WHAT IS A SEARCH?
Not all searches are searches in a constitutional sense.

SEARCH IN FOURTH AMENDMENT SENSE
- Government action
- Reasonable expectation of privacy
  1) Actual subjective expectation of privacy
  2) Expectation that is societally recognized

1) Actual subjective expectation
- Has defendant manifested an expectation of privacy?
- Objective manifestation of a subjective expectation
- Commonwealth v. Bly

1/06/2010
Bly Facts
- Defendant under arrest
- Police have DNA from scene of murder
- Interview defendant in custody
- Defendant smoking
- Drinking from water bottle
- Interview concludes
- Defendant leaves butts and bottle

BLY HOLDING
- No search in Fourth Amendment sense
- No subjective expectation of privacy
  - Not abandonment
  - Wholesale failure to manifest (objectively) any subjective expectation of privacy in the items

Contrast Abandonment
- Commonwealth v. Perkins
- Cigarette butts and soda can
- Left behind at end of interview
- No subjective expectation of privacy
  - Defendant knew he couldn’t take them
  - No attempt to sanitize them
No Privacy in “Expectoration”

- Commonwealth v. Cabral
- Expectoration in street
- No Expectation of privacy in expectorate
- Abandoned by defendant

2) Societally Recognized Expectation of Privacy

- Overnight guests
- Less than overnight guests
  - Delivery persons
  - Undercover officers
- Common areas
- Restricted areas
  - (Bathroom)
  - (Private bedroom)

2) Societally Recognized Expectation of Privacy

- An expectation of privacy that society recognizes as objectively reasonable
- “Fuzzy standard”
- Bears an uncanny resemblance to those expectations of privacy that the Justices consider reasonable
- Minnesota v. Carter, Scalia concurrence
Societally Recognized

- Enhancement devices
  - Common ones
    - Flashlights, binoculars
  - Uncommon ones
    - Infrared imaging devices
    - Parabolic microphones
    - Advancing technology

Societally Recognized

- Canine enhancement & dog sniffs
  - Sniffs of luggage, cars & objects
  - Sniffs of the person
  - Sniffs around the dwelling

Illinois v. Caballes

- Defendant stopped for speeding
- Trooper writing citation and making inquiry of driver
- Another trooper arrives with canine unsolicited
- Dog walks around vehicle
- Hits on drugs inside trunk
- Duration of stop not prolonged
Caballes Decision

- Majority
  - No search in constitutional sense
  - No infringement on constitutionally protected privacy interest
  - Duration not unreasonably prolonged
  - Conduct revealing only possession of contraband does not intrude on privacy interest
  - No revelation about non-contraband

Majority Opinion

- Expressly does not address use of drug sniffing dogs
  - On a person
  - Around a residence

Dissenting Opinions

- Dog sniff not a limited intrusion
- First step in revealing intimate details
- Dogs err
- Fear of indiscriminate use in parking garages and around pedestrians
- Changes the character of a stop
Implications

- If dog sniff is a search ...
  - Probable cause is required;
- If dog sniff is not a search ...
  - No predicate required;
Is there a tenable middle ground?
See Commonwealth v. Johnston (PA)

Thermal Imaging

- Kyllo v. United States
- What limits on power of technology to shrink realm of guaranteed privacy?
- Sense enhancing technology
- Not in general public use
- Pierces interior of home
- “[I]n the home all details are intimate”

GPS Devices

- Is installation of a GPS device in defendant’s vehicle and monitoring of activities a search or a seizure?
  - Consider majority and concurring opinions in section following on What is a Seizure?
Trash Bags
- Distinguish trash bags from bags of trash
- Trash at roadside
- Long considered no expectation of privacy
- Trash Bags, Homeless and Dispossessed
  - Commonwealth v Nattoo
  - Contrast Appeals Court and Supreme Judicial Court Decisions
  - Commonwealth v. Porter P. (homeless shelter)

Nattoo Facts
- Owner buys mobile home
- Visits the premises which appear occupied
- Posts "No trespassing" signs
- Finds the door broken and Nattoo sleeping inside
- Tells Nattoo to leave
- Nattoo begs for time to collect belongings
- Police are called

Nattoo Facts
- Nattoo places belongings in plastic trash bags
- Carries bags and television set to driveway at edge of property to await girlfriend
- On other side of driveway are plastic bags containing trash
- Police arrest Nattoo on outstanding warrant
- Owner calls police and says plastic bags still there
- Officer returns to scene, looks in bag and finds a gun
Nattoo Appeals Court Decision
- Opening bag not a search
- Any subjective expectation of privacy not reasonable
- Any traveler could have opened the bag
- Police should be in no worse position
- Police not required to arrest at convenience of defendant
- Nor required to safeguard the bags.
- Does not address whether opening qualified as inventory search

Nattoo SJC Decision
- Police “search” of Nattoo’s bag and seizure of gun reasonable
- No discussion of defendant’s expectation of privacy
- Rules sub silentio that defendant had an expectation of privacy in the bag
- Query: if opening bag is a search, why isn’t a search warrant required?