

## ARTICLES

### WHAT IS A “SEARCH” WITHIN THE MEANING OF THE FOURTH AMENDMENT?

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#### I. INTRODUCTION

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>1</sup> In analyzing any Fourth Amendment issue, two separate questions must be answered: Is the Amendment applicable; and (2) If so, is it satisfied?<sup>2</sup> To be applicable, a “search” or “seizure” must occur. This Article addresses the definition of a search. There are “few issues more important to a society than the amount of power that it permits its police to use without effective control.”<sup>3</sup> When it labels certain governmental quests to obtain evidence as not a search within the meaning of the Fourth Amendment, the Supreme Court insulates

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<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> See, e.g., *Soldal v. Cook County*, 506 U.S. 56, 69 (1992) (stating that “the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question whether the Amendment applies”).

<sup>3</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377 (1974); cf. *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (emphasizing that “[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government”); *Harris v. United States*, 331 U.S. 145, 161 (1947) (Frankfurter, J., dissenting) (stating that the protection against police search and seizure afforded by the Fourth Amendment “is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society”); James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 325 (2002) (“The significance of the threshold issue is hard to understate. If the employment of a new investigatory tool *is not a search* at all, it is outside the sphere of Fourth Amendment regulation, and government authorities are at liberty to use it whenever they wish, without need for prior justification.”).

those activities from any judicial oversight.<sup>4</sup>

Defining a search is a two-sided inquiry: governmental actions<sup>5</sup> must invade a protected interest of the individual.<sup>6</sup> If the individual does not have a protected interest, actions that might otherwise be labeled a search will not implicate the Fourth Amendment. If a person has a protected interest, then the focus turns to the governmental techniques used to obtain tangible things or information. Much has been written about what constitutes an individual's protected interest, which the Court measures by utilizing the often-criticized reasonable expectation of privacy standard.<sup>7</sup> This Article does not add to that discussion; instead, it *assumes* that the individual has a protected interest and focuses on the part of the inquiry that has often been neglected, that is, what governmental methods of obtaining tangible things or information are or should be considered invasions of the individual's protected interest and, hence, a search within the meaning of the Fourth Amendment.

This Article first examines the historical background of the Fourth Amendment, emphasizing the physical intrusions that animated its adoption. It then details the Court's treatment of the concept of a search, cataloguing both physical and non-physical governmental activities. The word "search" is a term of art in Fourth Amendment jurisprudence and is not used in its ordinary sense.<sup>8</sup> The conclusion that a search has happened varies

<sup>4</sup> Tomkovicz, *supra* note 3, at 326.

<sup>5</sup> The Fourth Amendment is applicable only to governmental activity; hence, it does not regulate private searches and seizures. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

<sup>6</sup> *See, e.g., Smith v. Maryland*, 442 U.S. 735, 740 (1979) (holding that "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a . . . legitimate expectation of privacy that has been invaded by government action" (internal quotation marks omitted)).

<sup>7</sup> *See infra* note 121.

<sup>8</sup> The Court has occasionally consulted the dictionary and other ordinary conceptions of a search but has not adopted any of them. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (explaining that "[w]hen the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief'" (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (6th ed. 1989))). Justice Brennan, dissenting in *Lopez v. United States*, stated:

In every-day talk, as of 1789 or now, a man 'searches' when he looks or listens. Thus we find references in the Bible to 'searching' the Scriptures (John V, 39); in literature to a man 'searching' his heart or conscience; in the law books to 'searching' a public record. None of these acts requires a manual rummaging for concealed objects. . . . [J]ust as looking around a room is searching, listening to the sounds in a room is searching. Seeing and hearing are both reactions of a human being to the physical environment around him—to light waves in one instance, to sound waves in the other. And,

depending on the type of governmental activity utilized to obtain the evidence. That activity may include physical manipulation, visual observations, other use of the senses, and the employment of instrumentalities such as a dog's nose or technological devices. In Supreme Court jurisprudence, physical manipulation by the police comes closest to a common sense understanding of what a search is. That literal view must be contrasted with other situations, particularly sense-enhancing devices where the legal definition is divorced from the ordinary meaning of the term, thus permitting the Court to conclude that no search has occurred. The use of technological devices to learn something that would not otherwise be discovered is so rapidly expanding that it is difficult to grasp the myriad ways the government can obtain tangible evidence or information. Therefore, it is essential that the Court provide a comprehensive definition of the concept of a search to ascertain when the Amendment is implicated by a device that the government employs.

This Article proposes that any intrusion with the purpose of obtaining physical evidence or information, either by a technological device or the use of the senses into a protected interest should be considered a search, and, therefore, must be justified as reasonable. As will be discussed, the definition proposed here is based on several considerations: an analogy to physical invasions, which is rooted in historical concerns and provides a workable standard; a need to inquire into the government's purpose in engaging in the activity because the Amendment is only applicable to intentional governmental actions; the relevant inquiry is not whether significant or criminal facts are learned, but that *something* is learned as a result of an intrusion into the individual's protected interest; there is no principled difference among sense-enhancing devices or their availability to the public; and finally, and most importantly, the Amendment's fundamental purpose, which is to protect individuals from unreasonable governmental intrusions.

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accordingly, using a mechanical aid to either seeing or hearing is also a form of searching. The camera and the dictaphone both do the work of the end-organs of an individual human searcher—more accurately.

373 U.S. 427, 459 (1963) (Brennan, J., dissenting) (quoting *United States v. On Lee*, 193 F.2d 306, 313 (2d Cir. 1951) (Frank, J., dissenting) (alteration in original)); cf. Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541 (1988) (offering a semantic analysis of the concept of a search).

## II. HISTORICAL CONTEXT OF THE FOURTH AMENDMENT

The Fourth Amendment was a creature of the Eighteenth Century's strong concern for the protection of property rights against arbitrary and general searches and seizures. That historical context has been viewed as a primary source for understanding the Amendment.<sup>9</sup> The reaction to the English and colonial search and seizure abuses culminated in the adoption of the Fourth Amendment,<sup>10</sup> which "took its origin in the determination of the framers" to create safeguards against those arbitrary and abusive invasions.<sup>11</sup>

The abhorred English and colonial search and seizure practices involved physical invasions of people's property.<sup>12</sup> That was not surprising given that physical invasions were the only way authorities could intrude at the time and given the lack of technology and other sophisticated surveillance techniques. Thus, for example, in *Entick v. Carrington*, Entick's house was physically searched and all his private papers seized by government messengers pursuant to a warrant issued by the Secretary of State, based on the charge that Entick was the author or responsible for the publication of several seditious papers.<sup>13</sup> The warrant named

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<sup>9</sup> See, e.g., JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19 (1966) (explaining that the Fourth Amendment was "the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England"); Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L. CRIMINOLOGY, & POLICE SCI. 393, 396 (1963) (stating that judicial "opinions are replete with reliance upon history").

<sup>10</sup> See generally Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 490-517 (1995) (collecting authorities and summarizing the significant colonial and English developments).

<sup>11</sup> *Weeks v. United States*, 232 U.S. 383, 390 (1914).

<sup>12</sup> See, e.g., *Entick v. Carrington*, 19 Howell's St. Tr. 1029, 1030-31 (Ct. Com. Pl. 1765) (detailing an invasion of home and seizure of all private papers pursuant to general warrant); *Huckle v. Money*, 95 Eng. Rep. 768, 769 (K.B. 1763) (concluding "[t]o enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition: a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject"); *Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (K.B. 1763) (opining that the power to issue general warrants might "affect the person and property of every man in this kingdom, and [would be] totally subversive of the liberty of the subject").

<sup>13</sup> *Entick*, 19 Howell's St. Tr. at 1030-31. *Entick* has been repeatedly cited by the United States Supreme Court "as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law.'" See, e.g., *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886)); *Berger v. New York*, 388 U.S. 41, 49 (1967); *United States v. Lefkowitz*, 285 U.S. 452, 466 (1932) (referring to *Entick* and stating that the "teachings of that great case were cherished by our statesmen

Entick but was otherwise general as to the places to be searched and the papers to be seized.<sup>14</sup> Entick sued the messengers in trespass, and the jury returned a verdict in his favor.<sup>15</sup> In an opinion upholding the verdict, Lord Camden discussed the fundamental role that property rights played in society: “The great end, for which men entered into society, was to secure their property.”<sup>16</sup> Evidencing the strong support that the common law gave to private property, Camden stated that “every invasion of private property, be it ever so minute,” was considered a trespass.<sup>17</sup> Accordingly,

[n]o man can set his foot upon my ground without my licence [sic], but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.<sup>18</sup>

Similarly, in 1763, in a speech before Parliament, William Pitt emphasized the right to exclude physical invasions: “The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!”<sup>19</sup>

Across the Atlantic, in his argument opposing the issuance of suspicionless writs of assistance, which allowed customs officials in Massachusetts to search anywhere the governmental agents desired,<sup>20</sup> James Otis was concerned with the unjustified nature of the physical intrusion into a person’s home and property.<sup>21</sup> Similar concerns were expressed by others. For example, a contemporaneous newspaper article recounting the evils of the writs asserted that if the writs were to be granted, “every housholder [sic]

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when the Constitution was adopted”).

<sup>14</sup> *Entick*, 19 Howell’s St. Tr. at 1034, 1063–65.

<sup>15</sup> *Id.* at 1030, 1032.

<sup>16</sup> *Id.* at 1066.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Pitt’s speech has been repeatedly cited by the Court. *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 601 n.54 (1980) (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)).

<sup>20</sup> *See* LANDYNSKI, *supra* note 9, at 31–35 (discussing writs of assistance cases).

<sup>21</sup> *Id.* at 34 (quoting 2 JOHN ADAMS, LIFE AND WORKS OF JOHN ADAMS 523 (1761)); *see* 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, at 471 (1865).

in this province, will necessarily become less secure than he was before this writ” because it would permit any officer to forcibly enter into a dwelling house “and rifle every part of it.”<sup>22</sup> Appearing in the Philadelphia press in 1768 and subsequently widely available was one of “John Dickinson’s letters by ‘a Farmer in Pennsylvania,’” criticizing the writs of assistance as “dangerous to freedom, and expressly contrary to the common law, which ever regarded a man’s *house* as his castle, or a place of perfect security.”<sup>23</sup> At a meeting of the inhabitants of Boston in 1772, a committee was appointed to state the rights of the colonists.<sup>24</sup> The committee report, published by order of the town, attacked the writs of assistance as giving “absolute and arbitrary” power to customs officials to search anywhere they pleased.<sup>25</sup> The report concluded:

Thus our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and Chests broke open, ravaged and plundered, by Wretches, whom no prudent Man would venture to employ even as Menial Servants; whenever they are pleased to say they *suspect* there are in the House, Wares, [etc.] for which the Duties have not been paid. Flagrant instances of the wanton exercise of this Power, have frequently happened in this and other seaport Towns. By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable. These Officers may under color of Law and the cloak of a general warrant, break through the sacred Rights of the *Domicil*, ransack Mens [sic] Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.<sup>26</sup>

As a final example, during the Virginia Convention that was called to ratify the Constitution, Patrick Henry opposed ratification, arguing in part that, “unless the general government be restrained by a bill of rights, or some similar restriction, [federal officials could] go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear.”<sup>27</sup> Based on those concerns,

<sup>22</sup> QUINCY, *supra* note 21, at 488–89 (quoting BOSTON GAZETTE, Jan. 4, 1762).

<sup>23</sup> M. H. SMITH, THE WRITS OF ASSISTANCE CASE 493–94 (1978).

<sup>24</sup> QUINCY, *supra* note 21, at 466.

<sup>25</sup> *Id.* at 467 (internal quotation marks omitted).

<sup>26</sup> *Id.* (internal quotation marks omitted); see *Warden v. Hayden*, 387 U.S. 294, 315 (1967) (Douglas, J., dissenting).

<sup>27</sup> Patrick Henry, *Virginia Resolutions of 1798 and 1799*, reprinted in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 448–49

the consequent expression of the individual's rights has often been phrased in subsequent Supreme Court opinions by reference to property and the notion that "every man's house is his castle," which became "a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures."<sup>28</sup>

### III. PHYSICAL INVASIONS

Consistent with this historical precedent, Supreme Court cases routinely label physical intrusions into the home and effects as searches.<sup>29</sup> The conclusion that a search occurs when government officials enter a house to recover evidence is so well-established that it is usually uncontested.<sup>30</sup> These results stem directly from the specific historical abuses that motivated the Framers and reflect the view that the home is "[a]t the very core [of] . . . the right . . . [to] be free from unreasonable governmental intrusion."<sup>31</sup>

Physical examinations of a person's body are almost uniformly characterized as searches, with the Court often exhibiting concern for protecting the person's bodily integrity.<sup>32</sup> The range of activities labeled searches have included the involuntary extraction of a suspect's blood by a doctor to ascertain his level of intoxication,<sup>33</sup> a

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(Jonathan Elliot ed., 2d ed. 1881), *quoted in* Cunningham, *supra* note 8, at 554.

<sup>28</sup> *Weeks v. United States*, 232 U.S. 383, 390 (1914) (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 611 (8th ed. 1927)). This view was shared by commentators. *See, e.g.*, Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 365 (1921) (explaining that the Fourth Amendment embodies the principle in English liberty that found "expression in the maxim every man's home is his castle" (internal quotation marks omitted)).

<sup>29</sup> *See, e.g.*, *Michigan v. Tyler*, 436 U.S. 499, 504–06 (1978) (entry into private buildings, whether for police investigation or for health, fire, or building inspection, is a search); *United States v. Ramsey*, 431 U.S. 606, 614–15 (1977) (opening a sealed letter is a search); *Taylor v. United States*, 286 U.S. 1, 5 (1932) (breaking into and searching garage); *Amos v. United States*, 255 U.S. 313, 314–17 (1921) (entrance into home and store to look for "violations of the revenue law" is a search); *Gouled v. United States*, 255 U.S. 298, 304–06 (1921) (after admission into defendant's office, the secret taking of a document without force is a search); *Weeks*, 232 U.S. at 386, 388–89 (physical intrusion of home and examination of letters and lottery tickets is an unreasonable search absent a warrant).

<sup>30</sup> *See, e.g.*, *Agnello v. United States*, 269 U.S. 20, 30 (1925).

<sup>31</sup> *Silverman v. United States*, 365 U.S. 505, 511 (1961).

<sup>32</sup> These concerns were originally grounded in due process analysis. *See Rochin v. California*, 342 U.S. 165, 172 (1952) (stating that "shocks the conscious" to permit the police to employ a doctor to administer an emetic solution to induce vomiting in order to obtain evidence that the accused had swallowed); *Breithaupt v. Abram*, 352 U.S. 432, 434 (1957) (upholding involuntary extraction of blood at hospital on due process grounds). Today, such actions would be considered searches within the meaning of the Fourth Amendment. *See County of Sacramento v. Lewis*, 523 U.S. 833, 849 n.9 (1998) (asserting that *Rochin* would be treated as a Fourth Amendment case if decided today).

<sup>33</sup> *Schmerber v. California*, 384 U.S. 757, 767–68 (1966).

compelled surgical procedure to remove a bullet from a suspect's chest,<sup>34</sup> and the testing of a person's urine and breath for the presence of drugs.<sup>35</sup> Similarly, when the police take scrapings from under a suspect's fingernails, it is a search.<sup>36</sup> In contrast, taking a handwriting exemplar<sup>37</sup> or a voice exemplar<sup>38</sup> and perhaps fingerprints<sup>39</sup> are not considered searches, with the Court basing its conclusions on a lack of a protected individual interest in those characteristics.<sup>40</sup>

Searches of a person's clothing that he or she is wearing and probing the exterior of a person's body are routinely viewed as

<sup>34</sup> *Winston v. Lee*, 470 U.S. 753, 759 (1985).

<sup>35</sup> *See, e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 828 (2002) (urinalysis drug-testing of high school students who participated in extracurricular activities); *Ferguson v. City of Charleston*, 532 U.S. 67, 76 n.9 (2001) (urinalysis drug-testing of pregnant woman); *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (urinalysis drug-testing of political candidates); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (urinalysis drug-testing of high school students who participated in school sports); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (blood and urine testing for the presence of alcohol and illegal drugs of railway employees involved in certain train accidents and breath and urine testing of employees who violate certain safety rules); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 659 (1989) (urinalysis testing of United States Customs Service employees seeking transfer or promotions to positions directly engaged in drug interdiction and employees required to carry firearms).

<sup>36</sup> *Cupp v. Murphy*, 412 U.S. 291, 295 (1973).

<sup>37</sup> *United States v. Mara*, 410 U.S. 19, 21–22 (1973).

<sup>38</sup> *United States v. Dionisio*, 410 U.S. 1, 15 (1973) (no protected interest in the physical characteristics of a person's voice including tone and manner).

<sup>39</sup> In *Davis v. Mississippi*, the Court in dicta indicated that a fingerprint was "something of evidentiary value which the public authorities have caused an arrested person to yield." 394 U.S. 721, 724 (1969). Nonetheless, the Court stated: "Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Id.* at 727. It was unclear whether the Court was grounding its position on whether fingerprinting was not a search or on the belief that it was a reasonable one. Justice Stewart, dissenting, asserted that fingerprints were "not 'evidence' in the conventional sense," but instead were similar to "the color of a man's eyes, his height, or his very physiognomy" in that they were "an inherent and unchanging characteristic of the man." *Id.* at 730 (Stewart, J., dissenting). Subsequently, the Court contrasted fingerprinting to scraping a person's fingernails, asserting that the former were "mere 'physical characteristics . . . constantly exposed to the public.'" *Cupp*, 412 U.S. at 295 (quoting *Dionisio*, 410 U.S. at 14); *see Dionisio*, 410 U.S. at 12 (ambiguously suggesting that the process of fingerprinting was not regulated by the Fourth Amendment). Later, in *Hayes v. Florida*, the Court indicated that fingerprinting was a "less serious intrusion upon personal security than other types of searches and detentions." 470 U.S. 811, 814 (1985). Thus, although some of the Court's language indicates that a person does not have a reasonable expectation of privacy in his or her fingerprints, which is to say that the police actions of taking a fingerprint would not be a search within the meaning of the Fourth Amendment, in *Hayes*, the Court signaled that a person has a protected interest, albeit a diminished one, in the taking of his or her fingerprints. *Id.* at 817.

<sup>40</sup> The Court has reasoned: "No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." *Dionisio*, 410 U.S. at 14.



searches.<sup>41</sup> This proposition was extended to frisks in *Terry v. Ohio* where the Court was confronted with a situation in which a police officer patted down the outside of the clothing of suspects that he had detained because he believed that they were planning to rob a store.<sup>42</sup> Prior caselaw had not considered such intrusions a search.<sup>43</sup> Nonetheless, the *Terry* Court extended the concept of a search to the limited activity of physically probing for weapons. The Court believed that a frisk was an “invasion” implicating significant aspects of personal security:<sup>44</sup> the “inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”<sup>45</sup> The Court viewed the “careful [tactile] exploration of the outer surfaces of a person’s clothing all over his or her body” as “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment”<sup>46</sup> and that such an intrusion is “an annoying, frightening, and perhaps humiliating experience.”<sup>47</sup> Indeed, the Court said: “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>48</sup>

The Court’s maintenance of the Amendment’s applicability to physical invasions, however minor, remains strong.<sup>49</sup> *Arizona v.*

<sup>41</sup> *See, e.g.*, *United States v. Robinson*, 414 U.S. 218, 223–24 (1973) (patting down suspect and reaching into pocket); *Sibron v. New York*, 392 U.S. 40, 65 (1968) (reaching into a suspect’s pocket to retrieve drugs); *Beck v. Ohio*, 379 U.S. 89, 90 (1964) (searching of person’s body yielded envelope beneath his sock).

<sup>42</sup> 392 U.S. 1, 6–7 (1968). The officer did not put his hands beneath their outer garments until he felt the weapons. *Id.* at 7.

<sup>43</sup> The police practice of stopping and frisking suspicious persons was a “time-honored police procedure” pre-dating *Terry*, but the constitutionality of the practice was largely ignored or avoided prior to *Terry*. *See* Wayne R. LaFave, “*Street Encounters*” and the *Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39, 40–42 (1968). *But see* *Minnesota v. Dickerson*, 508 U.S. 366, 381–82 (1993) (Scalia, J., concurring) (questioning whether there was a right at common law to physically search a suspect who had not been arrested).

<sup>44</sup> *Terry*, 392 U.S. at 23.

<sup>45</sup> *Id.* at 8–9.

<sup>46</sup> *Id.* at 16–17.

<sup>47</sup> *Id.* at 25.

<sup>48</sup> *Id.* at 9 (quoting *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

<sup>49</sup> *See* *Minnesota v. Dickerson*, 508 U.S. 366, 377–79 (1993) (holding that an officer exceeded the scope of a permissible frisk by “squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket” after determining that there was no weapon in it (internal quotation marks omitted)); *Maryland v. Buie*, 494 U.S. 325, 327, 335 n.3 (1990) (stating that a “protective sweep,” or “cursory visual inspection of those places in which a

*Hicks*,<sup>50</sup> notwithstanding the dissent,<sup>51</sup> exemplifies the Court's view that *any* physical manipulation of an object in which a person has a protected interest that discloses information constitutes a search. The police lawfully entered Hicks' apartment after a bullet was fired through its floor striking and injuring a man in the apartment below.<sup>52</sup> During the course of a search for the shooter, other victims, and weapons, Officer Nelson "noticed two sets of expensive stereo components, which seemed out of place in the squalid and otherwise ill-appointed four-room apartment."<sup>53</sup> Nelson suspected that the stereos were stolen and moved some of the components so that he could read the serial numbers.<sup>54</sup> Thereafter, using the serial numbers, it was determined that the stereos had been taken in a robbery.<sup>55</sup>

Justice Scalia, writing for the Court, concluded that Nelson's moving of the equipment was "a 'search' separate and apart from the search for the shooter, victims, and weapons that were the lawful objective of his entry into the apartment."<sup>56</sup> Scalia reasoned:

Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of [Hicks'] privacy interest. But taking

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person might be hiding" incident to an arrest and conducted to protect the safety of police officers or others is a search); *New York v. Class*, 475 U.S. 106, 114–15 (1986) (reaching into a vehicle to move papers that covered the vehicle identification number on the dashboard is a search).

<sup>50</sup> 480 U.S. 321 (1987).

<sup>51</sup> *Id.* at 330 (Powell, J., dissenting). Justice Powell, with whom Chief Justice Burger and Justice O'Connor joined, believed that the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches trivializes the Fourth Amendment." *Id.* at 333. He reasoned:

Numerous articles that frequently are stolen have identifying numbers, including expensive watches and cameras, and also credit cards. Assume for example that an officer reasonably suspects that two identical watches, both in plain view, have been stolen. Under the Court's decision, if one watch is lying face up and the other lying face down, reading the serial number on one of the watches would not be a search. But turning over the other watch to read its serial number would be a search. Moreover, the officer's ability to read a serial number may depend on its location in a room and light conditions at a particular time. Would there be a constitutional difference if an officer, on the basis of a reasonable suspicion, used a pocket flashlight or turned on a light to read a number rather than moving the object to a point where a serial number was clearly visible?

*Id.* at 333 n.4.

<sup>52</sup> *Id.* at 323 (majority opinion).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 324–25.

action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of [Hicks'] privacy unjustified by the exigent circumstance that validated the entry. . . . It matters not that the search uncovered nothing of any great personal value to [Hicks]—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.<sup>57</sup>

*Bond v. United States* is consistent with the view in *Hicks*. In *Bond*, the Court was confronted with the question “whether a law enforcement officer’s physical manipulation of a bus passenger’s carry-on luggage” was a search.<sup>58</sup> In that case, border patrol agent Cesar Cantu entered a bus stopped at a checkpoint.<sup>59</sup> As Cantu walked through the bus, “he squeezed the soft luggage which passengers had placed in the overhead storage space above the seats.”<sup>60</sup> In the compartment above Bond’s seat, Cantu “squeezed a green canvas bag and noticed that it contained a ‘brick-like’ object.”<sup>61</sup> Bond admitted that the bag was his and allowed Cantu to open it.<sup>62</sup> “Upon opening the bag, Agent Cantu discovered a ‘brick’ of methamphetamine . . . [which] had been wrapped in duct tape until it was oval-shaped and then rolled in a pair of pants.”<sup>63</sup> Bond challenged Cantu’s initial squeezing of the bag as an illegal search.<sup>64</sup>

Chief Justice Rehnquist, writing for the Court, agreed with Bond.<sup>65</sup> The Chief Justice first recognized that the luggage was “clearly an ‘effect’ protected by the Amendment” and that Bond “possessed a privacy interest in his bag.”<sup>66</sup> He then examined the Government’s reliance on the Court’s decisions in *California v.*

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<sup>57</sup> *Id.* at 325 (citing *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) (“The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item firsthand, its owner’s privacy interest in that item is lost . . .”).

<sup>58</sup> *Bond v. United States*, 529 U.S. 334, 335 (2000).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 336.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 336–37.

*Ciraolo* and *Florida v. Riley*.<sup>67</sup> The government contended that by exposing his bag to the public, Bond had lost his reasonable expectation that his bag would not be physically manipulated.<sup>68</sup> The majority rejected that claim:

Our Fourth Amendment analysis embraces two questions. First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that “he [sought] to preserve [something] as private.” Here, petitioner sought to preserve privacy by using an opaque bag and placing that bag directly above his seat. Second, we inquire whether the individual’s expectation of privacy is “one that society is prepared to recognize as reasonable.” When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent’s physical manipulation of petitioner’s bag violated the Fourth Amendment.<sup>69</sup>

*Bond* serves to remind us that the Amendment’s applicability is two dimensional. This allows the justices to focus either on the nature of the governmental conduct or the scope of the individual’s interest.<sup>70</sup> However, *Bond* and *Hicks* also demonstrate that when government agents engage in physical manipulation, the Court will readily conclude that a search has occurred so long as that manipulation infringes upon a protected interest.<sup>71</sup>

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<sup>67</sup> *Id.* at 337 (discussing *California v. Ciraolo*, 476 U.S. 207 (1986), and *Florida v. Riley*, 488 U.S. 445 (1989)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 338–39 (alteration in original) (citations omitted).

<sup>70</sup> Dissenting Justice Breyer reasoned that the squeezing by the agent was no different in kind than what “overhead luggage is likely to receive from strangers in a world of travel that is somewhat less gentle than it used to be.” *Id.* at 340 (Breyer, J., dissenting). “[B]ecause ‘passengers often handle and manipulate other passengers’ luggage,’ the substantially similar tactile inspection [in *Bond*] was entirely ‘foreseeable.’” *Id.* (citing *United States v. Bond*, 167 F.3d 225, 227 (5th Cir. 1999)). Breyer therefore believed that Bond had no reasonable expectation of privacy. *Id.* at 340–43.

<sup>71</sup> *See, e.g.*, *California v. Greenwood*, 486 U.S. 35, 40–42 (1988) (holding that there is no reasonable expectation of privacy in trash left for collection); *Cardwell v. Lewis*, 417 U.S. 583, 588–92 (1974) (finding that physical removal of paint scrapings from exterior of vehicle is not a search because no privacy interest was infringed by the removal); *Oliver v. United States*, 466 U.S. 170, 179–181 (1984) (concluding that there is no protected interest in open fields);

## IV. NON-TACTILE SEARCHES

*A. Boyd, Liberalism, and the Constructive Search Doctrine*

The more compelling and difficult question is whether and to what extent the Amendment protects against intrusions other than physical ones.<sup>72</sup> *Boyd v. United States*<sup>73</sup> was the first significant treatment of the Fourth Amendment by the Supreme Court and is the case to which it has repeatedly returned for inspiration.<sup>74</sup> In that case, the Court gave the Amendment and specifically the concept of a “search”<sup>75</sup> an expansive interpretation, reasoning in part:

[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.<sup>76</sup>

At issue in *Boyd* was the constitutionality of a statute authorizing the compulsory production of a person’s private papers to use as evidence against that person in a criminal case or forfeiture proceeding.<sup>77</sup> Rejecting the government’s contention that the statute did “not authorize the search and seizure of books and

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Hester v. United States, 265 U.S. 57, 59 (1924) (stating that Fourth Amendment protection does not extend to open fields).

<sup>72</sup> Permanent physical occupations of property invariably have been found to constitute a taking under the Takings Clause. *See, e.g.,* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982). However, as with regulatory takings, which the Court has had a great deal of difficulty resolving, see *Yee v. City of Escondido*, 503 U.S. 519, 528–33 (1992) (distinguishing between physical and regulatory takings), the Court has had more difficulty analyzing the significance of non-physical invasions under the Fourth Amendment.

<sup>73</sup> 116 U.S. 616 (1886).

<sup>74</sup> *See, e.g.,* Carroll v. United States, 267 U.S. 132, 147 (1925) (describing *Boyd* as the “leading case” interpreting the Amendment).

<sup>75</sup> *Boyd v. United States*, 116 U.S. 616, 635 (1886) (noting that literal construction of constitutional provisions reduces their efficacy and gradually depreciates the value of the rights that they are intended to protect).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 622–23.

papers, but only requires the defendant or claimant to produce them,” the Court observed that the act declared that if the documents were not produced, then the allegations would be treated as proven.<sup>78</sup> The Court viewed this as “tantamount to compelling their production”<sup>79</sup> and as “equivalent” to an “actual” search and seizure.<sup>80</sup> The Court observed:

It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man’s house and searching among his papers, are wanting, . . . but [the statute] accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man’s private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.<sup>81</sup>

The Court examined the events leading up to the American Revolution, placing particular reliance on *Entick v. Carrington*, and set forth a sweeping view of the concepts of a search and a seizure:<sup>82</sup>

The principles laid down in [*Entick*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés [sic] of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; [sic] but . . . it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden’s judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime

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<sup>78</sup> *Id.* at 621.

<sup>79</sup> *Id.* at 622.

<sup>80</sup> *Id.* at 635.

<sup>81</sup> *Id.* at 622.

<sup>82</sup> *Id.* at 624–30 (discussing *Entick v. Carrington*, 19 Howell’s St. Tr. 1029 (Ct. Com. Pl. 1765)).

or to forfeit his goods, is within the condemnation of that judgment.<sup>83</sup>

Thus, in *Boyd*, the Court created the concept of a “constructive” search<sup>84</sup> and viewed such an action as indistinguishable from an “actual” search.<sup>85</sup>

The constructive search doctrine was further developed in *Perlman v. United States*.<sup>86</sup> In that case, Perlman voluntarily used several exhibits in court in a suit against a corporation, which the court ordered impounded as a condition of granting a motion to dismiss.<sup>87</sup> The United States then filed an application to obtain access to the exhibits for use in criminal proceedings against Perlman.<sup>88</sup> Perlman claimed that that action constituted a search and seizure of the exhibits.<sup>89</sup> Rejecting that claim and viewing Perlman’s actions as “a voluntary exposition of the articles,”<sup>90</sup> the Supreme Court stated that the concepts of searches and seizures entail “compulsion, either upon the individual or, under some circumstances, his property,” but that “an actual entry upon premises, an actual search and seizure” was not required.<sup>91</sup> Instead, “[t]he principles preclude as well the extortion of testimony or detrimental inferences from silence or refusals to testify.”<sup>92</sup> The decided cases, the Court observed, involved the presence of “force or threats or trespass upon property, some invasion of privacy or governmental extortion.”<sup>93</sup>

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<sup>83</sup> *Id.* at 630. Justice Miller, with whom the Chief Justice joined, rejected the view that there was “in fact” a search or seizure authorized by the statute. *Id.* at 639 (Miller, J. concurring). He reasoned:

If the mere service of a notice to produce a paper to be used as evidence, which the party can obey or not as he chooses is a search, then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made.

*Id.* at 641.

<sup>84</sup> The *Boyd* Court did not characterize the search as “constructive.” That characterization is from a later case. *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 202 (1946); see *United States v. Morton Salt Co.*, 338 U.S. 632, 651–52 (1950) (observing that the rights protected by the Fourth Amendment are “not confined literally to searches and seizures as such, but extend[] as well to the orderly taking under compulsion of process”).

<sup>85</sup> See *Boyd*, 116 U.S. at 633–35.

<sup>86</sup> 247 U.S. 7 (1918).

<sup>87</sup> *Id.* at 8–9.

<sup>88</sup> *Id.* at 9.

<sup>89</sup> *Id.* at 13.

<sup>90</sup> *Id.* at 14.

<sup>91</sup> *Id.* at 13.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; cf. *Wyman v. James*, 400 U.S. 309, 317–18 (1971) (stating that caseworker visitation to the homes of aid recipients as a required condition of receiving public aid or aid to families

In *Hale v. Henkel*, the Court extended the concept of a constructive search and seizure to include subpoenas for the production of documents.<sup>94</sup> Although the Court recognized that “a search ordinarily implies a quest by an officer of the law” and that a seizure contemplated “a forcible dispossession of the owner,” it believed that “the substance of the offense is the compulsory production of private papers” and therefore viewed a subpoena duces tecum as within the regulation of the Amendment.<sup>95</sup> Later, in *Oklahoma Press Publishing Co. v. Walling*,<sup>96</sup> the Court reassessed its view of the scope of the Fourth Amendment’s safeguards against subpoenas, contrasting a “so-called ‘figurative’ or ‘constructive’ search with cases of actual search and seizure.”<sup>97</sup> It limited the safeguards against a subpoena to abuses of “too much indefiniteness or breadth in the things required to be ‘particularly described.’”<sup>98</sup> Observing that those criteria are not identical to the protections “against invasion by actual search and seizure, nor are the threatened abuses the same,” the Court nonetheless believed that its articulated limitations on a subpoena protected “the interests of men to be free from officious intermeddling.”<sup>99</sup> This is to say that the Court believed that the Amendment was applicable to subpoenas but that it was satisfied by a different measure of reasonableness than an “actual” search.<sup>100</sup>

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with dependent children is not a search, with the Court reasoning that the visitations were “not forced or compelled” and that the recipient could deny permission to visit at the cost of losing the aid). *But see id.* at 340–41 (Marshall, J. dissenting) (asserting that the home visit was a search and that the conclusion that a search occurred did not depend on the “size of the club that the State wields against a resisting citizen”).

<sup>94</sup> 201 U.S. 43, 76 (1906).

<sup>95</sup> *Id.*; see generally Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805 (2005) (discussing the Supreme Court’s Fourth and Fifth Amendment treatment of subpoenas).

<sup>96</sup> 327 U.S. 186 (1946).

<sup>97</sup> *Id.* at 202.

<sup>98</sup> *Id.* at 208.

<sup>99</sup> *Id.* at 213.

<sup>100</sup> The Court has also found mandatory reporting and document retention requirements consistent with the Fourth Amendment: although the language of the cases tends to be ambiguous, they appear to turn on the conclusion that the requirements are not unreasonable. *See, e.g.*, *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 59–67 (1974) (upholding reporting requirements of foreign and domestic financial transactions of banks); *United States v. Morton Salt Co.*, 338 U.S. 632, 651–52 (1950) (upholding requirements to file certain reports); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 174–77 (1911) (upholding statute requiring filing and subsequent publication of corporate tax return).



*B. Olmstead and the Literal View*

Unlike *Boyd's* expansive construction of the concept of a search, a competing line of authority began to develop with *Olmstead v. United States*,<sup>101</sup> based on a literal approach to interpreting the Amendment. That literal view used property law concepts to limit the Fourth Amendment inquiry to the protection of tangible items from physical invasions—that is, only physical intrusions into constitutionally protected areas constituted a “search.”<sup>102</sup> Acknowledging that *Boyd* had stated that the Fourth Amendment was to be liberally construed, Chief Justice Taft, writing for a narrow majority in *Olmstead*, then gutted that principle: “But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.”<sup>103</sup>

The *Olmstead* Court was confronted with the question whether the installation and use of wiretaps to monitor conversations were searches when the taps were placed on telephone lines leading to homes and offices.<sup>104</sup> The Court concluded that the activities were not searches for three related reasons: (1) conversations are not protected by the Amendment; (2) only certain tangible objects are protected; and (3) those tangible objects are only protected against physical invasions.<sup>105</sup> The Court reasoned: “The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects.”<sup>106</sup> Conversations could not be protected because they were not on that list.<sup>107</sup> The Court also reasoned that because the telephone lines outside the buildings were “not part of [a] house or office any more than are the highways along which they are stretched,” the interception of the conversations did not occur in an area protected by the Amendment.<sup>108</sup> Further, the Court asserted that “[t]he well known

<sup>101</sup> 277 U.S. 438, 464 (1928).

<sup>102</sup> See generally Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 309–27 (1998) [hereinafter Clancy, *Security*] (discussing the use of property law concepts to define what the Fourth Amendment protects).

<sup>103</sup> 277 U.S. at 465.

<sup>104</sup> *Id.* at 455–57.

<sup>105</sup> *Id.* at 464–66.

<sup>106</sup> *Id.* at 464.

<sup>107</sup> Clancy, *Security*, *supra* note 102, at 317 (citing *Olmstead*, 277 U.S. at 464).

<sup>108</sup> *Olmstead*, 277 U.S. at 465.

historical purpose of the Fourth Amendment . . . was to prevent the use of governmental *force* to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will."<sup>109</sup> There was no search or seizure when the wiretaps were installed outside the buildings because there was no physical entry into a house or an office.<sup>110</sup> Recording a conversation, which the Court viewed as akin to eavesdropping, did not entail a physical invasion of a protected area and therefore could not be a search or seizure.<sup>111</sup>

The Court used *Olmstead* for a significant portion of the twentieth century to limit Fourth Amendment applicability to physical trespasses into constitutionally protected areas and to searches and seizures of people and tangible physical objects.<sup>112</sup> Pursuant to that property-based analysis, the Court divided the world into those areas that were constitutionally protected and those that were not, compiling a list of each.<sup>113</sup> The cases consistently turned on the determination of whether the government had physically entered a protected area.<sup>114</sup> This theory of "property-based literalism" abandoned the liberal approach of *Boyd* but preserved the link between property rights and the Fourth Amendment.<sup>115</sup> That conjunction of literalism and property theory "guaranteed that the Fourth Amendment would be irrelevant as a device for regulating the use of new technologies that allowed the government to invade formerly private places without committing a common law trespass."<sup>116</sup> This is to say that the government had a great deal of freedom to utilize new technology to investigate without implicating the Amendment.

<sup>109</sup> *Id.* at 463 (emphasis added).

<sup>110</sup> *Id.* at 466.

<sup>111</sup> *Id.* at 464, 466.

<sup>112</sup> See Clancy, *Security*, *supra* note 102, at 316–20 (summarizing the *Olmstead* line of authority).

<sup>113</sup> See, e.g., *Lanza v. New York*, 370 U.S. 139, 143 (1962).

<sup>114</sup> See, e.g., *Silverman v. United States*, 365 U.S. 505, 510–12 (1961) (cataloguing cases and recognizing that the presence or absence of a physical invasion into a constitutionally protected area was the vital consideration).

<sup>115</sup> Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 611 (1996).

<sup>116</sup> *Id.*

*C. The Erosion of Olmstead: Intangible Interests and Intrusions, Hearing, and Katz*

In *Katz v. United States*,<sup>117</sup> the Court emphatically rejected *Olmstead's* view that the country was divided into two areas—those that were constitutionally protected and those that were not—and that government intrusions within the meaning of the Fourth Amendment were limited to physical trespasses. As discussed below, *Katz's* discussion of the two sides of the search question deserve separate evaluations.

In *Katz*, federal agents placed an electronic listening and recording device outside a public phone booth, from which Katz placed his calls.<sup>118</sup> As to what the Amendment protected, *Katz* vaguely asserted “that the Fourth Amendment protect[ed] people—and not simply ‘areas.’”<sup>119</sup> The majority posited that privacy is a centralizing principle upon which Fourth Amendment rights are premised.<sup>120</sup> That view and its mutation in subsequent cases into the reasonable expectations of privacy test, which I have argued elsewhere, fundamentally misconstrues what the Amendment protects.<sup>121</sup> Nonetheless, as stated at the beginning of this Article, I

<sup>117</sup> 389 U.S. 347 (1967).

<sup>118</sup> *Id.* at 348.

<sup>119</sup> *Id.* at 353.

<sup>120</sup> *Id.* at 350–52.

<sup>121</sup> *Id.* at 350–51. The Court subsequently adopted, from Justice Harlan’s concurring opinion in *Katz*, the reasonable expectation of privacy test to define the individual’s interest that is implicated by a search. *Id.* at 361 (Harlan, J., concurring); see, e.g., *California v. Ciraolo*, 476 U.S. 207, 214–15 (1986) (holding that an airplane flyover does not violate any reasonable expectation of privacy). The reasonable expectation of privacy test requires that a person exhibit an actual subjective expectation of privacy which society must recognize as reasonable. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (stating that the test “embraces two discrete questions”). If either prong is missing, no protected interest has been established, and the Court will conclude that no search has occurred. *Id.* at 745–46. There is a long list of situations where the Court has said that the individual lacks a protected privacy interest. See Clancy, *Security*, *supra* note 102, at 331–34 (itemizing the list). As detailed in *Security*, the privacy approach has proven to be inadequate. *Id.* at 339–44. The Fourth Amendment speaks of the right to be secure, and I have proposed invigorating that term and using it as the proper measure of the protection afforded by the Amendment. See *id.* at 344–66. The ability and the right to exclude governmental agents is the essence of the security afforded by the Fourth Amendment. The Fourth Amendment is a gatekeeper that keeps out the government. A gatekeeper does not ask why one desires to exclude the government; it simply follows orders. As a gatekeeper, the Amendment permits other rights to flourish. The purpose for exercising one’s Fourth Amendment rights neither adds to nor detracts from the scope of the protection afforded by the Amendment. Privacy may motivate a person to assert his or her right but it is the right to prevent intrusions—to exclude—which affords a person security. The ability to exclude must extend to all invasions, tangible and intangible, and must protect both tangible and intangible aspects of the Amendment’s protected objects. That was the essential lesson of *Katz v. United States* which afforded protection to intangible

am assuming that a person has a protected interest, whether it be labeled property, privacy, security, or something else; the focus here is on what governmental actions constitute an intrusion into a person's protected interest that should be labeled a "search."

Thus, the second principle developed in *Katz* is of more moment here. In announcing that the Fourth Amendment protected against the unwanted interception of conversations,<sup>122</sup> the Court concluded that it was "clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."<sup>123</sup> This rejection of the physical trespass theory was not premised on a broad philosophical view of the Amendment nor did the Court adopt *Boyd's* liberal construction of the Amendment. Indeed, it did not even cite *Boyd*. Instead, *Katz* acknowledged that listening with the "uninvited ear" could be a form of searching.<sup>124</sup> It

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interests against non-physical intrusions. 389 U.S. at 353. Its progeny and privacy theory, however, failed to grasp the essence of the interest protected. Although it may have been *Katz's* *expectation* that his conversation was not being heard, it was his *right* to exclude others from hearing. Indeed, an increasing number of commentators recognize that the *Katz* framework is unworkable. See, e.g., Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5, 28–29 (2002) [hereinafter Cloud, *Rube Goldberg*] ("After a third of a century, it is fair to conclude that *Katz* is a failure, at least if its original purpose was to ensure that Fourth Amendment standards regulate the use of modern surveillance technologies."); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1500 (2005) ("The 'expectation of privacy' notion is flawed to the core."). Yet, other commentators seek to invigorate privacy analysis. See, e.g., Peter P. Swire, *Katz Is Dead. Long Live Katz*, 102 MICH. L. REV. 904, 923 (2004) (maintaining that the reasonable expectation of privacy test could be given "greater substance" if courts "engage in a more substantive review of expectations of privacy in specific factual settings").

<sup>122</sup> The aspect of *Olmstead* that limited the objects protected to tangible things attenuated over time, with the Court by the 1960's and prior to *Katz* recognizing that private conversations could be the object of a search or seizure. See, e.g., *Desist v. United States*, 394 U.S. 244, 248 (1969) (discussing the demise of the belief that oral conversations could not be the object of a search or seizure); *Berger v. New York*, 388 U.S. 41, 51–53 (1967) (discussing circumstances under which the use of an electronic eavesdropping device would violate Fourth Amendment protection); *Hoffa v. United States*, 385 U.S. 293, 301 (1966) ("[T]he protections of the Fourth Amendment are surely not limited to tangibles, but can extend as well to oral statements."). Underlying that extension of the coverage of the Amendment was "its broader spirit." *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 313 (1972). But see *Katz*, 389 U.S. at 365–69 (Black, J., dissenting) (arguing that *Olmstead* rightly concluded that oral conversations were not covered by the Fourth Amendment and that the Court had not retreated from that position until the "amorphous holding in *Berger*"); *Berger*, 388 U.S. at 78–81 (Black, J., dissenting).

<sup>123</sup> *Katz*, 389 U.S. at 353 (majority opinion).

<sup>124</sup> *Id.* at 352. Other justices, in prior cases, had also directed their attention to perceived infirmities with the physical trespass theory. See, e.g., *Silverman v. United States*, 365 U.S. 505, 512–13 (1961) (Douglas, J., concurring) (stating that the invasion of an individual's privacy is the same regardless of whether an electronic eavesdropping device physically penetrates a wall); *Goldman v. United States*, 316 U.S. 129, 139–40 (1942) (Murphy, J., dissenting) ("Physical entry may be wholly immaterial."); *Olmstead v. United States*, 277 U.S.

then simply discussed the factual situation before it: “The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”<sup>125</sup>

*Katz* was so amorphous that subsequent cases could have taken many different roads. Arguing for a broad-based view of what constituted a search and writing seven years after *Katz* was decided, Anthony Amsterdam argued that *Katz* rejected a two-stage inquiry when a search occurs:

The entire thrust of the opinion is that it is needless to ask successively whether an individual has the kind of interest that the [F]ourth [A]mendment protects and whether that interest is invaded by a kind of governmental activity characterizable by its attributes as a “search.” Rather, a “search” is anything that invades interests protected by the [A]mendment.<sup>126</sup>

Amsterdam added that “[s]earches’ are not particular methods by which [the] government invades constitutionally protected interests: they are a description of the conclusion that such interests have been invaded.”<sup>127</sup>

Since *Katz*, the Court has consistently viewed nonconsensual eavesdropping<sup>128</sup> to capture conversations, including by technological means, as a search.<sup>129</sup> It has, however, construed the

438, 472–75 (1928) (Brandeis, J., dissenting) (“Breaking into a house and opening boxes and drawers are circumstances of aggravation . . .”).

<sup>125</sup> *Katz*, 389 U.S. at 353; *see id.* at 362 (Harlan, J., concurring) (agreeing that the physical trespass theory should be overruled because “reasonable expectations of privacy may be defeated by electronic as well as physical invasion”).

<sup>126</sup> Amsterdam, *supra* note 3, at 383.

<sup>127</sup> *Id.* at 385.

<sup>128</sup> According to Blackstone, eavesdropping was punishable at common law as a nuisance:

“Eaves-droppers, or such as listen under walls or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet: or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour [sic].”

*Lopez v. United States*, 373 U.S. 427, 466 n.13 (1963) (Brennan, J., dissenting) (quoting 4 BLACKSTONE COMMENTARIES 168 (1765–1769)). The American colonies, and later the states, adopted that view and afforded protection against such actions. *See, e.g.*, DAVID H. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 89 (Univ. Press of Virginia 1972) (discussing early colonial actions against eavesdroppers); *State v. Williams*, 2 Tenn. (2 Overt.) 106, 106–07 (1808) (upholding, under the common law, an indictment for eavesdropping).

<sup>129</sup> *See, e.g.*, *Alderman v. United States*, 394 U.S. 165, 171 (1969) (stating that the Fourth Amendment “affords protection against the uninvited ear” including illegally overheard

concept of consent broadly. Thus, the government can, without implicating the Amendment, use undercover agents with body wires or recording devices if they are invited as parties to conversations.<sup>130</sup> Underlying this line of authority is the view that one assumes the risk that the person to whom one is speaking will make public what he or she has heard.<sup>131</sup> More importantly, the next sections demonstrate that the Court has rarely construed the concept of a search as broadly as it did in *Katz* or at least as broadly as Amsterdam construed that decision.

#### *D. Visual Inspection*

##### 1. In General

If the police are lawfully present at a location, the Court has consistently stated that mere use of their eyes to visually inspect an object is not a search.<sup>132</sup> The Court has acknowledged that, in using their sense of sight, law enforcement officers are “looking for

conversations); *Berger v. New York*, 388 U.S. 41, 51 (1967) (holding that a conversation is protected by the Fourth Amendment and the use of an electronic device to capture it is a search).

<sup>130</sup> See, e.g., *United States v. White*, 401 U.S. 745, 749 (1971) (plurality opinion); *Osborn v. United States*, 385 U.S. 323, 327 (1966); *Hoffa v. United States*, 385 U.S. 293, 300–03 (1966); *Lewis v. United States*, 385 U.S. 206, 211 (1966); *Lopez*, 373 U.S. at 438–39; *On Lee v. United States*, 343 U.S. 747, 753–54 (1952).

<sup>131</sup> See, e.g., *Katz v. United States*, 389 U.S. 347, 363 n.\* (1967) (White, J., concurring). By allowing parties to conversations to use technological means to record or broadcast the conversation to others, the Court has rejected any qualitative difference between electronic surveillance and conventional police stratagems such as eavesdropping and disguise. This is despite the views of Justice Brennan who viewed “[t]he risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals” as much different than electronic eavesdropping:

The limitations of human hearing, however, diminish its potentiality for harm. Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny.

*Lopez*, 373 U.S. at 465–66 (Brennan, J., dissenting). Thus, in Brennan’s view, “[e]lectronic surveillance strikes deeper than at the ancient feeling that a man’s home is his castle; it strikes at freedom of communication, a postulate of our kind of society.” *Id.* at 470; cf. *Amsterdam*, *supra* note 3, at 388 (“The insidious, far-reaching and indiscriminate nature of electronic surveillance—and, most important, its capacity to choke off free human discourse that is the hallmark of an open society—makes it almost, although not quite, as destructive of liberty as ‘the kicked in door.’” (footnotes omitted)).

<sup>132</sup> See, e.g., *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001) (stating visual surveillance is not a search); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) (stating that visual inspection of the interior of a vehicle stopped at an immigration checkpoint is not a search).

something” and are, in the “broad sense,” searching; nonetheless, such activity is not a search “in the Fourth Amendment sense.”<sup>133</sup> Underlying that principle during the era when the Court relied on property-based concepts was the common law maxim that the eye cannot commit the trespass condemned by the Fourth Amendment.<sup>134</sup> In more recent times, however, the Court has usually explained that the Fourth Amendment does not require law enforcement officers to shield their eyes in order to avoid observing something when they are at a vantage where point they are entitled to be.<sup>135</sup> Those circumstances, formalized as the plain view doctrine,<sup>136</sup> establish that the use of sight is not a search within the meaning of the Amendment when no privacy interest has been impermissibly invaded to get to the observation point.<sup>137</sup>

## 2. Enhancements to Vision and Changing Position

Two permutations on the use of sight have often been before the Court: the use of devices by law enforcement to enhance sight and adjustments in position by law enforcement agents to allow them to get a better view. These variables have rarely changed the Court’s conclusion that no search occurred.<sup>138</sup>

A number of devices that enhance sight to facilitate observations have been discussed by the Court, which has routinely stated, often in dicta, that their use is not a search. This includes the “use of bifocals, field glasses or the telescope to magnify the object . . . even if they focus without [the target’s] knowledge or consent upon what [the target] supposes to be private indiscretions.”<sup>139</sup> The use of a

<sup>133</sup> *Soldal v. Cook County*, 506 U.S. 56, 68 n.13 (1992).

<sup>134</sup> *See, e.g., Kyllo*, 533 U.S. at 32–33; *Boyd v. United States*, 116 U.S. 616, 628 (1886). This maxim has its origin in Lord Camden’s remark in *Entick v. Carrington* that “the eye cannot by the laws of England be guilty of a trespass.” 19 Howell’s St. Tr. 1029, 1066 (Ct. Com. Pl. 1765).

<sup>135</sup> *United States v. Dunn*, 480 U.S. 294, 304–05 (1987); *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *see Kyllo*, 533 U.S. at 32 (noting that the Court had “decoupled violation of a person’s Fourth Amendment rights from trespassory violation of his property” but still maintains that visual observations are not a search).

<sup>136</sup> That doctrine has three requirements: (1) a prior valid intrusion; (2) observing an object in plain view; and (3) the incriminating character of the object must be immediately apparent. *Horton v. California*, 496 U.S. 128, 136–37 (1990).

<sup>137</sup> *See Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993); *Soldal*, 506 U.S. at 65–66.

<sup>138</sup> It must be emphasized that the law enforcement officer’s position must be lawfully acquired. *See* 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.2(b) (4th ed. 2004).

<sup>139</sup> *On Lee v. United States*, 343 U.S. 747, 754 (1952); *see United States v. Lee*, 274 U.S. 559, 563 (1927) (holding that “use of a search light is comparable to the use of a marine glass

flashlight to illuminate a darkened area is not a search.<sup>140</sup> Portending the exclusion of much governmental surveillance in the future, the Court's definition of a search does not include the use of tracking devices that are in lieu of or supplemental to visual surveillance, so long as the tracking occurs outside of the home.<sup>141</sup> On the other hand, the use of a movie projector to view a movie, the details of which cannot be observed by the unaided eye, is a search.<sup>142</sup>

The conclusion that no search has occurred extends to allowing police officers to change their physical position to better utilize their sight. Thus, to cite examples from the period of time when *Olmstead* dictated that a physical intrusion was needed, the Court believed that no search occurred when the police stood on a chair in the hallway of a rooming house to look through a transom into a room, allowing the police to observe evidence of an illegal lottery operation.<sup>143</sup> Similarly, the Court factually described as a non-

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or a field glass" and is not prohibited by the Fourth Amendment). The use of binoculars is perhaps the most commonly litigated vision enhancement. See generally Kate Donovan Reynaga, Annotation, *Observation Through Binoculars as Constituting Unreasonable Search*, 59 A.L.R. 5th 615 (describing the arguments for whether the use of binoculars by the police constitutes a search). As Professor LaFave observes, such use is not considered a search if the police do no more than:

- (1) use binoculars to observe more clearly or carefully that which was in the open and thus subject to some scrutiny by the naked eye from the same location; or (2) use binoculars to view at a distance that which they could have lawfully observed from closer proximity but for their desire not to reveal the ongoing surveillance.

LAFAVE, *supra* note 138, § 2.2(c). LaFave notes that the more difficult situation is posed when law enforcement uses binoculars or similar equipment to look inside premises, which is a situation that the Supreme Court has not addressed. *Id.* § 2.2(c).

<sup>140</sup> See *Dunn*, 480 U.S. at 305 (illuminating a barn); *Texas v. Brown*, 460 U.S. 730, 740–41 (1983) (plurality opinion) (illuminating the interior of a car); see also *Lee*, 274 U.S. at 563 (holding that use of a searchlight is not prohibited by the Fourth Amendment).

<sup>141</sup> *United States v. Karo*, 468 U.S. 705, 714–15, 719 (1984) (stating that mere transfer of a container with a tracking device inside is not a search nor was monitoring it outside of a home; monitoring in a home, however, is a search); *United States v. Knotts*, 460 U.S. 276, 282–85 (1983) (monitoring of a tracking device that had been inserted into a container but did not reveal information about the inside of a home was a mere substitute or supplement to visual surveillance that would have revealed the same facts).

<sup>142</sup> *Walter v. United States*, 447 U.S. 649, 657, 659 (1980).

<sup>143</sup> *McDonald v. United States*, 335 U.S. 451, 452–54 (1948). Professor LaFave, in his treatise, interprets *McDonald* as a search when the police looked through the transom in a rooming house. LAFAVE, *supra* note 138, § 2.3(c). That interpretation fails to acknowledge that the Court, although finding that the police actions of entering the apartment without a warrant after making the observations violated the Fourth Amendment, acknowledged that no illegality had occurred until that entry. *McDonald*, 335 U.S. at 455; see *id.* at 458 (Jackson, J., concurring) (noting that if the police had been legally in the hallway, "[l]ike any other stranger, [the police] could then spy or eavesdrop on others without being trespassers. If they peeped through the keyhole or climbed on a chair or on one another's shoulders to look through the transom, I should see no grounds on which the defendant could complain"); *id.* at



search situation the police looking through a keyhole.<sup>144</sup> In the post-*Katz* era, the Court has viewed the actions of bending down or otherwise changing position to facilitate observations as not constituting searches.<sup>145</sup> Thus, as a plurality of the Court reasoned, in finding that no search resulted when a police officer utilized a flashlight and adjusted his position to make observations of the interior of a car: “The general public could peer into the interior of Brown’s automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen.”<sup>146</sup> The Court’s treatment of aircraft overflights that observe activities within the fenced curtilage of a home illustrates the extent of the Court’s willingness to exclude visual observations—even when aided by technology—from the definition of a search.<sup>147</sup>

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461 (Burton, J., dissenting on other grounds) (agreeing that there was no search and that the objects were in plain view). Nonetheless, LaFave correctly observes that *McDonald* was decided during the pre-*Katz* trespass era where a physical invasion was needed to implicate the Fourth Amendment. LAFAVE, *supra* note 138, § 2.3(c). He adds that there must be a limit to the conclusion that a loss of privacy occurs due to configurations of residential structures such as cracks in doors. He concludes:

And certainly that limit *is* reached when the conduct in question is keyhole-peeping, transom-peeping, or looking through minute openings in covered windows. To assert that the tenant in a hotel or apartment building has an expectation of privacy in his place of residence is to say very little if that tenant is put to the choice of papering over his transom and stuffing his keyhole or else having a policeman look in.

*Id.* § 2.2(c) (footnotes omitted).

<sup>144</sup> See, e.g., *Lustig v. United States*, 338 U.S. 74, 75–76 (1949) (plurality opinion) (factually describing the evidence leading to the search as including a Secret Service agent looking through a keyhole of a hotel room door).

<sup>145</sup> *Brown*, 460 U.S. at 740 (plurality opinion).

<sup>146</sup> *Id.*

<sup>147</sup> The Court’s discussion of observations made from aircrafts as not constituting a search is based on its view that the individual has no protected privacy right infringed. See *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (“In an age where private and commercial flight in the public airways is routine, it is unreasonable [to expect privacy from the air].”); *Dow Chem. Co. v. United States*, 476 U.S. 227, 231, 239 (1986) (In finding no legitimate expectation of privacy impinged by the taking of aerial photographs of the smokestacks of an industrial complex, the Court reasoned: “Any person with an airplane and an aerial camera could readily duplicate them.”). These cases reflect an empirical approach, which examines whether actions can be observed and concludes from that factual analysis whether the individual has a protected interest. Thus, for example, the Court has stated that because police officers could see with their naked eye the marijuana plants when their aircraft overflew homeowner’s backyard at a height of 1000 feet, the individual had no reasonable expectation of privacy. *Ciraolo*, 476 U.S. at 212–15. The Court viewed the police’s actions as “simple visual observations from a public place.” *Id.* at 214; accord *Florida v. Riley*, 488 U.S. 445, 449–51 (1989) (plurality opinion). In *Kyllo*, the Court acknowledged that “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology,” listing as an example, “the technology enabling human flight [which] has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private.” 533

Moreover, the Court has found that no search occurs when the police order suspects to take actions that permit the police to make visual observations when those actions are adjuncts to otherwise valid intrusions.<sup>148</sup> Thus, during a valid traffic stop an officer can order the occupants of the vehicle to step, out revealing otherwise hidden parts of their bodies.<sup>149</sup> Similarly, the police may accompany arrestees into their houses when the police have permitted the arrestee to retrieve identification, thus allowing the police to make plain view observations.<sup>150</sup>

### 3. Limitations

But are there any limits to this? Some courts and commentators have extended the concept of a search to visual observations if special circumstances are present. For example, in *State v. Carter*,<sup>151</sup> the Minnesota Supreme Court opined that visual observations could constitute a search based on the “consideration of two factors: (1) the location of the officer at the time of the viewing; and (2) the precise manner in which the view was achieved.”<sup>152</sup> According to that court, although there is “no Fourth Amendment protection for activities that are easily observable by the general public,” if people take “sufficient precautions to keep their activities private,” governmental observations into such locations are searches.<sup>153</sup> Thus, “[p]eople who close their doors and window blinds . . . do not knowingly expose their activities to the public.”<sup>154</sup> Accordingly, the *Carter* court believed that a police officer’s

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U.S. 27, 33–34 (2001) (citing *Ciraolo*, 476 U.S. at 215). The Court noted that it had “previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much.” *Id.* at 33. The *Kyllo* majority distinguished the “enhanced aerial photography of an industrial complex” upheld in *Dow Chemical* on the ground that it did not involve “an area immediately adjacent to a private home, where privacy expectations are most heightened.” *Id.*

<sup>148</sup> Cf. Clancy, *Role of Individualized Suspicion*, *supra* note 10, at 550–57 (discussing the Court’s treatment of the reasonableness of certain intrusions that are adjuncts to primary intrusions).

<sup>149</sup> *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (permissible to order passengers out of vehicle as incident to a stop); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (viewing as de minimis the additional intrusion upon a validly stopped driver when he is ordered out of the vehicle by a police officer because the driver is “being asked to expose to view very little more of his person than is already exposed”).

<sup>150</sup> *Washington v. Chrisman*, 455 U.S. 1, 7 (1982).

<sup>151</sup> 569 N.W.2d 169 (Minn. 1997), *rev’d on other grounds*, 525 U.S. 83 (1998).

<sup>152</sup> *Id.* at 177.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

observations through a small gap in closed blinds into an apartment was a search, when, to make those observations, he had to leave the sidewalk, walk across the grass, climb over some bushes, crouch down, and place his face twelve to eighteen inches from the window.<sup>155</sup> The *Carter* court drew support from Professor LaFave's treatise<sup>156</sup> and noted that "[s]everal courts had agreed that it is a search whenever police take extraordinary measures to enable themselves to view the inside of a private structure."<sup>157</sup> To conclude otherwise, the court believed, would make it "difficult to imagine . . . that any activity short of an actual physical intrusion of a dwelling would violate a person's expectation of privacy."<sup>158</sup>

On appeal, the only member of the United States Supreme Court to address that aspect of the Minnesota court's analysis was Justice Breyer, who rejected that court's view of the facts as unfounded.<sup>159</sup> Breyer believed that the police officer could see through the window in a place where any member of the public was entitled to be.<sup>160</sup> Based on that version of the facts, Breyer concluded that the people bagging cocaine in the apartment had no reasonable expectation of privacy because they had failed to maintain it with respect to the "ordinary passerby."<sup>161</sup> Stating that the matter did not "turn upon 'gaps' in drawn blinds," Breyer asserted: "One who lives in a basement apartment that fronts a publicly traveled street, or similar space, ordinarily understands the need for care lest a member of the public simply direct his gaze downward."<sup>162</sup> Putting aside the specific facts of the case, Breyer saw a benefit to allowing police officers to conduct such observations without implicating the Amendment because, by doing so, they could confirm informant tips

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<sup>155</sup> *Id.* at 178.

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[W]hen police surveillance takes place at a position which cannot be called a "public vantage point," i.e., when the police—though not trespassing on the defendant's curtilage—resort to the extraordinary step of positioning themselves where neither neighbors nor the general public would be expected to be, the observation or overhearing of what is occurring within a dwelling constitutes a Fourth Amendment search.

*Id.* at 177 (quoting 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(d) (2d ed. 1987)). LaFave makes the same point in the most recent edition of his treatise. See LAFAVE, *supra* note 138, § 2.3(c).

<sup>157</sup> *Carter*, 569 N.W.2d at 177–78.

<sup>158</sup> *Id.* at 178.

<sup>159</sup> *Minnesota v. Carter*, 525 U.S. 83, 103–06 (1998) (Breyer, J., concurring). The majority did not reach the issue because it found that the occupants had no standing to challenge the officer's actions. *Id.* at 91 (majority opinion).

<sup>160</sup> *Id.* at 104 (Breyer, J., concurring).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 105.

of “allegedly illegal activity from a public vantage point.”<sup>163</sup>

### *E. Sense of Smell*

#### 1. In General

Similar to the plain view cases are the “plain smell” cases. When an officer is in a location in which he is entitled to be and detects an odor that he recognizes as evidence of criminal activity, his use of his olfactory sense to ascertain that fact is not considered a search within the meaning of the Amendment. Illustrations of this principle include officers who, through their training and experience, can detect the odor of illegal drugs, alcohol, chemicals, and the like.<sup>164</sup>

#### 2. Enhancement of the Olfactory Sense: Dog Sniffs

In *United States v. Place*, during the course of an opinion where the Court determined that law enforcement had illegally detained some luggage, the Court noted that drug enforcement agents had subjected the bags to a “sniff test” by a trained narcotics detection dog.<sup>165</sup> The dog reacted positively to one of the bags.<sup>166</sup> In extensive dicta, the Court concluded that such dog sniffs are not searches within the meaning of the Fourth Amendment.<sup>167</sup> The Court asserted:

A “canine sniff” . . . does not require opening the luggage. It does not expose noncontraband [sic] items that otherwise

<sup>163</sup> *Id.*

<sup>164</sup> *See, e.g.*, *United States v. Sharpe*, 470 U.S. 675, 679 (1985) (officer put his nose against rear window of truck and smelled marijuana); *United States v. Ventresca*, 380 U.S. 102, 104, 111 (1965) (finding that in a case where an investigator smelled an odor of fermenting mash as he walked on a sidewalk outside of a house, the Court observed that “[a] qualified officer’s detection of the smell of mash [to make liquor] has often been held a very strong factor in determining that probable cause exists”); *Johnson v. United States*, 333 U.S. 10, 12–13 (1948) (highlighting that officers who were “experienced in narcotic work” recognized the “strong odor of burning opium which to them was distinctive and unmistakable,” which led them to the specific room within the hotel may have supported probable cause for a warrant if one had been applied for); *Taylor v. United States*, 286 U.S. 1, 6 (1932) (“Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime.”); *see also* *Kyllo v. United States*, 533 U.S. 27, 43–44 (2001) (Stevens, J., dissenting) (noting that “aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building”).

<sup>165</sup> 462 U.S. 696, 699 (1983).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 707.

would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.<sup>168</sup>

The Court viewed a canine sniff as "*sui generis*," believing that there was "no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."<sup>169</sup> It accordingly concluded that the "exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment."<sup>170</sup> The Court's view in *Place* has been elevated in subsequent cases to established legal principle—dog sniffs are not searches within the meaning of the Fourth Amendment,<sup>171</sup> with the Court emphasizing that dog sniff alerts are confined to identifying the presence of contraband and that "information about perfectly lawful activity will remain private."<sup>172</sup>

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Illinois v. Caballes*, 543 U.S. 405, 410 (2005); *Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000).

<sup>172</sup> *Caballes*, 543 U.S. at 410. Remarkably, few Justices have disagreed with the position that a dog sniff is not a search. In *Place*, Justice Brennan, with whom Justice Marshall joined, opined: "A dog adds a new and previously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into an individual's privacy. Such use implicates concerns that are at least as sensitive as those implicated by the use of certain electronic detection devices." *Id.* at 719–20 (Brennan, J., dissenting). Brennan added that, although he had expressed the view that dog sniffs of people are searches in *Doe v. Renfrow*, 451 U.S. 1022, 1026 n.4 (1981) (Brennan, J., dissenting from denial of certiorari), he noted that in that case, he had "suggested that sniffs of inanimate objects might present a different case." *Place*, 462 U.S. at 720. In *Caballes*, only Justice Souter asserted that dog sniffs should be considered searches. 543 U.S. at 410 (Souter, J., dissenting). He believed that dog sniffs were searches because "[t]hey are conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conventionally enhanced." *Id.* at 413. A dog sniff "in practice . . . functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area." *Id.* While Souter conceded that technology had somewhat enhanced the concept of plain view, he stated that "if Fourth Amendment protections are to have meaning in the face of superhuman, yet fallible, techniques like the use of trained dogs, those techniques must be justified on the basis of their reasonableness." *Id.* at 416–17 n.6.

*F. Technology*

To this point, this Article has treated the five senses and various enhancements to the senses. Putting aside the details of any one technique, it takes little insight to recognize that the use of technology has dramatically increased the government's ability to obtain information. Many enhancements have resulted from technological innovations that have allowed the government to change its location, either figuratively or literally, and have magnified a sense beyond human capabilities. However, much of the new technology "does not merely amplify [something that is] already . . . exposed to public view, as do binoculars, telescopes or even high resolution cameras used on aircraft."<sup>173</sup> Ranging from electronic bits of information to the finest dust in one's house, technology will soon have the capability of making virtually everything knowable.<sup>174</sup> Whether or when that increased ability is

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<sup>173</sup> George Dery III, *Remote Frisking Down to the Skin: Government Searching Technology Powerful Enough to Locate Holes in Fourth Amendment Fundamentals*, 30 CREIGHTON L. REV. 353, 375 (1997) [hereinafter Dery, *Remote Frisking*] (discussing the intrusiveness of millivision). Millivision is a technology that allows for the detection of naturally emitted electromagnetic radiation at the millimeter wave length, especially that emitted by the human body. *Id.* at 356. Privacy concerns arise because this technology renders clothing "virtually transparent." *Id.* at 356-57. As such, other metallic and non-metallic materials which are also far less emissive than the human body at the millimeter wavelength appear as a readily discernable silhouette on a person viewed with millivision. *Id.* at 356. Essentially, law enforcement officers using the technology could look through a person's clothing and determine if they were carrying weapons, explosives, or drugs. *Id.* at 356-57.

<sup>174</sup> See, e.g., *Kyllo v. United States*, 533 U.S. 27, 36 n.3 (2001) ("The ability to 'see' through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development."); Lawrence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825, 866 (1989) (listing the technological devices for invading privacy including "miniature transmitters, bugs, beepers and phone taps, . . . parabolic microphones, image intensifiers, pen registers, computer usage monitors, electronic mail monitors, cellular radio interception, satellite beam interception, pattern recognition systems and detector systems operating on vibrations, ultrasound and infrared radiation sensors," and laser technology which can "bounce a laser beam off a closed window and retrieve conversations by digital transformation of the window pane vibrations"); Peter Joseph Bober, *The "Chemical Signature" of the Fourth Amendment: Gas Chromatography/Mass Spectrometry and the War on Drugs*, 8 SETON HALL CONST. L.J. 75, 76-82 (1997) (discussing hand-held devices that use gas chromatography and mass spectrometry to sample air, earth, or water to detect if the home is being used as a drug lab); George M. Dery III, *Lying Eyes: Constitutional Implications of New Thermal Imaging Lie Detection Technology*, 31 AM. J. CRIM. L. 217, 242-43 (2004) (discussing the constitutional implications of thermal imaging technology that can measure heat patterns on a person's face that change when a person is lying); Dery, *Remote Frisking*, *supra* note 173, at 357, 375 (discussing operational prototypes of technology that permit "remote frisking" using hand-held or vehicle-mounted devices that have the ability to detect not only guns but "all sorts of noncontraband items" under a person's clothing); David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1, 1, 9

an intrusion and a search under the Fourth Amendment is the core consideration of the twenty-first century, marking the line that separates the right of citizens to be secure from the government's ability to gather information without having to justify its actions. This section addresses the role of technology directly.

The Court first confronted technology's ability to improve government surveillance in *Olmstead* and, as previously discussed, used a property-based literalism to make the Fourth Amendment irrelevant in regulating much of its use.<sup>175</sup> In announcing the overruling of *Olmstead*, the Court in *Katz* believed it could no longer "ignore the vital role that the public telephone [had] come to play in private communication,"<sup>176</sup> and it found that a search occurred when private conversations were recorded by listening devices.<sup>177</sup> Nonetheless, following the demise of *Olmstead* and the substitution of *Katz's* privacy expectations theory as a measure of Fourth Amendment rights, the Court's reaction to technological innovations has generally not become more favorable to individual liberty. The Court has used the expectations test repeatedly to find that the individual has no protected interest against such technological devices as airplane overflights,<sup>178</sup> monitoring of movements,<sup>179</sup> and chemical testing of substances.<sup>180</sup> Indeed, at

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(1996) (discussing how private companies and a government laboratory are designing devices "that will allow police officers to 'see' through clothing to detect whether a person is carrying a concealed weapon" and noting that two of the designs "would let an officer perform the functional equivalent of a frisk . . . without having to approach or touch the person" (footnote omitted)); Roberto Iraola, *New Detection Technologies and the Fourth Amendment*, 47 S.D. L. REV. 8, 9–14 (2002) (canvassing new technologies such as gun detectors, gas chromatography, heartbeat detectors, and facial recognition systems); Kim Han, Note, *The Technological Sniffing Out of Constitutional Rights: Assessing the Constitutionality of the Passive Alcohol Sensor III*, 9 J.L. & POL'Y 835, 857–58 (2001) (noting passive alcohol detection technology attached to flashlight or clipboard can be used to test breath of vehicle drivers without their knowledge).

<sup>175</sup> The dissents of Justices Butler and Brandeis offered a much different view of the purpose and scope of the Amendment. Justice Butler argued for a liberal but property-based analysis:

The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence.

*Olmstead v. United States*, 277 U.S. 438, 487 (1928) (Butler, J., dissenting). See, e.g., Cloud, *Rube Goldberg*, *supra* note 121, at 18–19 (demonstrating how Justice Butler's dissent could have served as the basis for "an expansive interpretative theory" of property rights that could be utilized to "implement a broad notion of individual liberty"); see also *infra* Part VI.E.

<sup>176</sup> *Katz v. United States*, 389 U.S. 347, 352 (1967).

<sup>177</sup> *Id.* at 353.

<sup>178</sup> See *supra* note 147 and accompanying text.

<sup>179</sup> *United States v. Knotts*, 460 U.S. 276, 281 (1983) (stating that travelers in automobiles

times, the Court evidenced a “barely constrained enthusiasm for the emergence of new technologies and their inevitable use by law enforcers.”<sup>181</sup> Thus, in *Dow Chemical*, in rejecting the claim that aerial photography of an industrial complex was a search, the majority opined: “In common with much else, the technology of photography has changed in this century. These developments have enhanced industrial processes, and indeed all areas of life; they have also enhanced law enforcement techniques.”<sup>182</sup> *Dow* indicated that, as technology became more readily available to members of the public, its use by law enforcement would cease to be a search.<sup>183</sup> Interpreting this limitation, Morgan Cloud believes that the Court “accepted the premise that technological progress would inevitably dictate that our privacy expectations must decrease as intrusive technologies become more widely dispersed and readily available.”<sup>184</sup> As another example, in finding that the use of a tracking device to monitor movements from place to place was not a search, the Court observed: “Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.”<sup>185</sup> Commenting on that view, Tracey Maclin has observed that accepting that rationale—“equating electronic surveillance with what police might theoretically accomplish with naked eye monitoring—means that the Fourth Amendment will protect very little.”<sup>186</sup>

On the other hand, the development of new technologies does not seem to *increase* privacy interests. Thus, in *Smith v. Maryland*,<sup>187</sup> in finding that the recording of numbers dialed by pen registers did not implicate the Fourth Amendment, the Court rejected the view that the automation of phone dialing created a reasonable expectation of privacy in the numbers dialed: contemporary

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have no reasonable expectation of privacy in movements).

<sup>180</sup> United States v. Jacobsen, 466 U.S. 109, 123 (1984) (stating that a chemical test which reveals the identity of a substance compromises no legitimate property interest).

<sup>181</sup> Cloud, *Rube Goldberg*, *supra* note 121, at 38.

<sup>182</sup> Dow Chem. Co. v. United States, 476 U.S. 227, 231 (1986).

<sup>183</sup> *See id.* at 238.

<sup>184</sup> Cloud, *Rube Goldberg*, *supra* note 121, at 39.

<sup>185</sup> Knotts v. United States, 460 U.S. 276, 282 (1983); *see* United States v. Karo, 468 U.S. 705, 713–14 (1984) (permissible to use a beeper in a container of goods sold to the person to monitor its location so long as the container is outside the home).

<sup>186</sup> Tracey Maclin, Katz, Kyllo, and *Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 *MISS. L.J.* 51, 85 (2002).

<sup>187</sup> 442 U.S. 735 (1979).



telephone equipment was “merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber.”<sup>188</sup> Given that the person had no reasonable expectation of privacy in the numbers dialed if an operator had performed the task, the Court was “not inclined to hold that a different constitutional result is required because the telephone company has decided to automate.”<sup>189</sup>

The Court’s opinions are not without cautions and concerns about the intrusion of sophisticated technologies.<sup>190</sup> But those cautions and concerns have rarely been translated into labeling the employment of the technology in the case before the Court as a search. Moreover, the Court has traditionally refused to consider the impact of “recent and projected” technological developments on its analysis.<sup>191</sup>

*Kyllo v. United States*<sup>192</sup> thus stands in stark contrast to those trends. Justice Scalia, writing for the majority in that recent case, asserted that the Court was confronted with the question of what limits there are upon the “power of technology to shrink the realm of guaranteed privacy.”<sup>193</sup> The Court eschewed judicial restraint and insisted that it “must take the long view.”<sup>194</sup> It opined that “the rule we adopt must take account of more sophisticated systems that are already in use or in development.”<sup>195</sup> The *Kyllo* Court held that the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constituted a search within the meaning of the Fourth

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<sup>188</sup> *Id.* at 744.

<sup>189</sup> *Id.* at 745; *cf.* Tomkovicz, *supra* note 3, at 376–81 (discussing *Smith* and observing that the Amendment is not implicated when authorities merely use devices to exploit “revelatory conduct” that is used “to gain access to facts that an individual willingly conveys to the device”). *But see* Maclin, *supra* note 186, at 99–100 (arguing that a pen register is a search under the *Kyllo* standard because it reveals something about the interior of the home—the numbers dialed on a phone—which could not be otherwise detected unless police officers were in the home to observe the dialing and that the device is not generally used by the public).

<sup>190</sup> *See, e.g.*, *Dow Chem. Co. v. United States*, 476 U.S. 227, 238–39 (1986) (asserting that an electronic device that could “penetrate walls or windows so as to hear and record confidential conversations” would raise serious questions).

<sup>191</sup> *See, e.g.*, *Silverman v. United States*, 365 U.S. 505, 508 (1961). The *Silverman* Court said, “[w]e need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society.” *Id.* at 509.

<sup>192</sup> 533 U.S. 27 (2001).

<sup>193</sup> *Id.* at 34.

<sup>194</sup> *Id.* at 40.

<sup>195</sup> *Id.* at 36.

Amendment.<sup>196</sup>

The Court acknowledged one fundamental Fourth Amendment principle—mere visual observation is not a search.<sup>197</sup> On the other hand, it stressed the traditional importance of the home: “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.’”<sup>198</sup> The Court observed that to withhold protection from that area would “permit police technology to erode the privacy guaranteed by the Fourth Amendment.”<sup>199</sup> It therefore set this standard: “We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search—at least where . . . the technology in question is not in general public use.”<sup>200</sup>

The Court’s language is remarkable for its reliance on themes developed by the Court when property analysis was the applicable test to define the individual’s protected interest: the common law, constitutionally protected areas, analogy to physical intrusions, and reliance on what was protected at the time of the framing. This

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<sup>196</sup> *Id.* at 40. A federal agent came to suspect that marijuana was being grown in Danny Kyllo’s home. *Id.* at 29. Indoor marijuana growing operations typically require high-intensity lamps. *Id.* In order to determine whether the amount of heat emanating from Kyllo’s home was consistent with the use of such lamps, federal agents used a thermal imager to scan the house. *Id.* “Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye.” *Id.* “The imagers convert[ed] radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences.” *Id.* at 29–30. Thus, a thermal imager reveals the relative heat of various rooms in the home which the Court viewed as “information regarding the interior of the home.” *Id.* at 34. The scan of Kyllo’s home was from public vantage spots. *Id.* at 30. It revealed “that the roof over the garage and a side wall of [the] home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes.” *Id.* The agent concluded that Kyllo was using halide lights to grow marijuana in his house and, based on the thermal imaging and other information, obtained a warrant to search. *Id.* In the subsequent search of Kyllo’s home, federal agents found an indoor growing operation involving more than 100 marijuana plants. *Id.*

<sup>197</sup> *Id.* at 31–32. This was the main point of the dissent, which viewed the case as akin to plain view observations of the house. *Id.* at 42–44 (Stevens, J., dissenting) (“All that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner’s home . . . . Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building.”).

<sup>198</sup> *Id.* at 31 (majority opinion) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

<sup>199</sup> *Id.* at 34.

<sup>200</sup> *Id.* (quoting *Silverman*, 365 U.S. at 512) (citation omitted); cf. *United States v. Karo*, 468 U.S. 705, 715 (1984) (stating that a search occurs when the “[g]overnment surreptitiously employs an electronic device to obtain information [in a home] that it could not have obtained by observation from outside the curtilage of the house”).

language has much more in common with *Olmstead* than *Katz*. Yet, the Court retained the essential lesson of *Katz*, which is not that the Fourth Amendment protects privacy, but that the interests protected by the Amendment include tangible and intangible interests and that the mode of invasion into those interests is not limited to physical intrusions.<sup>201</sup> Indeed, the scope of protection afforded by the *Kyllo* Court to the home is remarkable for its breadth and for the Court's willingness to draw a firm and bright-line rule at the entrance of the house. As to what is learned, the Court asserted:

The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details . . . .<sup>202</sup>

Thus, in *Kyllo*, "how warm—or even how relatively warm—Kyllo was heating his residence"<sup>203</sup> was information about the interior of the home and was therefore protected.

As to the types of devices utilized by the government to obtain information, the Court created a normative-based and bright-line rule centered on the importance of the home:

But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the

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<sup>201</sup> *Kyllo*, 533 U.S. at 34.

<sup>202</sup> *Id.* at 37 (citation omitted).

<sup>203</sup> *Id.* at 38.

home.<sup>204</sup>

The Court thus established a broad protection against technological intrusions into the home. Indeed, the Court explicitly asserted that, in addition to thermal imaging, other technological intrusions, such as microphones that pick up sound, satellites that pick up visible light, “through-the-wall radar,” and “ultrasound technology [that] produces an 8-by-10 Kodak glossy” are also searches.<sup>205</sup> Thus, for example, if the police cannot discern the volume of sound of a conversation without being actually present, then a device that reveals that volume is a search.<sup>206</sup> Similarly, a device that measures the interior heat of the home is a search if the heat could only be otherwise detected by a person actually present in the house.<sup>207</sup> The logic of that analysis surely must apply to all technological devices that detect information about the interior of the home.

In sum, *Kyllo* rejects drawing the line as to what constitutes a search based either on “the sophistication of the surveillance equipment” or on “the ‘intimacy’ of the details” that are observed.<sup>208</sup> Instead, it draws the line by analogy to a physical invasion: “We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search.”<sup>209</sup> The “focus,” according to the Court, is “not upon intimacy but upon otherwise-imperceptibility.”<sup>210</sup>

## VI. CONSIDERATIONS IN DEFINING A “SEARCH”

### A. *Analogy to Physical Invasions*

For physical intrusions, the Court has not strayed far from the literal meaning of the term and it has consistently found that physical intrusions are searches within the meaning of the

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<sup>204</sup> *Id.* at 35–36.

<sup>205</sup> *Id.* at 36.

<sup>206</sup> *See id.* at 39.

<sup>207</sup> *See id.*

<sup>208</sup> *Id.* at 38.

<sup>209</sup> *Id.* at 34 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)) (citation omitted).

<sup>210</sup> *Id.* at 38 n.5.

Amendment.<sup>211</sup> Departures from that principle invariably turn on the Court's conclusion that the person has no protected interest infringed by the activity and, therefore, the government's actions are not a search within the meaning of the Amendment.<sup>212</sup> For senses other than the sense of touch, the Court is much less likely to label the activity a search. A hierarchy has been repeatedly referenced: physical inspections are more intrusive than other types;<sup>213</sup> this is despite other viewpoints, including *Katz* and *Kyllo*, which have rejected such a "mechanical" structure.<sup>214</sup> Those differing perceptions have remained a part of Fourth Amendment jurisprudence since *Olmstead*, with the Court generally demonstrating a general unwillingness to broadly expand Fourth Amendment applicability to non-tactile intrusions.

Rather than distinguishing physical invasions from other ways of obtaining evidence, the proper analogy *is* to physical invasions. Indeed, in deciding whether the use of technology or senses other than the sense of touch should be labeled a search, the Court has sometimes alluded to such an analogy.<sup>215</sup> *Kyllo*, as discussed,

<sup>211</sup> See, e.g., *Bond v. United States*, 529 U.S. 334, 337 (2000).

<sup>212</sup> See *supra* note 72.

<sup>213</sup> E.g., *Bond*, 529 U.S. at 337 ("Physically invasive inspection is simply more intrusive than purely visual inspection."); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (finding that observations from aircraft "took place in public navigable airspace in a "physically nonintrusive manner" (citation omitted)); *Dow Chem. Co. v. United States*, 476 U.S. 227, 237, 239 (1986) (holding that aerial photography of industrial complex is not a search but noting that "actual physical entry by EPA into any enclosed area would raise significantly different questions"); *United States v. Karo*, 468 U.S. 705, 715 (1984) (finding electronic surveillance "less intrusive" than physical entry); *United States v. Place*, 462 U.S. 696, 707 (1983) (finding that canine sniff of luggage did not "require opening the luggage").

<sup>214</sup> See *Kyllo*, 533 U.S. at 35 (deriding as "mechanical" the idea that the Fourth Amendment protects only against physical intrusions); *Bond*, 529 U.S. at 342 (Breyer, J., dissenting) (rejecting the "majority's effort to distinguish 'tactile' from 'visual' intervention[]" and concluding that "[w]hether tactile manipulation (say, of the exterior of luggage) is more intrusive or less intrusive than visual observation (say, through a lighted window) necessarily depends on the particular circumstances"); *Ciraolo*, 476 U.S. at 215–16, 223 (Powell, J., dissenting) (observing that "reasonable expectations of privacy may be defeated by electronic [and] physical invasion[s]" and asserting that "[r]eliance on the *manner* of surveillance is directly contrary to the standard of *Katz*" (quoting *Katz v. United States*, 389 U.S. 347, 362 (1967))); *Katz*, 389 U.S. at 353 ("[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."); see also Maclin, *supra* note 186, at 82 (stating that "*Katz* instructed that Fourth Amendment protection does not turn on the presence or absence of a physical intrusion" and that the "manner" of the police intrusion" is irrelevant); cf. *Minnesota v. Dickerson*, 508 U.S. 366, 376–77 (1993) (rejecting as inapposite the lower court's opinion that sense of touch was more intrusive and less reliable than sense of sight in extension of plain view doctrine to discovery of contraband during an otherwise valid frisk); Harris, *supra* note 174, at 49 ("A lesser degree of intrusiveness does not, by itself, mean that the action is not a search.").

<sup>215</sup> See, e.g., *Karo*, 468 U.S. at 715 (holding that a search occurs when government

elevates that analogy to the status of a test: “We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search.”<sup>216</sup> The logic of *Kyllo*’s analysis should be extended to all of the objects protected by the Amendment—houses, people, papers, and effects.<sup>217</sup> Any such intrusion must then be justified as reasonable. This analytical structure will require lower courts to make factual findings on what could or could not otherwise be obtained without physical intrusion.

This inquiry focuses on what the governmental actions have accomplished, as in *Boyd*, shifting the attention from “the form that government conduct takes to the nature and degree of the intrusion it effects.”<sup>218</sup> Given that police officers are usually the initial decision-makers and need clear guidance, that is, they should not be deciding what is a search based on some complicated formula with a long list of exclusions,<sup>219</sup> *Kyllo*’s clear rule permits the police to know in advance what is a search. Thus, *Kyllo*’s physical intrusion analogy has much to offer in properly defining those governmental activities that should be labeled as searches. The next sections modify and inform that standard.

### B. Purpose Inquiry

In this section, I propose adding the following component to

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“employs an electronic device to obtain information that it could not have obtained by observation outside the curtilage of the house”).

<sup>216</sup> 533 U.S. at 34 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)) (citation omitted).

<sup>217</sup> *See id.* at 48 (Stevens, J., dissenting) (“Clearly, a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to a home.”).

<sup>218</sup> *See* David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 184, 188–89 (2002) (discussing how the Court in *Kyllo* did “not look to the content of eighteenth-century rules of search and seizure; rather it looks to what those rules accomplished”); *see also* *Lustig v. United States*, 338 U.S. 74, 78 (1949) (plurality opinion) (concluding that a “search is a functional, not merely a physical, process”); Raymond Shih Ray Ku, *The Founders’ Privacy: The Fourth Amendment and the Power of the Technological Surveillance*, 86 MINN. L. REV. 1325, 1363 (2002) (“The *Kyllo* Court focused on the freedom from government surveillance enjoyed by the Founders rather than on the kinds of searches that concerned them.”).

<sup>219</sup> *Cf.* *New York v. Belton*, 453 U.S. 454, 458 (1981) (discussing the need for clear rules to guide the police) (citing *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979)); Amsterdam, *supra* note 3, at 403–04 (noting the difficulty of a policeman making the decision of what form of surveillance is or is not a search and expressing concern that he would not want “the extent of my freedom to be determined by a policeman’s answer” to the question).

*Kyllo*'s definition of a search: with the purpose to intrude.<sup>220</sup> In assessing whether a search has occurred, inquiry must be made into whether it is the goal of the government agent to learn something about the target when engaging in an activity or employing a technological device. Including an examination of intent is consistent with Supreme Court seizure jurisprudence. It is also consistent with both a dictionary definition and a semantic analysis of the concept of search,<sup>221</sup> which has the virtue of adding clarity of meaning for decision-makers.

Absent from modern search jurisprudence has been any consideration of the government's purpose when utilizing senses or devices that uncover information or other evidence. Indeed, the Court seems to consistently reject it. For example, airplane overflights are a form of technology by which the police can observe that which they cannot from the ground. It allows observations into the curtilage, an area protected by the Fourth Amendment. The Supreme Court in *Ciraolo* stated that such overflights are not searches because, in an age where commercial flights are common, any member of the public could observe the area; hence, there is no reasonable expectation of privacy in that area vis-à-vis overflights.<sup>222</sup> However, what distinguishes a private or commercial flight from that of the governmental agent flying over *Ciraolo*'s fenced-in yard is the purpose of each flight: members of the public are in the plane for transportation, not to observe what is in the yard.<sup>223</sup> The police in *Ciraolo* were using the technology for the purpose of learning something they could not otherwise learn absent a physical intrusion.<sup>224</sup>

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<sup>220</sup> *Kyllo*, 533 U.S. at 32 n.1.

<sup>221</sup> *See id.* ("When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.'" (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (1828) (reprint 6th ed. 1989)) (emphasis added) (alteration in original)); Cunningham, *supra* note 7, at 548–49 (analyzing the word "search" and observing that semantic features of the concept of a "search" include to "search X" and to "search for" which have in common a "purpose to find" something).

<sup>222</sup> *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

<sup>223</sup> *Cf. Kyllo*, 533 U.S. at 35 n.2 ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.").

<sup>224</sup> The lower court opinion in *Ciraolo* distinguished "routine patrol conducted for any other legitimate law enforcement or public safety objective" from the situation presented in *Ciraolo* where the police undertook the flight "for the specific purpose of observing this particular enclosure within defendant's curtilage." *People v. Ciraolo*, 208 Cal. Rptr. 93, 97 (1984), *rev'd*, 476 U.S. 207 (1986). On appeal, the Supreme Court found "difficulty understanding exactly how [*Ciraolo*'s] expectations of privacy from aerial observation might differ when two

For a seizure to occur under the Fourth Amendment, a necessary element must be that the officer has an intent to seize<sup>225</sup> measured objectively.<sup>226</sup> Thus, for example, in *Brower v. County of Inyo*, the Court emphasized that a seizure required an intentional action.<sup>227</sup> The Court explained that a “detention or taking itself must be willful” and that that requirement “is implicit in the word ‘seizure.’”<sup>228</sup>

The Court illustrated:

[I]f a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by

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airplanes pass overhead at identical altitudes, simply for different purposes.” *California v. Ciraolo*, 476 U.S. at 214 n.2. In my view, neither analysis is correct. If the police take flight for a “legitimate law enforcement or public safety objective,” then that goes to the reasonableness of the government’s actions and not to whether the Amendment applies. This is to say that the California appellate court was confusing the Amendment’s applicability with its satisfaction. On the other hand, the Supreme Court failed to give meaning to a central tenet of the Amendment: it regulates purposeful governmental action. Thus, if police in a helicopter who are routinely assigned to monitor traffic patterns decide to take advantage of their location to survey the ground for marijuana growing in backyards, that situation is *not* different from *Ciraolo*: the police used technology with the purpose to intrude. On the other hand, if a bored police officer on traffic patrol in a police helicopter happened to be looking down with no particular purpose in mind, I see that as no different than a situation where a marijuana grower opens the blinds to his house for any passerby on the sidewalk to observe the pot plant in his window.

<sup>225</sup> See, e.g., *Brower v. County of Inyo*, 489 U.S. 593, 596–98 (1989) (holding that a seizure requires an intentional act). See generally Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799, 805–06 (1991) (collecting cases and discussing the Supreme Court’s definition of a seizure); Thomas K. Clancy, *What Constitutes an “Arrest” Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129, 181–82 (2003) (discussing that an arrest requires an objective measurement of intent).

<sup>226</sup> Intent, under Supreme Court seizure jurisprudence, is measured objectively and is not dependent on the actual state of mind of the officer involved in the encounter. See, e.g., *Whren v. United States*, 517 U.S. 806, 812–13 (1996) (collecting cases and rejecting Fourth Amendment challenges based on officers’ actual motivations); *Brower*, 489 U.S. at 598 (finding inquiry into subjective intent inappropriate); *Michigan v. Chesternut*, 486 U.S. 567, 575 n.7 (1988) (“[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that intent has been conveyed to the person confronted.”); *Maryland v. Macon*, 472 U.S. 463, 470–71 (1985) (holding that Fourth Amendment violation is an objective inquiry and does not depend on the officer’s state of mind); *Scott v. United States*, 436 U.S. 128, 138 (1978) (directing that the Court must examine an officer’s actions and not his state of mind). An objective standard alleviates the need to assess the subjective intent of the police officer, thus avoiding self-serving declarations of intent. See, e.g., *State v. Swanson*, 475 N.W.2d 148, 152 (Wis. 1991) (adopting an objective test to determine whether an arrest had occurred so as to eliminate an assessment of actual intent of the officer).

<sup>227</sup> 489 U.S. at 596–97.

<sup>228</sup> *Id.* at 596.



lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant—even if, at the time he was in the process of running away from two pursuing constables. It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.<sup>229</sup>

A similar illustration demonstrates the importance of the requirement of willfulness in determining whether a search has occurred. Assume that a law enforcement officer trips and falls on a bus passenger's soft-sided luggage. As he falls, the officer extends his hands to brace his fall; as he comes into contact with the luggage, he notices a brick-like object. Thus, through his sense of touch, he has learned something about the interior of the luggage. It is nonsensical to say that he "searched" the bag, but this conclusion can only be reached because the officer did not intend to search it. Just as a seizure requires intentional action, so too does a search. Thus, in *Bond*, when the agent walked through the bus and squeezed the soft luggage with the purpose of learning something about its contents, the Court properly concluded that the agent's actions were a search.<sup>230</sup>

In *Harris v. United States*,<sup>231</sup> the Court seemed to utilize an analysis consistent with the one advocated here. In *Harris*, a police officer opened the door of a lawfully impounded car to roll up the window in order to prevent rain from entering.<sup>232</sup> In the process of doing so, the officer observed an automobile registration card on the metal stripping over which the door closed.<sup>233</sup> That card belonged to a robbery victim and was used as evidence against Harris.<sup>234</sup> In its per curiam opinion, the Supreme Court held that "the discovery of the card was *not* the result of a search of the car, but of a measure

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<sup>229</sup> *Id.* at 596–97.

<sup>230</sup> *Bond v. United States*, 529 U.S. 334, 336, 339 (2000).

<sup>231</sup> 390 U.S. 234 (1968) (per curiam).

<sup>232</sup> *Id.* at 235.

<sup>233</sup> *Id.* at 235–36.

<sup>234</sup> *Id.* at 234, 236.

taken to protect the car while it was in police custody.”<sup>235</sup>

In *Bond*, the Court observed in a footnote that the parties agreed “that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer’s actions violate the Fourth Amendment.”<sup>236</sup> The Court added, however, “[t]his principle applies to the agent’s acts in this case as well; the issue is not his state of mind, but the objective effect of his actions.”<sup>237</sup> The phrase “objective effect” is a curious one. If the Court was merely asserting that intent is to be measured objectively, which is ascertained by examining what the officer has done, then the Court’s view is consistent with its seizure analysis. If, however, the Court was saying that intent is irrelevant and that only effects matter, that would make intent no part of the “search” inquiry. Supporting the latter interpretation is Justice Breyer’s dissent in *Bond*.<sup>238</sup> Relying on the majority’s footnote, Breyer asserted that, although the squeezing of the luggage by the police was done with the purpose of searching for drugs, which differed from that of a bus driver or fellow passenger who might squeeze the bag in the process of making room for another parcel, those differing intents were irrelevant: “in determining whether an expectation of privacy is reasonable, it is the *effect*, not the purpose, that matters.”<sup>239</sup>

In *United States v. Maple*,<sup>240</sup> the appellate court initially adopted a view consistent with the one advocated here, that is, to determine if a search has occurred, a necessary element is an examination of the officer’s purpose in conducting the activity.<sup>241</sup> Thus, when an officer who had arrested the driver of the car opened the center console of the car to store a cell phone in order to protect it from

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<sup>235</sup> *Id.* at 236 (emphasis added); *see id.* at 237 (Douglas, J., concurring) (agreeing that the officer was “not engaged in an inventory or other search of the car”). Subsequent Supreme Court cases have inconsistently characterized the *Harris* opinion. *See, e.g.*, *Horton v. California*, 496 U.S. 128, 135 (1990) (viewing *Harris* as a no search situation); *South Dakota v. Opperman*, 428 U.S. 364, 374 n.9 (1976) (concluding that *Harris* was a no search situation); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (characterizing *Harris* as involving a valid community caretaking search).

<sup>236</sup> *Bond*, 529 U.S. at 338 n.2.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 341 (Breyer, J., dissenting).

<sup>239</sup> *Id.*; *cf.* *City of Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000) (stating that “subjective intent was irrelevant in *Bond* because the inquiry that our precedents required focused on the objective effects of the actions of an individual officer,” but adding that “our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level”).

<sup>240</sup> 334 F.3d 15 (D.C. Cir. 2003), *rev’d*, 348 F.3d 260, 263 (D.C. Cir. 2003).

<sup>241</sup> *Id.* at 19.

possible theft, his observation of a gun in that console was not a result of a search.<sup>242</sup> The majority cited, *inter alia*, *Harris* and *Kyllo* for that proposition.<sup>243</sup> Upon rehearing, a unanimous panel relied on *Bond* for the view that a search occurs regardless of an officer's purpose because the sole relevant inquiry is the effect of his actions, that is, whether a person's reasonable expectation of privacy has been infringed.<sup>244</sup>

This analysis is troubling. The *Bond* majority and Justice Breyer, along with *Maple II*, conflate the two aspects of search analysis: a search requires (1) governmental activity that (2) invades a person's reasonable expectation of privacy. Effect and not intent is the relevant inquiry as to the second aspect because there has to be some invasion into the individual's protected interest but, as to the first aspect, seizure analysis teaches us that only intended actions are of concern for Fourth Amendment applicability analysis. Missing from the "search" cases is that recognition.

A purpose inquiry is also consistent with *Boyd*, where the Court looked at the purpose that was served by the government's technique, which in that case was the mandatory production of documents or, failing that production, having the issue decided adversely to the defendant.<sup>245</sup> As James Tomkovicz has observed:

The strong implication of *Boyd* was that any official action with the purpose of compelling a person to furnish incriminating evidence must be treated like the physical entries and searches known to the Framers. Official actions designed to accomplish the same objectives as those searches had to be subjected to Fourth Amendment regulation and satisfy the Fourth Amendment demand of reasonableness. [By using that] "purpose-oriented" approach . . . the Court refused to confine Fourth Amendment scope to those practices that in physical character resembled the forcible entries experienced by our ancestors. To the *Boyd* majority,

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<sup>242</sup> *Id.* at 20.

<sup>243</sup> *Id.* at 19, 20.

<sup>244</sup> *United States v. Maple (Maple II)*, 348 F.3d 260, 263 (D.C. Cir. 2003).

<sup>245</sup> *Boyd v. United States*, 116 U.S. 616, 622 (1886).

[C]ompulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.

*Id.*

the question was one of substance, not form.<sup>246</sup>

This reasoning applies to familiar and exotic technology. When an officer shines a flashlight into a darkened place, her goal is to learn something about that place by illuminating it to facilitate her use of the sense of sight. If the flashlight is directed at a location where a person has a protected interest, such as through a house window, the Fourth Amendment should apply and the dispositive question is whether the actions are reasonable. Moreover, application of the purpose principle is equally applicable to the unaided senses. Thus, if police officers stand on chairs to look through transoms or keyholes or engage in unusual changes of position so as to permit observations with the *goal* of obtaining information or other evidence through use of their senses, then it should be held that a search occurs if they could not have otherwise obtained the evidence absent a physical intrusion.

### *C. The Nature of What Is Discovered and the Context of Discovery*

The Court, in a few cases, has relied on the contraband nature of the substance examined by the government activity to conclude that no search has occurred.<sup>247</sup> Although this technique most directly implicates whether the Court has properly construed the scope of an individual's protected privacy interest, it also influences the intrusion side of the applicability question. As previously discussed, *Place* and its progeny established that dog sniffs are not searches within the meaning of the Fourth Amendment.<sup>248</sup> Building on *Place*, the Court in *United States v. Jacobsen*<sup>249</sup> decided that the use of chemical tests to determine whether a substance is an illegal drug is not a search.<sup>250</sup> Writing for the Court, Justice Stevens believed that the field test did not invade any reasonable expectation of privacy because it only revealed whether the

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<sup>246</sup> Tomkovicz, *supra* note 3, at 329–30.

<sup>247</sup> *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 109–10 (1984); *Place v. United States*, 462 U.S. 696, 706 (1983).

<sup>248</sup> *See supra* Part V.E.2.

<sup>249</sup> 466 U.S. 109 (1984).

<sup>250</sup> *Id.* at 125. The pertinent facts were straightforward. During the course of the examination of a damaged package presented to the Drug Enforcement Administration agents by employees of a private freight carrier, the agents observed a white powdery substance. *Id.* at 111. An agent removed a trace of the powder from the package and subjected it to a chemical field test, which revealed that it was cocaine. *Id.* at 111–12. To conduct the test, that trace of powder had to be destroyed when mixed with the chemicals. *Id.* at 124–25.

substance was cocaine, which the Court did not consider as a legitimate privacy interest.<sup>251</sup> Stevens also believed that it did not matter whether the results of the tests were negative, that is, “merely disclosing that the substance is something other than cocaine [because] such a result reveals nothing of special interest.”<sup>252</sup>

Taken together, *Place* and *Jacobsen* stand for the view that the Fourth Amendment is not implicated when the government uses technology to ascertain “the ‘insignificant’ fact that contraband is not present or the ‘illegitimate’ fact that contraband is present.”<sup>253</sup> Underlying that view are the premises that “the Framers were only concerned with protecting significant, legitimate matters.”<sup>254</sup> These two premises are fundamentally flawed. As to the assertion that only legitimate matters are protected, as James Tomkovicz points out, the Amendment was adopted despite an awareness that “the constraints imposed on [governmental] power to search—would afford breathing space for criminal conduct.”<sup>255</sup>

The other premise underlying *Place* and *Jacobsen* is also inconsistent with the main thrust of Fourth Amendment jurisprudence.<sup>256</sup> For example, in *Karo*, the monitoring of a beeper in a person’s home was a search.<sup>257</sup> In *Knotts*, the Court concluded that all details of the home, including the relative heat in each of

<sup>251</sup> *Id.* at 123.

<sup>252</sup> *Id.*

<sup>253</sup> Tomkovicz, *supra* note 3, at 386.

<sup>254</sup> *Id.* at 387.

<sup>255</sup> *Id.* at 388–89.

<sup>256</sup> Harris states that the focus of *Place* and *Jacobsen* on the contraband nature of the object found is inconsistent with the proposition that “what police find as a result of a search can play no part in determining whether the officers violated the Fourth Amendment in conducting the search. The rule that a police technique is not a search if it only detects the presence of contraband obliterates this basic principle.” Harris, *supra* note 174, at 41 (footnote omitted). Moving away from a rule based on context to one based on intrusiveness “makes the existence of constitutional rules totally dependent upon law enforcement’s ability to develop and procure even better equipment.” *Id.* at 43.

<sup>257</sup> *United States v. Karo*, 468 U.S. 705, 712–15 (1984) (holding that mere transfer of a container with a tracking beeper inside is not a search nor is monitoring it outside of a home; monitoring in a home, however, is a search). As the Court has stated: “Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.” *Id.* at 716; *see id.* at 735 (Stevens, J., concurring in part and dissenting in part) (“[T]he Fourth Amendment protects the privacy interest in the location of personal property not exposed to public view.”); *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (“[N]o less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner [by locking them in a footlocker] is due the protection of the Fourth Amendment.”).

the rooms, were intimate details.<sup>258</sup> Indeed, the Court has rejected as unworkable any principled distinction between containers based on some pre-conceived notion of worthiness<sup>259</sup> and any attempt to distinguish between types of information learned about the details of the home.<sup>260</sup> This is to say that the context in which the

<sup>258</sup> *Kyllo v. United States*, 533 U.S. 27, 37–38 (2001).

<sup>259</sup> The Supreme Court at one point attempted to distinguish among types of containers in ranking expectations of privacy. *See, e.g., Chadwick*, 433 U.S. at 12–13 (contrasting reduced expectation of privacy surrounding an automobile with luggage and asserting that “a person’s expectations of privacy in personal luggage are substantially greater than in an automobile”). Some containers do not “deserve the full protection of the Fourth Amendment.” *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979). Indeed, “some containers (for example a kit of burglar tools or a gun case) by their very nature [could not] support any reasonable expectation of privacy because their contents [could] be inferred from their outward appearance.” *Id.* at 764–65 n.13; *accord* *Walter v. United States*, 447 U.S. 649, 658–59 n.12 (1980). The bankruptcy of an analytical structure based on distinguishing between types of containers soon became evident, at least to a plurality of the Court: it had no basis in the language of the Amendment which “protects people and their effects, and it protects those effects whether they are ‘personal’ or ‘impersonal.’” *Robbins v. California*, 453 U.S. 420, 426 (1981) (plurality opinion). Thus, the contents of closed footlockers or suitcases and opaque containers were immune from a warrantless search because the owners “reasonably manifested an expectation that the contents would remain free from public examination.” *Id.* (quoting *Chadwick*, 433 U.S. at 11). Moreover, the plurality believed that it would be “impossible to perceive any objective criteria” to make any distinction between containers: “What one person may put into a suitcase, another may put into a paper bag.” *Id.* (citing *United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981) (en banc), *rev’d*, 456 U.S. 798, 822 (1982)). A majority of the Court later adopted the view that there was no distinction between “worthy” and “unworthy” containers:

[T]he central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.

*United States v. Ross*, 456 U.S. 798, 822 (1982) (footnote omitted); *accord* *Florida v. Jimeno*, 500 U.S. 248, 25–54 (1991); *see* *California v. Carney*, 471 U.S. 386, 394 (1985) (rejecting the distinction between worthy and unworthy motor vehicles).

<sup>260</sup> The *Kyllo* Court stated:

Limiting the prohibition of thermal imaging to “intimate details” would not only be wrong in principle; it would be impractical in application, failing to provide “a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.” To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the “intimacy” of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The [thermal imager] might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider “intimate”; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which home activities are “intimate” and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know *in advance* whether his through-the-

information or the item is concealed should be the dispositive consideration.<sup>261</sup> Context is often just another way of saying that the individual has a protected interest invaded by the governmental actions. Although persons may have no legitimate expectation of privacy in contraband, they do have a protected interest in their “persons, houses, papers, and effects;”<sup>262</sup> *any* intrusion into those objects is a search.<sup>263</sup> This is to say that *Place* and *Jacobsen* were wrongly decided, and *Kyllo*, *Karo*, and *Hicks* demonstrate why: The relevant inquiry is not whether significant or criminal facts are learned; it is that *something* is learned as a result of an intrusion into the individual’s protected interest.<sup>264</sup>

#### *D. The Sophistication of the Device Used and Its Use by the Public*

The Court has sometimes sought to distinguish between devices based on the degree of enhancement of the senses that the technology provides<sup>265</sup> or based on its availability to the public.<sup>266</sup>

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wall surveillance picks up “intimate” details—and thus would be unable to know in advance whether it is constitutional.  
533 U.S. at 38–39 (citation omitted).

<sup>261</sup> *United States v. Jacobsen*, 466 U.S. 109, 139 (1984) (Brennan, J., dissenting) (“In determining whether a reasonable expectation of privacy has been violated, we have always looked to the context in which an item is concealed, not to the identity of the concealed item.”).

<sup>262</sup> *Id.* at 113 (majority opinion).

<sup>263</sup> *Id.* at 142 (Brennan, J., dissenting) (explaining that “the use of techniques like the dog sniff at issue in *Place* constitutes a search whenever the police employ such techniques to secure any information about an item that is concealed in a container that we are prepared to view as supporting a reasonable expectation of privacy”).

<sup>264</sup> *Maclin*, *supra* note 186, at 101–06 (arguing that dog sniffs are searches based on the *Kyllo* framework). Illustrative of the potential scope of the rule removing dog sniffs from the lexicon of a search is *Fitzgerald v. State*, where it was held that a police officer’s use of a dog to sniff four apartment doors from a hallway accessible to the public, resulting in the dog alerting to the presence of narcotics in one residence, was not a search. 864 A.2d 1006, 1007 (Md. 2004). *But see* *People v. Dunn*, 564 N.E.2d 1054, 1055 (N.Y. 1990) (finding that a dog sniff of a residence is a search under the New York Constitution).

<sup>265</sup> *See, e.g.*, *United States v. Knotts*, 460 U.S. 276, 283–84 (1983) (indicating that the use of a searchlight or field glass is unregulated by the Fourth Amendment, but that “different constitutional principles” might apply if the police use “dragnet-type law enforcement practices” to set up “twenty-four hour surveillance” of citizens).

<sup>266</sup> *See, e.g.*, *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (holding that police overflight of the curtilage of a house to observe a marijuana patch is not a search within the meaning of the Fourth Amendment, with the Court reasoning: “In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet”); *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) (upholding overflight but conceding that the use of technology to observe private property “might” implicate the Fourth Amendment if “highly sophisticated surveillance equipment not generally available to the public” is used). The cases used somewhat different language

That is, the use of technology to intrude stops being a search once that technology becomes familiar or commonly used by the public. Most recently, the Court in *Kyllo* explicitly reserved deciding whether use by the general public of a device would serve as an exception to its definition of a search.<sup>267</sup> Given the pace of technological change, what is an exotic technology one day becomes routine the next; which is to say that exotic new technologies rapidly become used routinely by the public.<sup>268</sup>

Any attempt to draw lines on permissible use based on relative intrusiveness or use by the public makes Fourth Amendment applicability, at best, a word game<sup>269</sup> and, at worst, a prescription for gutting the promise of individual security that the Fourth Amendment makes.<sup>270</sup> It is impossible to draw any principled distinction based on the sophistication of the devices. Indeed, as discussed in the preceding section, the weight of Supreme Court jurisprudence demonstrates that such an inquiry cannot be based on any principled criteria. *Hicks*, *Karo*, and *Kyllo* also demonstrate

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regarding the public use or availability standard, which others have analyzed. See Tomkovicz, *supra* note 3, at 403–20; see also Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393, 1411 (2002) (demonstrating that “the general public use and the naked eye doctrines are virtually impossible to apply in a meaningful manner”). In my view, any standard that excludes applicability of the Amendment based on actual or possible use by the public, regardless of the exact formulation of that standard, will serve to defeat individual liberty because the rapid adoption of technological devices in modern society will ultimately make any device to intrude ubiquitous.

<sup>267</sup> *Kyllo v. United States*, 533 U.S. 27, 39–40 n.6 (2001) (declining to reexamine the general public availability factor because the Court was “quite confident[] . . . that thermal imaging [was] ‘not routine’”).

<sup>268</sup> See *id.* at 47 (Stevens, J., dissenting) (the general public use limitation “is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available”); Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J. LAW & TECH. 383, 400 (1997) (rejecting the general public use standard because “so many highly intrusive devices . . . are readily ‘available’ to the public”).

<sup>269</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 768–69 (1994) (criticizing the Court’s “word games” in defining a “search”); cf. Kathryn R. Urbonya, *A Fourth Amendment “Search” in the Age of Technology: Postmodern Perspectives*, 72 MISS. L. J. 447, 513–14, 521 (2002) (offering a postmodern explanation of the definition of a search which “rejects the notion of a grand legal theory that acts as a restraint in decisionmaking” and observing that it is a legal construction “created by the justices in numerous cases, at times offering different paradigms for a Fourth Amendment ‘search’ and shifting constructions of what precedents mean in application”).

<sup>270</sup> See Sklansky, *supra* note 218, at 204–05 (collecting cases on the use of binoculars and telescopes and arguing that they should be considered a search because, if left unregulated by the Amendment, they “could do significant damage to the ‘degree of privacy against the government that existed when the Fourth Amendment was adopted’”) (quoting *Kyllo*, 533 U.S. at 34).



that all details are constitutionally relevant; the relevant inquiry is not based on the sophistication of the device used but what *any* sense-enhancing device has discovered that would not have been discovered absent a physical invasion. After all, the whole point of using technological devices such as airplane overflights, binoculars, or flashlights is to observe what otherwise could not be seen.

Once the bright-line rule of *Kyllo's* “otherwise-imperceptibility” test without its limitation on general public use is breached,<sup>271</sup> the Court’s options of either freezing the development of technological devices in some *ad hoc* manner<sup>272</sup> or permitting unlimited use of very intrusive devices as they become readily available are not particularly satisfactory.<sup>273</sup> There is another option. The *Kyllo* majority intimated that the correct analysis is to conclude that technologically-enhanced intrusions are searches, but that they are not *unreasonable* to the extent that the “portion of a house that is in plain public view” is observed.<sup>274</sup> This analysis places the emphasis where it should be: Is the intrusion reasonable? Under such circumstances, there would be the recognition that devices that detect things that are otherwise imperceptible are searches, forcing the Court to confront the reasonableness of such searches and putting pressure on the Court to revamp its inconsistent jurisprudence relating to the concept of reasonableness.<sup>275</sup>

<sup>271</sup> *Kyllo*, 533 U.S. at 38 n.5.

<sup>272</sup> Cf. LAFAYE, *supra* note 138, § 2.2(c) (analyzing the use of binoculars, telescopes, and photo enlargement equipment and observing “that there certainly comes a point, because of the sophistication of the photographic equipment and what it is able to accomplish over naked-eye observation, that photo enhancement becomes a search”).

<sup>273</sup> I have predicted elsewhere, but do not advocate, “that some compromise based on existing technology seems likely, despite its inconsistency with some of *Kyllo's* broader assertions.” Thomas K. Clancy, *Coping with Technological Change: Kyllo and the Proper Analytical Structure to Measure the Scope of Fourth Amendment Rights*, 72 MISS. L.J. 525, 561 (2002). “The analytical structure of that accommodation may be no more satisfactory than the acknowledgment that such devices have been previously sanctioned.” *Id.*

<sup>274</sup> 533 U.S. at 32. David Sklansky argues that any distinction between technology used to snoop by private actors and by government agents, with a search occurring when the latter use it regardless of its availability to the public, is in conflict with the voluntary exposure doctrine, that is, a person loses any reasonable expectation of privacy in anything he voluntarily exposes to the public. Sklansky, *supra* note 218, at 206–07. However, a person does not voluntarily expose something to the public if the public uses a technological device to snoop. *Id.* Thus, if a member of the public uses a telescope to observe the details of an apartment in a high-rise building through an open window that could not be otherwise obtained absent a physical invasion, then that does not mean the police should be able to do the same without implicating the Fourth Amendment.

<sup>275</sup> Compare *Kyllo*, 533 U.S. at 32 (noting that visual observations of the exterior of a home in plain view have not been characterized as a search “perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional”), with *Walling v. Oklahoma Press Publ'g Co.*, 327 U.S. 186, 202, 213 (1946) (finding that subpoenaing

*E. Normative-Based Interpretation*

Little interpretative skill needs to be utilized when the government physically invades. Even *Olmstead's* literalist approach guarded against such invasions. Indeed, with limited exceptions, that literal approach has yielded the conclusion that a search has occurred when the police physically invade. In contrast, the Court's approach to the other senses and to the use of technology often manifests a cabined and unrealistic approach that is inconsistent with the fundamental purpose of the Amendment. The Court has often failed to recognize that "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence [sic]; but it is the invasion of his indefeasible right of personal security, personal liberty and private property" that violates the Fourth Amendment.<sup>276</sup> The Fourth Amendment, at its most fundamental level, is designed to protect people from the government. It is no great leap to say that it should therefore be interpreted in a manner favorable to the enhancement of individual liberty. Thus, although the revulsion of the American colonists at the time of the framing focused on the techniques used, those physical intrusions were offensive because they impinged upon things held dear by those subjected to the searches, that is, their persons, homes, and private papers.

Dissenting in *Olmstead*, Justice Brandies set forth such a broad-based philosophical argument premised on the language and spirit of *Boyd*.<sup>277</sup> Brandies began with the proposition that because it was a constitution that the Court was expounding, which was to be applied "over objects of which the Fathers could not have dreamed," the Court had to adopt a construction susceptible of meeting modern conditions.<sup>278</sup> In particular, he argued that, although when the

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are a search but adjusting the requirements to measure their reasonableness). See generally Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 4 (2004) (examining the evolution of the Court's reasonableness analysis).

<sup>276</sup> *Boyd v. United States*, 116 U.S. 616, 630 (1886); see also *Soldal v. Cook County*, 506 U.S. 56, 69 (1992) ("What matters is the intrusion on the people's security from governmental interference.").

<sup>277</sup> *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandies, J., dissenting).

<sup>278</sup> *Id.* at 472; cf. *United States v. Jacobsen*, 466 U.S. 109, 137 (1984) (Brennan, J., dissenting) ("The prohibitions of the Fourth Amendment are not...limited to any preconceived conceptions of what constitutes a search or a seizure; instead we must apply the constitutional language to modern developments according to the fundamental principles that the Fourth Amendment embodies." (citing *Katz v. United States*, 389 U.S. 347 (1967)); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) ("[B]asic rights do not become petrified as of any one time.... It is of the very nature of a free society to advance in its standards of what is

Fourth Amendment was adopted, “the form that evil had theretofore taken” had been physical invasions, “[s]ubtler and more far-reaching means of invading privacy have become available to the Government.”<sup>279</sup>

Moreover, “in the application of a constitution, our contemplation cannot be only of what has been but of what may be” . . . Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. “That places the liberty of every man in the hands of every petty officer” was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed “subversive of all the comforts of society.” Can it be that the Constitution affords no protection against such invasions of individual security?<sup>280</sup>

Brandies believed that the Framers of the Amendment had “conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>281</sup> Accordingly, he concluded: “To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”<sup>282</sup>

Following Brandeis’ lead, many others through the decades have voiced similar arguments that the Fourth Amendment must be construed to afford protections against the dramatic increase in the ability of the government to intrude based on advances in technology.<sup>283</sup> Those voices recognize that a normative approach is

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deemed reasonable and right. . . . The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.”)

<sup>279</sup> *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting).

<sup>280</sup> *Id.* at 474 (footnotes omitted).

<sup>281</sup> *Id.* at 478.

<sup>282</sup> *Id.*

<sup>283</sup> *See, e.g.,* *California v. Ciraolo*, 476 U.S. 207, 218 (1986) (Powell, J., dissenting) (observing police policy from afar); *Dow Chem. Co. v. United States*, 476 U.S. 227, 251 (1986) (Powell, J., concurring) (noting the risk to privacy rights “as technological advances become generally disseminated and available in our society”); *United States v. White*, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting) (“What the ancients knew as ‘eavesdropping,’ we now call ‘electronic surveillance’; but to equate the two is to treat man’s first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known.”); *Alderman v. United States*, 394 U.S. 165, 203 (1969) (Fortas, J., concurring)

necessary in today's world, where technology threatens to make all the details of one's life detectable. Unless Fourth Amendment concepts have a value-based grounding, nothing is protected. *Kyllo* reflects this not only with its heavy emphasis on protecting the home but with its definition of a search, which, the Court asserted, "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."<sup>284</sup> More generally, the proper focus is whether the particular surveillance technique utilized by the government intrudes into any of the individual's interests protected by the Amendment. Would the "spirit motivating the framers" of the Amendment "abhor these new devices no less" than the "direct and obvious methods of oppression" which inspired the Fourth Amendment?<sup>285</sup> The answer to this question must always be a value-based judgment.<sup>286</sup>

## VII. CONCLUSION

A "search" is a two-sided inquiry: governmental actions must invade a protected interest of the individual. This Article has focused on the intrusion side of the definition. In Supreme Court jurisprudence, physical manipulation by the police comes closest to a common sense understanding of what a search is. That literal

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("[B]ecause by nature it is hidden, unlawful electronic surveillance is even more offensive to a free society than the unlawful search and seizure of tangible material."); *Osborn v. United States*, 385 U.S. 323, 341–43 (1966) (Douglas, J., dissenting) (discussing the increase in government surveillance and its resultant decline in personal privacy); *Lopez v. United States*, 373 U.S. 427, 459 (1963) (Brennan, J., dissenting) (deriding the *Olmstead* decision's refusal to extend the Fourth Amendment's applicability to new technology); *On Lee v. United States*, 343 U.S. 747, 759 (1952) (Frankfurter, J., dissenting) (noting that technological advances allow for "police intrusion into our private lives"); *Goldman v. United States*, 316 U.S. 129, 137–39 (1942) (Murphy, J., dissenting) (observing that modern life calls for greater Fourth Amendment protection from government intrusions); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 872–74 (1996) (applying Brandeis' interpretative approach of translation of the Framers' values to cyberspace).

<sup>284</sup> 533 U.S. 27, 34 (2001).

<sup>285</sup> *Goldman*, 316 U.S. at 139 (Murphy, J., dissenting).

<sup>286</sup> *See, e.g., White*, 401 U.S. at 786 (Harlan, J., dissenting) ("The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement."); Amsterdam, *supra* note 3, at 403 ("The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."); Cloud, *supra* note 121, at 49 (arguing that the Court "should enunciate an expansive, value-based theory of the scope of the Fourth Amendment and its role in preserving privacy and liberty—without which our democracy cannot survive").

view must be contrasted with other situations, particularly sense-enhancing devices, where the legal definition is divorced from the ordinary meaning of the term, and thereby permitting the Court to conclude that no search has occurred. In doing so, the Court has often failed to recognize that, “[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence [sic]; but it is the invasion of his indefeasible right of personal security, personal liberty and private property” that violates the Fourth Amendment.<sup>287</sup>

Instead of distinguishing physical invasions from other ways of obtaining evidence, the proper analogy *is* to physical invasions. *Kyllo* elevates that analogy to the status of a test: “We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search . . . .”<sup>288</sup> This rule has the virtue of clarity, permitting initial decision-makers to know in advance the definition of a search. It is also consistent with the views of *Boyd* and *Kyllo* that one should examine what the governmental actions have accomplished. The logic of this analysis should be extended to all of the objects protected by the Amendment—houses, people, papers, and effects. The governmental purpose in engaging in the conduct is a crucial consideration. The Court, in its mandatory production of document cases, such as *Boyd* and the subpoena cases, recognized that any intrusion that “effects the sole object and purpose of search” should be viewed as a search.<sup>289</sup> A purpose inquiry properly focuses attention on a necessary element for the Fourth Amendment to apply—intended governmental decisions to learn something about an individual’s private affairs. Moreover, the relevant inquiry is not whether significant or criminal facts are learned by the intrusion, but whether something is learned.

The Fourth Amendment, at its most fundamental level, is designed to protect people from the government. It is no great leap to say that it should therefore be interpreted in a manner favorable to the enhancement of individual liberty. Thus, although the revulsion of the American colonists at the time of the framing

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<sup>287</sup> *Boyd v. United States*, 116 U.S. 616, 630 (1886); see *Soldal v. Cook County*, 506 U.S. 56, 69 (1992) (“What matters is the intrusion on the people’s security from governmental interference.”).

<sup>288</sup> 533 U.S. at 34 (citation omitted).

<sup>289</sup> *Boyd*, 116 U.S. at 622.

focused on the techniques used, those physical intrusions were offensive because they impinged upon things held dear by those subjected to the searches, that is, their persons, homes, and private papers. That normative-based view should be applied to any intrusion with the purpose of obtaining physical evidence or information, either by a technological device or the use of the senses, into a protected interest.