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The Evolution of the Right to Exclude - More than a Property Right, a Privacy Right

Jace C. Gatewood

THE EVOLUTION OF THE RIGHT TO EXCLUDE—MORE THAN A PROPERTY RIGHT, A PRIVACY RIGHT

*Jace C. Gatewood**

More than two hundred years ago, William Blackstone defined the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." This concept, commonly referred to as the Right to Exclude, has been arguably one of the most significant and essential elements in defining our understanding of what constitutes property in the United States. Since Blackstone's description of property in the mid-eighteenth century, the right to exclude others has emerged as the single most important factor in determining the existence of private property. Historically, the right to exclude concerns the relationship between people with respect to things, "such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure assistance of the law in carrying out this decision." But, from a present-day perspective, the right to exclude is so much more than a property right that defines the existence of private property and the relationships between owners and things. It is a right that has evolved beyond the legal constructs of traditional property law to also encompass legal entitlements and benefits possessed by one person over another irrespective of the legal relationship between such person and the thing in which the right is claimed. This Article explores the evolution of the right to exclude beyond being an essential and fundamental property right associated primarily with interests in "things" (i.e., in rem conception of property rights) to also being the societal compass that helps form reasonable expectations of privacy that guide us in our dealings and relationships with one another (i.e., in personam conception of property rights). This Article also addresses how this new understanding of the right to exclude may be used to resolve expanding privacy concerns, particularly in the wake of advanced surveillance technology.

I. INTRODUCTION

More than two hundred years ago, William Blackstone[1] defined the right of property as "that sole and despotic dominion, which one man claims and exercises over the external things of the world, *in total exclusion*

* Jace C. Gatewood (Georgetown University, A.B., 1983; Georgetown University Law Center, J.D., 1990), Associate Professor of Law at Atlanta's John Marshall Law School. I would like to give special thanks to my research assistant Ms. Kandice Allen, whose thorough research and tireless dedication were invaluable.

1. William Blackstone was a professor of English law. His Commentaries on the Laws of England (1765–69) were popular in both England and the United States. JESSE DUKEMINIER ET AL., PROPERTY 24 (7th ed. 2010).

of the right of any other individual in the universe."[2] This concept, commonly referred to as the Right to Exclude,[3] has been arguably one of the most significant and essential elements in defining our understanding of what constitutes property in the United States.[4] Historically, our legal understanding of property ownership has generally been expressed metaphorically as a "bundle of sticks" or a "bundle of rights"[5] that define our rights vis-à-vis each other with respect to "things" in which we claim an ownership interest.[6] This bundle of rights, as expressed by one set of commentators, "h[as] always been fundamental to and part of the preservation of liberty and personal freedom in the United States."[7] While it is not clear from where the metaphor "bundle of rights" stems,[8] it is clear that there are a number of identifiable rights that commonly make up this "bundle,"[9] principal among them is the right to exclude others.[10] Since Blackstone's description of property in the mid-eighteenth century, the right to exclude has emerged as the single most important factor in determining the existence of private property.[11] This proposition is supported by many legal scholars and jurists.[12] In 1918, Justice Brandeis noted that "[a]n essential

2. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (photo. reprint, Univ. of Chi. Press 1979) (1766) (emphasis added).

3. The right to exclude, simply defined, is the right of a person to exclude others from the use or occupancy of a particular thing. *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW, § 103, at 5 (2d ed. 2007).

4. *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 745 (1998) (noting that "[t]here is strong evidence that, with respect to interests in land, the right to exclude is the first right to emerge in primitive property rights systems . . . [and that] [t]he fact that the right to exclude can be found in even the most primitive land-rights systems provides further support for the conclusion that the [right to exclude] provides the key to understanding the nature of property."). *See also* Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1836 (2006) ("American courts and commentators have deemed the 'right to exclude' foremost among the property rights, with the Supreme Court characterizing it as the 'hallmark of a protected property interest' and leading property scholars describing the right as the core, or the essential element, of ownership.") (footnotes omitted).

5. *See* Strahilevitz, *supra* note 4, at 1836 ("The American law generally regards the 'bundle of rights' as property's dominant metaphor.").

6. *See* Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 247 (2007) ("The modern legal understanding of property ownership in the United States is expressed through a metaphor as a 'bundle of rights' or 'bundle of sticks.'").

7. David L. Callies & J. David Breemer, *The Right to Exclude Others From Private Property. A Fundamental Constitutional Right*, 3 WASH. U.J.L. & POL'Y 39, 39 (2000).

8. *See* Johnson, *supra* note 6, at 252-53 ("No one is quite sure where the term 'bundle of sticks' and 'bundle of rights' came from, but we can identify the sticks or rights that make up the bundle.").

9. *Id.* at 253 (Author discusses essay written in the early 1960s by Anthony M. Honoré, an Oxford legal scholar, who sought to identify a list of rights or incidents of full ownership which he claimed was "common to all 'mature' legal systems."). *See also* Merrill, *supra* note 4, at 736 ("[T]he essence of property lies not just in the right to exclude others, but in a larger set of attributes or incidents, of which the right to exclude is just one.").

10. *See* Merrill, supra note 4, at 730 (arguing that "the right to exclude others is more than just 'one of the most essential' constituents of property—it is the sine qua non.").

11. *Id.* at 731 (asserting that the "right to exclude others is a necessary and sufficient condition of identifying the existence of property.").

12. *See e.g.*, Merrill, *supra* note 4; Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); Callies & Breemer, *supra* note 7. *See also* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Lucas v. S.C. Coastal Council, 505 U.S.

element of individual property is the legal right to exclude others from enjoying it."[13] Since that time, the Supreme Court has often described the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[14] These often quoted words have appeared in numerous Supreme Court decisions where private property owners sought just compensation for the government's interference with the right to exclude under the Takings Clause of the Fifth Amendment.[15] In this sense, the right to exclude is as historically fundamental to the concept of private property as private property is to the concept of ownership.[16] From a historical perspective, the right to exclude not only concerns the relationship between people with respect to things, "such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure assistance of the law in carrying out this decision,"[17] but the right to exclude also concerns the nature of the property owned.[18] Yet, from a present-day perspective, the right to exclude is so much more than a property right that defines the existence of private property[19] and the relationships between owners and things. It is a right that has evolved beyond the legal constructs of traditional property law[20] to also encompass legal entitlements and benefits possessed by one person over another irrespective of the legal relationship between such person and the thing in which the right is claimed. In other words, the right to exclude has evolved beyond the in rem[21] conception of

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1003, 1044 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (each quoting Kaiser Aetna, 444 U.S. at 176).

13. Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

14. *Kaiser Aetna*, 444 U.S. at 176.

15. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see Dolan*, 512 U.S. at 384; *Lucas*, 505 U.S. at 1044; *Nollan*, 483 U.S. at 831 (each quoting *Kaiser Aetna*, 444 U.S. at 176).

16. *See* Johnson, *supra* note 6, at 250 (In describing the concept of ownership in the early days of the history of the United States, the Honorable Judge Denise R. Johnson writes, "Ownership provided a circular justification for property rights that were themselves seen to naturally flow from ownership.").

17. Cohen, *supra* note 12, at 373.

18. *See supra* note 16 and accompanying text. The right to exclude traditionally has been invoked where the government attempted to secure access to or otherwise interfere with an individual's private property. *See* text accompanying notes 14 and 15. *See also* Callies & Breemer, *supra* note 7, at 41 ("Federal Courts have clearly recognized the fundamental nature of the right to exclude in cases where the government attempts to secure access to private property.").

19. *See* Merrill, *supra* note 4, at 731 (stating that "the right to exclude others is a necessary and sufficient condition of identifying the existence of property.").

20. Up until the late nineteenth century, interests in land were the principal objects described in property law. *See* Johnson, *supra* note 6, at 250 ("By the end of the nineteenth century, Blackstone's conception of property had become outdated. Interests in land were no longer the principal objects described by the law of property."). Beginning in the early twentieth century, Professor Wesley Hohfeld, in his article, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913), began to develop a new understanding of property as relationships among people as opposed to rights in a thing.

21. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357, 360 (2001) (arguing that "Property rights historically have been regarded as *in rem*. In other words, property rights attach to persons insofar as they have a particular relationship to something and confer on those persons the right to exclude a large and indefinite class of other persons ("the world") from the thing.").

property first articulated by Blackstone,[22] to also include an *in personam*[23] conception of property that attaches to people as people and reflects societal notions of reasonable expectations of privacy regarding our interactions with each other. It is this evolution of the right to exclude that is the scope of this Article.

This Article will explore such evolution of right to exclude beyond being an essential and fundamental property right associated primarily with interests in "things" (i.e., in rem conception of property rights) to also being the societal compass that helps form reasonable expectations of privacy that guide us in our dealings and relationships with one another (i.e., *in personam* conception of property rights).

This Article makes the case that the right to exclude is an expanded legal concept that derives its significance not merely from traditional property law concepts but also from social norms and societal expectations that find expression in the laws, customs, and mores of society. As such, the right to exclude does not merely refer to a statement of fact regarding ownership of property but also refers to societal understandings regarding expectations of privacy that promote and secure the right of an individual to act in particular ways vis-à-vis others and prevent others from interfering with his or her actions or invading his or her privacy, provided that such actions are not prohibited by other social choices and policies society has decided are more important. In this regard, the concept of the right to exclude can no longer be limited by the tenements commonly associated with private property and traditional property law concepts such as ownership and possession. In other words, one cannot fully evaluate the nature of the right to exclude merely by looking at the legal relationship between a person and a thing,[24] but rather, one must also delve into societal expectations and social norms concerning one's actions in relation to another's actions independent of any legal interest in whatever "thing" is owned. In essence, the nature and existence of right to exclude is not solely dependent on the nature of the "thing" owned or any interest therein, but also on the choices reflected in social values and reasonable expectations of privacy that we as a society are willing to enforce in relation to each other.[25]

To provide the full basis for the premise of this Article, this Article is divided into three parts. Part II will explore the historical significance of the right to exclude and its role in defining private property and property rights. Part III will discuss the evolution and expansion of the right to exclude beyond historical notions of private property and traditional property law concepts to more contemporary understandings of property rights that

22. *See id.* at 360-61 (associating the *in rem* conception of property with William Blackstone).

23. *See id.* at 360 (stating that "[i]n personam rights attach to persons as persons and obtain against one or a small number of other identified persons.").

24. *See* Johnson, *supra* note 6, at 249 (stating that "[t]he bundle of rights metaphor was intended to signify that property is a set of legal relationships among people and is not merely ownership of 'things' or the relationships between owners and things.").

25. *See* Merrill, *supra* note 4, at 733 (stating that "the rights associated with property require some institutional structure that stands ready to enforce these rights").

also encompass reasonable expectations of privacy that secure certain benefits and entitlements of a person enforceable by law independent of traditional concepts of property law. Finally, Part IV will address how this new understanding of the right to exclude may be used to resolve expanding privacy concerns, particularly in the wake of advanced surveillance technology.

II. THE RIGHT TO EXCLUDE—HISTORICALLY IN REM PROPERTY RIGHT

Since the days of William Blackstone,[26] the right to exclude has historically been tied to an interest in property; a right *in rem*.[27] Professors Thomas W. Merrill and Henry E. Smith make this single point in their essay, *What Happened to Property in Law and Economics?*[28] In their essay, while describing the traditional conception of property, Professors Merrill and Smith note that "[a] number of historically significant property theorists have recognized the *in rem* nature of property rights . . . ."[29] Their essay discusses in noteworthy fashion the understandings of key eighteenth century theorists such as Blackstone,[30] Adam Smith,[31] and Jeremy Bentham,[32] all who espoused to variations of the *in rem* theory of property rights—"a distinctive right in a thing good against the world that promotes security of expectations about the use and enjoyment of particular resources."[33] This notion that the right to exclude has historically been regarded as an *in rem* property right—a right well entrenched in the ownership of things—is strongly supported by development of our common law trespass laws.

At common law, according to Blackstone, trespass, as narrowly defined, "signifie[d] no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his

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26. *See supra* note 1 and accompanying text.

27. *See* Merrill & Smith, *supra* note 21, at 360-61 (2001) (associating the *in rem* conception of property with William Blackstone).

28. *Id.* at 360 ("We will not attempt in this Essay to provide anything like a comprehensive survey of the history of the concept of property. Instead, we stress a single point: Property rights historically have been regarded as *in rem*. In other words, property rights attach to persons insofar as they have a particular relationship to something and confer on those persons the right to exclude a large and indefinite class of other persons ('the world') from the thing.").

29. *Id.*

30. *See supra* note 1 and accompanying text.

31. Adam Smith (1723-1790) was a Scottish philosopher and considered to be a pioneer of political economics. He is best known for two literary works: *The Theory of Moral Sentiments* published in 1759, and a five-book series entitled *An Inquiry into the Nature and Causes of the Wealth of Nations* published in 1776. *Adam Smith (1723–1790)*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, http://www.econlib.org/library/Enc/bios/Smith.html (last visited October 30, 2013).

32. Jeremy Bentham (1748-1832) was a Utilitarian and English philosopher and a notable critic of William Blackstone. He is best known for his utilitarian work entitled, *Introduction to the Principles of Morals and Legislation,* published in 1789. *See* BLTC Research, *Jeremy Bentham (1748–1832)*, UTILITARIANISM.ORG, http://utilitarianism.org/bentham.htm (last visited Oct. 30, 2013).

33. Merrill & Smith, *supra* note 21, at 366.

real property."[34] For Blackstone, no action for trespass could be maintained at common law unless there was some ownership or possession of real property.[35] While there has been some controversy over the origins of the law of trespass,[36] one theory would regard trespass as having its origin in the *assize of novel disseisin*,[37] a common law action principally concerned with whether a plaintiff was dispossessed of land.[38] In other words, trespass laws evolved from and were designed to protect the exclusive possession of an owner or occupier of land (i.e., the right to exclude others from land).[39] The Supreme Court's treatment of the right to exclude has historically bared witness to this notion.

In several Supreme Court decisions involving the government's invasion of the right to exclude under the Takings Clause of the Fifth Amendment, the Supreme Court has often maintained that the right to exclude is a universally fundamental property right that cannot be interfered with by government action.[40] For example, in *Kaiser Aetna v. United States*,[41] the United States Army Corps of Engineers claimed that when petitioners converted a once private pond into a marina and connected it to the bay, it created a "navigational servitude" in favor of the Federal Government, thus requiring the owners of the pond to allow public access.[42] In finding that the government's actions of attempting to create a public right of access was a taking, the Court stated, "we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without [just] compensation."[43]

Yet another example of the Supreme Court's historical *in rem* treatment of the right to exclude appears in *Loretto v. Teleprompter Manhattan*

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34. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3, at 209 (photo. reprint, Univ. of Chi. Press 1979) (1766). Blackstone also recognized a broader interpretation of trespass which encompassed not only a trespass to real property, but a trespass to "the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property." *Id.* at 208.

35. *See id.* at 210 ("One must have property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass: or at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land.") (footnote omitted).

36. *See* George E. Woodbine, *Origins of the Action of Trespass*, 33 Yale L. J. 799, 799 (1924) ("Much has been written on the early history of trespass, but the actual origins of the action in its different forms have received such scant attention from the writers, that what they have said relative thereto can be regarded as hardly more than suggestions of possibilities and probabilities.").

37. See *Id.* at 806-08.

38. *Id.* at 807. *See also* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF COMMON LAW 369 (5th ed. 1956).

39. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 77 (5th ed. 1984).

40. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 419 (1982); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1044 (1992); and Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).

41. *Kaiser Aetna*, 444 U.S. at 164.

42. *Id.* at 170.

43. *Id.* at 179–80 (footnote omitted).

CATV Corp.[44] The Supreme Court in *Loretto* found that a New York statute that authorized a cable television (CATV) company to install its CATV facilities on the roofs of apartment buildings constituted a physical taking under the Fifth Amendment even though the equipment only occupied a small amount of space.[45] In defining the scope of taking by the government, the Court stated that "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests."[46] The Court continued by embellishing on an often-quoted metaphor: "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."[47]

Providing yet more support for the notion that the right to exclude was firmly engrained in the *in rem* conception of property is the Supreme Court's decision in *Lucas v. South Carolina Coastal Council.*[48] *Lucas* involved a regulation that prohibited the owner of two beachfront lots from building on them.[49] Although there was no physical taking of property as in *Loretto*, the Court found that "where [a] regulation denies all economically beneficial or productive use of land"[50] that is the equivalent of a physical appropriation.[51] *Lucas* expanded the nature of "takings" to included non-physical invasions of real property where there is a substantial interference with a person's right to exclude others from the appropriation of his property.[52] This idea that a non-physical invasion of property rights could constitute a taking where the right to exclude others has been invaded by the government can also been found in *Nollan v. California Coastal Commission.*[53]

In *Nollan*, the California Coastal Commission conditioned the issuance of a building permit to replace a small bungalow on petitioners' beachfront property with a larger home on the granting by petitioners of an access easement allowing the public to cross petitioners' property to access public beaches.[54] The Court found that requiring the petitioners to grant a public access easement interfered with the petitioners' right to exclude, and thus constituted a taking.[55] The Court stated, "[w]e have repeatedly held that, as to property reserved by its owner for private use, the right to exclude [others is] one of the most essential sticks in the bundle of rights that

44. *Loretto*, 458 U.S. at 419.

45. *Id.* at 441.

46. *Id.* at 435.

47. *Id.*

48. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1003 (1992).

49. *Id.* at 1007-09.

50. *Id.* at 1015.

51. *Id.* at 1017 (In the view of the Court, "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.").

52. The *Lucas* Court adopted a "categorical" takings rule: a taking will always be found if regulation eliminates "all economically beneficial or productive use of land," unless the regulation is justified under background principles of property or nuisance law. *Id.* at 1029–31.

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

54. *Id.* at 828.

55. *Id.* at 831–42.

are commonly characterized as property. . . . We think a permanent physical occupation has occurred, for purposes of that rule . . . ."[56]

As the above cases illustrate, Supreme Court jurisprudence has not only firmly established the right to exclude as an essential element of real property rights, but Supreme Court jurisprudence has firmly fixed the right to exclude as an *in rem* property right, tied to one's ownership interest in private property.[57]

Still further support, and perhaps stronger support, for the concept that property rights were historically *in rem* in nature is the adoption of the Fourth Amendment.[58] The Fourth Amendment provides strong historical support that the right to exclude was historically an *in rem* property right designed to protect rights not only in property, but also in privacy.

When the Fourth Amendment was adopted in the latter part of the eighteenth century, the primary focal point of concern was the home.[59] According to researchers, "[s]earches [under the Fourth Amendment] referred to the forcing open of persons' houses and the breaking open of their desks and cabinets in an effort to find evidence inside."[60] Thus, historically, in order to violate the Fourth Amendment there needed to be some sort of physical intrusion or trespass by the government on property belonging to another.[61] Thus, as borne by history, trespass (which is predicated on the notion of the right to exclude)[62] became the predominate theory used by the Supreme Court to determine whether a search had occurred under Fourth Amendment. The use of trespass as the driving force behind Fourth Amendment protections is clearly evident throughout the Fourth Amendment's doctrinal history.[63]

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56. *Id.* at 831–32 (citations omitted) (internal quotation marks omitted).

57. *See* Merrel & Smith, *supra* note 21 and accompanying text.

58. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

59. *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 72 (2012) ("Famous search and seizure cases leading up to the Fourth Amendment involved physical entries into homes, violent rummaging for incriminating items once inside, and then arrests and the taking away of evidence found. These examples, and some contemporaneous statements during the ratification debates, suggest that home entries and rummaging around inside were understood as the paradigmatic examples of 'searches.'"), *available at* http://ssrn.com/abstract=2154611.

60. *Id.* at 73.

61. *See* Kerr, *supra* note 59, at 92. *See also* Jace C. Gatewood, *Warrantless GPS Surveillance. Search and Seizure–Using the Right to Exclude to Address the Constitutionality of GPS Tracking Systems Under the Fourth Amendment*, 42 U. MEM. L. REV. 303, 333 (2011) ("[T]he Supreme Court recognized trespass as the driving force for Fourth Amendment protection.").

62. *See* Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 13 (1985) ("With respect to property in land. . .the right to exclude depends to a large extent on whether the intrusion in question is subject to common law trespass or of nuisance.").

63. *See* Gatewood, *supra* note 61, at 333-342 (discussing the use by the Supreme Court of the "trespass doctrine" from *Olmstead* to *Katz* and how, even after Katz, *physical intrusion* into a constitutionally protected area was still the barometer in determining Fourth Amendment violations).

The first articulation of the Supreme Court's recognition of trespass as the impetus behind Fourth Amendment protection was in *Olmstead v. United States*.[64] In *Olmstead*, the Court set forth what became known as the "trespass doctrine,"[65] which was based on the notion that "the Fourth Amendment protected 'persons, houses, papers, and effects' when these entities were located in a 'constitutionally protected area.'"[66] In *Olmstead*, federal agents installed wire taps in the streets outside the defendant's home.[67] The *Olmstead* court found that since there was no trespassing into the home or curtilage of the defendant there was no violation of the defendant's Fourth Amendment rights.[68] The *Olmstead* opinion set the course for all later Supreme Court decisions regarding Fourth Amendment violations where there was a physical trespass up until the early 1960s[69] when the Court slowly began to shift its focus to privacy rather than focus on whether or not there had been a physical trespass.[70] The formal shift from the trespass doctrine to a privacy-based doctrine came with the Supreme Court's decision in *Katz v. United States*,[71] where the Supreme Court fashioned a new test to determine Fourth Amendment violations—the reasonable expectation of privacy test.[72]

Beginning with the *Katz* decision in 1967 through 2011, the *Katz* reasonable expectation of privacy test was the primary test for determining when a search had occurred under the Fourth Amendment. However, in January 2012, the Supreme Court, in an unparalleled opinion, returned to

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64. Olmstead v. United States, 277 U.S. 438 (1928).

65. *See* David P. Miraldi, Comment, *The Relationship Between Trespass and Fourth Amendment Protection After* Katz v. United States, 38 OHIO ST. L.J. 709, 710-11 (detailing the Supreme Court's use of the "trespass doctrine" as a trigger for Fourth Amendment protection).

66. *See id.* at 710.

67. *Olmstead*, 277 U.S. at 456-57

68. *Id.* at 466.

69. *See* Gatewood, *supra* note 61, at 334 n. 178 ("The subtle break from the "trespass doctrine" began with Jones v. United States, 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980). Here, police officers arrested the defendant for possession of drugs while he was a guest in a friend's home. *Id.* at 258–59. The Court held that, despite being a guest in a friend's home, since the defendant was legitimately on the property, he had a reasonable expectation of privacy protected under the Fourth Amendment. *Id.* at 261–62.").

70. *But see* United States v. Jones, 132 S. Ct. 945 (2012). In *Jones*, in holding the defendant's Fourth Amendment rights were violated when the government used a GPS tracking device to track the suspect's movements for 4 weeks, the five-Justice majority returned to the trespass doctrine first articulated in *Olmstead*. The majority reasoned that applying common-law trespass principles best preserved the degree of privacy against intrusions by the government that existed when the Fourth Amendment was adopted, stating that "We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.* at 949.

71. Katz v. United States, 389 U.S. 347 (the Court concluded that "the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." *Id.* at 353. But the Court also stated that the Fourth Amendment protects individual privacy, "but its protections go further, and often have nothing to do with privacy at all," *id.* at 350, suggesting that property rights are not the only measure of Fourth Amendment violations. *Id.* at 350).

72. *Id.* at 361 (Harlan, J., concurring) (The Court adopted a two-pronged test for determining when a "search" had occurred. The first prong considers whether the defendant has a subjective expectation of privacy that was violated, and the second prong considers whether the defendant's subjective expectation of privacy is one society is prepared to recognize as reasonable.).

the trespass doctrine in *United States v. Jones*[73] to decide the issue of whether the use and installation of GPS tracking device to track the movements of a suspect on public streets constituted a search under the Fourth Amendment.[74] Justice Scalia writing for the majority wrote:

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.[75]

Citing *Entick v. Carrington*, Justice Scalia quotes the following passage in support of his view:

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.[76]

What the above illustrates is that throughout our history the law of trespass has played and continues to play a critical role in protecting one's right to exclude. It is equally clear from the above that the right to exclude has been well grounded in the *in rem* nature of property rights; a right primarily attaching to "persons insofar as they have a particular relationship to some thing and confer on those persons the right to exclude a large and indefinite class of other persons ('the world') from the thing."[77]

If, yet further support is needed that the right to exclude has been firmly connected with the *in rem* nature of property rights, several legal writers may provide such support. For instance, Professor Thomas W. Merrill contends in his Article, *Property and the Right to Exclude*, that without the right to exclude one has no property.[78] He expounds by saying, "[g]ive someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property."[79] In their Article, *The Right to Exclude Others from Private*

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73. *Jones*, 132 S. Ct. at 945; *See supra* note 70 and accompanying text.

74. In *Jones*, the government used a GPS tracking device attached to a vehicle driven by the defendant to track the defendant over a 28-day period. Based in part on the information gathered from the use of the GPS tracking device, the defendant was convicted of conspiracy to distribute, and possession with intent to distribute, cocaine and cocaine base. The conviction was reversed by the United States Court of Appeals for the District of Columbia and affirmed by the District of Columbia Circuit Court. *Jones*, 132 S. Ct. at 948.

75. *Id.* at 949 (citing Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765)).

76. *Id.* (citation omitted).

77. Merrill & Smith, *supra* note 21, at 360.

78. *Merrill*, *supra* note 4, at 730.

79. *Id.* at 730.

Property: A Fundamental Constitutional Right, Professor David L. Callies and co-author J. David Breemer, conclude that, "[t]he right of a landowner to exclude others is a fundamental part of the equally fundamental Constitutional Right to the enjoyment of private property."[80] Yet another author makes the point that, "[t]he idea of exclusion, in one form or the other, tends to inform almost *any* understanding of property – be it private, public or community."[81]

The *in rem* view of the right to exclude on an historical basis can be firmly and clearly established. However, because the right to exclude is so closely linked to the right of privacy as established by Fourth Amendment doctrinal history and the use of trespass to protect one's right to exclude and one's right of privacy,[82] the right to exclude cannot be limited by its historical *in rem* context. To be clear, as the Fourth Amendment has expanded privacy rights under the Fourth Amendment beyond the constraints of the home and personal effects, the right to exclude has expanded beyond the purely historical *in rem* nature of property (i.e., merely attaching to "persons insofar as they have a particular relationship to something")[83] to encompass an *in personam* view of property that attaches to persons based upon one's reasonable expectations irrespective of a particular relationship in some "thing."

III. The Expansion of The Right to Exclude—Beyond Historical Context

The evolution and expansion of right to exclude from a purely *in rem* property right to an *in personam* property right can be linked to the evolution and expansion of privacy rights under the Fourth Amendment. As explained earlier, the Supreme Court has historically recognized that the right to exclude is uncontrovertibly linked to the right to privacy, a fact made clear by the Supreme Court's initial (and continued)[84] use of trespass to resolve Fourth Amendment issues. However, due to advances in technology and the Supreme Court's concern that an individual's privacy could be invaded without any physical trespass,[85] the Supreme Court began to

80. Callies & Bremer, *supra* note 7, at 58.

81. Shyamkrishna Balganesh, *Demystifying the Right to Exclude. Of Property, Inviolability, and Automatic Injunctions*, 31 Harv. J.L. & Pub. Pol'y 593, 596 (2008) (footnote omitted).

82. *See* Gatewood, *supra* note 61, at 333-42 (discussing the use by the Supreme Court of the "trespass doctrine" from *Olmstead* to *Katz* and how, even after Katz, *physical intrusion* into a constitutionally protected area was still the barometer in determining Fourth Amendment violations. Author notes that "notwithstanding the *Katz* holding and the outright rejection of any "physical intrusion" test as a means to determine Fourth Amendment violations, the Court has on several occasions relied on the presence of a physical intrusion into a place or thing to make an assessment in what society deems as reasonable." *Id.* at 335.).

83. Merrill & Smith, *supra* note 21, at 360.

84. *See supra* note 70 and accompanying text.

85. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (Brandeis's dissent advocated that in order to protect citizens from abuses in advances in technology, "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.").

shift its focus from a property-based paradigm to a privacy-based paradigm.[86] This shift necessarily caused a shift in how property rights, particularly the right to exclude, were evaluated, and it's this shift that has caused the evolution and expansion of the right to exclude consistent with the evolution of privacy rights under the Fourth Amendment.

One might think that the logical place to start when assessing the evolution of the right to exclude beyond a purely property-based (*in rem*) analysis to a reasonable expectation of privacy (*in personam*) analysis is *Katz*. However, the evolution of the right to exclude began several years before *Katz* with *Jones v. United States.*[87]

In *Jones*, the petitioner was a guest in an apartment of a friend that was searched by federal officers pursuant to a search warrant.[88] During the search, narcotics were found and seized, and the petitioner was arrested for drug violations.[89] The petitioner moved to suppress the evidence so seized as an illegal search.[90] In holding that the petitioner had standing to challenge the search as illegal,[91] the Court stated that:

> it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private properly law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.[92]

Thus, instead of linking the defendant's right to exclude an historical *in rem* view of property (since defendant maintained no relationship with the property as he was merely a guest), the Court reasoned the following:

> [I]n order to qualify as a 'person aggrieved by an unlawful search and seizure,' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . . Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that

86. *See* Gatewood, *supra* note 61, at 363-65 (discussing the Supreme Court's shift from a property-based paradigm to a privacy based-paradigm under the Fourth Amendment).

87. Jones v. United States, 362 U.S. 257 (1960).

88. *Id.* at 259.

89. *Id.* at 258-259.

90. *Id.* at 259.

91. The Court found that the petitioner was the "person aggrieved" within the meaning of Rule 41(e) of the Federal Rules of Criminal Procedure. *Id.* at 260-267. Rule 41(e) of the Federal Rules of Criminal Procedure proscribes rules and regulations under which a warrant may be issued. *Id.*

92. *Id.* at 266.

> he establish, that he himself was the victim of an invasion of privacy.[93]

The Court's reasoning signaled the Court's move toward the view that property rights, principally, the right to exclude, are not purely *in rem* rights.

The concept that the right to exclude was moving from a purely *in rem* property concept to include an *in personam* property concept based on one's expectation of privacy continued with *Silverman v. United States*.[94] In *Silverman*, the Court addressed whether a "spike mike" shoved into an adjoining wall of a row house where conversations were overheard violated the Fourth Amendment rights of the defendant.[95] *Silverman* was a unique case because it was unclear whether the "spike mike" physically trespassed onto the defendant's property when it touched the heating duct of the defendant's home. However, the Court refused to limit its inquiry to property law concepts stating that "[i]n these circumstances, we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."[96] The Court further explained that "[t]he Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[97]

Silverman illustrates the Court's further willingness to protect a person's right to exclude (the right of a man to retreat into his home and be free from governmental intrusion)[98] irrespective of property law (i.e., *in rem*) concepts.

The final push away from a purely *in rem* property-based Fourth Amendment analysis to an *in personam* privacy-based Fourth Amendment analysis came with *Katz*.[99] *Katz* marked the first articulation of the Supreme Court's outright rejection of property-based analysis, stating that the Fourth Amendment's reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[100] In *Katz*, FBI agents installed a listening device to the outside of a telephone booth and recorded the defendant's conversations that were later used to convict the defendant of wire fraud.[101] The *Katz* court reasoned that because the defendant was

93. *Id.* at 261.
94. Silverman v. United States, 365 U.S. 505 (1961).
95. *Id.* at 511-512.
96. *Id.* at 511(footnote omitted).
97. *Id.* (citations omitted).
98. *Id.*
99. Katz v. United States, 389 U.S. 347 (1967).
100. *Id.* at 353.
101. *Id.* at 348.

inside a closed telephone booth he sought to exclude others from his conversation by closing the door.[102] As explained in Justice Harlan's concurrence, "'one who occupies [a telephone booth] shuts the door behind him, pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted."[103] Justice Harlan continued, "[t]he point is not that the booth is 'accessible to the public' at other times, but that it is a temporarily private place whose monetary occupants' expectations of freedom from intrusion are recognized as reasonable."[104] In other words, while the defendant in *Katz* did not have any property interest or other right in the "thing" (i.e., the telephone booth), the Court recognized the defendant's right to exclude others for the duration of his telephone call because the defendant had a legitimate expectation of privacy.[105] The *Katz* decision provides strong support of the Court's recognition that an individual's right to exclude cannot be limited to purely *in rem* concepts.

Katz marked the beginning of a long line of cases that not only illustrate the evolution of privacy rights but also clearly illustrate the evolution of the right to exclude from an *in rem* property right, based principally on one's interest or relationship to a "thing," to an *in personam* property right, based principally on one's reasonable expectations of privacy in the "thing." Several post-*Katz* examples illustrate this point.

One example is *Bond v. United States.*[106] In *Bond*, the Court considered whether the physical manipulation by an officer of the defendant's carry-on bag while travelling on a bus violated the defendant's Fourth Amendment rights.[107] While the Court held that a passenger's luggage is an "effect" protected by the Fourth Amendment,[108] the Court based its decision on whether society was prepared to recognize as reasonable the defendant's expectation of privacy in his carry-on luggage.[109] The Court, in holding that the defendant did have a reasonable expectation of privacy in his carry-on luggage, noted that while passengers clearly expect that their bags will be handled, they don't expect that "other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner."[110] In essence, the Court protected the defendant's right to exclude others from excessive manipulation of his luggage based, in large part, on the defendant's expectation of privacy in his luggage—the "thing," not merely because of the defendant's ownership interest or rights in the "thing." It is also important to note that in this particular case there was no physical intrusion into the defendant's luggage, and as such, the Court

102. *Id.* at 352.
103. *Id.* at 361 (Harlan, J., concurring) (internal citation omitted).
104. *Id.* (internal citation omitted).
105. *See id.* at 352.
106. Bond v. United States, 529 U.S. 334 (2000).
107. *Id.* at 335.
108. *Id.* at 336.
109. *Id.* at 338.
110. *Id.* at 338-39.

could not have decided the case on a purely *in rem* conception of property since there was no trespass.

Another example is *Kyllo v. United States*[111] In *Kyllo*, the Court held that the use of a thermal imager that detected heat emanating from the defendant's home was a search under the Fourth Amendment even though there was no physical trespass into defendant's home, because the technology provided information about the interior of the home not otherwise obtainable without a physical intrusion.[112] Here again, the Court based its decision not on traditional *in rem* property law concepts (i.e., the defendant's ownership interest in his home) since there was no physical trespass, but rather the Court's decision was based on *in personam* property law concepts (i.e., the defendant's expectation of privacy in his home), thus preserving and protecting the defendant's right to exclude even without a physical intrusion.

Other examples include *Dow Chemical Co. v. United States*,[113] where the Court held that the aerial observation and photographing of the outside of an industrial plant was not a search since there was no physical intrusion; *California v. Ciraolo*,[114] where the Court held there was no Fourth Amendment violation for the aerial observation of the curtilage of the home of the defendant because it occurred in a "physically nonintrusive manner;"[115] and *California v. Greenwood*,[116]where the Court addressed the issue of whether garbage left on the curb outside the curtilage of the defendant's home is protected by the Fourth Amendment.[117] In holding that the defendant had no reasonable expectation of privacy in trash left at the curb, the Court stated that "Fourth Amendment analysis must turn on such factors as 'our *societal understanding* that certain areas deserve the most scrupulous protections from government invasion . . . We have already concluded that society as a whole possesses no such understanding with regard to garbage left for collection at the side of a public street.'"[118]

While the Supreme Court in each of the aforementioned cases reached the conclusion that there was no Fourth Amendment violation, the Court's decision was based on the fact that the respective defendants had no reasonable expectation of privacy in the "thing" searched (an *in personam* conception of property) and was not based on whether there was physical trespass or intrusion onto the property of the defendants' (an *in rem* conception of property).[119] In each case, the Court recognized the defendant's right to exclude based on expectations of privacy but refused to lend

111. Kyllo v. United States, 533 U.S. 27 (2001).
112. *Id.* at 40.
113. Dow Chem. Co. v. United States, 476 U.S. 227, 237-39 (1986).
114. California v. Ciraolo, 476 U.S. 207, 213 (1986).
115. *Id.* at 213.
116. California v. Greenwood, 486 U.S. 35, 42-43 (1988).
117. *Id.* at 37.
118. *Id.* at 43-44 (emphasis added).
119. *See also* Florida v. Riley, 488 U.S. 445, 450–51 (1989) (holding that no Fourth Amendment search occurred when police used a helicopter to fly above the defendant's home for purpose of aerial observation as there was no physical intrusion); *and* Rawlings v. Kentucky, 448 U.S. 98, 105 (1980)

credence to the defendants' right to exclude because society was not prepared to accept that expectation as objectively reasonable.

So what does all this mean? What this objectively means is that the right to exclude has evolved beyond merely representing one's right to exclude others based on one's ownership interest or other right in property, which is ordinarily protected by common law trespass and other laws protecting the rights of property owners, to include legitimate expectations of privacy in places or things for which we may or may not maintain a property or other legitimate interest,[120] and which ordinarily would not be protected by common law trespass laws or other laws protecting property owners.[121] This expectation affords members of society the absolute right to exclude others not merely based on traditional property law concepts (i.e., *in rem* concepts) but also based upon societal understandings and reasonable expectations of privacy (i.e., *in personam* concepts).[122] This expansion of the right to exclude offers new understanding to property rights that may help resolve issues in the wake of advanced technology, particularly surveillance technology, that threatens not only property rights but also privacy rights because such technology is capable of electronically intruding on one's privacy without physically intruding on one's property and without violating current Fourth Amendment proscriptions.[123]

IV. THE "*NEW*" RIGHT TO EXCLUDE AND ADVANCED SURVEILLANCE TECHNOLOGY

Under Fourth Amendment proscriptions as currently interpreted:

> neither [the tests articulated in] *Jones* nor the reasonable expectation of privacy test set forth in *Katz* provides adequate Fourth Amendment protection against warrantless

(holding that defendant had no legitimate expectation of privacy as he did not have the right to exclude others from accessing a friend's purse).

120. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

121. *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001); Dow Chem. Co. v. United States, 476 U.S. 227 (1986); California v. Ciraolo, 476 U.S. 207 (1986).

122. *See* Rakas v. Illinois, 439 U.S. 128, 143 n. 12 (1978). Justice Rehnquist noted that, "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.* Justice Rehnquist further noted that:

> Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. . . . But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment. . . . On the other hand, even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.

Id. (citations omitted).

123. *See* Jace C. Gatewood, *Its Raining Katz and Jones. The Implications of* United States v. Jones*–A case of Sound and Fury*, 33 PACE L. REV. 683 (2013) (making that argument that neither *Katz* nor *Jones* provides adequate protection against warrantless surveillance either because, given today's technology, "there is no physical trespass involved, because of the nature of the intrusion involved, or because of the pervasiveness of the technology involved." *Id.* at 686.

> unwanted electronic intrusions by law enforcement or other nontrespassory invasions (even though such intrusion may result in the collection of vast amounts of information about an individual's daily movements) either because there is no physical trespass involved, or because of the nature of the intrusion [is short term] or because the pervasiveness of the technology involved.[124]

Our new understanding of the right to exclude may provide new perspective to issues involving advanced surveillance technology that current Fourth Amendment tests lack.[125]

The application of the right to exclude to advanced surveillance technology would only require that one question be asked and answered: "Whether the average person would reasonably believe, based on laws, customs, societal norms, or reasonable expectations, that he or she has a right to exclude someone from _____?" The blank could be filled in with just about anything, such as "tracking his or her every movement via a GPS tracking device" or "recording all of his or her online purchase" or "tracking his or her cell phone" or "recording and storing his or her license plate number as he or she traveled up the highway," or even "recording the phone numbers he or she dialed or text messages he or she sent."[126] The answer to this question would simply turn on society's reasonable belief that a right to exclude exists based a property interest or upon a reasonable expectation of privacy. In other words, if one reasonably believes that he or she has a right to exclude others from invading his or her person, houses, papers or effects,[127] this reasonable expectation should be protected against Fourth Amendment violations irrespective of whether the right to exclude arises under principals of property law or understandings recognized by society, or arises as a result of being in a space enclosed by four walls, in an automobile, or in any other location like a telephone booth,[128] and irrespective of whether the invasion of the right to exclude is for one minute, one hour, one day, or one month if societal norms so dictate.

Katz provides the strongest support for this proposition. The *Katz* court recognized a legitimate expectation of privacy in a closed telephone booth based on society's expectations that when one enters into a closed telephone booth, he or she seeks to *exclude others*, and thus expects his or

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124. *Id*. at 685-86.

125. *See* Gatewood, *supra* note 123 and accompanying text.

126. In June 2013, a whistleblower revealed that secret National Security Agency (NSA) programs are monitoring telephone calls and Internet communications, which include both recording phone numbers dialed and text messages sent. *See* Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, THE GUARDIAN (June, 6 2013), http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order.

127. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

128. *See* Katz, 389 U.S. 347 (1967).

her conversations will be free from government intrusion.[129] *Katz* endorses the proposition that the right to exclude is not merely based on property rights but legitimate expectations of privacy even in a phone booth.

In addition to *Katz*, generally accepted societal norms and expectations in other aspects of our lives lend support to this view. For example, we as a society espouse to a multiplicity of rights to exclude others, based strictly upon societal norms and expectations, including the right to exclude others from entering the same bathroom stall as you (at least while you're in it); the right to exclude others from sharing your theater seat or taking your theater seat once you've claimed it (at least for the duration of the show); the right to exclude others from cutting into waiting lines; the right to exclude others from entering into one's personal space; and the right to exclude others from taking items we've laid legitimate claim to even though we have yet to claim an ownership or other interest in such item, such as items intending to purchase in a grocery cart. In each of these instances, society would recognize as reasonable one's right to exclude others from interfering with this right to exclude, in some cases for the protection of property, in other cases for the protection of privacy, and, in yet other cases, just because that's what society has come to expect.

Similarly, with respect to advanced surveillance technology, it would not be unfathomable that society would recognize as reasonable the right to exclude others from tracking one's daily movements via a GPS tracking device, even for a limited period; the right to exclude others from constant surveillance and monitoring of one's daily activities via enhanced surveillance cameras; the right to exclude others from obtaining from third party providers personal data such as purchases, numbers dialed, text messages sent, and other personal information; or the right to exclude others from amassing a dossier on our public comings and goings, activities and affiliations. Each of these examples would not only presumably violate reasonable expectations of privacy based on acceptable societal understandings and norms, and thereby violate one's right to exclude, but each of these examples would fall outside the proscriptions of the Fourth Amendment as currently interpreted.[130] For these reasons, the use of the expansive right to exclude would ensure that privacy rights are adequately protected from advances in technology that would otherwise intrude upon property rights and privacy rights in violation of the Fourth Amendment.

V. CONCLUSION

Once a mere property right, the right to exclude has taken on new meaning and understanding in the age of expansive privacy concern in the wake of advanced technology and should take on a more expansive role in Fourth Amendment privacy issues. The right to exclude, unlike any other property right, has evolved to encompass societal norms and expectations

129. *See id.* at 352 (emphasis added).

130. *See* Gatewood, *supra* note 123 and accompanying text.

regarding our dealings and relationships with one another, and provides a useful benchmark for determining the scope of allowable intrusion into our daily lives consistent with the laws, customs, and mores of our society.