

THE INVIOULATE HOME: HOUSING EXCEPTIONALISM IN THE FOURTH AMENDMENT

Stephanie M. Stern†

The ideal of the inviolate home dominates the Fourth Amendment. The case law accords stricter protection to residential search and seizure than to many other privacy incursions. The focus on protection of the physical home has decreased doctrinal efficiency and coherence and derailed Fourth Amendment residential privacy from the core principle of intimate association. This Article challenges Fourth Amendment housing exceptionalism. Specifically, I critique two hallmarks of housing exceptionalism: first, the extension of protection to residential spaces unlikely to shelter intimate association or implicate other key privacy interests; and second, the prohibition of searches that impinge on core living spaces but do not harm interpersonal and domestic privacy. Contrary to claims in the case law and commentary, there is little evidence to support the broad territorial conception of privacy inherent to the “sanctity of the home,” a vital personhood interest in the physical home, or even uniformly robust subjective privacy expectations in varying residential contexts. Similarly, closer examination of the political and historical rationales for housing exceptionalism reveals a nuanced, and equivocal, view of common justifications for privileging the home. This Article advocates replacing the broad sweep of housing exceptionalism, and its emphasis on the physical home, with a narrower set of residential privacy interests that are more attentive to substantive privacy and intimate association.

INTRODUCTION	906
I. THE ICONIC HOME IN THE FOURTH AMENDMENT	912
A. Fourth Amendment Search: A Home-Centric Jurisprudence	913
B. The Cult of the Home: The Fourth Amendment in Cultural Perspective	918
C. Allocative Costs: Protecting the Home as a Justification for Less Privacy Protection Elsewhere . .	920
II. PSYCHOLOGICAL JUSTIFICATIONS FOR HOUSING EXCEPTIONALISM: REEXAMINING PRIVACY, PERSONHOOD, AND EXPECTATIONS	923

† Associate Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. I would like to thank Andrew Taslitz, Chris Slobogin, Tracey Maclin, Orin Kerr, Thomas Crocker, Janice Nadler, Alan Raphael, Hal Krent, and the faculty at the University of Georgia School of Law faculty workshop for their helpful comments. I would also like to thank Tom Gaylord for his research assistance.

A.	The Myth of Privacy as a Territorial Imperative	924
B.	Theory Versus Evidence: The Personhood Interest in Residential Privacy	926
C.	An Evidence-Based Analysis of Subjective Expectations of Privacy	930
III.	POLITICAL AND HISTORICAL RATIONALES FOR PRIVILEGING THE HOME	933
A.	Political Rationales: The Dangers of Government Overreaching	933
B.	Originalism Revisited	935
IV.	DETHRONING THE PHYSICAL HOME IN THE FOURTH AMENDMENT	938
A.	From Iconic Property to Substantive Privacy	938
B.	Revisiting the Residential Protection Default	942
1.	<i>Tethering Interior Search Protection to Substantive Privacy: Kyllo and Technological Scanning of the Home</i>	943
2.	<i>Correcting Overbreadth: The Example of Curtilage</i> . . .	945
3.	<i>The Home as a Proxy: Interior Physical Searches</i>	950
V.	REVISING THE THEORY OF THE INVIOULATE HOME: OBJECTIONS AND CONSIDERATIONS	953
A.	Security and Other Privacy Interests	953
B.	Repeat Searches and Ubiquitous Monitoring	954
C.	Social Norms of Privacy	955
	CONCLUSION	955

INTRODUCTION

The notions of the inviolate home and the paramount importance of constraining government search of the home are cherished tenets of constitutional law and scholarship.¹ The constitutional solicitude and judicial rhetoric surrounding the home reflects the belief that residential privacy rights are both psychologically and politically vital.² Assumptions about the psychological and political primacy of residential protection have pervaded Fourth Amendment case law and

¹ See *United States v. Karo*, 468 U.S. 705, 714–15 (1984); *Payton v. New York*, 445 U.S. 573, 589–90 (1980); Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 957 (1997) (“The most sacred of all areas protected by the Fourth Amendment is the home.”); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1215 (2004) (noting that American privacy law conceives of the home “as the primary defense”).

² See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 997–1000 (1982) (advocating strong protection of the home from criminal searches because of residents’ strong personhood interests); see also Arianna Kennedy Kelly, *The Costs of the Fourth Amendment: Home Searches and Takings Law*, 28 MISS. C. L. REV. 1, 3 (2009) (suggesting compensation for harms to personhood inherent in residential searches).

dominated criminal procedure commentary without examination or challenge.³ This Article seeks to fill that void.

Absent specified exceptions, criminal investigation of the home constitutes a Fourth Amendment search or seizure. Without a warrant, such a search is presumptively unreasonable.⁴ In an era of narrowing privacy protection,⁵ privacy in residential search and seizure receives comparatively stronger protection than many other contexts, including commercial buildings, certain automobile searches, computer databases, and public places. Indeed, at times the protection of privacy rights in the home has been so expansive as to appear absurd, with lawyers vigorously contesting whether suspects' dog houses receive Fourth Amendment protection.⁶

Historically, the strong protection accorded to the home derives in part from a property-based approach to identifying protected Fourth Amendment interests. In *Katz v. United States*, the Supreme Court declared that the Fourth Amendment "protects people, not places" and explicitly abandoned the property-based approach in favor of a standard that looks to reasonable expectations of privacy.⁷ As commentators have observed, however, the move from property to privacy has been incomplete, and traditional property concepts feature in some post-*Katz* cases.⁸ I contend that the move from property to privacy has been particularly (and perhaps paradigmatically) flawed

³ The sanctity of the home in criminal law parallels the enhanced protection accorded to the home in property, tax, and bankruptcy law. See Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1099–1108 (2009).

⁴ Activities or possessions within the home are subject to unregulated search and seizure only when occupants expose them to the public eye or ear, in certain exigent circumstances, or when the evidence is in plain view of a lawful intrusion. See *Horton v. California*, 496 U.S. 128, 136–37 (1990).

⁵ See STEPHEN R. SADY, OFFICE OF THE FED. PUB. DEFENDER, DIST. OF OR., DEVELOPMENTS IN FEDERAL SEARCH AND SEIZURE LAW 1–2 (2006), [http://or.fed.org/Search and Seizure Sept 2006.pdf](http://or.fed.org/Search%20and%20Seizure%2006.pdf).

⁶ See *Trimble v. State*, 816 N.E.2d 83, 94 (Ind. Ct. App. 2004) (holding that defendant had a reasonable expectation of privacy in the area encompassing the doghouse); *Bess v. State*, 636 S.W.2d 9, 10 (Tex. App. 1982) (holding that warrant authorizing the search of a residence encompassed the dog house and other outbuildings). In a similar vein, courts have scrutinized whether privacy protections extend to discarded garbage. See *California v. Greenwood*, 486 U.S. 35, 37, 40–41 (1988) (holding that search of garbage left on or at the curb did not intrude upon reasonable expectations of privacy because the garbage was outside the protective curtilage of the home and readily accessible to the public); see also *Crocker v. State*, 477 P.2d 122, 125 (Wyo. 1970) (holding that police officers did not violate the Fourth Amendment's prohibition on warrantless searches when they instructed garbage collectors to give garbage to authorities for inspection after the collectors removed it from the backyard).

⁷ 389 U.S. 347, 351 (1967).

⁸ Many scholars have discussed the property orientation of Fourth Amendment law with Orin Kerr's account being one of the more recent. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–27 (2004) (discussing the persistence of property concepts in Fourth Amendment doctrine).

in the area of residential search rights. *Katz* may have signaled a retreat from reliance on property law in Fourth Amendment doctrine for nonresidential property, but not for the home. This property-oriented, and specifically home-focused, approach has produced residential protection that is at times too strong and too blunt.⁹ This does not mean that residential protection is absolute; rather it is comparatively stronger than many other search contexts and unduly focused on the physical home. Housing exceptionalism has muddled Fourth Amendment jurisprudence with respect to residential property and more broadly as residential and nonresidential spaces have competed for Fourth Amendment protection.

This Article challenges two hallmarks of housing exceptionalism. First, privileging the physical home has adulterated Fourth Amendment doctrine by extending the home's expansive "umbrella" of Fourth Amendment protection beyond the relational and domestic core of residential spaces.¹⁰ This approach has contributed to the inefficient allocation of privacy protection relative to both individual harm and the societal interest in crime control. Moreover, as the rhetoric of home protection strained criminal justice enforcement, other Fourth Amendment doctrines, such as publicity and the plain-view seizure doctrine, moved to the jurisprudential fore and further contorted privacy allocation.¹¹ Second, within core domestic and relational spaces, many cases have afforded expansive, formalistic protection to the physical home rather than on the basis of substantive privacy interests and intimate association. By substantive privacy, I refer to subjective intrusiveness and objective privacy harm from police action, not constitutional substantive due process.¹²

⁹ In *United States v. Kyllo*, 553 U.S. 27 (2001), the majority described the shift in search and seizure doctrine from the common law of trespass of property to the reasonable expectations of privacy test, but the majority also noted that in the case of the home "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." *Id.* at 34 (emphasis added and omitted); see also William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633, 637 (1994) (noting that "the Fourth Amendment offers independent protection for property interests, apart from privacy interests").

¹⁰ See *United States v. Dunn*, 480 U.S. 294, 301 (1987) (describing the home's "umbrella" of Fourth Amendment protection).

¹¹ Christopher Slobogin describes how this dynamic interacts with the probable cause standard in general. He observes that the probable cause standard "exerts enormous pressure on the courts to reduce the scope of the Fourth Amendment by narrowly defining 'search' and 'seizure.'" CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK* 29 (2007).

¹² See, e.g., *Kyllo*, 553 U.S. at 37 (holding that "[i]n the home, . . . all details are intimate details"); *Dunn*, 480 U.S. at 300, 303 (broadly defining intimate activities to include "domestic life" and holding that an area is protected curtilage if it "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life" (internal quotation marks omitted)).

Disturbingly, the (over)protection of the home has justified decisions extending less protection in other contexts.¹³ One reason offered by courts for extending less protection to privacy in nonresidential contexts is their dissimilarity to residential privacy interests. In this way, residential search doctrine has indirectly facilitated precedents that limit protection in the more prevalent search contexts of vehicular search, stop and frisk, and public surveillance.¹⁴ This dynamic belies the popular intuition that protection for the home secures and fosters privacy protection as a general matter.

Despite these costs, housing exceptionalism has thrived on the assumption that Fourth Amendment protection of the physical home effectively safeguards critical personal and political interests.¹⁵ Psychological and historical evidence reveal a more complex and equivocal picture. With respect to the psychological claims, there is little objective evidence that privacy is primarily a spatial or territorial concept or that individuals require the utmost protection from residential privacy incursions. The empirical evidence also does not support strict protection of the *physical* home based on a personhood interest or the assumption that the home's inviolacy is vital to identity and psychological flourishing. Even subjective expectations of privacy suggest a relative view of home privacy and call into question the privileging of all things residential. Citizens ascribe much greater intrusiveness to searches of bedrooms, for example, than searches of home garages, curbside residential garbage, or surveillance of backyards.¹⁶

The political and historical necessity of housing exceptionalism also falters upon closer examination. The claim that homes are uniquely vulnerable to police harassment and overreaching because they contain so much potential evidence is unconvincing—overreaching is a more troubling issue in computer and database searches than in residential ones.¹⁷ Moreover, the way to protect against police over-

¹³ See, e.g., *Dow Chem. Co. v. United States*, 476 U.S. 227, 237 n.4 (1986) (“We find it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened.”); *California v. Carney*, 471 U.S. 386, 390–92 (1985) (holding that the expectations of privacy are with regard to homes rather than automobiles).

¹⁴ See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1062 & n.169 (1995).

¹⁵ See *infra* Part II.

¹⁶ See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727, 738 tbl.1 (1993); see also Jeremy A. Blumenthal et al., *The Multiple Dimensions of Privacy: Testing Lay “Expectations of Privacy,”* 11 U. PA. J. CONST. L. 331, 355 tbl.1 (2009).

¹⁷ See, e.g., *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 998 (9th Cir. 2009) (en banc) (stating that magistrate judges should insist that the government waive reliance on the plain view doctrine when granting warrants to search computer hard

reaching in residential search is not through housing exceptionalism but by undoing or limiting the plain-view seizure doctrine. Contrary to constitutional intuition, residential search protection does not provide citizens an effective haven from the reach of government. Because enhanced protection of residential privacy rights has justified less protection, jurisprudentially and politically, in more prevalent contexts of search and seizure, housing exceptionalism has tended to increase government's reach. Within residential search, the doctrinal emphasis on the physical home (and privacy versus publicity) has diverted judicial attention from substantive privacy harm and left gaps in residential search protection. Even the rationale of original intent, a constant in the Supreme Court's holdings, is subject to challenge. The historical record reveals a more complex view of the intentions of the Framers than the Court depicts. In addition, as Tracey Maclin and other scholars observe, the concerns of those who lived in 1791 should not determine the meaning of the Fourth Amendment for our modern criminal justice system.¹⁸

The iconic status of the home in American culture offers a lens through which to view the persistent privileging of the home in Fourth Amendment doctrine. The cultural ascendancy of the American home dates back at least to the Romantic philosophy of the home as a refuge from urban corruption. The New Deal subsequently marketed this vision of the home as a civic virtue and the centerpiece of Depression-era reform. The long-standing cultural dominance of the home—not a territorial zone of privacy interests, the home's special personhood nature, or the home as a haven against government—is a factor in housing exceptionalism's persistence. This cultural well-spring has produced laws privileging the home in multiple areas of law, including the Fourth Amendment.

This Article seeks to disentangle the concepts of residential property and privacy and to identify the substantive interests at stake in different contexts of residential search. A substantive privacy inquiry addresses the degree of intrusiveness and objective harm of the privacy invasion rather than property rights or residential boundaries. In particular, I focus on the substantive interest in intimate association

drives or electronic storage); *see also* Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 319 (2008) (discussing various data-mining activities by federal agencies).

¹⁸ *See* Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 971 (2002); *see also* WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791*, at 772 (2009) (suggesting that the Framers could not “anticipat[e] the constitutional issues of later centuries”); LARRY YACKLE, *REGULATORY RIGHTS: SUPREME COURT ACTIVISM, THE PUBLIC INTEREST, AND THE MAKING OF CONSTITUTIONAL LAW 5* (2007) (arguing for instrumentalism in interpreting the Constitution as opposed to the “pretense that the 1789 document and its amendments actually supply answers to difficult questions”).

and argue that it is a dominant—but not exclusive—interest in residential search. In my view, this interest derives from the Fourth Amendment and specifically from the holding in *Katz* that the Fourth Amendment safeguards expectations of privacy in order to protect “people, not places.”¹⁹

This approach to residential search seeks to unseat the icon of the physical home and replace it with a jurisprudence that is more responsive to the concerns of substantive privacy that animate residential settings. Some residential search contexts that presently receive protection are not likely to implicate substantial privacy harm. For example, searches of certain areas adjacent to the home that are not used for domestic life and do not impair the underlying interest in intimate association are likely to have a minimal impact on substantive privacy. Similarly, technological scans that reveal only physical information such as heat and light merit less stringent protection than technology that risks chilling interaction and authenticity by exposing inhabitants’ interpersonal activities and private actions. This analysis simplifies the seemingly controversial issue of government thermal scanning of homes addressed in the landmark case of *Kyllo v. United States* and suggests a lower standard of protection.²⁰

Before proceeding, I offer a few clarifications. First, my arguments focus on the constitutional understanding of privacy—the focus of Fourth Amendment jurisprudence for the past half century. I do not consider at length alternative grounds for protection, such as the rather vaguely conceptualized security interest in the Fourth Amendment²¹ or the risks of property destruction and violence attendant to residential search. To the extent that psychological and political rationales are the operative justifications for privileging the physical home, I advocate reorienting the doctrinal focus from housing exceptionalism to substantive privacy and privacy of intimate association. Second, my discussion primarily contemplates discrete instances of residential search,²² although I do consider institutional checks and legal safeguards for repeat searches. Last, my focus is on housing exceptionalism and the relative protection of privacy rights in

¹⁹ *Katz v. United States*, 389 U.S. 347, 351 (1967) (emphasis added).

²⁰ 533 U.S. 27, 40 (2001).

²¹ See, e.g., Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104–05 (2008) (arguing that the Fourth Amendment should protect security, not privacy, because the right to privacy does not address two central concerns of the Fourth Amendment: protection from government invasion and protection of liberty).

²² In the contexts of stop-and-frisk searches and vehicular stops, individual citizens who are subjected to a large number of intrusive searches are at a greater risk of psychological harm due to the ongoing loss of control and the inference that these practices signal a lack of societal respect toward them. See Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 23–24 (2003) (exploring the notion of disrespect as the cause of anger in minority communities over search and seizure practices).

residential spaces. Scholars debate whether Fourth Amendment protection should depend on the *Katz* test and the probable cause requirement for search or a sliding scale based on the strength of the government justification relative to the intrusiveness of the search.²³ In light of these issues, I do not specify comprehensive, detailed standards for residential search. Instead, I argue more generally that a residential investigation that does not harm interpersonal interests or other key privacy interests may not constitute a Fourth Amendment search, or if it is a Fourth Amendment search, may not necessitate the high standard of probable cause.

Part I of this Article explores the enshrinement of the physical home in Fourth Amendment jurisprudence, often at the expense of substantive privacy and doctrinal efficiency. Part II assesses the psychological evidence bearing on major rationales for privileging the physical home: the understanding of privacy as spatial exclusion, the personhood interest in the home, and subjective expectations of privacy. Moving to political and constitutional justifications, Part III analyzes the claim that residential searches are uniquely vulnerable to government overreaching and critiques the Supreme Court's interpretation of original intent. Part IV advocates replacing housing exceptionalism with a stronger, more consistent doctrinal focus on substantive privacy and privacy of intimate association. I describe, through illustrative examples, how a substantive-privacy approach can address some of the pitfalls of housing exceptionalism. Part V addresses objections to my account and considerations for revising the Fourth Amendment doctrine of residential privacy.

I

THE ICONIC HOME IN THE FOURTH AMENDMENT

Homes have achieved iconic status in the modern Fourth Amendment, with judicial rhetoric elevating residential search to the apex of protection. Doctrinally, homes receive greater protection than many contexts of search and seizure; only a few contexts, such as telephone booths and bodily invasion, receive greater protection.²⁴ Courts and

²³ See SLOBOGIN, *supra* note 11, at 21–45. Scholars also disagree about the amount of practical protection that warrants provide. See Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 589–93 (2008) (arguing that institutional competence, lack of resources, inadequate records of the probable cause finding, and lack of appellate review of probable cause findings undermine the protection that warrants provide); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1024–25 (1974) (observing that judges in warrant proceedings rely too heavily on counsel to raise issues and lack adequate administrative staff and resources).

²⁴ See *Winston v. Lee*, 470 U.S. 753, 766–67 (1985) (intrusion into the body); *Katz v. United States*, 389 U.S. 347, 350–53 (1967) (telephone booth); see also Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2522 (2006).

commentators justify stringent and expansive protection of the physical home based on the psychological primacy of privacy in the home and the home's political and historical role as a haven from the reach of government.²⁵ From the perspective of a cultural historian or property scholar, however, this persistent reverence is part of a broader cultural ascendance of the home across the last century—an ascendance that governmental actors and private business interests largely engineered. The perseverance of this “cult of the home” in criminal search doctrine and rhetoric has inflicted significant damage on Fourth Amendment jurisprudence. It has created an inefficient and anomalous pattern of protection within residential spaces and between residential spaces and other search contexts. It has also justified, both politically and jurisprudentially, reducing protection in other search contexts.

A. Fourth Amendment Search: A Home-Centric Jurisprudence

The Supreme Court has defended the home as a sacred site at the “core of the Fourth Amendment.”²⁶ Police may not physically intrude on a home, seize property within the home, or arrest a suspect in her home without a warrant.²⁷ The warrant must issue based on a showing of probable cause and satisfy other procedural requirements or risk exclusion of the evidence at trial.²⁸ In a jurisprudence focused on privacy versus publicity, the home is the quintessential private space.²⁹ Indeed, the Court's rhetoric (if not invariably its decisions) characterizes the “physical entry of the home [as] the chief evil against which the wording of the Fourth Amendment is directed.”³⁰ Absent a specified exception, warrantless physical invasion of the home “by even a fraction of an inch” is constitutionally impermissible.³¹ A long line of Supreme Court precedent has proclaimed the

²⁵ See *infra* Part I.A.

²⁶ *Wilson v. Layne*, 526 U.S. 603, 612 (1999). Scholars agree that the home site is jurisprudentially sacred. See, e.g., *Jones*, *supra* note 1, at 957 (“The most sacred of all areas protected by the Fourth Amendment is the home.”); *Kelly*, *supra* note 2, at 7–8 (noting that the home has become the “gold standard” for Fourth Amendment protection).

²⁷ See *Silas J. Wasserstrom*, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 257–59 (1984).

²⁸ See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (establishing the exclusionary rule); see also WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1 (4th ed. 2004) (describing the origins and purposes of the exclusionary rule).

²⁹ Cf. *Jeannie Suk*, *Taking the Home*, 20 LAW & LITERATURE 291, 299–309 (2008) (discussing the tension in law regarding the crossing of public and private in the home).

³⁰ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972).

³¹ *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)). Residential protection in Fourth Amendment law has addressed not only traditional dwellings but also temporary dwellings, such as hotels and boarding places, and some nontraditional residences, such as long-term hospital rooms. See, e.g., *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993) (“We have already estab-

sanctity of the home and its inviolability in language underscoring the home's connotation with sacredness and religiosity.³²

Not only has the Court rhetorically “drawn a firm line at the entrance to the house,”³³ it has expansively defined the “home’s ‘umbrella’ of Fourth Amendment protection” to include outdoor curtilage and on occasion garages and garbage.³⁴ The expansive reach of the home beyond core living spaces is one hallmark of Fourth Amendment housing exceptionalism.³⁵ Curtilage is the outdoor property surrounding the home. It receives protection from physical entry and search (subject to some significant exceptions).³⁶ Only at a remove from the home, in open fields, woods, or water, is the residence subject to police search without a warrant.³⁷

In the legal literature, criminal procedure scholars and privacy theorists almost invariably support stringent and expansive protection of the home. Even the most ardent advocates of limiting privacy stop

lished that a person can have an objectively reasonable expectation of privacy in a tent on private property.”); *LaDuke v. Nelson*, 762 F.2d 1318, 1331–32 (9th Cir. 1985) (permitting legitimate law enforcement practices in a “migrant worker farm housing community” but holding that farm checks violate the Fourth Amendment). In Fourteenth Amendment cases, the protective shield of the home has extended so far as to legalize conduct within the privacy of the home that would otherwise be unlawful. *See Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (holding that a state statute criminalizing private possession of obscene materials may not “reach into the privacy of one’s own home”). At the state level, the Alaska Supreme Court has extended constitutional protection to the personal consumption of marijuana in the home based on a right to privacy. *See Ravin v. State*, 537 P.2d 494, 503–04 (Alaska 1975).

³² *See, e.g., Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (holding that warrantless searches and seizures inside a home are “presumptively unreasonable” (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980))); *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (“[T]he Fourth Amendment has drawn a firm line at the entrance to the house . . . [and] that threshold may not reasonably be crossed without a warrant.” (quoting *Payton*, 445 U.S. at 590)); *United States v. Karo*, 468 U.S. 705, 714 (1984) (“[P]rivate residences are places in which the individual normally expects privacy . . . and that expectation is plainly one that society is prepared to recognize as justifiable.”); *United States v. On Lee*, 193 F.2d 306, 316 (2d Cir. 1951) (Frank, J., dissenting) (discussing inviolability of residential interiors). As Linda McClain observes, the Court quite deliberately chose the word *sacred*, with its connotations of religiosity and inviolability, to describe the home in constitutional jurisprudence. Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 *YALE J.L. & HUMAN.* 195, 202–06, 232–41 (1995).

³³ *Payton*, 445 U.S. at 590.

³⁴ *See, e.g., United States v. Dunn*, 480 U.S. 294, 301 (1987) (describing a four-factor test to determine if an area is within the home’s protected area); *United States v. Whaley*, 781 F.2d 417, 420–21 (5th Cir. 1986) (holding that entering residential property and seizing marijuana plants growing adjacent to the house violates the Fourth Amendment).

³⁵ Courts do not, however, appear reluctant to deem an area an open field rather than curtilage. This trend responds, as I shall discuss in Part IV, to an implicit recognition of the costs of the curtilage exception and the limited privacy interest in outdoor spaces.

³⁶ *See Dunn*, 480 U.S. at 300 (discussing the development of the curtilage exception). A significant exception to curtilage protection is that the Court has allowed aerial surveillance of backyards so long as the airspace is generally accessible to the public. *See California v. Ciraolo*, 476 U.S. 207, 213–15 (1986).

³⁷ *See Hester v. United States*, 265 U.S. 57, 59 (1924).

their assault at the threshold of the home and argue that residential privacy protection shelters actions that are legitimately exempt from government encroachment.³⁸ The dominant assumption in criminal procedure scholarship seems to be that the home, and privacy within the home, is psychologically and politically important to individuals in a way, or to a degree, that privacy in other contexts is not.³⁹ Recent work has gone so far as to consider whether Fourth Amendment home searches should be subject to a compensation requirement analogous to a government taking.⁴⁰

The draw of the home for courts and commentators—and of a formalistic, property-based approach to home protection—appears ineluctable.⁴¹ In the 1967 case of *Katz v. United States*, the Supreme Court declared that the Fourth Amendment “protects people, not places.”⁴² Prior to *Katz*, the Court premised search protection on property law concepts and employed the common law of trespass to discern when searches violated constitutionally protected areas.⁴³ The test articulated in Justice Harlan’s concurring opinion in *Katz* is that government action rises to the level of a search when the person has “an actual (subjective) expectation of privacy” and “society is prepared to recognize [that expectation] as ‘reasonable.’”⁴⁴ As *Katz* and subsequent cases made clear, however, the expulsion of property from the province of Fourth Amendment protection was not complete.⁴⁵ Rev-

³⁸ See e.g., AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 196 (1999) (“[C]ontemporary American society largely exempts from scrutiny most acts that occur inside the home . . .”).

³⁹ James Whitman observes that Americans, unlike Europeans, “tend[] to imagine the home as the primary defense, and the state as the primary enemy.” Whitman, *supra* note 1, at 1215; see also Radin, *supra* note 2, at 992 (“There is . . . the feeling that it would be an insult for the state to invade one’s home because it is the scene of one’s history and future, one’s life and growth.”). In some instances, there appears to be an unspoken sentiment that privacy protection should be employed to mitigate the harshness or discriminatory character of substantive criminal law. While I am sympathetic to these concerns, utilizing privacy and search law as a safety valve for the criminal justice system not only detracts from an efficient and coherent body of privacy law but also diffuses the political will necessary for independent reform of criminal law.

⁴⁰ See Kelly, *supra* note 2, at 35.

⁴¹ See Kerr, *supra* note 8, at 814–27 (describing the property-based component of the Fourth Amendment).

⁴² 389 U.S. 347, 351 (1967).

⁴³ See, e.g., *Goldman v. United States*, 316 U.S. 129, 134–36 (1942) (“We hold that what was heard by the use of the detectaphone was not made illegal by trespass or unlawful entry.”); *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928) (holding that a search does not violate an individual’s Fourth Amendment rights unless “there has been a search or seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure”).

⁴⁴ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

⁴⁵ Sherry F. Colb, *A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 MICH. L. REV. 889, 894 (2004) (“There

erence for the physical home tethered the Court to the property principles it had strived to abandon. Lower courts heeded Justice Harlan's explanation that determining reasonable expectations of privacy "requires reference to a 'place,'" and in the case of the residential property, "a man's home is, for most purposes, a place where he expects privacy."⁴⁶ A year later, the Court clarified the continuing dominance of the home by holding that *Katz* "was [not] intended to withdraw any of the protection which the Amendment extends to the home."⁴⁷

In the 2001 landmark case of *Kyllo v. United States*, the Supreme Court further strengthened Fourth Amendment protection of the home.⁴⁸ *Kyllo* held unconstitutional a warrantless thermal scan of a home conducted from a public street, which indicated probable cause to suspect a marijuana-growing operation.⁴⁹ The thermal scan recorded relative heat patterns and did not reveal other details of the occupants' interactions or interpersonal activities.⁵⁰ Drawing on the text and historical understanding of Fourth Amendment protection, Justice Antonin Scalia defended the interior of the home as the "prototypical . . . area of protected privacy."⁵¹ The majority opinion did, however, leave a substantial loophole that may ultimately erode home protection: it limited its holding to technology "not in general public use."⁵² The dissenters recognized the constitutional preeminence of the home but disagreed with the majority because the thermal scan did not penetrate the interior of the home and only measured its exterior—an interest they thought paled against "the chief evil against

has long been significant overlap between property rights and reasonable expectations of privacy. Privacy is one of the things that people value about private property.").

⁴⁶ *Katz*, 389 U.S. at 361 (Harlan, J., concurring); see, e.g., *United States v. Rohrig*, 98 F.3d 1506, 1518 (6th Cir. 1996); *United States v. Reed*, 733 F.2d 492, 500–01 (8th Cir. 1984).

⁴⁷ *Alderman v. United States*, 394 U.S. 165, 180 (1969). Subsequent cases, including those addressing warrantless arrest within the doorway of the suspect's residence, affirmed the home as a dividing line between constitutional and unconstitutional police conduct. See Kelly, *supra* note 2, at 9 ("[The] seemingly magical quality of a home to confer immunity from warrantless arrest to a person as soon as he is inside does not seem to accord with *Katz's* claim that the protections of the Fourth Amendment are for people rather than places.").

⁴⁸ 533 U.S. 27, 37, 40 (2001).

⁴⁹ See *id.* at 29–30, 40.

⁵⁰ See *id.* at 29–30.

⁵¹ *Id.* at 34.

⁵² *Id.* at 34; see also Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393, 1413–14 (2002) (discussing the difficulties lower courts will face when applying the "not in general use" standard).

which the wording of the Fourth Amendment is directed,' the 'physical entry of the home.'"⁵³

The *Kyllo* case highlights another hallmark of housing exceptionalism: the reflexive protection of the home interior as a vital form of property or an all-encompassing symbol of domestic life.⁵⁴ By virtue of their locus within the home, "all details are intimate details" no matter how mundane or technical.⁵⁵ In *Kyllo*, and in a number of other Fourth Amendment precedents, intimacy derives from the residential status of property, not from a particularized analysis of the *ex ante* likelihood that a type of search will implicate substantive interests.⁵⁶

To be clear, home protection is not absolute and there are chinks in the doctrinal armor. Housing exceptionalism describes the comparatively robust (and property-focused) protection of the home and the rhetoric surrounding residential intrusion; it does not presume total protection. Fourth Amendment residential search doctrine encompasses a variety of exceptions in tension with the Court's protectionist rhetoric. Many of these exceptions derive from property law and reveal the double-edged sword of housing exceptionalism's property orientation. For example, trespass has influenced Fourth Amendment doctrines that permit undercover agents to acquire evidence from conversations or other activities in the defendant's domicile and empower third-party cohabitants to consent to a residential search.⁵⁷ Squatting on another's property may nullify a person's privacy rights.⁵⁸ Other exceptions are based on safety, such as allowing pro-

⁵³ *Kyllo*, 533 U.S. at 41–42, 46 (Stevens, J., dissenting) (quoting *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972)).

⁵⁴ For a general overview of the problems of Fourth Amendment formalism, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759–61 (1994).

⁵⁵ *Kyllo*, 533 U.S. at 37 (emphasis omitted); see also *Silverman v. United States*, 365 U.S. 505, 512 (1961).

⁵⁶ See, e.g., *Kyllo*, 533 U.S. at 40; *United States v. Dunn*, 480 U.S. 294, 301 (1987) ("[T]he centrally relevant consideration [to the curtilage determination is] whether the area in question is so intimately tied to the home itself . . ."). Fourth Amendment case law contrasts starkly with Fourteenth Amendment jurisprudence in its ready recognition and consistent application of the principle that "the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life." *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting); see also Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 UCLA L. REV. 1, 3–5 (2009) (arguing that Fourth Amendment jurisprudence, rather than protecting intimate relationships, creates vulnerability).

⁵⁷ See *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (holding that warrantless entry to search for drug evidence did not violate the Constitution even though the police reasonably but erroneously believed that the consenting third party possessed common authority over the premises); *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (holding that defendant had no protected Fourth Amendment interest in information he voluntarily confided to a police informer while in the defendant's hotel room).

⁵⁸ See *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11 (1st Cir. 1975) ("The [squatting] plaintiffs knew they had no colorable claim to occupy the land That fact alone makes

tective sweeps of the home following arrest.⁵⁹ The exception with the greatest impact, the plain-view seizure doctrine, enables the police to seize evidence when police observe the evidence without assistance from a place where they have a right to be, and they have probable cause to believe that the object is the fruit, instrumentality, or evidence of the crime.⁶⁰

Even with these doctrinal exceptions, homes receive comparatively stronger protection than, for example, searches of commercial buildings, certain automobile searches, computer databases and in some instances the internet, and public places. The exceptions illustrate how the Court's property focus and absolutist rhetoric creates internal inefficiency within residential search doctrine: formalistic protection breeds formalistic exceptions. It may be the case that residential search doctrine has buckled under the force of its rhetoric and the steep costs to law enforcement of taking precedents strictly at their word. In addition, the extreme protectionist language in many cases, coupled with other precedents carving out exceptions, increases decisional variance. When deciding novel questions, the Court may extend the reach of exceptions, or, as in the *Kyllo* case, it may apply the sanctity of the home rhetoric to uphold strong residential protection.

B. The Cult of the Home: The Fourth Amendment in Cultural Perspective

The cultural and legal ascendance of the home across the twentieth century has encouraged the persistence of housing exceptionalism. Specifically, both the historical construction of the home as a sacred domestic sphere and the iconic cultural status of the home today have influenced constitutional doctrine. This influence does not explain the genesis of Fourth Amendment residential protection in the Framing Era, but it is a factor (although not the exclusive one) in

ludicrous any claim that they had a reasonable expectation of privacy.”). As another example, housing inspections are permissible subject to a warrant based on satisfaction of reasonable legislative or administrative standards for local inspection, not traditional probable cause. *See* *Camara v. Mun. Court*, 387 U.S. 523, 538 (1967) (holding that probable cause to issue a warrant to inspect property for housing code violations “must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied”).

⁵⁹ *See* *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (holding that a properly limited sweep incident to a lawful in-home arrest is permissible when police possess a reasonable belief based on specific and articulable facts that area harbors an individual posing danger).

⁶⁰ *See* *Texas v. Brown*, 460 U.S. 730, 738–40 (1983) (establishing plain view doctrine in context of vehicular search); *cf.* Andrew E. Taslitz, *Privacy as Struggle*, 44 *SAN DIEGO L. REV.* 501, 507 (2007) (“[I]t is the home that seems to be the one place where the Court claims to be, and often is, granting privacy without requiring extraordinary efforts to see that what is said and done in the home stays in the home.”).

the persistence of doctrines privileging the physical home.⁶¹ In turn, constitutional and statutory laws have reinforced norms regarding the preeminent importance of the residential home to its occupants and to society.⁶²

The cultural dominance of the home dates to the late nineteenth-century Romantic characterization of the home as a refuge from the corruption and danger of urban life. Social historians have described how industrialization recreated the home as a “private place.”⁶³ As early as 1880, Vermont recognized a property right of residential “quiet occupancy and privacy.”⁶⁴ Writing in 1896, Missouri Attorney General Herbert Spencer Hadley identified the “sanctity of the home” as well as the protection of private reputation as the key concerns of privacy.⁶⁵ During this time, the American press and influential commentators, including Samuel Warren and Louis Brandeis, began to regularly cite the British maxim of “home as castle.”⁶⁶

In the first half of the twentieth century, the reverence for the home only intensified with the New Deal, which cast homes and homeownership as civic virtues.⁶⁷ Government policy made housing the linchpin of Depression-era economic reform. Profit-savvy finan-

⁶¹ Other scholars have argued that Fourth Amendment protection derives from an inside/outside distinction with interior spaces protected at the expense of exteriors. For an application of this theory to the internet, see Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. (forthcoming 2010) (manuscript at 22–25), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348322.

⁶² From this perspective, criminal law is unique not in its overattentiveness to the home—that solicitousness is also a principal feature of property law, for example—but in the fact that it (rightly) does not differentiate protection on the basis of ownership versus rental or short-term occupancy. See *id.*

⁶³ See Tamera K. Hareven, *The Home and Family in Historical Perspective*, 58 SOC. RES. 253, 259 (1991) (“Following the removal of the workplace from the home as a result of urbanization and industrialization, the household was recast as the family’s private retreat, and home emerged as a new concept and existence.”).

⁶⁴ See Benjamin E. Bratman, *Brandeis and Warren’s The Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 632–33 n.59 (2002) (citing *Newell v. Witcher*, 53 Vt. 589, 591 (1880)).

⁶⁵ See H.S. Hadley, *Can the Publication of a Libel Be Enjoined?*, 4 NW. L. REV. 137, 145 (1896). Contemporaneously, journalists began to compare searches of homes to searches of the mail and telegraphs, a major privacy consternation of the nineteenth century. See *Telegrams in Court*, N.Y. TRIB., Jan. 8, 1877, at 4; *Trials of the Census-Taker*, N.Y. TIMES, July 19, 1875, at 4. With respect to government search, Judge Thomas Cooley observed that “[the] maxim that ‘every man’s house is his castle’ is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures.” THOMAS M. COOLEY, 1 A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 611 (Walter Carrington ed., 8th ed. 1927) (internal footnote omitted).

⁶⁶ See, e.g., Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890) (“The common law has always recognized a man’s house as his castle . . .”); M.J. Savage, *A Profane View of the Sanctum*, 141 N. AM. REV. 137, 146–47 (1885) (“An Englishman’s house is his castle.” (quotation marks omitted)).

⁶⁷ See Ronald Tobey et al., *Moving Out and Settling In: Residential Mobility, Home Owning, and the Public Enframing of Citizenship, 1921–1950*, 95 AM. HIST. REV. 1395, 1413–19 (1990).

cial and banking special interest groups were quick to respond.⁶⁸ The marketing of the home as a powerful symbol, coupled with financial incentives, channeled wealth investment to residential real estate and solidified the cultural icon of the residential home.⁶⁹

The cultural status of the home provides a new perspective on the persistence of expansive protection and absolutist rhetoric in Fourth Amendment residential search. The modern-day judicial sentiment that all details within the home are intimate details is eerily reminiscent of the Romantic ideal of the home as an idealized and encapsulated private domestic sphere in which to retreat from modern life. Without claiming exclusive causation, the history of the domicile as a culturally supercharged property suggests one motivation for the maintenance of property concepts in residential search doctrine long after the Court disavowed this approach.

Not only does the law reflect the cultural centrality of the home, it also entrenches and intensifies the home's normative significance. Laws protecting privacy influence what people view as private. In light of the circularity between law and norms, the determination of the objective reasonableness of subjective expectations, which *Katz* requires, should not be solely majoritarian (i.e., what most people in society would deem private).⁷⁰ Taking a strictly majoritarian view of privacy, without considering objective harm, creates a feedback loop that cements the iconic status of the home (and biases against minority interests and emerging technologies).

C. Allocative Costs: Protecting the Home as a Justification for Less Privacy Protection Elsewhere

Judicial doctrine and rhetoric constructing the home as a psychological and political fortress have created a strikingly inconsistent, and at times bizarre, pattern of privacy protection.⁷¹ The privileging of the physical home has stymied the efficient allocation of privacy by

⁶⁸ See *id.*

⁶⁹ See Alan Zundel, *Policy Frames and Ethical Traditions: The Case of Homeownership for the Poor*, 23 POL'Y STUD. J. 423, 426–28 (1995) (describing effect of the federal “Own Your Own Home” campaign and New Deal-era legislation on the ideology of homeownership).

⁷⁰ See, e.g., *California v. Greenwood*, 486 U.S. 35, 39–40 (1988) (“An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable.”); *Oliver v. United States*, 466 U.S. 170, 177 (1984) (“The Amendment does not protect the merely subjective expectation of privacy, but only those expectation[s] that society is prepared to recognize as ‘reasonable.’” (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (alteration in original) (internal quotation marks omitted))).

⁷¹ For example, while curtilage receives probable cause protection, strip searches in schools are subject to the lower standard of reasonable suspicion. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642–43 (2009) (holding that school officials did not have reasonable suspicion to strip search thirteen-year-old girl based only on another student claiming to have received ibuprofen from her).

according too much protection to residential property and physical structures (and then undoing a share of that protection through exceptions based on property concepts or publicity, rather than privacy and crime control needs). Privacy interests must be prioritized and balanced against other societal needs, such as safety, crime control, and judicial and governmental resources.⁷² The current patchwork of Fourth Amendment search protection does not strike an appropriate balance: in its permutations in various search contexts—residence, curtilage, garbage, and nonresidential—it overprotects and underprotects with respect to intrusiveness and harm.⁷³ Perhaps courts and commentators implicitly recognize that in balancing societal interests in crime control versus privacy there is not unlimited privacy protection to go around.⁷⁴ Rather than allocating privacy on the basis of intrusiveness, objective harm, and societal interests, however, courts have typically opted to allocate based on context or publicity.⁷⁵

This inefficiency extends beyond residential search: strong protection for the home often means less protection for other types of search. This relationship contradicts common intuitions in criminal procedure. Many scholars are keen proponents of strong privacy laws and worry about narrowing Fourth Amendment protection in the past half century.⁷⁶ If more privacy is a good thing,⁷⁷ the argument goes, then constitutional solicitude for the home is also a good thing because it affords protection in an age of shrinking privacy.

A review of the Fourth Amendment case law reveals that the home does not serve as a bastion of privacy protection that secures

⁷² Kerr, *supra* note 8, *passim* (discussing privacy interests and the proper manner to regulate the use of new technologies for criminal investigations); see also ETZIONI, *supra* note 38, at 9 (“[P]rivacy often is privileged over the common good . . .”).

⁷³ Chris Slobogin has argued that the “probable cause forever” approach to the Fourth Amendment is a significant cause of this problem. See SLOBOGIN, *supra* note 11, at 28–30; see also *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979) (no Fourth Amendment protection for the phone numbers that residents dial); *United States v. Miller*, 425 U.S. 435, 437–40 (1976) (no warrant requirement to obtain bank records).

⁷⁴ See FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 31 (1997) (“It is clear . . . that neither privacy values nor costs are absolute.”); see also Kenneth Einar Himma, *Privacy Versus Security: Why Privacy Is Not an Absolute Value or Right*, 44 *SAN DIEGO L. REV.* 857, 866 (2007) (“[I]nformational privacy rights are below security rights in the moral hierarchy.”); cf. AVISHAI MARGALIT, *THE DECENT SOCIETY* 201 (1996) (“The institutions in a decent society must not encroach upon personal privacy.”).

⁷⁵ For example, the curtilage doctrine has motivated artificial and nonsensical approaches to publicity to undo the damage that housing exceptionalism creates. The Fourth Amendment does not protect curtilage from aerial surveillance based on the questionable reasoning that commercial flights routinely enter the airspace above the curtilage. See *California v. Ciraolo*, 476 U.S. 207, 213–15 (1986). Similarly, driveways lose protection because they are susceptible to public trespass. See, e.g., *United States v. Hatfield*, 333 F.3d 1189, 1194–95 (10th Cir. 2003).

⁷⁶ See, e.g., Taslitz, *supra* note 60, at 514–16.

⁷⁷ See *United States v. Hendrickson*, 940 F.2d 320, 322 (8th Cir. 1991) (noting the importance of privacy to a free and open society).

privacy in other contexts. Rather, courts frequently employ the constitutional status of the home to justify more limited protection in contexts outside of the home. For example, in *Dow Chemical Co. v. United States*, the Supreme Court held that aerial surveillance of a commercial plant was not subject to Fourth Amendment protection because the plant complex was not analogous to the “‘curtilage’ of a dwelling” and because, unlike homeowners, businesses do not have an interest in being free from inspection.⁷⁸ The Court suggested that it would have extended protection if the complex had been a residence, “where privacy expectations are most heightened.”⁷⁹ In *California v. Carney*, the Court wrote that, in addition to the consideration of mobility, “‘less rigorous warrant requirements govern because the expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home or office.’ . . . These reduced expectations of privacy derive . . . from the pervasive regulation of vehicles capable of traveling on the public highways.”⁸⁰ In a similar vein, recent scholarship charges that technological searches and restraints, such as biometric scanners and DNA collection, do not receive protection because they “do not take the form of physical intrusions on sacred spaces.”⁸¹ I do not claim that residential search precedents are the sole reason these contexts receive less protection; rather the case law illustrates how home-search cases provide additional justification for limiting protection outside of the home.

This dynamic is particularly worrisome in light of the evidence that privileging residential privacy may result in less *net* privacy protection because most search activity is nonresidential. William Stuntz observes that “there are many, many more street encounters than searches of private homes” and that “protecting privacy in the home casts a smaller substantive shadow than protecting privacy in glove compartments or jacket pockets.”⁸² The symbolic stronghold of the home, which looms so large in American consciousness, diverts both public and judicial concern from other privacy interests. Social scientists have described how basing legal or social consequences on whether an action has occurred inside or outside of a protected territory makes the “territory appear[] as the agent doing the controlling.”⁸³ Of course, removing protection from residential spaces does

⁷⁸ 476 U.S. 227, 238–39 (1986). In general, commercial property is also subject to a lower standard of reasonableness when it is also subject to regulation and privacy-dissolving civil inspection. See *New York v. Burger*, 482 U.S. 691, 702 (1987).

⁷⁹ *Dow*, 476 U.S. at 237 n.4.

⁸⁰ 471 U.S. 386, 390–92 (1985) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 367–68 (1976)).

⁸¹ Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1359 (2008).

⁸² See Stuntz, *supra* note 14, at 1061–62.

⁸³ ROBERT DAVID SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY 33 (1986).

not guarantee that protections will accrue to important, nonresidential interests. However, reconceiving residential privacy rights and the Fourth Amendment as safeguarding vital interests and addressing substantive privacy harms can prompt such reform.

To the extent that public and private spaces compete for protection, there are also distributional consequences to the dominance of the home in Fourth Amendment search. Low-income individuals spend a greater share of their time in public venues and socialize more frequently in public spaces, which typically receive less protection under the Fourth Amendment. In addition, tying search protection to the physical home has made residents of nonaffixed mobile motor homes subject to warrantless search and seizure and created uncertainty as to whether the homeless receive protection in their public and transient living spaces.⁸⁴

II

PSYCHOLOGICAL JUSTIFICATIONS FOR HOUSING EXCEPTIONALISM: REEXAMINING PRIVACY, PERSONHOOD, AND EXPECTATIONS

Courts and commentators justify the expansive protection of the home, often to the neglect of substantive privacy, on the view that the physical home and “home territory” are psychologically unique and vital to its occupants. These accounts focus on the importance—or even the necessity—of strong search protection for residential property.⁸⁵ Much case law and commentary presumes a potent territorial interest in the protection of the physical home and that the Fourth Amendment safeguards the “personhood” property of the domicile.⁸⁶ The accepted wisdom is that stringent and expansive residential search protection, focused on the housing structure and property concepts, accords with citizens’ subjective expectations of privacy. This Part considers each of these rationales in turn and contends that the evidence belies the psychological exigency that courts and commentators attribute to the Fourth Amendment home.

⁸⁴ See *Carney*, 471 U.S. at 392–94; David H. Steinberg, *Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard*, 41 DUKE L.J. 1508, 1536–40 (1992) (describing the Connecticut state court case of *State v. Mooney*, 588 A.2d 145 (Conn. 1991), which considered the search of a homeless man living under a bridge underpass but ultimately extended protection on other grounds); cf. *United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1988) (holding that homeless man had a reasonable expectation of privacy in a closed container that he stored with permission in another person’s garage).

⁸⁵ See *supra* notes 26–56 and accompanying text.

⁸⁶ See Radin, *supra* note 2, at 1013; see also Kelly, *supra* note 2, at 28.

A. The Myth of Privacy as a Territorial Imperative

Fourth Amendment doctrine implicates a distinctly spatial and territorial conception of residential privacy—a conception that is at odds with the psychological research and privacy literature. A key jurisprudential justification for privileging the physical home is the formulation of privacy as exclusionary control over vital physical spaces—the “sanctity of the home.”⁸⁷ The Supreme Court has held that nowhere is the “zone of privacy” more clearly defined “than when bounded by the unambiguous physical dimensions of an individual’s home.”⁸⁸ The research literature belies this account and indicates that privacy is primarily psychological and relational, not territorial.

If privacy depended upon control of space, and specifically of homes, stable and robust privacy norms would persist with respect to residential spaces. Instead, the research reveals that individuals adapt their privacy norms to their environments.⁸⁹ Expectations of residential privacy vary widely among cultures.⁹⁰ Poorer individuals tend to expect and demand less privacy.⁹¹ Psychological and developmental studies indicate that people are socialized to identify certain areas as private and that these areas may change based on subsequent experiences.⁹² In addition, privacy regulation “can serve the important social function[] of allowing checks on compliance with norms.”⁹³

⁸⁷ See, e.g., *Payton v. New York*, 445 U.S. 573, 588 (1980) (illustrating the jurisprudential construction of the home as a protected “territory” at the core of the Fourth Amendment).

⁸⁸ See *id.* at 589.

⁸⁹ See Peter Kelvin, *A Social-Psychological Examination of Privacy*, 12 BRIT. J. SOC. & CLINICAL PSYCHOL. 248, 256 (1973) (“[A]reas of privacy, being a function of norms, may change—they are not immutable.”). Similarly, Amitai Etzioni observes, “Although some vague notion of privacy exists in most, if not all, societies, the specific way we treat privacy in our law and culture is a recent phenomenon [P]rivacy is hardly a near-sacred concept that cannot be reformulated.” ETZIONI, *supra* note 38, at 188 (internal footnote omitted).

⁹⁰ For example, tribal communities in Brazil live in communal housing, and the Japanese, whose dwellings frequently lack doors, freely enter and wander within others’ private homes. Irwin Altman, *Privacy Regulation: Culturally Universal or Culturally Specific?*, 33 J. SOC. ISSUES 66, 72–74 (1977); see also SANDRA PETRONIO, *BOUNDARIES OF PRIVACY: DIALECTICS OF DISCLOSURE* 24 (2002) (“[C]ultures may vary in the degree to which privacy plays a role in social life.”).

⁹¹ See Alexander Kira, *Privacy and the Bathroom*, in ENVIRONMENTAL PSYCHOLOGY: MAN AND HIS PHYSICAL SETTING 269, 274–75 (Harold M. Proshansky et al. eds., 1970) (finding that lower socioeconomic status results in more crowded living conditions that relax privacy norms); Robert S. Lauffer & Maxine Wolfe, *Privacy as a Concept and a Social Issue: A Multidimensional Developmental Theory*, 33 J. SOC. ISSUES 22, 29 (1977) (reporting that children and adolescents cited the bathroom as a private place only in families with few members or a low occupant-per-room ratio); Barry Schwartz, *The Social Psychology of Privacy*, 73 AM. J. SOC. 741, 743 (1968) (“Privacy has always been a luxury.”).

⁹² See Lauffer & Wolfe, *supra* note 91, at 29.

⁹³ See Stephen T. Margulis, *On the Status and Contribution of Westin’s and Altman’s Theories of Privacy*, 59 J. SOC. ISSUES 411, 416 (2003).

Contrary to the claims of some commentators, there is no evidence that residential privacy reflects an innate, biological drive to defend against territorial intrusion.⁹⁴ Humans are evolutionarily social beings, and the flexibility of their property arrangements (and defense of territorial property) reflects this pro-social orientation.⁹⁵ From prehistoric man to Native-American tribes to modern communes, people have cohabitated in groups, foregone private-property systems and stable settlement bounds, and lived nomadically.⁹⁶ In order for social groups to function, individuals must submit at times to various social and physical incursions that are acceptable to the group, or a dominant force within the group, but undesirable to the affected individual.⁹⁷ Inclinations toward absolute defense of individual or family territory would reduce the cooperative enterprises necessary for survival.⁹⁸ Territoriality, in the sense of robust defense of private property, is a "strategy that can be turned on and off"⁹⁹ when circumstances alter its efficiency.¹⁰⁰ Fourth Amendment protection of the home responds to normative values that are subject to debate, prioritization, and fluctuation, not to biological imperative.¹⁰¹

The current Fourth Amendment approach has conflated privacy, a concept that is essentially relational, with the protection of physical space.¹⁰² Contrary to the notion of residential privacy as spatial exclusion, psychologists study privacy in the domain of interaction.¹⁰³

⁹⁴ *But see, e.g.*, Adam D. Moore, *Toward Informational Privacy Rights*, 44 SAN DIEGO L. REV. 809, 815–18 (2007) ("[A] lack of private space . . . will threaten survival.")

⁹⁵ In many instances, people employ territorial strategies to increase, not prevent, social contacts. *See* Peter H. Klopfer & Daniel I. Rubenstein, *The Concept Privacy and Its Biological Basis*, 33 J. SOC. ISSUES 52, 54 (1977).

⁹⁶ *See, e.g.*, SACK, *supra* note 83, at 7–9 (describing Chippewa Indian settlements).

⁹⁷ Territoriality serves a constellation of functions, none of which maps onto residential criminal search. Owners or residents involved in criminal investigations are not resisting territorial invasion in order to affect their neighbors' behaviors or norms, increase the likelihood of passing on their genes, or personalize or mark territory to signal vigilance or community investment. *Cf.* Ralph B. Taylor & Sidney Brower, *Home and Near-Home Territories*, in HOME ENVIRONMENTS 183, 193 (Irwin Altman & Carol M. Werner eds., 1985).

⁹⁸ *See* SACK, *supra* note 83, at 24.

⁹⁹ *Id.*

¹⁰⁰ Territoriality studies focus on defense of feeding areas in situations where such defense is efficient. *See* Rada Dyson-Hudson & Eric Alden Smith, *Human Territoriality: An Ecological Reassessment*, 80 AM. ANTHROPOLOGIST 21, 22 (1978); Marshall D. Sahlins, *The Social Life of Monkeys, Apes and Primitive Man*, in THE EVOLUTION OF MAN'S CAPACITY FOR CULTURE 54, 57 (J.N. Spuhler ed., 1959) (comparing territoriality in subhuman primates with primitive social behavior).

¹⁰¹ A variety of forces other than evolution shape human behavior: social drives, cultural learning and reproduction, and environmental changes. An evolutionary or biological explanation for territoriality would be tautological. *See* SACK, *supra* note 83, at 21.

¹⁰² *See e.g.*, *supra* notes 29–31 and accompanying text.

¹⁰³ *See* IRWIN ALTMAN, THE ENVIRONMENT AND SOCIAL BEHAVIOR 18 (1975) (defining privacy regulation as a means to achieve an individual's or a group's optimum level of social interaction and access to the self); Patricia Brierley Newell, *Perspectives on Privacy*, 15 J. ENVTL. PSYCHOL. 87, 91–93, 94–97 (1995).

Privacy enables control over self-disclosure and allows others to access the individual's self.¹⁰⁴ In their interactions and relationships, people perennially engage in strategic self-presentation in order to shape others' views of their personality and disposition.¹⁰⁵ Physical space is important only insofar as it secures the ability to expose or conceal different aspects of our self to others.¹⁰⁶ Even Justice Louis Brandeis's famous description of privacy as "the right to be let alone" has a relational interpretation: we often wish others to leave us alone to eventually rejoin them, and we want government to leave us alone to safeguard the individuality and spontaneity essential to social existence.¹⁰⁷

B. Theory Versus Evidence: The Personhood Interest in Residential Privacy

A principal claim in the scholarly literature is that residential privacy and the right of exclusionary control of the physical home are vital to identity and psychological well-being—indeed, to an individual's very personhood. In her influential theory of property for personhood, Margaret Radin argued that certain kinds of property, with homes as the paradigmatic example, constitute an individual's self, enable proper self-development, and encourage human flourish-

¹⁰⁴ See ALTMAN, *supra* note 103, at 18; Kenneth Einar Himma, *Separation, Risk, and the Necessity of Privacy to Well-Being: A Comment on Adam Moore's Toward Informational Privacy Rights*, 44 SAN DIEGO L. REV. 847, 850 (2007) ("The need for personal space is not the same as the need for privacy. My need to have a home of my own . . . is primarily motivated by a desire for security, not privacy."); Patricia Brierley Newell, *A Systems Model of Privacy*, 14 J. ENVTL. PSYCHOL. 65, 75–76 (1994) (reporting that when asked about their actions to acquire privacy, less than half of subjects mentioned places and that a quarter of subjects included social interaction or other prosocial behavior as part of their privacy experiences).

¹⁰⁵ See Roy F. Baumeister, *A Self-Presentational View of Social Phenomena*, 91 PSYCHOL. BULL. 3, 3 (1982) (explaining that self-presentation is "aimed at establishing . . . an image of the individual in the minds of others"); Edward E. Jones & Thane S. Pittman, *Toward a General Theory of Strategic Self-Presentation*, in 1 PSYCHOLOGICAL PERSPECTIVES ON THE SELF 231, 233 (Jerry Suls ed., 1982) (defining strategic self-presentation as "those features of behavior . . . designed to elicit or shape others' attributions of the actor's dispositions" (emphasis omitted)).

¹⁰⁶ See ALTMAN, *supra* note 103, at 18 (stating that privacy is important only to the extent that it allows individuals to restrict access to themselves); Glenorchy McBride, *Privacy: A Relationship Model*, 7 MAN-ENV'T SYS. 145, 148 (1977) (arguing that possession or ownership of "any space, personal, real estate, or temporary, may appear at first sight to be an individual construct [of privacy], yet since it always concerns access, ownership is in fact a statement of social relationships between people").

¹⁰⁷ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see Warren & Brandeis, *supra* note 66, at 193; cf. Bascuas, *supra* note 23, at 585 (observing that Justice Brandeis's formulation "is more a rhetorical than a categorical characterization").

ing.¹⁰⁸ By virtue of the personhood connection, the law should accord owners broad liberty to control such property.¹⁰⁹

Based on the personhood interest in the home, Radin championed strict protection of privacy rights in residential search and seizure. She argued that personhood property provides a normative guide for Fourth Amendment jurisprudence and underscores the need for heightened protection in the home and possibly in vehicles as well.¹¹⁰ Other scholars echoed Radin's call for stringent protection of privacy rights in residential property on the basis of the prodigious "psychic toll" to personhood.¹¹¹

The empirical evidence does not support personhood theory's claim that exclusionary control over the physical home is a requisite constituent of personal identity and psychosocial functioning.¹¹² American homes are not personhood property, inextricably intertwined with self and identity, but commodities that on average are bought, sold, or rented every five years.¹¹³ Research shows that homes play a role, but not a starring one, in self-concept. Contrary to the notion that control over the physical home is of the utmost importance to self and personhood, subjects rate relationships, personal characteristics, and body parts as more closely connected to self than physical possessions.¹¹⁴ Moreover, evidence suggests that exercising

¹⁰⁸ See Radin, *supra* note 2, at 967–68.

¹⁰⁹ See *id.* at 960, 978.

¹¹⁰ See *id.* at 996–1002.

¹¹¹ See, e.g., Kelly, *supra* note 2, at 6 (arguing that the harms to personhood resulting from residential search may merit compensation to the occupants of the home).

¹¹² Although Radin's account focuses heavily on property, she does recognize the social and relational aspects of home. See Radin, *supra* note 2, at 1013 ("Our reverence for the sanctity of the home is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society."). In general, Radin's theory is somewhat amorphous and does not specify whether the crux of the personhood interest is to be a person, to be a particular person, to retain the same identity, or even to have a personality. Compare *id.* at 957 ("[T]o achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment."), with *id.* at 968 ("If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.").

¹¹³ See KRISTIN A. HANSEN, U.S. CENSUS BUREAU, SEASONALITY OF MOVES AND DURATION OF RESIDENCE 4 (1998), available at <http://www.census.gov/prod/3/98pubs/p70-66.pdf>; see also Susan Saegert, *The Role of Housing in the Experience of Dwelling*, in HOME ENVIRONMENTS, *supra* note 97, at 287, 290 (stating that the connection people feel toward their homes "depends on the housing market, the rental market, and the job market"). Unlike in the United States, homes in some cultures are imbued with personhood. For example, the Zuni view the home as a living thing and the principle setting for communication with the spirit world, and the Tswana of South Africa believe that the spirits of their ancestors reside in the home's courtyard. See Carol M. Werner et al., *Temporal Aspects of Homes: A Transactional Perspective*, in HOME ENVIRONMENTS, *supra* note 97, at 1, 8, 20.

¹¹⁴ See Ernst Prelinger, *Extension and Structure of the Self*, 47 J. PSYCHOL. 13, 14–23 (1959) (presenting the results of a study asking adult subjects to rate eight categories of items on a scale of whether those items were "definitely a part of your own self"). One study that asked

control over an object, such as one's dwelling, does not substantially increase the object's connection to the self.¹¹⁵ Within the home, residents use household possessions in a utilitarian fashion and do not strongly link those items to personal identity;¹¹⁶ the exceptions—rarely the target of criminal investigation—are family heirlooms, diaries, and photographs.¹¹⁷

The experimental research suggests that discrete privacy invasions of physical spaces that leave social relationships intact do not damage self or psychosocial functioning.¹¹⁸ Individuals are surprisingly adaptable to even acute losses in residential spaces.¹¹⁹ For example, psychologists have found that victims of natural disasters—whose houses are not merely searched but destroyed—typically do not suffer long-term mental health impairment.¹²⁰ High-quality relationships,

participants to rate items on a self/not-self scale found that relatives and friends, as well as body organs and even favorite vacation place, received higher ratings than dwelling. See Russell W. Belk, *Identity and the Relevance of Market, Personal, and Community Objects*, in *MARKETING AND SEMIOTICS* 151, 154–56 (Jean Umiker-Sebeok ed., 1987). Subjects rated the following items very similarly to current dwelling: favorite casual clothes, favorite vehicle now owned, and favorite book. *Id.* at 155. Also relevant to Fourth Amendment law, at least one study has found that subjects rank cars similarly to homes in terms of consumer's attachment and integration of the object into self-concept. See A. Dwayne Ball & Lori H. Tasaki, *The Role and Measurement of Attachment in Consumer Behavior*, 1 *J. CONSUMER PSYCHOL.* 155, 166 (1992).

¹¹⁵ See Prelinger, *supra* note 114, at 19.

¹¹⁶ In general, the psychology and sociology literature does not indicate, as Radin proposes, that the home is a requisite *constituent* of personhood. Cf. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 22–25 (1959) (describing the role of the “setting” for individuals' functioning).

¹¹⁷ See Deborah A. Prentice, *Psychological Correspondence of Possessions, Attitudes, and Values*, 53 *J. PERSONALITY & SOC. PSYCHOL.* 993, 995–96 (1987); see also MIHALY CSIK-SZENTMIHALYI & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF* 55–58 (1981) (identifying ten categories “symptomatic of what kinds of things people cherish in their homes”).

¹¹⁸ See Lois M. Haggard & Carol M. Werner, *Situational Support, Privacy Regulation, and Stress*, 11 *BASIC & APPLIED SOC. PSYCHOL.* 313, 334 (1990) (discussing how an experimental privacy invasion, in the form of a confederate entering and lingering in a subject's room, did not cause objective harm to the subject's mood or assessment of the environment and actually improved the subject's performance of a secondary task). Instead, the research literature suggests that only a profound and longstanding loss of privacy in an individual's residence will threaten her personhood. See David A. D'Atri, *Psychophysiological Responses to Crowding*, 7 *ENV'T & BEHAV.* 237, 247–50 (1975) (discussing a study that found a correlation between the number of inmates sharing a given space and the inmates' blood pressure levels).

¹¹⁹ For example, long-term disability, which has massive and irreversible impacts on privacy in the home, typically does not decrease happiness. See DANIEL GILBERT, *STUMBLING ON HAPPINESS* 152–53 (2006) (noting that disabled persons can adapt quickly to their conditions).

¹²⁰ See Peter Steinglass & Ellen Gerrity, *Forced Displacement to a New Environment*, in *STRESSORS AND THE ADJUSTMENT DISORDERS* 399, 401 (Joseph D. Noshpitz & R. Dean Codrington eds., 1990). A few studies have even found that forced relocation due to natural disaster predicts increased satisfaction with family life and neighborhood relations. See, e.g., Thomas E. Drabek et al., *The Impact of Disaster on Kin Relationships*, 37 *J. MARRIAGE &*

not the physical home or residential privacy, are what is essential to self and psychosocial functioning.¹²¹

A related theory in the privacy literature is that the incursion on privacy in general, not the personhood-securing nature of residential privacy rights in particular, causes the harm.¹²² Privacy scholars have long recognized a personhood interest in privacy irrespective of property or place.¹²³ On this view, privacy enables personhood by safeguarding “those attributes of an individual which are irreducible in his selfhood”¹²⁴ and protecting, as Warren and Brandeis describe, an individual’s self-definition of his or her “inviolable personality.”¹²⁵ This conception of personhood might support, for example, the role of privacy in Fourteenth Amendment cases addressing sexuality, sodomy, and contraception, but it does not explain housing exceptionalism or the assumption that government search of the home invariably threatens personhood.¹²⁶ If personhood accrues more squarely to privacy than property or homes, this relationship calls into question the privileging of the home in Fourth Amendment doctrine relative to comparable nonresidential privacy interests.

In addition, personhood theory suffers from indeterminacy and a tendency toward absolutism. It does not provide a viable litmus test for differentiating between protected and unprotected interests. As

FAM. 481, 490–92 (1975) (family life); Harry Estill Moore, *Some Emotional Concomitants of Disaster*, 42 MENTAL HYGIENE 45, 49–50 (1958) (neighborhood relations).

¹²¹ See Roy F. Baumeister, *The Self*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 680, 680 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (“Selfhood is almost unthinkable outside a social context Selves are . . . tools for relating to other people.”); see also JOHN T. CACIOPPO & WILLIAM PATRICK, *LONELINESS: HUMAN NATURE AND THE NEED FOR SOCIAL CONNECTION* 240 (2008) (noting that quality, not quantity, of relationships predicts loneliness).

¹²² Alternatively, the fact that the government is the home invader may create the harm that results from residential search. If this is the case though, then it calls into question public acceptance of housing inspection and zoning.

¹²³ See Kelvin, *supra* note 89, at 259 (“It is only in a condition of perceived privacy that one perceives oneself removed and protected from the power of others: and it is only to the extent that one has this sense of privacy that one can feel truly oneself, and responsible for one’s actions”).

¹²⁴ Paul A. Freund, Professor, Harvard Law School, Address to the American Law Institute (May 23, 1975), in THE AMERICAN LAW INSTITUTE, 52ND ANNUAL MEETING 568, 574 (1976); see also JEFFREY REIMAN, *CRITICAL MORAL LIBERALISM: THEORY & PRACTICE* 165 (1997) (“The right to privacy is the right to the existence of a social practice that makes it possible for me to think of this existence as *mine*. . . . The right to privacy, then, protects the individual’s interest in becoming, being, and remaining a moral person.” (emphasis added)); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1976) (stating that privacy confers a “moral title to [one’s] existence” (emphasis omitted)).

¹²⁵ Warren & Brandeis, *supra* note 66, at 205.

¹²⁶ See W.H. Foddy & W.R. Finighan, *The Concept of Privacy from a Symbolic Interaction Perspective*, 10 J. FOR THEORY SOC. BEHAV. 1, 6 (1980) (“Privacy is the possession by an individual of control over information that would interfere with the acceptance of his claims for an identity within a specified role relationship.” (emphasis omitted)).

Jed Rubenfeld writes, “Where is our self-definition *not* at stake?”¹²⁷ Compounding this problem, the moral character of personhood and the rights language of privacy push toward absolutism: once identified, rights warrant strict protection.¹²⁸

Perhaps one of the more compelling arguments for personhood and residential privacy—which personhood theory does not, but should, make explicit—is that control over privacy signals status.¹²⁹ Government action symbolizes social judgments as to an individual’s status and worth.¹³⁰ Individuals who are subject to privacy invasions on an ongoing basis may infer that others do not find them worthy of respect¹³¹ and ultimately come to believe they are, in fact, not worthy of respect. This impugns the common practices of repeat *Terry* stops and vehicular searches that disproportionately affect poor and minority individuals.¹³² Constricting the scope of residential search protection or lowering the standard for home searches may also disproportionately impact poor and minority individuals if the history of discriminatory targeting holds true. This underscores the need to address discriminatory police conduct; in the face of narrowed constitutional protection, the creation of statutory remedies and tortlike compensation can address discriminatory search or targeting.¹³³

C. An Evidence-Based Analysis of Subjective Expectations of Privacy

Turning to the realm of public opinion, the Supreme Court has used subjective expectations of privacy to justify the blunt and expan-

¹²⁷ Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 754–55 (1989).

¹²⁸ See William R. Lund, *Politics, Virtue, and the Right to Do Wrong: Assessing the Communitarian Critique of Rights*, 28 J. SOC. PHIL. 101, 104, 107 (1997) (quoting Justice Oliver Wendell Holmes’s statement that “rights tend to declare themselves absolute to their logical extreme”); see also ETZIONI, *supra* note 38, at 190 (“As the right to privacy is viewed as an inalienable right, it does not yield to the common good.”).

¹²⁹ See Newell, *supra* note 103, at 93 (reviewing empirical studies of human behavior and finding that dominant or powerful individuals establish themselves in more private spaces and strongly enforce privacy boundaries).

¹³⁰ In a self-report experiment that asked subjects to describe a situation where they preferred privacy, 76 percent of subjects mentioned whether others had respected their privacy. See Newell, *supra* note 104, at 74.

¹³¹ See Taslitz, *supra* note 22, at 15; see also Altman, *supra* note 90, at 68 (“A person who can successfully control interaction with others is likely to develop more of a sense of competence and self-worth than a person who fails repeatedly to regulate contacts with others.”).

¹³² See Taslitz, *supra* note 22, at 15, 21–22 (noting the concern of minority group members that police officers stop young black males without reason).

¹³³ For example, Christopher Slobogin has suggested that an independent ombudsman could administer a damages remedy and assess monetary damages against individual police officers, for discriminatory action, and departments, for failure to train officers on race issues. See SLOBOGIN, *supra* note 11, at 37.

sive approach of housing exceptionalism.¹³⁴ The doctrinal assumption appears to be that citizens hold uniformly high perceptions of intrusiveness for a wide array of residential search contexts.¹³⁵ The empirical evidence reveals a more variable and nuanced picture of residential privacy expectations and indicates that some contexts of home search, such as certain outdoor residential searches, do not raise strong privacy concerns.¹³⁶ Meanwhile, contexts of search that do not necessarily involve the home, such as wiretapping, searching luggage on a bus, or tapping into a corporation's computer, receive higher intrusiveness ratings than most categories of residential search.¹³⁷ This research raises a serious question of whether courts have assumed a more uniform and robust privacy expectation in various aspects of the home than citizens themselves.

In their seminal study of privacy expectations, Christopher Slobogin and Joseph Schumacher asked individuals to rate the degree of "invasion of privacy or autonomy" in various search scenarios.¹³⁸ They found that subjects gave markedly different privacy scores, for example, to searching curbside garbage, watching a person in the yard with binoculars, and searching a bedroom.¹³⁹ Subsequent independent research has replicated these findings.¹⁴⁰ Slobogin and Schumacher observed that some privacy expectations, such as the perceived unintrusiveness of curbside garbage searches and aerial curtilage searches, are consistent with Fourth Amendment doctrine while other privacy expectations diverge from Fourth Amendment doctrine.¹⁴¹ The variability in intrusiveness ratings for residential search scenarios casts doubt on the doctrinal tendency to treat the home, absent publicity or a specified exception, as a "force field" of uniformly elevated privacy expectations.

Although Slobogin and Schumacher did not manipulate this variable explicitly, their results also suggest that expectations of residen-

¹³⁴ See *Katz v. United States*, 389 U.S. 347, 361–62 (1967) (Harlan, J., concurring).

¹³⁵ See *supra* notes 33–37 and accompanying text.

¹³⁶ See Slobogin & Schumacher, *supra* note 16, at 739–41 (noting that safety inspections of residences and inspections of burned-down houses do not implicate substantial privacy concerns but still receive Fourth Amendment protection).

¹³⁷ See *id.* at 738–39 (body cavity searches and wiretaps received higher intrusiveness scores than bedroom searches and other residential searches); Blumenthal et al., *supra* note 16, at 358 tbl.1 (tapping into corporation's computer and perusing bank records received higher intrusiveness ratings than any type of residential search).

¹³⁸ Slobogin & Schumacher, *supra* note 16, at 736.

¹³⁹ The study did not assess several residential contexts that frequently receive Fourth Amendment protection, such as searches of garbage within curtilage or searches of specific interior rooms other than a bedroom. See *id.* at 729, 738–39 tbl.1.

¹⁴⁰ See Blumenthal et al., *supra* note 16, at 345 ("Our subjects' intrusiveness ratings are quite consistent with [Slobogin and Schumacher's] results; each of our samples correlated highly with their overall data.").

¹⁴¹ See Slobogin & Schumacher, *supra* note 16, at 739–40.

tial privacy concentrate in the interior living spaces of the home and diminish in exterior spaces.¹⁴² Subjects rated searches of bedrooms, interiors of mobile homes, and college dorm rooms as highly intrusive but rated searches of garages, aerial surveillance of yards, and searches of curbside garbage as moderately or minimally intrusive.¹⁴³ Their findings also suggest a strong privacy interest in interpersonal exchange. For example, subjects gave wiretaps the highest intrusiveness rating. Similarly, we can speculate that subjects may have rated searches of the bedroom as highly intrusive because of its strong association with interpersonal relationships and sexual intimacy.¹⁴⁴

Of course, subjective expectations alone cannot justify Fourth Amendment protection. Citizens' expectations of privacy may impose prohibitively high social costs, threaten undue impacts on insulated groups or minorities, or diverge too sharply from objective harm.¹⁴⁵ Scholars have long complained that reasonable expectations of privacy are amorphous and uncertain¹⁴⁶ and suffer from an inescapable circularity between existing law and expectations.¹⁴⁷ At the same time, Fourth Amendment doctrine should not neglect privacy expectations entirely, especially in light of the propensity for searches perceived as highly intrusive to inflict psychological or other harm.¹⁴⁸

¹⁴² See *id.* at 738–39. They did find that subjects rated open-field searches as moderately intrusive. See *id.* However, from the perspective of relational privacy, this item may have conflated property-focused expectations of autonomy with privacy-focused expectations of autonomy because the authors framed the question as being about privacy and autonomy and described the open field as being surrounded by a fence and “No Trespassing” signs. See *id.* at 736.

¹⁴³ See *id.* at 738–39.

¹⁴⁴ Obtaining information through the use of undercover agents also received moderately high intrusiveness ratings. See *id.*; see also Kelvin, *supra* note 89, at 255 (sexual intercourse typically subject to strong norms of privacy).

¹⁴⁵ Subjective expectations of privacy may not track objective harm: laboratory studies of minor privacy invasions show that subjects complain about intrusion and privacy violations but report no negative effects on mood or task performance. See Haggard & Werner, *supra* note 118, at 334.

¹⁴⁶ See, e.g., Bascuas, *supra* note 23, at 580 (describing reasonable expectations of privacy as “subjective specters that . . . judges view idiosyncratically”); Richard G. Wilkins, *Defining the “Reasonable Expectation of Privacy”: An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1128 (1987) (“The potentially limitless number of factors relevant to the determination whether a given expectation of privacy is ‘reasonable’ has resulted in confusion and uneven application of constitutional doctrine.”).

¹⁴⁷ See Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188; cf. Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 32–33 (1997) (arguing that this circularity enables a feedback mechanism because it cannot be avoided completely).

¹⁴⁸ See Kelvin, *supra* note 89, at 252 (Privacy refers to a “subjective state [P]rivacy is perceived privacy.”).

III
POLITICAL AND HISTORICAL RATIONALES FOR PRIVILEGING
THE HOME

Political concerns and constitutional originalism are fundamental to modern jurisprudence on residential search and seizure. A principal purpose of Fourth Amendment protection is to guard against police overreaching; the physical home is particularly vulnerable on this account because of the many possessions it contains as well as the political value of a zone of governmental noninterference. The Supreme Court has also privileged the physical home on the theory that the Framers intended its utmost protection. Original intent has guided the Court's, and particularly Justice Scalia's, interpretation of the Fourth Amendment.¹⁴⁹

A. Political Rationales: The Dangers of Government Overreaching

The political rationales for housing exceptionalism revolve around the common axis of limiting government's reach. First, courts fear that absent the constraints of a warrant and probable cause the police will be able to ransack a house and its curtilage for evidence unrelated to the crime under investigation and use that information to harass, coerce, or prosecute the suspect.¹⁵⁰ According to this account, the multitude of personal property, records, and effects within houses creates an exceptional risk of police overreaching and harassment.

Government overreaching is indisputably a proper concern of the Fourth Amendment, but there is reason to doubt that Fourth Amendment doctrine and housing exceptionalism effectively address this risk. Concerns of overreaching and harassment may justify a subset of residential protections but not the expansive and categorical reach of the home. Thermal scans of the home, for example, receive substantial protection despite the fact that the limited range of information discernible by the technology sharply constrains police overreaching in a given search. Also, contrary to the assumption that homes are uniquely vulnerable, the potential for overreaching and harassment appears higher in nonresidential contexts that currently

¹⁴⁹ U.S. CONST. amend. IV; *see, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

¹⁵⁰ *See* *United States v. Hendrickson*, 940 F.2d 320, 322 (8th Cir. 1991) (stating that the ultimate question for the Fourth Amendment is "whether, if the particular form of [conduct] 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 1 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 3.2, at 165 (1984))); *cf.* Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 53 (1995) (proposing additional privacy protections for property or information seized by government).

receive more limited protection, such as searches of financial records and computer storage.¹⁵¹

Even if the home is uniquely susceptible to overreaching, the plain-view seizure doctrine calls into question the ability of the Fourth Amendment to prevent this harm. The case law has clearly established that the police have a right to seize evidence that is in plain view so long as they are lawfully searching the area that contains the evidence and they have probable cause to believe that it is evidence of criminal activity.¹⁵² Because so much is in plain view of the police during many searches, this doctrine undoes much of the protection against overreaching that the Fourth Amendment seeks to confer.¹⁵³ It is not evident why probable cause and warrant protection, rather than warrant substitutes and a rule restricting seizure to the subject of the search (i.e., a rule that is the opposite of the plain-view seizure doctrine), are the solutions to the problem of overreaching.¹⁵⁴

The second major rationale for privileging residential privacy is that the home affords a haven from the reach of government. In this view, the home should establish a bright line that government may not cross. This line creates a zone of privacy and autonomy that is essential to human flourishing and productive citizenship. If it is true that a quantum of autonomy and privacy protection is necessary, and I am willing to accept that premise, then it seems that the Supreme Court has given away the farm. As Professor Stuntz has observed, residential searches represent a small fraction of total search activity.¹⁵⁵ If the goal is to provide citizens with a robust zone of noninterference, then it is difficult to offer a principled explanation for the choice of the home over more common search contexts, including the modern-

¹⁵¹ See, e.g., Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 319 (2008) (describing data-mining efforts by the federal government); Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and Its De-evolution for American Employees*, 42 J. MARSHALL L. REV. 83, 84 (2008) (arguing for strengthening employee privacy rights particularly as technology and workplace flexibility erode the strict division between work and home).

¹⁵² See *Horton v. California*, 496 U.S. 128, 134–36 (1990) (establishing standard for the plain-view seizure doctrine); cf. *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (holding that when police move objects in homes to obtain a better view, they initiate a separate search subject to the Fourth Amendment reasonableness requirement).

¹⁵³ It is not clear whether the plain-view seizure doctrine operates as a release valve when the stringency of Fourth Amendment doctrine threatens crime-control needs, or whether the Fourth Amendment reduces the impact of the plain view doctrine by constraining the scope and reducing the number of searches that may give rise to corollary seizures. Most likely, both are true.

¹⁵⁴ Doctrines prohibiting police actions that bear the indices of harassment, such as prosecuting for minor violations, repeatedly searching a particular person or group, or using crimes unrelated to the original investigation to obtain pleas, could also address these concerns.

¹⁵⁵ See Stuntz, *supra* note 14, at 1061 (“[P]rotecting privacy in the home casts a smaller substantive shadow than protecting privacy in glove compartments or jacket pockets.”).

day, computerized equivalents of “papers[] and effects” cited in the Fourth Amendment.¹⁵⁶

B. Originalism Revisited

The Supreme Court has repeatedly trumpeted fidelity to the Framers’ intent in Fourth Amendment cases, asserting that stringent protection of the physical home follows from the plain language of the Fourth Amendment.¹⁵⁷ Justice Scalia has stated that in cases of residential search, courts should strive for the “preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”¹⁵⁸ The historical record and scholarship offer a more nuanced view of the claims of original intent.

Residential property was an important privacy concern in the Founding Era, but it was not the only important concern.¹⁵⁹ Mail and writings were a particularly strong focus of early colonial privacy rights. Court cases, internal post office regulation, and the Organic Postal Act of 1825 accorded near-absolute protection to mail.¹⁶⁰ Judicial opinions of that era observed that “papers are often the dearest property a man can have,”¹⁶¹ and commentators charged that the paramount harm in residential search was having a man’s “desks bro-

¹⁵⁶ U.S. CONST. amend. IV.

¹⁵⁷ Cf. Maclin, *supra* note 18, at 896–97 (“[T]he Justices consult the history of the Amendment on a selective basis [T]he Article proposes that the Court stop considering the historical origins of the Fourth Amendment unless it is able to develop a more effective and consistent method by which to do so.”).

¹⁵⁸ *Kyllo v. United States*, 533 U.S. 27, 34 (2001); see also *Payton v. New York*, 445 U.S. 573, 589 (1980) (Fourth Amendment protection of privacy rights in the home “finds its roots in clear and specific constitutional terms: ‘The right of the people to be secure in their . . . houses . . . shall not be violated.’” (quoting U.S. CONST. amend. IV)).

¹⁵⁹ See Fabio Arcila, *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 10–12 (2007) (describing controversy over writs of assistance); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 590 (1999) (“[T]he Framers adopted constitutional search and seizure provisions with the precise aim of ensuring the protection of *person* and house by prohibiting legislative approval of general warrants.” (emphasis added)). But see David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 48–49 (2005) (arguing that in the Framing Era, the Fourth Amendment applied only to unlawful house searches).

¹⁶⁰ Because postmasters started the first newspapers, citizens suspected that private mail would become public news. In addition, concerns circulated during the revolutionary period that governments were opening or tampering with mail and that private individuals would steal mail in order to glean information about each others’ assets and commit theft or fraud. See DAVID J. SEIPP, *THE RIGHT TO PRIVACY IN AMERICAN HISTORY* 9–16 (1978); Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 562–68 (2007); see also *Denis v. LeClerc*, 1 Martin (o.s.) 297, 297–98 (Orleans 1811) (writer of letter may enjoin its unauthorized publication or disclosure).

¹⁶¹ *Entick v. Carrington*, (1765) 95 Eng. Rep. 807, 817–18 (K.B.) (quoted in *Boyd v. United States*, 116 U.S. 616, 627–28 (1886)).

ken open, his private books, letters, and papers exposed to prying curiosity.”¹⁶²

Close examination of the historical record also suggests that the home and residential privacy meant something quite different than they do today.¹⁶³ Contrary to modern-day sentiments, the consternation over residential searches in the Founding Era was not about the home as a sacred domestic sphere or lynchpin of psychological autonomy. Instead, concern focused squarely on the specific practice of customs and revenue searches of houses under general warrants or writs of assistance.¹⁶⁴ Thomas Davies observes that the common law of the era provided sufficient protection against unjustified intrusion and that warrantless searches were generally presumed illegitimate.¹⁶⁵ However, the common law could not adequately police against the risk that future legislation would make general warrants legal in the future.¹⁶⁶ As William Cuddihy explains, “Open your front door, ran the argument, and the extent of federal invasion will be infinite.”¹⁶⁷ The outcry over the home, which was particularly evocative under English and colonial common law, was an effective strategy for attacking the legality of general warrants.¹⁶⁸

¹⁶² COOLEY, *supra* note 65, at 306. In the modern day, the link between houses and papers is attenuated. As Ricardo Bascuas observes, “Houses . . . are no longer the primary repository of the very papers and effects the Framers most sought to protect.” Bascuas, *supra* note 23, at 580; *see also* Stuntz, *supra* note 14, at 1060 (“The dominant paradigm in search and seizure law has always been the ransacking of a private home, with an emphasis on rummaging around through the homeowner’s books and papers.”).

¹⁶³ For example, protection of the person from privacy invasions featured prominently in these historical accounts. *See* William Cuddihy & B. Carmon Hardy, *A Man’s House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 372 (1980) (describing how the Fourth Amendment was a break from, rather than an extension of, the English tradition of “house as castle,” which offered primarily discretionary protection and led to frequent intrusions on the home).

¹⁶⁴ *See* Davies, *supra* note 159, at 551 (“[T]he historical concerns were almost exclusively about the need to ban house searches under general warrants.”).

¹⁶⁵ *See id.* at 645–46; *cf.* CUDDIHY, *supra* note 18, at 771 (“The prevention of general warrants at the federal level was the preponderant motivation behind the amendment Why debate probable cause for a specific warrant to search one house when a general warrant laid entire towns open to government purview?”); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 218 (1993) (noting that while the Framers were not directly concerned with warrantless searches, such searches were a matter of public concern).

¹⁶⁶ *See* Davies, *supra* note 159, at 590 (arguing that, for this reason, the Framers adopted constitutional search and seizure provisions).

¹⁶⁷ *See* CUDDIHY, *supra* note 18, at 766.

¹⁶⁸ *See* Davies, *supra* note 159, at 603. In Davies’s view, the house was important intrinsically as well as strategically. He writes that even though modern cases recognize the unique status of the home at common law, “the rhetoric of modern doctrine falls short of recognizing the unique status accorded the house at common law. The domicile was a sacrosanct interest in late eighteenth-century common law” *Id.* at 642. Accordingly, the house received greater legal protection than places of business and ships. *See* CUDDIHY, *supra* note 18, at 770 (“[T]he dwelling house was not only the focus but a frontier of the

More broadly, scholars dispute whether the primary goal of the Constitution was to protect civil liberties, including privacy. In his scholarship on individual liberties, G. Edward White writes that “the central concerns of those who had convened at Philadelphia and drafted the Constitution . . . were not with what modern commentators would call the ‘civil liberties’ of Americans. . . . They were concerned, fundamentally, with the allocation of sovereign powers between the states and a central government in America.”¹⁶⁹ Cuddihy similarly observes that the Fourth Amendment “was no monument to civil libertarian altruism. . . . Madison did not write the amendment because its ideas commanded constitutional expression but because he was under the political gun of Antifederalism.”¹⁷⁰ The Framers intended the Bill of Rights to garner support for a federal republic.¹⁷¹

Even if the historical record were to reveal home protection as a critical impetus for constitution-making or an exclusive stronghold of colonial privacy concerns, there is still reason to avoid a strict originalist interpretation of the Fourth Amendment.¹⁷² Importing the Fourth Amendment’s purpose to restrict general warrants in the specific historical context of customs and revenue searches to the modern criminal justice system is misguided.¹⁷³ Davies explains, “Singling out and applying a specific common-law doctrine in a modern—that is, changed and foreign—context will often produce results that are different from, or even inconsistent with, the purpose the rule served in its historical milieu.”¹⁷⁴ Moreover, as Tracey Maclin observes, “The reach and meaning of the Fourth Amendment for our society should not be constrained by the expectations of those who lived in 1791.”¹⁷⁵

framers’ concern with privacy, for they accorded places of business lesser protection from promiscuous search and seizure, and ships, in the Collection Act, almost none.”).

¹⁶⁹ G. Edward White, *Revisiting the Ideas of the Founding* 12, 25 (Univ. Va. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 132, 2009), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1202&context=uvalwps>.

¹⁷⁰ CUDDIHY, *supra* note 18, at 770.

¹⁷¹ See White, *supra* note 169, at 24 (claiming that the Bill of Rights signaled the limited power of federal government). The Founders were attuned to the issues of corruption and government tyranny but perceived that the solution lay with a central government, not scrutiny of civil liberties violations. See *id.* at 26.

¹⁷² See Davies, *supra* note 159, at 740–41 (“Applying the original meaning of the language of the Fourth Amendment in a completely changed social and institutional context would subvert the *purpose* the Framers had in mind when they adopted the text.”).

¹⁷³ But see Steinberg, *supra* note 159, at 74 (arguing that the eighteenth-century understanding of the Fourth Amendment limited its scope to unlawful house searches and also arguing for a return to that understanding “not because eighteenth century views on law enforcement are particularly relevant today . . . [but] because we lack coherent, principled alternatives”).

¹⁷⁴ Davies, *supra* note 159, at 743. This statement is especially true given the degree of indeterminacy in the original Fourth Amendment. Maclin observes that beyond the specific prohibition of general warrants, “the scope and meaning of the Fourth Amendment was just beginning to develop” in the Constitutional Era. See Maclin, *supra* note 18, at 968.

¹⁷⁵ See Maclin, *supra* note 18, at 971.

The privacy concerns of a preindustrial nation, newly seceded from Britain, are not the concerns of a technology-rich democracy and complex criminal justice system two hundred years later.

IV

DETHRONING THE PHYSICAL HOME IN THE FOURTH AMENDMENT

To date, the case law and scholarship have assumed that housing exceptionalism affords the utmost respect to residential privacy. One aim of this Article is to illustrate how reflexive protection and property-focused safeguards of the physical home devalue the interests at the heart of privacy protection. Contrary to claims in the judicial precedents and scholarly literature, privacy and exclusionary control over a liberally defined home are not requisite to personhood, objective well-being, or, in some instances, subjective expectations of privacy.¹⁷⁶ Residential search is also not uniquely vulnerable to government harassment nor is the home a particularly effective privacy stronghold against the reach of government. The focus on the physical home in the Fourth Amendment has in turn obscured the privacy harms at stake in residential search protection and romanticized the home into a veritable force field of domestic relations.¹⁷⁷ This Article proposes replacing the expansive and formalistic protection of the physical home, and the rhetoric surrounding residential privacy, with a doctrinal focus on substantive privacy and intimate association.

A. From Iconic Property to Substantive Privacy

In many instances, Fourth Amendment jurisprudence has protected the physical home too expansively and categorically, often at the expense of substantive privacy. Many Fourth Amendment cases, such as in the curtilage context, protect areas that are unlikely to implicate strong substantive privacy interests. Other cases extend protection to searches of living spaces that do not reveal personal information or breach domestic life, such as certain technological scans. At the other extreme, courts have allowed highly intrusive searches just outside the residential property line despite the high likelihood of intrusion on domestic and intimate life.¹⁷⁸ For example, at least one federal court of appeals has held that unaided eavesdropping of activity within homes and hotels from a public vantage point

¹⁷⁶ See *supra* Part II.

¹⁷⁷ See *supra* Part I.

¹⁷⁸ For example, some state courts have held that the Fourth Amendment does not protect the interior of residences from observation with binoculars. See, e.g., *People v. Arno*, 15 Cal. Rptr. 2d 624, 627–28 (Cal. Ct. App. 1979).

does not violate the Fourth Amendment.¹⁷⁹ Although beyond the scope of this Article, substantive privacy and relational harm have also been given short shrift in many nonresidential contexts, such as video surveillance on public streets and searches of students in schools.¹⁸⁰

The theory of privacy advanced in this Article seeks to reorient Fourth Amendment residential privacy protection from the physical home to a stronger, more consistent doctrinal focus on substantive privacy interests. This proposal is not revolutionary. Long-established precedents hold that “the home is sacred . . . because of . . . *privacy* interests in the activities that take place within.”¹⁸¹ Yet, judicial application of this principle has been inconsistent.

What is substantive privacy? Thus far, much of this Article has defined substantive privacy by what it is not. It is not solicitude for the physical housing structure. It is not a focus on property law. It is not the precautionary extension of stringent Fourth Amendment protection to every residential search, regardless of the costs to criminal enforcement and degree of privacy harm. Curbing such housing exceptionalism enables doctrines of substantive privacy and intimate association to develop in residential search. A multiplicity of sources may inform the substantive privacy inquiry, including privacy-oriented Fourth Amendment precedents, concepts of privacy from common law and other legal sources, other constitutional provisions, public perceptions, and evidence of psychological or social impacts from privacy invasion. Admittedly, the specification of substantive privacy in residential search is a long-term constitutional project, particularly given the difficulty of envisioning all present and future search contexts. This Article endeavors only to sketch the broad parameters of

¹⁷⁹ See *United States v. Fisch*, 474 F.2d 1071, 1078–79 (9th Cir. 1973).

¹⁸⁰ See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642–43 (2009) (holding that a strip search of a thirteen-year-old girl was unconstitutional because the facts of the case did not indicate cause for reasonable suspicion). With respect to video surveillance, some local rules and state laws constrain such searches, but there is no comprehensive regulation or case law directly addressing what protection the Fourth Amendment grants in these situations. In *United States v. Knotts*, 460 U.S. 276 (1983), the Court was equivocal in addressing the issue of twenty-four-hour surveillance, noting that “if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” *Id.* at 284; see also Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 *Miss. L.J.* 213, 219–33 (2002) (discussing the history, scope, and problems of closed-circuit television surveillance in the United States and United Kingdom).

¹⁸¹ *Segura v. United States*, 468 U.S. 796, 810 (1984); see also Wilkins, *supra* note 146, at 1111–12 (“Before *Katz*, the home was protected simply because it *was* the home After *Katz*, the home is a protected locale, not only by virtue of its explicit mention in the language of the fourth amendment, but also (and perhaps primarily) because of the human activities innately associated with it.”). It is also plausible to read intimate association into the language of the Fourth Amendment protecting the “right of the people to be secure in their persons.” U.S. CONST. amend. IV.

substantive privacy and to offer illustrative examples of how this analysis can inform residential search.

Substantive privacy in residential search addresses a constellation of privacy impacts. I employ the term substantive privacy as distinct from substantive due process, although substantive privacy may on occasion overlap conceptually with areas of substantive due process protection. A substantive approach to residential search addresses the disruption and infringement of domestic life, especially harms to intimate association. Substantive privacy encompasses psychological harm from privacy invasion; this inquiry emphasizes objective harm. Subjective expectations of privacy do figure in this analysis as required under *Katz* and as befits the fact that searches perceived as extremely intrusive often correlate with objective harm. However, where there is on an *ex ante*, categorical basis only a modest level of perceived intrusiveness and no evidence or reason to suspect objective harm, there is serious question whether the highest standard of probable cause Fourth Amendment protection should apply. Substantive privacy is also attentive to government overreaching and considers whether repeat or ongoing search activity creates an incipient threat of a police state. By considering substantive impact, as well as the potential for widespread or continuous search activity, this inquiry limits government more effectively than housing exceptionalism's physical "zone" of domestic privacy.

Among the substantive privacy interests at issue in residential settings, the harm to intimate association is a critical, indeed prevailing, privacy interest. Intimate association refers to interpersonal interaction and relationships, particularly within the context of close relationships. Privacy of intimate association disregards the physical home in favor of assessing the likelihood that search activity will disrupt domestic life, engender interpersonal conflict, reveal personal information that is private to and constitutive of relationships, and chill socialization and intimacy. Psychological and sociological studies converge on interpersonal relationships as the reason for the significance that people attribute to the home.¹⁸² The strongly relational character of residential privacy parallels the preeminence of social relationships, not physical homes, in human flourishing.¹⁸³ Such rela-

¹⁸² See CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 117, at 86 (reporting that 82 percent of people listed an object as among their most valued possession because it reminded them of a close relative); GRANT McCracken, CULTURE AND CONSUMPTION II: MARKETS, MEANING, AND BRAND MANAGEMENT 35–46 (2005) (“[O]bjects are intended to recall the presence of family and friendship relationships, personal achievements, family events, ritual passages, and community associations.”).

¹⁸³ See John T. Cacioppo et al., *Loneliness Within a Nomological Net: An Evolutionary Perspective*, 40 J. RES. PERSONALITY 1054, 1080–82 (2006) (finding that social isolation is as strong a risk factor for morbidity and mortality as smoking, poor exercise, and high blood

tionships are of critical importance to self-concept, intimacy and sense of belonging, social norms, and even physical health and longevity.¹⁸⁴

A Fourth Amendment theory of privacy of intimate association derives principally from the precedent in *Katz* that reasonable expectations of privacy must “protect *people*, not places.”¹⁸⁵ Other key Supreme Court precedents, particularly curtilage cases, state that protection should not extend to areas that “do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance.”¹⁸⁶ My account of substantive privacy places relational harms front and center in residential search—indeed in the space traditionally occupied by autonomy. This approach nonetheless safeguards those who eschew social life by basing Fourth Amendment protection on the categorical, *ex ante* likelihood of relational harm as well as on a more encompassing account of substantive privacy.

Doctrines of substantive privacy and intimate association are not as clear-cut as a property line. But, with proper doctrinal development, a substantive approach can provide effective guidance to police. The foundation of such development is to assess individual categories of residential search and base protection on the *ex ante* likelihood of substantive privacy and relational harm in each context. In the following sections, I discuss illustrative examples of residential search and potential reforms on the basis of substantive privacy and intimate association.

pressure); L. Elizabeth Crawford et al., *Potential Mechanisms Through Which Loneliness Affects Health*, 37 PSYCHOPHYSIOLOGY S34, S34 (Supp. 2000) (describing in abstract links between loneliness and poor-quality sleep and high blood pressure); Mark Snyder & Nancy Cantor, *Understanding Personality and Social Behavior: A Functionalist Strategy*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 121, at 635, 657 (describing some benefits of intimate social connections).

¹⁸⁴ See Snyder & Cantor, *supra* note 183, at 654; see also Setha M. Low & Irwin Altman, *Place Attachment: A Conceptual Inquiry*, in PLACE ATTACHMENT 1, 7 (Irwin Altman & Setha M. Low eds., 1992).

¹⁸⁵ *Katz v. United States*, 389 U.S. 347, 351 (1967) (emphasis added). In contrast, Thomas Crocker views relational privacy as a liberty interest that may be read into the Fourth Amendment based on the Fourteenth Amendment. See Crocker, *supra* note 56, at 7–8 (“*Lawrence* protects against forms of state intrusion into a person’s home and intimate life in ways that are instructive for overcoming some of the worst consequences of the Fourth Amendment’s third-party doctrine.”).

¹⁸⁶ *Oliver v. United States*, 466 U.S. 170, 179 (1984); see also *Segura*, 468 U.S. at 810 (stating that the need to protect the home springs from “privacy interests in the activities that take place within”). In addition, the Fourth Amendment security interest may provide another basis for situating intimate association within the Fourth Amendment. Jed Rubenfeld argues that the Fourth Amendment protects liberty within “personal life,” and presumably interpersonal life, from the normalizing force of an unchecked government. See Rubenfeld, *supra* note 21, at 127–31.

B. Revisiting the Residential Protection Default

An approach focused on injury to substantive privacy and intimate association unsettles the current constitutional default. Viewed through this doctrinal lens, many contexts of residential search do not warrant their current level of Fourth Amendment protection. Swathes of protection currently afforded to sheds and garbage within residential property, for example, as well as from heat-sensing technology, diminish under this approach. In other instances, such as physical searches of interior living spaces, the proxy of the home more closely tracks substantive privacy interests and Fourth Amendment protection appears sensible. Mindful of the need to guide police action, the Fourth Amendment reforms I describe in this Part employ *ex ante*, categorical protection based on the likelihood that a specific context of search will harm substantive and relational interests (i.e., not based on actual privacy harm to individual defendants).

The basic project of this Article, to reorient the focus of residential search doctrine from the physical home to substantive privacy interests and intimate association, is accomplishable in a few ways. First, we may conclude that certain contexts of residential search are not, as a categorical matter, likely to harm substantive privacy (or objectively reasonable subjective expectations in the language of *Katz*) and exclude them from Fourth Amendment protection. This option has the potential to eliminate some of the most attenuated and questionable instances of search protection. However, it may open the door to unrestrained search activity and provide limited options for controlling repeat searches or ongoing surveillance. A second option derives from Slobogin's proposal for a Fourth Amendment proportionality principle. The proportionality principle enables a standard of reasonableness less than probable cause in some instances based on the strength of the government justification relative to the intrusiveness of the search.¹⁸⁷ This proposal has interesting applications to the present project of calibrating search protection to substantive privacy harm, although the overlapping and conceptually ambiguous inquiry under *Katz* complicates the analysis. Because the two-part test to determine whether an action violates the Fourth Amendment implicates reasonableness at both stages, substantive privacy interests may feature repetitively (indeed, this awkwardness may be one reason physical property has figured so heavily in the initial determination of Fourth Amendment search).

The following sections apply a substantive privacy model, utilizing both traditional approaches and proportionality analysis, to the

¹⁸⁷ See SLOBOGIN, *supra* note 11, at 38–39.

Fourth Amendment contexts of thermal-scanning technology, curtilage protection, and physical searches of the home interior.

1. *Tethering Interior Search Protection to Substantive Privacy: Kyllo and Technological Scanning of the Home*

The Supreme Court has struggled with the issue of technological invasions of the home.¹⁸⁸ Such searches include certain kinds of visual surveillance, tracking devices, and thermal scans. In *United States v. Karo*, the Court ruled that police needed a warrant to track the location of a beeper in private residences.¹⁸⁹ More recently, in *Kyllo v. United States*, the Court considered whether a warrantless thermal scan that revealed heat patterns indicative of a marijuana-growing operation constituted an unconstitutional search.¹⁹⁰ It held that the government conducts a Fourth Amendment search when it uses a device not in general public use to investigate the details of a home that would be unknowable absent physical intrusion.¹⁹¹ The majority opinion employed strong and decisive language about the preeminent importance of residential privacy, although the holding left open a substantial loophole for residential searches that employ technology that is in general use.¹⁹²

Rather than reflexively defend the home or inquire as to whether a technology is in general use, courts should determine whether a residential scan reveals details of intimate association, is likely to chill or harm relationships, or otherwise intrudes on the resident's core privacy interests by revealing personal information. A substantive model of privacy suggests that extending probable cause search protection to technology that does not reveal intimate, interpersonal, or personal information is misguided. Prior to *Kyllo*, lower courts held that thermal scans and similar searches were too "impersonal" to warrant Fourth Amendment protection.¹⁹³ Reorienting Fourth Amendment protection toward intimate association and domestic life refines these holdings and provides an *ex ante* means of differentiating between technologies that impermissibly encroach on privacy and those that do not. Such encroachments include technological searches that are likely, as an *ex ante*, categorical matter, to chill association, hamper authenticity and spontaneity, reveal the content of interpersonal interaction, or otherwise expose personal or sensitive information. In

¹⁸⁸ In particular, the Court has had to create Fourth Amendment doctrine to govern technological invasions that the Wiretap Act does not regulate. 18 U.S.C. §§ 2510–2522 (2006).

¹⁸⁹ 468 U.S. 705, 714–15 (1984).

¹⁹⁰ 533 U.S. 27, 29, 35–37 (2001).

¹⁹¹ See *id.* at 40.

¹⁹² See Slobogin, *supra* note 52, at 1393–94.

¹⁹³ See, e.g., *United States v. Pinson*, 24 F.3d 1056, 1058–59 (8th Cir. 1994).

making this determination, courts should address the scan or monitoring as employed and not the potentially privacy-threatening aspects of the technology or undeveloped future technologies.¹⁹⁴

By this metric, technologies that sense heat patterns indicating plant growth or mere human presence do not threaten the core principles of intimate association and substantive privacy.¹⁹⁵ In *Kyllo*, Justice Scalia railed that the thermal scan at issue could reveal “intimate details” such as what hour the “the lady of the house” takes her bath.¹⁹⁶ In fact, the technology would have merely registered heat suggesting a human occupant and hot water.¹⁹⁷

The attenuated privacy interest in protection from thermal scans makes this type of search one of the better candidates for reclassification as a non-search. Here, substantive privacy and intimate association suggest a bright-line, *ex ante* rule excluding thermal scanning and comparable technologies from Fourth Amendment search. Under *Katz*, there is little evidence that revealing heat patterns infringes upon subjective expectations of privacy, much less objectively reasonable expectations.¹⁹⁸ There is limited propensity for psychological harm from monitoring that reveals this kind of impersonal physical information and specification. Indeed, this information is not that different from the data utility companies gather regarding energy and water usage, particularly under the emerging smart-grid systems that

¹⁹⁴ See Alyson L. Rosenberg, Comment, *Passive Millimeter Wave Imaging: A New Weapon in the Fight Against Crime or a Fourth Amendment Violation?*, 9 ALB. L.J. SCI. & TECH. 135, 138–40 (1998); see also James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 438 (2002) (proposing that police investigations using technologies that enhance human sensory capabilities and threaten genuine interests in confidentiality are searches for the purposes of the Fourth Amendment).

¹⁹⁵ Most Fourth Amendment scholars positively view the protection that *Kyllo* extends. For a balanced assessment of the case, see Slobogin, *supra* note 52, at 1393–95.

¹⁹⁶ *Kyllo*, 533 U.S. at 38.

¹⁹⁷ In addition, some forms of technological surveillance may enhance privacy by reducing the need for more intrusive physical searches of the home. See Lee C. Milstein, Note, *The Fortress of Solitude or Lair of Malevolence? Rethinking the Desirability of Bright-Line Protection of the Home*, 78 N.Y.U. L. REV. 1789, 1790–91 (2003).

¹⁹⁸ Slobogin argues that the intrusiveness rankings for curtilage flyovers (ranked ten out of fifty items, from least intrusive to most intrusive) and binocular observation of a person in a front yard (ranked thirty-three out of fifty items) suggest that people view home surveillance using enhancement devices as more intrusive than the Supreme Court appears to believe. See SLOBOGIN, *supra* note 11, at 69–70. I disagree. First, the rankings, particularly for flyovers, were minimal or moderate. Second, the type of information and interaction that spying with binoculars potentially reveals is far more personal—and interpersonal—than a thermal scan. Indeed, a thermal scan revealing a grow-light system is far more similar to a curtilage flyover, which presumably is designed to detect illegal plant growth or other contraband, than to binocular spying, which implicates interpersonal interaction and domestic life. The difference in intrusiveness rankings may therefore be due to the greater potential for invasion of intimate association and other privacy interests from binocular spying.

track consumption more precisely.¹⁹⁹ It seems that individuals do not perceive this type of monitoring as an intrusion, or they readily habituate to ongoing collection of impersonal, physical information.²⁰⁰

The most compelling reason to hesitate before removing thermal scans from Fourth Amendment protection is not the privacy interest in heat patterns but the potential for misuse of such technology and government overreaching. Specifically, the police could employ thermal scans to wrongly target, harass, or discriminate or, at the other extreme, install them on every curbside. However, this problem does not inevitably require a constitutional solution. If wrongful or ubiquitous search becomes an issue, a variety of potential remedies are available, such as statutory constraints, internal police rules, or liability for discriminatory search.²⁰¹

2. *Correcting Overbreadth: The Example of Curtilage*

The Fourth Amendment protects privacy rights in the area surrounding the home from unreasonable search based on reasonable expectations of privacy.²⁰² Cases have held that a variety of areas adjacent to the home, including gardens, garages, and mowed areas of residential lawns, are protected curtilage.²⁰³ In *United States v. Dunn*,

¹⁹⁹ *But see* Jack I. Lerner & Deirdre K. Mulligan, *Taking the "Long View" on the Fourth Amendment: Stored Records and the Sanctity of the Home*, 2008 STAN. TECH. L. REV. 3, ¶¶ 45–46 (arguing that detailed utility information should be within the purview of the Fourth Amendment because it reveals private information about when a person is at home, sleeping, bathing, etc.).

²⁰⁰ *See id.* For example, people continue to use the Internet despite the collection of information about their web searches, an item arguably more personal than heat patterns. Admittedly, many Internet items, such as breaking news, travel bookings, and blog cites, are difficult, even impossible in modern life, to eschew. But even noncritical, discretionary internet searches do not appear to be "chilled" by personal information collection.

²⁰¹ Alternatively, a constitutional approach could address this problem through a reduced standard of reasonable suspicion (rather than probable cause) coupled with warrant substitutes to constrain police behavior. Slobogin notes that in *Kyllo*, the fact that "all details are intimate details" . . . does not necessarily dictate that *probable cause* is needed to use devices that detect only heat waves and do not reveal their source." SLOBOGIN, *supra* note 11, at 74–75. Intimate association gives the proportionality principle an important reference point for determining the intrusiveness of a search. This reference point is perhaps most useful in the context of thermal scans and other technological searches that only reveal physical attributes of a home.

²⁰² *See* *United States v. Oliver*, 466 U.S. 170, 179 (1984). The curtilage doctrine derives from English common law extending equivalent protection to houses and outbuildings under the law of burglary. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *225 ("[T]he capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall.").

²⁰³ *See, e.g.,* *United States v. Jenkins*, 124 F.3d 768, 773 (6th Cir. 1997) (finding that backyard with "neatly mowed lawn and garden arrangements" is "clearly demarked as a continuation of the home itself"); *United States v. Van Dyke*, 643 F.2d 992, 993 (4th Cir. 1981) (holding that a flower patch bordering mowed lawn 150 feet from a house is not *per se* outside the protected curtilage); *Coffin v. Brandau*, No. 07-cv-835, 2008 U.S. Dist. LEXIS 64952, at *17–18 (M.D. Fla. July 31, 2008) (attached garage).

the Supreme Court articulated a four-part test for determining whether an area is protected curtilage.²⁰⁴ Three of the four factors in the *Dunn* test reference property concepts: proximity to the house, enclosure, and steps taken by residents to secure privacy on their property.²⁰⁵ Only one factor, the nature of the area's use, directly addresses interpersonal interests.²⁰⁶

The Court's curtilage doctrine represents a partial evolution from a property-oriented approach to a substantive-privacy approach that emphasizes intimate association. In *United States v. Oliver*, the Court defined curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home,'" and in both *Oliver* and *Dunn*, the Court stated that judicial inquiry should focus on whether the search is likely to intrude upon intimate activities.²⁰⁷ Yet, the *Dunn* Court still emphasized the physical tie between the curtilage area and the home and accorded substantial weight to property-oriented factors and indicia of publicity.²⁰⁸ While some subsequent federal and state cases have weighed intimate activity in the residents' use of the area,²⁰⁹ others have based their rulings primarily on whether the area was enclosed or within the home's "mow lines."²¹⁰ A few state courts have categorically extended protection to open fields

²⁰⁴ 480 U.S. 294, 301 (1987).

²⁰⁵ See *id.* Assuming the analysis narrowly targets the property immediately surrounding the home, proximity to the house may indirectly implicate intimate association.

²⁰⁶ Commentators have also criticized curtilage doctrine for affording greater protection to rural residents than to urban or suburban dwellers. See Brendan Peters, Note, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 976-79 (2004); see also Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. CIV. RTS. L.J. 297, 311-19 (2005) ("Factors like proximity to the home or the existence of a fence make sense only in a relatively rural area.").

²⁰⁷ *Oliver*, 466 U.S. at 180 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); see also *Dunn*, 480 U.S. at 300-01.

²⁰⁸ *Dunn*, 480 U.S. at 301-02.

²⁰⁹ See, e.g., *Simko v. Town of Highlands*, 276 Fed. App'x 39, 41 (2d Cir. 2008) (finding that the presence of an overflowing dog "'poop pit' strongly suggests that the area surrounding the shed would be unattractive to private home activities").

²¹⁰ See, e.g., *United States v. Reilly*, 875 F. Supp. 108, 119 (N.D.N.Y. 1994) (citing *Dunn* factors but basing decision on the fact that officers found marijuana plants on a "groomed area" of the lawn despite the area's lack of enclosure or use in domestic life); *State v. Bayless*, No. 92-CA-527, 1992 Ohio App. LEXIS 6280, at *8 (Ohio Ct. App. Dec. 10, 1992) (holding that seizure of marijuana plants on the mowed lawn between the house and garden violated rights in the protected curtilage); *State v. Townsend*, 412 S.E.2d 477, 479 (W. Va. 1991) (holding that hog house outside the mowed area of lawn was not within curtilage); see also Peters, *supra* note 206, at 965-73 (discussing the significance courts have attributed to "mow lines"); Rowan Themer, Comment, *A Man's Barn Is Not His Castle: Warrantless Searches of Structures Under the "Open Fields Doctrine"*, 33 S. ILL. U. L.J. 139, 145-48 (2008) (reviewing state and federal cases determining whether a search occurred in open fields or protected curtilage).

via state constitutional protection for possessions,²¹¹ reinterpretation of reasonable expectations of privacy,²¹² and the presence of “No Trespassing” signs.²¹³

A substantive model of residential privacy calls into question the focus on physical property and the inconsistent judicial attention to intimate association and domestic life in curtilage cases. In a postindustrial society, the outer yard and outbuildings are often places of attenuated privacy interests, particularly with respect to intimate association and domestic life. For example, a physical search of shrubbery at the yard’s periphery, vegetable gardens, or even a garage attached to a home is unlikely to cause objective harm to intimate association or even create the highest levels of perceived intrusion upon privacy expectations. These searches are also unlikely to expose details of interactions, disrupt relational spaces, chill socialization, or otherwise strike at the heart of domestic life. In contrast, searches of decks, outdoor dining areas, narrowly circumscribed areas directly surrounding the home, and other outdoor locations commonly used for socialization are more likely to disrupt or chill intimate association and domestic life—a fact that argues against the categorical exclusion of curtilage from Fourth Amendment protection.

Beginning with the most conservative option for reform, one way to reorient Fourth Amendment residential protection toward substantive privacy is to consistently and explicitly accord predominant weight to the third *Dunn* factor, the nature of the area’s use. The focus of this inquiry should be whether an area is categorically likely to be used for domestic life (e.g., living, interacting, and socializing) as opposed to, for example, storage of household equipment or open space. This is a practical revision, not a theoretical departure from key Court precedents, except to the extent that I propose weighting this factor even more strongly than most precedents suggest. Another alternative, more responsive to relational intrusion but perhaps less so to certain nonrelational privacy interests, is to make the third *Dunn* factor, the nature of the area’s use, the exclusive inquiry. This approach would employ other factors, such as proximity to the house, only to the extent that they inform the analysis of use and whether a search

²¹¹ See *Falkner v. State*, 98 So. 691, 692 (Miss. 1924) (holding that the state constitution protects areas with no buildings as “possessions”).

²¹² See *State v. Kirchoff*, 587 A.2d 988, 994 (Vt. 1991) (holding that an owner of an open field has a reasonable expectation of privacy where fences or signs reasonably indicate that strangers are not welcome).

²¹³ See *State v. Bullock*, 901 P.2d 61, 75–76 (Mont. 1995) (interpreting the state constitution to mean that persons may have a reasonable expectation of privacy in areas of land beyond the curtilage if they place fences, “No Trespassing” signs, or other indications that entry is forbidden); *People v. Scott*, 593 N.E.2d 1328, 1330, 1338 (N.Y. 1992) (holding that open fields may fall within curtilage where landowners place fences, post “No Trespassing” signs, or otherwise indicate that entry is not permitted).

intrudes upon intimate association.²¹⁴ To provide guidance to law enforcement, these reforms would utilize *ex ante*, categorical analysis of whether various areas are likely settings for intimate association.

Proposals for reorienting the *Dunn* test more tightly around the nature of the area's use are feasible, but they raise the concern of too much unregulated search. An option that addresses this problem is to pair a modified version of the *Dunn* test focused on the nature of the area's use with a more flexible, fine-grained approach to reasonableness balancing. Courts could apply reasonableness balancing in curtilage cases under a less strict standard than probable cause based on the strength of the underlying associational and other privacy interests. This approach is not entirely novel in residential search and seizure cases. A handful of cases from state and federal courts have suggested, indirectly or in dicta, that reasonable suspicion may suffice in some instances of warrantless curtilage search.²¹⁵ In the scholarly literature, Slobogin has argued persuasively for a proportionality principle of reasonableness that weighs the strength of the justification for the search against the level of intrusiveness to enable multiple tiers of reasonableness, including standards lower than probable cause.²¹⁶ He grounds this proposal in the precedent of *Terry v. Ohio*, which applied the lower standard of reasonable suspicion to a stop-and-frisk search.²¹⁷

As applied to curtilage, a proportional or flexible approach to reasonableness balancing would weigh the state's justification versus the *ex ante*, categorical likelihood of substantive privacy impact from police conduct, with the probable intrusion on intimate association a critical factor. For example, the circumscribed area directly surrounding the house, decks, patios, and comparable outdoor spaces could retain traditional probable cause protection based on the likely impact of such searches on intimate association and domestic life. Areas of curtilage less likely to be implicated in intimate life, such as storage outbuildings, garages, and garbage within the curtilage could be subject to a reduced standard of reasonable suspicion.²¹⁸ Spaces that are

²¹⁴ To better account for nonrelational harms in this scenario, a privacy-focused reasonableness inquiry into the search's scope, temporal period, character, and degree of intrusiveness could accompany the "nature of the use" factor.

²¹⁵ See SLOBOGIN, *supra* note 11, at 242 n.108 (compiling cases, including curtilage cases, allowing warrantless searches based on less than probable cause).

²¹⁶ See *id.* at 30 (arguing that the proportionality approach responds to the "intuition, reflected throughout our jurisprudence, that the government's burden should vary depending on the effect of its actions on the individual"). He identifies two standards lower than probable cause: reasonable suspicion and relevance. He defines reasonable suspicion as thirty percent certainty that criminal activity is occurring and relevance as five percent certainty that criminal activity is occurring. See *id.* at 38–39.

²¹⁷ *Id.* at 30.

²¹⁸ See *id.* at 108–15 (referencing empirical study of levels of perceived intrusiveness).

unlikely to implicate substantive privacy or intimate association interests, such as outlying gardens or dog houses, could be subject to a low standard such as relevance or excluded altogether from Fourth Amendment protection.²¹⁹

This description is a preliminary sketch of the contours of a revised curtilage doctrine; development of curtilage subtypes and accompanying standards of protection will proceed best over time and in the context of judicial precedent. In certain cases, a reasonableness balancing approach will entail at least initial uncertainty as to the applicable standard for intermediate or mixed-use areas. In light of the exclusionary rule, police may opt for caution in ambiguous cases and secure traditional warrant protection (a process that can often be accomplished expeditiously). This is not a bad result. Notably, similar uncertainty exists in the present doctrine, particularly as it is implemented by the lower courts: there is currently significant ambiguity for law enforcement as to whether areas are protected curtilage or unprotected open fields.

Although the proposals discussed in this section may appear to radically revise the law, in fact the case law reveals increasing judicial ambivalence toward the curtilage doctrine. For example, there is limited protection for arrest within the curtilage; thresholds of homes are considered public places for the purpose of arrest.²²⁰ Courts do not appear hesitant to hold that outdoor areas are open fields rather than protected curtilage, and following *California v. Ciraolo*, the Fourth Amendment no longer protects curtilage from aerial surveillance.²²¹ An increasing number of circuits have opted to review curtilage determinations *de novo* rather than apply the clear error standard.²²² The narrowing of curtilage protection and the suggestion in a handful of cases that less than probable cause may be acceptable in curtilage

²¹⁹ Slobogin proposes that search and seizure doctrine encompass all government action that constitutes a search for evidence, including countless areas now excluded, and that warrants or warrant substitutes apply in all cases absent exigency. *See id.* at 45–47. In the residential search context, this Article’s depiction of the inefficiency and intransigence of the iconic home may suggest less dramatic reform. Retaining some form of the *Dunn* test but enabling some searchers with less than probable cause is a more incremental, and thus more palatable, reform. Categorically excluding some government action on curtilage as a non-search based on attenuated relational and other privacy interests may allow more efficient sifting and use of judicial resources. Similarly, requiring a warrant or warrant substitute for all curtilage searches may not be cost effective. From the perspective of resource conservation, the Supreme Court should not foreclose the possibility that some instances of residential search will qualify as searches and meet a proportional balancing test, perhaps under the lowest relevance standard, but do not require *ex ante* review in the form of a warrant substitute.

²²⁰ *See* *United States v. Santana*, 427 U.S. 38, 42 (1976).

²²¹ *See* 476 U.S. 207, 210 (1986).

²²² *See* Jake Linford, Comment, *The Right Ones for the Job: Divining the Correct Standard of Review for Curtilage Determinations in the Aftermath of Ornelas v. United States*, 75 U. CHI. L. REV. 885, 886–87 (2008).

searches hints that some of the reforms described in this section may be quietly beginning.²²³

3. *The Home as a Proxy: Interior Physical Searches*

The physical home has doctrinal value in selective contexts as a proxy for substantive privacy and privacy of intimate association. Homes are important to privacy and personhood not because homes symbolize intimate ties but because they so frequently shelter them. The home serves as the “stage” for household life and a variety of social relationships.²²⁴ An array of interpersonal processes takes place in the home including “social and cultural norms and rules, affective, emotional, and evaluative bonds, and cultural rituals and practices.”²²⁵ Psychological and sociological studies converge on interpersonal relationships as the reason for the significance that people attribute to their homes.²²⁶ Fourth Amendment protection should derive from the parameters of the physical home only where they are, as a categorical matter, a reasonably accurate proxy for substantive interests.

Physical searches that intrude on interior residential living spaces, or the “seat of family life,” entail a high risk of substantive privacy harm.²²⁷ People perceive searches of residential interiors, particularly bedrooms, as more intrusive than other forms of residential search.²²⁸ This finding is hardly surprising. Extensive physical searches of home interiors inflict objective harm by engendering fear, suspicion, and blame as government officers invade living spaces and frequently damage possessions. Cohabitants may feel that the suspect has brought this invasion upon them, and the criminal investigation is likely to raise questions or suspicions about the suspect’s character and behavior, even if the suspect is innocent.

²²³ See *supra* note 215.

²²⁴ See Irwin Altman, *Toward a Transactional Perspective: A Personal Journey*, in ENVIRONMENT AND BEHAVIOR STUDIES: EMERGENCE OF INTELLECTUAL TRADITIONS 225, 240 (Irwin Altman & Kathleen Christensen eds., 1990) (“[I]mportant human relationships occur in homes, including intimate social bonds and all manner of family relationships.”); see also CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 117, at 121–24 (“[A] home is much more than a shelter; it is a world in which a person can create a material environment that embodies what he or she considers significant.”); MCCracken, *supra* note 182, at 35 (observing that the home and its unique objects have “the effect of deeply personalizing the present circumstances”).

²²⁵ Werner et al., *supra* note 113, at 1, 3.

²²⁶ See CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 117, at 86 (reporting that 82 percent of people listed an object as among their most valued because it reminded them of a close relative); MCCracken, *supra* note 182, at 35–46 (noting role in domestic life of “objects [that] are intended to recall the presence of family and friendship relationships, personal achievements, family events, ritual passages, and community associations”).

²²⁷ See *Poe v. Ullman*, 367 U.S. 497, 551 (1961).

²²⁸ See *supra* notes 138–44 and accompanying text.

Interior or extensive residential searches also inflict harm by interrupting domestic life. Search activity halts the conversations, interactions, and domestic activities that are the foundation of interpersonal relationships and does so most severely when the search is prolonged or repetitious. Physical searches for contraband or evidence can also be quite destructive of living spaces. These searches not only disturb the suspect and any cohabitants but also disrupt (and even destroy) core living areas. The disruption of relational spaces in the home and the potential exposure of private items to social intimates create a high risk of privacy harm.²²⁹ Admittedly, these dynamics may occur in curtilage and other less intrusive residential searches, but they are typically less severe.²³⁰

The likelihood of harm to domestic life and intimate association merits the retention of traditional probable cause and warrant protection for physical searches of home interiors. By home interior, I mean the rooms inside the house rather than attached sheds or garages. The strong privacy and relational interest in such spaces may also counsel removing some of the established exceptions that apply to physical searches of home interiors. For example, an analytical focus on substantive privacy and relational harm suggests eliminating or restricting exceptions based on third-party, cohabitants' consent to residential search of home interiors.²³¹ As with the other reforms I

²²⁹ Contrary to popular intuition, the fact that police see or handle personal items is a lesser consequence of house search. Police are generally strangers, and our self-presentation and interpersonal concerns before them are highly attenuated. If the concern is that police will discuss private information or embarrassing activities not the subject of the crime with other community members, an internal rule prohibiting disclosure to a community member or tort liability for any such disclosure can address this problem. For a discussion of the problem of use of private information discovered in criminal search, see Krent, *supra* note 150, at 51 (arguing that seized property should be subject to "use restrictions . . . confining the governmental authorities to uses consistent with the [Fourth] Amendment's reasonableness requirement").

²³⁰ Another example of a doctrine that promotes interpersonal conflict within the home is third-party consent, which enables a third party with common authority to consent to search. See *United States v. Matlock*, 415 U.S. 164, 171 (1974). In recent scholarship, Thomas Crocker has argued persuasively that this doctrine forces the suspect to assume the risk of interpersonal sharing. See Crocker, *supra* note 56, at 48–49.

²³¹ Traditionally, third-party consent cases have focused on a cohabitant's apparent authority to consent to police trespass and search rather than on substantive privacy and relational harm. In a substantive privacy framework with intimate association as a key concern, it is clear that consent does not obviate the risk of relational harm from the search with respect to the defendant and *other* cohabitants or visitors. Also, the assumption in the literature is that a cohabitant who consents has signaled the end of the relationship. The evidence belies this assumption and seriously calls into question whether an *ex ante*, categorical approach to home interior search should recognize third-party consent. In light of the evidence that many third-party consenters do not understand that they are consenting, that they are free to withdraw consent, or the ramifications of their consent, there is a significant likelihood that consent will damage a viable relationship between the defendant and consenting cohabitant. See, e.g., Dorothy K. Kagehiro et al., *Perceived Voluntariness of Consent to Warrantless Police Searches*, 18 J. APPLIED SOC. PSYCHOL. 38, 46–47 (2006) (finding

discuss, the protection of privacy in home interiors via probable cause and warrants for physical search should be *ex ante* and categorical. This example of physical searches of interior living spaces illustrates how substantive privacy and intimate association can yield clear rules to guide police action. As a result, a home interior search will on occasion receive robust protection despite the fact that the search does not harm substantive privacy and intimate association interests of the specific defendant and cohabitants. On balance, the benefits of providing guidance to law enforcement outweigh these costs.

Proponents of strong privacy protection may be reluctant to distinguish physical (or comparably intrusive technological) searches of home interiors from less intrusive residential searches. Scholars have argued that broadly protecting property affords stronger privacy protection than the *Katz* reasonable expectations test.²³² Others claim that if protection of intimate life is a vital interest, then it deserves the most stringent and precautionary form of privacy protection. By this reasoning, the categorical protection of the home and its environs from all forms of government intrusion enables intimate relations to develop free from government interference.²³³ This approach, however, resurrects housing exceptionalism with all of its attendant costs to doctrinal efficiency and law enforcement. Requiring probable cause and warrant protection for every context of residential search (a standard higher than the Supreme Court's current approach) would hinder criminal law enforcement, undermine public support for privacy protection, and increase pressure on the judiciary to carve exceptions from residential search protection. Consequently, the approach I advocate tailors protection more narrowly to intimate life.

significant actor (third party) and observer (court) differences in perceptions of the perceived voluntariness of consent and the ramifications of legal consent). In addition, a substantive approach, by redirecting the inquiry to privacy harm, raises the question of whether the type of residential search, and its invasiveness, should matter to third-party consent cases.

²³² See Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1364 (2004) ("Instead of protecting individual expectations of privacy directly, courts might best protect privacy in public life *indirectly* by identifying and protecting those features of our society, including those features of public space, that allow anonymity and other privacy-related interests to exist in sufficient measure."); see also Bascuas, *supra* note 23, at 579, 626–28 (advocating that Fourth Amendment doctrine abandon the direct protection of privacy and instead protect property, broadly and pragmatically defined).

²³³ I thank Tommy Crocker for his comments on this point.

V

REVISING THE THEORY OF THE INVIOULATE HOME:
OBJECTIONS AND CONSIDERATIONS

Removing residential privacy rights protection from its hallowed and long-standing position of privilege represents an upheaval of Fourth Amendment doctrine. This Part responds to concerns and objections to revising the protection of privacy rights in the home. Specifically, I consider the security interest in the Fourth Amendment, the problem of repeat search, and social norms of privacy.

A. Security and Other Privacy Interests

One objection to my account is that criminal search protection is not about privacy, relational or otherwise, but about the right to security or other interests.²³⁴ In *Minnesota v. Carter*, Justice Anthony Kennedy wrote that the protection the home receives under the Fourth Amendment has “acquired over time a power and an independent significance justifying a more general assurance of personal security in one’s home, an assurance which has become part of our constitutional tradition.”²³⁵ Jed Rubenfeld has described this concept as the right to be let alone from the progressively normalizing force of the government.²³⁶ He has advocated replacing the current doctrinal focus on privacy with a reinvigorated notion of security.²³⁷

To the extent that housing exceptionalism is based on psychological and political rationales that falter upon closer examination, a new foundation for protection is necessary. The conceptualization of the Fourth Amendment security interest, however, does not presently offer a sufficiently firm and articulated ground. First, the interest in security is quite vague. It is not clear how it differs from the Supreme Court’s jurisprudence or the scholarship on privacy. Second, security presumably dovetails to some degree with the principle of intimate association. A principal impetus of our desire for security is to enable interpersonal sharing and social life.²³⁸ Revising housing exceptionalism promotes security, and other liberties, by refocusing the Fourth Amendment on the substantive interests at stake in residential search. With respect to interests other than security, I acknowledge that there may be reasons for affording protection to homes other than the rationales explored in this Article. When autonomy or other privacy

²³⁴ Commentators have noted “the difficulties in predicating constitutional protection on anything so abstract and manipulable as privacy.” Bascuas, *supra* note 23, at 580.

²³⁵ *Minnesota v. Carter*, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring).

²³⁶ See Rubenfeld, *supra* note 127, at 784.

²³⁷ See Rubenfeld, *supra* note 21, at 161.

²³⁸ See Charles Fried, *Privacy*, 77 YALE L.J. 475, 483–84 (1968).

interests are at issue, however, most of the proposals in this Article can accommodate those interests.

B. Repeat Searches and Ubiquitous Monitoring

One concern of more narrowly targeting residential privacy protection is that citizens may be subject to repeat searches or widespread monitoring. This Article has primarily contemplated discrete instances of search. Indisputably, a search that does not extensively interfere with substantive privacy or intimate association may eventually do so if it is repetitious. For example, a one-time or occasional inspection of certain kinds of curtilage poses limited substantive harm to interpersonal life; repeat inspections occurring over an extended period are a different matter.²³⁹ Harm occurs because of the cumulative impact of the privacy invasion, as well as the experience of prolonged loss of control.

This danger is especially pervasive in technological searches because of the capacity for continuous and widespread surveillance. There are a variety of options to address this problem. Search warrants or search-warrant substitutes provide an important measure of protection against repeat searches and ubiquitous surveillance. Statutes and internal police rules can also address repeat searches and prevent the development of a “police state.”

With respect to physical searches of curtilage and other residential spaces, internal checks on repeat searches are available. Law enforcement has limited resources.²⁴⁰ Police lack the time and resources necessary to repeatedly search a large number of geographically dispersed residences (as opposed to central streets and thoroughfares). This constrains, but does not eliminate, the repeat-search problem. As with technology, legal constraints and remedies can address repeat searches. A revised Fourth Amendment approach to residential search could, for example, extend heightened protection to repeat searches by requiring a warrant or higher standard of cause following the initial search. Statutes, internal rules, and a cause of action against police for search action that rises to the level of harassment are other possible sources of redress.²⁴¹

²³⁹ Cf. Tracey Maclin, *Police Interrogation During Traffic Stops: More Questions Than Answers*, 31 CHAMPION 34, 34–36 (2007) (describing precedents allowing police to stop and question motorists about subjects unrelated to the purpose of the traffic stop).

²⁴⁰ See, e.g., Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1199 (2001) (describing limited police resources as one justification for eschewing strong prohibitions on deception in interrogation).

²⁴¹ For members of protected classes, state prohibitions against discrimination and the availability of federal Section 1983 actions to redress discrimination and other constitutional violations may also protect against repeat search that rises to the level of discrimination or harassment. See 42 U.S.C. §§ 1983, 14141 (2006).

C. Social Norms of Privacy

If people believe homes should be inviolate, then shouldn't the Fourth Amendment reflect this belief? In other words, has my account neglected the proper role of subjective perceptions and social norms in defining privacy law? My response to this concern is twofold. First, the physical home is an imperfect proxy for what people find most meaningful about domestic spaces. The strongest focus of public consternation about residential privacy is presumably on incursions that reveal intimate associations and activities.²⁴² The available empirical evidence does not test this directly, but Slobogin and Schumacher's findings are broadly consistent with the notion that residential searches that expose, harm, or even symbolize intimate association, such as searches of bedrooms or home interiors, are considered the most intrusive.²⁴³

Second, the *Katz* test requires the Court to consider subjective expectations of privacy that "society is prepared to recognize as 'reasonable.'"²⁴⁴ An analysis focused exclusively on majoritarian views founders on the circularity between law and privacy norms and disadvantages minority interests and emerging technologies. Objective reasonableness must also be a factor. The limited research to date suggests modest effects from discrete physical invasions of spaces, particularly when relational harm is not at issue, and less harm from the exposure of possessions or embarrassing items to law enforcement than to intimates.²⁴⁵ There is not a strong basis in law or other evidence to conclude that housing exceptionalism meaningfully safeguards against privacy harm.

CONCLUSION

The Fourth Amendment has disproportionately protected residential privacy rights on the basis of property-law concepts and the rhetoric of the inviolate physical home. Housing exceptionalism has decreased the coherence and efficiency of the Fourth Amendment and derailed doctrine from the goal of protecting citizens from substantive privacy harm. Contrary to the current understanding of Fourth Amendment doctrine, the privileging of the home within criminal search is not a principled response to psychological and political exigency or original intent. I advocate replacing housing excep-

²⁴² See ALTMAN, *supra* note 103, at 22 ("Privacy is usually an interpersonal event . . .").

²⁴³ See Slobogin & Schumacher, *supra* note 16, at 738–39 tbl.1.

²⁴⁴ See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

²⁴⁵ See *supra* note 118 and accompanying text. Prioritizing intimate association over protection of the physical home is also consistent with the psychology literature conceptualizing privacy as interaction management. See Laufer & Wolfe, *supra* note 91, at 33.

tionalism and formalist property approaches with a strong and consistent doctrinal focus on harm to substantive privacy and intimate association.