

POLICE TRESPASSING

“The Fourth Amendment prohibits unreasonable searches and seizures, not trespasses.”¹

Law enforcement officers regularly walk and drive onto private property. It happens so often it’s hardly noteworthy. Although some might call it “trespassing,” to most people it’s insignificant, a nonevent.

Sometimes, however, it turns into a big deal—like when officers see something that results in a search or an arrest. Maybe they’ll trip over a marijuana plant, or happen to see the residents sitting around the kitchen table packaging heroin or cleaning their rocket launchers. In any event, evidence discovered as the result of an entry onto private property will be suppressed if the officers’ entry constituted an illegal “search.”

It might seem crazy to think of walking or driving onto private property as a “search.” But it *is*—at least under certain circumstances. What are those circumstances? And when is such a search lawful? These are the questions we will answer in this article.

Before we start, it should be noted that there are two kinds of trespassing: criminal and “technical.” The criminal variety is trespassing that is unlawful, such as occupying real property, or refusing to leave after being requested to do so by the owner.² This is not the type of trespassing that officers are likely to do. Even when they refuse an owner’s request to leave, their continued presence is hardly ever a criminal trespass because it’s usually justified under some exception to the warrant requirement.

On the other hand, officers routinely commit technical or “common law” trespassing, which is simply walking or driving onto private property without the owner’s permission.³ Although technical trespassing is not unlawful,⁴ it’s the type of trespassing that is most likely to constitute a “search.”

Finally, in this article the word “curtilage” is used in a few places. It’s a word from the common law which, for our purposes, simply means the private property immediately surrounding a home; e.g., the front, back, and side yards.⁵

¹ *Cohen v. Superior Court* (1970) 5 Cal.App.3d 429, 434.

² See Penal Code §§602(l), 602(n).

³ See *Oliver v. United States* (1984) 466 US 170, 183; *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 361; *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953; *People v. Macioce* (1987) 197 Cal.App.3d 262, 271.

⁴ See *People v. Camacho* (2000) 23 Cal.4th 824, 836 [“Since *Katz*, [the U.S. Supreme Court has] consistently held that the 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.” Quoting from *California v. Ciraolo* (1986) 476 US 207, 223 [dis.opn. of Powell, J.]; *Oliver v. United States* (1984) 466 US 170, 183, fn.15; *United States v. Karo* (1984) 468 US 705, 712-3 [“The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated.”]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1015; *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953-6; *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 361. **NOTE:** Many people believe that entering property without the owner’s consent is a criminal trespass but it isn’t unless the person enters with intent to dispossess the rightful owner. See *People v. Wilkinson* (1967) 248 Cal.App.2nd Supp. 906, 910 [“It is not a violation of Penal Code section 602, subdivision (l) to enter private property without consent unless such entry is followed by occupation thereof without consent.”].

⁵ See *Oliver v. United States* (1984) 466 US 170, 180 [“At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a man’s home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes.”]; *California v. Ciraolo* (1986) 476 US 207, 212-3 [“The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to

WHEN TRESPASSING IS A “SEARCH”

A trespass by officers is a “search” if it permitted them to see or hear something the occupants reasonably believed would be private.⁶ As the U.S. Court of Appeals put it:

Whether a police officer has commenced a “search” turns not on his subjective intent to conduct a search and seizure, but rather whether he has in fact invaded an area which the defendant harbors a reasonable expectation of privacy.⁷

As we will now discuss, whether an expectation of privacy exists and is reasonable depends largely on two things: (1) the nature of the property officers entered; and (2) whether, or to what extent, the occupants took steps to prevent or discourage entry.

Front yards

The least private area surrounding most homes and other structures is almost always the front. This is because it is usually visible to the public and it’s where visitors, tradespeople, and others must walk to reach the front door. Consequently, in determining whether an officer’s entry into the front yard constituted a search, the courts focus mainly on the extent to which visitors and others might use it to contact the occupants.

ACCESS ROUTES: There can be no reasonable expectation that officers and others will not walk on walkways, pathways, porches, and other access routes to the front door.⁸

the home, both physically and psychologically, where privacy expectations are most heightened.”]; *U.S. v. Johnson* (9th Cir. 2001) 256 F.3d 895. **NOTE:** Although it is now seldom necessary to determine whether a section of private property is within the curtilage, the U.S. Supreme Court has identified four circumstances that are relevant in making this determination: (1) the proximity of the section to the residence, (2) whether the section is included with an enclosure surrounding the home, (3) the nature of the uses to which the section is put, and (4) the steps taken by the occupant to protect the section from observation by passersby. See *United States v. Dunn* (1987) 480 US 294, 301.

⁶ See *Oliver v. United States* (1984) 466 US 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.”]; *Maryland v. Macon* (1985) 472 US 463, 469 [“A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”]; *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 361; *People v. Arango* (1993) 12 Cal.App.4th 450, 455 [“But even if climbing over the fence was a simple trespass it would not invalidate [the officers’] subsequent observations.”]; *People v. Camacho* (2000) 23 Cal.4th 824, 836, fn.3 [“We emphasize our decision today is not based on the simplistic notion that police violate a defendant’s constitutional rights whenever they commit a technical trespass.”]; *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 638; *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.”]; *People v. Willard* (1965) 238 Cal.App.2d 292, 299 [“It is worthy of note that while a few California cases seem to have given some consideration to the factor of trespass in determining the reasonableness of a search, by and large many of the case dealing with the question of a search arising from ‘looking through a window’ seem to have proceeded on the assumption that a minor or technical trespass not involving physical entry into a building does not derogate from the otherwise reasonable nature of the search.”]; *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.”].

⁷ *U.S. v. Reed* (8th Cir. 1984) 733 F.2d 492, 501.

Accordingly, an officer's presence on an access route is not a "search."⁹ As the U.S. Court of Appeals put it, "[N]o Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors"¹⁰

In fact, the California Supreme Court has ruled that the occupants of a residence impliedly *consent* to entries on access routes. Said the court, "A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there."¹¹

The question arises: Can officers depart somewhat from a pathway without converting their departure into a search? And if so, how far? It appears that officers, like other visitors, may stray somewhat from a path provided their detour was neither substantial nor unreasonable.¹²

⁸ See *U.S. v. Reyes* (2nd Cir. 2002) ___ F.3d ___ ["the route which any visitor to a residence would use is not private in the Fourth Amendment sense, when police take that route for the purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open."]; *U.S. v. James* (7th Cir. 1994) 40 F.3d 850, 862 ["Both the paved walkway and the rear side door were accessible to the general public and the rear side door was commonly used for entering the duplex from the nearby alley."].

⁹ See *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 840 ["It is common knowledge that a front yard is likely to be crossed at any time by door-to-door solicitors, delivery men and others unknown to the owner of the premises."]; *People v. Thompson* (1990) 221 Cal.App.3d 923, 943 ["An officer is permitted the same license to intrude as a reasonably respectful citizen."]; *People v. Bradley* (1969) 1 Cal.3d 80, 85; *U.S. v. Taylor* (4th Cir. 1996) 90 F.3d 903, 909 ["(T)he Taylors' front entrance was as open to the law enforcement officers as to any delivery person, guest, or other member of the public."]; *Davis v. U.S.* (9th Cir. 1964) 327 F.2d 301, 304 ["Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law."]; *U.S. v. Hammett* (9th Cir. 2001) 236 F.3d 1054, 1059 ["Law enforcement officers may encroach upon the curtilage of a home for the purpose of asking questions of the occupants."]; *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. Reyes* (2nd Cir. 2002) 283 F.3d 446, 465 ["Since the route which any visitor to a residence would use is not private in the Fourth Amendment sense, when police take that route for the purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open." Quoting from 1 LaFare, *Search and Seizure* (3rd Ed. 1996) § 2.3(e) at p. 499].

¹⁰ *U.S. v. Reed* (8th Cir. 1984) 733 F.2d 492, 501.

¹¹ *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 629. ALSO SEE *People v. Camacho* (2000) 23 Cal.4th 824, 832 ["A resident of a house may rely justifiably upon the privacy of the surrounding areas as a protection from the peering of the officer unless such residence is "exposed" to that intrusion by the existence of public pathways or other invitations to the public to enter upon the property."].

¹² See *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." Quoting from *State v. Seagull* (1981) 95 Wn.2d 898]; *U.S. v. Hammett* (9th Cir. 2001) 236 F.3d 1054, 1060 ["(A)n officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence."]; *U.S. v. James* (7th Cir. 1994) 40 F.3d 850; *U.S. v. Taylor* (4th Cir. 1996) 90 F.3d 903.

DRIVEWAYS: Driveways are sometimes used as pathways—sometimes the only pathway—to the front of a house. If so, for the reasons discussed above, an officer’s entry onto a driveway is not a search.

But even if the driveway was not a pathway to the front door, the occupants can seldom expect that officers and others will not walk on the driveway unless there were unusual circumstances that restricted such access.¹³ As the U.S. Court of Appeals pointed out:

Whether a driveway is protected from entry by police officers depends on the circumstances. 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.¹⁴

For example, the courts have ruled that officers did not need a warrant to walk onto a suspect’s driveway to install a tracking device under his car or to record his car’s license number.¹⁵

Another example is found in *U.S. v. Ventling*¹⁶ where a forest service agent was investigating the construction of an illegal roadblock on a government road. The agent noticed tire tracks leading from the roadblock to the driveway of Ventling’s house. So he followed the tracks down the driveway where he took photos of them. The photos were later used in Ventling’s trial on a charge of blocking a Forest Service road. In ruling that

¹³ See *U.S. v. Humphries* ¹³ (9th Cir. 1980) 636 F.2d 1172, 1179 [“It does not appear from the record that the driveway was enclosed by a fence, shrubbery or other barrier. [The officer] did not move bushes or other objects in order to make his observations.”]; *In re Gregory S.* (1980) 112 Cal.App.3d 764 [officer walked 20 feet down a driveway to speak with a suspect; court ruled the entry was lawful, noting, “The criterion to be applied is whether entry is made into an area where the public has been implicitly invited, such as the area furnishing normal access to the house. A reasonable expectation of privacy does not exist in such areas.”]; *U.S. v. Magana* (9th Cir. 1975) 512 F.2d 1169, 1170-1 [“The proper inquiry is whether the officers’ intrusion into the residential driveway constituted an invasion into what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public.”]; *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953 [“Just like any other visitor to a residence, a police officer is entitled to walk onto parts of the curtilage that are not fenced off.”]; *U.S. v. Reyes* (2nd Cir. 2002) 283 F.3d 446, 465 [“(W)e have found no Fourth Amendment violation based on a law enforcement officer’s presence on an individual’s driveway when that officer was in pursuit of legitimate law enforcement business.”]; *U.S. v. Evans* (7th Cir. 1994) 27 F.3d 1219, 1229 [“There was no evidence that the public had limited access to Glenn’s driveway, hence Evans had no reasonable expectation that members of the public or FBI agents would refrain from entering it.”]; *U.S. v. Ventling* (8th Cir. 1982) 678 F.2d 63, 66 [“(A) driveway and portion of the yard immediately adjacent to the front door of the residence can hardly be considered out of public view.”]; *U.S. v. Rogers* (1st Cir. 2001) 264 F.3d 1, 5 [“(A) person does not have a reasonable expectation of privacy in a driveway that was visible to the occasional passerby.”]; *U.S. 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 cognizable under the Fourth Amendment in this portion of his property.”]; *U.S. v. Pretzinger* (9th Cir. 1976) 542 F.2d 517, 520.

¹⁴ *U.S. v. Smith* (6th Cir. 1986) 783 F.2d 648, 651.

¹⁵ See *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953; *U.S. v. Humphries* (9th Cir. 1980) 636 F.2d 1172, 1179.

¹⁶ (8th Cir. 1982) 678 F.2d 63. ALSO SEE *U.S. v. Magana* (9th Cir. 1975) 512 F.2d 1169 [officers lawfully drove onto driveway to make an arrest]; *U.S. v. Roccio* (1st Cir. 1992) 981 F.2d 587, 591 [“It is undisputed that appellant’s Mercedes was clearly visible from the street on an obstructed driveway. As such, the IRS agents needed no warrant to seize the automobile, and appellant suffered no Fourth Amendment violation due to the warrantless seizure.”]; *U.S. v. Rogers* (1st Cir. 2001) 264 F.3d 1, 5 [IRS legally seized car on driveway].

the agent was not conducting a “search” when he drove down the driveway, the court said:

[A] driveway and portion of the yard immediately adjacent to the front door of the residence can hardly be considered out of public view. The extension of Ventling’s expectations of privacy to the driveway and that portion of the yard in front of the house do not, under these circumstances, appear reasonable.

Side yards

Like the driveway, the unfenced side areas of a home are usually visible to the public and are readily accessible. Still, unless there is a normal access route or walkway along the side of the house, the courts view unfenced side yards as somewhat more private than the front. And it becomes more private as the entry becomes more unusual or unexpected; e.g., entry late at night, officers had to climb over bushes to get into yard, officers traversed almost the entire side of the house.

For example, in *People v. Camacho*¹⁷ officers in Ventura County were dispatched to investigate a complaint of a “loud party disturbance” at Camacho’s home. The call came in at about 11 P.M. When the officers arrived they heard no loud noise and saw no sign of a party. Still, they decided to investigate. But instead of knocking on Camacho’s front door, one of the officers walked into the side yard which the court described as follows:

“[A]n open area covered in grass. No fence, gate or shrubbery suggested entrance was forbidden. Neither, however, did anything indicate the public was invited to enter; there was neither a path nor a walkway, nor was there an entrance to the house accessible from the side yard.

While in the side yard, the officer noticed a window that was open a few inches and was not covered by curtains. Looking through the window, he saw Camacho packaging cocaine. The officers then entered the house through the window and arrested him.

In ruling the officers’ entry into the side yard was an unlawful “search,” the court observed “Most persons, we believe, would be surprised, indeed startled, to look out their bedroom window at such an hour to find police officers standing in their yard looking back at them.”

Similarly, in *Lorenzana v. Superior Court*¹⁸ officers went to Lorenzana’s apartment at about 10 P.M. to investigate a tip that heroin was being sold there. Although there were no doors or pathways along the east side of the apartment, an officer walked there and, through a partially open window, was able to hear Lorenzana talking on the phone about a heroin sale he was about to make. This ultimately led to Lorenzana’s arrest.

The California Supreme Court ruled, however, the officer was conducting an illegal “search” when he heard the incriminating conversation. This was essentially because, (1) there were no pathways or doors at this side of the apartment, and (2) the area along the east side was not a common area for other apartment residents—it was solely for Lorenzana’s use.

Backyards

Privacy expectations in backyards (including fenced side yards) are almost always higher—usually much higher—than those in the front. There may be several reasons for this, such as, (1) most backyards are not readily visible to the public, (2) normal access

¹⁷ (2000) 23 Cal.4th 824.

¹⁸ (1973) 9 Cal.3d 626. COMPARE *U.S. v. James* (7th Cir. 1994) 40 F.3d 850 [officers walked on “a paved walkway along the side of the duplex leading to the rear side door. The passage to the rear side door was not impeded by a gate or fence. Both the paved walkway and the rear side door were accessible to the general public and the rear side door was commonly used for entering the duplex from the nearby alley.”].

routes seldom go through backyards, (3) backyards are usually surrounded by fences, and (4) the family activities that commonly occur in backyards more closely resemble the so-called “intimate” household activities that are afforded greater protection under the Fourth Amendment. As the court observed in *People v. Winters*,¹⁹ “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.”

To the extent that one or more of these circumstances do not exist, however, privacy expectations may be reduced, maybe even eliminated. For example, if access to the house is normally made from both the front and back, an officer’s entry into the backyard would not constitute a search. As the court observed in *U.S. v. Garcia*,²⁰ “If the front and back of a residence are readily accessible from a public place, like the driveway and parking area here, the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as a principal entrance to the dwelling.”

Similarly, if the front door is inaccessible, and if officers have a legitimate reason for contacting an occupant, it may be reasonable for them to go to the back to find another door. This occurred in *U.S. v. Daoust*²¹ where officers, having received a tip that Daoust might have some information about illegal drug activities, went to his house to speak with him. Upon arrival, they discovered that the stairs leading up to the front door were missing. And because the front door was five feet above the ground, the door was essentially “inaccessible.” So the officers walked into the unfenced backyard, looking for another door. While there, they saw a gun inside the house, which led to Daoust’s arrest for being a felon in possession of a firearm. In ruling the officers’ entry into the backyard was lawful, the court said:

A policeman may lawfully go to a person’s home to interview him. In doing so, he obviously can go to up the front door, and, it seems to us, if that door is inaccessible there is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person.

“Open fields”

There can be no reasonable expectation of privacy in a so-called “open field,” even if the property was obviously private. What is an “open field?” It is essentially any unoccupied and undeveloped private residential property that is outside the curtilage of

¹⁹ (1983) 149 Cal.App.3d 705, 707. ALSO SEE *People v. Cagle* (1971) 21 Cal.App.3d 57, 65 [“The bathroom was at the rear of the house, situated far from all normal access routes.”].

²⁰ (9th Cir. 1993) 997 F.2d 1273, 1279-80.

²¹ (1st Cir. 1990) 916 F.2d 757.

a home, almost always in rural areas.²² It is also possible that unoccupied or undeveloped commercial property may constitute an “open field.”²³

If property is deemed an “open field,” any evidence observed by officers while they are walking or driving on it cannot be suppressed.²⁴ As the Court of Appeal observed, “A warrantless observation made by law enforcement from an open field enjoys the same constitutional protection as one made from a public place.”²⁵

This is true even if the area is surrounded by a fences and NO TRESPASSING signs.²⁶ For example, in *United States v. Dunn*²⁷ DEA agents entered a 198-acre “open field” that was “completely encircled by a perimeter fence” and “several interior fences, constructed mainly of posts and multiple strands of barbed wire.” In order to get close to two barns on the land, the agents had to climb over two barbed-wire fences and a wooden fence. As they approached one of the barns, they observed a PCP laboratory. Based on this observation, they obtained a warrant to search the barn.

In ruling the agents’ presence on the property did not constitute a “search,” the U.S. Supreme Court noted that it has “expressly rejected the argument that the erection of fences on an open field—at least of the variety involved in those cases and in the present case—creates a constitutionally protected privacy interest.” Thus, said the Court:

It follows that no constitutional violation occurred here when the officers crossed over respondent’s ranch-style perimeter fence, and over several similarly constructed interior fences, prior to stopping at the locked front gate of the barn.

Adjoining property

²² See *Oliver v. United States* (1984) 466 US 170, 177, 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.”]; *Dow Chemical v. United States* (1986) 476 US 227, 235 [“(O)pen fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from governmental interference or surveillance.”]; *People v. Channing* (2000) 81 Cal.App.4th 985, 990; *People v. Freeman* (1990) 219 Cal.App.3d 894, 901-3; *People v. Channing* (2000) 81 Cal.App.4th 985, 990. **NOTE:** Property may be an “open field” even though it is neither “open” nor a “field,” if it was thickly wooded, or if it was marked with NO TRESPASSING signs. See *Oliver v. United States* (1984) 466 US 170, 177, 182; *People v. Freeman* (1990) 219 Cal.App.3d 894, 901 [“An open field need be neither ‘open’ nor a ‘field’ as those terms are used in common speech.”]; *People v. Channing* (2000) 81 Cal.App.4th 985, 990-1. It is also possible that unoccupied or undeveloped commercial property may constitute an “open field.” ²² See *Dow Chemical v. United States* (1986) 476 US 227, 236-8.

²³ See *Dow Chemical v. United States* (1986) 476 US 227, 236-8.

²⁴ See *Oliver v. United States* (1984) 466 US 170, 183 [“Nor is the government’s intrusion upon an open field a ‘search’ in the constitutional sense because that intrusion is a trespass at common law.”]; *United States v. Dunn* (1987) 480 US 294, 304 [“Under *Oliver* and *Hester*, there 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, 990 [“A subjective expectation of privacy in an open fields area is not an expectation that society is willing to recognize as reasonable.”]; *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.’” Citing *Hester v. United States* (1924) 265 US 57].

²⁵ *People v. Shaw* (2002) 97 Cal.App.4th 833, 838.

²⁶ See *U.S. v. Lewis* (10th Cir. 2001) 240 F.3d 866; *U.S. v. Caldwell* (6th Cir. 2000) 238 F.3d 424; *U.S. v. Rapanos* (6th Cir. 1997) 115 F.3d 367, 372 [“The rather typical presence of fences, closed or locked gates, and ‘no trespassing’ signs on an otherwise open field therefore has no constitutional import.”]; *U.S. v. Burton* (6th Cir. 1990) 894 F.2d 188; *U.S. v. Roberts* (9th Cir. 1984) 747 F.2d 537, 541.

²⁷ (1987) 480 US 294.

Private property adjacent to the suspect's property is, by its very nature, not within the curtilage of the suspect's house. It is, therefore, essentially an "open field" as to searches on the suspect's property. For example, if the suspect's neighbor permitted officers to use his property to watch the suspect's activities, the officers would be, as far as the law is concerned, in an "open field" because it is outside the curtilage of the suspect's house.²⁸

Even if officers entered the neighbor's property without the neighbor's consent, the suspect would not have standing to challenge the legality of the entry. As the court observed in *People v. Claeys*, "[D]efendant's Fourth Amendment rights stopped at his backyard fence because the [marijuana] plants were readily visible from his neighbor's property and he had no reasonable expectation of privacy in what could be seen from there."²⁹

Multiple-occupant buildings

In multiple-occupant buildings, such as apartments and hotels, the occupants do not have a reasonable expectation of privacy in areas that are for the use of the tenants in general such as hallways, walkways, recreation facilities, parking lots, and enclosed garages.³⁰ Consequently, an officer's act of entering such a common area is not a "search." As the court noted 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.³¹

Note that an entry into such a common area is not a search even if officers entered through a locked door.³²

²⁸ See *People v. Shaw* (2002) 97 Cal.App.4th 833, 838 [officer's observation from defendant's neighbor's property was essentially an observation from an "open field" because a neighbor's property is necessarily outside the curtilage of the defendant's property]; *People v. Claeys* (2002) 97 Cal.App.4th 55, 59 ["We can find no California cases, nor does defendant cite any, where a search has been held invalid under the federal constitution because the police trespassed onto property *adjoining* a defendant's property."]; *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 839-40.

²⁹ (2002) 97 Cal.App.4th 55, 59.

³⁰ See *People v. Shaw* (2002) 97 Cal.App.4th 833, 840 [in ruling that Shaw did not have a reasonable expectation of privacy in the back area of the apartment building in which he lived, the court noted that Shaw "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; *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. Galan* (1985) 163 Cal.App.3d 786, 792-3; *People v. Ortiz* (1995) 32 Cal.App.4th 286, 290-1 [hotel hallway]; *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 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."]; *People v. Arango* (1993) 12 Cal.App.4th 450, 455 [officers climbed over a wrought iron fence surrounding an apartment complex].

³¹ (1968) 263 Cal.App.2d 575, 577.

Officers may also walk on areas outside the structure that are accessible to the tenants. For example, in *U.S. v. Fields*³³ narcotics officers in New Haven, Connecticut received reliable information that Fields was presently bagging crack cocaine in the rear of a certain apartment, and that his activities were visible through an open window. They arrived at the apartment at 8:25 P.M.; it was dark. Because the windows out front were covered, the officers walked into the “fenced-in side yard.” There they saw Fields bagging crack cocaine. On appeal, the court ruled that Fields could not reasonably expect that people would not be in his side yard because the area was readily accessible to the other residents of the building. Said the court, “[D]efendants here could have no such legitimate [privacy] expectations because the building in which they conducted their operations contained other apartments whose tenants were entitled to use the side yard without giving notice or having the defendant’s permission.”

Businesses

A search does not result from an officer’s entering a parking lot, business, or other commercial establishment to which the public was expressly or impliedly given access.³⁴ As the U.S. Supreme Court observed in *Maryland v. Macon*,³⁵ “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.”

Signs and fences

The posting of NO TRESPASSING signs may be relevant in determining whether the occupants reasonably expected privacy. It is not, however, nearly as significant as erecting fences that are constructed to keep people out.

“**NO TRESPASSING**” SIGNS: NO TRESPASSING signs are like blaring car alarms: they’re so common, they’re usually ignored.³⁶ This is especially true if the sign is posted in a place where people can be expected to walk or drive. For example, it is unlikely that signs posted on a pathway leading to a home or apartment building would ever create a

³² See *People v. Howard* (1976) 63 Cal.App.3d 249, 254 [(W)e do not believe that the locked outside door [to an apartment building] established the same sanctity for the hallways and common areas as is established for individual apartments by the door to those apartments.”]; *People v. Shaw* (2002) 97 Cal.App.4th 833 [officers entered through a “break in the fencing”]; *People v. Seals* (1968) 263 Cal.App.2d 575, 577; *People v. Arango* (1993) 12 Cal.App.4th 450, 455.
³³ (2nd Cir. 1997) 113 F.3d 313. ALSO SEE *People v. Willard* (1965) 238 Cal.App.2d 292, 307 [“We can find nothing unreasonable in [the officers’] proceeding to the rear door which appears to have been a normal means of access to and egress from that part of the house. The gate was open and the rear door, actually on the side of the house, would probably be more public than a door at the back of the structure.”].

³⁴ 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.”].

³⁵ (1985) 472 US 463, 469.

³⁶ See *Oliver v. United States* (1984) 466 US 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. Raines* (8th Cir. 2001) 243 F.3d 419, 421 [no Fourth Amendment violation when officers, while walking down the driveway of the defendant’s home, walked through a ten-foot wide opening in a “makeshift fence of debris that encircled [the defendant’s] property.”]; *U.S. v. Ventling* (8th Cir. 1982) 678 F.2d 63, 66 [trial court stated, “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.”].

reasonable expectation that people would not walk to the front door.³⁷ Similarly, NO TRESPASSING signs around an “open field” would not create a reasonable expectation of privacy because open fields are simply not private places.³⁸

On the other hand, NO TRESPASSING signs at the entry to a backyard would be a more significant circumstance because backyards—especially fenced backyards—are traditionally much more private than front yards.

FENCES: Whether a fence creates or helps establish a reasonable expectation of privacy depends largely on the nature of the fence and the normal privacy expectations of the area it surrounds.³⁹ For example, a fence surrounding an apartment house or other multiple-occupant building will seldom establish a reasonable expectation of privacy because the fence is obviously not intended to prevent entry by the residents, their visitors, and tradespeople. Similarly, as noted earlier, a fence surrounding an “open field” will not create or even contribute to the owner’s privacy expectations.

On the other hand, a fence surrounding the backyard of a single-family residence is much more likely to demonstrate a reasonable expectation of privacy because backyards are fairly private to the extent they’re not readily visible to the public and are not places where normal access routes are ordinarily found. As the Court of Appeal observed, “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.”⁴⁰

The manner in which a fence or barrier is constructed may also be relevant in determining privacy expectations.⁴¹ A homeowner who surrounds his home with an electrified chain link fence topped with razor wire could make a good case that he reasonably expected privacy. On the other hand, a white picket fence or a chain hanging between two posts would not be viewed as a serious effort to prevent entry.

For example, in *U.S. v. Reyes*⁴² a probation officer went to Reyes’ house to investigate a report from the DEA that Reyes, a probationer, might be growing large quantities of marijuana. When no one answered the front door, the probation officer walked down a gravel driveway along the side of the house to see if Reyes was in the backyard. There was a “chain hanging from two posts across a portion of the driveway” but it “did not

³⁷ See *U.S. v. Reyes* (2nd Cir. 2002) 283 F.3d 446 [no reasonable expectation of privacy on a gravel 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.’]; *U.S. v. Ventling* (8th Cir. 1982) 678 F.2d 63, 65-6.

³⁸ See *U.S. v. Lewis* (10th Cir. 2001) 240 F.3d 866; *U.S. v. Caldwell* (6th Cir. 2000) 238 F.3d 424; *U.S. v. Rapanos* (6th Cir. 1997) 115 F.3d 367, 372 [“The rather typical presence of fences, closed or locked gates, and ‘no trespassing’ signs on an otherwise open field therefore has no constitutional import.]; *U.S. v. Burton* (6th Cir. 1990) 894 F.2d 188; *U.S. v. Roberts* (9th Cir. 1984) 747 F.2d 537, 541.

³⁹ See *Oliver v. United States* (1984) 466 US 170, 182, fn.13; *People v. Winters* (1983) 149 Cal.App.3d 705, 707 [reasonable expectation of privacy when gate enclosed the back yard and was posted with a sign reading, “Private Property/no trespassing/no soliciting”].

⁴⁰ *People v. Winters* (1983) 149 Cal.App.3d 705, 707. ALSO SEE *Vidaurri v. Superior Court* (1970) 13 Cal.App.3d 550, 553; *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.”].

⁴¹ See *U.S. v. Raines* (8th Cir. 2001) 243 F.3d 419, 421 [no Fourth Amendment violation when officers, while walking down the driveway of the defendant’s home, walked through a ten-foot wide opening in a “makeshift fence of debris that encircled [the defendant’s] property.”].

⁴² (2nd Cir. 2002) 283 F.3d 446.

extend the full width of the driveway.” While walking along the driveway, the probation officer spotted marijuana plants on Reyes’ property.

In ruling that Reyes could not reasonably expect that visitors would not walk along his driveway, the trial court said, “Although there was a chain to prevent vehicles from entering the driveway, there were no signs forbidding pedestrian access. [Furthermore] the driveway was not secluded in any manner. The driveway led to the street and could be viewed in its entirety from the street.” Thus, the court ruled, “In these circumstances, there was nothing inappropriate, much less unconstitutional, about the probation officers’ entry onto the driveway . . . ”

Finally, although the absence of a “serious” fence might suggest that no reasonable expectation of privacy exists, the courts have rejected the idea that people *must* construct fences in order to claim privacy. As the California Supreme Court stated in *People v. Camacho*,⁴³ “[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.”

LEGAL TRESPASS-SEARCHES

Even if an officer’s entry onto private property is a “search,” it’s not an unlawful search unless the intrusiveness of the trespass outweighed the law enforcement interest in being on the property. Consequently, to determine whether a trespass-search is lawful, the courts balance the justification for the trespass against its intrusiveness.⁴⁴ If the justification outweighs the intrusiveness, the search is lawful. Otherwise, it’s unlawful.

Justification

Because the intrusiveness of most technical trespasses falls somewhere between nonexistent and trivial, not much justification is ordinarily required. Even so, officers must be able to articulate some legitimate law enforcement interest for entering the property—as opposed to “simply snooping.”⁴⁵ The following are commonly cited:

TO INVESTIGATE: Officers reasonably believed the entry was necessary to investigate a crime or suspicious circumstance.⁴⁶

TO DETAIN OR ARREST: Officers had legal grounds to detain or arrest a person on the property.⁴⁷

⁴³ (2000) 23 Cal.4th 824, 835.

⁴⁴ See *In re Gregory S.* (1980) 112 Cal.App.3d 764, 776 [“The constitutionality of police intrusions is determined by weighing the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” Quoting from *Brown v. Texas* (1979) 443 US 47, 51.]; *People v. Thompson* (1990) 221 Cal.App.3d 923, 944; *U.S. v. Anderson* (8th Cir. 1977) 552 F.2d 1296, 1299-1300; *U.S. v. Daoust* (1st Cir. 1990) 916 F.2d 757 [court asked whether the officers have a legitimate need to be there, or were they “simply snooping?”].

⁴⁵ *U.S. v. Daoust* (1st Cir. 1990) 916 F.2d 757.

⁴⁶ See *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 841 [officers reasonably believed there were stolen car parts in the backyard]; *U.S. v. James* (7th Cir. 1994) 40 F.3d 850;]; *U.S. v. Hammett* (9th Cir. 2001) 236 F.3d 1054, 1060 [officers circled the house to speak with the residents about marijuana growing on their property].

⁴⁷ See *People v. Thompson* (1990) 221 Cal.App.3d 923, 945 [“The police would have an unreasonably difficult time protecting citizens and the property from the criminal actions of third parties if police were restricted to walkways, driveways, and other normal access routes when the third parties whom the officers seek to detain do not restrict themselves to such areas.”]; *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 363-4 [entry into backyard lawful in connection with the arrest of a “potentially armed parolee” who was “hiding in a residential neighborhood; i.e., near families and children.”]; *People v. Arango* (1993) 12 Cal.App.4th 450, 455 [“To detain

TO INSPECT STOLEN PROPERTY OR CONTRABAND: Officers entered the property to inspect property that they reasonably believed was stolen.⁴⁸

TO SPEAK WITH OCCUPANTS: Officers had a duty to attempt to speak with the occupants.⁴⁹

For example, in *People v. Camacho*,⁵⁰ discussed earlier, officers received a complaint of a “loud party disturbance” at Camacho’s home at about 11 P.M. When they arrived, however, they heard no loud noise and found no sign of a party. Nevertheless, they walked into the side yard where they happened to see Camacho in a bedroom bagging cocaine. The court ruled the officers’ technical trespass was not justified because there was no disturbance and, therefore, no need to take any action. Said the court:

Indeed, had the officers on their arrival at defendant’s house heard a raucous party, confirming the anonymous complaint that brought them there in the first place, and had they then banged on the front door to no avail, their entry into the side yard in an attempt to seek the source of the noise would likely have been justified. [But here] the officers arrived at defendant’s home late in the evening and heard no such noise. Without bothering to knock on defendant’s front door, they proceeded directly into his darkened side yard.

Another example—this one demonstrating *sufficient* justification—is found in *In re Gregory S.*⁵¹ which involved a “malicious mischief” call at about 1:45 P.M. The Contra Costa County sheriff’s deputy who was dispatched to the call saw the suspect standing in the front yard of his home. But when the deputy stopped to talk with him, the suspect started to walk around the side of his house. The deputy called out twice, “Hey you. Come here,” but the suspect kept walking. As the officer was walking down the driveway

appellants and investigate the suspicious narcotics trafficking circumstances, the officers were entitled to climb the wrought iron fence and enter an open carport area where the Buick was parked.”]. **ALSO SEE** *U.S. v. Reyes* (2nd Cir. 2002) 283 F.3d 446, 467 [probation officer entered driveway to conduct court-imposed home visit].

⁴⁸ See *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 841 [officers reasonably believed there were stolen car parts in the backyard]; *U.S. v. Hammett* (9th Cir. 2001) 236 F.3d 1054, 1060 [officers circled the house to speak with the residents about marijuana growing on their property].

⁴⁹ See *People v. Camacho* (2000) 23 Cal.4th 824, 836 [“Indeed, had the officers on their arrival at defendant’s house heard a raucous party, confirming the anonymous complaint that brought them there in the first place, and had they then banged on the front door to no avail, their entry into the side yard in an attempt to seek the source of the noise would likely have been justified.”]; *U.S. v. Reyes* (2nd Cir. 2002) 283 F.3d 446, 467 [probation officer entered driveway to conduct court-imposed home visit]; *U.S. v. Hammett* (9th Cir. 2001) 236 F.3d 1054, 1060; *U.S. v. Anderson* (8th Cir. 1977) 552 F.2d 1296, 1300 [“We cannot say that the agents’ action in proceeding to the rear after receiving no answer at the front door was not incompatible with the scope of their original purpose that any evidence inadvertently seen by them must be excluded. . . .”]. **COMPARE** *People v. Winters* (1983) 149 Cal.App.3d 705, 708 [“The officers [who, according to the court, were only conducting a “routine investigation”] could have determined *at the front door* no one was at home. . . . By trespassing into the back yard, they surpassed what was reasonable under the circumstances.”].

⁵⁰ (2000) 23 Cal.4th 824. **ALSO SEE** *People v. Winters* (1983) 149 Cal.App.3d 705, 708 [“The officers [who, according to the court, were only conducting a “routine investigation”] could have determined *at the front door* no one was at home. . . . By trespassing into the back yard, they surpassed what was reasonable under the circumstances.”]; *U.S. v. Anderson* (8th Cir. 1977) 552 F.2d 1296, 1300 [“We cannot say that the agents’ action in proceeding to the rear after receiving no answer at the front door was no incompatible with the scope of their original purpose that any evidence inadvertently seen by them must be excluded. . . .”]; *U.S. v. Raines* (8th Cir. 2001) 243 F.3d 419 [officer walked to the back of a house to serve a civil complaint].

⁵¹ (1980) 112 Cal.App.3d 764.

toward the suspect, the suspect told him to get off his property. The deputy told the suspect that he was investigating a complaint by a neighbor and that he had a legal right to be there. The suspect then started to leave and a struggle ensued. The suspect was charged with interfering with an officer in the performance of his duties.⁵²

In ruling the deputy had a right to be on the suspect's property, the court said:

Appellant argues that privacy was invoked when he ordered the officer off the property. But the officer had a right and commensurate duty to deal with the problem at hand. He did not enter the property arbitrarily. Appellant had ignored the officer's earlier order to come to the street. If, despite the lack of indicia of privacy, the entry be deemed an intrusion, the entry and detention were authorized by the public concern to maintain peace in the neighborhood.

Keep in mind that if the trespass is more than minimally intrusive, the courts will require more justification.

Intrusiveness

Assuming that officers are able to articulate some justification for entering the property, the issue becomes whether that justification outweighed the intrusiveness of the officers' entry. As a practical matter, most technical trespassing by officers involves nothing more than walking or driving onto private property which is seldom considered a significant intrusion. Sometimes, however, there are circumstances that increase the intrusiveness of the trespass, requiring additional justification. The following are circumstances that might be relevant:

TIME OF NIGHT: Privacy expectations may be affected by the time of day or night in which the entry occurred. Although there is little law on this subject, the court in *People v. Camacho*⁵³ cited the "lateness of the hour" (11 P.M.) as a circumstance indicating the defendant reasonably expected that officers and other people would not be walking along the side of his home.

LOOKING THROUGH WINDOWS: An entry may be deemed more intrusive if it enabled officers to see through a window that would otherwise not have afforded a view inside.⁵⁴

CLIMBING LEDGE OR FIRE ESCAPE: An officer's act of looking through the window of a home from a ledge, trellis, or fire escape may be deemed more intrusive because most people do not expect intruders on such places.⁵⁵ However, an expectation of privacy would likely be unreasonable if the fire escape or ledge was routinely used by others.⁵⁶

LENGTH OF TRESPASS: Sometimes cited but only marginally important; most are very brief.⁵⁷

⁵² See Penal Code § 148.

⁵³ (2000) 23 Cal.4th 824, 838.

⁵⁴ See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 636; *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 724.

⁵⁵ See *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 724 ["Thus, the trespass [Officer] Sweeney committed when he climbed upon the ornamental trellis to look into appellant's room through the accidental aperture was an unreasonable governmental intrusion."].

⁵⁶ See *Cohen v. Superior Court* (1970) 5 Cal.App.3d 429, 435 ["Whether or not the occupants of apartment 402 could reasonably assume that they were free from uninvited inspection through the window opening onto the fire escape was a question of fact, turning (inter alia) on the customary use or nonuse of the fire escape platforms for purposes other than emergency escape . . ."].

⁵⁷ See *People v. Camacho* (2000) 23 Cal.4th 824, 834 ["It is the nature, not the duration, of the intrusion that controls in this case."].

OFFICERS ORDERED OFF: The fact that officers remained on the property after being ordered to leave by a resident might make the entry more intrusive, but an order to leave does not make their presence unlawful if there was sufficient justification.⁵⁸

⁵⁸ See *In re Gregory S.* (1980) 112 Cal.App.3d 764, 776 [“Appellant argues that privacy was invoked when he ordered the officer off the property. But the officer had a right and commensurate duty to deal with the problem at hand. He did not enter the property arbitrarily. Appellant had ignored the officer’s earlier order to come to the street. If, despite the lack of indicia of privacy, the entry be deemed an intrusion, the entry and detention were authorized by the public concern to maintain peace in the neighborhood.”].