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AYENI V. MOTTOLA* AND THE IMPLICATIONS OF
CHARACTERIZING VIDEOTAPING AS A FOURTH
AMENDMENT SEIZURE

INTRODUCTION

Real-life television series have become increasingly popular in the last decade. These shows feature camera crews accompanying public servants in their daily work: police officers pursuing suspects; firefighters fighting three-alarm fires; and emergency medical technicians resuscitating those pulled from train wrecks. The Second Circuit, in an apparent check on the proliferation of such shows, recently has limited the ability of camera crews to accompany police officers executing search warrants.

In *Ayeni v. Mottola*,¹ the Second Circuit imposed personal liability on a secret service agent, James Mottola, for inviting a camera crew to film the execution of a validly issued search warrant.² Agent Mottola had asked a camera crew from the now-defunct CBS television series *Street Stories* to accompany him while he searched the home of Babatunde Ayeni, a man suspected of credit card fraud.³ After procuring a warrant, Mottola and the camera crew went to the Ayeni home where the crew videotaped the search, the inside of the Ayeni home and Babatunde Ayeni's wife and son.⁴

The Second Circuit held that Mottola violated clearly established fourth amendment principles by inviting the camera crew to come with him and that he could not have reasonably believed that his actions were lawful.⁵ The court's conclusion

* 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995). In order to avoid confusion, the circuit court opinion will be cited as *Ayeni II* and the district court opinion, reported at 813 F. Supp. 149 (E.D.N.Y. 1992), will be cited as *Ayeni I*.

¹ *Ayeni II*, 35 F.3d 680.

² *Id.* at 683.

³ *Id.*

⁴ *Id.* It was they who subsequently brought suit against Mottola. *Id.*

⁵ *Id.* at 689.

was based partially on the assertion that videotaping is a seizure in fourth amendment terms.⁶ This Comment will argue that the characterization of videotaping as a seizure is incorrect, and needlessly perpetuates a split among the circuit courts.

Part I of this Comment provides the background for the *Ayeni* decision by briefly surveying the United States Supreme Court's fourth amendment jurisprudence and reviewing the position of each circuit court that has decided the issue of whether videotaping effects a fourth amendment seizure. The Second and Fourth Circuits hold that a videotaping is a seizure while the Sixth Circuit holds that it is not. Part II reviews the facts of *Ayeni* and the decisions of the district and circuit courts, focusing on the rationale that these courts provide for the conclusion that videotaping constitutes a fourth amendment seizure.

Part III of this Comment argues that this conclusion is ill-conceived. This Part illustrates the flaws in such a characterization by identifying the negative and absurd consequences for law enforcement that flow therefrom. Effective law enforcement will be undermined if videotaping is disallowed as an impermissible fourth amendment seizure because police will have to forgo warrantless video-surveillance even in public places. Part III then argues that this issue can be better resolved by adopting the Sixth Circuit's conclusion that videotaping is not a seizure but a search. Such a characterization is consistent with precedent and does not needlessly fetter police.

I. BACKGROUND: THE FOURTH AMENDMENT

The Fourth Amendment is laden with interpretive difficulties.⁷ It acknowledges that some limits must be placed upon government in its efforts to enforce laws, but leaves the contours of those limits undefined.⁸ The amendment provides that

⁶ *Id.* at 688.

⁷ POLYVIOS G. POLYVIOS, *SEARCH & SEIZURE: CONSTITUTIONAL AND COMMON LAW* 91 (1982).

⁸ POLYVIOS, *supra* note 7, at 91. See also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994). The Fourth Amendment applies only to searches and seizures conducted by the government.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.⁹

What searches and seizures are—in short, what values are protected by the Fourth Amendment—has been difficult to ascertain.

In its first thorough discussion of the Fourth Amendment, the Supreme Court described the values protected by the amendment thus:

[The proscriptions of the Fourth Amendment] apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property¹⁰

Burdeau v. McDowell, 256 U.S. 465 (1921); *Walter v. United States*, 447 U.S. 649 (1980); EDWARD W. CLEARY, *MCCORMICK ON EVIDENCE* 469 (3d ed., 1984). Because the framers intended the amendment as a restraint only on "the activities of the sovereign authority," the Fourth Amendment does not protect against wrongful acts by private persons. *Id.* at 469.

⁹ U.S. CONST. amend. IV.

¹⁰ *Boyd v. United States*, 116 U.S. 616, 630 (1885). *Boyd* decided the constitutionality of a statute that provided that "in all suits and proceedings, other than criminal proceedings, arising under the revenue laws of the United States, the court, upon motion by the attorney representing the United States, could issue a notice to the defendant or claimant to produce books, invoices and papers which, in the judgment of the United States, will tend to prove any allegation made by the United States." *Id.* at U.S. 619-20. The statute further provided that in the event that such books, invoices or papers were not produced, the allegations made in the motion shall be taken as confessed. *Id.* at 620.

Petitioner *Boyd* had notice served on him for the production of certain invoices. *Id.* at 618. He produced the invoices but challenged the constitutionality of the statute on fourth and fifth amendment grounds. *Id.* The government maintained that the statute did not violate the Constitution because it did not authorize the search and seizure of books and papers, but merely required their production. *Id.* at 621. The Court rejected the government's contention and held the statute unconstitutional. *Id.* at 638.

The *Boyd* Court asserted that "constitutional provisions for the security of person and property should be liberally construed [because a] close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right" *Id.* at 635. Accordingly, the Court ruled that while the statute did not authorize the seizure of any tangible items or a physical intrusion, "it accomplishe[d] the substantial object" of such a seizure and, therefore, was subject to fourth amendment scrutiny. *Id.* at 622.

That description gave rise to three disparate lines of cases proclaiming that privacy, liberty and property, respectively, were the central focus of the Fourth Amendment.¹¹ Courts

¹¹ See, e.g., *Katz v. United States*, 389 U.S. 347 (1967) (focusing fourth amendment analysis on privacy); *Terry v. Ohio*, 392 U.S. 1 (1968) (focusing fourth amendment analysis on liberty); *Olmstead v. United States*, 277 U.S. 438 (1928) (focusing Fourth Amendment analysis on property). The Court's decision in *Boyd* contributed substantially to this ensuing confusion. *Boyd* established that government action need not involve a physical taking or intrusion to be subject to fourth amendment scrutiny. POLYVIU, *supra* note 7, at 16; *Boyd*, 116 U.S. at 635. Rather, "any measure, regardless of its form, which accomplishes the same result' as a conventional search will come within the gambit of the Fourth Amendment and be evaluated according to its standard" POLYVIU, *supra* note 7, at 16 (citing *Boyd*, 116 U.S. at 635).

In arriving at its decision, the *Boyd* Court adopted the reasoning of a British case from 1765, *Entick v. Carrington*, referring to that case as a "monument of English freedom" and as "the true and ultimate expression of constitutional law." *Boyd*, 116 U.S. at 626. *Entick* involved a forcible entry into a home and an exhaustive search of its contents, including an examination of private papers. The search was conducted by government officials and authorized by a warrant issued by the Secretary of State. Lord Camden, pronouncing the judgment of the court, harshly condemned the search. According to Camden, people enter into society to secure their property. That security, he asserted, is "sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole." *Id.* at 627. No power to breach that security had been granted to the Secretary of State, hence the search was illegal.

Both *Entick* and *Boyd* were predicated on traditional property law concepts. The holding in each case was not based on privacy as a value in itself. Rather *Entick*, a trespass action, deems the protection of the home to derive exclusively from the great end for which men entered into society—"to secure their property." Privacy in this context—the security of the home—is an extension of proprietary interests in the home. According to Lord Camden, "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing." *Id.* at 627. The right to exclude the government—i.e., the right to privacy—then, merely extended the principle that a fundamental property right is the right to exclude others—even the government. The greater scrutiny given to government action merely reflects the great disparity in power between the government and the individual. See POLYVIU, *supra* note 7, at 25.

Arguments in *Boyd* similarly focused on property. Counsel for the government urged that the statute in question was, in essence, the same as any number of statutes authorizing the forfeiture of stolen goods. 116 U.S. at 621. The court rejected this argument, however, emphasizing that the "owner from whom they were stolen is entitled to their possession . . . [w]hereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his [own] property." *Id.* at 624 (emphasis added). Again, the issue argued and decided arose from property rights.

Boyd, thus, established that in some sense fourth amendment protection extends to both privacy and property interests. Exactly what were the property and privacy interests safeguarded by the Fourth Amendment, and how those interests

asserting that personal security was the main concern of the Fourth Amendment focused their fourth amendment inquiries on governmental infringements of individual expectations of privacy.¹² Courts claiming that personal liberty was the central focus of the amendment concentrated their analyses on governmental impediments to individuals' freedom of movement.¹³ Courts declaring the primacy of property concerns, in turn, linked invocation of the amendment's protections to government infringement of possessory interests.¹⁴ The resulting confusion was not resolved by the Supreme Court until its 1984 decision in *United States v. Jacobsen*.¹⁵

A. *Interests Protected by the Fourth Amendment—United States v. Jacobsen*¹⁶

Jacobsen is significant in three respects. First, it reconciles the various lines of precedent by distinguishing between searches and seizures and defining those terms. Second, as a result of the framework for fourth amendment analysis established in *Jacobsen*, government infringements on privacy, liberty or property interests trigger fourth amendment protection independently of one another.¹⁷ Third, *Jacobsen's* clarification of the contours of fourth amendment rights provides law enforcement officials with a workable structure to guide their activities.¹⁸

were related, however remained unanswered until the Supreme Court's 1984 decision in *United States v. Jacobsen*, see *infra* notes 16-71 and accompanying text.

¹² See, e.g., *Katz*, 389 U.S. 347 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

¹³ See, e.g., *Cupp v. Murphy*, 412 U.S. 291 (1973); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁴ See, e.g., *Silverman v. United States*, 365 U.S. 505 (1960); *Olmstead v. United States*, 277 U.S. 438 (1928)

¹⁵ 466 U.S. 109 (1984).

¹⁶ This section draws heavily from the reading of Supreme Court fourth amendment jurisprudence expounded in William C. Heffernan, *Property, Privacy and the Fourth Amendment*, 60 BROOK. L. REV. 633, 637-58 (1994). It adopts Professor Heffernan's analysis and attempts to describe that analysis fully in order to illuminate the discussion that appears *infra* at text accompanying notes 153-190.

¹⁷ Heffernan, *supra* note 16, at 637-58.

¹⁸ *Jacobsen* involved a Federal Express package damaged in the course of shipping. 466 U.S. at 111. Upon discovering the damage, Federal Express employees examined the contents, pursuant to written company policy. *Id.* The examination

1. Privacy, Liberty and Property

Writing for the Court in *Jacobsen*, Justice Stevens stated that the Fourth Amendment protects two types of expectations, one involving searches, the other seizures.¹⁹ A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.²⁰ Seizures may involve two separate interests. A seizure of the person occurs when there is some meaningful interference, however brief, with an individual's freedom of movement—i.e., when there is an interference with his or her liberty.²¹ A seizure of property, in turn, occurs when there is some meaningful interference with an individual's possessory interest in that property.²² Each of these definitions draws from a separate line of fourth amendment cases.

Stevens drew his definition of *search* in *Jacobsen* primarily from cases holding that privacy is the central concern of the Fourth Amendment, especially *Katz v. United States*.²³ *Katz* involved the admissibility of evidence the FBI procured through a warrantless wiretap of a telephone from which defendant *Katz* was suspected of placing bets.²⁴ Justice Stewart, finding for *Katz* and writing for a majority of the Court, proclaimed that privacy was the main concern of the Fourth Amendment. According to Stewart:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be

revealed a tube approximately ten inches long, containing a bag filled with white powder. *Id.* The Federal Express employees called Drug Enforcement Agency officials upon discovery of the white powder. *Id.* Agents were dispatched and performed a field test on trace amounts of the white powder. The test revealed that the substance was cocaine. *Id.* at 112. The results of the test was admitted into evidence. *Id.* Defendants challenged the admissibility of the test results on the ground that the test had been conducted without a warrant and, hence, was unreasonable. *Id.*

¹⁹ *Id.* at 113.

²⁰ *Id.*

²¹ *Id.* at 113, n.5.

²² *Id.* at 113.

²³ 389 U.S. 347 (1967).

²⁴ *Id.* at 348.

constitutionally protected.²⁶

Stewart emphasized that a person who enters a phone booth, shuts the door and "pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."²⁶ Holding that the Fourth Amendment validates such an expectation of privacy, the Court ruled that the evidence procured by the surreptitious FBI wiretap violated that expectation and therefore was inadmissible.²⁷

While *Katz* establishes that privacy is a fourth amendment concern, the majority admonished that fourth amendment protection of privacy is neither exclusive nor absolute:

[T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and his very life, left largely to the law of the individual States.²⁸

Justice Stewart did not, however, offer a standard for determining what types of governmental intrusions upon privacy are condemned by the Fourth Amendment.

The standard for analyzing fourth amendment privacy claims which has been embraced by subsequent courts appears in the concurring opinion of Justice Harlan in *Katz*. It is that standard which is adopted by Justice Stevens in *Jacobsen* as the definition of a fourth amendment search. According to Harlan, in order for fourth amendment protection to attach to a privacy interest, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"²⁹

²⁶ *Id.* at 351-52 (citations omitted).

²⁸ *Id.* at 352.

²⁷ *Id.* at 359.

²⁸ *Id.* at 350-51.

²⁹ *Katz*, 389 U.S. at 361 (Harlan, J., concurring). For later opinions embracing Justice Harlan's standard see, e.g., *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Those majorities, however, did not adopt Justice Harlan's standard in its entirety. Rath-

Those cases asserting the centrality of liberty to the Fourth Amendment are also incorporated in *Jacobsen*. *Terry v. Ohio*,³⁰ decided shortly after *Katz*, was the first in a line of cases indicating that liberty is a central fourth amendment concern. The standards established by these cases are adopted in *Jacobsen* as the first prong of Justice Stevens's definition of seizure.

Terry involved the propriety of a warrantless "stop and frisk" of two men whom an officer observed engaging in suspicious behavior.³¹ The Court held that a stop is a fourth amendment seizure of the person and, therefore, that the actions of the officer should be subjected to fourth amendment scrutiny.³² Writing for the Court, Chief Justice Warren argued that "the central inquiry under the Fourth Amendment [is] the reasonableness in all circumstances of the particular governmental invasion of a citizen's personal security."³³ Personal security was deemed by the Court to encompass the liberty to move about freely.³⁴ Hence, the Court held that a fourth amendment seizure occurs "when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."³⁵

The broad language used by the Supreme Court in *Katz* and *Terry* to assert the centrality of privacy and liberty to fourth amendment analysis left unclear the scope of protection afforded to property interests. Some commentators, in fact, argued that property interests were protected by the amendment only to the extent that they were implicated by privacy and liberty concerns.³⁶ Pre-*Katz* cases extending fourth amendment protection to property were thought to have been overruled.³⁷ To an extent, those earlier cases were vindicated by the second prong of Justice Stevens's definition of seizure in *Jacobsen*.

er, they focused on the objective prong. *see, e.g., id.*

³⁰ 392 U.S. 1 (1968). *See also* *Cupp v. Murphy*, 412 U.S. 291 (1973); *Davis v. Mississippi*, 394 U.S. 721 (1969).

³¹ *Terry*, 392 U.S. at 6.

³² *Id.* at 16-17, 19.

³³ *Id.* at 19.

³⁴ *Id.* at 16.

³⁵ *Id.* at 19, n.16.

³⁶ *See* Heffernan, *supra* note 16, at 647.

³⁷ *Id.*

In *Jacobsen* Justice Stevens expressly stated that a governmental seizure of property invokes the protection of the Fourth Amendment.³⁸ According to Stevens, a seizure of property occurs when governmental authorities exert dominion and control over property for their own purposes.³⁹ This definition reveals reliance on those cases holding that property is the central concern of the Fourth Amendment.

First in the line of cases asserting the primacy of property concerns to fourth amendment analysis is *Olmstead v. United States*.⁴⁰ *Olmstead*, like *Katz*, involved the admissibility of evidence procured through a warrantless telephone wiretap.⁴¹ The *Olmstead* Court held the evidence admissible by reading the Fourth Amendment restrictively, limiting its scope by reference to its specific historical origins. According to the *Olmstead* court, the Fourth Amendment was intended to do no more than prohibit the government from issuing general warrants and writs of assistance.⁴²

The Court asserted that the amendment achieves its purpose by proscribing warrantless infringements on property rights.⁴³ Based on its determination of the purpose and intended effects of the amendment, the court limited the meaning of *search* to "actual physical invasion[s] of [a] house or curtilage for the purpose of making a seizure"⁴⁴ and the meaning of *seizure* to the taking of "tangible material effects."⁴⁵ In the case of wiretapping, "[t]here was no searching" because "there was no entry of the houses or offices of the defendants, and there was no seizure, because the evidence had been secured "by the sense of hearing . . ."⁴⁶

Olmstead required an infringement of a property interest by the government in order for the government's actions to be subjected to fourth amendment scrutiny. While *Jacobsen* does not adopt so myopic a view, Justice Stevens's discussion of a

³⁸ *Jacobsen*, 466 U.S. at 113.

³⁹ *Id.* at 120.

⁴⁰ 277 U.S. 438 (1928).

⁴¹ *Id.* at 455.

⁴² *Id.* at 449.

⁴³ *Id.* See also POLYVIU, *supra* note 7, at 23; Heffernan, *supra* note 16 at 638-

40.

⁴⁴ *Olmstead*, 277 U.S. at 466.

⁴⁵ *Id.*

⁴⁶ POLYVIU, *supra* note 7, at 22.

seizure of property derives from traditional tort and property law concepts, evaluating fourth amendment claims comparably to *Olmstead*.⁴⁷ Justice Stevens's standard for whether a seizure has occurred—that dominion and control be exerted to further interests contrary to those of the property owner—is identical to the common law definition of conversion.⁴⁸

2. Privacy, Property and Liberty Are Independent Interests

By defining searches and seizures and crystallizing the distinction between the two, *Jacobsen* made clear that searches and seizures are separate constitutional events involving distinct constitutional interests.⁴⁹ After *Jacobsen* it is clear that privacy, liberty and property are protected by the Fourth Amendment independently of each other. *Katz* is an example of

⁴⁷ See *Jacobsen*, 466 U.S. at 113, 120.

⁴⁸ *Id.* at 120, n.18. Cf. W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 15 (5th ed., 1984) (The intent required to commit a conversion is "an intent to exercise a dominion and control over the plaintiff's goods which is in fact inconsistent with the plaintiff's rights."); see also, e.g., *Poggi v. Scott*, 139 P. 815 (1914); *Salt Springs Nat'l Bank v. Wheeler*, 48 N.Y. 492 (1872); *Fouldes v. Willoughby*, 151 Eng. Rep. 1153 (1841), cited in, KEETON, *supra*. Moreover, Justice Stevens advised that "concepts of real or personal property law" should be considered when evaluating the reasonableness of a search. *Jacobsen*, 466 U.S. at 1660.

⁴⁹ JOHN WESLEY HALL, JR., SEARCH AND SEIZURE § 19:8 (2d ed. 1993). That searches and seizures are separate events was by no means obvious prior to *Jacobsen*. The discussion in *Katz* appears to assume that there is a difference between searches and seizures but provides no means by which to distinguish the two. The *Katz* court concluded that the wiretapping was a search and that intangible as well as tangible items may be seized. The Court did not reveal its reasoning as to how searches and seizures may be distinguished from one another.

Terry appears to recognize that the two are separate constitutional events but does not articulate their distinction. While the *Olmstead* court made a more thorough attempt to distinguish between searches and seizures, its definition assumes that the two occur as part of a single governmental action. According to the *Olmstead* court, a search is "an actual physical invasion of [a] house or curtilage for the purpose of making a seizure." POLYVIU, *supra* note 7, at 22-23. A seizure, in turn, is the taking of "tangible material effects." Under this rubric, a seizure cannot take place without a search.

While the inverse need not be true logically, the Court's rationale reveals that in fact searches and seizures were considered elements of a single governmental action. The *Olmstead* court based its interpretation of the Fourth Amendment on the notion that the amendment was framed exclusively to prohibit the issuance of general warrants. See generally POLYVIU, *supra* note 7, at 23. That basis presumes that searches and seizures are elements of a single action.

a pure privacy case. A pure liberty case is *Tennessee v. Garner*.⁵⁰ A pure property case, finally, is *Soldal v. Cook County*.⁵¹

No property interest had been infringed in *Katz*.⁵² The offending government action was the recording of defendant's conversations in a public telephone booth by placing a listening device on top of the booth that intercepted only the defendant's part of the conversation. According to Justice Stewart, the government failed to abide by the Fourth Amendment by "electronically listening to and recording the petitioner's words [which] violated the *privacy* upon which he justifiably relied while using the telephone booth."⁵³ The essence of the Court's holding in *Katz* is that the Fourth Amendment protects privacy even when no property interest is implicated.

At issue in *Garner* was the reasonableness of a Tennessee statute authorizing police officers to employ deadly force on suspects fleeing the scene of a felony.⁵⁴ Edward Garner, a fifteen year old boy who had broken into a home, was killed by police because he was trying to flee the scene of his crime.⁵⁵ Garner was not searched nor was any of his property taken. A necessary threshold inquiry was whether the taking of a life is a fourth amendment seizure of the person. The court quickly and unequivocally held that it was. Justice White, writing for the Court, stated:

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. While it is not always clear just when minimal police interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.⁵⁶

The statute was held to violate the Fourth Amendment on the ground that the deprivation of liberty which it authorized was unreasonable. No privacy or property interests were involved

⁵⁰ 471 U.S. 1 (1985).

⁵¹ 113 S. Ct. 538 (1992). These examples and the framework of the following discussion are drawn from Heffernan, *supra* note 16, at 637-58.

⁵² 389 U.S. at 353.

⁵³ *Id.* (emphasis added).

⁵⁴ *Garner*, 471 U.S. at 4 (citing TENN. CODE ANN. § 40-7-108 (1982)).

⁵⁵ *Id.* at 6.

⁵⁶ *Id.* at 7.

in *Garner*.

Soldal was an invocation of the Fourth Amendment based solely on property interests. The owners of the trailer park in which the Soldals lived forcibly evicted them from the park by pulling their trailer free from its moorings and towing it away.⁵⁷ Members of the Cook County Sheriff's Department were present to ensure that the Soldals did not interfere.⁵⁸ Neither the officers nor the owners of the park restricted the Soldals' freedom of movement, entered their home, looked through its windows or handled any of the Soldals' effects. Although no liberty or privacy interests were infringed, the removal of the home was held to have violated the Fourth Amendment because the Soldals' possessory interest in their home was infringed. Writing for a unanimous court, Justice White asserted that "seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place."⁵⁹

3. The Practical Value of *Jacobsen*

By announcing clear definitions of searches and seizures, *Jacobsen* establishes a framework within which law enforcement officials can structure their activities. Only those actions of the government that can be classified as searches or seizures are subject to the strictures of the Fourth Amendment.⁶⁰ Clear delineation of what constitutes a search or seizure allows the police to minimize the risk that evidence they uncover without a warrant will be inadmissible at trial.

Because searches and seizures, by definition, involve infringements upon the values sought to be protected by the Fourth Amendment, the warrant requirement seeks to minimize the discretion exercised by law enforcement officials in executing a search or a seizure.⁶¹ To that end, the warrant

⁵⁷ *Soldal*, 113 S. Ct. at 540.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ POLYVIU, *supra* note 7, at 23.

⁶¹ *Id.* While an in-depth description of the technical requirements for the issuance of a warrant, exceptions to the warrant requirement, and the subtleties of the exclusionary rule are beyond the scope of this Comment, a brief discussion of the meaning of *Jacobsen* for law enforcement is in order.

specifies the scope of the action to be taken and the manner in which the search or seizure is to be conducted.⁶² It states with particularity the place to be searched, describes the item or thing to be seized, and identifies the officers who will participate in the search and/or seizure.⁶³

The Fourth Amendment also requires that all searches and seizures be reasonable. Determining the reasonableness of governmental action in a fourth amendment context requires inquiry into "whether the totality of the circumstances justified a particular sort of search or seizure."⁶⁴ Various factors inform that determination. First, "the nature and quality of the intrusion on the individual's Fourth Amendment interests" must be balanced against the importance of the governmental interests offered in justification of the intrusion.⁶⁵ Second, the circumstances surrounding the seizure must be examined, including when the seizure is made and how it is carried out.⁶⁶ Warrantless searches and seizures are unreasonable per se in the absence of exigent circumstances or some other cir-

Searches and seizures must be made pursuant to a warrant issued by a detached and neutral magistrate upon oath or affirmation, usually in an affidavit, by the officer seeking the warrant that he has probable cause to believe that a particular search or seizure will reveal evidence of criminal behavior. U.S. CONST. amend. IV; see also YALE KAMISAR & WAYNE R. LAFAVE, ET AL., MODERN CRIMINAL PROCEDURE 214-15 (8th ed. 1994). The magistrate must examine the sworn statement of the officer to determine whether the facts stated and reasonable inferences drawn therefrom would lead a reasonable person to conclude that there is a fair probability that the action sought to be taken will reveal particular evidence of criminality. KAMISAR & LAFAVE, *supra*, at 214-15. She or he may issue the warrant only upon finding that such probable cause exists. KAMISAR & LAFAVE, *supra*, at 215.

⁶² *Horton v. California*, 496 U.S. 128, 139-40 (1990). See also KAMISAR & LAFAVE, *supra* note 61 at 215-16; HALL, *supra* note 49, § 44:24.

⁶³ KAMISAR & LAFAVE, *supra* note 61, at 215-16; HALL, *supra* note 49, § 44:24.

⁶⁴ *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985).

⁶⁵ *Id.* at 8.

⁶⁶ *Id.* This analysis is, at all times, an objective one. The motivation of the officer conducting a search or a seizure is not relevant to a determination of whether his or her actions were reasonable. *Graham v. Connor*, 490 U.S. 386, 397 (1989). As the *Graham* Court observed: "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* at 397. According to the Supreme Court, determinations of what is objectively reasonable are made by reference to sources outside the Fourth Amendment such as "concepts of real or personal property law or to understandings that are recognized and permitted by society." *United States v. Jacobsen* 466 U.S. 109, 122 n.22 (1984).

cumstance justifying exception to the warrant requirement.⁶⁷ Even where an exception applies, searches and seizures can only be made upon probable cause and must be reasonable.⁶⁸

In order to discourage lawless police conduct, evidence procured in violation of the Fourth Amendment is excluded at trial.⁶⁹ When a particular act can be construed as a search or a seizure, police officers must act both reasonably and upon probable cause if they hope to produce evidence helpful in securing a conviction. None of these strictures apply when the actions of the government are neither searches nor seizures in fourth amendment terms.⁷⁰

The Fourth Amendment does not limit the actions of police when they are not engaged in searches or seizures because no interests protected by the amendment are being infringed. The only limits on their discretion are federal, state and local laws, the regulations of their individual police departments and their own consciences. The clear definitions of search and seizure advanced by *Jacobsen*, thus, are of practical importance to law enforcement in that they provide police officers with bright lines as to how to exercise their power.

B. *A Split Among the Circuit Courts: Is the Taking of a Photograph a Fourth Amendment Seizure?*

Notwithstanding *Jacobsen*'s substantial clarification of the scope of the Fourth Amendment, what type of protection the amendment affords intangible forms of property, such as one's likeness or the images inside a home, remains in dispute. Three positions emerge from the circuit courts on the issue of whether the taking of a photograph is a seizure, each based on a different fourth amendment interest.⁷¹ The Second Circuit holds that the taking of a photograph is a fourth amendment

⁶⁷ *Horton v. California*, 496 U.S. 128, 139-40 (1990). See also KAMISAR AND LAFAYE, *supra* note 61, at 215-16; HALL, *supra* note 49, § 44:24.

⁶⁸ *Id.*

⁶⁹ *Terry v. Ohio*, 392 U.S. 7, 12 (1968).

⁷⁰ See, e.g., POLYVIUO, *supra* note 7, at 25.

⁷¹ See, *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990) (taking of photograph is a seizure of intangibles and thus violative of the Fourth Amendment); *United States v. Espinoza*, 641 F.2d 153 (4th Cir. 1981) (same); *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992) (taking of photographs not a seizure in fourth amendment terms).

seizure based on analogy to wiretapping cases. That court reads those cases to mean that tangible as well as intangible property may be "seized."⁷² The Fourth Circuit asserts that the taking of a photograph is always a seizure and that the nature of the seizure depends upon the subject of the photograph.⁷³ The Sixth Circuit, finally, holds that the taking of photographs is not a seizure based on the notion that a seizure requires interference with a possessory interest.⁷⁴

1. The Second Circuit Position

The Second Circuit first held that taking a photograph is a fourth amendment seizure in *United States v. Villegas*.⁷⁵ *Villegas* involved the validity of a warrant authorizing agents to search and photograph, but not to take anything from, a location suspected of being an operational cocaine factory.⁷⁶ Agents of the Drug Enforcement Administration entered the location surreptitiously.⁷⁷ Various pieces of evidence supporting the conclusion that the farm was used as a cocaine factory, including barrels of ether and racks for drying cocaine, were uncovered and photographed.⁷⁸ Defendant Villegas challenged the admissibility of the photographs, claiming that the warrant violated the Fourth Amendment because it did not state with particularity what information the agents could photographically "seize."⁷⁹ In analyzing Villegas's claim, the court implicitly accepted his premise that the taking of a photograph is a seizure in fourth amendment terms based on analogy to wiretapping.⁸⁰ The court reasoned that wiretapping, like photography, involves the interception of intangible property.⁸¹ Because wiretapping is subject to fourth amendment scrutiny, the *Villegas* court determined that the seizure of intangible evi-

⁷² *Villegas*, 899 F.2d at 1334.

⁷³ *Espinoza*, 641 F.2d at 166; *United States v. Johnson*, 452 F.2d 1363 (1971).

⁷⁴ *Bills*, 958 F.2d at 707.

⁷⁵ *Villegas*, 899 F.2d at 1324.

⁷⁶ *Id.* at 1330.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1333-34.

⁸⁰ *Id.* at 1334-35.

⁸¹ *Villegas*, 899 F.2d at 1335.

dence through photography should be scrutinized similarly.⁸²

The most significant among the cases classifying conversations as property and wiretaps as seizures are *Berger v. New York*⁸³ and *Katz v. United States*.⁸⁴ *Berger* involved the constitutionality of a New York statute which provided for the issuance of an ex parte order authorizing the surreptitious wiretapping of telephone numbers or telegraph lines for up to sixty days.⁸⁵ Such orders could issue upon the oath or affirmation of one of a number of state officers that reasonable grounds existed to believe that evidence of a crime could be obtained through the wiretap.⁸⁶ Writing for a narrow majority, Justice Clark argued that a "conversation was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a *search* within the meaning of the Amendment."⁸⁷ Because the New York statute did not require a particularized description of what property was sought, and allowed the wiretapping to go on for two months, it was held to violate the Fourth Amendment. According to Justice Clark, "the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to *seize* any and all conversations."⁸⁸

Decided only a few months prior to *Katz*, *Berger* set the stage for the *Katz* court's holding that an infringement of a reasonable expectation of privacy is, in itself, prohibited by the Fourth Amendment. Like *Berger*, *Katz* referred to the recording of a conversation as a seizure. The *Katz* court stated that "the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements."⁸⁹

⁸² *Id.*

⁸³ 388 U.S. 41 (1967).

⁸⁴ 389 U.S. 347 (1967).

⁸⁵ *Berger*, 388 U.S. at 44.

⁸⁶ *Id.*

⁸⁷ *Id.* at 51 (emphasis in original).

⁸⁸ *Id.* at 59.

⁸⁹ *Katz*, 389 U.S. at 353.

2. The Fourth Circuit Position

Still photography and the Fourth Amendment was discussed by the Fourth Circuit Court of Appeals in *United States v. Espinoza*.⁹⁰ *Espinoza* involved the admissibility of photographs taken without the authorization of a warrant.⁹¹ *Espinoza* was in the business of distributing pornographic material and was suspected of aiding and abetting in the transport in interstate commerce of obscene films and magazines involving children.⁹² Police officers entered a warehouse rented by *Espinoza* under a warrant authorizing them to search for records that would show that *Espinoza* owned such films and magazines, and moved them in interstate commerce.⁹³ While conducting the search, one of the officers took photographs of stacks of obscene magazines kept in the warehouse. *Espinoza* challenged the introduction of the photographs into evidence on the ground that the taking of the photographs was not authorized by the warrant and was therefore an unconstitutional seizure.⁹⁴

In an exceptionally unclear discussion, the *Espinoza* court accepted the position that the taking of a photograph constitutes a Fourth Amendment seizure.⁹⁵ The court offered no basis for its conclusion that a seizure is effected by photography. It did, however, point out that the nature of a photographic seizure depends upon what is photographed. Where objects are photographed, the seizure is of property.⁹⁶ Where a person is photographed, it is a seizure of the person in Fourth Amendment terms.⁹⁷

⁹⁰ 641 F.2d 153 (4th Cir. 1981).

⁹¹ *Id.* at 162.

⁹² *Id.* at 156.

⁹³ *Id.*

⁹⁴ *Id.* at 162.

⁹⁵ *Id.* at 166.

⁹⁶ *Espinoza*, 641 F.2d at 166.

⁹⁷ *Id.* The *Espinoza* court cites to *United States v. Johnson*, 452 F.2d 1363 (D.C. Cir. 1971) in support of this proposition. *Id. Johnson*, however, is not on point as it addresses the propriety of forcing a suspect to pose for a photograph and not the characterization of the photograph itself. See *Johnson*, 452 F.2d at 1371-72.

3. The Sixth Circuit Position

In contrast to the Second and Fourth Circuits, the Sixth Circuit's position is that the taking of a photograph is not a seizure. That conclusion was reached in *Bills v. Aseltine*.⁹⁸ *Bills* involved the admissibility of photographs taken by a person the police had invited to accompany them on a search of the Bills' residence.⁹⁹ The invitee, William Meisling, was a security officer at General Motors. The police invited Meisling to accompany them in the hope that he could identify stolen General Motors' property which the officers suspected was in the Bills' home.¹⁰⁰ The search uncovered large quantities of what appeared to be General Motors parts and equipment in the basement. Meisling took 231 photographs of the parts and equipment.¹⁰¹ The Bills' challenged the admissibility of the photographs claiming, in part, that the photographs were unconstitutional seizures because they were not authorized by the search warrant.¹⁰²

The court flatly rejected this contention based on reasoning much like that employed by Justice Stevens in *Jacobsen*. Although *Bills* was decided before *Jacobsen*, the seeds of the distinction between search and seizure expounded in *Jacobsen* had already been sown. The *Bills* court drew its conclusions from those seeds. In *Arizona v. Hicks*,¹⁰³ the Supreme Court had found that writing down the serial numbers of stereo equipment suspected of having been stolen was not a seizure because it "did not 'meaningfully interfere' with [a] possessory interest in either the serial numbers or the equipment."¹⁰⁴ Drawing from that holding, the *Bills* court concluded that "the recording of visual images of a scene by means of photography does not amount to a seizure because it does not 'meaningfully interfere' with any possessory interest."¹⁰⁵

⁹⁸ 958 F.2d 697 (6th Cir. 1992).

⁹⁹ *Id.* at 699-700.

¹⁰⁰ *Id.* at 700.

¹⁰¹ *Id.*

¹⁰² *Id.* at 707.

¹⁰³ 480 U.S. 321 (1987).

¹⁰⁴ *Id.* at 324 (citation omitted).

¹⁰⁵ *Bills*, 958 F.2d at 707.

II. *AYENI V. MOTTOLA*

A. *Facts*

On March 5, 1992, Secret Service agent James Mottola secured a warrant empowering himself and "any Authorized Officer of the United States," to enter the home of Babatunde Ayeni and search for evidence of credit card fraud.¹⁰⁶ That evening several Secret Service agents arrived at the Ayeni home, knocked on the door and announced that they were police officers conducting an investigation.¹⁰⁷ When Mrs. Ayeni cracked open the door to her apartment, one agent pushed her in the chest while two others slammed the door open.¹⁰⁸ Six agents barreled into the Ayeni home and began searching it.¹⁰⁹ Babatunde Ayeni was not at home. Only Mrs. Ayeni and her preschool-age son were present.¹¹⁰

Mrs. Ayeni asked to be shown a search warrant and was told that the agents were waiting for others who would bring it.¹¹¹ Twenty five minutes later, Agent Mottola arrived with the warrant, several other Secret Service agents and a camera crew from CBS's *Street Stories*.¹¹² The CBS crew operated a video camera and sound-recording devices as they entered the Ayeni home. One secret service agent wore a wireless microphone.¹¹³

Mrs. Ayeni objected to the videotaping and tried to shield her face with a magazine.¹¹⁴ The boy cried and told his mother that he was frightened. When Mrs. Ayeni attempted to cover her son's face with the magazine, Mottola grabbed the magazine out of her hand, threw it to the floor, and told them both to "shut up."¹¹⁵ Then, he or another of the Secret Service

¹⁰⁶ *Ayeni II*, 35 F.3d at 683.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 683.

¹¹¹ *Id.* It is unclear whether the agents suspended their search at this time. *Id.*

¹¹² *Ayeni II*, 35 F.3d at 683.

¹¹³ *United States v. Sanusi*, 813 F. Supp. 149, 152 (E.D.N.Y. 1992). This was the criminal trial of Babatunde Ayeni.

¹¹⁴ *Ayeni II*, 35 F.3d at 683.

¹¹⁵ *Id.*

agents directed the camera crew to tape Mrs. Ayeni's face. Mrs. Ayeni objected no further, believing that the camera crew was part of the team executing the warrant.¹¹⁶

Mrs. Ayeni was questioned about the whereabouts of her husband and about how the Ayenis could afford several expensive watches found in the apartment.¹¹⁷ The interrogation was recorded on videotape.¹¹⁸ In addition, the crew videotaped the agents' search of the apartment, and personal effects of the Ayeni's including books, photographs, financial statements and personal letters.¹¹⁹ Throughout the search, the agent wearing the microphone answered questions posed by the CBS crew.¹²⁰ When the search was concluded, while standing in the foyer of the apartment, he detailed "the modus operandi of people who commit credit card fraud."¹²¹ Finally, he led the crew out of the apartment, expressing his disappointment that the search uncovered nothing. In all, the crew taped for approximately twenty minutes.¹²²

B. *The District Court Decision*

Tawa and Kayode Ayeni brought suit against CBS and Mottola alleging fourth amendment violations. The plaintiffs argued that the search exceeded the limits of the Fourth Amendment in that the access of the camera crew was compelled by government officials, the camera crew was not present for any legitimate law enforcement purpose, and the crew "took from the home for the purpose of broadcasting them to the world at large, pictures of intimate secrets of the household, including sequences of a cowering mother and child resisting videotaping."¹²³

Both Mottola and CBS moved to dismiss on the ground of qualified immunity.¹²⁴ Mottola claimed that his conduct did

¹¹⁶ *Ayeni I*, 848 F. Supp. at 365.

¹¹⁷ *Ayeni II*, 35 F.3d at 683.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 688.

¹²⁰ *United States v. Sanusi*, 813 F. Supp. 149, 152 (E.D.N.Y. 1992).

¹²¹ *Id.*

¹²² *Id.* at 151-52.

¹²³ *Ayeni I*, 848 F. Supp. at 364. The complaint also charged that "the officials had themselves obtained consentless entry, ostensibly by means of a search warrant." *Id.*

¹²⁴ *Id.* While Congress had not expressly created a remedy for violations of

not violate any "clearly established statutory or constitutional rights of which a reasonable person should have known" and, alternatively, that it was objectively reasonable for him to believe that his conduct did not violate clearly established rights.¹²⁵ CBS, in turn, argued that if, as plaintiffs alleged, the camera crew was acting with the permission of government agents, they should be entitled to the same qualified immunity enjoyed by those government officials.¹²⁶

Mottola's motion to dismiss was denied on the ground that clearly developed fourth amendment principles establish that a search of a home cannot exceed the limits set by the warrant authorizing the search.¹²⁷ According to the court, because expectations of privacy are greater in the home than almost anywhere else, the government's ability to enter the home is sharply restricted by the Fourth Amendment.¹²⁸ Only urgent governmental interests will justify intrusion into the home.¹²⁹ The court asserted that the Fourth Amendment further requires that even when the government possesses sufficient justification to enter the home, agents of the government must ensure that the interruption of privacy occasioned by them is minimized.¹³⁰ In furtherance of that purpose, agents are

constitutional rights by federal agents, a cause of action for such violations was inferred to exist by the Supreme Court in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Damages against state officers for similar violations may be granted pursuant to 42 U.S.C. § 1983. That statute provides, in relevant part, that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

The standards for imposing liability on government agents are substantially the same for both federal and state agents. In both cases it is necessary to determine whether clearly established principles exist such that the officer could reasonably believe that she acted in good faith. See *Pierson v. Ray*, 386 U.S. 547 (1967). Where such reasonable beliefs exist, agents are immune from personal liability.

¹²⁵ *Ayeni I*, 848 F. Supp. at 365.

¹²⁶ *Id.* at 367.

¹²⁷ *Id.* at 366.

¹²⁸ *Id.* at 367.

¹²⁹ *Id.* at 366.

¹³⁰ *Id.* Thus, searches may not be unreasonably destructive, *United States v.*

bound to adhere strictly to the limits of the warrant authorizing their entry.¹³¹

The court concluded that Mottola violated the Fourth Amendment when, notwithstanding the absence of authorization in the warrant, he allowed the CBS camera crew to enter the Ayeni home and videotape the search.¹³² According to the court, a reasonable official would have understood that inviting persons to the execution of a search warrant, exclusively "so that they could titillate and entertain others was beyond the scope of what was lawfully authorized by the warrant."¹³³ Likening Mottola's actions to those of "a rogue policeman using his official position to break into a home in order to steal objects for his own profit or that of another,"¹³⁴ the court denied his motion to dismiss.

CBS's claims were similarly rejected. The court held that CBS's claim of immunity was meritless and that its actions violated the Fourth Amendment.¹³⁵ According to the court, "qualified immunity . . . acts to safeguard the government, and thereby to protect the public at large, not to benefit its agents."¹³⁶ CBS therefore could not benefit from qualified immunity even though it was acting under color of official right.¹³⁷ Rather, its actions would be subjected to fourth amendment scrutiny.

Application of fourth amendment standards to CBS's action resulted in the court's denial of the motion to dismiss. The court held that the videotaping was a seizure of the images of the Ayeni household without permission or official right and therefore violated the Fourth Amendment.¹³⁸ The crew's presence in the Ayeni home was not authorized by the warrant,

Becker, 929 F.2d 442 (9th Cir.), cert. denied, 502 U.S. 862, 112 S. Ct. 183 (1991); agents may only search in areas that could reasonably contain the items specified in the warrant, *United States v. Ross*, 456 U.S. 798 (1982); and, those searching may not remain on the premises for an unreasonable length of time after the search is complete, *United States v. Corrado*, 803 F. Supp. 1280, 1285 (M.D. Tenn. 1992). *Id.*

¹³¹ *Ayeni I*, 848 F. Supp. at 366.

¹³² *Id.* at 368.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 367 (citation omitted).

¹³⁷ *Ayeni I*, 848 F. Supp. at 368.

¹³⁸ *Id.*

served no legitimate law enforcement purpose and was not consented to by Mrs. Ayeni.¹³⁹

C. *The Second Circuit Decision*¹⁴⁰

On appeal, the Court of Appeals for the Second Circuit addressed the plaintiffs' claims that Mottola's actions violated the Fourth Amendment in that "(a) the Ayenis' privacy was invaded by the presence of unauthorized persons in their home and (b) the conduct of the search was excessively intrusive."¹⁴¹ The Second Circuit stated that the fundamental objective of the Fourth Amendment is to ensure "the protection of privacy from encroachment by government officers"¹⁴² and that private dwellings are ordinarily afforded the most stringent fourth amendment protection.¹⁴³ Determination of when a warrant will be issued and how it will be executed therefore rests with judicial, rather than law enforcement, officers,¹⁴⁴ with the actions of officers executing a warrant narrowly limited to those expressly or impliedly authorized by the warrant.¹⁴⁵ Like the district court, the circuit court found that Mottola exceeded the bounds of well-established principles when he brought into the Ayeni home persons whose presence was neither authorized by the warrant nor served any legitimate law enforcement purpose.¹⁴⁶ Thus, the court held that "an objectively reasonable officer could not have concluded that inviting a television crew—or any third party not providing assistance to law enforcement—to participate in a search was in accordance with Fourth Amendment requirements."¹⁴⁷

Similarly, the court held that the search violated the Fourth Amendment in that it was excessively intrusive.¹⁴⁸

¹³⁹ *Id.* at 368.

¹⁴⁰ Because CBS arrived at a settlement with the Ayenis, Agent Mottola was the only party to appeal. The terms of the settlement between CBS and the Ayenis were not disclosed.

¹⁴¹ *Ayeni II*, 35 F.2d at 684.

¹⁴² *Id.*

¹⁴³ *Id.* at 685.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 685.

¹⁴⁶ *Id.* at 686.

¹⁴⁷ *Ayeni II*, 35 F.2d at 686.

¹⁴⁸ *Id.* at 688.

The court noted that searches involving documents, like that in *Ayeni*, must be conducted in a manner that "minimizes unwarranted intrusions upon privacy."¹⁴⁹ Agent Mottola flaunted that requirement. The court found the intrusion was aggravated, rather than minimized, by two factors. First, private documents were viewed by "unauthorized persons with no business being in the home at all."¹⁵⁰ Second, the court asserted that "[t]he video and sound recordings were 'seizures' under the Fourth Amendment, and rendered the search far more intrusive than it needed to be."¹⁵¹ The court offered no justification for its conclusion that videotaping was a seizure other than stating its agreement with the district court's finding.¹⁵²

III. THE RIGHT RESULT FOR THE WRONG REASONS

The significance of the Second Circuit's decision in *Ayeni* lies in the reasoning of the court rather than the result. The *Ayeni* decision was correct to the extent that it validated expectations of privacy which attach to the home. The failure of *Ayeni* is that its conclusion is based partially on the characterization of the videotaping by the CBS camera crew as a fourth amendment seizure. This characterization perpetuates a split among the circuits which should be resolved in favor of the Sixth Circuit position. Videotaping is neither a seizure of property, as the Second Circuit held in *Ayeni* and *Villegas*, nor is it a seizure of the person, as the Fourth Circuit seems to assert.

The Supreme Court established in *Jacobsen* that a seizure of property requires an interference with that property akin to conversion.¹⁵³ An image not fixed in tangible form is not property. But even assuming that it is, the videotaping is not a seizure because it does not interfere with any possessory interest. Therefore, the Second Circuit's characterization is incorrect. The Fourth Circuit position is also flawed. *Jacobsen* es-

¹⁴⁹ *Id.* at 688 (citation omitted).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* The Circuit court remanded the case only for jury determination of whether Mottola was present and played a role in permitting the CBS news crew to be present at the search. *Id.* at 689, n.11.

¹⁵³ *United States v. Jacobsen*, 466 U.S. 109, 113, 121 (1984).

established that a seizure of the person requires an interference with liberty.¹⁵⁴ Because freedom of movement is in no way impeded by the taking of a photograph, a photograph is not a seizure of the person.

The danger of *Ayeni*, *Villegas* and *Espinoza* is that they have the potential of raising impediments for law enforcement without in any way furthering the values protected by the Fourth Amendment. Mischaracterizing photography and videography as seizures undermines effective law enforcement. Photography and video surveillance of known criminals in public places are invaluable to police efforts to derail criminal organizations.¹⁵⁵ These tools allow police to identify such organizations' members and structure.¹⁵⁶ If photographs are construed to be fourth amendment seizures, however, police surveillance activities will be thwarted; after *Jacobsen*, a seizure of property—here the image of a person—triggers fourth amendment protection notwithstanding the absence of infringements of privacy or liberty interests. All evidence procured through warrantless videotaping by police could be excluded, not just the videotaping of a person inside his or her home but videotaping of persons interacting in public.

A better approach to the concerns raised in *Ayeni* would be to characterize videotaping as a search. This approach is consistent with precedent and does not unduly impede use of videotaping by police where the subject lacks a reasonable expectation of privacy. At the same time, however, this approach would curb abusive invasions of privacy like the one in *Ayeni*.

A. *The Right Result*

Ayeni is correct to the extent that it vindicates the inviolability of the home. The primacy of the home to American society prompted its express inclusion in the Fourth Amendment. A home, by definition, is endowed with sufficient attributes of privacy that intrusion into it cannot be undertak-

¹⁵⁴ *Id.* at 113, n.5.

¹⁵⁵ JAMES G. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* § 1.2 (1995).

¹⁵⁶ *Id.*

en lightly.¹⁵⁷ "[T]he right of a man to retreat into his own home" has, in fact, been deemed to stand "at the very core of the Fourth Amendment."¹⁵⁸ The evolution of the rule that a warrantless entry into a home is unreasonable per se is further testament to that primacy.¹⁵⁹

The warrant and reasonableness requirements of the Fourth Amendment suffice to condemn Mottola's actions. The unreasonableness of facilitating entry by the camera crew into the Ayeni home is manifest. As both the district and circuit courts noted, the presence of the crew and the taping were neither authorized by the warrant nor were they necessary to some legitimate law enforcement purpose.¹⁶⁰ Mottola blatantly and unjustifiably disregarded the limits of the warrant.

The nature and quality of the fourth amendment interest infringed in *Ayeni* is dear—the privacy of the home. That interest was defiled both by the presence in the home of the camera crew, and the videotaping, intended for nationwide broadcast. No justification was offered for the presence of the camera crew or the taping.¹⁶¹ It is, in fact, difficult to imagine circumstances in which one could have been. One is hard-pressed to identify a governmental interest which would suffice to justify the government's providing one citizen with the ability to profit at the expense of another's constitutional rights. Because the home is endowed with significant privacy interests, any intrusion into it must be justified by a governmental interest which outweighs the reasonable expectation of privacy maintained by the dwellers of the home. No such interest was offered by the government in *Ayeni*, hence its actions violated the Fourth Amendment.

¹⁵⁷ *Soldal v. Cook County*, 113 S. Ct. 538, 545 (1992); *Ayeni II*, 35 F.3d at 684.

¹⁵⁸ *Soldal*, 113 S. Ct. at 543.

¹⁵⁹ Other examples abound. See, e.g., *Payton v. New York*, 445 U.S. 573 (1980); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ulman*, 367 U.S. 497 (1960) (Harlan, J., dissenting). The notion that the home is inviolable was articulated in *Entick v. Carrington* in a passage worth quoting: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter, but the King of England may not enter—all his forces dare not cross the threshold of the ruined tenement!" 19 Howell's State Trials 1029 (1765) (quoted in *Frank v. Maryland*, 359 U.S. 360, 378-79 (1959) (Douglas, J., dissenting)).

¹⁶⁰ *Ayeni II*, 35 F.3d at 685-86; *Ayeni I*, 848 F. Supp. at 368.

¹⁶¹ *Ayeni II*, 35 F.3d at 687; *Ayeni I*, 848 F. Supp. at 368.

B. *The Wrong Reasons*

While the results reached in *Ayeni* may be proper, its means are inherently flawed. The position that videotaping effects a fourth amendment seizure is incorrect. Neither the reasoning of the Second Circuit nor that of the Fourth Circuit withstands scrutiny. Supreme Court jurisprudence and the words of the amendment itself require the conclusion that photography and videotaping effect neither seizures of property nor seizures of the person in fourth amendment terms.

1. Videotaping Is Not a Seizure of Property

The *Ayeni* court makes no reference to *Jacobsen* in arriving at its conclusion that the videotaping by the CBS crew was a seizure. Rather, the court bases its holding on *Berger* and *Katz*. To be sure, *Berger* and *Katz* both characterize conversations as property subject to seizure.¹⁶² Analysis of the rationales advanced for the disposition of those cases, in light of the framework for judging fourth amendment claims established by *Jacobsen*, however, reveals that neither conversations nor images may be seized in fourth amendment terms.

The language employed in *Berger* and *Katz* belies those opinions' extension to the proposition that images may be seized because both decisions are based on the premise that wiretapping in specific circumstances is an unreasonable invasion of privacy. Notwithstanding various references by the *Berger* court to the seizure of conversations, the essence of the holding in *Berger* is that a statute which authorizes police to tap telephone lines for months on end is a general search proscribed by the Fourth Amendment. *Berger* did not proclaim the existence of a constitutionally protected possessory interest in a conversation as such. Rather, it condemned the means by which conversations were intercepted in that case. The Court's opinion was predicated on its judgment that "the use of electronic devices to capture [conversations] was a *search* within the meaning of the Amendment."¹⁶³ It was the invasion of

¹⁶² *Berger v. New York*, 388 U.S. 41, 44 (1967); *Katz v. United States*, 389 U.S. 347, 353 (1967).

¹⁶³ *Berger*, 388 U.S. at 51 (emphasis added).

privacy authorized by the New York statute which was an affront to the Fourth Amendment.

The decision in *Katz* rests on the same foundation. The government infringed the Fourth Amendment in *Katz* by exposing a conversation which the defendant sought to keep private and could reasonably expect would be kept private. The decision is not concerned with any seizure of property. It was because "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the *privacy* upon which he justifiably relied"¹⁶⁴ that the Fourth Amendment was violated.

It is plain that after *Jacobsen* the governmental actions of the type complained of in *Berger* and *Katz* are not fourth amendment seizures. Both *Berger* and *Katz* point to infringements of privacy interests.¹⁶⁵ *Jacobsen* makes clear that privacy interests are protected by the prohibition of unreasonable *searches*, not unreasonable *seizures*.¹⁶⁶

Even assuming that words or images are property in some sense, no seizure under the *Jacobsen* definition is effected by recording a conversation or taking a photograph. In order to effect a seizure after *Jacobsen*, an infringement of a possessory interest is necessary. Recording a conversation or taking a photograph is no such infringement. The content of a conversation is not affected because it is recorded. Observation of images, similarly, does not affect those images. They are not somehow changed because they are being observed; nor is ownership of them affected, if such ownership can be deemed to exist. The tape recorder and camera are merely extensions of the senses which fix in tangible form what could otherwise be recalled from memory.

This analysis is similar to that employed by the Sixth Circuit in *Bills*. The *Bills* court took heed of the Supreme Court's admonition in *Arizona v. Hicks* that a seizure requires some meaningful interference with a possessory interest. Accordingly, the *Bills* court concluded that "the recording of visual images of a scene by means of photography does not amount to a seizure because it does not 'meaningfully interfere' with

¹⁶⁴ *Katz*, 389 U.S. at 353 (emphasis added).

¹⁶⁵ *Id.* at 353.

¹⁶⁶ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

any possessory interest."¹⁶⁷ Again, recording of a scene does not affect that scene.

The conclusions of *Bills* and *Jacobsen* are eminently sensible. Only takings of property traditionally have been considered seizures.¹⁶⁸ As pointed out by Justice Black in his dissent in *Berger*, the Fourth Amendment proscribes only unreasonable seizures of "persons, houses, papers, and effects." "This literal language imports tangible things."¹⁶⁹ Certainly, technological advances have increased the intrusiveness of surveillance. That increased intrusiveness, however, does not justify broad deviation from the constitutional definition of seizure.¹⁷⁰

2. Videotaping Is Not a Seizure of the Person

The Fourth Circuit's assertion that a photograph is somehow a seizure of the person similarly cannot withstand scrutiny. The standard embraced by the Supreme Court in *Jacobsen*, and cases from which the *Jacobsen* standard is drawn, require the conclusion that the taking of a photograph does not constitute a fourth amendment seizure.

Under *Jacobsen*, a seizure of the person occurs where there is some meaningful interference with that person's liberty.¹⁷¹ The value which the Fourth Amendment safeguards in this respect is the right of every individual to move about freely and without restraint by the government.¹⁷² In an individual case, when interference with liberty becomes a seizure may not be ascertained easily.¹⁷³ Examples of when a seizure occurs range from the extreme and obvious—killing an individual—to the much slighter interference of preventing a person from moving from an area where he or she is encountered by police.¹⁷⁴ The standard in all cases, however, is the same: the

¹⁶⁷ *Bills v. Aseltine*, 958 F.2d 697, 707 (6th Cir. 1992):

¹⁶⁸ *Berger*, 388 U.S. at 78 (Burger, J., dissenting).

¹⁶⁹ *Id.*

¹⁷⁰ *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting).

¹⁷¹ *Jacobsen*, 466 U.S. at 113, n.5.

¹⁷² See generally *Tennessee v. Garner*, 471 U.S. 1 (1985); *Cupp v. Murphy*, 412 U.S. 291 (1973); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁷³ *Terry*, 392 U.S. at 9-10.

¹⁷⁴ Compare *Garner*, 471 U.S. 1 with *Terry*, 392 U.S. 1.

conclusion that a seizure of the person has occurred rests on a finding that his ability to move about has been impeded by the exertion of governmental authority. The *Terry* Court, for example, stated: "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."¹⁷⁵ In short, a seizure of the person is not some esoteric event; it requires the government to prevent a person from walking away. Snapping a photograph of an individual or recording her image with a video camera obviously does not act as a physical bar to that person's movements. It therefore cannot be construed to be a fourth amendment seizure of the person.

C. *The Consequences of Ayeni for Law Enforcement and a Better Approach*

Mischaracterizing videotaping and photography as a seizure places unjustifiable impediments in the way of law enforcement and leads to absurd results. After *Jacobsen*, a seizure is actionable by itself.¹⁷⁶ Police officers would be required to comply with the Fourth Amendment even absent an infringement of the privacy and liberty interests of those being observed. The fruits of surveillance, even of public places, therefore could be excluded from trial. Absurdly, officers directly observing suspects in public could later testify as to what they saw, notes made by the officers could be introduced into evidence, but the more reliable methods of chronicling the movements of suspects, such as photography and videotaping, would be excluded as impermissible fourth amendment seizures.

¹⁷⁵ *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968).

¹⁷⁶ See *Soldal v. Cook County*, 113 S. Ct. 538 (1992).

1. The Consequences for Law Enforcement¹⁷⁷

Labelling photography and videotaping as fourth amendment seizures has the potential of unjustifiably undermining effective law enforcement. Photographic evidence, currently heavily relied upon in prosecution, will likely be excluded in many circumstances, even when the evidence is secured without a violation of a privacy or liberty interest. This hindrance inappropriately attaches regardless of where a seizure takes place: a photograph taken on the street is just as much a seizure as a photograph taken after warrantless entry into a home. Curtailing police in this context is unnecessary because the values sought to be protected by the Fourth Amendment are not furthered.

Photography and videotaping in public places are especial-

¹⁷⁷ Consideration of the burdens on law enforcement is of no less importance to fourth amendment analysis as is consideration of individual liberties. The Fourth Amendment highlights the balance sought to be achieved by the framers of the Constitution between the rights of the individual and the powers of government. It is a balance between freedom and order. Chief Justice Rehnquist has argued convincingly that ensuring that law enforcement is fair and effective is central to that balance. According to Rehnquist:

In a society as populous and complex as ours, with the vast number of laws designed to regulate the lives of all of us, voluntary compliance with those laws is a virtually indispensable condition to a law abiding society. The great disadvantage of making the laws any more difficult to enforce than they now are is that it tends to make a sucker or a chump of the citizen who obeys the law because he feels he ought to obey it. It lessens the pressure to obey the law that is felt by the not inconsiderable number of us who are law abiding not out of a sense of moral duty but out of a fear of being caught if we transgress. As to that class, diminution in the effectiveness of the sanction will decrease the propensity to obey the law.

William H. Rehnquist, *Privacy, You've Come a Long Way Baby: Is an Expanded Right of Privacy Consistent with Fair and Efficient Law Enforcement?*, 23 KAN. L. REV. 1, 19 (1974).

Another Chief Justice described the situation thus: "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Id.* at 22 (quoting Chief Justice Hughes writing for the majority in *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)). In fourth amendment terms this balance is that between the core values which the Fourth Amendment seeks to protect and the ability of police to search and seize in a manner consistent with the Amendment. For more on this subject see R.N. BERKE, *SECURITY AND SOCIETY* (1986).

ly important to investigations of offenses such as gambling, loan sharking or drug trafficking.¹⁷⁸ These crimes generally are committed by networks of criminals working together and are characterized by the involvement of consenting participants rather than victims.¹⁷⁹ Police therefore are faced with a lack of people willing to provide them with information.¹⁸⁰ Photography and videotaping allow police not only to identify the members of these organizations but also to determine the structure of the organization by observing who meets with whom and the frequency with which such meetings occur.¹⁸¹

The goal of police photography and videotaping is for the photographs or videotapes to be admitted into evidence. Such documentation provides the jury with accurate visual records of the connections among defendants that must be established if a criminal organization is to be derailed. The cliché that "a picture is worth a thousand words" is especially true for the prosecution of organized crime members. Photographic evidence illustrating connections among defendants establishes those connections in a way that mere testimony does not. If videotaping is mischaracterized as a seizure, however, even where photographs are taken in public places, they will not be admitted in many circumstances. A seizure is a seizure whether it occurs in the Ayeni living room or on the street among a crowd of people. Police officers seeking to take photographs or videotape suspects in public places will have to be able to demonstrate probable cause to do so or risk exclusion of the evidence they obtain through videotaping.¹⁸²

It is the requirement that probable cause be present before a seizure may be effected that will preclude introduction of much photographic evidence. The American system of criminal justice gives law enforcement the burden of gathering the information that may lead to a conviction for the commission of a

¹⁷⁸ CARR, *supra* note 155, § 1.2(b). Cf. EDITH J. LAPIDUS, *EAVESDROPPING ON TRIAL* 203 (1974). On police surveillance powers and the implications of technological advances on Fourth Amendment concerns see Michael Goldsmith, *Eavesdropping Reform: The Legality of Roving Surveillance*, 65 U. ILL. L. REV. 401 (1987); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L. J. 549 (1990).

¹⁷⁹ LAPIDUS, *supra* note 178, at 203.

¹⁸⁰ LAPIDUS, *supra* note 178, at 203.

¹⁸¹ CARR, *supra* note 155, § 1.2(b).

¹⁸² See *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968).

crime.¹⁸³ When police begin a criminal investigation, they frequently do not have probable cause to search any place, arrest anyone or seize anything.¹⁸⁴ The entire purpose of the investigation is to provide them with sufficient information to give them probable cause either to search or seize.¹⁸⁵ Due to the absence of probable cause, even photographs taken in public places will often be excluded from evidence.

A simple hypothetical illustrates the absurd results of characterizing videotaping as a seizure. A police officer, acting on a hunch, follows someone whom the officer believes is involved in an illegal gambling operation. The officer observes the suspect meeting with three people known to be involved in illegal gambling, once in a public restaurant, once in a park and once on the street. The suspect later is indicted for his involvement in the operation run by the other three. The officer can testify to observing meetings between the suspect and each of the other three, but the more reliable record of the meetings—photographs or videotape—may not be admitted into evidence. It can be argued that a seizure without probable cause, an unreasonable seizure, was effected.

Ayeni presents a particularly outrageous set of facts: a reckless police officer with a camera crew in tow, acting out a Rambo-like fantasy at the expense of a mother and her child. The officer's behavior amounted to nothing more than cheap theatrics, properly condemned. But the legitimate purposes for which most officers in most instances use cameras are curbed by the *Ayeni* holding as well. Photographs of a suspected felon, sitting in a restaurant open to the public or suspected drug dealers meeting in a public park may not be admitted into evidence. Photographs chronicling daily meetings on public streets by high-ranking members of organized crime similarly may not be admitted.

The absurdity of the mischaracterization is that it furthers no values the Fourth Amendment protects. That no privacy interest is furthered plainly follows from the definitions of privacy established in *Jacobsen*. A seizure has nothing whatso-

¹⁸³ Rehnquist, *supra* note 177, at 10.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

ever to do with privacy.¹⁸⁶ Liberty is similarly not expanded by the characterization because videotaping or photographing a person does not physically restrain him. Finally, fourth amendment property concerns are not furthered by characterizing a videotaping as a seizure. Restrictions on appropriations of property were intended to ensure that the government did not use its powers to infringe upon the property rights of its citizens under the pretext of seeking to enforce the law. This prohibition ensures that no possessory interests are meaningfully interfered with by the government.¹⁸⁷ Images cannot be classified as property. Moreover, even if they could be, recording by police, exclusively for law enforcement purposes, does not meaningfully interfere with one's ownership of those images.

2. A Better Approach

A better approach to the issues raised in *Ayeni* would be to characterize videotaping as a fourth amendment search rather than a seizure. Such a characterization is consistent with precedent and does not unduly impede the use of videotaping by police. At the same time, it prevents abuses by either law enforcement officers or those acting pursuant to their authority.

What is objectionable about the filming of what transpired in *Ayeni* is not that the filming infringed some possessory interest which Tawa and Kayode Ayeni had in their images or the images of the inside of their home; it is the violation of the sanctity of their home that is objectionable. The Ayenis expected that when they entered their home and closed the door behind them their actions would not be monitored. In short, they had a reasonable expectation of privacy. Videotaping the search of their home violated that expectation. Because the videotaping threatened to expose to the world that which Tawa and Kayode Ayeni sought to preserve as private, the videotaping was objectionable.¹⁸⁸ Under the definitions established in *Jacobsen*, such a violation of privacy is a search, not a sei-

¹⁸⁶ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

¹⁸⁷ *See id.*

¹⁸⁸ *Id.*; *Katz v. United States*, 389 U.S. 347, 351 (1968).

zure.¹⁸⁹

Characterization of videotaping as a search affords the same degree of protection to citizens as does its characterization as a seizure without unduly limiting the activities of law enforcement officials. In all cases involving videotaping, the fundamental question will be the reasonableness of a person's expectation that his or her image, or those of his or her possessions will not be exposed to the public.¹⁹⁰ Thus, citizens are assured that what goes on within their homes, or their hotel rooms, or their private clubs will not be videotaped. Expectations of privacy in those places will almost always be reasonable.

Police, however, may continue to make use of photography and videotaping at their discretion, in circumstances where their subjects cannot reasonably expect privacy. Necessary evidence procured by police through videotaping will not be excluded on fourth amendment grounds. In short, if videotaping is characterized as a search, the rights of citizens will receive thorough protection without saddling police with absurd impediments.

CONCLUSION

In *Ayeni*, the Second Circuit mischaracterized videotaping as a seizure, unnecessarily perpetuating a split among the circuit courts. That characterization is inconsistent with precedent, imposes undue burdens on law enforcement and leads to absurd results. All of these detriments are avoided if videotaping is characterized as a search, without any attendant reduction in fourth amendment protection available to citizens.

Antonio Yanez, Jr.

¹⁸⁹ *Jacobsen*, 466 U.S. at 113.

¹⁹⁰ *Id.*; *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *New York v. Berger*, 388 U.S. 41, 75 (1967) (Black, J., dissenting) (The word "unreasonable" is "the key word permeating [the] whole Amendment."). See also, Amar, *supra* note 8, at 799.

