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ESSAY

Coping with Technological Change: *Kyllo* and the Proper Analytical Structure to Measure the Scope of Fourth Amendment Rights

Thomas K. Clancy[*]

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."[1] In analyzing any Fourth Amendment issue, two separate questions must be answered: is the Amendment applicable; and, if so, is it satisfied? This essay focuses on the first question. Only by understanding the meaning of the term "secure" is it possible to determine the scope of the Fourth Amendment's protections for individuals and, correlatively, the amount of unregulated governmental power the Amendment allows. If one does not know what is protected by the Amendment, then it cannot be determined what the government can do. If one does know what is protected, any intrusion–either by a technological device or by use of the senses–should be considered a search and must be justified as reasonable. Thus, as one distinguished commentator has observed: "The key to the [A]mendment is the question of what interests it protects."[2]

There are three possible candidates for defining the scope of the Amendment's protections: property, privacy and

[*] Director, National Center for Justice and the Rule of Law, and Professor, University of Mississippi School of Law. J.D., Vermont Law School. B.A., University of Notre Dame.

[1] U.S. CONST. amend. IV (emphasis added).

[2] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974).

security. Both the property and privacy approaches have proven to be inadequate. The Fourth Amendment speaks of the right to be secure, and I have previously proposed invigorating that term in an article entitled *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*,[3] and using it as the proper measure of the protection afforded by the Amendment.[4] In my view, the Supreme Court's decision in *Kyllo v. United States*[5] represents a potentially giant step in that direction.

PROPERTY LAW ANALYSIS

The Fourth Amendment was a creature of the Eighteenth Century's strong concern for the protection of real and personal property rights against arbitrary and general searches and seizures.[6] That historical context has been viewed as a primary source for understanding the Amendment.[7] The English and colonial search and seizure abuses and the reaction to those abuses, which culminated in the adoption of the Fourth Amendment, have been retold often.[8] Although reaction to the arbitrary nature of British search and seizure procedures often focused on the techniques used, the practices were offensive because they impinged upon things held dear by those subjected to the searches or seizures, such as their persons, homes and private papers.[9] The consequent expression of the

[3] Thomas K. Clancy, *What Does the Fourth Amendment Protet: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307 (1998).

[4] This essay summarizes that *Wake Forest Law Review* article and updates it with the impact of *Kyllo v. United States*, 533 U.S. 27 (2001).

[5] 533 U.S. 27 (2001).

[6] *See generally* Edward L. Barrett, Jr., *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46 (tracing the developments that resulted in interpreting the Fourth Amendment to afford greater protection to property rights than to personal liberty).

[7] *See* authorities cited in Clancy, *supra* note 3, at 309 n.9.

[8] *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) (discussing colonial and English developments). *See also* Weeks v. United States, 232 U.S. 383, 390 (1914) (the Fourth Amendment "took its origin in the determination of the framers" to create safeguards against those arbitrary and abusive invasions).

[9] *See, e.g.*, Entick v. Carrington, 19 Howell's State Trials 1029, 95 Eng. Rep. 807 (C.P. 1765) (holding invalid the invasion of a home and seizure of all private papers pursuant to a general warrant); 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"); Huckle v. Money, 95 Eng. Rep. 768, 769 (K.B. 1763) ("To 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 . . . .").

individual's rights was often phrased by reference to property, and the notion that "a man's house [is] his castle" became "a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures."[10]

Beginning with *Boyd v. United States*,[11] and extending to the latter third of the Twentieth Century, the Supreme Court defined the interest secured by the Fourth Amendment largely in terms of property rights.[12] Property rights analysis was used in two ways. First, in *Boyd*, the Court created a hierarchy of personal property rights, with the permissibility of a search or seizure premised on whether the government had a superior interest in the thing to be searched or seized.[13] Based on that hierarchy, often referred to as the mere evidence rule, the Court refused to sanction any search or seizure of certain objects, regardless of the procedures utilized. Second, beginning with *Olmstead v. United States*,[14] the Court used property law to define constitutionally protected areas and limited the Fourth Amendment inquiry to the protection of tangible items from physical invasions.[15] Based on that restrictive doctrine, the government had a great deal of freedom to utilize new technology to investigate without implicating the Amendment.

The requirement of a physical invasion into a protected place remained a cornerstone Fourth Amendment principle until *Katz v. United States*[16] in 1967.[17] 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.[18] "At the very core

[10] *Weeks*, 232 U.S. at 390. This view is shared by commentators. *See, e.g.*, Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 364-65 (1921) (opining that it was "apparent" that the Fourth Amendment embodied the principle in English liberty that found "expression in the maxim `every man's home is his castle'").

[11] 116 U.S. 616 (1886).

[12] *See generally* Clancy, *supra* note 3, at 309-27; Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 578-81 (1996).

[13] *Boyd*, 116 U.S. at 623-24.

[14] 277 U.S. 438 (1928).

[15] Olmstead v. United States, 277 U.S. 438, 464-65 (1928).

[16] 389 U.S. 347 (1967).

[17] *Katz*, 389 U.S. at 353.

[18] *See* Lanza v. New York, 370 U.S. 139, 143 (1962). In rejecting a claim that a prison cell was a constitutionally protected area, the Court gave a partial list of areas which were protected:

[stood] the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[19] Expanding on the justification for that core area, the Court explained:

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.[20]

It was within the defined constitutionally protected areas that a person could be secure:

> What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure.[21]

The cases consistently turned on the determination of whether the government had physically entered a protected area.[22] Thus, where a hotel room was separated from a room occupied by federal agents by two doors with a small air space between the rooms and the agents taped a microphone to the door on their side,[23] or where the agents placed a sensitive

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> A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's "house," and so, of course, may an apartment. An automobile may not be unreasonably searched. Neither may an occupied taxicab. Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day.

Id. (footnotes omitted).

[19] Silverman v. United States, 365 U.S. 505, 511-12 (1961).

[20] *Silverman*, 365 U.S. at 511 n.4 (quoting United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952)).

[21] Hoffa v. United States, 385 U.S. 293, 301 (1966) (footnote omitted).

[22] *See, e.g., Silverman*, 365 U.S. at 510-12 (cataloguing cases and recognizing that the presence or absence of a physical invasion into a constitutionally protected area was the vital consideration).

[23] *See* Desist v. United States, 394 U.S. 244, 245 n.2 (1969). The Court refused to apply *Katz* retroactively, stating that "to the extent *Katz* departed from previous holdings of this Court, it should be given wholly prospective

receiver against a partition wall,[24] the Court concluded that no Fourth Amendment rights were violated because there was no physical intrusion into the suspect's room, which was the constitutionally protected area.[25] On the other hand, when a "spike mike" was inserted into the party wall until it contacted the heating duct serving the suspect's house, thus converting the entire heating system into a conductor of sound, that minor physical intrusion triggered the applicability of the Fourth Amendment.[26]

PRIVACY ANALYSIS

Underlying *Boyd* and *Olmstead* were two conflicting visions of the Fourth Amendment, with the former advocating a liberal construction and the latter a literal one. However, because *Olmstead* primarily concerned the areas into which the government could intrude,[27] and *Boyd* primarily concerned what objects could be permissibly seized,[28] they did not directly collide. Both of those lines of authority coexisted uneasily until 1967, when the Court rejected property analysis and substituted privacy analysis to measure the scope of the Fourth Amendment's protections. *Warden v. Hayden*[29] dismantled the mere evidence rule, rejecting any hierarchy of property rights and any substantive restrictions on the ability of the government to search personal property.[30] *Katz v. United States*,[31] the better known but less articulately

application." *Id.* at 246.

[24] *See* Goldman v. United States, 316 U.S. 129, 131 (1942), *overruled in part by Katz*, 389 U.S. at 347.

[25] *See also* Kaiser v. New York, 394 U.S. 280, 281-82 (1969) (refusing to apply *Katz* retroactively and finding no violation of the Fourth Amendment when a listening device that recorded a phone conversation in a bar was attached to a central terminal in the basement of the building in which the bar was located); *cf.* On Lee v. United States, 343 U.S. 747, 751-52 (1952) (holding that where an undercover agent wearing a body wire that transmitted conversations was in another's home by consent, no trespass was committed, and the introduction of conversations into evidence did not violate the Fourth Amendment).

[26] *See Silverman*, 365 U.S. at 506-09 (explaining that the Court need not worry about the future technological development of listening devices employed by the police because the case at hand involves "physical penetration into the premises occupied by the petitioners").

[27] *See Olmstead*, 277 U.S. at 464-66.

[28] *See Boyd*, 116 U.S. at 622-24.

[29] 387 U.S. 294 (1967).

[30] *Warden*, 387 U.S. at 305-10.

[31] 389 U.S. 347 (1967).

reasoned case, rejected *Olmstead's* view that the country was divided into two areas—those that were constitutionally protected and those that were not.[32] Both *Hayden* and *Katz* asserted that privacy, not property, was the centralizing principle upon which Fourth Amendment rights were premised.[33]

In *Katz*, federal agents placed an electronic listening and recording device outside a public phone booth, from which Katz placed his calls.[34] In announcing that the Fourth Amendment protected people and not places,[35] the Court stated:

> It is true that the absence of [physical] penetration was at one time thought to foreclose further Fourth Amendment inquiry . . . for that Amendment was thought to limit only searches and seizures of tangible property. But "[t]he premise that property interests control the right of the Government to search and seize has been discredited." . . . Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any "technical trespass under . . . local property law." . . . Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.[36]

The Court's analysis was not sweeping. It did not acknowledge the depth of the precedent following *Olmstead* and expended little effort rejecting *Olmstead*'s reliance on the twin premises that the Constitution protects only some areas and that the protections extend only to physical invasions.[37]

The Court thereafter adopted and employed the reasonable expectation of privacy test to define, at least in large part, the Amendment's protections.[38] That test requires

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[32] *Katz*, 389 U.S. at 351-53.
[33] *Hayden*, 387 U.S. at 301-02; *Katz*, 389 U.S. at 351-52.
[34] *Katz*, 389 U.S. at 348.
[35] *Id*. at 351.
[36] *Id.* at 352-53 (citations and footnotes omitted).
[37] *Id.* at 352-53.
[38] *Id.* at 360-62 (Harlan, J., concurring). *See, e.g.,* Maryland v. Garrison, 480 U.S. 79, 90-91 (1987) (Blackmun, J., dissenting) (noting that Justice Harlan articulated "the proper test" in *Katz*); California v. Ciraolo, 476 U.S. 207, 214

that a person exhibit an actual subjective expectation of privacy and that this expectation be one that society recognizes as reasonable.[39] If either prong is missing, no protected interest is established.[40]

One fundamental aspect of Supreme Court analysis until *Katz* was the relational aspect of the concept of security: a person was secure in specified objects—one's person, house, papers and effects.[41] That analysis was, of course, driven by the language of the Amendment. For example, the Court had established in *Hester v. United States*[42] that the Amendment did not apply to open fields.[43] That decision was premised not on a definition of the word "secure," but on excluding open fields from the list of objects specified by the Amendment as protected.[44] That is, an open field was not included in the concept of a person, house, paper or effect.[45] *Katz* decoupled that relationship with a broad substitution of privacy: people, not places were protected, regardless of where that person was.[46]

The Court created a hierarchy of privacy interests by using several different techniques.[47] One technique has been to find that the effect of modern life, with its technological and other advances, serves to eliminate or reduce a person's justified expectation of privacy.[48] The Court's reaction to aircraft fly-overs, which may observe activities within the

(1986) (stating that "Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted"); Smith v. Maryland, 442 U.S. 735, 740 (1979) (stating that the Harlan test "embraces two discrete questions").

[39] *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). The Court in subsequent cases has sometimes used other words, such as "legitimate" and "justifiable" as substitutes for "reasonable," but those terms do not have a different meaning. *See, e.g., Ciraolo*, 476 U.S. at 219-20 n.4 (Powell, J., dissenting); *Smith*, 442 U.S. at 740.

[40] *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). Harlan concluded that the physical trespass theory was "bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.* at 362 (Harlan, J., concurring).

[41] *See* Olmstead v. United States, 277 U.S. 438, 464 (1928).

[42] 265 U.S. 57 (1924).

[43] *Hester*, 265 U.S. at 59.

[44] *See id.* at 59.

[45] *See id.*

[46] *See Katz*, 389 U.S. at 351.

[47] *See* Clancy, *supra* note 3, at 329-39.

[48] *See, e.g.,* California v. Ciraolo, 476 U.S. 207, 215 (1986) (finding that in an age where commercial flights are routine, it is unreasonable for an individual to expect marijuana plants to be constitutionally protected from aerial observation).

fenced curtilage of a home, illustrates this technique.[49] The Court has found that "[i]n an age where private and commercial flight in the public airways is routine," it is unreasonable to expect privacy from the air.[50] Similarly, in finding that no legitimate expectation of privacy was impinged by taking aerial photographs of the smokestacks of an industrial complex, the Court reasoned: "Any person with an airplane and an aerial camera could readily duplicate [such photos] . . . . [T]he technology of photography has changed in this century . . . enhanc[ing] industrial processes, and . . . law enforcement techniques."[51] Thus, the overall tendency of the Court–prior to *Kyllo*–has been to contract the protected individual interest as a consequence of modern technological advances and their utilization by the government.[52]

Another method has been the Court's use of an empirical approach to determine what constitutes a legitimate expectation of privacy. An empirical approach examines whether an act is observable and concludes from that factual analysis whether the individual has a protected interest.[53] For example, the Court has stated that because police officers could see marijuana plants when they flew over a homeowner's backyard, the homeowner had no reasonable expectation of privacy.[54] The Court viewed the police's actions as "simple visual observations from a public place."[55]

The Court's expectation of privacy analysis has many flaws,[56] including its lack of textual support in the language of the Amendment. It accordingly leaves the fluid concept of privacy to the vagaries of shifting Court majorities, which are able to manipulate the concept to either expand or contract the meaning of the word at will.[57] Indeed, it is difficult—if not

[49] *Id.* at 213-14.
[50] *Id.* at 215.
[51] Dow Chem. Co. v. United States, 476 U.S. 227, 231 (1986).
[52] *See, e.g.,* United States v. Karo, 468 U.S. 705, 712-18 (1984) (holding that it is 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); *see also* Smith v. Maryland, 442 U.S. 735, 743-44 (1979) (finding that installation of a device to record phone numbers dialed on a person's telephone was not a search).
[53] *See, e.g.,* California v. Greenwood, 486 U.S. 35, 40 (1988) (finding that there was no reasonable expectation of privacy in trash left for collection because the garbage bags were readily accessible to animals, children, scavengers, snoops, and other members of the public, and because it was left for a third party to collect).
[54] *See Ciraolo*, 476 U.S. at 213-14.
[55] *Id.* at 214; *accord* Florida v. Riley, 488 U.S. 445, 449-51 (1989) (plurality opinion).
[56] The academic critics are legion. *See, e.g.,* authorities cited in Clancy, *supra* note 3, at 339 n.234.
[57] *See* Katz v. United States, 389 U.S. 347, 373 (1967) (Black, J., dissenting).

impossible—to say exactly what the concept means.[58] Thus, while a liberal Court substituted privacy in lieu of property analysis to expand protected interests, a conservative Court has employed privacy analysis as a vehicle to restrict Fourth Amendment protections.

The Court has too readily made privacy expectations contingent on technology, empiricism and government regulation, highlighting the problem of relying on privacy to define the person's protected interest. Given that the number and varieties of official intrusions into individuals' lives has

> By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy.

Id. (Black, J., dissenting); *see also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 545 n.1 (1977) (Rehnquist, J., dissenting) (stating that "[t]he concept of `privacy' can be a coat of many colors"); Berger v. New York, 388 U.S. 41, 76-77 (1967) (Black, J., dissenting) (criticizing the Court's use of privacy to define the protections of the Amendment and asserting that the right of privacy, "like a chameleon, has a different color for every turning," arguing that the use of the word simply gave the Court a useful tool to "usurp the policy-making power of the Congress and to hold more state and federal laws unconstitutional"); Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting) (arguing that privacy is such a "broad, abstract and ambiguous concept" that could easily be "shrunken in meaning" or could be used broadly); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century,* 65 IND. L.J. 549, 556 (1990) (claiming that the privacy test "leaves room for broad swings of judicial interpretation and maneuvering").

[58] A recent effort by a distinguished Task Force of the American Bar Association simply gave up on attempting to define privacy.

> [T]he Task Force, like the courts, came to see privacy as a multi-factor concept, and thus ultimately defined privacy by simply listing relevant considerations. Although this approach obviously lacks the clarity that the Task Force had hoped to provide, the group concluded that it was the best way to define privacy: there are simply too many permutations involving technology to permit bright-line statements about activities or conditions that deserve the Constitution's greatest protection.

Christopher Slobogin, *Technologically-assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 439-40 (1997); *see also* James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 662-63 (1985) ("Privacy's amorphous nature and chameleon-like capacity to describe disparate interests makes it a somewhat problematic concept, preventing definition of the term that is both comprehensive and comprehensible.") (footnotes omitted).

increased exponentially as a result of the increasing complexities of society, the Court's willingness to reduce privacy expectations will too often lead to the conclusion that no protected individual interest has been invaded by the government. Use of an empirical approach in conjunction with permitting technological advances to reduce a person's protected interest inextricably leads to a smaller and smaller oasis of protection afforded by the Amendment. It may be possible to observe a homeowner's activities from an airplane, and, in that sense, viewing one's home from an airplane is not private. However, it is not so obvious that the homeowner has relinquished his right to be secure—that is, if normative values invigorate the concept of security.[59]

The most important and fundamental flaw in the Court's reliance on privacy analysis is that the inquiry has abandoned the structure of the Fourth Amendment and is based on confusing motivation for exercising the right to be secure with the right itself. As discussed below, the interest of individuals protected by the Fourth Amendment's right to be secure cannot be adequately described by reliance on a privacy analysis.

[59] For example, Justice Powell, dissenting in *Ciraolo*, adopted a normative approach and maintained that, even if the actions could be observed, a reasonable expectation of privacy should be found based on standards to measure legitimacy. California v. Ciraolo, 476 U.S. 207, 220 n.5 (1986) (Powell, J., dissenting). Such standards include real property law, personal property law and "`understandings that are recognized or permitted in society.'" *Id.* (Powell, J., dissenting) (quoting Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)).

The inquiry "necessarily focuses on personal interests in privacy and liberty recognized by a free society." *Id.*; *see also* Florida v. Riley, 488 U.S. 445, 456 (1988) (Brennan, J., dissenting) (arguing that any conclusion that a reasonable expectation of privacy exists ultimately depends on the judgment "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") (quoting Amsterdam, *supra* note 2, at 403); California v. Greenwood, 486 U.S. 35, 53-54 (1988) (Brennan, J., dissenting) (arguing that the police are required to "adhere to norms of privacy that members of the public plainly acknowledge," and concluding that a person has a reasonable expectation of privacy in trash left for collection); Dow Chem. Co. v. United States, 476 U.S. 227, 248-49 (1986) (Powell, J., concurring in part and dissenting in part) (using trade secret laws to justify the conclusion that an expectation of privacy was reasonable); *cf.* Jerome Atrens, *A Comparison of Canadian and American Constitutional Law Relating to Search and Seizure*, 1 SW. J.L. & TRADE AM. 29, 34-35 (1994) (contrasting the empirical approach of the United States Supreme Court in measuring a reasonable expectation of privacy with the normative approach of the Canadian Supreme Court); Katz, *supra* note 57, at 564 (arguing that the Court has turned the principle of knowing exposure to the public into a simple assumption-of-risk test, resulting in stripping the individual of a "great measure of fourth amendment protection" due to "living in a high-tech society," thereby stripping the Fourth Amendment of its "normative values").

THE RIGHT TO BE SECURE

A.

The Fourth Amendment speaks of the right to be secure and, in my view, is the proper measure of the protection afforded by the Amendment. Common themes and values underlay the concept of security throughout history. The term "secure" in a non-Fourth Amendment context has been associated with being safe or free from danger. The principal dictionary definitions of the word have changed little in the past two hundred years. Samuel Johnson's dictionary offered several definitions of the word, including "free from fear," "sure, not doubting," and "free from danger, that is, safe."[60] Similarly, he defined "to secure" to include the following: "to make certain"; "to put out of hazard"; "to protect"; "to make safe"; and "to insure."[61] The Oxford English Dictionary states that the word "secure" is derived from Latin and in late Latin meant "safe, free from danger."[62] That dictionary, with abundant references to literature and other written works dating to the colonial era, defines "secure," *inter alia*, as meaning—as to times, places, and actions—"being free from fear or anxiety."[63] Similarly, the word connotes having or affording ground for confidence and being safe.[64] As a verb, the word is used to convey the meaning "to make safe, to guard, or to protect."[65] To illustrate, the Oxford Dictionary offered this usage from 1754: "A very safe road, secured from all winds."[66] From 1756, it employed this usage: "Is the Watch doubled? Are the Gates secur'd [sic] Against Surprize [sic]?"[67] And from 1784, it used this reference: "The hedge-hog, so well secured against all assaults by his prickly hide."[68] Indeed, Blackstone defined property as "that sole and despotic dominion which one . . . claims and exercises over the external things of the world, in total exclusion of the right of any other

[60] JOHNSON'S DICTIONARY OF THE ENGLISH LANGUAGE (1st Am. ed. 1819).
[61] *Id.*
[62] XIV OXFORD ENGLISH DICTIONARY 851 (2d ed. 1989).
[63] *Id.*
[64] *See id.*
[65] *Id.* at 852.
[66] *Id.*
[67] *Id.*
[68] *Id.*

individual in the universe."[69]

The word "secure" does not lose its common meaning when used by the Fourth Amendment. However, for the Framers, it took on an additional, contextual meaning when used by the Amendment: the security was (1) from unreasonable governmental intrusion, and (2) the right applied only to specific objects—persons, houses, papers and effects.

1.

As to the first relation, security from unreasonable governmental intrusion, the Framers were referring to the ability to exclude the government. The court in *Entick v. Carrington*[70] inextricably linked security with the ability to exclude. After stating that the great end for which men had entered into society was to "secure" their property, Lord Camden asserted: "No man can set his foot upon my ground without my licence [sic]."[71] In 1766, in a speech before Parliament, William Pitt similarly emphasized the right to exclude:

> 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; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.[72]

Across the Atlantic, the use of the word "secure" by the American colonists, expressing dismay with British search and seizure practices, related to the arbitrary exercise of power to invade their property; security, for them, was the ability to prevent such invasions. In 1762, in his argument against the writs of assistance, which allowed customs officials in Massachusetts to search anywhere they desired, James Otis argued that the writ "is against the fundamental principles of law, the privilege of house. A man, who is quiet, is as secure in his house as a prince in his castle . . . ."[73]

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[69] Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 270-71 (1993) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *2).

[70] 19 Howell's State Trials 1029, 1066, 95 Eng. Rep. 807 (C.P. 1765).

[71] *Id*.

[72] NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 49-50 (Johns Hopkins Press 1937).

[73] JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY

Similarly, a contemporaneous newspaper article recounting the evils of the writs asserted that, if the writs were to be granted, "every householder [sic] 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.[74] Appearing in the Philadelphia press in 1768, and subsequently made widely available, was one of John Dickinson's "Farmer's Letters," which criticized 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."[75] In a meeting of the inhabitants of Boston on November 2, 1772, a committee was appointed "to state the Rights of the Colonists."[76] 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.[77] 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 the 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.[78]

Thus, there was clear historical precedent for use of the term "secure." The word was not an innovation of the Framers, and it was not used by accident. The Framers valued security and intimately associated it with the ability to exclude the government.

After eliminating the gloss of the Supreme Court's

BETWEEN 1761 AND 1772, at 471 (1865).

[74] *Id*. at 489 (quoting BOSTON GAZETTE, Jan. 4, 1762).

[75] M.H. SMITH, THE WRITS OF ASSISTANCE CASE 493 (1978).

[76] QUINCY, *supra* note 73, at 466.

[77] *Id*. at 467.

[78] *Id.*

property and privacy analyses, the underlying common theme that the Amendment protects the right to exclude has appeared often in the Court's opinions. Although the physical trespass theory of *Olmstead* and its progeny was too narrow because it only protected against physical invasions, that protection was the ability to exclude unreasonable intrusions.[79]

The post-*Katz* era Court has confused reasons for exercising the right protected with the right itself. A purpose of exercising one's Fourth Amendment rights might be the desire for privacy, but the individual's motivation is not the right protected. Indeed, one concept of privacy is simply the power `" . . . to control access by others to a private object (to a private place, to information, or to an activity). [It] is the ability to maintain the state of being private or to relax it as, and to the degree that, and to whom one chooses.'"[80] Is this not to say that people have the power to exclude? If privacy is only the power to exclude, then there is no reason to refer to the concept, which serves only to confuse what the individual's right is, particularly given the many uses that "privacy" has.[81]

The right to be secure permits one to do as one wishes for whatever reasons that motivate the person.[82] The Fourth Amendment is an instrument—a gatekeeper that keeps out the government. The gatekeeper does not ask why one desires to exclude the government; it simply follows orders.[83] As a

[79] *See, e.g.,* Silverman v. United States, 365 U.S. 505, 511 n.4 (1961) (quoting United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting), *aff'd,* 343 U.S. 747 (1952)).

[80] Lawrence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825, 855 (1989), quoting STANLEY I. BENN, A THEORY OF FREEDOM 266 (1988); *see also* Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 329 (1981) ("The essence of privacy is twofold: the ability to keep personal information unknown to others and to keep one's self separate from interaction with others.").

[81] *Cf.* Yeager, *supra* note 69, at 284 ("Whatever privacy means, it surely must include the right to exclude others.").

[82] *Cf. Bowers v. Hardwick,* 478 U.S. 186, 206-08 (1986) (Blackmun, J., dissenting) (arguing that the purpose for the Fourth Amendment protecting the home "is more than merely a means of protecting specific activities that often take place there"); *Warden v. Hayden*, 387 U.S. 294, 301 (1967) ("On its face, the [Fourth Amendment] assures the `right of the people to be secure in their persons, houses, papers, and effects' . . . without regard to the use to which any of these things are applied."); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 85 (1974) ("It would misconceive the great purpose of the [A]mendment to see it primarily as the servant of other social goods, however large and generally valuable.").

[83] *Cf.* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964) ("Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority.

gatekeeper, the Amendment permits other rights to flourish. However, the purpose of exercising one's Fourth Amendment rights neither adds to nor detracts from the scope of the protection afforded by the Amendment.

The privacy era cases have value because they afforded protection to intangible interests against non-physical intrusions. But it was this concern with extending protection to intangible interests and guarding against non-physical invasions that served to distort Fourth Amendment doctrine. Rather than recognizing that intangible objects must be protected against non-physical invasions, the Court went wildly astray by rejecting the Fourth Amendment's structure and superimposing a privacy analysis. It does not, however, require reworking the entire Fourth Amendment to reject *Olmstead*'s limitations on the protections afforded as being inconsistent with the Framers' intent.[84]

The Court prior to *Kyllo* acknowledged, at least in part, the failings of privacy analysis. Thus, for example, it identified three interests protected by the Amendment: privacy, possession of property, and freedom of movement.[85] For each of these interests, the essential attribute of the right to be secure is the *ability* of the individual to exclude the government from intruding. Thus, as to a search, one may exercise the right to prevent the intrusion; as to seizure of property, the individual may exercise the right to remain in possession; and, as to seizure of a person, one may exercise the right to continue with one's itinerary. In each case, there is an exercise of the ability to exclude the government from interfering with one's person, house, papers, or effects. This ability to exclude is so essential to the exercise of the right to be secure that it is proper to say that it is equivalent to the right—the right to be secure *is* the right to exclude. Without the ability to exclude, a person has no security. With the ability to exclude, a person has all that the Fourth Amendment promises: no non-justified intrusions by the government. In other words, the Fourth Amendment gives the right to say no to the government's attempts to search and

Within, he is master, and the state must explain and justify any interference.").

[84] *Cf.* California v. Hodari D., 499 U.S. 621, 627 n.3 (1991) ("What *Katz* stands for is the proposition that items which could not be subject to seizure at common law (e.g., telephone conversations) can be seized under the Fourth Amendment.").

[85] *See* Soldal v. United States, 506 U.S. 56 (1992).

seize. Privacy, human dignity, a dislike for the government, and other states of mind may be motivations for exercising the right to exclude, but they are not synonymous with that right or with aspects of the right. The right to exclude is the sum and essence of the right protected. Of course, the right is not absolute. It extends only to protect against *unreasonable* searches and seizures.

2.

As to the second relation, the concept of security cannot be divorced from the object protected. The meaning of security will vary somewhat in relation to the protected interest specified by the Amendment: persons, houses, papers, or effects.[86] However, the core concept remains the right to exclude. Privacy analysis purported to abandon reliance on the principle of constitutionally protected areas, with *Katz* asserting that the Amendment protects people, not places.[87] Such a claim simply ignores the language and structure of the Amendment: people have the right to be secure only as to their persons, houses, papers, and effects.

When speaking of a seizure of the person, even in *Katz* the Court acknowledged that the Amendment protected interests other than privacy:

> The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.[88]

The person on the street, patently, has no property or privacy interests implicated by an unreasonable seizure. Something else must underlie the Fourth Amendment right to be secure in that context.[89] This is why the Court in *Terry v. Ohio*[90]

[86] *Cf.* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 672-73 (1995) (O'Connor, J., dissenting) (stressing as important in the analysis of permissibility of the collection of urine to test for drugs that it is a search of a person, and thus one of the four categories of searches the Fourth Amendment lists by name); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (stating that although the Fourth Amendment protects people, not places, "[g]enerally . . . the answer to that question requires reference to a `place'").

[87] *See Katz*, 389 U.S. at 351.

[88] 389 U.S. at 350 n.4 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting)).

[89] *Cf.* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1261, 1328-30 (1990) (stating that the right of locomotion is grounded "in two fundamental

placed such emphasis on the "inestimable right of personal security," which "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."[91] Indeed, the Court said that "`[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person.'"[92] The Court has variously described that underlying personhood interest, using such terms as "dignity,"[93] freedom of movement,[94] or the right to be left alone.[95] However, though such concerns may motivate the individual's exercise of the Fourth Amendment right, that right does no more than prohibit the government from intruding upon the person without sufficient justification. Thus, the core concept, the right to exclude, remains—the ability of the individual to refuse to accede to the government intrusion.

As to searches of the person, the essential right is the right to exclude government agents from intruding into her body. Speaking in terms of a "dignity" interest or other interest confuses the issue. For example, in *Skinner v. Railway Executives' Ass'n*,[96] Justice Marshall observed: "Compelling a person to produce a urine sample on demand . . . intrudes deeply on privacy and bodily integrity. Urination is among the most private of activities. It is generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of personal seclusion."[97] Marshall went on to observe that the violation of one's privacy while performing an excretory function has been viewed as "`extremely

commitments in the fourth amendment's prohibition against unreasonable seizures[:] . . . `the right to be let alone' . . . [and the] protection of personal security") (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

[90] 392 U.S. 1 (1968).

[91] *Terry*, 392 U.S. at 8-9.

[92] *Id*. at 9.

[93] *See, e.g.*, Schmerber v. California, 384 U.S. 757, 767 (1966) (stating that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

[94] *See, e.g.*, Brower v. County of Inyo, 489 U.S. 593, 597 (1989) (Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*").

[95] *See, e.g.*, California v. Ciraola, 476 U.S. 207, 226 (1986) (stating that the Court has "consitently afforded heightened protection to a person's right to be left alone in the privacy of his house.")

[96] 489 U.S. 602 (1989).

[97] *Skinner*, 489 U.S. at 645-46 (Marshall, J., dissenting).

distressing, as detracting from one's dignity and self esteem.'"[98] Such concerns, however, may motivate a person to insist on his rights; but those motivations should not be confused with the right. Otherwise, by regulation and other means, one can whittle away at dignity interests and change perceptions. Indeed, to substitute the right to exclude with an analysis of whether a person has a protected privacy interest leads to cases such as *Vernonia School District 47J v. Acton*.[99] In *Vernonia*, the Court readily deprecated the privacy interests of school children and permitted suspicionless urinalysis of student athletes by maintaining that student athletes had a lesser expectation of privacy due to such things as the configuration of locker rooms.[100] People have different needs for privacy. Those subjective and relativistic needs do not serve to define or defeat the right to be secure. As another example, in *Winston v. Lee*,[101] which concerned whether the government could compel a person to undergo the surgical removal of a bullet, the Court felt compelled to emphasize repeatedly that the "privacy" interest of the person in such circumstances encompassed dignity and bodily integrity.[102] The Court suggested that it was the individual's *right* to exclude the government from intruding into his body that was implicated; he may have been motivated to exercise that right out of a concern for bodily integrity, privacy, or dignity—or simply a desire to thwart the government's efforts to convict him—but none of those motivations limited or defined the right given to him under the Fourth Amendment.[103]

Three types of property—houses, papers and effects—are afforded Fourth Amendment protection. These types of property may be treated alike for present purposes. The right to exclude has long been considered an essential attribute of the ownership of private property.[104] This right has been most

[98] *Id.* at 646 (Marshall, J., dissenting) (quoting Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968)).

[99] 515 U.S. 646 (1995).

[100] *Vernonia*, 515 U.S. at 657.

[101] 470 U.S. 753 (1985).

[102] *Winston*, 470 U.S. at 756-63.

[103] *Id.* at 767.

[104] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (stating that the right to exclude is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property'") (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); Yee v. Escondido, 503 U.S. 519, 528 (1992) (same); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); *Kaiser*, 444 U.S. at 179-80 (stating that the right to exclude is "universally held to be a fundamental element of the property right").

consistently recognized in the context of physical invasions of the home.[105] The right to be secure in that context has always been "the right to shut the door on officials of the state unless their entry is under proper authority of law."[106] This concept was the essence and purpose of *Olmstead*'s trespass theory. *Katz* properly extended the right to exclude non-physical invasions of intangible objects. However, with its broad substitution of privacy for property, *Katz* undermined the theoretical basis for protecting the house, as such, from invasions. Yet, despite its lack of theoretical justification under *Katz*, the house has remained a core protected place, regardless of the presence of the owner. Justice Stevens–at least prior to *Kyllo*[107]–grasped the reason for this:

> The cases are legion holding that a citizen retains a protected possessory interest in his home and the effects within it which may not be infringed without a warrant even though that person is in custody. . . . Even when a person is in custody after an arrest based on probable cause, he still, of course, owns his house and his right to exclude others—including federal narcotics agents—remains inviolate.[108]

To illustrate, if one lives in a totally glass house, such that the authorities may observe all of its details from the outside, the owner does not have a reasonable expectation of privacy in the contents of the house or in the conduct of his activities in the house. Does this mean that the authorities may walk into the house any time they desire? Is there some unarticulated residual privacy interest remaining that prevents the police from entering upon a whim? If so, what is it? No one appears able to identify it. Yet, homeowners would surely be offended to learn that the police are therefore permitted to enter. If the protected interest is defined as the right to exclude, living in a glass house presents no problem; although the homeowner in such a house has given up, at least partially, the right to exclude—he has made no attempt to exclude the unaided eye—he has not given up the right to

[105] *See, e.g.*, Alderman v. United States, 394 U.S. 165, 176-78 (1969) (stressing the Court's consistent protection of the home against physical invasions).

[106] Frank v. Maryland, 359 U.S. 360, 365 (1959).

[107] *Cf.* Kyllo v. United States, 533 U.S. 27, 41-43 (2001) (Stevens, J., dissenting) (rejecting the view that Kyllo had a protected interest because all the thermal imager did was collect heat measurements from exterior surfaces of the house and that the Fourth Amendment protected only the *inside* of the house).

[108] Segura v. United States, 468 U.S. 796, 826 (1984) (Stevens, J., dissenting).

exclude a physical invasion. The reason the police cannot enter is because the owner has the right to exclude; he does not have to justify that right by reference to any other interest.[109] It is his right and he may exercise it when the police come to his door.

Similarly, as to personal effects, Justice Stevens again had it right when he commented on the government's placement of an electric monitoring device in a can of chemicals, with the consent of the seller, before delivery to the buyer. Justice Stevens believed that the buyer's rights were infringed when the delivery of the can occurred:

> The attachment of the beeper . . . constituted a "seizure." The owner of property . . . has a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for his own purposes. When the Government attaches an electronic monitoring device to that property, it infringes that exclusionary right; in a fundamental sense it has converted the property to its own use. Surely such an invasion is an "interference" with possessory rights; the right to exclude, which attached as soon as the can respondents purchased was delivered, had been infringed. That interference is also "meaningful"; the character of the property is profoundly different when infected with an electronic bug than when it is entirely germ free.[110]

B.

The right to be secure must have a normative basis; otherwise, any definition will be subject to deprecation by interpretation favoring governmental needs. Along with a normative view, there must be an interpretation of the Amendment favorable to the promotion of individual rights—the "liberal" values expressed in *Boyd*. Otherwise, a majority of the Court may use any definition of the individual's protected interest, be it grounded in property, privacy or security, in a way inimical to individual rights. A proper understanding of the Framers' use of the term "secure" meets those requirements. Defining security as having the right to exclude has historical roots and meaning; the Framers lived in a time that equated security with the ability to exclude. It provides an easily identified and applied rule

[109] *Cf.* Rawlings v. Kentucky, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring) (stating that the "`right to exclude' often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest").

[110] United States v. Karo, 468 U.S. 705, 729 (1984) (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).

designed to protect an individual's right to be safe as to his or her person, house, papers and effects. It removes unworkable references to a person's motivations in seeking protection. It properly places on the government the burden to justify its actions.

Little interpretative skill needs to be utilized when the government physically invades. Even *Olmstead's* literalist approach guarded against such invasions. Similarly, little analysis is required when seizure of a person or property occurs. In each situation, the right to be secure has been patently invaded. A problem arises, however, when the government uses non-physical investigative techniques to obtain information. Indeed, this problem perplexed the Court throughout the Twentieth Century and, as *Kyllo* illustrates, continues to do so. In such situations, the admonition of *Boyd* must be understood and applied: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property" that violates the Fourth Amendment.[111] This is a call for a normative, liberal approach to interpreting the Amendment. Analyzing this passage, Morgan Cloud has insightfully written:

> The Court's conception of the relevant rights must be [the] starting point for understanding this critical passage. First, these rights were *indefeasible*. This is the language of strong fundamental rights—rights that trump social policies . . . . Indeed, these rights are so strong that the Constitution prohibits the most minimal transgressions against them, as well as the most severe. Second, these rights are indefeasible not only because the fundamental constitutional text defines them, but also because they are natural rights that are embodied in the Bill of Rights. Finally, these rights work in harmony, defining and amplifying one another. Personal security, liberty, and private property are not discrete interests; they unite to define significant attributes of individual freedom in the democracy.[112]

Cloud has captured the main justification for the normative liberal approach of *Boyd*: the importance of giving wide scope to Fourth Amendment protections due to their

[111] Boyd v. United States, 116 U.S. 616, 630 (1885).
[112] Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 576 (1996).

fundamental constitutional character.[113] One does not have to believe in natural rights theory as a prerequisite to a normative interpretation. Instead, one can find that normative basis in interpreting the Amendment as the Framers intended—that is, in their belief that persons have the fundamental right to be secure and in seeking to determine the values the Framers believed animated that right. Cloud comes close to the nature of the right involved when he asserts that security, liberty and property rights "are not discrete interests." However, these interests do not unite to define significant attributes of freedom. Instead, they stem from a common origin: the Framers' intent to give persons the right to exclude the government from interfering with those interests. 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.

A normative liberal approach is particularly necessary in today's world, where technology threatens to make all the details of one's life detectable. Modern surveillance techniques create great danger: "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.'"[114] Permitting the use of sensory enhancing devices encourages extraordinary efforts and technological innovation to defeat the ability to exclude the government. At what point does one voluntarily expose something: when the government can discover it by using binoculars; by looking over a fence; by looking from an airplane? Rather than making arbitrary decisions to differentiate among efforts made to keep secrets or among the effects of various technological devices, the inquiry must examine the essence of what the Amendment seeks to protect: the right to be secure—that is, the ability to exclude others from prying. Yet in today's society, technological and other advances preclude the ability to shield anything absolutely. To adequately protect and give recognition to the ability to exclude, normative values must be employed. Do the precautions taken by the person objectively

[113] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 991 (1987) ("Constitutional law provides a set of peremptory norms—a checking power—that is basic to the American notion of a government of limited powers.").

[114] Amsterdam, *supra* note 2, at 388 (footnote omitted).

evidence an intent to exclude the human senses? Does the particular surveillance technique utilized by the government defeat the individual's right to exclude? Would the "spirit motivating the framers" of the Amendment "abhor these new devices no less" than the "direct and obvious methods of oppression" that inspired the Fourth Amendment?[115] The answer to each of these questions may be an empirical inquiry at times, but is always a value judgment.

KYLLO V. UNITED STATES

In *Kyllo v. United States*,[116] the Court took a potentially significant step toward embracing a normative-based right to be secure as defining the protection afforded by the Fourth Amendment. But that decision is not without problematic language and it was issued by a closely–and an unusually split–Court. *Kyllo* has language from which proponents of all three of the potential candidates for defining what the Amendment protects–property, privacy or security–can draw for support to claim that their candidate is the proper measure of protection. However, much of *Kyllo's* analysis is more akin to that employed by the Court during its property rights era than to the privacy analysis that prevailed for the last third of the Twentieth Century. Indeed, language in *Kyllo* may have planted the seeds for the ultimate demise of the reasonable expectation of privacy test as the measure of Fourth Amendment protections. Much of that same language, which I call the good *Kyllo*, also broadly supports the security model as the proper measure of what the Amendment protects. Still, some of *Kyllo*'s language–the bad *Kyllo*–may serve to ultimately undermine the good *Kyllo*, resulting in a Fourth Amendment that does not protect citizens in their persons, houses, papers and effects from technological invasions. Thus, although *Kyllo* holds the promise of providing meaningful protection to the individual and workable rules that the police can follow, only time will tell whether that promise has been fulfilled.

Whether or not *Kyllo* ultimately turns out to be a major decision, the majority opinion certainly set lofty goals for the case. Writing for a bare majority of five, Justice Scalia viewed

[115] Goldman v. United States, 316 U.S. 129, 139 (1942) (Murphy, J., dissenting).

[116] 533 U.S. 27 (2001).

the Court's task in *Kyllo* expansively. Scalia 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."[117] The Court eschewed its oft-stated judicial restraint[118] and instead asserted that it "must take the long view."[119] It therefore opined: "While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development."[120]

Narrowly, the *Kyllo* Court was presented with the question whether 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 Amendment. The Court held that it did.

Kyllo involved the following facts.[121] A federal agent suspected that marijuana was being grown in Danny Kyllo's home. Federal agents used a thermal imager to scan Kyllo's home since high-intensity lamps are usually used to grow marijuana indoors. Thermal imagers detect infrared radiation—radiation that is emitted by most objects, but is not visible to the naked eye. Radiation is converted into images based on relative warmth so that "black is cool, white is hot, shades of gray connote relative differences."[122] Thus, a thermal imager reveals the relative heat of various rooms in the home, which the Court viewed as "information regarding

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[117] *Kyllo*, 533 U.S. at 39.

[118] *See, e.g.,* Silverman v. United States, 365 U.S. 505, 508-09 (1961) (rejecting the petitioner's urging that the Court consider recent and projected developments in the science of electronics and stating "[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.").

[119] *Kyllo*, 533 U.S. at 40.

[120] *Id.* at 36. The Court noted:

> The ability to "see" through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development. The National Law Enforcement and Corrections Technology Center, a program within the United States Department of Justice, features on its Internet Website projects that include a "Radar-Based Through-the- Wall Surveillance System," "Handheld Ultrasound Through the Wall Surveillance," and a "Radar Flashlight" that "will enable law enforcement officers to detect individuals through interior building walls." Some devices may emit low levels of radiation that travel "through-the-wall," but others, such as more sophisticated thermal imaging devices, are entirely passive, or "off- the-wall" as the dissent puts it.

Id. at 36, n.3 (citation omitted).

[121] *Id.* at 29.

[122] *Id.* ta 29-30.

the interior of the home."[123] Kyllo's home was scanned from streets in front and back of the home. The scan indicated that the garage roof and a wall were warmer than the rest of the home and neighboring homes. 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. In the subsequent search of Kyllo's home, federal agents found an indoor growing operation involving more than 100 marijuana plants.[124]

The *Kyllo* majority opinion was authored by Justice Scalia, and his disdain for the reasonable expectation of privacy test and his affinity for anchoring Fourth Amendment analysis on the common law as it existed in 1791 is clearly evident. The Court, in referring to the reasonable expectation of privacy test, used language that puts into question that test's viability. Indeed, in reaching the result in *Kyllo*, the Court did so without reliance on that test. The Court characterized *Katz* as involving "eavesdropping by means of an electronic listening device placed on the outside of a telephone booth–a location not within the catalog (`persons, houses, papers, and effects') that the Fourth Amendment protects against unreasonable searches."[125] The Court observed that the "*Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable."[126] Why would the Court, speaking through Justice Scalia, make these observations, which place in doubt the entire structure of reasonable expectation of privacy analysis that has prevailed since *Katz*, if that test were viewed as a viable and effective measure of Fourth Amendment rights?[127]

The Court also acknowledged one fundamental Fourth

[123] *Id.* at 35, n.2.

[124] *Id.*

[125] *Id.* at 32. In my view, the Court is wrong on this point. Katz was protected because he was within the catalog: he was a "person" and that object on the list includes both physical (the body) and non-touchable (the voice) interests. The government may pry, that is, search, by use of any of the senses. When a person takes steps to exclude the government from prying into any of those interests, such as closing a door of a telephone booth to engage in a conversation, he has a protected interest.

[126] *Id.* at 34.

[127] *Cf.* Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (criticizing the use of the reasonable expectation of privacy test to determine when a "search" has occurred as having no "plausible foundation in the text of the Fourth Amendment" and rejecting view that the Amendment guaranteed "some generalized `right of privacy,'" insisting instead that the text of the Amendment enumerates the objects to which privacy protection extends).

Amendment principle–mere visual observation of the home is not a search[128]–but harkened back to property law analysis to justify that conclusion:

> The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass. Visual surveillance was unquestionably lawful because "`the eye cannot by the laws of England be guilty of a trespass.'" We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property, but the lawfulness of warrantless visual surveillance of a home has still been preserved.[129]

Kyllo also acknowledged that "the degree of privacy secured to citizens by the Fourth Amendment" has been affected 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."[130] The Court noted that *Kyllo* involved "more than naked-eye surveillance of a home" and asserted 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."[131]

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[128] *Kyllo*, 533 U.S. at 32. This was the main point of the dissent, which viewed the case as involving nothing more than plain view observations of the house:

> Whether that property is residential or commercial, the basic principle is the same: "'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" That is the principle implicated here . . . . All that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others. . . . 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.
>
> Just as "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. In my judgment, monitoring such emissions with "sense-enhancing technology," and drawing useful conclusions from such monitoring, is an entirely reasonable public service.

Id. at 42-45 (Stevens, J., dissenting) (citations omitted).

[129] *Id.* at 31-32 (citations omitted).

[130] *Id.* at 33-34.

[131] *Id.* at 33. The *Kyllo* majority distinguished the "enhanced aerial photography of an industrial complex" upheld in *Dow Chemical* on the ground

Rather than rely on *Katz*, the Court 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.'"[132]

> While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists,* and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. 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 (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.[133]

The Court added that it must take the long view, from the original meaning of the Fourth Amendment forward and construe the Amendment in light of what was deemed an unreasonable search and seizure when it was adopted.[134] It accordingly held, "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a `search.'"[135]

The Court's language is remarkable for its reliance on themes developed by the Court when property analysis was the applicable test: the common law; constitutionally protected areas; analogy to physical intrusions; and reliance

that it did not involve "an area immediately adjacent to a private home, where privacy expectations are most heightened." *Id.* at 33.

[132] *Id.* at 31 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961). The Court contrasted the home to "an industrial complex, which does not share the Fourth Amendment sanctity of the home." *Id.* at 37.

[133] *Id.* at 34-35 (citations omitted).

[134] *Id.* at 40.

[135] *Id.* at 40.

on what was protected at the time of the framing. This 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.

The Court also used language supporting a security model for Fourth Amendment rights, grounded in language consistent with the meaning of the word "secure" that has prevailed since the time the Fourth Amendment was framed: the home is protected, the majority asserted, "because the entire area is *held safe* from prying government eyes."[136] Indeed, the scope of protection afforded by the *Kyllo* Court to the home is remarkable for its breadth and 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 . . . .[137]

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[136] *Id.* at 37 (emphasis added).

[137] *Id.* at 37 (citation omitted). The Court rejected any attempt to distinguish between types of information learned about the details of the home:

> 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-wall surveillance picks up "intimate" details—and thus would be unable to know in advance whether it is constitutional.

Id. at 38-39 (citation omitted).

Thus, in *Kyllo*, "how warm—or even how relatively warm—Kyllo was heating his residence"[138] was information about the interior of the home and was therefore protected.

As to 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 home.[139]

This rule is completely consistent with the security model of Fourth Amendment rights: the individual has the right to exclude the government from unreasonably searching or seizing any of objects identified by the Amendment as protected. After *Kyllo*, the individual does not have to give a reason for excluding the government beyond asserting that it is her house. The Court, in so analyzing the importance of protecting the home, thus establishes a broad protection against unjustified technological intrusions into that protected area. 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.[140] The logic of that analysis surely must apply to all technological devices that detect information about the interior of the home.

Kyllo correctly 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.[141] Instead, it draws the line by analogy to a

[138] *Id.* at 38.
[139] *Id.* at 35-36.
[140] *Id.* at 36.
[141] *Id.* at 37-38.

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 . . . ."[142] The "focus," according to the Court, is "not upon intimacy but upon otherwise-imperceptibility."[143] Thus, 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.[144] Similarly, a device that measures the interior heat of the home is a search if it could only be otherwise detected by a person actually present in the house.[145] This analytical structure will require lower courts to make factual findings on what could or could not be ascertained by the senses absent the use of technology. If the information could not otherwise be obtained without physical intrusion, it is a search.

All, however, is not well with the Court's analysis. The bad *Kyllo* left open a potentially fatal flaw in the protection of the home against the advance of technology by limiting its holding to technology not in general public use.[146] The Court saw this limitation as stemming from its prior precedent in *Ciraolo*, which had established that the police overflight of the curtilage of the house–an area considered part of the house for the purpose of the Fourth Amendment–to observe a marijuana patch growing there was not a search within the meaning of the Fourth Amendment.[147] The *Ciraolo* Court, premising its decision on the reasonable expectation of privacy test, stated "[i]n 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."[148] The *Kyllo* majority declined to reexamine that factor because it was "quite confident[]" that thermal imaging was not routine.[149]

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[142] *Id.* at 34.
[143] *Id.* at 38, n.5.
[144] *Id.* at 39.
[145] *Id.*
[146] *Id.* at 39-40, n.6.
[147] *Id.*
[148] California v. Ciraolo, 476 U.S. 207, 215 (1986). *See also* Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986) (observing that the question whether the use of "highly sophisticated surveillance equipment not generally available to the public, such as satellite technology"could be proscribed absent a warrant was not before the Court).
[149] *Kyllo*, 533 U.S. at 39-40, n.6.

The *Kyllo* majority set forth no criteria to determine when a device is in general public use.[150] More important than the uncertainty in ascertaining when something is in general public use, however, is the danger that such a limitation on the scope of the home's protection becomes embedded in Fourth Amendment analysis.[151] If it does, the good *Kyllo's* promise of protection for the home is illusory. Given the pace of technological change, what is an exotic technology one day becomes routine the next. If general public use serves to limit the scope of the home's protection, it also serves to defeat that protection.[152]

Will the good *Kyllo* or the bad *Kyllo* prevail? Certainly, the strength of the Court's language regarding the *per se* nature of the protection of information concerning the interior of the home bodes well for the good prevailing. The language "*all* details are intimate details" establishes an uncompromising rule. Thus, any technology that detects any detail of the interior of the home that would be otherwise imperceptible is a search and the police will know in advance that it is a search. The Court's view that it must take the long view and seek to prevent the infringement upon privacy that technology can create is also encouraging as a sign that the good *Kyllo* will endure.

However, the *Kyllo* majority was narrow and the highly unusual lineup of the Justices in the majority and the dissent leaves significant doubt that the good *Kyllo* will remain viable. Adding to the uncertainty is the majority's refusal–even though it was professing to take the long

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[150] Justice Stevens, dissenting, criticized the majority's view on that ground:

> [T]he contours of [the majority's] new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is "in general public use." Yet how much use is general public use is not even hinted at by the Court's opinion . . . . this criterion 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.

Id. at 47 (Stevens, J., dissenting) (citation omitted).

[151] *See* Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through* Kyllo's *Rules Governing Technological Surveillance*, 86 MINN. L. REV. (forthcoming 2002) (demonstrating that the "general public use and the naked eye doctrines are virtually impossible to apply in a meaningful manner").

[152] *See* 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 intrusive devices . . . are readily `available' to the public").

view–to address the gaping hole in its protection for the home, that is, the use of technology that is in general public use. Unless the Court ultimately rejects that limitation on the scope of the Fourth Amendment's protection, the general public use principle will eviscerate the good *Kyllo*.

The logic of *Kyllo's* analysis, it seems clear to me, should be extended to all of the objects protected by the Amendment–houses, people, papers, and effects. A search, following *Kyllo*, is when the police have learned something about the object that would otherwise have been imperceptible absent the use of the technological device. This would signal a return to a more literal and common-sense definition of a search.[153] Any such intrusion must be justified as reasonable.[154]

Applying *Kyllo's* "otherwise-imperceptibility" test would seem to invalidate the use of existing technological devices, such as airplane overflights and the use of binoculars and flashlights,[155] if they disclose that which would otherwise be imperceptible. After all, the whole point of using such items is to observe what otherwise could not be seen. The bad *Kyllo* has a ready answer: these devices are in general public use and, therefore, do not constitute searches. However, even if the good *Kyllo* prevails, some compromise based on existing

[153] *Cf.* Arizona v. Hicks, 480 U.S. 321, 325 (1987) (moving stereo system a few inches to observe serial numbers is a search: "A search is a search, even if it happens to disclose nothing but the bottom of a turntable.").

[154] *See Kyllo*, 533 U.S. 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."). Thus, cases such as *United States v. Place*, 462 U.S. 696, 707 (1983) must be reconsidered. *Place,* which established that a trained dog's sniffing of luggage to detain the presence of controlled drugs inside, was wrongly decided and *Kyllo* demonstrates why: an effect (as is a home) is on the list of protected items and any intrusion to ascertain the contents of a closed container (as with the details of the interior of the home), whether by the instrumentality of a highly trained dog's nose or by technological devices, is a search if it detects that which would otherwise not be perceptible. As a search, it must be justified as reasonable. It does not matter that the only information that can be learned by use of the instrumentality is that the person is engaged in criminal activity. *But see Kyllo*, 533 U.S. at 47-48 (Stevens, J, dissenting) (arguing that because "a dog sniff that `discloses only the presence or absence of narcotics does not constitute a "search" within the meaning of the Fourth Amendment,' . . . it must follow that sense-enhancing equipment that identifies nothing but illegal activity is not a search either"). The result of this analysis would similarly establish, for example, that 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 are also searches. *See* 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 (1997).

[155] *See* Texas v. Brown, 460 U.S. 730, 740 (1983) (quoting *U.S. v. Lee*, 274 U.S. 559, 563 (1927), "The use of a searchlight is comparable to the use of a marine glass or field glass. It is not prohibited by the Constitution.").

technology seems likely, despite its inconsistency with some of *Kyllo's* broader assertions. The analytical structure of that accommodation may be no more satisfactory than the acknowledgment that such devices have been previously sanctioned. As to airplane overflights, so long as they merely provide an observation platform to look down into the curtilage or into the exterior portions of an industrial complex, those observations, arguably, are attendant circumstances of modern life and fit with only relative discomfort into the visual surveillance doctrine. Indeed, *Kyllo* itself listed observation from airplanes as acceptable. Similarly, binoculars used merely to magnify sight or flashlights to illuminate dark spaces are, in general, consistent with that view. Under the circumstances, the individual who exposes something to observation from the air or fails to draw his blinds to exclude sight has relinquished his security guarantee by not excluding the prying eye.[156]

If such devices are permitted, the obvious question arises as to how sophisticated they can be–and how intrusive in their ability to obtain information–before the Court concludes that their use becomes a search. Once the bright-line rule of the good *Kyllo* is found inapplicable, the "general public use" criterion clearly affords no protection, leaving the Court with the options of either freezing the development of such devices in some *ad hoc* manner[157] or permitting unlimited use of very intrusive devices as they become readily available. Neither of these results is satisfactory.

There may be another option. The *Kyllo* majority intimated that the correct analysis of such observations is to conclude that they are searches but that they are not unreasonable to the extent that the "portion of a house that is in plain public view"[158] is observed. This is to say that the use of technology to enhance sight or the other senses should implicate the protections of the Amendment. This analysis properly places the emphasis on the question where it should

[156] *See, e.g.*, People v. Ferguson, 365 N.E.2d 77 (Ill. App. 1977) (use of binoculars to look through window not a search when window curtains open).

[157] *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.2(c) (3d Ed. 1996) (analyzing the use of binoculars, telescopes, and photo enlargement equipment and observing, *id.* at 425, "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.").

[158] *Kyllo*, 533 U.S. at 32. My view is stated at Clancy, *supra* note 3, at 340-41.

be: whether the search is reasonable. Under such circumstances, there would be the recognition that those devices that detect that which is otherwise imperceptible are searches, forcing the Court to confront the reasonableness of such searches. That shift would put pressure on the Court to revamp its inconsistent jurisprudence relating to the concept of "reasonableness," including when a warrant is required and what criteria, if any, there should be to measure the reasonableness of a search.

CONCLUSION

There are "few issues more important to a society than the amount of power it permits its police to use without effective control."[159] Only by understanding what is protected by the Fourth Amendment can one know what the government may do without implicating it. Shortly after the *Katz* decision, one commentator wrote that the Fourth Amendment's

> operative function is exclusionary: it works negatively to keep out the unwelcome agencies of government. It follows logically, however, that where something is to be kept out, that from which it is barred deserves recognition in a positive sense. It is for this reason that the fourth amendment should be looked upon as safeguarding an affirmative right of privacy.[160]

Within this syllogism is the flaw that has plagued courts and commentators. The Fourth Amendment does act negatively, to exclude. But that is also the essence of the right to be secure. To look beyond the right to exclude and seek positive attributes to the right to be secure, whether those attributes be called privacy or something else, serves to limit—and ultimately defeat—that right. Indeed, those attributes are mere motivations for exercising the right; they do not define it. The exclusionary function of the Amendment is so bound up with the right to be secure as to be equivalent to it: There is no security if one cannot exclude the government from

[159] Amsterdam, *supra* note 2, at 377; *cf.* Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) ("Uncontrolled 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 afforded by the Fourth Amendment against search and seizure by the police . . . is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society").

[160] Note, *From Private Places to Personal Privacy: A Post-*Katz *Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 968 (1968) (footnote omitted).

intruding.

Therefore, the ability and the right to exclude agents of the government is the essence of the security afforded by the Fourth Amendment. The commands of the Amendment are, after all, "practical and not abstract."[161] As to a person's house, it is "the right to shut the door on officials of the state unless their entry is under proper authority of law."[162] This was the core understanding expressed in the physical trespass theory of *Olmstead* and is also strongly evident in *Kyllo*. Of course, *Olmstead* read the right too literally. 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*; *Kyllo* appears to accept that lesson. *Katz*'s 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.[163] 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. *Kyllo* recognized this when it asserted that the entire home "is held safe from prying government eyes."

If one extends the good *Kyllo*'s vision to all of the objects protected by the Amendment, with the understanding that those objects include both tangible and intangible qualities that can be the subject of either physical or non-physical invasions, the proper scope of its protections is understood. The proper question is whether the papers or personal property are mine, whether the house is mine, whether the body is mine? If the answer is yes, then one has the right to exclude the government from searching or seizing. *Kyllo* does not answer this question but the logic of its analysis–at least for the good *Kyllo*–indicates that the answer should be yes.

The right to exclude, of course, is not absolute; the government can overcome the assertion of that right if it establishes that its actions are reasonable. But the burden is on the government to justify its actions. This returns the

[161] United States v. Ventresca, 380 U.S. 102, 108 (1965).

[162] Frank v. Maryland, 359 U.S. 360, 365 (1959).

[163] *Cf.* Amsterdam, *supra* note 2, at 385 ("Mr. Katz's conversation in a pay telephone booth was protected because he `justifiably relied' upon its being protected—relied, not in the sense of an expectation, but in the sense of a claim of right.") (footnote omitted).

structure of Fourth Amendment analysis to comport with the intent of the Framers: The people have the right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. By affording citizens the ability to exclude, their security is assured. That right to be secure is clear and pristine—it is the right to exclude the government.