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UNITED STATES V. JONES: CHANGING EXPECTATIONS OF PRIVACY IN THE DIGITAL AGE

Daniel W. Edwards*

"It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."¹

Does the legitimate expectation of privacy contained in the Fourth Amendment retreat as technology advances and becomes publicly available? The Supreme Court in *United States v. Jones*² attempted to answer the question as it relates to GPS monitoring.

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search 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.³

The Amendment thus does three things: it provides what is protected, "persons, houses, papers, and effects"; it protects the people from "unreasonable searches and seizures"; and it mandates the requirements for warrants.⁴ The issue in *Jones* was only whether the individual was protected under the Fourth Amendment from GPS monitoring when the device is placed on a personal automobile, not whether, if it is protected, a warrant or a particular degree of reasonableness was required.⁵

I. THE PRE-KATZ⁶ STANDARD: INVASION OF A PERSON, HOUSE, PAPER, OR EFFECT

Early cases required some type of trespass to create a Fourth Amendment issue. Not only was a trespass required, but the item had to be specifically the person, the physical place of the person's dwelling, the person's papers, or the person's effects. In *Hester v. United States*, the Court found no Fourth Amendment violation when government agents observed the defendant from fifty to one hundred yards away, though they were on Hester's land.⁷ The agents recovered certain items of evidence, including broken bottles that were found to contain illegal whiskey.⁸ The Court found no illegality in the viewing or the retrieval of the whiskey bottles, holding that,

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¹ *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001).

² *United States v. Jones*, 132 S. Ct. 945, 947-52 (2012).

³ U.S. CONST. amend. IV.

⁴ *Id.*

⁵ *Jones*, 132 S. Ct. at 947-53.

⁶ *Katz v. United States*, 389 U.S. 347 (1967). See discussion *infra* Section II.

⁷ 265 U.S. 57, 58-59 (1924).

⁸ *Id.* at 58.

although there was a trespass, there was no illegal search or seizure because it did not involve the defendant's "person, house, papers, or effects."⁹

One of the first cases involving the interplay of the Fourth Amendment and advancing technology concerned the invention of the telephone. In *Olmstead v. United States*, the Supreme Court held that the interception of private telephone conversations between the defendant and others did not amount to a Fourth Amendment violation:¹⁰

The well-known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will. . . .

The amendment itself shows that the search is to be of material things – the person, the house, his papers, or his effects.¹¹

The Court held that there were no searches and no seizures involved in wiretapping, accomplished outside of the defendant's home¹²:

The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched. . . .

The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment.¹³

Thirty years later the Court addressed the issue of electronic recordings of conversations *within* a dwelling in *Silverman v. United States*.¹⁴ There, the government used an electronic listening device attached to an extension, attaching it next to a heating duct in a dwelling, "thus converting their entire heating system into a conductor of sound."¹⁵ The Court explained, "We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society."¹⁶ The Court found that there was actual penetration into the dwelling and thus a Fourth Amendment violation.¹⁷ *Silverman* continued the notion that there had to be a physical intrusion to constitute a search or seizure.¹⁸ The decision rested upon the notion that there was "an actual intrusion into a constitutionally protected area."¹⁹

⁹ *Id.* at 58-59.

¹⁰ 277 U.S. 438, 466-67 (1928).

¹¹ *Id.* at 463-64.

¹² *Id.*

¹³ *Id.* at 465-66.

¹⁴ 365 U.S. 505, 506-08 (1961).

¹⁵ *Id.* at 506-07.

¹⁶ *Id.* at 509.

¹⁷ *Id.* at 509-13.

¹⁸ *Id.* at 508-13.

¹⁹ *Id.* at 512.

II. THE KATZ STANDARD: LEGITIMATE EXPECTATION OF PRIVACY

Finding the earlier cases unsatisfactory in resolving evolving Fourth Amendment issues, the Court in *Katz v. United States*²⁰ rejected the "physical trespass" theory in favor of a "legitimate expectation of privacy" test.²¹ The Court dismissed any formulation of the issue focused on "constitutionally protected areas" as "misleading"²²:

For the 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 constitutionally protected.²³

The Court held that an individual who entered a public phone booth and closed the door was protected by the Fourth Amendment, even though there was no physical trespass to the telephone booth by the government's placement of a listening device on the outside of the booth.²⁴ An individual entering into a phone booth and closing a door has demonstrated a desire to maintain personal privacy.²⁵ Society has the expectation that when a person enters a phone booth and closes the door, his privacy should be respected.²⁶ The combination of what the individual did to protect his own privacy and what society was willing to protect created an interest that was protected by the Fourth Amendment.²⁷ Justice Harlan in his concurrence created the paradigm that was adopted in 1967 and in effect to this day: a subjective expectation of privacy based on the person's conduct plus an objective expectation of privacy based on what is recognized by society as a reasonable expectation of privacy equals a legitimate expectation of privacy that the courts are willing to protect.²⁸

After *Katz*, for Fourth Amendment purposes, whether there is a "search" or "seizure" is determined by reference to a legitimate expectation of privacy.²⁹ Thus, a "search" is an extension of the senses into a legitimate expectation of privacy. A "seizure" is an intrusion into or interference with a legitimate expectation of privacy.³⁰

²⁰ 389 U.S. 347 (1967).

²¹ See, e.g., *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (recognizing that *Katz* overruled *Olmstead*).

²² *Katz*, 389 U.S. at 351.

²³ *Id.* (internal citations omitted).

²⁴ *Id.* at 352-53.

²⁵ *Id.* at 352.

²⁶ *Id.* at 353.

²⁷ *Id.* at 352-53.

²⁸ *Id.* at 361 (Harlan, J., concurring).

²⁹ See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 151 (1978) ("Only legitimate expectations of privacy are protected by the Constitution.").

³⁰ E.g., *United States v. Jacobsen*, 466 U.S. 109, 119-20 (1984) (finding that a Drug Enforcement Administration agent's search of a damaged cardboard box discovered by employees of a private freight carrier "infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment").

III. *UNITED STATES V. JONES*³¹: LEGITIMATE EXPECTATION OF PRIVACY PLUS INVASION OF A POSSESSORY INTEREST

Without question, advancing technology has the power to reduce citizens' Fourth Amendment right to privacy by bringing invasive applications into general public use. In *United States v. Jones*, the Court, in an opinion authored by Justice Scalia, attempts to stem the tide of advancing technology, in particular GPS monitoring, by re-installing a Fourth Amendment prohibition against invasion of a possessory interest while leaving in place the legitimate expectation of privacy test that was introduced in *Katz*.³² By including in the definition of a search an invasion of a possessory interest in a protected place ("persons, houses, papers, and effects") to obtain information, the Court determined that GPS monitoring that included the installation of a device on a defendant's car was a "search" that required either a warrant or a reasonable search under the Fourth Amendment.³³

Antoine Jones was the focus of an investigation by a joint task force of the FBI and Metropolitan Police Department for the District of Columbia.³⁴ Officers watched Jones by the use of visual observation, pen registers, and wiretaps.³⁵ Law enforcement placed a GPS monitor on Jones's personal vehicle.³⁶ The government tracked the vehicle 24 hours a day, seven days a week, for the next 28 days.³⁷ The monitor relayed over 2,000 pages of data.³⁸ Using the data from the monitoring, law enforcement searched a conspirator's house that contained \$850,000 and 97 kilograms of cocaine.³⁹ The defendant was indicted.⁴⁰ The defendant filed a motion to suppress the data from the GPS monitoring.⁴¹ The district court granted the motion in part, suppressing only the information gathered while the Jones's car was parked in his private garage.⁴² After the first trial ended with a hung jury, the government got a second indictment, held a second trial using the same GPS information allowed in the first, and won a guilty verdict; the defendant was sentenced to life imprisonment.⁴³ The Court of Appeals for the District of Columbia reversed the conviction, holding that the GPS monitoring, even outside the garage, violated the Fourth Amendment.⁴⁴

Justice Scalia, always an originalist,⁴⁵ held for the Court that "[a]t bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" ⁴⁶ At oral argument, the Justice stated:

³¹ 132 S. Ct. 945 (2012).

³² *Id.* at 949-950; *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

³³ *Jones*, 132 S. Ct. at 949.

³⁴ *Id.* at 947.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 948-949.

⁴⁰ *Id.* at 948.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 948-49.

⁴⁴ *United States v. Maynard*, 615 F.3d 544, 568 (2010).

⁴⁵ An "originalist" interprets the Constitution "according to the intent of those who drafted and adopted it." BLACK'S LAW DICTIONARY 1210 (9th ed. 2009). Justice Scalia is a self-described originalist. *E.g.*, 60 *Minutes: Justice Scalia on the Record* (CBS television broadcast Feb. 11, 2009), available at http://www.cbsnews.com/2100-18560_162-4040290.html?pageNum=7.

⁴⁶ *Jones*, 132 S. Ct. at 950 (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

However, it is one thing to add that privacy concept to the Fourth Amendment as it originally existed, and it is quite something else to use that concept to narrow the Fourth Amendment from what it originally meant. And it seems to me that when that device is installed against the will of the owner of the car on the car, that is unquestionably a trespass and thereby rendering the owner of the car not secure in his effects – the car is one of his effects – against an unreasonable search and seizure.⁴⁷

To make Justice Scalia's position clear, two principles apply in determining whether there has been a search for Fourth Amendment purposes: first, a trespass into a possessory interest of a protected place to gather information, and second, the "legitimate expectation of privacy" principle originating in *Katz*.⁴⁸ Here, the GPS monitor was placed on a personal automobile—an invasion into a possessory interest.⁴⁹ Justice Scalia found that the automobile was an "effect," and thus a protected place.⁵⁰ The Court further held 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.'"⁵¹ For Justice Scalia, the issue was whether the placement of the monitor invaded the Fourth Amendment protection afforded Jones; the actual monitoring of Jones' vehicle while on public streets was permissible by clear Supreme Court precedent.⁵²

Duration, a key issue for the concurrence of Justice Alito,⁵³ was not an issue for Justice Scalia, who stated in oral argument:

A hundred times zero equals zero. If . . . there is no invasion of privacy for one day, there's no invasion of privacy for a hundred days. Now, it may be unreasonable police conduct, and we can handle that with laws. But if there's no invasion of privacy, no matter how many days you do it, there's no invasion of privacy.⁵⁴

Justice Alito, with three Justices joining his opinion, rejected the re-establishment of the pre-*Katz* "invasion of a possessory interest" principle, but agreed that there was a Fourth Amendment violation because citizens have a legitimate expectation of privacy from lengthy GPS monitoring.⁵⁵ Justice Alito, citing Supreme Court precedent for the notion that a "seizure" exists when there is a "meaningful interference with an individual's possessory interest in that property,"⁵⁶ found that there was no Fourth Amendment seizure in *Jones* because no "meaningful interference" was caused by the placement of the monitor on the automobile.⁵⁷ "It is clear that the attachment of the GPS device was not itself a search"⁵⁸

⁴⁷ Transcript of Oral Argument at 6-7, *United States v. Jones*, 2011 WL 5360051 (2011) (No. 10-1259), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf.

⁴⁸ *Jones*, 132 S. Ct. at 949-950.

⁴⁹ *Id.* at 947.

⁵⁰ *Id.* at 949.

⁵¹ *Id.* (internal footnote omitted).

⁵² *Id.* at 951-952 (citing *United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Karo*, 468 U.S. 705 (1984)).

⁵³ *Id.* at 958 (Alito, J., concurring).

⁵⁴ Transcript of Oral Argument at 40-41, *United States v. Jones*, 2011 WL 5360051 (2011) (No. 10-1259), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf.

⁵⁵ See *Jones*, 132 S. Ct. at 957, 961-962, 964 (Alito, J., concurring).

⁵⁶ *Id.* at 958 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

⁵⁷ *Id.*

⁵⁸ *Id.*

The *Jones* case left unanswered much more than it solved. It told us that the placement of a GPS monitor upon an individual's automobile is a Fourth Amendment search because it invades a possessory interest of a constitutionally protected item to obtain information. What it did not do is establish any helpful standard for assessing the impact of developing technology on Fourth Amendment jurisprudence in the future.

IV. "GENERAL PUBLIC USE"

Cases pre-dating *Jones* held that as technology comes in general public use, the objective expectation of privacy is reduced and, therefore, no legitimate expectation of privacy exists. In *Dow Chemical Co. v. United States*,⁵⁹ the Court held that aerial photographs of a chemical company's industrial complex were not a search, even though the camera used is described in the dissent as a "\$22,000 mapping camera."⁶⁰ The opinion of the Court discussed the camera by saying:

Here, EPA was not employing some unique sensory device that, for example could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking. . . .

It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment *not generally available to the public*, such as satellite technology, might be constitutional proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns.⁶¹

Fifteen years later, in *Kyllo v. United States*, the Court addressed the issue of thermal imaging of a dwelling.⁶² Justice Scalia, for the Court, held that "[w]here, as here, the Government uses a device that is not in *general public use*, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."⁶³ Both *Dow Chemical* and *Kyllo* thus based their holdings on whether the technology was generally available to the public. The cases suggest that when the general public can purchase the technology for a non-exorbitant amount, the objective expectation of privacy has been reduced.

With general public use in mind, there is now an expressed concern about advanced technology becoming increasingly affordable and available to the general public. Justice Sotomayor, concurring in *Jones*, stated, "[B]ecause GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'"⁶⁴ Justice Alito, in a separate concurrence, stated, "Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap."⁶⁵ The implication, contrary to "general public use" reducing the objective expectation of privacy, is

⁵⁹ 476 U.S. 227 (1986).

⁶⁰ *Id.* at 250 n.12 (Powell, J., concurring in part).

⁶¹ *Id.* at 238 (emphasis added).

⁶² 533 U.S. 27, 28 (2001).

⁶³ *Id.* at 40 (emphasis added).

⁶⁴ *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) (citing *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)).

⁶⁵ *Id.* at 964 (Alito, J., concurring).

that availability for general public use is something to be avoided, something that society needs to protect against. It is an outright rejection of the "general public use" principle.

The "general public use" doctrine, however, fits well within the *Katz* reasonable expectation of privacy analysis. To have an objective expectation of privacy, one that society recognizes, courts look to see what private citizens can do.⁶⁶ In *Dow Chemical*, the Court found a \$22,000 camera to be "generally available to the public" even though, while cameras in general were available to the public, a \$22,000 camera in 1986 certainly was not.⁶⁷ A recent check of thermal imager pricing indicates that they can be purchased for as low as \$4,000 and rented for as little as \$125 per day.⁶⁸ GPS tracking devices are available to the public for as low as \$138.95 used and \$199.95 new.⁶⁹ If the test is general public use, these prices indicate at least general public availability. The Court has only two choices: either the test as articulated in *Dow Chemical* and *Kyllo* creates a reduction in the objective expectation of privacy for thermal imaging and GPS tracking or the "general public use" doctrine must be rejected for some yet-to-be-articulated test incorporating the idea that the very affordability and availability of certain technology actually counts *against* its acceptability for Fourth Amendment purposes.

V. LENGTH OF TIME AS A POSSIBLE GOVERNING PRINCIPLE

According to the principle adopted by five of the Justices—Justice Alito, concurring and joined by three other Justices, and Justice Sotomayor in her concurrence—the length of time GPS monitoring continues may constitute an infringement on a legitimate expectation of privacy.⁷⁰ While hoping for legislative action, Justice Alito stated, "The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated."⁷¹ Justice Alito makes a distinction between "short-term monitoring," that society recognizes as reasonable, and "longer term GPS monitoring," which "impinges on expectations of privacy."⁷² The Justice then, without creating a workable principle, went on to state that the precise point in time where the longer-term monitoring becomes a search "was surely crossed before the 4-week mark."⁷³

To make Justice Alito's position clear, the attachment of the GPS monitoring device is not itself a search or seizure because that action is *de minimus*; the short-term monitoring is not an invasion of objective expectations of privacy, but long-term monitoring is an invasion of a legitimate expectation of privacy. The issue for Justice Alito is not the placement of the monitor,

⁶⁶ See generally *id.*, 132 S. Ct. 945; *Kyllo*, 533 U.S. 27; *Dow Chemical*, 476 U.S. 227.

⁶⁷ *Dow Chemical*, 476 U.S. at 251 n.13; see also U.S. Census Bureau, Table H-8, *Median Household Income by State: 1984 to 2010* (2010), [http://www.census.gov/hhes/www/income/data/historical/household/follow "Table H-8. Median Household Income by State" link](http://www.census.gov/hhes/www/income/data/historical/household/follow%20Table%20H-8.%20Median%20Household%20Income%20by%20State%20link) (listing the median U.S. household income in 1986 as \$24,897).

⁶⁸ AMERICAN INFRARED, <http://www.americaninfrared.com/home.asp> (last visited Jan. 24, 2012) (new and used FLIR infrared cameras priced between \$4,000 and \$11,000); TESTEQUITY, <http://www.testequity.com/products/1661/#price> (last visited Jan. 24, 2012) (Fluke Ti10 thermal imager priced as low as \$4,495); AJAX ENVIRONMENTAL AND SAFETY SUPPLY, INC., <http://www.thermalcamerarentals.com/flir-i-series-cameras-i40i50i60.html> (last visited Jan. 24, 2012) (thermal camera rentals for \$125 per day and \$350 per week).

⁶⁹ BRICKHOUSE SECURITY, <http://www.brickhousesecurity.com/covert-small-gps-tracking-device.html> (last visited Jan. 24, 2012) (listing a police-grade, hardwired GPS vehicle tracking system for \$349.00); GPSCORNER.US, <http://gps-vehicle-monitoring.gpscorner.us/> (last visited Jan. 24, 2012) (GPS tracking unit listed from \$199.99).

⁷⁰ *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring).

⁷¹ *Id.* at 964.

⁷² *Id.*

⁷³ *Id.*

which is not a constitutional violation under his analysis, but the length of the monitoring, which is a constitutional violation.

Certainly the Court knows how to impose specific time limits, as it has done so in the past. For example, the Court imposed a 48-hour time limit for a probable cause finding of a defendant who is detained for a crime in *County of Riverside v. McLaughlin*,⁷⁴ and in *Maryland v. Shatzer* a 14-day break in custody was declared sufficient to permit law enforcement to try to interrogate a suspect again after the suspect's assertion of a right to counsel.⁷⁵ Arguably, then, the Court could create a time limit for such infringements of privacy as GPS monitoring. Justice Alito chose not to suggest or even hint at any such limit.⁷⁶

Justice Sotomayor agreed with Justice Alito that duration was an important consideration in determining whether there was a legitimate expectation of privacy: "[A]t the very least, longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."⁷⁷ But Justice Scalia criticized the duration theory, saying it "leads us needlessly into additional thorny problems."⁷⁸ Specifically, Justice Scalia points to the lack of any reasoned principle that would guide the Court in distinguishing between short-term and long-term monitoring.⁷⁹

Can time limits actually protect the expectation of privacy? It seems unlikely anyone would support a rule saying police may enter my dwelling on a whim as long as they remain only five minutes, or may search my car without any level of suspicion or a warrant for ten minutes, but not for eleven. Such examples seem to illustrate that rigid time limitations, though perhaps workable in other areas, are simply inappropriate in a Fourth Amendment context. Or as Justice Scalia put it at oral arguments, "if there is no invasion of privacy for one day, there's no invasion of privacy for a hundred days."⁸⁰ Whether or not an action violates the Fourth Amendment has nothing to do with "how many days you do it."⁸¹

VI. THE "CONTENT EXCEPTION" AS A POSSIBLE SOLUTION TO ELECTRONIC MESSAGING

Justice Sotomayor, in her concurrence, suggested that "[m]ore fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."⁸² The Court has protected the content of letters but not the address and return address,⁸³ the content of telephone calls but not the numbers dialed,⁸⁴ and refused to protect bank records by the Fourth Amendment because that information was made available to third parties.⁸⁵ "This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."⁸⁶

⁷⁴ 500 U.S. 44, 56 (1991).

⁷⁵ 130 S. Ct. 1213, 1223 (2010).

⁷⁶ See *Jones*, 132 S. Ct. at 957-64 (Alito, J., concurring).

⁷⁷ *Id.* at 955 (Sotomayor, J., concurring) (internal quotation marks omitted).

⁷⁸ *Id.* at 954.

⁷⁹ *Id.*

⁸⁰ Transcript of Oral Argument at 40-41, *United States v. Jones*, 2011 WL 5360051 (2011) (No. 10-1259), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf.

⁸¹ *Id.*

⁸² *Id.* at 957 (Sotomayor, J., concurring) (internal citations omitted).

⁸³ See *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

⁸⁴ *Smith v. Maryland*, 442 U.S. 735, 742-46 (1979), *superseded by statute*, Pub. L. No. 99-508, 100 Stat. 1848.

⁸⁵ *United States v. Miller*, 425 U.S. 435, 442-43 (1976), *superseded by statute*, Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641.

⁸⁶ *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

Lower courts have discussed what is called the "content exception" to information that might be revealed through law enforcement surveillance.⁸⁷ The exception finds its roots in *Ex parte Jackson*, a case holding that while the outside of a letter, i.e. mailing and return addresses, was available to the public, the contents of the letter itself remained protected.⁸⁸ In *Smith v. Maryland*, the Court held that a pen register installed on telephone company property was not a Fourth Amendment search.⁸⁹ The Court noted that pen registers, which simply record the number that is dialed, do not acquire the contents of the communications.⁹⁰ The Court found no legitimate expectation of privacy in the numbers being dialed because the public was aware that those numbers would be recorded and kept by the telephone company as a matter of course.⁹¹ The location from which the calls were made, in that case from within the defendant's home, was found to be irrelevant to the Fourth Amendment analysis.⁹² The Court noted that a person has no legitimate expectation of privacy in information that he turns over voluntarily to third parties.⁹³ The content of the telephone conversation itself, however, remained protected.⁹⁴

Recently, a federal district court addressed the release of cell phone records in *In re U.S. for an Order Authorizing the Release of Historical Cell-Site Information*.⁹⁵ The court noted:

[C]ellular service providers have records of the geographic location of almost every American at almost every time of day and night. . . .

What does this mean for ordinary Americans? That at all times, our physical movements are being monitored and recorded, and once the Government can make a showing of less-than-probable cause, it may obtain these records of our movements, study the map [of] our lives, and learn the many things we reveal about ourselves through our physical presence.⁹⁶

The government sought release of this information under the Stored Communications Act, which only requires "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication . . . are relevant and material to an ongoing criminal investigation."⁹⁷ Or stated another way, reasonable suspicion. Instead of analyzing the request under the statute, the Court considered the Fourth Amendment and ultimately held that the government was required to obtain a warrant on the basis of probable cause.⁹⁸ "The fiction that the vast majority of the American population consents to warrantless government access to the records of a significant share of their movements by 'choosing' to carry a cell phone must be rejected."⁹⁹

⁸⁷ See *In re U.S. for an Order Authorizing the Release of Historical Cell-Site Info.*, 809 F. Supp. 2d 113, 122-25 (E.D.N.Y. 2011) (discussing how federal courts apply the "content exception").

⁸⁸ *Jackson*, 96 U.S. at 733.

⁸⁹ *Smith*, 442 U.S. at 745-46.

⁹⁰ *Id.* at 741.

⁹¹ *Id.* at 742.

⁹² *Id.* at 743.

⁹³ *Id.* at 743-44.

⁹⁴ See *id.* at 741.

⁹⁵ 809 F. Supp. 2d 113, 113 (E.D.N.Y. 2011).

⁹⁶ *Id.*

⁹⁷ *Id.* (citing 18 U.S.C. § 2703(d) (2009)) (internal quotation marks omitted).

⁹⁸ *Id.* at 127.

⁹⁹ *Id.*

The Sixth Circuit adopted the "content exception" to emails in *United States v. Warshak*, holding that a warrant based upon probable cause was required to compel a commercial Internet service provider to turn over the contents of emails.¹⁰⁰ In *United States v. Forrester*, the Ninth Circuit discussed surveillance of to/from addresses on e-mails, the IP addresses of websites visited, and the total amount of data transmitted to or from an account.¹⁰¹ The court held that there was no reasonable expectation of privacy in those matters that "are voluntarily turned over in order to direct the third party's servers."¹⁰² The to/from addresses from emails and IP addresses were found to be addressing information, analogized to a letter, and did not concern the content of the messages.¹⁰³ The court held that there was a clear line between addressing information and content that was not violated by the government in that particular case.¹⁰⁴

Elsewhere, the Ninth Circuit has held that there is a reasonable expectation of privacy in text messages that are stored on the service provider's network,¹⁰⁵ and case law is slowly developing that finds a reasonable expectation of privacy in a person's cell phones and information stored on them, including text messages.¹⁰⁶ In *State v. Clampitt*, for example, the Missouri Court of Appeals stated that "society's continued expectation of privacy in communications made by letter or phone call demonstrates its willingness to recognize a legitimate expectation of privacy in the contents of text messages."¹⁰⁷

Could the "content exception" have applied in *Jones*? In order to protect an individual's privacy from government invasion, the Court would have to overrule the beeper cases that held that monitoring a beeper while the beeper was on public roads was not an invasion of privacy.¹⁰⁸ Those holdings only required a logical step from law enforcement physically following a civilian in public to the monitoring of a person in public by use of a beeper. That progression arguably leads to the conclusion that GPS monitoring in a public place is not a violation of a legitimate expectation of privacy. In this case, however, applying the "content exception," while the placement of a monitor on the car would not be a constitutional violation, revealing information about the defendant's travel would be.

¹⁰⁰ 631 F.3d 266, 287-88 (6th Cir. 2010).

¹⁰¹ 512 F.3d 500, 509-11 (9th Cir. 2008).

¹⁰² *Id.* at 510.

¹⁰³ *Id.* at 511.

¹⁰⁴ *Id.*

¹⁰⁵ *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008), *overruled on other grounds by City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (where the Supreme Court assumed that there was a reasonable expectation of privacy without deciding the issue).

¹⁰⁶ See, e.g., *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008) (finding defendant "had a reasonable expectation of privacy regarding this information"); *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007) (finding "a reasonable expectation of privacy in the call record and text messages on the cell phone"); *United States v. Davis*, 787 F. Supp. 2d 1165, 1170 (D. Or. 2011) (finding a reasonable expectation of privacy in personal cell phones, including call records and text messages); *United States v. Gomez*, 807 F. Supp. 2d 1134, 1140 (S.D. Fla. 2011) (finding a reasonable expectation of privacy in cell phones because "the weight of authority agrees that accessing a cell phone's call log or text message folder is considered a 'search' for Fourth Amendment purposes"); *United States v. Quintana*, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009) (requiring a search warrant "to search the contents of a cell phone unless an exception to the warrant requirement exists"); *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009) (finding a reasonable expectation of privacy in the information cell phones contain because of their multi-functional uses and storage of large amounts of private data, including text messages).

¹⁰⁷ *State v. Clampitt*, No. WD 73943, 2012 WL 177394, at *5 (Mo. Ct. App. Jan. 24, 2012).

¹⁰⁸ *United States v. Knotts*, 460 U.S. 276, 284-85 (1983); *United States v. Karo*, 468 U.S. 705, 714 (1984).

VII. FREQUENCY OF CONDUCT AS GUIDING EXPECTATIONS OF PRIVACY

In *Florida v. Riley*, the Supreme Court concerned itself with the issue of how a legitimate expectation of privacy was to be determined.¹⁰⁹ Riley lived in a mobile home in a rural location with a partially enclosed greenhouse approximately 20 feet away.¹¹⁰ Though [t]he greenhouse was covered by corrugated roofing panels," two of those panels were missing, resulting in the ability to see into the greenhouse from the air.¹¹¹ An officer flew over the property in a helicopter at a height of 400 feet.¹¹² Based upon this and other information, a search warrant was obtained, a search was conducted, and marijuana plants were seized.¹¹³ The plurality, Justice White joined by three other Justices, began with the notion from *Katz* that the police may lawfully observe what the public may see.¹¹⁴ Because a member of the public could look into the greenhouse from the air without violating a Federal Aviation Administration (FAA) regulation, law enforcement could do the same.¹¹⁵ The plurality also indicated that there was nothing in the record to indicate that helicopters flying at 400 feet were so rare as to substantiate Riley's claim that he could not have anticipated the observation—a failure of proof.¹¹⁶ Finally, the plurality held "no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury."¹¹⁷

Justice O'Connor concurred in the judgment finding that there was no objective expectation of privacy by Riley in the greenhouse.¹¹⁸ However, the Justice criticized the plurality in relying too heavily on whether a FAA regulation had been violated.¹¹⁹ Justice O'Connor framed the issue as "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not one that society is prepared to recognize as reasonable."¹²⁰ The question is one of frequency and expectation. The burden must necessarily be on the defendant to prove that his expectation of privacy is a reasonable one that society is willing to protect.¹²¹

Justice Brennan, joined by two other Justices, filed a dissent.¹²² The dissent reformulated the test as "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional constraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open

¹⁰⁹ 488 U.S. 445, 449 (1989) (plurality opinion).

¹¹⁰ *Id.* at 448.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 449.

¹¹⁴ *Id.* at 449-50.

¹¹⁵ *Id.* at 450-51.

¹¹⁶ *Id.* at 451-52.

¹¹⁷ *Id.* at 452.

¹¹⁸ *Id.* (O'Connor, J., concurring).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 454 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)) (internal quotation marks omitted).

¹²¹ *Id.* at 455; see also *Jones v. United States*, 362 U.S. 257, 261 (1960) ("Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."); *Nardone v. United States*, 308 U.S. 338, 341 (1939).

¹²² *Riley*, 488 U.S. at 456 (Brennan, J., dissenting).

society."¹²³ The dissent would frame the question whether the public's observation was "so commonplace" that the expectation of privacy could not be considered reasonable.¹²⁴ This dissent would place the burden on the government who has greater access to information concerning the frequency of flights.¹²⁵

Justice Blackmun also filed a dissent.¹²⁶ The Justice pointed out that five Justices (JJ. O'Connor, Brennan, Marshall, Stevens, and Blackmun) agreed that the question was an objective expectation of privacy that could in large part be measured by frequency of conduct.¹²⁷ More particularly, the question is whether that form of conduct by "nonpolice" was sufficiently frequent.¹²⁸ Justice Blackmun would place the burden of proving frequency on the government.¹²⁹

The issue in *Jones* could have been determined by gauging the frequency of conduct. The solution to the problem depends upon how the issue is framed. If the issue is how often "non-police" place items on a private automobile, the answer may well be that things are placed on automobiles all the time – flyers, business cards and the like. Because a "search" is a sensing into a legitimate expectation of privacy, there is no "search" when an item is placed on an automobile. Because a "seizure" is an interruption or interception of a legitimate expectation of privacy, there is no seizure for Fourth Amendment purposes by the mere placement of an item on an automobile.

However, if the issue is how often "non-police" place GPS monitoring devices on a private automobile and then monitor the location of that automobile, the answer is, almost never. Gauging the legitimate expectation of privacy by frequency under this framing of the issue would result in a determination that there *has* been an intrusion or interruption of a Fourth Amendment right to privacy.

VIII. CONCLUSION: A SEIZURE SEARCHING FOR A PRINCIPLE

The *Jones* case protects against the placement of a GPS monitor on a private vehicle without a warrant or some level of suspicion.¹³⁰ The government in *Jones* argued that even if there was a search or seizure under the Fourth Amendment, it was reasonable, and that probable cause or even reasonable suspicion was sufficient to justify the intrusion.¹³¹ The Court, however, withheld consideration of these arguments because they had not been raised in the lower courts.¹³²

Thus, it remains unanswered whether something less than a warrant is sufficient to justify the GPS placement and monitoring. The government's position will play out in the lower courts, where GPS monitoring performed without a warrant pre-*Jones* will be litigated. Undoubtedly, the prosecution will seek to justify the monitoring by arguing that law enforcement had reasonable suspicion or probable cause.

The Court may have well enough dealt with the placement of a GPS monitoring device on an automobile by reintroducing the invasion of a possessory interest concept, but it certainly

¹²³ *Id.* (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974)).

¹²⁴ *Id.* at 460.

¹²⁵ *Id.* at 465-66.

¹²⁶ *Id.* at 467.

¹²⁷ *Id.*

¹²⁸ *Id.* at 467-68.

¹²⁹ *Id.* at 468.

¹³⁰ See *Jones*, 132 S. Ct. at 949.

¹³¹ *Id.* at 954.

¹³² *Id.*

has not dealt with the problems created by, for example, cell phones, emails, texts, tracking of websites visited on a computer, tracking of grocery purchases, closed-circuit television video monitoring, toll road collection devices, GPS monitors installed with automobiles when they are manufactured, pharmacy purchases by seller cards, or purchases made by online retailers. Those types of invasions do not involve any type of trespass and harken back to the *Olmstead* reasoning that these invasions do not involve the "person, house, papers, or effects" of a citizen and are, therefore, not a violation of the Fourth Amendment.¹³³ Indeed, Justice Sotomayor in her concurrence in *Jones* stated that the rule relating to a person's reasonable expectation of privacy in information voluntarily disclosed to third parties must be reviewed and reformulated: "This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."¹³⁴

The majority and the two concurrences in *Jones* do not provide a workable principle for the Fourth Amendment when it comes to digital technology. While answering the issue of whether the attachment or monitoring of GPS is a search or seizure for Fourth Amendment purposes, the Court did not answer whether a warrant or some lesser reasonable search based upon probable cause or reasonable suspicion is sufficient to justify the invasion. Just as much as *Quon* disappointed in assuming but not resolving the question of whether there was a legitimate expectation of privacy in texting,¹³⁵ so *Jones* disappoints in failing to develop a principled rule for the Fourth Amendment in the digital age.

It took the Supreme Court forty years, from *Olmstead* to *Katz*, to expand its notion of privacy to include conversations on the telephone. We can only hope it will not take them so long to fully confront the meaning of the Fourth Amendment in our rapidly advancing digital age.

¹³³ See *Olmstead v. United States*, 277 U.S. 438, 465-66 (1928).

¹³⁴ *Jones*, 132 S. Ct. at 957.

¹³⁵ See *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).