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SEARCHES AND SEIZURES

Did the police require a warrant to search Greenwood's garbage?

On April 6, 1984, [Police Officer] Stracner asked the neighborhood's regular trash collector to pick up the plastic garbage bags that Greenwood had left on the curb in front of his house and to turn the bags over to her without mixing their contents with garbage from other houses. The trash collector cleaned his truck bin of other refuse, collected the garbage bags from the street in front of Greenwood's house, and turned the bags over to Stracner. The officer searched through the rubbish and found items indicative of narcotics use. She recited the information that she had gleaned from the trash search in an affidavit in support of a warrant to search Greenwood's home. Police officers encountered both respondents at the house later that day when they arrived to execute the warrant. The police discovered quantities of cocaine and hashish during their search of the house. Respondents were arrested on felony narcotics charges.

Learning Objectives

1. Know the Fourth Amendment protections and the historical background of the Fourth Amendment.

2. Explain the significance of *Katz v. United States* in the development of the Fourth Amendment.
3. Understand why there is no constitutionally protected expectation of privacy in conversations with an informant or undercover officer even when conducted in the home.
4. Identify the requirements for a plain view search.
5. Explain the difference between curtilage and open fields and the factors to consider in determining whether an area is curtilage or open fields. Compare the expectation of privacy for curtilage with the expectation of privacy for open fields.
6. Know whether curtilage has an expectation of privacy from aerial surveillance.
7. Appreciate the expectation of privacy that attaches to public places, businesses, and abandoned property.
8. Know the difference between "show of authority" seizures, physical seizures, and encounters.

INTRODUCTION

The investigation and prosecution of crime requires the collection of evidence of criminal activity. This may be physical evidence (e.g., a gun) or testimonial evidence (e.g., an eyewitness account). A criminal investigation

may prove relatively uncomplicated. Eyewitnesses may identify the perpetrator, investigators might find forensic evidence at the crime scene, or a suspect may decide to turn himself or herself in to the police. In



most instances, however, these types of evidence are unavailable. Eyewitnesses may be reluctant to come forward or to talk, the forensic evidence may point to a number of yet-to-be-identified individuals, and suspects may disappear or refuse to cooperate with the police. In these situations, the police typically turn to other methods of collecting evidence. These include the following:

- **Searches and seizures.** The police may search and seize evidence from automobiles, homes, luggage, and other locations so long as they comply with the Fourth Amendment (Chapters 4–8).
- **Interrogations.** The Fifth and Sixth Amendments permit the police to question suspects (Chapter 9).
- **Identifications.** Eyewitnesses and victims may be asked to identify suspects from lineups, showups, or photographs employing procedures that meet the requirements of the Fifth and Sixth Amendments (Chapter 10).

In this chapter, we begin our discussion of Fourth Amendment searches and seizures. The primary purpose of searches and seizures is to collect evidence that will assist law enforcement in the investigation of unlawful activity. These searches and seizures may involve various types of evidence (*Warden v. Hayden*, 387 U.S. 294 [1967]):

- **Instrumentalities of crime.** Items used to carry out a crime, such as firearms.
- **Fruits of a crime.** Money stolen from a bank, jewelry taken from a home, a wallet taken during a robbery, or computers stolen from a store.
- **Contraband.** Unlawful drugs and other prohibited substances.
- **Evidence of criminal activity.** Clothes with gunpowder stains, bloody clothes, or DNA that link a suspect to a crime.
- **Incriminating statements.** Statements overheard during electronic surveillance.

The Fourth Amendment to the U.S. Constitution addresses searches and seizures and 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.

The Fourth Amendment is directed at searches and seizures by the government and does not restrict searches and seizures by private individuals. The amendment protects individuals against “unreasonable” governmental searches and seizures in four constitutionally protected areas:

- **Persons.** This protects individuals against unreasonable detentions and unreasonable searches of their persons.
- **Houses.** Homes encompass all residences, dwellings attached to the residence, and areas immediately surrounding the home as well as areas of commercial businesses that are not open to the public.
- **Papers.** Letters, diaries, and business records are protected.
- **Effects.** Effects include personal possessions such as automobiles, clothing, and firearms.

The Fourth Amendment tells the police that they may search for and seize evidence of unlawful activity involving a person, house, paper, or effect so long as these searches and seizures follow the dictates of the Fourth Amendment. As we shall see in the next few chapters, the U.S. Supreme Court has devoted well over one hundred cases and thousands of pages to interpreting the requirements of the fifty-three words that compose the Fourth Amendment. In undertaking this task, the Supreme Court has struggled to balance the social interest in conducting searches and seizures to investigate unlawful activity against the interest of individuals in being free from governmental interference in their personal lives.



There are three steps in analyzing a Fourth Amendment **search** or seizure that we will be discussing in the textbook.

- **Exclusion from evidence.** If the search or seizure was unreasonable, does the exclusionary rule require that the object(s) seized be excluded from evidence? Or may the item be introduced at trial? (Chapter 10)
- **Definition.** Did the government engage in a search or seizure as defined in the Fourth Amendment? (Chapter 3)
- **Reasonableness.** Was the search or seizure reasonable, that is, lawfully conducted? (Chapters 4–7)

In this chapter, we define and discuss Fourth Amendment searches and seizures of individuals. Why is this important to consider? As technology advances, the Supreme Court undoubtedly will be asked to determine whether various types of intrusions constitute Fourth Amendment searches and seizures that require the police to obtain a warrant based on **probable cause** from a magistrate or judge, or whether the intrusions do not constitute Fourth Amendment searches and seizures and may be undertaken by the police without the approval of a judicial official. Consider whether the police should be required to obtain a warrant before directing individuals to donate DNA samples; or prior to monitoring e-mail activity, search engines, or cell phones; or before examining databases that contain personal information.

We first turn our attention to the definition of searches and then discuss the definition of seizures of individuals. Ask yourself whether you agree with the Supreme Court decisions discussed in this chapter. Pay particular attention to the court's effort to balance the need for the police to investigate crime against the protection of the individual interest in privacy.

THE HISTORICAL BACKGROUND OF THE FOURTH AMENDMENT

The Fourth Amendment was included in the Bill of Rights to protect individuals against the types of far-reaching searches and seizures conducted by British authorities in the American colonies. A particular source of anger was the use of **general warrants** and **writs of assistance** to search homes, businesses, and warehouses for goods that had been smuggled into the country to avoid paying the exorbitant customs duties imposed by the British. Searches also were used to seize able-bodied young men who were forced into the Royal Navy.

The general warrant was issued by a judge or government official and authorized searches anywhere, at any time, and for anything. The writ of assistance was a form of general warrant that authorized an official of the English Crown to compel police officers and citizens to assist in a search. These documents, once authorized, were legally effective for the life of the sovereign and did not expire until six months following the sovereign's death.

In 1761, in the *Writs of Assistance* case, sixty-three Boston merchants unsuccessfully challenged the legal authority of the Massachusetts Superior Court to issue writs of assistance. The superior court found that the English Parliament had granted Massachusetts colonial judges the authority to issue writs of assistance. Attorney James Otis in a celebrated argument proclaimed that the writ was a practice as “destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book.” He went on to note that “one of the most essential branches of English liberty is the freedom of one's house. . . . A man's house is his castle. . . . This writ, if it should be declared legal, would totally annihilate this privilege.”

A number of the colonial state legislatures responded by prohibiting general warrants. The Virginia Declaration of Rights in 1776 proclaimed that “general warrants . . . are grievous and oppressive, and ought not to be granted.” Both English and American colonial courts slowly began to declare “illegal and void” search warrants that authorized “all persons and places throughout the world to be searched” and insisted that local magistrates issue warrants only when there was probable cause that contraband was located in a “particular place or places” (*Frisbie v. Butler*, 1 Kirby 213 [Conn. 1787]).



The Fourth Amendment reflected the tenor of the times and was intended to abolish general warrants and writs of assistance by prohibiting “unreasonable” searches and seizures and providing that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.” In other words, a warrant requires the government to present evidence to a magistrate or judge that shows probable cause that evidence or contraband is located in a specific location at a particular time. A general warrant would be unreasonable under this standard.

The Supreme Court, while expressing a preference that searches be conducted based on a warrant founded on probable cause, has recognized that it is “reasonable” in various instances for the police to conduct a search and make a seizure without a warrant. Examples are “special needs” searches that are intended to protect the public safety rather than to collect evidence of a crime. These searches do not greatly intrude on an individual’s privacy, while they protect the public safety. They include searches at airports or at the border between the United States and Mexico or the United States and Canada (discussed in Chapter 7).

SEARCHES

Expectation of Privacy

In *Boyd v. United States*, the U.S. Supreme Court adopted a **property rights** or **trespassory approach** to the Fourth Amendment. The property rights theory protected individuals against physical intrusions or trespasses against their persons, houses, papers, and effects.

- **Physical intrusions.** For an intrusion to occur, there must be an actual physical entry into the home or physical examination of an individual or his or her papers or possessions.
- **Scope of protection.** Persons, houses, papers, and effects are protected.

Justice Hugo Black captured the essence of the property rights approach when he proclaimed that the Fourth Amendment was “aimed directly at the abhorrent practice of breaking in, ransacking and searching homes and other buildings and seizing people’s personal belongings without warrants issued by magistrates” (*Katz v. United States*, 389 U.S. 347, 367 [1967]).

The famous 1928 case of *Olmstead v. United States* starkly presents the limitations of the property rights approach. Olmstead was convicted of conspiracy to unlawfully import, possess, and sell liquor. The central evidence that was relied on at trial was gathered through warrantless wiretaps of the office and home phones of Olmstead and his coconspirators. The U.S. Supreme Court, by a 5–4 vote, rejected Olmstead’s contention that the close to 800 pages of notes gathered from the wiretaps had been obtained in violation of his Fourth Amendment rights.

The majority decision rested on two conclusions. First, the conversations that were heard by federal agents were transmitted across telephone wires and did not involve the search and seizure of a “physical object.” Second, the wiretaps were attached to phone lines outside the home and did not involve a physical intrusion into the home. The Supreme Court reasoned that the language of the Fourth Amendment “cannot be extended or expanded to include the telephone wires reaching to the whole world from the defendant’s home or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.”

In what was to prove an important dissent, Justice Louis Brandeis argued that the Fourth Amendment must be interpreted in light of changing circumstances. He argued that “the makers of our Constitution . . . conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men” and so “every unjustifiable intrusion upon the privacy of the individual, by whatever means employed, must be deemed a violation of the Fourth Amendment” (*Olmstead v. United States*, 277 U.S. 438, 465, 478 [1928]). In 1942, in *Goldman v. United States*, the Supreme Court followed the precedent established in *Olmstead* and affirmed that the installation of a detectaphone on the outside wall of an adjoining office for purposes of monitoring a conversation did not violate the Fourth Amendment (316 U.S. 129 [1942]).



In 1967, in *Katz v. United States*, which is the next edited case reprinted in the text, the Supreme Court adopted Justice Brandeis's viewpoint and overruled *Olmstead*. In *Katz*, the Supreme Court rejected the trespassory approach and adopted an **expectation of privacy** test for the application of the Fourth Amendment. The FBI, acting without a search warrant, had attached microphones to the outside of a clear glass enclosed telephone booth and recorded Katz's placing of interstate gambling bets and receipt of wagering information. The Supreme Court rejected the "trespass doctrine as no longer controlling" and held that the Fourth Amendment "protects people, not places. What a person knowingly exposes to the public . . . 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." In this instance, the government was determined to have violated the privacy of the telephone booth on which Katz justifiably relied. The fact that the government did not seize a "material object" or "penetrate the wall of the booth" did not remove the search from Fourth Amendment protection (*Katz v. United States*, 389 U.S. 347, 351 [1967]).

Justice John Marshall Harlan in his concurring opinion in *Katz* established a two-part test for a Fourth Amendment expectation of privacy that has been followed by the U.S. Supreme Court (389 U.S. at 353).

- **Subjective.** An individual exhibits a personal expectation of privacy.
- **Objective.** Society recognizes this expectation as reasonable.

Justice Harlan illustrated the test by noting that people retain an expectation of privacy in the home, while they do not retain an expectation of privacy in their public words or public actions.

In reading *Katz v. United States*, pay attention to the difference between the trespassory approach and the expectation of privacy approach established in *Katz*. Would *Katz* have been decided the same way under the trespassory approach? Does the Court provide a clear definition of when an individual possesses a reasonable expectation of privacy?

Did Katz have an expectation of privacy in the content of his conversations?

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

Facts

In February of 1965, the appellant was seen placing calls from a bank of three public telephone booths during certain hours and on an almost daily basis. He was never observed in any other telephone booth.

In the period of February 19 to February 25, 1965, at set hours, special agents of the Federal Bureau of Investigation (FBI) placed microphones on the tops of two of the public telephone booths normally used by the appellant. The other phone was placed out of order by the telephone company. The microphones were attached to the outside of the telephone booths with tape. There was no physical penetration inside of the booths. The microphones were activated only while the appellant was approaching and actually in

the booth. Wires led from the microphones to a wire recorder on top of one of the booths. Thus the FBI obtained a record of the appellant's end of a series of telephone calls.

A study of the transcripts of the recordings made of the appellant's end of the conversations revealed that the conversations had to do with the placing of bets and the obtaining of gambling information by the appellant.

On February 23, 1965, FBI Agent Allen Frei rented a room next to the appellant's apartment residence. He listened to conversations through the common wall without the aid of any electronic device. He overheard the appellant's end of a series of telephone conversations and took notes on them. These notes and the tapes made from the telephone booth recordings were



the basis of a search warrant, which was obtained to search the appellant's apartment. The search warrant called for bookmaking records and wagering paraphernalia, including but not limited to bet slips, betting markers, run-down sheets, schedule sheets indicating the lines, adding machines, money, telephones, and telephone address listings. The articles seized are all related to the categories described in the warrant.

During the conversations overheard by Agent Frei, the appellant made numerous comments to the effect that "I have Northwestern minus 7," and "Oregon plus 3." Also, there was a statement by the appellant such as, "Don't worry about the line. I have phoned Boston three times about it today."

At the trial, evidence was introduced to show that from February 19 to February 25, 1965, inclusive, the appellant placed calls from two telephone booths located in the 8200 block of Sunset Boulevard in Los Angeles. The conversations were overheard and recorded every day except February 22. The transcripts of the recordings and the normal business records of the telephone company were used to determine that the calls went to Boston, Massachusetts, and Miami, Florida.

From all of the evidence in the case, the court found the volume of business being done by the appellant indicated that it was not a casual incidental occupation of the appellant. The court found that he was engaged in the business of betting or wagering at the time the telephone conversations were transmitted and recorded. 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 "there was no physical entrance into the area occupied by [the petitioner]."

Issue

We granted certiorari in order to consider the constitutional questions thus presented. Was the warrantless surveillance of Katz's conversation a violation of the Fourth Amendment, despite the fact that the Government did not physically penetrate the telephone booth? Are Katz's conversations entitled to Fourth Amendment protection? 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.

Reasoning

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 or in a friend's apartment, 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. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

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, for that Amendment was thought to limit only searches and seizures of tangible property. But "the premise that property interests control the right of the Government to search and seize has been discredited." 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."



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* 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.

Holding

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. . . . 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. . . . It is apparent that the agents in this case acted with restraint. 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. . . . Searches conducted without warrants have been held unlawful “notwithstanding facts unquestionably showing probable cause.” The Constitution requires “that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . . Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,” and 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.

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. . . . [T]he judgment must be reversed.

Concurring, *Harlan, J.*

As the Court’s opinion states, “the Fourth Amendment protects people, not places.” The question, however, is what protection it affords to those people. . . . 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 “one 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.

Dissenting, *Black, J.*

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a “search” or “seizure,” I would be happy to join the Court’s opinion. . . . 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.

In addition to the language of the second clause indicates that the amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one "describe" a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop on one in the future? It is argued that information showing what is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the amendment, which says "particularly describing"? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

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 . . . recognized, "an ancient practice which at common law was condemned as a nuisance. In those days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse." 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. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope, and their limitations. Under these circumstances it strikes me as a charge against their scholarship, their common sense, and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.

In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words that they have never before been thought to have and that they certainly do not have in common ordinary usage. I will not distort the words of the amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. . . . The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of "persons, houses, papers, and effects." No general right is created by the amendment so as to give this Court the unlimited power to hold unconstitutional everything that affects privacy. Certainly the framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

Questions for Discussion

1. Why did the Supreme Court hold that the FBI's surveillance of Katz's conversation in the telephone booth violated the Fourth Amendment?
2. How does the rule established in *Katz* differ from the Supreme Court's holding in *Olmstead*?
3. Do you find the majority decision or Justice Black's dissent more persuasive?
4. **Problems in policing.** *Katz* requires that law enforcement obtain a warrant before engaging in the electronic surveillance

of a phone conversation. The information that the police gathered from monitoring Katz's phone conversations was used to obtain a search warrant to search Katz's apartment for "wagering paraphernalia." Would the Supreme Court's decision that the FBI violated Katz's Fourth Amendment rights have been different had Katz left the door to the telephone booth open? Made the call from an unenclosed telephone booth? If an FBI agent overheard the call while standing outside the closed telephone booth? What if a sign on the telephone booth warned Katz that "all calls may be monitored"?



Cases and Comments

1. Pen Register. Patricia McDonough was robbed in Baltimore, Maryland, on March 5, 1976. She provided the police with a description of the robber and of a 1975 Monte Carlo automobile that she observed near the scene of the crime. Following the robbery, McDonough began receiving threatening and obscene phone calls from a male who identified himself as the robber. Roughly two weeks after the robbery, the police spotted a man, who fit the description given by McDonough, driving a 1975 Monte Carlo. The police traced the license plate number to Michael Lee Smith. The next day, the police requested the phone company to place a pen register at its central offices to record the numbers dialed from the telephone at Smith's home. They did not obtain a warrant. The pen register revealed that on March 17, Smith called McDonough's home. The police relied on this information to obtain a search warrant to search Smith's home. The search revealed a phone book with a page turned down to the name and number of Patricia McDonough. Smith filed an unsuccessful motion to suppress "all fruits derived from the pen register" and was convicted of robbery and sentenced to six years in prison.

The U.S. Supreme Court distinguished *Smith* from *Katz*. In contrast to the contents of a telephone conversation, the Court held that an individual does not have a subjective expectation of privacy in the numbers dialed. He or she is aware that all numbers are conveyed to the phone company and that the phone company maintains records of all phone calls for billing and other legitimate business purposes.

Society at any rate is not prepared to recognize that an expectation of privacy in the numbers dialed is reasonable. By using the phone voluntarily, Smith conveyed the information to the phone company and "assumed the risk" that the company would reveal the information to the police.

Justice Stewart, in dissent, argued that there is a legitimate expectation of privacy in the numbers dialed. He noted that the pen register, by revealing the numbers dialed, indicates the person and places dialed and "reveals the most intimate details of a person's life." Justice Marshall noted that the phone is a necessity of life, and an individual who uses the phone has no alternative other than to transmit the numbers dialed to the police. The issue is not "the risks an individual can be pressured to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society."

Do you agree that the police should have access without a warrant to the numbers dialed from a telephone? The Supreme Courts of Colorado, Hawaii, Idaho, New Jersey, Pennsylvania, and Washington have found that their state constitutions provide greater protection than the Fourth Amendment and prohibit the warrantless use of pen registers (*Smith v. Maryland*, 442 U.S. 735 [1979]).

2. Bank Records and E-Mail. In 1976, in *United States v. Miller*, the Alcohol, Tobacco and Firearms Bureau opened an investigation of Miller and several coconspirators who subsequently were charged and convicted of various federal offenses for manufacturing and selling whiskey without paying the required federal tax. Grand jury subpoenas requesting Miller's financial records were presented to the Citizens & Southern National Bank at Warner Robins and to the Bank of Byron. The banks, without informing Miller, showed microfilm records to a federal agent and turned over checks, deposit slips, financial statements, and monthly statements. Copies of the checks were introduced at trial. Miller claimed that the government had engaged in an unlawful search and seizure of his records in violation of the Fourth Amendment.

The U.S. Supreme Court held that Miller did not have a reasonable expectation of privacy in the financial records. The records "contain . . . information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. . . . The depositor takes the risk in revealing his affairs to another, that the information will be conveyed by that person to the government." The Supreme Court noted that it had held on numerous occasions that the Fourth Amendment does not "prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will be betrayed." See *United States v. Miller*, 425 U.S. 435 (1976).

Katz, *Smith*, and *Miller* were relied on by the Sixth Circuit Court of Appeals in 2007 in *Warshak v. United States* in deciding whether Steven Warshak possessed an expectation of privacy in the content of his personal e-mail account. Warshak and his company, Berkeley Premium Nutraceuticals, were the subject of a criminal investigation involving mail and wire fraud, money laundering, and other federal offenses. The U.S. government obtained a court order directing Internet service provider (ISP) NuVox Communications to give government agents information involving Warshak's e-mail account. This included the "contents of wire or electronic communication (not in electronic storage unless greater than 181 days) that were placed or stored in directories or files owned or controlled by Warshak; and . . . all log files and backup tapes."

The Sixth Circuit Court of Appeals held that while Warshak assumed the risk that the recipient of a communication will reveal the contents of e-mails, Warshak maintained an expectation of privacy in regard to his ISP. The ISP was not expected to "access the e-mails in the normal course of business," and Warshak maintained an expectation of privacy in the content of these communications. Otherwise, phone conversations would



never be protected, merely because the telephone company can access them; letters would never be protected, by virtue of the Postal Service's ability to access them; the contents of shared safe deposit boxes or storage lockers would never be protected, by virtue of the bank or storage company's ability to access them.

"Compelled disclosure of subscriber information and related records" are "records of the service provider as well, and may be accessed by . . . employees in the normal course of their employment," and access to these records "likely creates no Fourth Amendment problems." However, there is a heightened expectation of privacy in regard to the contents of e-mail communications that society considers reasonable. E-mail is an "ever-increasing mode of private communication, and protecting shared communications through this medium is as important to Fourth Amendment principles today as protecting telephone conversations has been in the past." The ISP's right to access e-mails under the user agreement is reserved for "extraordinary circumstances." The outcome may be different where a user agreement calls for regular auditing, inspection, or

monitoring of e-mails. The fact that e-mails may be scanned for pornography or a virus was not considered by the Sixth Circuit Court of Appeals to "invade an individual's content-based privacy interest in the e-mails and has little bearing on his expectation of privacy in the content." This is analogous to the post office screening packages for drugs or explosives, which does not expose the content of written communications. See *Warshak v. United States*, 490 F.3d 455 (6th Cir. 2007), *vacated*, 532 F.2d 521 (6th Cir. 2008). The United States Court of Appeals for the Sixth Circuit later revisited the question whether Warshak possessed an expectation of privacy in the content of his e-mails and held that Warshak retained an expectation of privacy in the content of his e-mail account. The court stressed "that email requires strong protection under the Fourth Amendment; otherwise, the Fourth Amendment would prove an ineffective guardian of private communication, an essential purpose it has long been recognized to serve." See *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

Do you agree with the decision in *Warshak*? The U.S. Supreme Court upheld the reasonableness of a police department's investigatory search of an officer's texting records in *Ontario v. Quon*, 130 S. Ct. 2619, 560 U.S. ___ (2010).

You Decide



3.1 Plainclothes Los Angeles Police Officer Richard Aldahal and two other plainclothes officers observed defendant Leroy Triggs enter a men's room in Arroyo Seco Park. Ten minutes

later, David Crockett was observed entering the same men's room. The three officers entered a plumbing access area between the men's room and women's room that provided a vantage point to observe activity in the restrooms. Officer Aldahal was able to position himself in such a fashion that he was able look through

vents down into the doorless toilet stalls. He spotted Triggs and Crockett engaged in unlawful oral copulation. Triggs was convicted and placed on probation under the condition that he serve thirty days in the county jail. Officer Aldahal testified at trial that he had entered the plumbing access area roughly fifty times in the past to observe activity in the men's room. Did Triggs possess a reasonable expectation of privacy? Was this an unlawful, warrantless search under the Fourth Amendment? What if there were doors on the stalls that the suspects had closed? See *People v. Triggs*, 506 P.2d 232 (Cal. 1973).

You can learn what the court decided by referring to the Student Study Site, www.sagepub.com/lippman2e.

The Legal Equation

- | | | |
|--------------------------|---|--|
| Expectation of privacy | = | Exhibit an actual (subjective) expectation of privacy |
| | + | the expectation is one that society is prepared to recognize as reasonable. |
| Expectation unreasonable | = | What persons knowingly expose to the public, even in their own home or office (what they seek to preserve as private, even in an area accessible to the public, may be constitutionally protected) |
| | + | information turned over to a third party (assumption of the risk). |



INFORMANTS AND ELECTRONIC EAVESDROPPING

In *Katz* the government electronically monitored a conversation without the consent of either of the participants. The Supreme Court recognized that Katz had a subjective as well as a reasonable expectation of privacy in the content of his phone calls and held that a reasonable search under the Fourth Amendment required that the government obtain a warrant based on probable cause. The U.S. Supreme Court has taken a different approach to the so-called false friend cases in which a suspect talks to an individual without knowing that he or she is an undercover government agent or informant. In a second type of false friend scenario, the agent or informant is wired and the conversation is recorded or directly transmitted to the police at a remote location. The Supreme Court has held in both situations that the suspect has no reasonable expectation of privacy under the Fourth Amendment that has been violated. He or she *assumes the risk* that the conversation may not remain confidential and will be communicated to the police (Dressler & Michaels, 2006, pp. 84–88).

In *Hoffa v. United States*, Edward Partin, a local Teamsters Union official and government informant, visited the hotel room of Teamsters national president Jimmy Hoffa, who was standing trial for union-related corruption. Partin reportedly overheard conversations in which Hoffa conspired to bribe jurors; Partin later testified as the government’s central witness at Hoffa’s prosecution for jury tampering. The Supreme Court held that although the hotel room was a “constitutionally protected area,” Hoffa was

not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. . . . [Nothing in the] Fourth Amendment protects a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. (*Hoffa v. United States*, 385 U.S. 293, 302–303 [1996])

The Supreme Court reached the same conclusion in *Lewis v. United States*. Lewis invited undercover agent Cass over to his home on two occasions to sell Cass marijuana. The Supreme Court held that when the home is converted into a commercial center, it is entitled to no greater protection than if the commercial activities were carried on in a “store, garage, car or on the street.” Cass during his visits did not “see, hear, or take anything that was not contemplated, and in fact intended, by [Lewis] as a necessary part of his illegal business” (*Lewis v. United States*, 385 U.S. 206, 210–211 [1966]).

Would it make a difference that an informant was wired with an electronic device that recorded the conversation? In *United States v. White*, the informant was wired with a radio transmitter that relayed the conversation to government agents. The Supreme Court continued to follow a “risk analysis” and held that

if the conduct and revelations of an agent operating without electronic equipment do not invade the defendant’s constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made . . . from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks. (*United States v. White*, 401 U.S. 745, 751 [1971])

In summary, we *assume the risk* that the person with whom we are communicating may be working as a government agent or informant. There is no constitutionally protected expectation of privacy in conversations that we engage in with other individuals. It makes no difference whether the other individual is an informant or a government agent who

- immediately reports the contents of the conversation to the police and writes down his or her conversation.
- records the conversation using electronic equipment.
- transmits the conversation to police officers who are monitoring the conversation.

Justice Harlan, in his dissent in *United States v. White*, complained that the Supreme Court’s embrace of risk analysis and warrantless surveillance of conversations threatened the trust and security that makes people comfortable with freely talking to one another (401 U.S. at 787).



You can find
United States
v. White on the
Student Study Site,
[www.sagepub.com/
lippmancp2e](http://www.sagepub.com/lippmancp2e).

Do you agree with the Supreme Court that White assumed the risk that his conversation would be directly transmitted to law enforcement authorities? Should the Court distinguish between conversations in the home and conversations in public? In the next sections, we briefly review the requirements for a plain view search and seizure and discuss the relationship between plain view and the expectation of privacy in the areas surrounding the home and in the home.

PLAIN VIEW

Plain view is an exception to the Fourth Amendment warrant requirement; it allows the police to seize an item without a search warrant under two conditions:

- **Legally situated.** The police officer is lawfully positioned: He or she “has a right to be where he or she is situated.”
- **Probable cause.** The police officer has probable cause to believe that the object is evidence of criminal activity. The probable cause must be immediately apparent upon observing the item.

We will be discussing plain view searches in greater detail later in the text. At the moment it is sufficient that you understand that an officer who sees an unlawful object or object connected to unlawful activity may seize the object without a warrant. The individual, by exposing the object to “plain view,” has lost his or her expectation of privacy with respect to the item. The police, for example, may lawfully stop an individual for a traffic violation and spot and seize drugs or an open bottle of alcohol in plain view on the back seat. An officer searching a house for drugs may encounter and seize unlawful child pornography.

In *Arizona v. Hicks*, the police responded to a gunshot and entered a rundown apartment without a warrant. The officers saw a brand-new stereo unit; one of the officers moved the unit, read the serial numbers, and called headquarters, which confirmed that the stereo had been stolen. The Supreme Court agreed with Hicks that this was not a plain view search. The officers were “lawfully situated,” but it was not “immediately apparent” that the stereo was stolen, because the officer was forced to move the unit and to call headquarters to determine whether it had been stolen (*Arizona v. Hicks*, 480 U.S. 321 [1987]). The Supreme Court also has recognized a “plain feel” doctrine when an officer patting down a suspect concludes that he or she has encountered narcotics, and other courts have recognized a “plain smell” doctrine when an officer smells narcotics or alcohol in an automobile. In 2008, the Virginia Court of Appeals noted that an

individual, after all, has no privacy interest in his odors. He cannot broadcast an unusual odor (particularly one associated with illegal drugs) and reasonably expect everyone he comes into contact with, including police officers, to take no notice of it. [We therefore agree with the accepted view that] there is no “reasonable expectation of privacy” from lawfully positioned agents “with inquisitive nostrils.” (*Bunch v. Commonwealth*, 658 S.E.2d 724 [Va. Ct. App. 2008])

Courts also have recognized a “plain hearing” doctrine in those instances in which individuals have no reasonable expectation of privacy and their conversations are heard by a law enforcement officer (*United States v. Ceballos*, 385 F.3d 1120 [7th Cir. 2004]).

The next section on open fields and curtilage provides a good example of how the police rely on plain view. We then explore whether the police may rely on technology to enhance their ability to conduct plain view searches and seizures.

EXPECTATION OF PRIVACY

The U.S. Supreme Court has divided the home and the land surrounding the home into three separate categories with differing degrees of expectation of privacy and Fourth Amendment protection.

- **Open fields.** This includes land distant from the home, which the police may enter without probable cause or a warrant.



- **Home.** The physical structure of the dwelling house is accorded full and complete protection under the Fourth Amendment, and to enter it, the police in most instances require a search warrant founded on probable cause.
- **Curtilage.** The area immediately surrounding the home is considered part of the dwelling house. Curtilage has no expectation of privacy from aerial surveillance.

There are three other categories of property that we will discuss in this chapter. Each lacks an expectation of privacy under the Fourth Amendment.

- **Public property.** This land is generally open to the public, and a warrant is not required for the police to seize property.
- **Commercial property.** The police may enter and seize items without a warrant from stores and businesses that are open to the public. A warrant is required to enter those areas reserved for employees.
- **Abandoned property.** Property that is intentionally abandoned has no expectation of privacy and may be seized by the police without a warrant.

OPEN FIELDS

In *Oliver v. United States*, Kentucky State Police investigated reports that Thornton and Oliver were raising marijuana on Oliver's farm. The police drove past Oliver's house to a locked gate with a "No Trespassing" sign, followed a path around one side of the fence, and walked down the path until they discovered a field of marijuana over a mile from Oliver's home. "No Trespassing" signs were posted along the path, and the marijuana field was surrounded by woods, fences, and embankments and was not visible from any location accessible to the public. The U.S. Supreme Court held that the Fourth Amendment protection of "persons, houses, places and effects" from unreasonable searches and seizures is not intended to protect open fields. Open fields consequently possess no expectation of privacy, and the Kentucky police acted reasonably in entering and seizing the marijuana without a search warrant.

The Supreme Court explained that there are good reasons why **open fields** are not provided with Fourth Amendment protection and lack an expectation of privacy (*Oliver v. United States*, 466 U.S. 170 [1984]).

- **Purpose.** The Fourth Amendment is intended to protect "intimate" activities. There is no interest in protecting the type of activities that typically take place in open fields, such as the cultivation of crops.
- **Access.** Open fields are more accessible to the public than are houses or offices and are easily monitored from aircraft.

The Supreme Court also held that Oliver did not have an expectation of privacy in the open field despite the warnings to trespassers and efforts to conceal the marijuana plants. The Court explained that declaring that open fields lacked an expectation of privacy despite the "no trespassing" signs avoided placing the police in the position of having to decide on a case-by-case basis whether a particular open field merited Fourth Amendment protection.

Curtilage is the area immediately surrounding the home. Curtilage, in contrast to open fields, is the site of the "intimate activity" associated with the "sanctity of a man's [or woman's] home and the privacies of life" and therefore is considered part of the home itself. The Supreme Court noted that people use their decks, porches, and backyards to barbecue, socialize, and engage in recreation and other activities that are closely identified with the enjoyment of the home.

As a practical matter, how can a police officer distinguish curtilage from open fields? In *Dunn v. United States*, the Supreme Court listed four factors that are to be considered (*Dunn v. United States*, 480 U.S. 294 [1987]).

- **Distance.** Whether the area is distant or close to the area of the home
- **Enclosure.** Whether the area is within an enclosure surrounding the home
- **Function.** Whether the area is used for activities that normally are part of the home activities
- **Protection.** Whether an effort is made to protect the area from observation



These are general guidelines. The essential question is whether the area is “so intimately tied to the house itself” that it should be accorded Fourth Amendment protection. One federal judge accurately described the division between curtilage and open fields as an “imaginary boundary line between privacy and accessibility to the public” (*United States v. Redmon*, 138 F.3d 1109, 1112 [7th Cir. 1998]).

In *Dunn*, the U.S. Supreme Court held that a barn was part of open fields rather than the curtilage and that the federal officer who discovered a crystal meth laboratory did not require a search warrant to look into the barn. The barn was outside the fence surrounding the home and was fifty yards from the fence and sixty yards from the house, and Dunn had not taken sufficient steps to protect the inside of the barn from observation. Aerial photographs and chemical odors from the barn indicated that it was not being used for intimate activities associated with the home.

A number of state supreme courts, including those of Mississippi, Montana, New York, Tennessee, Vermont, and Washington, have interpreted their state constitutions to provide protection for open fields in those instances in which signs and fencing indicate that an individual possesses an expectation of privacy. These state courts have explained that the central question is whether an individual’s expectation of privacy is reasonable rather than whether the land is separate and apart from the home or curtilage or whether the land is used for “intimate activities” associated with the home.

Which approach do you believe makes more sense? Does it make sense that individuals lack a reasonable expectation of privacy in land that they own?



You can find *Oliver v. United States* on the Student Study Site, www.sagepub.com/lippmanpc2e.

CURTILAGE AND AERIAL SURVEILLANCE

Curtilage is viewed as part of the home and has a high expectation of privacy. The general rule is that a warrant is required for a search of the home and the curtilage. However, in this section we shall see that the curtilage does not receive the same degree of protection as the home itself. The U.S. Supreme Court held, in the two cases discussed below, that the warrantless, aerial surveillance of the curtilage does not violate an individual’s expectation of privacy.

In *California v. Ciraolo*, the police received information from an informant that Ciraolo was growing marijuana in his backyard. Ciraolo had surrounded his yard with a six-foot outer fence and a ten-foot inner fence that prevented the police from investigating the tip. The police refused to be discouraged; two trained narcotics investigators flew a plane within navigable airspace at 1,000 feet, observed marijuana plants in Ciraolo’s backyard, took a photograph, obtained a search warrant, and seized the plants. Ciraolo claimed that the police had violated his reasonable expectation of privacy.

The U.S. Supreme Court held that in an age in which air travel is “routine,” it is unreasonable for Ciraolo to expect that his marijuana plants are constitutionally protected from plain view observation with the naked eye from an altitude of 1,000 feet. Ciraolo did not possess a reasonable expectation of privacy, and the police officers were not required to obtain a warrant to conduct aerial surveillance (*California v. Ciraolo*, 476 U.S. 207, 215 [1986]).

The Supreme Court’s holding in *Ciraolo* was relied on as precedent by the Supreme Court in *Florida v. Riley*. The police were unable to verify an informant’s tip from the street that Riley was growing marijuana in the greenhouse ten to twenty feet behind his mobile home. Two of the four sides of the greenhouse were enclosed, and the top of the greenhouse was partially covered by corrugated roofing panels. An officer circled over the greenhouse in a helicopter flying at 400 feet and was able to see through a slit in the roof and through the open sides of the greenhouse; he identified what he believed were marijuana plants. The officer obtained a warrant, and a search of the greenhouse resulted in the seizure of marijuana plants. The Supreme Court stressed that the helicopter was flying at a legal altitude, and the Court found “nothing” to “suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent’s claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude” (*Florida v. Riley*, 488 U.S. 445, 452 [1989]).

Dow Chemical Company v. United States is a third case involving aerial surveillance. Although it involved an industrial plant, the case is significant for its discussion of visual enhancement technology. In *Dow*, the Environmental Protection Agency relied on aerial surveillance using a



standard precision aerial camera to determine whether Dow's 2,000-acre chemical plant was in compliance with governmental regulations. The Supreme Court held that the "mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems." In other words, the camera only clarified what was already visible to the naked eye. Keep in mind that the Supreme Court noted that Dow's plant fell somewhere in between open fields and curtilage and did not deserve the same expectation of privacy as the home (*Dow Chemical Company v. United States*, 476 U.S. 227, 238–239 [1986]).

In summary, the Supreme Court held that despite the fact that curtilage is part of the home and despite efforts to insulate the curtilage from plain view, the curtilage has no expectation of privacy from aerial surveillance, even, it appears, as in *Dow*, where the surveillance is assisted by technology. Do you agree with the Supreme Court's judgments on aerial surveillance? Could Ciralo and Riley reasonably have anticipated that their curtilage would be subject to aerial surveillance? Would a ruling that warrantless aerial surveillance of the curtilage violates individuals' Fourth Amendment rights handcuff the police? Keep in mind that although aerial surveillance may result in the detection of contraband, the police still require a warrant to enter the curtilage and seize the contraband or other evidence.

In *State v. Bryant*, the Vermont Supreme Court held that aerial surveillance of the curtilage violates an individual's reasonable expectation of privacy under the Vermont Constitution (*State v. Bryant*, 950 A.2d 467 [Vt. 2008]).



You can find *Florida v. Riley* on the Student Study Site, www.sagepub.com/lippmanpc2e.

TECHNOLOGY AND THE HOME

Search warrants and arrest warrants generally are required to enter into the home, which has the highest expectation of privacy. In *Kyllo v. United States*, the next case in the text, the U.S. Supreme Court confronted the question of whether the police may employ a thermal-imaging device without a warrant to measure the heat emanating from a home. The theory behind the use of thermal imaging is that an unusually high degree of warmth provides probable cause that heat lamps are being used inside the home to grow marijuana.

As we have seen, the Supreme Court has upheld the employment of recording devices, aerial overflights, and photographic technology to enhance surveillance. In the decades to come, we are likely to see new and even more powerful technological techniques of criminal investigation. The Supreme Court has adopted two general rules in regard to police reliance on technology:

- **Plain view.** Technology may be used without a search warrant to enhance observation of an area or object already in plain view (open fields, curtilage).
- **Home.** The physical structure of the home possesses a high expectation of privacy. Technology may not be used without a warrant founded on probable cause to engage in the surveillance of the interior of the home in order to detect activity that otherwise would not be revealed without physically entering the home.

An example of the use of technology to enhance surveillance of an object in plain view is *Texas v. Brown*. In *Brown*, the Supreme Court ruled that the use of a flashlight to "illuminate a darkened area" in the interior of an automobile does not constitute a Fourth Amendment search (*Texas v. Brown*, 460 U.S. 730 [1983]). In another example, the Supreme Court upheld the use of a beeper installed in a five-gallon drum of chloroform to track the movements of an automobile driven by a suspect in an illegal narcotics ring. The Court reasoned that the defendant's movements on the public roadways also were being tracked through aerial surveillance and that the beeper revealed no information that was not already available to the general public or to the police. The Supreme Court observed that "nothing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case" (*United States v. Knotts*, 460 U.S. 276 [1983])(rule 1).

On the other hand, the Supreme Court drew the line at continuing to electronically monitor a beeper in a can of ether once the can was taken into a home. The purpose was to verify that the can



remained inside a home thought to be the site of an illegal narcotics laboratory while the police obtained a search warrant. The Court reasoned that the government may not physically enter the home (without a warrant) to insure that the ether is inside, and the result is the same where the government secretly “employs an electronic device to obtain information that it could not have obtained by observation from outside the . . . house” (*United States v. Karo*, 468 U.S. 705 [1984]) (rule 2).

In 2001, in *Kyllo v. United States*, the U.S. Supreme Court was asked to rule on whether the warrantless use of a thermal-imaging device to measure infrared radiation that emanates from a house constitutes a search. The scan from the device, when combined with other information, provided probable cause to support a warrant to search Kyllo’s home, and the search resulted in the seizure of more than one hundred marijuana plants. Consider the cases we have discussed, and ask yourself whether Kyllo had a subjective expectation of privacy that would be considered objectively reasonable under the Fourth Amendment. Did the federal agents require a warrant before using the thermal-imaging device?

Does the use of a thermal-imaging device constitute the search of a home?

Kyllo v. United States, 533 U.S. 27 (2001), Scalia, J.

Issue

This case presents the question of 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.

Facts

In 1991 Agent William Elliott of the U.S. 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 one hundred 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 upheld the validity of the warrant that relied in part upon the thermal imaging and reaffirmed its denial of the motion to suppress. The 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.

Reasoning

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.” With few exceptions, the question of 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. . . . As Justice Harlan’s oft-quoted concurrence described it, a Fourth Amendment search occurs when the Government violates a subjective expectation of privacy that society recognizes as reasonable. 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.” We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search.

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. While we upheld enhanced aerial photography of an industrial complex in *Dow Chemical*, we noted that we found it “important that this is not an area immediately adjacent to a private home, where privacy expectations are most heightened.”

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.

Holding

The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as . . . 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.

The Government maintains, however, that the thermal imaging must be upheld, because it detected “only heat radiating from the external surface of the 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.

The Government also contends that the thermal imaging was constitutional, because it did not “detect private activities occurring in private areas.” . . . 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 non-intimate 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. Thus, in *Karo*, the only thing detected was a can of ether in the home; and in *Arizona v. Hicks*, the only thing detected by a physical search that went beyond what officers lawfully present could observe in plain view was the registration number of a phonograph turntable. These were intimate details, because they were details of the home, just as was the detail of how warm—or even how relatively warm—Kyllo was heating his residence.

We have said that the Fourth Amendment draws “a firm line at the entrance to the house.” That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no “significant” compromise of the homeowner’s privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.



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. Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the district court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.

The judgment of the court of appeals is reversed; the case is remanded for further proceedings consistent with this opinion.

Dissenting, Stevens, J., joined by Rehnquist, C.J., O’Connor, J., and Kennedy, J.

There is, in my judgment, a distinction of constitutional magnitude between “through-the-wall surveillance” that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand. The Court has crafted a rule that purports to deal with direct observations of the inside of the home, but the case before us merely involves indirect deductions from “off-the-wall” surveillance, that is, observations of the exterior of the home. Those observations were made with a fairly primitive thermal imager that gathered data exposed on the outside of petitioner’s home but did not invade any constitutionally protected interest in privacy. Moreover, I believe that the supposedly “bright-line” rule the Court has created in response to its concerns about future technological developments is unnecessary, unwise, and inconsistent with the Fourth Amendment.

There is no need for the Court to craft a new rule to decide this case, as it is controlled by established principles from our Fourth Amendment jurisprudence. One of those core principles, of course, is that “searches and seizures inside a home without a warrant are presumptively unreasonable.” But it is equally well settled that searches and seizures of property in plain view are presumptively reasonable. Whether that property is residential or commercial, the basic principle is the same: “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” That is the principle implicated here.

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, rain-water 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.

The notion that heat emissions from the outside of a dwelling is a private matter implicating the protections of the Fourth Amendment (the text of which guarantees the right of people “to be secure *in* their . . . houses” against unreasonable searches and seizures [emphasis added] is not only unprecedented but also quite difficult to take seriously. 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.’”

There is a strong public interest in avoiding constitutional litigation over the monitoring of emissions from homes, and over the inferences drawn from such monitoring. Just as “the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public,” so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. In my judgment, monitoring such emissions with “sense-enhancing technology,” and drawing useful conclusions from such monitoring, is an entirely reasonable public service.

On the other hand, the countervailing privacy interest is at best trivial. After all, homes generally are insulated to keep heat in, rather than to prevent the detection of heat going out, and it does not seem to me that society will suffer from a rule requiring the rare homeowner who both intends to engage in uncommon activities that produce extraordinary amounts of heat and who wishes to conceal such activity. The interest in concealing the heat escaping from one’s house pales in significance to “the chief evil against which the wording of the Fourth Amendment is directed,” the “physical entry of the home,” and it is hard to believe that it is an interest the framers sought to protect in our Constitution.

Because what was involved in this case was nothing more than drawing inferences from off-the-wall surveillance, rather than any “through-the-wall” surveillance, the officers’ conduct did not amount to



a search and was perfectly reasonable. 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.

Although the Court is properly and commendably concerned about the threats to privacy that may flow from advances in the technology available to the law enforcement profession, it has unfortunately failed to heed the tried and true counsel of judicial restraint. Instead of concentrating on the rather mundane issue that is actually presented by the case before it, the Court has endeavored to craft an all-encompassing rule for the future. It would be far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints.

Questions for Discussion

1. What is the holding in *Kyllo*? Explain the significance of the fact that the thermal-imaging device is not in "general use."
2. Discuss the relationship between the Supreme Court rulings in *White*, *Ciraolo*, and *Riley* with those in *Dow* and *Kyllo*.
3. Summarize the argument of the dissent. Do you find the majority opinion or the dissenting opinion more persuasive?
4. **Problems in policing.** Describe the steps that the police officers in *Kyllo* should have taken before using the thermal-imaging device.

Cases and Comments

GPS Monitoring of Automobiles. In 2012 in *United States v. Jones*, the U.S. Supreme Court addressed the constitutionality of the warrantless attachment of a Global-Positioning-System (GPS) tracking device to Jones's car for the purpose of monitoring the movement of his vehicle on a public street. Jones claimed that his reasonable expectation of privacy had been violated by the warrantless 28-day surveillance of his movements.

Justice Scalia writing in a 5 to 4 decision held that the government's physical trespass and installation of a GPS device on Jones's vehicle for the purpose of obtaining information constituted a "search. He concluded that the government had "improperly physically intruded on a constitutionally protected area by affixing the GPS to Jones's vehicle." Justice Scalia wrote that "[w]e 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." He noted that under the privacy analysis of *Katz*, "mere visual observation does not constitute a search" regardless of the length of the surveillance or the seriousness of the crime.

A four-judge concurring opinion written by Justice Alito relied on a privacy-based approach. Justice Alito concluded that "the use of longer term GPS monitoring in investigations of most offenses impinges on

expectations of privacy." In the case of narcotic crimes, "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." He noted that there may be "extraordinary offenses" justifying reliance on long-term tracking. Justice Alito pointed out that under Justice Scalia's trespass approach, the police would be in violation of the Fourth Amendment if they attach a GPS device to a car without first obtaining a search warrant and briefly follow the automobile. On the other hand, if the police "follow the same car for a much longer period using unmarked cars and aerial surveillance," this tracking would not constitute a Fourth Amendment search (*United States v. Jones*, 132 S. Ct. 945, 565 U.S. ___ [2012]).

In *United States v. Skinner*, ___ F.3d ___ (6th Cir. 2012) (No. 09-6497), the Sixth Circuit Court of Appeals relied on the precedent in *United States v. Jones* and held that the defendant "did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone." The court of appeals noted that the tracking in *Skinner* did not involve physical trespass on the suspect's personal property and was conducted for three days rather than twenty-eight days.

You can find United States v. Jones on the Student Study Site, www.sagepub.com/lippman2e.



CRIMINAL PROCEDURE IN THE NEWS

Law enforcement increasingly is employing dogs to detect whether narcotics and explosives are being carried into subways, airports, and train stations. Dogs also are used to detect prohibited foods, plants, and fruits that are brought into the United States and to uncover land mines in war zones; it is even claimed that some dogs are able to detect cancer in patients. Dogs are currently employed at over seventy-three ports of entry into the United States and are described as much more efficient than humans in detecting contraband in vehicles and large shipping containers.

You might have wondered whether the Fourth Amendment permits the use of dogs to “search” for contraband. In 1983, in *United States v. Place* (462 U.S. 696), Drug Enforcement Agency officers at Miami International Airport tipped off agents at New York’s La Guardia Airport that their suspicions had been aroused by passenger Raymond Place. Agents in New York monitored Place’s movements at La Guardia and also found his behavior suspicious. The agents approached Place and informed him that they suspected that he was carrying narcotics. Place refused to consent to a search of his baggage, and the agents removed the bags to John F. Kennedy airport where a trained narcotics dog indicated that one of the bags contained unlawful narcotics. Based on the dog’s reaction, a federal magistrate issued a search warrant, and the agents discovered 1,125 grams of cocaine in the bag. Place appealed and argued that the dog sniff constituted an unlawful, warrantless search of his luggage and that the resulting search warrant had been based on evidence that had been obtained in an unconstitutional search of his bag.

The U.S. Supreme Court held that a canine sniff is “one of a kind.” The Court was 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. The sniff discloses only the presence or absence of narcotics and does not require agents to search through a suspect’s belongings. The Supreme Court accordingly ruled that the exposure of luggage to a trained narcotics dog does not constitute a “search” within the meaning of the Fourth Amendment. Subsequently, in 2005, in *Illinois v. Caballes*, the Supreme Court held that the use of a narcotics dog during a lawful traffic stop does not infringe on the driver’s Fourth Amendment rights (543 U.S. 405).

In summary, *Place* and *Caballes* stand for the proposition that law enforcement personnel are not required to obtain a warrant based on probable cause to use dogs to search containers, automobiles, and other property, because dog sniffs are not a Fourth Amendment search. Federal and state courts remain divided over whether dogs may be lawfully employed without a warrant to search persons.

Law enforcement as a result is relatively free to employ trained narcotics and bomb sniffing dogs. The Transportation Security Agency is spending roughly \$2.7 million to train and certify roughly thirty German shepherds, Belgian Malinois, and Labrador retrievers and their handlers for explosive detection in the nation’s subways. Dogs’ noses have been estimated to be between 100 and 10,000 times more sensitive than the human nose, depending on the scent. They are able to detect small amounts of certain substances and are able to single out a specific substance even when it is surrounded by other odors.

Despite the deserved praise and regard for our canine friends, some law enforcement officers have noted that dogs are not quite as effective as we might want to believe. In his dissent in *Caballes*, Justice David Souter noted that the “infallible” dog is largely a “legal fiction.” He noted that errors by handlers and dogs combined to create a rate of false positives in artificial testing situations of between twelve and one-half and sixty percent. The most comprehensive study of the accuracy of dogs was undertaken in the Australian state of New South Wales, where Sydney is located. A study of the use of trained narcotics dogs over a two-year period by the New South Wales Ombudsman found that drug dogs are accurate between twenty-five and thirty percent of the time. Only slightly more than one percent of the “positive sniffs” resulted in the seizure of a significant amount of marijuana (“one in every 526 positive sniffs”). In most instances the police uncovered a small amount of drugs to be used for personal use. The Ombudsman concluded that there is “little evidence” to support the argument that drug detection dogs “deter drug use, reduce drug-related crime or increase perceptions of public safety. Further, criticisms of the cost-effectiveness of general drug detection operations appear well-founded.” In other words, most people stopped in New South Wales either were completely innocent or possessed only small amounts of drugs.

There are several explanations as to why dogs may not be as useful as we have been led to believe.

Training. There are instances in which trainers have falsely represented the capacity of dogs that they have sold to governmental agencies. Dogs also typically are trained for specific chemicals and are unable to detect other compounds. There are some explosives that are so unstable and so likely to ignite that dogs cannot be trained to detect them.

Effectiveness. Dogs may indicate the presence of a chemical when an individual is not actually in possession of a prohibited substance but has indirectly come in contact with a narcotic or explosive. In their desire to please their handler and to receive a reward, dogs may respond to a smell that is similar to one



that they have been trained to detect. Dogs function at a high level in a quiet and contained environment. They can become distracted and confused by noise and people.

Fatigue. Dogs are no different than other creatures. They are likely to grow bored and tired and typically are in need of rest after thirty minutes of intense work.

The Russians claim to have overcome the weakness of existing breeds by creating the Sulimov, which is a combination of reindeer herding hound, fox terrier, and spitz dog. Forty Sulimovs are currently employed in

Russian airports, and it is claimed that these dogs are able to detect twelve different chemical components that are used in explosives.

In the coming years, efforts likely will be made to replace dogs with a new generation of more accurate technology. We nevertheless likely will see continuing efforts to harness the unique abilities of animals to counter crime. Some researchers have claimed that nonstinging wasps encapsulated in a plastic container and connected to a laptop computer have proven to be easily trained and highly accurate.

PUBLIC PLACES AND PRIVATE BUSINESSES

The police may seize items that they observe in public places, streets, parks, and monuments. Public places also include private businesses that are open to the public. A search warrant is required for the police to enter portions of a business that are not open to the public, such as employee-only work areas and employee offices. In *Maryland v. Macon*, a nonuniformed police detective entered a store and paid for a magazine. He later returned and arrested the clerk for distributing obscene material. The U.S. Supreme Court held that the officer's entering the bookstore and examining the material that was "intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment" (*Maryland v. Macon*, 472 U.S. 463, 469 [1985]).

ABANDONED PROPERTY

Abandoned property is the last type of property that we will discuss. Abandoned property is property that an individual intends to abandon and physically abandons. An individual has no expectation of privacy in abandoned property, and the property has no Fourth Amendment protection. As a result, the police are not required to obtain a warrant to examine and take control of the property. Property typically does not carry a sign indicating that it is abandoned. Judges rely on the totality of the circumstances and consider where the property is found, the condition of the property, and the type of property along with other factors. For example, an old and worn-out suitcase found in a dumpster clearly has been abandoned. A different conclusion might be reached if the bag is a new and very expensive leather purse that reportedly has been stolen.

In most instances, the question whether property is abandoned is straightforward. In *Hester v. United States*, Hester fled from government revenue agents and dropped a jug and a jar, and an agent later uncovered a bottle; all three containers held unlawfully manufactured moonshine whiskey. The Supreme Court ruled that the containers had been abandoned and lacked an expectation of privacy and that there had been no Fourth Amendment seizure (*Hester v. United States*, 265 U.S. 57, 58 [1924]). In *Abel v. United States*, the petitioner was found to have voluntarily abandoned items that he left behind in the trash can of his hotel room, and the Supreme Court held that there was "nothing unlawful in the Government's appropriation of such abandoned property" (*Abel v. United States*, 362 U.S. 217, 241 [1960]).

In the next case, *California v. Greenwood*, the U.S. Supreme Court was asked to decide whether the petitioners retained an expectation of privacy in sealed garbage bags that a local ordinance required to be placed on the side of the road outside of the curtilage. The police received information that Greenwood was linked to drug trafficking and asked the regular trash collector to pick up the garbage bags that Greenwood had left on the curb in front of his house and to turn the contents over to the police. On two occasions, the police recovered narcotics paraphernalia from Greenwood's garbage; these provided the basis to obtain search warrants for the home, and the search resulted in the seizure of unlawful narcotics. The petitioners moved to suppress



the introduction of the narcotics at trial based on the fact that they retained an expectation of privacy in the trash. They argued that their expectation was that the garbage collector would pick up and mingle the trash with other garbage and deposit the debris in the garbage dump. It was not anticipated that the trash would be turned over to the police and examined.

Garbage reveals the most intimate aspects of an individual's life, and most people do not expect that it will be examined by the police. On the other hand, garbage that is left at the curb arguably has been abandoned and may be examined by anyone who happens to walk down the street. In reading *Greenwood*, consider whether the police should be required to obtain a search warrant to search and seize material from the trash. Pay particular attention to the Supreme Court's discussion of whether Greenwood retained an expectation of privacy in the garbage.

Did the police require a warrant to search Greenwood's trash?

California v. Greenwood, 486 U.S. 35 (1988), White, J.

Issue

The issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude, in accordance with the vast majority of lower courts that have addressed the issue, that it does not.

Facts

In early 1984, investigator Jenny Stracner of the Laguna Beach Police Department received information indicating that respondent Greenwood might be engaged in narcotics trafficking. Stracner learned that a criminal suspect had informed a federal drug enforcement agent in February 1984 that a truck filled with illegal drugs was en route to the Laguna Beach address at which Greenwood resided. In addition, a neighbor complained of heavy vehicular traffic late at night in front of Greenwood's single-family home. The neighbor reported that the vehicles remained at Greenwood's house for only a few minutes. Stracner sought to investigate this information by conducting a surveillance of Greenwood's home. She observed several vehicles make brief stops at the house during the late night and early morning hours, and she followed a truck from the house to a residence that had previously been under investigation as a narcotics-trafficking location.

On April 6, 1984, Stracner asked the neighborhood's regular trash collector to pick up the plastic garbage bags that Greenwood had left on the curb in front of his house and to turn the bags over to her without mixing their contents with garbage from other houses. The trash collector cleaned his truck bin of other refuse, collected the garbage bags from the street in front of Greenwood's house, and turned the bags over to Stracner. The officer searched through the rubbish and found items indicative of narcotics use. She recited the information that she had gleaned from the trash search in an affidavit in support of a warrant to search Greenwood's home.

Police officers encountered both respondents at the house later that day when they arrived to

execute the warrant. The police discovered quantities of cocaine and hashish during their search of the house. Respondents were arrested on felony narcotics charges. They subsequently posted bail.

The police continued to receive reports of many late night visitors to the Greenwood house. On May 4, investigator Robert Rahaeuser obtained Greenwood's garbage from the regular trash collector in the same manner as had Stracner. The garbage again contained evidence of narcotics use. Rahaeuser secured another search warrant for Greenwood's home based on the information from the second trash search. The police found more narcotics and evidence of narcotics trafficking when they executed the warrant. Greenwood was again arrested.

The superior court dismissed the charges against respondents. . . . The court of appeal affirmed. . . . The California Supreme Court denied the State's petition for review of the decision of the court of appeals. We granted certiorari.

Reasoning

The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable. Respondents do not disagree with this standard. They assert, however, that they had, and exhibited, an expectation of privacy with respect to the trash that was searched by the police: The trash, which was placed on the street for collection at a fixed time, was contained in opaque plastic bags, which the garbage collector was expected to pick up, mingle with the trash of others, and deposit at the garbage dump. The trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone.

It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public.



An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable. Here, we conclude 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. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

Furthermore, as we have held, the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Hence, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

Holding

Our conclusion that society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public is reinforced by the unanimous rejection of similar claims by the federal courts of appeals. . . . The judgment of the California Court of Appeal is therefore reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

Dissenting, Brennan, J., joined by Marshall, J.

Every week for two months, and at least once more a month later, the Laguna Beach police clawed through the trash that respondent Greenwood left in opaque, sealed bags on the curb outside his home. Complete strangers minutely scrutinized their bounty, undoubtedly dredging up intimate details of Greenwood's private life and habits. The intrusions proceeded without a warrant, and no court before or since has concluded that the police acted on probable cause to believe Greenwood was engaged in any criminal activity.

The framers of the Fourth Amendment understood that "unreasonable searches" of "paper[s] and effects"—no less than "unreasonable searches" of "person[s] and houses"—infringe privacy. . . . So long as a package is "closed against inspection," the Fourth Amendment protects its contents, "wherever they may be," and the police must obtain a warrant to search it just "as is required when papers are subjected to search

in one's own household." . . . In *Robbins v. California* (453 U.S. 420 [1921]), for example, Justice Stewart, writing for a plurality of four, pronounced that "unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment," and he soundly rejected any distinction for Fourth Amendment purposes among various opaque, sealed containers:

Even if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished. What one person may put into a suitcase, another may put into a paper bag. . . . And . . . no court, no constable, no citizen, can sensibly be asked to distinguish the relative "privacy interests" in a closed suitcase, briefcase, portfolio, duffel bag, or box.

More recently, in *United States v. Ross* (456 U.S. 798 [1982]), the Court, relying on the "virtually unanimous agreement in *Robbins* . . . that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper," held that a distinction among "paper bags, locked trunks, lunch buckets, and orange crates" would be inconsistent with "the central purpose of the Fourth Amendment. . . . A traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case."

Respondents deserve no less protection just because Greenwood used the bags to discard rather than to transport his personal effects. Their contents are not inherently any less private, and Greenwood's decision to discard them, at least in the manner in which he did, does not diminish his expectation of privacy.

A trash bag, like any of the above mentioned containers, "is a common repository for one's personal effects" and, even more than many of them, is "therefore . . . inevitably associated with the expectation of privacy." "Almost every human activity ultimately manifests itself in waste products. . . ." A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" which the Fourth Amendment is designed to protect. . . . In evaluating the reasonableness of Greenwood's expectation that his sealed trash bags



would not be invaded, the Court has held that we must look to “understandings that are recognized and permitted by society.” Most of us, I believe, would be incensed to discover a meddler—whether a neighbor, a reporter, or a detective—scrutinizing our sealed trash containers to discover some detail of our personal lives.

Had Greenwood flaunted his intimate activity by strewing his trash all over the curb for all to see, or had some nongovernmental intruder invaded his privacy and done the same, I could accept the Court’s conclusion that an expectation of privacy would have been unreasonable. Similarly, had police searching the city dump run across incriminating evidence that, despite commingling with the trash of others, still retained its identity as Greenwood’s, we would have a different case. But all that Greenwood “exposed . . . to the public” were the exteriors of several opaque, sealed containers. Until the bags were opened by police, they hid their contents from the public’s view every bit as much as did Chadwick’s double-locked footlocker and Robbins’s green, plastic wrapping. Faithful application of the warrant requirement does not require police to “avert their eyes from evidence of criminal activity that could have been observed by any member of the public.” Rather, it only requires them to adhere to norms of privacy that members of the public plainly acknowledge.

The mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in their 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. “What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”

Nor is it dispositive that “respondents placed their refuse at the curb for the express purpose of conveying it to a third party, . . . who might himself have sorted through respondents’ trash or permitted others, such as the police, to do so.” In the first place, Greenwood can hardly be faulted for leaving trash on his curb when a

county ordinance commanded him to do so. Orange County Code § 4-3-45(a) (1986) requires that each resident must “remov[e] from the premises at least once each week” all “solid waste created, produced or accumulated in or about [his] dwelling house”) and prohibit him from disposing of it in any other way. (Orange County Code § 3-3-85 [1988]: Burning trash is unlawful.) Unlike other circumstances in which privacy is compromised, in these circumstances, Greenwood could not “avoid exposing personal belongings . . . by simply leaving them at home.” More important, even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the “express purpose” of entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors (and certainly have greater incentive) to “sor[t] through” the personal effects entrusted to them, “or permi[t] others, such as police to do so.” Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance.

In holding that the warrantless search of Greenwood’s trash was consistent with the Fourth Amendment, the Court paints a grim picture of our society. It depicts a society in which local authorities may command their citizens to dispose of their personal effects in the manner least protective of the “sanctity of [the] home and the privacies of life,” and then monitor them arbitrarily and without judicial oversight—a society that is not prepared to recognize as reasonable an individual’s expectation of privacy in the most private of personal effects sealed in an opaque container and disposed of in a manner designed to commingle it imminently and inextricably with the trash of others. The American society with which I am familiar “chooses to dwell in reasonable security and freedom from surveillance,” and is more dedicated to individual liberty and more sensitive to intrusions on the sanctity of the home than the Court is willing to acknowledge.

Questions for Discussion

1. What is the holding in *Greenwood*? What are the facts that the Supreme Court relied on to establish that Greenwood lacked an expectation of privacy in the garbage?
2. Did Greenwood abandon his trash? Did he intend to convey his garbage to the police?
3. Would the Supreme Court in *Greenwood* have reached the same result in the event that the police directly collected the garbage bags? How would the Supreme Court have ruled if the garbage had been left in the curtilage? Could the police have lawfully searched the trash bags without a warrant if

Greenwood was about to catch a plane, had used the garbage bags for his clothes, and had left the garbage bags on the curb while he went in the house to make a phone call?

4. Summarize the dissent. Do you agree with the majority or with the dissenting opinion?
5. **Problems in policing.** What is the legal test for determining whether an item possesses a reasonable expectation of privacy? Why is it important for the police to understand the concept of expectation of privacy?



Cases and Comments

1. **State Courts.** The supreme courts of Hawaii, New Hampshire, New Jersey, Vermont, and Washington all have interpreted their state constitutions to provide an expectation of privacy in garbage. In the New Jersey case of *State v. Hemepele*, the police in response to an informant's tip seized white plastic bags from a garbage can and brought the bags to police headquarters, where the police detected traces of marijuana, cocaine, and methamphetamine in them. The police obtained a search warrant and uncovered narcotics and drug paraphernalia in Hemepele's home. The New Jersey Supreme Court did not address the significance of the fact that the garbage was situated inside Hemepele's property line or that the garbage had been seized by the police rather than by the garbage company. The court held that the legal test followed in New Jersey was whether Hemepele possessed an objectively reasonable expectation of privacy in the content of the opaque garbage bags. The court held that most people reasonably expect that their garbage will remain free from arbitrary seizures. Garbage contains sensitive information such as discarded bank statements, pharmaceutical bottles, receipts, and financial records. The Fourth Amendment does not distinguish between "worthy" and "unworthy" containers, and garbage bags have the same expectation of privacy as a purse or luggage.

The fact that dogs or children or the poor might rummage through the garbage did not mean that Hemepele lacked a reasonable expectation of privacy against the police. The Fourth Amendment is intended to safeguard individuals against unreasonable governmental searches and seizures and "there is a difference between a homeless person searching for food and clothes, and an officer of the State scrutinizing the contents of a garbage bag for incriminating materials." Only governmental searches may lead to criminal liability.

Hemepele may have intended to turn his garbage over to a third party trash company, but the only information conveyed to the company was the number, type, and weight of the bags. He was not transmitting information about the contents of the bags. The expectation was that the trash company would deposit the contents at a garbage dump where Hemepele's trash would be commingled with other garbage.

The New Jersey Supreme Court analogized the trash bags to a letter left in the mailbox to be picked up by an

employee of the post office. The letter is conveyed to the post office for delivery, and there is no expectation that the contents of the letter will be seized by the police. . . . You might throw away a letter with the reasonable belief that it will not be read by another individual. . . . The New Jersey Supreme Court concluded by observing that law enforcement officers are free to search garbage so long as this is based on a search warrant based on probable cause. See *State v. Hemepele*, 576 A.2d 793 (N.J. 1990).

2. **Luggage.** Steven Bond was a passenger on a Greyhound bus that was stopped at a border patrol checkpoint in Sierra Blanca, Texas. Agent Cesar Cantu checked the immigration status of the passengers, and as he walked toward the front of the bus, he squeezed the soft luggage that passengers had placed in the overhead storage space above the seats. He squeezed a green canvas bag and detected that it contained a brick-like object. Bond admitted that he owned the bag and consented for Cantu to open the bag. Cantu discovered a "brick" of methamphetamine wrapped in duct tape and rolled into a pair of pants. Bond was convicted of conspiracy to possess methamphetamine and possession with intent to distribute methamphetamine. Bond appealed on the grounds that Agent Cantu had improperly squeezed his bag. The government responded that the bag was exposed to the public and lacked an expectation of privacy.

The U.S. Supreme Court held that Bond had indicated a subjective expectation of privacy by placing his belongings in a closed bag in the overhead bin. Was this expectation of privacy reasonable? The Court recognized that when a passenger places a bag in the overhead bin, he or she reasonably expects "that other passengers or bus employees may move it for one reason or another." However, an individual does not "expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here." The Court accordingly held that Cantu's "physical manipulation" of Bond's bag violated the Fourth Amendment. Would the Supreme Court have ruled differently in the event that Bond had placed his bag in the baggage carriage under the bus? See *Bond v. United States*, 529 U.S. 334 (2000).

You Decide



agents seized garbage bags from the front of Scott's home. They discovered various shredded documents. The agents

3.2 Alan Scott was suspected by the Internal Revenue Service (IRS) of involvement in a plan to defraud the government through the filing of false income tax returns. IRS

methodically reconstructed the documents, which provided the probable cause required to obtain a search warrant. The warrant resulted in the search and seizure of additional documents that formed the basis of a forty-seven count indictment. Scott moved to suppress the reconstructed documents. As a judge, how would you rule in this case? See *United States v. Scott*, 975 F.2d 927 (1st Cir. 1992).

You can learn what the court decided by referring to the Student Study Site, www.sagepub.com/lippmanpcp2e.



You Decide



storage units within a fenced self-storage facility. The dog entered with the permission of the facility's management and indicated that a controlled substance was stored within one of the units. The St. Paul police obtained a warrant for Carter's storage unit and home. The warrant application alleged that Carter and his brother were gang

3.3 The St. Paul, Minnesota police observed suspicious activity by Benjamin Carter at the storage units he rented at Secure Mini Storage. A drug-detection dog conducted a "sniff" outside Carter's

members with prior arrests for drugs and unlawful possession of a firearm.

The police executed the warrants and seized cocaine at Carter's home and two firearms, ammunition, and a nylon bag containing a stocking cap at the storage unit. Carter was charged with illegal possession of a firearm and filed a motion to suppress the firearm seized from the storage locker.

The Minnesota Supreme Court addressed whether a warrantless "dog-sniff" outside a storage facility is a search within the meaning of the Fourth Amendment? What is your view? See *State v. Carter*, 697 N.W.2d 199 (Minn. 2005).

You can learn what the court decided by referring to the Student Study Site, www.sagepub.com/lippmanpc2e.

Table 3.1 illustrates situations in which individuals have an expectation of privacy and the search and seizure is subject to Fourth Amendment protections. The table contrasts those examples with situations in which individuals lack an expectation of privacy and the search and seizure is not subject to the requirements of the Fourth Amendment.

Table 3.1 Expectations of Privacy and Police Fourth Amendment Searches

| <i>Expectation of Privacy/Fourth Amendment Search</i> | <i>No Expectation of Privacy/No Fourth Amendment Search</i> |
|---|---|
| Electronic surveillance of a phone conversation | Eavesdropping on a conversation |
| Opening luggage | Entry onto farm land |
| Entering a home | Aerial surveillance of a backyard |
| Opening and reading a private diary | Examination of trash in a dumpster |

SEIZURES OF PERSONS

The drafters of the U.S. Constitution were concerned with protecting persons as well as their houses, papers, and effects from unreasonable searches and seizures. A Fourth Amendment seizure occurs when a law enforcement officer detains an individual and restricts his or her freedom of movement. You may want to consult Table 3.2 as you read this section to help you understand the material.

The U.S. Constitution is intended to promote individual freedom, and it limits that freedom only to the extent required to protect the safety and security of society. Fourth Amendment seizures follow a simple formula that we will develop in detail in the next few chapters. The greater the interference with an individual's freedom, the greater the factual burden that must be satisfied by the police to justify the stop. An arrest of an individual that may result in the person's being taken into custody, and the accompanying search, incident to the arrest, for weapons or contraband, requires probable cause. In contrast, a brief investigative stop of an individual may be based on the less-demanding standard of reasonable suspicion and permits only the protective frisk of an individual's outer clothing for weapons.

**Table 3.2 The Fourth Amendment and Searches and Seizures of Persons**

| Standard of Justification | Requirements | Scope of Search |
|---------------------------|--|---------------------------------------|
| Probable cause | Reasonable person would conclude that individual has committed a crime. | Full body search for weapons/evidence |
| Reasonable suspicion | Reasonable person would believe that a crime has been or is about to be committed. | Frisk for weapons |
| Encounter | No justification required. | None. May ask for consent |

The Supreme Court has recognized a third category of police–citizen interactions that law professors refer to as **encounters**. These are noncoercive and voluntary contacts between the police and citizens that are not regulated by the Fourth Amendment. The Court has observed that not all street contacts between citizens and the police constitute a seizure. There are any number of casual interactions on the street or in a park or in a restaurant that do not restrain an individual’s freedom of movement. The Supreme Court has stressed that the police should be free to carry out investigations by briefly questioning individuals in public about suspected criminal activity. In *United States v. Mendenhall* the Court observed that “characterizing every street encounter between a citizen and the police as a ‘seizure’ . . . would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices” (446 U.S. 544, 554 [1980]).

Courts analyze the totality of the circumstances to distinguish a **seizure** from an encounter. The distinction at times can be unclear. Consider whether Sylvia Mendenhall’s interaction with federal agents was a seizure or an encounter. In *United States v. Mendenhall*, two federal drug agents approached Sylvia Mendenhall in the concourse of the airport in Detroit. They identified themselves and asked to examine her driver’s license and airline ticket. The ticket was issued in the name of “Annette Ford.” The agents noticed that Mendenhall appeared “shaken” and “nervous” and had difficulty speaking. The agents returned Mendenhall’s identification and ticket, and she agreed to accompany them to an office fifty feet from where they were standing. Once inside the office she consented to a body search, which resulted in the seizure of heroin.

The Supreme Court held that this was not a Fourth Amendment seizure. As a result, the officers were not required to establish either probable cause (as would be required if they were to arrest her) or reasonable suspicion (as would be required to stop and frisk her) to justify their decision to approach Mendenhall. Mendenhall had not been seized

simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification and posed a few questions. . . . Otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Examples of circumstances that might indicate a seizure would be the

threatening presence of several officers, the display of a weapon by an officer, some physical touching . . . or the use of language or tone of voice indicating that compliance . . . might be compelled.

The fact that the agents returned Mendenhall’s identification and ticket before asking her to accompany them to the office likely was a central consideration in the Supreme Court’s analysis.

The lesson is that the police must remain aware of the distinction between seizures and encounters. Note that the federal agents had no firm facts to justify approaching Mendenhall and that if the Supreme Court had ruled that their interaction with Mendenhall constituted a seizure, this would have meant that she had been unlawfully detained, and the drugs would have been inadmissible as the “fruit” of her illegal seizure (*United States v. Mendenhall*, 446 U.S. 544, 553 [1980]).



The recognition that not every contact between a police officer and a citizen is a seizure is consistent with the recommendation of the American Law Institute's *Model Code of Pre-Arrest Procedure*, which in section 110.1 provides that a law enforcement officer may request an individual to voluntarily

respond to questions, to appear at a police station, or to comply with any other reasonable request . . . [and that] compliance with a request . . . shall not be regarded as involuntary or coerced solely on the ground that such request was made by one known to be a law enforcement officer.

When is an individual seized under the Fourth Amendment? There are two types of seizures: a **physical seizure** of a suspect and a **show of authority seizure** in which police officers restrain individuals through the display of official authority without the use of actual physical force. Remember that a seizure requires a showing of either probable cause or reasonable suspicion.

- **Physical seizures.** A law enforcement officer intentionally takes physical hold of a suspect with the intent to prevent the individual from leaving.
- **Show of authority seizures.** Law enforcement officers demonstrate their authority by directing an individual to halt, displaying their weapons, blocking the suspect's movement, or other conduct that would lead a reasonable person not to feel free to leave or otherwise to terminate the encounter. The suspect must actually submit to the demonstration of authority.

In summary, an individual is seized once he or she is physically restrained or once a law enforcement officer acts in a way that would result in a reasonable person's not feeling free to leave or to terminate the encounter. In the latter case, the individual must actually submit to the officer's demonstration of authority. As noted, the distinction between a seizure and an encounter is not always crystal clear. Consider the following cases in which the Supreme Court has held that there was no Fourth Amendment seizure.

Factory sweeps. Immigrant and Naturalization Service agents carrying walkie-talkies entered a plant, blocked the exits, and asked workers questions regarding their legal status. The sweep lasted between one and two hours. The Supreme Court noted that the workers were free to move around the plant and that their freedom of movement was restricted by their voluntary commitment to their job rather than by the federal agents (*Immigration and Naturalization Service v. Delgado*, 466 U.S. 210 [1984]).

Bus sweeps. Two sheriff's deputies, one of whom was openly armed, boarded a crowded interstate bus during a stop to pick up passengers and approached Bostick, who was sitting in the back of the bus. The agents asked Bostick a few questions and requested permission to search his luggage. They did not threaten him or display their weapons. Bostick consented and the search revealed illegal narcotics. The Supreme Court held that the question, in light of the totality of the circumstances, was whether a reasonable (innocent) person would feel free to decline the officer's request or otherwise terminate the encounter (*Florida v. Bostick*, 501 U.S. 429 [1991]). See also *United States v. Drayton*, 536 U.S. 194 (2002).

Vehicle surveillance. Four officers in a squad car observed a man exit his automobile and approach Michael Chesternut. Chesternut appeared surprised to see the squad car and fled. The officers accelerated and drove alongside Chesternut for a short distance. The officers observed Chesternut discard four packages; one of the officers discovered that these contained unlawful narcotics. The officers did not activate the siren or flashers on their squad car, display weapons, or block Chesternut's movements. The Supreme Court held that Chesternut could not have reasonably concluded that the officers' "mere presence was so intimidating that the particular police conduct as a whole and within the setting of all of the surrounding circumstances" had "in some way restrained his liberty so that he was not free to leave" (*Michigan v. Chesternut*, 486 U.S. 567 [1988]).

The next case in the textbook, *California v. Hodari*, established the legal test for a Fourth Amendment show of force seizure. Four or five juveniles fled as they saw an unmarked police car approach. Officer Jerry Pertoso gave chase, and Hodari claimed that he did not see Pertoso until "he saw Officer Pertoso running towards him." Hodari immediately tossed away what appeared to be a small rock of crack cocaine and was tackled, handcuffed, and arrested. Hodari claimed that Officer Pertoso engaged in an unreasonable seizure (lacking reasonable suspicion or probable



cause) when he confronted Hodari and that the narcotics should be excluded from evidence as the fruit of the unlawful seizure. The government, on the other hand, argued that Hodari abandoned the drugs and that this provided a legal basis to tackle and to seize (arrest) Hodari. In other words, the government's theory was that it was only when Hodari was tackled that he was seized by the officer. Which approach makes more sense? As you read *Hodari*, note how the court's judgment adds an additional requirement to the rule established in *Mendenhall*.

Was Hodari seized when he dropped the drugs?

California v. Hodari, 499 U.S. 821 (1999), Scalia, J.

Facts

Late one evening in April 1988, Officers Brian McColgin and Jerry Pertoso were on patrol in a high-crime area of Oakland, California. They were dressed in street clothes but wearing jackets with "Police" embossed on both front and back. In their unmarked car, they proceeded west on Foothill Boulevard and turned south onto Sixty-Third Avenue. As they rounded the corner, they saw four or five youths huddled around a small red car parked at the curb. When the youths saw the officers' car approaching, they apparently panicked and took flight. The respondent here, Hodari D., and one companion ran west through an alley; the others fled south. The red car also headed south at a high rate of speed.

The officers were suspicious and gave chase. McColgin remained in the car and continued south on Sixty-Third Avenue; Pertoso left the car, ran back north along Sixty-Third, then west on Foothill Boulevard, and turned south on Sixty-Second Avenue. Hodari, meanwhile, emerged from the alley onto Sixty-Second and ran north. Looking behind as he ran, he did not turn and see Pertoso until the officer was almost upon him, whereupon he tossed away what appeared to be a small rock. A moment later, Pertoso tackled Hodari, handcuffed him, and radioed for assistance. Hodari was found to be carrying \$130 in cash and a pager, and the rock he had discarded was found to be crack cocaine.

In the juvenile proceeding brought against him, Hodari moved to suppress the evidence relating to the cocaine. The court denied the motion without opinion. The California Court of Appeal reversed, holding that Hodari had been "seized" when he saw Officer Pertoso running toward him, that this seizure was unreasonable under the Fourth Amendment, and that the evidence of cocaine had to be suppressed as the fruit of that illegal seizure. The California Supreme Court denied the State's application for review. We granted certiorari.

Issue

As this case comes to us, the only issue presented is whether, at the time he dropped the drugs, Hodari

had been "seized" within the meaning of the Fourth Amendment. If so, respondent argues, the drugs were the fruit of that seizure, and the evidence concerning them was properly excluded. If not, the drugs were abandoned by Hodari and lawfully recovered by the police, and the evidence should have been admitted. (In addition, of course, Pertoso's seeing the rock of cocaine, at least if he recognized it as such, would provide reasonable suspicion for the unquestioned seizure that occurred when he tackled Hodari.)

California conceded that Officer Pertoso did not have the "reasonable suspicion" required to justify stopping Hodari and that it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police.

We have long understood that the Fourth Amendment's protection against "unreasonable . . . seizures" includes seizure of the person. . . . The present case . . . does not involve the application of any physical force; Hodari was untouched by Officer Pertoso at the time he discarded the cocaine. His defense relies instead upon the proposition that a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Hodari contends (and we accept as true for purposes of this decision) that Pertoso's pursuit qualified as a show of authority when Pertoso called upon Hodari to halt. The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.

Reasoning

The language of the Fourth Amendment, of course, cannot sustain respondent's contention. The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ("She seized the purse-snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!"



at a fleeing form that continues to flee. That is no seizure. . . . An arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority.

Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest without either touching or submission.

Respondent contends that his position is sustained by the so-called *Mendenhall* test, formulated by Justice Stewart’s opinion in *United States v. Mendenhall* and adopted by the Court in later cases. *Mendenhall* states a necessary, but not a sufficient, condition for seizure—or, more precisely, for seizure effected through a “show of authority.” *Mendenhall* establishes that the test of a show of authority is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement but whether the officer’s words and actions would have conveyed that to a reasonable person. Application of this objective test was the basis for our decision in the other case principally relied upon by respondent, *Chesternut*, where we concluded that the police cruiser’s slow following of the defendant did not convey the message that he was not free to disregard the police and go about his business. We did not address in *Chesternut*, however, the question whether, if the *Mendenhall* test was met—if the message that the defendant was not free to leave had been conveyed—a Fourth Amendment seizure would have occurred.

Holding

Assuming that Pertoso’s pursuit in the present case constituted a show of authority enjoining Hodari to halt, because Hodari did not comply with that injunction, he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied. We reverse the decision of the California Court of Appeal, and remand for further proceedings not inconsistent with this opinion.

Dissenting, Stevens, J., joined by Marshall, J.

The Court’s narrow construction of the word “seizure” represents a significant, and in my view, unfortunate, departure from prior case law construing the Fourth Amendment. Almost a quarter of a century ago, in two landmark cases—one broadening the protection of individual privacy, and the other broadening the powers of law enforcement officers—we rejected the method of Fourth Amendment analysis that today’s majority endorses. In particular, the Court now adopts a definition of “seizure” that is unfaithful to a long line

of Fourth Amendment cases. Even if the Court were defining seizure for the first time, which it is not, the definition that it chooses today is profoundly unwise. In its decision, the Court assumes, without so acknowledging, that a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment—as long as he misses his target.

For the purposes of decision, the following propositions are not in dispute. First, when Officer Pertoso began his pursuit of respondent, the officer did not have a lawful basis for either stopping or arresting respondent. Second, the officer’s chase amounted to a show of authority as soon as respondent saw the officer nearly upon him. Third, the act of discarding the rock of cocaine was the direct consequence of the show of authority. Fourth, as the Court correctly demonstrates, no arrest occurred until the officer tackled respondent. Thus, the Court is quite right in concluding that the abandonment of the rock was not the fruit of an arrest.

In *United States v. Mendenhall*, the Court “adhered to the view that a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained.” The Court looked to whether the citizen who is questioned “remains free to disregard the questions and walk away,” and if she is able to do so, then “there has been no intrusion upon that person’s liberty or privacy” that would require some “particularized and objective justification” under the Constitution. The test for a “seizure,” as formulated by the Court in *Mendenhall*, was whether, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” Examples of seizures include

the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.

The Court’s unwillingness today to adhere to the “reasonable person” standard, as formulated by Justice Stewart in *Mendenhall*, marks an unnecessary departure from Fourth Amendment case law.

The Court today draws the novel conclusion that even though no seizure can occur unless the *Mendenhall* reasonable person standard is met, the fact that the standard has been met does not necessarily mean that a seizure has occurred. *Mendenhall*

states a necessary, but not a sufficient condition for seizure. . . . Whatever else one may think of today’s decision, it unquestionably represents a departure from earlier Fourth Amendment case law. . . . Moreover, by narrowing the definition of the term



seizure . . . the Court has significantly limited the protection provided to the ordinary citizen by the Fourth Amendment.

Because the facts of this case are somewhat unusual, it is appropriate to note that the same issue would arise if the show of force took the form of a command to “freeze,” a warning shot, or the sound of sirens accompanied by a patrol car’s flashing lights. In any of these situations, there may be a significant time interval between the initiation of the officer’s show of force and the complete submission by the citizen. At least on the facts of this case, the Court concludes that the timing of the seizure is governed by the citizen’s reaction, rather than by the officer’s conduct. One consequence of this conclusion is that the point at which the interaction between citizen and police officer becomes a seizure occurs not when a reasonable citizen believes he or she is no longer free to go, but, rather, only after the officer exercises control over the citizen.

It is too early to know the consequences of the Court’s holding. If carried to its logical conclusion, it will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering

whatever privacy rights they may still have. . . . The Court today defines a seizure as commencing not with egregious police conduct, but rather with submission by the citizen. Thus, it both delays the point at which “the Fourth Amendment becomes relevant” to an encounter and limits the range of encounters that will come under the heading of “seizure.” Today’s qualification of the Fourth Amendment means that innocent citizens may remain “secure in their persons . . . against unreasonable searches and seizures” only at the discretion of the police.

Some sacrifice of freedom always accompanies an expansion in the executive’s unreviewable law enforcement powers. A court more sensitive to the purposes of the Fourth Amendment would insist on greater rewards to society before decreeing the sacrifice it makes today. Former Yale law professor Alexander Bickel presciently wrote that “many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest.” The Court’s immediate concern with containing criminal activity poses a substantial, though unintended, threat to values that are fundamental and enduring.

Questions for Discussion

1. What is the issue in *Hodari*? Explain the holding of the Supreme Court.
2. How does the holding in *Hodari* modify the rule in *Mendenhall*? Explain how *Hodari* requires both an objective and subjective test for a show of authority seizure. Would an action that constitutes a seizure under the *Hodari* standard also constitute a seizure under the *Mendenhall* standard?
3. Why do Justices Stevens and Marshall write that the judgment “poses a substantial, though unintended, threat to values that are fundamental and enduring”?
4. **Problems in policing.** Explain the two tests for a seizure under the Fourth Amendment. In those instances in which a police officer may lack reasonable suspicion or probable cause to stop an individual, describe how a police officer should conduct himself or herself when interacting with a suspect.

Cases and Comments

State Law. Connecticut, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, and Washington State do not follow *Hodari* and continue to adhere to the *Mendenhall* test. In 1998, in *State v. Young*, the Supreme Court of Washington held that the test for a seizure under Article I, Section 7, of the Washington Constitution is a “purely objective one, looking to the actions of the law enforcement officer, thus rejecting the test for seizure under the Fourth Amendment articulated by the United States Supreme Court in *California v. Hodari*.”

Deputy Sheriff Robert Carpenter was working in an area with a high incidence of narcotics activity. He stopped and exited his patrol car and approached

Kevin Young, whom he did not recognize as living in the neighborhood, and engaged in what the officer described as a “social contact.” Officer Carpenter returned to his patrol car and asked for a criminal records check, because he did not know Young. The check revealed that Young had prior narcotics arrests. Carpenter drove away while looking in his rear view mirror. Carpenter saw Young out in the middle of the street. The officer testified that “it appeared to me that he was looking to see if I was leaving the area.”

Carpenter drove out of Young’s view and then turned his vehicle around and headed back up toward Young. He spotted Young walking at a quick pace. Carpenter accelerated and shined his patrol vehicle



spotlight on Young when Young was three or four feet from a tree. Carpenter saw Young walk behind the tree, crouch down, and toss an object the size of a small package near the tree. Young continued walking away from the tree at a fast pace. After he moved a distance from the tree he “stopped running and began walking. Carpenter stopped his patrol car” close to the tree, exited the vehicle, and “asked Young to stop.” Then he retrieved the object Young had tossed, which was a charred can that contained a rock-like substance that appeared to be crack cocaine. Carpenter later testified he believed that Young was trying to “dispose of some type of contraband, narcotics or something, that he didn’t want me to find on his possession at the time, and I believed that his actions were suspicious enough for me to check what that was.”

Young was arrested and charged with the unlawful manufacture of a controlled substance. The evidence was suppressed. The Washington Supreme Court held that it would continue to follow *Mendenhall* rather than *Hodari* on the grounds that Article I, Section 7 of the Washington Constitution establishes a high standard for the protection of the privacy of individual citizens. The court held that the focus should be on the conduct of the police rather than on the state of mind and reaction of the citizen to the police conduct. An objective approach that focuses on police conduct

provides law enforcement with definite standards to determine whether their acts constitute a Fourth Amendment seizure. The Washington Supreme Court applied the *Mendenhall* test and held that Carpenter’s shining his spotlight did not constitute the required level of intrusiveness to qualify as a seizure. Carpenter did not activate his siren or emergency lights, he did not draw his weapon, and his squad car did not come screeching to a halt near Young. Shining the light only revealed what was already in plain view.

The spotlight did not amount to such a show of authority a reasonable person would have believed he or she was not free to leave, not free . . . to keep on walking or continue with whatever activity he or she was then engaged in, until some positive command from Carpenter issued.

Judge Alexander dissented from the judgment of the Washington Supreme Court and analogized shining the spotlight on Young under these circumstances to flashing the vehicle’s police lights. The judge expressed concern that placing the bar for a seizure “so high” would permit the police to stop and question citizens without violating the Fourth Amendment. See *State v. Young*, 957 P.2d 681 (Wash. 1998).

You Decide



3.4 Four Buffalo, New York, police officers were patrolling in an unmarked car on June 11, 2002, in search of Kenneth Foster-Brown, who was wanted for dealing drugs. All four officers

had encountered Foster-Brown in the past. He was described as an African American male who was five feet eight inches tall and who weighed 145 pounds. Defendant Swindle also is an African American and is six feet one inch tall and at the time weighed 215 pounds.

The officers observed a black Pontiac Bonneville, a type of car that Foster-Brown had previously been seen “near,” but had never been known to drive. The officers observed the automobile halting in front of a known drug house that Foster-Brown had frequented in the past. The officers watched an African American male exit the Bonneville, enter

the house, leave a short time later, and drive away. The officers were uncertain whether the driver was Foster-Brown.

In fact, the man in the Bonneville was Swindle. The officers followed in their car and, within a minute, activated their police lights and ordered Swindle to pull over. Swindle disregarded the order to stop and kept driving. While being pursued, Swindle violated two traffic laws by crossing a double yellow lane divider and driving the wrong way on a one-way street. Swindle also threw a plastic bag out of the car window. The bag was found to contain 33 smaller bags of crack cocaine. Swindle eventually pulled over and then fled on foot. The police apprehended him and placed him under arrest. He was charged with unlawful possession of a controlled substance.

At what point was Swindle seized? Why is it significant when Swindle was seized? See *United States v. Swindle*, 407 F.3d 562 (2nd Cir. 2005).

You can learn what the court decided by referring to the Student Study Site, www.sagepub.com/lippmancp2e.

**You Decide**

3.5 Police officers Nowell and Ashe responded to dispatcher's report that an informant had observed an individual with a gun at 1009 West Seventh Street in Wilmington, Delaware. The officers

saw three women and two men on the porch at the address on West Seventh Street. Officer Ashe approached and positioned herself 8 to 10 feet from the residence while Officer Nowell approached the home. Ashe took the precaution of ordering the individuals on the porch to place their hands over their heads. They all complied, with the exception of Waterman who kept his hands in his jacket pocket. Ashe and Nowell drew their weapons and repeatedly ordered the defendant to put his hands in the air. Waterman did not

respond and unsuccessfully tried to open the front door. The door suddenly opened and Waterman entered the residence.

The police followed Waterman into the residence and seized a firearm and narcotics. A federal district court held that the police officers did not have reasonable suspicion to seize the five individuals on the porch and that the seizure of the contraband in the home had resulted from an unlawful search and seizure.

The Third Circuit Court of Appeals was asked to decide whether Waterman had been seized by the police officers. How should the Court of Appeals rule based on the precedent in *California v. Hodari*? Would the firearm and narcotics be admissible if Waterman had not been seized on the porch? See *United States v. Waterman*, 569 F.3d 144 (3rd Cir. 2009).

You can learn what the court decided by referring to the Student Study Site, www.sagepub.com/lippmanpc2e.

CHAPTER SUMMARY

The Fourth Amendment was intended to protect individuals against the type of dragnet searches and seizures that were carried out by British colonial authorities through the use of general warrants and writs of assistance. The Fourth Amendment effectively abolishes general warrants and writs of assistance by prohibiting unreasonable searches and seizures and by providing that no warrant shall issue but upon probable cause, particularly describing the place to be searched and the person or things to be seized. The Supreme Court, while expressing a preference for warrants, has recognized that it is reasonable in certain limited circumstances for the police to conduct warrantless searches.

The Supreme Court initially adopted a property rights or trespassory approach to the Fourth Amendment. This protected individuals against physical intrusions or trespasses into their persons, houses, papers, and effects. In 1967, in *Katz v. United States*, the Supreme Court rejected a property rights or trespassory approach and adopted a privacy test for application of the Fourth Amendment. Justice John Harlan in his important concurring opinion in *Katz* established the test for an expectation of privacy. The question is whether an individual exhibits a personal (subjective) expectation of privacy and whether society (objectively) recognizes this expectation as reasonable. An individual is considered to lack a reasonable expectation of privacy in those instances in which he or she turns information over to a third party or where an object or area is accessible to the public.

Commentators question whether the privacy-based approach has increased Fourth Amendment protections. For example, an individual "assumes the risk" that conversations with a government informant in and outside of the home will be overheard or recorded or transmitted to law enforcement authorities. Plain view permits the police to seize items in open fields and to conduct aerial surveillance of curtilage. There also is no expectation of privacy in public areas, in commercial businesses open to the public, or in abandoned objects and trash.

The Supreme Court did draw a firm line of protection at the home in *Kyllo v. United States*. The Court held that the government may not employ heat-sensing technology to obtain information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into the dwelling.

Fourth Amendment seizures of individuals must be based on factual grounds that constitute either probable cause or reasonable suspicion. A seizure may be accomplished by a physical restraint or by a show of authority. The show of authority must lead a reasonable person to believe that he or she is not free either to leave or to refuse to cooperate, and the individual must actually submit to police authority. The Supreme Court has recognized that not every interaction between the police and citizens constitutes a seizure. The police may engage in informal contacts or encounters without being required to meet the probable cause or reasonable suspicion



standard. This provides the police with the flexibility to engage in criminal investigations without being required to satisfy the probable cause or reasonable suspicion requirements of the Fourth Amendment. The line between an encounter and a seizure at times may be difficult to determine. The police run the risk that an encounter will be viewed by a court as constituting a seizure and that any evidence that is uncovered will be excluded on the grounds that the police unreasonably detained a suspect.

In summary, in this chapter we reviewed the requirements for a Fourth Amendment search and a Fourth Amendment seizure. The Supreme Court has struck a balance in Fourth Amendment searches and seizures between the need for the police to detect and investigate crime and individuals' expectation of privacy. Individuals have full Fourth Amendment protection in those areas, such as the home, that have an expectation of privacy that society views as reasonable. On the other hand, areas and objects in plain view do not enjoy an expectation of privacy, and the police are not required to obtain a warrant. These areas generally are accessible to the public, or in the case of information or objects, they have been turned over to a third party. The Supreme Court requires the police to justify seizures on either probable cause or reasonable suspicion. The police, however, may engage in encounters and may question suspects so long as the suspect feels free to leave or to decline to cooperate with the police.

In the next chapters, we discuss the requirements for a reasonable search under the Fourth Amendment. Chapter 4 covers reasonable suspicion "stops and frisks," and in the following three chapters, we explore probable cause seizures and searches and "special needs" searches. We complete our coverage of the Fourth Amendment in Chapter 10 with a discussion of the exclusionary rule.

CHAPTER REVIEW QUESTIONS

1. How did the use of general warrants and writs of assistance by British colonial authorities influence the drafting of the text of the Fourth Amendment?
2. Distinguish the property rights or trespassory approach to the Fourth Amendment from the expectation of privacy approach. Which, in theory, provides individuals with greater protection?
3. What is the legal test for the expectation of privacy established in *Katz v. United States*?
4. Define plain view "searches" and seizures. Describe the relationship between plain view and expectation of privacy.
5. Discuss the expectation of privacy in relation to pen registers, the electronic monitoring of conversations, and trash.
6. Distinguish open fields from curtilage. Why is this significant?
7. What is the importance of the Supreme Court judgment in *Kyllo v. United States*?
8. Describe the difference between physical seizures and show of authority seizures.
9. How do seizures differ from encounters? Why is this distinction significant?
10. What is the holding in *Hodari*? How does this modify the test in *Mendenhall*?

LEGAL TERMINOLOGY

abandoned property
curtilage
encounters
expectation of privacy
general warrants

open fields
physical seizure
plain view
probable cause
property rights approach

search
seizure
show of authority seizure
trespassory approach
writs of assistance



CRIMINAL PROCEDURE ON THE WEB

Visit the Student Study Site at www.sagepub.com/lippmanpcp2e to assist you in completing the Criminal Procedure on the Web exercises.

1. Read about technology and personal privacy and civil liberties.
2. Look at some recent developments and training tips for police dogs.
3. See what the FBI Law Enforcement Bulletin has to say about *California v. Greenwood*.
4. Read about police use of informants.

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