

# Offensive Searches: Toward a Two-Tier Theory of Fourth Amendment Protection

---

Kiel Brennan-Marquez\* & Andrew Tutt\*\*

*This Article examines the newly minted “trespass” test in Fourth Amendment law, which holds that police conduct qualifies as a search — and triggers constitutional scrutiny — when it involves “physical intrusion” onto a “constitutionally protected area.” The trespass test portends a possible sea change, offering a new baseline of protection against searches that do not fit neatly within the familiar “reasonable expectations of privacy” framework of Fourth Amendment harm. Going forward, Fourth Amendment law will have two tiers: a first tier that asks whether government agents have searched by physically intruding on a constitutionally protected area, and a second tier that asks whether government agents have searched by impinging on a person’s “reasonable expectations of privacy.”*

*Among scholars, there is a nascent but growing consensus that “intrusions” under the trespass test refer to violations of positive law. We disagree. Instead, we argue that the test is concerned with government action that would be highly offensive or degrading to a reasonable person. Not only does this construction better comport with the Court’s reasoning in “trespass search” cases; it also brings into focus blurry corners of Fourth Amendment law that are hard to justify on privacy grounds but easily explained as tacit applications of the trespass-as-indignity doctrine.*

*The Article closes with an examination of dignity’s role in Fourth Amendment law. We contend that dignity is a fundamental Fourth Amendment value because respect for dignity helps to preserve — and strengthen — popular sovereignty. Dignitary protections safeguard important interests in autonomy, equality, and human flourishing. And they ensure that government agents, in discharging their duties, adhere to norms of civility and respect, bolstering their status as the people’s servants and guardians.*

## CONTENTS

INTRODUCTION . . . . .	104
I. DEFINING “TRESPASS” . . . . .	109
A. What “Trespass” is Not . . . . .	109
B. Trespass as Indignity . . . . .	116
II. THE DOCTRINAL IMPLICATIONS OF TRESPASS (AS INDIGNITY) . . . . .	120

---

\* Postdoctoral Research Fellow, New York University Law School.

\*\* Attorney-Adviser, Office of Legal Counsel, Department of Justice. The views expressed in this Article are the authors’ only and do not necessarily reflect the views of the Department of Justice or the Office of Legal Counsel. For valuable feedback, the authors would like to thank BJ Ard, Will Baude, Adele El-Khoury, Josh Fairfield, Kevin Frick, Leif Overvold, Shalev Roisman, Laurent Sacharoff, Andrew Selbst, Chris Slobogin, Kathy Strandburg, and Carly Zubrzycki. They are also indebted to the editors of the *Harvard Civil Rights-Civil Liberties Law Review*, who helped refine both the style and the substance of the piece.

A. *Resolving Mysteries* ..... 120  
 B. *Reforming Problems* ..... 129  
 III. THE VIRTUES OF FOURTH AMENDMENT DIGNITY ..... 138  
 CONCLUSION ..... 143

INTRODUCTION

A quiet revolution may be afoot in Fourth Amendment law. In the last few terms, the Supreme Court has resolved three important cases by sidestepping the “reasonable expectations of privacy” test announced in *Katz v. United States*,<sup>1</sup> and instead resting its protective holdings on a distinct — and essentially new — conceptual framework: “trespass.”<sup>2</sup>

In 2012, in *United States v. Jones*, the Court held that a search occurred when the police installed a GPS device on Antoine Jones’s car.<sup>3</sup> Because the installation constituted a “trespass,” the monitoring triggered Fourth Amendment scrutiny independent of the privacy implications that arose from tracking Jones’s movements.<sup>4</sup> The next Term, in *Florida v. Jardines*, the Court once again invoked the trespass logic (this time using the phrase “physical intrusion”<sup>5</sup>) to hold that a warrant is required before police officers may bring a drug-sniffing dog up to the porch of a private home, because doing so requires the officers to occupy the home’s “curtilage.” Finally, in a per curiam opinion in the 2014–15 Term — *Grady v. North Carolina* — the Court held that using an ankle monitor to track the whereabouts of an ex-convict past the term of his sentence amounts, on trespass grounds, to a search.<sup>6</sup>

This Article endeavors to take the trespass test on its own terms. What is the test about? And what does its logic, if extended, suggest for the rest of Fourth Amendment law? We are not the first commentators to ask these questions. But existing answers have failed to capture the essence of the trespass test. Some scholars have simply written it off as misbegotten originalism.<sup>7</sup> The rest, striking a more charitable pose, have argued that the

<sup>1</sup> *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

<sup>2</sup> *United States v. Jones*, 132 S. Ct. 945, 950 (2012). We say “essentially new” because, as Orin Kerr has extensively documented, “No historical trespass era existed. Surprisingly, the first Supreme Court case applying a trespass test to identify Fourth Amendment searches appears to be *United States v. Jones*.” Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 69 (2012).

<sup>3</sup> *Jones*, 132 S. Ct. at 949.

<sup>4</sup> *Id.*

<sup>5</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). As other commentators have recognized, however, the core principle is the same. See, e.g., William Baude & James Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1835–36 (2016). See also *infra* notes 17–28 and accompanying text.

<sup>6</sup> *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015).

<sup>7</sup> See Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in Jones*, 31 GA. ST. U. L. REV. 471, 473–74 (2014) (explaining that the Justices in *Jones* were “wrong about [eighteenth century] American [trespass] law” and that “this is not the only historical error in originalist jurisprudence”); *Keeping Up with the Joneses: Making Sure Your*

test either is, or should be, about grounding Fourth Amendment doctrine in positive law — whether the police “broke the law” to gather information.<sup>8</sup> On this view, the Court’s invocation of the terms “trespass” and “physical intrusion” are to be taken literally: as references to property and tort rules.

We disagree. The positive law construction has some superficial appeal because the terms “trespass” and “physical intrusion” appear to track common law categories. On scrutiny, however, the positive law construction is neither the most attractive construction of the trespass test, nor is it even the most *accurate* construction in light of the Court’s language in *Jones*, *Jardines*, and *Grady*. Instead, we argue that the trespass test is about establishing a baseline of Fourth Amendment protection for individual dignity.<sup>9</sup> The test asks whether the government has “physically intrud[ed] on a con-

---

*History is Just as Wrong as Everyone Else’s*, 111 MICH. L. REV. FIRST IMPRESSIONS 21, 22 (2013) (same); Kerr, *supra* note 2, at 69. Cf. Erin Murphy, *Back to the Future: the Curious Case of United States v. Jones*, 10 OHIO ST. J. CRIM. L. 325, 326 (2012) (characterizing the *Jones* majority as seeking out the “shelter of originalism”).

<sup>8</sup> For background on the positive law model of Fourth Amendment law, see Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 516 (2007) (“When courts apply the positive law model, they look at whether there is some law that prohibits or restricts the government’s action (other than the Fourth Amendment itself). If the government broke the law in order to obtain the information it did, the government conduct violated a reasonable expectation of privacy.”); Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 315–21 (2016) (responding to William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*). For the descriptive variant of this understanding of *Jones* (and *Jardines*), see, for example, Fabio Arcilla, Jr., *GPS Tracking Out of Fourth Amendment Dead Ends: United States v. Jones and the Katz Conundrum*, 91 N.C. L. REV. 1, 26 (2012) (arguing that the majority opinion in *Jones* rests on a “historically-based, property-centric trespass theory”); Caren M. Morrison, *The Drug Dealer, the Narc, and the Very Tiny Constable*, 3 CAL. L. REV. CIRCUIT 113, 115 (2012) (describing the *Jones* majority opinion as grounded in “property norms”); Erica Goldberg, *How United States v. Jones Can Restore Our Faith in the Fourth Amendment*, 110 MICH. L. REV. FIRST IMPRESSIONS 62, 66 (2014) (“The majority opinion in *Jones* thus resurrects the pre-*Katz* link between the Fourth Amendment and property rights. . . .”). Melanie Reid, *United States v. Jones: Big Brother and the “Common Good” Versus the Fourth Amendment and Your Right to Privacy*, 9 TENN. J. L. & POL’Y 7, 8 (2013). For the normative variant, see Baude & Stern, *supra* note 5, at 1834 (expressing hope that the trespass test, as elaborated in *Jones*, *Jardines*, and *Grady*, “might one day blossom into [a] positive law model”); Laurent Sacharoff, *Constitutional Trespass*, 81 TENN. L. REV. 877, 889–93 (2014) (arguing that *Jones*, despite not explicitly applying positive law, rests on a contemporary understanding of trespass law, and that *Jardines* should be read to have gestured toward trespass, despite avoiding the specific term).

<sup>9</sup> The virtue of dignity as a Fourth Amendment principle has not gone totally unnoticed in the surrounding commentary. See, e.g., Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of “Pointless Indignity,”* 66 STAN. L. REV. 987, 1010–18 (2014) (arguing that in addition to protecting privacy, the Fourth Amendment “also may promote state respect for human dignity”). Nonetheless — and not surprisingly, given the doctrine’s emphasis (until *Jones*) on privacy — dignity hovers at the margins of Fourth Amendment theory, and has largely eluded a systematic elaboration, particularly one that connects up to existing case law. The one exception is John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 660 (2008), which sets forth the beginnings of a dignity-based conception of a Fourth Amendment search’s “reasonableness.” Our project complements Castiglione’s by showing how trespass offers a doctrinal vehicle for realizing that conception of the Fourth Amendment’s proper scope.

stitutionally protected area” to obtain information.<sup>10</sup> We argue that at a doctrinal level a “physical intrusion” occurs when government agents enter a constitutionally protected area in a manner that would be highly offensive to a reasonable person<sup>11</sup> — or, as Justice Brennan once put it in dissent, when state officials have behaved “contrary to commonly accepted notions of civilized behavior.”<sup>12</sup> If so, such behavior should trigger Fourth Amendment scrutiny due to its offensive or degrading nature alone, regardless of how the behavior would fare under the labyrinthine precedents generated by *Katz*.<sup>13</sup>

At a functional level, our position certainly overlaps with the positive law construction; in many cases conduct that subverts basic norms of civilized behavior will also be illegal.<sup>14</sup> However, the two constructions are not functionally identical, and the points of divergence matter. If the trespass test were tethered to positive law, it would be simultaneously under-inclusive and over-inclusive.<sup>15</sup> Some actions that are highly offensive to a reasonable person are, nonetheless, permitted by law; likewise, there are actions that law enforcement officers ought to be able to take, but that should nevertheless be proscribed in other contexts.<sup>16</sup>

---

<sup>10</sup> *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (quoting *United States v. Jones*, 132 S. Ct. 945, 950 n.3 (2012)).

<sup>11</sup> *Cf.* RESTATEMENT (SECOND) OF TORTS § 652B (1977) (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”).

<sup>12</sup> *California v. Greenwood*, 486 U.S. 1625, 1632 (1988) (Brennan, J., dissenting).

<sup>13</sup> For an exemplary recent application of the trespass test in this manner, see *United States v. Ackerman*, No. 14-3265, 2016 WL 4158217, at \*11 (10th Cir. Aug. 5, 2016) (holding that opening and reading emails is analogous to a trespass to chattels that triggers the Fourth Amendment because it is a violation of “the dignitary interest in the inviolability of chattels”) (quoting *United States v. Jones*, 132 S. Ct. 945, 957 n.2 (2012) (Alito, J., concurring in the judgment)).

<sup>14</sup> *See, e.g., United States v. Jones*, 132 S. Ct. 945, 957 n.2 (2012) (Alito, J., concurring in the judgment) (noting that, “[a]t common law, a suit for trespass to chattels could be maintained if there was a violation of ‘the dignitary interest in the inviolability of chattels’”).

<sup>15</sup> For an excellent general critique of the positive-law model along these lines, see *supra* note 8.

<sup>16</sup> Consider the following examples: surreptitiously recording a conversation between a police officer and an individual in a jurisdiction that requires two-party consent to record; pretending to be a drug buyer to gain entry to a residence in a jurisdiction that considers entry-by-deception to be trespassing; flying a helicopter at an altitude that violates general federal aviation regulations promulgated to protect individuals on the ground from the nuisance of air-traffic noise in order to observe information otherwise exposed to public view; following an individual around in public in violation of certain anti-stalking ordinances; breaching a contract (or inducing another person to breach a contract) that might prevent the collection of useful investigation-relevant information; writing about someone in the newspaper in order to ask people with information to come forward in possible violation of that person’s right to publicity; various privacy torts and conceivably defamation and libel laws; or asking people who worked for a business under investigation to divulge trade secrets. Our point is simply this: many laws exist to protect interests other than privacy, and no one would think that because they exist they should automatically trigger the warrant requirement. *See Oliver v. United States*, 466 U.S. 170, 183 n.15, (1984) (explaining that positive law protects a wide assortment of values only some of which intersect with privacy).

Perhaps more importantly, the positive law construction does not plausibly track the Court's own conception of the "trespass" test — or, for that matter, its established view of what role positive law should play in Fourth Amendment analysis. In a series of cases in the 1980s, the Court entertained — and explicitly rejected — the notion that positive law should set Fourth Amendment baselines.<sup>17</sup> Moreover, nothing about the reasoning in *Jones*, *Jardines*, or *Grady* suggests that the Court was interested in the tort or property law of any particular jurisdiction. If anything, the opposite is true. In *Jones*, the Court disregarded positive law.<sup>18</sup> In *Jardines*, it actively disavowed positive law.<sup>19</sup> And in *Grady*, positive law was the source of the constitutional problem.<sup>20</sup>

After taking a closer look at *Jones*, *Jardines*, and *Grady* in Part I, in Part II we show why the trespass test, construed in terms of "offensive conduct," has considerable doctrinal advantages. We make two arguments. First, the trespass test accounts for aspects of existing Fourth Amendment law that are poorly explained by *Katz*. For example, rules concerning when police may use deception, or rely on the consent of third parties, to enter constitutionally protected areas are difficult, if not impossible, to rationalize on *Katz*-style privacy grounds. Second, the trespass test also helps explain why certain cases, like *Whren v. United States*, seem wrongly decided to so many observers,<sup>21</sup> despite impinging very little, if at all, on privacy interests.

<sup>17</sup> See, e.g., Murphy, *supra* note 7, at 327 (exploring the apparent tension between *Jones*'s invocation of "trespass" and the Court's earlier jurisprudence rejecting positive law baselines); see also section I(A) and accompanying notes. It is possible, of course, that these cases are wrongly decided. But it would be odd to think the new batch of "trespass" cases overturns them sub silentio. Exemplary cases where positive law was rejected include *California v. Greenwood*, 486 U.S. 35, 42 (1988) (rejecting argument that because warrantless trash pulls violated the California Constitution they also therefore violate the Fourth Amendment, holding expressly that "[w]e have never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs"); *Dow Chem. Co. v. United States*, 476 U.S. 227, 240 (1986) (rejecting the argument that aerial photographs of a Dow industrial plant taken to determine whether Dow had complied with environmental regulations violated reasonable expectations of privacy because the surveillance divulged Dow's trade secrets); *Oliver v. United States*, 466 U.S. 170, 183 (1984) (rejecting claim that trespass to land, when entry was onto an "open field" violated the Fourth Amendment simply because it was trespassing); *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980) (rejecting the argument that Bahamian bank secrecy laws created a reasonable expectation of privacy in defendant's bank records in the Bahamas).

<sup>18</sup> See, e.g., Baude & Stern, *supra* note 5, at 1835 (describing the invocation of "trespass" in *Jones* not "as actual law," but rather, "as a source of analogies").

<sup>19</sup> See *infra* notes 30–32 and accompanying text; see also Florida v. *Jardines*, 133 S. Ct. 1409, 1424 (2013) (Alito, J., dissenting) ("[T]he real law of trespass provides no support for the Court's holding today. While the Court claims that its reasoning has 'ancient and durable roots,' its trespass rule is really a newly struck counterfeit.")

<sup>20</sup> *Grady v. North Carolina*, 135 S. Ct. 1368, 1369 (2015) (noting that Fourth-Amendment-violating ankle monitor was attached pursuant to North Carolina law).

<sup>21</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 67–72, 108–09 (2012) (discussing the ways in which *Whren* contributes to a criminal justice that oppresses and disadvantages minorities); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1069 n.395 (2010) ("The academic criticism of the Supreme

In short, there are situations in which no “expectations of privacy” (in the *Katz* sense) are at stake, but the Court nevertheless finds Fourth Amendment violations — or, alternately, it is widely believed that the Court *should* find Fourth Amendment violations. In our view, the reason is that dignity norms infuse Fourth Amendment law. The trespass test both recognizes and extends those norms by highlighting a class of Fourth Amendment harms that are rooted, not in privacy norms,<sup>22</sup> but in an overall conception of the proper relationship between individuals and the state.

Part III offers a normative defense of dignity as an important Fourth Amendment value. In short, we argue that dignity norms naturally supplement *Katz*-style privacy norms by shoring up another core purpose of the Fourth Amendment: ensuring that state officials who wield considerable power over our lives wield it in a respectful way. The Fourth Amendment’s regard for individual dignity — from its concern for the inviolability of the body, to the sacredness of the home, to its protection from coerced consent and involuntary seizure — prevents government agents from losing sight of their role as guardians and servants.

Ultimately, this Article asks a basic question: will courts capitalize on the opportunity afforded by the trespass test to construct a more intelligible and comprehensive Fourth Amendment? The test is administrable, normatively attractive, and consistent with decades of jurisprudence. Our hope is that tethering the “trespass” test to dignity norms will achieve two goals at once. First, it will help to fortify aspects of Fourth Amendment law that have fallen into disrepair over the last few decades. Second, it will help ensure that the “trespass” test does not fade into doctrinal obscurity.

---

Court’s decision [in *Whren*] has been harsh, with defenders of the decision relatively few and far between.”); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 442 (1997) (“The race-based pretextual traffic stop tears a hole in the fabric of our constitution by allowing discriminatory behavior to invade the criminal justice system. Faced with the opportunity to repair the hole, the Supreme Court chose to ignore it, leaving African-Americans and other people of color without a clear and effective remedy for this discriminatory treatment.”).

<sup>22</sup> We are not saying that these dignitary harms could not, in principle, be cast as a species of privacy harm. In fact, we take no position on the relationship between privacy and dignity. Suffice it to say that many theorists believe that dignitary interests (in some forms at least) can be folded into privacy interests, and insofar as they are right, it is possible to describe what we are calling “dignity” in terms of privacy. See, e.g., JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 19 (2000) (arguing that intrusions on privacy interests can be “intrinsic[ally] offens[ive]” to “individual dignity”); Anita L. Allen, *An Ethical Duty to Protect Information Privacy?*, 64 ALA. L. REV. 845, 863 (2013); Castiglione, *supra* note 9, at 689 (“Commentators have noted that privacy and dignity, especially in the search-and-seizure context, can orbit each other closely.”). For our purposes, the point is that whatever else might be said about the relationship between dignity and privacy, the notion of “dignity” identified implicitly in the trespass cases is not the same as *Katz*-style privacy. See Castiglione, *supra* note 9, at 675 (“The Supreme Court has hinted at dignity’s place as a Fourth Amendment value, but has alternately conflated the dignitary interest with the privacy interest, or ignored the dignitary interest altogether.”).

## I. DEFINING “TRESPASS”

We begin by tracing the roots of the trespass test. First, we demonstrate that *Jones*, *Jardines*, and *Grady* cannot plausibly be read to establish — or even to prefigure — a positive law model of Fourth Amendment violation. Rather, all three cases, properly understood, cut the other way. Second, we argue that the trespass test is best understood in terms of dignity.

## A. What “Trespass” is Not

When the Supreme Court announced that trespasses were searches in *United States v. Jones*, it seemed possible, if not likely, that the Court meant what it said: When government agents commit a trespass — as defined by the law of trespass in the relevant jurisdiction — they engage in a Fourth Amendment search, and a warrant is required.<sup>23</sup> That was certainly how Justice Alito understood the trespass test, protesting in concurrence that “under the Court’s theory, the coverage of the Fourth Amendment may vary from State to State.”<sup>24</sup> Furthermore, the positive law construction also seemed in keeping with the majority’s rationale for distinguishing *Jones* from two earlier cases that involved automobile tracking — *United States v. Karo* and *United States v. Knotts*.<sup>25</sup> In those cases, the *Jones* majority reasoned, the tracking device had been installed before the defendant in question owned the car; thus, the trespass test would not have been satisfied.<sup>26</sup> This logic seemed to suggest, if not to necessitate, that the standard in *Jones* came back to formalities of property law.

Fast forward four years, however, and it is clear that the “trespass” and “physical intrusion” tests, notwithstanding their common law pedigree, are not truly about positive law. There were hints in *Jones* itself. There, the supposed “trespass” occurred when the police installed a GPS on a private car.<sup>27</sup> In modern law, however, trespass claims do not lie for *de minimis*

---

<sup>23</sup> *United States v. Jones*, 132 S. Ct. 945, 949–54 (2012); see also Sacharoff, *supra* note 8, at 878–83.

<sup>24</sup> *Jones*, 132 S. Ct. at 961 (Alito, J., concurring in the judgment).

<sup>25</sup> See *United States v. Karo*, 468 U.S. 705, 711–12 (1984); *United States v. Knotts*, 460 U.S. 276, 285 (1983).

<sup>26</sup> *Jones*, 132 S. Ct. at 951–52 (distinguishing *Karo*, 468 U.S. at 705, and *Knotts*, 460 U.S. at 276, on the grounds that in those cases “at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later”). To be clear, the *Knotts* Court found that a search had occurred, but the reason had nothing to do with surveillance on public roads. It turned on the fact that the beeper was unwittingly transported (by the defendant) to a private residence, where it continued to record the defendant’s activity; because the defendant had a reasonable expectation of privacy in *that* portion of his activity, the use of the beeper constituted a search. See *id.* at 282–85.

<sup>27</sup> See, e.g., *Jones*, 132 S. Ct. at 949 (“It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a “search” within the meaning of the Fourth Amendment when it was adopted.”); Kerr, *supra*

incursions on chattel.<sup>28</sup> As Justice Alito explained in concurrence, the only way that the majority might have reached its conclusion was to hold that installing the GPS device violated “the dignitary interest in the inviolability of chattels,” the eighteenth century common law test for trespass to chattels.<sup>29</sup>

But the real death knell for the positive law construction came in *Jardines* and *Grady*. In *Jardines*, the Court held that dog sniffs on the curtilage of a home come within the ambit of the doctrine.<sup>30</sup> But taking a dog up to someone’s porch is neither an uncommon occurrence nor, in any jurisdiction we are aware of, trespassing.<sup>31</sup> Indeed, other commentators have noted that the majority opinion in *Jardines* was consciously crafted to evade the niceties of property law, because it was clear from the opinion below that the police did not engage in trespassing under Florida law.<sup>32</sup> That may be why the Court opted to frame the issue in terms of “physical intrusion”: describ-

note 2, at 91 (“The Court’s opinion breezes by why a trespass occurred. The Court describes the act as ‘trespassory’ and announces a conclusion . . . No explanation is offered.”).

<sup>28</sup> *Jones*, 132 S. Ct. at 957 n.2 (Alito, J., concurring in the judgment). Laurent Sacharoff has argued that even a de minimis incursion on a chattel should qualify as a “trespass” for Fourth Amendment purposes, even if no damages remedy would be (theoretically) available at common law. Sacharoff has argued that any trespass to a chattel — even a de minimis one — changes the legal relationship between the parties (by, for example, privileging the owner to use force to prevent it). Thus, according to Sacharoff, a non-actionable trespass to chattels should still count as a positive-law violation triggering Fourth Amendment scrutiny. See Sacharoff, *supra* note 8, at 906–07. In our view, Sacharoff’s argument only further exposes the problem with attempting to tie Fourth Amendment violations to positive law violations. Neither Sacharoff nor the *Jones* majority offers a basis for determining what types of legal relations should create legal protections that trigger Fourth Amendment scrutiny. We find it hard to believe anyone would contend, for instance, that the government’s breach of a contractual promise to some third-party not to enter a particular public area would suddenly mean the government needed a warrant to enter simply because the contract provides a right to performance.

<sup>29</sup> *Jones*, 132 S. Ct. at 957 n.2 (Alito, J., concurring in the judgment).

<sup>30</sup> See Bradly Pollina, *Florida v. Jardines: Why The Supreme Court Did Not Say “Trespass”*, 3 WAKE FOREST L. REV. COMMON LAW 19, 19–21 (2013) (“[T]he police were lawfully present on the defendant’s property at the time of the dog sniff.”); *Florida v. Jardines*, 133 S. Ct. 1409, 1417–18 (2013) (holding that a trespass search occurred even though officers were not trespassing under Florida law).

<sup>31</sup> See, e.g., *Jardines*, 133 S. Ct. at 1424 (Alito, J., dissenting) (“[I]n the entire body of common-law decisions, the Court has not found a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog on a leash.”); see also Pollina, *supra* note 30 (arguing that the Florida courts’ determination that no trespass had occurred led the Court to avoid invoking it).

<sup>32</sup> *Jardines v. Florida*, 73 So. 3d 34, 61, 63 (Fla. 2011) (Polston, J., dissenting) (“[I]t is undisputed that one dog and two officers were lawfully and briefly present near the front door of Jardines’ residence when the dog sniff at issue in this case took place.”); *State v. Jardines*, 9 So. 3d 1, 4 (Fla. Dist. Ct. App. 2008) (“[T]he officer and the dog were lawfully present at the defendant’s front door . . .”). Indeed, Justice Alito explicitly raised the point with defense counsel at oral argument, asking why the Supreme Court should not defer to the Florida Supreme Court’s holding that, under Florida law, no trespass had occurred. See Transcript of Oral Argument at 59, *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (No. 11-564), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-564.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-564.pdf), archived at <http://perma.cc/3QNK-XLYP>.



ing the problem in trespass terms would have actively misrepresented the law.

*Grady* is even more glaring. There, positive law, far from resolving the Fourth Amendment question, was precisely the reason for the challenge; the question was whether a North Carolina law authorizing the forcible tracking of recidivist sex offenders via ankle bracelets violated the Fourth Amendment.<sup>33</sup> The practice under scrutiny in *Grady* was not against the law — it *was* the law.<sup>34</sup> Nevertheless, the Court had no difficulty concluding — unanimously, and without argument — that because North Carolina’s monitoring program operates “by physically intruding on a subject’s body,” it “effects a Fourth Amendment search.”<sup>35</sup>

Even if the apparent irrelevance of positive law in *Jones*, *Jardines*, and *Grady* could somehow be set aside, there is one final clue that the trespass test does not turn on the actual law of trespass (or physical intrusion). Namely, three decades before *Jones*, the Court had already considered — and explicitly rejected — the notion that the Fourth Amendment’s application should or does depend on positive law. And neither *Jones* nor its progeny purports to overrule those cases.

<sup>33</sup> *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015).

<sup>34</sup> In fairness, Baude and Stern, as well as Sacharoff, have a readymade answer to this point. Under both frameworks, the relevant question is not whether the actions of law enforcement were legitimate under *any* positive law; the question is whether it would have been illegal for a lay person to do what the police officers did. See Baude & Stern, *supra* note 5, at 1831 (explaining that under their framework, “[t]he question is: *has a government actor done something that would be unlawful for a similarly situated non-government actor to do?*” Stated differently, the Fourth Amendment is triggered if the officer — stripped of official authority — could not lawfully act as he or she did”); Sacharoff, *supra* note 8, at 917 (“In identifying state trespass law, the Court should draw, as it effectively did in *Jones* and *Jardines*, from the general civil trespass law that governs conduct between private citizens, rather than any special trespass doctrine a state has developed for law enforcement”). There are two problems with this rejoinder. First, it relies on the concept that it is possible to reasonably identify circumstances in which state actors and private actors are “similarly situated.” Indeed, the task of much of Fourth Amendment law is to try to make that very determination. A major issue in such examinations is that the police and strangers are almost never similarly situated. Cf. Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 110 (2008) (“The policeman’s job is to enforce the law, keep the peace, and in some cases aid people in danger. Accordingly, policemen must ignore reasons for inaction that strangers will bear foremost in mind.”). Second, once the court is tasked with deciding between sources of positive law, a normative decision-rule of some kind is required. Put simply, what justifies a court’s decision to look to positive law regulating ordinary citizens in determining whether the Fourth Amendment should apply? If the answer is that positive law regulating ordinary citizens better tracks fundamentally offensive or degrading conduct (see Sacharoff, *supra* note 8, at 917 (explaining that positive law regulating ordinary citizens is “more likely to [ ] incorporate our ordinary cultural and customary norms vis-a-vis trespass”), we certainly agree. But surely that goal would be better vindicated by simply asking what is fundamentally offensive or degrading, not by relying on (one aspect of) positive law as a proxy. Taking cues from positive law designed to regulate non-law enforcement actors runs the risk of over-inclusivity, insofar as there are things that law enforcement should be permitted to do (without triggering Fourth Amendment scrutiny) that ordinary citizens should *not* be permitted to do. See *supra* note 16.

<sup>35</sup> *Grady*, 135 S. Ct. at 1369.

Exhibit one: *United States v. Karo*, which involved electronic monitoring of a car's movements on public roads — this time with a beeper surreptitiously concealed in a can of ether purchased by defendant, not a GPS device installed on the exterior of defendant's car.<sup>36</sup> In *Karo* the Supreme Court rejected the argument that when the police inserted the beeper into the can of ether, they trespassed, impinging on Mr. Karo's Fourth Amendment rights.<sup>37</sup> Tellingly, the *Karo* Court did not hold that a trespass — in the positive law sense — had not occurred. Rather, it held that the police's actions constituted "at most [ ] a technical trespass," which did not trigger the Fourth Amendment.<sup>38</sup> In other words, the *Karo* Court was willing to assume arguendo that a violation of positive trespass law had occurred, but even so, it held that "no Fourth Amendment interest . . . was infringed" thereby.<sup>39</sup> In the Court's words, "an actual trespass is neither necessary nor sufficient to establish a [Fourth Amendment] violation."<sup>40</sup>

Exhibit two: *Oliver v. United States*, which addressed the so-called "open fields" doctrine in Fourth Amendment law.<sup>41</sup> The police entered Mr. Oliver's private estate in direct violation of a "no trespassing" sign, and performed surveillance of his home from afar, but also from an indisputably non-public vantage point — his own property.<sup>42</sup> The Court rejected Mr. Oliver's claim that because the police had trespassed onto his property, the surveillance of his home constituted an illegal search.<sup>43</sup> Instead, it held that the "open fields" surrounding a private residence are not spaces to which a "legitimate" expectation of privacy attaches.<sup>44</sup> Rather, the Court concluded that regardless of whatever rights of exclusion Mr. Oliver may have enjoyed against the general public under property law, he "ha[d] no legitimate expectation that open fields [would] remain free from warrantless intrusion by government officers."<sup>45</sup> Put simply, "the law of trespass [ ] forbids intrusions upon land that the Fourth Amendment would not proscribe,"<sup>46</sup> which is to say, in the view of the *Oliver* Court, Fourth Amendment protection is by nature narrower than — and not derived from — positive property law.

If *Jones* (and *Jardines* and *Grady*) were about positive law, the tension here would be palpable. *Jones* would vitiate *Karo*'s reasoning, if not necessarily its result,<sup>47</sup> and it would effectively overturn *Oliver*.<sup>48</sup> Justice Scalia,

<sup>36</sup> *United States v. Karo*, 468 U.S. 705, 710–11 (1984).

<sup>37</sup> *Id.* at 712–13.

<sup>38</sup> *Id.* at 712.

<sup>39</sup> *Id.* at 713.

<sup>40</sup> *Id.*

<sup>41</sup> *Oliver v. United States*, 466 U.S. 170, 173 (1984). For background on the open fields doctrine, see *Hester v. United States*, 265 U.S. 57 (1924).

<sup>42</sup> *Oliver*, 466 U.S. at 173.

<sup>43</sup> *Id.* at 182.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 181.

<sup>46</sup> *Id.* at 183.

<sup>47</sup> *Karo* leaves open the possibility that the insertion of the beeper into the can was not, in fact, a trespass, see *Karo*, 468 U.S. at 712 (stating that "[a]t most, there was a technical

in crafting the majority opinion in *Jones*, was not unaware of this problem. In fact, he addressed it head on:

[T]he Government’s position gains little support from our conclusion in *Oliver* that officers’ information-gathering intrusion on an “open field” did not constitute a Fourth Amendment search even though it was a trespass at common law. Quite simply, an open field, unlike the curtilage of a home[,] is not one of those protected areas enumerated in the Fourth Amendment. The Government’s physical intrusion on such an area — unlike its intrusion on the “effect” at issue here — is of no Fourth Amendment significance.<sup>49</sup>

Whatever the normative virtues or shortcomings of drawing the distinction this way,<sup>50</sup> one thing is clear: it forecloses the positive law conception of *Jones*. If the variable that separates *Jones* from *Oliver* is that the former, unlike the latter, involved a “protected area[ ] enumerated in the Fourth Amendment,” the analysis is manifestly not focused on positive law. The police broke the law in both cases in an effort to discover incriminating information; although the physical location of the trespass was an “open field” in *Oliver*, the information gathered was from a home — unambiguously “protected area.” By focusing on where the intrusion occurred, rather

---

trespass on the space occupied by the beeper”) — and this (not surprisingly) is how Justice Scalia’s opinion in *Jones* seems to cast it, *see Jones*, 132 S. Ct. at 952 (stating that “Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper’s presence, even though it was used to monitor the container’s location”). Of course, whether or not *Karo* actually *did* involve a trespass — in the positive law sense — cannot be resolved by mere insinuation in *Jones*. It turns on actual property law.

<sup>48</sup> *See supra* note 17 and accompanying text. In fact, *Oliver* would not be the only casualty. The entire line of “open fields” cases would be thrown into confusion. *See, e.g.*, *United States v. Dunn*, 480 U.S. 294, 300 (1987) (relying on *Oliver* to conclude that no Fourth Amendment violation occurred when police performed “open fields” surveillance on defendant’s barn, located sixty feet from his home). The logic of the aerial surveillance cases, which have consciously eschewed a trespass standard in favor of an expectations-of-privacy analysis, would also be cast into doubt. *See, e.g.*, *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (holding that no Fourth Amendment violation occurred when police observed a marijuana-growing operation in defendant’s backyard from an altitude of 1,000 feet).

<sup>49</sup> *Jones v. United States*, 132 S. Ct. 945, 953 (2012).

<sup>50</sup> In fact, there is good reason to doubt its virtues. Justice Scalia’s argument — that discovering incriminating information by trespassing onto an “open field” is “of no Fourth Amendment significance” because an open field is not one of the things individuals are promised security in by the Fourth Amendment (the right presumably being limited to security in “persons, houses, papers, and effects”) — rings hollow when one considers that illegal action was the precondition of surveillance in *Oliver*. Moreover, taken at face value, Justice Scalia’s reconstruction of *Oliver* in *Jones* would imply that if the officers in *Oliver* had climbed on top of the defendant’s combine harvester (instead of merely trespassing on his land) to get a better look at his house, that would have amounted to an “intrusion” on his “effects” and, therefore, a search. Additionally, Justice Scalia’s distinction would imply that retail outlets, factories, hotels, restaurants, schools, and stadiums — indeed commercial establishments and public-use spaces of all kinds — have no Fourth Amendment protection because spaces other than houses are not among the “protected areas enumerated in the Fourth Amendment.” *Jones*, 132 S. Ct. at 953. These results are difficult to abide.

than the fact that positive law was violated, the *Jones* Court tacitly acknowledged that it would examine the nature and circumstances of positive law violations when determining whether they qualify as Fourth Amendment searches. At best, then, the trespass test makes violation of positive law one (potentially) relevant variable in Fourth Amendment analysis. But it is plainly not the exclusive variable — or even the controlling variable.<sup>51</sup>

If positive law is not the driving force of the trespass test, what about privacy? *Jones*, *Jardines*, and *Grady* are, after all, Fourth Amendment cases. For nearly half a century, the “lodestar”<sup>52</sup> of Fourth Amendment protection has been “expectations of privacy,”<sup>53</sup> a rubric elaborated in Justice Harlan’s concurrence in the famous wiretapping case, *United States v. Katz*.<sup>54</sup> The common wisdom, at least until *Jones*, was that the “*Katz* test” — which asks whether the intrusion in question violates an expectation of privacy recognized by society to be reasonable — operates as both a floor and a ceiling; and that it constitutes the sole test for determining whether the Fourth Amendment governs police conduct.<sup>55</sup> Given the sturdiness of this benchmark, might it make sense to cast *Jones*, *Jardines*, and *Grady* as creative reconfigurations of *Katz*?

Whatever appeal this approach may have in the abstract,<sup>56</sup> *Jones* forecloses it. Justice Scalia’s majority opinion in *Jones*, along with Justice Sotomayor’s concurrence, makes abundantly clear that the “trespass” test is violated even when no reasonable expectations of privacy are violated.<sup>57</sup>

---

<sup>51</sup> To be clear, we are only trying (for the moment) to reconstruct the Court’s understanding of the distinction between *Jones* and *Oliver*, not to defend it on the merits. In our view, if *Jones* and *Oliver* are distinguishable, it must be because *Jones* involved an “offensive search” in a manner that *Oliver* did not. And to the extent *both* cases involved “offensive searches,” our account suggests that *Oliver* was wrongly decided.

<sup>52</sup> *Smith v. Maryland*, 442 U.S. 735, 739 (1979).

<sup>53</sup> See *United States v. Jones*, 132 S. Ct. 945, 950 (2012) (“Our later cases have applied the analysis of Justice Harlan’s concurrence in [*Katz v. United States*], which said that a violation [of the Fourth Amendment] occurs when government officers violate a person’s ‘reasonable expectation of privacy.’”) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

<sup>54</sup> See *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *Katz*, 389 U.S. at 360 (Harlan, J., concurring)) (explaining that the reasonable expectations of privacy test is “[t]he touchstone of Fourth Amendment analysis”).

<sup>55</sup> See Note, *The Fourth Amendment’s Third Way*, 120 HARV. L. REV. 1627, 1632 (2007) (“*Katz* declared that the trespass doctrine can no longer be regarded as controlling and for the most part, nobody has looked back.”) (internal marks and alterations omitted); see also *Jones*, 132 S. Ct. at 961 (Alito, J., concurring in the judgment) (“[T]he majority is hard pressed to find support in post-*Katz* cases for its trespass-based theory.”).

<sup>56</sup> Cf. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1227–28 (1967) (positing that “[a] physical invasion test” could be “a convenience for identifying” which governmental actions should be regarded as “clearly compensable” takings, but suggesting that “this justification for a physical invasion criterion is really rather weak” for reasons analogous to those provided in the text).

<sup>57</sup> But see Chris Slobogin, *A Defense of Privacy as the Central Value Protected by the Fourth Amendment’s Prohibition on Unreasonable Searches*, 48 TEX. TECH L. REV. 143,

The trespass test neither displaces the “expectations of privacy” test nor operates as a proxy for it. Trespass supplements privacy.<sup>58</sup> The *Jones* opinion goes out of its way to explain that the trespass test reflects the principle that the Fourth Amendment “provide[s] at a minimum the degree of protection it afforded when it was adopted” (which includes protection against “physical intrusion into constitutionally protected areas”).<sup>59</sup> It is an “irreducible constitutional minimum,”<sup>60</sup> which is to say: claims of privacy violation not decided by trespass “remain,” post-*Jones*, “subject to *Katz* analysis.”<sup>61</sup> This analysis logically entails that the trespass test is (1) distinct from the *Katz* test, and (2) protects different Fourth Amendment values than the *Katz* test.<sup>62</sup> Indeed, this feature of the trespass test is precisely what led the four concurring Justices to part ways with the majority’s analysis.<sup>63</sup>

*Jones*’s two-tiered theory of Fourth Amendment harm makes sense, for there is significant daylight between the reasonable expectations of privacy test (per *Katz*) and the trespass test.<sup>64</sup> Trespass searches violate the Fourth

147–48 (2015) (arguing the majority opinion in *Jones* can be reconstructed as privacy-based logic, insofar as “it is the little-noticed fact that the trespass in that case — occasioned by planting a GPS device on the defendant’s car — was not enough by itself to make the government’s action a search,” and that “in fact,” the “precise holding of *Jones* was that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a search”) (emphasis in original) (citations omitted).

<sup>58</sup> See, e.g., Morrison, *supra* note 8, at 115 (explaining that under the majority’s framework in *Jones*, the *Katz*-based privacy test is “residual” and subsequent to the trespass analysis).

<sup>59</sup> *United States v. Jones*, 132 S. Ct. 945, 953 (2012). Glimmers of this two-tiered theory are discernible in older case law as well. In *Soldal v. Cook County*, for example, the Court held that the local sheriff effected a Fourth Amendment seizure, despite infringing on no privacy interest, when the sheriff dispossessed plaintiffs’ of their trailer home by towing it away. 506 U.S. 56, 64 (1992) (“Respondents rely principally on [our privacy-based] precedents such as [*Katz*] . . . to [argue] that the Fourth Amendment is only marginally concerned with property rights. But the message of those cases is that property rights are not the *sole measure* of Fourth Amendment violations.”) (emphasis added). Not surprisingly, when the *Soldal* Court described the facts of the case, it used inflammatory language designed to underscore the outrageousness — what we would call the indignity — of the government action. See *id.* at 72 (“The complaint here alleges that respondents . . . dispossessed the Soldals of their trailer home by *physically tearing it from its foundation and towing it to another lot*. Taking these allegations as true, this was no “garden-variety” landlord-tenant or commercial dispute.”) (emphasis added).

<sup>60</sup> *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

<sup>61</sup> *Id.* at 953 (opinion of the Court).

<sup>62</sup> Imagine a hypothetical with exactly the same facts as *Knotts*, as to the amount of surveillance, but that involved an initial GPS installation. The *Jones* logic would deem this a Fourth Amendment search, even though it clearly established that short periods of monitoring on public roads (per *Knotts*) intrude on no expectation of privacy. See *id.* at 964 (Alito, J., concurring in the judgment) (explaining that, under *Knotts*, “relatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable”).

<sup>63</sup> *Id.* at 961 (describing the majority opinion in *Jones* as “[d]isharmon[ious] with a substantial body of existing case law”).

<sup>64</sup> We recognize, again, that many scholars of privacy have argued that “privacy” is broad enough to encompass concern for individual dignity. See *supra* note 22 and accompanying text. However, the word “privacy” in the *Katz* context has come to be associated almost exclusively with a narrow conception of privacy in information. See Castiglione, *supra* note 9,

Amendment even if they infringe on no expectations of privacy at all.<sup>65</sup> Affixing a GPS to a car, for example, violates the trespass test even if an individual has no expectation of privacy in the movements of his vehicle on the public streets.<sup>66</sup> Dog sniffs, which the Court has long assumed never yield false positives,<sup>67</sup> similarly cause no privacy harms, yet under the trespass search doctrine are automatically searches when they take place on the curtilage of a home.<sup>68</sup> In short, trespass severs the identity, implied in *Katz*, between Fourth Amendment harms and privacy violations.

### B. Trespass as Indignity

If the trespass test is about neither common law nor privacy, the question becomes: What is it about? In our view, the best answer is *dignity*, in the sense once described by Robert Post, and echoed by other theorists,<sup>69</sup> as “norms that define the forms of respect that we owe to each other,” whose infringement is seen as “intrinsically harmful, because [it is] violative of the self.”<sup>70</sup> As Dean Post rightly notes, the idea that individuals have dignity (and are capable of experiencing dignitary harm) “presupposes a particular kind of social structure in which persons are joined by common norms that govern the forms of their social interactions.”<sup>71</sup> Simply put, “these norms constitute the decencies of civilization.”<sup>72</sup>

The importance of protecting dignity by law is that, without its protection, individuals are denied the formation of a personality that society deems

at 687–93 (discussing this narrow conception). *But see* Slobogin, *supra* note 57, at 157–63 (offering a more expansive interpretation of *Katz*-style privacy).

<sup>65</sup> *See, e.g.*, Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013) (acknowledging that privacy interests need not be considered in trespass analysis, terming it a “virtue” of the test that “keeps easy cases easy”).

<sup>66</sup> United States v. Knotts, 460 U.S. 276, 281 (1983) (“A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”).

<sup>67</sup> *See* Illinois v. Caballes, 543 U.S. 405, 411 (2005) (Souter, J., dissenting) (explaining that the court’s dog sniff opinions rest on the false “proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband. . . . Hence, the argument goes, because the sniff can only reveal the presence of items devoid of any legal use, the sniff ‘does not implicate legitimate privacy interests’ and is not to be treated as a search.”).

<sup>68</sup> *See infra* notes 99–103 and accompanying text (explaining why, in light of the dog sniff jurisprudence, the trespass test is necessary to justify *Jardines*).

<sup>69</sup> On this front, the sources are fountainous. *See, e.g.*, AVISHAI MARGALIT, THE DECENT SOCIETY (1996); Martha Nussbaum, *Human Dignity and Political Entitlements*, in HUMAN DIGNITY AND BIOETHICS (2008); Bowers, *supra* note 9, at 1010–13 (compiling sources).

<sup>70</sup> Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092 (2001) [hereinafter “Three Concepts”]. For other Articles in which Post has explored the concept of dignity, see, for example, Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991), and Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989).

<sup>71</sup> Post, *Three Concepts*, *supra* note 70, at 2093.

<sup>72</sup> *Id.*

them entitled to possess.<sup>73</sup> For example, if sexual harassment were permitted in the workplace, employees subject to such harassment would be denied the ability to form identities there on the same terms as other coworkers. Workplace harassment law civilizes the workplace by placing the weight of the law behind the notion that sex is irrelevant to one's value. Sexual harassment laws can thereby be said to protect "dignity" in the workplace.<sup>74</sup>

We argue that this conception of dignity, by focusing on the benchmark norms of civility, elegantly captures the types of harm the "trespass" test means to guard against. *Jones*, *Jardines*, and *Grady* shift the locus of Fourth Amendment inquiry away from the question of what the government discovered toward the question of whether the government acted offensively. The unifying theme of trespass search cases is that the Fourth Amendment cares about the "How?" of police investigation in addition to the "What?" As such, investigative methods that "intrude" on "protected areas" violate the Fourth Amendment — on dignity grounds — even when the information they yield is subject to no reasonable expectation of privacy.

Take *Jardines*.<sup>75</sup> In the majority's view, the police conduct amounted to a "physical intrusion" on a "constitutionally protected area" because, in essence, they acted in an extremely offensive manner.<sup>76</sup> The police invaded private property to find incriminating evidence.<sup>77</sup> Whatever else informal norms of custom and etiquette permit, surely, as the majority put it, "[t]here is no customary invitation to do *that*."<sup>78</sup> To prove its point, the majority offered the following hypothetical: imagine finding a "visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello."<sup>79</sup> The Court thought such conduct plainly unacceptable, the kind of thing that "would inspire most of us to — well, call the police."<sup>80</sup> In other words, no one would tolerate a stranger coming onto her property unannounced, with a large dog in tow, to search for evidence of a crime. Thus, according to the *Jardines* majority, doing so constituted a search.

Justice Kagan's concurrence made essentially the same point. Inviting the reader to imagine a "stranger [who] comes to the front door of your home carrying super-high-powered binoculars," and who "doesn't knock or say hello" but instead "stands on the porch and uses the binoculars to peer

---

<sup>73</sup> Post, *Social Foundations*, *supra* note 70, at 962–64 ("By following these rules, individuals not only confirm the social order in which they live, but they also establish and affirm 'ritual' and 'sacred' aspects of their own and others' identities.").

<sup>74</sup> See Rosa Ehrenreich, *Dignity and Discrimination: Toward A Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 24–26 (1999) (explaining how workplace sexual harassment law protects women's dignity under the Post-ian conception we articulate here).

<sup>75</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

through your windows, into your home's furthest corners,"<sup>81</sup> she reasoned that such conduct would clearly violate basic norms of civility. In her words: "Has [this] 'visitor' trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has."<sup>82</sup>

Both Justice Scalia's majority opinion and Justice Kagan's concurrence conjure images of a search far more invasive than what actually occurred. But that is the point. For both Justices, the "trespass" in *Jardines* arose from the feelings of violation instilled by the law enforcement conduct. In other words, both opinions seemed interested in the same question: whether an individual would find the conduct highly intrusive and offensive, regardless of who — private actor or police officer — the culprit was. In that sense, the trespass test turns on a very different question than *Katz*. The latter asks whether an individual expected privacy. The former asks whether an individual was entitled to courtesy.

This most recent Term, the themes of dignity and offensiveness came further to the fore in *Birchfield v. North Dakota*, a consolidated challenge to warrantless testing for blood alcohol content.<sup>83</sup> Two types of search were at issue: breathalyzers and blood draws. The question was whether law enforcement may, incident to a suspect's arrest on DUI charges, perform either method of testing without a warrant.<sup>84</sup> The majority split the difference, holding that breathalyzer tests may be performed without a warrant, but blood tests may not.<sup>85</sup> To draw this distinction, the majority relied on two axes of difference. First, it observed that "while humans exhale air from their lungs many times per minute, humans do not continually shed blood," rendering blood draws inherently "more intrusive than [making someone] blow [ ] into a tube."<sup>86</sup> Second, the majority concluded that law enforcement can, in principle, "extract information beyond . . . alcohol content" from blood, and that this possibility — even if explicitly proscribed by law — "may result in anxiety for the person tested."<sup>87</sup>

Although both of these distinctions are understandable,<sup>88</sup> neither is anchored in privacy. With respect to the first distinction, the Court does not even attempt a privacy rationale. It hangs its hat, just as in *Jones*, *Jardines*, and *Grady*, on the intrusiveness — and thus, offensiveness — of the blood draw. Moreover, the Court's second distinction, though styled as an information privacy concern, is actually about something quite apart from pri-

---

<sup>81</sup> *Id.* at 1418 (Kagan, J., concurring).

<sup>82</sup> *Id.*

<sup>83</sup> *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

<sup>84</sup> *Id.* at 2166, 2172.

<sup>85</sup> *Id.* at 2184.

<sup>86</sup> *Id.* at 2178.

<sup>87</sup> *Id.*

<sup>88</sup> We are not necessarily saying that they should be dispositive of the constitutional question — simply that they are, in fact, viable distinctions.



vacy: anxiety.<sup>89</sup> The point of the example is that even when one knows that law enforcement will not extract further information from a blood sample, merely knowing that they could do so might (justifiably) produce a feeling of intrusion and insecurity. In short, both of the distinctions offered in *Birchfield* for treating breathalyzers and blood samples differently are hard to fathom on pure privacy grounds, but are effortlessly rationalized on dignity grounds.

The focus in *Birchfield* on the offensive means used to perform a bodily search — rather than the private nature of the evidence exposed by the search — contained echoes of another recent opinion: Justice Scalia’s iconic dissent in *Maryland v. King*.<sup>90</sup> The question in *King* was whether law enforcement’s forcible taking of DNA samples from arrestees during booking qualifies as a search.<sup>91</sup> In an opinion widely criticized by the scholarly community, the Court said no.<sup>92</sup> Justice Scalia, writing for four Justices in dissent, excoriated the majority opinion.<sup>93</sup> What the dissent zeroed-in on, however, was not the privacy interests associated with the type or quantity of information contained in DNA. It was the method by which the DNA was gathered — a cheek swab. For Justice Scalia, there was something basically offensive about that procedure, in spite of it being painless, gentle, and efficient. As he put it, in a striking piece of rhetoric: “I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”<sup>94</sup> The import of this image is clear. The point is not that cheek swabs cause physical or emotional anguish, but that

---

<sup>89</sup> To be sure, such “anxiety” may be *about* privacy. But the two interests are distinct. The way we protect privacy interests, per *Katz*, is by imposing procedural conditions on intrusion, in the form of Fourth Amendment rules (and, in some contexts, statutory rules as well). The “anxiety” interest described by the *Birchfield* Court, by contrast, cannot be addressed by procedural conditions. The whole point of the Court’s analysis is that even if law enforcement use of the blood sample is constrained by normal Fourth Amendment rules — as the Court puts it, “even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC” — the “potential [for intrusion] remains,” and “may result in anxiety.” *Birchfield*, 136 S. Ct. at 2178. In other words, the anxiety interest described by the Court is about the perceived *inadequacy* of privacy protections, not the need for privacy protections in the first instance.

<sup>90</sup> See *Maryland v. King*, 133 S. Ct. 1988, 1989–90 (2013) (Scalia, J., dissenting).

<sup>91</sup> *Id.* at 1965–66.

<sup>92</sup> See generally Barry Friedman, *Maryland v. King: the Supreme Court Fails the Fourth Amendment Test*, 8 N.Y.U. J.L. & LIBERTY 176 (2014); Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161 (2013). For excellent background and commentary that prefigured *King*, see Elizabeth Joh, *Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 859–90 (2006).

<sup>93</sup> *King*, 133 S. Ct. at 1982 (2013) (Scalia, J., dissenting) (“The Court hastens to clarify that it does not mean to approve invasive surgery on arrestees or warrantless searches of their homes [by approving use of DNA collection by buccal swab]. That the Court feels the need to disclaim these consequences is as damning a criticism of its suspicionless-search regime as any I can muster. . . . [C]ould the police engage, without any suspicion of wrongdoing, in a ‘brief and . . . minimal’ intrusion into the home of an arrestee — perhaps just peeking around the curtilage a bit? . . . Obviously not.”).

<sup>94</sup> *Id.* at 1989.

they are inherently demeaning. And the Fourth Amendment, at a minimum, abhors demeaning acts carried out by state officials in the course of law enforcement investigations.

The Court's trespass search cases have a clear direction. They suggest that the government must treat individuals with a minimal level of respect and civility. As it turns out, this construction of the trespass test fits neatly into existing Fourth Amendment law. For the Court has long recognized, though seldom named, a dignitary core of Fourth Amendment protection.

## II. THE DOCTRINAL IMPLICATIONS OF TRESPASS (AS INDIGNITY)

Part I offered a host of reasons for construing *Jones*, *Jardines*, and *Grady* to enshrine (using the vocabulary of trespass) a dignitary conception of Fourth Amendment harm. In this Part, we pan a wider angle, and ask what doctrinal work the trespass-as-indignity test performs. In our view, numerous areas of Fourth Amendment law are much better explained — and some, perhaps, only explained — by dignity rather than privacy concerns. The analysis is divided into two clusters. First, there are holdings that are widely thought to have come out correctly, but that are hard, if not impossible, to rationalize on privacy grounds. Second, there are holdings that are widely thought to have come out incorrectly, but privacy poorly explains their shortcomings.

### A. *Resolving Mysteries*

To begin with, consider *Jones*, *Jardines*, and *Grady*. Of the three, *Grady* is the only one that is easily disposed of on privacy grounds. *Karo* established that monitoring a suspect's movements qualifies as a search — on privacy grounds — when (among other things) it penetrates the walls of a home.<sup>95</sup> This principle would seem to apply squarely to *Grady*. The point of ankle monitoring is that it records *all* movement, even within private homes; thus, it qualifies as a *Karo*-style search.

*Jones* and *Jardines* are a different story. When viewed through the privacy lens, both are in tension with the Court's previous holdings. *Jones* clashes with the principle articulated in *Karo* that one has no expectation of privacy in "movements of [an] automobile" that "could have been observed by the naked eye."<sup>96</sup> Indeed, this is part of what made *Jones* such a vexing case. There can be little doubt that no search occurs when the police officers tail someone in a car. What, ultimately, is the difference between that and GPS monitoring?<sup>97</sup> Unsurprisingly, the government took the view

---

<sup>95</sup> United States v. Karo, 468 U.S. 705, 714 (1984).

<sup>96</sup> *Id.* at 715.

<sup>97</sup> In the scholarship, there are essentially two contending positions. The first is that the quantity of collected information — and more importantly, the further information that can be extrapolated — is what makes the difference. This view has long flickered in the case law.

that no difference exists. In its briefing and during argument, the government continually maintained that, at least as far as *Katz*-style privacy was concerned, *Karo* (and *Knotts*) controlled *Jones*; because *Jones* involved no surveillance beyond movement on public roads, it did not implicate Fourth Amendment privacy interests at all.<sup>98</sup>

*Jardines* offers an even stronger example. Since at least *United States v. Place*,<sup>99</sup> the Court has held that dog sniffs encroach upon no privacy interests whatsoever, because police dogs are trained to look exclusively for contraband — narcotics, bombs, etc. — and the Court has assumed, somewhat fantastically, that sniffs rarely if ever yield false positives.<sup>100</sup> Many scholars, as well as dissenting judges, have expressed misgivings with this princi-

---

*See, e.g.,* *People v. Sporleder*, 666 P.2d 135, 142 (Colo. 1983) (“[A] pen register record holds out the prospect of an even greater intrusion in privacy when the record itself is acquired by the government, which has a technological capacity to convert basic data into a virtual mosaic of a person’s life.”). It has come to be known as the “mosaic theory.” For an eloquent defense of the mosaic theory, see Joel R. Reidenberg, *Privacy in Public*, 69 U. MIAMI L. REV. 141 (2014) (exploring the ways that technology has rapidly intensified the amount of “public” information that can be seized and stored, putting strain on the “exposure” principle at the heart of much Fourth Amendment law). For an equally eloquent critique, see Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012). The second position is that it is not the quantity of information gathered, but rather the means of gathering, that matters. Danielle Citron & David Gray, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 143 (2013). On the latter view, even a small amount of GPS monitoring would implicate the Fourth Amendment, because the question is what capacity the surveillance technology has *in principle*. For background discussion on these contending viewpoints, and others, see Kiel Brennan-Marquez, *Fourth Amendment Fiduciaries*, 84 FORDHAM L. REV. 611, 639–44 (2015).

<sup>98</sup> *See* Brief for the United States at 17–39, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259), 2011 WL 3561881, \*17–39. Of course, one might argue that the “public highway” principle from *Karo* embeds an implicit limitation on scope. If one construes the reference to “movements of [an] automobile . . . observ[able] by the naked eye” to mean — as Justice Alito’s concurrence in *Jones* construed it — the “relatively short-term monitoring of a person’s movements on public streets,” and one believes that the surveillance in *Jones* amounted to more than short-term monitoring, then the ostensible tension between *Jones* and *Karo* falls away. *Karo*, 468 U.S. at 715. With some interpretive gymnastics, in other words, the two cases become reconcilable, based on *Jones*’s more extended intrusion that may reveal information not otherwise observable on public streets. Of course, there may be good jurisprudential reasons to avoid interpretive gymnastics — not least of all, that short-term versus long-term understanding of *Jones* leaves us with a new, and perhaps more difficult, puzzle. Namely, do all long-term stakeouts and police tails now require a warrant because their duration impinges on an individual’s expectations of privacy even when everything the police officers observe occurs in a public place? *See* Murphy, *supra* note 7 (outlining the confusion that persists after *Jones* about exactly what is required of police who want to engage in GPS monitoring, or other longer-term surveillance).

<sup>99</sup> 462 U.S. 696, 707 (1983) (explaining that a canine sniff by a well-trained narcotics detection dog as “*sui generis*” because it “discloses only the presence or absence of narcotics, a contraband item”).

<sup>100</sup> *See* *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (Souter, J., dissenting) (explaining that the court’s dog sniff opinions rest on the false “proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband. . . . Hence, the argument goes, because the sniff can only reveal the presence of items devoid of any legal use, the sniff ‘does not implicate legitimate privacy interests’ and is not to be treated as a search”).

ple.<sup>101</sup> But putting these normative disputes aside, and taking the principle at face value, the tensions within *Jardines* are clear. If, as *Place* and the surrounding case law suggest, dog sniffs invade no expectation of privacy because of what they reveal, it is hard to see why the analysis would change when the dog sniff occurs on the curtilage of a home. As we noted above, Justice Kagan, concurring in *Jardines*, likened the reliance of drug-detecting dogs to the use of “super-high-powered binoculars” that can peer into the home from afar.<sup>102</sup> But this analogy — which was explicitly intended to frame the case in terms of technological enhancement, as with *United States v. Kyllo*<sup>103</sup> — misses the mark in light of the prior dog sniff jurisprudence. Doctrinally, drug dogs are not analogous to binoculars. They only detect contraband, which is precisely why they receive different treatment. Counterfactually, of course, it would have been possible for a *Jardines* opinion — styled in terms of privacy — to modify the dog sniff jurisprudence, thereby relieving the tension.<sup>104</sup> But as it stands, the tension persists, and something other than *Katz*-style privacy is necessary to explain the case.

•

*Jones* and *Jardines* are not isolated examples. In fact, there are vibrant branches of Fourth Amendment law that prove difficult to explain on privacy grounds. In our view, this is because, contrary appearances notwithstanding, the Court has long embraced the proposition that the *methods* the police use

---

<sup>101</sup> See generally Richard E. Myers II, *Detecter Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1 (2006); see also *Caballes*, 543 U.S. at 410 (2005) (Souter, J., dissenting) (arguing that *Place* was built on the “untenable [ ] assumption that trained sniffing dogs do not err”).

<sup>102</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1418 (2013) (Kagan, J., concurring).

<sup>103</sup> See *id.* at 1419 (Kagan, J., concurring) (“If we had decided this case [i.e., *Jardines*] on privacy grounds, we would have realized that *Kyllo v. United States* already resolved it.”); *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (“We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search — at least where (as here) the technology in question is not in general public use.”)

<sup>104</sup> There is some evidence that appellate courts applying *Jardines* may look to push Justice Kagan’s reasoning in this direction. See, e.g., *United States v. Whitaker*, 820 F.3d 849, 853 (7th Cir. 2016) (holding that it qualified as a Fourth Amendment search for the police to use a drug-sniffing dog in the hallway of defendant’s apartment, because, (1) under *Kyllo*, “the police were not entitled . . . to bring a ‘super-sensitive instrument’ to detect objects and activities that they could not perceive without its help,” and (2) “the fact that this was a search of a home distinguishes this case from dog sniffs in public places in *United States v. Place* and *Illinois v. Caballes*). The reasoning in *Whitaker* is far from airtight. For instance, both the *Place* Court and the *Caballes* Court assumed that the areas subject to dog sniffs — the inside of a piece of luggage, and the inside of a car, respectively — are protected by the Fourth Amendment, and yet the sniffs *did not even qualify as searches*. Why, under this logic, it should matter that it was the inside of a home, as opposed to the inside of a piece of luggage or of a car, when the Seventh Circuit conceded that “Whitaker did not have a reasonable expectation of complete privacy in his apartment hallway” (where the sniff was performed), is not entirely clear. *Id.*

to perform investigations are constitutionally relevant insofar as they cause dignitary harms.<sup>105</sup>

Consider, for example, consent searches. Consent searches are a subcategory of searches that may be undertaken without a warrant because an individual with authority has consented to the search.<sup>106</sup> Consent searches are perhaps the most important searches in American law, accounting for as many as 98% of all police searches.<sup>107</sup>

Consent plays a complex role in Fourth Amendment law.<sup>108</sup> For most rights, the threshold inquiry — that is, the legal test for determining whether a right is implicated — does not incorporate the right-holder's expectations. If one waives the right to speak, or the right against self-incrimination, there can be no doubt that the individual nonetheless *had* the right to speak, or *had* the right against self-incrimination, in the first place. In Fourth Amendment law, by contrast, it is unclear how the act of waiver relates to the existence of the right. By waiving my Fourth Amendment rights, am I saying that I have a reasonable expectation of privacy, but in this instance, I am choosing not to exercise it? Or am I effectively eliminating my reasonable expectation of privacy by waiver?

Imagine the police ask for consent to search a place one has no reasonable expectation of privacy in — for example, the sidewalk proximate to one's home — and the right-holder declines to give consent. Under *Katz*, the Fourth Amendment still permits the police to perform the search, because there was no right in the first place. On the other hand, if an individual

<sup>105</sup> For a fuller discussion of this theme, see *infra* notes 126–61 and accompanying text.

<sup>106</sup> See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *United States v. Matlock*, 415 U.S. 164, 169 (1974); *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Interestingly, from a purely normative-conceptual vantage point, it is not clear why the Fourth Amendment *should* yield to a consent exception. In fact, it did not at first. Two cases, *Zap v. United States*, 328 U.S. 624 (1946), and *Davis v. United States*, 328 U.S. 582 (1946), are conventionally held out as the authority supporting consent searches. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967); see also Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 216 (2002) (“The Supreme Court first recognized the validity of a search based not on a warrant but upon a person’s consent in 1946.”). Neither case commanded a majority opinion, neither case explained why the right was waivable, and neither case cited any earlier case for the proposition that the right could be waived. At least one earlier case suggested the possibility of a contrary result. See *Amos v. United States*, 255 U.S. 313, 317 (1921) (reserving the question whether wife could consent to search where wife’s consent was coerced).

<sup>107</sup> See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 275 (3d ed. 2002) (citing estimates); see also Strauss, *supra* note 106, at 214 (“Although precise figures detailing the number of searches conducted pursuant to consent are not — and probably can never be — available, there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year.”).

<sup>108</sup> See generally Joseph Blocher, *Rights To and Not To*, 100 CAL. L. REV. 761 (2012). Blocher’s Article attempts to craft a taxonomy of rights, and to explain when they are waivable on the basis of the values that they serve. Blocher’s analysis may support the view that one should not be able to waive his Fourth Amendment rights at all, an argument we reserve for future work. See, e.g., *id.* at 801–03; see also Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 867–69 (2003) (discussing waiver in the Fourth Amendment context); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 786–95 (1989) (same).

consents to a search, it is unclear that the resulting intrusion still qualifies as a “Fourth Amendment event” (even if ultimately a reasonable one). After all, it is hard to imagine how one could reasonably claim an expectation of privacy in a place (or an effect) that one has voluntarily allowed government agents to search.

Not surprisingly, these metaphysical questions about the intersection between consent and the nature of the Fourth Amendment right are seldom discussed. But even taking the rather straightforward view that Fourth Amendment rights are waived, but not eviscerated, by consent, one would expect cases involving contested consent searches to always involve at least two antecedent questions. First, one would expect courts to ask whether there was a reasonable expectation of privacy at stake at all. If not, no consent would have been needed; indeed, it would be redundant to even ask about consent. Second, one would expect courts to ask whether the consent was given by someone who had the authority to open the space. That is, courts would ask whether the space in question had been voluntarily “revealed to a third party,”<sup>109</sup> and if so, the third party’s consent to search would be treated — just as a third party’s production of records would be treated — as a non-event from the perspective of the suspect’s privacy rights. The suspect would simply lack “Fourth Amendment standing” to challenge the resulting search.<sup>110</sup>

But the Court’s consent search cases look nothing like this. To begin with, consent searches are routinely invalidated in circumstances in which people had no reasonable expectation of privacy in the place searched to begin with.<sup>111</sup> Furthermore, in cases in which one person’s consent results in the discovery of evidence that is (1) incriminating against someone else, but (2) not incriminating against the consenting person, the Court has long required that the consenting person’s consent nonetheless be voluntarily given — even though nothing in the Fourth Amendment prohibits the police from

---

<sup>109</sup> *United States v. Miller*, 425 U.S. 435, 443 (1976).

<sup>110</sup> *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 105–06 (1980) (holding that defendant lacked “standing” to challenge consented-to search of his girlfriend’s purse); *Rakas v. Illinois*, 439 U.S. 128, 128–29 (1978) (holding that if passengers in a car lack a possessory interest in either the car or the evidence searched for in the car, they have no standing to bring a Fourth Amendment challenge); *cf. United States v. Karo*, 468 U.S. 705, 726 (1984) (O’Connor, J., concurring in part and concurring in the judgment) (“Another relatively easy case arises when two persons share identical, overlapping privacy interests in a particular place, container, or conversation. Here both share the power to surrender each other’s privacy to a third party.”).

<sup>111</sup> *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 131 (2006) (Roberts, C.J., dissenting) (“Whatever social expectation the majority seeks to protect, it is not one of privacy. The very predicate giving rise to the question in cases of shared information, papers, containers, or places is that privacy has been shared with another.”). *See generally United States v. Jeffers*, 342 U.S. 48 (1951) (invalidating a consent search when consent was given by a hotel manager on behalf of guest); *Stoner v. California*, 376 U.S. 483, 487–88 (1964) (likewise); *Chapman v. United States*, 365 U.S. 610, 612 (1961) (likewise, except consenting party was a landlord, not a hotel manager).

pressuring third-parties into revealing other people's criminal acts.<sup>112</sup> Indeed, in a number of contexts, such as interrogations and plea deals, police routinely do just that.<sup>113</sup> Beyond that, rather than permitting anyone with legal access to a space to consent to a search, the Court has often, although not consistently, held that consent searches are invalid unless the person who gave consent had actual or apparent authority to consent on behalf of the target of the search.<sup>114</sup> A wife, girlfriend, even a child, can consent to the search of a home they do not own, for example, but hoteliers and landlords cannot consent to the search of a person's room or apartment, even if they have a key and a contractual right to enter for any reason.<sup>115</sup>

To appreciate just how strange these results are under *Katz*, we need to take a fresh look at that case, both as it was decided and as it has developed. In the same breath that the *Katz* Court delivered its watershed protective rule, it also held that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>116</sup> In the years immediately following *Katz*, this principle was understood to entail that exposing information to others automatically damages an individual's claim to any expectation of privacy in it, no matter how intimate the association or how limited the exposure.<sup>117</sup> In other words, by re-

<sup>112</sup> See, e.g., *Randolph*, 547 U.S. at 111; see also *Davis v. United States*, 328 U.S. 582, 593–94 (1946) (examining circumstances surrounding giving of consent in holding that it was validly given).

<sup>113</sup> See, e.g., Neal Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1328 (explaining that “the primary way that a conspirator can be induced to provide information is by threatening penalties against that individual,” and citing sources to that effect).

<sup>114</sup> See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 186–88 (1990) (holding that consent-based entry was valid even though consenting party only had apparent authority to admit guests); *Brennan-Marquez*, *supra* note 97, at 629–33 (explaining the Fourth Amendment rules as related to apparent and actual authority).

<sup>115</sup> See *supra* note 106 and accompanying text.

<sup>116</sup> *United States v. Katz*, 389 U.S. 347, 351 (1967) (emphasis added) (citing *Lewis v. United States*, 385 U.S. 206, 210 (1966) and *United States v. Lee*, 274 U.S. 559, 563 (1927)). The Supreme Court had to engraft that odd exclusion onto the *Katz* test to account for one of the most time-honored of all police practices: investigation by deception. Some of the principal “confidential informant” cases preceding *Katz* were *Hoffa v. United States*, 385 U.S. 293 (1966), *Lewis v. United States*, 385 U.S. 206 (1966), *Lopez v. United States*, 373 U.S. 427 (1963), *On Lee v. United States*, 343 U.S. 747 (1952), and *Gouled v. United States*, 255 U.S. 298 (1921). *Hoffa* did say that the Fourth Amendment can be violated by “guileful as well as by forcible intrusions into a constitutionally protected area.” 385 U.S. at 301. But the case it cited for that proposition, *Gouled*, found no Fourth Amendment violation as long as the agent did not go beyond the scope of the “consent” the suspect had thought to authorize. *Gouled*, 255 U.S. at 306. That is, if an agent poses as a repairperson, and acts like a repairperson would (and does not just begin to rifle through drawers, cabinets, and cushions) the agent has not exceeded the “scope” of the deception, and the Fourth Amendment has not been violated under the *Hoffa*, *Gouled*, and *Lewis* line of cases. Thus, the search in *Gouled* was found to violate the Fourth Amendment because the government agent obtained access to the defendant's office on pretext of a social visit, but he exceeded the scope of the consent given by carrying away private papers. On the other hand, in *Lewis*, an equally guileful agent stayed within the bounds of the access to defendant's home, by carrying away only a package of drugs the suspect provided because the suspect believed the agent was a willing purchaser.

<sup>117</sup> See *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (holding that the government's use of a “pen register” to monitor the phone numbers an individual had dialed did not violate

laying information — or opening up an otherwise private space — to someone else, one “assumes the risk” (for Fourth Amendment purposes) that the other party will betray his trust.<sup>118</sup> In the Court’s words, the Fourth Amendment “affords no protection to ‘a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.’”<sup>119</sup>

Taking these pronouncements at face value, an observer could be forgiven for concluding, as the Court sometimes appears to conclude, that by sharing information with another person, one consents ipso facto to the surveillance of that information by law enforcement.<sup>120</sup> If that were true, people would rarely ever have a reasonable expectation of privacy in places and effects to which other people have access.<sup>121</sup>

As it turns out, however, the consent search cases tell a far more checkered story — one that we think is better explained by dignitary principles than privacy principles.<sup>122</sup> After all, the Court has been hard-pressed to justify why, in the context of shared information and shared space, consent to search is ever necessary, given the “knowing exposure” arm of the *Katz* doctrine.<sup>123</sup> If information has been exposed, what need is there to get consent?<sup>124</sup>

the Fourth Amendment because defendant voluntarily turns over the phone number to the phone company, and “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties”); *United States v. Miller*, 425 U.S. 435, 442–43 (1976) (holding that government could freely obtain an individual’s financial data from a bank because “[a]ll of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business,” and, as such, the information could no longer be considered private, “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”).

<sup>118</sup> See, e.g., Brennan-Marquez, *supra* note 97, at 620–23 (unpacking the “misplaced trust” principle in Fourth Amendment law); *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (the Fourth Amendment provides no bulwark against “a wrongdoer’s [mistaken] belief that a person to whom he voluntarily confides his wrongdoing will not reveal it”).

<sup>119</sup> *United States v. White*, 401 U.S. 745, 749 (1971) (quoting *Hoffa*, 385 U.S. at 302); see also *id.* (explaining that *Hoffa* “was left undisturbed by *Katz*” and that “*Hoffa*, *Lewis*, and *Lopez*” — all confidential informant cases — “remained unaffected by *Katz*”).

<sup>120</sup> Indeed, this is how Orin Kerr, in his famous defense of the third-party doctrine, described its practical operation. See Orin Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 562, 588–90 (2008).

<sup>121</sup> For a superb exploration of how *Jones* reshapes (or might reshape) some of this, see Stephen Henderson, *After United States v. Jones, After the Fourth Amendment Third-Party Doctrine*, 14 N.C.J. L. & TECH. 431 (2013).

<sup>122</sup> See, e.g., *United States v. Drayton*, 536 U.S. 194, 207 (2002) (suggesting that “[i]n a society based on law, the concept of agreement and consent should be given a weight and dignity of its own” and suggested that “[i]t reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding.”).

<sup>123</sup> But see *Georgia v. Randolph*, 547 U.S. 103, 128 (2006) (Roberts, C.J., dissenting) (“If an individual shares information, papers, or places with another, he assumes the risk that the other person will in turn share access to that information or those papers or places with the government.”).

<sup>124</sup> Scholars have often noted how the Supreme Court has failed to display the courage of its own convictions with regard to the third-party doctrine. See, e.g., Brennan-Marquez, *supra* note 97, at 620 (“Notwithstanding the Court’s rather zealous language from *Smith* and *Miller*,



Under *Katz*, this question proves difficult to answer. On dignity grounds, by contrast, the answer is obvious. Certain means of gaining access to information — certain information flows<sup>125</sup> — are highly offensive; they run contrary to the grain of civilized society. For example, the Court has held that police may not rely on the consent of a landlord or a hotel manager to enter someone’s rented home or hotel room.<sup>126</sup> Nor may the police enter a home where two inhabitants answer the door, and one says come in while the other says keep out.<sup>127</sup> Additionally, even though social hosts

---

it simply is not the case that ‘individual[s] ha[ve] no reasonable expectation of privacy in information voluntarily disclosed to third parties’) (alterations in original) (internal citations omitted); Kathy Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614, 633–38 (2009) (arguing that, notwithstanding the sweeping language of *Smith* and *Miller*, the “aggressive” form of the third-party doctrine has almost never been faithfully applied); Stephen Henderson, *After United States v. Jones, After the Fourth Amendment Third Party Doctrine*, 14 N.C. J. L. & TECH. 431, 438 (2013) (arguing that in the last twenty five years, “there have certainly been cases which some of the Justices believed to be governed by the [third-party] doctrine,” but the doctrine “has not fared well”); *id.* at 438–43 (exploring how the Court has departed from the third-party doctrine in no fewer than five prominent cases).

<sup>125</sup> See generally HELEN NISSENBAUM, *PRIVACY IN CONTEXT* (2008) (developing a context-based theory of privacy, centered on information flows).

<sup>126</sup> See *Stoner v. California*, 376 U.S. 483, 485–88 (1964) (invalidating a consent search when consent given by hotel manager on behalf of guest); *Chapman v. United States*, 365 U.S. 610, 610–15 (1961) (likewise, except consenting party was a landlord, not a hotel manager); *United States v. Jeffers*, 342 U.S. 48, 50–52 (1951) (invalidating a consent search when consent given by hotel manager on behalf of guest); see also *United States v. Spicer*, 432 Fed. App’x 522, 524 (6th Cir. 2011) (holding that the private search rule — allowing law enforcement to retrace the steps of private actors who have already performed a search — does not apply to hotel rooms because they are, in essence, residences); *United States v. Young*, 573 F.3d 711, 720–21 (9th Cir. 2009) (drawing on *Stoner* to hold that it was a Fourth Amendment violation when security personnel at a hotel — private employees — engaged in a search of defendant’s hotel room, opened suitcases to locate contraband, and gave the contraband to the police).

<sup>127</sup> See generally *Georgia v. Randolph*, 547 U.S. 103 (2006). The holding in *Randolph* is particularly striking in light of its subsequent application in *Fernandez v. California*, 134 S. Ct. 1126 (2014). *Fernandez* differed from *Randolph* in one key respect. The first time the police went the door, the *Randolph* dynamic transpired: one occupant said come in, and the other said no. But then the police — perhaps having read *Randolph* — waited for the objecting occupant to leave the premises, so they could return to the house, knock on the door again, and request entry from the originally-consenting occupant (who said yes). The question was: were the objecting occupant’s *Randolph* rights violated? Over a vociferous dissent, the majority said no. Construing *Randolph* as a “narrow exception” to the general maxim that cotenants may consent to police searches on the part of the entire house — no matter the preferences of other cotenants not present at the time of requested consent — the Court “refuse[d] to extend *Randolph* to the very different situation in [*Fernandez*], where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared.” 134 S. Ct. 1126, 1130 (2014). *Randolph* and *Fernandez* are difficult, if not impossible, to distinguish on privacy grounds. Why would the ephemeral absence of the objecting cotenant — having already voiced his lack of consent — change the privacy calculus? But consider *Randolph* as a case about dignity, and the distinction makes complete sense. It is very different for law enforcement officers to barge in a private home over the protest of an occupant standing in the doorway than it is for them to enter when no one is there to be humiliated by their entry. Entry over the objection of someone standing in the doorway is more offensive than entry after they are gone. Cf. Sacharoff, *supra* note 8, at 890 (likewise suggesting that *Fernandez* cannot be rationalized on privacy grounds — but arguing that it should be understood to turn on “trespass and property principles”).

retain access to the rooms of their guests, the Court has held that police may not search the rooms of guests without a warrant.<sup>128</sup> The Court has also noted — in dictum, but tellingly — that an eight-year-old child could not give consent to search an entire house, even if the child had access to its entirety.<sup>129</sup>

None of those results are convincingly explained on privacy grounds, since the premise behind all of them, per *Katz*, is that the defendant's expectations of privacy evaporated the moment he shared the space with a third party (under the misplaced trust theory). Rather, these exceptions to the consent-to-search doctrine hinge on a broader — and more consciously normative — concept of dignity: the rituals of courtesy that define how people deserve and expect to be treated.

•

The consent-to-search cases are not the only site of dignitary reasoning in the Court's Fourth Amendment case law. Consider also the Court's fixation on two "sacred" spaces — the body and the home.<sup>130</sup> The Court's opinions treat them with an uncommon reverence that has seemingly little to do with privacy expectations. Invocations of inviolability, sacredness, and security appear repeatedly in opinions that touch upon intrusions into these two spaces.<sup>131</sup> The home is a "'sanctuary,' 'sacred retreat,' 'enclave,' and 'the last citadel of the tired, the weary, and the sick.'" <sup>132</sup> The possession and control of one's own person is "sacred,"<sup>133</sup> and "inviolable."<sup>134</sup> The language and imagery run counter to the sterile descriptive question at the heart of *Katz*. The Court is not merely asking if people have an expectation of non-intrusion in their bodies and their homes. It is asking whether they

<sup>128</sup> See *Minnesota v. Olson*, 495 U.S. 91, 98 (1990) ("To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share.").

<sup>129</sup> See *Georgia v. Randolph*, 547 U.S. 103, 112 (2006) (citing 4 W. LaFare, *Search and Seizure* § 8.4(c), p. 204 (4th ed. 2004)).

<sup>130</sup> Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 *YALE J.L. & HUMAN.* 195, 201–05 (1995).

<sup>131</sup> For some scholars, this is exactly the *problem* with the Court's jurisprudence in this area; the Court has fixated on dignitary considerations, instead of thinking carefully about privacy. See Joh, *supra* note 92. For cases invoking these terms and conceptions, see *infra* notes 132–139.

<sup>132</sup> See *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (Hand, J.) ("Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him"); Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 *CORNELL L. REV.* 905, 912–23 (2010).

<sup>133</sup> Daniel J. Solove, *Conceptualizing Privacy*, 90 *CAL. L. REV.* 1087, 1135 (2002) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

<sup>134</sup> See *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) (upholding blood test for alcohol and stating that "against the right of the individual that his person be held inviolable . . . must be set the interests of society" in protecting against "one of the greatest causes of the mortal hazards of the road."); see also *Winston v. Lee*, 470 U.S. 753, 760 (1985); *Terry v. Ohio*, 392 U.S. 1, 17 (1967); *Rochin v. California*, 342 U.S. 165, 172–73 (1952).

ought to have one — whether such an expectation forms part of the fabric of civilized society.

No strand of Fourth Amendment law better exemplifies the gravitational pull of dignity than “intrusio[n] into the human body” cases.<sup>135</sup> The Court has applied the Fourth Amendment to police blood draws,<sup>136</sup> the scraping of an arrestee’s fingernails,<sup>137</sup> and even to breathalyzer tests.<sup>138</sup> The cases quickly glide over *Katz*, declaring it “obvious” that physical intrusions into the body “infringe [ ] an expectation of privacy that society is prepared to recognize as reasonable.”<sup>139</sup> Yet *Katz*’s application in such cases is rarely obvious. A breathalyzer test occasions no “intrusion” into the skin and vessels of the body.<sup>140</sup> Moreover, if people truly have “no legitimate privacy interest” in contraband, per the dog sniff cases, it is unclear how a blood draw that can only reveal blood alcohol content can infringe on a person’s legitimate expectation of privacy.<sup>141</sup>

The body’s inviolability and the home’s sacredness are dignitary concepts, and they fit neatly into a conception of the Fourth Amendment that requires that police honor individual dignity without, at least, probable cause to trespass upon it.

### B. Reforming Problems

Ultimately, however, the trespass test does not merely explain fixed points in existing law. It also accounts for past holdings that seem incorrect to many observers — and other holdings that, even if correct as to outcome, are correct for the wrong reasons.

First, consider cases in which the police obtain information by deception. Over the sweep of nearly a century, the Supreme Court has permitted police officers to obtain information by either enlisting agents or embedding officers in criminal enterprises to conduct warrantless searches and surveillance.<sup>142</sup> Some of these cases may well survive the application of the trespass test, because dignity principles allow for the possibility, in principle, of

<sup>135</sup> See *Schmerber v. California*, 384 U.S. 757, 770 (1966).

<sup>136</sup> See *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013); *Schmerber*, 384 U.S. at 770.

<sup>137</sup> See *Cupp v. Murphy*, 412 U.S. 291, 295 (1973).

<sup>138</sup> See *Skinner v. Ry. Labor Executives’ Assn.*, 489 U.S. 602, 616–17 (1989).

<sup>139</sup> See *id.* at 616.

<sup>140</sup> See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2176 (2016) (“Breath tests do not require piercing the skin. . . .” (internal marks omitted)).

<sup>141</sup> See *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (“[G]overnmental conduct that only reveals the possession of contraband ‘compromises no legitimate privacy interest.’”). Likewise, it is unclear — given the circularity of *Katz* — why a routine procedure, codified by law, invades a reasonable expectation of privacy. See *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013) (noting that “all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense” but curiously holding that BAC test was nonetheless a search).

<sup>142</sup> See generally *Hoffa v. United States*, 385 U.S. 293 (1966); *Gouled v. United States*, 255 U.S. 298 (1921).

holding people to account for criminal activities revealed to counter-parties to illegal transactions, accomplices, and co-conspirators.<sup>143</sup> Dignity is a social entitlement; it reflects “intersubjective norms that define the forms of conduct that constitute respect between persons.”<sup>144</sup> As such, dignity claims vary with context. In some settings, a reasonable person has the right to make fewer demands than she otherwise would. Prisoners, for example, suffer certain kinds of indignities built into everyday life under conditions of incarceration that average citizens would never expect to confront. The same holds true, by analogy, with respect to certain types of wrongdoing undertaken by wrongdoers who have not yet been caught.

Take *Lewis v. United States* as an example. The police suspected Mr. Lewis of dealing drugs from his home, so plain-clothes officers feigned an interest in buying drugs; Lewis agreed, inviting the officers into his home.<sup>145</sup> Once prosecuted, Mr. Lewis moved to suppress the officer’s discovery of drug evidence in his home on the grounds that he had been deceived.<sup>146</sup> He permitted the officers’ entry only because he thought they were customers — had he known they were officers, he never would have opened his home.<sup>147</sup> The Court rejected Mr. Lewis’s argument, holding that he had, in effect, “converted [his home] into a commercial center to which outsiders are invited for purposes of transacting unlawful business,” which meant that the drug transaction, despite occurring in a private residence, was “entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street.”<sup>148</sup>

The result in *Lewis* may or may not harmonize with dignity principles. We tend to think it does,<sup>149</sup> but the important point is not the result in *Lewis*. It is that *Lewis* is in principle susceptible to dignity analysis. The defendant could only be deceived if he was engaged in criminal conduct. Whatever respect the police owe to citizens, one could argue, there is no obligation not

---

<sup>143</sup> See, e.g., *Sorrells v. United States*, 287 U.S. 435, 441 (1932) (“Artifice and stratagem may be employed to catch those engaged in criminal enterprises”).

<sup>144</sup> See Post, *Three Concepts*, supra note 70, at 2092.

<sup>145</sup> *Lewis v. United States*, 385 U.S. 206, 207 (1966).

<sup>146</sup> *Id.* at 209.

<sup>147</sup> *Id.* at 210.

<sup>148</sup> *Id.* at 211.

<sup>149</sup> Indeed, we see at least two dignitary lines that are consistent with *Lewis*. First, and most protectively, *Lewis* could stand for the proposition that police are entitled to impersonate criminal accomplices and co-conspirators. That is consistent with a dignity-based view for the same reason as drug sniffing dogs; in both cases, the method detects only contraband (perhaps within some margin of error), which means, in practice, that police officers who impersonate criminal accomplices pose no danger to those who have no interest in engaging in crimes. Second, and less protectively, *Lewis* could stand for the proposition that deception is appropriate as long as the deception is narrowly tailored to the subject-matter of the investigation. That line is more vague, and it cannot ensure that no innocent people will be deceived. But it can at least ensure that police will rarely deceive the innocent because the nature of the permissible forms of deception is limited. Indeed, these are precisely the dignitary lines William Stuntz suggested should govern search-by-deception more than two decades ago. See Stuntz, supra note 108, at 790–94.

to deceive them if the deception is effective only when they have chosen to break the law.

*Lewis* is an extreme case: the deception perfectly targeted a criminal enterprise. Other cases in the “search by deception” canon are far more difficult, if not impossible, to justify under the trespass test.<sup>150</sup> Consider, for example, when the police exploit the decision to permit a service provider entry into one’s home. Under *Katz*, this tactic is fair game: the misplaced trust rule, as outlined above, dictates that information shared with a third party loses its halo of privacy. On that metric, why should it matter if the third party is a friend (and turns out to be a “false friend”<sup>151</sup>), or the third party is, instead, a service provider (and turns out to be a “false service provider”)? In both cases, the voluntary disclosure of information should result in the waiver of privacy interests.<sup>152</sup> On dignity grounds, however, the cases pull apart. Preying on people’s need for basic services, and in the process, undermining people’s ability to rely on the integrity of service providers, is anathema to civilized society in a way that deception more closely tailored to criminal activity — in cases where a suspect has, to some extent, relinquished her right to demand respectful treatment from others — is not. Conceptually, this analysis tracks the distinction society has drawn between justified lies and unjustified lies. Although lying is generally regarded as presumptively wrongful because (at least on some accounts) it denies the equal dignity of the party deceived,<sup>153</sup> it is no indignity for someone to lie to a murderer about the location of his next victim.<sup>154</sup> The reason is obvious: a murderer or would-be murderer, by virtue of his conduct, has less standing to demand civilized treatment from those around him.<sup>155</sup>

For an illustration of a case on the opposite end of the spectrum from *Lewis*, one that could have netted anyone, consider the recent case of Wei Seng Phua — a gambler the FBI suspected of running an illegal betting ring

<sup>150</sup> Obviously, if one disagrees about *Lewis*, 385 U.S. at 206, and believes that it fails the trespass-as-indignity test, the closer cases become even easier to diagnose as problematic. From a contrary result in *Lewis*, the closer cases would follow a fortiori.

<sup>151</sup> See, e.g., *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (observing that the Fourth Amendment provides no bulwark against “a wrongdoer’s [mistaken] belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”).

<sup>152</sup> Or, equally, we could imagine a world in which *neither* case resulted in the waiver of privacy interests. The point is simply that on privacy grounds, the two are symmetrical.

<sup>153</sup> See, e.g., R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 41 (1981) (arguing police deception “hardly accord[s] with respect for autonomy and dignity.”); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 814 n.186 (1997) (“[A]ll lying shows disrespect for the autonomy and dignity of the dupe.”).

<sup>154</sup> See SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 32–46 (1978).

<sup>155</sup> See *id.* The broader point is that dignity’s relationship with deception is contingent on the nature of the lie, its purposes, to whom it is directed, by whom it is proffered, and other variables. Thus, even though children are quite different from murderers, lies to children are also (in many cases) seen as consistent with dignity — not because children lack standing to demand respect, but because a certain degree of paternalism is warranted in light of the underlying relationship. The same is true, in some contexts, of white lies.

from his hotel room. To gain access to Phua's room, the authorities came up with a ruse: they cut the room's internet service and showed up at his hotel room door, posing as repairmen. When Phua let the officials in (to get him back online), they pretended to fix the problem, all the while looking for evidence that would confirm their theory.<sup>156</sup>

To many, this seems like an obvious Fourth Amendment violation. But *Katz*-style privacy analysis has a remarkably hard time explaining why. Indeed, the magistrate judge in *United States v. Phua* recommended finding no violation, on the grounds that when Mr. Phua knowingly opened his hotel room to the fake repairmen, he waived any reasonable expectation of privacy in the contents of the room.<sup>157</sup> The district court judge ultimately disagreed, but was at pains to convincingly explain why.<sup>158</sup> The opinion vacillates between rationales. At first, the court focuses on the government's role in creating the problem — that it cut the room's internet — as the relevant variable.<sup>159</sup> But then the court backs off this rationale, invoking a distinction between “essential” and “non-essential” services — which had surfaced in a smattering of previous cases<sup>160</sup> — and suggesting that the *real* question is an all-things-considered examination of whether there was “coercion.”<sup>161</sup>

<sup>156</sup> The facts in the above paragraph are drawn from the filings in *United States v. Phua*. According to the criminal complaint, he is “known by law enforcement to be a high ranking member of the 14K Triad,” a Chinese organized crime group. Criminal Complaint at 3, *United States v. Phua*, No. 2:14-CR-00249-APG (D. Nev. July 14, 2014), 2014 WL 5473012; Opposition to Motion to Suppress at 3, *United States v. Phua*, No. 2:14-CR-00249-APG (D. Nev. Nov. 10, 2014), 2014 WL 10384065; *see also* Motion to Suppress, *United States v. Phua*, No. 2:14-CR-00249-APG (D. Nev. Oct. 28, 2014); Opposition to Motion to Suppress at 1, *United States v. Phua*, No. 2:14-CR-00249-APG (D. Nev. Nov. 10, 2014), 2014 WL 10384065 (“This case involves the use of a ruse by law enforcement officers to obtain Defendants’ consent to enter Villas 8881 and 8882 after Caesars reported to the authorities substantial evidence that Defendants, who had asked Caesars to supplement its complementary WI-FI with the installation of DSL lines, were using those DSL lines to conduct an illegal internet sports betting operation.”).

<sup>157</sup> *See* Report of Findings and Recommendation, *United States v. Phua*, No. 2:14-CR-00249-APG (D. Nev. Feb. 2, 2015), 2015 WL 427862, at \*22, *report and recommendation adopted in part, rejected in part*, 100 F. Supp. 3d 1040 (D. Nev. 2015).

<sup>158</sup> *United States v. Phua*, 100 F. Supp. 3d 1040, 1051–52 (D. Nev. Apr. 17, 2015).

<sup>159</sup> *Id.* at 1051 (“Arguably, Phua invited the agents in to perform the lawful and legitimate service of repairing the DSL, like the defendant in *Scherer* invited someone onto his property to build duck blinds. What separates this case from any that have come before is the additional fact that here the Government was not just taking advantage of a fortuitous opportunity. Rather, the Government created the need for the occupant to call for assistance from a third party by cutting off a service enjoyed by the occupant.”).

<sup>160</sup> The leading case is *United States v. Giraldo*, where Judge Jack Weinstein held that the government performed an unlawful search when a police officer pretended to work for the gas company and told the defendant she was checking for a gas leak. 743 F. Supp. 152, 154–55 (E.D.N.Y. 1990). The court found the defendant's consent was obtained by falsely inducing fear of an imminent life-threatening danger and was therefore invalid because the defendant's only “free choice” was to have refused entry and “risk [ ] blowing up himself and his neighbors.” *Id.* at 154. The court also noted that condoning this sort of deception could potentially harm public safety because it is vital that emergency warnings be trusted. *Id.* at 153, 155.

<sup>161</sup> *United States v. Phua*, 100 F. Supp. 3d 1040, 1051 (D. Nev. Apr. 17, 2015) (“[S]everal cases have held the government cannot obtain consent through deception by creating a false emergency or life-threatening circumstance. But no case has held that consent is

Those policy considerations are certainly cogent. Neither one of them, however, has much to do with *Katz*. Put simply, the government's hand in creating the conditions of entry is irrelevant to whether a person's expectations of privacy were violated. Suppose the government encourages one of its informants to persuade a suspect to throw a dinner party; the resulting consent-to-entry would be no less legitimate, nor less an instance of "misplaced trust," because of that. Similarly, the essential-inessential dichotomy also seems irrelevant to privacy expectations, as traditionally understood; whether the serviceperson to whom you open your private space provides an essential service or an inessential one, the resulting exposure, and corresponding loss of privacy, is the same. Of course, the policy rationale here is obvious: we do not want people to hesitate when calling on emergency responders. But again, this has little to do with privacy.

To be clear, we are not criticizing the district court for having difficulty locating a right-to-privacy-based rationale for *Phua*. Such difficulty is expected in a world where the only officially recognized Fourth Amendment harms are narrowly focused on information privacy. The point is that the case is effortlessly resolved on dignity grounds. It is certainly illegitimate for government agents to dress up as service providers and capitalize on people's faith in the social infrastructure that structures their daily lives. And it is all the more offensive if the service they pretend to provide was an essential one.

•

Pretextual searches and seizures are a second category of cases better resolved by a trespass-as-indignity analysis. In *Whren v. United States*, the Supreme Court famously rejected the argument that a search and seizure justified by cause — and thus objectively reasonable — becomes *unreasonable* if it is motivated by pretext.<sup>162</sup> The D.C. police pulled Mr. Whren over for spending an unusually long time stationary at a stop sign, and for pulling away at an abnormal speed.<sup>163</sup> After commencing the traffic stop, the officer immediately noticed bags of crack cocaine in plain view inside the car — leading him to arrest the car's occupants.<sup>164</sup> In his motion to suppress, Mr. Whren argued that even if the officer had reasonable suspicion, the stop was nevertheless unconstitutional because the reason for the stop was not a minor traffic violation; it was racial profiling.<sup>165</sup> In other words, Mr. Whren argued that pretext, if proven, should invalidate an otherwise-valid car stop.

---

invalidated *only* when the government creates such a situation or terminates an "essential" service. I conclude that disruption of even "non-essential" services may support a finding that consent was coerced if the totality of the circumstances otherwise supports that finding.") (emphasis added).

<sup>162</sup> *Whren v. United States*, 517 U.S. 806, 814 (1996).

<sup>163</sup> *Id.* at 808.

<sup>164</sup> *Id.* at 809.

<sup>165</sup> *See id.*

The Court disagreed. It held that as long as officers have a lawful basis for a given search or seizure — even if it was not the actual basis for the search or seizure — the stop is *ipso facto* constitutional.<sup>166</sup> In arriving at this result, the Court rejected the two alternate frameworks offered by Mr. Whren. First, he proposed that courts should look at an officer's subjective intentions when performing a cause-based search or seizure. Second, he proposed that, barring an examination of actual intention, courts should ask "whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind."<sup>167</sup> In the Court's view, neither of these frameworks would be administrable.<sup>168</sup> But more importantly, neither framework would vindicate what is actually at stake in the Fourth Amendment — privacy, as understood by *Katz*. "We of course agree," the majority wrote, "that the Constitution prohibits selective enforcement of the law based on considerations such as race," but, it continued, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."<sup>169</sup> The purpose of the Fourth Amendment — per *Katz* — is to ensure that the state does not intrude on reasonable expectations of privacy without cause. But once cause is established, there is no need for any further "balancing" analysis," even if "searches or seizures [are] conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests."<sup>170</sup>

*Whren* is widely reviled.<sup>171</sup> The Court's reasoning has been accused of abject formalism,<sup>172</sup> and at a practical level, the opinion has been linked to the "new Jim Crow" quality of the modern prison industrial complex.<sup>173</sup> On privacy grounds, however, it is hard to explain what is wrong with *Whren*.<sup>174</sup> After all, the majority is correct that, traditionally, the Fourth Amendment

<sup>166</sup> *Id.* at 813.

<sup>167</sup> *Id.* at 814.

<sup>168</sup> The second is even less administrable than the first. See *Whren*, 517 U.S. at 814 ("Why one would frame a test designed to combat pretext in such fashion that the court cannot take into account *actual and admitted pretext* is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option.").

<sup>169</sup> *Id.* at 813.

<sup>170</sup> *Id.* at 818.

<sup>171</sup> See sources cited *supra* note 21.

<sup>172</sup> See, e.g., Bowers, *supra* note 9, at 1002 (suggesting that *Whren* is only able to reach the result it does by "ma[king] the act the exclusive object of analysis," at the expense of all other variables — e.g., "the actor or his *motivation[s]*," motivations that might shape the moral and legal valence of the act).

<sup>173</sup> See Alexander, *supra* note 21, at 67–72, 108–09; Davis, *supra* note 21, at 442 ("The race-based pretextual traffic stop tears a hole in the fabric of our constitution by allowing discriminatory behavior to invade the criminal justice system. Faced with the opportunity to repair the hole, the Supreme Court chose to ignore it, leaving African-Americans and other people of color without a clear and effective remedy for this discriminatory treatment.").

<sup>174</sup> See, e.g., Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 699 (1998) (suggesting that Mr. Whren's lawyers faced a "daunting task" in trying to conceptualize the violation of pretextual stops in terms of privacy).



solution to the invasion of privacy interests — as understood by *Katz* — is cause. And here, cause indisputably existed. So what is the problem?

As many observers have noted, there are major problems with *Whren*, but they are not privacy problems.<sup>175</sup> In fact, the problems are far better characterized in dignity terms. Pulling someone over (or performing any other search or seizure) on the basis of race — and other protected categories — is highly offensive conduct. Indeed, it directly offends individual dignity, as we have been using the concept. Of course, racially motivated policing also raises concerns under the Fourteenth Amendment, but that does not exhaustively capture the harm. Under the trespass test, selective investigation and enforcement along racial lines also raises alarm under the Fourth Amendment.

Just take Justice Sotomayor’s spirited dissent in *Utah v. Strieff*, a recent case about the applicability of the exclusionary rule.<sup>176</sup> A police officer unlawfully stopped Mr. Strieff outside a suspected drug den (the state conceded the stop’s illegality).<sup>177</sup> Having done so, the officer ran a check that turned up a minor traffic warrant.<sup>178</sup> The warrant gave the officer cause to arrest Mr. Strieff, and the arrest, in turn, gave the officer authority to perform a search incident to arrest.<sup>179</sup> The search turned up drugs.<sup>180</sup> Mr. Strieff argued that the drugs should have been suppressed because their discovery was directly traceable to an unlawful seizure.<sup>181</sup> They were, in the language of the Court’s exclusionary rule precedents, “fruits of the poisonous tree.”<sup>182</sup>

The *Strieff* Court disagreed. In its view, the exclusionary rule should not apply because the discovery of an outstanding warrant “attenuated” the link between the discovered contraband and the initial stop.<sup>183</sup> Justice Sotomayor filed a strenuous dissent. She argued that the majority had, in effect, handed officers in highly-policed areas a blanket license to perform random stops, in hope of discovering outstanding warrants.<sup>184</sup> Beyond the generalized problem of police abuse, Justice Sotomayor worried, in particular, about the racially disparate impact of the *Strieff* rule.<sup>185</sup> Although the Petitioner in this case was white, Justice Sotomayor observed point-blank

---

<sup>175</sup> See *id.* at 696–97 (calling for advocates for greater regulation of law enforcement to “think beyond” Fourth Amendment privacy).

<sup>176</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2066 (2016) (Sotomayor, J., dissenting).

<sup>177</sup> *Id.* at 2059–60.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 2060–61.

<sup>183</sup> See *Strieff*, 136 S. Ct. at 2063 (“[W]e hold that the evidence discovered on Strieff’s person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant.”).

<sup>184</sup> See *id.* at 2066 (Sotomayor, J., dissenting).

<sup>185</sup> *Id.* at 2070–71.

that: “[I]t is no secret that people of color are disproportionate victims of this type of scrutiny,”<sup>186</sup> and that

[f]or generations, black and brown parents have given their children ‘the talk’ — instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger — all out of fear of how an officer with a gun will react to them.<sup>187</sup>

Like the concern about racial pretext in *Whren*, the concerns voiced by Justice Sotomayor in *Strieff* are not, in any familiar sense, about privacy.<sup>188</sup> In fact, they are about something far deeper: the character of an institution responsible for molding the relationship between state and subject.<sup>189</sup> In *Whren*, the question centered on the existence of cause, whereas in *Strieff*, it centered on the availability of suppression as a remedy. But a common thread unites them. Both cases involve litigants seeking recognition of Fourth Amendment values that elude a privacy lexicon, but that speak intimately to the Amendment’s promise: that individuals will be treated with the respect consistent with their full and equal membership in a democratic society.<sup>190</sup>

•

The examples analyzed so far in this section are illustrative, not exhaustive. In fact, many areas of Fourth Amendment law — especially burgeoning Fourth Amendment law in the digital age — would benefit considerably from a trespass gloss. We think it quite likely, for example, that the designation of searches in the digital realm will increasingly depend on what “areas” the Court regards as constitutionally protected — perhaps an individual’s profile on a social network, posts on an internet forum, or emails stored with a remote email provider. The question asked under the trespass standard would diverge importantly from the emphasis, under existing law, on who *holds* particular types of information. Under the trespass-as-indignity test, something like the government using deception or exploiting a loophole in a social network to view information otherwise only shared with a friends and family could qualify as a trespass because the question would not focus on whether the user waived her expectation of privacy, but

---

<sup>186</sup> *Id.* at 2070.

<sup>187</sup> *Id.*

<sup>188</sup> Dignitary reasoning infuses Justice Sotomayor’s dissent. She writes at one juncture that “few may realize how degrading a stop can be when the officer is looking for more” and at another that “[t]he indignity of the stop is not limited to an officer telling you that you look like a criminal.” *Id.* at 2069. Sotomayor closes her dissent by noting that “[t]he white defendant in this case shows that anyone’s dignity can be violated in this manner.” *Id.* at 2070.

<sup>189</sup> *Id.* at 2070–71 (Sotomayor, J., dissenting) (explaining that the court’s holding “says that your body is subject to invasion while courts excuse the violation of your rights . . . [and] implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”).

<sup>190</sup> See *infra* notes 206–09 and accompanying text.

rather, whether the resulting intrusion registers as fundamentally offensive to most people.

To take but one example, consider the case of Walter Ackerman, a man charged with possession of child pornography largely on the strength of an intercepted email.<sup>191</sup> AOL uses an automated “hash value matching” algorithm to screen user email to determine whether it contains child pornography — when AOL’s algorithm found a match, it automatically forwarded the email to the National Center for Missing and Exploited Children (NCMEC), as federal law requires.<sup>192</sup> A NCMEC analyst opened Ackerman’s email, viewed the images within it, and confirmed that it contained child pornography.<sup>193</sup> Ackerman moved to suppress the email on the grounds that its warrantless examination by NCMEC constituted an unconstitutional search.<sup>194</sup> The District Court denied Ackerman’s motion.<sup>195</sup> He appealed.<sup>196</sup>

The Court of Appeals for the Tenth Circuit, in an opinion by Judge Gorsuch, found that NCMEC’s act of opening the forwarded email constituted a search because an email is “a ‘paper’ or ‘effect’ for Fourth Amendment purposes,”<sup>197</sup> and that opening the email was a “physical intrusion.”<sup>198</sup> In conducting the analysis, the court of appeals reasoned, borrowing from Justice Alito’s concurrence in the judgment in *Jones*, that the Fourth Amendment is triggered by any action by government agents that would violate the eighteenth century tort of trespass to chattels — that is, any “violation of ‘the dignitary interest in the inviolability of chattels.’”<sup>199</sup> It further reasoned that although the tort of trespass to chattels did not literally apply to opening email, the tort’s application by analogy was obvious in the case. In Judge Gorsuch’s words, it would be “hard to imagine” a “more obvious analogy . . . and, indeed, many courts have already applied the common law’s ancient trespass to chattels doctrine to electronic, not just written, communications.”<sup>200</sup>

<sup>191</sup> United States v. Ackerman, 831 F.3d 1292, 1294 (10th Cir. 2016).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* Doctrinally, the challenge involved two distinct questions. First, was NCMEC operating as a state actor — bound by the Fourth Amendment — when it examined Ackerman’s email? Second, did that examination qualify as a Fourth Amendment “search”? The trespass test, both as the Tenth Circuit understood it and we understand it, bears only on the second question. See *id.* at 1307. That being said, it bears mention in passing that the Tenth Circuit had no trouble finding that NCMEC was operating as a state actor when it opened Ackerman’s email. See *id.* at 1295–1300. And we have little trouble agreeing.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1304.

<sup>198</sup> *Id.* at 1307.

<sup>199</sup> *Id.* at 1307 (quoting United States v. Jones, 132 S. Ct. 945, 957 n.2 (2012) (Alito, J., concurring in the judgment)).

<sup>200</sup> *Id.*

To be sure, the analysis we would apply in *Ackerman* would differ slightly from the analysis applied by the panel. The panel in *Ackerman* frames its dignitary analysis as an analogy to a tort that uses dignity to determine whether the tort has been committed. We think the trespass test simply calls on courts to grapple with dignity directly, without elaborate analogies to eighteenth century torts. Nonetheless, the analysis in *Ackerman* — that it is highly offensive for government agents to open and read email without a warrant when the government is not the intended recipient, even if the sender has no reasonable expectation of privacy in its contents — follows naturally from the dignitary conception of trespass adopted in *Jones*, *Jardines*, and *Grady*.

### III. THE VIRTUES OF FOURTH AMENDMENT DIGNITY

The Fourth Amendment nowhere mentions privacy. Rather, the Amendment safeguards “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>201</sup> For nearly a hundred years after the Amendment’s passage, it was used, mainly as a sword, to deny federal agents protection from State trespass laws in suits for damages.<sup>202</sup> Indeed, the idea that the Fourth Amendment serves as a shield against unlawfully-seized evidence during criminal prosecution is a modern innovation.<sup>203</sup> In the early twentieth century the Amendment’s operation flipped; it became a shield instead of a sword, a tool of exclusion for evidence unconstitutionally procured.<sup>204</sup> In

---

<sup>201</sup> U.S. CONST. Amend. IV.

<sup>202</sup> See JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 66 (4th ed. 2010) (“At common law, and for decades after the Fourth Amendment was ratified, your only remedy was a tort suit against the agents for trespass.”); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1150 (1969) (noting that, prior to *Weeks*, a citizen seeking to enforce Fourth Amendment rights could sue only in a state-law trespass action); see also *Gardner v. Neil*, 4 N.C. 104, 104 (1814) (“Every entry by one, into the dwelling-house of another, against the will of the occupant, is a trespass, unless warranted by such authority in law as will justify the entry.”).

<sup>203</sup> See I SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 254a, at 354 (11th ed. 1863) (“It may be mentioned in this place, that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The Court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question.”); see also *Adams v. New York*, 192 U.S. 585, 594 (1904) (explaining, contrary to *Weeks*, that “the courts do not stop to inquire as to the means by which the evidence was obtained. The rule is thus laid down in *Greenleaf* (vol. 1, § 254a).”); *Gindrat v. People*, 27 N.E. 1085, 1087 (Ill. 1891) (holding that evidence is still admissible in a state criminal trial even if obtained pursuant to an unlawful search); *State v. Griswold*, 34 A. 1046, 1048 (Conn. 1896) (agreeing with *Gindrat*); *State v. Atkinson*, 18 S.E. 1021, 1024–25 (S.C. 1894) (agreeing with *Gindrat*).

<sup>204</sup> The pivotal cases are *Boyd v. United States*, 116 U.S. 616, 634–35 (1886) (offering Fourth Amendment protection against a self-incriminating subpoena), and *Weeks v. United States*, 232 U.S. 383, 396 (1914) (announcing the exclusionary rule). See also *Olmstead v. United States*, 277 U.S. 438, 474–75 (1928) (Brandeis, J., dissenting) (quoting *Boyd*, 116 U.S. at 630) (arguing that wiretaps are Fourth Amendment searches because what matters is that the

service of this change, the normative locus of Fourth Amendment shifted: instead of focusing, as it had historically, on the *means* by which evidence was discovered,<sup>205</sup> the analysis came to focus on the nature of the evidence, and what relationship the evidence bore to privacy interests.

However, there is no reason, in principle, why the Fourth Amendment must choose between privacy and dignity. Courts certainly could evaluate investigative methods against both a dignitary metric and a privacy metric. Indeed, that is precisely what the trespass test emboldens them to do. The *Jones* majority identified two distinct tiers of Fourth Amendment protection. First, as a constitutional floor, the Fourth Amendment shields individuals from law enforcement methods that are “trespassory” insofar as they subvert dignity norms. Second, layered on top of this initial tier of protection, the Fourth Amendment also shields individuals from invasions of privacy.

For the reasons explored above, we believe this two-tiered model has much to recommend it at a doctrinal level. It also has much to recommend it on normative grounds. Erecting threshold protections against dignitary harm is among the most important roles of Fourth Amendment law. It is one of the ways — sometimes, the primary way — the Fourth Amendment helps calibrate the relationship between citizen and state in a liberal-democratic society. The Court has long spoken of “community hostility” as an inherent check on the legitimacy (and practical authority) of police officers.<sup>206</sup> Similarly, it has described the role of police officers in consciously utopian tones:

---

contents of the call are private, not whether the means of interception violate a property right). For more about the remedial transformation, see STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 495 (9th ed. 2010); and DRESSLER & THOMAS, *supra* note 202, at 66–70. The creation of the exclusionary rule may have been part and parcel of a broader transformation in remedies law from one in which officials could be routinely held accountable for damages to one in which unlawful conduct was prohibited by injunctions and other more substantial means. See Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 399, 410, 449–51 (1987) (explaining the transformation of the law as the notion that the primary mechanism for constitutional accountability should shift from prevention of “direct physical trespass” to prevention of the “violation of a legal duty”).

<sup>205</sup> Contemporaneous concerns expressed in newspapers of the time offer a flavor of the Fourth Amendment’s concern with abusive methods. See, e.g., *Article by a Farmer and Planter*, *Mar. 27 1788*, MARYLAND JNL. AND BALTIMORE ADVTR., Apr. 1, 1788 (no. 1025: vol. 15, no 27), p. 2, col. 1.) (without a Fourth Amendment “the house of every private family that produced any excised commodity from soap to cider would be vulnerable to perpetual invasion, night or day; every door, desk, and chest could be broken open”); *Remarks on the Amendments to the Federal Constitution . . . by a FOREIGN SPECTATOR*, No. 4, THE FEDERAL GAZ., AND PHILADELPHIA EVENING POST, Dec. 2, 1788 (no. 54), p. 2, col. 2) (in the absence of Fourth Amendment protections, the people would be vulnerable to “the dreadful giant Congress storming our domestic castles . . . and searching our cellars, garrets, bed-chambers and closets . . .”).

<sup>206</sup> See, e.g., *Illinois v. Lidster*, 540 U.S. 419, 426 (2004) (explaining that “practical considerations,” including “community hostility,” are unlikely to lead to an “unreasonable proliferation of police checkpoints”); Transcript of Oral Arguments at 5, *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (No. 11-564) (counsel for the government arguing that the two natural constraints on police activity “[the] Court has always pointed to” are, first, “restraint on resources,” and second, “the check of community hostility”).

as “caretak[ers],”<sup>207</sup> “public servants,”<sup>208</sup> and “protect[ors] [of the] fundamental rights of our citizenry.”<sup>209</sup>

These formulations shore up what should be an obvious point: that a democratic society is partly measured by the respect (or lack thereof) that law enforcement officials pay to ordinary citizens, even when those citizens are subject to criminal investigation. One promise of such respect is that law enforcement officials will not intrude, without cause, into private or otherwise intimate spheres of life. But another promise — the promise codified in the trespass test — is that even when privacy is not at stake, citizens will not be subject to degrading or highly offensive modes of investigation. In Part I, we argued that *Jones*, *Jardines*, and *Grady* provide three inaugural examples; and in Part II, we offered a number of preliminary suggestions for how the logic of those cases might extrapolate.

Here, the point is more fundamental. Putting to one side which exact modes of investigation qualify as degrading or highly offensive, incorporating this standard into Fourth Amendment law — as a threshold test, designed to identify “searches” and “seizures” that *Katz*-style privacy would either overlook or explain on other grounds — serves a number of overlapping normative goals. Broadly, we count three.

First, requiring that police treat citizens with a minimum level of courtesy and respect bolsters the legitimacy of law enforcement agencies — and of democratic institutions writ large.<sup>210</sup> Individuals who are treated disrespectfully by the police are more likely to become alienated from the political and social order.<sup>211</sup> Knowing that police have the inclination (and the

<sup>207</sup> *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (“Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”); see also *Colorado v. Bertine*, 479 U.S. 367, 381 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976). For other places that dignity-based considerations have (arguably) surfaced in the case law, see *Bowers*, *supra* note 9, at 1015–18.

<sup>208</sup> See *Locurto v. Giuliani*, 447 F.3d 159, 178–79 (2d Cir. 2006) (“Police officers and firefighters alike are quintessentially public servants. As such, part of their job is to safeguard the public’s opinion of them, particularly with regard to a community’s view of the respect that police officers and firefighters accord the members of that community.”); see also *Dible v. City of Chandler*, 515 F.3d 918, 929 (9th Cir. 2008) (quoting *Locurto*, 447 F.3d at 178–79).

<sup>209</sup> See *Spano v. New York*, 360 U.S. 315, 321 (1959) (“[I]n recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime.”); see also *United States v. Mitchell*, 322 U.S. 65, 70 (1944) (“[O]fficers of the law should deem themselves special guardians of the law.”).

<sup>210</sup> See, e.g., BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* (forthcoming 2016) (on file with authors) (explaining the importance of democratic oversight and community participation for police).

<sup>211</sup> See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2070–71 (2016) (“By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”).

authority) to treat citizens in dehumanizing ways can result, in addition to the harms it causes on an individual level, in a vicious cycle of diminished political engagement and loss of confidence in structures of democratic governance.

Second, for the same reasons that dignitary constraints on police conduct enhance the legitimacy of law enforcement bodies, they also stand to facilitate cooperation between law enforcement and the public. Numerous scholars have documented the rise of the so-called “anti-snitching” movement as a response, at least in substantial part, to the perception of abusive law enforcement practices.<sup>212</sup> When police are seen as adversaries rather than “caretakers” or civil servants — when their presence is resented rather than welcomed — it only stands to reason that citizens would be disinclined to assist with investigations. This, too, can result in a vicious cycle: the less information that police receive from willing members of the community, the more they will resort to invasive tactics to fill in the gaps.

Third, standards of Fourth Amendment dignity prevent the dehumanization and depersonalization of police officers themselves.<sup>213</sup> Police are among a very small number of persons in our society who are authorized to violate the rules of civility in certain situations.<sup>214</sup> Permitting them to do so routinely, and without strong reasons, is as likely to affect them as it is to affect their targets.<sup>215</sup> Licensing disrespect begets disrespect — and disrespect tends to compound, reciprocally, over time. Police officers are human; it is only natural that conditions of acrimony would cause them to lose sight of their role as public servants.

•

In closing, we briefly address two possible objections to incorporating dignity-based constraints into Fourth Amendment law. Although both objections raise important points, neither is truly an argument against embracing dignity as a Fourth Amendment virtue. On the contrary, both are arguments for doing so *wisely* — for ensuring that dignitary claims flow from the proper conceptual source.

---

<sup>212</sup> See, e.g., Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 185–87 (2003) (highlighting the ways that perceptions of prejudicial policing foster an atmosphere of distrust among citizens, and lead to solidarity against the police). By calling this a “perception,” we do not mean to imply that police abuse is not a real phenomenon. Of course it is — as the events of the last few years have made painfully clear. The point, however, is that whether or not police abuse is real, the perception of such abuse is, in a practical sense, what often matters most.

<sup>213</sup> See David A. Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CAL. L. REV. 1069, 1107, 1111–12 (2014) (suggesting that “privacy violations are harmful not solely because of their effects on the victims, but also, and maybe mostly, because of the habits and ways of thinking they engrain in the violators”).

<sup>214</sup> See Malcolm Thorburn, *Justifications, Power, and Authority*, 117 YALE L. J. 1070, 1103–07 (2008) (describing the warrant requirement — and other doctrines that legitimate police officer conduct — as conceptually akin to justification rules in criminal law).

<sup>215</sup> See Sklansky, *supra* note 213, at 1111–12.

First, one might argue that if dignity is construed (as we construe it) to describe the requirements of courtesy and reciprocal respect that define civil society, the concept becomes unwieldy when applied to police encounters. Put simply, police officers are *different* than other citizens. As Jed Rubenfeld once put it, “the chief concerns” of an average person, facing the prospect of (for example) entering a private home, would “presumably include: the demands of etiquette; the potential offense he might give . . . and, perhaps most prominently, the likely unpleasantness to follow, including the risk of forcible ejection, were he to enter.”<sup>216</sup> Based on this observation, however, it neither follows “logically”<sup>217</sup> nor makes much normative sense to conclude that police officers should be required to abide by the same requirements. On the contrary, police officers play a distinctive role in our social order: they constantly flout the “demands of etiquette,” and they enjoy immunity from the types of “forcible objection” (or subsequent legal action) that would apply to ordinary citizens.<sup>218</sup>

The core premise of this argument — that police officers differ from ordinary citizens by virtue of their institutional role — is surely right. However, this argument suffers from two important limitations. First, that dignitary constraints do not bind the police in precisely the same way they bind ordinary people hardly means that dignitary constraints do not bind the police *at all*. It simply means that to determine how dignitary constraints bind police officers, one cannot look to everyday notions of etiquette and decorum; rather, one must develop a (normative) conception of the role that police officers play, and to ask what dignitary norms attach to that role. This, needless to say, is a task that courts — which frequently assess the normative performance of police officers — are well-equipped to carry out. The second limitation is even simpler: one of the main reasons that police officers are allowed to flout the bounds of everyday decorum and etiquette is precisely that they comply with (among other strictures) the procedural hurdles imposed by the Fourth Amendment. In this sense, there is something analytically odd, even perverse, about invoking the general difference between police officers and ordinary citizens as a reason *not* to impose Fourth Amendment protection in response to officer conduct that deviates from everyday notions of civility. In many settings, compliance with the Fourth Amendment is precisely what legitimates those deviations.

Second, one might argue that our dignitary approach risks exacerbating a different class of dignitary harms — those arising from preexisting hierarchies of power in society. If dignity is rooted in the social duties we owe one another, the argument goes, it will reproduce the same biases, indignities, and unrecognized forms of disrespect that society already excuses in its

---

<sup>216</sup> Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 110 (2008).

<sup>217</sup> *Id.* Indeed, Rubenfeld goes so far as to say that believing police officers should respect the bounds of dignity in the same sense as everyday people is “easy to dismiss.” *Id.*

<sup>218</sup> *Id.*



broader culture. Some have argued, for example, that certain areas in society “are coded as ‘spaces of civility’ (e.g., the university and the suburb) and other parts ‘spaces of violence’ (e.g., the slum and the colony).”<sup>219</sup> They contend that “[b]eing located in (or belonging to) a degenerative space puts one ‘beyond universal justice’ and ‘limit[s] the extent to which the violence done to [one’s] body c[an] be recognized and the accused made accountable for it.”<sup>220</sup>

To this argument, the best rejoinder is simply to concede the point, but simultaneously to emphasize that even half-measures are preferable to *no* measures. Indeed, recognizing dignitary harms as a species of Fourth Amendment violation leaves open the possibility that at a later, more enlightened era in our nation’s history, unacknowledged inequalities will be addressed, and everyone, no matter their social standing, will finally be treated with the respect they deserve as human beings. Indeed, such “dignitary evolution” is more than just an abstract possibility; it has been an active part of our nation’s history. And it is among the things that our constitutional law, in its best form, helps to secure.<sup>221</sup>

In many ways, in fact, that is exactly the *point* of the trespass test. If we are right, and the test supplies the Court with a new and clear avenue to guard against dignitary harms, then the next question — the question we began to explore in this Article — is what types of trespass-as-indignity claims should be subject to revitalized Fourth Amendment protection. A fuller answer to that question awaits future work. But it is work that ought to be done, and that dignity, as a concept, will help courts do.

## CONCLUSION

“Reasonable expectations of privacy” were both the means and the price of extending the Fourth Amendment’s protections beyond physical invasions. However, we believe that the trespass test acknowledges the important role that dignity plays in Fourth Amendment analysis as well. The test, in our view, is best understood as holding that a search occurs whenever the Government obtains information by accessing a constitutionally protected area in a manner that would be highly offensive to a reasonable person.

By safeguarding individual dignity, the trespass test simultaneously shields individuals from the intrinsic harms that offenses against civility inflict, while simultaneously protecting the structural relationship between in-

---

<sup>219</sup> Adam Benforado, *The Geography of Criminal Law*, 31 CARDOZO L. REV. 823, 851 (2010).

<sup>220</sup> *Id.*

<sup>221</sup> See generally JACK BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011) (explaining how the drive to repair and redeem the constitutional project fundamentally shapes the development of the law of the constitution).

dividuals and the state that is essential to a functioning democracy. Going forward, we believe the trespass test could have important applications in numerous areas of Fourth Amendment law.