordination and empowerment requires us, I argued elsewhere,[347] to adopt a multi-perspectival way of knowing, informed by the detailed particularities of our lives.[348] This paradigmatic shift requires abandoning the so-called objective reasonableness epistemology of the Fourth Amendment altogether.[349] We must learn to view

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[339] *Herring*, 129 S.Ct. at 701 (citing United States v. Leon, 468 U.S. 897, 911 (1984)).

[340] In *Weeks v. United States*, 232 U.S. 383 (1914), officers broke into the defendant's home and confiscated incriminating papers; in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), federal officials went into the defendant's office and made a clean sweep of every paper they could find; and in *Mapp v. Ohio*, 367 U.S. 643 (1961), officers forced open the door to Ms. Mapp's house flashing a false warrant, handcuffed her and prevented her attorney from entering, and then officers canvassed the house for obscenity.

[341] *Herring*, 129 S. Ct. at 702. *Davis*, 131 S. Ct. at 2428-29.

[342] 129 S. Ct. 2633 (2009).

[343] *Redding*, 129 S. Ct. at 2645.

[344] *Id.* at 2644.

[345] *Id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part).

[346] *Id.*

[347] Raigrodski, *supra* note 3, at 213-26.

[348] MacKinnon, *supra* note 5, at 86.

[349] *See* Raigrodski, *supra* note 3, at 213-226; *cf.* Zalesne, *supra* note 297, at 885 ("Power

the world from more than a single, reflexive position.[350] Such multi-perspectival jurisprudence is not solely the ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed. All of us, regardless of gender, race and class, can access that world. It may not be easy to understand those whose experiences and values are very different from our own, yet, it is possible "with concentrated effort, much willingness to listen to others, and genuine good faith"[351] to learn to identify with others and to allow ourselves to be moved by others.

Of course, claiming to put ourselves in the exact shoes of the other, risks becoming as essentialist and unattainable as the current (objective) standards.[352] At the same time, by trying to take the perspective of another, we acknowledge the partiality of our own perspective;[353] it forces us to question our own categories and assumptions and expose other power webs that may have not affected us as much as they have others.[354] As a white woman and a mother, I can easily imagine the perspective of Gail Atwater, a woman who faced a threat to her children. As an educated professional, I grasp the seriousness of the intrusion into Dr. Ortega's office and private papers. At the same time, I would not claim to know the pain and indignation suffered by people of color of all clas-

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is the root of sexual harassment. The 'reasonableness' standards do not account for the unique power relationship that often exists between a landlord and a tenant . . . . [T]he law should focus on relations between the oppressor and the oppressed and question the defendant's actions in light of the power differentials between the parties. This shift in focus requires abandoning the reasonableness standards altogether.").

[350] Raigrodski, *supra* note 3, at 216. Patricia Williams has described this practice as the "ambi-valent, multivalent way of seeing that is . . . at the heart of what is called critical theory, feminist theory, and the so-called minority critique." Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2151 (1989).

[351] *See* Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 815 (1994) (quoting Kim L. Scheppele, *The Reasonable Woman*, 1 THE RESPONSIVE COMMUNITY 36 (1991)).

[352] As Mari Matsuda points out: "I cannot pretend that I, as a Japanese American, truly knows the pain of, say, my Native American sister. But I can pledge to educate myself so that I do not receive her pain in ignorance." Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 10 (1989).

[353] Minow, *supra* note 321, at 60.

[354] Martha Minow explains: "If you try to break out of unstated assumptions and take the perspective of [the "other"] . . . you may glimpse that your patterns for organizing the world are both arbitrary and foreclose their own reconsideration. . . . You may see an injury that you had not noticed, or take more seriously a harm that you had otherwise discounted. . . . You will then get the chance to examine the reference point you usually take for granted. Maybe you will conclude that the reference point itself should change. . . . You may find you had so much ignored the point of view of others that you did not realize you were mistaking your point of view for reality. Perhaps you will find that the way things are is not the only way things could be." *Id.* at 72.

ses who are often stopped by the police. Nor can I pretend to know the harm suffered by poor women who have their private lives constantly scrutinized by welfare and social authorities. But this does not mean that I cannot listen to their stories and educate myself about their experiences. It does not mean that I cannot learn to make the connections and see the broader picture of subordination and invalidation.[355]

It should be noted, however, that when we take other perspectives into account it does not necessarily mean that the perspective of the "other" will or should prevail,[356] as the earlier discussion of *Caballes* or *Rettele* suggests. But at least it will be seriously considered. In the long term, if we are truly guided by the values embodied in the Fourth Amendment, police officers and judges may better weigh the interests of the individual without much effort.[357] Furthermore, if we can minimize subordinating encounters between individuals and the police, or remedy more instances of oppressive governmental conduct in courts, then we will have fulfilled the promise of the Fourth Amendment and restore faith in the criminal justice system, at least to some extent.[358]

To sensitize judges, lawyers, police officers and the public to the dynamics of power webs and to structural hierarchies of subordination, I have suggested elsewhere that we explicitly adopt a methodology of narratives and incorporate these first-person narratives into judicial opinions, police training and media coverage of Fourth Amendment issues.[359] this Article similarly suggests that rather than hypothesizing about the perspective of the individual or the officer in the abstract, rather than hypothesizing the power dynamics between them, we make room for concrete personal accounts of the parties involved.[360]

Judith Greenberg and Robert Ward, for example, documented the use of narrative in their law and race class to encourage the students to confront both the Rodney King controversy and the more general evidence of deeply embedded prejudice in modern society and the modern legal regime.[361] The students in Greenberg's and Ward's class studied various narratives ranging from formal

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[355] At the very least, the very impossibility of fully knowing the perspective of another invites a certain amount of humility and self doubt when we try to gain knowledge, which in turn may allow us to "glimpse" a point of view other than our own, or at least to acknowledge that our own point of view is not the only truth and to open our minds to accept more than one, two, or even three truths in any given situation. *See* Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 129-30 (1987).

[356] Raigrodski, *supra* note 3, at 218.

[357] *Id.* at 218.

[358] *Id.*

[359] *Id.* at 218-26.

[360] *See generally id.* at 218-26 (giving a detailed account of utilizing first-person narratives in lieu of abstract so-called objective theorizing, such as the use of reasonable person or reasonable officer fictions).

[361] Greenberg & Ward, *supra* note 3.

trial documents to media coverage to personal testimonies of experiences with racism.[362] Significantly, students related more to the first person accounts of racism. They empathized with the pain and helplessness of the victims[363] and consequently better understood how race and experience with racism shape identity.[364] These first person narratives were effective in allowing the students to connect their own identities with those of people of a different race and to develop a consciousness of the realities of race and racism.[365] In the same way, first person stories about police-citizen encounters may allow judges, police officers and the public to connect and "allow ourselves to be persuaded by stories that previously seemed unbelievable because of their unfamiliar otherness."[366]

More importantly, we should view our commitment to giving voice to multiplicity and diversity as part of an expanded commitment to the true sharing of social power.[367] Multiperspectivity and anti-subordination are substantive commitments. First, they place a duty on us to make decisions "based on genuine attempts at understanding the perspectives and social circumstances of others,"[368] and to making choices with care and humility. Second, they require a willingness to reach results that redistribute power: "[We must] be willing to accept the hard choices—and losses—that true redistribution would entail."[369]

As the Court's Fourth Amendment cases demonstrate, however, we are bound to face situations where the individual may view the police conduct as subordinating while the police are truly trying to exercise their power in a responsible and respectful manner. We must recognize that their multiple stories reflect multiple experiences and realities,[370] which also means acknowledging "the tragic impossibility of all prevailing at once."[371] How can we then choose among competing stories from the perspectives of the police officer and the individual? How do we support responsive governance and effective policing

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[362] *Id.* at 340.

[363] *Id.*

[364] *Id.* at 341.

[365] *Id.* at 342.

[366] Raigrodski, *supra* note 3, at 219. "Voicing multiple stories and experiences of subordination conveyed particularly through first-person narratives is also important to the individual who is telling his or her story. Personal narratives [have an] empowering potential which is uniquely suited to redress the traditional invalidation of outsiders by the exclusion of their stories and perspectives from the law. . . . [T]he legal discourse of the Fourth Amendment can [thus] become empowering to the individual by letting the person's unmediated voice be [heard]." *Id.* at 220.

[367] *Id.* at 221.

[368] Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1232 n.201 (1990).

[369] *Id.* at 1233.

[370] Raigrodski, *supra* note 3, at 222.

[371] Minow, *supra* note 321, at 78.

while ensuring security, trust and empowerment for the individuals? Here as well, our substantive commitment to focus on power webs and interlocking systems of subordination, and our commitment to redistribute and share social power, can inform the decision-making process. A jurisprudence of power that is captured in the principles of anti-subordination and empowerment may enable us to choose among these competing realities.[372]

How do we identify subordination? As a start, "[w]e can determine when subordination exists by looking at social indicators: wealth, mobility, comfort, health, and survival tend to mark the rise to the top and the fall to the depths," observes Mari Matsuda.[373] At the same time, domination manifests and permeates in multiple ways that cannot be reduced to one *essence*.[374] Focusing on the moral crux of the matter rather than articulating one formula is exactly what we need. "Valuing the principle of antisubordination," observes Leti Volpp, "is more than a game of hierarchical rankings of 'who's most oppressed'; it means a serious commitment to evaluating and eradicating all forms of oppression."[375]

We should explicitly examine whether an individual was less powerful than the police in the specific case, and whether the police exploited or benefited, directly or indirectly, from its power over the individual. We can assume that typically the police are more powerful than the individual, even though this is due to the operation of social forces outside the specific encounter and to the individual's social position. We can also assume that the police benefit from its privileged position of power and the relative powerlessness of the individual, even if the officer does not intentionally exploit the vulnerability of the individual. Finally, we can assume that the individual is subordinated at least to the extent that the police benefit from the individual's relative powerlessness. Consequently, the burden should be on the state to persuade us that no power disparity, in its broadest sense, operated to the disadvantage of the individual.[376]

In examining whether the government officers unfairly benefit from such power imbalances, our inquiry should not be limited to intentional exploitation of power. Power imbalances are often invisible and appear *natural*. However, as long as people are disadvantaged because of their non-white race, for example, white people enjoy the privilege and power that accompanies whiteness. As long as male ideology and perspective dominate the world, men enjoy the

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[372] Raigrodski, *supra* note 3, at 223.

[373] *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2362 (1989).

[374] Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1388 (1986).

[375] Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 97-98 (1994) (arguing that "[a]ntisubordination is a value that the legal system must factor into [the decision] whether to present testimony as to a defendant's cultural background").

[376] Raigrodski, *supra* note 3, at 224.

social status and privilege of those on the top of the hierarchy, regardless of whether they harbor personal hostility toward those beneath them or not. In contrast, a jurisprudence of anti-subordination imposes a moral obligation on the powerful to act from the perspective of those less powerful. The police should attempt to see the world from the point of view of those they control and exercise their power accordingly. Judges should expressly examine questions of power, identifying the power matrix between the parties in light of a variety of factors, which contribute to an imbalance of power in the specific case. Judges must then determine whether such power disparities were *exploited* in an impermissible way. Such an experience would not necessarily tell them what result to reach, but it may give them, and all of us, a way to forge new approaches to the core protections afforded by the Fourth Amendment.

VI. CONCLUSION

The Court's rethinking of its long standing Fourth Amendment privacy discourse in *U.S. v. Jones*, while at the same time re-emphasizing a property-based paradigm of the Fourth Amendment, should prompt us to rethink Fourth Amendment jurisprudence as a whole. This Article employed feminist epistemology and feminist methodology to argue that rather than viewing the Fourth Amendment as intended to specifically protect either privacy or private property interests, we should focus on the real issues of power and control that fuel searches and seizures.

The Article offered a feminist critique of the public-private discourse in search and seizure law, and the dichotomies of home/market and intimate/commercial that animate it. Consequently, this Article argues that the Fourth Amendment property and privacy discourse and the public-private dichotomy are construed to protect the interests of white privileged men and to perpetuate male ideology and domination. This dominant narrative of protecting one's property and privacy from the tyrannical hands of the government is supported by the history of the Fourth Amendment, but, as this Article has argued, is not mandated by it.

In fact, a feminist re-reading of the historical sources of the Fourth Amendment further supports reframing the Fourth Amendment within a theory of power hierarchies and oppression. Limiting the scope of constitutional protection to the experiences and property and privacy interests of the white privileged men has come at a significant expense to the *security* of many others. Instead, we need to conduct our Fourth Amendment inquiries through a prism of multiple, web-like power hierarchies. In so doing, our Fourth Amendment jurisprudence can build on anti-subordination principles, which are especially suited for the newly envisioned power-centered Fourth Amendment.

Feminist jurisprudence has much to offer to the Fourth Amendment as a matter of substance, as a matter of epistemology, and as a matter of methodology. Instead of limited privacy and property it rethinks power; instead of reasonableness it examines power webs with a commitment to anti-subordination;

instead of abstract objectivity, it offers multiple perspectives and experience-based personal narratives. Taken for all it has to offer, feminist emphasis on diversity of voices and perspectives, especially those who have so far been excluded, on personal narratives and on the importance of eradicating hierarchical power structures provide the initial tools sufficient to start imagining a different Fourth Amendment and with it, a more just society.