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Right to Privacy: Thermal-Imaging Threatens Fourth Amendment Rights

By Katherine Will, Sophomore, Dance Major

Although the Constitution contains no express right to privacy, it is a value that most consider essential to the decency of society. Furthermore, the word “privacy” does not appear in the Constitution, but it arises in numerous instances. One is the Fourth Amendment, which ultimately protects the privacy of an individual’s home and possessions. Although the Constitution was written over two hundred years ago, this protection has not changed, and it cannot be denied as new technology develops. However, this very issue was questioned in the 2001 Supreme Court case *Kyllo v. United States*.

In 1992, when suspicions arose that Danny Kyllo was growing marijuana in his triplex, federal agents aimed an Agema Thermovision 210 thermal-imager at his residence. The imager detected that Kyllo’s house was unusually hot in comparison to the neighboring units. The agents received a search warrant and found that Kyllo was growing more than one hundred marijuana plants with numerous high intensity lamps.

Indicted on a federal drug charge, Kyllo originally claimed that the thermal-imaging search violated his Fourth Amendment right. This attempt to suppress the evidence failed, and he entered a conditional guilty plea. The Ninth Circuit court affirmed the decision of the district court, which claimed that Kyllo had shown no expectation of privacy since he had not attempted to conceal the escaping heat. Furthermore, the court said that Kyllo’s reasonable expectation to privacy had not been violated because the “thermal-imager did not expose any intimate details of Kyllo’s life, only amorphous hot

spots on his home's exterior." In a five-four vote, the Supreme Court overturned this ruling and declared that *Kyllo's* Fourth Amendment right had been infringed.

The Fourth Amendment states, "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...." In order to apply the protections of this amendment it is necessary to determine what constitutes a "search." According to the law.com Law Dictionary, to search is "to examine another's premises to look for evidence of criminal activity." This definition applies to *Kyllo* because the federal agents were looking for proof that *Kyllo* was engaged in the criminal activity of cultivating marijuana. Although they did not initially enter the *Kyllo's* triplex, they still took part in a search from the exterior.

In the Court's opinion, Justice Scalia describes a "search" when he says, "...We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search." In *Kyllo*, the agents used the thermal-imager to obtain information about the heat inside *Kyllo's* house that could not have been acquired without the "sense-enhancing technology." Therefore, *Kyllo* was the subject of a search without a warrant.

It is next necessary to consider when a search is "reasonable" or "unreasonable." In *Katz v. United States* (1967), the Supreme Court established that an individual's "subjective expectation of privacy" is key to deciding if a search is within constitutional bounds. If a person has a reasonable expectation that his actions are not being observed, he should not have to worry that police will search his home without a warrant. *Kyllo* rightfully assumed that his privacy was protected when he was in the confines of his home, yet his home was still searched with no warrant. Therefore, a literal reading of the Fourth Amendment leads to the conclusion that *Kyllo's* rights were violated.

Despite arguments that a literal interpretation is not reasonable in *Kyllo* because of technological advancements since the Bill of Rights was written, this type of analysis is the only way to preserve an individual's privacy and the overall integrity of the Constitution. The Fourth Amendment was written in accordance with the English common law principle that "the eye cannot by the laws of England be guilty of trespass." Therefore, information obtained by the naked-eye is valid, but anything beyond natural visual surveillance becomes a question of infringement. At the time that the Bill of Rights was written, it is unlikely that anyone even conceived such a device as a thermal-imager. In fact, the technology is still considered advanced, as it detects infrared radiation that is entirely invisible to the human eye.

According to Justice Stevens' dissenting opinion, "This case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner's home." While the information supplied by the imager was obtained from outside, it is entirely unreasonable to claim that the information was readily available to the general public because law

enforcement officers required such advanced technology to prove that the heat existed. In an interesting yet unrealistic example, Justice Stevens compares the heat waves emitted from Kyllo's triplex to "aromas that are generated in a kitchen..." and "enter the public domain if and when they leave a building." However, the two are not equivalent because the ability to smell cookies baking does not require nasal-enhancing technology, while detecting the heat on the interior of a home does require sense-enhancing equipment.

In *Kyllo*, a literal interpretation of the Fourth Amendment is the only Constitutional means of protecting against unreasonable searches because there is no room for placing limitations on new technology. According to the opinion of the Court, "Limiting the prohibition of thermal-imaging to 'intimate details' would not only be wrong in principle; it would be impractical in application..." Indeed, if warrantless thermal-imaging searches were allowed in special situations, it would only become increasingly unclear where to draw the line.

As technology continues to expand, the development of new equipment will also continue. If the advancements become openly available for unregulated use, the ambiguity of what instances violate the Fourth Amendment will only increase. Furthermore, if technological advancements become permissible in every unwarranted search, a homeowner can have no reasonable expectation to privacy because privacy will cease to exist altogether.

Title IX: Building Equality in Collegiate Athletics

By Molly Frantz, Sophomore, Economics Major

The implementation of Title IX of the Education Amendments of 1972 has made a tremendous impact on today's society. Once predominately male driven, today's society thrives to incorporate change, which has enabled it to significantly develop. Women play a much greater role in today's world than they did in the past. Much of this revolution is a direct result from the implementation of Title IX, which prohibits sexual discrimination against students and employees of educational institutions, thereby creating gender equitability among all people. This regulation requires federally funded educational facilities to employ certain practices and policies into their programs so that no persons are discriminated against based on their sex.

Under this law men and women must both receive equal treatment in regard to all aspects of public schooling. Many people ignore the importance of Title IX and do not realize how great of an impact it has had. Women today now have the ability to participate in activities of their preference, a right that previously did not exist. Title IX mandates equal treatment in activities among men and women; moreover, it plays a vital role in women's athletics.

Because of Title IX's strict standards to which all programs must adhere, society's values and norms have become dramatically transformed. Today's women play much greater roles than they once did in the past; furthermore, it is extremely common to find women in positions of top management and even as company presidents. Fifty years

ago, before Title IX, women primarily worked as housewives, nurses, and teachers. It is extremely clear how the employment of Title IX, in its thirty-six years of existence, has only strengthened today's world.

When applied to athletics, the three basic aspects of Title IX include participation, scholarships, and additional athletic program components. First, every school must demonstrate fairness in athletic opportunities between men and women. Second, scholarship amounts must be substantially proportionate to the ratio of men and women in a particular school. And finally, equal opportunity in other athletic programs must be met.

As a member of the Women's Swimming and Diving Team at Towson University, I find that I benefit tremendously from Title IX. First of all, I am able to participate in this sport, a right that might have not existed if Title IX had not been enacted back in the 1970s. This athletic organization is a fully funded program, receiving a generous amount of money from the school. The budget pays for many different necessities for the sport, including scholarships, equipment, travel expenses, and uniforms, just to name a few. Because the number of female students exceeds the number of male students at Towson University, more money must be allocated to women's athletics, and the Women's Swimming and Diving Team is a direct beneficiary.

While the women's team greatly prospers from Title IX, the men's team does not. The Men's Swimming and Diving Team at Towson University is not permitted to obtain the same amount of money to which the women's team is entitled. Unfortunately, the men's team does not receive the type of scholarships, equipment, and traveling expenses as the women's team does. People might look at this scenario and disapprove of Title IX, but they need to look at the entire picture. There are more female students than male students who attend Towson University, so in order to accommodate the provisions of Title IX, Towson Athletics must allocate more funds to women's athletics.

Many collegiate and secondary school athletic programs find themselves fully employing Title IX provisions on a daily basis. Occasionally, however, some individuals might find that they must fight for their rights. They may feel that their Title IX entitlements have been flouted. *Jackson v. Birmingham Board of Education*, a fairly recent court case decided in March of 2005, exemplifies this situation.

Roderick Jackson, who was a teacher in the Birmingham, Alabama, public school district, sued the local Board of Education, claiming that the school district retaliated against him for the manner in which he fought for Title IX rights. Jackson, a girls' basketball coach at a Birmingham public high school, knew that his girls' team was not receiving its share of equal opportunity. He claimed that his team was not obtaining, "equal funding and equal access to athletic equipment and facilities." Unfortunately after many attempts, Jackson found his supervisors ignoring him and later negatively evaluating him. He was later even removed from his coaching position.

The District Court dismissed this case, stating that, "Title IX's private cause of action does not include claims of retaliation, and the Eleventh Circuit agreed and affirmed." Justice O'Connor delivered the opinion of the Court, claiming that Jackson could not be entitled to relief because he was not secured by the statute that protected this class of people. She ruled that Jackson's complaints of discrimination were not proportionate to the provisions of Title IX and that therefore he did not receive compensation for the manner in the way in which he fought for his girls' rights.

Unfortunately, after fighting for Title IX rights, something that individuals should not have to do in this day and age, Jackson failed. He not only lost his case to gain equality for his girls' basketball team, but he also experienced a great deal of hostility from his supervisors. This case seems as if it was blown completely out of proportion. First, by law, all citizens are entitled to their Title IX rights, which must be fully recognized at all times. Obviously, in this example, they were not. Second, individuals who feel the need to argue for their Title IX rights should by no means have to suffer, as Johnson did. Title IX was implemented to fully enforce equality, not to create animosity, which is what occurred in his case.

It is apparent that Title IX of the Education Amendments of 1972 has drastically changed the ways in which the American culture operates, especially in the context of female athletics. Today one will find a much greater number of women athletes and women executives as opposed to the stereotype of the limited responsibilities that women once possessed, which is a direct effect of Title IX. Because Title IX enforces the right of equality among all people, both men and women, the law has radically helped alter the privileges and rights of women, especially in athletics.

Today, women have the right to participate in the same number of activities as men as well as to receive fair consideration in the funding of their programs. One hundred years ago, the existence of a women's sports team was completely out of the picture, but now with Title IX, one would not even ponder this notion. Imagine if Title IX were never enacted. Would men receive all of the funds and recognition for athletic programs? The answer is probably yes. It is significant how the employment of one law has made such a tremendous impact on the traditions and behavior of American society.

Defining the "Reasonable" Man *By Laura Elliot, Senior, Political Science Major*

Who is the reasonable man? How does he think? What makes him reasonable? Who dubbed him reasonable? And why does he have the authority to determine what is and is not reasonable? Furthermore, how can the term *reasonable* be defined? Nearly every legal scholar has pondered this thought at one time or another. How can one not wonder about the *reasonable man* when he appears in case law, statutes, and even indirectly in our Constitution?

When *reasonable* appears in various places it is no wonder one wonders, what does reasonable mean? Reasonableness, whether it is reasonable doubt or the cryptic

reasonable man, is very unclear. The Fourth Amendment of our Constitution refers to a *reasonable expectation of privacy*. Reasonable for whom? What is reasonable for one person does necessarily mean the same will be reasonable for another person. This is certainly true for a person trying to conceal an illegal substance and for the police officer having for a reasonable suspicion or probable cause that the suspect should be arrested.

The reasonable man statute is one which originated in the common law. The perspective of the reasonable man is deliberately distinct from that of a "common" person. Contrary to many popular beliefs, the reasonable man is not necessarily average. More or less the idea assumes that the *reasonable person* is well versed in rational thoughts and ideas. However, the questions of how a reasonable person might act or what decisions they might make under numerous circumstances perform a significant role in legal reasoning in areas such as negligence, contract law, and criminal law.

The reasonable person is properly knowledgeable, competent, and conscious of the law, but he is not necessarily an expert. This person may do something unexpected under certain circumstances, but whatever that person does or thinks is always "reasonable." Alan Patrick Herbert addressed this issue in *The Myth of the Reasonable Man*, stating that the reasonable man would be "devoid . . . of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example." Herbert suggests that such a man or person probably does not exist.

Professionals, such as doctors, are often questioned about their expert decisions. A doctor, for example, may determine to a *reasonable* degree of medical certainty that a patient's injuries were directly related to an accident. Then there is the issue of innocent bystanders. At what point is it reasonable for a witness to a crime to report the incident or to try to prevent it from happening. Additionally, at what point does a bystander render care to a person who has been injured?

All of these questions create reservations that lead to some disagreement in the way laws are made, interpreted, and practiced. If the term *reasonable* were more clearly defined, the law and its practice might become increasingly clearer. Numerous people have challenged the question and are often disappointed with the answers they receive. The abstract question, which is forever an unclear pillar of our law, is this: "what do you mean by the word *reasonable*?"

Reasonable is different for every person, and every person has different life experiences, different values, different religious views, different ages, different genders, different backgrounds, and so on. These differences all contribute to how each individual might define his or her personal reasonable man. It is because of these differences in society that the reasonable man may never truly be found. Consequently, the laws will continue to be vague. Without the law being at least somewhat vague, there would be no room for interpretation. The term reasonable, and *the reasonable man* may change and

develop as time goes on, so that what is reasonable today may not be reasonable tomorrow.

**...With Liberty and Justice for All:
Equal Protection in the Fourteenth Amendment**
By Zachary Schlein, Junior, English Major

The Fourteenth Amendment was ratified in 1868, one of three Amendments (along with the Thirteenth and the Fifteenth) designed to address the causes and the consequences of the American Civil War. The Fourteenth Amendment is divided into five sections, the most controversial of which is undoubtedly the first. It is largely from section one of the Fourteenth Amendment that the Supreme Court has “discovered” privacy rights in the Constitution (“penumbras,” as Justice Douglas termed them). It is also against this section that the Court continues to prop up affirmative action programs, which, contrary to the “equal protection clause” from which they draw their authority, discriminate on the basis of race. Needless to say, there is a lot of debate surrounding Supreme Court interpretations of the Fourteenth Amendment, particularly those that apply to affirmative action. However, I would like to focus on the “equal protection” clause and on what I believe is an entire frontier of under-protected Americans: homosexuals.

The principle behind the “equal protection” clause is simple: every American citizen is entitled to equal protection under the law, and those laws must not contribute to a social climate of inequality. (Early interpretations of the Fourteenth Amendment failed to recognize social equality; it wasn't until the landmark *Brown v. Board of Education* that the Court recognized that equal protection under the law and in the realm of society is inextricably linked). I don't like classifying “rights” into different groups, i.e., women's rights, minority rights, and so on. There are simply rights, and *everybody* has them; this includes homosexuals.

The Supreme Court has, under the “equal protection” clause, addressed inequality with regard to gender, age, race, and disability; it is utterly inconsistent that it has not done the same with regard to sexual orientation. In 1986, The Supreme Court upheld Georgia's anti-sodomy law in *Bowers v. Hardwick*. Clearly such laws are in gross violation of the “equal protection” clause, as they discriminate specifically against homosexuals, while claiming (ostensibly) to preserve some constructed morality. The Court overruled the *Bowers* decision in 2003 with *Lawrence v. Texas*, but on the grounds of privacy, not equal protection.

Thus, there was no real victory for so called “gay rights.” In that case, a man by the name of John Geddes Lawrence was caught having consensual sodomy with another man in the privacy of his home; this violated a Texas law that prohibited “deviant sexual intercourse” between people of the same gender. Lawrence eventually appealed his case to the Supreme Court on the grounds that the Texas statute violated the “equal protection” clause of the Fourteenth Amendment, but the Court overturned his conviction

on the grounds that it violated his privacy. Sandra Day O'Connor was the only Justice to address equal protection:

The statute at issue here makes sodomy a crime only if a person "engages in deviant sexual intercourse with another individual of the same sex." Sodomy between opposite-sex partners, however is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by [the Texas law]. (*Lawrence v. Texas*)

As Justice O'Connor suggests at the end of the above quote, even if the Texas law didn't specifically name same-sex relations in its ban on "deviant sexual intercourse," the law still would have effected discrimination against homosexuals and thus, it would still be in violation of the Fourteenth Amendment's "equal protection" clause. Recall the words of Justice Stanley Matthews: "Though [a] law be fair on its face and impartial in appearance...if it is applied and administered by a public authority with an evil eye and an unjust hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is ... within the prohibition of the Constitution" (*Yick Wo v. Hopkins*, 1886).

One of the hottest debates in popular politics over the past few years has been the issue of gay marriage. Most States disallow gay marriage and refuse to recognize gay marriages performed in States where it is legal. Marriage is recognized as both a legal and a social institution (it is licensed by the government, but often performed in a religious context), and in an effort to offer "equal protection" (or at least the guise of equal protection), certain States have legalized "civil unions," which allow homosexual couples to receive the legal benefits of marriage without the legal title. Civil unions are ultimately presented as "separate but equal" institutions.

To echo Chief Justice Warren, "Separate . . . is inherently unequal." I see no difference between disallowing blacks to attend schools with whites, and disallowing gays to marry exactly as heterosexuals do. It is discrimination under the law, and thus, in violation of the Fourteenth Amendment. Similarly, laws that specifically punish sodomy or "deviant sexual intercourse" (as in *Lawrence v. Texas*) violate the "equal protection clause" because they clearly target homosexuals; as Justice Harlan put it, "No one would be so wanting in candor as to assert otherwise" (dissenting in *Plessy v. Ferguson*, 1896).

While I have been a vocal advocate for privacy rights and abortion rights, I nevertheless recognize that such rights do not exist in the Constitution, and thus, must be deliberated and determined in the legislative sphere. But unlike such "substantive" rights, the "equal protection" clause is clear and explicit: "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Laws that prohibit homosexuals from participating in institutions available to heterosexuals, or that establish "separate but equal" institutions, are inconsistent with current precedent and the very wording on the Fourteenth Amendment, and thus, are unconstitutional.

The Bush Approach to Military Commissions

*By Capt. William Jones, U.S. Army, M.S. Candidate,
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The Military Order authorizing military commissions to try alleged terrorist suspects is one of the many policies enacted by the Bush Administration that legalized and legitimized the idea that individuals captured during the Global War on Terror are not Prisoners of War and are not entitled to the protections of the Geneva Conventions. This subtle but constant theme in the military ranks manifested in the detainee abuses in Afghanistan, at Guantanamo Bay, in the alleged massacres of Iraqi civilians by the American military, and in the Abu Ghraib prison. The prisoner torture at Abu Ghraib was the first major significant blow against the military "Coalition" in Iraq. The abuses enraged the Sunni Arabs and motivated thousands of zealots to cross from neighboring countries into Iraq in order to kill Americans. The Abu Ghraib abuse was not just the work of a handful of out-of-control and untrained National Guardsmen on the graveyard shift of guard duty.

When I arrived at the Forward Operation Base that was to be home to me and my 138 man infantry company, I received a tour of the camp. My combat team was part of Operation Iraqi Freedom II as we were replacing troops that had been there since the beginning of the War in Iraq. The soldiers we replaced were tired and bitter. They had defeated the Iraqi Army and had confidence that the war would be short and satisfying. However, instead of peace, they watched the insurgency grow. Unable to challenge the enemy because of equipment and manpower shortages, their hope of a quick war disappeared. As the insurgency grew stronger, the Americans became more aggressive at interrogating captured suspects.

The officer giving me the tour happily told me how before the revelations of abuse at Abu Ghraib, they did whatever they thought necessary to get information from detainees. I was surprised and asked him whether he or anyone in his unit received special training to qualify them to conduct intensive interrogation. He said that American government agents (he thought that maybe they were agents of the Central Intelligence Agency, but he said no one knew for sure) had worked with them for several weeks, teaching them to acquire information from suspects. I was shocked. It takes several weeks to teach a paratrooper to jump from an airplane, and I am sure interrogating prisoners requires more training than falling from a plane. I did not ask him to give any details because I really did not want to know.

My unit had ten days to make the transition to takeover from the unit we were replacing. During this period, I saw more clues to the mentality that "the ends justify the means." The Bush Administration's moral double speak – to talk about liberty and justice but to do just the opposite – was embodied in the actions of these tired, angry, and frustrated young men. On one mission, I witnessed American military intelligence officers roughly handle women and children. I followed the commander whom I was replacing up the stairs of an Iraqi house we had raided, and when I was going back down,

I saw profanity written in English on the walls of the stairwell that was not there when I went up.

The commander of the American soldiers looked at me and said, "They [his soldiers] are frustrated." A typical kind of abuse was to place weapons on dead suspected insurgents. If American forces engaged anyone, they had to report the contact. Every vehicle on the battlefield projects a signal for tracking. It is impossible to hide or to have a gunfight without someone finding out where the insurgents are. At the end of every contact with the enemy, an officer from higher headquarters received a battle damage assessment, including how many enemy personnel were killed and what weapons were captured. Dead or wounded suspected enemy personnel without weapons prompted an investigation. If soldiers carried captured enemy weapons in the back of the vehicles, they could just throw a weapon on an unarmed dead or wounded Iraqi, take his picture, and report to higher authorities that they had killed or wounded another insurgent. No investigation was required, regardless whether the person who was shot was an insurgent or an innocent civilian in the wrong place at the wrong time.

The abuses I witnessed reflected the same attitude as that of the Bush Administration: might equals right and the ends justify the means. The assumption that one's authority and superior weaponry are a legitimate replacement for principled treatment of others, even our enemies, is destructive and hazardous. The military order authorizing military commissions, like the abuses in its wake, is ultimately corrosive to the foundations of the Uniform Code of Military Justice, which both empowers and protects our own soldiers: it lays out in clear language how military trials – by courts martial or military commissions – must be carried out with an eye toward both the law and justice. The order is legally deficient, unnecessary and unwise.

Editors' Note:

The election of new officers and the 2008-09 Executive Board of the Towson University Prelaw Society were held this May. The results are as follows:

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Please contact any of these individuals if you wish to become in the Society's activities.

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WRITE FOR THE PRELAW JOURNAL. Published once each semester, the journal is completely written and edited by Towson University students. If you have a legal or constitutional issue that you have strong feelings about, write a 1000-1200 word commentary, and we will consider it for publication. Please provide it to us via e-mail by a Microsoft Word attachment (please forward all submissions to Dr. Fruchtman, jfruchtman@towson.edu). We also consider essays about legal internships and other experiences you may have had in a legal setting, including but not limited to law firms, states attorneys offices, judges' chambers. In addition, we particularly would like to see a debate on a particular subject. If you wish to take a position and know someone who takes the opposite perspective, we would like to review both essays for publication.

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