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Rediscovering Trespass:
Towards a Regulatory Approach to Defining Fourth Amendment Scope in a World of Advancing Technology

MARTIN R. GARDNER†

INTRODUCTION

Any genuine understanding of the Fourth Amendment begins with an appreciation of what governmental activities constitute a "search" or a "seizure" within the meaning of the Amendment. While defining activities and circumstances constituting seizures has proven relatively unproblematic, the task of determining which intrusions constitute Fourth

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1. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place . . . ." U.S. CONST. amend. IV.

2. 1 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 562-63 (5th ed. 2012); see also Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 377 (1974) ("I can think of few constitutional issues more important than defining the reach of the [F]ourth [A]mendment.").

3. 1 LAFAVE, supra note 2, at 563; see also United States v. Jacobsen, 466 U.S. 109, 113 (1984) ("A 'seizure' of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.").
Amendment searches has proven notoriously difficult and controversial. Since its 1967 decision in *Katz v. United States*, the United States Supreme Court has defined the scope of the Fourth Amendment in terms of whether governmental actions offend a citizen’s "reasonable privacy expectations." *Katz* is generally understood to have sounded the death knell for an earlier approach which defined searches and seizures as "physical trespasses" into protected areas. Recently, after over fifty years’ experience with the *Katz* rubric, the Court suddenly reintroduced the trespass approach as an alternative to the privacy test in the *United States v. Jones* and *Florida v. Jardines* cases. It is now clear that protecting interests in both property and privacy are vital Fourth Amendment considerations.

While the full significance of the reemergence of trespass theory is not yet clear, its recognition clearly signals that the Court has broken with its employment of the *Katz* standard as the exclusive vehicle for defining Fourth Amendment scope. Seemingly, the Court has recognized that new approaches are needed to resolve the complicated twenty-

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5. Buckets of ink have been spilt attending to the controversy. See infra notes 104-22 and accompanying text.


7. See infra notes 28-56 and accompanying text.


10. 133 S. Ct. 1409 (2013). *Jardines* is discussed in detail infra notes 178-88 and accompanying text.
first century balance between controlling crime and protecting national security, while at the same time respecting civil liberties. Indeed, having now freed itself from defining searches and seizures solely in terms of privacy expectations, the way is now clear for the Court to move even further and adopt an approach explicitly couched in terms of regulating unacceptable governmental conduct as a third alternative to the privacy and property tests already in place. Unlike those perspectives which are grounded in atomistic rights to privacy and property respectively, the regulatory viewpoint addresses the constitutionality of the government’s conduct in a given case as it impacts protected interests of society in general without necessarily assessing the effects on any particular parties affected thereby.

This Article traces the developments which have left the Court poised to embrace a regulatory test alternate as the means to protect “persons . . . against unreasonable searches and seizures” in the modern era of technological information gathering. The discussion begins with an exploration of the problematic nature of Katz and a review of its progeny, most of which employs controversial assumption of risk analysis as a basis for denying Fourth Amendment coverage. Before turning to Jones and Jardines, I discuss Kyllo v. United States, a precursor to those cases. I argue that these three cases signal the Court’s inclination to adopt a new regulatory alternative. In anticipation of such a move, I formulate a specific test which I recommend the Court adopt if it indeed seeks a regulatory criterion to address threats to privacy posed by advanced technology—threats presently rendered outside Fourth Amendment protection under the current

11. See Kyllo v. United States, 533 U.S. 27, 47 (2001) (Stevens, J., dissenting) ("[I]t seems likely that the threat to privacy will grow . . . as the use of intrusive equipment becomes more readily available."). Kyllo is discussed in detail infra notes 133-54 and accompanying text.

12. The distinction between “atomistic” versus “regulatory” approaches to determine Fourth Amendment searches is discussed infra notes 50-56 and accompanying text.

13. See U.S. CONST. amend. IV.

14. See supra note 11.
expectation of privacy and trespass to property standards. I argue that any adoption of a regulatory test should supplement rather than replace the present atomistic standards, with the new test being utilized in a given case only after no Fourth Amendment searches result from scrutiny under first Jones/Jardines then Katz. Finally, where the regulatory test is applicable, I argue that the Court should exercise restraint in putting it to use in deference to the superior competence of other branches of government to address the complicated Fourth Amendment problems posed by modern technology.

I. FROM TRESPASS TO EXPECTATIONS OF PRIVACY

It has long been understood that the Fourth Amendment is inapplicable without a "search or seizure," no matter how unreasonable a governmental intrusion would appear to be. On the other hand, if a given intrusion constitutes a search or seizure affecting "persons, houses, papers, and effects," the intrusion must be "reasonable" under the Fourth Amendment. While historically there arguably existed no necessary connection between the warrant provisions of the Amendment and its reasonableness requirement, the

15. See infra notes 192-203 and accompanying text. No attempt is made in this Article to assess the constitutionality of such technological threats under the proposed regulatory standard.

16. In order for the Fourth Amendment to apply, searches and seizures must be conducted by governmental officials and not private parties. See Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (explaining it is not unconstitutional for private employer to seize incriminating papers of employee and turn them over to law enforcement officials).

17. Amsterdam, supra note 2, at 356 ("Law enforcement practices are not required . . . to be reasonable unless they are either 'searches' or 'seizures'.") Moreover, searches and seizures are not governed by the Fourth Amendment unless they are related to "persons, houses, papers, and effects." Id.

18. Id.; see U.S. CONST. amend. IV.

19. See Akhil Reed Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 64-74 (1998); Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 771-72 (1994) ("[T]he Founders viewed judges . . . with suspicion . . . . The [Fourth] Amendment's Warrant Clause does not require, presuppose, or even encourage warrants—it limits them. . . . The Framers did not exalt warrants, for a warrant was issued ex parte by a government official on the imperial payroll and had the purpose and effect of precluding any common law trespass suit the
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Supreme Court has expressed a "strong preference"\textsuperscript{20} that searches be supported by warrants, to the point that some refer to a warrant "requirement"\textsuperscript{21} subject to a variety of exceptions.\textsuperscript{22} In articulating the meaning of searches and seizures, the Supreme Court initially required a physical trespass by the government into a protected area for the purpose of gathering evidence. Thus, in \textit{Olmstead v. United States},\textsuperscript{23} the Court found the Fourth Amendment inapplicable when federal officials listened to a private conversation by means of a wiretap—placed on phone lines supported by poles running in public space—because the interceptions "were not in the house of either party to the conversation."\textsuperscript{24} Arguably, such aggrieved target might try to bring before a local jury after the search or seizure occurred.

\textsuperscript{20} LAFAVE, \textit{supra} note 2, at 559.
\textsuperscript{21} See, e.g., CHARLES H. WHITEBREAD \& CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 97-103 (arrest warrant requirement), 148-51 (search warrant requirements) (5th ed. 2008).

\textsuperscript{22} Professor LaFave has identified exceptions to include: cases of emergency which excuse failures to obtain warrants; situations involving "diminished expectations of privacy[,]" including consensual searches; and searches incident to arrest. 2 LAFAVE, \textit{supra} note 2, at 566-72. Moreover, Fourth Amendment intrusions justified by "reasonable suspicion" rather than the more stringent "probable cause" standard need not be supported by warrants. See WHITEBREAD \& SLOBOGIN, \textit{supra} note 21, at 253-96 (discussing Terry "stops and frisks"); see also MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 137-46 (4th ed. 2014) (discussing school searches and seizures based on "reasonable suspicion.").

\textsuperscript{23} 277 U.S. 438 (1928).
\textsuperscript{24} Id. at 456-57.
\textsuperscript{25} Id. at 466. The Court viewed wiretapping as an insufficient "use of governmental force to search a man's house, his person, his papers and his effects" necessary to trigger the Fourth Amendment. \textit{Id.} at 463. Similar to \textit{Olmstead}, the Court found no Fourth Amendment applicability when federal agents placed an
an approach made sense at a time when the government’s primary means of discovering information about people amounted to physically interfering with their property. The physical trespass doctrine clearly proved inadequate, however, to address governmental intrusions in an era of developing technology.

A. *Katz* and Reasonable Expectations of Privacy

In response to perceived inadequacies of the physical trespass doctrine, the Court broke new ground in *Katz*, a case involving governmental interception of telephone conversations which were obtained when the police attached an electronic listening device to the outside of a public phone booth. Unbeknownst to Katz, his end of the conversations were recorded and later used to convict him of illegally transmitting wagering information.

amplifying device against a partition wall of an office, again because there was no physical intrusion into the space from which conversations were overhead. See Goldman v. United States, 316 U.S. 129, 134 (1942). On the other hand, the Court found that the attachment of a “spike mike” into the heating duct of a home, amplifying the sounds therein, constituted a physical trespass, thus triggering Fourth Amendment applicability. Silverman v. United States, 365 U.S. 505, 511-12 (1961).


27. See infra note 28.

28. See *Katz* v. United States, 389 U.S. 347 (1967). As did *Olmstead*, *Katz* involved governmental listening to telephone conversations. Without elaboration, the *Katz* Court noted that the telephone had “come to play [a vital role] in private communication[,]” suggesting technological advancement since 1928, the year of the *Olmstead* decision. *Id.* at 352. Justice Harlan was more specific, arguing for overruling the cases requiring physical trespass of a protected area by a tangible object: “[Those cases] should now be overruled. [Their] limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.” *Id.* at 362 (Harlan, J., concurring).

29. *Id.* at 348 (majority opinion).

30. *Id.*
In reversing the conviction, the Court abandoned the Olmstead physical trespass requirement, thus rejecting the government's argument that no Fourth Amendment search occurred because the listening device in Katz did not physically penetrate "a constitutionally protected area." Rather than focusing on trespasses to property, the Court shifted its attention to a privacy analysis, finding that the action of the government "violated the privacy upon which [Katz] justifiably relied while using the [phone] and thus constituted a [Fourth Amendment] 'search and seizure.' The Court elaborated:

[T]he . . . Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Having found the attachment of the listening device a Fourth Amendment search, the Court deemed it "unreasonable" for want of a supporting warrant.

31. The Court noted the Fourth Amendment "protects people—and not simply 'areas'— . . . [therefore,] the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Id. at 353.

32. Id. at 349-50.

33. Id. at 353. The Court also observed, however, that the "Fourth Amendment cannot be translated into a general constitutional 'right to privacy,'" noting that some of the Amendment's protections "have nothing to do with privacy at all." Id. at 350.

34. Id. at 351-52. As will be discussed later, the "knowing exposure to the public" concept expressed in the text planted the seed for the idea that one assumes the risk of privacy invasions, thus negating the possibility of Fourth Amendment protection, when she exposes otherwise private areas of life to others. See infra notes 57-118 and accompanying text. Justice White made the point explicitly: "When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates." Katz, 389 U.S. at 363 n.* (White, J., concurring).

35. The Court found that warrantless searches are "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-defined exceptions." Katz, 389 U.S. at 357, 359.
Of perhaps even greater significance than the Court’s opinion in Katz, Justice Harlan offered a concurrence in which he articulated the standard which would become virtually the sole measure of Fourth Amendment scope until the recent reemergence of the trespass doctrine. Harlan formulated the test for defining searches and seizures as follows: “[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” Harlan went on to explain that even in one’s home, “objects, activities, or statements” exposed by the homeowner to the “plain view” of outsiders are outside the protection of the Fourth Amendment.

Harlan’s two-prong test has proven extremely controversial. The relevance of a subjective expectation of privacy as a necessary condition for rendering an intrusion a non-search is obviously questionable. The requirement would seem to permit the government to circumvent a historically held expectation of privacy by simply notifying the public that systematic invasions of the expectation would begin to occur regularly. Notwithstanding such problems, the


38. Id. Such language reiterates the assumption of risk notions suggested by the Katz majority and by Justice White in his concurrence. See supra note 34.

39. Ironically, Harlan himself eventually disavowed the test. See United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting); infra notes 57-59 and accompanying text. Even so, the Court continues to employ the Harlan test as the primary vehicle to determining Fourth Amendment searches and seizures. See infra notes 49-111 and accompanying text.

40. Subjective expectations of privacy “[have] no place in . . . a theory of what the [F]ourth [A]mendment protects.” Amsterdam, supra note 2, at 384. Otherwise, “the government could diminish each person’s subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced . . . and that we were all forthwith being placed under comprehensive electronic surveillance.” Id.; see also Ronald J. Bacigal, Some Observations and Proposals on the Nature of the Fourth Amendment, 46 GEO. WASH. L. REV. 529, 535-37 (1978) (favoring abandoning the subjective expectation requirement).
Supreme Court continues to give lip service to the subjective expectation of privacy formulation, although that factor is seldom actually meaningful as cases are usually examined solely in terms of whether a "reasonable expectation of privacy existed."

No less controversial is the test's second, "objective," prong. The Court's recognition that searches necessarily entail intrusions of "reasonable expectations of privacy" creates at least two kinds of problems: (1) definitional issues inherent in the term "reasonable"; and (2) questions surrounding the wisdom of framing the test in terms of privacy expectations. These problems will be considered in turn.

1. "Reasonable": An Empirical or Normative Modifier? The adjective "reasonable" is a notoriously vague term used throughout the law. The term is ambiguous, sometimes

Supreme Court has recognized the problems with the subjective expectation of privacy requirement:

Situations can be imagined, of course, in which Katz' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, 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.


41. 1 LAFAVE, supra note 2, at 583-84.

42. Id. Sometimes the Court even refers to the Katz formulation as simply the "reasonable 'expectation of privacy'" test. See, e.g., Terry v. Ohio, 392 U.S. 1, 9 (1968).

43. One need only think of such standards as "beyond a reasonable doubt" or "reasonable suspicion" to appreciate the open-ended nature of the term.
meaning empirically normal, and at other times connoting the normative notion of legitimacy. It should be noted that in explicating the reach of Fourth Amendment protection, Justice Harlan employed the "reasonable expectation of privacy" language rather than utilizing the Court's "justifiable reliance on privacy" rubric. The majority's terminology sounds decidedly normative. As Professor Amsterdam observed: "Mr. Katz's conversation in a pay telephone booth was protected because he 'justifiably relied' upon its being protected—relied, not in the sense of an expectation, but in the sense of a claim of right." Thus, in attempting to clearly articulate the standard defining Fourth Amendment scope, Justice Harlan actually introduced additional uncertainty. It is not clear whether his test was meant to entail normative judgments, ones that define expectations citizens have a right to assert against the government, or simply descriptive ones inviting a focus on those expectations normal people in fact possess.

While Justice Harlan would eventually disavow his Katz standard altogether in favor of an unabashedly normative test, the Court continues to utilize the reasonable expectation framework in a decidedly non-normative manner. As will be discussed later in detail, the Court has repeatedly relied on Katz's "knowing exposure to public"
language to find, as an empirical matter, that privacy expectations are negated when various risks of invasion are assumed.

**2. Expectations of Privacy: Vindicating Atomistic Rights or Regulating Government?** It has long been understood that the Fourth Amendment can be understood either "as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct." By focusing on privacy expectations, the Supreme Court has clearly embraced the atomistic view. Unless reasonable privacy interests of an individual citizen have been offended, the Fourth Amendment is inapplicable no matter how reprehensible governmental action may otherwise appear. Thus, for example, if a citizen invites a

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49. See supra text accompanying note 34.
50. Amsterdam, supra note 2, at 367.
51. Id.
52. Not only does Fourth Amendment applicability depend on the presence of a search or seizure under *Katz*, but it also depends on the person challenging the intrusion. See *Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978) (holding passengers in car could not contest the possible illegality of police gathering of evidence from the car because passengers lacked sufficient privacy expectations in the car). *Rakas* reduced traditional Fourth Amendment "standing" issues to the search and seizure issue under *Katz*. See *Whitebread & Slobogin*, supra note 21, at 141-48.
53. To illustrate the point, Professor Amsterdam posed a now famous hypothetical where the police appear to blatantly violate the Fourth Amendment but act outside the scope of the Amendment because no atomistic privacy expectation is violated under *Katz*:

Suppose that two men drive into Minneapolis and rent a hotel room, paying in advance for three nights. During the first night, they plan a bank robbery which they execute the next day. Following the robbery, they drive directly out of town, never returning to the hotel. Late that same evening, policemen go the rounds of the local cheap hotels, armed with a police artist's sketch of the unmasked half of one bank robber's face drawn from a bystander's description. The night manager tells the officers that the sketch looks like one of the guys in room 212. From outside the hotel, the officers observe that the lights in 212 are lit. The night manager informs them that the occupants checked in yesterday afternoon for three days. After obtaining the manager's permission, the officers break the door of room 212 in force with drawn guns. No one is there, of course; but the officers find and take away a penciled map of the bank area, parts cut from a stocking to make a stocking mask, and other
police officer to search the citizen's home but the officer does not hear and is thus unaware of the invitation, no Fourth Amendment search occurs even though the officer—from his point of view— barges into the home and conducts a nonconsensual, warrantless intrusion.\textsuperscript{54} While such an intrusion would appear to demand regulation as the quintessential Fourth Amendment intrusion, no search occurs under the atomistic view since the citizen relinquished her privacy interests by inviting the officer into her home.\textsuperscript{55}

Adherence to the atomistic approach has led the Court to the view that privacy expectations are not reasonable, and

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items that are later sought to be used in evidence to connect the former occupants of the room with the bank robbery after their apprehension.

On the defendants' motion to suppress this evidence, the first question that the court will ask is whether any violation of the [F]ourth [A]mendment occurred. From the perspective of the occupants, room 212 was "abandoned" and they had no constitutionally protected interest in it at the time of the search. From the perspective of the police, however, the room appeared to be occupied; they entered it upon that assumption; and it is difficult to imagine a more egregious case of the kind of police conduct that the [F]ourth [A]mendment was designed to prevent. Amsterdam, supra note 2, at 368.

Another commentator recently observed: "[W]e might want to regulate government information gathering even when it does not violate privacy." Solove, Pragmatism, supra note 26, at 1525.

The distinction between atomistic and regulatory approaches discussed in the text is similar to that manifested in the two contrasting views utilized to define the entrapment defense. Under the "subjective" test, the focus is on the atomistic situation of the person allegedly entrapped, specifically whether he or she was "predisposed" to commit the crime at the time of the government's instigation. See WHITEBREAD & SLOBOGIN, supra note 21, at 546-55. The "objective" view, on the other hand, focuses on regulating the undesirable governmental conduct regardless of the subjective predispositions of the person raising the defense. Id. at 556-58.

54. I have previously explored the implications of the "uncommunicated actual consent" hypothetical in Martin R. Gardner, Consent as a Bar to Fourth Amendment Scope—A Critique of a Common Theory, 71 J. CRIM. L. & CRIMINOLOGY 443, 458-60 (1980).

55. Id.; see also Sherry F. Colb, What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 STAN. L. REV. 119, 148 (2002) ("Giving consent to a search . . . means voluntarily allowing the police to look at . . . what would otherwise be private," thus rendering the police intrusion a nonsearch).
thus without Fourth Amendment protection, in situations where a citizen is found to have assumed the risk that the alleged private matter at issue will be made public,\(^{56}\) regardless of how unreasonable the governmental conduct might appear. These assumption of risk implications, entailed in the emphasis on atomistic privacy expectations, eventually led Justice Harlan to reject his two-part test in favor of a normative regulatory approach to defining searches and seizures.\(^{57}\) In a case where an undercover governmental informant, wearing a hidden monitoring device, engaged a suspect in conversations overhead by police officers, the Court found that no search occurred because the defendant assumed the risk that his confidant might be untrustworthy.\(^{58}\) Justice Harlan sharply objected:

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 custom 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. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

This question must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.\(^{59}\)

To appreciate the strength of the argument for a test such as that recommended by Justice Harlan, it is necessary to understand how firmly ensconced in Fourth Amendment jurisprudence the *Katz* assumption of risk doctrine has become. Thus, in the discussion immediately following, I

\(^{56}\) See *infra* notes 60-111 and accompanying text.

\(^{57}\) See *infra* text accompanying note 59.


\(^{59}\) *Id.* at 786 (Harlan, J., dissenting).
document the prevalence of the doctrine and describe its controversial nature.

B. *The Katz Progeny: Assumption of Risk to the Forefront*

Justice Harlan's criticism of the role played by assumption of risk analysis in application of the *Katz* expectation of privacy test is shared by many commentators. One has described such analysis as a move that undergirds "almost all of the Court's cases defining the meaning of a Fourth Amendment 'search,'" creating a "doctrinal position that is untenable." Nevertheless, in reliance on the *Katz* invitation to disregard what one "knowingly exposes to the public" as a Fourth Amendment search, the Court has employed risk analysis as a means of disqualifying situations from Fourth Amendment protection in two contexts: (1) in cases where the possibility of public disclosure is deemed to negate privacy expectations; and (2) in cases where an intentional sharing of an otherwise private matter with another is equated with sharing the matter with the world, given the risk that the other may share the matter with a third party. Without attempting a discussion of the full panoply of the Court's cases, I will highlight several examples from both of the two categories.

1. *Possible Public Disclosure as Negating Privacy Expectation.* While *Katz* specifies that "knowing" exposure to the public negates privacy expectations, subsequent cases have gone further in holding such negations where the Court perceives a mere risk that a public disclosure will occur.

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60. 1 LAFAVE, *supra* note 2, at 590.

61. Colb, *supra* note 55, at 121; see infra text accompanying note 117.

62. Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 627 (1989) (criticizing the Court for focusing on the degree of public exposure rather than "simply the fact of public exposure, or worse, the mere possibility of public exposure" under *Katz*); see cases discussed infra notes 65-81 and accompanying text.

63. See Colb, *supra* note 55, at 122; cases discussed infra notes 82-111 and accompanying text. This analysis is often referred to as "the third-party doctrine." See infra note 82 and accompanying text.

Thus, in *United States v. Knotts*, the Court found no Fourth Amendment violation when police placed an electronic monitoring device in a five-gallon drum containing chloroform—which had been purchased by one of Knotts’s co-defendants—and subsequently utilized the device to monitor the movements of a car carrying the chloroform. In finding that the monitoring did not constitute a search under *Katz*, the Court appealed to the assumption of risk analysis of a prior case in noting that:

Visual surveillance from public places along [the car’s] route . . . would have sufficed to reveal all of [the car’s movements] to the police. The fact that the officers in this case relied not only on visual surveillance, but also on the use of the [monitoring device] to signal the presence of [the] automobile to the police receiver, does not alter the situation.

Therefore, “[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy . . . from one place to another” because when one travels over public streets, “he voluntarily convey[s] to anyone who want[s] to look the fact that he [is] travelling over particular roads in a particular direction.”

Similarly, in *California v. Ciraolo*, the Court found no invasion of a reasonable expectation of privacy when police flew an airplane over the respondent’s house and detected marijuana plants growing in his yard even though the respondent had enclosed his yard with a ten-foot fence. The

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66. *Id.* at 277.
67. *Id.* at 283 (citing *Smith v. Maryland*, 442 U.S. 735, 744-45 (1979)). *Smith* is discussed in detail infra notes 92-100 and accompanying text.
69. *Id.* at 281-82. In a subsequent case, *United States v. Karo*, 468 U.S. 705, 714 (1984), the Court held that use of a monitoring device similar to that used in *Knotts* did violate a “justifiable interest in . . . privacy” when police tracked movements within a private residence which were not visible to the outside.
70. 476 U.S. 207 (1986).
71. *Id.* at 213. The Court identified the issue as “whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable.” *Id.*
Court quoted the "knowing exposure" language of *Katz* and found that respondent had essentially assumed the risk that the marijuana might be observed by "[a]ny member of the public flying in [the] airspace" above his yard. Thus, even though respondent harbored a subjective expectation of privacy in his yard, an "expectation that his garden was protected from [aerial] observation [was] unreasonable."

72. *Id.*; see supra note 34 and accompanying text.

73. *Ciraolo*, 476 U.S. at 213-14. Four dissenters in *Ciraolo* objected to the majority's assumption of risk analysis, noting: "The risk that a passenger on [a commercial flight] might observe private activities, and might connect those activities to particular people, is simply too trivial to protect against." *Id.* at 223-24. Contrary to the majority's suggestion, "people do not knowingly expose their residential yards to the public merely by failing to build barriers that prevent aerial surveillance." *Id.* at 224 (internal quotation marks omitted). Noting the majority's failure to appreciate the "qualitative difference" between police surveillance and other uses made of airspace, the dissenters observed:

Members of the public use the airspace for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards. Here, police conducted an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant. It is not easy to believe that our society is prepared to force individuals to bear the risk of this type of warrantless police intrusion into their residential areas.

*Id.* at 224-25.

74. The Court found that respondent "clearly—and understandably . . . manifested his own subjective intent and desire to maintain privacy by placing the fence to conceal street-level views of his property. *Id.* at 211.

75. *Id.* at 213-14. In another aerial surveillance case, *Florida v. Riley*, 488 U.S. 445, 448-50 (1989), the Court found no Fourth Amendment search when police observed marijuana growing in Riley's greenhouse while flying in a helicopter above Riley's land. Again citing the *Katz* knowing exposure language, a four-Justice plurality concluded that "it is unreasonable . . . to expect that [the] marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet[,]" thus rendering it unreasonable for Riley to "have expected the contents of his greenhouse to be immune from examination by [the] officer." *Id.* at 449-50. Curiously, the plurality observed that "no intimate details connected with the use of the home . . . were observed," *id.* at 452, as if Riley would somehow not have assumed the risk of such observation had it occurred.

Three dissenters in *Riley* objected to the plurality's assumption of risk analysis: "To say that an invasion of Riley's privacy from the skies was not impossible is most emphatically not the same as saying that his expectation of privacy within his . . . curtilage was not 'one that society is prepared to recognize as reasonable.'"
Finally, in *Oliver v. United States*, the Court found no Fourth Amendment intrusion when drug enforcement officials disregarded a “No Trespassing” sign and discovered marijuana growing on petitioner’s farmland over a mile from his home. The Court again employed assumption of risk analysis in denying that the intrusion into the petitioner’s “open fields” constituted a Fourth Amendment search. “[A]ctivities . . . that occur in open fields . . . are accessible to the public and the police . . . . It is not generally true that fences or ‘No Trespassing’ signs effectively bar the public . . . .” Moreover, the petitioner admittedly assumed the risk that his land could be lawfully surveyed from the air. Therefore, “the asserted expectation of privacy in open fields is not an expectation that society recognizes as reasonable.”

2. Sharing with Another as Sharing with the World. In a similar line of cases reflecting what is often characterized as “the third party doctrine,” the Supreme Court has held that

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Id. at 460 (Brennan, J., dissenting) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).


77. Oliver had placed the sign on a locked gate to his farmland. The officials followed a footpath, which led around one side of the gate, walking through woods several hundred yards along the edge of Oliver’s farm before observing two marijuana patches fenced with chicken wire. *Id.* at 173-74.

78. The “open fields” doctrine permits police officers to enter and search a field without a warrant. *Id.* at 173. Open fields, unlike the curtilage area immediately associated with dwellings, are neither “houses” nor “effects” within the language of the Fourth Amendment. *Id.* at 176-80. This remains true even if the officers trespassed upon the landowner’s land. *Id.* at 183. Disregarding “no trespassing” signs on open fields does, however, constitute a trespass. *Id.* at 190-91 (Marshall, J., dissenting).

79. *Id.* at 179 (majority opinion).

80. See *id*.

81. *Id.* (internal quotation marks omitted). Justices Marshall, Brennan, and Stevens argued in dissent: “Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the [s]tate in which the land lies is protected by the Fourth Amendment . . . .” *Id.* at 195.

when one voluntarily "reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information." This is true, "even if the 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." Thus, in California v. Greenwood, Greenwood left his garbage in opaque plastic bags on the street for trash collectors to pick up, only to discover that the bags were later turned over to police at their request and opened, revealing their contents. The Court found the police intrusion was not a search because, by knowingly exposing the bags to third-party trash collectors, Greenwood assumed the risk that the bags would be opened and their contents revealed. As the Court explained, "it is common knowledge that plastic garbage bags left on ... a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." Thus, Greenwood possessed no

83. United States v. Jacobsen, 466 U.S. 109, 117 (1984). In Jacobsen, private parties opened a package inadvertently damaged, discovered white powder therein, repackaged the parcel, and notified drug officials who subsequently reopened the package without a warrant. Id. at 111. The Court held the police intrusion did not violate an expectation of privacy since such expectation had already been violated by the private worker's intrusion. Id. at 118.

84. United States v. Miller, 425 U.S. 435, 442-43 (1976) (holding no Fourth Amendment safeguards required when government obtains a person's bank records because she has no reasonable expectation in such records since she knows several third parties will see any check she writes).


86. Id. at 37. The police had received a tip from an informant that Greenwood might be engaged in narcotics trafficking. Responding to the tip, the police requested the trash collectors to separate Greenwood's garbage and deliver it to them. Id.

87. Upon opening the bag, the police discovered items indicative of drug use, which were used to obtain a warrant to search Greenwood's house, which, upon execution, turned up quantities of cocaine and hashish later admitted in evidence against Greenwood. Id. at 37-38.

88. Id. at 40-41.

89. Id. at 40 (footnotes omitted).
reasonable expectation of privacy in the contents of the bags under the *Katz* principle that what one "knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." 

The Court expressed the same idea in *Smith v. Maryland*, holding that when one willingly allows a telephone company access to the numbers dialed from her phone, she allows the police similar access. By using the phone, she voluntarily conveys numerical information, including phone numbers dialed to the phone company, thus

90. *Id.* at 40-41. The Court appeared to grant, however, that Greenwood possessed a subjective expectation of privacy because he "did not expect . . . the contents of [the] garbage bags [to] become known to the police or other members of the public." *Id.* at 39.

91. *Id.* at 41 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). Justices Brennan and Marshall countered the Court's assumption of risk analysis:

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

> . . . [E]ven the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the express purpose of entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors (and certainly have greater incentive) to sort through the personal effects entrusted to them, or permit others, such as police to do so. Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance.

*Greenwood*, 486 U.S. at 54-55 (Brennan, J., dissenting) (internal quotation marks omitted).


93. *Id.* at 744-45. In *Smith*, the police requested the telephone company install a pen register on Smith's phone, suspecting that he was making threatening phone calls to a robbery victim. The pen register recorded phone numbers dialed on Smith's phone, some of which were made to the victim. *Id.* at 737.
In doing so one “assume[s] the risk that the company [will] reveal to the police the numbers [she] dialed.”95 Such risk would clearly be assumed had calls been made through an operator.96 The Court deemed the situation no different when the dialing information was obtained electronically, as was the case in Smith.97 While Smith might have possessed a subjective expectation of privacy in the phone numbers he dialed,98 his expectation was not reasonable because he assumed the risk that the police might obtain the numbers.99 Therefore, the installation of the pen register did not constitute a Fourth Amendment search.100

In a final example, the Court in United States v. White101 reaffirmed pre-Katz cases holding that when one shares information with another she assumes the risk that the confidant will divulge the information to the police,102 or even

94. Id. at 744. The Court noted: “Telephone users typically know . . . that they must convey numerical information to the phone company for [billing purposes]; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes.” Id. at 743.

95. Id. at 744.

96. Id.

97. Id. at 744-45.

98. Id. at 745.

99. Id. The Court used the terms “legitimate” and “reasonable” as equivalent. Id. at 740, 745.

100. Id. at 745-46. Justices Marshall and Brennan again objected to the majority’s assumption of risk analysis:

The Court concludes that because individuals have no actual or legitimate expectation of privacy in information they voluntarily relinquish to telephone companies, the use of pen registers by government agents is immune from Fourth Amendment scrutiny. Since I remain convinced that constitutional protections are not abrogated whenever a person apprises another of facts valuable in criminal investigations . . . I respectfully dissent.

Id. at 748 (Marshall, J., dissenting).


102. Id. at 749. Katz did not indicate in any way that “a defendant has a . . . constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.” Id.
that the confidant might in fact be an undercover police agent. In White, police agents monitored and overheard conversations between White and Jackson, an undercover police operative, by means of a radio transmitter concealed on Jackson's person, unbeknownst to White. The police agents testified as to the incriminating nature of the conversations at White's trial, over his objection that the method of monitoring the statements violated the Fourth Amendment. The White Court found no violation because White had no protected expectation of privacy that Jackson would not reveal the conversations to the police. It made no difference that the police were themselves listening to the conversations. "If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case." In the Court's eyes, "one contemplating illegal activities must realize [the] risk that his companions may be reporting to the police." The wrongdoer's "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it" is no defense to the risk of revelation. Thus, however private White might have subjectively expected his conversations to be, such expectations were not reasonable

103. Id. Katz left unaffected earlier cases, id. at 749, where the Court found no constitutional violations when government agents secretly befriended a suspect to gather incriminating evidence, Hoffa v. United States, 385 U.S. 293 (1966); where the government sent a secret agent to a suspect's home to purchase narcotics, Lewis v. United States, 385 U.S. 206 (1966); and where secret agents carried hidden recording devices to gather evidence from a suspect, Lopez v. United States, 373 U.S. 427 (1963).

104. White, 401 U.S. at 746-47.

105. Id. at 747.

106. Id. at 749.

107. Id. at 752 (citing Lopez, 373 U.S. at 430).

108. Id. at 752.

109. Id. at 749 (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)).

110. Id. at 751.
because he assumed the risk that the conversations would be, or were being, revealed.111

C. Criticism of the Assumption of Risk Approach

As illustrated by Justice Harlan's rejection of his own expectation of privacy formulation,112 and by dissenting opinions of other justices raising similar objections,113 the Court's atomistic assumption of risk approach is extremely controversial.114 A host of commentators have voiced disapproval. Some have criticized the Court for being "sting[y] in finding a 'reasonable expectation of privacy[,]" seeing the Katz regime as "a sword for the government, not a shield of personal privacy."115 Others see the expectation of privacy formula as "destr[uctive of] Katz and most of [its] substance."116 In an age of technology, critics view Katz as particularly inadequate,117 leading to the conclusion that "the reasonable expectation of privacy test cannot be resuscitated."118

The third-party doctrine has come under particular fire.119 One critic voiced his concerns this way:

111. Id. at 751-52. As noted earlier, Justice Harlan strongly objected to the Court's assumption of risk analysis. See supra text accompanying note 59.

112. See supra text accompanying notes 57-59.

113. See supra notes 73, 75, 81, 91, & 100.

114. I have earlier noted problems with the atomistic view and the possible need for a regulatory approach in the context of dogs sniffing school students for drugs while the students sat in their classrooms. See Martin R. Gardner, Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope, 74 NW. U. L. REV. 803, 827, 845 (1980).


116. Amsterdam, supra note 2, at 383.

117. See Sobel et al., supra note 47, at 33.

118. Solove, Pragmatism, supra note 26, at 1521.

119. Orin S. Kerr, The Case for the Third-Party Doctrine, 107 Mich. L. Rev. 561, 563-64 (2009) [hereinafter Kerr, Third-Party] ("The third-party doctrine is the Fourth Amendment rule scholars love to hate. . . . The verdict among commentators has been frequent and apparently unanimous: the third-party doctrine is not only wrong, but horribly wrong."). For a sample of articles and
Exposure of privacies to limited, chosen members of the public should not preclude fourth amendment protection if governmental actions intrude to a greater degree than those members of the public to whom such privacies knowingly have been exposed. . . . One of the essential components of privacy . . . is not solitude but the ability to choose those with whom to share business or personal intimacies. Therefore, it is not the voluntary exposure of intimacies to chosen members of the public that destroys privacy; rather, it is uninvited governmental intrusion that destroys privacy by destroying that freedom of choice.120

Finally, and perhaps most significantly, there exists no principled basis to prevent the assumption of risk approach from swallowing any and all privacy protection. As one observer noted, the assumption of risk approach “ha[s] steadily eroded privacy in specific cases, and conceptually promise[s] to eliminate it altogether, because [it] does not admit of any logical stopping point.”121 After all, if, as in Riley, one assumes the risk of the police flying over his greenhouse and observing marijuana growing therein,122 why would he not similarly assume the risk of police observing “intimate” activity transpiring in the greenhouse123 or, for that matter, intimacies observed through a bathroom’s sunroof as police fly over one’s home? If, as in Greenwood, one assumes the risk of the police perusing his garbage, does he not similarly assume the risk that government officials will reassemble

books criticizing the doctrine, the whole of which in Professor Kerr’s opinion would constitute “the world’s longest law review footnote,” see id. at 563 n.5.

120. Serr, supra note 62, at 635-36.

121. Colb, supra note 55, at 121. Of course, the Court has not in fact followed the assumption of risk approach to its logical conclusions. See, e.g., Mancusi v. DeForte, 392 U.S. 364, 369 (1968), where the Court granted standing to DeForte to contest the warrantless search of an office he shared with several others. While DeForte no doubt assumed the risk that one of the others might consent to a search of the office, the Court nevertheless recognized the intrusion as a “search” vis a vis DeForte because he possessed “a reasonable expectation of freedom from governmental intrusion” under Katz. Id. at 368-69. Note that DeForte represented a “standing” case at a time prior to the Court’s merger of “standing” and “search and seizure” issues into a single inquiry. See Rakas v. Illinois, 439 U.S. 128, 132-34 (1978).


123. Id. at 452.
documents he has shredded and placed in garbage bags to be collected for disposal?\(^{124}\)

In short, the logic of the assumption of risk approach reduces privacy to secrecy. If sharing information with another means sharing it with the world, including the government, we can be assured of privacy only by keeping our affairs secret—simply not involving others in our lives. However, any meaningful sense of privacy must be understood as the power to share intimacies with some while excluding others.\(^{125}\) One commentator put it this way:

> Ordinary patterns of human behavior embody shared privacies. That is, people are embedded in relationships and they act as if they expect those relationships to be respected by others. . . . Shared privacy is invaluable. We need to be able safely to share with others to become fully human. We further need to be able to create enclaves from the world at large in which we can be with our chosen intimates.\(^{126}\)

The Court’s assumption of risk theory, premised as it is on an atomistic view of privacy,\(^{127}\) disregards the importance of intimacy and interconnectedness.\(^{128}\) The doctrine has been extended by some lower courts to hold that the mere possibility of third-party consent, inherent in shared access, is sufficient to eliminate the defendant’s reasonable expectation of privacy.\(^{129}\) Such cases leave little room for any

\(^{124}\) At least one lower court has answered affirmatively. See United States v. Scott, 975 F.2d 927 (1st Cir. 1992) (holding IRS agents did not conduct Fourth Amendment search by reassembling shredded documents in garbage).

\(^{125}\) Justice Douglas noted:

> Every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing.


\(^{127}\) See supra notes 49-59 and accompanying text.

\(^{128}\) Coombs, supra note 126, at 1635.

\(^{129}\) Id. at 1649 (discussing cases).
coherent protection of privacy:

Clearly, merely sharing with persons whom we ordinarily expect to protect our interests ought not be equated with losing all expectations of privacy. Sharing does mean accepting the risk that others may exercise their autonomy and choose, in a particular instance, to consent. There is thus a sense in which one who shares "assumes the risk" inherent in the unpredictability of human beings. Too many courts, however, seem ready to convert this "assumption of the risk" into a battering ram by which the government may freely invade any place in which human interaction occurs. Neither as a matter of description nor prescription does it makes sense to treat betrayal by our friends as the norm.130


As discussed immediately below, the limitations of the Katz expectation of privacy standard seemingly have not gone unnoticed by the Supreme Court. However, rather than simply replacing the Katz expectation of privacy emphasis, the Court has chosen to supplement that approach by reinvigorating the trespass to property standard which had lain dormant since the appearance of Katz.

There is reason to believe, however, that even expanded protections of both privacy and property will prove inadequate as grounds for defining an acceptable scope of the Fourth Amendment in the age of technology.131 Indeed, the emergence of the Court's trespass cases, along with its earlier seminal decision in Kyllo,132 indicates that the Court may be moving towards explicit recognition of a regulatory standard as a third alternative to the atomistic approaches entailed respectively in the privacy and trespass to property approaches. This Part examines the indications of the eventual emergence of a regulatory orientation.

130. Id. at 1649-50.
131. See infra notes 145, 172-77 and accompanying text.
132. Kyllo is discussed in detail infra notes 133-54 and accompanying text.
A. Kyllo

*Kyllo v. United States*\(^{133}\) represents the first evidence that the Court may be moving away from the *Katz* expectation of privacy approach as the sole means of defining Fourth Amendment searches. Indeed, *Kyllo* has been described as a case reflecting “the Court’s own discomfort” with the assumption of risk doctrine while at the same time expressing attraction to a regulatory, “norm transgression” view.\(^{134}\)

In *Kyllo*, the Court found a Fourth Amendment search where police employed a thermal imaging device to detect heat patterns emanating from Danny Kyllo’s house, in which they suspected marijuana plants were being grown.\(^{135}\) The police, situated in a police vehicle across the street from Kyllo’s house, engaged the scanning device for only a few minutes.\(^{136}\) The device revealed heat imaging patterns consistent with the use of high-intensity lamps associated with the cultivation of marijuana growth.\(^{137}\) The images provided support for a warrant, the execution of which resulted in the seizure of marijuana plants from the house.\(^{138}\)

The *Kyllo* Court reiterated the longstanding view that Fourth Amendment rights had been “decoupled . . . from trespassory violation[s] of . . . property”\(^{139}\) but hinted at a possible reemergence of a property-oriented test by noting that sufficient grounds for searches exist “if there is an ‘actual intrusion into a constitutionally protected area.”’\(^{140}\) While visual observations are themselves non-searches,\(^{141}\) the Court found that “obtaining by sense-enhancing technology any information regarding the interior of the home that could

136. *Id.* at 30.
137. *Id.* at 29-30.
138. *Id.* at 30.
139. *Id.* at 32.
140. *Id.* at 31 (quoting Silverman v. United States, 365 U.S. 505, 512 (1960)).
141. *Id.* at 32.
not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search—at least where (as here) the technology in question is not in general public use.”142

Such a view recognizes the interior of homes as the “prototypical . . . area of protected privacy.”143 Responding to the claim that the imaging device detected only public heat radiating from the exterior of the house,144 the Court found that such a position would “leave the homeowner at the mercy of advancing technology[,]” which might eventually access details within the home, an area held safe from “prying government eyes.”145 Granting that perhaps only a minimal privacy intrusion occurred in Kyllo,146 the Court nevertheless insisted on taking the “long view” of the Fourth Amendment from its original meaning forward.147

Curiously, however, the Court intimated that if the thermal imaging procedure utilized in Kyllo had been in “general public use,” it might not have constituted a search.148

142. Id. at 34 (quoting Silverman, 365 U.S. at 512).
143. Id. at 34.
144. Id. at 35. A dissenting opinion in Kyllo argued that the device did not reveal information regarding the interior of the home, contrary to the majority’s view that the device revealed the relative heat of various rooms in the home. Id. at 34 n.2.
145. Id. at 35, 37.
146. While conceding that “it is certainly possible to conclude . . . that no ‘significant’ compromise of [Kyllo’s] privacy [] occurred” through the use of the thermal imaging device, id. at 40, the Court nevertheless observed that “any physical invasion of the structure of the home ‘by even a fraction of an inch’ [is] too much.” Id. at 37 (quoting Silverman, 365 U.S. at 512). The Court thus rejected any de minimis argument, maintaining that there exists no constitutional difference between “intimate” and “nonintimate” matters within the home. Id. at 37 (“In the home . . . all details are intimate details because the entire area is held safe. . . .”). The Court went on to suggest that the detection device used in Kyllo might actually reveal “intimate” details of home life such as “at what hour each night the lady of the house takes her daily sauna and bath.” Id. at 38.
Commentators have suggested that the Kyllo Court “stretched the reasonable-expectation test to suit its purpose of upholding increased privacy protections for the interior of the home.” Sobel et al., supra note 47, at 29.
147. Kyllo, 533 U.S. at 40.
148. See supra note 142 and accompanying text; see also Kyllo, 533 U.S. at 40.
Such dicta appears to be an attempt to distinguish Kyllo from the Court's assumption of risk cases,\(^\text{149}\) thus preserving the continued viability of those cases. If so, the upshot of Kyllo is that while the police invaded Kyllo's privacy by means of the thermal imaging device, they would not have done so if the general public, and presumably also the government, routinely used the device. Under such circumstances, apparently no Fourth Amendment consequences would follow if the police subjected the entire public to the intrusion at issue in Kyllo. If so, wholesale governmental incursions into the lives of the public are no more likely to constitute "unreasonable" invasions of privacy than the one-time action in Kyllo.

To avoid this anomaly, some have suggested that Kyllo is not really a Katz reasonable expectation of privacy case at all, but rather a common law trespass case.\(^\text{150}\) Thus, as a precursor to the Jones and Jardines trespass cases, "[i]f use of a thermal imaging device was a search because it was a common law trespass, then presumably it should stay a

\(^{149}\) As Professor Colb has observed, the Kyllo Court attempted to distinguish assumption of risk cases such as Knotts, Ciraolo, Riley, Oliver, and Greenwood. See Colb, supra note 55, at 169; see also supra notes 65-91 and accompanying text. The Kyllo Court 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." Colb, supra note 55, at 169. Thus, Kyllo did not assume the risk of his home being invaded by thermal imaging technology, while citizens subjected to intrusions by means of planes and helicopters do assume the risk of such intrusions. The Kyllo Court distinguished Greenwood and Oliver on the ground that no technology was used in those cases at all. Id. Unlike those cases, Kyllo involved "more than naked-eye surveillance of a home." Kyllo, 533 U.S. at 33.

For detailed discussion of the relevance of whether a surveillance procedure is "in general use" or not, see Christopher Slobogin, Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance, 86 MINN. L. REV. 1393, 1398-1411 (2002).

\(^{150}\) See Orin Kerr, Three Questions Raised by the Trespass Test in United States v. Jones, VOLOKH CONSPIRACY (Jan. 23, 2012, 6:57 PM), http://www.volokh.com/2012/01/23/three-questions-raised-by-the-trespass-test-in-united-states-v-jones [hereinafter Kerr, Three Questions]; see also Kerr, Fourth Amendment, supra note 8, at 832 (arguing Kyllo reinforces the "primacy of property law" as a "traditional goal of property protection in the home"); Radsan, supra note 8, at 1482 (arguing Kyllo Court influenced by pre-Katz era's emphasis on trespass).
search regardless of how common thermal imaging devices may be.\textsuperscript{151}

Nevertheless, the \textit{Kyllo} Court did not explicitly ground its decision on an invasion of Kyllo's property rights. Neither did it identify a significant encroachment of privacy under \textit{Katz}. Yet the Court still found a Fourth Amendment search, a finding seemingly less concerned with protecting Kyllo's atomistic property or privacy rights than with regulating future governmental use of increasingly sophisticated technology deemed threatening to general Fourth Amendment interests.\textsuperscript{152} In explaining its "long view,"\textsuperscript{153} the Court quoted an early case, observing that the "Fourth Amendment is to be construed in . . . a manner which will conserve public interests as well as the interests and rights of individual citizens."\textsuperscript{154} Conserving "public interests" could conceivably entail regulating governmental practices offending Fourth Amendment values even where no particular atomistic interests are at stake.

If \textit{Kyllo} does not itself represent a regulatory approach to defining Fourth Amendment searches, it at least evidences a significant nod in that direction. Following \textit{Kyllo}'s lead, the recent trespass cases, \textit{Jones} and \textit{Jardines}, reflect a similar movement.

\textbf{B. The Trespass Cases}

1. \textit{Jones}. \textit{United States v. Jones}\textsuperscript{155} addressed the

\textsuperscript{151} Kerr, \textit{Three Questions}, supra note 150.

\textsuperscript{152} While conceding that the technology employed in the instant case was "relatively crude," the \textit{Kyllo} Court nevertheless worried that advancing thermal imaging technology could eventually discern all human activity in the home. \textit{Kyllo}, 533 U.S. at 35-36. Thus, the Court felt it necessary that the rule adopted in \textit{Kyllo} "take account of more sophisticated systems that are already in use or in development." \textit{Id.} at 36.

\textsuperscript{153} See supra text accompanying note 147.

\textsuperscript{154} \textit{Kyllo}, 533 U.S. at 40 (quoting \textit{Carroll v. United States}, 267 U.S. 132, 149 (1925)).

\textsuperscript{155} 132 S. Ct. 945 (2012).
constitutionality of a warrantless attachment of a GPS tracking device by law enforcement agents to the undercarriage of a vehicle parked in a public parking lot. Possessing a bailment interest in the vehicle, Jones complained that the subsequent twenty-eight-day governmental monitoring of the vehicle as it travelled on public streets constituted an unreasonable search, rendering evidence obtained through the monitoring inadmissible. The Court agreed, holding that the installation of the device and its use to monitor the vehicle’s movements constituted a Fourth Amendment search because the government “physically occupied private property for the purpose of obtaining information.” Hearkening back to historical understandings, the Court found that Fourth Amendment jurisprudence continued to be “tied to common-law trespass,” even though Jones may not have possessed a reasonable expectation of privacy under Katz. His property interest in the vehicle, an “effect” under the Fourth Amendment, entitled him to be free from a governmental trespass upon that protected area. “Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, a search has

156. Although governmental agents obtained a warrant authorizing the use of a GPS tracking device on the car at issue in Jones, the agents failed to comply with the warrant’s time and place requirements, rendering the eventual placement of the GPS device on the car a warrantless intrusion. Id. at 948-49.

157. The vehicle was registered to Jones’s wife, but Jones was its exclusive driver and thus functioned as a bailee. Id. at 949 n.2.

158. See id. at 948-49.

159. Id. at 949.

160. Id.

161. While the Government argued that no expectation of privacy was violated through its utilization of the GPS device, the Court saw no need to address such contentions since “Jones’s Fourth Amendment rights [did] not rise or fall with the Katz formulation.” Id. at 947. Katz and its progeny never abandoned the traditional understanding that the Fourth Amendment embodies “a particular concern for government trespass upon areas [persons, houses, papers, and effects] it enumerates.” Id.

162. Id. at 949. The Court found that by “attaching the [GPS] device to the [vehicle], officers encroached on a protected area.” Id. at 952.
undoubtedly occurred."\(^{163}\) The Court made clear, however, that a mere trespass qualifies as a search only where a government agent "attempt[s] to find something or to obtain information."\(^{164}\) Finally, the Court specified that the trespass test operates as a supplement to the \textit{Katz} privacy test and not as its replacement.\(^{165}\)

\textit{Jones} is significant for several reasons,\(^{166}\) not the least of which is that it represents the Court's willingness to expand

\begin{quote}
163. \textit{Id.} at 950 n.3. The Court distinguished \textit{Knotts}, see \textit{supra} notes 65-69 and accompanying text, by noting that the beeper in that case had been placed in the container with the consent of the then-owner \textit{before} it came into Knotts's possession. \textit{Jones}, 132 S. Ct. at 952. Therefore, there was no trespass to Knotts's property. \textit{Id.}

164. \textit{Id.} at 951 n.5.

165. \textit{Id.} at 952 (finding the \textit{Katz} test "has been \textit{added to}, not \textit{substituted for}, the common-law trespassory test." (italics in original)).

Justice Alito and three other members of the Court concurred in the majority's decision that the GPS monitoring constituted a search, but grounded their finding in the \textit{Katz} rubric, seeing the "lengthy" tracking of the vehicle's movements as violating Jones's reasonable expectations of privacy. \textit{Id.} at 964. These Justices objected to the majority's utilization of the trespass approach, seeing it as totally rejected by \textit{Katz}, which is, in their eyes, the sole basis for defining Fourth Amendment searches. \textit{Id.} at 959-60.

166. One commentator concludes:

\[\text{[Jones as] a more explicit focus on property rights as an objective proxy for privacy expectations has the potential to diminish the subjectivity and circularity currently plaguing Fourth Amendment analysis. Over time, especially if trespass to chattels is considered a search, Jones may cover most of the territory currently protected by \textit{Katz} and could ultimately replace \textit{Katz} as a clearer, cleaner metric of when the Fourth Amendment is implicated.}\]


Another added:

\textit{Jones} represents a logical addition to the current Fourth Amendment analysis. First, the Fourth Amendment was given proper deference by the entire Court. Second, the Court revitalized a historic attribute of the Fourth Amendment, trespass, that had lain largely moribund during the checkered reign of \textit{Katz}. Third, the Court retained such value as \textit{Katz} may have in avoiding the procedural pitfalls of the trespass doctrine.

the universe of analytical vehicles available to define Fourth Amendment searches. No longer are searches determined solely in terms of the inquiry into reasonable expectations of privacy.

Moreover, Jones shifts attention from an exclusive focus on the interests of the citizen searched to also include a consideration of the state of mind of the government actor. Like Katz, the Jones trespass doctrine is on its face a formula requiring infringement of atomistic rights of the citizen—privacy rights in Katz, property rights in Jones. But Jones adds a further dimension requiring that governmental intrusions must be accompanied by a particular motivation—an intent “to find something or to obtain evidence.”167 Searches under Katz, on the other hand, require no such particular state of mind on the part of government officials,168 but occur whenever governmental intrusions disrupt “reasonable expectations” of privacy.169 Thus, for example, police officers entering homes without warrants to aid or assist those inside are “searching” under Katz, and are thus subject to Fourth Amendment reasonableness,170 even though such intrusions would not constitute searches under Jones

167. Prior to Jones, some lower courts had adopted a similar requirement. See, e.g., United States v. Maple, 334 F.3d 15, 20 (D.C. Cir. 2003) (holding, without specifically mentioning the trespass approach, that no search occurred because a police officer “was not looking for ‘something’ when the officer, attempting to secure a motor vehicle and its contents after arresting the vehicle’s driver, opened a compartment in the center console of the vehicle in order to hide the arrestee’s cell phone from public view). This conclusion was controversial to a dissenter who criticized the majority’s “novel notion” that the officer’s subjective intent was relevant in determining whether a search occurred. Id. at 22-23 (Rogers, J., dissenting). Ultimately, however, the dissenting opinion prevailed on rehearing. See United States v. Maple, 348 F.3d 260, 263 (D.C. Cir. 2003) (“the issue is not the law enforcement officer’s ‘state of mind’—whether he was intentionally rummaging about for contraband or wished to find something in particular—but the objective effect of his actions’—whether a reasonable expectation of privacy was infringed.”) (quoting Bond v. United States, 529 U.S. 334, 338 n.2 (2000)).

168. The Court, in an early case, did suggest, however, that “a search ordinarily implies a quest by an officer of the law.” Hale v. Henkel, 201 U.S. 43, 76 (1906).

169. See supra notes 36-111 and accompanying text.

170. See, e.g., Roberts v. Spielman, 643 F.3d 899, 906 (11th Cir. 2011) (holding a police officer acted reasonably under Fourth Amendment when he entered citizen’s home believing he was preventing the citizen’s suicide).
for want of an intent "to find something or to obtain evidence." This redirected focus in Jones away from an inquiry exclusively centered on atomistic rights towards an additional examination into how the government acts, and with what state of mind its actors possess, plants the seed for a standard couched exclusively in terms of regulating governmental overreach as a third alternative to the present atomistic privacy and property rights tests.\footnote{1}

Proponents of a regulatory test see its necessity in light of issues left unaddressed in Jones—such as the "unique attributes of GPS surveillance . . . [which] require particular attention,"\footnote{172} as noted by Justice Sotomayor in her Jones concurrence: \footnote{171. One commentator has argued that "given contemporary realities regarding technology and social norms" unaddressed by Jones, the time has come for the Court to make "a reasoned normative pronouncement" to deal with the "inadequately theorized area of contemporary electronic surveillance." Caren Myers Morrison, The Drug Dealer, the Narc, and the Very Tiny Constable: Reflections on United States v. Jones, 3 CAL. L. REV. CIRCUIT 113, 114 (2012), http://www.californialawreview.org/assets/circuit/Morrison_3-113.pdf. Professor Thomas Clancy has called for a new "normative, liberal approach to interpreting the [Fourth] Amendment" in the modern era:

The inquiry must examine the essence of what the Amendment seeks to protect: the right to be secure—that is, the ability to exclude the government from prying.

In today’s society, technological and other advances preclude the ability to shield anything absolutely. To adequately protect and give recognition to the ability to exclude, normative values must be employed. Do the precautions taken by the person objectively evidence an intent to exclude the human senses? Does the particular surveillance technique utilized by the government defeat the individual’s right to exclude? Would the spirit motivating the framers of the Amendment abhor these new devices no less than the direct and obvious methods of oppression that inspired the Fourth Amendment? The answer to those questions is always a value judgment.

Clancy, supra note 36, at 318-19 (internal quotation marks omitted).

In addition to Professor Clancy’s regulatory approach, see the normative regulatory standard at supra notes 58-59 and accompanying text. See also infra notes 204-05 and accompanying text. See infra notes 227-35 and accompanying text for an argument that the regulatory test should, and likely will, augment rather than replace the Katz and Jones approaches.

GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. . . . The Government can store such records and efficiently mine them for information years into the future. . . . Awareness that the Government may be watching chills associational and expressive freedoms. . . . I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one’s public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.  

In recognizing that much GPS monitoring can occur without a trespass to property, thus excluding such cases from the purview of Jones, Justice Sotomayor suggested expanding the recognition of searches under Katz, arguing that “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.” Indeed, in discussing satellite imaging technology, one commentator noted: “[t]he combined caselaw that permits law enforcement to examine curtilage from navigable airspace; to monitor one’s movements on public thoroughfares; and to accept

to address Fourth Amendment problems posed by modern technology, see infra notes 175–76 and accompanying text.


Justice Sotomayor quoted People v. Weaver, 12 N.Y.3d 433, 441-42 (2009):

Disclosed in GPS data will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque synagogue or church, the gay bar and on and on.

Jones, 132 S. Ct. at 955 (alterations omitted).

174. Justice Sotomayor noted: “the Government will be capable of duplicating the monitoring undertaken in [Jones] by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones.” Id.

175. Id. at 957. Some commentators agree. See, e.g., Kathryn Nobuko Horwath, A Check-in on Privacy After United States v. Jones: Current Fourth Amendment Jurisprudence in the Context of Location-Based Applications and Services, 40 Hastings Const. L.Q. 925, 948 (2013) (The “third-party doctrine must be circumscribed to reflect evolving technological realities.”).
information disclosed to third parties (Third Party Doctrine) initially suggests that government use of satellite imaging technology may be without constitutional significance.”

Such considerations have led many to criticize Jones for failing to embrace a regulatory test thought necessary to deal with a host of difficult issues created by modern technology which are not adequately addressed by either the Katz privacy expectation formula or the Jones trespass approach.

2. Jardines. Citing Jones, the Court saw the dog sniff as a “straightforward” example of a physical intrusion of the curtilage of the house, thus constituting a search “within the original meaning of the Fourth Amendment.” While granting that police officers, like ordinary citizens, possess an implied license to approach a home and knock on its door, the Court nevertheless found that the police were not licensed to enter Jardines’s porch for “[the] purpose [of] conduct[ing] a search.” Thus, the “use of trained police dogs to investigate the home and its immediate surroundings [constituted] a [Fourth Amendment search].”

As in Jones, the Jardines Court saw no need to assess the dog sniff under Katz, observing that “[o]ne virtue of the . . . property-rights baseline is that it keeps easy cases easy.” For the Court, it was enough that the police learned


177. See, e.g., Clancy, supra note 36, at 322 (Jones fails to give “guidance [or] any coherent framework” for addressing “new technologies”); Susan Freiwald, The Davis Good Faith Rule and Getting Answers to the Questions Jones Left Open, 14 N.C. J. L. & TECH. 341, 346 ("[V]ery few courts are answering . . . the questions raised by . . . Jones"); Horwath, supra note 175, at 934 (Jones “sidestepped the larger issue” of whether the GPS monitoring violated reasonable privacy expectations); Leary, supra note 176, at 333 (Jones “fails to keep current with technology”); Morrison, supra note 171, at 123 (Jones Court “refus[ed] to engage with any of the thorny but nonetheless pressing issues raised by new technology”).


180. Id. at 1417-18.

181. Id. at 1417.
what they learned “only by physically intruding on Jardines’[s] property to gather evidence.”

Justice Alito and three other dissenters saw no search under either the Katz or the trespass approaches. Alito found no search under Katz and its assumption of risk doctrine because Jardines would, as a “reasonable person,” understand that odors emanating from within his house “may be detected from locations that are open to the public,” and thus could not count on “the strength of those odors remaining within the range that, while detectible by a dog, cannot be smelled by a human.” Moreover, in finding no trespass to Jardines’s property, Alito focused on the fact that police officers not only possess a license to approach a house and knock on its door, but also to do so for the purpose of gathering evidence against the homeowner, even by asking her incriminating questions when she responds to the knock. Therefore, under this view of the majority opinion,

182. Id.
183. Id. at 1420, 1426 (Alito, J., dissenting) (joined by Chief Justice Roberts and Justices Kennedy and Breyer).
184. Id. at 1421.
185. Id. at 1420. The majority disagreed, arguing that the police license allows them only to “speak with the occupant,” not to gather evidence against the homeowner. Id. at 1416 n.4. If the police behavior “objectively reveals a purpose to conduct a search,” the behavior is not licensed. Id. at 1417. Such a view appears to beg the question—was there a “search”?—which the majority attempts to define in terms of whether the officer intended to conduct a “search.”

Justice Alito responded to the majority’s points as follows:

The Court concludes that [the police] went too far because [they] had the “objective[e] . . . purpose to conduct a search.” (emphasis added). What this means, I take it, is that anyone aware of what [the police] did would infer that [their] subjective purpose was to gather evidence. But if this is the Court’s point, then a standard “knock and talk” and most other police visits would likewise constitute searches. With the exception of visits to serve warrants or civil process, police almost always approach homes with a purpose of discovering information. That is certainly the objective of a “knock and talk.” The Court offers no meaningful way of distinguishing the “objective purpose” of [the police] conduct here . . . .

What the Court must fall back on, then, is the particular instrument that [the police] used to detect the odor of marijuana, namely [their] dog. But in the entire body of common-law decisions, the Court has not found a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog on a leash. On the
the trespass in Jardines occurred only because the police were accompanied by their dog during their otherwise lawful visit to the front door of Jardines’s house. Finding no authority for such a proposition, Alito concluded that trespass law provides no support for the majority’s holding.

If Justice Alito’s assessment of the majority opinion is correct, significant Fourth Amendment questions arise. What difference did it make to Jardines whether the police entered his property with a dog or not? How was his quiet enjoyment of his property affected by a dog being briefly on his front porch? Was it really an infringement of Jardines’s property rights that were at stake, or perhaps rather the specter of what the police did, Jardines’s rights aside, that was the problem? Seemingly it was the latter.

Again assuming that Justice Alito and his three colleagues correctly assessed the Jardines majority opinion, the case—while recognizing a technical invasion of atomistic property interests—is best understood as an attempt to regulate police misbehavior. Why, after all, would it be permissible for the police to ask Jardines incriminating questions from his porch but not if they have their dog with them? The most plausible answer seems to be that the presence of the dog, sniffing the house, sends a message to Jardines’s neighbors, or anyone else passing by, that Jardines is under police suspicion. The mere presence of the police, even uniformed officers, on a person’s porch conveys no necessary message of suspicion of the home’s occupants. Indeed, such presence may well be viewed not as an attempt to gather incriminating evidence against those in the home, but rather to do such things as notify them of a family member’s accident, or as an attempt to seek information contrary, the common law allowed even unleashed dogs to wander on private property without committing a trespass.

186. See id. at 1420. The majority disagreed with this point, arguing that it was the police behavior, and not the dog, that caused the problem, stating: “[The] typical person would find it ‘a cause of great alarm’ to find a stranger snooping about his front porch with or without a dog.” Id. at 1416 n.3 (emphasis in original).

187. See supra note 186.

188. The dog was on Jardines’s porch no more than “a minute or two.” Jardines, 133 S. Ct. at 1421.
about whether suspicious persons have been seen in the neighborhood, or as an inquiry into whether those in the home know the whereabouts of a person of interest to the police. On the other hand, when police direct a dog to sniff particular property, they are usually looking for contraband concealed therein. Thus understood, the evil presented by Jardines was not that Jardines's property, much his less privacy, interests were threatened, but that the police engaged in conduct that unjustifiably risked holding him up to public ridicule. This view suggests that the essential concern in Jardines was whether such police conduct, if engaged in routinely without sufficient cause, would improperly disparage the reputation of law abiding citizens in the eyes of the public. By finding a search, the police misconduct could be deterred.

If this indeed captures the gist of Jardines, the Court has, perhaps for the first time, implicitly embraced a normative, regulatory approach to defining Fourth Amendment scope. If so, the constitutional mischief of an

189. The Jardines majority seemingly held that the search should have been supported by a warrant: 

"[A] police officer not armed with a warrant may approach a home and knock." Id. at 1416. By negative implication, an officer exceeding the scope of his license to approach a home must do so only with a warrant.

190. Professor LaFave has argued such a proposition in connection with his criticism of Illinois v. Caballes, 543 U.S. 405 (2005), a case holding that no search occurred when police led drug-sniffing dogs around a car legally stopped for a traffic violation:

Use of a drug dog on the vehicle of a motorist stopped for a traffic violation is an accusatory act. . . . Use of a drug dog incident to a traffic stop is likely to be humiliating to the driver of the vehicle, for such use manifests police suspicion of the driver as a drug courier to all those who may pass by while the scenario is being played out on the side of an interstate highway or city street.

4 LaFave, supra note 2, at 546-47.

There was no evidence that anyone saw the police and their dog on Jardines's porch. Thus, Jardines himself did not experience the humiliation of an unjustified public accusation. If such accusation is indeed the constitutional evil in Jardines, the thrust of the opinion must be directed at protecting the general public from such accusations in the future. In short, the opinion appears aimed at regulating—deterring—this kind of governmental misconduct rather than protecting the rights of any particular person.
unsupported search seemingly occurs whenever the police cast a public pall of suspicion upon a citizen without adequate cause, whether or not the suspicion is associated with an invasion of the atomistic property or privacy rights of a particular person.

In the next Part of this Article, I formulize particular language which I recommend the Court adopt if and when it explicitly moves to a regulatory standard. I also discuss how that standard relates to the present *Katz* and *Jones/Jardines* standards.

III. A REGULATORY STANDARD: A THIRD ALTERNATIVE TO ATOMISTIC PRIVACY AND PROPERTY APPROACHES

As shown above, the Supreme Court appears to be in the process of adopting a regulatory approach to defining Fourth Amendment searches and seizures in recognition of the fact that current doctrine is ill-equipped to address threats posed to privacy interests by advancing technology. For example, as previously mentioned, GPS monitoring can occur without a trespass to property, in cases of factory or owner-installed vehicle tracking devices.\(^\text{191}\) Governmental access to information provided by such devices would thus not constitute a search under *Jones*, nor would it under *Katz*, because, as in *Knotts*,\(^\text{192}\) one would assume the risk of being ubiquitously observed when he or she travels in an automobile on public thoroughfares.\(^\text{193}\) Of perhaps greater concern, smart phone monitoring is potentially more invasive than GPS vehicle tracking, given that people routinely carry their phones on their persons at all times, and monitoring can occur wherever the phone is located, both indoors and outside.\(^\text{194}\) While government monitoring in the home would constitute a search under *Kyllo*,\(^\text{195}\) tracking the movements of

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191. *See supra* note 174 and accompanying text.
192. *See supra* notes 65-69 and accompanying text.
193. *See supra* notes 68-69 and accompanying text.
194. Horwarth, *supra* note 175, at 945.
195. *See supra* notes 133-42 and accompanying text. Tracking the movements of a mobile phone within a home would also appear to constitute a search under *Karo*. *See supra* note 69.
the phone and its possessor in other settings would appear to be permissible—except where a trespass to property is involved\textsuperscript{196}—under the assumption of risk principles articulated in \textit{Smith}.\textsuperscript{197}

In addition to problems created by satellite imaging, technology allowing data mining through phone and internet surveillance presents a threat to privacy. Governmental acquisition of stored electronic communications from a service provider would again likely be deemed a risk assumed by the citizen communicator, thus negating any claim to a violation of a reasonable expectation of privacy.\textsuperscript{198} Moreover, under \textit{Smith}, even wholesale collection of source and destination information from all U.S. citizens, obtained from phone and internet usage, likely does not constitute a search under the assumption of risk doctrine,\textsuperscript{199} notwithstanding a recent judicial suggestion to the contrary.\textsuperscript{200}

\begin{itemize}
\item \textsuperscript{196} Even a trespass to property is permissible if the one asserting the violation lacks standing to contest the intrusion. \textit{See, e.g.}, Minnesota v. Carter, 525 U.S. 83 (1998) (holding persons invited into a residence solely to engage in a cocaine bagging operation lacked standing—they possessed no reasonable expectation of privacy—to contest a search of the residence by the police).
\item \textsuperscript{197} \textit{See supra} notes 92-100 and accompanying text; \textit{see also} United States v. Skinner, 690 F.3d 772 (6th Cir. 2012) (finding no reasonable expectation of privacy in data given off by cell phone).
\item \textsuperscript{198} \textit{See Patricia L. Bellia, Surveillance Law Through Cyberlaw's Lens,} 72 GEO. WASH. L. REV. 1375, 1382 (2004) (explaining that prevailing assumption is that an expectation of privacy is lacking in communications stored by a service provider on the user's behalf).
\item \textsuperscript{199} \textit{Id.} at 1383 (arguing that so long as surveillance of electronic communications reveal only source and destination of information and not the content, substance or meaning of a communication, the surveillance is not a search). At least one federal judge agrees, finding \textit{Smith} applicable even where the Government collects bulk telephone metadata from virtually all citizens. \textit{See Am. Civil Liberties Union v. Clapper}, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) ("The fact that there are more calls placed [than in \textit{Smith}] does not undermine the Supreme Court's finding that a person has no subjective expectation of privacy in telephony [sic] metadata"). \textit{Id.} at 752.
\item \textsuperscript{200} \textit{See Klayman v. Obama}, No. 13-0881, 2013 WL 6598728 (D.D.C. Dec. 16, 2013). Without reaching the Fourth Amendment merits, Judge Richard Leon concluded that citizens likely have a reasonable expectation of privacy when the Government, for purposes of protecting national security against terroristic threats and with no particularized suspicion, collects and stores for five years the telephone metadata of citizens for purposes of subjecting it to high-tech querying
\end{itemize}
A final example of potential threats to privacy by technological innovation is manifested by the possibility of hidden video cameras with face-scanning capabilities installed throughout the streets of a city.\textsuperscript{201} Such devices may present virtually ubiquitous observation which, if known to be present by citizens, may create in them a "constant state of apprehension and self-consciousness whenever out in public," even though such technology likely does not invade reasonable expectations of privacy under present assumption of risk doctrine.\textsuperscript{202}

If a move towards a regulatory approach to defining Fourth Amendment scope is imminent, three problems arise: (1) determining the form the new standard should take; (2) determining the role, if any, the present atomistic privacy and trespass tests should play with the addition of a new regulatory standard; and (3) determining whether the judiciary is institutionally capable of regulating

and analysis without any case-by-case judicial approval. Judge Leon attempted to distinguish \textit{Smith} by arguing that the massive governmental surveillance in \textit{Klayman} was on a scale so different from the "simple pen register" in \textit{Smith}, that "\textit{Smith} is of little value" in assessing whether the Government's actions in \textit{Klayman} constituted a search. Id. at *19.

Judge Leon did not explain why, if the defendant in \textit{Smith} assumed the risk of the government obtaining the numbers he dialed from his phone, citizens in general would not also assume the risk of bulk retrieval by the government of the numbers they dial—particularly in light of the \textit{Kyllo} Court's suggestion that wholesale governmental surveillance of devices "in general public use" (telephones in this case) is no more likely to be considered a search than the retrieval of the phone numbers of a single individual as in \textit{Smith}. See supra notes 144-45 and accompanying text. The attempt to distinguish \textit{Smith} without explaining why its assumption of risk premise is not applicable in \textit{Klayman} is thus unconvincing.

The situation discussed here and in note 201 \textit{infra} represents a clear candidate for resolution under a regulatory standard. I therefore recommend that courts in subsequent considerations of the data mining issues raised in those cases consider the proposals offered in this Article. See \textit{infra} notes 219-46 and accompanying text.


\textsuperscript{202} Colb, \textit{supra} note 55, at 138.
governmental intrusions employing sophisticated technology. The remainder of this Article will address these issues. After proposing a specific regulatory test, I will argue that the test should supplement rather than replace the present *Katz* and *Jones/Jardines* standards and be applied in a given case only after application of those standards, in turn, yields no Fourth Amendment search. Finally, I will recommend that legislatures take the lead in providing regulations to protect privacy from high-tech governmental encroachment, with courts playing a role only where judicial action is clearly needed to provide a constitutional safety net.

A. *Articulating a Regulatory Test*

A host of commentators have joined Justice Harlan in calling for a regulatory approach to defining Fourth Amendment searches. Professor LaFave has offered a particularly helpful formulation:

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203. See *supra* notes 171-72. For Justice Harlan's recommended standard, see *supra* text accompanying note 59. Professor Amsterdam offered this early proposal:

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That . . . seems to me the judgment that the Fourth Amendment inexorably requires the Court to make.

Amsterdam, *supra* note 2, at 403.

Professor Solove offered a similar conceptualization: "[T]he crucial question[ ] [is] . . . [s]hould the government be able to gather [personal] information without any oversight . . . [or] suspicion at all? . . . Should it be able to do this systematically for millions of people without any limitation?" Solove, *Pragmatism, supra* note 26, at 1530-31.

Yet another example of a regulatory proposal is put forward by Professor Serr:

[There are] two factors that courts must consider if the Fourth Amendment is to be a living right—the nature of the privacy interest implicated by the governmental surveillance and the intrusiveness of that surveillance. When these two factors sufficiently coalesce—for example, highly intrusive governmental surveillance of an important individual privacy interest—the Fourth Amendment, with its requirement of reasonableness, must regulate that governmental conduct.
The matter must be viewed from a broad perspective. It must be asked whether permitting the police regularly to engage in a given practice, limited by nothing "more than self-restraint by law enforcement officials," requires the "people" to which the Fourth Amendment refers to give "up too much freedom as the cost of privacy." That is, the fundamental inquiry is whether that practice, if not subjected to Fourth Amendment restraints, would be intolerable because it would either encroach too much upon the "sense of security" or impose unreasonable burdens upon those who wished to maintain that security. An affirmative answer to the question, . . . might be given even when the privacy invasion required very little effort by the police and "uncovered nothing of any great personal value . . . ." 

This standard, rather than focusing on the atomistic privacy interest of the citizen, addresses particular police actions and assesses whether, if regularly practiced, they would unduly compromise Fourth Amendment values of personal privacy and security. If so, the practice is a search regardless of its effects on the atomistic interests of any particular person.

The LaFave formulation illustrates that regulatory approaches defining Fourth Amendment scope inherently entail value judgments. Evaluating police practices in terms of underlying Fourth Amendment interests is a policy-oriented enterprise inviting considerable subjectivity. Thus, Professor Amsterdam, while himself articulating a regulatory judicial standard, concluded that its application by the Supreme Court would be "perfectly impossible." Nevertheless, unless and until policymakers fashion rules

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Serr, supra note 62, at 640.

Finally, Professor Slobogin argues: "Members of our society should be constitutionally entitled to expect that government will refrain from any spying on the home—technological or otherwise—unless it can demonstrate good cause for doing so." Slobogin, supra note 149, at 1411.

204. 1 LaFave, supra note 2, at 589-90 (footnotes omitted).

205. See, e.g., Clancy, supra note 36, at 318-19; supra text accompanying note 59 ("The critical question . . . is whether . . . we should impose on our citizens the risks of the electronic listener . . . without at least the protection of a warrant requirement"); supra text accompanying note 204 ("[T]he fundamental inquiry is whether [a particular governmental] practice . . . [is] intolerable" in light of underlying Fourth Amendment values).

206. Amsterdam, supra note 2, at 403.
protecting privacy in the modern technological world, the Court will likely conclude that it has no other choice but to enter the fray, fearing that the Fourth Amendment would otherwise be rendered dormant at a time when citizens are subjected to the possibility of an increasing array of governmental intrusions into their private lives.

If a regulatory approach is to emerge, it is essential that the standard ultimately embraced embodies objective criteria to the extent possible to avoid requiring courts to decide the search issue solely in terms of the policy preferences of particular judges. Therefore, using the LaFave test as a point of departure, I will propose a test aimed at accommodating law enforcement, national security, and civil liberties interests within a framework that provides a modicum of objectivity.

207. The desirability of legislative rules as the means of protecting privacy while enabling effective law enforcement is discussed infra notes 236-51 and accompanying text.

208. An objective standard is important in order that the police have notice of how they can conduct their investigations within the boundaries of the Fourth Amendment. If the definition of searches and seizures is too vague, "[h]ow in the devil is a policeman engaged in an investigation supposed to decide whether the form of surveillance that he proposes to use [constitutes a search?]" Amsterdam, supra note 2, at 403-04. "[T]he fourth amendment speaks to the police and must speak to them intelligibly." Id. at 403.

209. As described by Professor Herbert Packer, two separate value systems operate simultaneously within the criminal process. See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-73 (1968). The "Crime Control Model" is premised "on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process[,]" while the "Due Process Model" focuses on protecting criminal defendants by designing impediments to carrying accused persons through the process. Id. at 158, 163. These models pose a "normative antinomy at the heart of the criminal law." Id. at 153. Most persons, including judges, while not totally disregarding the values of one model, will tend to emphasize the values of the other. See id. at 153-54. Such value preferences are highly subjective, given that "few conclusive positions . . . can be reached by appeal to the Constitution." Id. at 155.

Packer's observations are sometimes clearly reflected in the orientations by particular Supreme Courts. Thus, during the Warren Court era, the due process model predominated, see WHITEBREAD & SLOBOGIN, supra note 21, at 1-4, while the post-Warren, Burger, Rehnquist and Roberts Courts have decidedly reflected crime control model values, see id. at 4-12.
As LaFave observes, the regulatory inquiry is directed at protecting the people, society in general, from threatening governmental intrusions. LaFave's test essentially requires the reviewing court to engage in a thought experiment: in assessing whether a search has occurred, the court must imagine whether the particular police practice at issue, if unregulated and "regularly engaged in," would "encroach too much" upon "the people's sense of security." The "too much" language clearly invites a weighing of governmental and civil liberties interests. Therefore, I suggest that the test make this balancing of interests explicit by adding Justice Harlan's requirement that the impact of particular police conduct on the citizenry's sense of security be "balanced against the utility of the conduct as a technique of law enforcement [or of protecting national security]."210 For any test to be effective, it must allow necessary governmental investigation of criminal activity and protection of national security while at the same time protecting the Fourth Amendment interests of citizens. As Professor Packer warned years ago, a test that embodies only the values of law enforcement and rejects civil liberties interests, or vice versa, would represent a "fanatic[al]" approach.211

Such a problem potentially exists under LaFave's formulation of "regularly engaged in" police practices.212 His test appears to invite courts to imagine the effects on the public at large if any given police practice were "regularly" engaged in, regardless of whether regular occurrence of the practice is presently possible or reasonably likely to occur in the future. The breadth of such an interpretation risks a "fanatical" civil liberties bias by rendering virtually any police activity a Fourth Amendment search, with the

210. Supra text accompanying note 59. I have added the "national security" interest as a friendly amendment to the Harlan language. As evidenced by the cases discussed supra notes 199-200, national security issues will likely join law enforcement interests at the forefront of problems facing courts in future cases raising Fourth Amendment search issues. For a final formulation of my proposed standard, see infra text between notes 220-21.

211. See Packer, supra note 209, at 154.

212. See supra text accompanying note 205.
suppression of any evidence derived therefrom as a consequence.\textsuperscript{213}

Take for example the police practice at issue in \textit{Greenwood},\textsuperscript{214} If the police regularly rummage through the garbage of substantial numbers of citizens, surely the practice would be alarming to many and thus likely "encroach too much upon ‘the [people’s] sense of security.’"\textsuperscript{215} Or, considering the police practice in the \textit{Hoffa} case,\textsuperscript{216} if the police routinely plant undercover agents into the private lives of vast numbers of citizens, the practice would obviously constitute a search under the LaFave test. Likewise, if the police extensively employ the surveillance technique utilized in \textit{Ciraolo}\textsuperscript{217} and observe the private property of significant numbers of citizens by flying airplanes over their property, the practice may well constitute a search.\textsuperscript{218} Even such trivial things as a police officer directing a routine question to a citizen on a public street could be deemed a search if the police routinely and systematically confront substantial numbers of citizens with even innocuous inquires.\textsuperscript{219} All police encounters would thus be subjected to possible scrutiny under the LaFave test, with the police left at the

\begin{thebibliography}{99}
\bibitem{213} With certain exceptions, the exclusionary rule excludes the fruits of illegal searches and seizures from admission into evidence in criminal trials brought against those whose rights have been violated. \textsc{Yale Kamisar et al.}, \textit{Basic Criminal Procedure: Cases, Comments and Questions} 222 (13th ed. 2012). Unless it can be shown that secondary evidence was discovered independently of "taint[ed]" primary evidence, the secondary evidence will also be excluded as the "fruit of the poisonous tree." \textit{Wong Sun v. United States}, 371 U.S. 471, 484-88 (1963).
\bibitem{214} See \textit{supra} text accompanying notes 85-91.
\bibitem{215} See \textit{supra} notes 204-05 and accompanying text.
\bibitem{216} See \textit{supra} note 103.
\bibitem{217} See \textit{supra} notes 70-75 and accompanying text.
\bibitem{218} Similarly, if the \textit{Oliver} facts, \textit{supra} text accompanying notes 76-81, were extended and the police positioned officers in the "open fields" of a substantial number of citizens, the sense of security of all citizens possessing open fields would likely be compromised.
\bibitem{219} Such systematic confrontations could be deemed searches because they encroach too much on the public's sense of security even though the police do not engage in a "\textit{Terry} stop" by applying force, manifesting intimidating movements, showing force, or speaking with an authoritative tone of voice. \textit{United States v. Drayton}, 536 U.S. 194, 204, 207 (2002).
\end{thebibliography}
mercy of a court's conclusions under a highly subjective test. Such a situation, if not resulting in virtually all investigative police practices being deemed searches, would at a minimum provide little guidance to the police as to which practices constitute searches and those which do not.

The way to avoid these problems is to note the obvious fact that some police practices, such as those reflected in Greenwood, Hoffa, and Ciraolo, could never realistically be employed in such wholesale ways as to threaten the security of the public at large. The police simply do not have the resources to go through everyone's garbage, infiltrate everyone's life with an undercover agent, or routinely fly planes over everyone's private property. Such practices thus pose little risk of encroaching on the general public's sense of security. Therefore, police practices that cannot realistically be employed so extensively as to reasonably threaten the general public's sense of security should not be subjected to the regulatory test.

With these considerations in mind, I propose the following test: "A Fourth Amendment search occurs when given governmental conduct—which realistically could simultaneously impact a majority of the public—poses such a threat to the public's sense of security that it outweighs the utility of the conduct as a technique of law enforcement or as a means of protecting national security." Requiring that the practice be a "realistic" threat avoids subjecting purely hypothetical public threats to scrutiny under the test. Requiring that the threat be so extensive as to simultaneously affect a "majority" of the public provides the test with a degree of objectivity. While practices impacting...

220. Rather than require exposure to a "majority" of the public, the test might be couched in a variation of the language of the Kyllo Court: whether police practice is "in general public use." See supra text accompanying note 142. The "majority" language is preferable because it allows for a more objective determination of the extent of public exposure to the police practice. In his Kyllo dissent, Justice Stevens complained that "how much use is general public use is not even hinted at by the Court's opinion . . . ." Kyllo v. United States, 533 U.S. 27, 47 (2001) (Stevens, J., dissenting). Moreover, avoiding the Kyllo language as part of a regulatory standard is also desirable to avoid confusing the roles played by the in "general public use" language in Kyllo and its possible inclusion in a regulatory standard. In Kyllo, the in "general public use" language speaks to whether a given technology is so commonly used as to render its access by the
a significant minority of the public could arguably also compromise the public sense of security, it is better to require an impact on the majority of citizens to minimize subjective debates among judges as to how many people it takes for the "public" to be impacted by a given police practice.

My proposed test would thus subject to possible regulation the kinds of wholesale technological intrusions posed by satellite imaging, data mining of phone and internet records, and face-scanning by hidden cameras described above. However, not all uses of technology would be scrutinized under the test. For example, the test would not be applied to the use of the hidden transmitter in White because no realistic possibility exists that a majority of the public could simultaneously be engaged by undercover governmental agents wearing hidden transmitting devices.

Because they would be left unregulated under the test, the police practices involved in such cases as Greenwood, Hoffa, and Oliver would be permitted to continue. Such a result accommodates law enforcement interests while not risking erosion of the public's sense of security. Finding a search in Hoffa, for example, would essentially be the death knell to the use of undercover police, deemed by many as an effective, indeed necessary, practice in enforcing certain areas of the law. Likewise, police investigations would be government a non-search because the public assumes the risk of its access. See supra text accompanying notes 148-49. On the other hand, the general use issue under the proposed regulatory standard speaks to determining the existence of a search if given practices were routine employed. For a discussion of the role played by the assumption of risk doctrine should the proposed regulatory test be adopted, see infra notes 226-44 and accompanying text.

221. See supra text accompanying notes 192-203.

222. See supra notes 100-11 and accompanying text.

223. The Supreme Court has recognized the necessity of undercover police work. In rejecting the argument that the Fourth Amendment prohibited an undercover police agent, posing as a drug buyer, from accepting an invitation of a drug seller to enter his home to effectuate an illegal drug transaction, the Court said: "Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional per se[,]" a consequence at odds with the Court's acknowledgment that "in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents." Lewis v. United States, 385 U.S. 206, 209-10 (1966). Indeed, the Court noted that precluding
significantly hampered if the activity in Ciraolo constituted a search, perhaps leading to the ultimate conclusion that police engage in searches whenever they conduct naked eye observation of private property, whether from a plane or otherwise, even though they engage in no trespass to protected "houses" or "effects."

To reiterate, the Supreme Court appears ready to adopt a new, normative regulatory standard for defining Fourth Amendment scope. When the Court makes this move, I propose that it utilize the following test:

A Fourth Amendment search occurs when given governmental conduct—which realistically could simultaneously impact a majority of the public—poses such a threat to the public's sense of security that it outweighs the utility of the conduct as a technique of law enforcement or as a means of protecting national security.

B. Retaining or Replacing the Atomistic Approach

Some commentators have concluded that in light of Kyllo the Supreme Court has become uncomfortable with present doctrine and may eventually abandon Katz entirely in favor of a normative regulatory standard aimed at addressing the realities of modern technology. Justice Sotomayor alluded to such a move when suggesting it may be necessary to reconsider the assumption of risk premise entailed in Katz

undercover police work would "severely hamper... ferreting out... organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest." Id. at 210; see also United States v. Henry, 447 U.S. 264, 298 (1980) ("The Court acknowledges that the use of undercover policework is an important and constitutionally permissible method of law enforcement."); Weatherford v. Bursey, 429 U.S. 545, 557 (1977) ("Our cases... have recognized the unfortunate necessity of undercover work and the value it often is to effective law enforcement."); United States v. Russell, 411 U.S. 423, 434 (1973) ("Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer.") (quoting Sherman v. United States, 356 U.S. 369, 372 (1958)).

224. See, e.g., Colb, supra note 55, at 123-24; Swire, supra note 115, at 913 (arguing that faced with problems posed by pervasive technology in the lives of citizens, courts may overrule Katz explicitly).
While it is possible that the Court may eventually replace *Katz* with a regulatory test, it is also possible, and I will argue preferable, that the Court add the regulatory standard while retaining the existing atomistic privacy and property approaches.

Rather than suggesting the eventual abandonment of *Katz*, *Kyllo* may more accurately be read as reaffirming the continued viability of the expectation of privacy, assumption of risk approach. Why else would the Court imply that surveillance techniques involving devices “in general public use” may, by that factor alone, render the technique a non-search?226 Furthermore, the Court had the opportunity in *Jones* and *Jardines* to disavow expressly the privacy-centered perspective of the *Katz* line of cases in lieu of its reaffirmation of the trespass to property approach.227 Instead, the Court chose to supplement the expectation of privacy standard with one attending to invasions of property interests. Thus, the Court appears to be in the business of adding new alternatives to *Katz* rather than abandoning assessments of reasonable expectations of privacy and assumptions of risk.

Moreover, the Court has suggested that the *Jones/Jardines* and *Katz* alternatives have a logical, serial relation. The *Jardines* Court saw no reason to assess the dog sniff situation under *Katz* because the property-rights baseline provided an “easier” resolution of the search issue.228 Thus, the Court teaches that the tests are to be utilized in order of difficulty of application: first, the trespass test; if no search thereunder, then the privacy expectation test. *Katz* is thus only applicable if no prohibited trespass occurs.


226. *See supra* notes 142, 147-49 and accompanying text.

227. Some commentators have, however, argued that the trespass doctrine has essentially predominated all along, *Katz* notwithstanding. Kerr, *Fourth Amendment, supra* note 8, at 809 (“In most contexts, whether an expectation of privacy is deemed reasonable can be answered by whether it is backed by . . . a ‘loose’ version of real property law.”).

228. *See supra* text accompanying notes 181-82.
The addition of a new regulatory standard should occupy the third step in the order. If trespass assessments are "easier" than considerations of privacy infringements, determining whether a given police practice "encroaches too much on the public's sense of security" is clearly more difficult still. While the regulatory standard is value-laden and prone to subjective application, the assumption of risk analysis under Katz is essentially an empirical matter and relatively easy to apply. Therefore, courts should not turn to the regulatory standard until they have determined that no search has occurred, in order, under: (1) Jones/Jardines, and then (2) Katz. Finding a search under the regulatory standard as a third step in the process would thus not call into question the efficacy of the first two steps when they yield a no search finding. The regulatory prong would add a new normative scrutiny of the surveillance practice. As Professor Swire has observed: "[T]here is a clear and large difference between a . . . holding[ ] that no 'search' prohibited by [Katz] has occurred and the claim that [the practice] is normatively desirable."231

Not only is the Supreme Court unlikely to abandon the existing privacy and property standards and move entirely to a regulatory approach, but such a move would be undesirable, especially if the regulatory standard proposed

229. See supra notes 207-10 and accompanying text.

230. See supra notes 43-49 and accompanying text. Justice Harlan came to see the assumption of risk analysis as an empirical mirroring and reflecting society's risks without inquiry into the normative desirability of "saddling" the risks upon society. See supra notes 43-49 and accompanying text.

231. Swire, supra note 115, at 920.

232. Professor Kerr has argued, among other things, that retaining the assumption of risk doctrine is necessary to prevent "savvy wrongdoers [from using] third-party services in a tactical way to enshroud the entirety of their crimes in zones of Fourth Amendment protection." Kerr, Third-Party, supra note 119, at 561, 564, 573-76. Kerr explains:

Without the doctrine, criminals could use third-party agents to fully enshroud their criminal enterprises in Fourth Amendment protection. A criminal could plot and execute his entire crime from home knowing that the police could not send in undercover agents, record the fact of his phone calls, or watch any aspect of his Internet usage without first obtaining a warrant. He could use third parties to create a bubble of
in this Article is adopted. That standard leaves unregulated police practices that could not realistically impact a majority of the public, thus freeing the police from Fourth Amendment constraints under that standard so long as the nature of their intrusions fall outside the regulatory test. Indispensable atomistic privacy and property interests would be left totally unprotected in such a situation if *Katz* and *Jones/Jardines* were abandoned.233

Moreover, determining Fourth Amendment searches solely in terms of a regulatory test is a bad idea even if the chosen test were along the lines of LaFave's proposal without my proposed modifications. Such a test, with its unfettered invitation to consider whether any police practice constitutes an "intolerable encroachment on the public's sense of security" amounts to little more than a direction to courts to engage subjectively in wholesale policymaking. While such activity is not entirely precluded when courts apply the *Katz*

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Fourth Amendment protection around the entirety of his criminal activity.

*Id* at 576.

233. Suppose, for example, that the government develops a one-of-a-kind x-ray machine that can reveal all the activities within a home but, because of its expense, can be used only extremely rarely. Use of such a machine without a warrant, while blatantly offensive to atomistic constitutional values, would be constitutionally permissible if my proposed regulatory standard were the sole determiner of Fourth Amendment scope.

Theoretically, provisions of the Constitution other than the Fourth Amendment might prohibit use of the hypothetical x-ray machine. Police actions "shock[ing to] the conscience" are prohibited by the Due Process Clause. *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (holding two capsules believed to be narcotics inadmissible where police entered defendant's home without a warrant, broke open the door to his bedroom, attempted to force open his mouth to retrieve the capsules he was attempting to swallow, and took him to a doctor, who thrusted an emetic solution into defendant's stomach causing him to vomit up the capsules—capsules held inadmissible because police conduct "shocks the conscience"). The due process remedy is rarely available, however. *See*, e.g., *Irvine v. California*, 347 U.S. 128 (1954) (finding no due process violation where police made repeated illegal entries into defendant's home for the purpose of installing secret microphones, including one in his bedroom, from which they listened to his conversations for over a month). Note, the Fourth Amendment was not applicable in *Irvine* because at the time of the case the Amendment had not yet been held applicable to the States.
rubric, that approach at least reminds decision-makers that they function as judges and not legislators.\textsuperscript{234}

C. Legislative Input

In his dissenting opinion in \textit{Kyllo}, Justice Stevens, joined by three others,\textsuperscript{235} cautioned against the unwisdom of attempting judicial solutions to the complicated Fourth Amendment problems posed by modern technology:

Although the Court is properly and commendably concerned about the threats to privacy that may flow from advances in the technology available to the law enforcement profession, it has unfortunately failed to heed the tried and true counsel of judicial restraint. Instead of concentrating on the rather mundane issue that is actually presented by the case before it, the Court has endeavored to craft an all-encompassing rule for the future. It would be far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints.\textsuperscript{236}

\textsuperscript{234} Professor Amsterdam makes the point this way:

What is involved here is a matter of mood, of tone, of the basic attitudes that shape a court’s perception of problems and its will to act upon them. Certainly, in one sense all judges appreciate that the [F]{\textsuperscript{ourth}} [A]{\textsuperscript{mendment}} is concerned with regulating police behavior. But it makes a difference whether that regulation is conceived to be the primary thrust of the amendment or a mere by-product of the amendment’s protection of isolated enclaves of individual interest against invasion by particular police actions.

Amsterdam, supra note 2, at 371.

\textsuperscript{235} Justices O’Connor, Kennedy, and Chief Justice Rehnquist joined in the dissent.

\textsuperscript{236} Kyllo v. United States, 533 U.S. 27, 51 (2001) (Stevens, J., dissenting). Other members of the Court have subsequently voiced similar reservations. See, e.g., City of Ontario v. Quon, 130 S. Ct. 2619, 2629 (2010), where Justice Kennedy, joined by seven other Justices, said: “The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment . . . . The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” In \textit{Quon}, the Court found no Fourth Amendment violation when government employers conducted a warrantless search of messages sent on a police officer’s government-owned paper. \textit{Id.} at 2633.

Critics of judicial involvement in the metadata gathering at issue in the cases discussed supra notes 199-200 have argued:
Others have expressed similar views, most persuasively Professor Orin Kerr, who argues that democratically elected legislatures "possess a significant institutional advantage . . . over courts" in generating "effective rules regulating criminal investigations involving new technologies."237 Judicial difficulty applying a regulatory test

The right check on our national surveillance programs, as they work today, is not the Constitution, with which they clearly comply, but politicians and the public, who are discomfited by them. In some cases, they have reason to be: [a]buses do happen, oversight is necessary, and the programs' effectiveness has to be proven to the satisfaction of the public.

In the first place, rather than convene a body to decide how it would like to change the NSA's programs, [as President Obama did], the executive branch should have the intelligence community explain and defend them. If, for instance, the collection of metadata is crucial to finding and catching terrorists, then it should be strongly defended, not neutered as a sop to the political moment. Instead of having the executive branch and Congress decide whether holding metadata is justified by our national-security needs, the panel basically entrusts federal judges with constantly revisiting that question on an individual basis. . . .

. . . [T]his question should ultimately be decided by the political branches accountable to the people whose lives are at stake, not unaccountable courts.


For an argument that the Supreme Court may be reluctant to become involved in the NSA data mining controversy because of the Court's perceived lack of its own expertise to deal with sophisticated technological issues affecting Fourth Amendment interests, see Mark Sherman, Technology? Some Justices Want to Keep a Distance, ASSOCIATED PRESS: THE BIG STORY, (Jan. 7, 2014, 3:03 PM), http://bigstory.ap.org/article/technology-some-justices-want-keep-distance.

237. Kerr, Fourth Amendment, supra note 8, at 858. Legislative and judicial rules differ in that "legislatures typically create generally applicable rules ex ante, while courts tend to create rules ex post in a case-by-case fashion." Id. at 868. Legislatures thus "enact generalized rules for the future, whereas courts resolve disputes settling the rights of parties from a past event" resulting in court rules "tend[ing] to lag behind parallel statutory rules and current technologies by at least a decade." Id.

Kerr's views are strongly contested, however, by Professor Solove. See generally Daniel J. Solove, Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference, 74 FORDHAM L. REV. 747 (2005) [hereinafter Solove, Codification] (rejecting Kerr's claims of judicial inferiority as based on, for Solove, faulty assumptions that are not well grounded in either theory or practice).
defining Fourth Amendment searches led Professor Amsterdam\textsuperscript{238} to propose that "all police search and seizure activity . . . be regulated by legal directives that confine police discretion within reasonable bounds."\textsuperscript{239} A more modest proposal is forwarded by Professor Christopher Slobogin, who urges that Congress enact legislation prohibiting use of technological devices under circumstances analogous to the legislation currently treating the use of eavesdropping instruments.\textsuperscript{240}

Professor Kerr, as the leading proponent of judicial restraint in the regulation of modern technology, invokes a variety of reasons for his position.\textsuperscript{241} It is well beyond the scope of this Article to articulate all, and assess the merits of, these reasons. A brief list must therefore suffice: Legislatures are said to craft more comprehensive and clearer rules than courts,\textsuperscript{242} and because they "can act any time"—unlike courts that must wait for a case or controversy to arise—they are better able to respond at the early stages of an emerging technology.\textsuperscript{243} Moreover, given the complexity of new technologies, legislatures are arguably better able than

\begin{footnotesize}
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  \item See Amsterdam, supra note 2, at 403.
  \item Id. at 416. Professor Amsterdam further noted:
  
  The rule of constitutional law that I urge is simple, having . . . only three parts: (1) Unless a search or seizure is conducted pursuant to and in conformity with either legislation or police departmental rules and regulations, it is an unreasonable search and seizure prohibited by the [F]ourth [A]mendment. (2) The legislation or police-made rules must be reasonably particular in setting forth the nature of the searches and seizures and the circumstances under which they should be made. (3) The legislation or rules must, of course, be conformable with all additional requirements imposed by the [F]ourth [A]mendment upon searches and seizures of the sorts that they authorize.
  
  Id. at 416-17.
  \item Slobogin, supra note 149, at 1396.
  \item Professor Kerr offers an extensive argument for legislatures playing the predominant role in regulating how the government should use its powers of information gathering in the technological age. See Kerr, Fourth Amendment, supra note 8, at 857-87.
  \item Id. at 806.
  \item Id. at 870.
\end{enumerate}
\end{footnotesize}
courts to understand the complexities and thus fashion more effective rules.\footnote{244}{Id. at 807 ("Courts ... lack the information needed to understand how the specific technologies in cases before them fit into the broader spectrum of changing technologies, and cannot update rules quickly as technology shifts.").}

While I find Kerr's points persuasive, others disagree, with some offering point-by-point rebuttals of Professor Kerr's position.\footnote{245}{See, e.g., Swire, supra note 115, at 918-19; see generally Solove, Codification, supra note 237.} Others offer spirited arguments against the judicial restraint position claiming, in one instance, that legislatures "don't . . . give a damn about the rights of the accused"\footnote{246}{See, e.g., Swire, supra note 115, at 914 (noting that the legislative process tends towards permitting greater surveillance over time).} because voters have strong law enforcement biases to which legislators respond.\footnote{247}{Id. at 1088-90. In discussing the interest in effective law enforcement, Professor William Stuntz makes a similar point:

Here more than most places, politicians . . . deal with voters directly. And crime is one of those matters about which most voters care a great deal. Today it is regularly a major issue in elections at all levels of government, and it has been an issue in local elections for more than a century. If there is any sphere in which politicians would have an incentive simply to please the majority of voters, it's criminal law. . . .

Voters may know little about criminal law doctrine, but they presumably have some idea of the set of results they would like to see: conviction and punishment of people who commit the kinds of offenses that voters fear. Legislators, one can fairly hypothesize, have an interest in producing those results (or at least taking credit for them), so that voters will continue to support them.


Such considerations lead some to conclude that Congress simply defers to the Court's decisions, finding no Fourth Amendment searches without exercising its constitutional prerogative of enacting privacy legislation when those decisions inadequately protect the Fourth Amendment rights of citizens.\footnote{248}{See, e.g., Swire, supra note 115, at 921. A finding of "no search" by the Court does not, of course, preclude legislative bodies from affording statutory provisions affording greater protection of civil liberties than those afforded by the Court.}
Again, it would require a separate article to thoroughly defend the argument favoring judicial restraint. I therefore must simply conclude here that I find it wise for courts generally to defer to policymakers rather than themselves fashioning rules regulating sophisticated surveillance techniques. However, if the government employs modern technology in ways which seriously call into question basic Fourth Amendment rights of citizens, and legislative protections are not enacted, then the Court should act to protect the public's "sense of security," but then only to resolve the instant case without proposing "all-encompassing rule[s] for the future."249 Judicial opinions should be confined to announcing fundamental principles, with the hope that Congress will then supply the details.250 As even critics of Kerr's judicial restraint position recognize, "[d]ialogue and continued participation by both [judicial and legislative] branches is likely to lead to better outcomes."251

CONCLUSION

This Article has addressed the United States Supreme Court's perennial problem of articulating an adequate standard to determine which governmental intrusions constitute Fourth Amendment searches and seizures. As shown, the reasonable expectation of privacy rubric of the Katz case has proven controversial, especially in an era of ever increasing technologically advanced surveillance techniques. I have argued that the Court's recent embrace of the earlier discarded trespass to privacy standard, as a supplement to Katz, signals that the Court is prepared to openly consider new perspectives when defining Fourth

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Constitution. See, e.g., Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (holding no violation of First Amendment rights of newspaper when police searched the paper's offices pursuant to a search warrant rather than seeking the desired evidence by subpoenaing the paper to turn over the evidence). Congress responded to Zurcher by enacting legislation requiring subpoenas as the preferred method of seeking information from newspapers, thus granting greater protection of First Amendment interests than those afforded by the Zurcher Court. See Privacy Protection Act, 42 U.S.C. § 2000aa (2010).

250. Swire, supra note 115, at 905.
251. Id. at 922.
Amendment scope. Indeed, as illustrated by my discussion of *Kyllo* and the subsequent *Jones* and *Jardines* trespass cases, the Court has now planted the seeds for the emergence of a new normative regulatory approach.

In anticipating adoption of a regulatory alternative, I have proposed specific language for such and argued that the regulatory standard should supplement, and not replace, the present tests and be utilized only when searches are not found under, first *Jones/Jardines*, and then *Katz*. Finally, I have urged judicial restraint when the regulatory alternative is utilized, lest the courts become unduly involved in issues more suited to the expertise of the legislative branch. I offer these recommendations hoping to assist in the difficult task of accommodating competing governmental and civil liberties interests in a world of expanding technological intrusions into the private lives of citizens.