# CHAPTER 2

# SEARCHES AND SEIZURES OF PERSONS AND THINGS

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## I. AN INTRODUCTION TO THE FOURTH AMENDMENT

### A. THE PROBLEM OF GATHERING EVIDENCE

When government focuses its attention on crime detection and crime prevention, frequently it encounters uncooperative individuals. But the police are not compelled to forego investigative and preventive measures for lack of voluntary cooperation. When they seek information without cooperation, they must consider the limitations imposed by the Fourth Amendment, which reads as follows:

> 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.

### B. THE BASICS OF THE FOURTH AMENDMENT

A number of points will seem obvious from a reading of the language of the Amendment, even without knowledge of its history and interpretation.

First, the language ascribes the right to *the people*, not to one person as under the Fifth Amendment, or to an accused as under the Sixth Amendment. The wording resembles that found in the Ninth and Tenth Amendments. Professor Amsterdam has suggested that the choice of language might well be important in properly interpreting the Amendment; in his view the courts should focus on how to regulate or control the conduct of the government so that Fourth Amendment violations do not occur, rather than on fashioning remedies for only those individuals who have suffered a personal Fourth Amendment wrong. See Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 335, 367 (1974). But the Supreme Court has instead invoked the term "the people" to narrow the class of those protected by the Fourth Amendment.

### *"The People" as a Limiting Term: United States v. Verdugo-Urquidez*

In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), a Mexican citizen and resident was apprehended by Mexican police and transported to the United States for trial on drug charges. After his arrest, United States law enforcement officials, working with Mexican officials, conducted warrantless searches of the defendant's residences in Mexico. The lower courts held that the searches violated the Fourth Amendment.

The Supreme Court held that the Fourth Amendment does not apply to a search of property that is owned by a non-resident alien and located in a foreign country. Chief Justice Rehnquist, writing for the Court, reasoned that the Fourth Amendment's reference to "the people," as opposed to a particular person, was a "term of art." He asserted that the term was intended to refer only to a class of persons "who are part of a national community or who have otherwise developed sufficient connection with this country to be considered a part of that community."

The Court held that the defendant, who had been transported against his will to the United States three days before the foreign search was conducted, lacked sufficient connection with the United States to be one of "the people" protected by the Fourth Amendment. The Chief Justice looked to the history of the Amendment and concluded that its purpose was to protect the people of the United States from abuses by their own government and could not fairly be read to limit government action against aliens taken outside the United States.

Justice Brennan, joined by Justice Marshall, dissented. He noted that the defendant was convicted for violating a Federal law, even though his conduct occurred outside the United States. Thus, the defendant had been subject to an extraterritorial application of American criminal law. Justice Brennan argued that it was unfair for the Federal Government to require aliens outside the country to obey Federal laws, and yet refuse to obey its own laws in the course of investigating the very extraterritorial activity that the government has criminalized. According to Justice Brennan, the Fourth Amendment is an "unavoidable correlative" of the government's power to enforce the criminal law. Justice Blackmun wrote a separate dissenting opinion.

### *Searches Against Illegal Aliens in the United States?*

In *Verdugo-Urquidez,* the Court specifically refused to decide whether an illegal alien who lived in the United States would be one of "the people" protected by the Fourth Amendment. Five Justices, however, (Stevens, Kennedy, Brennan, Marshall and Blackmun), in various

opinions in *Verdugo-Urquidez,* indicated that they would hold the Fourth Amendment applicable to searches of illegal aliens conducted within the United States. The reasoning was that an illegal alien living in the United States would have the "connection" with this country required to be one of "the people" protected by the Fourth Amendment.

But *Verdugo-Urquidez* was decided before the terrorist attack of September 11, 2001. Since that time, various government officials have argued that illegal aliens living in the United States do not have the right to invoke Fourth Amendment protections as they do not have a legitimate connection to the United States. What do you think? Should it matter whether the alien has been deported and then illegally re-entered the country?

### *The Reasonableness Clause and the Warrant Clause*

As a second introductory point, the Fourth Amendment is set forth in two parts, the first dealing with unreasonable searches and the second dealing with warrants. Because the term "unreasonable" is used first, it might be thought to predominate so that all searches and seizures must satisfy its command, whereas the warrant clause would come into play only when a warrant is sought to justify government action. But the Supreme Court has purported not to read the language in this way. One observer has suggested that the Court has "stood the amendment on its head" by reading the warrant clause as the controlling clause of the Amendment. T. Taylor, Two Studies in Constitutional Interpretation 23–24 (1969). The Court has stated that searches and seizures are *presumed* to be unreasonable unless carried out pursuant to a warrant. But important exceptions to the presumptive warrant requirement have been created. When an exception to the warrant requirement is applicable, only the reasonableness requirement must be satisfied. It must also be noted that the Court has in some cases explicitly invoked the reasonableness clause as the predominant clause of the Fourth Amendment, most notably when the government's search or seizure serves "special needs" beyond criminal law enforcement.

### *"Probable Cause"*

Third, the term "probable cause" is used to define the minimum showing necessary to support a warrant application; it is not used to demarcate reasonableness generally in search and seizure situations. But despite the placement of the words, the decisions make probable cause a limitation on many searches and seizures even though no warrant is deemed necessary under the circumstances. Also, note that the definition of probable cause is not altogether clear; the Amendment itself contains

not a hint as to its meaning. The courts have been left to give meaning to the term, and their efforts will be analyzed later in this Chapter.

### *State Action Requirement*

Fourth, the Amendment plainly recognizes a right, but does not indicate against whom it applies. Arguably, the people have a right to be free from all searches and seizures that are not reasonable, even if conducted by private persons. But, unlike the Thirteenth Amendment, the Fourth is interpreted as providing protection only against the government and those acting in conjunction with it.

On the other hand, nothing in the language of the Amendment limits the applicability to criminal investigations or to the police. The protection is against all unreasonable searches and seizures conducted by government officials regardless of the purpose of the investigation or the identity of the investigator. Courts have accepted this reading, but do take the nature of the investigation into account in assessing the reasonableness of particular searches and in defining the requirements of a proper warrant.

## C. THE AMENDMENT AND THE EXCLUSIONARY RULE

It is useful to distinguish two questions in thinking about Fourth Amendment problems. First, there is the question whether the Amendment prohibits the kind of governmental conduct described in the cases. If so, the second question is whether evidence obtained by means of a Fourth Amendment violation should be available as proof in criminal trials and other proceedings. The debate over the wisdom of an exclusionary rule is a debate over the second question. Yet, too often analysis of the first question is confused in the process of debating the second. Consider, for example, the following personal editorial by the late Judge Malcolm Wilkey of the United States Court of Appeals for the District of Columbia Circuit:

> Among nations of the civilized world we are unique in two respects: (1) We suffer the most extraordinary crime rate with firearms. (2) In criminal prosecutions, by a rule of evidence which exists in no other country, we exclude the most trustworthy and convincing evidence.
>
> These two aberrations are not unconnected. In fact, the "exclusionary rule" has made unenforceable the gun control laws we have and will make ineffective any stricter controls which may be devised. Its fetters particularly paralyze police efforts to prevent, detect and punish street crimes involving not only weapons but narcotics.

Why Suppress Valid Evidence, Wall Street Journal, Oct. 7, 1977, at 1, col. 1.

This is an argument by a distinguished jurist who pondered search and seizure problems for years. Yet, it is fundamentally flawed. "Probable cause" is a term found in the language chosen by the framers. If the Court correctly interprets the Fourth Amendment as requiring probable cause for particular police action such as a search for guns, then it is the substance of the Fourth Amendment itself (as interpreted by the Court), not the remedy for a violation, that impairs the ability to enforce firearm laws. Immediate abolition of the exclusionary rule would not free officers to search for guns in violation of the substance of the Amendment. They remain bound by the Constitution.[1] So even with the demise of the exclusionary rule, some criminal laws still will be hard to enforce. The cases that comprise the bulk of this Chapter assume that the remedy for an unconstitutional search and seizure is exclusion.

The costs and benefits of the exclusionary rule are not discussed until late in the Chapter. Delay should provide an adequate opportunity for an understanding of the different circumstances in which a Fourth Amendment violation occurs. But delay in no way is intended to imply that the exclusionary rule is plainly desirable and that the debate over it is not important. The debate is important for practical and symbolic reasons, and delay in reaching it is tantamount to deference to its significance. But, it is true that even without the exclusionary rule, the basic problems of deciding what the Amendment means would remain. As you read the cases, keep in mind that despite the fact that the issues usually are cast in terms of whether evidence should have been excluded at trial, the same issues could often arise in some form or other—perhaps in civil suits rather than criminal cases—even without an exclusionary rule. So you cannot avoid grappling with the meaning and proper interpretation of the Fourth Amendment simply by doing away with the exclusionary rule.

## II. THRESHOLD REQUIREMENTS FOR FOURTH AMENDMENT PROTECTIONS: WHAT IS A "SEARCH?" WHAT IS A "SEIZURE?"

The Fourth Amendment prohibits unreasonable searches and seizures. If the government activity is neither a "search" nor a "seizure" it is not regulated by the Fourth Amendment, and therefore the activity does not have to be reasonable—at least as far as the federal Constitution is concerned.

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[1] This point is made by another experienced jurist, Justice Stewart, in The Road to *Mapp v. Ohio* and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum.L.Rev. 1365 (1989).

It has been argued that in deciding the threshold question of whether a government intrusion is a search or seizure, one should err on the side of the citizen. The consequence of finding a search or seizure is merely that the government is required to act reasonably, whereas the consequence of not finding a search or seizure is that government officials can act unreasonably and arbitrarily. See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349 (1974). In fact, however, the Supreme Court for several decades has held that a variety of police investigative activity is neither a search nor a seizure, and is thus free from the strictures of the Fourth Amendment.

## A. THE REASONABLE EXPECTATION TEST

In the following landmark case, the Court established a general test for determining whether government investigative activity rises to the level of a search—the reasonable expectation of privacy test. As will be seen later in the Chapter, the Court, having bypassed the "trespass doctrine" in *Katz*, has more recently reinvigorated it and established that the *Katz* test is not the sole ground for finding that a police activity is a search.

### KATZ V. UNITED STATES

Supreme Court of the United States, 1967.
389 U.S. 347.

**MR. JUSTICE STEWART delivered the opinion of the Court.**

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a Federal statute. At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because "[t]here was no physical entrance into the area occupied by [the petitioner]." We granted certiorari in order to consider the constitutional questions thus presented.

The petitioner has phrased those questions as follows:

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."

We decline to adopt this formulation of the issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is like the protection of his property and of his very life, left largely to the law of the individual States.

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. * * *

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical

penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, Olmstead v. United States, 277 U.S. 438, 457, 464, 466; Goldman v. United States, 316 U.S. 129, 134–136, for that Amendment was thought to limit only searches and seizures of tangible property. But "[t]he premise that property interests control the right of the Government to search and seize has been discredited." Warden v. Hayden, 387 U.S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under * * * local property law." Silverman v. United States, 365 U.S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude 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. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of Federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly

authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. * * *

* * * Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means to that end * * *.

* * *

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization

> "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the * * * search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96.

And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police."

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification * * * that is central to the Fourth Amendment," a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

* * *

**MR. JUSTICE HARLAN, concurring.**

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by Federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

The critical fact in this case is that "[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. The point is not that the booth is "accessible to the public" at other times, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.

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**MR. JUSTICE BLACK, dissenting.**

* * *

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that many people believe to be desirable.

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and

philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. * * *

The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures * * *." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. * * *

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was * * * an ancient practice which at common law was condemned as a nuisance. * * * There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges.

* * *

[JUSTICE MARSHALL took no part in the consideration or decision of this case. Concurring opinions by DOUGLAS, J., joined by BRENNAN, J., and by WHITE, J. are omitted.]

① offends privacy int.
② privacy int = reasonable

### *Katz as a Two-Pronged Test*

*Katz* has been read to set forth a two-pronged test for determining whether government conduct constitutes a search. First, the government conduct must offend the citizen's subjective manifestation of a privacy interest. Second, the privacy interest invaded must be one that society is prepared to accept as "reasonable" or "legitimate." This two-pronged test comes not from Justice Stewart's majority opinion but rather from Justice Harlan's concurring opinion. It is notable that in the later case of United States v. White, 401 U.S. 745 (1971) (holding that no search occurred where police electronically eavesdropped on a two-party conversation with the consent of one of the parties), Justice Harlan dissented and expressed misgivings about the test that he had promulgated in *Katz:*

> While these formulations represent an advance over the unsophisticated trespass analysis of the common law, they too have their limitations and can, ultimately, lead to the substitution of

> words for analysis. The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.

Justice Harlan's concern was that the reasonableness of an expectation of privacy would be determined by existing laws and practices, and that this could result in the diminution of protected privacy interests; "expectation" of privacy could be based on what government conditions us to expect.

Should the Fourth Amendment threshold be dependent on what we should *expect* from government, or rather on what we can *demand* from government? Consider Professor Clancy's critique of *Katz:*

> The ability to exclude must extend to all invasions, tangible and intangible, and must protect both tangible and intangible aspects of the amendment's protected objects. That was the essential lesson of *Katz*. *Katz* and the privacy theory, however, failed to grasp the essence of the interest protected. Although it may have been Katz's *expectation* that his conversation was not being heard, it was his *right* to exclude others from hearing. It is not privacy which may motivate a person to assert his or her right. It is the right to prevent intrusions—to exclude—which affords personal security.

Clancy, What Does the Fourth Amendment Protect: Property, Privacy, or Security?, 33 Wake Forest L. Rev. 307, 367–8 (1998).

### *Privacy and Technological Advances*

Has the reasonable expectation of privacy test become outmoded in our technologically advanced society, where very little if any information can be kept private? Professor Henderson, in Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search, 56 Mercer L.Rev. 507 (2005), argues that the reasonable expectation of privacy test should be dropped in favor of a test that evaluates every government intrusion by whether it is reasonable under the circumstances. He explains that if the *Katz* test is retained, "technology will lead to no privacy, and police practice will incorporate that technology to create a reality of no privacy." In contrast, a reasonableness test "is a flexible one that allows courts to continue to protect privacy as we transition into a world in which no intrusion is technologically inconvenient."

## B. THE RETURN OF THE TRESPASS ANALYSIS

The Court in *Katz* appeared to reject a focus on physical trespass as determining whether a search has occurred. But in the following

landmark case, the Court returned to the trespass test to *supplement* the reasonable expectation of privacy test.

## UNITED STATES v. JONES

Supreme Court of the United States, 2012.
132 S.Ct. 945.

**JUSTICE SCALIA delivered the opinion of the Court.**

We decide whether the attachment of a Global Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.

* * *

In 2004 respondent Antoine Jones, owner and operator of a nightclub in the District of Columbia, came under suspicion of trafficking in narcotics and was made the target of an investigation by a joint FBI and Metropolitan Police Department task force. Officers employed various investigative techniques, including visual surveillance of the nightclub, installation of a camera focused on the front door of the club, and a pen register and wiretap covering Jones's cellular phone. Based in part on information gathered from these sources, in 2005 the Government applied to the United States District Court for the District of Columbia for a warrant authorizing the use of an electronic tracking device on the Jeep Grand Cherokee registered to Jones's wife. A warrant issued, authorizing installation of the device in the District of Columbia and within 10 days.

On the 11th day, and not in the District of Columbia but in Maryland, agents installed a GPS tracking device on the undercarriage of the Jeep while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements, and once had to replace the device's battery when the vehicle was parked in a different public lot in Maryland.[a] By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4-week period.

The Government ultimately obtained a multiple-count indictment charging Jones and several alleged coconspirators with, as relevant here, conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base * * *. Before trial, Jones filed a motion to suppress evidence obtained through

[a] In this litigation, the Government has conceded noncompliance with the warrant and has argued only that a warrant was not required.

the GPS device. The District Court granted the motion only in part, suppressing the data obtained while the vehicle was parked in the garage adjoining Jones's residence. It held the remaining data admissible, because " '[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.' " Jones's trial in October 2006 produced a hung jury on the conspiracy count.

In March 2007, a grand jury returned another indictment, charging Jones and others with the same conspiracy. The Government introduced at trial the same GPS-derived locational data admitted in the first trial, which connected Jones to the alleged conspirators' stash house that contained $850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base. The jury returned a guilty verdict, and the District Court sentenced Jones to life imprisonment.

The United States Court of Appeals for the District of Columbia Circuit reversed the conviction because of admission of the evidence obtained by warrantless use of the GPS device which, it said, violated the Fourth Amendment. * * * We granted certiorari.

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search."

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. Entick v. Carrington, 95 Eng. Rep. 807 (C. P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' " with regard to search and seizure. In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:

> "[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."

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the

phrase "in their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. Thus, in Olmstead v. United States, 277 U. S. 438 (1928), we held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because "[t]here was no entry of the houses or offices of the defendants."

Our later cases, of course, have deviated from that exclusively property-based approach. In Katz v. United States, we said that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy."

The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. * * * As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates.[b] * * *

* * * *Katz* did not erode the principle that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment. We have embodied that preservation of past rights in our very definition of "reasonable expectation of privacy" which we have said to be an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property

[b] Justice Alito's concurrence * * * doubts the wisdom of our approach because "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case." But in fact it posits a situation that is not far afield—a constable's concealing himself in the target's coach in order to track its movements. There is no doubt that the information gained by that trespassory activity would be the product of an unlawful search—whether that information consisted of the conversations occurring in the coach, or of the destinations to which the coach traveled.

In any case, it is quite irrelevant whether there was an 18th-century analog. Whatever new methods of investigation may be devised, our task, at a minimum, is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

law or to understandings that are recognized and permitted by society." *Katz* did not narrow the Fourth Amendment's scope.[c]

[The majority distinguishes *Knotts* and *Karo*—two beeper-tracking cases discussed later in this Chapter, in which the Court found that the tracking was not a search—on the ground that *Knotts* did not challenge the placement of the beeper and *Karo* did not involve the government's trespass on private property.][d]

* * *

The concurrence begins by accusing us of applying "18th-century tort law." That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply exclusively *Katz*'s reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed. The concurrence faults our approach for "present[ing] particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the exclusive test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis.

In fact, it is the concurrence's insistence on the exclusivity of the *Katz* test that needlessly leads us into "particularly vexing problems" in the present case. This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. We accordingly held in *Knotts* that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a 4-week period "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance," our cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result

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[c] The concurrence notes that post-*Katz* we have explained that "an actual trespass is neither necessary nor sufficient to establish a constitutional violation." That is undoubtedly true, and undoubtedly irrelevant. * * * Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information. Related to this, and similarly irrelevant, is the concurrence's point that, if analyzed separately, neither the installation of the device nor its use would constitute a Fourth Amendment search. Of course not. A trespass on "houses" or "effects," or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.

[d] *Knotts* noted the "limited use which the government made of the signals from this particular beeper," and reserved the question whether "different constitutional principles may be applicable" to "dragnet-type law enforcement practices" of the type that GPS tracking made possible here.

through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.

And answering it affirmatively leads us needlessly into additional thorny problems. The concurrence posits that "relatively short-term monitoring of a person's movements on public streets" is okay, but that "the use of longer term GPS monitoring in investigations of most offenses" is no good. That introduces yet another novelty into our jurisprudence. There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4-week investigation is "surely" too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an "extraordinary offens[e]" which may permit longer observation. What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist? We may have to grapple with these "vexing problems" in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

* * *

**JUSTICE SOTOMAYOR, concurring.**

* * *

* * * Justice Alito's approach, which discounts altogether the constitutional relevance of the Government's physical intrusion on Jones' Jeep, erodes that longstanding protection for privacy expectations inherent in items of property that people possess or control. By contrast, the trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.

Nonetheless, as Justice Alito notes, physical intrusion is now unnecessary to many forms of surveillance. With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones. In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance. But "[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis." As Justice Alito incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. Under that rubric, I agree with Justice Alito that, at the

very least, "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. The Government can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility.

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may alter the relationship between citizen and government in a way that is inimical to democratic society. I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent a too permeating police surveillance.

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice Alito notes, some people may find the

"tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

Resolution of these difficult questions in this case is unnecessary, however, because the Government's physical intrusion on Jones' Jeep supplies a narrower basis for decision. I therefore join the majority's opinion.

**JUSTICE ALITO, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN, join, concurring in the judgment.**

This case requires us to apply the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. By attaching a small GPS device[e] to the underside of the vehicle that respondent drove, the law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels. And for this reason, the Court concludes, the installation and use of the GPS device constituted a search.

This holding, in my judgment, is unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.

I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.

* * * The Fourth Amendment prohibits "unreasonable searches and seizures," and the Court makes very little effort to explain how the attachment or use of the GPS device fits within these terms. The Court does not contend that there was a seizure. A seizure of property occurs when there is "some meaningful interference with an individual's possessory interests in that property," and here there was none. Indeed, the success of the surveillance technique that the officers employed was dependent on the fact that the GPS did not interfere in any way with the

[e] Although the record does not reveal the size or weight of the device used in this case, there is now a device in use that weighs two ounces and is the size of a credit card.

operation of the vehicle, for if any such interference had been detected, the device might have been discovered.

The Court does claim that the installation and use of the GPS constituted a search, but this conclusion is dependent on the questionable proposition that these two procedures cannot be separated for purposes of Fourth Amendment analysis. If these two procedures are analyzed separately, it is not at all clear from the Court's opinion why either should be regarded as a search. It is clear that the attachment of the GPS device was not itself a search; if the device had not functioned or if the officers had not used it, no information would have been obtained. And the Court does not contend that the use of the device constituted a search either. On the contrary, the Court accepts the holding in United States v. Knotts, 460 U. S. 276 (1983), that the use of a surreptitiously planted electronic device to monitor a vehicle's movements on public roads did not amount to a search.

The Court argues—and I agree—that we must assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?[f]) The Court's theory seems to be that the concept of a search, as originally understood, comprehended any technical trespass that led to the gathering of evidence, but we know that this is incorrect. At common law, any unauthorized intrusion on private property was actionable, but a trespass on open fields, as opposed to the "curtilage" of a home, does not fall within the scope of the Fourth Amendment because private property outside the curtilage is not part of a "hous[e]" within the meaning of the Fourth Amendment.

* * *

The Court's reasoning in this case is very similar to that in the Court's early decisions involving wiretapping and electronic eavesdropping, namely, that a technical trespass followed by the gathering of evidence constitutes a search. * * * This trespass-based rule was repeatedly criticized. * * * Katz v. United States finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation. * * * Under this approach, as the Court later put it when addressing the relevance of a technical trespass, "an actual trespass is neither necessary nor sufficient to establish a constitutional violation." * * *

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[f] The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.

Disharmony with a substantial body of existing case law is only one of the problems with the Court's approach in this case. I will briefly note four others. First, the Court's reasoning largely disregards what is really important (the use of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation). Attaching such an object is generally regarded as so trivial that it does not provide a basis for recovery under modern tort law. But under the Court's reasoning, this conduct may violate the Fourth Amendment. By contrast, if long term monitoring can be accomplished without committing a technical trespass—suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car—the Court's theory would provide no protection.

Second, the Court's approach leads to incongruous results. If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.

* * *

Third, under the Court's theory, the coverage of the Fourth Amendment may vary from State to State. If the events at issue here had occurred in a community property State or a State that has adopted the Uniform Marital Property Act, respondent would likely be an owner of the vehicle, and it would not matter whether the GPS was installed before or after his wife turned over the keys. In non-community-property States, on the other hand, the registration of the vehicle in the name of respondent's wife would generally be regarded as presumptive evidence that she was the sole owner.

Fourth, the Court's reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked. For example, suppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. But may such decisions be followed in

applying the Court's trespass theory? Assuming that what matters under the Court's theory is the law of trespass as it existed at the time of the adoption of the Fourth Amendment, do these recent decisions represent a change in the law or simply the application of the old tort to new situations?

* * *

The *Katz* expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties. It involves a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks. In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.

On the other hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened with respect to wiretapping. After *Katz*, Congress did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute, and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law. In an ironic sense, although *Katz* overruled *Olmstead*, Chief Justice Taft's suggestion in the latter case that the regulation of wiretapping was a matter better left for Congress has been borne out.

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Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements. In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the movements of motorists who choose to make use of that convenience. Many motorists purchase cars that are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen.

Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as

of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States. * * *

In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. The surveillance at issue in this case * * * would have required a large team of agents, multiple vehicles, and perhaps aerial assistance. Only an investigation of unusual importance could have justified such an expenditure of law enforcement resources. Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap. In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.

To date, however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.

Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark. * * * We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.

* * *

### *GPS Tracking After Jones*

After *Jones*, when does GPS tracking in the absence of a trespass constitute a search? For example, GPS tracking through a smartphone does not require a physical trespass. Thus, in United States v. Skinner,

690 F.3d 772 (6th Cir. 2012), the court found that tracking a cellphone's location over three days did not constitute a Fourth Amendment search. The officers used the GPS on the defendant's phone to track him while he drove a motor home transporting narcotics. The court found the tracking not to be a search under *Jones* because here there was no trespass. Nor did the tracking present the concern raised by Justice Alito in *Jones,* as a three-day tracking came "nowhere near" the line of comprehensive tracking that concerned Justice Alito. The court noted that "there is little precedent for what constitutes a level of comprehensive tracking that would violate the Fourth Amendment."

### *Pervasive, Prolonged Surveillance After Jones*

In Justice Alito's view, police surveillance of a citizen's activity can constitute a search if it is pervasive and "prolonged"—even though the activity is in public. The reason is that prolonged surveillance can tell the government more about the citizen than any member of the public would find out by casual tracking, and more than officers would know by using traditional methods. It is important to note that Justice Alito's interpretation of the *Katz* test, as limiting prolonged surveillance, is joined by five members of the Court—Justice Sotomayor, while joining the majority opinion on trespass, also agrees with Justice Alito's view on the expectation of privacy test. Therefore Justice Alito's opinion about prolonged surveillance provides the standard for judging whether surveillance of public movements constitutes a search.

How does *Jones* apply to surveillance conducted by government security cameras all over town? It is possible these days for police security cameras and other detection devices to track an individual driving through intersections and tollbooths, entering buildings and trains, and on and on. While this kind of tracking is not targeted to an individual, the effect is the same, as the government can put together the information for long-term tracking of an individual's public movements. Could there come a time when this surveillance is too pervasive and prolonged and so would constitute a search under Justice Alito's view?

### *Physical Intrusion into the Area Surrounding a Home to Conduct a Canine Sniff: Florida v. Jardines*

In the following case, the Court continues what it started in *Jones:* a revival of the focus on physical intrusion for investigative purposes as one way to define a Fourth Amendment search. As will be seen later in this section, the Court has held that a dog sniff of luggage was not a search under the *Katz* test because the sniff can only determine whether contraband is in the luggage, and a person does not have a legitimate expectation of privacy in contraband. But as will be seen in *Jardines*, the

majority finds a search without applying the *Katz* reasonable expectation of privacy rationale, and also demonstrates that it is not always easy to apply the trespass doctrine.

## FLORIDA V. JARDINES

Supreme Court of the United States, 2013.
133 S.Ct. 1409.

**JUSTICE SCALIA delivered the opinion of the Court.**

We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment.

* * *

In 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified tip that marijuana was being grown in the home of respondent Joelis Jardines. One month later, the Department and the Drug Enforcement Administration sent a joint surveillance team to Jardines' home. Detective Pedraja was part of that team. He watched the home for fifteen minutes and saw no vehicles in the driveway or activity around the home, and could not see inside because the blinds were drawn. Detective Pedraja then approached Jardines' home accompanied by Detective Douglas Bartelt, a trained canine handler who had just arrived at the scene with his drug-sniffing dog. The dog was trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, indicating the presence of any of these substances through particular behavioral changes recognizable by his handler.

Detective Bartelt had the dog on a six-foot leash, owing in part to the dog's "wild" nature, and tendency to dart around erratically while searching. As the dog approached Jardines' front porch, he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor. As Detective Bartelt explained, the dog "began tracking that airborne odor by . . . tracking back and forth," engaging in what is called "bracketing," "back and forth, back and forth." Detective Bartelt gave the dog "the full six feet of the leash plus whatever safe distance [he could] give him" to do this—he testified that he needed to give the dog "as much distance as I can." And Detective Pedraja stood back while this was occurring, so that he would not "get knocked over" when the dog was "spinning around trying to find" the source.

After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his

vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.

On the basis of what he had learned at the home, Detective Pedraja applied for and received a warrant to search the residence. When the warrant was executed later that day, Jardines attempted to flee and was arrested; the search revealed marijuana plants, and he was charged with trafficking in cannabis.

[The question for the Court was whether the dog sniff on the porch of the house constituted a search within the meaning of the Fourth Amendment.]

* * *

The Fourth Amendment * * * establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." United States v. Jones, 132 S.Ct. 945 (2012). By reason of our decision in Katz v. United States, property rights are not the sole measure of Fourth Amendment violations—but though *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections when the Government does engage in a physical intrusion of a constitutionally protected area.

That principle renders this case a straightforward one. The officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

* * * The Fourth Amendment indicates with some precision the places and things encompassed by its protections: persons, houses, papers, and effects. The Fourth Amendment does not, therefore, prevent all investigations conducted on private property; for example, an officer may (subject to *Katz*) gather information in what we have called "open fields"—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text. Hester v. United States, 265 U.S. 57 (1924).

But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly

diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes. That principle has ancient and durable roots. * * *

While the boundaries of the curtilage are generally clearly marked, the conception defining the curtilage is at any rate familiar enough that it is easily understood from our daily experience. Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends.

* * * Since the officers' investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion. While law enforcement officers need not shield their eyes when passing by the home on public thoroughfares, an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas. * * * As it is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not.

"A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." McKee v. Gratz, 260 U.S. 127, 136 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." Kentucky v. King, 131 S.Ct. 1849, 1862 (2011).

But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden

before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. * * * Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

The State points to our decisions holding that the subjective intent of the officer is irrelevant. See Whren v. United States, 517 U.S. 806 (1996). But those cases merely hold that a stop or search that is objectively reasonable is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason. Thus, the defendant will not be heard to complain that although he was speeding the officer's real reason for the stop was racial harassment. Here, however, the question before the court is precisely whether the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.

* * * The State argues that investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest. The State cites for authority our decisions in United States v. Place, 462 U.S. 696 (1983), United States v. Jacobsen, 466 U.S. 109 (1984), and Illinois v. Caballes, 543 U.S. 405 (2005), which held, respectively, that canine inspection of luggage in an airport, chemical testing of a substance that had fallen from a parcel in transit, and canine inspection of an automobile during a lawful traffic stop, do not violate the "reasonable expectation of privacy" described in *Katz*.

Just last Term, we considered an argument much like this. *Jones* held that * * * [t]he *Katz* reasonable-expectations test "has been added to, not substituted for," the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.

Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.

* * *

**JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, concurring.**

* * *

The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines' privacy interests. A decision along those lines would have looked . . . well, much like this one. It would have talked about "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." It would have insisted on maintaining the "practical value" of that right by preventing police officers from standing in an adjacent space and "trawling for evidence with impunity." It would have explained that "privacy expectations are most heightened" in the home and the surrounding area. And it would have determined that police officers invade those shared expectations when they use trained canine assistants to reveal within the confines of a home what they could not otherwise have found there.

**JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE Kennedy, and JUSTICE BREYER join, dissenting.**

The Court's decision in this important Fourth Amendment case is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence.

The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time. This license is not limited to persons who intend to speak to an occupant or who actually do so. (Mail carriers and persons delivering packages and flyers are examples of individuals who may lawfully approach a front door without intending to converse.) Nor is the license restricted to categories of visitors whom an occupant of the dwelling is likely to welcome; as the Court acknowledges, this license applies even to "solicitors, hawkers and peddlers of all kinds." And the license even extends to police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions).

According to the Court, however, the police officer in this case, Detective Bartelt, committed a trespass because he was accompanied during his otherwise lawful visit to the front door of respondent's house by his dog, Franky. Where is the authority evidencing such a rule? Dogs have been domesticated for about 12,000 years; they were ubiquitous in both this country and Britain at the time of the adoption of the Fourth Amendment; and their acute sense of smell has been used in law enforcement for centuries. Yet the Court has been unable to find a single case—from the United States or any other common-law nation—that supports the rule on which its decision is based. Thus, trespass law provides no support for the Court's holding today.

The Court's decision is also inconsistent with the reasonable-expectations-of-privacy test that the Court adopted in Katz v. United States. A reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those odors remaining within the range that, while detectible by a dog, cannot be smelled by a human.

* * *

As the majority acknowledges, this implied license to approach the front door extends to the police. As we recognized in Kentucky v. King, 131 S.Ct. 1849 (2011), police officers do not engage in a search when they approach the front door of a residence and seek to engage in what is termed a "knock and talk," i.e., knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence. Even when the objective of a "knock and talk" is to obtain evidence that will lead to the homeowner's arrest and prosecution, the license to approach still applies. In other words, gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach. And when officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point.

* * *

The Court concludes that Detective Bartelt went too far because he had the "objectiv[e] . . . purpose to conduct a search." What this means, I take it, is that anyone aware of what Detective Bartelt did would infer that his subjective purpose was to gather evidence. But if this is the Court's point, then a standard "knock and talk" and most other police visits would likewise constitute searches. * * * The Court offers no meaningful way of distinguishing the "objective purpose" of a "knock and talk" from the "objective purpose" of Detective Bartelt's conduct here.

The Court contends that a "knock and talk" is different because it involves talking, and "all are invited" to do that. But a police officer who approaches the front door of a house in accordance with the limitations already discussed may gather evidence by means other than talking. The officer may observe items in plain view and smell odors coming from the house. So the Court's "objective purpose" argument cannot stand.

What the Court must fall back on, then, is the particular instrument that Detective Bartelt used to detect the odor of marijuana, namely, his dog. But in the entire body of common-law decisions, the Court has not found a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog on a leash. On the contrary, the common law allowed even unleashed dogs to wander on private property without committing a trespass.

* * *

For these reasons, the real law of trespass provides no support for the Court's holding today. While the Court claims that its reasoning has "ancient and durable roots," its trespass rule is really a newly struck counterfeit.

### *Questions About Jardines*

In *Jones,* Justice Scalia determined that the officers had committed a trespass by putting the tracker on Jones's license plate. But if you search his opinion in *Jardines*, the word "trespass" is never used. The term of art is "physical intrusion of a constitutionally protected area." Is that different from a trespass? Note that Justice Alito uses the term "trespass" throughout his dissent, noting that roaming dogs could not commit trespass under the common law; Justice Scalia never engages on this point. So why is Justice Scalia backing away from the term "trespass"? Could it be that the law of trespass varies from state to state, and what might be a trespass in one state is not a trespass in another?

Does *Jardines* prohibit a "knock and talk"—in which an officer simply knocks on a person's door and asks to talk to them? In United States v. Shuck, 713 F.3d 563 (10th Cir. 2013), officers walked up to the defendant's trailer without a warrant, in order to speak to Shuck about reports from his neighbors about the smell of marijuana coming from the trailer. They knocked on the door and received no response. But they did see a PVC pipe coming out of the trailer and one officer kneeled down to smell the end of the pipe, and smelled marijuana. Armed with this and other information, the officers obtained a warrant to search the trailer and found evidence of a growing operation. The court held that the officers' activity in approaching the trailer and smelling the PVC pipe did not constitute a search under *Jardines*, because "the officers used the normal route of access which would be used by anyone visiting this trailer. This is an area that police may approach even without reasonable suspicion if they have a knock and talk purpose, as these officers did." The court concluded that "[a]ny observations that the officers made from the vantage point of the back door, including Detective Grieco's smell of the PVC pipe, are not protected by the Fourth Amendment."

## C. INTERESTS PROTECTED BY THE FOURTH AMENDMENT UNDER *KATZ* AND *JONES*

The Court has held on several occasions after *Katz* that there is no legitimate privacy interest in illegal activity. See United States v. Place, infra (no privacy interest in possession of contraband). If that is the case, it may be wondered why Katz was entitled to protection in the phone

booth. Katz was not expressing private, personal thoughts; he was engaging in illegal betting transactions.

One possible answer is that Katz received the protection of the Fourth Amendment because the government was not certain that his activity was illegal *until officials listened to the conversations.* Where guilt is not certain before the intrusion, the police may be invading the legitimate privacy and possessory interests of those who are actually innocent. See Loewy, The Fourth Amendment as a Device for Protecting the Innocent, 81 Mich.L.Rev. 1229 (1983) (Fourth Amendment can be invoked by the guilty "when necessary to protect the innocent"); Colb, Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence, 96 Colum.L.Rev. 1456 (1996) (discussing the "Innocence Model" of the Fourth Amendment).

But even if Katz is "presumed innocent" before the phone is tapped, couldn't the government in *Katz* have argued that if he were placing an innocent call, he should have no complaint about government surveillance? If the private activity is not criminal, what does the citizen have to hide?

Courts after *Katz* have found that people have three legitimate interests that could be impaired by a government intrusion. First, there is an interest in being free from physical disruption and inconvenience. Thus, an innocent person who is subject to a bodily seizure suffers a Fourth Amendment intrusion; the fact that he or she had nothing to hide is irrelevant. Second, certain information, even though not indicative of criminal activity, may be personal or embarrassing; innocent citizens have a legitimate interest in keeping such information private. Third, the Fourth Amendment prohibits unreasonable seizures of property as well as searches. The citizen has a legitimate interest in control over and use of his or her property, and that interest is obviously implicated when the government exercises dominion and control over such property.

### *Seizures and Searches Implicate Different Interests*

Note that a seizure may occur without a search, and a search may occur without a seizure. As Justice Stevens explained in his concurring opinion in Texas v. Brown, 460 U.S. 730, 747–48 (1983):

> Although our Fourth Amendment cases sometimes refer indiscriminately to searches and seizures, there are important differences between the two * * *. The Amendment protects two different interests of the citizen—the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter. As a matter of timing, a seizure is usually preceded by a search, but when a container is involved the converse is often true. Significantly, the two

protected interests are not always present to the same extent; for example, the seizure of a locked suitcase does not necessarily compromise the secrecy of its contents, and the search of a stopped vehicle does not necessarily deprive its owner of possession.

Justice Stevens's point is that searches and seizures implicate different interests, and that the Fourth Amendment regulates searches and seizures independently. This point was later made by the Court in Soldal v. Cook County, 506 U.S. 56 (1992). The Soldal family resided in a trailer on a rented lot. The owner of the lot removed and towed the trailer prior to an eviction hearing, while deputy sheriffs at the scene declined to intervene. The Soldals brought an action under 42 U.S.C. § 1983, claiming that their Fourth Amendment rights had been violated when their trailer was taken away.

The lower court had dismissed the action, reasoning that the Fourth Amendment was not implicated because the removal and towing did not occur in the course of an investigation for evidence, and did not involve invasion of the privacy interests of those living in the trailer. Justice White, writing for the Court, rejected this position and stated that for Fourth Amendment purposes a "seizure" of property occurs whenever "there is some meaningful interference with an individual's possessory interests in that property." He concluded: "[w]e fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment."

Justice White cited *Katz* for the proposition that privacy rights are not the sole measure of Fourth Amendment violations, and noted that "seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." He rejected the lower court's notion that the Fourth Amendment only applies to efforts to collect evidence.

After *Soldal*, the question of whether a seizure of property has or has not occurred is usually obvious and is rarely contested. More difficult questions have arisen from police efforts to talk to an individual—when does a seizure of a *person* occur? These questions are considered in the discussion of stop and frisk, later in this Chapter.

## D. APPLICATIONS OF THE REASONABLE EXPECTATION OF PRIVACY ANALYSIS (WITH THE TRESPASS SUPPLEMENT)

The cases discussed below illustrate the difficulty that courts have had in applying the Fourth Amendment and the *Katz* test to modern investigative techniques. As you go through this material, keep in mind that if the court finds that the police conduct is a search or seizure, it

means only that the Fourth Amendment is applicable, and police activity will still be permissible if it satisfies the requirements of the Fourth Amendment. On the other hand, if the court finds that the police conduct is not a search or seizure, it means that the Fourth Amendment is completely inapplicable; consequently, as far as that Amendment is concerned, the police do not have to explain why they are doing what they are doing. In short, the police can do it to whom they want, when they want, as often as they want, for whatever reason they want—and not violate the Fourth Amendment.

Also keep in mind that after *Jones,* the expectation of privacy analysis is not the exclusive means of determining whether a search has occurred. Under *Jones,* police activity is a search if it involves a trespass (or physical intrusion) onto a person, house, paper or effect, when the officer's purpose is to obtain information. So even if the government does not intrude into an area in which the citizen has a legitimate expectation of privacy, there will still be a search if the government trespasses to obtain information.

### 1. Subjective Manifestation

Individuals must take affirmative steps to protect their privacy interests; otherwise, a police inspection will not constitute a search, due to failure to satisfy the "subjective manifestation" prong of *Katz*. See, e.g., United States v. Bellina, 665 F.2d 1335 (4th Cir.1981) (no search where officer used a step ladder to peer into the interior of a plane; the defendant made no attempt to cover the windows, and therefore did not sufficiently manifest a subjective interest in privacy).

Many cases hold, for example, that abandonment of property is inconsistent with the retention of any subjective privacy or possessory interests, so police detention and investigation of abandoned property does not trigger Fourth Amendment protection. Moreover, abandonment need not be explicit. "Whether abandonment has occurred is a question of intent that may be inferred from acts, words, and other objective facts." United States v. Cofield, 272 F.3d 1303 (11th Cir. 2001). Thus, in United States v. Hoey, 983 F.2d 890 (8th Cir.1993), police entered into an apartment where Hoey had lived, and discovered evidence that was used against her at trial. The court held that the government activity did not constitute a search because the defendant had abandoned the apartment: at the time that the police entered, the defendant was six weeks behind on her rent; she had held a moving sale; and she was seen leaving the apartment two days before the police entry and had not returned. See also United States v. Thomas, 451 F.3d 543 (8th Cir. 2006) (defendant abandoned the mail in his rented post office box; nobody had claimed the mail, or paid the rent on the mailbox, for a year; therefore a police

officer's seizure and search of the mail in the box did not implicate the Fourth Amendment).

In contrast, in Smith v. Ohio, 494 U.S. 541 (1990), a defendant carrying a brown paper bag was approached by two plainclothes officers. When the officers identified themselves, the defendant threw the bag on the hood of his car. The officers asked what was in the bag and the defendant tried to grab it. One officer pushed the defendant's hand away and opened the bag. The Court declared that "a citizen who attempts to protect his private property from inspection after throwing it on a car to respond to a police officer's inquiry clearly has not abandoned that property."

Abandonment is often found when a person denies ownership of a container in the face of police inquiries. See, e.g., United States v. McDonald, 100 F.3d 1320 (7th Cir.1996) (police officers discovered contraband in a bag placed in the overhead bin of the passenger compartment of a bus; when the police asked the owner of the bag to claim it, McDonald did not come forward; this constituted an abandonment of McDonald's privacy interest in the bag); United States v. Sanders, 196 F.3d 910 (8th Cir. 1999) ("statements to the officers that he did not own the bag were sufficient to constitute abandonment").

Often the issue of abandonment is considered as a question of whether the defendant has "standing" to assert a Fourth Amendment issue. See, e.g., United States v. Garzon, 119 F.3d 1446 (10th Cir.1997) ("Abandonment is akin to the issue of standing because a defendant lacks standing to complain of an illegal search or seizure of property which has been abandoned.") The concept of "standing" is discussed in the materials on the exclusionary rule, *infra*.

### 2. Open Fields

Prior to *Katz*, the Court had established an "open fields" rule. In Hester v. United States, 265 U.S. 57 (1924), the Court distinguished open fields from constitutionally protected areas like houses, and held that a police entry into open fields was not regulated by the Fourth Amendment. The Court in Oliver v. United States, 466 U.S. 170 (1984) held that the "open fields" doctrine was still valid after *Katz*, because a person does not have a legitimate expectation of privacy in an open field. An important thing to note about *Oliver* is that the term "open fields" was a misnomer as applied to the area searched in that case.[2] Oliver complained that two state police officers trespassed on his farm to investigate reports that he was growing marijuana. They drove past his house to a locked gate with a

[2] See United States v. Van Damme, 48 F.3d 461 (9th Cir.1995) ("The unfortunate use of the term 'open fields' in this body of law causes misunderstanding and confusion, and should be replaced by a term which means what it says, such as 'unprotected area.' ").

"No Trespassing" sign on it. A footpath led around one side of the gate. The officers took it, walked around the gate and along the road for several hundred yards. They found a field of marijuana on the property, about a mile from Oliver's house. The question for the Court was whether this police investigation amounted to a search.

Justice Powell wrote the Court's opinion and was fully supported by four other Justices. Justice White joined the majority on the proposition that the Fourth Amendment "indicates with some precision the places and things encompassed by its protections" and that open fields are not "effects" within the coverage of the Amendment. Justice White did not join the longer parts of the majority opinion concluding that a citizen has no legitimate expectation of privacy in an open field. The lengthy opinion contained the following statements:

1. "An individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."

2. "Open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."

3. "It is not generally true that fences or no trespassing signs effectively bar the public from viewing open fields in rural areas."

4. "[O]nly the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home."

5. "[C]ourts * * * have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual may expect that an area immediately adjacent to the home will remain private."

6. "An open field need be neither 'open' nor a 'field.' "

The majority in *Oliver* rejected "the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate." Although it recognized that Oliver "planted the marijuana upon secluded land and erected fences and no trespassing signs around the property," the Court found that these efforts did not establish that any expectation of privacy was legitimate. In other words, Oliver might have had a *subjective* expectation of privacy in light of his efforts to cordon off his property; but it was not an expectation that society was prepared to accept as legitimate, because there is no legitimate expectation of privacy in an open field.

The *Oliver* majority concluded that even if the officers committed a trespass under state law, the Fourth Amendment was not violated: "in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevancy to the applicability of the Fourth Amendment." Note that the government in *Jones, supra*, cited this passage from *Oliver* to argue against the trespass theory that the *Jones* Court was relying upon. But Justice Scalia's answer was that a trespass for investigation constitutes a search only if the trespass is on a person, house, paper or effect—and under *Oliver* an open field is none of those.

Justice Marshall, joined by Justices Brennan and Stevens, dissented in *Oliver*. He challenged the majority's reasoning that open fields are not protected by the language of the Fourth Amendment, observing that telephone booths and commercial establishments do not fit the language of the Amendment any more than open fields do, yet Supreme Court decisions have found them to be protected by the Fourth Amendment. He also noted that many private activities occur on property outside the curtilage of a home—including romantic activities, nature walks, and secret meetings.

### *QUESTIONS ABOUT OLIVER AND THE OPEN FIELDS DOCTRINE*

Is it now the case that no one—scientist, naturalist, lover, or simply a private person who prefers outdoors to indoors—can rely on the Fourth Amendment to protect against police surveillance of land areas not immediately adjacent to a house? May the police engage in as much surveillance as they care to as often as they want on the theory that there is no violation of any reasonable expectation of privacy? See United States v. Van Damme, 48 F.3d 461 (9th Cir.1995) (no search where police officer trespassed on the defendant's land in the middle of the night, walked through the defendant's forest, and climbed over his wire fence to conduct surveillance). Could it be that such surveillance might be so prolonged and pervasive that it might constitute a search under Justice Alito's concurring opinion in *Jones*?

Suppose police officers jump over a property owner's fence and are traipsing through the owner's field when they come upon a barrel with a lid. If they pry open the lid and look into the barrel, is that a search? May officers in an "open field" lift up a tarpaulin to see what is beneath it? Does it make a difference if the tarpaulin is tied to the ground with stakes? If you would not be willing to let officers open barrels or lift up covers on objects, are you more willing to permit them to roam about and look at uncovered objects? Might the reason that objects are uncovered be that landowners rely on their fence to keep out intruders?[3]

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[3] The Supreme Court's open field cases are criticized in Saltzburg, Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated By the Open Fields Doctrine) 48

### *Defining "Curtilage": United States v. Dunn*

The Fourth Amendment does not protect open fields, but, as *Oliver* notes, the Amendment does protect "curtilage." Questions arise, of course, on how far "curtilage" extends in any particular case. In United States v. Dunn, 480 U.S. 294 (1987), the Supreme Court held that a barn located approximately fifty yards from the fence surrounding a residence on almost two hundred acres of property was outside the curtilage—therefore police intrusion into that area did not constitute a search. Although Dunn's entire ranch was encircled by a fence and interior fences constructed of posts and barbed wires also were present, Federal and state officers ignored the fences and trespassed without a warrant upon Dunn's land. They crossed over the outer fence and one interior fence before smelling the odor of an acid used in the manufacture of certain drugs. The officers then crossed an interior barbed wire fence surrounding one smaller barn, and another barbed wire interior fence surrounding a larger barn. The larger barn had an open overhang, a wooden fence around it, locked, waist-high gates barring entry into the barn, and netting above the gates. From a distance the officers could not see through the netting. They approached the gates, shined a light through the netting and saw what appeared to a drug laboratory. They left the property without entering the barn, but twice reentered the property without a warrant before obtaining a warrant to search the barn from a Federal magistrate.

Justice White's opinion for the Court declared that curtilage questions should be resolved with particular reference to four factors:

- the proximity of the area claimed to be curtilage to the home;
- whether the area is included within an enclosure surrounding the home;
- the nature of the uses to which the area is put; and
- "the steps taken by the resident to protect the area from observation by people passing by."

Justice White rejected the government's "invitation to adopt a 'bright-line' rule that the curtilage should extend no farther than the nearest fence surrounding a fenced house." Justice White instead applied the four factors and found that the barn was outside the curtilage because it was 60 yards from the house itself, not within the area enclosed by the house fence, there was no objective indication that the barn was used for intimate activities associated with the home, and there was no protection from observation by those standing in open fields. The Court accepted

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U.Pitt.L.Rev. 1 (1986). See also Wilkins, Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis, 40 Vand.L.Rev. 1077 (1987).

arguendo, but did not decide, Dunn's contention that an *entry* into the barn would have been impermissible even though the barn itself was in an open field. Can a barn be an open field?

Justice Scalia concurred in the opinion, except for the portion that focused on whether law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home. In his view, the significant point was that the barn was not being so used, not whether the law enforcement officers knew that. Justice Brennan, joined by Justice Marshall, dissented.[4]

Even if property is within the curtilage, a visual inspection of that property from *outside* the curtilage does not constitute a search. See United States v. Hatfield, 333 F.3d 1189 (10th Cir. 2003) ("[W]e hold that police observation of a defendant's curtilage from a vantage point in the defendant's open field is not a search under the Fourth Amendment. Even though we can conclude that Hatfield had a subjective expectation of privacy in the space immediately behind his house, this is not an expectation of privacy that society regards as reasonable, at least with respect to visual observations made from an adjoining open field.").

### 3. Access by Members of the Public

Even if a person tries to keep information private, it is sometimes the case in society that the person will not get his or her wish. You cannot walk along a public street and reasonably expect that your movement will be free from public viewing. A homeowner cannot demand that planes not fly overhead.

After *Katz*, the Supreme Court held in a series of cases that if an aspect of a person's life is subject to scrutiny by other members of society, then that person has no legitimate expectation in denying equivalent access to police. The Court essentially found that there is no search if the police obtain information that members of the public could obtain.

After *Jones* and *Jardines*, however, it cannot be categorically stated that there is no search where police obtain information that members of the public could obtain. This is for three reasons: 1) the majority in *Jones* holds that trespass-for-investigation constitutes a search even if the citizen exposed the information to members of the public, and the

[4] For lower court cases applying the *Dunn* factors, see Daughenbaugh v. City of Tiffin, 150 F.3d 594 (6th Cir.1998) (unattached garage was within curtilage of the house, where it was 50 yards away from the house, within natural boundaries of a river and trees that circled the property, set far back from the road, and the officers had no indication that the defendant was using the garage for any illegal activity); United States v. Traynor, 990 F.2d 1153 (9th Cir.1993) (workshop not within curtilage, where it was 70 feet from the house, and shop and house were not enclosed within a single fenced-in area); United States v. McKeever, 5 F.3d 863 (5th Cir.1993) (area not within curtilage where it was 50 feet from home and not within an immediate fenced-in area); United States v. Swepston, 987 F.2d 1510 (10th Cir.1993) (chicken shed within the curtilage but barn was not).

majority in *Jardines* reaches a similar conclusion; 2) the Alito concurrence in *Jones*—joined by five members of the Court—provides that police surveillance of information known to the public can be a search if it is sufficiently pervasive and prolonged; and 3) Justice Sotomayor, in her concurring opinion, argues that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" because that approach "is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."

So the Supreme Court cases on public access, set forth below, must be read through the prism of the later decision in *Jones*.

### *a. Consensual Electronic Surveillance*

In United States v. White, 401 U.S. 745 (1971), a government informer carrying a radio transmitter engaged the defendant in conversations that were overheard by an agent using a radio receiver. Justice White's opinion for himself, Chief Justice Burger, Justice Stewart and Justice Blackmun concluded that the defendant had no reasonable expectation of privacy in the conversations. The plurality stated that "the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police" and that "one contemplating illegal activities must realize and risk that his companions may be reporting to the police." Justice Black concurred in the judgment for the reasons he stated in *Katz*. Justice Douglas dissented, questioning whether a citizen must "live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world." Justice Harlan in dissent argued that the assumption of risk approach was not an adequate guide to controlling new threats to privacy. As he put the question, it was not whether the defendant knew there was a risk of third party bugging but whether "we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement." He concluded that "[t]he impact of third-party bugging must * * * be considered to undermine that confidence and sense of security in dealing with another that is characteristic of individual relationships between citizens in a free society." Justice Marshall also dissented.[5] Justice Brennan concurred in the result on a different ground.

The "assumption of risk" analysis applied in *White* is assailed by Professor Maclin in Informants and the Fourth Amendment: a Reconsideration, 74 Wash.Univ.L.Q. 573 (1996) ("A home or private

[5] Some state courts have sided with the dissenters. See, e.g., People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975); State v. Glass, 583 P.2d 872 (Alaska 1978).

conversation should not lose its constitutional protection against promiscuous police intrusion merely because an individual has allowed a third party's presence. When it comes to Fourth Amendment rights, the difference between the police and everyone else matters.").

Courts have applied the *White* analysis to video surveillance as well. In United States v. Gonzalez, 328 F.3d 543 (9th Cir. 2003), Gonzalez and an associate arranged to receive a shipment of drugs in a package addressed to a hospital, where one of them worked in the mailroom. Officers were tipped off to the shipment, and obtained the consent of the hospital to install a hidden video camera in the mailroom. The video showed that when the package arrived, Gonzalez clapped his hands and acted "in a manner usually reserved for post-touchdown endzone celebrations." Gonzalez argued that the suspicious conduct on the video could not be used at trial because the video surveillance was an illegal search. But the court noted that the mailroom was a large, "quasi-public" space at a public hospital, with large windows through which the room was visible, and that it was accessed frequently by hospital employees. The Court concluded as follows:

> Gonzalez would have us adopt a theory of the Fourth Amendment akin to J.K. Rowling's Invisibility Cloak, to create at will a shield impenetrable to law enforcement view even in the most public places. However, the fabric of the Fourth Amendment does not stretch that far. He did not have an expectation of privacy in the public mailroom that society would accept as reasonable.

If Gonzalez did not have a legitimate expectation to be free from video surveillance, why did Katz have a legitimate expectation of privacy in the public telephone booth? If the phone company that owned the booth had consented to the FBI's wiretap, would that have meant that Katz had no reasonable expectation of privacy?

### *b. Financial Records*

In United States v. Miller, 425 U.S. 435 (1976), Justice Powell's opinion for the Court held that the Fourth Amendment was not implicated by a subpoena issued to a bank to obtain a depositor's records compiled by the bank. Over dissents by Justices Brennan and Marshall, the Court found that because the depositor made the records accessible to the bank, there was no reasonable expectation that they would be free from government surveillance. Justice Sotomayor's concurring opinion in *Jones* suggests that it may be time to reconsider these and other "third party disclosure" cases.

### c. *Pen Registers*

In Smith v. Maryland, 442 U.S. 735 (1979), police installed a pen register device in the phone company offices. This device recorded the numbers called by the defendant from his home telephone. Justice Blackmun, writing for six members of the Court, found that the use of the pen register did not constitute a search, and so no warrant or probable cause was required. The majority stated that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" and that "when he used his phone, petitioner voluntarily conveyed numerical information to the telephone company." Justice Stewart, joined by Justice Brennan, dissented, arguing that because private telephone conversations were protected by *Katz*, the numbers dialed from a private telephone were equally protected. Justice Marshall's dissent asserted that "privacy is not a discrete commodity, possessed absolutely or not at all" and that those who disclose information for "a limited business purpose need not assume that this information will be released to other persons for other purposes."

After the Court's decision in *Smith*, Congress imposed statutory limitations on the use of pen registers. The most important statutory enactment is the "pen register" provisions of the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 3121 et seq. The statute prohibits the use of pen registers unless 1) the "provider" gives consent, or 2) a court order is obtained. The court is authorized to issue an order to install a pen register upon a certified statement of a government official that the pen register is likely to uncover information relevant to a criminal investigation. Note that the government does not need to show probable cause, as it would have to do were the use of a pen register a search. Note also that the violation of the statutory requirement does not give rise to the exclusion of any evidence obtained. See United States v. German, 486 F.3d 849 (5th Cir. 2007) (pen register information obtained without court order was properly admitted, as there was no search under *Katz*, and Congress did not provide that a violation of the pen register statute should result in exclusion).

How do pen registers fare under *Jones*? A pen register is installed on the citizen's phone line but it is physically placed in the phone company offices—so it would not appear to be a search under Justice Scalia's trespass test. But query whether a pen register surveillance might be so prolonged in a particular case as to trigger a finding of a search under Justice Alito's concurring opinion in *Jones*? Wouldn't that also be true of the much more pervasive monitoring and collection of phone data by the National Security Administration?

### *Carnivore and Computers*

The FBI has developed a computer surveillance program called "Carnivore." The program can monitor activity over the Internet. Carnivore is an electronic surveillance system that monitors a targeted user's e-mail, web browsing, and file transfer activity. The system is capable of gathering information associated with Internet activities at two levels. First, in "full collection" mode, Carnivore intercepts the addressing information and content of a targeted user's electronic communication. The FBI readily admits that in "full collection" mode, the use of Carnivore constitutes a search that is regulated by the Fourth Amendment. Second, in "pen collection" mode, Carnivore gathers only the addressing information associated with e-mail, web browsing, and file transfer activity. The FBI argues that this information is equivalent to the numbers dialed on a telephone, and therefore the "pen collection" mode is not a search. The argument is that a computer user has no legitimate expectation of privacy in the web addresses that he visits or the e-mail addresses to which he sends e-mail, as this information is accessible to his Internet service provider. Do you agree? For more discussion of the use of Carnivore, see Schultz, Unrestricted Federal Agent: "Carnivore" and the Need to Revise the Pen Register Statute, 76 Notre Dame L. Rev. 1215 (2001).

Courts have generally found that surveillance of computers for pen-register-like information is not a search. See Guest v. Leis, 255 F.3d 325 (6th Cir. 2001) ("computer users do not have a legitimate expectation of privacy in their subscriber information because they have conveyed it to another person—the system operator"); United States v. Forrester, 512 F.3d 500 (9th Cir. 2008) (use of computer surveillance techniques that revealed "to" and "from" addresses of email messages, addresses of websites visited, and total amount of data transmitted to or from the defendant's internet account did not constitute a "search" because there is no expectation of privacy in such information: "the surveillance techniques the government employed here are constitutionally indistinguishable from the use of a pen register").

Again, these holdings might be altered by *Jones* at least in cases of prolonged surveillance—because, according to Justice Alito, society's expectation "has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue" every single public activity of a person for a prolonged period.

### *d. Trash*

In California v. Greenwood, 486 U.S. 35 (1988), police officers asked a neighborhood trash collector to pick up plastic garbage bags that Greenwood left on the curb in front of his house and to turn the bags over

to the police. The police rummaged through the bags and found items indicating narcotics use. This information was used to obtain warrants to search Greenwood's house. Greenwood challenged the warrants as the fruit of an illegal search of his trash. Justice White, writing for seven members of the Court, concluded that the officer's inspection of the trash was not a search and therefore was permissible without a warrant or probable cause.

Justice White relied on *Smith* (the pen register case) and asserted that "respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." Because the public had access to the trash, Justice White reasoned that "the police cannot be reasonably expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." Justice White therefore found it irrelevant that Greenwood was prohibited by city ordinance from disposing of his trash in any way other than leaving it for the trash service. The Court's ruling was not based on Greenwood's "abandonment" of property, as that would require some showing of a voluntary relinquishment. Rather, the ruling was based squarely on the premise that Greenwood had no expectation of privacy in property to which members of the public had access.

Justice Brennan, joined by Justice Marshall, dissented. He argued that "scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior" and that "society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public." Justice Brennan concluded as follows:

> The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in its contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone.

Who more accurately captures societal expectations of the American people, Justice White or Justice Brennan?[6]

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[6] Professors Slobogin and Schumacher have argued, on the basis of some empirical research, that the Court's conclusions about societal expectations are often at odds with the actual views of most members of society. See Slobogin and Schumacher, Reasonable

### *QUESTIONS ABOUT GREENWOOD*

What if Greenwood had placed his garbage bags in a trash can just inside his fenced-in backyard? See United States v. Hedrick, 922 F.2d 396 (7th Cir.1991) (not a search even though trash was located near garage, well inside property, because a member of the public could still have reached into the trash can). See also United States v. Redmon, 138 F.3d 1109 (7th Cir.1998) (en banc) (no search where officers walked up the defendant's driveway, took trash out of a trashcan located next to the garage, and rummaged through the trash; the court reasons that members of the public, as well as raccoons, could have obtained access to the trash, so police officers could not be excluded).

Would it make any difference if Greenwood had shredded documents and papers into tiny pieces before depositing them in the trash? The Court in United States v. Scott, 975 F.2d 927 (1st Cir.1992), held that an officer's investigation of shredded trash did not constitute a search:

> What we have here is a failed attempt at secrecy by reason of underestimation of police resourcefulness, not invasion of constitutionally protected privacy. There is no constitutional protection from police scrutiny as to information received from a failed attempt at secrecy. * * * The Fourth Amendment * * * does not protect appellee when a third party expends the effort and expense to solve the jigsaw puzzle created by shredding.

Courts have applied the *Greenwood* holding to find that investigations of other kinds of "waste" are not searches under the Fourth Amendment. See, e.g., Riverdale Mills Corp. v. Pimpare, 392 F.3d 55 (1st Cir. 2004) (manufacturer lacked reasonable expectation of privacy in wastewater discharged from its plant, so the EPA's collection and inspection of wastewater did not constitute a search; any member of the public could have collected and inspected the wastewater).

What if police went through Greenwood's trash every day for four weeks? Would this be a search under Justice Alito's opinion in *Jones*. If so, when would have become a search? After the 30th day? The 31st?

### *e. Public Areas*

The "public access" prong of the *Katz* test means that most acts conducted in public are not protected by the Fourth Amendment. But sometimes the question arises as to whether an area is truly "public." For example, can police officers look through the effects of a homeless person (such as a closed cardboard box) without a warrant? Is *Greenwood* good authority for holding that such an inspection is not a search? In Connecticut v. Mooney, 218 Conn. 85, 588 A.2d 145 (1991), the court held that a homeless person had a reasonable expectation of privacy in the

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Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 Duke L.J. 727 (1993).

contents of a duffel bag and cardboard box kept on public property. The court distinguished *Greenwood* as a case in which defendants placed trash at the curb for the purpose of conveying it to a third party. Is this distinction persuasive? Compare D'Aguanno v. Gallagher, 50 F.3d 877 (11th Cir.1995) (homeless persons did not have reasonable expectation of privacy in belongings stored on private property without landowner's permission).

Is it a search if a police officer peers into a closed public bathroom stall? In United States v. White, 890 F.2d 1012 (8th Cir.1989), an officer surreptitiously observed the defendant in a bathroom stall by looking through the gap between the bathroom stall door and the wall of the stall. In this manner the officer saw the defendant engaged in criminal activity. The court held that the officer's activity did not constitute a search. It stated that while the defendant "could reasonably expect a significant amount of privacy in the bathroom stall," that expectation was not violated "because the design of the stall allowed the officer to make her observations without placing herself in any position that would be unexpected by an occupant of the stall."

### *f. Aerial Surveillance*

The Court has applied the public-access-therefore-police-access rationale of *Smith* and *Greenwood* to aerial surveillance of private property. In California v. Ciraolo, 476 U.S. 207 (1986), Chief Justice Burger wrote for the Court as it held, 5–4, that the Fourth Amendment was not violated by aerial observation of a fenced-in backyard, from an altitude of 1,000 feet, even though the officers were operating without a warrant or probable cause. Ciraolo had erected two fences, a six foot outer and a ten foot inner fence, to protect his backyard from observation on the ground. But the aerial overflight revealed the fact that Ciraolo was growing marijuana. The majority reasoned that "the mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." Because any member of the public flying in the public airspace could have peered into the yard, the majority concluded that Ciraolo had no reasonable expectation of privacy against aerial surveillance by the police. The defendant argued that a flyover by members of the public would be different in character and purpose from a flyover by law enforcement officers. But the majority rejected any such distinction, and had "difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes pass overhead at identical altitudes, simply for different purposes."

Justice Powell, joined by Justices Brennan, Marshall and Blackmun, dissented. He relied upon *Katz* and argued that the Court erred in relying

solely on the manner of surveillance rather than "focusing on the interests of the individual and of a free society" and suggested that "[a]erial surveillance is nearly as intrusive on family privacy as physical trespass into the curtilage." Does *Jardines* establish that the dissent is correct?

Dow Chemical Co. v. United States, 476 U.S. 227 (1986), was decided the same day by the same vote as *Ciraolo*. The Environmental Protection Agency engaged in aerial photographing of Dow Chemical Co.'s manufacturing plant in Michigan. Dow had maintained elaborate ground security that barred public views of its plant from the ground and had investigated low flights over the plant. It sued for injunctive relief against the EPA, arguing that its Fourth Amendment rights were violated by the aerial overflights. Chief Justice Burger's majority opinion concluded that "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment."

Again Justice Powell wrote for the four dissenters. He relied upon *Katz* to argue that trade secrets laws demonstrate societal recognition of legitimate interests in business privacy, and distinguished *Ciraolo* on the ground that the EPA needed to use a sophisticated camera to discover the details revealed in its photographs.

### *Ordinary Overflights: Florida v. Riley*

The Court applied *Ciraolo* in Florida v. Riley, 488 U.S. 445 (1989), and held that surveillance of a backyard from a helicopter hovering at 400 feet was not a search. Justice White, writing for a plurality, relied on prior cases for the proposition that if information is made available to the public, then an officer can act as any member of the public could and obtain the information free from Fourth Amendment restrictions.

The crucial question in *Riley* was whether the public could gain access to the information in Riley's backyard by way of aerial surveillance; the information was partially obscured by a greenhouse, precluding observation by airplane. To see what was going on, the officers had to hover over the property in a helicopter at a height of 400 feet. Justice White noted that no law prohibited the public from hovering over Riley's property in a helicopter at that level; therefore the police could do so as well. Justice White relied on FAA regulations that allow helicopters to be operated at virtually any altitude so long as they do not pose a safety hazard. He added that there was no injury to the property or any dust or threat from the visual inspection, and that no intimate activities in the house or curtilage had been observed.

Justice O'Connor concurred in the judgment. She disagreed with the plurality's analysis and contended that the proper test for determining the reasonableness of an expectation of privacy was whether the public

*ordinarily* had access to the information sought by the police, not whether it was legally possible for a member of the public to obtain it. Thus, for Justice O'Connor, the question was whether members of the public *ordinarily* hovered over Riley's property at 400 feet in helicopters—if not, the police conduct would be a search. Justice O'Connor nonetheless concurred in the result, asserting that the burden was on Riley, the moving party, to show that members of the public did not regularly hover over his property in helicopters. Because Riley had offered no proof on this point in the lower court, she agreed that a search was not shown on the facts in *Riley*.

Justice Brennan wrote a dissenting opinion joined by Justices Marshall and Stevens. He agreed with Justice O'Connor that the reasonableness of a privacy expectation should be determined by whether the public ordinarily has access to the information, not by whether it is legally possible to obtain access. Justice Brennan urged that judicial notice could be taken of the infrequent nature of lowflying helicopters, and that the burden should be placed upon the government to show that this type of aerial surveillance is so frequent as to render unreasonable a privacy expectation. Justice Blackmun also dissented. He agreed with Justices Brennan and O'Connor that the appropriate test is one of whether public access to the property is potentially frequent as opposed to merely possible. Justice Blackmun agreed with Justice Brennan that the burden should be placed upon the government to show frequency of public access. He argued that a remand would give the government the opportunity to satisfy the burden.

In *Riley* five members of the Court agreed that the mere *possibility* of public access is not enough to render a privacy expectation unreasonable. Isn't that the same point that Justice Brennan made in dissent in *Greenwood*? How can *Riley* and *Greenwood* be reconciled?

How does the Court's opinion in *Jones* affect aerial overflights? They are not trespassory and so they would appear to be unaffected by Justice Scalia's trespass-for-investigation test. But could police conduct overflights on a particular property over such a prolonged period that there would eventually be a search under Justice Alito's opinion in *Jones*?

### *g. Manipulation of Bags in Public Transit*

In recent years, officers have used many techniques to halt the flow of drug traffic on interstate buses and trains. One method is for officers to enter a bus or train and examine, by touch, the outside of bags that have been placed in the overhead baggage rack. Soft bags are manipulated to determine whether they contain hard objects that could be guns or drugs. In Bond v. United States, 529 U.S. 334 (2000), the Court considered the question whether a law enforcement officer's physical manipulation of a bus passenger's carry-on luggage violated the Fourth Amendment's

proscription against unreasonable searches. The Court held that it did. The officer boarded a bus and squeezed a green canvas bag in the baggage area above Bond's seat. He noticed that it contained a "brick-like" object. The question was whether the manipulation of the bag was a search, because the officer did not have probable cause. Bond conceded that other passengers had access to his bag, but contended that the officer manipulated the bag in a way that other passengers would not—specifically he prodded and poked the bag to determine whether there was a brick-like object inside.

Chief Justice Rehnquist, writing for the Court, found that the officer's manipulation of the bag went beyond what would be expected by members of the public, and so constituted a search. He explained that "a bus passenger clearly expects that his bag may be handled," but "[h]e does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner."

Justice Breyer, joined by Justice Scalia, dissented in *Bond*, argued that in modern travel other passengers often squeeze and handle the bags of others in an attempt to cram more bags into baggage compartments, and predicted that "[a]t best, this decision will lead to a constitutional jurisprudence of "squeezes."

### *QUESTION ABOUT BOND*

*Bond* was decided before September 11, 2001. Do you think it would be decided the same way today? If so, then how is it permissible to conduct the intrusive searches of the luggage and even the persons of air travelers that have become common practice after 9/11? Answers to that last question might be found in the discussion of "special needs" searches and seizures, later in this Chapter.

## 4. Investigation That Can Only Reveal Illegal Activity

Investigation that threatens to uncover innocent, private activity can constitute a search, because it invades a legitimate Fourth Amendment secrecy interest. In contrast, the Supreme Court has held that there is no legitimate expectation of privacy in illegal activity. Therefore—at least under the expectation of privacy test—an investigation is not a search if it can *only* reveal illegal activity.

### *a. Canine Sniffs*

In United States v. Place, 462 U.S. 696 (1983), the Supreme Court held that a canine sniff of closed luggage for drugs was not a search under the expectation of privacy test.

The Court, in an opinion by Justice O'Connor, said this about "canine sniffs":

> A "canine sniff" by a well-trained narcotics detection dog * * * does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.

Recall that Justice Scalia distinguished *Place* in *Jardines*. It is obviously true that a suitcase is not a house, but equally obvious is that a suitcase is an "effect" with the meaning of the Fourth Amendment. Given that, does the distinction make sense?

While the dog sniff in *Place* was not a search under *Katz*, the Court nonetheless held that the cocaine found in Place's luggage was illegally obtained. This was because police did not have the dog ready when Place's luggage arrived at the airport; it took 90 minutes to bring the dog to the scene, and Place's luggage was detained for that time. This detention was an exercise of dominion and control over the luggage, which implicated the Fourth Amendment's prohibition against unreasonable *seizures*; and the Court found the 90 minute seizure unreasonable under the circumstances, because the officers were not diligent in their investigation and had no probable cause to detain the luggage.

### *Dog Sniffs and Trespass*

*Place* was of course decided before the Court in *Jones*, supra, revived the old trespass test as a supplement to the *Katz* reasonable expectation of privacy test. Under the trespass-investigation test of *Jones*, police activity is a search if there is a trespass for investigatory purposes—presumably even if the investigation can only reveal illegal activity. So if a dog, in order to conduct a sniff, physically enters a constitutionally

protected space, the dog sniff is a search under *Jones*. *See Jardines*, *supra*.

### *Dog-Sniff of a Car During a Routine Traffic Stop: Illinois v. Caballes*

In Illinois v. Caballes, 543 U.S. 405 (2005), the defendant was legally stopped for speeding. While one officer was processing the speeding ticket, another officer came to the scene with a drug-detecting dog, and walked the dog around Caballes's car. The officer had no justification for thinking that Caballes was carrying drugs. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested Caballes. The entire incident lasted less than 10 minutes. Justice Stevens for the majority stated the question before the Court as follows: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." Reasonable suspicion would only be required if Caballes was subject to a search or a seizure beyond that permitted by the traffic stop itself (which Caballes did not challenge).

Justice Stevens found no Fourth Amendment violation in the use of the dog. He explained that the dog sniff occurred without extending the time required for the traffic stop, relied on *Place* to say that the dog sniff did not violate any reasonable expectation of privacy, and warned that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." The Court concluded as follows:

> Accordingly, the use of a well-trained narcotics-detection dog * * * during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Chief Justice Rehnquist did not participate in the decision in *Caballes*. Justice Souter dissented, expressing concern that dog sniffs are fallible—citing examples of one dog with a 70% accuracy rate and another dog that gave false positives 38% of the time. He noted that dog sniffs "are conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conventionally enhanced."

Justice Ginsburg wrote a separate dissenting opinion. She argued that the use of the dog changed the character of what began as a lawful traffic stop and expressed concern that "[u]nder today's decision, every

traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population."

### *b. Chemical Testing for Drugs*

The Court applied the reasoning in *Place* when it upheld the warrantless chemical field-testing of a powder that a Federal agent obtained from a package opened by Federal Express employees in United States v. Jacobsen, 466 U.S. 109 (1984).[7] Justice Stevens' opinion for the Court stated that "[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy." Even if the results of the test are negative, the results reveal "nothing of special interest." Thus, "[h]ere, as in *Place*, the likelihood that official conduct * * * will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment."

While the field test in *Jacobsen* was not a search, it did constitute a *seizure*, because the powder sample that was tested was destroyed in the process. Thus, the test affected "possessory interests protected by the Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one." However, Justice Stevens found that the seizure involved in the field test was reasonable under the Fourth Amendment—because only a minimal amount of the powder was destroyed, and the officer had a clear indication that the powder was some kind of contraband before he tested it.

Justice Brennan, joined by Justice Marshall, wrote a dissenting opinion in *Jacobsen*. The dissent found it "most startling" that in this case and in *Place* the Court put "its exclusive focus on the nature of the information or item sought and revealed through the use of a surveillance technique, rather than on the context in which the information or item is concealed." Rather than hold that a technique either always or never violates reasonable expectations of privacy, Justice Brennan urged the Court to examine the private nature of the area or item subjected to intrusion.

Does *Jacobsen* mean that an officer can enter a house to do a field test without triggering any Fourth Amendment protection? Would the defendant be able to argue that while the field test itself is not a search, the entry into the house to do the field test is a search? How would that argument play under *Katz*? How would it play under *Jones*?

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[7] The portion of the Court's opinion upholding the visual examination and seizure of the plastic bags containing the powder is discussed in the section on mixed public and private searches, *infra*.

### *Other Drug Testing*

Does *Jacobsen* mean that drug tests on urine samples are not searches? In Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), the Court unanimously held that drug testing of urine was a search. The Court noted that unlike the field testing in *Jacobsen,* drug testing of urine samples could uncover such innocent secret information as epilepsy, pregnancy, or the use of prescription drugs. Moreover, the process of collecting urine samples (including aural observation) was intrusive and embarrassing. The Court concluded that "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable."

## 5. Use of Technology to Enhance Inspection

Under *Katz*, visual inspection is not always a "search", as seen in the aerial overflight cases. But what if visual inspection is aided by sophisticated technological devices? And what if it involves a trespass?

### *a. Thermal Detection Devices*

One technological advance in law enforcement has been the development of an infrared thermal detection device. The use of such a device in detecting a drug-growing operation was reviewed by the Supreme Court in the following case. You may observe that some of Justice Scalia's observations paved the way for his opinions in *Jones* and *Jardines*, considered previously.

### KYLLO V. UNITED STATES

United States Supreme Court, 2001.
533 U.S. 27.

**JUSTICE SCALIA delivered the opinion of the Court.**

This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment.

* * * In 1991 Agent William Elliott of the United States Department of the Interior came to suspect that marijuana was being grown in the home belonging to petitioner Danny Kyllo, part of a triplex on Rhododendron Drive in Florence, Oregon. Indoor marijuana growth typically requires high-intensity lamps. In order to determine whether an amount of heat was emanating from petitioner's home consistent with the use of such lamps, at 3:20 a.m. on January 16, 1992, Agent Elliott and Dan Haas used an Agema Thermovision 210 thermal imager to scan the triplex. Thermal imagers detect infrared radiation, which virtually all

objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of Agent Elliott's vehicle across the street from the front of the house and also from the street in back of the house. The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was. Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner's home, and the agents found an indoor growing operation involving more than 100 plants. Petitioner was indicted on one count of manufacturing marijuana, in violation of 21 U.S.C. § 841(a)(1). He unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea.

The Court of Appeals for the Ninth Circuit remanded the case for an evidentiary hearing regarding the intrusiveness of thermal imaging. On remand the District Court found that the Agema 210 "is a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house"; it "did not show any people or activity within the walls of the structure"; "[t]he device used cannot penetrate walls or windows to reveal conversations or human activities"; and "[n]o intimate details of the home were observed." Based on these findings, the District Court upheld the validity of the warrant that relied in part upon the thermal imaging, and reaffirmed its denial of the motion to suppress. A divided Court of Appeals * * * held that petitioner had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home, and even if he had, there was no objectively reasonable expectation of privacy because the imager "did not expose any intimate details of Kyllo's life," only "amorphous 'hot spots' on the roof and exterior wall." We granted certiorari.

* * * "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.

On the other hand, the antecedent question of whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth

Amendment jurisprudence was tied to common-law trespass. Visual surveillance was unquestionably lawful because "the eye cannot by the laws of England be guilty of a trespass." Boyd v. United States, 116 U.S. 616, 628 (1886). We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property, but the lawfulness of warrantless visual surveillance of a home has still been preserved. * * *

One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a "search" despite the absence of trespass, is not an "unreasonable" one under the Fourth Amendment. But in fact we have held that visual observation is no "search" at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional. In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in Katz v. United States. * * * We have subsequently applied this principle to hold that a Fourth Amendment search does not occur—even when the explicitly protected location of a house is concerned—unless "the individual manifested a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable."

search if..
① manif. exper. of privacy
② expect is reasonable

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. * * *

It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. For example, * * * the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.

The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable. While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by

the Fourth Amendment. 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—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.[a]

* * * The Government maintains, however, that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house." The dissent makes this its leading point, contending that there is a fundamental difference between what it calls "off-the-wall" observations and "through-the-wall surveillance." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development. * * * As for the dissent's extraordinary assertion that anything learned through "an inference" cannot be a search, that would validate even the "through-the-wall" technologies that the dissent purports to disapprove. Surely the dissent does not believe that the through-the-wall radar or ultrasound technology produces an 8-by-10 Kodak glossy that needs no analysis (i.e., the making of inferences). * * *

The Government also contends that the thermal imaging was constitutional because it did not "detect private activities occurring in private areas." It points out that in Dow Chemical v. United States, 476

[a] The dissent's repeated assertion that the thermal imaging did not obtain information regarding the interior of the home is simply inaccurate. A thermal imager reveals the relative heat of various rooms in the home. The dissent may not find that information particularly private or important, but there is no basis for saying it is not information regarding the interior of the home. The dissent's comparison of the thermal imaging to various circumstances in which outside observers might be able to perceive, without technology, the heat of the home—for example, by observing snowmelt on the roof—is quite irrelevant. The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. The police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful. In any event, on the night of January 16, 1992, no outside observer could have discerned the relative heat of Kyllo's home without thermal imaging.

U.S. 227 (1986), we observed that the enhanced aerial photography did not reveal any "intimate details." *Dow Chemical*, however, involved enhanced aerial photography of an industrial complex, which does not share the Fourth Amendment sanctity of the home. The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes. * * *

Limiting the prohibition of thermal imaging to "intimate details" would not only be wrong in principle; it would be impractical in application * * *. To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the "intimacy" of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider "intimate"; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which home activities are "intimate" and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know in advance whether his through-the-wall surveillance picks up "intimate" details—and thus would be unable to know in advance whether it is constitutional.

The dissent's proposed standard—whether the technology offers the "functional equivalent of actual presence in the area being searched"—would seem quite similar to our own at first blush. The dissent concludes that *Katz* was such a case, but then inexplicably asserts that if the same listening device only revealed the volume of the conversation, the surveillance would be permissible. Yet if, without technology, the police could not discern volume without being actually present in the phone booth, JUSTICE STEVENS should conclude a search has occurred. The same should hold for the interior heat of the home if only a person present in the home could discern the heat. Thus the driving force of the dissent, despite its recitation of the above standard, appears to be a distinction among different types of information—whether the "homeowner would even care if anybody noticed." The dissent offers no

practical guidance for the application of this standard, and for reasons already discussed, we believe there can be none. The people in their houses, as well as the police, deserve more precision.[b]

* * *

H Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

* * *

**JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.**

* * *

All that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others. As still images from the infrared scans show, no details regarding the interior of petitioner's home were revealed. * * *

Indeed, the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer. Nor, in my view, does such observation become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.

* * * Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building. A subjective expectation that they would remain private is not only implausible but also surely not "one that society is prepared to recognize as reasonable."

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b The dissent argues that we have injected potential uncertainty into the constitutional analysis by noting that whether or not the technology is in general public use may be a factor. That quarrel, however, is not with us but with this Court's precedent. See *Ciraolo* ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet"). Given that we can quite confidently say that thermal imaging is not "routine," we decline in this case to reexamine that factor.

* * *

Despite the Court's attempt to draw a line that is "not only firm but also bright," the contours of its new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is "in general public use." Yet how much use is general public use is not even hinted at by the Court's opinion, which makes the somewhat doubtful assumption that the thermal imager used in this case does not satisfy that criterion. In any event, putting aside its lack of clarity, this criterion is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.

* * *

### *QUESTIONS ABOUT KYLLO*

What happens if police use a thermal imaging device on a warehouse rather than a home? Is *Kyllo's* emphasis on the sanctity of the home determinative? Professor Maclin, in *Katz, Kyllo,* and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century, 72 Miss. L.J. 51 (2002), comments that it may be possible in future cases to distinguish the thermal imaging directed at a home from thermal imaging directed at an office or other business facility. Why? Doesn't the citizen have the same right to preserve information as private in her warehouse as she does in her home?

What happens if the use of thermal imaging devices becomes commonplace among members of the public? Doesn't the majority in *Kyllo* admit that the use of the devices by police officers at that point will not be a search? If that is so, then how much has the Court done to protect citizens from technological advances in official investigations?

Note that at least at this point, the Court's holding in *Kyllo* puts an end to the law enforcement use of thermal imaging devices to scan homes. Such a scan would be a search, and searches require probable cause. If an officer has the probable cause necessary to conduct a thermal imaging scan, then he has no need for the thermal imaging scan. He can just get a warrant to search the home. Before *Kyllo*, thermal imagers were used to *obtain* the probable cause necessary to get a warrant. Moreover, thermal imagers rely on a relative comparison of heat emanation. So typically—and as in *Kyllo*—an officer would have to scan other houses in the neighborhood to determine whether the suspect's house emanated heat more than those other houses. Under *Kyllo*, the scan of each of the houses in the neighborhood is an illegal search.

### *Kyllo and Trespass*

Justice Scalia, at the beginning of his opinion in *Kyllo*, states that notions of trespass were "decoupled" from Fourth Amendment protection in *Katz*. Recall that this passage about "decoupling" Fourth Amendment

rights from trespass was written before Justice Scalia's opinion for the Court in *Jones*. After *Jones,* trespass is not "decoupled" but rather provides an alternative protection of Fourth Amendment rights. It is true that the trespass theory would not help Kyllo directly, because the thermal detection device was used off his property. But in fact, Justice Scalia's opinion in *Kyllo* can be seen as a precursor to *Jones*, because it reintroduces trespass concepts to regulate advanced surveillance techniques. At least with regards to a home, the *Kyllo* Court holds that the use of advanced surveillance technology is a search whenever it is used to obtain information that could not be obtained otherwise without a trespass into the home.

### *b. Electronic Tracking Devices*

#### *Tracking Public Movements: United States v. Knotts and United States v. Karo*

The Court first discussed the use of electronic beepers to track a person's public movements in United States v. Knotts, 460 U.S. 276 (1983). State officers, suspicious that a purchaser of chemicals, Armstrong, might be using them to manufacture drugs, obtained the consent of the company selling the chemicals to install a beeper inside a 5 gallon container of chloroform before Armstrong picked it up. Armstrong placed the container in his car. The officers monitored the beeper signal from the container and followed Armstrong to Petschen's house where the container was transferred to his car. Ultimately the signal became stationary at a location identified as a cabin belonging to Knotts. Because Knotts did not (and could not, for lack of standing) challenge the warrantless installation of the beeper in the container, the Court had no occasion to address the permissibility of that intrusion. Justice Rehnquist's opinion for six Justices quoted from *Katz* and *Smith* (the pen register case) and framed the question presented as whether the officers had invaded any legitimate expectation of privacy held by Knotts when they tracked the container's movement by use of the beeper. The opinion reasoned as follows:

> Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

Knotts argued that if the tracking by beeper was not even a search, it would mean that unlimited surveillance of any citizen would be possible without judicial supervision. But the Court responded that "if such dragnet type law enforcement practices * * * should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." It noted too that nothing in the record indicated that the beeper signal was used to monitor any activity in the cabin.

In United States v. Karo, 468 U.S. 705 (1984), officers tracked the movement of a beeper attached to a can of ether. Agents saw Karo pick up the ether from a government informant and followed him to his house. They used the beeper to determine that the ether was still in the house, and they subsequently used it to detect that the ether had been moved to Horton's house. From this house, agents could smell the ether while standing on the sidewalk. A third use of the beeper helped agents discover that the ether had been moved to Horton's father's house, and a fourth use revealed it had been taken to a commercial storage facility. Agents could smell the ether in a row of lockers and used the beeper a fifth time to discover the exact location of the ether. The sixth use led agents to another storage facility where they detected the smell of ether from a locker. They obtained consent to install a closed-circuit camera in the facility and observed a man and woman load the ether into Horton's pick-up truck. While undertaking to follow the truck to another house, the agents used the beeper a seventh time. The eighth use assured the agents that the ether remained in the house when the truck left. Finally, agents obtained a search warrant for the house. They found cocaine and laboratory equipment and made arrests.

Justice White wrote for the Court. He concluded first that no authorization was necessary to place a beeper in the can of ether.

> It is clear that the actual placement of the beeper into the can violated no one's Fourth Amendment rights. The can into which the beeper was placed belonged at the time to the DEA, and by no stretch of the imagination could it be said that respondents then had any legitimate expectation of privacy in it.

Justice White next concluded that the Fourth Amendment was not implicated by the fact that Karo received a can that contained an electronic tracking device.

> The mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest. It conveyed no information that Karo wished to keep private, for it conveyed no information at all. To be sure, it created a *potential* for an invasion of privacy, but we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment. A holding

potential invasion of privacy ≠ actual invasion of privacy

to that effect would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on. It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence.

We likewise do not believe that the transfer of the container constituted a seizure. A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." Although the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way. * * *

### *Beepers in the House*

Justice White reached a different conclusion in *Karo* as to the monitoring of the beeper "in a private residence, a location not open to visual surveillance".

The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant. The case is thus not like *Knotts*, for there the beeper told the authorities nothing about the interior of Knotts' cabin. * * * We cannot accept the Government's contention that it should be completely free from the constraints of the Fourth Amendment to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article—or a person, for that matter—is in an individual's home at a particular time. Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.

can't use the beeper a nymac when it's in someone's home

Although the Court condemned warrantless monitoring of a beeper inside a private house, it nonetheless sustained the search warrant that agents obtained at the end of their surveillance. The knowledge that the agents obtained without using the beeper, together with their proper use of the beeper in monitoring travel outside the house, provided sufficient independent information to justify the issuance of a search warrant. Thus, the illegally obtained information (i.e., that the can was inside a house for some period of time) had no effect on the Magistrate's issuance of the warrant.

Justice Stevens, joined by Justices Brennan and Marshall, dissented in part. Justice Stevens observed that "the character of the property is profoundly different when infected with an electronic bug than when it is entirely germ free." He concluded that agents asserted dominion and control over the can of ether when they inserted the beeper and that this amounted to a seizure of the property under the Fourth Amendment. He contended that "the private citizen is entitled to assume, and in fact does assume, that his possessions are not infected with concealed electronic devices." He found "little comfort in the Court's notion that no invasion of privacy occurs until a listener obtains some significant information by use of the device."

But if Justice Stevens felt this way with respect to the use of the beeper in *Karo*, how could he then accept the use of the thermal imaging device in his dissent in *Kyllo*? Is it that the thermal imager operates "on-the-wall" while the beeper operates "through the wall." Or, might it be that the beeper is "planted" by the government into property that most "buyers" would regard as beeper-free, while the heat generated from a home is surely something of which the homeowner is fully aware?

Justice O'Connor, joined by Justice Rehnquist, wrote a separate opinion in *Karo* concurring in most of the Court's opinion and in its judgment. She wrote separately to state her view that a homeowner might not be able to claim that his privacy rights are violated if he permits a third person to enter the home with property that contains a beeper. If, for example, a government undercover agent posing as a drug buyer entered a suspect's home and carried a beeper, the homeowner might not have a valid complaint, because he assumed the risk. Justice White responded in a footnote by saying that he did not necessarily disagree with this analysis. Justice White found it inapplicable to the instant case, where the defendant himself had purchased the beepered can and brought it into the house.

### *Knotts, Karo, and Public Tracking After Jones*

Recall that in United States v. Jones, 132 S.Ct. 945 (2012) set forth after *Katz* in this Chapter, supra, the Court did not read *Knotts* and *Karo* as holding that electronic surveillance of public movements could never be a search. Two limitations on that broad principle were agreed upon by two different five-member coalitions of the Court: 1) if the surveillance device was installed by trespassing on the citizen's person or property, the tracking is a search under pre-*Katz* law; and 2) if the tracking is "prolonged" it is a search under *Katz* because members of the public would not reasonably expect such long-term tracking.

Knott/ Karo exclep.

## 6. Investigative Activity Conducted by Private Citizens

### *a. Private Activity*

The Fourth Amendment is intended to regulate state actors. Consequently, a search or seizure conducted by a private citizen is not a "search or seizure" within the meaning of the Fourth Amendment. In Burdeau v. McDowell, 256 U.S. 465 (1921), the Supreme Court held that private papers stolen from office safes that were blown open and a desk that was forced open, could be presented to a grand jury by a government prosecutor, because the search was conducted by private parties and so it was not regulated by the Fourth Amendment. Justice Brandeis, joined by Justice Holmes, dissented. See also United States v. Stevenson, 727 F.3d 826 (8th Cir. 2013) (Internet service provider that scanned its users emails for evidence of child pornography, and turned over suspicious information to the government, was a private actor and therefore the search did not violate the Fourth Amendment).

#### *Mixed Public and Private Action*

Courts have found the Fourth Amendment to apply if a private individual is acting, under the circumstances, as an agent for the government. Government officials may not avoid Fourth Amendment requirements by enlisting private individuals to do what government officials cannot. See United States v. Walther, 652 F.2d 788 (9th Cir.1981) (airline employee acted as government agent when he expected a DEA reward for his actions and the agency had encouraged him).

In Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), the Court held that drug-testing procedures promulgated by private railroad companies, pursuant to Federal regulations granting authority to the railroads, implicated the Fourth Amendment. The government had mandated that the railroads not bargain away the drug-testing authority granted by the Federal regulations. Also, the Federal regulations made plain a strong preference for testing as well as the government's desire to have access to the results. The Court held that the Fourth Amendment could be applicable even if the government does not actually compel a search by a private party. The Court found "clear indices of the Government's encouragement, endorsement, and participation" sufficient to make the drug testing a government search regulated by the Fourth Amendment. See also United States v. Pierce, 893 F.2d 669 (5th Cir.1990) (for a search by a private person to trigger Fourth Amendment protection, the government must have known about the search in advance, and the private party must be acting for law enforcement purposes).

### *b. Government Investigative Activity Subsequent to Private and Other Legal Searches*

#### *Limits Imposed by the Initial Search: Walter v. United States*

Difficult questions can arise when government agents follow up on a private search. Walter v. United States, 447 U.S. 649 (1980), divided the Court on the question whether FBI agents, who received a package of films from a recipient to whom it was misdelivered by a private carrier, could view the films without a warrant. The recipient had opened the package but had not viewed the films. Justice Stevens's opinion, joined by Justice Stewart, concluded that "the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy," and that "an officer's authority to possess a package is distinct from his authority to examine its contents." So although the agents could receive the films, they could not view them without a warrant, even though a private person not covered by the Fourth Amendment had opened the package. These Justices reasoned that "[a] partial invasion of privacy cannot automatically justify a total invasion." Justice White, joined by Justice Brennan, concurred in part and disagreed with a footnote of Justice Stevens that left open the question "whether the Government projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government." Justice White agreed that a search by private persons could provide probable cause for a warrant, but said it could not excuse the government from the warrant requirement for its own search. Apparently, both opinions agreed that what the FBI observed in plain view was properly observed. Justice Marshall concurred in the judgment without opinion. Justice Blackmun's dissent, joined by Chief Justice Burger and Justices Powell and Rehnquist, argued "that, by the time the FBI received the films, these petitioners had no remaining expectation of privacy in their contents."

#### *Reopening Permitted: United States v. Jacobsen*

The extent to which government agents may search or seize evidence following searches by private individuals again divided the Court in United States v. Jacobsen, 466 U.S. 109 (1984). A Federal Express supervisor asked an office manager to examine a package that had been torn by a fork lift. Inside a cardboard outer container, the supervisor and manager found, cushioned by five or six pieces of crumpled newspaper, a ten-inch long tube wrapped with the kind of silver tape used on basement ducts. They cut open the tube and found a number of zip-lock bags that contained white powder; they then put the bags back into the tube and closed but did not reseal the tube. They notified the Drug Enforcement

Administration of their finding, and an agent arrived at the office, reopened the tube, opened the zip-lock bags, removed a trace of the powder from each, did a "field test," and discovered that the powder was cocaine.

The Court sustained the agent's actions. Justice Stevens's opinion commanded six votes. He reasoned that the Federal Express employees' actions were not covered by the Fourth Amendment and that *Walter* required an analysis of the extent to which the government exceeded the bounds of the private search.

Justice Stevens observed that there was no Fourth Amendment violation in the employees' describing what they saw and reasoned as follows: when the officer first saw the package he knew that it contained "nothing of significance except a tube containing plastic bags and, ultimately, white powder"; "a manual inspection of the tube and its contents would not tell [the officer] anything more than he already had been told"; the only reason for the inspection was to avoid "the risk of a flaw in the employees' recollection," which did not involve an infringing of privacy rights; the removal of the plastic bags from the tube and the officer's visual inspection "enabled the agent to learn nothing that had not previously been learned during the private search"; the officer's seizure was reasonable because the package already had been opened, it remained unsealed, and the employees invited the agent to inspect its contents; and the warrantless seizure of the bags was reasonable on the ground that they probably contained contraband.

Finally, Justice Stevens reasoned that the field test—to determine only one thing, whether the powder was cocaine—compromised "no legitimate privacy interest." This portion of his opinion, discussed earlier in this Chapter, reasoned that a citizen has no legitimate expectation of privacy in contraband, and therefore an investigation cannot constitute a search if it can only determine whether a substance is contraband or not.

Justice White concurred in part and in the judgment, though he was very critical of the majority's analysis. He argued that the effect of the Court's decision was to permit police to break into a locked car, suitcase, or even a house, if a private person previously did so and reported what he found to the police. Justice White concluded that a warrant should be required in these cases. Justice Brennan, joined by Justice Marshall, dissented and agreed with Justice White's criticism of the majority opinion.

In thinking about the majority's approach in *Jacobsen*, consider whether it really is important that the employees told the agent that the package contained only the bags with the powder. Justice Stevens states that there was nothing of significance in the package other than the bags. On these facts, he probably is correct. What, however, if the newspapers

had not been crumpled, or if something else was in the package besides the bags? Does the agent decide what is significant? Or should a magistrate decide?

In considering Justice White's concerns about officers breaking into locked cars and houses simply because a member of the public previously did so, recall that the Court in *Jones* has now restored the trespass-investigation theory as a supplement to *Katz*. How would the trespass-investigation theory be applied to Justice White's examples? How would it be applied to the officer's reopening the tube in *Jacobsen*? Isn't the reopening a physical intrusion into property? If so it is a search under *Jones* even if there is no expectation of privacy under *Katz*.

### *Controlled Deliveries: Illinois v. Andreas*

*Jacobsen* establishes that if an initial intrusion (at least into a container) is not covered by the Fourth Amendment, a later intrusion by police officers to the same extent is also free from Fourth Amendment constraints. While *Jacobsen* dealt with an initial search to which the Fourth Amendment did not apply, its principle has been held equally applicable when initial searches of containers are valid under the Fourth Amendment.

For example, in Illinois v. Andreas, 463 U.S. 765 (1983), government agents conducted a legal customs search of a wooden crate that was being shipped to an address in the United States, and found drugs hidden in a table therein. They then resealed the crate, and followed it to its destination using a surveillance process called a "controlled delivery." Surveilling police ultimately saw Andreas drag the container into his apartment; when he re-emerged with it 30 to 45 minutes later, the agents searched the container without a warrant. Chief Justice Burger, writing for the Court, reasoned that "the simple act of resealing the container to enable the police to make a controlled delivery does not operate to revive or restore the lawfully invaded privacy rights." Thus, the reopening of the container was not a search, because no legitimate expectation of privacy existed in the container at that time.

What if Andreas came out with the crate two days later? If a customs official legally searches a suitcase, can government agents search the same suitcase without a warrant a year later? In *Andreas,* Chief Justice Burger recognized that there may be a gap in surveillance, during which "it is possible that the container will be put to other uses—for example, the contraband may be removed or other items may be placed inside." He concluded, however, that the Fourth Amendment would be applicable to a subsequent reopening only if there is "a substantial likelihood that the contents of the container have been changed during the gap in surveillance." Otherwise, "there is no legitimate expectation of privacy in

the contents of a container previously opened under lawful authority." On the facts, the Court found that the re-opening did not implicate a revived privacy interest, due to the unusual size of the container, its specialized purpose, and the relatively short time that Andreas had the container in his apartment.

### 7. Foreign Officials

Courts have uniformly held that "[e]vidence obtained by foreign police officials from searches conducted in their country is generally admissible * * * regardless of whether the search complied with the Fourth Amendment." United States v. Behety, 32 F.3d 503 (11th Cir.1994). This is because searches by foreign officials do not constitute the kind of "state action" that is circumscribed by the Bill of Rights. There are, however, two very limited exceptions to this general rule. These exceptions are set forth by the court in United States v. Barona, 56 F.3d 1087 (9th Cir.1995):

> One exception * * * occurs if the circumstances of the foreign search and seizure are so extreme that they shock the judicial conscience, so that a federal appellate court in the exercise of its supervisory powers can require exclusion of the evidence. This type of exclusion is not based on our Fourth Amendment jurisprudence, but rather on the recognition that we may employ our supervisory powers when absolutely necessary to preserve the integrity of the criminal justice system. * * *

exception #1

> The second exception * * * applies when United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials.

exception #2

A suggested approach for identifying foreign searches subject to American constitutional restraints is offered in Saltzburg, The Reach of the Bill of Rights Beyond the Terra Firma of the United States, 20 Va.J.Int'l L. 741 (1980).

Even if the foreign search is conducted by or at the behest of American officials, it will not implicate the Fourth Amendment if the victim of the search is a non-resident alien. In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), discussed earlier in the Chapter, the Court held that non-resident aliens lack sufficient connection with this Country to be considered as part of "the people" covered by the Fourth Amendment.

### 8. Jails, Prison Cells, and Convicts

Chief Justice Burger wrote for the Court in Hudson v. Palmer, 468 U.S. 517 (1984), as it held that a prisoner has no constitutionally protected expectation of privacy in his prison cell or in papers or property

in his cell. Therefore, the Fourth Amendment was not implicated when prison officials rummaged through Hudson's cell and personal effects and destroyed some of his property in the course of their conduct. The Court concluded that "[t]he uncertainty that attends random searches of cells renders these searches perhaps the most effective weapon of the prison administrator in the constant fight against the proliferation of knives and guns, illicit drugs, and other contraband." It added that prison officials must be free to seize any articles from cells when necessary to serve legitimate institutional interests.

Justice Stevens, joined by Justices Brennan, Marshall and Blackmun, dissented. He did not disagree that prison officials should be able to conduct random searches to protect prison security, but he took exception to the holding that "no matter how malicious, destructive or arbitrary a cell search and seizure may be, it cannot constitute an unreasonable invasion of any privacy or possessory interest that society is prepared to recognize as reasonable." In his opinion, "[t]o hold that a prisoner's possession of a letter from his wife, or a picture of his baby, has no protection against arbitrary or malicious perusal, seizure or destruction would not * * * comport with any civilized standard of decency."

Justice Stevens noted that the majority's holding was limited to a prisoner's papers and effects located in his cell, and that the Court apparently "believes that at least a prisoner's person is secure from unreasonable search and seizure." In Bell v. Wolfish, 441 U.S. 520 (1979), the Court stated that at best prisoners have a reasonable expectation of privacy "of diminished scope" and that strip searches and body cavity searches of pretrial detainees after contact visits were governed by the Fourth Amendment but were reasonable under the circumstances. As to when and whether searches of prisoners are reasonable under the Fourth Amendment, see the section on "special needs" searches later in this Chapter.

### 9. Public Schools and Public Employees

In New Jersey v. T.L.O., 469 U.S. 325 (1985), the Court rejected a state's arguments that students have no legitimate expectation of privacy in their possessions that they take to a public school. Although the Court recognized the need for schools to maintain discipline, it declined to apply its decision in the prisoner case, Hudson v. Palmer, *supra*, to the school context. Justice White wrote for the Court and stated that "[w]e are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." His opinion also rejected the state's suggestion that a student is free to maintain any privacy interest in personal property simply by leaving the property at home. The opinion concluded that "schoolchildren may find it necessary to carry with them a

variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."

It is important to remember however, that a finding of a legitimate expectation of privacy is simply the first step in the Fourth Amendment inquiry. If the citizen has a legitimate expectation of privacy, then the official intrusion is reviewed for its reasonableness. In *T.L.O.*, the Court held that the school official's inspection of a student's handbag was a search, but concluded that the search was reasonable because the official could reasonably suspect that the student had cigarettes in her bag. This holding on reasonableness is discussed further in the section on "special needs" searches, *infra*.

The Supreme Court in O'Connor v. Ortega, 480 U.S. 709 (1987), unanimously rejected an argument that governmental employees "can never have a reasonable expectation of privacy in their place of work," although the Justices could not agree on an opinion for the Court. State hospital officials, investigating various charges made against a psychiatrist, entered the psychiatrist's office and seized various items from his desk and file cabinets. The psychiatrist brought a civil rights action against the officials, claiming that they had violated his Fourth Amendment rights.

Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justices White and Powell, declined to decide whether the psychiatrist had a reasonable expectation of privacy in his office, but found that he definitely had one in his desk and file cabinets. The plurality concluded "that public employers' intrusions upon the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct should be judged by the standard of reasonableness under all the circumstances." Applying those reasonableness standards, Justice O'Connor found that the search of the public employee's office was permissible because investigating officials had reasonable suspicion to believe that the employee had stolen government property.

Justice Scalia concurred in the judgment. He objected to the vagueness of the plurality opinion and "would hold * * * that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by the Fourth Amendment protections as a general matter. (The qualification is necessary to cover such unusual situations as that in which the office is subject to unrestricted public access * * *.)" But, Justice Scalia also "would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the

private-employer context—do not violate the Fourth Amendment." He agreed with Justice O'Connor that the search in the instant case was reasonable because officials had reasonable suspicion to believe that the employee had stolen property.

Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented in *Ortega*. The dissenters agreed with Justice Scalia's view that government employees had a reasonable expectation of privacy in their offices. But they argued that the reasonableness of the search should be judged by standards of probable cause rather than the lesser standards of reasonable suspicion. For further discussion on the reasonableness of searches of public employees, see the section on "special needs" searches later in this Chapter.

# III. THE TENSION BETWEEN THE REASONABLENESS AND THE WARRANT CLAUSES

## A. THE IMPORTANCE OF THE WARRANT CLAUSE GENERALLY

Searches and seizures conducted without a warrant are presumed to be unreasonable. The language of the Court is that "searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967).

But the vision of a tough, sweeping per se warrant rule yielding only to the most demanding claims for exceptions is at odds with reality. Despite the Court's ringing language, the so-called per se rule can be restated as follows:

> A search and seizure in some circumstances is presumed to be unconstitutional if no prior warrant is obtained, but in many other circumstances the prior warrant is unnecessary to justify a search or seizure.

As Justice Scalia stated in his concurring opinion in California v. Acevedo, 500 U.S. 565 (1991), the Court's jurisprudence with respect to the warrant requirement has "lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone." According to Justice Scalia, the result is that the warrant requirement has become "so riddled with exceptions that it [is] basically unrecognizable."