

Nine Situations in Which the Trespass Theory of the Fourth Amendment Might Matter

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In United States v. Jones, 565 U.S. ___ (2012), and Florida v. Jardines, 569 U.S. ___ (2013), the Supreme Court announced a new (or perhaps revived an old) understanding of the Fourth Amendment that is closely tied to the law of trespass. Some commentators have suggested that the trespass theory may not be very significant in practice – that it “may move around the doctrinal boxes without changing outcomes.” Orin S. Kerr, The Curious History of Fourth Amendment Searches, 2012 Sup. Ct. Rev. 67, 70 (2012). What follows is a list of situations in which the trespass theory might change case outcomes.

- 1) **GPS tracking.** Prior to Jones, most courts had ruled that GPS tracking of a suspect, at least on the public roads, was not a Fourth Amendment search. Technically, the holding of Jones concerned the installation of the tracking device rather than the tracking itself, but the effect of the ruling is to make GPS tracking a Fourth Amendment search. One could argue that five Justices were prepared to rule that prolonged GPS tracking was a search under the reasonable expectation of privacy framework that the Court adopted in Katz v. United States, 389 U.S. 347 (1967) (the “Katz/REP” formulation), making the trespass theory inessential to the result. But after Jones, even short-term tracking on public roads, which likely isn’t an intrusion on a reasonable expectation of privacy, is a search because it requires the installation of a tracking device, which is a trespass under Jones.
- 2) **Knock and talks.** Jones and Jardines may affect the law of knock and talks in several ways.
 - a) **Use of investigative techniques.** Courts and commentators have sometimes suggested that so long as officers remain on the entranceway to a residence, there is no Fourth Amendment intrusion, because there is no reasonable expectation of privacy in the entranceway. See, e.g., United States v. Lakoskey, 462 F.3d 965 (8th Cir. 2006) (“[W]e will not extend [defendant’s] expectation of privacy to his driveway, walkway or front door area.”). But even if there is no reasonable expectation of privacy in an entranceway, and so no limit to what an officer may do in such an area under the Katz/REP analysis, Jardines holds that an officer who engages in an investigative technique beyond what a social visitor is likely to do is a trespasser and so in violation of the Fourth Amendment. Jardines specifically rules that bringing a drug dog on a knock and talk exceeds the scope of the implied license to approach a residence by a common entranceway, and so renders the entry a trespass and a Fourth Amendment search, but the rationale of Jardines applies equally to other investigative conduct. The majority opinion states that “exploring the front path with a metal detector” would likewise be outside the scope of the implied license. Another possible example is swabbing a drug suspect’s front doorknob for drug residue. As discussed in State v. Nielsen, 306 P.3d 875 (Utah Ct. App. 2013), pre-Jones courts split over whether such activity constituted a Fourth Amendment search. The argument that it is a search after Jardines is much stronger. Even an officer who bends down to examine the undercarriage of a vehicle parked in a suspect’s driveway might be viewed as exceeding the scope of the implied license. Cf. United States v. Pineda-Moreno, 617 F.3d 1120 (9th Cir. 2010)

(Kozinski, J., dissenting from denial of rehearing en banc) (police placed a GPS tracking device on a suspect's vehicle while it was parked in his driveway near his home; a panel of the Ninth Circuit ruled that the suspect had no reasonable expectation of privacy in the driveway because it was a common entranceway that might be used by visitors, delivery people, or neighborhood children; Chief Judge Kozinski argued that the fact that others might have access to an area for limited purposes doesn't necessarily defeat the occupant's expectation of privacy in the area altogether such that law enforcement officers have unfettered access to the area). Furthermore, when a knock and talk is rendered a trespass under Jardines because it is joined with investigative activity not usually undertaken by social visitors, even information obtained by the officer's casual observation rather than the investigative technique may be subject to exclusion. For example, if an officer sees marijuana plants through a window as he approaches a suspect's home with a drug dog, there is a reasonable argument that the entire visit is a trespass and therefore a Fourth Amendment search, so that anything discovered during the visit is subject to suppression, even if it could have been discovered through a standard knock and talk.

- b) **Nighttime approaches.** Jardines strongly suggests that knock and talks conducted late at night are searches. Previous knock and talk cases generally allowed the technique to be used during the nighttime. See, e.g., Scott v. State, 782 A.2d 862 (Md. 2001) (no Fourth Amendment violation where police "randomly knock[ed] on motel room doors at 11:30 p.m." in the hopes of obtaining consent to search the rooms; the court indicated that the late hour was a factor in deciding whether a Fourth Amendment intrusion had taken place, but rejected any bright-line rule about late night knock-and-talks, and determined that the one at issue did not implicate the Fourth Amendment); State v. Whitaker, 2013 WL 3353334 (Tenn. Ct. Crim. App. June 28, 2013) (unpublished) (holding that a knock and talk conducted at 10:00 p.m. was not a seizure and stating that "[t]he fact that the encounter occurred at night does not per se invalidate a knock and talk, but it is instead a factor to be considered in conjunction with the other circumstances surrounding the encounter"). Cf. Luna-Martinez v. State, 984 So. 2d 592 (Fla. Ct. App. 2nd Dist. 2008) (ruling that a defendant's consent to search obtained during a 3:00 a.m. knock and talk was given voluntarily and stating that although the late hour is a factor in analyzing the interaction between the police and a suspect, it does not carry great weight as "it is not unusual for the police in their investigative efforts to have late night encounters with individuals"). However, Jardines seems to indicate that the implied invitation that allows officers and others to approach dwellings' front doors is not in place 24 hours per day. The Jardines dissent states that "as a general matter," a visitor may not "come to the front door in the middle of the night without an express invitation." Slip op. at 5. The majority suggests that the dissent is "quite right[]" on this issue, which would seem to make a late night knock and talk a trespass. Slip op. at 7 n.3. Neither opinion offers much guidance about how late is too late. Is 8:00 p.m. the cutoff? 9:00 p.m.? Nightfall? This appears to be a question about social conventions with no clear answer, particularly because local customs vary. For example, farmers may retire earlier than city dwellers.
- c) **Duration.** The Jardines majority states that there is an "implicit license [that] typically permits [a] visitor to approach [a] home by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer), leave." The Court's admonition that the visitor

must “knock promptly” and “wait briefly” for a response suggests that an officer who tarries too long during a knock and talk may violate the Fourth Amendment under the trespass theory.

- 3) **Garbage.** There has been some uncertainty, both within North Carolina and nationally, about the status of garbage that has been placed in a garbage can or otherwise discarded but that remains within the curtilage of a home. In State v. Hauser, 342 N.C. 382 (1995), the court stated that “a reasonable expectation of privacy is not retained in garbage simply by virtue of its location within the curtilage of a defendant’s home.” See also United States v. Segura-Baltazar, 448 F.3d 1281 (11th Cir. 2006) (finding it “unnecessary to decide” whether trash was inside the curtilage of the defendant’s residence because garbage may be “exposed to the public” and so not the subject of a reasonable expectation of privacy while still inside the curtilage, citing United States v. Long, 176 F.3d 1304 (10th Cir. 1999), and United States v. Comeaux, 955 F.2d 586 (8th Cir. 1992)). But in State v. Reed, 182 N.C. App. 109 (2007), the court noted that Hauser involved collection by sanitation personnel, not law enforcement officers, and ruled that officers violated the Fourth Amendment by seizing a cigarette butt that remained within the defendant’s curtilage even though the defendant had discarded it. The argument that trash is protected so long as it remains within the curtilage is strengthened by the trespass theory of the Fourth Amendment. See, e.g., Commonwealth v. Ousley, 393 S.W.3d 15 (Ky. 2013) (suggesting that trespass theory allows trash pulls only when the garbage has been placed outside the curtilage for collection).
- 4) **No trespassing signs.** Under the Katz/REP analysis, no trespassing signs generally have been treated as a factor that tends to support the existence of a reasonable expectation of privacy in an area, but courts generally have not viewed the presence of signs as conclusive. See, e.g., State v. Pasour, ___ N.C. App. ___, 741 S.E.2d 323 (2012) (“[W]hile not dispositive, a homeowner’s intent to keep others out and thus evidence of his or her expectation of privacy in an area may be demonstrated by the presence of ‘no trespassing’ signs.”). No trespassing signs may have greater significance under the trespass theory. One could argue that posting a sign eliminates the implied license to approach a residence that is discussed in Jardines, and thereby completely precludes law enforcement from entering the curtilage for a knock and talk. On the other hand, one might argue that no trespassing signs don’t completely eliminate the implied license, at least for public safety personnel and other government officials. Cf. United States v. Walters, 529 F.Supp.2d 628 (E.D. Tex. 2007) (“Even if there were [‘no trespassing’] signs,” officers lawfully approached the defendant’s residence; “[n]otwithstanding barrier signs, police officers with legitimate business may enter areas surrounding the home impliedly open to the public and typical visitors”).
- 5) **Consent to enter or search obtained by ruse.** The Supreme Court has previously ruled that there is no Fourth Amendment problem when an undercover officer poses as a drug buyer in order to gain entry to a drug dealer’s home, as the drug dealer has “converted [his residence] into a commercial center to which outsiders are invited for purposes of transacting unlawful business.” Lewis v. United States, 385 U.S. 206 (1966). Other situations in which an officer might obtain consent to enter or to search through a ruse include entering a home by posing as a person interested in purchasing the property, see, e.g., People v. Lucatero, 166 Cal.App.4th 1110 (Cal. Ct. App. 5th Dist. 2008), or obtaining consent to examine a suspect’s computer (in the hopes of finding child pornography) by telling the suspect that the officer is investigating a possible computer virus or data theft. Under the law of trespass, there is an argument that at least in some instances, misrepresentations by an

officer may render a suspect's consent invalid and may make the officer a trespasser. See Council on American-Islamic Relations Action Network, Inc. v. Gaubatz, 793 F.Supp.2d 311 (D.D.C. 2011) ("Consent given upon fraudulent misrepresentations will not always defeat a claim for trespass. Consent may be ineffective if induced by a substantial mistake concerning the nature of the invasion of [the owner's] interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation."); Desnick v. American Broadcasting Companies, 44 F.3d 1345 (7th Cir. 1995) (people working for television network and posing as patients at an eye clinic were not trespassers despite their misrepresentations because such ruses do not implicate the purposes that the trespass doctrine was meant to protect, but "[i]f a homeowner opens his door to a purported meter reader who is in fact nothing of the sort – just a busybody curious about the interior of the home – the homeowner's consent to his entry is not a defense to a suit for trespass"); Keyzer v. Amerlink, Ltd., 173 N.C. App. 284 (2005) (private investigators did not trespass when they posed as prospective clients and entered an attorney's office while actually investigating the attorney; "the individual facts of a case determine whether consent given pursuant to a misrepresentation of identify is valid as a defense to a claim of trespass," and here, "the entry complained of was not of the kind that interfered with [the attorney's] ownership or possession of the [premises]," so it was not a trespass); Food Lion v. Capital Cities/ABC, 194 F.3d 505 (4th Cir. 1999) (television network employees worked undercover for Food Lion during investigation of food handling practices; jury held them liable for trespass as they entered Food Lion's stores under misrepresentations regarding their identities and purpose; the Fourth Circuit noted that "the courts of [North Carolina] have not considered the validity of a consent to enter land obtained by misrepresentation," and that "the various jurisdictions and authorities in this country are not of one mind in dealing with the issue," but ultimately followed Desnick, supra, and found that the misrepresentations in this case were not sufficient to support the finding of a trespass). The same issue might potentially arise in a virtual environment, as when an officer poses as a person interested in child pornography in order to convince a pedophile to give him access to the pedophile's computer on a peer-to-peer network. These facts are present in, for example, United States v. Brooks, 2012 WL 6562947 (E.D.N.Y. Dec. 17, 2012) (unpublished) (finding no trespass due to the lack of a physical intrusion and stating that the fact that the officer "may have deceived [the defendant] as to his true identity does not render the consent involuntary or invalid").

- 6) **Paint scrapings from cars.** In Cardwell v. Lewis, 417 U.S. 583 (1974), police arrested a murder suspect and immediately impounded his car, which was parked in a public lot. The police examined the car's tire treads and took paint scrapings from the vehicle, which helped tie the suspect to the murder. The Court ruled that this did not violate the Fourth Amendment. Although the Court's opinion sometimes emphasizes the existence of probable cause, at other times it seems to suggest that there was simply no Fourth Amendment intrusion as no "expectation of privacy was infringed." See also Tackett v. State, 822 S.W.2d 834 (Ark. 1992) (a defendant was convicted of manslaughter in connection with automobile accident after police found his vehicle in a public lot, took paint scrapings, and "removed the front bumper, the grill, a piece of molding from the front fender, and the front headlight frame"; the court ruled that this was not a search because under Lewis, the defendant had "no right to privacy in the exterior of his van"). Lewis is addressed briefly in footnote 7 of the majority opinion in Jones. The Court simply observes that the basis for the outcome in Lewis

is unclear, without expressly noting what appears to be the case: that the result in Lewis is indefensible under the trespass theory. The taking of paint scrapings is at least as much of an intrusion as the installation of the GPS tracking device at issue in Jones.

- 7) **Items entrusted to repairpersons and other third parties.** A common fact pattern arises when a person entrusts his computer to a repairperson and the repairperson stumbles upon child pornography on the computer. The repairperson tells the police, and the police review what the repairperson has seen. Courts generally have ruled that the police are not conducting a search under this circumstance, because the computer's owner has relinquished his expectation of privacy in the computer by entrusting it to the repairperson. *See, e.g., State v. Ballard*, 276 P.3d 976 (N.M. Ct. App. 2012) (defendant who had given his laptop and two external hard drives containing child pornography to a coworker to have them repaired "lost any expectation of privacy he may have had once he gave the computer and external hard drives" to his coworker); *Melton v. State*, 69 So.3d 916 (Ala. Ct. Crim. App. 2010) (defendant "relinquished any reasonable expectation of privacy in the files containing child pornography when he exposed the [repair personnel] to those files [by asking them to repair his computer without first removing or password-protecting the files]," and "[b]ecause he did not retain a privacy interest in those files, the officers did not violate Fourth Amendment principles when they viewed the contents of any of those files, regardless of whether the officers exceeded the scope of the search conducted by" the repair personnel). But under the trespass theory, the fact that the computer's owner has allowed the repairperson access to the computer may not defeat the claim that the police are trespassers when they examine the computer, any more than a homeowner's consent to having a cleaning person in his or her home would permit the police to enter the home. On the other hand, examining a computer may not require a physical intrusion, which might render the trespass analysis inapplicable.
- 8) **Intrusions into airspace.** Historically, landowners owed the air above their land, up to an infinite height. Even today, landowners own air rights to "at least as much of the space above the ground as they can occupy or use in connection with the land." *United States v. Causby*, 328 U.S. 256 (1946). Under modern law, areas above the point of utility are a "public highway," *id.*, and belong to the United States, 49 U.S.C. § 40103. In *California v. Ciraolo*, 476 U.S. 207 (1986), the Court held that officers who flew over a suspect's fenced yard at an elevation of 1000 feet were in "public navigable airspace," were not intruding on the suspect's reasonable expectation of privacy, and so were not conducting a search. *See also Florida v. Riley*, 488 U.S. 445 (1989) (applying *Ciraolo* and ruling that a helicopter overflight at 400 feet didn't intrude on a reasonable expectation of privacy, though Justice O'Connor's controlling opinion leaves the door open to a different result if a defendant establishes that "the public rarely, if ever, travels overhead at such altitudes"). One could argue that the overflight at issue in *Ciraolo* would have been a trespass at common law; that it is the common law of trespass that is relevant under Jones; and that *Ciraolo* should therefore be reconsidered. Even if the Court would apply modern air rights law to reaffirm *Ciraolo*, an overflight below public navigable airspace, whether by an officer in a helicopter or by a surveillance drone, might still be a trespass, and it is at least conceivable that such an overflight would become a trespass before it would become an intrusion on a reasonable expectation of privacy. For a discussion of the law of trespass as it relates to drones, see Congressional Research Service, Integration of Drones into Domestic Airspace: Selected Legal Issues (2013) (available online at

<http://www.fas.org/sgp/crs/natsec/R42940.pdf>); Alexis C. Madrigal, If I Fly a UAV over My Neighbor's House, Is It Trespassing?, The Atlantic (Oct. 10, 2012) (available online at <http://www.theatlantic.com/technology/archive/2012/10/if-i-fly-a-uav-over-my-neighbors-house-is-it-trespassing/263431/>).

- 9) **Electronic trespasses.** Justice Alito's concurrence in Jones faults the trespass theory for "present[ing] particularly vexing problems in cases involving . . . electronic, as opposed to physical, contact." Slip Op. at 9. The majority indicates that such cases would likely be analyzed under Katz rather than the trespass theory, Slip Op. at 11, but that has not stopped some defendants from attempting to rely on the trespass theory in cases involving wireless signals. For example, in United States v. Norris, 2013 WL 4737197 (E.D. Cal. Sept. 3, 2013), officers used a product called "Moocherhunter" to determine who was using an unsecured wireless network, without permission, to distribute child pornography. The defendant cited Jardines and argued that the officers used Moocherhunter to "sniff the air waves" coming from his home and thereby committed an electronic trespass. The court disagreed, ruling that there was no intrusion into the defendant's home, physical or otherwise, as officers used the product in a "passive mode" and "no data were transmitted from the agents' device." The use of active wireless technologies by the police – such as using a cell phone jammer to limit a suspect's communications, or attempting to initiate a wireless connection between a police computer and a suspect's computer – might lead to a different result under the trespass theory. Of course, such activities might also implicate the Fourth Amendment under the Katz/REP analysis.