

**TEST YOUR KNOWLEDGE:
TRUE/FALSE**

1. The Fourth Amendment to the Constitution was adopted to ensure that the newly established American government continued to follow the search-and-seizure policies of the British colonial authorities.
2. *Katz v. United States* is important in the development of the Fourth Amendment because the decision established that because words are not physical objects, law enforcement authorities do not require a search warrant to listen to phone conversations.
3. There is no constitutionally protected expectation of privacy in a criminal suspect's conversations with an informant or undercover officer even when conducted in the home.
4. The police may seize an object that is in plain view without a search warrant.
5. The police in most instances require a warrant to search the area immediately surrounding the home as well as to search land distant from the home devoted to raising crops.
6. Individuals have less protection from aerial surveillance of their property than from physical searches of their property.

Did the Federal Agents Require a Search Warrant to Scan the Exterior of Kylo's Home to Determine Whether There Was Probable Cause to Believe That He Was Growing Marijuana?

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 . . . Danny Kylo, . . . 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 . . . 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 scan of Kylo'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. . . .

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 links 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)?

TEST YOUR KNOWLEDGE: TRUE/FALSE

7. The police do not require a warrant to search abandoned property.
8. An individual does not have a constitutional right to be free from warrantless surveillance of his or her movements on the street.
9. A Fourth Amendment seizure of an individual by a police officer occurs when the police officer orders the individual to “halt” even if the individual flees from the officer.

Check your answers on page 90.



Master the content at
[edge.sagepub.com/
lippmanp4e](http://edge.sagepub.com/lippmanp4e)

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).

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 eight hundred 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]).

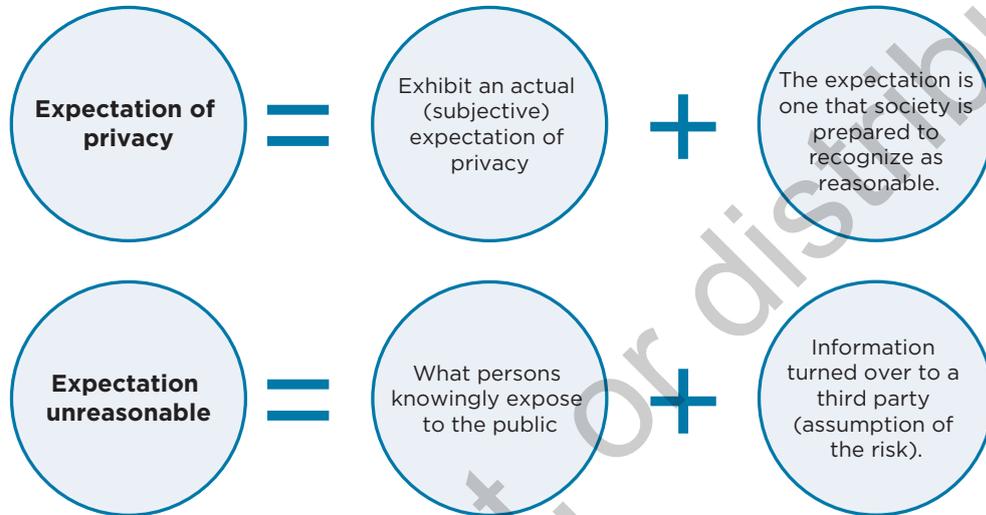
Justice John Marshall Harlan in his concurring opinion in *Katz* established a two-part test for a Fourth Amendment expectation of privacy that has been followed by the U.S. Supreme Court (389 U.S. at 353).

- **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?

Legal Equation: 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.

(Continued)

(Continued)

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.

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 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. . . .

In interpreting the Bill of Rights . . . 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.

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of “persons, houses, papers, and effects.” . . . Certainly the framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court . . . omnipotent lawmaking authority. . . . 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

(Continued)

(Continued)

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. 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).

3. E-mail. The Sixth Circuit Court of Appeals in 2010 in *United States v. Warshak* relied on *Katz*, *Smith*, and *Miller* in deciding whether Steven Warshak possessed an expectation of privacy in the content of his personal e-mail account. Warshak was convicted of various charges stemming from a scheme to defraud the customers of his company, Berkeley Premium Nutraceuticals, Inc.

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 would 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.3d 521 (6th Cir. 2008). Do you agree with the decision in *Warshak*?

The U.S. Supreme Court upheld the reasonableness of a police department’s noninvestigatory search of an officer’s texting records for the work-related purpose of ensuring that the city was not paying for extensive personal communications in *Ontario v. Quon*, 560 U.S. 746 (2010).

YOU DECIDE 3.1

Plainclothes Los Angeles Police Officer Richard Aldahl 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 Aldahl was able to position himself in such a fashion that he was able to 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 Aldahl 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, edge.sagepub.com/lippmanpc4e.

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 [1966])

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).

The Montana Supreme Court relied on the Montana Constitution in holding that an informant’s recording of a conversation of a drug transaction with a suspect in the individual’s home violated the individual’s expectation of privacy. The judges stated that while we are “willing to risk that a person with whom they are conversing in their home or other private setting may repeat that conversation to a third party, we are firmly persuaded that they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge” (*State v. Goetz*, 2008 Mont. 296).

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.

You can find *United States v. White* on the Student Study Site, edge.sagepub.com/lippman4e.

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.

YOU DECIDE 3.2

In *United States v. Jaimez*, Jaimez consented to a search of his home by the police for narcotics and weapons. A federal magistrate held that the cellular phones and packaged cash that were seized were immediately apparent and were properly admitted into evidence under the plain view doctrine. Jaimez appealed the magistrate’s decision to admit into evidence six spiral-bound notebooks found in the bedroom closet. The notebooks had “normal covers” without any writing on the cover. Deputy Sheriff Ashley Pope, based on his three years of investigating narcotics cases, believed that the notebooks contained lists of individuals involved in drug transactions who owed Jaimez money. On opening and reading the notebooks, Pope’s suspicions were confirmed when he found that the notebooks contained “owe-me lists.” Was the seizure search of the notebooks a valid plain view search? See *United States v. Jaimez*, 15 F. Supp. 3d 1338 (N.D. Ga. 2013).

You can learn what the court decided by referring to the Student Study Site, edge.sagepub.com/lippmanpc4e.

- **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 AND CURTILAGE

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 more than 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 *United States v. Dunn*, the Supreme Court listed four factors that are to be considered (*United States v. Dunn*, 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 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?

In 2014, the U.S. Supreme Court in *Florida v. Jardines* affirmed the high expectation of privacy accorded to curtilage. Local police in *Jardines* accompanied by a drug-sniffing dog entered Joelis Jardines's front yard to investigate a tip that marijuana was being grown in his home. As the police approached Jardines's front porch, the dog sensed the odor of narcotics. The police obtained a search warrant and subsequently seized marijuana plants inside the home.

Justice Antonin Scalia held that the police had unconstitutionally entered the curtilage of Jardines's home, which as an extension of the dwelling carried a high expectation of privacy. The police like any other citizen enjoy an implied invitation or license to knock on the front door for the purpose of talking to the residents. This invitation does not extend to law enforcement officers who enter the curtilage with a drug-sniffing dog for the purposes of detecting contraband. Justice Scalia held that the police had the "objectiv[e] . . . purpose to conduct a search" and the fact that the officers "learned what they learned only by physically intruding on Jardines'[s] property to gather evidence is enough to establish that a search occurred . . . which is not what anyone would think [they] had a license to do." In summary, the entry of the police and a police dog into the curtilage of a home to undertake a scent search for incriminating evidence constitutes an unreasonable search, absent a warrant (*Florida v. Jardines*, 569 U.S.1 [2013]).

You can find *Oliver v. United States* and *Florida v. Jardines* on the Student Study Site, edge.sagepub.com/lippmancp4e.

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 one thousand 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 one thousand 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 four hundred 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 two-thousand-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]). In *State v. Davis*, a New Mexico appellate court held that the New Mexico Constitution requires that the police obtain a search warrant founded on probable cause to conduct aerial surveillance of the curtilage (*State v. Davis*, 321 P.3d 955 [N.M. App. 2014]).

Virtually every state either has passed or is in the process of adopting a law restricting the use of drones by law enforcement and requiring that the police obtain a warrant founded on probable cause authorizing drone surveillance, with the exception of emergency situations.

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.

You can find *Florida v. Riley* on the Student Study Site, edge.sagepub.com/lippman4e.

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.

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.

YOU DECIDE 3.3

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 agents seized garbage bags from the front of Scott’s home. They discovered various shredded documents. The agents 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, edge.sagepub.com/lippmancp4e.

TABLE 3.1
Expectations of Privacy and Police Fourth Amendment Searches

Expectation of Privacy/Fourth Amendment Search	No Expectation of Privacy/No Fourth Amendment Search
Electronic surveillance of a phone conversation	Eavesdropping on a conversation
Opening luggage	Entry onto farmland
Entering a home	Aerial surveillance of a backyard
Opening and reading a private diary	Examination of trash in a Dumpster

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 [1981]), 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.

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.”

Greenwood deserves no less protection just because he 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 non-governmental 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. . . . 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

(Continued)

(Continued)

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?
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?
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
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 have interpreted their state constitutions to require a warrant based on probable cause to search trash. In *State v. Goss*, 834 A.2d

316 (N.H. 1984), a police detective observed what appeared to be a “grow light” for growing marijuana in the window of Goss’s house that appeared to be concealed by “white material.” The detective and another officer on two occasions

seized two black plastic bags left in the driveway for normal trash pickup. On each occasion, the officers found a wire scraper on which there was charred material that tested positive for marijuana. The officers obtained a search warrant and inside Goss's home seized marijuana, a marijuana cigarette, and three pipes, and Goss was convicted of marijuana possession. The New Hampshire Supreme Court held that under the New Hampshire Constitution, Goss possessed an expectation of privacy in the trash as indicated by his placing the trash in sealed garbage bags. Society, according to the New Hampshire court, viewed this expectation as reasonable because individuals recognize that most intimate aspects of their lives often are contained in trash that most people would not want to be exposed to the public.

The fact that individuals or animals may gain access to the trash does not negate privacy any more than the fact that a burglar may enter a house eliminates the expectation of privacy in a dwelling. Transmitting garbage to a trash disposal company does not indicate that an individual anticipates that the garbage will be searched by the police. The expectation is that a trash disposal company will intermingle the trash with other garbage collected by the company and dispose of the garbage in accordance with its contractual obligations.

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).

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"

YOU DECIDE 3.4

County Sheriff Joel Wagner met with a confidential informant about drug dealing at 6902 Stockbridge Drive, Apartment 204, in Madison, Wisconsin. Wagner talked to the property manager and learned that Apartment 204 was leased to Ruthie Whitaker. Wagner later obtained consent from the property manager authorizing a K9 search of the building. Wagner and Deputy Jay O'Neil accompanied their K9 partner, Hunter, to the second floor of the apartment building and entered the locked hallway, where there were six to eight apartments. The K9, Hunter, on the first "quick walk through" of the hallway showed "extreme interest" in Apartment 204. The second time through the hallway, Hunter alerted Wagner to the presence of narcotics in the apartment. After obtaining a search warrant, the officers entered and seized cocaine, heroin, and marijuana in Apartment 204. Defendant Ruthie Whitaker filed a motion to suppress the narcotics, which was denied. She appealed based on the fact that the warrantless K9 sniff of her apartment was in violation of her right to privacy under the Fourth Amendment. See *State v. Whitaker*, 820 F.3d 849 (7th Cir. 2016).

You can learn what the court decided by referring to the Student Study Site, edge.sagepub.com/lippmancp4e.

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 ensure 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

(Continued)

(Continued)

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 v. United States*, for example, we made clear that any physical invasion of the structure of the home, “by even a fraction of an inch,” was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, all details are intimate details, because the entire area is held safe from prying Government eyes. 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.

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, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer. Nor, in my view, does such observation become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.

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) 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.’”

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 from outsiders, to make sure that the surrounding area is well insulated. 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.

Instead of concentrating on the rather mundane issue that is actually presented by the case. . . . 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*, *Riley*, and *Dow* with the decision in *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

1. 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 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 twenty-eight-day surveillance of his movements.

Justice Scalia writing in a 5–4 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.

(Continued)

(Continued)

Justice Samuel Alito in a four-judge concurring opinion 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*, 565 U.S. 400 [2012]).

2. GPS Monitoring of Individuals. Torrey Dale Grady was convicted of a second-degree sexual offense in 1997 and of taking indecent liberties with a child in 2006. Following his release from prison, a hearing was conducted before a North Carolina superior court. The court ordered Grady as a two-time sex offender to wear a satellite-based monitoring (SBM) tracking device ankle bracelet at all times for the rest of his life. The U.S. Supreme Court held that “[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area . . . a [Fourth Amendment] search has undoubtedly occurred.” The case was remanded for the North Carolina court to determine the reasonableness of the search based on the “totality of

the circumstances.” What is your view? See *Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct. 1368 (2015).

3. Cell-site Simulators. Several federal and state courts have held and state legislatures have passed laws that law enforcement are required to obtain a warrant founded on probable cause to use a cell-site simulator (“Stingray”). The portable simulator is programmed to the unique identifier, a MIN or IMSI number, identified with a target phone. Once the cell-site simulator locates the signal, the simulator begins to report the location of the phone. These devices also may be used to monitor an individual’s movements. Courts have taken various approaches to analyzing the constitutionality of warrantless cell-site simulator searches. The District of Columbia Court of Appeals, in *Prince Jones v. United States*, reasoned that the use of a Stingray device without judicial oversight is an unreasonable search that places an individual in the “difficult position” of either “accepting the risk that at any moment his or her cell phone could be converted into tracking device” to determine the individual’s location and diminish his or legitimate expectation of privacy or forgoing the “necessary” use of a cell phone. The court of appeals concluded that the government should not be authorized to engage in the warrantless exploitation of a “vulnerability” in the operation of a cell phone, which is a necessity of modern life, to diminish individuals’ legitimate expectation of privacy. See *Prince Jones v. United States*, No 15-CF-322 (D.C. Ct. of Appeal, 2017).

You can find *United States v. Jones* on the Student Study Site, edge.sagepub.com/lippmancp4e.

TECHNOLOGY AND CELL-SITE LOCATION INFORMATION

In *Carpenter v. United States*, the police obtained a court order under the Stored Communications Act, 18 U.S.C. §2703(d), to obtain the cell phone records for Timothy Carpenter and for several other suspects in a series of robberies. The Act permits the Government to obtain a court order (**subpoena duces tecum**) to compel the disclosure of certain telecommunications records when it “offers specific and articulable facts showing that there are reasonable grounds to believe” that the records sought “are relevant and material to an ongoing criminal investigation.” Keep in mind that the Stored Communications Act authorizes the government to obtain records based on reasonable grounds rather than the more demanding requirement of probable cause, which is the standard for a criminal warrant discussed in Chapter 6.

A Federal Magistrate Judge issued two orders directing Carpenter’s wireless carriers to disclose “cell/site sector [information] for [Carpenter’s] telephone at call origination and at call termination for incoming and outgoing calls” during the four-month period when the string of robberies occurred. The Government obtained 12,898 location points cataloging Carpenter’s movements—an average of 101 data points per day. Carpenter, on the basis of this data and other evidence, was convicted on eleven criminal counts and sentenced to 100 years in prison. Carpenter appealed his conviction and argued that the government had unconstitutionally obtained his cell phone records.

Chief Justice John Roberts, writing in a 5–4 decision, held that Carpenter possessed an expectation of privacy under the Fourth Amendment in his cell-site location information (CSLI). The Government accordingly is required to meet a probable cause warrant standard to “access[] historical cell phone records [from a private wireless carrier] that provide a comprehensive chronicle of the user’s past movements.” Justice Roberts in his majority decision reasoned that individuals retain an expectation of privacy in CSLI because the information is “unique” in the detail, nature, and amount of information that is revealed. This information cannot be said to be voluntarily turned over to a cell phone provider because individuals are subjected to continuous monitoring without any affirmative act on their part.

Justice Roberts concluded that “[i]n light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government’s acquisition of the cell-site records here was a search under that Amendment.”

As you read *Carpenter v. United States*, consider how the Court’s decision is influenced by the “seismic shift” in development of technology. Do you agree with the majority decision in *Carpenter v. United States*?

Were the police required to obtain a search warrant to seize Carpenter’s cell-site location information?

CARPENTER V. UNITED STATES,
585, U.S. __ (2018), ROBERTS, C.J.

Issue

This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user’s past movements.

Facts

There are 396 million cell phone service accounts in the United States—for a nation of 326 million people. Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called “cell sites.” Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings. Cell sites typically have several directional antennas that divide the covered area into sectors.

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone’s features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater

the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

Wireless carriers collect and store CSLI for their own business purposes, including finding weak spots in their networks and applying “roaming” charges when another carrier routes data through their cell sites. In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years, phone companies have also collected location information from the transmission of text messages and routine data connections. Accordingly, modern cell phones generate increasingly vast amounts of increasingly precise CSLI.

In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and T-Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified fifteen accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies.

(Continued)

(Continued)

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records when it “offers specific and articulable facts showing that there are reasonable grounds to believe” that the records sought “are relevant and material to an ongoing criminal investigation.” 18 U.S.C. §2703(d). Federal Magistrate Judges issued two orders directing Carpenter’s wireless carriers—MetroPCS and Sprint—to disclose “cell/site sector [information] for [Carpenter’s] telephone at call origination and at call termination for incoming and outgoing calls” during the four-month period when the string of robberies occurred. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter’s phone was “roaming” in northeastern Ohio. Altogether, the Government obtained 12,898 location points cataloging Carpenter’s movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government’s seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion.

At trial, seven of Carpenter’s confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter’s phone near four of the charged robberies. In the Government’s view, the location records clinched the case: They confirmed that Carpenter was “right where the . . . robbery was at the exact time of the robbery.” Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. The court held that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. Given that cell phone users voluntarily convey cell-site data to their carriers as “a means of establishing communication,” the court concluded that the resulting

business records are not entitled to Fourth Amendment protection.

Reasoning

For much of our history, Fourth Amendment search doctrine was “tied to common-law trespass” and focused on whether the Government “obtains information by physically intruding on a constitutionally protected area.” More recently . . . [i]n *Katz v. United States*, we established that “the Fourth Amendment protects people, not places,” and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual “seeks to preserve something as private,” and his expectation of privacy is “one that society is prepared to recognize as reasonable,” we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.

Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings “of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted.” On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure “the privacies of life” against “arbitrary power.” Second, and relatedly, that a central aim of the Framers was “to place obstacles in the way of a too permeating police surveillance.”

We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools. As technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to “assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” For that reason, we rejected in *Kyllo* a “mechanical interpretation” of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant’s home was a search. Because any other conclusion would leave homeowners “at the mercy of advancing technology,” we determined that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore what was happening within the home.

Likewise in *Riley*, the Court recognized the “immense storage capacity” of modern cell phones in holding that police officers must generally obtain a warrant before searching the contents of a phone. We explained that while the general rule allowing warrantless searches incident to arrest “strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to” the vast store of sensitive information on a cell phone (discussed in Chapter 6).

The case before us involves the Government's acquisition of wireless carrier cell-site records revealing the location of Carpenter's cell phone whenever it made or received calls. This sort of digital data—personal location information maintained by a third party—does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake.

The first set of cases addresses a person's expectation of privacy in his physical location and movements. In *United States v. Knotts*, we considered the Government's use of a "beeper" to aid in tracking a vehicle through traffic. Police officers in that case planted a beeper in a container of chloroform before it was purchased by one of Knotts's co-conspirators. The officers (with intermittent aerial assistance) then followed the automobile carrying the container from Minneapolis to Knotts's cabin in Wisconsin, relying on the beeper's signal to help keep the vehicle in view. The Court concluded that the "augment[ed]" visual surveillance did not constitute a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Since the movements of the vehicle and its final destination had been "voluntarily conveyed to anyone who wanted to look," Knotts could not assert a privacy interest in the information obtained.

This Court in *Knotts*, however, was careful to distinguish between the rudimentary tracking facilitated by the beeper and more sweeping modes of surveillance. The Court emphasized the "limited use which the government made of the signals from this particular beeper" during a discrete "automotive journey." Significantly, the Court reserved the question whether "different constitutional principles may be applicable" if "twenty-four-hour surveillance of any citizen of this country [were] possible."

Three decades later, the Court considered more sophisticated surveillance of the sort envisioned in *Knotts* and found that different principles did indeed apply. In *United States v. Jones*, FBI agents installed a GPS tracking device on Jones's vehicle and remotely monitored the vehicle's movements for 28 days. . . . [F]ive Justices agreed that related privacy concerns would be raised by, for example, "surreptitiously activating a stolen vehicle detection system" in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone. Since GPS monitoring of a vehicle tracks "every movement" a person makes in that vehicle, the concurring Justices concluded that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"—regardless of whether those movements were disclosed to the public at large.

In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he

shares with others. We have previously held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." That remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose." As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.

This **third-party doctrine** largely traces its roots to *Miller*. While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a Fourth Amendment challenge to the records collection. For one, Miller could "assert neither ownership nor possession" of the documents; they were "business records of the banks." For another, the nature of those records confirmed Miller's limited expectation of privacy, because the checks were "not confidential communications but negotiable instruments to be used in commercial transactions," and the bank statements contained information "exposed to [bank] employees in the ordinary course of business." The Court thus concluded that Miller had "take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government."

Three years later, *Smith* applied the same principles in the context of information conveyed to a telephone company. The Court ruled that the Government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search. Noting the pen register's "limited capabilities," the Court "doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial." Telephone subscribers know, after all, that the numbers are used by the telephone company "for a variety of legitimate business purposes," including routing calls. And at any rate, the Court explained, such an expectation "is not one that society is prepared to recognize as reasonable." When Smith placed a call, he "voluntarily conveyed" the dialed numbers to the phone company by "expos[ing] that information to its equipment in the ordinary course of business." Once again, we held that the defendant "assumed the risk" that the company's records "would be divulged to police."

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.

At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates

(Continued)

(Continued)

the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.

We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.

A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." For that reason, "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."

Allowing government access to cell-site records contravenes that expectation. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." These location records "hold for many Americans the 'privacies of life.'" And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.

In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts*

or the car in *Jones*, a cell phone—almost a "feature of human anatomy"—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. The data is that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower." Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this new found tracking capacity runs against everyone. Unlike with the GPS device in *Jones*, police need not even know in advance whether they want to follow a particular individual, or when.

The Government and Justice Kennedy contend, however, that the collection of CSLI should be permitted because the data is less precise than GPS information. Not to worry, they maintain, because the location records did "not on their own suffice to place [Carpenter] at the crime scene"; they placed him within a wedge-shaped sector ranging from one-eighth to four square miles. Yet . . . [f]rom the 127 days of location data it received, the Government could, in combination with other information, deduce a detailed log of Carpenter's movements, including when he was at the site of the robberies. And the Government thought the CSLI accurate enough to highlight it during the closing argument of his trial.

At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development." While the records in this case reflect the state of technology at the start of the decade, the accuracy of CSLI is rapidly approaching GPS-level precision. As the number of cell sites has proliferated, the geographic area covered by each cell sector has shrunk, particularly in urban areas. In addition, with new technology measuring the time and angle of signals hitting their towers, wireless carriers already have the capability to pinpoint a phone's location within 50 meters.

Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements.

The Government's primary contention to the contrary is that the third-party doctrine governs this case. In its view, cell-site records are fair game because they are "business records" created and maintained by the wireless carriers. The Government (along with Justice Kennedy) recognizes that this case features new technology, but asserts that the legal question nonetheless turns on a garden-variety request for information from a third-party witness.

The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Smith* and *Miller*, after all, did not rely solely on the act of sharing. Instead, they considered "the nature of the particular documents sought" to determine whether "there is a legitimate 'expectation of privacy' concerning their contents." *Smith* pointed out the limited capabilities of a pen register; as explained in *Riley*, telephone call logs reveal little in the way of "identifying information." *Miller* likewise noted that checks were "not confidential communications but negotiable instruments to be used in commercial transactions." In mechanically applying the third-party doctrine to this case, the Government fails to appreciate that there are no comparable limitations on the revealing nature of CSLI.

The Court has in fact already shown special solicitude for location information in the third-party context. In *Knotts*, the Court relied on *Smith* to hold that an individual

has no reasonable expectation of privacy in public movements that he "voluntarily conveyed to anyone who wanted to look." But when confronted with more pervasive tracking, five Justices agreed in *Jones* that longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search. Justice Gorsuch wonders why "someone's location when using a phone" is sensitive, and Justice Kennedy assumes that a person's discrete movements "are not particularly private." Yet this case is not about "using a phone" or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*.

Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume the risk" of turning over a comprehensive dossier of his physical movements.

We therefore decline to extend *Smith* and *Miller* to the collection of CSLI. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection. The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

Holding

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes

(Continued)

(Continued)

and radios, the Court must tread carefully in such cases, to ensure that we do not “embarrass the future.” Having found that the acquisition of Carpenter’s CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. Although the “ultimate measure of the constitutionality of a governmental search is ‘reasonableness,’” our cases establish that warrantless searches are typically unreasonable where “a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.” Thus, “[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.”

The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show “reasonable grounds” for believing that the records were “relevant and material to an ongoing investigation.” That showing falls well short of the probable cause required for a warrant. The Court usually requires “some quantum of individualized suspicion” before a search or seizure may take place. Under the standard in the Stored Communications Act, however, law enforcement need only show that the cell-site evidence might be pertinent to an ongoing investigation—a “gigantic” departure from the probable cause rule, as the Government explained below. Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber’s CSLI, the Government’s obligation is a familiar one—get a warrant.

Further, even though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual’s cell-site records under certain circumstances. “One well-recognized exception applies when ‘the exigencies of the situation’ make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.

As Justice Brandeis explained in his famous dissent, the Court is obligated—as “[s]ubtle and more far-reaching means of invading privacy have become available to the Government”—to ensure that the “progress of science” does not erode Fourth Amendment protections. Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, “after consulting the lessons of history,” drafted the Fourth Amendment to prevent.

We decline to grant the state unrestricted access to a wireless carrier’s database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government’s acquisition of the cell-site records here was a search under that Amendment.

In a footnote, Justice Roberts states that the Court does not decide whether the decision would control a request for documents that covered a period fewer than seven days.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Dissenting, Kennedy, J., joined by Thomas, J. and Alito, J.

Cell-site records can serve an important investigative function, as the facts of this case demonstrate. Petitioner, Timothy Carpenter, along with a rotating group of accomplices, robbed at least six RadioShack and T-Mobile stores at gunpoint over a 2-year period. Five of those robberies occurred in the Detroit area, each crime at least four miles from the last. . . . The Government . . . faced a daunting task. Even if it could identify and apprehend the suspects, still it had to link each suspect in this changing criminal gang to specific robberies in order to bring charges and convict. And, of course, it was urgent that the Government take all necessary steps to stop the ongoing and dangerous crime spree.

Cell-site records were uniquely suited to this task. The geographic dispersion of the robberies meant that, if Carpenter’s cell phone were within even a dozen to several hundred city blocks of one or more of the stores when the different robberies occurred, there would be powerful circumstantial evidence of his participation; and this would be especially so if his cell phone usually was not located in the sectors near the stores except during the robbery times.

To obtain these records, the Government applied to federal magistrate judges for disclosure orders pursuant to §2703(d) of the Stored Communications Act. That Act authorizes a magistrate judge to issue an order requiring disclosure of cell-site records if the Government demonstrates “specific and articulable facts showing that there are reasonable grounds to believe” the records “are relevant and material to an ongoing criminal investigation.”

[T]he Stored Communications Act requires a neutral judicial officer to confirm in each case that the Government has “reasonable grounds to believe” the cell-site records “are relevant and material to an ongoing criminal investigation.” This judicial check mitigates the Court’s concerns about “a too permeating police surveillance.”

From Carpenter’s primary service provider, MetroPCS, the Government obtained records from between December 2010 and April 2011, based on its understanding that nine robberies had occurred in that time frame. The Government also requested seven days of cell-site records from Sprint, spanning the time around the robbery in Warren, Ohio. It obtained two days of records. These records confirmed that Carpenter’s cell phone was in the general vicinity of four of the nine robberies, including the one in Ohio, at the times those robberies occurred.

Here the only question necessary to decide is whether the Government searched anything of Carpenter’s when it used compulsory process to obtain cell-site records from Carpenter’s cell phone service providers. This Court’s decisions in *Miller* and *Smith* dictate that the answer is no . . . *Miller* and *Smith* hold that individuals lack any protected Fourth Amendment interests in records that are possessed, owned, and controlled only by a third party. . . . The records were the business entities’ records, plain and simple. The defendants had no reason to believe the records were owned or controlled by them and so could not assert a reasonable expectation of privacy in the records.

A person’s movements are not particularly private. As the Court recognized in *Knotts*, when the defendant there “traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination.” Today expectations of privacy in one’s location are, if anything, even less reasonable than when the Court decided *Knotts* over 30 years ago. Millions of Americans choose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media.

[C]ell-site records disclose a person’s location only in a general area. The records at issue here, for example,

revealed Carpenter’s location within an area covering between around a dozen and several hundred city blocks. “Areas of this scale might encompass bridal stores and Bass Pro Shops, gay bars and straight ones, a Methodist church and the local mosque.” These records could not reveal where Carpenter lives and works, much less his “familial, political, professional, religious, and sexual associations.”

The location information revealed by cell-site records is imprecise, because an individual cell-site sector usually covers a large geographic area. The FBI agent who offered expert testimony about the cell-site records at issue here testified that a cell site in a city reaches between a half mile and two miles in all directions. That means a 60-degree sector covers between approximately one-eighth and two square miles (and a 120-degree sector twice that area). To put that in perspective, in urban areas cell-site records often would reveal the location of a cell phone user within an area covering between around a dozen and several hundred city blocks. In rural areas cell-site records can be up to 40 times more imprecise. By contrast, a Global Positioning System (GPS) can reveal an individual’s location within around 15 feet.

By contrast, financial records and telephone records do “revea[] . . . personal affairs, opinions, habits and associations.” What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records.

[T]he Court maintains, cell-site records are “unique” because they are “comprehensive” in their reach; allow for retrospective collection; are “easy, cheap, and efficient compared to traditional investigative tools”; and are not exposed to cell phone service providers in a meaningfully voluntary manner. But many other kinds of business records can be so described. Financial records are of vast scope. Banks and credit card companies keep a comprehensive account of almost every transaction an individual makes on a daily basis. “With just the click of a button, the Government can access each [company’s] deep repository of historical [financial] information at practically no expense.” And the decision whether to transact with banks and credit card companies is no more or less voluntary than the decision whether to use a cell phone. Today . . . “it is impossible to participate in the economic life of contemporary society without maintaining a bank

(Continued)

(Continued)

account.” But this Court, nevertheless, has held that individuals do not have a reasonable expectation of privacy in financial records.

In §2703(d) Congress weighed the privacy interests at stake and imposed a judicial check to prevent executive overreach. The Court should be wary of upsetting that legislative balance and erecting constitutional barriers that foreclose further legislative instructions. The last thing the Court should do is incorporate an arbitrary and outside limit—in this case six days’ worth of cell-site records—and use it as the foundation for a new constitutional framework. The Court’s decision runs roughshod over the mechanism Congress put in place to govern the acquisition of cell-site records and closes off further legislative debate on these issues.

The Court says its decision is a “narrow one.” But its [decision] will have dramatic consequences for law enforcement, courts, and society as a whole.

Most immediately, the Court’s holding that the Government must get a warrant to obtain more than six days of cell-site records limits the effectiveness of an important investigative tool for solving serious crimes. As this case demonstrates, cell-site records are uniquely suited to help the Government develop probable cause to apprehend some of the Nation’s most dangerous criminals: serial killers, rapists, arsonists, robbers, and so forth. These records often are indispensable at the initial stages of investigations when the Government lacks the evidence necessary to obtain a warrant. And the long-term nature of many serious crimes, including serial crimes and terrorism offenses, can necessitate the use of significantly more than six days of cell-site records. The Court’s arbitrary 6-day cutoff has the perverse effect of nullifying Congress’ reasonable framework for obtaining cell-site records in some of the most serious criminal investigations.

The Court’s decision also will have ramifications that extend beyond cell-site records to other kinds of information held by third parties, yet the Court fails “to provide clear guidance to law enforcement” . . . [F]irst, the Court’s holding is premised on cell-site records being a “distinct category of information” from other business records. But the Court does not explain what makes something a distinct category of information. Whether credit card records are distinct from bank records; whether payment records from digital wallet applications are distinct from either; whether the electronic bank records available today are distinct from the paper and microfilm records at issue in *Miller*; or whether cell-phone call records are distinct from the home-phone call records . . . are just a few of the difficult questions that require answers. . . .

Second, the majority opinion gives courts and law enforcement officers no indication how to determine whether any particular category of information falls on

the financial-records side or the cell-site-records side of its newly conceived constitutional line. The Court’s multi-factor analysis—considering intimacy, comprehensiveness, expense, retrospectivity, and voluntariness—puts the law on a new and unstable foundation.

Third, even if a distinct category of information is deemed to be more like cell-site records than financial records, courts and law enforcement officers will have to guess how much of that information can be requested before a warrant is required. The Court suggests that less than seven days of location information may not require a warrant. But the Court does not explain why that is so, and nothing in its opinion even alludes to the considerations that should determine whether greater or lesser thresholds should apply to information like IP addresses or website browsing history.

In short, the Court’s new and uncharted course will inhibit law enforcement and “keep defendants and judges guessing for years to come.” . . .

Dissenting, Alito, J., joined by Thomas, J.

First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today’s decision does, is revolutionary. . . .

In 1946, in *Oklahoma Press Publishing Co. v. Walling*, . . . we held that the Fourth Amendment regulates the compelled production of documents, but less stringently than it does full-blown searches and seizures. . . . [T]he Court held that “the basic distinction” between the compulsory production of documents on the one hand, and actual searches and seizures on the other, meant that two different standards had to be applied. . . . [A] court order must “be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” Here, the type of order obtained by the Government almost necessarily satisfies that standard. The Stored Communications Act allows a court to issue the relevant type of order “only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that . . . the records . . . sought[t] are relevant and material to an ongoing criminal investigation.” And the court “may quash or modify such order” if the provider objects that the “records requested are unusually voluminous in nature or compliance with such order otherwise would cause an

undue burden on such provider.” No such objection was made in this case . . .

[T]he Court also holds that a defendant has the right under the Fourth Amendment to object to the search of a third party’s property. . . . By allowing Carpenter to object to the search of a third party’s property, the Court threatens to revolutionize . . . Fourth Amendment doctrine. In this case, as Justice Kennedy cogently explains, the cell-site records obtained by the Government belong to Carpenter’s cell service providers, not to Carpenter. Carpenter did not create the cell-site records. Nor did he have possession of them; at all relevant times, they were kept by the providers. Once Carpenter subscribed to his provider’s service, he had no right to prevent the company from creating or keeping the information in its records. Carpenter

also had no right to demand that the providers destroy the records, no right to prevent the providers from destroying the records, and, indeed, no right to modify the records in any way whatsoever (or to prevent the providers from modifying the records). Carpenter, in short, has no meaningful control over the cell-site records, which are created, maintained, altered, used, and eventually destroyed by his cell service providers . . . Because the records are not Carpenter’s in any sense, Carpenter may not seek to use the Fourth Amendment to exclude them. . . . In the end, the Court never explains how its decision can be squared with the fact that the Fourth Amendment protects only “[t]he right of the people to be secure in their persons, houses, papers, and effects.” . . .

Questions for Discussion

1. What type of information can be obtained from cell phone location data? How was cell phone data used to arrest Timothy Carpenter?
2. Explain the significance of *Knott* and of *Jones* for Justice Roberts’s analysis in *Carpenter*.
3. Summarize the decisions *Smith* and in *Miller* and why the “third party doctrine” is an important part of the Court’s decision in *Carpenter*.
4. Justice Roberts writes that “while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records.” Why does Justice Roberts conclude that cell phone location data is different from the type of information involved in *Smith* and in *Miller* and has a greater expectation of privacy than other types of information? Do you agree?
5. Explain why the Court majority concludes that a search warrant based on probable cause is required to seize CSI.
6. Why does Justice Roberts write at the end of the majority decision that *Carpenter* is a narrow decision?
7. Explain Justice Kennedy’s argument that Carpenter’s expectation of privacy was not violated by the government’s seizure of his cell-site records. What of his argument that CSLI data is no more invasive of privacy than other types of information?
8. Why did Justice Kennedy conclude that Carpenter lacked an expectation of privacy in his movements recorded in the CSLI?
9. Explain why Justice Alito argues that Court opinion threatens to “revolutionize Fourth Amendment doctrine.”
10. Consider the facts in *Carpenter*. Will the Court’s decision interfere with the ability of law enforcement to investigate criminal activity?
11. Problems in policing. As a police officer, how does the decision in *Carpenter* affect your ability to employ technology to track the movements of suspects?

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 more than 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.

(Continued)

(Continued)

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), DEA 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 so long as the dog sniff does not prolong the driver’s detention. The dog sniff was “performed on the exterior of respondent’s car while he was lawfully seized for a traffic violation. Any intrusion on respondent’s privacy expectations does not rise to the level of a constitutionally cognizable infringement. . . . A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment” (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.

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 12.5 and 60 percent.

In 2013, in *Florida v. Harris*, the U.S. Supreme Court established the standard for evaluating the reliability of a dog. In other words, the question is whether the reaction of a dog constitutes probable cause to conduct a search. In *Harris*, Clayton Harris was pulled over by Florida police officer William Wheelley on June 24, 2006, for driving with an expired license plate. Aldo, a German shepherd trained to detect certain narcotics, signaled that there were narcotics in the car. A search of the auto did not reveal any of the narcotics that Aldo was trained to detect. The search, however, led to the seizure of “200 loose pseudoephedrine pills, 8,000 matches, a bottle of hydrochloric acid, two containers of antifreeze, and a coffee filter full of iodine crystals—all ingredients for making methamphetamine.” Harris was charged with possessing pseudoephedrine for use in manufacturing methamphetamine. Harris was pulled over by Wheelley a second time while out on bail. Aldo again sniffed the truck and indicated that there were narcotics on the driver’s-side door handle. Wheelley searched the truck and failed to detect narcotics (*Florida v. Harris*, 568 U.S. 237 [2013]).

Harris filed an unsuccessful motion to suppress the narcotics seized in his truck on the grounds that Officer Wheelley lacked probable cause for a search of his car for narcotics because of the unreliability of Aldo’s reactions.

Wheelley testified that in 2004, Aldo had undergone three training classes and that in 2005, Officer Wheelley together with Aldo underwent a forty-hour refresher course and additional training sessions each week. The training logs indicated that “Aldo always found hidden drugs” and that he performed “satisfactorily” (the higher of two possible assessments) on each day of training.

Wheelley conceded on cross-examination that Aldo’s certification had expired the year before he pulled Harris over for a traffic violation and also acknowledged that he did not keep complete records of Aldo’s performance on traffic stops or in other field work and only kept track of Aldo’s alerts that resulted in arrests. Wheelley explained that Aldo’s two alerts to Harris’s “seemingly narcotics-free truck” likely resulted from the fact that Harris “probably transferred the odor of methamphetamine [prepared by Harris] to the door handle.”

The Supreme Court held that field performance was not a reliable indicator of a canine’s accuracy because there is no way of knowing whether a dog failed to detect narcotics that were in the vehicle, and when a dog indicates that there are narcotics in a vehicle and none are discovered, the dog may be responding to the odor of narcotics that already have been removed or the officer failed to locate. In contrast, in field certification, the trainers are aware of whether a vehicle contains narcotics and are able to accurately evaluate a dog’s performance.

The U.S. Supreme Court noted that Aldo had successfully completed two recent drug-detection courses and maintained his proficiency through weekly training exercises. The Court concluded that Aldo’s training record “sufficed to establish Aldo’s reliability.” “[E]vidence of a dog’s satisfactory performance on a certification or training program

can itself provide sufficient reason to trust his alert.” The question is whether the Court places too much confidence in the reliability of testing procedures.

You can find *Florida v. Harris* on the Student Study Site, edge.sagepub.com/lippmanpc4e.

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.

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

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

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. Immigration 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. 621 (1991), 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,

(Continued)

(Continued)

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. . . . [A]n 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.*

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. This, however, does not mean that Hodari was seized prior to being tackled to the ground.

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. . . . 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.

In this case, the officer's show of force—taking the form of a head-on chase—adequately conveyed the message

that respondent was not free to leave. Hodari attempted to end "the conversation" before it began, and soon found himself literally "not free to leave" when confronted by an officer running toward him head-on who eventually tackled him to the ground.

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. . . .

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." . . . 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 a 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. As a police officer, which test would make your job easier?

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 *Commonwealth v. Matos*, the Pennsylvania Supreme Court consolidated three cases with similar fact patterns. In the lead case, two Philadelphia police officers responded to a radio broadcast that “unknown” individuals were selling narcotics. The officers approached three men on a playground, who fled as the officers approached them. During the subsequent chase, one of the officers saw Matos discard a plastic bag. The officer retrieved the bag and apprehended Matos. The bag was found to contain twelve vials of cocaine. Five additional vials of cocaine were found in Matos’s pocket after he was seized by one of the officers. In each of the three cases consolidated in *Matos*, the issue was “whether the pursuit by the police officer was a seizure. If it was not a seizure, then the contraband was abandoned property, lawfully found by the officer. However, if the pursuit was a seizure, then the abandonment was coerced, and the officer must demonstrate either probable cause to make the seizure or a reasonable suspicion to stop and frisk.”

The Pennsylvania Supreme Court held that the Pennsylvania Constitution provided greater protection of individual privacy than was available under the U.S. Constitution and adopted the *Mendenhall* standard for a seizure that “a person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.” Matos according to the court was entitled to refuse to speak to the police and was seized without reasonable

suspicion or probable cause when the officer pursued him and caused him to discard the narcotics. As a result, the court suppressed the narcotics discarded by Matos. The Pennsylvania Supreme Court stressed that the seriousness of criminal activity under investigation, whether it involves the sale of drugs or the commission of a violent crime, can never justify ignoring or abandoning the constitutional right of every individual in the Commonwealth to be free from intrusions upon his or her personal liberty absent reasonable suspicion or probable cause. The court expressed apprehension that adoption of the standard in *Hodari* would require the police in seizing individuals to engage in physically intimidating and threatening behavior and place citizens at risk. Justice Ronald D. Castille in dissent argued that the court’s adoption of the *Mendenhall* standard would hamper the police because “police officers . . . are left with little authority to pursue, follow, or even approach and ask questions of suspects absent probable cause or reasonable suspicion to do so.” See *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996).

In 1998, in *State v. Young*, the Supreme Court of Washington 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. See *State v. Young*, 957 P.2d 681 (Wash. 1998).

YOU DECIDE 3.5

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 the car window. The bag was found to contain thirty-three 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 (2d Cir. 2005).

You can learn what the court decided by referring to the Student Study Site, edge.sagepub.com/lippman4e.

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. Explain why the Supreme Court in *Carpenter v. United States* required law enforcement to obtain a search warrant to access historical cell-site location data.
9. Describe the difference between physical seizures and show of authority seizures.
10. How do seizures differ from encounters? Why is this distinction significant?
11. What is the holding in *Hodari*? How does this modify the test in *Mendenhall*?

LEGAL TERMINOLOGY

abandoned property 62
curtilage 60
encounters 83
expectation of privacy 51
general warrants 50
open fields 60
physical seizure 84

plain view 58
property rights approach 51
search 49
seizure 83
show of authority seizure 84
subpoena duces tecum 72
third-party doctrine 75

trespassory approach 51
writs of assistance 50

TEST YOUR KNOWLEDGE: ANSWERS

1. False
2. False.
3. True.
4. True.
5. False.
6. True.
7. True.
8. True.
9. False.



Get the tools you need to sharpen your study skills. SAGE edge offers a robust online environment featuring an impressive array of free tools and resources.

Access practice quizzes, eFlashcards, video, and multimedia at edge.sagepub.com/lippman4e