Walking the Fine Line: Code Enforcement and the Fourth Amendment

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ILLUSTRATION:TRUJILLO DESIGN

Introduction

Illegal searches under the Fourth Amendment can be one of the biggest risks for a code enforcement officer. This article discusses how to reduce that risk.

The Inspection: Inspections are probably the greatest challenge in code enforcement:

First, ***inspections can be dangerous***. Most code enforcement officers are unarmed. Yet, they often must venture into some of the most dangerous neighborhoods and sometimes must deal with persons who think they are allowed to defend their homes against even the government, or are simply unstable. Most code enforcement departments have stories about officers being threatened-- with job loss, arrest, or physical violence; or actually being assaulted and battered (such as being spit upon, beaten or struck, including with a hatchet). Sadly, in August 2018, during a re-inspection in West Valley City, Utah, a code enforcement officer was shot and killed in the driveway at the home of an angry violator.

Second, ***inspections can be legally complicated***. The Fourth Amendment, and to a lesser extent the Substantive Due Process provision of the Fourteenth Amendment, provide arcane limits upon the code inspection process. State constitutions, statutes, and even local regulations often impose additional limitations upon inspections. Knowing whether an inspection is required or appropriate, where the code enforcement officer may be located when viewing a violation, whether consent is required or effective, whether a warrant is needed or justified, and whether the evidence can be used in an enforcement case—are all examples of the legal complexity of inspections.

Third, ***if wrongful, inspections can have major adverse consequences.***

For the case--Evidence gained by a defective inspection cannot be admitted or considered.

For the government--A lawsuit alleging deprivation of civil rights under 42 U.S.C. Sec. 1983 can be brought for violation of federal constitutional or statutory prohibitions. States have similar causes of action for wrongful inspections. A civil rights suit against the city or county will claim existence of a policy or practice of allowing illegal searches, deliberate indifference to the rights of citizens,[1] or failure to train or supervise properly. Compensatory damages and attorneys' fees can be awarded.

For the code enforcement officer--A civil rights action against the municipality will normally include a claim against the code enforcement officer individually, based upon the actual illegal inspection. The officer will likely have qualified immunity, but that could be lost if the inspection was clearly unlawful.[2] In the worst-case scenario, the code enforcement officer can be subject to individual liability for damages, including compensatory and even punitive damages--plus attorneys' fees; which is rare but possible. The code inspector can also be subject to disciplinary action from the government employer.

Tension between Public Welfare and Privacy: The tension between the government's police powers—to protect the public health, safety and welfare—and individual property and privacy rights is at least as old as the concept of private property ownership.

Castle Doctrine--The legal concept of the home being one's "castle" was analyzed in England at least as long ago as 1604. "The house of every one is to him as his castle and fortress as well as for his defence against injury and violence as for his repose."[3] Of course,

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the Castle Doctrine did not then, and does not now, mean the that the King, or the local police officer or code enforcement officer could never enter the "castle" or its surroundings when acting under appropriate circumstances. Such a misunderstanding has led to deadly consequences over the years, often in standoffs between the owner or occupier and law enforcement.

History of the Fourth Amendment—At the times leading up to the Declaration of Independence and the Revolutionary War many colonists were black-marketing goods out of their homes, buggies and boats to avoid taxation, including taxation of alcohol, under the despised British Stamp Act and Townshend Acts. The British were confiscating bootlegged contraband, as well as the buggies, boats and documents (papers) that might incriminate the smugglers.

In 1761, John Adams (attorney and later President) was present when attorney James Otis, Jr. and a group of colonial merchants went to the Superior Court of Massachusetts to block Writs of Assistance (authorizations similar to search warrants)—unsuccessfully. Adams said, "…[T]hen and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."[4] Adams later defended a smuggler of untaxed Madeira wine whose sloop, the *Liberty*, was confiscated by the British. Although the defendant was not convicted, the sloop was retained, renamed the *HMS Liberty* and then used to confiscate other colonial black-market vessels. Enraged, the colonists burned the *Liberty*. The bootlegger's name was John Hancock.[5]

The Fourth Amendment did not make it into the Constitution in 1787-1789, but was adopted in 1791 as part of the Bill of Rights. Many of the Framers did not want to trade one despot (King George III) for another (the new federal government). Curiously, the Fourth Amendment was not adopted in its original language. James Madison, the author, had written the Amendment so that there could be no search at all without a warrant. However, the final version as approved by the States reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Applicability--The Fourth Amendment is one of the most litigated and thoroughly interpreted (and reinterpreted) provisions in the U.S. Constitution. Not only is it fact-intensive, but the term "unreasonable" opens it up to fundamental policy interpretations, and leads to many close court decisions.

Plain meaning--As with any other regulation, it is crucial to read the actual words. Notably, the Amendment is limited in scope to: *persons, houses, papers and effects*. For code enforcement purposes the "search" (inspection) is likely to be primarily of the "house," for conditions upon the property; and possibly of "papers" such as computer information, or "effects" such as a boat stored illegally, or an inoperable vehicle.

As to real property, the common law of trespass has some applicability. The old writ for trespass "Quare Clausum Fregit," (i.e., "Wherein he broke the close") refers to the line enclosing private property. Hence, earlier search and inspection jurisprudence makes reference primarily to trespass law. However, the Fourth Amendment does not prohibit non-consensual searches of all of the owner's real property—it covers only the "house" which includes the "curtilage" (discussed below).

Open fields vs. house and curtilage--Many of the Founders owned vast areas of open land, so the main worry was over privacy of the actual house and those areas and structures closely associated with the house. From this distinction came two legal concepts—"*open fields doctrine*"—Open fields do not have protection from searches and inspections (if truly "open") and *curtilage*—Curtilage has essentially the same level of protection from searches and inspections as the "house" itself. "Curtilage" or "homestall" is the area immediately surrounding and associated with the home and is considered part of the home for Fourth Amendment purposes. For the house and curtilage, the property owner has the right to determine who is allowed upon the property and to grant or withhold consent to those the owner wishes to exclude, including government "intruders."

Thus, the "curtilage" protection ("No man may set his foot upon his neighbor's close without his permission") has permeated court decisions in England from at least 1765 to U.S. Supreme Court case law as of May 29, 2018.[6] Without consent (or an exception), the government must obtain a search warrant or inspection warrant. The identity of home and what Blackstone called the "curtilage or homestall," thereby "protects and privileges all its branches and appurtenants."[7] This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened."[8] Areas that have been deemed by courts to be "curtilage" include: porches, garages, carports, car patios, back yards—and even a driveway next to a house where the code violation was partially covered. In *Florida v. Jardines*, a 2013 Supreme Court case,[9] the Court determined that a police officer who was on the front porch ostensibly to ask permission to search, but was accompanied by a drug-sniffing dog, needed consent or a warrant to search the house.[10] In the most recent case, in 2018, the Court invalidated a search for a stolen motorcycle that was covered with a white tarp, located at the top of the driveway, in a partly enclosed car patio. The officer had received a tip that the motorcycle might be at that location; when the officer lifted the tarp to verify the Vehicle Identification Number and license plates on the motorcycle, the search was held to be illegal. Code enforcement officers routinely do the same thing in order to identify inoperable vehicles. It is now clear that this cannot be done without consent or a warrant.[11]

License and Plain View Doctrine--So, can the inspector go onto private property and to the front porch or front door to seek the owner's consent to inspect? Yes. This is sometimes called "knock and talk" or "knock and announce". In *Jardines*, the Court said that there is a "license" to go onto the property for the purpose of seeking consent, just as the National Girl Scouts and trick or treaters might do. While on the "baseball path" to the door, the inspector can observe anything that may be in "plain view". (Justice Scalia was known for his witticisms.) The Plain View Doctrine allows prosecution of violations that are in plain view of the officer, *if* the search is otherwise lawful. Officers need not "shield their eyes" when passing by a home on public thoroughfares. However, the inspector cannot go out of the path and snoop (inspect) into areas not in plain view.

Posted Property—Most states have a statute providing for posting of property. This is an indication that the owner or occupant has a subjective *expectation of privacy*. Does that prohibit the inspector from using the "Girl Scout" or "trick or treater" license? Probably not—Posting is only one attribute of the "expectation" of privacy. Of course, this may depend upon each individual state's own statute.

In a 2017 Tennessee Supreme Court case (post-*Jardines*), the court held that Defendant's posting of "No Trespassing" signs near the unobstructed driveway leading to the residence did not, under the federal and state constitutions, establish a reasonable expectation of privacy precluding officers from driving up the driveway and approaching the front door in order to conduct a warrantless "knock-and-talk" encounter. Even if defendant had an actual, subjective expectation that his signs would keep all persons from entering his property under all circumstances, a reasonable member of society would view the signs as simply forbidding any unauthorized or illegitimate entry onto the property.[12]

Reasonable Expectation of Privacy—In many cases, the courts look to the factual situation and determine whether there is an *expectation of privacy* that is *objectively reasonable*. This is more important with respect to places or devices that might otherwise be considered as public but privacy is reasonably expected, such as a phone booth (place);[13] or an IPhone, IPad, computer or tracking device (equivalent to papers or effects).[14] Much of the current Fourth Amendment litigation deals with the adaptation of 1791 concepts to today's technology.

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Examples of personal property that cannot ordinarily be searched or inspected without consent, warrant or exception include:

Conversations—Wiretapped in a public telephone booth. "The Fourth Amendment protects people, not places," wrote Justice Potter Stewart for the Court.[15]

Animals—The ability to go onto property to search for or inspect for animal neglect or cruelty depends upon the *location* of the animal and the likely *condition* of the animal or animals. As with most Fourth Amendment cases the answer depends upon the specific facts. As to the location—dog in a hot car or cows in a barn, for example--the curtilage analysis may not apply, as opposed to an animal located in a house or back yard. Most successful animal cases are those where the inspector can articulate a real and imminent danger to the welfare of the animal and that there is no reasonable opportunity to get consent or a warrant to save the animal from death or severe injury or illness. A generalized concern for the animal would not suffice. Exigent circumstances (below) is one of the recognized exceptions.

Is a Code Enforcement Inspection a Search? Yes. In the seminal cases of *Camara v. Municipal Court of City & County of San Francisco*[17] and *See v. Seattle*[18] the Supreme Court held that civil code enforcement inspections are a type of "search" within the meaning of the Fourth Amendment. However, the Court did provide a lower hurdle dealing with what constitutes sufficient "cause" for an administrative inspection as opposed to a criminal "search." While a law enforcement officer must show "probable cause" to believe that a crime has been committed, the Court said that for a code inspection "cause" is either:

Reasonable cause to believe there is a violation; or

The existence of a written policy for allowing the conduct of periodic inspections or area inspections.

Additional policies may exist in state statutes or local ordinances (such as fire, building, property maintenance, housing, and land use regulations). These should be reviewed to ensure that they are actually in effect. If these ordinances do not exist, the local government should at least adopt the policies into an administrative regulation, such as a Standard Operating Procedure ("SOP").

In summary, for a code inspection to be valid, there must one of the following: consent, a lawful inspection warrant, or an exception to the requirement (such as public view, plain view, open fields, or exigent circumstances).

Consent—Consent to the inspection must be given by an owner or person in legal dominion over or control of the premises, to the inspector. "Premises" means the area subject of the inspection.

Apartment or Condo--The dwelling

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unit is in the renter's or condo owner's control. Common areas are in control of landlord or association. Caution: *Consent by a landlord based upon a lease provision or condo declaration allowing the landlord or association to inspect the unit at reasonable times does not inure to the benefit of the code inspector*. Consent must be given *knowingly* and *voluntarily*—without duress.

Building Inspections—Consent from a contractor to inspect the permitted work does not empower the building code inspector to inspect unless the consent is attributable to the owner, and within the scope of the area necessary for permit compliance. The Supreme Court says that if one owner consents and the other specifically refuses, a warrant is required.[19] Consent may be *withdrawn* at any time.

Exceptions: There are several exceptions that may allow a non-consensual and warrantless search. Here are the most-used:

1. Hot Pursuit or Fresh Pursuit—Allows search or seizure without a warrant to prevent harm to persons or destruction of evidence. The exception applies mainly to law enforcement, and is a type of Exigent Circumstances (discussed below).

2. Special Needs—The government has a special need, usually based upon national, homeland or domestic security concerns. Its application to code enforcement would appear to be limited.

3. Open Fields—(Discussed above).

4. Public View or Open View—Public View allows observation from an area open to the public. Open View permits observation from an area not necessarily open to the public, but from an area in which the inspector is allowed to be, such as a neighbor's yard. General rule—If the inspector is at a location where she or he is allowed by law to be, the inspector may cite what is seen.

5. Plain View—As discussed above, Plain View applies also to *back yards*. A fenced back yard (curtilage) can be viewed and a violation prosecuted if the officer lawfully is on another property and the violation can be seen in plain view. This is so even if there is a *privacy fence, and even if the fence is only partially open*.[20] As applied to curtilage inspections, this is sometimes interchangeable with "Public View" and "Open View," above. As a U.S. District Court indicated in a post-*Jardines* civil rights case against a city and its code enforcement officers individually:

> Clearly established Fourth Amendment law holds that which a person knowingly exposes to *public view* is not subject to Fourth Amendment protections, and that City employees are not required to close their eyes to avoid observing that which is *visible from a place where the public is lawfully able to be*. See *Florida v. Riley*, 488 U.S. 445, 449 (1989) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("That the area was within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."); *United States v. Whaley*, 779 F.2d 585, 591 (11th Cir. 1986) (defendant did not have a reasonable expectation of privacy as to activity which could be viewed with naked eye *from position on neighboring property*, and "could not have reasonably expected the activity in his basement to be private as long as he failed to cover his windows. He conducted his activity in plain view ....") (emphasis added).[21]

If the officer must use an aid such as ladder to see the violation, some courts may be less apt to find the inspection of the home or curtilage to be lawful, especially if the view is aided by a telescope.[22] Obtaining evidence by sophisticated sense-enhancing technology, such as GPS, that cannot be obtained without physical intrusion is a search.[23] Binoculars have been approved, while telescopes with lighting aids have not.[24] Likewise, if the search and prosecution is dependent upon use of *high-tech thermal imaging devices* (such as detecting heat from "Grow House") it will be a Fourth Amendment violation.[25]

The Supreme Court's delineation based upon the level of need for high technology not readily available to the public[26] has less meaning as advances permit formerly sophisticated technology to get into hands of people easily and cheaply. A recent law review analysis of the interplay between new technology and privacy concludes: "As the evolution of Fourth Amendment jurisprudence suggests, the privacy standard guaranteed by the Amendment must focus on unlawful intrusion, not the mechanism by which the intrusion is or may be perfected."[27] Thechnology such as Drones,[28] Selfie Sticks,[29] Smart Televisions, Echo/Alexa, Social Media, and the Internet itself immediately come to mind.

Courts, including the U.S. Supreme Court, have allowed prosecution where there is a *lawful fly-over* that shows the curtilage and the violation.[30] However, some courts are questioning the lawfulness of certain continuous fly-overs where they are overly intrusive.[31]

6. Public Records and State Laws—The potential use of aerial photography as public records evidence of a violation should not be overlooked. Public records are normally admissible evidence. Aerial photography of this nature is not conducted or compiled by law enforcement or code enforcement, or for surveillance purposes. Photos are in the public domain. Admissibility may depend upon state law. While the Fourth Amendment may permit a particular inspection, state law may not. For example, Florida law does not permit issuance of an inspection warrant for an owner-occupied family residence even though the Fourth Amendment would permit it. In a somewhat infamous 2001

case, the U.S. Supreme Court did not find a prohibition *under the Fourth Amendment* for an arrest that led to a strip search for a misdemeanor seat belt violation.)

7. Exigent Circumstances—This exception includes circumstances constituting emergencies or imminent danger to life, health, or safety. The theory is that nobody should have to die while the inspector is filling out paperwork. However, the inspector will likely be called upon to testify as to the nature of the exigent circumstances, whether there were reasonable attempts to contact the violator, or why consent or a warrant was not sought. This is often after-the-fact, so the code enforcement officer is likely to be second-guessed in cross-examination. Examples of exigent circumstances include housing violations such as abandoned and dilapidated structures where children have been seen to play, businesses where gasoline or chemicals are known to be present, or attractive nuisances. Potentially irreparable or irreversible circumstances include imminent danger to animals (above) and imminent environmental damage such as pollution, or destruction of trees.

Papers: Occasionally, a code enforcement officer may want to refer to "papers" to prove a violation. Some states permit issuance of *administrative subpoenas* for documents. This is an underutilized tool. In some code cases, the "papers" (trash or hoarder's junk) *are* the violation. Once papers are put outside for trash hauling or are just located in plain view, they are fair game for evidence or for citation (subject to house/curtilage rules, of course). The code inspector must never go into a mailbox for any reason.

Other Cautions: While it is wise to coordinate prosecutions with law enforcement, *the code enforcement officer should not perform a code inspection in lieu of a police search*. Since the standard of probable cause for a search warrant is greater than the standard for cause for an inspection warrant, law enforcement's search may be invalidated by the use of only an inspection warrant or code inspection. Law enforcement cannot use code enforcement to do an inspection as a prequel to a search warrant. Some states have statutes to that effect.

Conclusion: The best way for code enforcement officers to avoid governmental and personal liability stemming from violations of the Fourth Amendment and other applicable regulations is to be fully aware of the law and its pitfalls--and above all to exercise caution when conducting inspections. This is an area where effective training and accurate, timely advice can prevent the municipality and its code enforcement professionals from being caught up in needless litigation. Local government attorneys have a major role to play in that mission.

1. Canton v. Harris, 489 U.S 378 (1989).
2. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
3. Sir Edward Coke, Coke's Institutes of the Lawes of England Fifth, 5 Coke Rep. 91; commenting on Semayne's Case, 77 Eng. Rep. 195 (January 1st, 1604).
4. *See* most recent recounting of this history in Carpenter v. U.S., No. 16–402, 585 U.S. ___ (Slip Op. at 5) (2018).
5. For a humorous take on this serious incident *see*, Kevin Bleyer, Me the People 247 (Random House, 2012). Wikipedia-"HMS *Liberty*" has a nice review of the fate of the Liberty as one of the first overt acts of defiance before the Revolutionary War.
6. *See* Entick v. Carrington, 19 Howell's State Trials (1765), discussed in Silverman v. U.S, 81 S.Ct. 679 (1961); and see, Collins v. Virginia, Case No. 16-1027, 584 U.S.____ (2018).
7. 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769)
8. California v. Ciraolo, 476 U.S. 207, 213 (1986).
9. 569 U.S. 1 (2013).
10. *Id*.
11. *Collins*, *supra* note 6.
12. State v. Christensen, 517 S.W.3d 60 (Tenn. 2017).
13. Katz v. United States 389 U.S. 347 (1967) was a wiretapping case that overruled Olmstead v. United States 277 U.S. 438 (1928). It held that the "trespass" doctrine of Olmstead v. United States, 277 U. S. 438, and Goldman v. United States, 316 U. S. 129, was no longer controlling. 389 U. S. 347, at 351, 353. (It is interesting that the U.S. was wiretapping phone wires in 1926 and that Sheriff Olmstead was making the equivalent of about $28 million a year in current valuation—through bootlegging and smuggling. John Hancock would have been proud.)
14. Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (2014) and United States v. Wurie 573 U.S. ____(consolidated)--the Court unanimously held that the warrantless search and seizure of digital contents of a cell phone seized during an arrest (without exigent circumstances) is unconstitutional. Carpenter v. United States, no. 16-402, 585 U.S. ____ (June 22, 2018) (review of cell-site records from wireless carriers was a Fourth Amendment search).
15. Katz, *supra* note 13.
16. *Cf*. Broden v. Marin Humane Society, 83 Cal. Rptr. 2d 235 (Cal. Ct. App. 1st 1999) (reliable complaint, combined with the smell, the officer's past experience, and the flies trying to get into the building, provided strong grounds for a warrantless entry) with Brinkley v. County of Flagler, 769 So. 2d 468 (Fla. Dist. Ct. App. 2000) (vague foreboding alone cannot justify a warrantless entry).
17. 387 U.S. 523 (1967).
18. *Id*. at 541.
19. Georgia v. Randolph, 547 U.S. 103 (2006).
20. United States v. Dunn, 480 U.S. 294 (1987), perimeter fence surrounding a barn and home was not one that was designed to keep people in open fields from observing what was going on behind the fence; in point of fact, the fence was designed to corral livestock.
21. Thomas v. City of Palm Coast, WL 1179961 (Middle District, Fla. Unrep. (2017). (Notably, although the judge denied the claims for damages against the City and individual officers, he did admonish the City that this was a close case and that *training was lacking*.)
22. *Cf*. United States v. Bellina, 665 F.2d 1335 (4th Cir. 1981) (stepladder on runway to peer into airplane) and State of Hawaii v. Kender, 60 Haw. 301 (1978) (officer climbing neighbor's fence, peering through thick "California grass" and using telescope).

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19. § 2000cc-2(a).
20. *See* Sossamon v. Texas, 131 S. Ct. 1651, 1655, 1658–59 (2011) (holding that RLUIPA does not unambiguously abrogate the sovereign immunity of the states from damages claims).
21. *See, e.g.*, Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1168–69 (9th Cir. 2011) (holding that municipalities and counties may be liable for money damages under RLUIPA; *see also Lighthouse Inst.*, *supra* note 18, 510 F.3d at 260–61; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977) (recognizing that political subdivisions of states do not enjoy Eleventh Amendment immunity)
22. § 2000cc-2(b).
23. *See Centro Familiar*, *supra* note 21, 651 F.3d at 1171-1172.
24. 651 F.3d 1163, 1168 (9th Cir. 2011).
25. 643 F.3d 419 (5th Cir. 2011), cited by the court in Opulent Life Church v. City of Holly Springs, 697 F.3d 279 (5th Cir. 2012).
26. Elijah Group, Inc. v. City of Leon Valley, 643 F.3d 419 at 422 (5th Cir. 2011).
27. Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 291 (5th Cir, 2012), *(citing Centro Familiar*, *supra* note 21, 651 F.3d at 1169, n. 25).
28. *Id.*
29. Khatib v. County of Orange, 639 F.3d 898 (9th Cir. 2011).
30. *Id.*
31. *Id.*
32. 697 F.3d 279 (5th Cir. 2012).
33. 697 F.3d 279 at 281.
34. 697 F.3d 279 at 295.
35. 697 F.3d 279 at 296.
36. 360 F.3d 1024 (9th Cir. 2004).
37. 360 F.3d 1024 at 1035.
38. *Id.*
39. *Id.*
40. 360 F.3d 1024 at 1034.
41. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 n.9 (1987) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."); Merced v. Kasson, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so." (*citing Smith*, 494 U.S. at 887)).
42. 508 U.S. 520 (1993).
43. 381 F. 3d 202 (3d Cir. 2004),
44. *Blackhawk*, 381 F.3d. at 211
45. *Id.*
46. No. 4:17-cv-05126-YGR (2017).
47. *Citing to Employment Division v. Smith* (494 U.S. 885 (1990) and *San Jose Christian College*.
48. 768 F.3d 183 (2d Cir, 2014).
49. 429 U.S. 252 (1977).
50. 14-cv-3272 (D. Minn. 2014).
51. 14 So. 3d 1027 (Fla. Ct. App. 2009).
52. *Citing to* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762-63 (7th Cir.2003).
53. 504 F.3d 338 (2d Cir. 2007)
54. Alger Bible Baptist Church v. Township of Moffatt, 2014 WL 462354, at *6 (E.D. Mich. 2014).
55. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 744 (1995).
56. *Lukumi Babalu Aye*, *supra* note 2, 508 U.S. 520 at 546.
57. Wisconsin v. Yoder, 406 U.S. 205 (1972).
58. Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, 734 F.3d 673 (7th Cir. 2013).
59. Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87, 108 (D. Conn. 2003), vacated, 402 F.3d 342 (2d Cir. 2005).
60. Harbor Missionary Church Corp. v. City of San Buenaventura, 642 F. App'x 726 (9th Cir. 2016).
61. 342 F.3d 752, 762-63 (7th Cir. 2003).
62. DOJ September 22, 2010 Statement. ML

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23. United States v. Jones, 565 U.S. 400 (2012).
24. United States v. Kim, 415 F.Supp. 1252 (D. Haw. 1976).
25. Kyllo v. United States 533 U.S. 27 (2001) (Thermal sensing device to detect "grow house" is a search—illegal without warrant).
26. *Id.* The problem with this approach is discussed in *Jardines*, above.
27. Stefan Ducich, *These Walls Can Talk! Securing Digital Privacy in the Smart Home Under the Fourth Amendment*, 16 Duke L. & Tech. Rev. 278 (2018).
28. Drones are now regulated to some extent by the Federal Aviation Administration. 14 CFR, Title 17 Part 107. Unfortunately, there is nothing permitting or prohibiting drone searches or protecting curtilage privacy. Some states have prohibited police and code enforcement from using drones for close-up searches due to expectations of privacy.
29. Extended selfie sticks can be purchased cheaply on the open market so the *Kyllo* sophisticated- device-not-readily-available-to-the-public analysis would not provide assistance. They are much like a ladder over a back yard fence.
30. California v. Ciraolo, 476 U.S. 207 (1986). Marijuana viewable from lawful 1000 feet.
31. Order Granting Defendant's Motion to Suppress, United States v. Vargas, No. CR-13-6025-EFS, at 19 (E.D. Wa. Dec. 15, 2014). *See also*, State v. Davis, 360 P.3d 1161, 1172 (N.M. 2015) (holding that "prolonged hovering [by a helicopter] close enough to the ground to cause interference with [the defendant's] property" was an unconstitutional violation of the subject's expectation of privacy). These are discussed in a thought-provoking article: Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 Emory L.J. 527, 554 (2017) at fn. 99 & 100.
32. Fla. Stat. § 933.21 (2018).
33. Atwater v. Lago Vista, 532 U.S. 318 (2001).
34. Fla. Stat. § 933.30 (2018). ML