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Arianna Kennedy Kelly

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*Arianna Kennedy Kelly**

I. INTRODUCTION

A government actor's forcing a private citizen to submit to some physical occupation of his land is at the heart of a Fifth Amendment taking.[1] A home search conducted pursuant to the Fourth Amendment also fits this description; it involves the forced submission of the home's residents to the entrance of government agents for whatever length of time is necessary to complete the search. While compensation is possible for damage caused to personal property incident to the search,[2] homeowners are not compensated for the government's use of the physical space of the home. The exclusion of home searches from the realm of takings is unjust. A home is a home and what constitutes a compensable intrusion into it should not depend on the purpose animating that intrusion. From the point of view of the homeowner, the cost is borne regardless of the purpose of the intrusion.

The current interpretation of the Takings Clause provides strong support for finding home searches to be takings. This essay will explore the reasons why home searches are not seen as such and possible palliatives to the harms caused by such searches.[3] When compared to widely accepted eminent domain takings – such as an easement across a property to allow for beach access[4] or the placement of wires into the walls of a building[5] – the criminal search can be a far more jarring experience and greater intrusion upon the private space of the home. Searches are typically done without prior notice to the home's inhabitants, and involve a far more cavalier treatment of their personal property and private possessions. While there are valid reasons for the often brutal nature of the Fourth Amendment search (a gentler search with greater respect for privacy would afford a commensurately greater opportunity to destroy or hide of the evidence that

* Assistant District Attorney, Suffolk County, Mass.; Harvard Law School, J.D. 2008; Harvard College, A.B. 2005. I thank Professors William Stuntz and Carol Steiker for their invaluable advising. I also thank Alex Potapov, Ellen Weis and Larissa Kelly for their support and encouragement during the writing of this Piece.

1. Yee v. City of Escondido, 503 U.S. 519, 527 (1992).

2. Steagald v. United States, 451 U.S. 204, 215–16 (1981).

3. I have chosen to look at the home in this Essay for two main reasons. First, it is a frequent source of litigation in both takings law and criminal cases. Particularly in criminal cases, crucial evidence is frequently in the home because it may be the sole private place a criminal defendant has. Second, the home is fundamentally connected to notions of privacy and personal space. For two doctrines which both give serious attention to the interplay between privacy and property rights, the home provides a prime example of how these concepts need not (and perhaps cannot) be disentangled.

4. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

5. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

was the object of the search), these searches nonetheless impose costs upon their subjects.

The jurisprudence on takings cases and Fourth Amendment cases currently find citizens' rights on these subjects officially grounded in different values. Takings cases are fundamentally based in property rights with compensation afforded on the basis of the harm to property value the owners have suffered as the result of the government's intrusion. Since *Katz v. United States*,[6] the rights afforded under the Fourth Amendment are privacy rights, and have been thought of as attaching to "people, not places."[7] The specifics of the physical space in which the search occurs, such as whether the subject of the search owns the property, are meant to take a back seat to the looser doctrine of the expectations people attach to their conduct at any point in time. However, doctrine in this area remains confused as to whether the Fourth Amendment's protections are fundamentally tied to the historical protection of property rights or the more modern conception of privacy rights.

Though the extent to which courts have even tried to cleave strictly to privacy rights in Fourth Amendment law is questionable, it would nonetheless still be difficult to separate the notion of an individual's legitimate expectation of privacy from his physical location. No matter how private an individual seated in an open field may believe his conversation to be, the courts see no legitimacy in his expectation.[8] Conversely, there are other physical spaces, such as the home, where courts believe expectations of privacy are unassailably legitimate. An individual's expectation of privacy cannot be fully severed from his physical location and while the assertion that the Fourth Amendment protects people is true, it protects them only so long as they remain in particular places. As a result, the right to privacy in these places and their sacrosanct quality under the law are protected. To the extent that the Fourth Amendment's protection is dependent on an individual's physical location, the boundaries of personal space protected are tied to an individual's property interest in his location.

Particularly in the case of the home, property rights and privacy rights become deeply intertwined. To a large measure, the value that individuals derive from their homes is due to the privacy it affords them, and the law has recognized the value of this privacy in a number of contexts. Homes are explicitly mentioned as a protected sphere under the Fourth Amendment, and to date, courts have been highly opposed to any sort of unwarranted physical incursion into the home. However, they have been permissive with the plain sight doctrine, allowing activities such as flyovers and other methods of gathering information about the private space of the home so long as the information is gathered from outside the home's physical boundaries. In contrast, takings law does not have to interest itself in questions of privacy, as typical takings cases give the property owner the

6. 389 U.S. 347 (1967).
7. *Id.* at 351.
8. Hester v. United States, 265 U.S. 57 (1924).

opportunity to remove the private nature of the sphere (if not the attachment to the space) prior to any government intrusion. If takings law requires compensation for the intrusion onto property interests alone when there is no conceivable harm to the privacy interests that adhere to the property, we should certainly compensate when, although there has been a lesser violation of the property interest as a whole, there has been much greater violence to the privacy interests that the property interests protect.[9] Criminal suspects bear real costs as a result of home searches, costs of a kind for which others would demand compensation. Viewing home searches through the lens of takings law leads to an interesting inconsistency: while the Fourth Amendment turns a blind eye to the costs incurred by legitimate searches, the care for individuals' property embodied in the Takings Clause helps to illustrate why this blindness is unjust.

There are arguments against compensation in these cases, unlike in the typical takings scenario where an individual's property is taken largely as the result of accident of location, home searches are generally conducted on criminal suspects. Arguably, individuals whose homes are searched are, as a class, more likely to have had some role in creating the need for the home search; the costs they bear could be seen as akin to imposing court costs on acquitted defendants. This argument treads dangerously close to a punitive argument against criminal suspects; the subjects of home searches have not been convicted of any crime, nor, frequently, even formally charged. Further, court costs are generally waivable for individuals of limited means, who cannot bear the costs that would otherwise be imposed upon them. There is no similar system that can compensate individuals for the psychic injuries of the home invasion.

I do not suggest these should exist as a sort of modified Bivens claim,[10] but instead that homeowners should be compensated regardless of whether the search was warranted or reasonable. The harm which occurs as a result of the taking is not dependent on the reasonableness of the search; it is not the presence or absence of the government's right to search the home which contributes to the owner's feeling of violation but instead, the intrinsic violations of the search itself. I am also not proposing that takings be used as a way to stop necessary searches, but instead as a means to encourage law enforcement officials to reduce the costs they impose in conducting them (as I do not imagine that payouts of this kind ever would be made, this Article is a theoretical exercise rather than a policy suggestion). The question of whether the government produced sufficient evidence to

9. While payments based purely on the current takings regime of compensation for the value of the rent of the property over the time of the seizure would be relatively small given the limited duration and property damage caused by a home search, an implicit characteristic of the value of property is found in the private space it affords. The payments granted for loss of exclusive use of property in the absence of damage to property and payments granted for trespass bespeak a concern in property law for the privacy property affords. *See infra* pp. 39–41.

10. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). When a plaintiff seeks relief for a violation of his constitutional rights, it is often referred to as " Bivens claim."

obtain a warrant or had exigent circumstances, which would allow the evidence to be presented in a court of law, is quite aside from the considerations at play in this case. From the perspective of the homeowner, the home search carries with it equal or greater harms to intrusions onto property that are clearly compensable.

Part I looks at the boundaries of the home as defined under the Fourth Amendment. The Fourth Amendment has long recognized the special status of the home in the expectations of citizens, but cases have been far from consistent in their holdings as to whether this right is one relating to property or privacy. By untethering the protections of the Fourth Amendment from property rights and instead attaching them to privacy rights, the Supreme Court has made the injuries suffered less directly and clearly compensable than under my proposal, though the harms suffered are no less profound. I suggest that Fourth Amendment law tends to protect individuals where they have both some form of a property interest[11] and a privacy interest in the space searched, and offers no protection where only the privacy interest has been surrendered in some way. Thus, when a home search is conducted which implicates the Fourth Amendment – requiring probable cause and a warrant – it is virtually guaranteed to intrude upon the subject's most private and intimate property.

Part II explores the significance of the home in theoretical literature and why it is a space deserving of particular protections, specifically with regard to the privacy value the home affords. I look to Margaret Jane Radin's personhood theory of property law to analyze how this intrusion into private space damages the individual. Radin analyzes both Fourth Amendment searches and takings to explore reasons why property, and particularly intimate and private spaces such as the home, has a significant deserving protection beyond its mere economic value. Her theory describes how the attachments individuals form to certain types of property (such as the home) connect to their sense of self, and ascribe a particularly high status to and need for protection for these types of property. I use this theory to explain the nature of the loss suffered in a home search.

Part III analyzes current takings law, looking specifically to its treatment of features of home searches which differ from more typical physical takings. Going through these factors one at a time, it is clear none of them individually preclude a home search from being considered a taking. I also look briefly to trespass law to note a system which has already recognized a harm to the property owner apart from mere intrusion.

Part IV makes the argument for why home searches should be viewed as takings, and addresses possible reasons why they may not. The main reasons that home searches are unlikely to be conceived of as takings are the practical issues which arise in criminal law which do not occur in takings law; such as the often culpable nature of the claimants, the frequency of home searches, the ephemeral nature of the harm suffered, the difficulty

11. This is subject to some exceptions. *See infra* notes 28–30.

in assessing the monetary value of the harm, and the chilling effect on law enforcement activities. However, though they may properly describe why payments do not and will not occur, I argue that these are not bars to viewing these sorts of invasions as outside the scope of takings, but administrative challenges only.

II. BOUNDARIES OF THE FOURTH AMENDMENT

The Fourth Amendment's protections help illuminate both the value and importance of privacy in the home and demonstrate the depth of the harm wreaked upon the execution of a search warrant, concepts also common to takings inquiries. By considering these strands, we begin to see how takings law raises important questions about home searches.

The Fourth Amendment has long recognized the special status of the home in the expectations of citizens.[12] The doctrine against unreasonable searches and seizures originally derived from the English common law of trespass, forbidding the state from entering onto a citizen's property merely because it was a state actor rather than a private one.[13] The framers conceived the right to be free from unreasonable search or seizure as one fundamentally linked to property rights. Over the years, *Katz* and its progeny[14] have shifted the grounding of Fourth Amendment protections to privacy rights, but the importance of property rights in determining whether individuals have a legitimate, objective right to privacy in a particular location has not disappeared. Particularly in the wake of *Kyllo v. United States*,[15] the Fourth Amendment's protections against unreasonable and unwarranted searches maintain a strong relationship to property rights.

Search and seizure jurisprudence illuminates the complicated interrelations between privacy and property rights. The home and the property rights which attach to it are important and protected because of the private space they afford. However, the space would not be "private" if the boundaries of the location were not protected and the right of exclusive use a strong one. If the owner had to worry that the space might be entered by others, it would cease to be a truly private area and would not be as valuable. This problem is only exacerbated by the fact that an individual's privacy expectations are only legitimate under the Fourth Amendment when an individual is in a place the law considers to be "private." Even if the individual has a firmly held, subjective conviction that the space is private,

12. *See* Silverman v. United States, 365 U.S. 505, 511–512, n.4 (1961). ("A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty-worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." United States v. On Lee, 193 F.2d 306, 315–16 (Frank, J., dissenting)).

13. Boyd v. United States, 116 U.S. 616, 626–28 (1886) (citing Entick v. Carrington and Three Other King's Messengers, 19 How. St. Tr. 1029 (1765)).

14. *Katz*, 389 U.S. 347; New York v. Burger, 482 U.S. 691 (1987); Payton v. New York, 445 U.S. 573 (1980).

15. 533 U.S. 27, 34–41 (2001).

his concerns are irrelevant if society does not agree.[16] In practice, as well, these two bases do not lead to marked differences in the outcomes they produce. The major difference of the privacy rather than property grounding is that it affords greater protection for spaces over which the individual exercises only a temporary or incomplete dominion[17] and removes protections from individuals who have allowed others access to or information about their property.[18]

In this way, *Katz* has created a regime wherein an individual's protected spaces under the Fourth Amendment are primarily a subset of the spaces to which he has some property claim. Specifically, they are the spaces where an individual has not only a property claim, but where he has also taken steps the greater society considers reasonable and necessary to ensure his privacy in the space. Where he has not taken these steps, the Fourth Amendment offers no protection, despite his property interest. When police action becomes an event under the Fourth Amendment, it is likely to infringe upon the property rights the individual has protected for his most intimate and private conduct. When a home search occurs, violating that space, it is almost guaranteed to take a psychic toll upon the resident.

A. Progression of the Fourth Amendment[19]

The history of the Fourth Amendment is the story of two evolving and competing bases for its existence: protection for the home and property rights and an individual's innate right to have his privacy respected (limited by society's recognition of the legitimacy of this expectation). Grounded in the common law of trespass,[20] the protection against unreasonable searches and seizures was originally understood as a right grounded in the right to own property; just as private individuals had no right to intrude on one's home and papers, neither did the government except in those cases where the government had gained approval from a magistrate.[21] Over time though, the courts applied the protections of the Fourth Amendment to individuals who had no property rights to the locations they were in at the time of the search. The most famous example is *Katz*, which reassigned the basis of the Fourth Amendment from property law to an individual's right to privacy from government intrusion in its often-quoted statement that the

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

17. Minnesota v. Olson, 495 U.S. 91 (1990); *but see* Rakas v. Illinois, 439 U.S. 128 (1978) (expressly stating that individuals legally in a private space do not automatically have standing to raise a Fourth Amendment challenge).

18. Arizona v. Hicks, 480 U.S. 321, 326–328 (1987).

19. This discussion is by no means a comprehensive survey of the bases of the Fourth Amendment; I explore this theme only to the extent necessary to assess the current state of Fourth Amendment doctrine. See Thomas K. Clancy, *"What Does the Fourth Amendment Protect: Property, Privacy, or Security?,"* 33 WAKE FOREST L. REV. 307 (1998) for a comprehensive survey of this topic.

20. *Boyd*, 116 U.S. at 626.

21. For an extended discussion, see Justice Scalia's dissent in Georgia v. Randolph, 547 U.S. 103, 143 (2006). He discusses which individuals were and were not capable of consenting to a home search over time, which was grounded in the principles of property law.

Fourth Amendment protects "people, not places."[22] This has expanded Fourth Amendment privacy rights to grant standing to overnight visitors in the homes of others to challenge the legality of searches.[23] The Court has not, however, expanded its protections to guests who are present in another's home for only a short period of time.[24]

Post-*Katz*, the protections afforded by the Fourth Amendment are vague at best. While *Katz* promises to protect individuals' expectations of privacy, determining precisely when individuals are rightfully exercising these expectations can be a daunting task. People inside their bedrooms have clearly recognized expectations of privacy;[25] those standing in the middle of a field clearly have none.[26] What are the crucial factors that make one's actions more akin to the first group than the second?

Throughout the progression of cases on this issue, the protections of the Fourth Amendment have been limited to serve the needs of law enforcement and have not been quick to embrace expansions to existing conceptions of privacy.[27] In case after case, the Supreme Court has gone to great lengths to permit any sort of information which might have been (even if it was not, in fact) gathered visually to be unprotected by the Fourth Amendment. Plain sight permissions are sometimes carried to extremes, with the Court concluding that inspection of garbage left on the street,[28] taking photographs of backyards from overhead aircraft,[29] and observations of the inside of a home made through open drapes,[30] are non-events under the Fourth Amendment despite individuals' subjective – and many would argue, objectively reasonable – beliefs that an ordinary person would believe themselves and their possessions private in these locations. The inquiry simply ends at the non-trespassory nature of the search, rather than examining what subjective and objectively reasonable expectations of privacy an individual might have had.[31] It is enough that the individual did not have or had given up the right of exclusion in some way.

Despite these incursions, the Fourth Amendment has always been solicitous in its protections of physical incursions into the home's privacy. Deriving its protections from the phrase "persons, houses, papers, and effects,"[32] the home seems to have long served as a gold standard in criminal

22. *Katz*, 389 U.S. at 351.

23. *Olson*, 495 U.S. at 98–99.

24. Minnesota v. Carter, 525 U.S. 83 (1998).

25. Griswold v. Connecticut, 381 U.S. 479 (1965).

26. *Hester*, 265 U.S. at 57.

27. Hudson v. Michigan, 547 U.S. 586, 594 (2006); Florida v. Riley, 488 U.S. 445 (1989); *Hicks*, 480 U.S. at 326–28.

28. California v. Greenwood, 486 U.S. 35, 39–43 (1985).

29. *Riley*, 488 U.S. at 449–52.

30. Coolidge v. New Hampshire, 403 U.S. 443, 467–468 (1971). Though sight alone cannot justify a warrantless seizure, the mere sight of an item in a window is itself a non-event.

31. *See supra* notes 28–30.

32. U.S. CONST. amend. IV.

law for spaces that must be protected.[33] *Kyllo* reasserted the protected nature of the home over *Katz*'s ambiguity as to the relevance of physical boundaries in determining Fourth Amendment protections.[34] Justice Scalia's majority opinion drew on the historical protections of the home to set forth the proposition that all people have some minimal expectation of privacy within the home. He draws on the view from *Silverman* and its progeny, that the home is a "constitutionally protected area,"[35] to support the proposition that "[i]n the home . . . all details are intimate details."[36] Instead of parsing through what might have been observed from outside the home[37] and concluding that the homeowners have no privacy right over disclosure of these facts, *Kyllo* affirms a line of cases painting a bright line around the entrance of the home.[38] Although Justice Stevens's dissenting opinion criticized the majority for the lengths it stretched in finding "intimate details" delivered by use of the thermal imaging system,[39] *Kyllo*'s refusal to permit any warrantless uses of technology, which had only a tiny possibility of capturing intimate details of the home, has not been upset in any meaningful way in the eight years since the decision.[40]

Kyllo makes more sense when looked at from a takings-like perspective. The unauthorized "use" of the home seems to be the determinative factor in finding that the infrared surveillance constituted a "search." The house itself could be seen as giving information: the outer surface of the house could be read and processed to learn about the relative temperatures inside. In this way, the house's exterior is "used," despite the near-total lack of any private information being revealed.

B. What is Really Protected After Katz?

Why does the plain view doctrine or other non-physical surveillance into the home have such an easy time passing constitutional muster? While there are somewhat reasonable hooks to explain why an individual has sacrificed some measure of his privacy when he allows others to see into his home, it is far more difficult to claim that an individual has invited the world to violate his privacy if his drapes are cracked or if a plane could fly over his backyard. It is also difficult to reconcile how the individual with the cracked drapes has a less reasonable expectation of privacy than Katz had in the public phone booth or the overnight visitor had in his friend's

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

34. Justice Scalia notes the "firm line" that has been drawn around the entrance of the home. *Kyllo*, 533 U.S. at 40 (citing *Payton*, 445 U.S. at 590).

35. *Silverman*, 365 U.S. at 512.

36. *Kyllo*, 533 U.S. at 37.

37. For example, what a mailman might see putting mail through a slot, or what a utility representative might notice while checking a meter.

38. *Kyllo*, 533 U.S. at 40.

39. *Id.* at 48–50.

40. The only decision which comes close is Illinois v. Caballes, 543 U.S. 405 (2005). However, the Court clearly differentiates the holding on the grounds that the dogs only alert for contraband, rather than reveal any protected, intimate details. Further, the search was of a car rather than a home; cars have long been regarded as having less intrinsic privacy than homes.

home. The latter two must be aware that others could walk past them at any time, possibly hear their conversations, or see what they are doing. I posit that the answer to these seeming contradictions is that the Fourth Amendment continues to primarily protect property rights rather than privacy rights. The wide allowances of the plain sight doctrine seem to owe more to *Boyd* than *Katz*, the former case maintaining that "the eye cannot by the laws of England be guilty of a trespass."[41] The plain sight doctrine does not entail a physical incursion, it must be accomplished before a property right has been upset.

Payton v. New York continues to complicate the claim that the Fourth Amendment is not grounded in property rights by holding that police officers have much greater freedoms to arrest individuals outside of their homes than inside of them.[42] This 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. The same individual who gave the police the same probable cause for arrest at a nearly identical point in time, already sacrificed his right to privacy by being in public and taking whatever action caused the basis for the arrest. The privacy of the individual, at least over such brief periods of time as are contemplated in *Payton*, is not something that can be regained once surrendered. The privacy *Payton* seeks to protect is that of the home, even when the need for the arrest of the individual is pressing upon the police officers. Here, the right clearly attaches to the property rather than the individual.

The decisions relating to the application of the Fourth Amendment to encounters in and around the home, which have followed *Katz*, make more sense if *Katz*'s claim to protect "people, not places" is ignored, or at least not taken at face value.[43] The best explanation for the spheres of privacy protected under the Fourth Amendment appears to be grounded in property law rather than in individuals' expectations of privacy.[44] An individual is generally seen as having a legitimate privacy interest when he is in a place over which he exercises some sort of dominion. This need not be a permanent or perfect property interest in the place, but he must have been given some sort of license to be in the place for a substantial period of time. The phone booth in *Katz* belongs to the phone company but the company grants an implied license to members of the public to use it; Katz could not have been thrown out of the phone booth by any member of the public so long as he was in the booth. At the time he was in the booth, his claim to it

41. *Boyd*, 116 U.S. at 628.

42. *Payton*, 445 U.S. at 586–87. *See also* New York v. Harris, 495 U.S. 14, 20 (1990) (specifying that the protections against in-house arrest are meant to protect the home rather than the individual).

43. *Katz*, 389 U.S. at 351.

44. Indeed, even looking within *Katz* itself, the Court must resort to the language of property to describe what it means when it says the Fourth Amendment protects people rather than places. In the next paragraph after that claim, the Court attempts to illustrate when an individual has a legitimate right of privacy by offering various locations where an individual might rightfully believe he would not be heard by the government, such as an office, taxicab or friend's apartment. *Katz*, 389 U.S. at 352.

was superior to all members of the public. However, a temporary guest in a home who may be dismissed at the owner's will has no such protections; his stay on the premises is at all times controlled by his host. He never develops any claim of right to the space he inhabits and accordingly gains no Fourth Amendment protections.[45] Simply put, post-*Katz* cases have not, in practice, created a sphere of privacy that travels with the individual claiming protection, but they have only slightly broadened the areas protected against government trespass.

However, this protection does not extend to all of an individual's property rights; he must also not have surrendered any of the privacy interests afforded by his dominion over the space. Individuals who have full and complete property interests in their spaces are seen as surrendering their right to privacy if they allow the area to be seen or perceived by the outside world in some fashion.[46] Having some sort of property claim is not sufficient to merit protection without also safeguarding the area. The contours of the doctrine are such that protected areas are essentially a subset of an individual's property interests, specifically those the individual has kept the most private.

The purpose of the home search is to discover what is contained within the home; we only reach the home search in cases where law enforcement could not obtain the necessary information either through sensory technology or the resident's exposing the interior of the home in some way.[47] It is important to note that in the case of this physical entrance, the individual has a full property interest in the area being searched, as well as legitimate privacy interests as recognized by the state. The home search not only tramples upon property rights, in direct opposition to the purpose of the Takings Clause, but it is almost assuredly trampling on a property right that protects an individual's intimate associations and privacy. The damage caused by such an invasion is as severe as a trespass can be.

My argument is strengthened by *New York v. Burger*.[48] *Burger* held that searches of commercial properties, particularly those in highly regulated industries, have a lower threshold of reasonableness because owners

45. *But see Olson*, 495 U.S. at 91. An overnight visitor has been granted some limited license to the premises where he is staying; he is given some space of his own and it would at least be inappropriate for a guest granted permission to stay in a home to be kicked out in the middle of the night. However, this is a case where the Fourth Amendment's protections actually do seem to be grounded more in privacy than property; the guest's property claim is far from perfected, and remains no more than an expectation that he will be allowed to use the space without interference for the night. It is interesting that the protections for individuals who do not have a valid property claim seem to be mostly directed at homes; one cannot help but wonder if the law's strong protection of the boundaries of the home has expanded to protect the hosts of guests who are searched from unreasonable intrusions.

46. *See supra* notes 28–30.

47. The standard is necessarily a fact-based one, but the law enforcement officers must show probable cause to be granted the warrant, meaning "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). This inquiry must be secondary to other forms of evidence-gathering, as the warrant will only be granted upon a showing of other evidence to a magistrate supporting the conclusion contraband will be found.

48. 482 U.S. 691 (1987).

have less of a legitimate right to privacy within them.[49] This was found to hold true even for warrantless searches by administrative agencies or police officers charged with enforcing the regulatory regimes under which the companies worked.[50] Essentially, if owners are accustomed to inspectors regularly coming onto their property, the owners cannot expect that those inspectors will not avail themselves of their full investigative powers and search other areas they find to be suspicious. For individuals in highly regulated industries, the entrances onto their property are more properly akin to being seen as licenses for operation or other fees than as close analogs of home searches.

Workplaces are fundamentally different from homes in that they are not places of intimate association, but a combination of public and private space. Individuals simply do not have the freedoms at work that they possess at home in that they may not exercise total rights of exclusion. They may not engage in discriminatory hiring practices, create a hostile work environment, or engage in many other practices an individual in a home would be free to pursue. Because of this known quality of a workplace, those who enter it are already on notice that the space is not one of complete privacy, but part of the public sphere. In heavily regulated industries, attachment to the particularities of the place and loss felt at the opening of the space are simply not present because people do not allow these sorts of attachments to form. Highly regulated industries usually are such because they pose some general threat to the public if unregulated; thus, individuals are not allowed to engage in these sorts of professions unless they can offer some assurance that they will not create the harm anticipated. They are frequently required to obtain licenses or pay fees to offset the possible damage they might cause and the cost of maintaining public safety. This is not generally seen as a taking because there is fundamentally some consensual exchange occurring between the government and the regulated entity. The government confers some special power to engage in a dangerous business and the individual gives up some form of property right, usually a monetary amount, but it could also surrender the right to exclusive use of the regulated property. The individual need not enter this bargain and thus, need never surrender the right of exclusive use; the individual may also exit the highly regulated industry and reclaim the totally exclusive use of his property at any time. While one could claim the criminal defendant could also simply allow government agents in, and thereby eliminate forced entry at the point of a warranted search, the individual has no actual choice in the matter of whether the government agents will be entering.

While criminal defendants also impose costs on society, the Court finds ample differences between the case of the home search and the search of commercial property in *Burger*, and for good cause. Perhaps in a hypothetical world in which entrances into the home were commonplace, where

49. *Id.* at 702.

50. *Id.* at 702–06.

everyone's home was a heavily regulated location subject to routine inspection by government agents, there would be less of a case for home searches being takings. However, privacy and property rights can often have a kind of circular quality to them in that if a place is expected to be protected, people vest their privacy rights there and it takes on greater value to them. Homes are not subject to routine intrusions, the public does not want them to be and neither does the Court; because we do not expect intrusions, we allow ourselves to use the home as a private space. The public may want certain industries regulated because of their possibly deleterious effects on the public welfare, but it does not want that sort of intrusion into their private lives or those of their neighbors and the Court has never attempted to open the home in this fashion.

The effect of *Katz* on searches into private areas has not been to divorce the protections of the Fourth Amendment from property rights, but instead to limit the protections to only those spaces where the owner has manifested an interest in privacy. The Court recognizes the special position of the home to an individual in its strong protections of the rights to privacy and exclusive use. By painting such a "firm line"[51] around the home, the Court allows individuals to feel secure in their privacy, and thus strengthens the connection between property and privacy in the domestic sphere.

III. The Importance of the Home: A Theoretical Basis

The reader might reasonably ask why physical entrances into the home for such a limited time and scope matter, and even if they do matter, why are they worth the effort and judicial resources necessary to compensate for them? Physical encroachments onto private property occur daily in many different forms from private citizens or government officials accidentally or intentionally walking over lawns, making visits, etc. Trespasses are extremely common and generally easily brooked, and while home searches are a more traumatic form of trespass than most, they are fundamentally fleeting events. The rapid nature and limited scope of the search would also translate into a fairly limited economic compensation; as translated into a "rent" for a property during the hours needed to conduct the search, payments would be unlikely to break two digits. Given the limited nature of both the intrusion and compensation, an argument could be made that compensation would have purely symbolic significance.

Though the cash value may not be large, I would argue that the value of seizing the property, even for a short time, stands in for the value of the privacy pierced by the search. Intuitively, it seems clear that an individual would likely have to be paid a fairly significant amount of money to allow government officials to conduct a home search, likely far more than he would have to be paid to merely leave his home and have no use of it for the same period of time so the government could conduct sound testing which made the home unlivable. The time of the seizure, denying the

51. *Silverman*, 365 U.S. at 512.

homeowner use of the property, is identical; but the former scenario involves a denial of exclusive use by intruding into the intimate space of the home, whereas the latter is a complete taking during the same time and would likely merit greater payment.

This loss of exclusive use in private spaces is extremely damaging and thus, worthy of more significant compensation.[52] Though takings law rarely contemplates incomplete seizures or takings of still-intimate spaces,[53] it recognizes the loss of exclusive use of a property as a taking and the legal framework is in place to consider the damages actually stemming from the taking of that right.[54] The intuition that the search mentioned above would be far more offensive than the temporary and planned evacuation is due to the home not being a purely fungible asset, but instead a place fraught with personal significance to the owner. In many areas of the law, it has been designated as a special place,[55] being the site of most of the owner's intimate associations and a physical manifestation of himself in many ways. This is recognized at law in the payments over market that are typically given in takings cases.[56] People are simply not indifferent between their home and a dwelling of equal market value; there is some other characteristic that is unique to the particular property.

A. The Personhood Theory of Property

To explore this special quality of the home, I look to Margaret Radin's "personhood" theory of property which holds that property's value is not completely based upon its physical characteristics.[57] Radin argues that property deserves protections because of the values and expectations with which owners imbue it, such that certain types of property may be rightfully seen as extensions of its owner.[58] Objects and assets also have value in what they allow a person to do, either for their value in trade or more specific permissions they afford a person (such as a home's giving a person

52. While modern takings are often justified on grounds of forcing government efficiency, which has become foundational, takings nonetheless have an extremely long tradition in American law dating to the Fifth Amendment's ratification in 1791. *See, e.g.*, Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Darryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 349 (2000). As such, compensating for home searches may help to better balance the government's interests in protecting private property and public safety.

53. *Loretto*, 458 U.S. at 435–38 (decided in 1982 as a matter of first impression).

54. *See, e.g.*, *Nollan*, 483 U.S. 825.

55. This special position for the home has been long recognized in the law. The castle doctrine in criminal law allows individuals to take lethal action against trespasses into their home and essentially immunizes them against claims of excessive force. The castle doctrine is not accepted in every jurisdiction, but it was once common practice and continues to be on the books in many states. While only instructive in the current inquiry, it helps to demonstrate a general attitude in the law that homeowners should not have to brook intruders. *See* Alberty v. United States, 162 U.S. 499, 508 (1896); United States v. Peterson, 483 F.2d 1222, 1236, n.92 (D.C. Cir. 1973) (citing Beard v. United States, 158 U.S. 550, 562–64 (1895)).

56. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 121–30 (2006).

57. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

58. *Id.* at 1014–15.

the ability to speak or act more freely than he might in public).[59] She argues that property is a medium upon which individuals are able to express themselves and this ability grants them liberties.[60] Building on the Lockean notions of the labor dessert theory, the person as a continuing consciousness,[61] and Hegelian ideas, the right to property being a function of expressing one's will over it,[62] Radin argues that property is necessary to individuals' abilities to act on their desires and express their individuality and that property allows individuals to attain some form of control over their environment.[63] People form relationships with objects to such an extent that the objects become a part of themselves rather than simply a fungible thing.[64] Radin demonstrates this point through her observations that people may feel a sense of loss when they are separated from an object (such as an heirloom or wedding ring) that is not erased merely by the replacement of the object.[65]

Takings cases demonstrate a form of recognition of the personhood theory in the courts' favoring of object lost rather than wealth lost. Losing a particular thing is seen as much more worthy of compensation rather than an owner being subjected to conditions which lower the market value of the thing.[66] The object-loss can be translated directly to Bruce Ackerman's view of property as a "bundle of rights," some combination of which is held by the owner.[67] Radin theorizes that part of the relationship between personhood and property is found in the continuity of relationships between people and objects. This relationship is severed when one or more of the sticks are taken from the owner, but it is not severed by a mere diminution in value to the owner.[68] The taking of these sticks is disruptive to the owner's life in a way wealth-loss is not, and Radin posits that the personhood perspective has substantial explanatory value for understanding why physical takings are much more easily viewed as implicating the Fifth Amendment than regulatory takings.

Radin looks particularly at the value of the home for the facilitation of personal development and freedoms.[69] The home serves as a place outside

59. *Id.* at 991–92.

60. *Id.* at 966–68.

61. *Id.* at 965, 967.

62. *Id.* at 971–74, 976.

63. Radin, *supra* note 57, at 986.

64. *Id.* at 959.

65. *Id.*

66. *Id.* at 1003–04.

67. *Id.* at 1003. This view has also been approved by the Supreme Court in PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). "The term 'property' as used in the Taking Clause includes the entire group of rights inhering in the citizen's [ownership]." *Id.* at 83n.6. "It is not used in the vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." *Id.* "[Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.* (internal citations omitted).

68. Radin, *supra* note 57, at 1003–04.

69. *Id.* at 991–92.

of society for an individual to structure his private relations.[70] The most crucial aspect of the home that allows for this kind of personal development is the home's private, protected quality and the right of the individual to exclude others from it. The home may have its own sentimental value that could not be replaced by another equal home, but the second equal home would likely also be able to serve the function of providing its owner the private space necessary for the development of the self. This special quality inheres to the home's current status as a private place rather than merely the individual's attachment to it.

Radin traces the special place of the home through different bodies of case law, noting that its quality as a protected sphere is highly consistent throughout. She notes the Court's protection of obscene materials found within the home in *Stanley v. Georgia*.[71] There, the court focuses on the private nature of the home and the importance that individuals may take whatever actions enable them to most completely express themselves, so long as they do not affect other members of society.[72] She looks to landlord-tenant disputes favoring tenants who have claimed the property as a personal space, whereas it is purely a piece of property for the owners.[73] She then looks to criminal law, which has historically been extremely protective of the home,[74] recognizing the "sanctity of the home."[75] In *Payton*, the Court found that an arrest made in the home carried "not only the invasion attendant to all arrests,"[76] but also upset the home's private space in a manner impermissible without a warrant or exigent circumstances. An individual gains a degree of safety by entering his home that he would not have outside of it because of the "sanctity" of the place. The Court is recognizing a special characteristic possessed by the home which is recognized in no other space under the law. Even when the Court is stripping away the rights of searched parties, as in *Warden, Maryland Penitentiary v. Hayden*,[77] there is a clear understanding that the nature of the home as a private space is not impacted by what is found within it. The Court will not support the "mere evidence" rule because it finds no essential difference between a search for contraband and a search for evidence to be used against a defendant; the impact of being searched for the homeowner is the same because of the piercing of the space.[78]

Radin notes other cases granting special protections to the home in zoning ordinances,[79] but finds it anomalous that personhood has not

70. *Id.* at 997.

71. *Id.* at 991.

72. Stanley v. Georgia, 394 U.S. 557, 564–65 (1969).

73. Radin, *supra* note 57, at 992–96.

74. *Id.* at 996–1000.

75. *Payton*, 445 U.S. at 589.

76. *Id.* at 588–89.

77. 387 U.S. 294, 301–02 (1967).

78. Radin, 34 STAN. L. REV. at 998–99. Protections for mere evidence are more firmly grounded in self-incrimination provisions of the Fifth Amendment than in home protections in the Fourth.

79. *Id.* at 1005, n.172 (citing Moore v. City of E. Cleveland, 431 U.S. 494 (1977) ("where a plurality found a substantive due process right to live in one's home with one's extended family, hence a

emerged to give special protections to family homes in takings cases.[80] However, that the lack of special protections for the home must be balanced against the generally strong protections for physical property in the takings regime and premiums above market often paid for homes and other property with personal attachments.[81] While the empirical practices heightening the value of the home are not the same as judicial authorization of this value, they support Radin's argument that this subjective value of homes and other "special," non-commercial properties, is widely recognized. Further, perhaps a push for valuing the subjective value of homes is unnecessary because it is already widely accounted for in practice and additional recovery beyond what has already been voluntarily paid would not be forthcoming (or at least not greater than the costs of litigation).[82] Also, perhaps takings law does not favor the home over other sorts of physical space because by the time the home is taken, much of the home's value as a protector of privacy has already been stripped.

The harm in the home search suffered by the owner comes not only from the discovery of contraband, but also from the discovery of whatever else the homeowner prefers to keep only within the private sphere. The protections Radin cites help to create this sphere of privacy for intimate relations but also recognize some quality of home beyond its closed-off nature:

> It is not just that liberty needs some sanctuary and the home is a logical one to choose because of social consensus. There is also 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 other words, one embodies or constitutes oneself there. The home is affirmatively part of oneself—property for personhood—and not just the agreed-on locale for protection from outside interference.[83]

The sentiment that an invasion of the home is an "insult" is echoed in *Loretto*, one of a small number of partial takings cases.[84]

B. Application of the Personhood Theory to Fourth Amendment Takings

Radin's analysis supports the current state of ambiguity as to the proper role for property and privacy as sources of protection for the home in different bodies of law. Her argument that property may have a dual value, both as a tradable asset and as a more specific reflection of the

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substantive due process limitation on the power of local government to zone for occupancy by nuclear families only.").

80. She does, however, note that some special protections for group rights in takings cases can be found in Indian law. Radin, 34 STAN. L. REV at 1006.

81. *See* Garnett, *supra* note 56. Tracing the history of takings cases in Chicago, Garnett finds that generally, governmental authorities seizing properties go to great lengths to avoid taking properties of high subjective value. *Id.* at 110–11. Further, she finds that many states and localities have instituted rules to pay property owners more than the value of their property, either through statutes mandating this treatment, or through high payouts of discretionary relocation assistance funding. *Id.* at 121–22.

82. *Id.*

83. Radin, *supra* note 57, at 992.

84. *Loretto*, 458 U.S. 419.

owner's desires and personality, is a powerful one and has a significant intuitive resonance and considerable value in explaining the law's treatment of the home. The home is frequently an individual's most substantial investment but it is also a private, protected sphere for the individual outside of society. It is the site of an individual's intimate and family interactions and it is a location safe from prying eyes and government intrusions.

Radin works through the personal attachment to property in the takings law in particular.[85] Object-loss is more significant to personhood than wealth-loss because wealth-loss relates to the value society places on possessions and is definitionally monetizable (even if imperfectly so).[86] However, an individual's personal valuation of an object may be totally unaffected by the wealth-loss suffered; if he had no plans to sell the object, the fact that others now value it less makes no difference to his enjoyment of it. Object-loss or loss of a particular right of use to the object has a different quality to it, as the taking is more distinctly related to an individual's connection to the object. For example, one would be more harmed by full payment in exchange for the government's seizure of one's wedding ring than by a price cap on the resale of rings which made the ring much less valuable. Physical space is highly specific and infungible; it necessarily involves the taking of "this" house or property, fitting Radin's definition of object-loss. The qualities of takings law which the personhood theory best explains have clear application to searches. The problem in searches is not that the home suffers a diminution in value, but instead that the residents have lost a discrete interest in the property: the right to exclude others from the home. This is the sort of "stick" that takings law would find easy to conceptualize as an object-loss harm and compensate.

Criminal law's typically strong protections of the home reinforce the notion that the sanctity of the home may not be breached for mere trifles or suspicions, but instead only upon the issuance of a warrant. Unlike takings law, criminal law has taken much more of a concern for the notions of protected spaces and privacy because it deals with spaces that are still inhabited at the time of the law's interactions with them. The purported shift in *Katz* towards protecting privacy rather than property rights is a recognition of personhood theory; it protects the owner's subjective value of property, which is at least partially the privacy it affords. The space is made private by an individual's expectation of privacy, which is deeply linked to his attachment to the object.[87]

Radin's argument, that part of the value of the home is grounded in the expressions of personhood it allows, helps to explain the nature of the loss suffered by a home search. The harm suffered by the owner is beyond the mere "rent" value of the property during the time of the physical seizure of the home; the harm is in the violation felt by having the privacy

85. Radin, *supra* note 57, at 1002–13.

86. *Id.* at 1003–06.

87. *Id.* at 1000n.159.

of the home compromised, and the subjective benefits of the home's privacy are severely damaged. This harm cannot be measured solely in terms of the value of the home and the time over which it is seized, but instead in the revelation of years of private materials and personal information. Because the nature of the harm is in the allowance of unwanted intruders into the home, the harm has a greater relationship to the depth of the search and the exposure of private materials to numerous outsiders than the length of time the home is seized.

While this harm does not look exactly like the harms of traditional takings cases, it is no less real. The subjective and objective values of property are not the same, and the subjective value will always be far more difficult to properly evaluate. However, even if police actions would not eliminate the value of the property to the general public, they undermine the purpose of possessing the property for the owners who are searched. In this sense, the "rent" system of compensation is a poor one, as the harm comes more from the values inuring to property than in tangible harms to market value. In the absence of a good system of valuing subjective loss, the use of objective loss seems to be a sufficient (if crude) substitute. It would likely still undervalue the harm suffered by the owners by paying them for the temporary use of the space, but would provide at least a first pass at compensating them for the harm suffered; at least some of the value of the privacy the property affords would be incorporated into society's market prices. Though the police actions do not damage the proxies for the value of property, they go directly to the underlying value and the reason for property.

IV. Takings Law and Property Claims

A typical home search will often include police officers entering a home, either upon the owner's opening the door for them or after the door has been broken down due to the owner's refusal or absence. The officers conduct the search pursuant to a warrant which gives them the right to search the entire home or specific areas of the home. The owners may remain in the home for the duration of the search but may not interfere with the officers' business and the officers may remain in the home for however long is necessary for them to accomplish their purpose. The search likely occurs because the owner's home contains some evidence necessary for a criminal investigation or trial.

Although such a home search has not yet been recognized as a taking, it takes very little imagination to conceive of a forced entry into the home by a law enforcement agency as a taking. A physical taking is conceptually simple: it must be a (1) physical occupation (2) for a public purpose.[88] A home search in which law enforcement agents enter into a dwelling by right

88. Applegate v. United States, 35 Fed. Cl. 406, 413–14 (Fed. Cl. 1996). In physical takings cases, the inquiry is limited to whether claimant can establish physical occupation, not necessarily of infinite duration, of his property by government. Physical occupation need not occur directly, but can be found in physical injury to real property substantially contributed to by public improvement.

of a warrant directing them to search for evidence or contraband, satisfies the two requirements. The key element which makes a government action fall under the purview of the Takings Clause is the *forced* submission of property owners to invasion by the government.[89] The above home search involves an involuntary physical intrusion into the space designated in the warrant, akin to a kind of per se taking.[90]

When a government action effects a physical intrusion, the Court is extremely inclined to find a taking has occurred. In demonstrating the decisiveness of the physical aspect of the taking, the majority in *Loretto* cites to two cases where the government interfered with the use of mines during times of war.[91] In *United States v. Pewee Coal*, the government actually took over a mine for over a year, then extended its ownership twice.[92] In *United States v. Central Eureka Mining Co.*,[93] the government ordered that "nonessential gold mines" be shut down in order to preserve resources for the war effort. Both cases stemmed from measures passed during World War II. The former was found to be a clear taking,[94] (with the dissent arguing only as to whether damages of sufficient heft had been shown)[95] and the latter was found by eight justices not to be a taking.[96] The length of time the regulation was in effect was far from the controlling question as to whether the government had effected a taking; instead, the close resemblance to a physical invasion in one but not in the other was dispositive.[97]

The differences between a home search and a more typical taking are not in the barebones definition or in the fact of the physical intrusion, but instead in the qualities of the property rights taken. A standard takings case generally involves the full, permanent seizure of a piece of land or structure, because the particular parcel of land is needed indefinitely for some other use.[98] This may be achieved either through condemnation proceedings, if the character of the structure or land is such that it causes the property to be taken (such as for health or safety reasons in the case of a dilapidated building or slum),[99] or through inverse condemnation if the

89. *See Yee*, 503 U.S. at 527 (holding that "the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property").

90. This would be in contrast to a regulatory taking, in which the harm is suffered in terms of the value of the home or limitations on the specific purposes the homeowners intend for the space. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 412–13 (1922).

91. *Loretto*, 458 U.S. at 431–32.

92. 341 U.S. 114, 115–16 (1951).

93. 357 U.S. 155, 156–57 (1958).

94. *Pewee Coal*, 341 U.S. at 115–17.

95. *Id.* at 121–22 (Burton, J., dissenting).

96. *Central Eureka*, 357 U.S. at 168–69.

97. *Pewee Coal*, 341 U.S. 114; *Central Eureka*, 357 U.S. 155.

98. *See, e.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216, 233 (2003); Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). *See also* Armstrong v. United States, 364 U.S. 40, 49 (1960); Old Dominion Land Co. v. United States, 269 U.S. 55 (1925); Rindge Co. v. L.A. County, 262 U.S. 700 (1923); Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992); Kelo v. City of New London, Conn., 545 U.S. 469, 496–98 (2005) (O'Connor, J., dissenting).

99. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954).

land has no intrinsic faults but merely sits on a site needed for other purposes, such as a highway.[100]

I make no claim that having a home searched is equal to losing the home outright, but there is no requirement that the government must take all of an owner's rights to his property in order to effect a taking.[101] Bruce Ackerman describes how property rights may be viewed as "a bundle of rights," and notes that the court frequently recognizes takings where any of the "sticks" in the bundle have been taken from the owner.[102] Property rights in a physical thing have been described as the rights "to possess, use and dispose of it."[103] To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. Home searches take two of these rights for their duration, possession and use. Many characteristics of a search might differentiate it from a more typical taking: the incomplete nature of the invasion; the abbreviated, indefinite period of time over which the search occurs; the owner's ability to be in the home during the search; and the owner's culpability in causing the home to be entered. However, none of these factors individually cause any sort of hand-wringing for justices when they occur in other takings cases because they do not go to the heart of whether an invasion is or is not a taking. I will go through each of these concerns, demonstrating their irrelevance in determining whether a taking has occurred upon a physical invasion.

A. Partial Physical Takings

The fact that the home search may not encompass the entire home would not disqualify it from being a taking based on well-established interpretations of the Fifth Amendment. The courts have recognized takings in cases of permanent partial physical invasion where the government destroys the right to use only a piece of the property. "A permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[104] *Loretto* set a profound precedent showing the strong protection given to the physical space of the home, no matter how it was violated.[105] Even a slight incursion, such as cable wires in the walls, which seemed to have little intrusion onto the private space of the home or the privacy interests of the residents of the apartment building,[106] was found to be a compensable taking. The small extent of the intrusion factored only into the compensation awarded, not into whether a violation had occurred.[107] Unlike in the regulatory takings cases, it was not necessary to make a measurement of whether the government had gone

100. *See* United States *ex rel.* TVA v. Powelson, 319 U.S. 266 (1943). *See also*, United States v. Miller, 317 U.S. 369 (1943), *cited in* Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979).

101. *See, e.g.*, *Loretto*, 458 U.S. 419; *Nollan*, 483 U.S. 825.

102. BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION, 113–67 (1977).

103. *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

104. *Loretto*, 458 U.S. at 427.

105. *Id.* at 435–37.

106. *Id.* at 422–24.

107. *Id.* at 437–38.

"too far" in using the space of the home, as any incursion was sufficient to constitute an invasion. This interpretation has not been challenged in any way in the years following *Loretto*.[108] In *Skip Kirchdorfer, Inc. v. United States*,[109] the Federal Circuit found that when the Navy seized a warehouse it had previously leased to a contractor, it committed a taking merely by "breaking and entering . . . after the Navy forced the doors, SKI no longer controlled access. The Navy took SKI's property."[110] The status of this entry as a taking was also unaffected by the limited duration of the taking and SKI's continued access to taken property.[111]

B. Easements and the Right of Exclusive Use

The right to exclude others from property has always been viewed as an important "stick" in the bundle of property rights, and when the government forces an owner to allow others onto his land, it effects a physical taking. Takings cases dealing with public easements involve forcing the owner to give up his right of exclusion over his property but do not take away his right to be present on his land and theoretically cause a limited amount of damage.[112] Easements differ from the home search in that they are generally permanent or at least long-term arrangements rather than one-time entrances onto the property, but also merely involve passage over outdoor portions of the property, rather than through the more intimate space of the home. While it is impossible to determine precisely how these opposing factors might weigh against each other, it is worth noting that easement cases are clear-cut in the eyes of the law.[113] A pregnable property simply has less value to the owner than one over which he has sole dominion because other individuals now have a legitimate right to use his land. These claims are for a limited purpose and period of time, but the land is no longer entirely his so long as others desire to use it.[114] Other

108. *Yee*, 503 U.S. at 520; F.C.C. v. Fla. Power Corp., 480 U.S. 245 (1987); Fresh Pond Shopping Ctr., Inc. v. Callahan, 464 U.S. 875 (1983).

109. 6 F.3d 1573 (Fed. Cir. 1993).

110. *Id.* at 1583.

111. *Id.*

112. *Nollan*, 483 U.S. at 828–29 (involving only the right of citizens to walk across his beachfront property: the only damage to the land ought to have been as a result of individuals walking across sand); *Kaiser Aetna*, 444 U.S. at 176 (where the public at large would have been allowed to use the plaintiff's waterway, presumably without any meaningful damage to the pond).

113. *See Nollan*, 483 U.S. at 834 ("Requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment."); United States v. Dickinson, 331 U.S. 745, 748 (1947) ("Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."); Ridge Line, Inc. v. United States, 346 F.3d 1346, 1353 (Fed. Cir. 2003) (citing *Dickinson*, 331 U.S. at 748) ("It is well established that the government may not take an easement without just compensation).

114. The taking here could be conceptualized as akin the taking seen in *Loretto*, in that a portion of the land is no longer under the control of user for intermittent periods. Instead of taking possession of a discrete physical bundle of the land, the government has instead taken the land over the space of time. Either way, the significant act for the Court is the entrance onto the land, rather than the specific duration of the intrusion (though it seems clear both in the easements and in *Loretto*, the Court conceptualizes the intrusions as likely to extend for a substantial amount of time.) *Loretto*, 458 U.S. at 419.

cases establish that a taking need not be continuous but, looking to the laws of easements, find that intermittent intrusions may suffice to demonstrate a taking over a longer period of time.[115] Thus, an individual whose home is seized on several occasions might claim that his home has never been truly surrendered back to him.

The loss of the exclusion right alone is seen as taking away a key factor in the owner's enjoyment of the land, necessitating compensation. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.[116] Cases requiring that owners waive their rights to exclusion for very specific purposes or intrusions are seen as particularly egregious.[117] Both *Loretto* and *Skip Kirchdorfer* are clear that the loss of the right to exclusive use of property by no means requires that an individual cannot use the property himself; indeed, in *Loretto*, the residents had seemingly unfettered access to nearly all uses of their property.[118] The loss of exclusive use of property is complete when an individual loses the right to exclude whomever he wishes and thus, the fact that owners continue to have some rights to the use of their property during a home search does not negate the diminution of their right of exclusive use.

The Court's analysis of the differences between *PruneYard Shopping Center*[119] and *Kaiser Aetna* demonstrates how the value of the right to exclusive use is fundamentally tied to the owner's protection of that right. Both involve the government's promulgating regulations which would force private property owners to allow citizens onto their properties over the owners' objections. In *PruneYard*, a group of students wanted to raise awareness of Zionism inside a large shopping mall and the mall owners wanted to prevent their doing so. The state forced the mall to grant access to the students over the mall's protests. The Court found that while "there has literally been a 'taking' of" the right to exclude others from a property, it did not amount to a taking in a constitutional sense.[120] The Court found the controlling standard was from *Armstrong*, looking to whether private individuals had been forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[121] In finding the mall has not been unreasonably deprived by the regulation, the determinative factor in *PruneYard* had not been forced to bear such a burden was the general openness of the mall. The Court mentions the mall is "open to the public at large," that it is "a large commercial complex," and that the

115. *Skip Kirchdorfer*, 6 F.3d 1573; Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

116. *Yee*, 503 U.S. at 528 (quoting *Kaiser Aetna*, 444 U.S. at 176 ("[T]he 'right to exclude' is doubtless[ly] . . . , 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'")). *See also Loretto*, 458 U.S. at 435.

117. *Loretto*, 458 U.S. at 436.

118. *Id.* at 422–24; ACKERMAN, *supra* note 102.

119. 447 U.S. 74 (1980).

120. *Id.* at 82.

121. *Id.* at 83.

speakers' activities were "limited . . . to the common areas of the shopping center."[122]

In contrast, the Court paints the property opened to the public in *Kaiser Aetna* as a "private pond,"[123] open only to fee-paying members and the fees were paid in part to "maintain the privacy and security of the pond."[124] These cases are otherwise strikingly similar in the character of government action, except that the mall's essential purpose required it to be open to the general public, while the value of the pond in *Kaiser Aetna* depended on its use being limited. The Court freely admits Pruneyard's right to exclusive use was taken, but it finds no real value in this right; the mall was not a private space, so the right to exclusive use was of no value.[125] This is in striking contrast to the very clear-cut decision in *Kaiser Aetna* where the Court does not find the taking to be a close call due to the private nature of the space.[126] The home's status as a private and exclusive space is far better protected than in either of the above examples and thus, the taking of the right to exclusive use ought to be a clear taking.

C. Duration of the Taking

Taking property for a period of limited rather than permanent duration bears only on the compensation owed rather than the status of the taking. "[C]ompensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary."[127] Cases involving temporary takings of factory and production facilities where the government would take over the lease of a factory for a period of a year or two in order to satisfy the production demands of the war effort under the War Powers Act amply demonstrate this proposition.[128] The fights in these cases are about what sort of compensation is owed to the former possessors of the properties (whether damages should be merely for the value of the property or also for the lost income the factories might have produced over the relevant period), not about whether these were takings at all.[129] While these factories were taken for a much longer time than a property is seized during a home search, the principle remains that a seizure known to be of a limited duration where the property will be returned to the owner, is a taking. Courts have also applied this standard to cases such as *Loretto* and *Hendler v.*

122. *Id.* at 83–84.

123. *Kaiser Aetna*, 444 U.S. at 166.

124. *Id.* at 168.

125. *PruneYard*, 447 U.S. at 84–4.

126. Radin, *supra* note 57, at 983n.190. Even public accommodations can suffer takings for not being able to exclude whomever they want to.

127. *Legal Found. of Wash.*, 538 U.S. at 233–34 (citing *General Motors*, 323 U.S. 373, United States v. Petty Motor Co., 327 U.S. 372 (1946)). *See also* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); Cienega Gardens v. United States, 331 F.3d 1319, 1339 (Fed. Cir. 2003); Yuba Natural Res., Inc. v. United States, 821 F.2d 638, 642 (Fed. Cir. 1987) (just compensation for a temporary taking based on the term of the taking).

128. *General Motors*, 323 U.S. 373; *Petty Motor*, 327 U.S. 372.

129. *General Motors*, 323 U.S. at 378–79; *Petty Motor*, 327 U.S. at 374–75.

United States,[130] stating that in the context of some physical object being placed upon an individual's land, "'permanent' does not mean forever, or anything like it. A taking can be for a limited term-what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute."[131] The time limitations only effect the payments owed to the owner rather than the status of the action.

The one exception to this general rule is the surveying of lands already marked to be taken at a later date. These entrances only fail to require the procurement of an easement or takings payments when the entrance poses no damage to the land and does not interfere with the owner's possession of the land.[132] This conclusion supports the view of a home search as a taking; the presence of law enforcement officials searching a home much more closely resembles extracting rock samples from land than taking simple measurements without causing damage. The process is a violent one which disrupts the ability of owners to use the home and courts have found analogously jarring experiences sufficient to constitute takings in other contexts.

D. Culpability in the Taking

Physical takings questions are set apart from peripheral matters. They are issues of property and are parsed as such without a broader concern for the relationship between the government's action in the particular case and individual from whom property is taken. Condemnation of slums in order to make more productive use of the land or area pose routine takings cases, but the only real question in those cases is whether the purpose of the government in seizing these buildings to give them to another private entity is an acceptable reason for condemnation. Whether the slumlord deserves payment for seizing his property after allowing it to become so run-down

130. 952 F.2d at 1376.

131. *Id.*; *see also Skip Kirchdorfer*, 6 F.3d at 1582.

132. For limited surveys incident to condemnation proceedings, courts have not found a taking necessarily occurs. *See* S. Cal. Gas Co. v. Joseph W. Wolfskill Co., 28 Cal. Rptr. 345 (Cal. App. 4th 1963); State By Waste Mgmt Bd. v. Bruesehoff, 343 N.W. 2d 292 (Minn. Ct. App. 1984); Cleveland Bakers Union v. State, Dept. of Admin. Services-Pub. Works, 43 N.E.2d 999 (Ohio Ct. App. 1981). However, where substantial interference occurs, courts may find a taking based on preliminary actions to a later, more complete taking. *See* Mo. Highway and Transp. Comm'n v. Eilers, 729 S.W.2d 471, 473–74 (Mo. Ct. App. 1987) (entering private property, drilling holes, and removing soil, without consent of the landowner, amounted to an unconstitutional taking of the property; the soil survey could not be conducted until the Commission received permission from the landowner or " intiates judicial proceedings and pays the damages for a temporary easement before entering the land"). *See also* 29A C.J.S. *Eminent Domain* § 88 (2008).

that it posed a menace to public health and safety is not an issue;[133] the fact of the physical invasion is more than sufficient to prove the taking.[134]

Kaiser Aetna establishes that even if an owner's actions make him far more susceptible to a taking or bring his possessions under government regulations, allowing any sort of public right of access onto his property is still a taking. Kaiser Aetna made substantial repairs and improvements to its property, which transformed its pond into a navigable waterway.[135] Navigable waterways fall under the auspices of the federal government and as such, the government sought to clarify whether it had the right to do what it saw fit with the developed land. However, what it wished to do (build an aquatic park partially made of Kaiser Aetna's property) would have affected an easement upon the property by allowing the general public to use the waterway. Though the case was technically a regulatory takings case, the Court saw the government's actions as a clear invasion of Kaiser Aetna's property interest in the waterway, "even if the Government physically invades only an easement in property."[136] Even though Kaiser Aetna could have avoided any question in this case simply by failing to improve its waterway through dredging, thus precluding it from being considered a "navigable waterway," its property interests in the waterway were undiminished.[137] The fact the *Kaiser Aetna* brought the regulation upon itself was not seen as a relevant question in this litigation.

I do not believe that the "reasonable investment-backed expectations" prong of the regulatory takings doctrine, showing that a property owner's intentions should be weighed in the calculations of whether a taking has occurred,[138] would alter this balance. In regulatory takings cases, individuals seek to receive payment after being prevented from using property in the way they intend to use it. The concern addressed by the reasonable investment-backed expectations prong is that landowners may attempt to use the takings doctrine to obtain a windfall from the government by purchasing land which may be subject to regulation, only to receive the

133. The only real area where takings concerns itself with the culpability of the property owner in bringing about the taking is in the regulatory takings arena in questions of reasonable investment-backed expectations. *See* Pa. Cent. Transp. Co. v. United States, 438 U.S. 104 (1978). There, courts take some concern for whether the property owner was willfully blind to the likelihood of regulation, and possibly purchased the property in hopes of receiving a windfall from the government. It is not enough to have committed any wrongdoing (neglecting a building such that it becomes a menace), but the offense needs to relate specifically to the property in question and represent some sort of attempt to reap gains which are not deserved. It seems unlikely to be a problem in the proposed home search takings that individuals would hide contraband in their homes in the hope that the government would search and give them a payment; the amounts of money and criminal charges involved would simply make this a losing proposition.

134. *Kelo*, 545 U.S. at 469; Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239 (1984); *Berman*, 348 U.S. at 28–37; Maher v. City of New Orleans, 516 F.2d 1051, 1059 (5th Cir. 1975).

135. *Kaiser Aetna*, 444 U.S. at 168.

136. *Id.* at 180.

137. *Id.* at 185–86.

138. *Supra* note 133. Generally, regulatory takings are much less permissive than physical takings; the courts have less concern for fluctuations in the market value of property, which is already erratic, than for any sort of physical encroachment. *See, e.g.*, *Legal Found. of Wash.*, 538 U.S. at 233. I will set this concern aside for the sake of argument.

takings payments granted when the regulation comes to pass, rather than put the land to productive use. This worry would not arise for searched individuals. Presumably, people involved in criminal activities would not want their homes searched and their activities discovered. They would not attempt to abuse the takings system but to the contrary, would hope to have no relationship with the criminal justice system. While some may think that wrongdoing negates a taking, the question of the moral dessert of the invasion is simply not one asked in the takings context.

E. Trespass

Though the corpus of tort law is distinct from both criminal and takings law, it is important to at least take a brief look at trespass law.[139] The tort of trespass helps to illustrate the argument that entering onto a property is recognized under the law as creating a compensable harm for the property owner. Consider the Restatement (First) of Torts § 163, which speaks to trespasses that result in no physical damage to the property:

> One who intentionally enters land in the possession of another without the consent of the possessor or other privilege so to do, is liable for a trespass under the rule stated in § 158, although his presence on the land causes no harm to the land, its possessor or to any thing or person in whose security the possessor has a legally protected interest.[140]

The notion that harm is caused merely by presence and the violation of exclusive use, is another uncontroversial notion under the current legal principles. This provision for tort damages is a clear recognition that the loss of exclusive use alone is sufficient to cause some injury to the property owner in the absence of any tangible harm. While the legal stance of law enforcement officers entering property pursuant to a warrant is distinct in that they have the privilege to enter, they still fail to enter at the consent of the owner. From the perspective of the homeowner, the uninvited law enforcement officer bears a strong resemblance to the uninvited trespasser, with the distinction that the homeowner has no power to ward off or remove the law enforcement officer. The privilege to enter is taken from the possessor unwillingly and thus, the same harms apply. The notion that harm is done by a trespasser even when no specific monetary damage is achieved by his trespasser is well-settled in tort law.

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139. RESTATEMENT (FIRST) OF TORTS § 158 defines the tort of trespass as follows: "One who intentionally and without a consensual or other privilege (a) enters land in possession of another or any part thereof or causes a thing or third person so to do, or (b) remains thereon, or (c) permits to remain thereon a thing which the actor or his predecessor in legal interest brought thereon in the manner stated in §§ 160 and 161, is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests."

140. *Id.*

F. Conclusion

While it is clear that none of these cases involve a very close approximation of a home search, all of the qualities which might set a home search apart from more traditional takings cases are not considered controversial by courts, or even close cases. These are all settled questions of law and the mere combination of them, while novel, does not alter the fundamentally similar character of the search to recognized takings. While the home search does not look the same as the taking of a home to build a new roadway, the case law on point does not allow for a clear legal ground upon which this sort of invasion could be differentiated from a standard taking.[141] It is not enough to point to incomplete seizure of the home, continued use by the owner, limited duration of the search, or possible culpability of the owner. These are simply not issues that come into play in determining whether or not a taking has occurred.

The home search looks most like an easement into the home, a particularly damaging sort of easement. As the Supreme Court noted in *Loretto*:

> [A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property . . . . [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.[142]

The Supreme Court describes precisely the nature of the harm suffered by an easement or partial physical taking: the owner is not removed from his property entirely and he is not paid for the full value of his home so that he may go and find another home that he may have to himself. Instead, he is forced to share his home (the injury) with another entity not of his choosing (the insult). The Court highlights here that a principal benefit of property is found in its private quality and when unwanted others are allowed in, the loss is not trifling. Justice Marshall uses strong language in this passage to illustrate the damage caused by any sort of physical invasion. The injury is particularly profound when the homeowner has no power to stop the officers from looking into the most private areas of the home and cannot prepare himself in any way for the invasion. This is a far

141. While the cases on point, particularly *Loretto*, often stress that the recognized case law for takings relate to a permanent intrusion, they notably have not ruled out shorter time frames. *Loretto*, 458 U.S. at 428–29 (noting that some older cases involving temporary flooding of land were found not to constitute takings).

142. *Loretto*, 458 U.S. at 436; *see also Fla. Power Corp.*, 480 U.S. at 252–53.

greater form of the injury than the one in *Loretto*, where the owner merely had to submit to wires in his walls. The wires did not transmit any information about the home and before any installation occurred, the owner had the opportunity to secure the private areas of the home. Neither the easement in *Nollan* nor the cable company's installation of wires in *Loretto* was accompanied by anything remotely resembling the violence of a home search.

Due to the lack of warning and inability of those searched to prepare for the invasion into the private space – another factor that differentiates a search from a traditional taking – the search poses a stronger argument for compensation because it takes away not only some monetary interest in the physical property, but also a large measure of the owner-specific value of the property. In this way, a search is also akin to a trespass. Though it lacks the illegality of a normal trespass (at least in the cases of warranted searches), the fact that the harm of intrusion is compensated in tort law even when it does not result in damage, or an effective seizure of the property trespassed upon, is telling. There is a recognition under the law of the psychic harms of an uninvited individual invading personal space.

V. Conclusion

A. Home Searches as Takings

A physical taking is any intrusion onto property mandated by the government rather than allowed by the property owner. This standard has a long history and has been highly resistant to allowing any entry, no matter how slight, without compensation. Because the takings inquiry is such an arid one, looking solely to whether an individual's property rights have been violated, there is a strong argument for finding that a taking occurs in a home search. The primary differences between the typical takings cases and home searches are found in the duration of the taking and the nature of the space intruded upon. We are not used to compensating for injuries to privacy as takings so it may be more difficult to view the home search as such, but takings granted for violating the right to exclusive use of a property bridge the gap between what we are used to recognizing as a taking and the taking which occurs in a search.

What has truly been lost in a home search is the sense of privacy and personhood invested in the home. This more amorphous concept is not directly recognized as a compensable harm under the law of property, but it is encapsulated by the loss of exclusive use of one's property. The value of exclusive use is more difficult to define than many other strands of property rights; it does not imply the owner has lost the primacy of his use of the land nor any alteration of the land's physical characteristics. Instead, Radin best describes its true value as the owner's subjective valuation of his ability to exercise his privacy rights and to fully control his personal space in whatever way he sees fit. In cases such as *Loretto*, the court is profoundly offended by the intrusion into the physical area of the home,

even when there is essentially no attendant loss of privacy.[143] Similarly, the Court's reluctance to allow any sort of physical entrance into the home in the Fourth Amendment context, or any sort of surveillance which reveals the intimate details of the home, bespeaks the value of this privacy. If the Court did not think people found any value in the privacy of their homes, it would not be so stringent in protecting the home's boundaries.[144] While not everything of value has a price under the law, the value of exclusive use clearly does under takings law. Because the exclusive use of the home is lost in such a violent and profound manner, the entry into the home causes a taking of non-trivial magnitude.

B. Why Might Home Searches Be Different?

1. Claimants' Culpability

Unlike in takings cases, where the government's desire to take the claimant's property is almost always unrelated to any other characteristic of the claimant's, claimants in a Fourth Amendment taking would not be so innocent. In order to obtain a search warrant, the police must have probable cause to believe that the space to be searched has contraband or evidence of criminal activities. While the individual owning the home may not have committed a crime, he may not have entirely clean hands. Many would argue the home search is an acceptable cost to put upon the class of criminal suspects, who in turn impose costs on society through their criminal activities.

This concern does not hold up because criminal suspects have not been found guilty of any crime and because takings law is disinterested in the culpability of claimants. Searched individuals are suspects, not convicts, and the home search forces them to bear a cost without any process or opportunity to resist. While some might argue this cost is akin to court costs or attorneys' fees, which are routinely imposed on people not found guilty of any crime, I suggest two key differences: the waivability and monetary nature of those payments. While people may become attached to their money, loss of general, non-specific assets carries with it none of the highly specific and unchangeable losses carried by an invasion of one's privacy. This is recognized in takings law, which provides my second counterargument that only regulatory takings look to the question of how an actor's conduct played into his loss. Regulatory takings law has a similar suspicion of its claimants, who are often investors who have mere expectations in their property rather than personal ties, or may have been gambling against the regulation and attempting to cash in either way. For questions of physical takings though, the inquiry ends upon the entrance into the building. *Kaiser Aetna* and cases dealing with the condemnation of slums provide strong support for this proposition: but for the owner's actions, the

143. It is possible this is due to a cross-fertilization between the laws of property and criminal law. Criminal law takes a substantial concern for the inviolability of property, protecting the home in particular from criminal searches.

144. *Kyllo*, 533 U.S. at 41.

government would have had no authority over the property. The question of whether these owners deserved to have their rights of exclusive use taken was simply not on the table. Physical takings cases are based on property rights alone, not on a holistic inquiry into who deserved to have their property taken from them.

2. Limitations of Constitutional Rights

A constitutional analog to the above-stated concern would be that nearly all constitutional rights are subject to some limits; they are not absolute where important government interests cannot be accomplished in any other way. For example, the First Amendment states that Congress shall make no law abridging free speech, but yields to numerous exceptions when government ends of protecting public safety cannot be accomplished through the preservation of the right, such as fighting words and threats. The government cannot protect its people without conducting criminal investigations, and it cannot accomplish these investigations without searches of particular homes. The right to property and compensation for seizure of property is not infinite and should carve out an exception when important government interests are implicated.

The government's interest in protecting safety is not necessarily greater than other interests which are accomplished by property seizures under the Takings Clause. The government must take actions all the time through the use of its police power which involve seizing property (such as condemning slums, taking homes to build roads or public utilities) and compensates these seizures as clear takings. The government's interests in providing services and protecting its citizens from blight are not of a fundamentally different character or importance from its interests in protecting them from crime. They are all part of the government's mission to promote its citizens' general welfare. The government would still be able to protect its citizens if it had to pay for its use of private property, it would only increase the cost of the protection.[145] Neither the government interests nor the harms suffered are of such a different type from a typical taking that they would warrant differentiation and an exception to the general right.

3. Mere Evidence Rule/Government's Right to the Property

Older cases dealing with home searches only allowed the seizure of contraband, as individuals were seen as having no legitimate property rights to such materials, but prevented the seizure of "mere evidence" or other materials in the individual's possession that might be used as evidence that a crime had been committed, but the ownership of which was not illegal.[146] The Supreme Court eliminated this distinction in *Warden v. Hayden*, finding the government could seize whatever evidence it needed

145. This stands in stark contrast to threats cases, in which the harm is achieved merely through the speech in question.

146. *Hayden*, 387 U.S. at 300–04.

to prove the crime had occurred.[147] Due to this permission, some might argue that home searches cannot be viewed as takings because the government is entering the home only to extract materials to which it has obtained a controlling property interest. The government could compel the production of this information through subpoena, but the targets of searches cannot be trusted to produce the incriminating information sought. Thus, the government is taking only the actions necessary to preserve its own property interests.

My argument is not that the government must compensate for the seizure of contraband or evidence, but instead that it inflicts harm by entering the intimate space of the home. The government's choice to enter the home uninvited with a search warrant to recover the objects sought is most likely a sensible one (as I agree using a subpoena would likely have limited effectiveness in most cases), but the fact remains that the government's choice to improve the efficacy of its evidence-gathering process through the home search imposes the cost of the physical invasion upon the subjects of the search. The subjects never had the opportunity to avoid the cost of the search because of the government's unilateral decision to accomplish the evidence-gathering in that manner. Thus, the subjects cannot then be blamed for the cost because of the government's assumptions that they would destroy the evidence. Despite the government's claims to the evidence in the home, it takes far more than the objects sought by the search warrant when it physically enters a home and exposes its private contents to uninvited people.

4. Consonance Between Fourth and Fifth Amendments

A strictly originalist reading of the Constitution would certainly bar my argument: home searches were not recognized as takings at the adoption of the Fifth Amendment, nor at any point since, for that matter. However, a non-originalist but constitutionalist challenge might assert that viewing searches as takings would be precluded because it would create dissonance between the Fourth Amendment's bar to unreasonable searches and seizures and the Fifth Amendment's Takings Clause. This argument would suggest that the Fourth Amendment, having already spoken directly to the issue of home searches, would be the controlling constitutional authority for questions relating to them. The language in the Fourth Amendment does not mention payments, nor suggest that searches may be conducted after payment, but merely that citizens are to be free of unreasonable and unwarranted searches. The silence on reasonable searches assigns the government the right to conduct searches without restraints (such as payment). The Fifth Amendment was not written to deal with home searches and does not speak to them directly, and given that there is already specific language speaking to home searches which do not paint them

147. *Id.* at 307–08.

as takings, it cannot be mere oversight that home searches have not been seen as a taking.

The Fourth and Fifth Amendments protect fundamentally different interests, which would not become discordant if takings were extended to home searches. The Fourth Amendment is an absolute protection for citizens to be free from unreasonable searches; the government may never search unreasonably. The framers did not elaborate as to many aspects of how searches may be accomplished, failing to lay out which circumstances create probable cause and what limits govern those conducting a search. The government has broad powers to conduct reasonable, warranted searches, much as it has the power to take property it deems necessary to the accomplishment of some public purpose by eminent domain. The purpose of the Takings Clause is not to prevent the government from seizing property (or, as per my argument, searching homes), but instead to ensure that adequate compensation is given when it does. The Fourth Amendment's prohibitions could be read as more akin to preventing otherwise illegal takings (such as takings for a purely private purpose) than as barring compensation. My argument does not implicate the Fourth Amendment, as it would serve not to exclude evidence or prevent the search, but merely allows the homeowner to recover damages for the actual harms the search imposed. This reading to create greater harmony among the amendments, as compensating under the Fifth Amendment for home searches, would simply treat physical intrusions conducted pursuant to criminal law in the same way other intrusions are treated rather than creating an unwritten exception to the Takings Clause for law enforcement interests.

5. Takings Are Ill-Suited to Compensate the Harm Found in Home Searches

Typical takings pose only a limited intrusion to property as it exists as a private space. Takings are not accomplished suddenly or without warning. Ample notice is given before the potential trespass occurs, usually with the individual suffering the taking having time to appeal the decision before it is effected. While government takings may frequently result in the loss of an object valued for the privacy it granted to the owner, they allow the owner time to modify his behavior in such a way that the space is no longer private when the right to exclusion is lost. The owner's sentimental connection with the home remains, which alone is perhaps worthy of greater compensation, but the home's role as a private space has likely now been transferred to a new space. The owner has been able to, in a sense, take the private space to another physical location.

Criminal searches almost definitionally do not allow for this modification time. The Fourth Amendment is protective of a broader range of property interests than is takings law, recognizing a use-based property interest for individuals who have no permanent claim to the space they are in. For example, if the government was to seize a phone booth by eminent domain, none of the regular users of that booth would have a takings claim

because they have been deprived of a space they were once free to inhabit; they would, however, have a Fourth Amendment claim if their use of the booth was monitored. Takings law is rarely posed with the question of whether an intrusion limited in time constitutes a taking because the government rarely attempts to accomplish tasks which do not require permanent possession or regulation through coercive means; the government does not even think of exposing citizens to these sorts of harms on a regular basis or at a moment's notice, so these sorts of issues only arise in cases of emergency.[148] The government would not seize a phone booth while a person is inside it making a phone call, and it would not seize a person's right to sleep on a friend's couch in the middle of the night. The sudden, violent nature of a criminal seizure, which is necessary for an effective search, is simply not present in takings cases.[149] The piercing of the private space is a necessary part of obtaining evidence that is hidden out of public sight or sense. Thus, while criminal searches do not result in a long-term deprivation, they take away the privacy that a typical takings case leaves intact.

The dissimilarity between the government action in searches and more typical physical takings could be used to argue that takings law is ill-equipped to assess the sort of harms suffered in a search. This more amorphous quality of privacy is not actually reflected in the market value of the property or in a rental of the space for the time of the search. The real harm would not be compensated and would result only in a trivial payment loosely tied to the harm suffered. However, I would argue takings law is in no way incapable of making this valuation; it is a typical recovery theory in takings law to look at the consequential harms suffered due to the taking.[150] The fact that private space is generally left untrammeled does not mean that courts cannot make these assessments as they make these valuations in trespass cases.

6. Political Will/Management Problems

The reasons above are the main ones grounded in some intrinsic qualities of takings and criminal law which I can see explaining the failure to compensate. The other major problem with a recognition of a takings claim in home searches is that there would be no political will for a regime which hampers police departments by forcing payments every time a home is entered. An opponent might suggest this program would be hugely expensive, causing the government to have to make these payouts every time any sort of physical intrusion into a space was made, and would likely chill police from entering private property.[151] I find it very unlikely that the

148. *See supra* notes 127–28.

149. *See, e.g.*, *Hudson*, 547 U.S. at 595 (not applying the exclusionary rule to violations of the knock-and-announce rule on the grounds that the rule was never intended to allow shielding of the contents of the home from search).

150. *General Motors*, 323 U.S. 373; *Petty Motor*, 377 U.S. 372.

151. To the contrary, the greater problem could result from police finding the takings system overly burdensome and attempting to avoid the traditional warranted search system altogether. Faced

public would want any counterweight against police searches when probable cause exists for such a search. The public's interest is in its safety, and as yet, no meaningful "criminal's rights" lobby has emerged to demand payment for police incursions. Politicians and judges would not curry favor by suggesting these sorts of reforms and they would likely expose themselves as targets of ridicule if they were to do so.

Concerns about the cost of such a program do not hold water. The claimants most likely to bring suit under this right would be those who had suffered substantial harms as a result of the search. Individuals who suffered only trivial harms or limited invasions onto their privacy would likely not find it in their financial interest to pursue such a takings claim. Thus, concerns as to the cost of creating such a right would be mitigated, as most recovery would be limited to individuals who had actually suffered egregious harm. Further, the mere existence of this right, even if not frequently used by searched individuals, would create good incentives for law enforcement officers conducting searches to be more gentle and respectful to privacy in order to avoid making cash payouts. Allowing a right to recovery from mere entrance into the home creates a meaningful counterweight to the incentive to find materials as quickly as possible.

The harms that are being imposed in these cases are harms to privacy rather than specific property damage and thus, would be extremely difficult to price accurately, making the administration of the regime expensive for the payments doled out. The psychic harms suffered when a home is searched would likely have highly subjective components. For example, would people who had just moved into a home but set up very few private things there, have the same loss to privacy upon intrusion as those who had lived in a home for a long time? Unlike takings cases which generally involve much more easily monetizable harms based on a market valuation of the property seized, searches would be a judicial nightmare to value accurately and the public would have little interest in recognizing the full extent of the harm suffered. I would argue that trespass cases are instructive in this area as to how to value the privacy harms suffered, but I do not claim that this regime would be simple to manage. My argument is instead that the difficulty of administration does not trump the harms inflicted by these sorts of searches.

Finally, I suggest the failure to compensate may derive from the claimants' status, not as criminal suspects, but as likely poorer individuals who may not own the property searched.[152] Takings cases do not arise for temporary inhabitants of property who have no claim against the government, but instead with the property owners. An individual who owns some parcel

with the possibility of making payouts for forced entries, police and courts might attempt to broaden consent doctrine. By pressuring search targets to submit to a consensual search, they would avoid both the warrant requirement of the Fourth Amendment and potential takings payouts (as the search would no longer be the result of a forced entrance). My intuition is that search targets would still be resistant to allowing incursions and would resist such pressure, but this could be a potential outcome of my proposal.

152. *See also* Levinson, *supra* note 52, at 378.

of property is likely to be a person of greater means than a person only temporarily occupying or renting a space. In addition to perfected property interests being easier to categorize (as described above), I suggest that society is quicker to take offense at the intrusion onto permanently owned space than onto temporarily occupied space (even space occupied over a long period, such as a rental). This concern is borne out in Fourth Amendment cases where the privacy claims of guests with full legal rights and permissions to be in the home of another are seen as far more tenuous than the claims of owners of property.

C. What can be done about this problem?

Based on the arguments presented in this Essay, I believe there is a sound argument which could be made and supported based on existing legal precedent for allowing home searches to be conceptualized and compensated as physical takings. However, it is probably politically unfeasible to propose that criminal defendants be paid because their homes were searched for contraband. For the same reason and the lack of any specific precedents or dicta permitting payments for this type of intrusion (particularly as originalism becomes an increasingly influential doctrine on the Supreme Court), I find it unlikely a court would sustain a claim brought on the grounds I suggest.

Nonetheless, I hope this essay demonstrates why the costs imposed on suspects ought to at least be minimized. The mere fact that the searched individuals may have been involved in criminal conduct does not eliminate their right to be secure in their property; their interests in the property existed legitimately and were taken by the search. The search's necessity for societal ends also does not alter the cost for searched individuals. By admitting how similar these searches are to events which routinely require compensation under the Constitution, we begin to realistically assess the actual costs imposed upon criminal suspects. While we may not have any interest in paying people to search their homes, I think that if the issue is seen as a cost, the next logical step is that the cost should be minimized. Police departments should attempt to balance the competing needs of finding evidence and protecting individuals' privacy. By drawing out these similarities, I hope to call attention to the less tangible rights invaded by home searches and contextualize home searches in a way which demonstrates their value.