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# Back to the Future: United States v Jones Resuscitates Property Law Concepts in Fourth Amendment Jurisprudence

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## BACK TO THE FUTURE: *UNITED STATES V. JONES* RESUSCITATES PROPERTY LAW CONCEPTS IN FOURTH AMENDMENT JURISPRUDENCE

Nancy Forster

Calling the Fourth Amendment “an embarrassment,” noted scholar Akhil Reed Amar had this to say about United States Supreme Court’s jurisprudence in this area of the law:

Much of what the Supreme Court has said in the last half century—that the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence—is initially plausible but ultimately misguided. As a matter of text, history, and plain old common sense, these three pillars of modern Fourth Amendment case law are hard to support; in fact, today’s Supreme Court does not really support them. Except when it does. Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so. . . . The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse. . . .<sup>1</sup>

What is most interesting about this acerbic summation of Fourth Amendment jurisprudence is that it was written in 1994; almost twenty years and 130 Fourth Amendment Supreme Court opinions ago.<sup>2</sup> If Professor Amar was embarrassed by Supreme

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1. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–58 (1994) (footnote omitted).
  2. *See, e.g.*, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (holding that invasive searches conducted by county jails did not violate detainee’s Fourth Amendment rights); *United States v. Jones*, 132 S. Ct. 945 (2012) (holding that Government’s attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a search under the Fourth Amendment); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (holding that a strip search of a student based on

Court opinions on the subject in 1994, he must certainly be apoplectic today in light of the Court's recent decision in *United States v. Jones*.<sup>3</sup> Writing for the Court in *Jones*, Justice Scalia resuscitated property law concepts to define a "search" within the meaning of the Fourth Amendment, insisting the concepts had never died.<sup>4</sup> This insistence will no doubt come as a surprise to many in the legal community, including fellow Supreme Court justices, who thought the use of property law, and more specifically the doctrine of trespass, in the Fourth Amendment context had been overruled by the Court in *Katz v. United States*.<sup>5</sup> A litigant's reliance on a trespass theory post-*Katz* was routinely tossed aside as no longer viable.<sup>6</sup> The Sixth Circuit Court of Appeals recently summed it up best:

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principal's suspicion that student was distributing drugs violated the Fourth Amendment); *Samson v. California*, 547 U.S. 364 (2009) (holding that suspicionless search of California parolee did not violate the Fourth Amendment); *United States v. Knights*, 534 U.S. 112 (2001) (holding that warrantless search of probationer's home was authorized by a condition of his parole was reasonable as required by the Fourth Amendment); *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that warrantless use of thermal imaging device to measure heat emanating from home violated the Fourth Amendment); *Florida v. White*, 526 U.S. 559 (1999) (holding that Fourth Amendment permitted warrantless seizure of vehicle from public space with probable cause to believe it was forfeitable contraband); *United States v. Ramirez*, 523 U.S. 65 (1998) (holding that officers executing search warrant did not violate Fourth Amendment when they broke garage window during court of "no-knock" entry into Defendant's residence); *Ohio v. Robinette*, 519 U.S. 33 (1996) (holding that Fourth Amendment does not require that detainee be "free to go" before his consent to search will be deemed voluntary).

3. *Jones*, 132 S. Ct. at 949.
4. *Id.* at 950 ("At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates.") (citation omitted).
5. *Katz v. United States*, 389 U.S. 347, 353 (1967) ("We conclude that the underpinnings of *Olmstead* [*v. United States*, 277 U.S. 438, (1928)] and *Goldman* [*v. United States*, 316 U.S. 129, (1942)] have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling."); *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) ("[P]recedents such as *Katz v. United States* . . . overrul[e] the 'trespass' doctrine."); *Desist v. United States*, 394 U.S. 244, 269 (1969) (Fortas, J., dissenting) (stating *Katz* "administered the formal coup de grace to the moribund doctrine of *Olmstead*").
6. *See, e.g., Bentz v. City of Kendallville*, 577 F.3d 776, 782 (7th Cir. 2009) ("[A]lthough the Supreme Court has often expressed concern for protecting 'the sanctity of a man's home,' it has, with equal vigor, emphasized that 'the

The *Jones* decision represents a significant change in Fourth Amendment jurisprudence unanticipated by any of the circuit courts which had faced the question of whether use of a GPS unit amounted to a Fourth Amendment search. Courts and commentators had understood that in [*Katz*] . . . “the Supreme Court replaced the trespass doctrine with the privacy doctrine.”<sup>7</sup>

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Fourth Amendment protects people, not places. . . .’ Thus, the Supreme Court long ago abandoned the ‘trespass’ doctrine. . . .”) (citations omitted); *United States v. Michael*, 645 F.2d 252, 255 (5th Cir. 1981) (“Although originally viewed as protecting property rights of individuals, the Supreme Court has now rejected the idea that fourth amendment coverage turns on ‘arcane distinctions developed in property . . . law.’”) (citation omitted); *United States v. Jackson*, 588 F.2d 1046, 1051 (5th Cir. 1979) (“In finding an illegal search despite the absence of a physical intrusion into the phone booth, the Court rejected the trespass doctrine applied in previous cases and held that an individual is entitled to Fourth Amendment protection whenever he has a ‘reasonable expectation of privacy.’”); *United States v. Venema*, 563 F.2d 1003, 1006 (10th Cir. 1977) (“We recognize that the Supreme Court in [*Katz*] stated that the underpinnings of *Goldman* and *Olmstead* had been so eroded that the ‘trespass’ doctrine could no longer be deemed as controlling.”) (citation omitted); *Dancy v. United States*, 390 F.2d 370, 372 (5th Cir. 1968) (noting that the cases delineating the trespass theory “were expressly overruled” by *Katz*); *United States v. Missler*, 414 F.2d 1293, 1298 (4th Cir. 1969) (“Overruling the ‘trespass’ doctrine announced in [*Olmstead*], and [*Goldman*], the Court observed that *Katz* sought to exclude the ‘uninvited ear’ and noted that ‘the Fourth Amendment protects people, not places.’”) (citations omitted); *United States v. Hagarty*, 388 F.2d 713, 717 (7th Cir. 1968) (“The trespass and physical intrusion doctrines were rejected in *Katz*.”).

7. *United States v. Fisher*, Nos. 2:10-cr-28, 2:10-cr-32, 2012 WL 6913429, at \*9 (W.D. Mich. 2012) (citation omitted). The federal District Court in Hawaii similarly interpreted the lower courts’ understanding of *Katz* in *United States v. Leon*, 856 F. Supp. 2d 1188, 1194 (D. Haw. 2012), where it noted:

That *Jones* now makes clear that the Fourth Amendment reasonable expectation of privacy test augments, but does not displace, concepts of trespass does not directly address the law as understood in 2009. In fact, [*United States v. McIver*] [186 F.3d 1119 (9th Cir. 1999)], in the context of the placement of the GPS device, drew a clear distinction between trespass law and a Fourth Amendment reasonable expectation of privacy: “Assuming *arguendo* that the officers committed a trespass in walking into McIver’s open driveway, he has failed to demonstrate that he had a

Part I of this article will trace the early use of property law in Fourth Amendment cases involving surreptitiously gathered information. Part II will examine *Katz* and post-*Katz* cases that changed the focus in defining a search within the meaning of the Fourth Amendment from property rights to privacy rights. Part III of the article will analyze the *Jones* case with particular emphasis on its revival of and reliance on the trespass doctrine instead of the privacy emphasis created in *Katz* and what it may portend.

#### I. FOURTH AMENDMENT SEARCH AND SEIZURE: THE TRESPASS THEORY

One of the earliest cases to interpret the Fourth Amendment proscription against unreasonable searches and seizures is *Boyd v. United States*.<sup>8</sup> Boyd was accused of fraud for failing to pay required duties on thirty-five cases of imported plate glass, and the government, over Boyd's objection, sought forfeiture of the goods.<sup>9</sup> During the forfeiture proceeding, it became necessary for the government to prove the quantity and value of the glass, and in order to do so, the government introduced invoices.<sup>10</sup> Those invoices had been obtained by the government pursuant to an order of the district court directing Boyd to produce them.<sup>11</sup> Boyd challenged the constitutionality of the statute permitting a court to order production of documents claiming it violated the Fourth Amendment.<sup>12</sup> The issue before the U.S. Supreme Court devolved to:

[Whether] a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an 'unreasonable search and seizure'

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legitimate expectation of privacy cognizable under the Fourth Amendment in this portion of his property.

*Leon*, 856 F. Supp. 2d at 1194 (quoting *United States v. McIver*, 186 F.3d 1119, 1126 (9th Cir. 1999)).

8. *Boyd v. United States*, 116 U.S. 616 (1886).

9. *Id.* at 617–18.

10. *Id.* at 618.

11. *Id.*

12. *Id.*

within the meaning of the fourth amendment of the constitution[.]<sup>13</sup>

Harkening back to British use of writs of assistance and general warrants against the colonists,<sup>14</sup> the Court explained the practices that animated the Fourth Amendment.

The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced ‘the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;’ since they placed ‘the liberty of every man in the hands of every petty officer.’ This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. . . . These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government.<sup>15</sup>

But it was the decision written by Lord Camden in *Entick v. Carrington*<sup>16</sup>—condemning the entry of the private home of John Wilkes under the authority of a general warrant issued by the secretary of state for the search and seizure of papers that would support a claim of libel—that the *Boyd* Court found most persuasive on the subject.

The great end for which men entered into society was to secure their property. That right is preserved sacred

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13. *Id.* at 622.

14. The act that permitted the issuance of writs of assistance, 13 & 14 Car. II. C. 11, § 5, authorized the search “of ships and vessels, and persons found therein, for the purpose of finding goods . . . on which the duties were not paid.” *Boyd*, 116 U.S. at 626–27. General warrants “authorized searches in any place, for any thing.” *Boyd*, 116 U.S. at 641.

15. *Id.* at 625.

16. *Entick v. Carrington*, 19 How. St. Tri. 1030 (1765).

and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. *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, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil.*<sup>17</sup>

Thus, the Court held that while there was no literal trespass onto Boyd's property by the government, "any forcible and compulsory extortion of a man's . . . private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of [*Entick*]."<sup>18</sup> Further, the Court pointed out that the words of Lord Camden in *Entick* were "relied on as expressing the true doctrine on the subject of searches and seizures, and . . . furnish[ed] the true criteria of the reasonable and 'unreasonable' character of . . . [searches and] seizures" referred to in the Fourth Amendment.<sup>19</sup>

*Boyd* was followed by *Weeks v. United States*.<sup>20</sup> *Weeks* was charged with using the mails to engage in a lottery enterprise.<sup>21</sup> After arresting *Weeks*, state police and federal agents, without a search warrant, obtained the key to *Weeks*'s home, entered it, searched it, and seized numerous papers and documents found inside.<sup>22</sup> Those documents were the subject of a motion filed by *Weeks* for their return.<sup>23</sup> The trial court ruled that those seized documents not relevant to the trial had to be returned but those

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17. *Boyd*, 116 U.S. at 626–27 (emphasis added).

18. *Id.* at 630.

19. *Id.*

20. *Weeks v. United States*, 232 U.S. 383 (1914).

21. *Id.* at 386.

22. *Id.*

23. *Id.* at 387–89.

needed for trial could be introduced.<sup>24</sup> Finding that the appropriate remedy for violating the Fourth Amendment was exclusion of the seized evidence from use at trial, the Court elaborated on the illegal nature of the search and seizure conducted in the case:

Resistance to [unreasonable searches and seizures] had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers. . . . "The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen." "Accordingly . . . no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony; and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon."<sup>25</sup>

The Court distinguished the cases relied upon by the government noting that in *Weeks's* case, police had engaged "in the wrongful invasion of the home of [a] citizen and the unwarranted seizure of his papers and property."<sup>26</sup>

The same property principles were applied to the defendant's place of business in *Silverthorne Lumber Co. v. United States*,<sup>27</sup> where federal agents, without a warrant, entered the defendant's company and "made a clean sweep of all the books, papers and documents found there."<sup>28</sup> The Court applied the *Weeks* decision and concluded that "knowledge gained by the Government's own wrong cannot be used by it . . . ."<sup>29</sup>

The Supreme Court consistently interpreted a Fourth Amendment search in terms of property law principles and

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24. *Id.* at 388. It was not until 1961 that the Supreme Court ruled that the exclusionary rule would apply to the states through the Fourteenth Amendment Due Process Clause. *Mapp v. Ohio*, 367 U.S. 643 (1961).

25. *Weeks*, 232 U.S. at 389, 390.

26. *Id.* at 394–98.

27. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

28. *Id.* at 390.

29. *Id.* at 391–92.



looked to the conduct of the government to determine whether or not a trespass had been committed.<sup>30</sup> But the cases before the Court were rather simplistic and clear cut.<sup>31</sup> They generally involved government agents breaking into a defendant's home or office, searching it, and seizing items of evidence, all without a warrant.<sup>32</sup> The cases required very little in the way of analysis by the Court as the wording of the Fourth Amendment clearly prohibited such conduct.<sup>33</sup> But advancing technology soon permitted police to obtain evidence without breaking into the home of defendants. Thus, in 1928 the Court was confronted with a case involving evidence of private telephone conversations obtained by police, without a warrant, through the use of wiretapping. In *Olmstead v. United States*, the defendant was suspected of violating the National Prohibition Act.<sup>34</sup> Police gathered evidence over a period of months by inserting small wires "along the ordinary telephone wires from the residences of four of the [defendants] and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines

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30. *Agnello v. United States*, 269 U.S. 20, 32 (1925) ("[I]t has always been assumed that one's house cannot lawfully be searched without a search warrant. . . . The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws."); *Hester v. United States*, 265 U.S. 57, 59 (1924) ("[T]he special protection accorded by the *Fourth Amendment* to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."); *Amos v. United States*, 255 U.S. 313, 314-17 (1921) (stating that evidence "seized in the search of [Amos's] home by government agents without warrant of any kind, in plain violation of the Fourth . . . Amendment[]" must be suppressed).
31. See *Agnello*, 269 U.S. at 29-30; *Amos*, 255 U.S. at 315-16; *Silverthorne Lumber Co.*, 251 U.S. at 390; *Weeks v. United States*, 232 U.S. 383, 386 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).
32. See *Agnello*, 269 U.S. at 29-30; *Amos*, 255 U.S. at 315-16; *Silverthorne Lumber Co.*, 251 U.S. at 390; *Weeks*, 232 U.S. at 386, *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).
33. See *Agnello*, 269 U.S. at 30; *Amos*, 255 U.S. at 315-16; *Silverthorne Lumber Co.*, 251 U.S. at 391-92; *Weeks*, 232 U.S. at 398. The Fourth Amendment provides: "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." U.S. CONST. amend. IV.
34. *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled in part by* *Katz v. United States*, 389 U.S. 347 (1967).

were made in the streets near the houses.”<sup>35</sup> Olmstead challenged the admissibility of the evidence arguing the wiretapping was an unconstitutional search within the meaning of the Fourth Amendment.

Constrained by the ruling in *Weeks*, requiring exclusion of evidence obtained through unlawful searches, in order to affirm Olmstead’s convictions, the Court had to conclude that the wiretapping was not a search.<sup>36</sup> Over the vigorous dissent of four justices, the Court did precisely that.

Justice Bradley, in the *Boyd* Case . . . said that the . . . Fourth Amendment . . . [was] to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

. . . .  
Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. 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. Here those who intercepted the projected voices were not in the house of either party to the conversation.

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant, unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical

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35. *Id.* at 456–57.

36. *Id.* at 466–68.

invasion of his house 'or curtilage' for the purpose of making a seizure.

We think, therefore, that the wiretapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.<sup>37</sup>

The Court did not disguise its opinion that the police conduct at issue was, perhaps, unscrupulous; however, the court found it more important that criminals be brought to justice.<sup>38</sup> Indeed, in a rather blatant nod to the majority's perceived superior capabilities of law enforcement in such matters, the Court cautioned that "[i]n the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it."<sup>39</sup> Because there had been no trespass on *Olmstead's* property, there had been no search within the meaning of the Fourth Amendment. However, with advancing technology, the *Olmstead* holding became increasingly problematic.<sup>40</sup> Indeed, Justice Brennan noted "that its authority has been steadily sapped by subsequent decisions of the Court . . . ."<sup>41</sup>

In *Goldman v. United States*,<sup>42</sup> federal agents used "a detectaphone" placed against a partition wall to overhear conversations in the office next door where Goldman was meeting with other conspirators. The conversations were introduced into evidence, over objection, at Goldman's trial. In only two paragraphs, the Court turned aside Goldman's claim that his Fourth Amendment right to privacy had been violated.

In asking us to hold that the information obtained was obtained in violation of the Fourth Amendment, and that its use at the trial was, therefore, banned by the Amendment, the petitioners recognize that they must

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37. *Id.* at 465-66.

38. *Id.* at 468. "A standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore." *Id.*

39. *Id.*

40. *See Lopez v. United States*, 373 U.S. 427, 458-59 (1963) (Brennan, J., dissenting).

41. *Id.*

42. *Goldman v. United States*, 316 U.S. 129 (1942).

reckon with our decision in [*Olmstead*] . . . . They argue that the case may be distinguished. The suggested ground of distinction is that the *Olmstead* case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the Constitutional guarantee and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the *Olmstead* case.

The petitioners ask us, if we are unable to distinguish [*Olmstead*] . . . to overrule it. This we are unwilling to do. That case was the subject of prolonged consideration by this court. The views of the court, and of the dissenting justices, were expressed clearly and at length. To rehearse and reappraise the arguments pro and con, and the conflicting views exhibited in the opinions, would serve no good purpose. Nothing now can be profitably added to what was there said. It suffices to say that we adhere to the opinion there expressed.<sup>43</sup>

Justice Murphy, in his dissent, was particularly troubled by the continued reliance on property law and the trespass doctrine.<sup>44</sup> He noted:

There was no physical entry in this case. But the search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were

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43. *Id.* at 135–36 (citation omitted).

44. *Id.* at 139 (Murphy, J., dissenting).

detested by our forebears and which inspired the Fourth Amendment.<sup>45</sup>

A chink in the *Olmstead* armor appeared when *Silverman v. United States*<sup>46</sup> reached the Court. There, federal agents used a "spike mike" to overhear conversations in Silverman's home.<sup>47</sup>

The instrument in question was a microphone with a spike about a foot long attached to it together with an amplifier, a power pack, and earphones. The officers inserted the spike under a baseboard in a second-floor room of the vacant house and into a crevice extending several inches into the party wall, until the spike hit something solid "that acted as a very good sounding board." The record clearly indicates that the spike made contact with a heating duct serving the house occupied by the petitioners thus converting their entire heating system into a conductor of sound.<sup>48</sup>

The overheard conversations were introduced, over objection, into evidence at Silverman's trial for gambling offenses.<sup>49</sup> Noting the importance of the fact that the spike mike made contact with the "heating system, which was an integral part of [Silverman's] premises,"<sup>50</sup> the Court concluded that this violated the Fourth Amendment because it was an "intrusion into a constitutionally protected area."<sup>51</sup> Notwithstanding the many references to trespassing—e.g., "eavesdropping was accomplished by means of an unauthorized physical penetration into the premises,"<sup>52</sup> "unauthorized physical encroachment,"<sup>53</sup> "physical invasion of premises,"<sup>54</sup>—the Court quizzically ended its opinion with the following language:

Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the

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45. *Id.*

46. *Silverman v. United States*, 365 U.S. 505, 509–12 (1961).

47. *Id.* at 507.

48. *Id.* at 506–07.

49. *Id.*

50. *Id.* at 511.

51. *Id.* at 511–12.

52. *Id.* at 509.

53. *Id.* at 510.

54. *Id.*

petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. *In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law.*<sup>55</sup>

Thus, in a single opinion, the Court disavowed the application of property law concepts in Fourth Amendment cases while at the same time placed critical importance on the fact that the agents had physically intruded upon Silverman's premises without his consent.<sup>56</sup> And thus began a steady shift away from property and trespass concepts in defining a search in Fourth Amendment cases and a turn toward privacy rights.<sup>57</sup>

A mere seven months before the landmark decision in *Katz*, the Court seemed to put to rest any notion that property law applies in Fourth Amendment analyses.<sup>58</sup> In *Warden v. Hayden*,<sup>59</sup> the Court made the following pronouncement:

The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be “unreasonable” within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.<sup>60</sup>

However, the Court in *Warden* only added to the confusion when it stated that its decision in *Silverthorne Lumber Co.*,<sup>61</sup> decided in 1920, marked the escape from “the bounds of

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55. *Id.* at 511 (emphasis added) (citation omitted).

56. *See supra* notes 46–55 and accompanying text.

57. *See* discussion *infra* Part II.

58. *See* *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

59. *Id.*

60. *Id.*

61. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920).

common law property limitations . . . when it became established that suppression might be sought during a criminal trial, and under circumstances which would not sustain an action in trespass or replevin."<sup>62</sup> Of course, such a claim completely ignored the decisions in *Goldman*, *Olmstead*, *Agnello*, *Hester*, and *Amos*,<sup>63</sup> all decided post-*Silverthorne Lumber Co.* and all relying on property law concepts. The claim in *Warden*, that property law concepts had long ago been discredited, only serves to reinforce Professor Amar's cogent observation that in this area of the law, the Court's decisions have resulted in "a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse."<sup>64</sup>

## II. DEFINING A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT: FROM PROPERTY RIGHTS TO PRIVACY RIGHTS

### A. *The Katz Decision*

In 1967, police suspected that Charles Katz was engaging in a bookmaking operation and was using public telephones to transmit information in violation of federal law.<sup>65</sup> Katz used a particular glass telephone booth from which to make many of his calls.<sup>66</sup> Federal agents, unbeknownst to Katz, attached a listening device to the top of the telephone booth, which allowed them to overhear and record bookmaking conversations engaged in by Katz.<sup>67</sup> At trial, Katz unsuccessfully objected, on Fourth Amendment grounds, to the introduction of the recordings.<sup>68</sup> The issues that ultimately made their way to the United States Supreme Court were twofold: whether a telephone booth is a constitutionally protected area, and if so, whether physical intrusion into the booth is required before a Fourth Amendment challenge could be raised.<sup>69</sup> The framing of the issues in this

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62. *Warden*, 387 U.S. at 304–05 (citation omitted).

63. *Goldman v. United States*, 316 U.S. 129, 134–36 (1942); *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928); *Agnello v. United States*, 269 U.S. 20, 30–33 (1925); *Hester v. United States*, 265 U.S. 57, 58–59 (1924); *Amos v. United States*, 255 U.S. 313, 315–17 (1921).

64. *Warden*, 387 U.S. at 304–05; *supra* note 1, at 757–58.

65. *Katz v. United States*, 389 U.S. 347, 348, 354 (1967).

66. *Id.* at 352.

67. *Id.* at 348–49.

68. *Id.*

69. *Id.* at 349–50.

manner seems perfectly reasonable in light of the cases discussed above. However, again proving Professor Amar's point, the Court chastised counsel as having framed the issues in a "misleading" manner.<sup>70</sup> This is so, the Court stated, because:

[T]his effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. 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.<sup>71</sup>

The Court specifically addressed the use of the trespass doctrine in this way:

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, for that Amendment was thought to limit only searches and seizures of tangible property. But "[t]he premise that property interests control the right of the Government to search and seize has been discredited." Thus, *although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any "technical trespass under . . . local property law." Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against*

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70. See *id.* at 352–53.

71. *Id.* at 351.



*unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.*

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the “trespass” doctrine there enunciated can no longer be regarded as controlling. The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a “search and seizure” within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.<sup>72</sup>

To a certain degree, the majority opinion in *Katz* remarkably reads as if the Court were annoyed that counsel on both sides had addressed the facts using a theory of trespass as applied to a “constitutionally protected area” as if such a theory had no precedents in Supreme Court case law.<sup>73</sup> Ironically, however, Justice Stewart who wrote for the majority in *Katz*, was also the architect of the majority opinion in *Silverman*, which held “[the] decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. *It is based upon the reality of an actual intrusion into a constitutionally protected area.*”<sup>74</sup>

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72. *Id.* at 352–53 (alteration in original) (emphasis added) (footnote omitted) (citations omitted).

73. Although the Court gave lip service in a single footnote to its prior references to “constitutionally protected areas,” in the same footnote the Court dismissed reliance on such a standard stating, “It is true that this Court has occasionally described its conclusions in terms of ‘constitutionally protected areas,’ but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.” *See id.* at 352 n.9 (citations omitted).

74. *Silverman v. United States*, 365 U.S. 505, 512 (1961) (emphasis added). It appears that introduction of the phrase “constitutionally protected area” in the context of Fourth Amendment cases was first introduced by Justice Stewart in the *Silverman* decision. *See* Charles H. Rogers, *The Fourth Amendment and Evidence Obtained by a Government Agent’s Trespass*, 42 NEB. L. REV. 166, 166–67 (1962) (explaining the Court’s usage of the constitutionally protected area test as applied to the Fourth Amendment in *Silverman*).

Ultimately, the Court held that in order to conduct electronic surveillance, the government must, unless national security is at stake, obtain prior approval from a judge.<sup>75</sup>

[The government] argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization “bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.” And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations “only in the discretion of the police.”

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored “the procedure of antecedent justification . . . that is central to the Fourth Amendment,” a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner’s conviction, the judgment must be reversed.<sup>76</sup>

For the first time, the Court unequivocally held that electronic surveillance, even in the absence of a trespass, constituted a search within the meaning of the Fourth Amendment.<sup>77</sup>

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75. See *Katz*, 389 U.S. at 357–59 & n.23.

76. *Id.* at 358–59 (footnote omitted) (quoting *Beck v. Ohio*, 379 U.S. 89, 96 (1964)).

77. See *id.* at 353. That this was a clear repudiation of prior decisions that required a trespass in order to invoke the application of the Fourth Amendment was solidified by the Court’s later decision in *Desist v. United States*, 394 U.S. 244, 247–48 (1969), overruled by *Griffith v. Kentucky*, 479 U.S. 314, (1987). In determining whether *Katz* should be subject to retroactive or prospective

It is difficult, however, to construe from the majority opinion a meaningful test for determining if conduct by the government constitutes a search, with or without trespassing.<sup>78</sup> This is probably why Justice Harlan felt the need to file a concurring opinion distilling such a test from the majority opinion. Justice Harlan wrote:

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, . . . and unlike a field, . . . a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that 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." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected

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application, the *Desist* court held that "[w]hile decisions before *Katz* may have reflected growing dissatisfaction with the traditional tests of the constitutional validity of electronic surveillance, the Court consistently reiterated those tests and declined invitations to abandon them. However clearly our holding in *Katz* may have been foreshadowed, *it was a clear break with the past*, and we are thus compelled to decide whether its application should be limited to the future." *Desist*, 394 U.S. at 247-48 (emphasis added) (footnotes omitted).

78. See *infra* notes 79-80 and accompanying text.

against being overheard, for the expectation of privacy under the circumstances would be unreasonable. . . .

The critical fact in this case is that “[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume” that his conversation is not being intercepted. . . . The point is not that the booth is ‘accessible to the public’ at other times, . . . but that it is a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable.<sup>79</sup>

Justice Harlan’s test certainly provided more guidance than the majority opinion, and turned the focus to privacy interests rather than property interests. Post-*Katz* Supreme Court cases reflected this change in focus.<sup>80</sup>

### B. *The Advance of Technology Post-Katz*

The focus on privacy rights could not have come at a more fortuitous time as technology began to advance beyond the relatively benign eavesdropping techniques used prior to *Katz*, i.e., the detectaphone in *Goldman* and the spike mike in *Silverman*.<sup>81</sup> Many of the pre-*Katz* techniques used by police

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79. *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring) (alteration in original) (citations omitted).

80. See, e.g., *Oliver v. United States*, 466 U.S. 170, 183–84 (1984) (holding that petitioner had no reasonable expectation of privacy in open fields on his own property notwithstanding the trespass by government agents to view the open field); *Rawlings v. Kentucky*, 448 U.S. 98, 105–06 (1980) (holding that petitioner had no reasonable expectation of privacy in the contents of a purse belonging to another even though he admitted that he owned the drugs found within the purse); *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979), *superseded by statute*, Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (holding that petitioner had no legitimate expectation of privacy in the telephone numbers he dialed as it is generally known that the numbers one dials are transferred to the telephone company who has facilities to record the numbers).

81. Compare *Silverman v. United States*, 365 U.S. 505, 506 (1961) (involving the use of a spike mike); *Goldman v. United States*, 316 U.S. 129, 134 (1942) (involving the use of a detectaphone), *overruled by Katz v. United States*, 389 U.S. 347 (1967), with discussion *infra* Part II.B (noting the technology used in *Kyllo v. United States*, 533 U.S. 27, 29 (2001) (involving the use of a thermal-imaging device); *California v. Ciraolo*, 476 U.S. 207, 209 (1986) (involving the use of aerial surveillance); *Dow Chem. Co. v. United States*, 476 U.S. 227, 229

required some type of physical intrusion and posed no real difficulty in concluding it was a search by relying on property rights. This is not to say that the focus on privacy rights created an easy resolution when addressing advancing technology and its effect on the Fourth Amendment.<sup>82</sup> While it may, in most cases, be relatively easy to discern whether or not one has exhibited a subjective expectation of privacy, it is no easy task to determine whether or not that expectation is one that society would recognize as reasonable.<sup>83</sup> In other words, precisely who is this “society”? The Harlan test presumes a homogenous society that any judge, at any time, could easily channel when making a determination that an expectation of privacy is one society would consider reasonable.<sup>84</sup> But the test actually generates far more questions than it answers and leaves the societal reasonableness of an expectation of privacy at the mercy of the speed with which technology is put into general use.<sup>85</sup> The following cases demonstrate the advance in technology and the Court’s efforts to apply the *Katz* test to that technology.

*United States v. Knotts* concerned the placement of a beeper device in a five-gallon container of chloroform, which was then tracked to Knotts’ property.<sup>86</sup> Government officials had reason to believe that the chloroform was being used to produce methamphetamine and other illicit drugs.<sup>87</sup> The government agents followed the truck where the chloroform was placed by a co-conspirator.<sup>88</sup> It was ultimately taken to Knotts. Based on

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(1986) (involving the use of aerial photography); *United States v. Karo*, 468 U.S. 705, 708 (1984) (involving the use of a beeper); *United States v. Knotts*, 460 U.S. 276, 277 (1983) (involving the use of a beeper)).

82. See generally Tracey Maclin, Katz, Kyllo, and Technology: *Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51, 72 (2002) (explaining the failings of the *Katz* decision as applied to advancing technology and its impact on the Fourth Amendment).
83. In later cases the Court notes that an expectation of privacy is “reasonable” when it is consistent with “widely shared social expectations.” *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). The Court has stated that there is “no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable,” *O’Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality opinion), and simply measures the reasonableness in terms of “the everyday expectations of privacy that we all share.” *Minnesota v. Olson*, 495 U.S. 91, 98 (1990).
84. See *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring).
85. See *id.* at 361–62 (Harlan, J., concurring).
86. *United States v. Knotts*, 460 U.S. 276, 277 (1983).
87. *Id.* at 278.
88. *Id.*

this tracking information, as well as other details, the government was able to secure a search warrant for the property, and upon execution, found a drug lab.<sup>89</sup> Upon his arrest and trial, Knotts challenged the monitoring of the beeper on Fourth Amendment grounds.<sup>90</sup> When the case reached the United States Supreme Court, the Court held that no search or seizure had occurred when *monitoring* the beeper specifically because:

A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [the co-defendant] travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.<sup>91</sup>

Citing the “limited use” of the beeper and the fact that it did not reveal “information as to the movement of the drum within the cabin,” the Court concluded that there had been no search.<sup>92</sup> Significantly, the Court held that nothing in the Fourth Amendment prohibits the government from “augmenting the sensory facilities bestowed upon them at birth with such enhancement as science and technology afforded them.”<sup>93</sup>

One year after the decision in *Knotts*, the Court again addressed the validity of the government’s use of a beeper in *United States v. Karo*.<sup>94</sup> After receiving a tip that Karo and his cohorts would be using ether to extract cocaine from clothing imported into the United States, agents placed a beeper into a can of ether and monitored its movements over a period of several weeks.<sup>95</sup> During that time, the can was moved from commercial storage lockers and ultimately taken to the residence

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89. *Id.* at 279.

90. *Id.* at 281–82 (emphasis added).

91. *Id.* at 281–82 (emphasis added).

92. *Id.* at 284–85. Because it had not been raised below, the Court refused to address the question whether or not *placing* the beeper into the container, as opposed to simply monitoring it, constituted a search. *See id.* at n.\*\*

93. *Id.* at 282.

94. *United States v. Karo*, 468 U.S. 705, 708–11 (1984).

95. *Id.* at 708–10.

of one of the defendants.<sup>96</sup> Agents confirmed the presence of the can in the residence through use of the beeper device and obtained a warrant to search the residence.<sup>97</sup> The search revealed cocaine and laboratory equipment used in the extraction process.<sup>98</sup> The government asserted that the case was controlled by *Knotts* and that no search within the meaning of the Fourth Amendment had occurred because agents, through visual observation, could easily have verified that the can was carried into the home.<sup>99</sup> Turning aside this reasoning, the Court held:

In this case, had a DEA agent thought it useful to enter the Taos residence to verify that the ether was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house. The beeper tells the agent that a particular article is actually located at a particular time in the private residence and is in the possession of the person or persons whose residence is being watched. Even if visual surveillance has revealed that the article to which the beeper is attached has entered the house, the later monitoring not only verifies the officers' observations but also establishes that the article remains on the premises. Here, for example, the beeper was monitored for a significant period after the arrival of the ether in Taos and before the application for a warrant to search.

The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant. The case is

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96. *Id.*

97. *Id.* at 709-10.

98. *Id.* at 713-16.

99. *See id.* at 713-16.

thus not like *Knotts*, for there the beeper told the authorities nothing about the interior of Knotts' cabin. The information obtained in *Knotts* was "voluntarily conveyed to anyone who wanted to look . . ."; here, as we have said, the monitoring indicated that the beeper was inside the house, a fact that could not have been visually verified.

We cannot accept the Government's contention that it should be completely free from the constraints of the Fourth Amendment to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article—or a person, for that matter—is in an individual's home at a particular time. Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.<sup>100</sup>

Thus, the critical difference between *Knotts* and *Karo* is that the information revealed by monitoring the beeper in *Karo*, unlike in *Knotts*, could not have been learned through visual observation even if that observation were enhanced with technology.<sup>101</sup>

It is doubtful that anyone would have predicted that the Court's reference in *Knotts* to augmentation of sensory facilities with "science and technology," would include aerial surveillance. Nevertheless, a mere three years after the decision in *Knotts*, the Court concluded that aerial surveillance did *not* constitute a search under the Fourth Amendment.<sup>102</sup> In *California v. Ciraolo*, officers received an anonymous tip that Ciraolo was growing marijuana in his backyard.<sup>103</sup> The officers attempted to view the plants from the ground level but were unable to do so because of a six-foot high outer fence surrounding a ten-foot high inner fence constructed around the area.<sup>104</sup> Officers secured a private plane that flew over the yard

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100. *Id.* at 715–16 (footnote omitted).

101. *Id.* at 713–15.

102. *California v. Ciraolo*, 476 U.S. 207, 207–08 (1986).

103. *Id.* at 209.

104. *Id.*



at a navigable air space of 1,000 feet.<sup>105</sup> The officers onboard, using a standard 35-mm camera, photographed the plants and subsequently used the photographs, *inter alia*, to obtain a search warrant.<sup>106</sup> Execution of the warrant resulted in the seizure of marijuana plants.<sup>107</sup> Focusing on the second prong of *Katz*, that is, the reasonableness of one's subjective expectation of privacy, the Court held:

In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.<sup>108</sup>

The Court's focus on the type of surveillance used by police misses the point entirely. The focus instead should have been on those privacy interests that a free society would deem reasonable and not on what type of technology could be used to easily overcome that interest in privacy.

The analysis used in *Ciraolo* was also applied in its companion case of *Dow Chemical Co. v. United States*, where agents of the Environmental Protection Agency (EPA) sought to conduct a second inspection of the sprawling 2,000 acre facility owned by Dow Chemical.<sup>109</sup> The agents had earlier conducted an on-site inspection with Dow's consent. The second request was denied by Dow.<sup>110</sup> Without seeking an administrative search warrant, the EPA agents hired an aerial photographer using "the finest precision aerial camera available" to film "a great deal more than the human eye could ever see."<sup>111</sup> Dow sought, and was awarded, injunctive relief preventing further photography of its facilities.<sup>112</sup> The court of appeals reversed

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105. *Id.*

106. *Id.*

107. *Id.* at 209-10.

108. *Id.* at 212-15.

109. *Dow Chem. Co. v. United States*, 476 U.S. 227, 229 (1986).

110. *Id.*

111. *Id.* at 229-30.

112. *Id.* at 230.

finding that Dow had a subjective expectation of privacy in its ground-level operations, but because Dow had taken no similar precautions to preclude aerial observation, there was no subjective expectation of privacy.<sup>113</sup> Among other arguments made in the Supreme Court, Dow contended that “EPA’s use of aerial photography was a ‘search’ of an area that, notwithstanding the large size of the plant, was within an ‘industrial curtilage’ rather than an ‘open field,’ and that it had a reasonable expectation of privacy from such photography protected by the Fourth Amendment.”<sup>114</sup> Finding that no search under the Fourth Amendment had taken place, the Court held:

*Oliver* recognized that in the open field context, “the public and police lawfully may survey lands from the air.” 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. The Government asserts it has not yet enlarged the photographs to any significant degree, but Dow points out that simple magnification permits identification of objects such as wires as small as 1/2-inch in diameter.

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 constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility’s buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other

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113. *Id.*

114. *Id.* at 232–33.

trade secrets would raise very different and far more serious questions; other protections such as trade secret laws are available to protect commercial activities from private surveillance by competitors.<sup>115</sup>

As noted by the dissenting opinion, the rationale employed by the majority to conclude that no search had occurred completely ignored the fundamental basis of *Katz*.<sup>116</sup> “*Katz* measures Fourth Amendment rights by reference to the privacy interests that a free society recognizes as reasonable, not by reference to the method of surveillance used in the particular case. If the Court’s observations were to become the basis of a new Fourth Amendment standard that would replace the rule in *Katz*, privacy rights would be seriously at risk as technological advances become generally disseminated and available in our society.”<sup>117</sup>

The irrationality of the Court’s interpretation of what is a reasonable expectation of privacy reached its nadir when four justices applied its holding in *Ciraolo* to police flying a helicopter over a roofed greenhouse at a level of 400 feet in *Florida v. Riley*.<sup>118</sup> The area surveyed by the police was described:

A greenhouse was located 10 to 20 feet behind the mobile home. Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were obscured from view from surrounding property by trees, shrubs, and the mobile home. The greenhouse was covered by corrugated roofing panels, some translucent and some opaque. At the time relevant to this case, two of the panels, amounting to approximately 10% of the roof area, were missing. A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a “DO NOT ENTER” sign.<sup>119</sup>

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115. *Id.* at 238–39 (footnote omitted).

116. *Id.* at 251 (Powell, J., concurring in part and dissenting in part).

117. *Id.*

118. *Florida v. Riley*, 488 U.S. 445, 447–49 (1989).

119. *Id.* at 448.

After receiving a tip that marijuana was being grown in the greenhouse, police flew a helicopter over the area at a height of 400 feet. Citing *Ciraolo*, the Court held:

Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more. This is not to say that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law. But it is of obvious importance that the helicopter in this case was *not* violating the law, and there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude.<sup>120</sup>

The dissenters in this case used various suitable terms to describe the plurality's holding that because police had a right to be where they were and because any member of the public could fly overhead in a helicopter, an expectation of privacy in a covered area within the curtilage of one's home was not reasonable: "disingenuous,"<sup>121</sup> "unfortunate,"<sup>122</sup> "remarkable,"<sup>123</sup> "curious,"<sup>124</sup> "misguided,"<sup>125</sup> "incredible,"<sup>126</sup> "disconcerting,"<sup>127</sup> and "puzzling."<sup>128</sup>

The unsound reasoning of the plurality opinion in *Riley* is only highlighted by the Court's later effort to distinguish it in *Bond v. United States*.<sup>129</sup> In *Bond*, a border patrol agent boarded a bus after it had stopped at a rest area.<sup>130</sup> Border Patrol Agent Cantu

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120. *Id.* at 451–52.

121. *Id.* at 457 (Brennan, J., dissenting).

122. *Id.* at 461.

123. *Id.* at 458 n.1, 463.

124. *Id.* at 458.

125. *Id.* at 459.

126. *Id.* at 460 n.2.

127. *Id.* at 461.

128. *Id.* at 462.

129. See *Bond v. United States*, 529 U.S. 334, 337 (2000).

130. *Id.* at 335.

boarded the bus “to check the immigration status of its passengers.”<sup>131</sup> When Agent Cantu began to walk from the rear of the bus to the front, he “squeezed the soft luggage which passengers had placed in the overhead storage space above the seats.”<sup>132</sup> As Agent Cantu did so, he felt a “brick-like object” in a bag belonging to Bond.<sup>133</sup> After Bond admitted that the bag belonged to him, he agreed to allow Cantu to open it.<sup>134</sup> Upon doing so, Agent Cantu discovered a “brick” of methamphetamine and arrested Bond.<sup>135</sup> When the *Bond* case reached the Supreme Court, the government argued, relying on *Ciraolo*, that “by exposing his bag to the public, [Bond] lost a reasonable expectation that his bag would not be physically manipulated.”<sup>136</sup> The Court held, “*Ciraolo* and *Riley* are different from this case because they involved only visual, as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection.”<sup>137</sup> Thus, police may employ an airplane or helicopter pilot to fly over one’s home and, using high powered equipment, take photographs that may reveal intimate activities within the curtilage of the home, and should a window be uncovered, those within the home;<sup>138</sup> but they best not touch one’s luggage kept in an overhead compartment on a public bus.

The forward march of science and technology and its consequent effect on privacy rights came under closer scrutiny in *Kyllo v. United States*,<sup>139</sup> where the Court confronted the question of what, if any, “limits there are upon this power of technology to shrink the realm of guaranteed privacy.”<sup>140</sup> Federal agents suspected Kyllo of growing marijuana inside his residence.<sup>141</sup> Because high-powered lights generating copious amounts of heat are needed for growing the plants, police

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131. *Id.*

132. *Id.*

133. *Id.* at 335–36.

134. *Id.*

135. *Id.*

136. *Id.* at 337.

137. *Id.*

138. Justice Scalia, writing for the majority in *Kyllo v. United States*, 533 U.S. 27 (2001), noted that “the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private.” *Id.* at 34.

139. *Id.* at 33–34.

140. *Id.* at 34.

141. *Id.* at 29.

compared Kylo's electrical bills with those of his neighbors and confirmed that they were excessive.<sup>142</sup> To further confirm their suspicions, agents used an Agema Thermovision 210 thermal imager to scan Kylo's home as well as his neighbors' homes.<sup>143</sup> The thermal imager was directed at the homes from inside an agent's car parked on the public street.<sup>144</sup> The scan "detect[s] infrared radiation" not visible to the naked eye.<sup>145</sup> The scan lasted only a few minutes.<sup>146</sup> It showed "that the roof over the garage and a side wall of [Kylo's] home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes . . . ."<sup>147</sup>

Using this information, agents obtained a search warrant and discovered a marijuana growing operation.<sup>148</sup> The government contended before the Court that the use of the thermal imaging device from a public vantage point did not constitute a search as it did not reveal activities within the home. To this point the Court held:

The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes. Thus, in *Karo*, the only thing detected was a can of ether in the home; and in *Arizona v. Hicks*, the only thing detected by a physical search that went beyond what officers lawfully present could observe in "plain view" was the registration number of a phonograph turntable. These were intimate details

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142. *Id.* at 29–30.

143. *Id.*

144. *Id.* at 27, 30.

145. *Id.* at 29.

146. *Id.* at 30.

147. *Id.* at 30.

148. *Id.*

because they were details of the home, just as was the detail of how warm—or even how relatively warm—Kyllo was heating his residence.<sup>149</sup>

One troubling aspect of the decision in *Kyllo* concerns the Court's apparent willingness to conclude that no search occurs when the technology used by the government is also in general public use.<sup>150</sup> The Court reaffirms the sanctity of the home and acknowledges the clear existence of an expectation of privacy in one's home.

We have said that the Fourth Amendment draws “a firm line at the entrance to the house,” . . . . That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no “significant” compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.<sup>151</sup>

At the same time, however, the Court also stated:

We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area,” constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.<sup>152</sup>

The Court does not define “general public use” but simply notes in a footnote, citing *Ciraolo*, that use of the thermal imaging technology was not “routine.”<sup>153</sup> This is hardly a “clear

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149. *Id.* at 37–38 (citation omitted).

150. *Id.* at 34–35.

151. *Id.* at 40 (citation omitted).

152. *Id.* at 34–35 (emphasis added) (footnote omitted).

153. *Id.* at 39 n.6.

specification of those methods of surveillance that require a warrant.”<sup>154</sup> Nor does it promote confidence that there indeed is a bright line at the entrance to one’s home over which police may not validly step without a warrant.<sup>155</sup>

Given the rationale of *Kyllo*, one would expect that technology that is commonplace and routinely used by the general public can also be used by police without a warrant and without implicating the Fourth Amendment. But that “long view” taken by the Court in 2001 did not last very long at all.

### III. AND THEN ALONG CAME JONES<sup>156</sup>

Federal agents suspected Antoine Jones of trafficking drugs.<sup>157</sup> Agents conducted surveillance both visually and with cameras fixed on a nightclub owned by Jones.<sup>158</sup> They also relied on a pen register and wiretap of his cell phone.<sup>159</sup> Based on the information gathered from these sources, the government sought and obtained authority to place a Global Positioning System (GPS) device on a Jeep Cherokee owned by Jones’s wife but driven mainly by Jones.<sup>160</sup> The warrant permitted the placement of the device on the Cherokee but required that it be done in Washington, D.C., and within ten days.<sup>161</sup> Ignoring these constraints, on the eleventh day after obtaining the warrant, the government placed the device on the Jeep while it was parked on a public parking lot in Maryland.<sup>162</sup> The device was placed on the undercarriage of the Jeep and remained there for a period of 28 days.<sup>163</sup> “By means of signals from multiple satellites, the device established the vehicle’s location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data

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154. *Id.* at 40.

155. *See id.*

156. “Along Came Jones” is a song written by Jerry Leiber and Mike Stoller and originally recorded by The Coasters in 1959. THE COASTERS, ALONG CAME JONES (Atco 6141) (1959).

157. *United States v. Jones*, 132 S. Ct. 945, 947 (2012).

158. *Id.*

159. *Id.*

160. *Id.* at 947, 949 n.2.

161. *Id.* at 947.

162. *Id.*

163. *Id.*



over the four-week period.”<sup>164</sup> Jones was tried jointly with Lawrence Maynard and was convicted.<sup>165</sup>

On appeal to the Court of Appeals, District of Columbia Circuit, Jones contended that his reasonable expectation of privacy was violated by the twenty-four-hour-a-day tracking of his movements while in the Jeep.<sup>166</sup> For its part, the government, relying on *Knotts*, contended that there had been no search because one has no reasonable expectation of privacy while traveling on public roads.<sup>167</sup> Seizing upon language in *Knotts*, the D.C. Court of Appeals found that the type of twenty-four-hour surveillance involved in Jones’s case was expressly *not* addressed in *Knotts*.<sup>168</sup>

Most important for the present case, the Court [in *Knotts*] specifically reserved the question whether a warrant would be required in a case involving “twenty-four hour surveillance,” stating[:]

if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.<sup>169</sup>

In other words, the issue reserved in *Knotts* as unnecessary to its holding was “squarely presented” in Jones’s case.<sup>170</sup> The appellate court took pains to address the difference between the prolonged tracking of Jones via GPS, and the mere “movements from one place to another” by the government in *Knotts*.<sup>171</sup> The court meticulously distinguished the movements of Jones from that of *Knotts* and concluded:

[W]e hold the whole of a person’s movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all

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164. *Id.*

165. *United States v. Maynard*, 615 F.3d 544, 548–49 (D.C. Cir. 2010), *aff’d in part sub nom*, *United States v. Jones*, 132 S. Ct. 945 (2012).

166. *Id.* at 555.

167. *Id.* at 555–56.

168. *Id.* at 556–57.

169. *Id.* at 556 (citing *Knotts*, 460 U.S. 276, 284 (1983)).

170. *Id.* at 558.

171. *Id.* at 557.

those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.<sup>172</sup>

In short, the court concluded: "The difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life . . . ." <sup>173</sup> The court was unconcerned, with good reason given the shift from property rights to privacy rights, with the government's trespass to Jones's property.<sup>174</sup>

Few could have anticipated the outcome of *Jones* in the Supreme Court. The Petition for Writ of Certiorari filed by the Government sought review of the lower court's ruling, arguing that GPS tracking is not a search at all because one has no reasonable expectation of privacy in movements made in public.<sup>175</sup> The Brief in Opposition to the Government's request for certiorari asked that if the Court were to grant review, it also consider the question of whether the actual installation of the GPS device constituted a violation of the Fourth Amendment.<sup>176</sup> In support of this, Jones stated,

In this case, "the police not only engaged in surveillance by GPS but also intruded (albeit briefly and slightly) on the defendant's personal property, namely his car, to install the GPS device on the vehicle . . . ." Just as "squeezing [the] outer surface of a bag" constitutes a Fourth Amendment search, . . . the

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172. *Id.* at 566–59, 560.

173. *Id.* at 562.

174. *See id.* at 556–58, 563–65.

175. Petition for a Writ of Certiorari at 11–12, *United States v. Jones*, 615 F.3d 544 (2011) (No. 10-1259), 2011 WL 1462758, at \*11–12.

176. Brief in Opposition at 2, *Jones*, 615 F.3d 544 (No. 10-1259), 2011 WL 2263361, at \*2.

government's installation of a device on Jones's private vehicle constitutes a search.<sup>177</sup>

The grant of certiorari included the additional issue proposed by Jones.<sup>178</sup> In its brief, the Government contended that placing the device on Jones's car was not a search because there can be no reasonable expectation of privacy in the exterior of one's vehicle.<sup>179</sup> Jones countered,

The Fourth Amendment protects "property as well as privacy." Its protections take account of property law concepts not only because they aid in determining whether the government has committed a seizure, . . . but also because they are an important and sometimes dispositive consideration in determining whether a subjective expectation of privacy is one that society is prepared to accept as reasonable.<sup>180</sup>

Clearly, the argument of both parties centered on satisfying the two-pronged test of *Katz*. The references to property rights made by Jones were in support of his contention that his expectation of privacy was reasonable and did not rely on the trespass doctrine.<sup>181</sup>

Thus, when the Supreme Court ruled in Jones's favor, the rationale it relied on in doing so was surprising.

The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy against

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177. *Id.*

178. Grant of Certiorari, *United States v. Jones*, 131 S. Ct. 3064 (2011) (No. 10-1259).

179. Brief for United States at 39, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259), 2011 WL 3561881, at \*20.

180. Brief for Respondent at 17, *Jones*, 132 S. Ct. 945, 2011 WL 4479076, at \*12. (quoting *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992)).

181. See *supra* notes 175-80 and accompanying text.

government that existed when the Fourth Amendment was adopted.” As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (“persons, houses, papers, and effects”) it enumerates.<sup>182</sup>

At bottom, the Court concluded, “the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”<sup>183</sup> The Court made clear that its trespass theory did not apply, as contended by Justice Alito in his concurrence, to “any technical trespass that led to the gathering of evidence.”<sup>184</sup> Rather, it applies only to trespasses to persons, houses, papers, and effects enumerated in the Fourth Amendment itself.<sup>185</sup> But while the majority insists that “technical” trespasses “don’t count,” they certainly did count when the Amendment was adopted.<sup>186</sup> Recall the opinion in *Entick*, which, ironically, Justice Scalia supportively cites in *Jones*:

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*, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil.<sup>187</sup>

It is unfortunate that the Court chose in *Jones* not to apply the *Katz* test because today’s technology permits continued surveillance of one’s movements over a long period of time without trespassing on one’s property or effects. Thus, in those types of cases, *Jones* provides no guidance on the question of whether the use of non-trespassory technology would constitute

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182. *United States v. Jones*, 132 S. Ct. 945, 950 (2012) (footnote omitted) (citation omitted) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

183. *Id.* at 952.

184. *Id.* at 953 n.8 (Alito, J., concurring).

185. *Id.*

186. *See id.* at 949; *supra* note 184 and accompanying text.

187. *Entick v. Carrington*, 95 E.R. 807 (1765) (emphasis added), *quoted in Jones*, 132 S. Ct. at 949.

a search or seizure. The Court dodged the most important question presented in the case: whether intrusive surveillance of an individual invades a reasonable expectation of privacy. Given advances in technology and the amount of information about an individual's life such technology can gather and track, the answer to that question is critical. Further, there is no guidance as to what constitutes a "technical" trespass, which the majority seems to suggest would not present a Fourth Amendment problem. And finally, the decision provides no guidance for police in determining whether they must obtain a warrant before using non-trespassory GPS tracking. In short, the Court seems only to have kicked the can down the road.

#### IV. SHORTCOMINGS OF *KATZ* AND *JONES* IN THE 21<sup>ST</sup> CENTURY

Putting aside for the moment whether the trespass doctrine has been alive and well all along in Fourth Amendment jurisprudence, the fact remains that neither the trespass doctrine—relied upon in *Jones*—nor the expectation of privacy doctrine—relied upon in *Katz*—provides adequate guidance to law enforcement units seeking, quite properly, to use ever more advancing technology in criminal investigations. Nor does either of those tests adequately protect privacy interests of citizens subject to those criminal investigations using advanced non-trespassory technology.<sup>188</sup> The latest technology in tracking<sup>189</sup> allows police to stay one step ahead of the trespass

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188. Justice Scalia, speaking for the majority in *Jones*, stated that “[S]ituations involving merely the transmission of electronic signals without trespass remain subject to *Katz* analysis . . . . It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy . . . .” *Jones*, 132 S. Ct. at 953–54. This recognition that searches without trespass remain subject to the *Katz* legitimate expectation of privacy test adds nothing to the debate about what would be considered a “legitimate” expectation of privacy in the advanced digital age in which we live.

189. For example, consider, *AKELA, THROUGH THE WALL STANDOFF DETECTION AND TRACKING OF INDIVIDUALS: REPORT OF THE DEPARTMENT OF JUSTICE NATIONAL INSTITUTE OF JUSTICE* (Apr. 30, 2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240231.pdf>. The report provides a summary of the technology that a corporation named AKELA is developing for law enforcement use.

AKELA Inc. developed a sense-through-the-wall (STTW) standoff radar imaging system for law enforcement use. The underlying technology of the imaging system is a multiple antenna, continuous

prohibition while gathering an extraordinary amount of information about a person's private life.<sup>190</sup> Thus, the celebratory note struck by several commentators since the release of the *Jones* decision is perplexing. For example, an attorney who filed an amicus brief on behalf of *Jones* referred to the Court's decision as a "landmark ruling in applying the Fourth Amendment's protections to advances in surveillance technology."<sup>191</sup> It is hardly a "landmark" ruling because the Court dodged the critical issue.<sup>192</sup> Instead of reviving the trespass doctrine, the facts in *Jones* provided the Court with an opportunity to address a more fundamental concern that will no doubt crop up again in the very near future: the effect, if any, technology should have on the reasonableness calculation of societal expectations of privacy.

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wave, frequency stepping radar in a portable case that can be positioned at standoff distances of up to 30 m away from a building of interest. Radar information is processed in real time on a laptop computer to allow detection and tracking of stationary or moving individuals within a building structure.

The project goals were to provide an easy to use, battery operated, FCC compliant, portable system weighing less than 15 lbs, at a total system cost of less than \$5,000, that detects personnel behind an eight inch thick concrete block wall at a range of 30 meters, is capable of being controlled by a wireless Ethernet connection allowing remote deployment and operation, and produces images identifying stationary and moving individuals within building structures.

*Id.* at 3.

190. See, *The Drones Are Coming, But Our Laws Aren't Ready*, <http://www.nbcnews.com/technology/technolog/drones-are-coming-our-laws-arent-ready-1C9006243>.
191. Robert Barnes, *Supreme Court: Warrants Needed in GPS Tracking*, WASH. POST (Jan. 23, 2012), [http://www.washingtonpost.com/politics/supreme-court-warrants-needed-in-gps-tracking/2012/01/23/gIQAx7qGLO\\_story.html](http://www.washingtonpost.com/politics/supreme-court-warrants-needed-in-gps-tracking/2012/01/23/gIQAx7qGLO_story.html); see also Sherry F. Colb, *The Supreme Court Decides the GPS Case*, *United States v. Jones, and the Fourth Amendment Evolves*, VERDICT JUSTIA (Feb. 15, 2012), <http://verdict.justia.com/2012/02/15/the-supreme-court-decides-the-gps-case-united-states-v-jones-and-the-fourth-amendment-evolves-2>. Professor Colb states that she feels "optimistic about the future of the Fourth Amendment" post-*Jones* and pointed to the fact that Justices Scalia and Alito both "endorse[d] the 'reasonable expectation of privacy' test," as supporting her cause for optimism. *Id.*
192. Certainly, if one accepts the notion that the trespass doctrine has never gone out of use and has always been available as an arrow in one's Fourth Amendment quiver, there is nothing "landmark" about the *Jones* decision.

Justice Sotomayor touched on this in her concurring opinion in *Jones*. She noted:

[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. 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. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice ALITO notes, some people may find the “tradeoff” of privacy for convenience “worthwhile,” or come to accept this “diminution of privacy” as “inevitable,” *post*, at 962, and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.<sup>193</sup>

And Justice Alito succinctly explained the dilemma.

The *Katz* expectation-of-privacy test . . . is not without its own difficulties. It involves a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks. In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change

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

may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.<sup>194</sup>

The question, it seems, is *should* the inevitability of advancing technology define society's reasonable expectation of privacy? Or as Professor Amsterdam so eloquently stated, the question "is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."<sup>195</sup> If it is inevitable that technology will develop x-ray vision glasses that police can wear to see the contents of a student's backpack as he walks down the street, or the inside of a woman's purse as she walks in public, does this mean the student and the woman have no legitimate expectation of privacy in the backpack or purse because each is aware of the use of such technology by police? If one's legitimate realm of privacy is to be dependent upon the type of technology available to intrude into that realm, without trespassing, "the [Fourth] [A]mendment's benefit would be too stingy to preserve the kind of open society to which we are committed and in which the [A]mendment is supposed to function. What kind of society is that?"<sup>196</sup> Because the Court based its holding on the resuscitated trespass doctrine in *Jones*, the answer to these questions must await another day.

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194. *Id.* at 962 (Alito, J., concurring).

195. Anthony G. Amsterdam, *Perspectives on The Fourth Amendment*, 38 MINN. L. REV. 349, 403 (1974).

196. *Id.* at 402.



