

Police Surveillance

“In the months ahead, the Los Angeles County Sheriff’s Department will test an unmanned, remote-controlled surveillance plane.” —Wired News (June 19, 2006)

New developments in police surveillance are getting a lot of attention. Many people are, of course, impressed by the eye-popping gear which, not long ago, was available only to science fiction writers. But more importantly, today’s surveillance technology is making a difference.

For example, surveillance cameras on city streets and in crime-ravaged neighborhoods help provide a safer environment because criminals prefer not to have an audience, especially one that might include officers and jurors. As one commentator observed, “With their long-range and wide-area monitoring capabilities, surveillance cameras have a significant deterring effect, and have helped police foil many of the crimes that take place in public such as vandalism, mugging, car theft, drug distribution, and drive-by shooting.”¹

As a result, surveillance cameras are becoming somewhat commonplace, especially in cities. According to the *San Francisco Chronicle*, “The trend is unmistakable in the Bay Area: San Jose is seeking four cameras downtown. Oakland recently bought about a dozen. Pittsburg has installed 13 cameras, plus a live-monitoring room.”²

Surveillance technology is also making it much easier for officers to follow people who are under suspicion. The old “follow that cab!” maneuver has been superseded by GPS trackers and FLIR-equipped police helicopters. Then there are night-vision binoculars, thermal imagers, sonic gunshot locators, facial-recognition software, and much more.

Still, some people worry about today’s surveillance capabilities. We are not concerned here with people who resent any effective method of police surveillance, such as career criminals and so-called “privacy advocates.” We are talking about people without an agenda who worry that, as the result of technological advances, there may soon be nothing they say or do that cannot be heard or seen by someone else.

They have a point. Just consider that some years ago the United States Supreme Court described parabolic microphones and sonic wave detectors as “frightening paraphernalia” which the electronic age “may visit upon human society.”³ Well, as we all know, these items are no longer just visiting. And it’s not going to stop there. For example, officers may soon have the ability to “see” through the walls of suspect’s homes and other structures. At least, according to the Court, that is “a clear, and scientifically feasible, goal of law enforcement research and development.”⁴

¹ Guirguis, “Electronic Visual Surveillance and the Reasonable Expectation of Privacy” (2004) *Journal of Technology Law and Policy*, University of Florida.

² *San Francisco Chronicle* (July 23, 2006). **NOTE:** “In the United States, the security industry estimates that more than two million surveillance cameras are in use across the country. In Manhattan in 1998, volunteers counted 2,400 electronic eyes in public places used to catch everything from red-light runners at traffic intersections, shoplifters outside grocery and department stores, and drug sellers loitering near lampposts.” *Miss. Law Rev.* (Fall 2002) “The Effect of Technology on Fourth Amendment Analysis and Individual Rights.”

³ *Silverman v. United States* (1961) 365 U.S. 505, 509.

⁴ *Kyllo v. United States* (2001) 533 U.S. 27, 36, fn.3. ALSO SEE *People v. Joubert* (1981) 118 Cal.App.3d 637, 647 [“We are not unconscious of the legitimate concern about the activities of the government as ‘Big Brother.’”]; *People v. Arno* (1979) 90 Cal.App.3d 505, 511 [“[E]lectronic bugs and remote microphones have

What does this mean to law enforcement officers? Among other things, it means that their decisions on when and how to utilize surveillance technology will be subjected to increasing scrutiny by the courts of law and public opinion. And if either concludes that officers are not exercising good judgment in deciding when and how to use it, there will be pressure to impose severe restrictions.

To help prevent that from happening, we are going to examine one of the most important judgment calls that officers must make when conducting surveillance: when to seek a search warrant. As we will explain, knowing how to determine when a warrant is required is especially important because some of the new technology does not fit within the protocols that cover physical surveillance.

Before we begin, a word about terminology. As used in this article, the term “surveillance” means to “closely watch” a person, place, or thing for the purpose of obtaining information in a criminal investigation.⁵ It also includes recording the things that officers see or hear, and gaining access to public and private places from which they can make their observations. It does *not* include wiretapping and bugging which, because of their highly-intrusive nature, are subject to more restrictive rules.⁶

THE TEST: “Plausible vantage point”

Surveillance becomes a “search”—which requires a warrant—if it reveals sights or sounds that the suspect reasonably believed would be private.⁷ As the court explained in *People v. Arno*, “[T]he test of validity of the surveillance [turns upon] whether that which is perceived or heard is that which is conducted with a reasonable expectation of privacy.”⁸ Thus, a warrant is unnecessary if the suspect knew, or should have known, there was a reasonable possibility that officers or others might have seen or heard him.⁹ In the words of the Supreme Court, “What a person *knowingly* exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”¹⁰

The question, then, is how can officers and the courts determine whether such knowing exposure occurred. The most reliable way is to apply what we call the “plausible

made it possible to intrude upon private conversation surreptitiously in an Orwellian degree”]; *People v. Cook* (1985) 41 Cal.3d 373, 375 [“[T]he instruments of surveillance at the disposal of the police are far more sophisticated than our nation’s founders could have dared contemplate.”]; *U.S. v. Lee* (3rd Cir. 2004) 359 F.3d 194, 222 [“[G]iven the evolving sophistication of technology, it is increasingly imperative that the fundamental liberties guaranteed under the Fourth Amendment not be eroded by the warrantless use of devices that allow the government to see through curtains, walls and doors.” dis. opn. of McKee, C.J.].

⁵ See *Merriam-Webster’s Collegiate Dictionary* (11th Edition) p. 1259.

⁶ See 18 USC §§ 2510 et seq.; Penal Code §§ 629.50 et seq.

⁷ See *Kyllo v. United States* (2001) 533 U.S. 27, 33 [“[A] Fourth Amendment search does not occur—even when the explicitly protected location of a house is concerned—unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable.”]; *Maryland v. Macon* (1985) 472 U.S. 463, 469 [“A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”]; *Illinois v. Andreas* (1983) 463 U.S. 765, 771 [“If the inspection by the police does not intrude upon a legitimate expectation of privacy, there is no ‘search’ subject to the Warrant Clause.”].

⁸ (1979) 90 Cal.App.3d 505, 511.

⁹ See *Illinois v. Caballes* (2005) 543 U.S. 405, 408 [“Official conduct that does not compromise any legitimate interest in privacy is not a search”]; *People v. Deutsch* (1996) 44 Cal.App.4th 1224, 1229 [“Information and activities which are exposed to public view cannot be characterized as something in which a person has a subjective expectation of privacy, nor can they fulfill the second prong of *Katz*—as being that which society expects will remain private.”]; *People v. Siripongs* (1988) 45 Cal.3d 548, 564 [“Defendant could not have justifiably expected his conversation was not being intercepted, because he could clearly see that at least one police officer could hear every word he said.”].

¹⁰ *Katz v. United States* (1967) 389 U.S. 347, 351. Emphasis added.

vantage point” test. Under this standard, a warrant is not required if a reasonable person in the suspect’s position would have realized there was a vantage point from which officers could have conducted surveillance without violating his Fourth Amendment rights, and with reasonable effort.

At the outset, three things should be noted about this test. First, because its objective is to determine whether disclosure was reasonably foreseeable, it is immaterial that the suspect wanted or even expected privacy.¹¹ As the Court of Appeal explained, “[I]t is absolutely essential that the [suspect] exhibit a reasonable expectation (as opposed to mere subjective, personal desire) that the activity in question be so protected.”¹²

Second, if a plausible vantage point existed, it does not matter that officers conducted their surveillance from somewhere else, such as a distant location via parabolic microphone. This is because it is the *existence* of a plausible vantage point—not the officers’ actual use of it—that eliminates a suspect’s reasonable expectation of privacy.¹³ As the court observed in *Burkholder v. Superior Court*:

[I]f the purpose of the optically aided view is to permit clandestine police surveillance of that which could be seen from a more obvious vantage point without the optical aid, there is no unconstitutional intrusion; and if the purpose of the optical aid is to view that which could not be seen without it, there is.¹⁴

Third, it is immaterial that the suspect took steps to prevent a type of surveillance that officers did not utilize.¹⁵ For example, a suspect who surrounds his property with a 12-foot high solid steel fence might reasonably expect privacy from surveillance at ground level, but not from the air.¹⁶

¹¹ See *Maryland v. Macon* (1985) 472 U.S. 463, 469 [“The mere expectation that the possibly illegal nature of a product will not come to the attention of the authorities, whether because a customer will not complain or because undercover officers will not transact business with the store, is not one that society is prepared to recognize as reasonable.”]; *California v. Ciraolo* (1986) 476 U.S. 207, 211-2 [Court notes the difference between a defendant’s subjective expectation of privacy and “merely a hope that no one would observe his unlawful gardening pursuits”]; *People v. Scheib* (1979) 98 Cal.App.3d 820, 827 [“The issue is not simply whether a [suspect] has exhibited a ‘hope’ of privacy or a desire to avoid detection but instead the issue is whether he has a *reasonable expectation of privacy*.”]; *People v. Finchum* (1973) 33 Cal.App.3d 787, 791 [“[Hope] falls far short of what the law recognizes as a reasonable expectation.”].

¹² *People v. St. Amour* (1980) 104 Cal.App.3d 886, 891.

¹³ See *United States v. Knotts* (1983) 460 U.S. 276, 282 [Because Peterson was traveling on public streets, [t]he fact that the officers relied not only on visual surveillance, but on the use of the beeper to signal the presence of Peterson’s automobile to the police receiver, does not alter the situation.”]; *People v. Arno* (1979) 90 Cal.App.3d 505, 509; *People v. Mullins* (1975) 50 Cal.App.3d 61, 68 [“[D]efendant’s property had lost its private character”]; *People v. St. Amour* (1980) 104 Cal.App.3d 886, 893; *U.S. v. McIver* (9th Cir. 1999) 186 F.3d 1119, 1125 [“We reject the notion that the visual observation of the site became unconstitutional merely because law enforcement chose to use a more cost-effective ‘mechanical eye’ to continue the surveillance.”]; *Oregon v. Wacker* (1993) 317 Or. 419, 429 [no reasonable expectation of privacy existed when officers used night-vision binoculars to observe narcotics activity inside a car in a public parking lot where people who were walking nearby could have observed the activity].

¹⁴ (1979) 96 Cal.App.3d 421, 426.

¹⁵ See *California v. Ciraolo* (1986) 476 U.S. 207, 213 [“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.”]; *People v. St. Amour* (1980) 104 Cal.App.3d 886, 891 [“The reasonable expectation to protect airspace overlying the land, however, cannot be demonstrated by measures taken to defend the land from earthly intrusions (e.g., by setting up a roadblock, trespass signs or by hiding the area or activity from ground observation).”].

¹⁶ See *Dow Chemical Co. v. United States* (1986) 476 U.S. 227, 237, fn.4.

LAWFUL VANTAGE POINT

As noted, the existence of a vantage point can eliminate the need for a warrant only if the officers' presence there did not violate the suspect's Fourth Amendment rights. Plainly, a vantage point satisfies this requirement if it was located in a public place or a place that was generally accessible to the public. As the United States Supreme Court explained, "As a general proposition, the police may see what may be seen from a public vantage point where they have a right to be."¹⁷ This is true even if surveillance from the location was unlikely.

For example, in *U.S. v. McIver*¹⁸ officers with the U.S. Forest Service hid a motion-activated video camera in a remote national forest location in which a marijuana field had been discovered. The defendants, who made an appearance on camera harvesting their crop, contended that the warrantless surveillance was unlawful because they could reasonably expect privacy in such a remote area. The court disagreed, pointing out that they "were on public land in a national forest when they cultivated their marijuana garden. Thus, they knowingly exposed their illegal activities to any person who visited the area."

Trespassing on the suspect's property

At first glance, it might seem that surveillance conducted from any location on the suspect's land would be unlawful. Not so. In fact, trespassing violates the suspect's Fourth Amendment rights only if it enabled officers to see or hear something that he reasonably believed would be private. Usually, however, mere encroachment onto private property seldom reveals such things. Thus, the United States Supreme Court explained, "[The] capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."¹⁹ Or, to put it more succinctly, "The Fourth Amendment prohibits unreasonable searches and seizures, not trespasses."²⁰

Accordingly, officers do not violate a suspect's Fourth Amendment rights by walking onto his private property if they confine their excursion to places in which the public had been expressly or impliedly invited.²¹ This type of trespassing, commonly known as

¹⁷ *Florida v. Riley* (1989) 488 U.S. 445, 449. ALSO SEE *California v. Greenwood* (1988) 486 U.S. 35, 41 ["[T]he police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."]; *Payton v. New York* (1980) 445 U.S. 573, 587 ["The seizure of property in plain view involves no invasion of privacy"]; *People v. Deutsch* (1996) 44 Cal.App.4th 1224, 1229 ["Information or activities which are exposed to public view cannot be characterized as something in which a person has a subjective expectation of privacy"]; *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 677 ["Videotaping of suspects in public places, such as banks, does not violate the fourth amendment; the police may record what they normally may view with the naked eye."]; *U.S. v. Jackson* (10th Cir. 2000) 213 F.3d 1269, 1280 ["The use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment."].

¹⁸ (9th Cir. 1999) 186 F.3d 1119.

¹⁹ *Rakas v. Illinois* (1978) 439 U.S. 128, 143. ALSO SEE *Oliver v. United States* (1984) 466 U.S. 170, 183. ["The law of trespass forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest."].

²⁰ *Cohen v. Superior Court* (1970) 5 Cal.App.3d 429, 434.

²¹ See *United States v. Karo* (1984) 468 U.S. 705, 712-3 ["The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated."]; *Oliver v. United States* (1984) 466 U.S. 170, 183, fn.15 ["[I]t does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment."]; *People v. Camacho* (2000) 23

“technical” or “common law” trespassing, does not offend the Fourth Amendment because it is reasonably foreseeable. After all, people know that others will regularly walk onto their property to, for example, visit, deliver the mail or a package, inquire about a lost dog, sell Girl Scout cookies or maybe even a ticket to the local Police Officer’s Ball.

Accordingly, a trespass by officers will not constitute a Fourth Amendment violation if both of the following circumstances existed:

- (1) **Normal access routes:** They stayed on or near normal access routes, driveways, common areas, or open fields.
- (2) **Access not barred:** The suspect did not take reasonably effective measures to prevent entry into the location.

NORMAL ACCESS ROUTES: Officers who walk onto a suspect’s property will seldom violate his Fourth Amendment rights if they stayed on normal access routes. “A sidewalk, pathway, common entrance or similar passageway,” said the California Supreme Court, “offers an implied permission to the public to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there.”²²

Furthermore, officers may ordinarily stray somewhat from these areas if their departure was not too unusual.²³ An example of an impermissible departure is found in *People v. Camacho*²⁴ where officers walked along the side of the defendant’s home for a distance of about 40 feet from the sidewalk. In ruling that this constituted a Fourth Amendment trespass, the California Supreme Court noted, “[T]here was neither a path nor a walkway, nor was there an entrance to the home accessible from the side yard.”

Similarly, entering a suspect’s backyard is likely to constitute a Fourth Amendment trespass because backyards are relatively private places, plus they are usually surrounded by fences. For that reason, the court in *Vidaurri v. Superior Court* ruled that “a person who surrounds his backyard with a fence, and limits entry with a gate, locked or unlocked, has shown a reasonable expectation of privacy for that area.”²⁵

Cal.4th 824, 836 [“[T]he presence or absence of physical trespass by police is constitutionally irrelevant to the question whether society is prepared to recognize an asserted privacy interest as reasonable.”]; *Cohen v. Superior Court* (1970) 5 Cal.App.3d 429, 434 [“The test to be applied in determining whether observation into a residence violates the Fourth Amendment is whether there has been an unreasonable invasion of the privacy of the occupants, not the extent of the trespass which was necessary to reach the observation point.”]; *Dean v. Superior Court* (1973) 35 Cal.App.3d 112, 118 [“The reach of the Fourth Amendment no longer turns upon a physical intrusion into any given enclosure; hence, that a trespass was later revealed is not controlling.”]; *U.S. v. Ventling* (8th Cir. 1982) 678 F.2d 63, 66 [“The standard for determining when the search of an area surrounding a residence violates Fourth Amendment guarantees no longer depends on outmoded property concepts, but whether the defendant has a legitimate expectation of privacy in the area.”]; *U.S. v. Lakoskey* (8th Cir. 2006) 462 F.3d 965, 973 [“[T]he question is not whether the officers were trespassing, but whether [the suspect] had a reasonable expectation of privacy.”].

²² *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 629. ALSO SEE *U.S. v. Reed* (8th Cir. 1984) 733 F.2d 492, 501 [“[N]o Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors—such as driveways, walkways, or similar passageways.”].

²³ See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 636 [looking through a window was unlawful because the officers were standing “a scant six inches from the window” that was not on a normal access route, and they had to traverse bushes that constituted a “significant hindrance”]; *People v. Thompson* (1990) 221 Cal.App.3d 923, 943 [“[A] substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.”]; *U.S. v. Taylor* (4th Cir. 1996) 90 F.3d 903 [“search” did not result when “officers proceeded from the driveway, crossed the lawn, and climbed the stairs of the front porch” and from there saw incriminating evidence through a picture window].

²⁴ (2000) 23 Cal.4th 824.

²⁵ *Vidaurri v. Superior Court* (1970) 13 Cal.App.3d 550, 553.

DRIVEWAYS: Because driveways are almost always accessible to the public, officers may ordinarily walk on them, even if they do not serve as normal access routes.²⁶ Thus, the Tenth Circuit said matter-of-factly, “[P]olice observations made from the driveway do not constitute a search.”²⁷

COMMON AREAS: Officers do not violate a suspect’s Fourth Amendment rights by conducting surveillance from hallways, staircases, lobbies, garages, and other common areas of multiple-occupant buildings, such as apartments, condominiums, motels, and office buildings.²⁸ As the court observed in *People v. Seals*, “[P]olice officers in performance of their duty may, without doing violence to the Constitution, enter upon the common hallway of an apartment building without warrant or express permission to do so.”²⁹ This is true even if the officers had to climb over a locked gate to gain access.³⁰

“OPEN FIELDS”: Surveillance from so-called “open fields” is not unlawful even if the field was owned by the suspect, plastered with “No Trespassing” signs, and fenced in.³¹ This is because the law views “open fields” as public land.³² Said the court in *U.S. v.*

²⁶ See *U.S. v. Reyes* (2nd Cir. 2002) 283 F.3d 446, 465 [“[D]riveways that are readily accessible to visitors are not entitled to the same degree of Fourth Amendment protection as are the interiors of defendants’ houses.”]; *U.S. v. Singer* (8th Cir. 1982) 687 F.2d 1135, 1144, fn.17 [“In the course of everyday life we expect members of the public—salesmen, children, or even strangers looking for an address—to enter upon a driveway.”]; *Maisano v. Welcher* (9th Cir. 1991) 940 F.2d 499, 503 [“There is no evidence that the driveway was obstructed or enclosed in any way.”]; *U.S. v. Smith* (6th Cir. 1986) 783 F.2d 648, 651 [“The fact that a driveway is within the curtilage of a house is not determinative if its accessibility and visibility from a public highway rule out any reasonable expectation of privacy.”]; *U.S. v. Lakoskey* (8th Cir. 2006) 462 F.3d 965, 973 [“[W]e will not extend Lakoskey’s expectation of privacy to his driveway, walkway or front door area.”].

²⁷ *U.S. v. Hatfield* (10th Cir. 2003) 333 F.3d 1189, 1194.

²⁸ See *People v. Galan* (1985) 163 Cal.App.3d 786, 793 [“[I]t has been held that the garage of a condominium apartment which is available to all tenants and readily accessible by the members of the general public, does not fall within the protective umbrella of the Fourth Amendment”]; *People v. Shaw* (2002) 97 Cal.App.4th 833, 840 [defendant “introduced no evidence of any right to exclude others from the common area of the apartment complex.”]; *People v. Robinson* (1986) 185 Cal.App.3d 528, 531 [hallway of residential hotel]; *People v. Superior Court (Reilly)* (1975) 53 Cal.App.3d 40, 45 [officer standing outside motel room]; *People v. Petersen* (1972) 23 Cal.App.3d 883, 894 [“the dynamite was apparently in plain sight in a garage used in common by all the apartment tenants, so that any expectation of privacy on the part of appellant in placing it there, would have been unreasonable.”]; *People v. Campobasso* (1989) 211 Cal.App.3d 1480, 1482-3 [officer looked into the hallway of a storage facility containing “dozens of rental lockers”]; *People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 409 [“The open carport area was used commonly by all motel tenants and thus was not a private, constitutionally protected space.”]; *People v. Szabo* (1980) 107 Cal.App.3d 419, 428 [underground garage for apartment residents]; *People v. Terry* (1969) 70 Cal.2d 410, 425-8 [garage under an apartment building]; *People v. Berutko* (1969) 71 Cal.2d 84, 91; *People v. Willard* (1965) 238 Cal.App.2d 292, 307 [“The structure was a duplex and although the record does not spell it out, it is a reasonable inference that other occupants of the building had use of the area around it.”]; *U.S. v. Willoughby* (2nd Cir. 1988) 860 F.2d 15, 22-3 [conversation in jail’s multipurpose area with some 35 people milling around, some within 10 feet of the suspects, was conducted in a “public area.”].

²⁹ (1968) 263 Cal.App.2d 575, 577.

³⁰ See *People v. Arango* (1993) 12 Cal.App.4th 450, 455 [“But even if climbing over the fence [surrounding the apartment complex] was a simple trespass it would not invalidate their subsequent observations.”].

³¹ See *Oliver v. United States* (1984) 466 U.S. 170, 178 [“[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”]; *People v. Scheib* (1979) 98 Cal.App.3d 820, 825 [“As early as 1924, the United States Supreme Court held that the Fourth Amendment protection against unreasonable searches and seizures did not apply to ‘open fields.’”].

³² See *United States v. Dunn* (1987) 480 U.S. 294, 304 [“[T]here is no constitutional difference between police observations conducted while in a public place and while standing in the open fields.”]; *People v. Channing* (2000) 81 Cal.App.4th 985, 993 [“A warrantless observation made by law enforcement from an open field enjoys the same constitutional protection as the one made from a public place.”]; *People v. Shaw*

Hatfield, “Indeed, the police can enter open fields at any time for investigative purposes without violating the Fourth Amendment.”³³

What’s an “open field?” In the context of police surveillance, it is essentially any unoccupied or undeveloped private residential property (usually in rural areas) that is outside the curtilage; i.e., beyond the back and side yards.

COMMERCIAL PROPERTY: If a store or other commercial establishment is open to the public, officers may enter to conduct surveillance even though it was owned by the suspect.³⁴ They may also walk on a parking lot or other adjoining private land unless the suspect had taken reasonable steps to prevent entry.³⁵

For example, in *U.S. v. Hall*³⁶ Customs agents suspected that employees of the Bet-Air Company were selling restricted military parts to Iran. In the course of their investigation, they conducted a warrantless search of a dumpster located in the employees’ parking lot. The dumpster contained incriminating evidence, and the defendant argued that it should have been suppressed because the agents’ entry constituted an illegal search. The court disagreed, pointing out that the United States Supreme Court “has consistently stated that a commercial proprietor has a reasonable expectation of privacy only in those areas where affirmative steps have been taken to exclude the public.”

ATTEMPTS TO PREVENT ENTRY: Although it does not happen often, an officer’s entry onto a suspect’s private property may constitute a search if the suspect had taken reasonable steps to prevent entry. This typically occurs when the suspect surrounds his property with the type of fence that is designed to keep people out. For example, a homeowner who replaces his white picket fence with an electrified chain link fence topped with razor wire (or even something less dramatic) could make a good case that he reasonably expected privacy.³⁷

As for “No trespassing” signs, they are seldom viewed as a serious effort to prevent entry, especially if they were posted around areas where reasonable privacy expectations

(2002) 97 Cal.App.4th 833, 838 [“A warrantless observation made by law enforcement from an open field enjoys the same constitutional protection as the one made from a public place.”].

³³ (10th Cir. 2003) 333 F.3d 1189, 1198.

³⁴ See *Maryland v. Macon* (1985) 472 U.S. 463, 469 [“The officer’s action in entering the bookstore and examining the wares that were intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment.”]; *On Lee v. United States* (1952) 343 U.S. 747, 752 [wired agent entered defendant’s laundry]. COMPARE *Dow Chemical Co. v. United States* (1986) 476 U.S. 227, 236-7 [Dow had a “reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings” because the buildings were “elaborately secured to ensure they are not open or exposed to the public from the ground.”].

³⁵ See *U.S. v. Reed* (8th Cir. 1984) 733 F.2d 492, 501 [“[T]here was no indication that the back parking lot was ‘private’ to the owners or to those specifically authorized to use it. . . . [It] served as a common loading area for C.D.Y. and a carpet business located to the immediate west of C.D.Y.”]; *U.S. v. Edmonds* (5th Cir. 1980) 611 F.2d 1386, 1388 [no reasonable expectation of privacy in loading dock-parking lot area of a business]. ALSO SEE *Donovan v. Dewey* (1981) 452 U.S. 594, 598-9 [“[T]he expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual’s home”]; *Vega-Rodriguez v. Puerto Rico telephone Co.* (1st Cir. 1997) 110 F.3d 174, 178-9 [“Generally speaking, business premises invite lesser privacy expectations than do residences. Still, deeply rooted societal expectations foster some cognizable privacy interests in business premises.”].

³⁶ (11th Cir. 1995) 47 F.3d 1091, 1096.

³⁷ See *U.S. v. Raines* (8th Cir. 2001) 243 F.3d 419, 421 [no Fourth Amendment violation when officers, while walking down the defendant’s driveway, walked through a ten-foot wide opening in a “makeshift fence of debris that encircled [his] property.”]. **NOTE: Absence of fence:** The absence of a fence does not automatically negate a reasonable expectation of privacy. See *People v. Camacho* (2000) 23 Cal.4th 824, 835 [“[W]e cannot accept the proposition that defendant forfeited the expectation his property would remain private simply because he did not erect an impregnable barrier to access.”].

are minimal or nonexistent; e.g., the front of the house or in an “open field.”³⁸ On the other hand, signs at the entrance to a backyard might cause problems because, as noted, backyards are viewed as fairly private places.³⁹

Surveillance from adjoining property

As a general rule, officers do not need a warrant to conduct surveillance from land adjoining the suspect’s property if the property owner consented to their entry. For example, in *Dillon v. Superior Court*⁴⁰ the court ruled that an officer’s observation of marijuana plants in the defendant’s fenced-in backyard was lawful because the officer viewed the plants from the second floor of the house next door whose owner had consented to their entry. Similarly, in *Hart v. Superior Court*⁴¹ the court ruled a warrant was not required when an officer, at the request of the suspect’s neighbor, “went into the neighbor’s yard and looked through a ½ inch area separating the wood planks.”

What if the property owner did not consent? It would not matter because, even if the officers’ entry constituted a “search,” it would have violated the Fourth Amendment rights of the *neighbor*, not the suspect. As the court explained in *People v. Claeys*, “[A] search does not violate the Fourth Amendment simply because police officers trespassed onto a neighbor’s property when making their observations.”⁴²

REASONABLE EFFORT

Even if the officers’ presence at the vantage point would not have violated the suspect’s Fourth Amendment rights, a warrant will be required if he reasonably believed that a person situated there would have been unable to see or hear the incriminating sights or sounds. To put it another way, a warrant will be required if the amount of effort necessary for the observer to make the discovery would have been beyond that which the suspect could have reasonably anticipated.

On the other hand, a warrant would not be needed if the requisite effort did not exceed that which your basic, run-of-the-mill inquisitive person would have expended. As

³⁸ See *Oliver v. United States* (1984) 466 U.S. 170, 182, fn.13 [“Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post ‘No Trespassing’ signs.”]; *U.S. v. Ventling* (8th Cir. 1982) 678 F.2d 63, 66 [trial court: “The presence of ‘no trespassing’ signs in this country without a locked or closed gate make the entry along the driveway for the purposes above described not a trespass and therefore does not constitute an intrusion prohibited by the Fourth Amendment.”]; *U.S. v. Reyes* (2nd Cir. 2002) 283 F.3d 446 [no reasonable expectation of privacy on a driveway with “a chain hanging from two posts across a portion of the driveway; it did not extend the full width of the driveway . . . [T]he District Court found that the chain and posts ‘did not block off ingress and egress for pedestrians but appeared to be something that would be put in place to keep vehicles either in or out of that area.’”]. ALSO SEE *New York v. Class* (1986) 475 U.S. 106, 114 [“[E]fforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist.”]; *California v. Ciraolo* (1986) 476 U.S. 207, 213 [“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.”].

³⁹ See *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, 424 [“search” occurred when an officer ignored “no trespassing” signs and “used a master key to unlock a gate across the dirt access road leading to the [petitioner’s] property; encountering a second padlocked gate about three-fourths of a mile farther on, the party simply skirted the unfenced gate and entered upon petitioner’s property without permission.”].

⁴⁰ (1972) 7 Cal.3d 305, 311. ALSO SEE *People v. Shaw* (2002) 97 Cal.App.3d 833 [with permission of a neighbor, officers standing behind a fence looked into the common area of defendant’s apartment]; *People v. Vermouth* (1974) 42 Cal.App.3d 353, 362 [The marijuana plants were seen in plain and unobstructed view from a neighbor’s backyard.”].

⁴¹ (1971) 21 Cal.App.3d 496.

⁴² (2002) 97 Cal.App.4th 55, 59.

the court explained in *James v. U.S.*, “That a policeman may have to crane his neck, or bend over, or squat, does not render the [plain view] doctrine inapplicable, so long as what he saw would have been visible to any curious passerby.”⁴³

While the “reasonable effort” standard might seem somewhat ambiguous, in most cases the results are fairly predictable.

Visual surveillance

If a lawful vantage point existed, a warrant is not required to conduct visual surveillance of people, places, and things in plain view.⁴⁴ This is because ordinary visual surveillance is virtually effortless. Thus, the Court of Appeal pointed out, “Information or activities which are exposed to public view cannot be characterized as something in which a person has a subjective expectation of privacy.”⁴⁵ Oftentimes, however, the object of the surveillance cannot be seen, or at least seen clearly, without some added effort. The question is, at what point does this added effort become unreasonable effort?

USING VISUAL AIDS: Utilizing binoculars and other conventional visual aids is considered reasonable effort if it simply enlarged or clarified things that were, to some degree, perceptible to the naked eye.⁴⁶ In the words of the United States Supreme Court, “[T]he use of bifocals, field glasses or the telescope to magnify the object of a witness’ vision is not a forbidden search or seizure.”⁴⁷

⁴³ (D.C. Cir. 1969) 418 F.2d 1150, 1151. ALSO SEE *Bond v. United States* (2000) 529 U.S. 334, 338-9 [a suspect who places a backpack in the overhead bin of an airliner or bus would not expect the officers or others would “feel the bag in an exploratory manner”]; *U.S. v. Kim* (D. Hawaii 1976) 415 F.Supp. 1252, 1255 [“Nor are we deciding the extent to which an agent may crane his neck, or bend over, or squat, so long as what he saw would have been visible to any curious passerby.”].

⁴⁴ See *Florida v. Riley* (1989) 488 U.S. 445, 449 [“As a general proposition, the police may see what may be seen from a public vantage point where they have a right to be.”]; *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375 [“The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy”]; *People v. St. Amour* (1980) 104 Cal.App.3d 886, 893 [“So long as the object which is viewed is perceptible to the naked eye, the person has no reasonable expectation of privacy and as a consequence, the government may use technological aid of whatever type without infringing on the person’s Fourth Amendment rights.”].

⁴⁵ *People v. Deutsch* (1996) 44 Cal.App.4th 1224, 1229.

⁴⁶ See *United States v. Knotts* (1983) 460 U.S. 276, 282 [“Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.”]; *Dow Chemical Co. v. United States* (1986) 476 U.S. 227, 238 [“The mere fact that human vision is enhanced somewhat, at least to the degree here [a “precision aerial mapping camera”], does not give rise to constitutional problems.”]; *Texas v. Brown* (1983) 460 U.S. 730, 740 [“[T]he use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.”]; *United States v. Dunn* (1987) 480 U.S. 294, 305 [“[T]he officers’ use of the beam of a flashlight, directed through the essentially open front of respondent’s barn, did not transform their observations into an unreasonable search”]; *People v. St. Amour* (1980) 104 Cal.App.3d 886, 893 [“So long as the object which is viewed is perceptible to the naked eye, the person has no reasonable expectation of privacy and as a consequence, the government may use technological aid of whatever type without infringing on the person’s Fourth Amendment rights.”]; *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, 426 [binoculars merely provided “greater detail”]; *People v. Joubert* (1981) 118 Cal.App.3d 637, 646 [“[A] binocular aided aerial examination from a lawful altitude does not infringe on a property holder’s constitutional right of privacy.”]; *People v. Superior Court (Mata)* (1970) 3 Cal.App.3d 636, 639 [“Observation of that which is in view is lawful, whether the illumination is daylight, moonlight, lights with the vehicle, lights from street lamps, neon signs, or lamps, or the flash of lights from adjacent vehicles”]; *People v. Clark* (1989) 212 Cal.App.3d 1233, 1238 [“The deputies’ use of a flashlight to illuminate the interior of the jacket pocket did not change the plain view nature of the discovery.”].

⁴⁷ *On Lee v. United States* (1952) 343 U.S. 747, 754.

Significantly, a warrant is also unnecessary if the visual aid merely enabled officers to see things that they could have observed without magnification from a more exposed or conspicuous vantage point. As the Court of Appeal explained, “[I]f the purpose of the optically aided view is to permit clandestine police surveillance of that which could be seen from a more obvious vantage point without the optical aid, there is no unconstitutional intrusion.”⁴⁸

GETTING INTO POSITION: Visual surveillance does not become a search merely because it required some effort to get into position; e.g., bending down, climbing up, standing on tiptoes. For example, in *U.S. v. Elkins*⁴⁹ officers in Memphis suspected that the defendant was growing marijuana inside a commercial building. While walking on a path next to the structure, they noticed a small PVC pipe protruding from the wall, about three feet from the ground. By bending down, one of the officers was able to look inside the building through a gap surrounding the pipe. And one of the things he saw was marijuana. Based on this observation, he was able to obtain a warrant to search the building.

Elkins argued that the officer’s act of bending down converted the observation into a search, but the court disagreed, saying, “Any contortions [the officer] made to peer through the opening did not change the ‘plain view’ character of his observation” and, therefore, “his look through the gap was not a search requiring a warrant.”

Similarly, in *People v. Superior Court (Stroud)*⁵⁰ officers saw stolen property in the suspect’s backyard after they walked into a neighbor’s yard and looked over a fence. In ruling that the effort utilized by the officers did not convert their surveillance into a search, the court said, “The observation made by the officers looking over the five-foot fence from the neighbor’s yard disclosed no more than what was in plain view of the neighboring householders and anyone else who might be on their premises with or without an invitation.”

In contrast, in *People v. Fly*⁵¹ the court concluded that the defendant could have reasonably expected privacy in his backyard because, “in order for the officer to peer through the vines into the yard, he had to squeeze into a narrow area between the neighbor’s garage and defendant’s fence and that area was almost blocked by heavy foliage and weeds.”

LOOKING THROUGH WINDOWS: Looking through uncovered or partially covered windows on a suspect’s home is not a search if officers merely saw that which was visible to passerby with reasonable effort.⁵² As the court observed in *U.S. v. Hatfield*, “Although

⁴⁸ *People v. Arno* (1979) 90 Cal.App.3d 505, 509. ALSO SEE *On Lee v. United States* (1952) 343 U.S. 747, 754.

⁴⁹ (6th Cir. 2002) 300 F.3d 638.

⁵⁰ (1974) 37 Cal.App.3d 836.

⁵¹ (1973) 34 Cal.App.3d 665. ALSO SEE *People v. Lovelace* (1981) 116 Cal.App.3d 541, 550, fn.9 [in a questionable ruling, the court concluded that although officers could see through knotholes and gaps in the defendant’s fence, a warrant was required because he had tried (albeit not hard enough) to make the fence impenetrable].

⁵² See *People v. Camacho* (2000) 23 Cal.4th 824, 834 [“Had [the officers] been standing on a public sidewalk, they could have observed defendant [through the window of his home] for as long as they wished.”]; *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 724 [“Clearly, by drawing the curtains on the window of a motel room which was located on the second floor of the building and at a considerable distance from any public vantage point, appellants exhibited a reasonable expectation of privacy.”]; *People v. Walker* (1969) 276 Cal.App.2d 39, 43 [“[The window] had no blinds and there was an unobstructed view into the kitchen which was well lighted.”]; *People v. Stevens* (1974) 38 Cal.App.3d 66, 68-9 [lawful observation into home through a “defectively closed door”]; *Ponce v. Craven* (9th Cir. 1969) 409 F.2d 621, 625 [“If [the defendant] did not wish to be observed, he could have drawn his blinds.”]; *Commonwealth v. Hernley* (1971) 216 Pa.Super. 177 [in discussing the defendant’s failure to prevent police surveillance by simply installing curtains, the court

privacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects, there is no reasonable expectation that a home and its curtilage will be free from ordinary visual surveillance.”⁵³

For example, in *People v. Superior Court (Reilly)*⁵⁴ two San Jose officers happened to see a vehicle belonging to a suspected drug dealer parked in front of a motel room. While standing outside the room, they were able to see inside through a three-inch gap in the curtains. What they saw was a man who photographing what appeared to be a false ID. This led to the arrest of the man and the defendant for counterfeiting. In rejecting the argument that the officers’ visual surveillance constituted a search, the court pointed out that “[a]nyone passing by could observe [the man’s] strange nocturnal activity.”

What about using binoculars? Again, if the binoculars merely enhanced or clarified things that the officers could have seen with the naked eye, a warrant is not required. For example, in *Cooper v. Superior Court*⁵⁵ FBI agents were tipped off that a man named Horrigan had been involved in the robbery of a jewelry store in Moraga. When they learned that Horrigan was staying in a certain apartment, they obtained consent from a neighbor to use her apartment to conduct visual surveillance. Without using visual aids, an agent was able to see four people inside Horrigan’s apartment, and they were using a scale to weigh gold colored objects. Then, using binoculars, he was able to confirm that the objects were, in fact, jewelry. This information was used to obtain a warrant to search the apartment.

On appeal, the defendant argued that the agent’s use of the binoculars rendered their surveillance unlawful. The court disagreed, pointing out:

Here, [the agent] could clearly see into the [defendant’s] household from a neighbor’s apartment. For two hours he observed the four suspects around a table. On the table was a scale which was being used to weigh objects with a gold glint. Although the precise description of the objects being weighed could not be determined without the aid of binoculars, the activity of the suspects weighing gold was in plain view.

As with other types of visual surveillance, however, the likelihood that a warrant would be required increases as it becomes more difficult to get into position; i.e., to see through the window. For example, in *Pate v. Municipal Court* the court ruled that an officer conducted a search when he looked through the window of the defendant’s motel room because, to do so, he had to climb over a fence, onto a trellis, then walk along the trellis for a considerable distance.⁵⁶ Similarly, the courts have ruled that a warrant was required when, to see inside, the officers had to step onto “a small planter area between the building and the parking lot,”⁵⁷ or had to traverse some bushes that constituted a “significant hindrance.”⁵⁸

A warrant will also be required if officers could see through the window only from a distant location using high-powered binoculars. For example, in *People v. Arno*⁵⁹ LAPD officers were informed that Arno was selling illegal pornographic movies out of his office

said, “The law will not shield criminal activity from visual observation when the actor shows such little regard for his privacy.”]

⁵³ (10th Cir. 2003) 333 F.3d 1189, 1196.

⁵⁴ (1975) 53 Cal.App.3d 40, 45.

⁵⁵ (1981) 118 Cal.App.3d 499.

⁵⁶ (1970) 11 Cal.App.3d 721, 724.

⁵⁷ *Jacobs v. Superior Court* (1973) 36 Cal.App.3d 489.

⁵⁸ *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 636.

⁵⁹ (1979) 90 Cal.App.3d 505.

in the Playboy Building. In the course of the investigation, an officer stationed himself on a hilltop about 250 yards away. With the naked eye he could see only the shapes and shadows of people inside the office. But with a pair of high-powered binoculars he was able to see Arno and others handling a box that was “distinctively marked” as a container of pornography. Based on this information, they obtained a warrant to search the office. The court ruled, however, the such surveillance was illegal without a warrant because “the activity seen through [the officer’s] 10-power binoculars within suite 804 was not observable to anyone not using an optical aid.”

In a similar case, *U.S. v. Kim*,⁶⁰ FBI agents in Hawaii were informed that Kim was operating a “major” sports book out of his high-rise apartment. So they began watching the apartment from the only vantage point they could find: a building about a quarter of a mile away. Using a high-powered telescope, they could see through a window. And what they saw, repeatedly, was Kim talking on a telephone while reading a certain sports journal that was apparently quite popular among Hawaii’s bookies. In any event, this information was used to help establish probable cause for a wiretap. But the court ruled the warrantless surveillance constituted an illegal search, saying, “It is inconceivable that the government can intrude so far into an individual’s home that it can detect the material he is reading and still not be considered to have engaged in a search.”

Aerial surveillance

Although aerial surveillance requires much more effort than, say, looking through a suspect’s window, air traffic is so commonplace that a warrant is not required if both of the following requirements are met: (1) the aircraft was flown in accordance with FAA regulations,⁶¹ and (2) it was not flown in a physically intrusive manner.⁶²

The latter requirement is directed mainly at police helicopters which, because they can hover and fly at much lower altitudes than fixed-wing aircraft, they are capable of notoriously invasive surveillance. In fact, one of the many frightening (but, as it turned out, farfetched) images from George Orwell’s *1984* was this one:

In the far distance a helicopter skimmed down between the roofs.
[I]t was the Police Patrol, snooping into people’s windows.

⁶⁰ (D. Hawaii 1976) 415 F.Supp. 1252.

⁶¹ See *California v. Ciraolo* (1986) 476 U.S. 207, 215 [“The Fourth Amendment simply does not require the police traveling in the public airways at this altitude [1,000 feet] to obtain a warrant in order to observe what is visible to the naked eye.”]; *Florida v. Riley* (1989) 488 U.S. 445, 451 [“But it is of obvious importance that the helicopter in this case was *not* violating the law”]; *People v. Romo* (1988) 198 Cal.App.3d 581, 586 [“[T]here is no question that the helicopter was operating lawfully. As just mentioned, *Ciraolo* requires no more.”]; *People v. McKim* (1989) 214 Cal.App.3d 766, 771 [“Although the dust has not entirely settled on the issue of helicopter aerial surveillance in light of *Riley*’s plurality status and multiplicity of opinions, this much is clear: five United States Supreme Court justices do not think that the warrantless surveillance of a residential backyard from a helicopter 400 feet in the air constitutes a per se violation of the Fourth Amendment”]; *People v. Venghiattis* (1986) 185 Cal.App.3d 326, 331 [“Even if the area in which the marijuana was growing could be characterized as part of the curtilage, Venghiattis may not successfully assert a reasonable expectation of privacy from lawful aerial observations.”].

⁶² See *People v. Romo* (1988) 198 Cal.App.3d 581, 587 [“[The helicopter] did not hover over defendant’s backyard . . . No maneuvering was required”]; *People v. St. Amour* (1980) 104 Cal.App.3d 886, 894 [“[T]he officers here were flying at normal heights”]; *People v. Stanislawski* (1986) 180 Cal.App.3d 748, 755-6 [“[T]here would appear to be no sound basis for distinguishing between ‘curtilage’ and ‘noncurtilage’ areas equally visible from the air.”]; *Dean v. Superior Court* (1973) 35 Cal.App.3d 112, 117 [“When the police [in a helicopter] have a plain view of contraband from a portion of the premises as to which the occupant has exhibited no reasonable expectation of privacy, there is no search in a constitutional sense”]; *People v. Eckstrom* (1986) 187 Cal.App.3d 323, 334 [defendant’s marijuana gardens “were spotted in open fields”].

More recently (but less dramatically), the Court of Appeal said, “We judicially notice the unique capabilities of the helicopter to gambol in the sky—turning, curtsying, tipping, hummingbird-like suspended in space, ascending, descending and otherwise confounding its fixed wing brethren.”⁶³ Thus, helicopter surveillance would likely be deemed a search if the pilot engaged in “aerial acrobatics” or “treetop” observations, or possibly “interminable” hovering.⁶⁴

Note that aerial surveillance does not become a search merely because the suspect had constructed fences or other barriers that prevented surveillance from the ground.⁶⁵

Eavesdropping

Unlike visual surveillance which can usually be conducted from a variety of vantage points, non-electronic eavesdropping in public places is much more limited because it requires close physical proximity. So, unless the suspect is unusually indiscreet, a warrant will probably be required.

As for conversations that occur in private places, the “reasonable effort” test still applies. As a result, if officers are lawfully inside an apartment, motel room, or other structure, they may listen to conversations in adjoining rooms through the walls or floors if the conversations could have been overheard without amplification equipment.⁶⁶

⁶³ *People v. Sabo* (1986) 185 Cal.App.3d 845, 853. ALSO SEE *People v. Romo* (1988) 198 Cal.App.3d 581, 588 [“Helicopters and airplanes have different capabilities and the helicopter is particularly suited for conducting more intrusive-type flights.”]; *Florida v. Riley* (1989) 488 U.S. 445, 451 [“But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft.”].

⁶⁴ See *Florida v. Riley* (1989) 488 U.S. 445, 452 [“[T]here was no undue noise, and no wind, dust, or threat of injury.”]; *People v. Romo* (1988) 198 Cal.App.3d 581, 588; *People v. Sneed* (1973) 32 Cal.App.3d 535, 542 [“The positioning of the helicopter 20 to 25 feet above appellant’s backyard, in addition to being an obtrusive invasion of privacy, was probably illegal.”]; *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 839 [“Patrol by helicopter has been part of the protection afforded the citizens of the Los Angeles metropolitan area for some time. The observation made from the air in this case must be regarded as routine.”]; *People v. McKim* (1989) 214 Cal.App.3d 766, 772 [there was no evidence that the helicopter “created any undue noise, wind, dust, or threat of injury.”]; *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, 426 [“[N]either of the flights herein involved a purposeful and intensive (helicopter) overflight in an unreasonable and unlawful altitude”]. ALSO SEE G. Orwell, 1984, Harcourt Brace Jovanovich ed., 1949 [“In the far distance a helicopter skimmed down between the roofs. [I]t was the Police Patrol, snooping into people’s windows.” At p.4].

⁶⁵ See *Dow Chemical Co. v. United States* (1986) 476 U.S. 227, 236-7 [that “Dow’s inner manufacturing areas are elaborately secured to ensure they are not open or exposed to the public from the ground” did not prevent aerial surveillance]; *Florida v. Riley* (1989) 488 U.S. 445, 450 [warrant not required to view inside of greenhouse through missing panels]; *California v. Ciraolo* (1986) 476 U.S. 207, 213 [“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.”]; *People v. Venghiattis* (1986) 185 Cal.App.3d 326, 331 [“His efforts at hiding the garden from passers-by do not serve to protect him from overflights.”]; *People v. Joubert* (1981) 118 Cal.App.3d 637, 646 [“Only by growing the marijuana in a hothouse or otherwise covering the plants to shield them from aerial observation will the property holder be deemed to have demonstrated an objectively reasonable expectation of privacy from overflights.”]; *People v. Smith* (1986) 180 Cal.App.3d 72, 83 [“It is unreasonable for one cultivating a crop in a haphazardly fenced-in area to expect privacy from overhead.”]. **NOTE: Commercial property:** Privacy expectations as to commercial property are less than those for private property. *Dow Chemical Co. v. United States* (1986) 476 U.S. 227, 237-8.

⁶⁶ See *People v. Guerra* (1971) 21 Cal.App.3d 534, 538; *U.S. v. Fisch* (9th Cir. 1973) 474 F.2d 1071, 1077 [“Here the conversations complained of were audible by the naked ear in the next room.”]; *U.S. v. McLeod* (7th Cir. 1974) 493 F.2d 1186, 1188 [“As the agent was located in a public place and overheard the conversation by McLeod without the use of any amplification device, the court properly overruled the motion to suppress.”]; *U.S. v. Llanes* (2nd Cir. 1968) 398 F.2d 880, 884 [“[C]onversations carried on in a tone of voice quite audible to a person standing outside the home are conversations knowingly exposed to the public.”]. **NOTE:** It is unclear whether eavesdropping by means of a stethoscope would require a warrant. In

For example, in *People v. Kaaienapua*⁶⁷ the manager of a boarding house in Santa Monica thought that one of his tenants, Kaaienapua, was selling drugs. So he notified the police and permitted officers to eavesdrop from an adjacent room where, “by placing their ears to the dividing wall,” they could overhear “conversations and noises” that helped establish probable cause to arrest.

On appeal, the court rejected Kaaienapua’s argument that such warrantless eavesdropping was unlawful, pointing out, “With the manager’s express permission they entered into a vacant room wholly controlled by the manager and, consequently, were in a place where they had a right to be.” The court also offered this analysis of the propriety of eavesdropping:

Listening at the door to conversations in the next room is not a neighborly or nice thing to do. It is not genteel. But so conceding we do not forget that we are dealing here with the competitive enterprise of ferreting out crime. [T]he officers were in a room open to anyone who might care to rent. They were under no duty to warn appellants to speak softly, to put them on notice that the officers were listening.⁶⁸

For these reasons, officers may also listen through open windows to audible conversations occurring inside homes and other private structures, so long as they could get into position without violating the occupants’ Fourth Amendment rights.⁶⁹

Electronic surveillance

In the past, it was impractical or impossible to conduct visual surveillance without some light, to chronicle a suspect’s activities via high-definition DVD, or to follow him by means of satellites in orbits thousands of miles above earth. That has, of course, changed. So has the general availability and affordability of invasive surveillance equipment. For example, just a few years ago, parabolic microphones were considered the ultimate in crafty surveillance technology. But today, any snoop or busybody can buy his own “Sonic Sleuth” parabolic mike on eBay for only \$24.99, plus shipping.

This does not mean that anything goes. But it *does* mean that the law is having to adjust its idea of how much privacy people can reasonably expect and, therefore, what types of surveillance will require a search warrant. As the United States Supreme Court observed, “It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”⁷⁰

Kaaienapua, below, the court said in a footnote, “We need not here decide whether or not the successful use of a stethoscope would be [impermissible].”]

⁶⁷ (1977) 70 Cal.App.3d 283.

⁶⁸ Quoting from *U.S. v. Fisch* (9th Cir. 1973) 474 F.2d 1071, 1077.

⁶⁹ See *U.S. v. Llanes* (2nd Cir. 1968) 398 F.2d 880, 884 [“We believe that conversations carried on in a tone of voice quite audible to a person standing outside the home are conversations knowingly exposed to the public.”]; *People v. Guerra* (1971) 21 Cal.App.3d 534, 538 [“[I]f an individual desires that his speech remains private, he can easily assure himself of privacy by whispering”]; *Ponce v. Craven* (9th Cir. 1969) 409 F.2d 621, 625.

⁷⁰ *Kyllo v. United States* (2001) 533 U.S. 27, 33-4. ALSO SEE *Dean v. Superior Court* (1973) 35 Cal.App.3d 112, 116 [“Judicial implementations of the Fourth Amendment need constant accommodation to the ever-intensifying technology of surveillance.”]; *People v. Arno* (1979) 90 Cal.App.3d 505, 511 [“[E]lectronic bugs and remote microphones have made it possible to intrude upon private conversation surreptitiously in an Orwellian degree”]; *U.S. v. Hill* (9th Cir. 2006) 459 F.3d 966, 979 [“Technology is rapidly evolving and the concept of what is reasonable for Fourth Amendment purposes will likewise have to evolve.”]; *U.S. v. Kim* (D. Hawaii 1976) 415 F.Supp. 1252, 1257 [“[A]s the technological capability of law enforcement agencies increases, the Fourth Amendment must likewise grow in response.”].

For example, in *U.S. v. Dellas*,⁷¹ the court summarily rejected the idea that the use of night-vision binoculars constituted a search, pointing out that they “merely” amplify ambient light. The Oregon Supreme Court reached the same conclusion.⁷²

So, what’s the law? Although it is evolving, the prevalent view seems to be that a warrant is not required if officers utilize technology that merely permits them to see or hear things that would have been perceptible from a plausible vantage point—but with greater effort. As the U.S. Court of Appeals noted, “While technology certainly gives law enforcement a leg up on crime, the Supreme Court has never equated police efficiency with unconstitutionality.”⁷³ Or, as the court observed in *U.S. v. Harrelson*,⁷⁴ “Mistaking the degree of intrusion of which probable eavesdroppers are capable is not at all the same thing as believing there are no eavesdroppers.”

Also note that the likelihood that a warrant would be required may decrease to the extent the technology is in “general public use.”⁷⁵

VIDEO SURVEILLANCE: A warrant is certainly not required to conduct live or recorded video surveillance of people in public places. For example, in *U.S. v. Jackson*⁷⁶ officers suspected that the defendant was running a major crack cocaine distribution operation in Oklahoma. So they installed two video cameras atop telephone poles overlooking her house. The cameras were especially invasive because, according to the court, they “could be adjusted by officers at the police station, and could zoom in close enough to read a license plate.” The videotapes were used against Jackson at her trial, and she was convicted.

On appeal, she contended the tapes should have been suppressed because the agents had not obtained a warrant. But the court ruled a warrant was unnecessary because the cameras “were incapable of viewing inside the houses, and were capable of observing only what any passerby would easily have been able to observe. Thus, [the defendant] had no reasonable expectation of privacy that was intruded upon by the video cameras.”

What about video surveillance of semi-private places? Although the rules are far from settled, it appears that a warrant will not be required if the location was generally exposed to the public or to a fairly large number of people. For example, in *U.S. v. Gonzalez*⁷⁷ DEA agents made a controlled delivery of a package containing 20,000 “ecstasy” tablets that had been addressed to a physician at Kaiser Permanente Hospital in Los Angeles. Figuring that the person who had ordered the pills would intercept the package, they obtained Kaiser’s permission to install a hidden video camera inside the hospital’s mailroom. A surveillance videotape showed Gonzalez, a Kaiser Hospital employee, excitedly examining the box then, apparently overjoyed with the success of his wily enterprise, clapping his hands and, in the words of the court, “acting in a manner usually reserved for post-touchdown end zone celebrations.”

⁷¹ (N.D.Cal. 2005) 355 F.Supp.2d 1095, 1107.

⁷² *Oregon v. Wacker* (1993) 317 Or. 419, 429.

⁷³ *U.S. v. Ishmael* (5th Cir. 1995) 48 F.3d 850, 555. ALSO SEE *United States v. Knotts* (1983) 460 U.S. 276, 284 [“We have never equated police efficiency with unconstitutionality, and we decline to do so now.”].

⁷⁴ (5th Cir. 1985) 754 F.2d 1153, 1170.

⁷⁵ See *Kyllo v. United States* (2001) 533 U.S. 27, 39, fn.6 [whether the technology is “general public use” is a factor]; *Dow Chemical v. United States* (1986) 476 U.S. 227, 238 [“It may well be that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant.”].

⁷⁶ (10th Cir. 2000) 213 F.3d 1269. ALSO SEE *State v. Holden* (Utah 1998) 964 P.2d 318 321 [warrant not required to conduct constant video surveillance of defendant’s front yard].

⁷⁷ (9th Cir. 2003) 328 F.3d 543.

In dismissing Gonzalez’s argument that the warrantless surveillance was unlawful, the court said:

[G]iven the public nature of the mailroom in a community hospital where individuals—even DEA agents—strolled nearby without impediment during the transaction, we conclude the defendant had no objectively reasonable expectation of privacy that would preclude video surveillance of activities already visible to the public.

Similarly, the Court of Appeal has ruled that a warrant was not required to conduct video surveillance of a jail release office because, among other things, it was “accessible to any number of people, including other jail employees, inmates on cleaning detail and outside personnel.”⁷⁸

On the other hand, a warrant might be required if access to the location was highly restricted. For example, the Ninth Circuit has noted that an employee “may have an objectively reasonable expectation of privacy in private work areas given over to [the] employee’s exclusive use.”⁷⁹

Even if the employee did not have exclusive use of the location, he may nevertheless reasonably expect that he will not be secretly videotaped. For example, in *Trujillo v. City of Ontario*,⁸⁰ the court ruled that covert video surveillance of a police department’s locker room used by officers constituted a search because, said the court, “A person can have a subjective expectation of privacy that he or she will not be covertly recorded, even though he or she knows there are other people in the locker room.”

It is also possible that a warrant would be required if the video surveillance was continuous and prolonged, or otherwise unusually intrusive. For example, in *U.S. v. Cuevas-Sanchez*⁸¹ officers suspected that the defendant’s home in Texas was being used as a “drop house” for drug traffickers. So they installed a closed-circuit television camera atop a power pole overlooking the defendant’s backyard, which was surrounded by a ten-foot high metal fence. Among other things, the camera showed people removing drugs from hidden compartments in various cars.

The Fifth Circuit ruled, however, that a warrant was required to conduct this type of surveillance because, (1) backyards are semi-private places, and (2) the surveillance was incessant. Said the court:

This type of surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the specter of the Orwellian state. [The defendant’s] expectation to be free from this type of video surveillance in his backyard is one that society is willing to recognize as reasonable.

⁷⁸ *Sacramento County Deputy Sheriff’s Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1482.

⁷⁹ *U.S. v. Gonzalez* (9th Cir. 2003) 328 F.3d 543, 548.

⁸⁰ (C.D. Cal. 2006) 428 F.Supp.2d 1094. ALSO SEE *Mancusi v. DeForte* (1968) 392 U.S. 364, 369 [“In such a ‘private’ office, DeForte would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken except with his permission or that of his union superiors.”].

⁸¹ (5th Cir. 1987) 821 F.2d 248, 251. ALSO SEE *U.S. v. Nerber* (9th Cir. 2000) 222 F.3d 597, 601 “[T]he legitimacy of a citizen’s expectation of privacy in a particular place may be affected by the nature of the intrusion that occurs.”]; *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 676 [although an office worker may not have a general privacy interest in another person’s office, he may reasonably expect that he will not be videotaped while he is there]; *Trujillo v. City of Ontario* (C.D. Cal. 2006) 428 F.Supp.2d 1094, 1106 [“A court may take into account the severity of the intrusion when analyzing whether a person’s expectation of privacy is reasonable.”].

“WIRED” AGENTS: A warrant is not required to conduct covert audio or video surveillance of people in homes or other private places if one of the people was an undercover officer or police agent who, (1) knew he was being recorded; and (2) was present at all times so that the suspect knew, or should have known, that the agent could have seen or heard whatever was recorded. The theory here is that criminals cannot reasonably expect that the people they conspire with, or people who are able to overhear their incriminating conversations, will not secretly record them and give the recordings to investigators.⁸² As the United States Supreme Court observed:

If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State’s case.⁸³

For example, in *U.S. v. Laetividal-Gonzales*⁸⁴ Customs agents suspected that Shirley Brown was involved in a money laundering scheme. In the course of their investigation, they arranged for an informant to rent office space from Brown in her Florida real estate office. With the informant’s knowledge, they installed covert audio and video recording equipment in the room. Then they put their plan into action: Figuring that Brown might want to invest some of her idle cash in a lucrative drug smuggling operation, the agents instructed the informant to represent to her that he was an importer of illegal drugs. Brown took the bait and, while the cameras rolled, she met with the informant in his office and gave him \$5,000 in cash with which to purchase drugs.

In rejecting Brown’s argument that the warrantless surveillance was unlawful, the court said, “As long as one of the parties to a conversation knows of and consents to the recording, the fourth amendment is not violated when the government records the exchange.”

As noted, however, if the undercover officer or agent leaves the room, continued warrantless surveillance becomes unlawful because the occupants’ privacy expectations would have been restored. As the court noted in *U.S. v. Lee*, “[T]he cases involving

⁸² See *Lopez v. United States* (1963) 373 U.S. 427, 439 [“Stripped to its essentials, petitioner’s argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent’s memory, or to challenge the agent’s credibility without being beset by corroborating evidence that is not susceptible of impeachment.”]; *Hoffa v. United States* (1966) 385 U.S. 292, 302 [“Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”]; *On Lee v. United States* (1952) 343 U.S. 747, 752; *People v. Murphy* (1972) 8 Cal.3d 349, 360 [“[We] perceive no distinction between the risk one faces that the person in whom he confides will later breach that trust by testifying about the conversation and the risk that such a person has already betrayed him and is instantaneously transmitted their conversation electronically to police equipped with radio receivers.”]; *People v. Siripongs* (1988) 45 Cal.3d 548, 564 [the audio recorder “merely memorialized what [the officer] heard.”]; *People v. Strohl* (1976) 57 Cal.App.3d 347, 365 [the Fourth Amendment was intended to protect people from the “uninvited ear, not from a breach of trust by one of the parties to the conversation.”]; *U.S. v. Lee* (3rd Cir. 2004) 359 F.3d 194, 201 [“[A] person has no legitimate expectation of privacy in conversations with a person who consents to the recording of the conversations.”]; *U.S. v. Longoria* (10th Cir. 1999) 177 F.3d 1179, 1183 [“Mr. Longoria voluntarily entered the informant’s tire shop and knowingly made incriminating statements in the informant’s presence.”]; *U.S. v. Brathwaite* (5th Cir. 2006) 458 F.3d 376, 380 [“In the case at hand, we are unable to find a constitutionally relevant difference between audio and video surveillance. Once Brathwaite invited the CI into his home, he forfeited his privacy interest in those activities that were exposed to the CI.”].

⁸³ *United States v. White* (1971) 401 U.S. 745, 752.

⁸⁴ (11th Cir. 1991) 939 F.2d 1455.

consensual monitoring do not apply if recordings are made when the cooperating individual is not present.”⁸⁵

For example, in *People v. Henderson*⁸⁶ a man named Bub obtained permission from Hake to use Hake’s condominium in Palm Springs to manufacture methamphetamine. Hake, a DEA informant, notified agents who, with his consent, hid a video camera inside the condo. Henderson, who was one of Bub’s associates, appeared on the videotape as he was cooking up a batch of methamphetamine. He was subsequently charged with manufacturing and conspiracy to manufacture. When his motion to suppress the videotape was denied, he pled guilty.

The Court of Appeal ruled, however, that the warrantless videotaping was unlawful because Hake was not present when it occurred. Said the court, “Once Hake left the condo, Henderson’s expectation of privacy increased, and his Fourth Amendment rights would be violated by continued DEA video surveillance.”

Similarly, in *U.S. v. Nerber*⁸⁷ narcotics officers hid a video camera inside a motel room where Nerber was going to complete his purchase of cocaine from some police informants. When the informants and Nerber entered the room, the informants gave him some cocaine, and Nerber “flashed” some money in a briefcase. The informants then left the room, ostensibly to get more cocaine. While they were gone, the videotape captured Nerber and his associates brandishing weapons and sampling the cocaine.

On appeal, the court ruled that the warrantless videotaping that occurred while the informants were in the room was lawful, but that it became unlawful when they stepped outside. As the court explained, “When defendants were left alone, their expectation of privacy increased to the point that the intrusion of a hidden video camera became unacceptable.”

AUDIO AIDS: While people know that they may be *seen* in public places, they can usually expect that their conversations in public will not be overheard unless there were other people in the immediate vicinity.⁸⁸ Thus, a warrant will usually be required to conduct electronic eavesdropping. As the Court of Appeal explained, “[T]he use of equipment to hear what the unaided ear cannot hear violates reasonable expectations of privacy.”⁸⁹

For example, in *Katz v. United States*⁹⁰ FBI agents in Los Angeles attached a tape recorder to the outside of a phone booth that was being used by some local bookies. One of them was Katz who was overheard placing bets. At Katz’s trial for transmitting wagering information, the Government argued that a warrant was not required to record his conversations because he was in a public place and, therefore, could not have reasonably expected privacy. The Supreme Court disagreed, pointing out that when Katz

⁸⁵ (3rd Cir. 2004) 359 F.3d 194, 202. ALSO SEE *U.S. v. Nerber* (9th Cir. 2000) 222 F.3d 597, 604-5 [“The government *conceded* that audio surveillance conducted after the informants departed was inadmissible”]; *U.S. v. Laetividal-Gonzalez* (11th Cir. 1991) 939 F.2d 1455, 1462 [“Any conversations recorded when [the informant] was absent from the office would not have been admissible evidence, since none of the parties would have been aware of the recording devices.”].

⁸⁶ (1990) 220 Cal.App.3d 1632.

⁸⁷ (9th Cir. 2000) 222 F.3d 597.

⁸⁸ See *U.S. v. McLeod* (7th Cir. 1974) 493 F.2d 1186, 1188 [“As the agent was located in a public place and overheard the conversation by McLeod without the use of any amplification device, the court properly overruled the motion to suppress.”]; *U.S. v. Llanes* (2nd Cir. 1968) 398 F.2d 880, 884 [“[C]onversations carried on in a tone of voice quite audible to a person standing outside the home are conversations knowingly exposed to the public.”].

⁸⁹ *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1644.

⁹⁰ (1967) 389 U.S. 347.

entered the phone booth he intended to exclude the “uninvited ear,” not the “intruding eye.” In other words, he did not lose his right to have a private conversation merely because he made his calls from a place where he might have been seen.

What about parabolic microphones? Surprisingly, the courts have not specifically ruled on whether a warrant is required. This may be because the result is fairly obvious. A warrant or wiretap order would plainly be required if the conversation occurred inside a home or other private place because the device would be functioning as an audio bug.⁹¹ If the mike was used to intercept a conversation in a public place, the result would depend on whether there were people nearby or whether, as in *Katz*, the suspect reasonably expected privacy.

VEHICLE TRACKING DEVICES: A warrant is not required to follow a vehicle on public streets by means of an electronic tracking device, whether conventional or GPS.⁹² This is because a person’s travels on streets and highways are exposed to public view. As the United States Supreme Court observed, “A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”⁹³

For example, in *U.S. v. Moran*⁹⁴ the court responded as follows to the defendant’s argument that GPS tracking constituted an unlawful search: “Moran had no expectation of privacy in the whereabouts of his vehicle on a public roadway. Thus, there was no search or seizure and no Fourth Amendment implications in the use of the GPS device.”

Note that the result would be the same even though officers might have had difficulty visually following the suspect because he had utilized counter-surveillance measures.⁹⁵

As for secretly installing trackers on vehicle, a warrant is not required if the car was parked in a public place (e.g., on the street or in a public garage); or if it was parked on the suspect’s driveway, provided the driveway was accessible to the public.⁹⁶ As the court explained in *People v. Zichwic*, “It does not amount to a search to examine the

⁹¹ See *Silverman v. United States* (1961) 365 U.S. 505 [warrantless use of “spike mic” illegal].

⁹² See *Cardwell v. Lewis* (1974) 417 U.S. 583, 590-1 [“A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view.”]; *U.S. v. Gbemisola* (D.C. Cir. 2000) 225 F.3d 753, 759 [“[G]bemisola had no reasonable expectation of privacy with respect to his travels on the public street.”]; *U.S. v. Berry* (D. Maryland 2004) 300 F.Supp.2d 366, 367-8 [“Measured against today’s technology, a beeper is unsophisticated, and merely emits an electronic signal that the police can monitor with a receiver. The police can determine whether they are gaining on a suspect because the strength of the signal increases as the distance between the beeper and the receiver closes.”].

⁹³ *United States v. Knotts* (1983) 460 U.S. 276, 281.

⁹⁴ (N.D. New York 2005) 349 F.Supp.2d 425, 467. ALSO SEE *U.S. v. Berry* (D. Maryland 2004) 300 F.Supp.2d 366, 368 [“A GPS merely records electronically what the police could learn if they were willing to devote the personnel necessary to tail a car around the clock.”].

⁹⁵ *United States v. Knotts* (1983) 460 U.S. 276, 285 [“Admittedly, because of the failure of the visual surveillance, the beeper enabled the law enforcement officials in this case to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise.”].

⁹⁶ See *People v. Zichwic* (2001) 94 Cal.App.4th 944, 956 [“[T]he detective who walked up the driveway and placed an electronic tracking device on the undercarriage of the truck did not violate any reasonable expectation of privacy”]; *United States v. McIver* (9th Cir. 1999) 186 F.3d 1119, 1126 [“Assuming *arguendo* that the officers committed a trespass in walking into McIver’s open driveway, he has failed to demonstrate that he had a legitimate expectation of privacy under the Fourth Amendment in this portion of his property.”]; *U.S. v. Pretzinger* (9th Cir. 1976) 542 F.2d 517, 520 [“[N]o warrant is needed to justify installation of an electronic beeper unless fourth amendment rights necessarily would have to be violated in order to initially install the device.”]; *U.S. v. Gbemisola* (D.C. Cir. 2000) 225 F.3d 753, 758 [“[I]n installing the tracking device did not require any additional intrusion into anyone’s reasonable expectation of privacy.”].

undercarriage, to touch it, or to attach a tracking device, so long as a police officer does so from a place where the officer has a right to be.”⁹⁷

CONTRABAND TRACKING: In some cases, officers will install a beeper inside a package that is being shipped to a certain destination. This typically occurs after the carrier or Customs agents lawfully discover drugs or other contraband inside it. Under these circumstances, a warrant is not required to install the beeper,⁹⁸ nor to follow the package via the beeper as it is being transported in public places.⁹⁹ As the Ninth Circuit put it, “Electronic tracking devices continually broadcast ‘here I am’ This intrusion, though, is slight and is not an impermissible search.”¹⁰⁰

Once the package is taken inside a residence or other private place, however, a warrant will be required because the beeper would be providing information that could not have been obtained through visual surveillance.¹⁰¹ For this reason, the United States Supreme Court has advised officers that “warrants for the installation and monitoring of a beeper [in a package] will obviously be desirable since it may be useful, even critical, to monitor the beeper to determine that it is actually located in a place not open to visual surveillance.”¹⁰²

THERMAL IMAGING: As noted earlier, a warrant is not required to utilize thermal imaging devices, such as FLIR, to conduct surveillance in public places.¹⁰³ A warrant is required, however, to use them to detect heating conditions inside a residence. This is not because the technology is too sophisticated.¹⁰⁴ It is because homes are places that receive the highest protection by the Fourth Amendment.¹⁰⁵

⁹⁷ (2001) 94 Cal.App.4th 944, 956. ALSO SEE *U.S. v. Berry* (D. Maryland 2004) 300 F.Supp.2d 366, 368, fn.2 [“The police may be guilty of a trespass when they install a beeper, but the Supreme Court has held that the commission of a trespass, without more, does not violate the Fourth Amendment.” Citing *Oliver v. United States* (1984) 466 U.S. 170].

⁹⁸ See *People v. Karo* (1984) 468 U.S. 705, 713 [“We conclude that no Fourth Amendment interest of Karo or of any other respondent was infringed by the installation of the beeper.”]; *People v. Salih* (1985) 173 Cal.App.3d 1009, 1015 [“The installation of a beeper in the circumstances of this case [a U.S. Customs inspection] violated no one’s Fourth Amendment rights. ¶ At most, there was a technical trespass of the space occupied by the beeper. Thus, no Fourth Amendment interest of appellant nor any other person was infringed by the installation of the beeper.”].

⁹⁹ See *United States v. Knotts* (1983) 460 U.S. 276, 281.

¹⁰⁰ *U.S. v. Dubrofsky* (9th Cir. 1978) 581 F.2d 208, 211.

¹⁰¹ See *United States v. Karo* (1984) 468 U.S. 705, 716 [“Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.”]; *United States v. Knotts* (1983) 460 U.S. 276, 285 [“But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin”]; *People v. Zichwic* (2001) 94 Cal.App.4th 944, 956 [“Monitoring does amount to a search when it reveals information about otherwise hidden activities inside a residence.”]; *People v. Salih* (1985) 173 Cal.App.3d 1009, 1015.

¹⁰² *United States v. Karo* (1984) 468 U.S. 705, 713, fn.3. **NOTE:** The affidavit for such a warrant should “describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested.” *Id.* at p. 718.

¹⁰³ **What is thermal imaging?** See *U.S. v. Nueva* (1st Cir. 1992) 979 F.2d 880, 882 [“All objects emit heat, in the form of infrared radiation, which can be observed and recorded by thermal imaging devices. Specifically, thermal imagers detect energy radiated from the outside surface of objects, and internal heat that has been transmitted to the outside surface of an object, which may create a differential heat pattern.”]; *U.S. v. Robinson* (11th Cir. 1995) 62 F.3d 1325, 1327, fn.2 [“FLIR thermal imaging is a process whereby differences in heat emissions are measured and reflected on a videotape. Heat concentration is indicated on a videotape on a spectrum of light to dark, with bright white showing intense heat.”].

¹⁰⁴ See *Kyllo v. United States* (2001) 533 U.S. 27, 36.

¹⁰⁵ See *Groh v. Ramirez* (2004) 540 U.S. 551, 564 [“[A]bsent consent or exigency, a warrantless search of the home is presumptively unconstitutional.”]; *Coolidge v. New Hampshire* (1971) 403 U.S. 443,

For example, in *Kyllo v. United States*¹⁰⁶ agents with the Department of the Interior received information that Kyllo was growing marijuana inside his home in Oregon. Because marijuana plants require lots of heat, the agents sought to determine whether the amount of heat Kyllo was using was excessive. So, while parked in a car across the street, an agent scanned the house with a thermal imager and determined that the roof over the garage was relatively hot. Based in part on this information, agents obtained a warrant to search the house, and the search netted over 100 marijuana plants.

But the United States Supreme Court ruled the information was obtained unlawfully because it pertained to conditions existing inside the residence. Said the Court, “Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ which is presumptively unreasonable without a warrant.”

FIREARM DETECTORS: One of the more intriguing recent developments in surveillance technology is the “passive millimeter wave imager” that can detect firearms under a person’s clothing. While this technology will be of great use in airports, it might also be used to conduct random electronic “pat searches” of people on the streets and at public gatherings.

Because the technology is new, the courts have not yet decided whether a warrant is required. It would seem, however, that a warrant might not be necessary if the device alerted *only* to concealed handguns. This is because the United States Supreme Court has pointed out that “any interest in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest.”¹⁰⁷ POV

454-5 [“[T]he most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”]; *Kyllo v. United States* (2001) 533 U.S. 27, 37 [“In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.”].

¹⁰⁶ (2001) 533 U.S. 27.

¹⁰⁷ *Illinois v. Caballes* (2005) 543 U.S. 405, 408. ALSO SEE *United States v. Place* (1983) 462 U.S. 696, 707 [warrant not required to use drug-detecting dog because it “discloses only the presence or absence of narcotics, a contraband item”]. **NOTE:** Although some people who carry concealed weapons have licenses for them, the number is so relatively small that it should not to change the result.