10-1-2002

What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy

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What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy

Sherry F. Colb*

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* Professor of Law and Judge Frederick B. Lacey Scholar, Rutgers Law School-Newark. The author thanks Professors Michael C. Dorf, George C. Thomas III, and Neil Buchanan, for reading early drafts and providing extremely helpful comments, suggestions, and encouragement. The author also thanks the faculties of Fordham Law School, Hofstra Law School, and the University of Pennsylvania Law School for giving her invaluable feedback on the paper and presentations at their respective faculty workshop series. University of Pennsylvania Professors Seth Kreimer, Arti Rai, Ed Rubin, David Rudovsky, Kim Scheppele, and Amy Wax offered extremely useful specific suggestions for improving the piece, as did Hofstra Professor John DeWitt Gregory and Fordham Professor Ben Zipursky. The author is also grateful to the members of the Competing Conceptions of Fourth Amendment Privacy Seminar at the University of Pennsylvania for contributing their insights about the various issues addressed in this Article. And last but not least, the author gratefully acknowledges the excellent research assistance of Benjamin Flattery, Christine Intromasso, Jung Kim, Tim Madden, Tom McGuiness, Justin Petruzzelli, and Cara Simonetti, and the marvelous editing work of Jonathan Sanders and others on the Stanford Law Review. This project was funded in part by a grant from the Dean’s Summer Research Fund of Rutgers Law School-Newark.
INTRODUCTION

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”1 Ushering in modern Fourth Amendment doctrine, the Supreme Court held in Katz v. United States that when a person enters a telephone booth, shuts the door, and makes a call, government agents may not record the conversation that follows without a warrant.2 The Court noted, moreover, that the physical presence of the recording device on the outside of the telephone booth does not diminish the illegality of the taping.3 As the concurring opinion and later decisions affirmed, the Fourth Amendment gives individuals a “reasonable expectation of privacy” in such telephone conversations.4 People accordingly have a right to expect that, absent probable cause and a warrant, no uninvited listeners will have access to them.5

The decision in Katz continues to regulate the extent of lawful government investigations. As numerous scholars have observed, however, the decisions that followed Katz very narrowly defined the scope of protected privacy, such that much of the universe of investigative activity does not even trigger the

1. U.S. CONST. amend. IV.
3. Id. at 353 (declaring that it is “clear that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure”).
4. Id. at 360 (Harlan, J., concurring).
5. Id. at 352 (“[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.”).
Fourth Amendment’s reasonableness requirements. Commentators have argued persuasively that the Court’s motivation for these decisions has been the link between judicially acknowledging a violation of Fourth Amendment privacy and suppressing reliable, incriminating evidence. In other words, because a holding that the Fourth Amendment applies in a particular case might free a guilty defendant, courts are tempted to find no Fourth Amendment application. Though this hypothesis might causally explain why the Court has been motivated to reduce the scope of Fourth Amendment privacy, however, it does not tell us how the Court has gone about doing so, from a doctrinal, analytic perspective.

To answer the how question, this Article looks to the logical “moves” that unify almost all of the Court’s cases defining the meaning of a Fourth Amendment “search.” These moves have steadily eroded privacy in specific cases, and conceptually promise to eliminate it altogether, because they do not admit of any logical stopping point. The Court has therefore brought itself to a doctrinal position that is untenable, even for the most tough-on-crime Justices. In some recent decisions that recognize and leave open the possibility of broader Fourth Amendment protection, the Court displays ambivalence about the moves it has repeatedly employed and thereby calls into question the logical moves and doctrinal conclusions embraced by the earlier precedents.

6. See Edwin J. Butterfoss & Mary Sue B. Snyder, Be My Guest: The Hidden Holding of Minnesota v. Carter, 22 HAMLIN L. REV. 501 (1999) (criticizing the narrowing of what constitutes a “legitimate expectation of privacy”); Mary I. Coombs, Shared Privacy and the Fourth Amendment, or the Rights of Relationships, 75 CAL. L. REV. 1593, 1594 (1987) (criticizing the various ways in which “current fourth amendment law tends to ignore shared privacy, implicitly adopting a view of persons as highly individualistic in their behaviors and expectations”); Tracey Maclin, The Decline of the Right of Locomotion: The Fourth Amendment on the Streets, 75 CORNELL L. REV. 1258, 1265-77 (1990) (discussing the way in which the Court’s decisions have rendered much police activity, and specifically the right to inquire, not subject to Fourth Amendment scrutiny at all); Tracey Maclin, Informants and the Fourth Amendment: A Reconsideration, 74 WASH. U. L.Q. 573, 575-76 (1996) (“The Court reads the Fourth Amendment’s guarantee against unreasonable governmental searches and seizures to place no limitations on the government’s power to send informants to infiltrate our homes, businesses, religious organizations, or social groups.”).

7. See, e.g., Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 799 (1994) (arguing that “[j]udges do not like excluding bloody knives, so they distort doctrine, claiming that the Fourth Amendment was not really violated”); Sherry F. Colb, Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence, 96 COLUM. L. REV. 1456, 1512 (1996) (noting that “[s]cholars have often argued that the reason the Supreme Court sometimes makes the doctrinal mistake of taking a defendant’s guilt into account in determining whether there has been a search is that the exclusionary rule distorts the meaning of the Fourth Amendment by making the viability of a criminal conviction turn on a narrow interpretation of the Fourth Amendment right, an interpretation which will then apply to guilty and innocent alike”); Donald Dripps, The Case for the Contingent Exclusionary Rule, 38 AM. CRIM. L. REV. 1 (2001) (urging adoption of a discretionary exclusionary rule that would permit judges to charge the State money damages, if the State agrees, in lieu of suppressing evidence, following a successful suppression motion).
Unfortunately, both the moves and their occasional disavowal occur beneath the surface, rendering the doctrine, and privacy itself, unstable.

When determining what privacy the Fourth Amendment does and does not protect—what circumstances, in other words, give rise to a "reasonable expectation of privacy"—the Court asks: "What is a search?" To rule out activities that do not qualify, the Court denies privacy in whatever people "knowingly expose" to the public. If a person knowingly exposes some object or activity to the public, there has accordingly been no search. Absent a search, police may observe the thing that is "exposed" without having to obtain a warrant or otherwise justify their observations. "Probable cause," warrants, "reasonable suspicion," and other measures of Fourth Amendment reasonableness do not come into play unless there has been a search.

In developing the category of things that are "knowingly exposed," and therefore not a search, the Court has repeatedly made two analytic moves that effectively rob the category of any firm boundaries: (1) It treats the risk of exposure through third-party wrongdoing as tantamount to an invitation for that exposure ("Move One"); and (2) it treats exposure to a limited audience as morally equivalent to exposure to the whole world ("Move Two").

Treating risk-taking as inviting exposure effectively excuses (and even justifies) what would otherwise be wrongful conduct by third parties, including the police. If a man lies down and falls into a deep sleep on a subway train, for example, he risks having his pocket picked. A pickpocket can easily swipe the sleeping man's wallet without encountering any resistance. We might even say colloquially that the sleeping man has "asked to have his pocket picked." This colloquialism does not, however, describe a legal justification for the pickpocket. We would not say, in other words, that the man on the train has willingly agreed to the taking of his wallet (as we would, for example, if he had abandoned the wallet in the street). Like taking candy from a baby, taking a wallet from a sleeping man remains a crime, no matter how easy it is to accomplish.

The second of the two moves, treating exposure to a limited audience as identical to exposure to the world, means failing to recognize degrees of privacy in the Fourth Amendment context. A person going on vacation, for example, might give a neighbor the key to her house and ask him to water her plants while she is gone. The neighbor now has explicit permission to observe what would otherwise be hidden from view, namely, the inside of the vacationer's home (at least those parts visible from areas through which he must travel to reach the plants). By granting this permission, the vacationer has

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8. See, e.g., Katz, 389 U.S. at 351-52 ("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.") (citations omitted).

9. See id.
WHAT IS A SEARCH?

forfeited a measure of privacy and has thus knowingly exposed part of her home to her neighbor. Still, if the neighbor were to invite his friends or family into the apartment to see the vacationer's personal items, even just those things visible from where the plants are located, that act would go beyond the scope of the vacationer's permission and therefore represent an invasion of her privacy. There are degrees of privacy and, accordingly, degrees of exposure, and one might choose to forfeit some of her freedom from exposure without thereby forfeiting all of it.

This Article contends that since *Katz* was decided, the Court—in giving content to the “knowing exposure” that separates what is protected by Fourth Amendment privacy from what is not—has made frequent use of the two moves, equating risk-taking with inviting exposure and equating limited-audience with whole-world self-exposure. This Article claims that therefore, to address the instability and poverty of Fourth Amendment doctrine, the Court must extricate these moves from its repertoire and replace them with an honest inquiry into whether police have acted in a manner that exposes what would have remained hidden absent the transgression of a legal or social norm. This inquiry would adhere to the doctrinal foundations of privacy as articulated in *Katz*.

In the process of explicating and critiquing the Court’s two analytic moves, this Article argues that the notion of “knowing exposure” ought to (and does, in its definition) resemble the idea of “consent” to a search. Recognizing a common definition for these two concepts would yield beneficial results. First, it would represent an open acknowledgement that “knowing exposure” only occurs when there has been some explicit or tacit consent to public observation, and not simply the taking of a risk or the limited exposure of what is then further disseminated. Second, the coordination of “knowing exposure” and “consent” might move the Court to reconsider its ill-advised position that one can give voluntary consent to a search without knowing that police would take “no” for an answer. Finally, through a close analysis of several recent cases, including *Kyllo v. United States*, *Ferguson v. City of Charleston*, and *Minnesota v. Carter*, this Article identifies and discusses the Court’s own discomfort with the two logical moves it has embraced for dealing with the

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10. The Court has in one context indicated agreement with this contention in holding that police violate the Fourth Amendment by bringing a reporter along on a house search and seizure. See *Wilson v. Layne*, 526 U.S. 603 (1999).
11. Justice Marshall first made an argument of this sort in his dissenting opinion in *Schneckloth v. Bustamonte*, 412 U.S. 218, 277 (1973) (Marshall, J., dissenting) (claiming that a consent search is not a search at all, rather than a “reasonable search,” as the majority held).
12. *Id.* (“I would have thought that the capacity to choose necessarily depends upon knowledge that there is a choice to be made.”).
question of what qualifies as a Fourth Amendment search. These cases leave open the possibility that norm transgression will come to replace the flawed moves of “risk as invitation” and “partial exposure as total exposure” in defining the scope of Fourth Amendment privacy.

I. THE BASICALLY SOUND CONCEPT OF “KNOWING EXPOSURE”

The Supreme Court has consistently held that some governmental activities do not qualify as searches and thus do not trigger the Fourth Amendment’s requirement that they be reasonable. The word “searches” appears in the text of the Fourth Amendment as the subject matter to be regulated, but “search” is not a self-defining term. As a result, one’s view of police investigative power will inevitably shape one’s interpretation of that term. Decisions about which police activity to place entirely outside the scope of the Fourth Amendment, for example, will rest on normative choices. Indeed, the Court has acknowledged the relationship between social norms and Fourth Amendment law by defining a search as the invasion of a “reasonable expectation of privacy” and by explicitly proposing that a person’s subjective expectation of privacy implicates the Fourth Amendment only if the “expectation of privacy is ‘legitimate in the sense required by the Fourth Amendment,’ . . . [which] turns on whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment.”16 Social norms are therefore at the heart of the Court’s approach to designating those expectations of privacy that receive Fourth Amendment protection.

One important component of the normative privacy inquiry is the behavior of the individual claiming Fourth Amendment protection. Sometimes, for example, a person acts in a manner that other people would ordinarily take as an invitation to the public to watch or listen. Under those circumstances, a police officer can also observe.

If a person is walking down the street, for instance, police may observe him without having to obtain a warrant and without having to justify their actions with preexisting suspicion. By walking around outside, the individual knowingly exposes himself to observation. The police need not avoid looking at what everyone else can see.

The idea that not all police activity triggers Fourth Amendment protection makes sense. Indeed, the notion of a right to expose oneself to all private actors while simultaneously concealing oneself from the police would appear, on its face, to have little to do with privacy and much to do with evading the law. It is normal for passersby, including police officers, to look at us momentarily. Someone who wishes to avoid being viewed briefly by others probably cannot, realistically, leave his home.

Police who situate themselves similarly to the strangers walking around us do not measurably detract from our privacy. Requiring police to look away when everyone else may observe would accordingly add little to our privacy. Police having to obtain a warrant simply to glance at John Smith in public, for example, would not appreciably alter the level of privacy that Smith enjoys. This is true because most of the people Smith encounters on the street are not law enforcement officers. The police therefore do not significantly affect, by their presence on the street, the individual’s privacy from observation by others. As one commentator insightfully put it, “the fourth amendment creates no right to share information with all the world save government officers.”¹⁷ In building its doctrine of the Fourth Amendment, then, the Court has defined a “reasonable expectation of privacy” by reference to the privacy that one might legitimately expect to have from other private actors, independent of any state surveillance.¹⁸

When a person takes what is otherwise personal and shows it publicly, she effectively invites or agrees to the predictable public scrutiny that will follow. Once this self-exposure occurs, the Court has reasoned, there remains no entitlement to privacy from the police. The argument is a sound one. It is not “reasonable,” in the language of the Fourth Amendment, for a person to expect


¹⁸. Of course, the State itself can play a role in setting and modifying private norms and expectations. *See* United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (“The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present. Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.”); *see also* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. Rev. 723 (1999) (proposing that government might lead the way in reinvigorating the value of privacy in the face of societal neglect); Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. Rev. 607 (2000) (discussing how the state can disrupt or further entrench existing conduct norms). Nonetheless, the Fourth Amendment regulates only state action and therefore cannot provide a basis for forcing private actors to respect one another’s privacy, though it may be desirable for our legislatures to do so. What the Fourth Amendment can do is keep the government from further diminishing people’s expectations of privacy. Accordingly,

if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation’s traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, where an individual’s subjective expectations had been ‘conditioned’ by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a ‘legitimate expectation of privacy’ existed in such cases, a normative inquiry would be proper.

privacy from governmental observation of those things and activities that the person willingly shares with the world. Police should not have to close their ears and eyes to what everyone else can hear and see. It is in giving content to the phrase “knowing exposure,” however, that the Fourth Amendment cases go wrong.

II. MOVE ONE: EQUATING RISK AND INVITATION

Consider a man who stands on the sidewalk yelling to his friend across the street, “I just killed a boy!” The man has, unquestionably, knowingly exposed his words to the public. He cannot reasonably expect to be heard only by the friend to whom he spoke. Indeed, only a fool would be surprised to learn that people around him were listening. As previously discussed, a crucial component of judging a police officer’s conduct under these circumstances entails an understanding that nongovernmental passersby violate no social or legal norm by listening to words yelled across the street.

But now suppose that instead of yelling, the man in our example whispers into the ear of his friend. Though the man is still on the street, out in public, his conduct no longer invites listeners. The act of whispering communicates a desire for privacy from people in the surrounding area. Under these circumstances, if a passerby were to lean in close to the speaker’s mouth to listen to his whispers, the speaker could rightfully respond, “Stop listening and mind your own business!” The passerby should experience embarrassment or shame in being “caught” violating a social norm against eavesdropping.

The difference between the above two scenarios is the difference between consensual exposure and risktaking. Whispering to a friend in public does risk that someone will lean over and listen to what is said. Nonetheless, in contrast to the yelling scenario, the whispered words only become “exposed” to the passerby after the passerby violates a social norm. Exposure was thus unwanted and uninvited, even though it was risked. Another way of analyzing the situation is to say that it was the passerby, rather than the speaker, who exposed the whispered words to the third party.

Another helpful analogy in considering this distinction is the risk of exposure in public restrooms, where anyone could stand on a toilet seat and peer over the neighboring stall. This too is a risk, and yet it would be a gross invasion of privacy for police or anyone else to watch people using the bathroom. Though the distinction between risk and invitation is a familiar

19. See supra notes 16-17 and accompanying text.
20. See Sherry F. Colb, The Qualitative Dimension of Fourth Amendment “Reasonableness,” 98 COLUM. L. REV. 1642, 1709-13 (1998) (discussing Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), a case in which police engaged in visual surveillance of toilet stalls from the ceiling of a public restroom in order to apprehend men engaged in illegal consensual sexual acts there. In the course of this investigation, 25 to 30 innocent persons were observed in the act of using the restroom.). As I noted in discussing Smayda,
and important one, the Supreme Court has often disregarded it in elaborating the category of Fourth Amendment "searches."

A. Trash

Perhaps the leading decision equating risk and invitation is California v. Greenwood. Suspecting narcotics trafficking, a police officer asked a garbage collector to segregate Greenwood's trash upon collection. After separating the target's garbage, the collector then gave it to the officer to permit her to rummage through it. The Supreme Court considered the following question: "[W]hether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home." Did the officer, in other words, invade any "reasonable expectation of privacy" by obtaining and rummaging through Greenwood's trash, such that a Fourth Amendment search took place, triggering the warrant requirement?

The Court answered no to these questions and concluded that when a person leaves his trash at the curb, he knowingly exposes it to the public. When Greenwood placed his garbage on the street, the Court said, he took a significant risk that the bag would be torn open and its contents revealed. "It is common knowledge," the majority explained, "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." In other words, children, raccoons, and snoops would have had access to the garbage, sitting out in public as it was, and they could have raided it, just as the police officer did.

If the named risk had come to pass, and the snoops and others had torn open and spread Greenwood's garbage all over the street, then the whole neighborhood would have been able to see whatever personal effects Greenwood had placed in his trash. Naturally, under these circumstances, Greenwood could not have reasonably expected the police to turn a blind eye on what was visible to everyone else on the street. The Court then implicitly reasoned that by taking the risk that such events might occur, Greenwood had knowingly exposed his garbage to the public eye.

By invoking the risk of snoops rummaging through Greenwood's garbage, the Court made Move One, described above. It treated a person who takes

"In spite of its relative unimportance as a locus of fundamental rights . . . people nonetheless value privacy from observation in the restroom." Id. at 1712.

22. Id. at 37-38.
23. Id. at 37.
24. Id. at 40 (footnotes omitted).
25. Id. ("Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection.").
26. The Court in Greenwood makes the second of the two doctrinal moves I identify as
the risk that something might occur as having invited the materialization of that risk. Without explicitly articulating this equivalence, the Court permitted the officer to act as though the garbage, which was in fact safely enclosed within an opaque bag, had actually been strewn about by all manner of errant creatures in the neighborhood. By constructively inviting such exposure, Greenwood could not be heard to complain of the government's acceptance of the invitation.

The Supreme Court's approach to the facts of Greenwood was highly artificial. It is unpersuasive to argue that by putting out his garbage, Greenwood had knowingly relinquished the secrecy of its contents. When the garbage was at the curb, Greenwood's hypothetical snoopy neighbor might have had to violate the law to rummage through it in the way that the police officer did. To say that he invited the world to rummage through it was thus to confuse the risk of exposure, one that he can perhaps be said to have knowingly taken, and exposure itself, something that the police officer brought about in a manner that would have been wrongful conduct if attempted by a private "snoop."

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28. An actual example of this situation presented itself in United States v. O'Bryant, 775 F.2d 1528 (11th Cir. 1985). In this case, a car was stolen and a briefcase that had been inside the car was abandoned next to a trash dumpster. Id. at 1529, 1533. Though the briefcase was originally shielded from public acquisition and scrutiny, once it was abandoned by the thief next to a dumpster it was not a search for the police to examine the formerly private property. It would, however, have been a search for the police to take the briefcase from the original owner's car, and the government could not have avoided this classification simply by noting that leaving a briefcase in one's car risks snoops or scavengers taking it and abandoning it in a place where it is no longer private.
29. To the extent that the Court was suggesting that Greenwood had deliberately communicated a renunciation of privacy by putting out the garbage, this suggestion flies in the face of reality. For one thing, the law required Greenwood to dispose of his garbage, as the dissenting opinion noted. If instead of putting out his garbage, Greenwood had hoarded it inside his house or burned it in his fireplace, he would have been violating a county ordinance. See Greenwood, 486 U.S. at 54-55 (Brennan, J., dissenting). In addition to obeying the law, Greenwood may also have put out his garbage so that it would not clutter his home and foster a noxious environment. Neither rationale contemplates or reflects a decision to forfeit his privacy in the contents of the trash.
30. See id. at 52 (Brennan, J., dissenting) ("Beyond a generalized expectation of privacy, many municipalities, whether for reasons of privacy, sanitation, or both, reinforce confidence in the integrity of sealed trash containers by 'prohibit[ing] anyone, except authorized employees of the Town ... to rummage into, pick up, collect, move or otherwise interfere with articles or materials placed on ... any public street for collection.'") (alterations in original). The California Supreme Court had itself previously held that an unwarranted search of a suspect's rubbish was unconstitutional in People v. Krivda, 5 Cal. 3d 357, 366 (1971) (noting that many California municipal codes prohibit anyone but a licensed trash collector from opening or hauling garbage away), vacated, 409 U.S. 33 (1972).
To see further why the Court’s equation of risk and invitation in Greenwood is destructive of privacy, consider what else a “snoop,” raccoon, or child might have done. These creatures do not necessarily limit their mischief to bags left outside the curtilage, as the trash bag was in Greenwood. A snoop, raccoon, or child might have climbed beyond the curb, onto the curtilage, and into Greenwood’s house through an open window, perhaps proceeding to remove items from the shelves. Each, in turn, could have also torn open mail and thrown it out of the window for neighbors to see. The Court presumably would not suggest, however, that these possibilities might justify the police in doing the same. The suggestion is nonetheless implicit in the “risk as invitation” argument that the Court adopts in Greenwood.

Under the Court’s logic, it follows that when a resident leaves a window open, she invites the public (and therefore the police) to climb inside, rummage through drawers, tear open mail, and read it. Though mishaps do occur on occasion to make short shrift of our privacy, an intentional breach is nonetheless experienced and ought accordingly to be treated as unwelcome and wrongful. When carried out by the police, such a breach should be classified as a “search” subject to the Fourth Amendment.

B. “Open Fields”

An earlier decision to apply the “reasonable expectation of privacy” standard, the “open fields” case, similarly demonstrates Move One. In Oliver v. United States,31 two narcotics agents from the Kentucky State Police, “[a]rriving at [a] farm... drove past petitioner’s house to a locked gate with a ‘No Trespassing’ sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards, passing a barn and a parked camper.”32

Since police had no warrant to authorize their entry onto Oliver’s land, the case presented the question whether or not privately owned land surrounded by fencing and “no trespassing” signs is “knowingly exposed” to the public. In other words, did entry onto such land violate the landowner’s reasonable expectation of privacy?33 As in Greenwood, the Supreme Court answered in the negative. In contrast to the home and the “curtilage” surrounding the home,34 the Court said, there is no reasonable expectation of privacy in an

32. Id. at 173.
33. Id. at 177. Note that although the police did receive reports of marijuana fields prior to their investigation, the Court did not rely on those reports in ruling that there was no reasonable expectation of privacy. Therefore, its holding authorizes such investigation even in the absence of any preexisting basis for suspicion.
34. United States v. Dunn, 480 U.S. 294, 301 (1987) (stating that the four factors relevant to determining whether an area qualifies as curtilage or as an open field are: (1) proximity of the area to the house; (2) whether the area is included within fences or other
"open field," a designation which, given the facts of this case, was question-begging.

What was it about Oliver’s field that made it open or knowingly exposed to public observation? In the Court’s view, it was partly the fact that people regularly ignore fencing and “no trespassing” signs. “It is not generally true,” said the majority, “that fences or ‘No Trespassing’ signs effectively bar the public from viewing open fields in rural areas.” In other words, the Court claimed that one would not necessarily have privacy from outsiders in such fields.

Significantly, the Court in Oliver reasoned against the privacy of the open field by appealing to social norms about trespass. Even on such reasoning, it is almost certainly not the case that everyone feels free to violate the law against trespass. The Court’s observation that people blithely trespass on open fields, moreover, might not extend to land as enclosed as Oliver’s was. The fact that such trespass was criminal ought likewise to have undermined the idea that police did not engage in wrongdoing—that the public (and therefore the police as well) had somehow been invited to walk around in Oliver’s field.

By doing private things in his field, Oliver might well have taken a risk of exposure, much as the subway-train sleeper risks the theft of his wallet. Oliver’s taking this risk, however, should not entitle a trespasser to enter onto his field any more than it would entitle a thief to pick a passenger’s pocket. As the dissent ably explained,

\[\text{[P]ositive law not only recognizes the legitimacy of [the landowners’] insistence that strangers keep off their land, but subjects those who refuse to respect their wishes to the most severe of penalties—criminal liability. Under these circumstances, it is hard to credit the Court’s assertion that [the landowners’] expectations of privacy were not of a sort that society is prepared to recognize as reasonable.}\]

Though the Court acknowledged that “[i]n this case, the officers had trespassed upon defendant’s property,” it asserted that trespass law was designed to protect property, not privacy. The Court proposed as well that police could legally have flown overhead and thereby observed the field without having to trespass: “[B]oth petitioner Oliver and respondent Thornton

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35. Oliver, 466 U.S. at 179.
36. One might expect that such norms could similarly drive more protective judgments in other cases about which it can be said that an individual has neither consented nor knowingly exposed himself or his personal life to public scrutiny.
38. Id. at 175.
39. Id. at 183.
concede that the public and police lawfully may survey lands from the air.\textsuperscript{40} Because there was a lawful alternative means of observing the same private field, reasoned the Court,

[i]n practical terms, [the landowners'] analysis merely would require law enforcement officers, in most situations, to use aerial surveillance to gather the information necessary to obtain a warrant or to justify warrantless entry onto the property. It is not easy to see how such a requirement would advance legitimate privacy interests.\textsuperscript{41}

This argument is weak. It permits police to engage in what is criminal misconduct on the theory that they could have made the same observations by a legal, alternative means.\textsuperscript{42} The reasoning here would suggest that in \textit{Katz}, the Court should have approved of electronic surveillance of a phone call in a public booth, because police could have lawfully used the alternative of a lip-reader to learn what Katz had said.\textsuperscript{43}

\section{Flight}

Two years after deciding \textit{Oliver}, the Supreme Court handed down a decision in \textit{California v. Ciraolo}.\textsuperscript{44} Police in \textit{Ciraolo} had flown an airplane at a height of one thousand feet, directly over the fenced-in curtilage of a home, and had visually inspected the area.\textsuperscript{45} The majority implicitly acknowledged that if police had physically entered that same area, it would have required a warrant and probable cause.\textsuperscript{46} However, reasoned the Court, because there was

\begin{thebibliography}{99}
\bibitem{40} Id. at 179.
\bibitem{41} Id. at 179 n.9.
\bibitem{42} Contrast Justice Scalia's majority opinion in \textit{Kyllo v. United States}:
The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. The police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful.
\bibitem{43} 533 U.S. 27, 35 n.2 (2001).
\bibitem{44} In both \textit{Katz} and \textit{Oliver}, police would in fact have found it more difficult (and therefore would have been less likely) to employ lawful alternative measures, either by flying over Oliver's field or by hiring a lip-reader to watch Katz. This difficulty in itself would render more empirically reasonable a person's expectation of privacy under the given circumstances. The Court added a separate argument that people do not engage in private activities in "open fields," \textit{Oliver}, 466 U.S. at 179 n.10, exhibiting a poverty of the imagination that the dissent criticized. The dissent noted that people meet lovers, pray, and take solitary walks in open fields. They are places where people can be unconventional out of doors. Id. at 192 (Marshall, J., dissenting). Nonetheless, on the Court's reasoning, to own land on which one does not build a house (or which is not directly adjacent to a house) is knowingly to expose to the public that land and anything happening on it. Id. at 179.
\bibitem{45} 476 U.S. 207 (1986).
\bibitem{46} Id. at 209.
\bibitem{46} See id. at 213-14 (focusing on the permissibility of viewing the curtilage from various public vantage points without questioning the "curtilage doctrine" that protects the privacy of fenced-in curtilage from physical intrusion).
\end{thebibliography}
no physical intrusion and because the police had flown in navigable airspace, where “private and commercial flight in the public airways is routine,” the inspection did not trigger the Fourth Amendment’s protections. Had the Court applied its Oliver reasoning here, it would have permitted physical trespass as well. After all, “[i]n practical terms,” a contrary analysis “merely would require law enforcement officers, in most situations, to use aerial surveillance.” The Court did not follow this line of reasoning, however, but rested instead on the physical intrusion dimension of the situation.

Three years after handing down Ciraolo, the Court decided a second aerial surveillance case, Florida v. Riley, this time approving the visual inspection from a helicopter of a partially open covered greenhouse. The greenhouse was located within the curtilage of a person’s home, and the police made the observations at issue from an altitude of only four hundred feet. The Court emphasized that FAA safety regulations did not prohibit helicopter flight at this altitude. A plurality opinion said specifically that “[a]ny member of the public could legally have been flying over Riley’s property in a helicopter at the altitude of 400 feet and could have observed Riley’s greenhouse. The police officer did no more.” This opinion appeared to stand for the proposition that whatever police can view without violating state or federal statutes is ipso facto “knowingly exposed” to the public and thus unprotected by the Fourth Amendment.

Unlike the other decisions I have discussed, the main opinion in Florida v. Riley did not command a majority. In a separate opinion, the fifth Justice to concur in the judgment, Justice O’Connor, made clear that “[i]f the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have ‘knowingly expose[d]’ his greenhouse to public view.” A majority of the Justices (Justice O’Connor and four dissenters) therefore continued to recognize expectations of privacy that could extend beyond the particular requirements of state and federal statutes.

D. Tracking Devices

Because bagged garbage and enclosed fields are better concealed than cars on the public roads, it should come as no surprise that the Court has ruled that police may—without a warrant or probable cause—track the whereabouts of

47. Id. at 215.
48. Id.
51. See id. at 448.
52. Id. at 451.
53. Id. at 455 (O’Connor, J., concurring).
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In considering the reasoning of the decision, we can likewise see that the Court's conclusion is flawed in some of the same ways as its rulings in the other cases. In United States v. Knotts, police placed a beeper into a "five-gallon drum containing chloroform purchased by one of respondent's co-defendants" and thereby "monitor[ed] the progress of a car carrying the chloroform." The beeper enabled the police to track the car's whereabouts, even when they could no longer see the vehicle. The police had not obtained a warrant authorizing the tracking nor did the government argue that police had probable cause to justify a search. It claimed instead that neither a warrant nor probable cause (nor any alternative "reasonableness" measure) was required, because no reasonable expectation of privacy was implicated.

The Supreme Court agreed with the government and held that because the car in question was outside of the house and visible to the public, the use of a tracking device did not trigger Fourth Amendment requirements. Tracking the movements of the person's car did not qualify, in other words, as a Fourth Amendment search. Tracking would only become a search at the point at which the item being monitored entered a nonvisible part of a private residence, where analogous visual surveillance would be impermissible.

The reasoning is now familiar. People who drive their cars on the road knowingly and continuously expose their whereabouts to the public. Since anyone and everyone can watch them and observe the places they go, there is no additional intrusion involved in police surveillance of them. This ceases to be true, however, once the car begins moving around inside a private residence.

55. Id.
56. Id. at 277.
57. Id. at 279.
58. See Brief for the United States at 28, Knotts (No. 81-1802).
Because of the strictly limited nature of the information conveyed by a beeper, which is capable only of a very narrow intrusion, if any, on privacy interests, we submit that it is entirely reasonable under the Fourth Amendment to permit law enforcement officers to conduct beeper surveillance without a warrant on the basis of reasonable suspicion falling short of probable cause.

59. Id. at 7-8 ("As with other, more traditional law enforcement surveillance techniques, such as visual observation, radar, or bloodhounds, the use of a beeper to follow the movements and determine the whereabouts of a vehicle does not constitute a search or seizure because an individual has no legitimate expectation of privacy in his public travels.")
60. Knotts, 460 U.S. at 283-86. Although the government did learn at some point that the car containing the transmitter ended its journey inside a private cabin, it did not obtain any information about where in the cabin the car was located and therefore did not implicate any privacy interests that visual viewing from a public vantage point would not have also implicated.

61. See United States v. Karo, 468 U.S. 705, 714 (1984) (holding that using a beeper to monitor area of a private residence not visible to the outside violates the Fourth Amendment rights of those who have a "justifiable interest in the privacy of the residence").
Far from reflecting common values about privacy and the way people actually behave, however, the Court's analysis here is counterintuitive. Imagine that police officers presented you with the option of having them follow you everywhere you travel, keeping track of when you leave your house each day, where you go for recreation and how often you visit various people and places. Now imagine that as an alternative, the police propose tracking exactly where inside your garage your car is parked at any given time. Which of the two would you choose? Which of the two represents the greater invasion of privacy?

Only the most formalistic analysis would consider the threshold of the home the place where privacy begins and ends, regardless of how trivial the "hidden" data and how absolute the "public" surveillance. Under any common-sense approach, the tracking of everywhere you go would represent the far greater imposition upon your privacy and security. Yet if the Court views the privately owned field as knowingly exposed, it would seem to follow that so are a person's movements on public property. A car's location within a person's garage, by contrast, is not publicly exposed. Without a tracking device, no one can detect where it is without entering the resident's private space.

Putting aside the privacy of a car inside a garage, the Court's theory in Knotts might seem correct at first glance. By driving around in public, a person does appear knowingly to expose her comings and goings in the vehicle to the outside world. She, in effect, agrees to public observation. Upon further reflection, however, the conclusion that she does is dubious. The Knotts reasoning is flawed because people do not expect to be followed when they move about in public areas. When you notice a person following you on the road, you are likely to feel unnerved. It is not that you suppose you are literally "invisible" in public. Occasionally, you will see or be seen by someone you know. Other times, you may go to two different places and run into the same acquaintance or stranger at both. Nonetheless, for the most part, you rightly anticipate a measure of public privacy. Unless you are a

62. For an excellent and thorough critique of the Court's insistence on drawing the reasonable expectation of privacy line between the inside of the house and everywhere else, see Christopher Slobogin, Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance, 87 MINN. L. REV. (forthcoming 2002).

63. For one thing, the individual lacks other options. Her inability to avoid leaving the house (and thereby "exposing herself") makes Knotts comparable to Greenwood, the garbage case. People who never leave their homes, for example, are called "shut-ins" and normally suffer from a mental or physical illness that requires others to take care of them. See Erin Emery, Finding Their Centers Mentally Ill Get Coping Assistance Through Drop-In Self-Help Services, DENV. POST, Aug. 1, 1999, at B05; see also Al Guida & Natasha Verhage, Editorial, Documented Distress, WASH. POST, July 21, 2001, at A21 (mentioning "Mental Health: A Report of the Surgeon General"); infra note 85 (discussing psychological injuries inflicted by solitary confinement).
celebrity, you rely on a level of anonymity and mutual distance that comes with most public outings. If you know someone is following, you will therefore feel a sense of violation or intrusion.

The intuitions of nonlawyers, asked about their expectations of privacy, mirror my description of tracking as wrongdoing. In 1993, Christopher Slobogin and Joseph E. Schumacher published an empirical study about Fourth Amendment searches. Experimenter presented subjects with a list of governmental activities, many of which corresponded to those considered in Supreme Court cases. Subjects were then asked to rank the activities in order of perceived intrusiveness. The authors found, not surprisingly, that much of what the Court has considered nonintrusive struck individuals unfamiliar with the Court's cases as highly intrusive.

In one finding relevant to Knotts, subjects rated "[u]sing a beeper to track car" as significantly more intrusive than "[f]ollowing pedestrian in police car." This finding poses a challenge to the Supreme Court's suggestion that by going out in public, a person knowingly exposes herself to such tracking.

Consider the implicit steps in the Supreme Court's ultimate conclusion that tracking a car is not an invasion of privacy. First, the Court observed that a person driving on the street is out in public. He therefore knowingly exposes himself to scrutiny by others. Just as people can easily look momentarily at his car, the Court reasoned, people may also watch his car over time. Normally, of course, viewing a moving car over time would require a person to follow the car. After implicitly taking this first step, from momentarily observing the car to following it, the Court then concluded that tracking everywhere a car goes in public is not a search. Because police are able to use a tracking device

64. See JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 15-18 (2000) (discussing how "we maintain boundaries of reticence that other people are forbidden to cross without mutually negotiated consent" and providing as an example the way people conduct themselves in an elevator) (citing ERVING GOFFMAN, BEHAVIOR IN PUBLIC PLACES (1963)).


66. Id. at 740.

67. Id. at 738 tbl.1.

68. United States v. Knotts, 460 U.S. 276, 281 (1983) ("A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.").

69. We know that following a person does not represent a Fourth Amendment seizure, so perhaps, given the "out in public" logic of the Court, it would not represent a search either. See Michigan v. Chesternut, 486 U.S. 567 (1988) (holding that police following a suspect to see where he is going and driving alongside him for a short distance does not constitute a Fourth Amendment seizure). Indeed, the Court later held that running a person down with the obvious intent of catching him does not represent a Fourth Amendment seizure prior to successful apprehension (either by submission to authority or physical contact). See California v. Hodari D., 499 U.S. 621 (1991).
to do what others could have done with their sensory faculties, the Court said, police therefore may use such a device without implicating any reasonable expectation of privacy.\(^{70}\)

Notably, the subjects of the Slobogin and Schumacher survey viewed being tracked as more intrusive than being followed. It is unlikely that this judgment arose from the belief that being followed all of the time (and therefore being in constant view of the follower) is less intrusive than having the whereabouts of one’s car known (but not seen) all of the time. For that reason, it seems probable that subjects assumed in the hypothetical case in which a police officer follows a suspect that the act of following is temporary (for example, for only a few city blocks). Indeed, it might be impractical and therefore improbable for police to send a car to follow a random individual all of the time.

People thus perceive the act of tracking everywhere a person drives in public as meaningfully distinct from temporarily following a person, an activity which is itself a step removed from simply noticing the person because he or she is driving out in public. Though an individual can be said to invite notice by going outside, this invitation does not extend to people following her, particularly if that “following” takes the form of tracking, a constant sort of traveling surveillance that would both alarm most people and violate legal and social norms of conduct.\(^{71}\)

The criminal law’s recognition of stalking as an offense reflects the importance of being left alone, even out in public. “‘Stalking’ is generally defined as the ‘willful, malicious, and repeated following and harassing of another person.’”\(^{72}\) If we think about what is wrong with stalking, it goes to a very elemental component of the individual’s sense of security in her person, her ability to be left alone and to choose not to associate with others.\(^{73}\)

In Knotts, as in Greenwood and Oliver, the Court made the logical leap from the fact that it is “easy” to victimize a person (and therefore risky to be in that person’s shoes) to the conclusion that it must therefore be acceptable for people (including the police) to do so. The police, in other words, may violate

\(^{70}\) Significantly, the Court implicitly rejected this move in Katz, as we saw above in analyzing the lip-reader scenario. See supra notes 42-43 and accompanying text.

\(^{71}\) Since Slobogin and Schumacher “asked the participants [in the empirical study] to assume that the various intrusions described in the Intrusiveness Rating Scale were carried out by government agents,” Slobogin & Schumacher, supra note 65, at 748, we do not know exactly how intrusive the subjects would find the activities if conducted by private persons, the baseline which the Supreme Court uses in determining whether police have invaded an area that would otherwise be private. Nonetheless, the relative ratings given various activities are useful in revealing distinctions that subjects draw between activities that the Court appears to view as morally equivalent.

\(^{72}\) JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 737 (1999).

\(^{73}\) See ROSEN, supra note 64, at 15-18 (describing a person’s expectation of personal space).
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the law and disregard social norms because there is a risk that private actors will do so.

People who rummage through their neighbors' garbage, trespass on fenced-off fields, and stalk people, however, are criminals who intrude upon others' sense of security, safety, and privacy. We all risk falling prey to such criminals simply by carrying out our lives in an unobjectionable manner—putting out our garbage, taking solitary walks on private property, and going for drives in public. Taking these risks does not, however, represent consent or knowing exposure of our private lives, and does not render the criminal actions that sometimes follow innocuous, whether carried out by our neighbors or by the police. As I noted earlier, the man who sleeps on the subway is perhaps colloquially "asking to be robbed," but he is in fact not inviting misconduct, and his pickpocket is therefore no less blameworthy for engaging in it.

E. Electronic Eyes and Privacy in Public

To illustrate the importance of public privacy, let us take an arguably less controversial example than Knotts of police monitoring of what is broadly available to the public. There now exist technologies that can scan the eyes and faces of large crowds to identify a specific individual. A machine scans faces in the way that a computer might scan fingerprints.74 Police have used such technologies at football games, for example, to determine whether a particular target is in the audience.75 Following the Court's "public visibility" approach to the Fourth Amendment that we saw in Knotts, no one could plausibly object on privacy grounds to scanning. Yet we shall see that scanning does raise some difficult questions.

Sitting in the bleachers of a sporting event is arguably the essence of a public appearance. Anyone sitting nearby, and perhaps even a television audience, has visual access to the spectator's presence at the game. If the scanned individual did not want to be seen or identified there, then it seems he should have stayed home and watched the event on television.

This perspective, however, may not give us the whole story. An insightful letter to the editor of the New York Times convincingly challenged the idea that such scanning technology does no more than anyone sitting near the observed person could do.76 As the writer noted, under normal circumstances, we are in a position to "observe the observers."77 If someone stares at us (or points a

74. See Tony Mauro, Even Walls Won't Protect Your Privacy Now, USA TODAY, Feb. 20, 2001, at 13A.
75. See, e.g., Seeing Is Believing in Biometrics, FUTURE BANKER, June 2001, at 15 ("At the 2001 Super Bowl, every fan's face was scanned by police in an attempt to catch known criminals.").
77. Id.
television camera at us) in a public place, we tend to notice. Having noticed, we can take measures to put a stop to the staring or the filming. We can stare back and hope the other person will look away or blink. Because there is a social norm against staring, simply catching the offender will often do the trick. We can also behave differently for the few seconds that a camera is trained on us (as spectators often do by waving momentarily at television viewers). Such actions allow us to control the extent of our own exposure. Alternatively, we can change seats or leave the area altogether. Our ability to observe our observers thus gives us the power to rebuff, confront, and escape invasions of our privacy. Knowledge is power.

Not so with scanning technology (or hidden video cameras in the streets). With such devices, we can be watched wherever we go and have no idea at the time. The scanners, moreover, do not feel constrained by social norms of personal space. If we do not know that we are being observed, though, do we really "suffer" from the intrusion? The answer is that we do. Such technology is different from the unknown "watcher," because we know that the technology is available and may be in use. If the Supreme Court were to rule that the technology does not invade any reasonable expectation of privacy, as the logic in the precedents suggests it would do, the face scanner (or hidden camera) would always be a possibility whenever we left the house. Rather than living in blissful ignorance of constant surveillance, we might therefore find ourselves in a constant state of apprehension and self-consciousness whenever out in public. Our knowledge, however, unlike that of the observed who can see their own observers, does not give us any means of protecting ourselves.

Like a driver on the road, the target of an ocular scanning device will lose the practical invisibility on which most of us who are not celebrities can

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78. Cf. ROSEN, supra note 64, at 8-9 (noting that taking someone's intimate information out of context—where the person does not control the exposure—makes the person "vulnerable to being misjudged on the basis of [his or her] most embarrassing, and therefore most memorable, tastes and preferences").

79. See David Callahan, Overmatched by Technology, WASH. POST, July 22, 2001, at B3 ("Cameras using face-recognition technology watch over a downtown nightlife district and match the faces picked up with a database of mug shots.").

80. See, e.g., William Safire, The Great Unwatched, N.Y. TIMES, Feb. 18, 2002, at A15 ("To be watched at all times, especially when doing nothing seriously wrong, is to be afflicted with a creepy feeling. That is what is felt by a convict in an always-lighted cell. It is the pervasive, inescapable feeling of being unfree.").

81. One might make a related point about the federal psychotherapist/patient privilege, recognized by the Court in Jaffee v. Redmond, 518 U.S. 1 (1996). Justice Scalia argued in dissent that although the federal privilege had not existed until that point, people had still felt free to speak openly to their therapists. Therefore, he argued, the privilege was not necessary to facilitate patient/therapist communication. One flaw in his analysis was its failure to account for the fact that people might not have previously known that their communications were unprivileged. See id. at 22-24 (Scalia, J., dissenting). Had Justice Scalia’s dissenting view prevailed, the lack of privacy in therapy would then have come to light, producing the chilling effect the majority feared.

82. See supra Part II.D (discussing police monitoring of the defendant's automobile in
depend. Though we may run into a friend at a sporting event now and then, and though we could even turn up on television for a moment, we can generally assume we will remain anonymous out in public. The story of the employee who plays hooky from work only to find himself pictured on the evening news attending a baseball game is an exceptional one. Though we all take the risk of “blowing our cover” when we walk outside, the risk does not ordinarily materialize. And again, because we normally see the people who see us on the street, we can usually escape their glances by leaving the vicinity. Social norms come to the rescue by prohibiting our neighbors from following us all over the place, even if they might observe our movements from time to time. Technology neither knows nor abides by such normative limits.

F. Pretend Friends

In the Fourth Amendment cases defining “search” examined thus far, the Court has treated people who risk exposure as having invited or tacitly consented to that exposure. In each case, a person trusted unknown strangers to abide by legal and social rules that prohibit the action that was taken. Each time, in turn, the Supreme Court held that the Fourth Amendment permitted the government to disregard and exempt itself from these conduct rules, and the Court defended the governmental disregard by citing the risk that others in the public might have acted similarly.

In another line of cases, the Court has similarly treated risk-taking as tantamount to an invitation. What distinguishes these cases is that rather than simply behaving like a stranger who defies public norms, the government here behaves like an intimate who betrays a friend’s trust. These are what some have called the “false friend” cases and that I will call the “pretend friend” cases.


83. In one episode of Seinfeld, the “Elaine” character goes to a New York Yankees baseball game, where she sits in the owner’s box. She wears an Orioles cap to the game and refuses to remove the cap when asked, thus causing a scene. Because of the ruckus, she turns up on the cover of the newspaper, where she fears her boss at work (to whom she lied about why she was not at work that day, claiming that she was visiting her father in the hospital) will see her picture. Seinfeld: The Letter (NBC television broadcast, Mar. 25, 1992).

84. See e.g., Bernard W. Bell, Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool, 60 U. PITT. L. REV. 745, 800 (1999) (“The Fourth Amendment does not restrict police use of undercover techniques, in part because everyone—private persons and media—can act as ‘false friends.’”); Colb, supra note 20, at 1711 n.290 (“[T]he Court would face a dilemma very much like those it faced in the cases allowing nonsuspicion-based ‘false-friends’ to solicit, record, and transmit the words of a suspect.”); Jaleen Nelson, Sledge Hammers and Scalpels: The FBI Digital Wiretap Bill and Its Effect on Free Flow of Information and Privacy, 41 UCLA L. REV. 1139, 1175 (1994) (“Even if precautions are taken to protect the information, there is also a notion in search and seizure doctrine that information voluntarily given to another person is an assumption of risk.
In reviewing challenges to various undercover operations, the Court has held that nothing in the Fourth Amendment prevents a government agent from feigning a relationship with a person and thereby insinuating himself into the person’s confidence. The police accordingly need not articulate a reason for suspecting the people they target for such deception. As scholars have said in summarizing these holdings, the Court recognizes no reasonable expectation of privacy in one’s friends.85

Unlike rummaging through neighbors’ garbage, trespassing, and stalking, betraying a friendship is not generally a criminal act. We do make friends at our own risk, in this sense, and if we misplace our trust, there is not much the law will do for us.86 It stays out of arbitrating friendships in no small part because such regulation would itself invade the privacy of close relationships. The fact that our friends can betray us without legal consequence, however, does not ultimately support the Court’s approach to undercover friendships. To see exactly what the pretend friend cases reveal about the Court’s philosophy of privacy, it is useful to compare them with Katz.

Recall that in Katz, the Supreme Court held that a person has a reasonable expectation of privacy in the conversations he conducts from a closed public

by that person that the ‘false friend’ will give the information to law enforcement officials.”).

85. See Lewis R. Katz, In Search of a Fourth Amendment for the Twenty-First Century, 65 IND. L.J. 549, 552 (1990) (“[A] friend may freely report to the police all that he sees or hears while in our home. He can steer the conversation to suit his government handlers and electronically transmit our conversations while he is in the house.”); Maclin, supra note 6, at 575-76 (“The Court reads the Fourth Amendment’s guarantee against unreasonable governmental searches and seizures to place no limitations on the government’s power to send informants to infiltrate our homes, businesses, religious organizations, or social groups.”) (footnote omitted); Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 MICH. L. REV. 2466, 2473 (1996) (“The government through the use of informants violated no reasonable expectation of privacy... because the suspect was not entitled to rely upon his ‘misplaced confidence’ that his friends... would not ‘reveal his wrongdoing.’”) (citing Hoffa v. United States, 385 U.S. 293, 302 (1966)).

As with putting out one’s garbage and moving about outside the house, however, people have a need to share their personal lives with other people. One commentator has argued that part of what makes privacy worthwhile is that it can be shared with intimates. The article was later cited by Justice Ginsburg in a dissent. See Minnesota v. Carter, 525 U.S. 83, 107 (1998) (Ginsburg, J., dissenting) (“The power to exclude implies the power to include.”) (citing Coombs, supra note 6, at 1618 (“One reason we protect the legal right to exclude others is to empower the owner to choose to share his home or other property with his intimates.”)) (quotation marks omitted). Of course, the law does not require us to have friends, as it requires us to dispose of garbage. But human beings are social animals. Indeed, the mental impairments that result from long-term solitary confinement attest to the need for social interaction. See Stuart Grassian, Psychopathological Effects of Solitary Confinement, 140 AM. J. PSYCHIATRY 1450, 1454 (1983) (concluding “that the use of solitary confinement carries major psychiatric risks”).

86. But see Rosen, supra note 64, at 50 (“[In invasion of privacy cases,] courts ask... whether... publication would be ‘highly offensive to a reasonable person.’”).
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telephone booth.\textsuperscript{87} Only four years after Katz was decided, the Court handed down United States v. White,\textsuperscript{88} in which it reaffirmed and extended older decisions, holding that government agents could pretend friendships and thereby elicit, transmit, and tape record confidential disclosures without implicating the Fourth Amendment. As many commentators have noted, Katz and White appear to be inconsistent with each other.\textsuperscript{89} If it invades an individual’s privacy for police to tape a telephone conversation between him and another person, why should police be allowed to pretend to be that other person and tape a telephone conversation between the trusting individual and the deceptive officer? If anything, the latter might seem like the more profound invasion of privacy.

Though the critiques of White are convincing in many respects, there is at least one conceptual distinction between Katz and White on which commentators have not focused. This distinction concerns the relevant individual’s skill at detecting pretend friends. In Katz, the target of the police officers’ investigation did not misplace his trust. The person whom Katz trusted was honestly (though illegally) receiving Katz’s communications with no apparent intention of betraying the confidence. In White, Hoffa v. United States,\textsuperscript{90} and Lewis v. United States,\textsuperscript{91} in contrast, the person in whom the respective targets confided secrets were all traitors.\textsuperscript{92} The government had sent them to pretend closeness and acquire confidences, and they had succeeded in doing so. Rather than spying from the outside on an extant and trusting relationship, in other words, the police became the other half of perceived friendships.

So what? In both kinds of cases, the police carried on a deception that made the individual believe that he was speaking in a confidential setting when in fact he was not. Why should anything turn on whether the deception concerned an apparently sound-proof telephone booth or an apparently faithful friend? The answer may be that the Court viewed betrayal as an expected (if reprehensible) behavior among human beings, much like rummaging, trespass, and following people around. Nosy neighbors and pretend friends are not

\textsuperscript{87} Katz v. United States, 389 U.S. 347, 352 (1967).
\textsuperscript{88} 401 U.S. 745, 751 (1971).
\textsuperscript{89} See, e.g., Jon Wesley Wise, State v. Reeves: Interpreting Louisiana's Constitutional Right to Privacy, 44 LA. L. REV. 183, 193 (1983) ("[A] conflict appears to exist between Katz and White with regard to the correct approach to evaluating privacy as it is protected by the fourth amendment. On the one hand, Katz appears to define the parameters of privacy, at least in part, in terms of an individual's expectations and his own efforts to exclude others. By contrast, White would allow this self-determination of privacy to be vitiating by another individual's consent.").
\textsuperscript{90} 385 U.S. 293 (1966).
\textsuperscript{91} 385 U.S. 206 (1966).
\textsuperscript{92} White, 401 U.S. at 746 (secret informant); Hoffa, 385 U.S. at 296 (same); Lewis, 385 U.S. at 206 (undercover agent).
unheard-of phenomena. We trust such people to behave properly at our own risk.

If this is the way the Court viewed such actions, then it might have accordingly permitted police to take on the role of these known figures in human society without worrying that their actions would significantly alter the natural course of events. Taping others' telephone conversations is another matter, however. The Court could not plausibly consider electronic spying to be as common in human interaction as other kinds of misbehavior and betrayals. On this hypothesized reasoning, then, for the police to engage in electronic surveillance would introduce an invasion of privacy that would not have taken place absent governmental action and thereby interfere with a "reasonable expectation of privacy."

The person protected by Katz and unaffected by White is thus someone who can tell when to trust another person. Such a person might have a "sixth sense" through which she detects those people who are willing to betray her and accordingly steers clear of them. When she talks on the telephone with a trusted confidante, she can therefore relax. Since bugging is impermissible, her secrets are safe. It is only the mistakenly trustful speaker—the one with flawed judgment about people—who is jeopardized by government traitors.

This disparity, however, between those who have and those who lack a sixth sense for traitors, ought not to dictate expectations of privacy, for two separate reasons. First, the "traitor detector" is analogous to the person whose home has an effective alarm system (or a watchdog). The intending burglar who comes to the door might decide to go elsewhere when the alarm goes off or the dog begins to bark, choosing instead to burglarize the house of a neighbor whose lock can be picked without setting off either a mechanical or a canine response.

The unalarmed house will probably be subject to burglaries more frequently than the alarmed one. The crime of breaking and entering a home to commit a felony, however, is no less serious when a home lacks an alarm. It is certainly no defense for the burglar to say that "the resident knowingly exposed his home to me by failing to alarm the house against burglars." Police would similarly have no Fourth Amendment defense for a warrantless house invasion in citing the fact that an individual failed to alarm his home.

Vulnerability does not translate to an invitation to break in. It similarly should not do so in the context of friendship. Misconduct that is easy to perpetrate does not, by virtue of its ease, become any less reprehensible. The reasonableness of an expectation of privacy or freedom from wrongful acts should accordingly not turn on the attractiveness of a target to an intending wrongdoer. And that principle applies as well to the wrongdoer who betrays a trusting friend, one who does not appreciate the sort of person with whom she is dealing.

There is a second problem with a doctrine that guarantees privacy only to those who can detect faithless friends, even taken at face value. The Court
might correctly observe that in the hypothetical state of nature, where the
government is temporarily left out of the equation, trusting a person and
sharing secrets with her risks betrayal. The person you trust can repeat
everything you tell her or unfairly exploit that information.

By allowing the police to send out pretend friends, however, the Court does
more than simply mimic the sorts of betrayals that would inevitably occur from
time to time in the real world of friendship. By planting moles in our midst, the
government deliberately manipulates reality to create relationships for the sole
purpose of betrayal. Such friendships, founded entirely on treachery and one-
sided gain, are unusual. By utilizing such spies, the government therefore adds
a level of unusual risk to our private lives. Even for those of us who trust our
own judgment in detecting pretend friends, the government-issue friend is
peculiar enough to be more like the recording device on Katz's telephone booth
than like a friend in the real world who fails to keep a secret. Such creatures
are more difficult to discover (since they are not naturally occurring) and could
therefore chill even the savvy individual, otherwise insulated by a sixth sense,
from trusting other people.\footnote{See White, 401 U.S. at 787 (Harlan, J., dissenting) ("The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society.")}

One might object to this argument on the ground
that the use of spies can be a crucially important method for gathering evidence
against suspected criminals. Calling the surveillance technique a search,
however, does not rule it out as a tool of law enforcement. It simply requires
that some level of individualized suspicion generally accompany its use.

Perhaps the proposal to apply the Fourth Amendment to the use of pretend
friends will strike some as too radical a change from the status quo. Must we
resolve the matter of pretend friends by classifying either \textit{all} or \textit{none} of them as
engaged in Fourth Amendment searches? Not necessarily.

One way to protect people's privacy in their existing relationships without
calling every use of spies a search is to embrace an approach that turns on the
identity of the person who initiates the spying. If the government makes
contact with an informant, whether the latter is known to the target or not, then
any subsequent state-directed spying ought to count as a search. In such
situations, the state has altered—or created—a betrayal where previously there
was none. If, on the other hand, a potential informant approaches the
government with information about the target and only \textit{then} does the
government encourage further spying, it may be fair to say under these
circumstances that there is no search. The friend has become a traitor before
the government enters the picture. The adage "you can't trust your friends"
may be true in this limited context.

Recall the sordid tale of Linda Tripp and Monica Lewinsky. Though
people hold former Independent Counsel Kenneth Starr responsible for many
abuses, few would primarily blame Starr—or the federal government generally—for Linda's having taped conversations with Monica and turned them over to him. It was Linda's idea to invade Monica's privacy in her personal telephone conversations, and Linda was the primary traitor in that regard. To the extent that the Fourth Amendment question is one of attribution, it is perhaps fair to say that Monica "knowingly exposed" her secrets to Linda and that Linda—not the government—was subsequently responsible for invading Monica's privacy by disseminating secrets meant only for Linda's ears. On this approach, the state action necessary to trigger the Fourth Amendment's application is arguably absent (or at least minimal) in pretend friendships like Linda's and Monica's.\footnote{4. In my workshop presentation of this project at the University of Pennsylvania Law School, Amy Wax suggested that a flexible state-action approach might provide a useful compromise position on the "search" status of pretend friends. I am grateful for the suggestion and for our subsequent conversations on the topic, to which I credit the alternative vision of pretend friends that appears in the text.}

III. "KNOWING EXPOSURE" AND CONSENT

A. Strict Liability Crime

As we have seen, the Supreme Court uses the concept of "knowing exposure" to decide whether to exempt an activity by the police from Fourth Amendment coverage. The Court has tended to apply an idiosyncratic interpretation of this phrase, however, so that it extends to situations in which people have merely taken a risk that a wrongdoer might come along but have in no way invited the public to observe what would otherwise be private. This broad construction of knowing exposure has an analogue in the criminal law that provides some insights into what is wrong with its application to the Fourth Amendment, illustrating as well the flaws of a related doctrinal concept, the "consent search."

In the criminal law, a defendant must normally have a culpable state of mind, or "mens rea," to be guilty of an offense.\footnote{See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 101 (2d ed. 1995) ("[E]xcept in rare circumstances, a person is not guilty of an offense unless he performs a voluntary act (or omits an act that is his legal duty to perform) that causes social harm (the \textit{actus reus}), with a \textit{mens rea} (literally, a 'guilty mind').") (footnote omitted).} The offender's mens rea typically connects a voluntary act with some harmful result or attendant circumstance. So, for example, if you serve orange juice to a friend, and it turns out that someone spiked the juice with a lethal dose of arsenic, you are not in any way guilty of killing your friend unless you either knew or should have known that the juice was poisoned. Even though you knowingly exposed your friend to orange juice, and the juice contained poison, you nonetheless did
not willingly, knowingly, recklessly, or negligently harm your friend and therefore should not be considered blameworthy or responsible in connection with her death.

There are some exceptions to this criminal law principle, cases in which a person might be guilty of committing a crime even though he lacks a guilty state of mind with respect to the circumstances surrounding his actions or their consequences. These exceptions are sometimes called “strict liability” criminal offenses. In cases of strict criminal liability, a person acts voluntarily but does so without having at his disposal material factual information about surrounding circumstances.

An old example of a strict liability crime is the sale of adulterated milk under a statute reviewed by the Massachusetts Supreme Court in 1864. The court held that a person could be convicted of selling adulterated milk, regardless of whether he knew it to be adulterated, explaining that

[i]t is of the greatest importance that the community shall be protected against the frauds now practised [sic] so extensively and skilfully [sic] in the adulteration of articles of diet by those who deal in them, and if the legislature deem it important that those who sell them shall be held absolutely liable, notwithstanding their ignorance of the adulteration, we can see nothing unreasonable in throwing this risk upon them.

Many commentators have questioned the legitimacy of strict liability crimes. It seems unfair to hold a person criminally responsible for action taken under factual circumstances that would have led any reasonable person to believe the action was legal. Proponents of strict liability offenses respond to critics by arguing that the existence of strict liability offenses protects societal interests by motivating potential offenders to find out the facts and avoid even the possibility of committing the crime in question. As a general matter, strict liability crimes tend to fall into the category of “public welfare” offenses. Such offenses involve actions inherently risky enough to put the actor on notice that he must exercise extreme caution. Furthermore, penalties for public

97. Id. at 490.
99. See Hippard, supra note 98, at 1045 (discussing purposes of strict liability crimes); Larry W. Myers, Reasonable Mistake of Age: A Needed Defense to Statutory Rape, 64 Mich. L. Rev. 105 (1965) (discussing legitimacy of strict liability with respect to statutory rape).
100. See Staples v. United States, 511 U.S. 600, 610-11 (1994) (refusing to treat the National Firearms Act as a strict liability offense, in part because “[g]uns in general are not ‘deleterious devices or products or obnoxious waste materials’ . . . that put their owners on notice that they stand ‘in responsible relation to a public danger’”) (citations omitted).
welfare offenses are ordinarily not very severe and accordingly render such offenses “regulatory” rather than punitive in nature.101

B. “Knowing Exposure” and Strict Liability Crime

Consider now the similarity between strict criminal liability and the forfeiture of Fourth Amendment privacy. In determining what falls outside the definition of “search,” the Supreme Court has assumed that a person knowingly exposes herself to the following: trespassers onto private land; stalkers who watch her wherever she goes (outside of her home); snoops who tear through her opaque garbage bags; helicopters that hover over her curtilage; planes that fly over her land; and “friends” who deceive their way into her confidence and trust with the specific goal of betrayal. All of this behavior is some combination of illegal, socially deviant, and wrongful, though there is no guarantee that it will not occur. In the absence of such a guarantee, the Court permits government officials to treat the individual as having invited the misconduct.

Because a person voluntarily and intentionally places garbage at the curb, and thereby makes it available for the snoop to tear open, the Court treats the person as having invited the snoop to rifle through her garbage. The person who enables the intrusion to occur, in other words, is vested with full responsibility for that intrusion. Rather than holding the police responsible for invading a person’s privacy, the doctrine says that under knowing-exposure circumstances, the individual has given up any legitimate expectation of privacy. Like the strict liability criminal who is punished for harms that he causes without fault, the person victimized by those who violate social and legal norms is held responsible for any resulting loss of privacy.

Does the “public welfare” rationale for most strict liability crimes extend logically to strict liability self-exposure for Fourth Amendment purposes? One might believe so if one viewed the individual hoping for privacy as an aspiring criminal considering whether to risk apprehension. Because the Fourth Amendment cases that come before the Supreme Court are almost invariably cases about criminals attempting to conceal their crimes, as I noted earlier, it is perhaps not surprising that the Court has taken this perspective.

On such reasoning, anyone who engages in a criminal enterprise must expect that a gap in the veil of illegitimate concealment will be exploited by law enforcement. As Justice White said revealingly of pretend friendship in

101. See id. at 616.

Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea. Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary.

Id.
United States v. White, “Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize.”

If a criminal worries that he is being constantly watched and monitored, that fear will inure to the benefit of society, because it will make him hesitate before pursuing his criminal objectives. There is no cost, in this reckoning, to the criminal’s inability to trust people (or otherwise to enjoy privacy).

Absent requirements for a warrant, probable cause, or even reasonable suspicion, however, innocent people are subject to the same chilling effects as criminals. Innocents—uninterested in using privacy for criminal enterprises—could be chilled from legitimately utilizing their private spaces, both literal and figurative, for fear of police wrongdoing and betrayal. As I have suggested elsewhere, a principal purpose of the reasonableness requirement is to maximize the odds that the guilty rather than the innocent will suffer invasions of privacy. Unlike “one contemplating illegal activities” or one engaged in the inherently suspect activities that place the public welfare in jeopardy, the innocent person who seeks privacy should not have to assume that “Big Brother Is Watching.” To live in fear of such scrutiny is detrimental to people’s wellbeing and incompatible with the security and freedom from unreasonable searches and seizures that the Constitution guarantees.

C. “Knowing Exposure” and Consent

Having considered the parallel between strict criminal liability and knowing exposure in the Fourth Amendment, let us now turn to the related doctrine of consent searches. A consent search is a governmental activity that invades a reasonable expectation of privacy, and for which the Fourth Amendment would therefore ordinarily require a warrant. Due to the presence of consent, however, the invasion of privacy is “reasonable,” notwithstanding the absence of any basis for suspicion or outside authorization. The consent of the person searched thus effectively becomes a substitute for probable cause and a warrant.

The notion of a consent search is a feature of Fourth Amendment doctrine that distinguishes searches from stops and other seizures of the person. The

103. See Colb, supra note 7, at 1472.
104. White, 401 U.S. at 752.
105. See GEORGE ORWELL, 1984 (1949).
106. ROSEN, supra note 64, at 207 (“Denied a private space where they can work behind closed doors, gas station mechanics are forced to perform under constant scrutiny, which increases the tension of their job.”); id. at 208-09 (“[I]f all communications in cyberspace are treated as public rather than private, workers will have fewer opportunities to collect themselves and put down their masks.”).
Court has not drawn a line, in other words, between police conduct that is not a stop, on the one hand, and police conduct that is a stop but that is also consensual and therefore need not be otherwise justified, on the other. If a person agrees to remain in the presence of the police when he is free to leave (and would reasonably understand his freedom to leave), then there is no stop.\footnote{See, e.g., United States v. Mendenhall, 446 U.S. 544, 554 (1980) (Stewart, J.) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."). This test was later adopted by a majority in Michigan v. Chesternut, 486 U.S. 567, 573 (1988), and its status as a necessary condition of a seizure of the person was reaffirmed in California v. Hodari D., 499 U.S. 621, 627-28 (1991).}

To say that police have consensually stopped a person would accordingly represent a contradiction in terms.

Though the Court has developed a law of consent searches, the wall between "not a search" and "consent search" has proven less than solid, reflecting substantial overlap between the Court's definitions of the two categories. Giving consent to a search, under the precedents, means voluntarily allowing the police to look at or rummage through what would otherwise be private. It is something a person does willingly to relinquish a right to privacy from law enforcement. Giving up a Fourth Amendment expectation of privacy in one's personal things or activities, under the cases, means knowingly exposing them to the public (which includes the police). From the perspective of the individual, then, there is no functional difference between a consent search by police, on the one hand, and activities by police that do not qualify as a search at all, on the other. The only distinction between the two is whether people other than government officials are invited to make observations as well. Because nongovernmental intrusions normally fall outside the scope of the Fourth Amendment, that difference has little constitutional significance.\footnote{But see Wilson v. Layne, 526 U.S. 603, 605-06 (1999) (holding that police executing a valid arrest warrant in a suspect's home violated the Fourth Amendment by bringing with them a reporter who took pictures during the execution of the warrant).}

The Court has nonetheless refused to acknowledge that consent searches are essentially the same thing as activities falling outside the scope of the search category altogether. In the leading case of Schneckloth v. Bustamonte,\footnote{412 U.S. 218 (1973).} police stopped a car containing six occupants.\footnote{Id. at 220.} After talking with the occupants, police asked one who had produced a driver's license, Joe Alcala, whether they could search the car. Alcala responded yes and opened the trunk for them. The police subsequently found several stolen checks.\footnote{Id.}

In reviewing Bustamonte's petition for habeas corpus, the United States Court of Appeals for the Ninth Circuit noted that the government had not shown that Joe Alcala knew, when asked for consent, that the police were
prepared to honor his decision if he declined.\textsuperscript{112} The government had failed to prove, in other words, that Alcala understood his right to refuse consent. On the basis of this apparent ignorance of his rights, the Ninth Circuit held, Alcala’s consent was invalid.\textsuperscript{113}

The Supreme Court reversed the Court of Appeals, holding that knowledge of the right to refuse consent is a relevant but not dispositive factor in determining whether a suspect has given valid consent to a search.\textsuperscript{114} The Court added that a consent search of a car is still a search but that it is “reasonable” and therefore does not violate the Fourth Amendment, even in the absence of probable cause and a warrant.\textsuperscript{115}

The \textit{Bustamonte} decision is important. It tells us that consent to a search is not the same thing as “waiver” of rights. Waivers, such as the waiver of the right to trial or counsel, must be knowing and voluntary. Through consent to a search, a person enables the police to inspect and observe what would otherwise be off-limits, thereby making the inspection count as reasonable. But a lack of information that would vitiate a waiver does not categorically invalidate consent.

Underscoring the essential similarity between “consenting” to a search and “knowingly exposing” one’s personal life, the Court refused to take an approach to consent searches that would require a true willingness on the part of the individual to expose what was previously private. A person can be said to consent even if he mistakenly believes that he has no choice, just as he can be said to expose his personal items and activities even if he correctly believes and expects that only third-party wrongdoing could bring about their exposure.

As in the case of knowing exposure, moreover, the Court seems to have taken a strict-criminal-liability perspective on the individual who consents to a search. Finding that there is consent, the Court suggests, is socially beneficial, because it facilitates searches that can help solve and prosecute crimes. “[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.”\textsuperscript{116}

Significantly, the Court’s eagerness to facilitate consent searches rests implicitly on the assumption that there is likely to be evidence found, an assumption that strangely—by definition—need not correspond with the presence of probable cause or a warrant or any other basis for suspicion. As in the context of strict liability crimes, then, even in the absence of evidence, the Court does not view the person whose rights are in question as innocent but

\begin{enumerate}
\item \textit{Id.} at 222.
\item \textit{Id.}
\item \textit{Id.} at 226-27.
\item \textit{Id.} at 219 (citing Davis v. United States, 328 U.S. 582, 593-94 (1946)).
\item \textit{Id.} at 243.
\end{enumerate}
instead places the burden upon him to acquaint himself with the relevant facts, here the legal and factual significance of saying no to the police.

The strict-criminal-liability parallel extends beyond the Supreme Court's definition of the fact of consent, to its scope. The Court has said, for example, that after a person consents to an officer's search of a car, the officer may legally search the inside of a folded-over paper bag located on the floorboard of the car, without obtaining any additional permission.\textsuperscript{117} Though the officer could easily ask, "Do you mind if I look in this bag?", the Court held that such a request is legally unnecessary.

In the particular case at issue,

[the officer] had informed respondent [Enio Jimeno] that he believed respondent was carrying narcotics, and that he would be looking for narcotics in that car. We think that it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within the car which might bear drugs.\textsuperscript{118} The Court thus relied on the fact that incriminating evidence was likely to be in the bag as a basis for inferring that the driver had agreed to the search of that bag.\textsuperscript{119}

Yet, because the suspect presumably knew there was evidence in his bag, the conclusion that he truly intended to agree to the search of the bag seems dubious.\textsuperscript{120} The Court therefore appeared to be reasoning that once the suspect consented to the search of his car, he simply ran the risk that the officer would open the closed bag on the floorboard and find drugs. The suspect should have known, in other words, that the officer might open the bag.

The risk that the consenting suspect took with respect to the officer resembles the risk taken by Greenwood in putting his garbage at the curb for collection. Once a person permits an officer to search his car, the officer is in a position from which he can easily open a bag, much as scavengers and snoops can easily tear open garbage left at the curb. It is artificial, however, for the Court to claim that Greenwood and Jimeno actually agreed to or invited each respective course of events. In both cases, the Court utilized a strict criminal liability model to find knowing self-exposure. When a defendant acts in a manner that—unwittingly—enables the ultimate disclosure, the Court readily attributes responsibility for that disclosure to the defendant.

\textsuperscript{118.} Id. at 251.
\textsuperscript{119.} Id.
WHAT IS A SEARCH?

D. Pretend Friends and the Breakdown of the Consent/Knowing Exposure Distinction

As we have seen, the Court distinguishes between what it classifies as a consent search and what it classifies as no search at all, on the ground that consent is a special exposure limited to law enforcement, and "not a search" is an all-purpose, knowing exposure for public consumption.\(^1\)

The distinction breaks down, however, if we examine the context of what I have called the pretend friend cases. When an undercover informant befriends a private individual and gains entry into the individual's home through that pretense, the Court does not classify the behavior as a search.\(^2\) This is so, even though the Court does not normally include the inside of a person's home among those items knowingly exposed to the public. The government official in pretend friend cases therefore enters with impunity one of the most sacred private places protected by the Fourth Amendment, the house, and does so without a warrant or probable cause.

What makes the undercover agent's entry legal? The fact that the resident has invited the agent into his home. Unlike activities that take place in public, such as driving down the street, the Court's precedents continue to protect activities within the home from police scrutiny.\(^3\) By inviting the government official into his home, however, the individual knowingly exposes the inside of the home, along with the conversations audible from there, to that government agent.

Rather than say that the informant's entry in White was not a search, why didn't the Court simply hold that the officer had obtained White's consent to enter his home? The answer may be that consent would mean that there had been a search and that the search was reasonable. The police deception used to acquire consent, however, would seem to aggravate the intrusiveness of home entry and questioning and thus to undermine a claim of reasonableness. By substituting the claim that a search has not taken place for the claim that the search is reasonable, the Court converts what would otherwise be an aggravating factor—that police are concealing their true identities—into a

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121. This distinction may account for the Court's unwillingness to allow a private person to piggyback on an officer's warrant. When police invade a suspect's home, either with a warrant or on the basis of consent, they are performing a search. This means that they are invading what would otherwise remain private from governmental and nongovernmental actors. The warrant or consent gives the police a limited license to engage in this invasion, but it does not authorize others to do the same. See Wilson v. Layne, 526 U.S. 603 (1999).


condition that eliminates their obligation to conform their conduct to Fourth Amendment standards. Calling the entry and surveillance “not a search” thus allows the Court to elide altogether the question of Fourth Amendment reasonableness.124

Had it conceptualized the facts of White differently, the Court might have had to ask whether it is reasonable for police to gain entry into private homes under false pretenses. The Court might have had to say that gaining entry in this manner is reasonable only under circumstances that make clear the target’s criminal intent, circumstances that appeared to have been present in White. Relieving undercover operations of any Fourth Amendment scrutiny at all, however, means instead that police may “befriend” innocent parties out of animosity or even curiosity. Though such police conduct would certainly seem unreasonable to most of us, the Court ensured in White and its predecessors that the Fourth Amendment would have nothing to say about it. The unreasonableness of the conduct, in other words, would represent no bar to its legality.

Since the Court makes related arguments in both “not a search” and “consent search” cases, there should be one corrective that addresses the problem in both contexts. A more exacting standard for determining that there has been a knowing exposure or that there has been consent could redeem a doctrine that currently fails to protect areas and activities that people consider private. What makes doctrinal reform here especially important is evident in the implications of calling a police activity a consent search or a nonsearch, on the one hand, and calling it a nonconsensual search, on the other. Police conduct that invades what has been either knowingly exposed or consensually subject to search may be unwarranted and completely disconnected from legitimate law enforcement objectives—conduct, in other words, that is unreasonable.125 An innocent, utterly unsuspicious person harboring no

124. Using a similar sort of logic, the Court held in Illinois v. Perkins, 496 U.S. 292, 296-97 (1990), that an undercover police officer and informant who questioned a suspect in a jail cell had not “interrogated” the suspect in custody, within the meaning of Miranda v. Arizona, 384 U.S. 436 (1966), because the suspect did not know that he was being questioned by agents of law enforcement. To say instead that he was interrogated but consented thereto might have required him to have known that it was the government doing the questioning.

125. The Court has, of course, sometimes permitted what appear to be unreasonable activities even when it acknowledged that they qualified as searches or seizures. See, e.g., Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (holding that arrest for a misdemeanor punishable by a maximum $50 fine is not an unreasonable seizure, even though the particular arrest was pointless, humiliating, and completely unnecessary); Whren v. United States, 517 U.S. 806 (1996) (holding that a “traffic stop” that could not plausibly have occurred absent an illegitimate ulterior motive is nonetheless reasonable under the Fourth Amendment). Usually, however, the status of an investigation as a search or seizure places some limits on the police in carrying it out, even though the limits are generally only quantitative and therefore incomplete. See Colb, supra note 20 (urging a substantive, qualitative reasonableness approach to the Fourth Amendment).
IV. MOVE TWO: EQUATING SMALL AND LARGE INTRUSIONS

In the last two Parts of this Article, we saw that one of the flaws leading to the unduly narrow doctrinal scope of Fourth Amendment privacy protection is the equation of risk with an invitation to expose what would otherwise remain private. Making oneself vulnerable to legal or normative wrongdoing thus becomes a forfeiture of the right to privacy. Given the Court’s stated commitment to judging reasonable expectations of privacy by reference to community norms, such forfeiture threatens to derail the right of privacy. As we saw as well, the Court has made a similar move in defining the meaning and scope of consent to intrusions into concededly reasonable expectations of privacy. We observed that an inappropriate strict-criminal-liability approach to individual privacy can be said to characterize both of the two closely related notions of knowing exposure and consent search.

Some of the same cases discussed in the previous Part, and some additional ones as well, provide a distinct account of the Court’s failed approach to defining a search: the equation of small and large intrusions upon a particular expectation of privacy. The harm in this tendency is that it allows government officials to treat as knowingly exposed to the world (and thus to the police as well) not only those things that have been exposed to the public at large, but also those things that have been knowingly exposed to any third party.

A. Garbage

Recall the conception of privacy expressed in California v. Greenwood:126 Garbage left in a closed, opaque bag at the curb is knowingly exposed to the public. One reason for the Court’s conclusion in Greenwood, discussed in Part II.A,127 was the fact that snoops, animals, and children can easily get into garbage once it is out on the street. The Court articulated a second reason as well, one having to do with the homeowner willingly placing the garbage in the custody of a third party—the collector.

The Court reasoned that by leaving his garbage on public property, an individual deliberately hands that garbage over to a third party. Greenwood accordingly invited the collector to share in the knowledge of the contents of his garbage. The Court did not suggest, of course, that Greenwood expected the garbage collector to show the trash to other people. Once he had willingly relinquished it to the collector, however, the Court refused to count dissemination to others as an invasion of Greenwood’s privacy, above and

127. See supra notes 21-30 and accompanying text.
beyond that to which Greenwood had already implicitly agreed. This move—equating exposure to one person with exposure to everyone—permitted the Court to rule that when police require a third party to hand over what has been privately entrusted to him, that conduct normally does not trigger the protections of the Fourth Amendment. This equation of small-scale and large-scale exposure represents the second of the Court’s problematic doctrinal moves.

Note how the second move works in Greenwood. Having picked up garbage from the curb, a collector might deliberately or inadvertently open the trash bag in the process of emptying it into the truck, thus exposing its contents.128

Even accepting the Court’s apparent assumption that the collector had permission to look at it, however, there still remains an important gap between giving the collector one’s garbage and suffering the outcome of the case. By hypothesis, Greenwood had invited one person to examine his trash. What the police officer asked of the collector, however, was further dissemination. The notion that absent police intervention, the garbage collector might have—on his own—disseminated Greenwood’s garbage to other third parties is highly implausible.

Having others see one’s garbage is therefore not a natural consequence of putting a sealed trash bag at the curb for collection. Such dissemination would almost certainly have been unwelcome to Greenwood and to most other homeowners. Even if the trash collector did have an invitation to snoop, there is a cognizable difference between showing one’s garbage to the trash collector and disseminating the contents of that garbage to additional third parties.

If we had reason to expect collectors to distribute our garbage to the general public, we would probably take greater precautions than we currently do in concealing or destroying what is personal about it. As some have observed, an effective strategy for learning about a person’s most private thoughts and activities is to go through his garbage.129 Notwithstanding this fact, the Court refused to acknowledge the validity of any distinction between

128. Incidentally, such an examination would probably, if noticed by Greenwood or one of his neighbors, occasion complaints to the collector’s supervisor. Therefore, we might normally assume that even the collector would remain in the dark about Greenwood’s garbage. Interview with George C. Thomas III, Distinguished Professor, Rutgers Law School, in Newark, N.J. (July 30, 2001). A garbage collector would not generally interpret the homeowner’s act of leaving out her garbage as an invitation for him to snoop through its contents. It might therefore have been quite reasonable for Greenwood to expect even the collector to leave completely undiscovered any secrets contained in his trash.

129. See Ann M. Gynn, Eureka: Ariz. Project Unearths Truths About People, WASTE NEWS, May 15, 2000, at 52 (discussing a University of Arizona project that compared people’s survey responses to what was discovered in their trash: “What people say they do and what they actually do are two different things . . . . If you really want to know, don’t ask them—look at their garbage.”) (quotation marks omitted).
the garbage collector and the whole world in construing the extent of Greenwood’s knowing self-exposure.

An initial invasion of privacy can surely, on occasion, be so complete as to leave nothing for additional intrusions. If, for example, an arsonist were to burn down the walls of a person’s home, then the inside of the home would be visible to everyone passing by, for some period of time. If television cameras and hordes of private actors came to observe the home during this period, it would not work any additional privacy harm for a police officer to join the group of onlookers. There is sometimes, in other words, perhaps through no fault of the individual and however regretfully, no privacy left to protect. Under these circumstances, it would further no privacy interest to require police to obtain a warrant.

The Court, however, makes the mistake of treating situations in which only a limited exposure has occurred as though there had been this kind of total, irreparable exposure. The Court’s argument in Greenwood, that we have relinquished any privacy in our garbage with respect to third parties, exemplifies this error. The argument is that once we show something to the garbage collector, it becomes part of the public domain. The idea is flawed because it ignores norms about keeping confidences.

It is understood that garbage collectors will not pay close attention to the contents of our trash. It is further understood that whatever the garbage collector knows about us will be kept private. We do not expect, nor should we expect, that the strangers with whom we deal will broadcast our secrets generally. In assuming that they will, the Court ignores this norm and disregards the distinction between one person knowing our business and the whole world knowing our business. The Court approves the police officer’s unfettered ability to examine the contents of people’s garbage without regulation as arising out of the norms and practices of society. This approval evidences a disregard for social norms and degrades Fourth Amendment privacy.

B. Telephone and Bank Records

One might respond to the above analysis that although the homeowner does not expect the garbage collector to share his garbage, there is really no “understanding” between them on which to rely. The collector’s only obligation is to take the garbage away. We may be able to assume, as an empirical matter, that the collector will not pay attention to our garbage, but we have no privacy right to rely on that inattention. Garbage collection, on this account, is not a relationship of trust.

The Supreme Court has not, however, limited its dissemination logic to the arena of trash collection. It has, on the contrary, extended that logic to
relationships that are implicitly based on trust. In *Smith v. Maryland*,¹³⁰ for example, the Court held that when police use a pen register, an instrument that tracks all numbers called from a private telephone, they do not invade any legitimate expectation of privacy.¹³¹ Using a device that detects and discloses the identities of recipients of a person's calls is therefore not a search subject to the Fourth Amendment. The reason? As with garbage that we willingly surrender to the collector, each of us willingly allows the telephone company, made up of countless strangers, to keep track of our calls. Since we relinquish such data to strangers at the telephone company, we give up any interest we might have had in the privacy or secrecy of that information from the rest of the world, including the police.

Yet, as the Court knows, the telephone company tracks our calls for billing purposes, and we might accordingly expect that, like the garbage collector, the telephone company employee neither takes any interest in perusing our call lists nor embarks on a campaign to disseminate their contents to others. Under the Pennsylvania analogue of the Fourth Amendment, for example, police must acquire a warrant prior to using a pen register, notwithstanding the telephone company's access.¹³² The Pennsylvania Supreme Court thus rejects the Move Two reasoning of *Smith v. Maryland* in favor of a more nuanced approach to privacy in which a partial knowing exposure does not amount to an absolute forfeiture.

Under federal doctrine, by contrast, sharing access to the lists of phone numbers triggers no Fourth Amendment interests, even though it intrudes upon customers' privacy without their consent and does so without any basis in suspicion. By equating the original exposure with further dissemination, the Court manages to avoid altogether the issue of consensual self-disclosure implicit in the conclusion that a knowing exposure has taken place.

The Court reasons similarly about bank records in *United States v. Miller*.¹³³ Under *Miller*, the government may subpoena a person's bank records without having to abide by any Fourth Amendment safeguards.¹³⁴ The Court concluded that because several third parties will see any check that a person writes, and the person knows this from the outset of her relationship with the bank, there is no reasonable expectation of privacy in such records.¹³⁵ Is that conclusion sensible? Is opening a checking account the equivalent of

¹³¹. Id. at 742.
¹³⁴. See ROSEN, supra note 64, at 61 (discussing the federal statute passed specifically to protect some of the privacy denied by the Court in *Miller*, by prohibiting banks from turning over records to federal agencies).
WHAT IS A SEARCH?

posting all of our daily transactions on a public web site? Is signing up for telephone service the equivalent of publishing a list of the numbers we call in the newspaper? From the perspective of customers, the answer is probably no.

As Seth Kreimer observed regarding the Pennsylvania Supreme Court’s construction of its own constitution’s protection against unreasonable searches and seizures,

Most prominent in its theoretical divergence from the federal model is Commonwealth v. DeJohn... [Rejecting the reasoning of Miller, the court] viewed the Miller approach as “a dangerous precedent, with great potential for abuse.” It sensibly repudiated the proposition that an individual’s expectation of privacy is a bursting bubble like an evidentiary privilege that dissipates on emerging from total isolation. Instead, [it] adopted the California Supreme Court’s reasoning that a customer’s disclosure to the bank for the limited purpose of “facilitat[ing] the conduct of his financial affairs,” did not waive an expectation of privacy with regard to further exposure to government searches and seizures.136

By contrast, the United States Supreme Court un persuasively suggests that in using a telephone or a bank account, we invite the world to peruse all of our calls and transactions.137 When we make a call, the number we have dialed is automatically conveyed to the telephone company. This does not mean, however, that we expect others to learn that information. We trust that telephone company employees will give our list of phone numbers little if any attention, other than to bill us, and we expect the same of our garbage collectors with respect to our trash and of bank employees with respect to our financial information.

Under Smith v. Maryland, however, the police can—without even a reasonable suspicion of wrongdoing—monitor call lists to learn the frequency of contact between us and our friends, family, and coworkers. And they can do so on the theory that the government should be able to look at what we have already knowingly exposed to the public. The premise that we have knowingly exposed our phone lists and bank records to the public, however, is fiction. As Kreimer observes, the understanding “that sharing information with a single individual or institution does not dissipate the ‘expectation of privacy’ vis-a-vis third parties, accords with common social practice.”138

In United States v. Jacobson, 139 the Court similarly makes Move Two, assuming that third-party dissemination invades no reasonable expectation of privacy. It does so under a slightly different set of facts, however, in which no one claimed that the individual knowingly exposed anything to the public. In

136. Kreimer, supra note 132, at 9-10 (quotation marks omitted).

137. As with garbage, of course, we do not have the option of preventing all third-party strangers from seeing the telephone numbers we call and the checks we write, other than by not having a telephone or a bank account at all.

138. Kreimer, supra note 132, at 11.

Jacobson, two Federal Express employees examined a damaged private package. After opening the package and discovering a white powder inside, one of the employees notified the DEA and then reclosed the damaged package. A DEA agent subsequently picked it up, reopened it without a warrant, and field-tested the powder to determine that it was cocaine.

Jacobson, the person whose package was opened, was prosecuted for various drug offenses. Prior to trial he brought a suppression motion arguing that the DEA agent violated the Fourth Amendment by opening the package without a warrant. A majority of the Supreme Court ultimately rejected this argument, however, emphasizing the fact that a Federal Express employee (a nongovernmental actor) had already opened the package, without any prompting from the government, before the DEA stepped in. Once a private individual had exposed its contents, the Supreme Court held, the government accomplished no invasion of an intact privacy interest by reopening the very same package.

Jacobson evidences the Court’s belief that the further sharing of what has been exposed to a third party does no new privacy harm to the individual. Since Jacobson himself did nothing to expose the contents of his package, the Court’s refusal to recognize dissemination of information as a Fourth Amendment search necessarily extends beyond cases in which the initial exposure may be attributed to the individual in question (due to either knowing exposure or consent). The reasoning would apply, in other words, even when the initial exposure occurred because one private party had concededly invaded the privacy of another.

Consider the implications of this reasoning. Not only can the police obtain a warrant based upon the information supplied by a private person, an

140. The package had been torn by a forklift and opened pursuant to company policy on insurance claims. Id. at 111.
141. Id.
142. Id. at 111-12.
143. Id. at 112.
144. Id.
145. Id. at 118-22. As the Court explained, The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant. Id. at 117-18. By contrast, where—as here—a private party has already frustrated the defendant’s expectation of privacy, the government does not implicate the Fourth Amendment by reopening the package. The Court relied on a standard under which “additional invasions of respondents’ privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search.” Id. at 115.
unremarkable proposition in and of itself, but they can bypass the warrant and probable cause requirements altogether. And this is precisely because a private party has already carried out an initial privacy invasion, rendering the subsequent police investigation no search at all.

Now assume that a Federal Express employee opens a package out of simple curiosity and finds a personal gift, perhaps an overtly sexual article of clothing or device. If the employee hands the package over to the police, Jacobson suggests that the police can take out the gift and examine it, without any justification whatsoever. Because someone has already opened it, the officer’s actions do not constitute a Fourth Amendment search and thus need not be reasonable. Though the officer who searched the package in Jacobson may have had probable cause, the ruling in Jacobson means that he did not have to.

In the above example, neither the person sending the gift nor its intended recipient held it out for public consumption. Nor did either of them consent to anyone’s opening it. There is no sense in which the gift can realistically be deemed public, unless any limited nongovernmental invasion of privacy simply strips our property, things, and selves of Fourth Amendment protection. The Court would assert that once the Federal Express employee opened the package, there was no privacy left to protect. But that plainly was not the case.

C. Pretend Friend Wearing a Wire

Return now to the “pretend friend” line of cases. We saw the Court make Move One in finding that agents of the government legally could—with neither warrant nor probable cause—fake friendship with an individual. The theory was that one trusts friends at one’s own peril. I have already examined some of this argument’s flaws, but the Court went further than it did in the older pretend friend cases when it decided United States v. White. It held there that no warrant is required even when the government-issue friend is wearing a wire. There is thus no reasonable expectation of privacy from having what one might call a walking and talking police wiretap enter a person’s home under false pretenses and broadcast her conversations to third parties.

Because the Supreme Court was willing to equate limited and wholesale exposure, it found that an individual who decides to have a friend risks an even greater loss of privacy than simple betrayal would have caused. The Fourth Amendment apparently has nothing to say not only about pretend friendships but also about the use—by government-employed friends—of transmitters and tapes for more efficient and reliable data collection and distribution. The Court thus made both Moves One and Two in its pretend friend doctrine, as it did in the garbage case, treating a willingness to trust people as an invitation to deception and then treating the further sharing of the fruits of that pretense as no more intrusive than the initial deception.
V. SIGNS OF AMBIVALENCE

Up until this point, I have examined the two analytic moves through which the Court has devalued privacy. I have located one or both moves in the main cases defining the meaning of a Fourth Amendment search and I have analyzed their flawed nature. Fortunately, the Court has itself occasionally turned away from the implications of these moves. By doing so, it has given us reason to believe that it might come, in time, to revisit some of the precedents and take seriously the differences, respectively, between vulnerability to wrongdoing and knowing exposure, and between a limited, knowing self-exposure and further unwanted dissemination.

A. Ambivalence About Move One

1. Moving a stereo component.

In Arizona v. Hicks, the Court hinted at the possibility that a person might retain a reasonable expectation of privacy even when that privacy is quite vulnerable to uninvited intrusion. Risk, in other words, need not translate into knowing exposure. The police in that case entered Hicks's home without a warrant after gunshots were fired from his apartment into the apartment below. The Fourth Amendment permits warrantless entry under exigent circumstances, to secure the premises and search for potential perpetrators and victims without delay. While looking around in Hicks's apartment pursuant to this authority, a police officer noticed stereo equipment that appeared unusually expensive relative to the otherwise ill-appointed surroundings.

Suspecting that the equipment might be stolen, the officer moved a few stereo components to expose serial numbers. He read and recorded the serial numbers, phoned in to headquarters and found out that the turntable had been taken in an armed robbery. Based on this information, the officer seized the turntable. The Supreme Court, in an opinion by Justice Scalia, held that absent probable cause, the officer's moving the stereo equipment to read and record its serial numbers violated Hicks's Fourth Amendment right against

148. See Warden v. Hayden, 387 U.S. 294, 298-99 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").
149. Hicks, 480 U.S. at 323.
150. Id.
151. Id. He also brought back the list of recorded serial numbers, and it turned out that they were for other items taken in the same armed robbery. On the basis of this information, police obtained a warrant to seize that equipment from the apartment as well. Id. at 323-24.
unreasonable searches. Though the officer was lawfully on the premises, the Court held, his presence did not justify any intrusions unconnected with the emergency basis on which it rested, i.e., the shooting.

*Hicks* did not specifically address issues of consent or knowing exposure. It does not appear that Hicks himself was at home during the search to provide consent to the police or otherwise to indicate a willingness to have his apartment observed. Like the officer who obtains consent, however, or the undercover officer who procures an invitation through pretend friendship and thus converts a home entry into a nonsearch, the police officer in *Hicks* did not violate the Fourth Amendment when he entered Hicks’s home. The Court nonetheless held that the officer’s lawful presence in the home did not legitimate any movement or perusal of the subject’s stereo equipment.

In thinking about this decision, in the context of the cases we have been examining, note that the officer, who was already (lawfully) in the room with suspicious stereo equipment and had noticed the equipment in plain view, was able easily to turn a component around and thereby reveal its serial number. One might therefore have expected the Court to say that Hicks’s equipment was already exposed to the officer, or to anyone else lawfully within the apartment itself. If the police officer could behave like the hypothetical snoops and scavengers in *Greenwood*, for example, is there any doubt that he could have turned the equipment around? Even guests who would never consider rummaging through a neighbor’s garbage have been known to move items in the living room out of curiosity, when the host has temporarily left the room.

Nonetheless, the Court, in an opinion by Justice Scalia, held the officer strictly to the limited search permitted (or invited) by the circumstances. The ease of the officer’s breach, in other words, did not justify it. Though an invited guest in Hicks’s home might have similarly snooped around without the host’s knowledge or permission, the Court in *Hicks* understood that such snooping would violate the individual’s reasonable expectation of privacy. It would be improper, in other words, for someone lawfully in a private apartment to exploit the opportunity to examine areas not otherwise immediately apparent, even within the room into which he was invited.

The Court was unwilling to tolerate the officer’s transgression, even though snoops might well have acted similarly. The *Hicks* approach might thus

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152. *Id.* at 326-28.

153. *Id.* at 323 (describing what the police found upon entering respondent’s apartment without mentioning anything about respondent’s presence or any interaction between police and respondent).

154. Due to circumstances in the case, one might say that Hicks had in some sense invited the police to enter and make sure everything was okay. The shotgun blast through the floor had, after all, exposed the apartment to public attention and scrutiny. The Court’s decision did not, however, appear to turn on whether the officers’ presence on the premises could somehow be attributed to Hicks’s behavior.
have directed a different outcome in Oliver, Greenwood, Knotts, and the pretend friend cases.

2. Governmental peeping toms.

Over the years, the Court has had numerous occasions to reconsider the question of whether the public’s opportunity to engage in social or legal misconduct eliminates the Fourth Amendment’s application to such misconduct. This question arose again recently in Minnesota v. Carter.\footnote{525 U.S. 83 (1998).}

In Carter, a police officer stood outside the shaded window of an individual’s home and peered inside for a period of several minutes.\footnote{Id. at 85.} Though the blinds were drawn, a gap enabled the officer (and an informant who had first alerted the officer) to see inside. The officer saw two people packaging cocaine for distribution. This observation gave the officer probable cause, which led to further searches and seizures and the arrest of two drug-dealers, neither of whom lived in the residence in question.

Carter and his accomplice were subsequently tried and convicted on various controlled substance charges.\footnote{Id. at 86.} They claimed on appeal that the police officer violated the Fourth Amendment by looking into a private residence through a break in the blinds.\footnote{Id.} After the Minnesota Supreme Court decided that the officer had indeed violated the Fourth Amendment and that the evidence should accordingly have been suppressed, the United States Supreme Court agreed to hear the case.\footnote{Id. at 87.}

The Court did not reach the question of whether peering into a private home through a gap in the blinds constitutes a Fourth Amendment search. It focused instead on the particular Fourth Amendment interests of the respondents. It found that the defendants had too tenuous a connection to the residence into which the police officer had peered to have acquired a reasonable expectation of privacy there.\footnote{Id. at 91.}

In a manner of speaking, the respondents lacked “standing” to object to any Fourth Amendment violations that the officer might have committed. Because the Court had rejected “standing” analysis in the Fourth Amendment context,\footnote{See Rakas v. Illinois, 439 U.S. 128, 140-49 (1978) (holding that mere passengers have no reasonable expectation of privacy in a car and rejecting the “standing” analysis previously used to separate the justiciability of a particular individual’s Fourth Amendment claims from the merits question of whether the underlying police behavior violated the Fourth Amendment); see also Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980) (holding}
law to hold that the defendants lacked any reasonable expectation of privacy in the residence.

This holding might not sound like a victory for Fourth Amendment interests. Many scholars have in fact viewed it as a blow to privacy.\textsuperscript{162} There is a way to read the decision, however, as opening the door to an approach more sympathetic to privacy interests than the Move One cases we have examined. Consider what the Court might have said if it were following the reasoning of decisions such as Greenwood, Ciraolo, Riley, and Knotts. The Court would have held that there is simply no reasonable expectation of privacy against observation from a public vantage point.

Indeed, the Court did say something along these lines in Ciraolo.\textsuperscript{163} In that case, recall, the police were able to observe marijuana growing in the curtilage of an individual’s home by flying overhead in an airplane. The Court said that because FAA regulations permitted such flight, anyone could fly overhead at this altitude, and the police surveillance therefore did not constitute a search.\textsuperscript{164} That conclusion exemplified Move One, the equation of risk and invitation.

As noted earlier, it is quite tempting to find no Fourth Amendment violation when the result of finding a violation might be to reverse a conviction.\textsuperscript{165} Rather than make Move One, however, the Court focused in Carter on the identities of the particular defendants attempting to suppress evidence. Instead of arguing that the voyeur invades no reasonable expectation of privacy, the Court in Carter suggested by negative implication that he very well might. It did so by resting its holding on the view that short-term commercial guests are not the ones who possess such an expectation, if one exists, and are therefore not the appropriate people to complain.\textsuperscript{166}

The Court could, of course, deny a petitioner standing in one case only to announce in another that there was no Fourth Amendment violation at all.\textsuperscript{167} Nevertheless, the Court had a clear opportunity in Carter to say that absent any


\textsuperscript{163} 476 U.S. 207 (1986).

\textsuperscript{164} \textit{Id.} at 213-14; \textit{see also} Florida v. Riley, 488 U.S. 445 (1989).

\textsuperscript{165} \textit{See supra} note 7.


\textsuperscript{167} Cf. Rawlings \textit{v.} Kentucky, 448 U.S. 98, 105-06 (1980) (holding that police did not violate reasonable expectations of privacy of man who claimed a possessory interest in contraband seized from a friend’s pocketbook); Rakas \textit{v.} Illinois, 439 U.S. 128, 148-49 (1978) (holding that police did not violate reasonable expectations of privacy of a car’s passengers by searching the car, in part because the passengers did not claim a possessory interest in the contraband seized).
physical trespass onto a closed curtilage or into a house, eavesdropping and peering into private homes is constitutionally permissible. In his concurrence in the judgment, in fact, Justice Breyer said exactly that. The majority opinion could alternatively have included a footnote or otherwise hinted at its acceptance of the Breyer position, a position that follows from prior precedent. But the Court chose not to do so.

It instead emphasized the commercial nature of the defendants’ presence at the location at issue. The defendants’ only connection to the apartment in which they packaged cocaine was their having obtained and used a room there exclusively for commercial (criminal) activity. The majority opinion rested on the fact that the defendants were only in the apartment to do business for a few hours and had no other relationship to the place.

The Court’s emphasis on standing suggests, again by negative implication, that someone with a stronger connection to the residence, as either a tenant or overnight guest, might have had a Fourth Amendment interest against official voyeurs who stand and peer in from outside for several minutes through a crack in the blinds. Indeed, Justice Kennedy, in a separate concurring opinion, emphasized the importance of avoiding unwanted surveillance in the home.

Justice Breyer’s position that eavesdropping is not a search was consistent with the Court’s equation of risk and invitation in the many cases we have examined at length. Just as scavengers and snoops can tear open garbage, thus exposing personal refuse to public observation, so can a nosy neighbor stand outside a window and peer through a hole in the blind for long periods of time. In fact, this is exactly what the informant in Carter did before alerting the police officer who subsequently went on to do the same thing.

Though the risk/invitation equation would seem to dictate this result, the Court perhaps chose not to adopt it (or at least conspicuously to defer adopting it) out of fidelity to the principles embraced in an earlier case, the first to

168. Carter, 525 U.S. at 104 (Breyer, J., concurring in the judgment).
169. Justice Scalia, in his opinion for the Court in California v. Hodari D., 499 U.S. 621, 623 n.1 (1991), for example, indicated that he believed that running from the police gave rise to reasonable suspicion to justify a stop of the runner, even though this issue was not presented. California had conceded that the police lacked reasonable suspicion and argued only that there had not been a stop, an argument the Court accepted. The Court later embraced the Scalia dictum by holding that unprovoked flight from the police gives rise to reasonable suspicion, at least under some circumstances. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (“Headlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”).
170. Carter, 525 U.S. at 86. The Court explicitly found that the defendants “lived in Chicago and had come to the apartment for the sole purpose of packaging the cocaine.” Id. The Court also stated that the defendants “had never been to the apartment before and were only in the apartment for approximately 2 1/2 hours.” Id. As I have argued elsewhere, moreover, there is no reasonable expectation of privacy in criminal activity itself. Colb, supra note 7, at 1513-14.
171. Carter, 525 U.S. at 99-100 (Kennedy, J., concurring).
172. Id. at 85.
announce that the Fourth Amendment protects legitimate expectations of privacy, *Katz v. United States*.

In *Katz*, the Supreme Court confronted the issue of electronic surveillance of a public telephone booth. Police had attached an electronic listening and recording device to the outside of a telephone booth in order to record the conversations of suspected interstate gambler Charles Katz. In a prior case, *Olmstead v. United States*, the Court had held that telephone conversations do not fall within the "constitutionally protected areas" covered by the Fourth Amendment. Justice Brandeis dissented in a now-famous opinion about the right to be let alone.

The two questions presented in *Katz* were whether a public telephone booth is a "constitutionally protected area" and, if so, whether a recording device placed on the outside of the booth, rather than inside its walls, infringes upon this constitutionally protected space. Upon revisiting the issue of recorded telephone conversations, the Court decided no longer to define Fourth Amendment protection by reference to places. It accordingly replaced the property rubric that had previously governed this area with reasonable expectations of privacy.

In holding that a person should be able to expect privacy when he enters a telephone booth, closes its door, and places a call, the Court decided that the question of where the recording device was placed—inside versus outside the booth itself—was irrelevant to the Fourth Amendment. Consider how this case might come out today, on the Move One reasoning applied to *Carter* by Justice Breyer and employed by the Court generally in its Fourth Amendment cases.

As Justice Breyer noted, anyone walking down the street could have stopped and watched the activities going on in the house in which Carter and his codefendant packaged cocaine. Since the blinds were drawn, however, one would probably have had to stare for a while to figure out exactly what was happening. In general, because such staring attracts notice and violates social norms, one might expect it to be relatively rare.

Justice Breyer's focus, however, like that of most of the Court's other Fourth Amendment decisions, was not on the rarity of a risk actually

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174. *Id.* at 348.
175. 277 U.S. 438 (1928).
176. *Id.* at 471-85 (Brandeis, J., dissenting).
178. *Id.* at 351 (stating that "the Fourth Amendment protects people, not places").
179. *Id.* at 353.
181. See *id.* at 85 ("The officer looked in the same window through a gap in the closed blind and observed the bagging operation for several minutes.").
materializing but instead on its possibility, however remote. For this reason, Justice Breyer treated the risk in *Carter* as the equivalent of the risk that someone living in a glass house might be observed by surrounding neighbors. As a virtual certainty, such observation of the glass house's contents would preclude its residents from successfully claiming any reasonable expectation of privacy against police surveillance from outside the house.

Returning to the public telephone booth in *Katz*, the police there placed a listening and recording device outside the booth. Even if one were to assume that a person who closes the door to the telephone booth has the right to stop others, including "uninvited ear[s]," from entering, there is nothing that would stop these others from listening from directly outside the booth or, by analogy, from placing their own tape recorders on the outside of the booth. They would not physically be invading the protected area if they did so.

Suddenly, in other words, the distinction between placing a recording device inside versus outside the booth, a distinction that appeared meaningless to the majority in *Katz*, might become dispositive. *Katz*, after all, could not prevent sound waves from leaving the booth and therefore could not prevent people from approaching the booth closely and listening or using devices to listen from outside.

Had the police officer in *Carter* broken into the house and observed the packaging of cocaine from indoors, Justice Breyer would certainly have found this behavior objectionable under the Fourth Amendment. It was the fact that the officer was on public property, where anyone and everyone had a right to go, that was decisive for him. The fact that a person's home was involved and that the blinds were drawn, thus indicating a desire for privacy (and thus preventing casual passersby from seeing much without staring), made no difference to Justice Breyer. In an age of high-tech surveillance, of course, the difference between "inside" and "outside" might not provide much assurance of privacy.


In June 2001, the Supreme Court handed down *Kyllo v. United States,* a case about the sort of technology that might evolve some day to make tape recording and wire transmission seem quaint. In *Kyllo*, the police used a thermal imaging device to detect heat patterns emanating from Danny Kyllo's home. After detecting the patterns, the device converted them into visual images based on relative warmth.

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183. See *Carter*, 525 U.S. at 104 ("Officer Thielen, then, stood at a place used by the public and from which one could see through the window into the kitchen. The precautions that the apartment's dwellers took to maintain their privacy would have failed in respect to an ordinary passerby standing in that place.").

It turned out that Kyllo had been using high-intensity lamps to cultivate marijuana plants inside his home and the escaping heat patterns indicated this activity. The question presented in the case was whether the use of a thermal imaging device from a public street to detect the relative amounts of heat within an individual's home constituted a search subject to Fourth Amendment restrictions. In a five-to-four majority opinion written by Justice Scalia, the Court held that it did.\(^\text{185}\) Justice Stevens authored a strong dissent.

Perhaps emboldened by prior case law, the government had emphasized the fact that police did not physically invade the petitioner's home but instead operated their device from across the street.\(^\text{186}\) The surveillance thus occurred well outside the curtilage, even further outside than the curb where Greenwood had placed his garbage for collection. Furthermore, the heat detection technology itself did not invade the physicality of the home. It simply detected radiation emitted from the home and thus already outside in the public domain. The dissent accordingly described thermal detection as "off the wall" surveillance, because it did not involve any penetration of the structure in the way that "through the wall surveillance" (such as X-rays) would have.\(^\text{187}\)

The Court rejected the government's argument. It held that as with the recording device that gathered sound waves from outside the telephone booth in \textit{Katz}, it made no difference to the Fourth Amendment whether an eavesdropping device gathered emissions from inside or outside a designated private space.\(^\text{188}\) What mattered instead was whether police were gathering information about a private area that, in the absence of a technology not in general public use, could only be obtained by physical intrusion.\(^\text{189}\) According to the majority in \textit{Kyllo}, the police were doing just that.

To understand the significance of this ruling, imagine what would happen if, as the dissent had proposed, the Court had sided with the government, on the dissent's theory that thermal imaging devices collect data already out in the public domain. Imagine further that thermal imaging technology advanced considerably over time. Some day, it appears, a thermal imaging device will be capable of providing a heat-based photograph of people and things that occupy a house. Though the house might be surrounded by walls of opaque concrete, brick, or stone, in other words, the technology will effectively enable people to "see through" the walls and watch the inhabitants and their activities within.\(^\text{190}\)

\(^{185}\) \textit{Id.}\n\(^{186}\) \textit{See} Brief for the United States at 14-37, \textit{Kyllo} (No. 99-8508).\n\(^{187}\) \textit{See} \textit{Kyllo}, 533 U.S. at 41 (Stevens, J., dissenting).\n\(^{188}\) \textit{See id.} at 35 ("We rejected such a mechanical interpretation of the Fourth Amendment in \textit{Katz}, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth.").\n\(^{189}\) \textit{See id.} at 29.\n\(^{190}\) As the Court noted in \textit{Kyllo}: The ability to 'see' through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development. The National Law Enforcement and Corrections Technology Center, a program within the United States Department of...
Almost no resident of a house or apartment would feel comfortable with people—whether private persons or government officials—watching their activities inside the house through thermal imaging. Virtually anyone would consider such watching an overwhelming invasion of privacy, no less intrusive than the internal installation of hidden video cameras.

Unlike the hidden video camera, however, the thermal imaging device could gather its information without anyone having to intrude physically into a person’s home. The device could collect discarded heat waves that had exited the home and thus become “public.” Like the police officer rifling through the garbage in Greenwood, the police officer using a thermal imaging device could stand on public property and collect these abandoned materials.

Theoretically, as in Greenwood, anyone could get access to a thermal imaging device and make the same observations as the police did from a public vantage point. Therefore, on Justice Breyer’s theory of privacy, expressed in Minnesota v. Carter and premised on such cases as Greenwood and Ciraolo, there would seem to be no reasonable expectation of privacy in avoiding even highly specific, photograph-quality thermal surveillance, if the vantage point were public and use of the device violated no law.

Even the dissent in Kyllo resisted this outcome in the hypothetical scenario above. However, the majority claimed correctly that if the fact that the technology does not intrude physically were decisive, as the dissent had suggested, then a passive thermal detector that created precise visual images based on discarded heat waves would not run afoul of the Fourth Amendment. The dissent responded to this point that what matters, in addition to physical intrusion, is whether private content is revealed, and that therefore, such a precise device would implicate Fourth Amendment entitlements. The dissent thus ultimately seemed to disavow the implications of the factor that it initially pressed as dispositive of the case at hand, the distinction between “through the wall” and “off the wall” surveillance.

The Kyllo majority correctly criticized the dissent’s insistence on distinguishing between a device that emits radiation that penetrates the home and a device that absorbs discarded radiation that has vacated the home. Functionally, the invasion of privacy is identical if, in both cases, highly personal information that is generally inaccessible to the public becomes

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Justice, features on its Internet Website projects that include a ‘Radar-Based Through-the-Wall Surveillance System,’ ‘Handheld Ultrasound Through the Wall Surveillance,’ and a ‘Radar Flashlight’ that ‘will enable law officers to detect individuals through interior building walls’... Some devices may emit low levels of radiation that travel ‘through the wall,’ but others, such as more sophisticated thermal imaging devices, are entirely passive, or ‘off-the-wall’ as the dissent puts it.

Id. at 36 n.3 (citation omitted).

191. See id. at 48-49 (Stevens, J., dissenting).
192. See id. at 35.
193. See id. at 48-49 (Stevens, J., dissenting).
available to the police. It was a tacit concession to the majority's reasoning that the dissent was unwilling to take its through the wall/off the wall distinction to its logical extreme.

It should not be surprising, however, that the dissent believed its position to follow naturally from the reasoning of earlier cases. The majority's rejection of that position accordingly calls into question the logic of those decisions, despite the Court's efforts to distinguish them. The cases we have discussed, Greenwood, Ciraolo, Riley, and Knotts, all suggest that as long as it is possible to learn and observe personal goings-on without actually entering an individual's home (or other privacy-bound area), such observation implicates no Fourth Amendment concerns. Though the physical intrusion line is arbitrary, just as the majority claimed, how much better is the line that the majority drew between Kyllo and other case law?

The Kyllo majority distinguished Ciraolo and Riley on the ground that thermal imaging is a special technology to which few people have access, in contrast to airplanes and helicopters, which are routinely used by the public.

It distinguished cases like Greenwood and Oliver on the ground that no technology was used there at all: Everything was discovered and observed through the unaided sense of sight. These distinctions, however, do not hold up to scrutiny.

What seemed most important to the Kyllo majority, and rightly so, was that police had gathered information about a private home that would normally have remained unknown. The reason it would have remained unknown is that few people have or use thermal imaging technology. This reason, however, should be no more compelling—in terms of privacy entitlements—than the fact that few people rummage through others' garbage, because such rummaging is illegal and socially deviant, or the fact that few people trespass on land that is surrounded by fences, for similar reasons. The underlying argument for Fourth Amendment privacy in all of these cases is that because people can reasonably expect that such items will not generally be exposed to members of the public, the police who intrude upon that domain invade what would otherwise remain private space.

It is as accurate to say that Kyllo's heat waves had entered the public domain and therefore were publicly exposed, as the dissent suggested, as it is to say that personal items contained within an individual's opaque garbage bag or within fenced-in private property were accessible to intruders and had thus been publicly exposed, as the majority did. It is also as accurate to say the heat waves were knowingly exposed as it is to suggest that one has publicly exposed the secrets one has chosen to tell an apparent close friend who is actually a police agent wearing a wire. The essence of the majority opinion in Kyllo is

194. See id. at 33-34.
195. See id. ("The present case involves officers on a public street engaged in more than naked-eye surveillance of a home.").
thus flatly at odds with the very cases that it cited and struggled to distinguish and is therefore at odds with the principles that drove the virtual-heat-camera hypothetical scenario with which it attacked the dissent. The revulsion that both majority and dissent experienced when confronted with that scenario should accordingly lead all the Justices to revisit the moves that typify earlier cases.

4. Drug testing pregnant women.

In the same Term in which Kyllo was decided, the Supreme Court handed down a ruling in Ferguson v. City of Charleston. Petitioners were ten women arrested after seeking obstetrical care in a public hospital, some after giving birth. The women were arrested because they had tested positive for cocaine and were therefore suspected of having distributed illegal drugs to a minor, namely, their fetuses. The ten women went to court to challenge the drug-testing policy under which they were screened for cocaine.

Petitioners claimed that the hospital had violated their Fourth Amendment rights against unreasonable searches and seizures. In reviewing their claims, the Supreme Court concluded that the hospital was required to obtain consent from the women before performing drug tests aimed at collecting evidence for the police. In the absence of consent, the Court held, such drug screens would represent "unreasonable search[es]." 4

Many civil libertarians were relieved by the Court's decision. By reaching the result that it did, a majority of the Court was apparently refusing to add perinatal cocaine testing to its growing list of searches authorized in the absence of probable cause and a warrant. In addition, because the drug testing policy was part of a fetal-protection regime, some might have understood the Court's decision as a sign of respect for a pregnant woman's right to procedural and substantive privacy from state intrusion.

Whether or not celebration is warranted on these particular grounds, civil libertarians have an independent basis for rejoicing in the Ferguson outcome. The Court's reasoning and decision in Ferguson together represent a very significant development in Fourth Amendment law. As Justice Scalia correctly argued in his dissent, though with little glee, the decision departed radically from prior Fourth Amendment precedents, just as the Scalia majority in Kyllo

197. Id. at 70.
199. To examine further the important link between procedural and substantive privacy rights in the Fourth Amendment area, see Colb, supra note 20.
did. And as in Kyllo, the (different) majority failed to justify, explain, or even acknowledge the departure.

Apparently, upon entering the hospital, the maternity patients had signed a form in which they agreed to provide urine samples and permit medical staff to perform tests upon these samples, including drug toxicology tests.\(^{200}\) The women also voluntarily gave the urine samples in response to the hospital’s pretextual requests.\(^{201}\) In spite of their agreements and voluntary behavior, however, the Supreme Court assumed without deciding that there was no consent.\(^{202}\)

Generally, when an appellate court assumes a matter arguendo, it does so because the matter presents a real question, perhaps one that a lower court should have the first opportunity to answer. Therefore, if it were obvious that there had been consent to the drug tests sufficient to satisfy Fourth Amendment standards, then it would have made little sense to assume arguendo that there was not. The Court could simply have asserted that although suspending the probable cause and warrant requirements here would be inappropriate, the searches of the women were still reasonable in this case because they were consensual. Instead, the Court held that consent was required and that the lower courts would have to decide whether or not it was in fact obtained. This might appear to have been an uneventful conclusion, a remand for further factfinding. But that appearance is deceptive.

By sending down the question of consent, the Court necessarily held that on the facts as presented to the Court, there might not have been consent. The Court could not avoid this implication, because if there were no question about consent, on the undisputed facts, then a remand would have been inappropriate. Justice Scalia, ever the keeper of analytic rigor, pointed out in an angry dissent just how controversial the remand was.

The only search, contended Justice Scalia, was the taking of the urine sample.\(^{203}\) As he explained, however, the women did not argue that the urine sample was nonconsensually taken from them.\(^{204}\) In other words, they did consent to medical personnel taking their urine, in the limited sense that they agreed to provide the sample and to have it drug tested for medical purposes. Justice Scalia argued that once the women had turned over their urine to medical personnel, however, the diagnostic drug test performed upon the

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\(^{200}\) See Ferguson, 532 U.S. at 96 n.4 (Scalia, J., dissenting).

\(^{201}\) The women patients consented to have their urine collected by doctors. See infra note 204.

\(^{202}\) See Ferguson, 532 U.S. at 76.

\(^{203}\) Id. at 91 (Scalia, J., dissenting).

\(^{204}\) They conceded consent in the briefs, though only for the purposes of medical treatment, not for a search of those samples by the police. See Reply Brief for Petitioner at 14, Ferguson (No. 99-936) (arguing that, “[s]imply put, a written consent permitting hospital personnel to test urine for medical purposes does not constitute consent to use the urine for police investigations”).

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discarded urine could not itself constitute a search. This struck Justice Scalia as decided law, and yet the Supreme Court was behaving as though the meaning of consent (and implicitly, the meaning of search) were up for grabs.

Given Justice Scalia’s preferred outcome, he was right to be alarmed. Once urine is voluntarily surrendered to a third party, the Court’s usual equation of risk and invitation would say that all events that follow fall outside the zone of protected privacy under the Fourth Amendment. Consider why this is so. By voluntarily surrendering one’s urine to a third party, a person risks that party (and others) “rummaging” through that urine for information. In support of this conclusion, Justice Scalia could have properly cited the reasoning about abandonment of garbage found in Greenwood.

Notably, Justice Scalia went on to reject such reasoning a few months later in Kyllo, by refusing to adopt the dissent’s position that “[h]eat waves . . . enter the public domain if and when they leave a building.” Though heat waves have left the building, said Justice Scalia for the Court, their collection through technology is still a house search subject to the Fourth Amendment. Like thermal detection technology, however, the machinery used to analyze a urine sample is “sense-enhancing technology” which is “not in general public use” and which provides “information regarding the interior” of a person “that could not otherwise have been obtained without a physical ‘intrusion.’”

205. In the interests of full disclosure, I must admit that I myself have made the argument that there is not (and should not be) a Fourth Amendment privacy interest in the mere fact that one is engaged in criminal activity, a fact that is revealed by the drug toxicology test performed on the urine. See Colb, supra note 7, at 1478 (describing the perfect search—one that invades no reasonable expectations of privacy—as one that inherently uncovers only criminal activity while disclosing nothing that is innocent but personal). Under my approach, once the person gives up her urine consensually, she has no interest in preventing a diagnostic test that will reveal (to doctors or to anyone else) only the fact that she has used cocaine, an illicit substance. Nonetheless, because urine tests can reveal information extending far beyond the presence or absence of narcotics, I would strongly disagree with Justice Scalia’s position (and seemingly the Supreme Court’s position prior to Ferguson) that the only privacy interest a person has with respect to a urine test is the interest in not providing a sample in the first place. For purposes of my discussion of this case and its implications, I shall therefore treat both the drug test and the revelation of its results to third parties in the way I would if it were something other than a simple crime-detection test. This treatment is called for because the implications of Ferguson for Fourth Amendment doctrine and for the definition of a search go far beyond the particular fact that the diagnostic test at issue happened to be a test for cocaine. (In addition, such tests are imprecise enough, as discussed below in connection with Vernonia School District 47J v. Acton, 515 U.S. 646 (1995), that they effectively force a person to reveal his use of legal but potentially embarrassing medications in order to avoid a false positive result for cocaine.)

207. See id. at 33-35.
208. Id. Though Kyllo concerned the interior of a home, a person—whose interior becomes known through the testing of his urine—is, like the home, an explicit textual subject of Fourth Amendment protection. U.S. CONST. amend. IV.
majority opinions in *Kyllo* and in *Ferguson* therefore stand together for the proposition that the risk/invitation equation may be in retreat.

A focus on where a government investigator is standing or the fact that he is not touching any property, the sort of focus that animated the Court’s decisions in *Greenwood*, *Ciraolo*, *Riley*, and *Knotts*, does not provide protection against a technology that lets the police watch us without touching or even coming near our homes. A return to the logic of *Katz*, however—a return presaged in *Carter*, by what the Court did not say, and in *Ferguson* and *Kyllo*, by what it did—would suggest that where your observer happened to stand is less important than whether the activities in which you engaged were of the sort and in a context that an individual would hope, reasonably and legitimately, to preserve as private from the uninvited eye and ear.210


The law of trade secrets provides an unexpected but important parallel to the law of Fourth Amendment privacy.211 As defined in the Restatement of Unfair Competition, “[a] trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”212 An individual or business has an interest in keeping innovative processes or methods secret from competitors, even and especially prior to acquiring patent or copyright protection. Without legal protection against spies, a business might worry that others could gain a competitive advantage by stealing the product of its labor—a trade secret—without having to make a similar investment. Though the privacy interest is commercial rather than personal, the risks of others intruding and the sorts of steps the trade secret holder might take to minimize those risks are related.

One strikingly similar set of facts might involve overhead flight surveillance of a manufacturing plant. Instead of figuring out how to make a better product the hard way, a competitor might simply fly a plane or helicopter over the innovative manufacturer’s plant while it is still under construction and watch what the employees there do. If courts took the approach to trade secret law that the Supreme Court has taken to the Fourth Amendment, then as long as a competitor’s spy plane remained in navigable airspace, it would not violate any reasonable expectation of secrecy on the part of the manufacturer. Recall that the Court resolved the *Ciraolo* and *Riley* issue of privacy from overhead surveillance in exactly this way.213

210. In *Katz v. United States*, the Court recognized that what the petitioner “sought to exclude when he entered the booth was . . . the uninvited ear.” 389 U.S. 347, 352 (1967).

211. I am entirely in Kim Lane Scheppele’s debt for pointing out the striking parallels between the definition of a trade secret and the meaning of a Fourth Amendment search.

212. *RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995).*

Notably, the Move One approach has not prevailed in the law of trade secrets. Take the frequently cited example of *E.I. duPont deNemours & Co. v. Christopher*.\(^1\) In *duPont*, defendant photographers were hired to take aerial photographs of new construction at the plaintiff's Beaumont plant. Plaintiff duPont claimed that it had developed a secret process for producing methanol, a process which took much time and money to develop but the use of which would give duPont a competitive advantage. DuPont had accordingly taken steps to safeguard the secrecy of the process and brought suit against the defendant photographers for damages and an injunction against any additional photographing and any further dissemination of existing photographs.

The defendants moved to dismiss the action, claiming that

they committed no "actionable wrong" in photographing the DuPont facility and passing these photographs on to their client because they conducted all of their activities in public airspace, violated no government aviation standard, did not breach any confidential relation, and did not engage in any fraudulent or illegal conduct. In short, the Christophers argue[d] that for an appropriation of trade secrets to be wrongful there must be a trespass, other illegal conduct, or breach of a confidential relationship. We disagree.\(^2\)

Relying on the 1939 Restatement of Torts formulation,\(^3\) which the Texas Supreme Court had adopted, the federal appeals court found that on the facts as presented in *duPont*'s complaint, defendants had discovered plaintiff's secret "by improper means." "To obtain knowledge of a process without spending the time and money to discover it independently is improper," said the court, "unless the holder voluntarily discloses it or fails to take reasonable precautions

207, 215 (1986); *supra* Part II.C. Moreover, in the separate case of *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the petitioner attempted to draw on trade secret law to inform the Court's construction of the Fourth Amendment. As the Court explained, "Dow... relies heavily on its claim that trade secret laws protect it from any aerial photography of this industrial complex by its competitors, and that this protection is relevant to our analysis of such photography under the Fourth Amendment." *Id.* at 231. The Court rejected the claim: "That such photography might be barred by state law with regard to competitors, however, is irrelevant to the questions presented here." *Id.* The Court went on to hold that "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment." *Id.* at 239.

214. 431 F.2d 1012 (5th Cir. 1970). This influential case has continued to be cited for three decades by courts elaborating the scope of trade secret protection. See, e.g., *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 785 (5th Cir. 1999) ("A complete catalogue of improper means is not possible. In general they are means which fall below the generally accepted standards of commercial morality and reasonable conduct.") (quoting *duPont*, 431 F.2d at 1016) (citation omitted).


216. *RESTATEMENT OF TORTS* § 757 (1939). In 1979, the similar Uniform Trade Secrets Act—which codified the common law approach to trade secret protection—was promulgated and adopted by a majority of the states. See *RESTATEMENT (THIRD) OF UNFAIR COMPETITION* § 39 (1995).
to ensure its secrecy." The court emphasized that not all observation by competitors is forbidden.

Perhaps ordinary fences and roofs must be built to shut out incursive eyes, but we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available. . . . Reasonable precautions against predatory eyes we may require, but an impenetrable fortress is an unreasonable requirement. . . .

Finally, "[h]aving concluded that aerial photography, from whatever altitude, is an improper method of discovering the trade secrets exposed during construction of the DuPont plant, we need not worry about whether the flight pattern chosen by the [defendants] violated any federal aviation regulations." Note the contrasts between the court's approach to trade secrets and the United States Supreme Court's approach to Fourth Amendment privacy. On the facts, respondents in both Ciraolo and Riley had made efforts to protect the privacy of their curtilage. Each had erected fences, and one had even put up a roof over his greenhouse. Nonetheless, the government was able to fly overhead and spy on the two people notwithstanding their efforts. As in DuPont, it would seem normatively "improper" to find out information about people by hovering over their properties and spying (at least in the absence of a good reason to suspect wrongdoing), in spite of the fact that the airspace is not legally out of bounds under FAA flight-safety regulations.

More generally, the notion that people should not have to make their private spaces impenetrable to sustain a reasonable expectation of privacy is instructive. Rifling through people's garbage, trespassing on their open fields, and faking relationships with them would all qualify as improper under such a test. Furthermore, just as Move One becomes unavailable once we accept the reasoning of the trade secret cases, the court in DuPont implicitly rejects Move Two as well. It does so by allowing for an injunction that prohibits not only the taking of photographs in the first instance but also the further dissemination of those that have already been taken. Though the photographs exist and someone has improperly discovered a trade secret, it does not follow that any existing privacy is lost. Contrast this approach with the ruling in Jacobson, under which a limited loss of privacy—even one that was involuntary—is the moral equivalent of absolute public exposure.

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217. DuPont, 431 F.2d at 1015-16.
218. Id. at 1016-17.
219. Id. at 1017.
221. See United States v. Jacobson, 466 U.S. 109, 118-22 (1984); supra Part IV.B.
6. Balancing in First Amendment cases.

The Supreme Court has itself shown insight into the distinction between risk and invitation when it comes to invasions of privacy, in an entirely different area of constitutional law, the First Amendment right of free expression. In considering the permissible scope of defamation law, the Court has distinguished between ordinary people and those among us who invite public attention. This distinction helps explain why it might be unreasonable for some people to expect to go unnoticed in public. A decision like \textit{Knotts} (the monitored-car case) might make some sense when applied to such people. Celebrities, for example, attract a great deal of attention. When popular movie stars and rock musicians want privacy in public, they wear disguises, leave the country, and in other ways treat the public streets of the city as full exposure. Though there is nothing in Fourth Amendment law to distinguish these people from someone like Knotts, the First Amendment has a vocabulary to accommodate the distinction.

The First Amendment public figure doctrine holds some individuals to have forfeited their interest in anonymity and in being left alone in public. In \textit{New York Times Co. v. Sullivan}, the Supreme Court held that a newspaper defending a libel suit against a public-official plaintiff could not be subject to liability for publishing false information about the plaintiff's official conduct unless the newspaper had acted in reckless disregard of the truth. The Court reasoned that there is a strong First Amendment interest in the publication of available information about public officials. A stricter standard than reckless disregard could have an impermissible chilling effect on public dialogue. The Court, notably, did not eliminate the negligence standard of libel as a general matter. It held only that the standard could not apply in suits brought by public officials.

In \textit{Gertz v. Robert Welch, Inc.}, the Court extended the First Amendment ruling regarding public officials to "public figures," those who have "thrust themselves" into the public eye. For such people, like for public officials, freedom of the press must include a degree of latitude in reporting that protects the publication of even false information, as long as the newspapers have not acted in reckless disregard of the truth. The Court reasoned that in becoming a public figure, a person gives up a level of reputational privacy that might otherwise require reporters to exercise due care in their fact checking. Libel

\begin{itemize}
\item 223. 376 U.S. 254 (1964).
\item 224. \textit{Id.} at 279-80.
\item 225. 418 U.S. 323 (1974).
\item 226. \textit{Id.} at 345 (stating that while it may be theoretically possible to become a public figure without deliberate action on one's own part, "[m]ore commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in
law can continue, without offending the First Amendment, to protect the reputations of people who have not thus "thrust" themselves into the public eye.

One could conclude, by adapting the arguments in *Gertz* to the Fourth Amendment context, that people may walk or drive around in public without thereby inviting the public to feast on their lives.\textsuperscript{227} *Gertz* is not a decision about the Fourth Amendment. Its holding does, however, provide a useful lesson on the difference between being literally visible to passersby—as Knotts might have been—and truly relinquishing one's anonymity and becoming part of the public domain. Fourth Amendment doctrine currently treats this distinction as nonexistent, for purposes of defining the threshold of "knowing exposure."

It may well be that by becoming a famous celebrity, a person gives up the ability to avoid having others follow her around in news vans, take pictures, and keep track of everywhere she goes. Once subject to this level of scrutiny, moreover, she perhaps cannot plausibly complain that police who follow her invade what would otherwise be private space. The typical individual who drives on the public road, however, has not similarly relinquished her anonymity.

In the latter case, it therefore does represent an invasion of privacy and an act of wrongdoing for anyone, whether a private actor or a police officer, to track her whereabouts at all times. For the ordinary private person who goes outside, the risk of being tracked in this unusual way amounts to a risk that some third party will engage in wrongdoing, a risk that cannot drive the definition of a search without divesting this normative term of meaning.

A distinct area of First Amendment law addresses a harm that police inflict when they track an individual driver, one that I have elsewhere called the "targeting harm."\textsuperscript{228} Cases in this area of the First Amendment illustrate how singling out an individual for scrutiny and confrontation can create an intrusion that exceeds the normal, random encounters to which people expose themselves by occupying public spaces.

In *Frisby v. Schultz*,\textsuperscript{229} for example, a group of abortion protestors picketed outside the home of a doctor who performed abortions at clinics in neighboring towns.\textsuperscript{230} Under normal circumstances, the First Amendment protects people's right to assemble and protest behavior to which they object, even if the

\textsuperscript{227} For a persuasive argument that even public figures or figures engaged in matters of public concern ought to be entitled to some level of privacy from public exposure, see ROSEN, supra note 64, at 46-48.

\textsuperscript{228} See Colb, supra note 7, at 1464.

\textsuperscript{229} 487 U.S. 474 (1988).

\textsuperscript{230} Id. at 476.
assemblers are offensive and embrace an abhorrent ideology.\textsuperscript{231} As in the area of defamation, however, the Court in \textit{Frisby} held that prohibiting otherwise protected speech is constitutionally acceptable here to promote the strong privacy interests at stake.\textsuperscript{232}

Public property does not, in other words, invite all manner of intrusion. Even expressly enumerated constitutional rights must sometimes yield to the competing interest in privacy. The holding in \textit{Frisby} is particularly noteworthy because streets and sidewalks qualify as traditional public forums, places where restraints on speech receive the most searching First Amendment scrutiny.\textsuperscript{233}

Other related First Amendment decisions rest on a similar recognition of the importance of privacy and security for targeted individuals. In a series of cases, for example, the United States Supreme Court has upheld injunctions, statutes, and ordinances requiring that protestors not affiliated with an abortion clinic stay away from people who have come within a specified distance from the clinic.\textsuperscript{234} The First Amendment protected protestors in their marching and proclaiming their message outside of this area, where anyone in the vicinity could see their posters and hear their words.\textsuperscript{235} Once a person entered the protected zone, however, in which she presumably became identifiable as a patient of the clinic (as opposed to a mere passerby), the protestors could be forced—consistent with the First Amendment—to leave her alone.

The pro-life protestors in \textit{Hill}, \textit{Schenk}, and \textit{Madsen v. Women's Health Center, Inc.}\textsuperscript{236} were, naturally, not bound by the Fourth Amendment right of privacy, which applies only to government actors. Nonetheless, the Court's recognition of an individual's interest in being left alone in this context has important implications for Fourth Amendment privacy. By upholding restrictions on protestors' speech rights, the Court acknowledged the value of giving people a measure of privacy and personal safety once they approach and

\textsuperscript{231} See Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (protecting the right of a Nazi political group to march in front of the town hall); see also Brandenburg v. Ohio, 395 U.S. 444 (1969) (overturning conviction of Ku Klux Klan leader for advocating the use of force in a manner that did not incite imminent lawless action).

\textsuperscript{232} See \textit{Frisby}, 487 U.S. at 484-85 ("[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom."); \textit{id.} at 484-88 (holding that a law banning targeted picketing survives First Amendment scrutiny because it serves the compelling interest in privacy from the focused direction of unwelcome speech at a captive audience).

\textsuperscript{233} \textit{id.} at 480.

\textsuperscript{234} See \textit{Hill} v. Colorado, 530 U.S. 703, 707 (2000) (involving a challenge to a statute that created a regulated area within 100 feet of the clinic where protestors were forbidden from "knowingly" coming within eight feet of another person, without that person's consent, in order to counsel the person or protest).


\textsuperscript{236} 512 U.S. 753 (1994).
enter a clinic, a value that survives even in the face of a competing constitutional free speech claim.

The Court thus exhibited an appreciation for the distinction, however subtle, between disseminating a pro-life message to the community near the clinic and harassing and intruding upon individuals who have identifiably made a decision of which the speaker disapproves. By walking in public toward the entrance of an abortion clinic, the patient does not agree to expose herself to targeted invasions of her space. On the reasoning of most of the Court’s Fourth Amendment cases, however, it would appear that she both consents to such invasion and invites people to approach and direct targeted disapproval at her for her presumed decision to have an abortion. The Court’s refusal to follow this approach in the First Amendment context is laudable and provides an alternative conception of privacy, knowing exposure, and consent that ought to inform Fourth Amendment doctrine.237

B. Ambivalence About Move Two

As we saw above, the Court has shown ambivalence and sometimes outright disdain for the notion that taking a risk of legal or normative wrongdoing by others constitutes a knowing exposure and negates a person’s reasonable expectation of privacy. If outsiders must do something that would violate social and legal norms to gain access to another’s personal life, then under Katz and the more recent cases of Carter, Kyllo, and Ferguson, police who take such actions would appear to be “searching,” regardless of whether the target of the intrusion has made himself vulnerable to such wrongful action by putting out garbage, making friends, or having a gap in the Venetian blinds.

The Court has similarly raised questions about the argument equating self-exposure to a limited audience with wide-scale public dissemination. As we will see below, it has done so by suggesting that disseminating surrendered information might constitute a search. The Court has occasionally shown a willingness, in other words, to recognize that knowing exposure to a third party does not necessarily forfeit one’s privacy as against the rest of the world.

1. Drug testing student athletes.

In Vernonia School District 47J v. Acton,238 the Supreme Court upheld a public school program that subjected student athletes to random drug tests. The majority opinion noted the reduced expectation of privacy that student athletes

237. Note that these cases do not turn on the fact that abortion is a constitutionally protected right. For example, Chief Justice Rehnquist, a strong opponent of abortion rights, has usually joined or authored the Court’s opinions affirming clinic protection against First Amendment challenges. See Hill, 530 U.S. at 705 (joining the majority); Schenk, 519 U.S. at 361 (writing for the majority); Madsen, 512 U.S. at 757 (writing for the majority).
enjoy. Because they already expose themselves to their teammates by showering and changing in front of others in the locker room, having to collect and hand over urine for drug testing does not represent much of an additional intrusion.239

In the process of articulating its position, the Court noted that on top of having to provide urine samples, athletes were asked to provide proof of any prescription medications they might be taking.240 Presumably, the reason for this request was that a positive drug test might reflect the presence of a legal prescription medicine rather than an illegal controlled substance. In the course of approving this component of the testing program, the Court specifically emphasized that “[o]nly the superintendent, principals, vice-principals, and athletic directors have access to test results.”241 Similarly, in a later decision, approving random drug testing for all public school students participating in extra-curricular activities, the Court emphasized the fact that test results are “kept in confidential files separate from a student’s other educational records and released to school personnel only on a ‘need to know’ basis.”242

Though someone—a third party—would lawfully be collecting urine and personal data, in other words, a privacy interest would survive in that data going no further. Indeed, the distinction between limited disclosure and wide-scale dissemination contributed to the reasonableness of the drug-testing program. The Court’s decision to uphold athlete drug testing thus rested in part on the limited nature of the disclosure to which discovered information would be subject.243 The Court, notably, did not treat limited exposure and absolute dissemination as legally equivalent. Dissemination by government actors who had performed a search could accordingly represent an additional intrusion with separate Fourth Amendment implications.

239. Id. at 657. This was particularly true, as the Court explained, because the student athletes could produce the urine in visual privacy from the monitor who would be collecting the sample. Id. The Court subsequently expanded the scope of permissible random drug testing to all public school students participating in any extracurricular activities. See Bd. of Educ. v. Earls, 122 S. Ct. 2559 (2002), a decision that necessarily downplays the distinctions between athletes and others.
240. Vernonia, 515 U.S. at 650.
241. Id. at 651.
242. See Earls, 122 S. Ct. at 2566. Though the respondents noted that the school had been careless in protecting the confidentiality of student information, the Court refused to allow one instance of alleged carelessness to undermine the legitimacy of the general directive, noting—significantly—that “the test results are not turned over to any law enforcement authority.” Id. at 2556. This holding therefore confirms the Court’s implicit rejection of Move Two in the context of limited-audience drug testing.
243. The Court has similarly defended the drug testing of federal employees under various circumstances where only medical personnel would see the results of the tests. See National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (upholding random suspicionless drug testing of federal narcotics officers); Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602 (1989) (approving suspicionless drug testing of railroad workers involved in accidents).
2. **Riding along with the police.**

In a second case bearing on the question of privacy and dissemination to third parties, the Court held that police officers executing a legal arrest warrant violated the Fourth Amendment when they brought a news reporter with them to watch and film a home arrest.\(^{244}\) Noting that there was no special reason to bring the reporter, the Court held that his presence constituted an additional invasion of the resident’s privacy that was not supported by the arrest warrant.\(^{245}\) This holding was significant because it recognized that some people (in this case, police officers) may gain legal access to what is otherwise private without thereby annihilating the individual’s interest in maintaining privacy against the rest of the world. This holding stands in marked contrast to the cases described above presenting related circumstances, in which telephone and bank records, garbage, and confidences to one’s friends, among other things, can be disseminated to the police on demand, on the theory that the initial surrender represented a knowing exposure and accordingly, a complete forfeiture of privacy.

3. **Drug testing pregnant women.**

In *Ferguson*, a case I discussed above in connection with Move One, the Court also raised doubts about the legitimacy of Move Two. Recall Justice Scalia’s outraged dissent in which he argued that there could not possibly remain an issue about consent (to perinatal drug testing) for remand. His argument was founded on case law that had consistently embraced Move One, under which discarding one’s urine would appear to forfeit any interest in keeping secret the information contained within that urine.

Importantly, moreover, there was a second step to the disclosure that the Court held required consent: the sharing of information, obtained from urine, with the police. Justice Scalia concluded from prior cases that once a person voluntarily exposes her urine sample to a third-party stranger for testing, any dissemination of the results of ensuing tests does not represent an *additional* invasion of privacy. For this position, Justice Scalia could have cited *Smith v. Maryland*,\(^{246}\) the pen register case; *Miller*, the bank records case; *Greenwood*, for the line of argument about surrender to the garbage collector; *Jacobson*, the Federal Express package reopening case; and *White*, the “pretend friend with transmitter” case.

In each of these decisions, the Court made abundantly clear 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

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245. *Id.* at 614.
information is revealed on the assumption that it will be used only for a
limited purpose and the confidence placed in the third party will not be
betrayed.\textsuperscript{247}

Police collection of what has been surrendered to a third party, in other words,
is not a Fourth Amendment search. The similarity between what medical
personnel did with the urine in \textit{Ferguson}, what bank personnel did with records
in \textit{Miller}, and what the garbage collector did with the trash in \textit{Greenwood} is
striking. Nonetheless, the majority in \textit{Ferguson} did not accept Justice Scalia’s
argument that what occurred in the hospital had necessarily carried the consent
of the petitioners (or that it was, alternatively, not a search at all).

4. \textit{Knowing exposure and consent in the perinatal drug testing context.}

I have argued that, for Fourth Amendment purposes, the doctrinal test for
consent is (and conceptually ought to be) essentially the same as the test for
what falls completely outside the definition of a search. I have also claimed
that this would make sense as a normative matter. The search question is
whether the individual has knowingly exposed some activity, possession, or
fact to the public (and therefore to the police as well). When consent is at
issue, the Court focuses on knowing exposure to the \textit{police}, without requiring
the more general exposure to the public that removes an activity from Fourth
Amendment coverage.

In \textit{Ferguson}, the distinction between consent and knowing exposure is
important for what it says about the Court’s potential willingness to expand the
definition of search and contract the definition of consent. Previously, handing
something over to a third-party stranger appeared to relinquish any interest in
its privacy. The majority opinion in \textit{Ferguson} suggests, however, that a
separate consent for dissemination might in fact be necessary.

If this is true, it not only elevates what was previously not a search
(dissemination of what has already been exposed to someone) to the status of a
search. It also, by the same action, makes the definition of consent more
demanding than it previously was. The fact that it does both of these things
simultaneously, moreover, evidences the artificiality of the distinction between
knowing exposure and consent.

If, as the Court implicitly held, a third party’s turning over data to the
police violates a reasonable expectation of privacy, then it would be quite
difficult to argue that what occurred in \textit{Ferguson} was a consent search.
Consider why.

The rationale under which the Court has historically rejected claims that
third-party dissemination constitutes a search is that the initial disclosure to the
third party forfeits any interest in privacy from further dissemination. On the
facts of \textit{Ferguson}, then, the surrender of one’s urine to a doctor (or other

medical personnel) would forfeit any interest in avoiding having the test results further disseminated. If, however, the surrender to the third party does not necessarily imply a forfeited privacy claim against further dissemination, then for the very same reason, the surrender itself would not imply consent to dissemination to law enforcement officers.

There is nothing in the surrender of urine to medical personnel, in other words, that would distinguish law enforcement officials from the rest of the public as more welcome recipients of the information flowing from that urine. If the public at large was not invited, then by implication, neither were the police.

In addition to virtually ruling out consent in this particular case, the Court also opened the door to an argument that, henceforth, consent must be “informed,” a position that modifies its decision in *Bustamonte*, which considered information a nondispositive factor in Fourth Amendment consent. The only information that the women lacked when they surrendered their urine in *Ferguson* was that police would be learning the results of their toxicology tests. As far as they knew, they were only providing urine and information to medical personnel. According to the Court, their ignorance of the fact that the medical personnel were gathering the urine as agents of law enforcement could potentially vitiate their consent.

Prior to *Ferguson*, the Court had held (in the pretend friend cases) that ignorance about the fact that a confidante is actually a police officer (or an agent of the police) is irrelevant to one’s having knowingly forfeited one’s privacy. In determining whether a person has given valid consent to a search, by contrast, the Court had said in *Bustamonte* that ignorance about one’s right to refuse consent is a relevant factor, but not a dispositive one. The Court had therefore prioritized knowledge of the right to refuse consent over knowledge of a confidante’s identity as an agent of law enforcement. If, under *Ferguson*, consent now requires a person to know—prior to disclosure—that police will see whatever is disclosed, however, then it would seem to follow a fortiori that consent also requires a person to know—prior to disclosure—that he can refuse consent. By holding that the previously immaterial deception about police participation might now undermine the validity of consent, the Court therefore calls into question the continuing vitality of *Bustamonte* and its holding that voluntary consent need not be informed.

The item missing from the women’s consents in *Ferguson* that might conceivably have affected the legality of the urine tests was the knowledge that the information would be shared with law enforcement. Justice Scalia was therefore right to fear in *Ferguson* that the Court’s remand implicitly held that signing a consent form allowing the hospital to do drug screens might not alone amount to consent to sharing any data with the police. This case thus raises doubts about the whole notion that exposure to one is exposure to many, along with the idea that ignorance of one’s rights does not vitiate consent.
Cases such as *Vernonia*, *Layne*, and *Ferguson* together represent a recognition that exposure to one is not exposure to the world, and that therefore one might relinquish some privacy without thereby inviting absolute transparency. The context of each case is different, of course, from that of the earlier cases. None explicitly concerns the question of whether there is any reasonable expectation of privacy. What took place, whether a urine test for drugs or a reporter entering a home with police and filming the premises, was in fact a search governed by the Fourth Amendment. Nonetheless, in each case, the Court held that further dissemination of what had already been exposed could count as an intrusion upon a reasonable expectation of privacy. The Court has therefore set out some of the ingredients for a more robust Fourth Amendment protection.

C. Reconsidering the Old Cases

In *Kyllo*, *Ferguson*, and other recent cases expressing ambivalence about Moves One and Two, the Court scrupulously avoided any suggestion that it was overruling prior precedents. Nonetheless, as we have seen through a close analysis of the cases, they appear to be inconsistent with the earlier decisions in rejecting or declining to adopt arguments employing the two moves. Consider *Greenwood*, the garbage case, in light of recent decisions by the Court. The *Greenwood* majority relied quite heavily upon two facts. The first was the presence of the garbage bag on public property, outside the curtilage of Greenwood’s home. The second was Greenwood’s specific intention to hand over his garbage to a third party, the collector. Because the garbage was on public property, it was possible to learn of its contents without having to invade the traditional private space of the home or its surrounding area. And because Greenwood meant to give his garbage to the collector, he relinquished any interest in its privacy from widespread public dissemination.

After *Kyllo*, the first fact—that Greenwood’s garbage was placed on public property—might not have quite the same weight as it once did. With thermal detection technology, the police in *Kyllo* were able to measure the heat waves emerging from Kyllo’s home without having to invade the home itself. As Justice Stevens said in his dissent, the technology was “off the wall.” Nonetheless, the majority refused to hold that the thermal detection had no Fourth Amendment implications. Because the device processed otherwise invisible and undetectable heat waves outside the house to learn about goings-on within the house, its use represented an invasion of Kyllo’s reasonable expectations of privacy.

By analogy, when the police officer rummaged through Greenwood’s opaque garbage bag, she took what had been the invisible and undetectable contents of that container and exposed it to her own observation. Those contents, moreover, revealed facts about the inside of Greenwood’s home, and the activities going on there, that would otherwise have remained unknown to...
the officer. On the logic of *Kyllo*, rummaging through Greenwood’s garbage should therefore be considered a search.

After *Ferguson*, the second significant fact of *Greenwood*—that the garbage had been deliberately given to the collector—might also have limited importance. Like the person who conveys his garbage to the collector, the patient in a hospital who provides a urine sample knowingly engages in a partial exposure to third parties of what was previously private. Nonetheless, the Court held in *Ferguson*, the women who gave urine samples at the hospital where they delivered their babies did not necessarily provide the required informed consent to the police search that took place.

The search over which the Court expressed potential doubt regarding the presence of consent was either the toxicology test itself or the handing over of the results to the police. If the test itself was the search, then the surrender of an item, including garbage, to a third party might not entail the knowing exposure of all the precise contents of that item. If instead handing over the urine test results to the police was the search in *Ferguson*, then it follows that a person can knowingly relinquish an item—such as garbage—to one third party without thereby authorizing its distribution to others. Again, the reasoning of *Greenwood* becomes vulnerable because the Court’s recent decisions call Moves One and Two into question.

Consider another of the earlier cases, *Knotts*. In *Knotts*, the Court held that police could use a beeper to track the whereabouts of a person’s car, without implicating the Fourth Amendment. The Court reasoned that when an individual goes outside and drives on the roads, he knowingly makes himself visible to the public. As we saw, however, he is visible to any one member of the public for only a brief period of time. The technology of a tracking device removes that limitation and thereby alters the individual’s privacy.

In *Kyllo*, the Supreme Court refused to allow technology to fill the gap between limited visibility and complete information. In dissent, Justice Stevens noted that heat waves emerging from a person’s home will often come to the attention of neighbors because it causes snow on the roof of the house to melt. Sometimes, in other words, items that are inside become known to the public without any technological intervention. As Justice Scalia pointedly responded in his majority opinion, however, the phenomenon of snowmelt does not open the door to the more intrusive technology of thermal detection. By the same logic, the phenomenon of driver visibility to the public should not open the door to the minute-by-minute monitoring of a driver’s whereabouts through a police tracking device.

Consider finally the case of *White*, which upheld police use of a pretend friend wearing a wire. The fact that the suspect intentionally exposed his words (not to mention the inside of his home) to his pretend friend was critical to the outcome of that case. Had the police planted listening devices on the suspect or on his telephone wire, without the suspect’s permission, the activity would
have constituted a search under *Katz*. The decision in *Ferguson*, however, casts doubt on the distinction between *Katz* and *White*.

The women in *Ferguson* voluntarily relinquished their urine to hospital personnel. Nonetheless, the fact that hospital personnel turned out to have been instruments of law enforcement seeking out evidence of crime meant that the women might not have consented to the search of their urine. Their ignorance about the cooperation between medical care professionals and the police could thus have vitiated whatever consent they gave to the people who took their urine samples.

The significance of ignorance in *Ferguson* has two implications for the decision in *White*. First, the fact that a pretend friend is secretly wearing a wire might render the electronic transmission of the suspect’s words an independent, nonconsensual search. Second, the fact that the pretend friend is an agent of the police seeking evidence of crime might undermine the suspect’s knowing exposure of his words to the pretend friend himself. In other words, the use of pretend friends, wired or not, might no longer be a practice that is fully insulated from the demands of the Fourth Amendment.

The Court may have, for many years, unwittingly embraced Moves One and Two, in part because making these moves facilitated outcomes that the Court liked. As illustrated in this Article, however, the Court has begun, in significant ways, to refuse to follow Moves One and Two to their logical conclusions. *Kyllo* and *Ferguson* represent two examples of this refusal. And, as a result, the Court might now be open to acknowledging the possibility that these moves have in fact driven the law for some time and the accompanying possibility that the moves—and the cases that embrace them—are now and have long been illegitimate.

**CONCLUSION**

This Article has set out to describe a set of moves employed by the Supreme Court that have led to a devaluation of privacy. Specifically, the moves have defined much of what government officials do to investigate private citizens as falling outside the scope of the Fourth Amendment’s protection against unreasonable searches. The Article contends that although these moves are never expressly articulated as such in the cases, they emerge repeatedly and play a significant role in shaping the doctrine of Fourth Amendment privacy.

In the first move, the Court excludes from the category of searches those investigations that exploit an individual’s vulnerabilities to third-party intrusion, even if such exploitation would constitute wrongdoing if it were carried out by a private third party. The Court accomplishes this move by calling various items knowingly exposed when they are, in fact, hidden from public view. It is through Move One, for example, that the Court managed to
classify the government’s use of pretend friends and tracking devices as failing to implicate the Fourth Amendment.

In the second move, the Court treats as already publicly disseminated that which has been exposed only to a limited audience. In doing so, it turns minimal self-disclosure into an invitation for wide-scale public scrutiny. Due to this move, the Court has refused to apply the Fourth Amendment’s requirement of reasonableness to government examination of such things as telephone and bank records, on the theory that the contents have already been willingly shared with strangers.

This Article has also linked the Court’s “not a search” jurisprudence (and associated moves) with the doctrine of consent searches. By noting the doctrinal similarities between what it takes for something to be classified as not a search and what it takes for something to be deemed a consent search, the Article demonstrates that the Court has engaged in a kind of strict criminal liability approach to individual freedom from unreasonable searches, an approach that does violence to the important rights at stake and does so on the false premise that those who benefit from such rights are typically lawbreakers.

Perhaps because these moves are destructive and at odds with any strong vision of privacy, as the Article suggests, the Court has begun to distance itself from them in a variety of recent cases. In addressing heat detection technology and perinatal cocaine testing, for example, the Court specifically refused to say that vulnerability to exposure is the equivalent of privacy forfeiture and left open the possibility that more robust doctrines of consent and of partial exposure are in the offing. It held that people might be able to maintain their reasonable expectations of privacy, moreover, even when they have voluntarily expelled heat waves and urine from their most private places. Since the two moves have proceeded beneath the surface, they continue to be available, and they underlie most extant Fourth Amendment doctrine. These recent developments are positive signs, however, and courts including the highest in the land will be free to pursue their full implications with greater alacrity once they have acknowledged and evaluated Moves One and Two, a first step toward rejecting them on the merits.

**AFTERWORD**

Following the events of September 11, 2001, one might wonder whether the Fourth Amendment will continue to have any vitality in the years to come. If not, academic projects surrounding the Fourth Amendment will become increasingly irrelevant. No doubt the Fourth Amendment’s future will substantially depend on what the people—those who are protected by the Fourth Amendment—feel is warranted in the face of uncertainty. My prediction, for what it is worth, is that Fourth Amendment questions will continue to matter and may in some instances matter even more.
It is possible, of course, that people who believe privacy is a luxury we can no longer afford will amend the United States Constitution to eliminate the Fourth Amendment. Alternatively, the Supreme Court might choose to gut the provisions prohibiting unreasonable search and seizure to an extent functionally equivalent to such a constitutional amendment. In either case, Fourth Amendment scholarship would have little utility beyond the historical.

Yet, although it is difficult to make such predictions with confidence, the Fourth Amendment seems unlikely to disappear. Indeed, the degree to which commentators of different political stripes have taken aim at some of Attorney General Ashcroft’s recent initiatives suggests that people continue to value liberty even in a crisis. If so, we can anticipate compromises but not the complete elimination of the constitutional right of privacy. In a world of compromise, a coherent and stable account of when the Fourth Amendment ought to apply will remain important.

One possible future development in Fourth Amendment jurisprudence is that older precedents limiting the universe of “the people” entitled to the provision’s protection may resurface and shrink the qualifying group even further. Thus, we might find that the question of what is a search is relevant to law enforcement efforts directed at citizens but not aliens, or at least not all aliens. Alternatively, the Court may come to create a new category of “special law enforcement interests” that tips the balance of reasonableness in favor of a diminished protection for privacy in some contexts. The Court has already


249. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (holding that the United States is not bound by the Fourth Amendment in its dealings with noncitizens outside of the territory of the United States). As Justice Brennan suggested in dissent, “[t]he Court admits that “the people” extends beyond the citizenry, but leaves the precise contours of its “sufficient connection” test unclear. At one point the majority hints that aliens are protected by the Fourth Amendment only when they come within the United States and develop “substantial connections” with our country . . . . At other junctures, the Court suggests that an alien’s presence in the United States must be voluntary and that the alien must have “accepted some societal obligations.” Id. at 282-83 (Brennan, J., dissenting) (footnote omitted).
done something like this, for example, in approving random drug tests for customs officials absent probable cause, a warrant, or even reasonable suspicion.\textsuperscript{250} Were the Court to proceed in either of these directions, the definition of search would probably remain intact in the many other contexts falling outside of the antiterror agenda. My analysis and proposals would remain relevant in this somewhat shrunken domain.

If the Court decides instead (or in addition) to further contract the definition of search that I criticize in this Article, then the arguments I make here still remain relevant, but in a different way. One problem I identify in the current doctrine is that the threshold for search is set too high; much conduct that ought to be entitled to privacy, in other words, is subject to intrusion without even triggering the Fourth Amendment’s requirements. If this were the only problem, then raising the bar for triggering Fourth Amendment protections still higher in response to fears of terrorism would represent a complete rejection of my concerns.

But the Court’s failure to give adequate protection to privacy is not the only problem I identify in current doctrine. The other problem is incoherence, the fact that the very tests that the Court announces and applies in some contexts are contradicted and undermined in others. To the extent that the Court intends to retain a vital, even if more limited, role for the Fourth Amendment in protecting expectations of privacy, I set out here a series of illustrations of why it should do so in a principled fashion. The right of the people to be secure is in danger, both from perpetrators of heinous acts against civilians and (to a less dramatic degree) from our own Attorney General. The courts may ultimately decide whether and in what form that right will survive the crisis in which we now find ourselves embroiled.

\textsuperscript{250} National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989) ("We think the Government’s need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.").