Arkansas Law Review

Volume 73 | Number 3 Article 2

December 2020

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THE JONES TRESPASS DOCTRINE AND THE NEED FOR A REASONABLE SOLUTION TO UNREASONABLE PROTECTION

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INTRODUCTION

Each day that Houston drivers exit from Interstate 45 to drive to downtown Houston, they pass an odd sight. Nestled within some bushes is an encampment of tents.[1] This encampment is very clearly located on public property adjacent to the interstate highway,[2] and equally clearly populated by homeless individuals. While local police ostensibly tolerate this presence, at least temporarily, the sight frequently evokes an image in my mind of a police search of those tents. This thought is especially prominent on the days I am driving to my law school, South Texas College of Law Houston, to teach my federal criminal procedure course.[3]

Prior to the Supreme Court decision in *United States v. Jones*,[4] the hypothetical in my mind lead me to contemplate many factors that would inform the assessment of whether such police action would qualify as a search. While there is no doubt police

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1. GOOGLE MAPS, 29°46'05.9"N 95°21'52.1"W, [https://perma.cc/WT79-TJ6C] (last visited Sept. 11, 2020); Eric Braate, *Ask 2: Why Are There Growing Homeless Encampments Under Various Freeways in Our Area?*, CLICK 2 HOUSTON (Jan. 27, 2020), [https://perma.cc/9L29-CQVE].

2. *Houston Map Viewer*, CITY OF HOUSTON, [https://perma.cc/U9G6-N7PM] (last visited Sept. 11, 2020) (located in the intersection of interstates 45 and 10).

3. S. TEX. C. OF LAW HOUS., *Geoffrey S. Corn*, [https://perma.cc/SA4W-ZG7K] (last visited Sept. 11, 2020).

4. United States v. Jones, 565 U.S. 400 (2012).

would be "looking" for something, those familiar with Fourth Amendment analysis would be quick to recognize that "looking" does not *ipso facto* qualify as "searching" within the meaning of that Amendment.[5] Instead, it would be necessary to analyze whether the police intruded upon what the Supreme Court labeled a reasonable or legitimate "expectation of privacy" when they were in the process of "looking."[6] And, pursuant to well-established jurisprudence, this would, in turn, require assessing whether the individual who owned the tent manifested a subjective expectation of privacy and whether that subjective expectation was one society recognized as legitimate or "reasonable."[7]

While the subjective prong of the assessment seems relatively straightforward in this hypothetical—the result of the individual shielding his possessions and activities within the tent from the public eye—the reasonableness of that expectation would be a more complicated question.[8] Several factors suggest that an expectation of privacy in such a location is not one society would recognize as legitimate or reasonable, most notably the transient nature of the encampment coupled with the fact that it was emplaced near an interstate highway on public property ostensibly not designated for such encampments.[9]

The *Jones* decision changed this search assessment equation.[10] In *Jones*, the Supreme Court held that any physical trespass resulting from an investigatory motive against an individual's "houses, papers, and effects"—items falling within the scope of the Fourth Amendment's textual protections—qualified as a search per se.[11] As a result, any such trespass qualifies as a search and triggers the Fourth Amendment's reasonableness requirement, even in situations where before

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5. *Id.* at 408 n.5.

6. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

7. *Id.* at 360-61.

8. Jeremy J. Justice, *Do Residents of Multi-Unit Dwellings Have Fourth Amendment Protections in Their Locked Common Area After* Florida v. Jardines *Established the Customary Invitation Standard?,* 62 WAYNE L. REV. 305, 329 (2017).

9. Oliver v. United States, 466 U.S. 170, 178 (1984) (holding that an individual "may not legitimately demand privacy for activities conducted out of doors in fields.").

10. *See Jones,* 565 U.S. at 404-06.

11. *Id.* at 404.

Jones there would be no credible claim of a privacy expectation society was willing to recognize as legitimate or reasonable.[12] Thus, even when chattel property (an individual's effect) is held out or exposed to the public, *Jones* indicated that the Fourth Amendment protects that effect from any police investigatory trespass, even one that does not qualify as a seizure.[13]

Ensuring the Fourth Amendment extends to what it enumerates, as the Court indicated in *Jones*, is a logical minimum. But did the holding create its own illogic? In his concurring opinion, Justice Alito indicated that the mere trespass on Jones' vehicle was not, standing alone, sufficient to qualify as a search.[14] For Justice Alito, it was the violations of respondent's reasonable expectation of privacy resulting from the long-duration and pervasive monitoring of the movements of the vehicle he drove.[15] Specifically, he noted, "[t]he Court's theory seems to be that the concept of a search, as originally understood, comprehended any technical trespass that led to the gathering of evidence, but we know that this is incorrect."[16] Later, the concurrence noted the illogic of classifying a trivial trespass as a search:

> . . . the Court's reasoning largely disregards what is really important (the *use* of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation). Attaching such an object is generally regarded as so trivial that it does not provide a basis for recovery under modern tort law.[17]

The concurrence's triviality criticism is arguably illustrated by the Sixth Circuit's 2019 decision in *Taylor v. City of Saginaw*, holding that a parking meter enforcement officer's "chalking" of a tire to monitor the time in a parking spot qualifies as a search.[18] Chalking a tire, like the hypothetical such as the one I contemplate

12. *Id.* at 407.
13. *See id*. at 408-11.
14. *Id*. at 420-24 (Alito, J., concurring).
15. *Jones*, 565 U.S. at 419.
16. *Id*. at 420.
17. *Id*. at 424-25.
18. *See* Taylor v. City of Saginaw, 922 F.3d 328, 332 (6th Cir. 2019).

each time I pass by those tents, raise a valid question: has this resurrection of the Fourth Amendment trespass doctrine gone too far? Did the Sixth Circuit Court strike the right balance of interests in *Jones*, or was the concurrence triviality concern valid?

This Article will explore that question and argue that redefining the reasonable expectation of privacy test as one that is residual to the trespass test has opened the door for its own unreasonable results. More specifically, this Article will propose that the illogical overbreadth criticized by the *Jones* concurrence will necessitate an expansion of qualifications to the resurrected trespass doctrine: the implied license exception and the non-investigatory motive exception. Part I of the Article will trace the demise and resurrection of the trespass doctrine, to include how that doctrine may evolve to address the difficult question of investigatory access to an individual's information.[19] Part II of the Article will outline the impact of subordinating the reasonable expectation of privacy standard for assessing what is, or perhaps what is not a search, to the *Jones* trespass doctrine.[20] Part III will address the potential expanding scope of the trespass doctrine and how this expansion will challenge the efficacy of law enforcement and national security investigations.[21] Part IV will propose an approach for reconciling the logic of the reasonable expectation of privacy doctrine with the trespass doctrine that could mitigate what seems to be the almost illogical consequences of the current equation.[22]

I. BOOTLEGGING, WIRETAPPING, AND RESURRECTION OF THE PHYSICAL TRESPASS DOCTRINE

Roy Olmstead, a former Lieutenant in the Seattle Police Department, built a bootlegging empire in the Pacific Northwest.[23] His downfall came as the result of a federal

19. *See infra* Part I.
20. *See infra* Part II.
21. *See infra* Part III.
22. *See infra* Part IV.
23. Daryl C. McClary, *Olmstead, Roy (1886-1966)*, HISTORY LINK (Nov. 13, 2002), [https://perma.cc/9P27-4EUZ].

investigation that relied on wiretapping his phone.[24] Indeed, although Olmstead was protected from the Seattle police force as the result of extensive bribery, federal agents relied heavily on this relatively modern surveillance technique.[25] When Olmstead faced the consequences of that investigation—federal criminal prosecution—he revealed his belief that such surveillance ran afoul of the Fourth Amendment.[26] Unfortunately for Olmstead, his downfall was the partial result of the Supreme Court's ultimate decision contradicting this belief.[27] This decision established the touchstone for assessing what qualifies as a Fourth Amendment search and influenced government authority to conduct surveillance without implicating the Fourth Amendment for decades.[28] That opinion, *Olmstead v. United States*,[29] upheld Olmstead's conviction for various federal offenses related to his bootlegging activities.[30] More specifically, the Court held that wiretapping his phone line did not implicate Olmstead's Fourth Amendment rights, as none of that evidence was obtained by means of a search within the meaning of that Amendment.[31] Trespass, or the absence thereof, was critical to this decision; because the government never trespassed on Olmstead's residence, and never seized any tangible property belonging to Olmstead, there was no search.[32]

This decision established what came to be known as the "trespass" doctrine: a defendant seeking to exclude evidence was required to establish that government agents engaged in a physical trespass against his person, home, papers, or effects.[33] In all other situations, police were therefore permitted to engage in substantial investigatory activities that did not qualify as searches within the meaning of the Fourth Amendment.[34] Even when

24. *Id*.
25. Olmstead v. United States, 277 U.S. 438, 456-7 (1928).
26. *McClary*, *supra* note 24, at 5.
27. *Id.*
28. *See generally Olmstead,* 277 U.S. 438 (1928).
29. *Id.*
30. *See id.* at 469.
31. *Id.* at 466.
32. *Id.*
33. *Olmstead,* 277 U.S. at 466.
34. *Id.* at 465.

doing so intruded into places individuals might expect were secure or private, the police action did not qualify as a search.[35]

This all changed when the Court issued its landmark opinion in *Katz v. United States*.[36] In that case, federal law enforcement agents utilized a listening device attached to the top of a public phone booth to listen to Katz as he conversed with another individual after closing the phone booth door and paying the toll for the use of the phone.[37] Unsurprisingly, the agents did not seek a warrant to conduct this surveillance;[38] why would they? Pursuant to the *Olmstead* trespass doctrine, the surveillance could not qualify as a Fourth Amendment search and was therefore not subject to the Amendment's reasonableness requirement.[39] Based on the conversations Katz had while in the phone booth, he was convicted for transmitting wagering information over interstate telephone lines and challenged the legality of the wiretap by asserting that the government surveillance intruded upon his zone of privacy.[40]

After refining the issue slightly, the Supreme Court held that the *Olmstead* trespass doctrine provided an insufficient benchmark for the scope of Fourth Amendment protections.[41] As the Court noted, the Fourth Amendment protected "people, not places."[42] More specifically, the Court held that the Amendment was intended to protect people *in those places* where they expect privacy.[43] *Olmstead*, according to the Court in *Katz*, was insufficient to ensure such protection because it restricted the applicability of the Amendment to only those things and places enumerated in the Amendment's text.[44]

In his seminal concurring opinion, Justice Harlan added significant flesh to the bones of the majority opinion; his theory that true benchmark for Fourth Amendment applicability was

35. *Id.*
36. Katz v. United States, 389 U.S. 347, 353 (1967).
37. *Id.* at 348.
38. *See id.* at 356.
39. *Olmstead,* 277 U.S. at 466.
40. *Katz,* 389 U.S. at 348-49.
41. *Id*. at 352-53.
42. *Id.* at 351.
43. *See id.* at 352.
44. *Id.* at 353.

whether police surveillance intruded into an individual's "reasonable expectation of privacy."[45] More specifically, Harlan noted that:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.[46]

Harlan then explained the significance of Katz's efforts to shield the content of his conversation from the public, and why that was so significant for extending Fourth Amendment protection to a place which could not qualify as his "home" or "effect":

> The critical fact in this case is that "[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. . . . . The point is not that the booth is "accessible to the public" at other times, . . . but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.[47]

Harlan's approach for assessing a reasonable expectation of privacy, triggering applicability of Fourth Amendment protections, was subsequently adopted by a majority of the Court in its holding in *United States v. White*.[48] In that decision, the

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45. *Katz,* 389 U.S. at 360 (Harlan, J., concurring).
46. *Id.* at 361.
47. *Id.* (citations omitted).
48. United States v. White*,* 401 U.S. 745, 748 (1971).

Court rejected the assertion that police violated the Fourth Amendment when the police recorded White's conversation *with the consent* of the other party to the conversation.[49] Unlike Katz, because White had exposed the content of the conversation to a false friend, he assumed the risk that it would be made available to the government.[50] But more significantly, the opinion reinforced the critical touchstone for assessing what qualified as a reasonable expectation of privacy: whether the "thing" subject to government surveillance had been voluntarily exposed to the public or other third parties.[51]

This *Katz* reasonable expectation of privacy test was frequently criticized as circular.[52] This is because the subjective expectation of privacy was inevitably assessed by applying an objective criterion: had the individual exposed the thing to the public?[53] And the assessment of the objective reasonableness of a privacy expectation—the question of whether it was one society was willing to recognize as reasonable—was inherently subjective in nature: does the presiding judge believe it is an expectation society recognizes as legitimate?[54]

Nonetheless, because *Katz* moved well beyond the trespass doctrine, *Katz* extended these protections to many areas that prior to the decision had been understood as falling outside the scope of the Amendment.[55] For example, subsequent to *Katz*, a Fourth Amendment search would occur if a police officer stood on the

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49. *Id.* at 751.

50. *Id.*

51. *Id.*

52. Kyllo v. United States, 533 U.S. 27, 34 (2001).

53. *See* 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, 122 (2002).

54. Richard G. Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1096 (1987) (" . . . experience [has] shown the open-ended *Katz* test to be judicially unmanageable when applied to container searches."); Colb, *supra* note 54, at 122-23 (critiquing the reasonable expectation of privacy doctrine as "unstable," and suggesting that the Court must move towards an honest inquiring into "whether police have acted in a manner that exposes what would have remained hidden absent the transgression of a legal or social norm."); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 29 (1988) (asserting that having a reasonable expectation of privacy standard means determining which expectations are reasonable, which has led the Court to " . . . produce[] a series of inconsistent and bizarre results" that do not require the government to intervene when privacy values are at risk).

55. *See* Smith v. Maryland, 442 U.S. 735, 739-40 (1979).

toilet in a public bathroom stall to observe an individual in the adjacent stall.[56] This is because by closing the door to the stall the individual demonstrated a subjected expectation of privacy, and it is an expectation the public considers legitimate.[57] Accordingly, such police surveillance would amount to an invasion of a reasonable expectation of privacy, meaning a search.[58]

But the *Katz* doctrine was a double-edged sword, for while it expanded the scope of Fourth Amendment protections to places and things not enumerated in the text of the Amendment, it also provided a relatively clear indication of what *was not* within the scope of the Amendment's protections: namely, anything voluntarily exposed to the public.[59] And, pursuant to the second prong of the Harlan test, even some things an individual sought to keep from the public eye fell outside the scope of the Amendment's protections because a court concluded society was unwilling to recognize the expectation of privacy as legitimate.[60] Examples of the latter situation included the secret possession of illegal narcotics[61] and the activities of an individual who *unlawfully* occupied someone else's property.[62]

Until 2012, the *Katz* reasonable expectation of privacy test was generally understood as the exclusive method for assessing what qualified as a Fourth Amendment search.[63] Indeed, in the

56. United States v. White, 809 F.2d 1012, 1015 (8th Cir. 1985).

57. *Id.*

58. *Id.*

59. Katz v. United States, 389 U.S. 347, 351 (1967); United States v. White, 401 U.S. 745, 749 (1971) (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)) (" . . . for that amendment affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'"); Smith v. Maryland, 442 U.S. 735, 743-44 (1979) ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to the third parties.").

60. *White*, 401 U.S. at 749; *Smith*, 422 U.S. at 744-45; Miller v. United States, 425 U.S. 435, 442 (1976) (holding that a bank depositor has no legitimate expectation of privacy in "information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.").

61. United States v. Place, 462 U.S. 696, 706-07 (1983).

62. People v. Antwine, 809 N.W.2d 439, 443 (Mich. Ct. App. 2011).

63. Christopher Totten & James Purdon, *A Content Analysis of Post-*Jones *Federal Appellate Cases: Implications of* Jones *for Fourth Amendment Search Law*, 20 NEW CRIM. L. REV. 233, 234 (2017).

2000 Supreme Court opinion *Kyllo v. United States*,[64] none-other than Justice Scalia noted that,

> On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass . . . . *We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property* . . . .[65]

Apparently, however, Justice Scalia's assertion of a "decoupling" was overbroad, for in 2012, he would author the opinion that resurrected the *Olmstead* trespass doctrine: *United States v. Jones*.[66]

In *Jones*, police placed a GPS tracking device on the undercarriage of Jones' car so that they could track his movements over an extended period.[67] Although they had originally obtained a warrant authorizing the placement, the warrant had expired when government agents actually put the GPS on the undercarriage of the car and began surveillance.[68] Jones moved to suppress the tracking records, asserting the nature and extent of the surveillance violated the Fourth Amendment.[69] The trial court, applying the *Katz* reasonable expectation of privacy test, denied the motion except for a brief period of time when the car was in Jones' garage.[70] Jones was convicted and sentenced to life in prison.[71]

When the case reached the Supreme Court, the government argued, perhaps predictably, that neither the placement of the GPS device, nor the surveillance (with the exception of information obtained while the car was in the garage with the door closed), intruded upon Jones' reasonable expectation of privacy,

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64. Kyllo v. United States, 533 U.S. 27 (2001).
65. *Id.* at 31-32 (emphasis added).
66. United States v. Jones, 565 U.S. 400, 405 (2012).
67. *Id.* at 402-03.
68. *Id.*
69. *Id.* at 403.
70. *Id.*
71. *Jones*, 565 U.S. at 404.

and therefore never qualified as a search.[72] Justice Scalia's majority opinion acknowledged as much.[73] However, the Court then substantially recast the relationship between the *Katz* reasonable expectation of privacy doctrine and the physical trespass doctrine, with no reference to Justice Scalia's assertion in *Kyllo* that the Court had "decoupled" Fourth Amendment analysis from physical trespass.[74] Specifically, the Court noted that,

> The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." . . . . As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. *Katz* did not repudiate that understanding.[75]

Because government agents physically trespassed on Jones' car—his chattel property—to emplace the GPS device, the Court held that the government conducted a search within the meaning of the Fourth Amendment.[76] And, as reflected in the prior passage, it was irrelevant that the property was exposed to the public; the trespass on an item enumerated in the Fourth Amendment amounted to a search *per se* with no need to assess whether the government intruded upon a reasonable expectation of privacy.[77] Justice Sotomayor's concurring opinion suggested the nature of technology might necessitate reconsideration of the "exposure to the public" touchstone for assessing when an

72. *Id.* at 406.
73. *Id.*
74. *Id.* at 406-09; Kyllo v. United States, 533 U.S. 27, 32 (2001).
75. *Jones*, 565 U.S. at 406-07 (footnote omitted) (internal citation to *Kyllo* omitted).
76. *Id.* at 404.
77. *Id.* at 404-07.

individual loses an expectation of privacy.[78] But she clearly agreed with the majority conclusion that the *Katz* reasonable expectation of privacy test is a supplement to, and not a substitute for, the physical trespass doctrine. Indeed, her opinion reinforced the Court's holding when she noted:

> I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, "[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area." . . . . In this case, the Government installed a Global Positioning System (GPS) tracking device on respondent Antoine Jones' Jeep without a valid warrant and without Jones' consent, then used that device to monitor the Jeep's movements over the course of four weeks. The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection.[79]

One of the Court's justifications for resurrecting this trespass doctrine was simplicity; that unlike the circular and less predictable *Katz* reasonable expectation of privacy approach, a simple assessment of the status of the item and the existence of physical trespass would indicate a search.[80] It may indeed be quite simple to determine when government agents engage in a physical trespass.[81] But while the *Jones* opinion seems to indicate that any such trespass qualifies as a search, analysis may not actually be so simple. This is because of an additional condition indicated in an important footnote in the *Jones* opinion,[82] and a subsequent qualification established in the Court's first opportunity to apply the resurrected trespass doctrine.[83] Taken together, this may open the door to outcomes that may tend to align with the reasonable expectation of privacy assessment that the trespass doctrine was intended to supersede.

78. *Id.* at 415-16 (Sotomayor, J., concurring).
79. *Id.* at 413-14 (citation omitted).
80. *See Jones*, 565 U.S. at 404-06, 412.
81. *See id.*
82. *Id.* at 408 n.5.
83. *See infra* Part III.

II. FOOTNOTE 5 AND THE ESSENTIAL ELEMENT OF INVESTIGATORY MOTIVE?

In footnote 5 of the *Jones* opinion, the Court appears to have added an additional requirement for a physical trespass to qualify as a search: what is best understood as an investigatory motive.[84] Specifically, the Court noted that,

> The concurrence notes that post-*Katz* we have explained that "'an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation.'" . . . . That is undoubtedly true, and undoubtedly irrelevant. . . . *Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information*.[85]

That such an investigatory motive is an essential requirement for treating a "textual trespass" as a search is reflected in the Sixth Circuit's *Taylor* opinion, which concluded that, "[u]nder *Jones,* when governmental invasions *are* accompanied by physical intrusions, a search occurs when the government: (1) trespasses upon a constitutionally protected area, (2) to obtain information."[86] The court then emphasized that trespass alone was insufficient to find a Fourth Amendment search, and that, "once we determine the government has trespassed upon a constitutionally protected area, we must then determine whether the trespass was 'conjoined with . . . an attempt to find something or to obtain information.'"[87]

As the Sixth Circuit recognized, not all textual trespasses are motivated by an effort to find or discover information.[88] As a result, this investigatory motive requirement means that some physical trespasses are excluded from the scope of the *Jones* trespass doctrine because they were not the result of such a motive.[89] But this also raises a difficult question: if motive is an essential element of the *Jones* trespass test, does this mean the

84. *Jones*, 565 U.S. at 408 n.5.

85. *Id.* (second emphasis added) (citations omitted).

86. Taylor v. City of Saginaw, 922 F.3d 328, 332 (6th Cir. 2019) (citing *Jones*, 565 U.S. at 404-05).

87. *Id.* at 333.

88. *Id.* at 332-33.

89. *Id.*

subjective intent of the officer becomes dispositive? Such an approach to assessing whether police engaged in a Fourth Amendment search would be fundamentally inconsistent with the thread that runs through almost all Fourth Amendment jurisprudence: compliance with the Amendment is based on an objective standard.[90] Accordingly, what this element almost certainly requires is an objective motive assessment.[91]

This is exactly how the Sixth Circuit addressed this element in *Taylor*, concluding that:

> Neither party disputes that the City uses the chalk marks for the purpose of identifying vehicles that have been parked in the same location for a certain period of time. That information is then used by the City to issue citations. As the district court aptly noted, "[d]espite the low-tech nature of the investigative technique . . . , the chalk marks clearly provided information to Hoskins." This practice amounts to an attempt to obtain information under *Jones*.[92]

But how should this element be assessed in situations where the government does dispute the motive for the trespass, or where the motive is not nearly as objectively obvious? For example, imagine a police officer walks up to the door of a home, in response to a 911 call, picks up an item blocking the walkway, only to realize after the trespass that the item is contraband or evidence. Would such a trespass qualify as a search? Or perhaps after entering the home in response to a domestic violence call, an officer picks up a baseball bat lying on the floor simply to secure the scene and protect her safety, only to subsequently observe blood on the bat. Would that qualify as a search?

Unfortunately, what qualifies as an investigatory motive is far from clear, and *Jones* offered no criteria for assessing this question. Sheer logic suggests that most police efforts to "look" for something would result from an investigatory motive, with perhaps only incidental discovery of evidence falling outside that category of police discoveries. But what if, as in the examples above, the discovery was incidental to a broader investigatory effort? Nor did *Jones* provide any guidance on whether such an

90. United States v. Robinson, 414 U.S. 218, 235-36 (1973).
91. *See id.* at 236 n.7.
92. *Taylor*, 922 F.3d at 333.

investigatory motive must be linked to the discovery of evidence related to a criminal investigation.[93] So where should courts look for guidance to resolve this question? One logical answer would be to look to one theory of exemption from the normal warrant/probable cause requirement that predated *Jones*—the community caretaking doctrine—and one that followed close on the heels of *Jones,* the implied license exemption.[94] While there may be other situations where it is possible to conclude a trespass was not the product of an investigatory motive, these two exemption theories provide a logical starting point to better align the *Jones* holding with Justice Alito's overbreadth concern.[95]

The community caretaking doctrine treats a search as reasonable if the primary motive is to protect the public from some danger as opposed to discovery of evidence.[96] A similar rationale allows police to invoke exigent circumstances to conduct a warrantless entry of a home when they reasonably believe that some non-criminal threat endangers the occupants and the person is in need of immediate aid.[97] Accordingly, the essential distinction between these warrantless searches without probable cause and those subject to the normal warrant/probable cause requirement is the motive for the search.[98] It is logical to assume that these exceptions survive the resurrection of the

93. *See* United States v. Jones, 565 U.S. 400, 408 n.5 (2012) (Justice Scalia does not provide that the motive must be linked).

94. *See* Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (establishing an exception to the warrant requirement when a search is executed for the purpose of keeping the community safe and not motivated by a criminal investigation); Florida v. Jardines, 569 U.S. 1, 8-10 (2013) (establishing an exception to the warrant requirement when a government actor is granted an implied license to enter, depending upon the purpose for the entry).

95. *See* Fabio Arcila, Jr., *GPS Tracking Out of Fourth Amendment Dead Ends:* United States v. Jones *and the* Katz *Conundrum*, 91 N.C. L. REV. 1, 10-11, 59-62 (2012); *Cady*, 413 U.S. at 441 (noting there are times when a police officer may approach a car for purposes other than to investigate a violation of criminal statute); *Jardines*, 569 U.S. at 8 (indicating an officer may approach a front door of a home just as a visitor might do consistent with implied social license).

96. *See Cady*, 413 U.S. at 447-48 (1973) (holding that the warrantless search of an automobile impounded by police pursuant to an administrative inventory regulation was reasonable because it was standard police procedure to prevent something dangerous in the automobile from falling into the wrong hands).

97. Mincey v. Arizona, 437 U.S. 385, 392 (1978).

98. *See* Gregory T. Helding, *Stop Hammering Fourth Amendment Rights: Reshaping the Community Caretaking Exception With the Physical Intrusion Standard*, 97 MARQ. L. REV. 123, 139 (2013); *Jardines*, 569 U.S. at 10.

trespass doctrine precisely because their applicability indicates the absence of the second element of the *Jones* trespass doctrine: the investigatory motive. Indeed, in *Taylor*, although rejected by the Sixth Circuit, the government invoked the community caretaking doctrine in an effort to exempt tire chalking from a *Jones* trespass.[99] According to the court:

> Taylor argues that the search was unreasonable because the City fails to establish an exception to the warrant requirement. Specifically, Taylor argues that the search at issue is not covered by the community caretaker exception and that the City fails to establish that any other exception applies to their warrantless search. The City responds that, even if chalking is a search under *Jones,* the search was reasonable because there is a reduced expectation of privacy in an automobile. The City further contends that the search was subject to the community caretaker exception. We disagree with the City.[100]

The opinion suggests that *if* the government had been able to persuade the Sixth Circuit Court that the chalking was in fact an exercise of community caretaking, it would have been treated as reasonable.[101] But if that reasonableness turns on the conclusion that the police were not motivated by a desire to discover information or evidence related to criminal activity, then perhaps the better approach is to simply treat such trespass as falling outside the scope of a trespass search.

The community caretaking exception is based primarily on the Supreme Court's decision in *Cady v. Dombrowski*.[102] That case involved the inventory search of a vehicle impounded by police after it was involved in an accident.[103] The vehicle was owned by a police officer, and the specific motivation for the search of the vehicle was to ensure that the officer's service revolver was not left unsecured.[104] The Court concluded the warrantless search of the vehicle was reasonable and that bloody items found in the trunk while the officer was looking for a

99. Taylor v. City of Saginaw, 922 F.3d 328, 331 (6th Cir. 2019).
100. *Id.* at 333-34.
101. *Id.* at 336.
102. *Id.* at 335; Cady v. Dombrowski, 413 U.S. 433, 441 (1973).
103. *Cady*, 413 U.S. at 435-437.
104. *Id.*

service revolver were therefore admissible against Dombrowski when he was subsequently tried for the murder of his brother.[105] According to the Court, "[l]ocal police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what . . . may be described as community caretaking functions . . . ."[106] This indicates that when exercising a community caretaking function, compliance with the Fourth Amendment is assessed pursuant to a more flexible test for reasonableness; and that a public safety motivation for the search is what distinguishes an 'evidence' search from a community caretaking search.[107]

Cady's more flexible test for assessing reasonableness and the accordant compliance with the Fourth Amendment is, of course, predicated on the assumption that the police action qualified as a search.[108] Nothing in the opinion suggested that a community caretaking motive indicated that there was no search.[109] But *Jones* seems to open the door to questioning this underlying assumption.[110] By making an investigatory motive an essential element for a trespass to qualify as a search, might a community caretaking motive fall outside the scope of that definition? This would seem to be a logical interpretation of *Jones* if what the Court meant was that police must be motivated to find evidence, or something related to a criminal investigation. In contrast, a broad reading of *Jones* would result in the conclusion that an investigatory motive is established whenever police are looking for *something*, even when they are not doing so as part of a criminal investigation.

It is clear that the community caretaking doctrine impacts the assessment of reasonableness, not whether police engage in a search,[111] which makes it notable that *Jones* made no reference to

105. *Id.* at 449-50.
106. *Id.* at 441.
107. *Taylor*, 922 F.3d at 335.
108. *See Cady*, 413 U.S. at 439, 442.
109. *Id.* at 441-42, 446-48.
110. *See* United States v. Jones, 565 U.S. 400, 408 n.5 (2012).
111. *See Cady*, 413 U.S. at 433 (basing the decision on whether or not the search was reasonable, rather than being based on if there was a search); *Jones*, 565 U.S. at 400 (basing the decision on whether or not a search had occurred).

Cady or the community caretaking doctrine.[112] This suggests that the *Jones* Court did not perceive its opinion as altering that doctrine,[113] but also supports the assumption that such searches were conducted pursuant to 'investigatory motive'. This same assumption would also reach the emergency aid exception, as invocation of that exception is predicated on a reasonable belief that someone is in danger.[114] Thus, both situations police will always be looking for *something*, albeit not evidence of a crime.

But it is significant that such a broad interpretation of investigatory motive will inevitably expand the range of police actions that qualify as searches within the meaning of the *Jones* trespass doctrine.[115] As a result, *Jones* may have set the conditions for an accordant expansion of the underlying rationale of the community caretaking and emergency aid exceptions and adoption of an accordant more flexible assessment of reasonableness.[116] In other words, the overbreadth central to Justice Alito's concern in *Jones* may inevitably be offset by a broadening of situations where warrantless trespass searches are assessed by balancing the nature of the trespass with the weight of the government interest.[117] Expanding this balancing approach to assessing Fourth Amendment compliance seems most logical when the "something" police are looking for is minimally related to a *criminal* investigatory motive.[118]

Assessing compliance with the Fourth Amendment for searches motivated by an interest other than general crime control pursuant to a flexible test of reasonableness has been a feature of Fourth Amendment doctrine since the Supreme Court's decision in *Camara v. Municipal Court*.[119] That decision held that such "administrative searches" fall within the Amendment's scope, but

112. *See* United States v. Jones, 565 U.S. 400 (2012).

113. *See Jones*, 565 U.S. at 400 (basing the decision on whether or not a search had occurred); *Cady*, 413 U.S. at 433.

114. Helding, *supra* note 101, at 135.

115. *See id.* at 163-64.

116. *See id.* at 134.

117. *See Jones*, 565 U.S. at 424-25 (Alito, J., concurring); Arcila, *supra* note 98, at 67; *see also* Camara v. Mun. Court, 387 U.S. 523, 534-35 (1967) (applying a balancing test to determine if a warrantless administrative search was proper).

118. *See* Arcila, *supra* note 98, at 67-68.

119. *See Camara*, 387 U.S. at 534-35 (1967).

because of the motives for the search do not require a warrant based on probable cause to be reasonable.[120] Instead, *Camara*[121] and its progeny allow for a balancing of individual and government interests in assessing what qualifies as reasonable in this context.[122] But like the community caretaking exception, *Jones* opens the door to arguments that a non-criminal investigatory motive for administrative searches fall outside the scope of the trespass doctrine, ostensibly qualified by footnote 5 of that opinion.[123]

If an investigatory motive is relevant exclusively to the assessment of what qualifies as a search, then arguably coupling a textual trespass with an effort to find *anything* produces a binary outcome.[124] As a result, the investigatory motive element of *Jones* would dictate characterizing the activity as a search, but would play no role in assessing the reasonableness of the search.[125] However, *Jones* may have produced an ironic effect: the need to place greater emphasis on the *nature* of the investigatory motive in order to offset an illogical textual trespass overbreadth.[126] Why would this be ironic? Because in seeking to simplify the assessment of what qualifies as a search, *Jones* has arguably necessitated expansion of the type of searches falling outside the scope of the normal warrant/probable cause requirement but instead subject to a balancing test assessment of reasonableness that defined the *Katz* search assessment the Court relegated to a secondary role.[127]

As Justice Alito's concurring opinion in *Jones* warned, characterizing a trivial trespass as a search even where police act pursuant to a criminal investigatory motive risks illogical

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120. *Id*.

121. *Id*. at 538-39.

122. *See* New York v. Burger, 482 U.S. 691, 702 (1987); Donovan v. Dewey, 452 U.S. 594, 601-03 (1981); United States v. Biswell, 406 U.S. 311, 316 (1972).

123. *See* United States v. Jones, 565 U.S. 400, 408 n.5 (2012).

124. *See* Gerald S. Reamey, *Constitutional Shapeshifting: Giving the Fourth Amendment Substance in the Technology Driven World of Criminal Investigation*, 14 STAN. J. C.R. & C.L. 201, 230-31 (2018).

125. *Id.* at 234, 240.

126. *See Jones*, 565 U.S. at 412-13.

127. *See* Reamey, *supra* note 125, at 235-36 (explaining that *Jones* complicated what the *Katz* test could have resolved).

results.[128] Indeed, tire chalking seems like an ideal example of this concern. Of course, the overbreadth that triggered Justice Alito's concern resulted not simply from treating the trespass as a search, but from the accordant exclusion of the evidence discovered as a result of the trespass.[129] Where the motive for the trespass is unrelated to a criminal investigatory interest, this overbreadth seems even more apparent. However, if nature of the investigatory motive were considered not to only to assess whether the trespass was a search, but also whether the search was reasonable under the objective circumstances, it would produce a different exclusionary result where what the "something" police were looking for was unrelated to a criminal investigation.[130] This would allow the government to use evidence discovered as the result of such a trespass precisely because the objective facts indicated that police were not seeking to discover that evidence.[131]

Consider the example of individuals compelled to live in a transient tent encampment. Whether searching such tents—whether to prevent misuse of government property or to check on the health of the occupants—falls within the scope of one of the established exceptions to the warrant and probable cause requirements is unclear. A restrictive reading of those exceptions would suggest such a search should be assessed no differently than a search related to a criminal investigation.[132] But if the motive for such a search is objectively unrelated to the discovery of evidence, it would support a more expansive application of these exceptions and the balancing of interests upon which they are based.[133] As a result, *Jones* would dictate that the trespass on the tent qualifies as a search, but any contraband discovered as a result would fall outside the scope of the exclusionary rule.[134]

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128. *Jones*, 565 U.S. at 424-425 (Alito, J., concurring).

129. *Id.*

130. *See* Reamey, *supra* note 125, at 229-30.

131. *Id*. at 240.

132. *See* Frank v. Maryland, 359 U.S. 360, 371-72 (1959); *see also* Carrie Leonetti, *Motive and Suspicion:* Florida v. Jardines *and the Constitutional Right to Protection from Suspicionless Dragnet Investigations*, 14 OHIO ST. J. CRIM. L. 247, 250 n.16. (2016).

133. *See* Leonetti, *supra* note 133, at 250 n.16.

134. U.S. v. Jones, 565 U.S. 400, 404 (2012).

Nor would a focus on the trespass motive necessarily conflict with the Court's consistent rejection of focusing on an officer's subjective state of mind when assessing Fourth Amendment compliance.[135] Motive may very well be a subjective concept, but as in other contexts of the Fourth Amendment, it is always been assessed objectively.[136] Implicit in *Jones* is the assumption that courts will assess the existence of an investigatory motive by considering the objective facts and circumstances.[137] There is no reason why that assessment cannot include not only whether police were looking for "something," but also why they were looking. Indeed, this type of objective assessment of motive is already central to the applicability of the community caretaking and administrative search exceptions.[138]

Ultimately, it is unlikely the Court would endorse limiting the *Jones* trespass search to only those trespasses coupled with a *criminal* investigatory motive.[139] What seems more likely is the Court's willingness to accept an expansion of the balancing approach central to the community caretaking and administrative search doctrines to assess compliance with the Fourth Amendment where the police trespass is motivated by a non-criminal investigatory motive.[140] Nonetheless, the Court's emphasis in footnote 5[141] on the investigatory motive should be clarified in the context of the existing non-criminal search jurisprudence.

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135. Whren v. United States, 517 U.S. 806, 813 (1996); Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011).

136. *See* Reamey, *supra* note 125, at 228-29.

137. *See Jones*, 565 U.S. at 407-08.

138. *Whren*, 517 U.S. at 813 ("Subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis"); s*ee* Brendlin v. California, 551 U.S. 249, 260 (2007) (discussing how the California State Supreme Court shifted the objectively manifested intent of an officer during a traffic stop to a subjective intent test, which the Supreme Court has repeatedly rejected attempts of introductions of subjectivity into Fourth Amendment analysis); *see* Ohio v. Robinette, 519 U.S. 33, 38 (1996) (following *Whren* in determining the legal justifications for a police officer's actions do not invalidate the action taken so long as the circumstances, when viewed objectively, justify the action taken).

139. *See Jones*, 565 U.S. at 408 n.5 (the majority does not limits that it must be a *criminal* investigatory motive, but merely a motive to find something).

140. *See* Reamey, *supra* note 125, at 230.

141. *Jones,* 565 U.S. at 408 n.5.

III. COULD "IMPLIED LICENSE" EXTEND TO CHATTEL EFFECTS?

Shortly after the resurrection of the trespass doctrine resulting from the Court's decision in *Jones* the Supreme Court decided *Florida v. Jardines*.[142] In that case, police suspected Jardines of growing marijuana in his home.[143] As part of the investigation, police brought a dog trained to detect narcotics onto Jardines' front porch.[144] According to the opinion,

> As the dog approached Jardines' front porch, he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor. As Detective Bartelt explained, the dog "began tracking that airborne odor by . . . tracking back and forth," engaging in what is called "bracketing," "back and forth, back and forth." . . . . Detective Bartelt gave the dog "the full six feet of the leash plus whatever safe distance [he could] give him" to do this—he testified that he needed to give the dog "as much distance as I can." . . . . After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.[145]

Based on this alert, police obtained a warrant to search the home, which resulted in the discovery and seizure of marijuana plants.[146]

Building on *Jones*, the outcome of the case seemed deceptively simple: because a police officer trespassed on the suspect's home with an investigatory motive, it was an obvious search.[147] Indeed, the Supreme Court held as such.[148] And, because there was no lawful justification for doing so, the fruit that ultimately grew from that "poison tree"—the narcotics

142. *Florida v. Jardines*, 569 U.S. 1 (2013).
143. *Id.* at 3.
144. *Id.* at 3-4.
145. *Id.* at 4.
146. *Id.*
147. *Jardines*, 569 U.S. at 5-6.
148. *Id.* at 11.

discovered pursuant to the warrant—was inadmissible.[149] However, the Court introduced a new component to the *Jones* trespass analysis: the potential impact of police acting within the scope of express or implied social license.[150] While ultimately rejecting the Government's argument that this is what actually occurred, the decision created the first qualification to Jones: a trespass will not qualify as a search when police act within the scope of such social license.[151]

This issue arose in response to the assertion that the officer who brought the dog to Jardines' porch did nothing more than any other neighbor might do when he entered the curtilage and went to the front porch.[152] Accordingly, the Court noted that, "[s]ince the officers' investigation took place in a constitutionally protected area, we turn to the question [of] whether it was accomplished through an unlicensed physical intrusion."[153] This emphasis on the "unlicensed" physical intrusion seems to indicate an exception to the *Jones* trespass rule: a trespass will not qualify as a Fourth Amendment search if it is within the scope of customary license.[154] More specifically, the Court noted that,

> As it is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not. "A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." . . . . We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." . . . . This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally

149. *See id.* at 11-12.
150. Id. at 8-10.
151. *Id.* at 9-10.
152. *Jardines* 569 U.S. at 8.
153. *Id.* at 7.
154. *Id.* at 7-8.

> managed without incident by the Nation's Girl Scouts and trick-or-treaters.[155]

As noted above, this qualification to the trespass doctrine proved of no value to the Government as the Court concluded the police officer exceeded the scope of the implied license to approach the home.[156] According to the Court, the officer did much more than what any other neighbor might do when he lingered on the porch and allowed his dog to dart back and forth in search of a scent.[157] Nonetheless, by addressing this issue the Court created a new question: what exactly is a social license and when will it provide an exception to the *Jones* trespass doctrine?[158]

It may be that this license exception to the *Jones* trespass doctrine is strictly limited to allow police to approach the front door of a home, announce their presence, and wait a brief time for the occupant to respond.[159] But it seems noteworthy that the Court began its analysis by indicating that the habits of the country may imply such license.[160] Of course the "habit" the Court emphasized in *Jardines* was the habit of approaching the front door to ring the bell.[161] But if the key question is societal "habit" that implicitly tolerates a limited trespass, it could extend well beyond the facts of *Jardines*.[162]

Extending this notion of license beyond the facts of *Jardines* might enable the government to assert that some trespasses against an individual's effects fall within the scope of an implied license exception.[163] But, ironically, this might also inject the same type of "legitimate expectation of privacy" analysis into the search equation that *Jones* ostensibly superseded. This is because the license could prove to be a proverbial back door to concluding society tolerates the trespass because the individual exposed the

155. *Id.* at 8 (internal citations omitted).
156. *Id.* at 5-6.
157. *Jardines,* 569 U.S. at 9-10.
158. *See id.* at 8.
159. *See id.*
160. *Id.*
161. *See id.*
162. *See Jardines*, 569 U.S. at 8-9.
163. *See id.* at 9 nn.3-4; s*ee id.* at 19, 21 (Alito, J., dissenting).

thing to routine and acceptable trespass.[164] For example, in the *Jardines* case, had the officer confined his activity to the limits of the implied license discussed by the Court, the fact that the officer did no more than any other citizen was "licensed" to do would have exempted the trespass from the Fourth Amendment.[165] This conclusion would have been predicated on the determination that the homeowner exposed the path to the front door of the home to any other member of the public, so long as the purpose was to ring the bell and wait a reasonable time for a response.[166] While not framed in terms of expectations of privacy, it is interesting that this conclusion would turn on an analysis similar to that applied to determine when an expectation of privacy is or is not one society recognizes as legitimate.[167]

This implied license concept may extend to other situations where police do in fact physically trespass on an individual's effects, perhaps even where the police act pursuant to an investigatory motive.[168] Imagine instead of squatting on public property, a homeowner awakes one morning to see an uninvited tent erected in her backyard. Police arrive and the property owner gives consent for them to check the tent and investigate why someone is trespassing on their property. In so doing, the officer, after opening the tent, finds contraband inside in plain view. Can the occupant of the tent—the individual who trespassed to pitch the tent—assert that by physically touching his tent with an investigatory motive police committed a *Jones* trespass, subjecting the contraband to Fourth Amendment based exclusion? Such an assertion seems absurd; one that would certainly fail under pre-*Jones* reasonable expectation of privacy analysis. But because *Jones* indicates that the reasonable expectation of privacy test is secondary to the textual trespass test,

164. *See Jardines*, 569 U.S. at 21 (Alito, J., dissenting).

165. *Id*. at 9 (majority opinion) (holding that a citizen is implied to have license to merely knock on the front door but does not have license to "introduc[e] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence[,]" nor "explor[e] the front path with a metal detector, or march[] his bloodhound into the garden before saying hello and asking permission . . . .").

166. *See id.* at 8; *see id.* at 17 (Alito, J., dissenting).

167. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); United States v. White, 401 U.S. 745, 751-52 (1971).

168. *See Jardines,* 569 U.S. at 21 (Alito, J., dissenting).

it suggests that this analysis may not be invoked to negate or dilute the textual minimum that led to the resurrection of that trespass doctrine.

But, might an implied social license provide an alternative rationale for excluding such a physical trespass from the definition of a search? Did the officer act within the scope of such a license based on the trespass to the homeowner's property and the subsequent request for assistance? Unless the concept of social license were extended to such a situation it is difficult to see how the physical trespass to the tent would not be a search within the meaning of *Jones*.

Or, consider how an implied license might influence the assessment of the police activity addressed in *Bond v. United States*.[169] In that case, the Supreme Court, applying the reasonable expectation of privacy test, held that the physical *manipulation* of a bus passenger's bag placed on the overhead storage shelf constituted a Fourth Amendment search.[170] The Government argued that by placing the bag on the overhead shelf, the passenger exposed it to public view and therefore had no legitimate expectation of privacy protecting the bag from police touching.[171] The Court rejected this argument, noting that there is a material difference between visual observation (suggesting just looking at the bag would not have been a search) and the tactile inspection engaged in by the police officer.[172]

The Court's analysis in *Bond* seems aligned with *Jones*: it was the physical touching of the chattel property, coupled with an investigatory motive, that crossed the line from a non-search visual observation to a Fourth Amendment search.[173] However, according to the opinion, "petitioner concedes that, by placing his bag in the overhead compartment, he could expect that it would

169. Bond v. United States, 529 U.S. 334 (2000); *see generally* Jason W. Eldridge, *The Fourth Amendment: The Privacy of Overhead Luggage Compartments on Commercial Buses*, 27 WM. MICHELL L. R. 2003, 2023-30 (2001) (discussing the *Bond* decision and the lack of criteria for determining a reasonable expectation of privacy for luggage in overhead compartments).

170. *Bond*, 529 U.S. at 339.

171. *Id*. at 337.

172. *Id*. at 337-38.

173. *Id*. at 337-39.

be exposed to certain kinds of touching and handling."[174] The Court then noted,

> When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. [175]

Accordingly, it was not the touching *per se* that constituted the search, but instead a touching that extended to tactile manipulation that exceeded the expectation common to passengers who place bags in such a location.[176]

Nothing in the *Bond* Court's discussion focused on whether police touching would have been incidental or pursuant to an investigatory motive.[177] Instead, the key consideration seems to have been whether the touching was or was not consistent with what the passenger would expect any other passenger to do while moving or adjusting the bag.[178] But *Jones* suggests this distinction in the nature of the touching is now irrelevant.[179] In contrast, *Jardines* may dictate an outcome aligned with *Bond* when assessing whether such a touching qualifies as a search by analyzing whether the nature or extent of the touching fell within the scope of social license, even assuming an investigatory motive.[180] When a passenger places a bag on an overhead shelf on a bus, it is implicitly understood that other passengers may touch it to move it.[181] Of course, there is no analogous implication that other passengers may manipulate it to search the contours of its contents, and hence what the officer did in *Bond* would not fall within the scope of a limited social license.[182] But if all the officer does is touch the bag to move it, and as a result

174. *Id*. at 338.
175. *Bond*, 529 U.S. at 338-39.
176. *See id.*
177. *See Bond*, 529 U.S. at 338-39.
178. *See id.*
179. *See* United States v. Jones, 565 U.S. 400, 404-05, 409-10 (2012).
180. Florida v. Jardines, 569 U.S. 1, 9 (2013).
181. *Bond*, 529 U.S. at 338.
182. *Id.* at 338-39.

detects the presence of contraband, where would this detection fall within the *Jones/Jardines* continuum?

This raises an important post-*Jardines* question: may an officer engage in such a physical trespass without implicating the Fourth Amendment? Interestingly, the answer to this question may itself implicate the officer's motive. In the *Bond* context, this motive to discover evidence no matter the nature or extent of the touching may itself indicate the trespass is inconsistent with the social license applicable to other passengers; while they may touch a bag to move it, they are not doing so in the hopes of discovering something.[183] But the same could have been said for the hypothetical officer in the *Jardines* analysis who did nothing more than enter upon the curtilage to approach the front door and ring the bell consistent with implied license as nothing in the Court's discussion of such action turned on the motive for the police action.[184]

Unfortunately, *Jardines* fails to provide clear guidance on whether an investigatory motive negates the applicability of the implied social license exemption.[185] At one point in the opinion, the Court, citing *Kentucky v. King*, notes that, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'"[186] Ostensibly the officer is approaching and knocking because she seeks to investigate *something*.[187] This suggests that even when acting pursuant to an investigatory motive, an officer acting within the scope of implied social license *is not* engaged in a *Jones* trespass search.[188] However, later in the opinion the Court seems to indicate a contrary conclusion when it notes,

> [t]he scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a

183. *See id; see Jardines,* 569 U.S. at 9.
184. *See Jardines*, 569 U.S. at 8.
185. *See id.* at 10.
186. *Id.* at 8; Kentucky v. King, 563 U.S. 452, 469 (2011).
187. *Jardines*, 569 U.S. at 22 (Alito, J. dissenting).
188. *See Jardines*, 569 U.S. at 9; *King*, 563 U.S. at 469.

> visitor to the front door do not invite him there to conduct a search.[189]

Thus, the motive for the trespass does seem central to assessing whether an officer is acting within the scope of implied social license, suggesting that the mere fact that a trespass is consistent with how other members of society might trespass is not dispositive on the question of whether the trespass is or is not exempted from the *Jones* doctrine.[190] If an investigatory motive negates the implied license exemption, then any trespass no matter how trivial would qualify as a search.[191]

But even this aspect of the opinion creates uncertainty because it is not clear what the Court means with the phrase "to conduct a search."[192] The facts of *Jardines* and the examples the Court provides (using a metal detector along the path to the front door or allowing a bloodhound to run through the flower bed adjacent to the front door[193]) suggest an effort to discover evidence. Would this "motive" based nullification of social license apply when police were looking for something unrelated to a criminal investigation? For example, what about the police in Boston going door to door in response to the Boston Marathon bombing? Clearly these officers were looking for *something*—the bombers or other related evidence; but they were not looking for evidence related to crimes committed by the homeowners.[194] Imagine a homeowner opens the door and an officer observes contraband unrelated to the bombings; detains the homeowner while she obtains a warrant; and then seizes the evidence. Will that evidence then be subject to exclusion as the result of a *Jones* trespass or will the social license exception apply?

If implied social licenses are nullified only by a criminal investigatory motive, the *Jardines* decision might also be relevant to the legality of police inspections of indigent tent encampments. Might a court determine that police may act within implied

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189. *Jardines*, 569 U.S. at 9.

190. *See id.* at 8-9; Bond v. United States, 529 U.S. 334, 338 (2000).

191. *See Jardines*, 569 U.S. at 8-9.

192. *Id*. at 9.

193. *Id.*

194. Katy Waldman, *Can the Police Search My Home for a Bomber?*, SLATE (Apr. 19, 2013), [https://perma.cc/9T27-S6QN].

license to physically trespass on an individual's chattel property located in such an encampment? Even if individuals reside in these tents, it is unlikely that the area immediately surrounding the tent would qualify as the curtilage of a home, especially where the tent is pitched on public property not designated for such use.[195] As a result, police need not refrain from inspecting these public areas merely because individuals pitch their makeshift homesites on them.[196] Furthermore, as the Court emphasized in *Jardines*, there is no requirement that police shield their eyes[197] from that which is observable from such vantage point. Accordingly, any information that becomes apparent to an officer while moving in and about such a homeless encampment would not be acquired as the result of a Fourth Amendment search.

What becomes more problematic, however, is whether police may look *inside* the tents or other makeshift shelters, or whether they may remove the property from the public area. Either action would require a physical trespass to an individual's effects. From the citizen's perspective, such action would certainly qualify as a trespass on "effects" the moment the officer crossed the line from visual observation to physically touching.[198] But would such physical trespass fall within the scope of social license allowing police to maintain the integrity of public property?[199] If the issue of license relates to the implied authority of other residents, without consent, to enter someone else's tent, the assertion would almost certainly fail.[200] Indeed, one of the reasons individuals erect tents is to establish some level of privacy from others located in the same area.

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195. *Jardines*, 569 U.S. at 6 (defining the curtilage as "the area 'immediately surrounding and associated with the home" which is part of the home itself for purposes of the Fourth Amendment); Oliver v. United States, 466 U.S. 170, 180-81 (1984) (distinguishing that only the curtilage, not neighboring open fields, warrants Fourth Amendment protections that attach to the home).

196. *See* Doyle Baker, Annotation, *Search and seizure: reasonable expectation of privacy in tent or campsite*, 66 A.L.R.5th 373, § 4 (1999).

197. *Jardines*, 569 U.S. at 7.

198. United States v. Jones, 565 U.S. 400, 404-05 (2012).

199. Baker, *supra* note 197; People v. Thomas, 45 Cal. Rptr. 2d 610, 613 (Cal. Ct. App. 1995).

200. *See generally* Carrie Leonetti, *The Wild, Wild West: The Right of the Unhoused to Privacy in Their Encampments*, 56 AM. CRIM. L. REV. 399 (2019).

This hypothetical raises the complicated question of whether government agents act within the scope of implied license when inspecting public areas, especially when those areas are not intended for temporary residential use? And because such police action may be motivated by a community caretaking function, the question of implied license becomes even more complex *if* motive contributes to the assessment of such license. Certainly, securing the public from risks in public spaces is a central function of law enforcement agents.[201] And, but-for the erection of these tents, there would be no restriction on the activities of such agents to inspect such areas. Thus, if such license exists, it is not the product of implied consent from the occupant of the tent, but instead from the scope of traditional government authority to ensure the safety of public spaces.[202]

There is very little in the way of jurisprudence indicating the parameters of such an implied license theory.[203] Nonetheless, extending the *Jardines* implied license exception to such situations might produce a more rational balance of interests.[204] This is especially true when the primary motive for the trespass is objectively unrelated to a criminal investigation and where the scope of any trespass is limited to a cursory observation to rule public safety risk.[205] For example, imagine an officer seeking to check on the health of individuals in such an encampment during an unusual cold spell in Houston. Unlike residents of most northern communities, Houston's indigent population is generally poorly equipped to contend with below freezing temperatures.[206] Is a police officer checking on the condition of tent occupants conducting a Fourth Amendment search? Or is she acting within

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201. Mary Elisabeth Naumann, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325, 326 (1999).

202. *Id*. at 339-40; *see* Cady v. Dombrowski, 413 U.S. 433, 447 (1973).

203. Florida v. Jardines, 569 U.S. 1, 8 (2013) (quoting McKee v. Gratz, 260 U.S. 127, 136 (1922) ("A license may be implied by the habits of the country."")). *But see* Oliver v. United States, 466 U.S. 170, 180 (1984) (relying on *Hester* for the implied licenses rule but appeared to be more about "open fields" than the conditions producing an implied license).

204. *See supra* Part II.

205. Castagna v. Jean, 955 F.3d 211, 220-21 (1st Cir. 2020).

206. Davis Land, *As Cold Weather Continues, Advocates Keep Homeless In Mind*, HOUSTON PUBLIC MEDIA (Nov. 14, 2018), [https://perma.cc/8RD6-2S9T].

the scope of implied license to ensure the safety of individuals in public areas?

The answer to this question would be decisive in assessing whether contraband *incidentally* discovered during such a 'check' would be admissible or subject to Fourth Amendment based exclusion.[207] Of course, as noted above, treating such an inspection as a search would be the first step in assessing admissibility, and the community caretaking exception might then apply to render the search reasonable.[208] But this predicate question of search is obviously important in order to decide whether such an exception is even required. Still, even assuming *arguendo* that social license might exempt such inspections from the scope of the *Jones* trespass doctrine, it provides only a limited answer to the question posed herein. This is because it would only apply to those situations where the police officer's primary motive is distinct from discovery of evidence or contraband.[209] And, as noted above, that alone may be sufficient to exclude such inspections from the trespass doctrine.[210] But what if police do seek to discover evidence or contraband?

IV. THE UNREASONABLE CONSEQUENCE OF AN UNRESTRICTED TRESPASS DOCTRINE

The *Jones* decision is overt in foreclosing the relevance of expectations of privacy in relation to police activity that qualifies as a textual Fourth Amendment trespass. But is this outcome logical when an individual places chattel property in a location

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207. *See* MIL. R. EVID. 313(a); Of course, the interests of good order and discipline that impact that exclusion of such inspections from the search category are absent in the homeless area context. But the expectation that government actors take measures to ensure health and safety in each respective context is analogous. In the military context, these inspections are not treated as searches for Fourth Amendment purposes (unless certain considerations suggest the inspection was a subterfuge for a probable cause search). As a result, any contraband that comes into plain view during the course of such an inspection is considered admissible evidence in a subsequent disciplinary proceeding, including trial by court-martial. *See* MIL. R. EVID. 316(c).

208. *See* Megan Pauline Marinos, *Breaking and Entering or Community Caretaking? A Solution to the Overbroad Expansion of the Inventory Search*, 22 GEO. MASON U. CIV. RTS. L. J. 249, 289-90 (2012).

209. *See* United States v. Jones, 565 U.S. 400, 408 n.5 (2012).

210. *See supra* notes 85-104 and accompanying text.

where it seems objectively unreasonable to expect that the property is immune from such physical trespass? Is it reasonable to vest such property with Fourth Amendment protection based solely on the fact that it qualifies as a personal effect? Or might the inherent unreasonableness of the privacy expectation translate into a conclusion that police may act within implied license to trespass on the chattel property?

While perhaps purely theoretical, it is nonetheless interesting to consider how the Court's decision resurrecting the trespass doctrine seems to have been influenced by a perceived perversion of the reasonable expectation of privacy rational: the Court seemed to believe that a test adopted to *expand* protection from government surveillance actually evolved to *deny* protection provided by the Fourth Amendment's text.[211] Indeed, this was precisely the theory relied on by the Government in that case: because neither the placement of the GPS device on Jones' car nor tracking his movements intruded upon a reasonable expectation of privacy, the government asserted it did not qualify as a search.[212] The Court categorically rejected this argument, concluding that the physical trespass on his "effect" was a search.[213] And, by characterizing the reasonable expectation of privacy doctrine as a *supplement*, and not a *substitute*[214] for the textual protections of the Amendment, the Court emphasized what it perceived was illogic: allowing the reasonable expectation test to open the door to conduct that runs afoul of the Amendment's text.[215]

But did *Jones* create its own illogic by providing protection against physical trespass of effects in situations where that protection seems objectively unjustified? More specifically, is it logical to subject police to the requirements of the Fourth Amendment when a physical trespass on an effect can, in no credible way, appear to invade a privacy expectation society would view as unacceptable? For example, is it logical to impose Fourth Amendment constraints on police when the trespass is

211. *See Jones*, 565 U.S. at 406, 410-12.
212. *Id*. at 406, 410, 412.
213. *Id.* at 404.
214. *Id*. at 409.
215. *See id.* at 411 n.8.

consistent with the type of trespass any other member of the public might commit? Ideally the *Jardines* license concept[216] will evolve to provide a solution to this potential overbreadth, which might also align with Justice Alito's concerns that treating a trivial physical trespass to chattel property as a search, even if it reveals nothing.[217]

Using the example of the trespasser who pitches his tent on someone else's property, the illogic of treating a physical investigatory trespass on the tent as a search because an officer touches the trespasser's effect seems self-evident. Pursuant to the *Jones* trespass doctrine, the occupant of that tent may now assert Fourth Amendment protection, as may others whose chattel property is located in areas where there is really no reasonable justification to expect a privacy interest.[218] And even assuming the officer is responding to a criminal trespass of the homeowner's property, treating the touching of the tent as a search would mean the officer's conduct is presumptively unreasonable, absent a warrant.[219] In contrast, this illogical extension of the requirements of the Fourth Amendment would have been easily dispensed with, pursuant to the reasonable expectation of privacy test.[220] But according to *Jones*, this test becomes irrelevant the moment a trespass occurs on an individual's chattel property.[221] Perhaps the *Jardines* license concept[222] will evolve to align the trespass doctrine with inherent logic. At least such an evolution seems warranted by Justice Alito's concerns about treating

It is of course unremarkable that the Fourth Amendment limits law enforcement efforts to investigate crime and gather evidence; an inherent consequence of the Amendment from inception.[223] But that consequence, and the exclusionary rule

216. Florida v. Jardines, 569 U.S. 1, 8-9 (2013).
217. *Id*. at 18 (Alito, J., dissenting).
218. *See Jones*, 565 U.S. at 411 (the officer would be touching the person's effect).
219. *Id*. at 414 (Sotomayor, J., concurring).
220. *Id*. at 427 (Alito, J., concurring).
221. *Id.* at 406-07 (majority opinion).
222. Florida v. Jardines, 569 U.S. 1, 8-9 (2013).
223. United States v. Leon, 468 U.S. 897, 933 n.4 (1984) (Brennan, J., dissenting).

created to ensure police compliance with the Amendment,[224] has always been justified by the assumption that the liberty or privacy interest of the citizen outweighed the public's interest in efficient law enforcement. By extending the trespass doctrine to *any* textual trespass whenever motivated by an interest of finding *something*, the doctrine risks becoming attenuated from this rationale.[225]

While *Jones* forecloses the possibility that the inherent unreasonableness of a privacy expectation should qualify the trespass doctrine. Yet it is ironic that if the *Jardines* implied license concept is expanded to apply to other situations, courts may be thrust into the same type of "expectation" assessment when seeking to assess the existence and scope of such license.[226] Indeed, this reasoning was inherent in the *Jardines* Court's conclusion that there is no 'reason' to expect police will be restricted from approaching one's front door to ring the bell because such activity falls within the scope of implied license. This conclusion was based on the Court's assessment that an average member of the public implicitly consents to such activity, which in a sense is a backdoor determination that no person would consider such conduct an unreasonable invasion of privacy.[227] In other words, assessment of implied social license may turn on an underlying assessment of the reasonableness of expecting other members of the public to do exactly what the police did, which certainly seems reminiscent of the expectation of privacy analysis.[228]

Still, it is important to recognize that even if the *Jardines* implied license exception to the *Jones* trespass doctrine were to extend to other contexts, the burdens associated with any Fourth Amendment based litigation be materially different than the traditional expectation of privacy analysis. Unlike the traditional *Katz* test, a defendant objecting to government surveillance would

224. *Id.* at 918-19 (majority opinion); Herring v. United States, 555 U.S. 135, 139-42 (2009) (". . . [t]he exclusionary rule was crafted to curb police rather than judicial misconduct"); Mapp v. Ohio, 367 U.S. 643, 656 (1961).

225. *Jones*, 565 U.S. at 404-05, 408 n.5.

226. Florida v. Jardines, 569 U.S. 1, 8-9 n.2 (2013).

227. *See id.*

228. *Id.*

have no burden to establish a reasonable expectation of privacy.[229] Instead, pursuant to *Jones*, *any* investigatory trespass directed against a textually protected interest would *presumptively* qualify as a Fourth Amendment search.[230] Once that trespass is established, the government would then bear the burden of establishing that the trespass fell within the scope of an express or implied social license.[231] While the existence of such license might be supported by evidence that few would expect the item to be immune from trespass (like a bag in a bus or airplane overhead), situations to which this social license theory would apply would ostensibly be far more limited than those in which there is no reasonable expectation of privacy.[232] This is because merely exposing an item to public view would in no way justify the conclusion of such a license. Thus, the government would bear the burden of proving far more than the ability of any other member of the public to observe the item; they would have to prove that other members of the public were implicitly authorized to *physically trespass* on the effect in the same manner as did the government agent.[233] As the Court's decision in *Bond* indicates, even when assessing the reasonableness of an expectation of privacy, this is not easily satisfied.[234]

The impact of such a qualification to the *Jones* trespass doctrine would concededly be limited mainly to an individual's effects, and only when those effects were held out in a manner clearly within the scope of an implied license allowing limited trespass.[235] This is because it is almost inconceivable that the

229. *See id.* at 8.

230. *Jones*, 565 U.S. at 404-05.

231. *See Jardines*, 569 U.S. at 8-9.

232. *See id.*; Bond v. United States, 529 U.S. 334, 338 (2000).

233. *Jardines*, 569 U.S. at 8-9; *Bond*, 529 U.S. at 338. This would of course raise the same type of objections of arbitrariness that have traditionally been leveled at the Katz test: that an ostensible "objective" standard is really nothing more than a subjective judicial assessment lacking any consistency. But unlike the traditional Katz test, the weight of the presumptive protection of the textual interest would to a certain extent offset this risk. Furthermore, a demanding burden for rebuttal could be a component of this qualification. For example, only where the government establishes by clear and convincing evidence that the nature of the exposure of the "effect" or "paper" indicates an objectively unreasonable expectation of privacy would the protection be denied.

234. *Bond*, 529 U.S. at 336-38.

235. *Id*. at 337.

government could demonstrate an implied social license to trespass on the home or the curtilage of the home that extended beyond the limited license addressed in *Jardines*. Indeed, as the Court has noted, the home has always been regarded as, "the first among equals"[236] for Fourth Amendment analysis. This maximum or heightened status of the protected nature of the home was reinforced in the post-*Jones* decision in *Collins v. Virginia*.[237] In that case the Court rejected application of the auto exception to the warrant requirement as a justification to trespass upon the curtilage of a home to search a motorcycle.[238] Instead, the Court held entering upon the curtilage to get to the motorcycle was a trespass search with no lawful authority. Thus, even when exposed to the public eye, a trespass onto the curtilage of the home to access effects qualifies as a search.[239]

The facts of *Jones* also provide a useful example of how limited this qualification could be in practice.[240] Unlike the motorcycle in *Collins*, the automobile in *Jones*, subjected to what the Court held was a Fourth Amendment "trespass" search, was at the time of the trespass located in a commercial parking lot.[241] Thus, approaching the automobile did not qualify as a search in that situation.[242] However, the physical trespass required to place the GPS device on the undercarriage did.[243] Nothing suggested herein would alter that conclusion. This is because there is nothing to support an assertion that placing a device on the undercarriage of a car in a public parking lot falls within the scope of implied license.

But the same may not be the case for an individual who "pitches camp" in a public area where such activity is prohibited; or who trespasses on another person's property; or whose soft bag

236. *Jardines,* 569 U.S. at 6.

237. Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018).

238. *Id.* at 1671.

239. *Id.* at 1675.

240. United States v. Jones, 565 U.S. 400, 402-03 (2012); United States v. Caira, 833 F.3d 803, 808 (7th Cir. 2016); United States v. Stimler, 864 F.3d 253, 266 (3d Cir. 2017); United States v. Neugin, 958 F.3d 924, 933 n.6 (10th Cir. 2020); United States v. Moore-Bush, 963 F.3d 29, 45 (1st Cir. 2020).

241. *Jones*, 565 U.S. at 403; *Collins,* 138 S. Ct. at 1667.

242. *Jones*, 565 U.S. at 404.

243. *Id.* at 404.

is touched in a plane's overhead compartment while being moved. In these situations, the Government should be afforded the opportunity to demonstrate that the trespass was consistent with implied license, and to do so the Government will almost certainly emphasize the inherent unreasonableness of the expectation that the chattel property will be immune from such trespass precisely because other members of the public may do what the police officer did.[244] If the individual citizen benefits from a presumption of protection, with an accordant demanding burden placed on the Government to establish exemption from this trespass-triggered presumption, a more logical balance will emerge rather than the *per se* rule adopted in Jones.[245]

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244. Florida v. Jardines, 569 U.S. 1, 8-9 (2013).

245. There is another looming reason why it is important to consider whether the trespass trigger for Fourth Amendment protections should be subject to this type of qualification: the impact on electronic data. As noted in *Jones* and reinforced in *Jardines*, the trespass doctrine is limited to those items enumerated in the text of the Fourth Amendment. *See* United States v. Jones, 565 U.S. 400, 411 n.8 (2012); *see also Jardines*, 569 U.S. at 5. To date, this does not include electronic data. But the Court's jurisprudence, coupled with the increasingly pervasive role of data in our day-to-day lives, suggests that the treatment of electronic data as the modern-day analogue to "papers" within the meaning of the Fourth Amendment may not be far off. Justice Gorsuch's dissenting opinion in *United States v. Carpenter* may have been the opening salvo for such an evolution. *See* United States v. Carpenter, 138 S. Ct. 2206 (2018) (Gorsuch, J., dissenting). In that case, the Court held that government access to cell-site location data qualified as a search. *Id.* at 2220 (majority opinion). The majority reached this decision by applying the reasonable expectation of privacy test. *Id*. at 2217. According to the Court, the relatively involuntary nature of how such data is shared coupled with the pervasiveness of the location information it provides were enough to rebut the third-party doctrine and establish a reasonable expectation of privacy. *Id.*

In his dissenting opinion, Justice Gorsuch explained why he believed the *Katz* reasonable expectation of privacy test was a fundamentally flawed touchstone for Fourth Amendment protections. *Id.* at 2265 (Gorsuch, J., dissenting). Like the criticisms frequently proffered by Justice Scalia, Gorsuch focused on the arbitrariness of the test. *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J. dissenting). This arbitrariness was, according to his opinion, on full display in the majority holding and reasoning. *Id*. at 2266-67. As he noted, the lower courts had properly applied the *Katz* test coupled with the third-party doctrine qualifier: because Carpenter's cell site date was shared with a third party, that qualifier "snuf[fed] out" his reasonable expectation of privacy. *Id*. at 2267-78 (citing Soldal v. Cook County, 506 U.S. 56 (1992)). However, unlike the lower Courts, the majority adopted a new qualifier to the qualifier, concluding that even though the data had been shared with a third-party, Carpenter still retained a reasonable expectation of privacy. *Id.* at 2217 (majority opinion).For Justice Gorsuch, the majority approach only added a new layer of complication to the *Katz* test. *See id.* at 2267 (Gorsuch, J., dissenting). For him, a much simpler answer seemed apparent: a textual approach. *See Carpenter*, 138 S. Ct. at 2267-68 (Gorsuch, J. dissenting). After criticizing the third-party doctrine as inconsistent with actual societal views on the protection of privacy, Gorsuch suggested that treating data as the modern-day analogue of Fourth

Amendment papers offered a solution that was both more coherent and consistent with the essence of the Amendment. *Id*. at 2268. First, in rejecting the underlying rational for the third-party doctrine, Gorsuch hinted at the textual trespass alternative: "Just because you entrust your data—*in some cases, your modern-day papers and effects*—to a third party may not mean you lose any Fourth Amendment interest in its contents." *Id.* at 2269 (emphasis added). Then later in his opinion he indicated that, "It seems to me entirely possible a person's cell-site data *could qualify as his papers* or effects under existing law." *Id.* at 2272 (second emphasis added).Justice Gorsuch's suggestion that data be treated as "papers" for Fourth Amendment purposes may be the first salvo in a barrage that will bring this approach from the realm of a dissent into that of a holding. *Id.* Indeed, the Court's increasingly protective treatment of data suggests it is moving in just such a direction. Cases like *Carpenter* and *Riley v. California*, as well as several of the concurring opinions in *Jones*, indicate a substantial concern that the pervasive use of data necessitate a new approach to its protection. *See generally Carpenter*, 138 S. Ct. at 2219-20 (majority opinion); *see also* Riley v. California, 573 U.S. 373, 385-86 (2014); *Jones*, 565 U.S. at 416-17 (Sotomayor, J., concurring); *Jones*, 565 U.S. at 427 (Alito, J., concurring). To this end, it seems significant that it was this aspect of *Jones* that the *Carpenter* majority relied on to bolster the Court's holding.

Enhancing protection for electronic data shared with third parties was a thread that connected the *Carpenter* majority with Justice Gorsuch. *See Carpenter*, 138 S. Ct. at 2217. For the majority, this necessitated a qualification to the third-party doctrine; for Justice Gorsuch, a better solution was a new approach to the characterization of data. *Id*. at 2268-71 (Gorsuch, J., dissenting). Many would agree that the concern for the protection of data is both logical and necessary. But if data were to be treated as "papers," the *Jones* trespass doctrine might produce an overbreadth that is just as troubling as the pervasive exposure of data to government surveillance pursuant to the third-party doctrine. *See id*. If a trespass on that data qualifies as a Fourth Amendment search, then arguably, no matter how widely exposed to the public that data may be, law enforcement agents would be prohibited from accessing and seizing that data unless they comply with the Fourth Amendment. *See generally Jones*, 565 U.S. at 410 n.7.Such an application of the trespass doctrine seems as illogical as a claim of Fourth Amendment protection for a tent pitched on a neighbor's property without consent. When data is shared not only with the entity providing the storage service, but with the public generally, there seems little justification for treating government access of that data as a search. *Id*. at 409-10. However, if treated as an analogue to papers for purposes of the Fourth Amendment, accessing and taking control of that data might qualify as the type of physical trespass implicating the *Jones* doctrine. *See id*. at 407-08.It may be tempting to consider application of the plain view doctrine as a solution to this potential protective overbreadth. After all, once shared with the public, data would be just as easily observed by government agents. But *Jones* establishes that an investigatory trespass is to be treated as a *search,* and not a *seizure. See id*. at 408-09. Accordingly, it is irrelevant whether the "thing" being trespassed against has been exposed to the public. *See id.* Indeed, this is exactly the argument proffered by the government in *Jones*, and rejected by the Court: it was irrelevant that police accessed Jones' car in a public place when the placed the GPS device on the car because it was the trespassory placement, and not the access, that qualified as a search. *Jones*, 565 U.S. at 410. Because the plain view doctrine is an exception to the warrant requirement for a seizure, and in no way renders a search reasonable, it provided no justification for that trespass. *Id*. at 410 n.7. Gaining access to electronic data fully exposed to the public would arguably implicate the same analysis, resulting in the conclusion that it is the trespassory access, and not the seizure, that would implicate the Fourth Amendment. *See id.*

In the alternative, the protection from trespass against data were treated as presumptive instead of conclusive, a more rational balance of interests would be advanced. Like the

CONCLUSION

Resurrecting the physical trespass test for assessing when government action qualifies as a Fourth Amendment search substantially expanded the range of investigatory actions subjected to the Amendment's reasonableness requirement. By relegating the *Katz* reasonable expectation of privacy test to a supplemental role, the Court sought to ensure what it concluded was the minimum protection provided by the text of the Amendment was not diluted by a test developed to enhance the scope of that protection.[246] However, in seeking to prevent "unreasonable" outcomes resulting from application of the reasonable expectation of privacy doctrine, the Court may have set the conditions for a different type of unreasonable protective overbreadth, especially with regard to an individual's "effects."[247] Now that the mere physical touching of such effects in the course of an investigation qualifies as a search, it means that such touching triggers the requirements of the Fourth Amendment even when it in no way would be perceived as intruding on a reasonable expectation of privacy.[248]

The potential protective overbreadth of this resurrected trespass doctrine is reflected in cases involving the type of trivial physical trespass involved in "chalking" a car tire.[249] This risk of illogic overbreadth may lead the Court to search for openings to

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trespass against chattel property, the government would be provided the opportunity to establish that the access to the data was consistent with implied license because the government did no more than any other member of the public might do. *See Jardines*, 569 U.S. at 8. As Justice Gorsuch notes in his *Carpenter* dissent, when the government obtains data from a third-party repository, objective analysis suggests that data should fall within the scope of Fourth Amendment protection. *Carpenter*, 138 S. Ct. at 2262-63 (Gorsuch, J., dissenting). This is because the individual entrusting the data to the third-party rarely expect the third-party to disclose that data to others and certainly would not expect other individuals unassociated with the third-party to access that data. *Id.* However, the situation is quite different when the *individual* exposes the data to the general public. In such situations, the exposure provides an objective touchstone for concluding access to the data falls within the scope of implied license. *See Jardines*, 569 U.S. at 7-9. In short, so long as the government does nothing more to obtain the data than any other member of the public could do, it should not qualify as a search, even if the government must engage in what amounts to a physical trespass to obtain the data. *See id*. at 8.

246. *See Jones*, 565 U.S. at 408-09.

247. *See id.* at 411 n.8.

248. *See id.* at 424-25 (Alito, J., concurring).

249. Taylor v. City of Saginaw, 922 F.3d 328, 332-33 (6th Cir. 2019).

qualify to scope of the doctrine. Two seeds for such qualifications may have already been planted: the investigatory motive element of *Jones* and the implied social license concept addressed in *Jardines*.[250] How this doctrine will ultimately evolve is yet to be seen. Perhaps cases like *Taylor* will now be the norm, requiring law enforcement agents to obtain a warrant or identify a relevant exception whenever they lay their hands on a suspect's chattel property.[251] Or perhaps the Court will indeed search for a more logical alignment between the physical trespass doctrine and the reasonable expectation doctrine? If it chooses to do so, the seeds it has planted should provide the opportunity.

250. *See Jardines*, 569 U.S. at 8.
251. *See Taylor*, 922 F.3d at 332-33.