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Susan Bandes

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# Power, Privacy and Thermal Imaging

Susan Bandes†

Given that this is a symposium about privacy and technology, the first and most important point of my article is this: The Fourth Amendment is not about privacy, and the Fourth Amendment challenges posed by thermal imaging, Carnivore, Magic Lantern, and the like are most usefully viewed, not as problems caused by advancing technology, but as symptoms of a deeper problem with modern Fourth Amendment jurisprudence. The first part of this statement echoes a central thesis of Raymond Ku's article. Professor Ku asserts that the Fourth Amendment is not about privacy but about governmental power.<sup>1</sup> The government's power to intrude raises concerns about privacy, but also about force and coercion, about indiscriminate and discriminatory intrusions, and ultimately, about the measure of our liberty. The *Katz*<sup>2</sup> case may well have been written in an effort to constrain government power and protect individual liberty, but it has become increasingly a case about privacy, and the transformation has, by and large, unleashed governmental power at the expense of our liberty.

Professor Ku and I might part company somewhat, however, on the significance of technology to the debate about the Fourth Amendment. Although he appears to view technology as a challenge to pre-existing doctrinal understandings, and an occasion to rethink them, I will argue that the doctrinal understandings deserve to be rethought quite apart from the advent of technological advances.

To begin with our common ground, Professor Ku and I agree that refocusing Fourth Amendment analysis from privacy to governmental power would have a number of salutary ef-

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1. Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance After Kyllo*, 86 MINN. L. REV. 1325 (2002).

2. *Katz v. United States*, 389 U.S. 347 (1967).

fects. Ku notes that the "Supreme Court has transformed the Fourth Amendment from a constitutional provision delineating the scope of governmental power generally as determined by the people into a provision that protects only isolated pockets of interests as determined by judges."<sup>3</sup> I will return later to his position that the people (by which he means juries and perhaps legislatures) should determine the scope of these protections. For now, my focus is on his astute observation that current doctrine creates isolated pockets of interest. Current doctrine is atomistic rather than holistic; focused on defining the pockets of privacy each of us is permitted to keep from the government's prying eye, rather than on creating and enforcing an effective web of constraints against encroaching government power. This difference in focus has crucial implications.

The question of whether particular government conduct amounts to a search is the threshold question determining whether the Fourth Amendment will provide any constraint at all. The *Katz* test acts as an on-off switch, and when it is off, the governmental conduct is subject, not to lesser constitutional protection, but to no protection at all. When the switch is on, it triggers the (alleged) per se rule in favor of warrants, as well as the exclusionary rule. Commentators have noted the problem of having such dramatic consequences riding on a single question,<sup>4</sup> and of placing judges in the unpleasant and risky position of having to exclude evidence of crime, and possibly letting "[t]he criminal . . . go free."<sup>5</sup> Thus, as Justice Scalia seems to suggest in *Kyllo*, the *Katz* test has become a way to avoid what are perceived to be the onerous effects of the warrant requirement.<sup>6</sup>

It is arguable that *Katz* did not start out as a tool for avoiding the warrant requirement—quite the contrary.<sup>7</sup> Its increasing focus on the legitimacy of the complainants' expectations and on the fictional notion of assumption of risk,<sup>8</sup> however, has

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3. Ku, *supra* note 1, at 1357.

4. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974).

5. "[B]ecause the constable has blundered." *People v. Defore*, 150 N.E. 585, 587 (1926) (Justice (then Judge) Cardozo's famous criticism of the rule).

6. See *Kyllo v. United States*, 533 U.S. 27, 31-39 (2001).

7. See Amsterdam, *supra* note 4, at 383-86.

8. The articles presented by Professors Swire, Schwartz, and Janger illustrated well the difficulties for the populace inherent in understanding the nature of the risks we assume, and in choosing not to assume them. See Ed-

transformed it into just such an implement. Excluding searches from the reach of the Fourth Amendment is made easier when the interests invaded are portrayed as individualistic. Fourth Amendment standing doctrine, which the Court has declared to be a subspecies of "search" doctrine,<sup>9</sup> illustrates the atomistic nature of search doctrine and its consequences. It not only declares the Fourth Amendment interests at stake to be personal to the defendant asserting them, but portrays the interests possessed as narrowly as possible.<sup>10</sup> Fourth Amendment standing doctrine rejects the available model from Article III standing doctrine, which sometimes permits standing based on the importance of the principle and the recognition that it affects others besides the individual litigant.<sup>11</sup> Indeed, it is inconsistent with the model on which the exclusionary rule is based, which views the Fourth Amendment not as a personal right but as a broad constraining principle. Unfortunately, if a litigant cannot establish standing to challenge the validity of a search, the exclusionary rule does him little good.

Standing doctrine permits law enforcement agents to engage in conduct that would be illegal if certain litigants complained about it, so long as it directs it at those without the right to complain. In the Court's metaphysically challenging parlance, the conduct is "not a search"<sup>12</sup> as to certain persons, though it is as to others. Standing law encourages even searches of homes that invade the privacy of homeowners, so long as it is the visitor, not the homeowner, who is caught with contraband.<sup>13</sup> Even intentional police misconduct like the theft

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ward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 MINN. L. REV. 1219 (2002); Peter P. Swire, *The Surprising Virtues of the New Financial Privacy Law*, 86 MINN. L. REV. 1263 (2002).

9. See *Rakas v. Illinois*, 439 U.S. 128, 140 (1978).

10. See *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980); *Rakas*, 439 U.S. at 133-40; John M. Burkoff, *When is a Search Not a "Search"? Fourth Amendment Doublethink*, 15 U. TOL. L. REV. 515, 532-38 (1984) (discussing *Rawlings*).

11. See, for example, the third party standing cases, such as *Doe v. Bolton*, 410 U.S. 179 (1973). See also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 265-70 (1990) (discussing alternative models of Article III standing).

12. See *Rakas*, 439 U.S. at 129-38.

13. See *Minnesota v. Carter*, 525 U.S. 83, 87-91 (1998) (denying standing to a casual visitor to a home); *Steagald v. United States*, 451 U.S. 204, 211-20 (1981) (holding a search warrant is needed to enter the premises of a third

of private papers (while the owner was distracted by a governmentally supplied prostitute) at issue in the *Payner*<sup>14</sup> case was not considered a search, because, as the government well knew, the parties with the requisite interests had no incentive to complain about it and the parties with the incentive lacked the requisite interests. A Fourth Amendment jurisprudence that took seriously the notions of providing advance guidance to police, or deterring police overreaching, would not countenance such results.

The inadequacies of the atomistic approach to restraining police conduct are not solely a feature of Fourth Amendment doctrine. Part of the reason why the chasm between searches and non-searches is so vast is that there is no constitutional safety net. The Court says it is the job of the Fourth Amendment to protect privacy and not, for example, equality. The unholy trinity of *United States v. Robinson*,<sup>15</sup> *Whren v. United States*,<sup>16</sup> and *Atwater v. City of Lago Vista*<sup>17</sup> permits custodial arrests and full body searches as long as police have probable cause to believe that any crime, even a minor traffic violation, has been committed, even if the officer has singled out the arrestee based on pernicious criteria. The Court finds this problem to reside, if anywhere, in the Fourteenth Amendment's Equal Protection clause, but has simultaneously erected daunting barriers to proof of discriminatory arrest under the Fourteenth Amendment.<sup>18</sup> A more holistic jurisprudence focused on constraining governmental power might seek to avoid creating a chasm between the Fourth and Fourteenth Amendments, leaving so much police overreaching and abuse of discretion unconstrained.

Notice that the sorts of objectionable governmental conduct I just described—stealing a briefcase, entering a home without a warrant, singling out a suspect based on race, class, or other pernicious factors—have nothing high-tech about them. One concern about *Kyllo*, and about Professor Ku's arguments in fa-

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party); *Payton v. New York*, 445 U.S. 573, 583-90 (1980) (holding an arrest warrant is needed to arrest a suspect in his own home).

14. See *United States v. Payner*, 447 U.S. 727, 735 (1980).

15. 414 U.S. 218 (1973).

16. 517 U.S. 806 (1996).

17. 532 U.S. 318 (2001).

18. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 461-71 (1996) (creating difficult hurdles for a claim of selective prosecution).

vor of *Kyllo's* approach, stems from the importance they place in addressing technological developments. Certainly, technology poses a challenge for the *Katz* test. As one commentator put it, "[N]ew technologies alter individuals' privacy expectations and encroach upon realms for which society has yet to develop such expectations. . . ."19 On a more basic level, technological advances pose the challenges that always beset the constitutional enterprise—those involved with trying to create fixed rules, or at least a workable rule of law, for a changing world. In this regard, technology *illustrates* the problem with trying to rely on fixed understandings of how the world works. For example, it vividly illustrates the problem with relying on Framers' intent in an overly particularized fashion; with considering not just the values underlying the Fourth Amendment but the particular concerns and expectations of the Framers' historical time.<sup>20</sup>

My concern is with Ku's assertion that the use of emerging technologies is "an altogether different inquiry" from that pertaining to what he calls physical searches, and generally, that the difficulty with Fourth Amendment doctrine can be attributed "especially to surveillance technologies."<sup>21</sup> Ku seemingly argues for some form of step-by-step authorization for each new technological advance that invades the sphere of liberty.<sup>22</sup> Ultimately, my concern is that any solution addressed especially to the problems raised by technology, such as viewing the use of new technology as requiring special justification, will be a step in the wrong direction.

There are several concerns with such an approach. First, the harm flowing from the Court's treatment of technological advances predates, or at any rate exists independent of, those advances. For example, consider the use of police spies. Cases like *Lopez v. United States*,<sup>23</sup> *Lewis v. United States*,<sup>24</sup> and *Hoffa v. United States*,<sup>25</sup> all pre-*Katz* cases whose holdings have

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19. *The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 346 (2001).

20. See Amsterdam, *supra* note 4, at 401.

21. Ku, *supra* note 1, at 1331.

22. See *id.* at 1362-67.

23. 373 U.S. 427 (1963).

24. 385 U.S. 206 (1966).

25. 385 U.S. 293 (1966).

been held to survive *Katz*,<sup>26</sup> made a number of leaps in logic that bear much of the blame for our current sorry doctrinal state. These cases used an amalgam of expectation of privacy analysis and assumption of risk analysis to conclude, first, that betrayal by those we trust is a recognized risk of social interaction. This proposition is unremarkable, but the Court takes two important and questionable steps. First, it conflates the risk of perfidious friends with the risk of spies sent by the government. Tony Amsterdam had the classic response to this conflation. He observed the Court's "unworldly" and all-or-nothing notion of privacy:

The difference between the risk of faithlessness that we all run when we choose our friends and the risk of faithlessness that we run when government foists a multiplying army of bribed informers on us may well be a matter of degree; but of such degrees is liberty or its destruction engineered.<sup>27</sup>

The question, however, is not just about the magnitude of the risk. As Amsterdam emphasizes, it is, most crucially, about the source of the risk. As he also famously asks, does the fact that junkies are likely to break into my car in Greenwich Village mean that the police may also do so?<sup>28</sup> The Fourth Amendment is not concerned with whether our friends betray us; it is concerned with constraining abuse of our rights by agents of the government. The assumption of risk test, as Justice Marshall said in his dissent in *Smith v. Maryland*,<sup>29</sup> allows the government to inform us of what risks we have assumed, what expectations it deems reasonable for us to hold.<sup>30</sup> As Chris Slobogin ably demonstrated, the Court's application of the assumption of risk test has generally contradicted any settled expectations that can be empirically measured.<sup>31</sup> The question should not be what we are permitted to expect, but rather, whether the police activity is consistent with the aims

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26. See *United States v. White*, 401 U.S. 745, 749 (1971).

27. Amsterdam, *supra* note 4, at 407.

28. *Id.* at 406-07.

29. See 442 U.S. 735, 749-51 (1979) (Marshall, J., dissenting).

30. See also *Burkoff*, *supra* note 10, at 537-41 (discussing the Court's "Orwellian doublethink").

31. 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, 774 (1993).

of a free and open society.<sup>32</sup> Perhaps we might conclude that police spies meet this standard, and perhaps, as Tracy Maclin has persuasively argued,<sup>33</sup> we might not. But the question needs to be asked, not assumed away.<sup>34</sup>

The second step that cases like *On Lee*,<sup>35</sup> *Lewis*, and *Hoffa* take is to permit the government spies who have covertly entered the suspect's home or workplace or confidence to wear wires or tape recorders, reasoning that this use of technology simply enhances the reliability of the agent's observation.<sup>36</sup> Tracey Maclin has it exactly right when he argues that, in the police spy cases, although the enhancement is a "circumstance[] of aggravation," the crux of the harm is the original act of surreptitious surveillance by the police.<sup>37</sup> The real problem here is not the leap from covert action to technological enhancement, but the conflation of private and public action.

I do not mean to defend the leap from the unaided senses to technological enhancement. The disingenuousness and "otherworldliness" of saying "we are merely making our observation more accurate" is problematic. Just as there is a difference in kind between disloyal friends and government spies, there is often a difference in kind between naked eye observation and enhanced observation. The *Kyllo* opinion should be lauded for its recognition of this point, if only in the context of a home. *Kyllo* rejected the proposition that the use of thermal imaging technology is no different in kind from watching the snow melt on a home and observing that it melts more quickly in some places than in others.<sup>38</sup>

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32. *Smith*, 442 U.S. at 750 (Marshall, J., dissenting); see also *Florida v. Riley*, 488 U.S. 445, 456 (1989) (Brennan, J., dissenting) (citing Amsterdam for the proposition that the inquiry depends on whether the surveillance would diminish privacy and freedom inconsistent with the aims of a free and open society).

33. See generally Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 WASH. U. L.Q. 573 (1996) (arguing that the Court's interpretation of the Fourth Amendment, which sanctions the government's authority to use secret spies and informants, is misguided).

34. See *id.* at 623 (calling the assumption of risk test "a legal conclusion masquerading as legal analysis"); see also Amsterdam, *supra* note 4, at 406 (calling it "wildly beside the point").

35. *On Lee v. United States*, 343 U.S. 747 (1952).

36. See, e.g., *id.* at 753-54.

37. Maclin, *supra* note 33, at 601 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)) (citation omitted).

38. *Kyllo v. United States*, 533 U.S. 27, 43 (2001) (Stevens, J., dissenting)



But why is it different, and will that difference melt away when thermal imaging technology is within reach of the average citizen? The difference is, in part, that police are using technology that is either unavailable or rarely available to the average citizen, and that therefore the equation with naked eye observation, or plain view, is simply inapposite. In reality, the average citizen would be unlikely to take comparative heat waste measurements, or obtain Carnivore to search vast stores of e-mail correspondence.<sup>39</sup> It is not that difficult to rent a helicopter, I suppose, if one wants to hover over a neighbor's backyard at 500 feet, and soon we should be able to purchase thermal imaging technology at Best Buy. Ought the entry of the technology into general use convert the police activity into one the Fourth Amendment should not reach? At bottom, this is a prescriptive issue, one that needs to be faced whether the means are high tech, or as low tech as a garbage search or a police officer climbing a tree to peer in a second story bedroom window. Perhaps, if I choose my friends and neighbors poorly enough, someone will decide to go through my garbage, secretly tape his conversations with me, even hover above my backyard in a helicopter. The police, however, should not do so—at least not without meeting the requirements of the Fourth Amendment.

The focus on technology, and the general use limitation it has spawned, deflect us from this crucial inquiry. I offer two sets of reasons for this conclusion. First, the focus on technology relies too heavily on an unduly narrow version of the Framers' intent. Second, the general use requirement fails to address the problems with technological advance in particular and the Fourth Amendment more broadly because it will ultimately diminish privacy, and because it does not adequately address the issue of inequality.

First, I will turn to the problem with reliance on the Framers' intent. Professor Ku argues that the predominant Fourth Amendment approach, which asks whether the means em-

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(making the argument). *But see id.* at 35 n.2 (rejecting the argument).

39. *See Florida v. Riley*, 488 U.S. 445, 457 (1989) (Brennan, J., dissenting) (criticizing the majority's "exceedingly grudging Fourth Amendment [t]heory" in the context of police helicopter surveillance because under the theory one's expectation of privacy is defeated if a single member of the public could do the same as the police no matter "the difficulty a person would have in so positioning, and however infrequently anyone would in fact do so").

ployed were similar to means that the Framers would consider a search, is misguided.<sup>40</sup> Ku's objection to the means inquiry is that it permits courts to contract the degree of privacy "the Founders would have enjoyed."<sup>41</sup> His proposed solution is to shift the power from the courts to juries and legislatures and to require that one of these bodies authorize each new use of technology.<sup>42</sup> Although I agree with his conclusion that we should not rely too heavily on what constituted a search at the time of the Framers, and with his argument that doing so would allow technology to drive the inquiry,<sup>43</sup> I fear that his reasoning and his proposed solution themselves place too much reliance on a narrow version of the Framers' intent.

Why should we assume that the balance between security and privacy that obtained at the time of the Framers ought to guide us today? In one sense, this is another way of asking this question: On what level of generality should the inquiry into Framers' intent proceed?<sup>44</sup> Should we seek to address the Framers' concern with rifling through papers in homes on the authority of general warrants by focusing on the privacy content of papers, or the intrusion into homes, or the breadth of warrants? Or should we address it on a more general level as a concern with the unfettered use of government power? In part, however, it is a different question: not what the Framers were concerned with, but what balance the Fourth Amendment ought to preserve today. As a practical matter, at a high level of generality the questions might not seem that different. If, for example, the Framers' intent is seen simply as providing constraints against unfettered government power, this leaves plenty of flexibility to flesh out the contours in light of current concerns. Yet the difference is still significant. The very balance between liberty and security may shift over time. The Fourth Amendment has means to accommodate such shifts, as does the Constitution as a whole.

One such shift in values occurred at the time of the Reconstruction-era amendments. These amendments make clear that the concerns of the founders needed to be supplemented in light of later concerns. If the Framers feared indiscriminate

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40. Ku, *supra* note 1, at 1332.

41. *Id.* at 1363; *see also id.* at 1327-28.

42. *Id.* at 1373-77.

43. *Id.* at 1350.

44. *See Amsterdam, supra* note 4, at 366.

searches on broad warrants, post-Reconstruction jurisprudence needed to face the growing realization that discriminatory searches, usually conducted without warrants, were equally destructive and pernicious. These concerns were addressed in multiple ways, by both Congress and the courts: notably, in the 1960s through incorporation doctrine, new and reconceived jurisdictional rules, expanded habeas corpus, and changes in interpretation and coverage of the first and fourth amendments, among others. These changes worked in concert to advance emerging notions of constitutional liberty.

Some might argue that this sea change was unique, but this argument seems to be contradicted by, for example, current events. Until this fall, there was substantial agreement among scholars that we were living through the New Federalism,<sup>45</sup> another seismic shift of power—this time back to the states. Since September 11th, this characterization has become more complicated, and we are now witnessing new grants of federal power for law enforcement, and more generally, a conventional wisdom that says “the boundary between security and liberty has shifted.”<sup>46</sup> We should debate whether this shift ought to occur, and what it ought to mean for the Fourth Amendment and the Constitution as a whole. The Framers provide one important reference point in this debate—but they cannot solve it.

For the same reasons, we can refer to the Framers’ preferred solutions, but again, they provide no definitive yardstick for measuring current day solutions. Ku’s second, or “radical,” thesis suggests that when police seek to use technologies that are not yet in general use, their actions should be considered reasonable only when authorized by statute. He argues that this rule would ensure that the people determine the reasonableness of these new incursions into privacy. I note parenthetically that technology is often viewed solely as a source of incursions into privacy. It is certainly conceivable, however, that technology can offer greater protection of privacy. Consider, for example, the privacy protection offered by automated phone service replacing human operators, buzzer systems and intercoms in apartment buildings, or, more recently, encryption

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45. See, e.g., Susan Bandes, *Erie and the History of the One True Federalism*, 110 *YALE L.J.* 829, 832-33 (2001).

46. See, e.g., David E. Rovella, *Pro-Police Opinions on the Rise, Poll Says*, *NAT'L L.J.*, Jan. 21, 2002, at A1.

technology. The Court, it is true, never seems to view technology as a means to increase our subjective expectations of privacy,<sup>47</sup> but it is not clear to me that we should view technology as a one-way ratchet toward a police state. Nevertheless, I agree with Ku that we need a way to reverse the *Katz* downward spiral (the less privacy we have, the less we can expect<sup>48</sup>), which places more and more police conduct outside the reach of the Fourth Amendment.

My concern in this context is with Ku's argument that the Framers' preference for juries over judges should today lead to a preference for authorizing new types of search by statute. Apart from the fact that the historical conclusion is quite controversial,<sup>49</sup> its relevance for today needs to be evaluated independently. Even if the colonists found juries to be in the best position to protect their rights, in our more heterogeneous times, judges may need to play a greater role in protecting minority interests.<sup>50</sup> Ku is right to be concerned that the Fourth Amendment now protects only isolated pockets of interest. It is not clear, however, that either juries or legislatures are best equipped to ensure that the protection extends to all people, including the reviled and the powerless.

Finally, I turn to my second set of reasons for believing that the general use rule will not help us properly define the scope of the Fourth Amendment: This rule will ultimately diminish privacy, and it does not adequately address the issue of inequality. Let me first turn to the privacy issue. Ku cites with approval Justice Scalia's retort to Justice Stevens in *Kyllo*, which was that Stevens' suggested focus on the means used

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47. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 742-44 (1979) (stating that the petitioner had no legitimate expectation of privacy in the numbers he dialed on his phone); see also 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 2.7(b), at 506 (2d ed. 1987) (identifying "the ominous proposition that modern technology cannot add to one's justified expectation of privacy, but can only detract from it"); Burkoff, *supra* note 10, at 540.

48. RICHARD H. SEAMON, *KYLLO V. UNITED STATES AND THE PARTIAL ASCENDANCE OF JUSTICE SCALIA'S FOURTH AMENDMENT* 18 (Wash. & Lee Pub. L. & Legal Theory Research Paper Series, Working Paper No. 01-20, 2001).

49. See Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 21-25 (1994); Carol Steiker, *Sober Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 826-30 (1994); Susan Bandes, *"We the People" and Our Enduring Values*, 96 MICH. L. REV. 1376, 1399-1402 (1998).

50. See Bandes, *supra* note 49, at 1399-1402.

would “leave ‘the homeowner at the mercy of advancing technology.’”<sup>51</sup> Ku prefers Scalia’s approach, which would require a warrant for any use of technology “to enhance [the] senses.”<sup>52</sup> He argues that

[t]o the extent that flashlights, cameras, and binoculars are routinely in general public use, we become as familiar with the threats they pose as we have our natural senses. Likewise, we become as capable of evaluating and responding to the technology’s threat either with privacy enhancing technology or by limiting its use by law.<sup>53</sup>

As Chris Slobogin points out, however, the general use doctrine affords us only the amount of privacy that is available from the public at large, and as technology gets cheaper and more widely used, that amount continues to shrink—until it may swallow the prohibition on technological advancement entirely.<sup>54</sup> Scalia’s approach is not well poised to reverse this downward spiral.

The general use test is also ill-suited to safeguard equality. Ku’s argument in favor of the test is that it guarantees that

the public as a whole understands the risks and has borne the costs of such technologies. . . . [T]herefore, [it] reduces the risk that the public will acquiesce to government use of technology because a majority or powerful minority have not internalized the costs of such technology, and therefore, either misperceive the relative costs and benefits or selfishly are willing to allow others to pay them.<sup>55</sup>

This is an interesting argument. It falls prey, however, to the trap of conflating what the public can do with what the police should do. The fact that a particular technology has entered common use has little to do with whether, or how, the police should use it. Since the test does not focus on these questions about the proper scope of government power, it is unable to address the abuse of that power—a question little correlated with the sophistication of the technology at issue. Ensuring that the burden is widespread is often the problem, rather than the solution. As I noted above, it reduces our liberty and

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51. Ku, *supra* note 1, at 1365 (quoting *Kyllo v. United States*, 533 U.S. 27, 35-37 (2001)).

52. *Id.* As Ku recognizes, Scalia appears to have intended this approach to extend only to searches of constitutionally protected areas, such as the home. *Id.* at 1366-67; see *Kyllo*, 533 U.S. at 34.

53. Ku, *supra* note 1, at 1371.

54. Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo’s Rules Governing Technological Surveillance*, 86 *Minn. L. Rev.* 1393 (2002).

55. Ku, *supra* note 1, at 1370.

privacy from governmental intrusion across the board. Nor is the move to indiscriminate searches successful at reducing discriminatory searches.<sup>56</sup> For example, luggage scans at the airport have become ubiquitous for the flying public, yet their very ubiquity spawns the usual problems about use of pernicious criteria to choose subjects for more thorough scans. When technology is in use, it does not operate on its own—it is operated by fallible human beings who ought to be supervised. The weight of their errors and prejudices rarely falls evenly over the populace. This is a problem whether we deal with the low tech *Terry*<sup>57</sup> pat down or high tech thermal imaging—a technology that is subject to interpretation and manipulation like any other,<sup>58</sup> and will remain so even when it enters “general use.”

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56. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) (arguing that widespread searches are less intrusive because they do not single out individuals).

57. See generally *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing limited stops of individuals based on reasonable suspicion of criminal activity and permitting a limited frisk of the individual for weapons if the officer reasonably believes the suspect is armed and dangerous).

58. Kathleen A. Lomas, *Bad Physics and Bad Law: A Review of the Constitutionality of Thermal Imagery Surveillance After United States v. Elkins*, 34 U.S.F. L. REV. 799, 801 (2000) (discussing ways in which thermal imaging technology can be misinterpreted and manipulated).

