

Michigan Law Review First Impressions

Volume 114

2015

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Brian L. Owsley

University of North Texas-Dallas College of Law

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Recommended Citation

Brian L. Owsley, *Supreme Court Jurisprudence of the Personal in City of Los Angeles v. Patel*, 114 MICH. L. REV. FIRST IMPRESSIONS 51 (2015).

Available at: http://repository.law.umich.edu/mlr_fi/vol114/iss1/7

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SUPREME COURT JURISPRUDENCE OF THE PERSONAL IN *CITY OF LOS ANGELES V. PATEL*

*Brian L. Owsley**

Recently, the Supreme Court issued a 5-4 decision in *City of Los Angeles v. Patel* striking down a city ordinance that required hotel and motel owners to make their guest registries available to police officers whenever requested to do so. Although the Court's opinion in *Patel* simply affirmed the Ninth Circuit's finding that the ordinance was unconstitutional, the Court could have used *Patel* to readdress the third-party doctrine, which establishes that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."¹ *Patel* provided a vehicle for the Court to do so, particularly because recent Supreme Court decisions suggest that the Court is concerned about the third-party doctrine's applicability to broad and warrantless searches of private information. For example, in *United States v. Jones*, the Court held law enforcement's use of a GPS tracking device to monitor a suspect's public movements constituted a search pursuant to the Fourth Amendment.² Additionally, in *Riley v. California*, the Court held that, absent exigent circumstances, law enforcement may not search a suspect's cell phone without a warrant and probable cause.³ In both cases, the Court could have applied the third-party doctrine and held that citizens forfeit any expectations of privacy when they travel in public spaces or transmit information that a third party can access. As evident in *Jones* and *Riley*, the Justices value their privacy as much as most people and could have used *Patel* to further safeguard it when dealing with potential breaches that have real-world possibilities for them.

In Part I, this Essay addresses the *City of Los Angeles v. Patel* case as it presented itself to the Supreme Court from an en banc decision by the U.S.

* Assistant Professor of Law, University of North Texas–Dallas College of Law. From 2005 until 2013, the author served as a United States Magistrate Judge for the United States District Court for the Southern District of Texas.

1. *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (holding that telephone user had no reasonable expectation of privacy in the telephone numbers that were dialed as that information is voluntarily conveyed to the telephone company); *see also* *United States v. Miller*, 425 U.S. 435, 442–43 (1976) (holding that bank customer had no reasonable expectation of privacy in the financial information that he voluntarily gave the bank to engage in routine banking transactions).

2. 132 S. Ct. 945, 949 (2012).

3. 134 S. Ct. 2473, 2494 (2014).

Court of Appeals for the Ninth Circuit. Part II focuses on the privacy concerns that personally affected the Justices in both *Jones* and *Riley*. Part III returns to *Patel* and delves into the personal aspects of this case that may have piqued the interest of the Court.

I. CITY OF LOS ANGELES V. PATEL

Factually, *Patel* is a straightforward case. In January 2008, the City of Los Angeles passed Ordinance No. 179533, which was later codified as Los Angeles Municipal Code § 41.49 and titled “Hotel Registers and Room Rentals.” The ordinance permits police officers to review hotel and motel guest registries at any time without any judicial authorization.⁴

Because the motel owners felt harassed by the manner in which police officers sought the registries,⁵ several of them challenged the new ordinance as violative of the Fourth Amendment.⁶ The motel owners did not object to the requirement to maintain the registries, but were unhappy that the police would often seek to review them late at night and often without a warrant or any suspicion whatsoever.⁷ In fact, the police subjected motel owners to numerous nonconsensual searches and seizures of their motel registration records by the police,⁸ often in the motels’ nonpublic areas.⁹

The district court addressed two subsections of the ordinance. First, it considered a subsection entitled “Hotel Record Information,” which requires all hotel operators to maintain records of information including “the name and address of each guest and the total number of guests,” “the number . . . of the room rented or assigned to each guest,” “the rate charged and amount

4. L.A. MUN. CODE § 41.49, http://clkrep.lacity.org/onlinedocs/2006/06-0125-s1_ord_179533.pdf [<http://perma.cc/5FV7-M4WV>]; Adam Liptak, *Supreme Court Will Consider Police Searches of Hotel Registries*, N.Y. TIMES (Oct. 20, 2014), http://www.nytimes.com/2014/10/21/us/supreme-court-will-weigh-in-on-police-hotel-searches.html?_r=0 [<http://perma.cc/Y799-FLTN>]; David G. Savage, *Supreme Court to Decide L.A. Hotel-Motel Privacy Case*, L.A. TIMES (Oct. 20, 2014), <http://www.latimes.com/business/la-na-supreme-court-los-angeles-motel-registry-20141013-story.html> [<http://perma.cc/NS7R-RQ8N>].

5. David G. Savage, *L.A. Wants Court to Revive Law Allowing Motel Guest Registry Searches*, L.A. TIMES (Sept. 27, 2014), <http://touch.latimes.com/#section/-1/article/p2p-81523368/> [<http://perma.cc/Y6MW-X54X>].

6. *Patel v. City of Los Angeles*, No. CV 05-1571, 2008 WL 4382755, at *2-3 (C.D. Cal. 2008) [hereinafter *Patel I*].

7. Savage, *supra* note 5.

8. *Patel I*, 2008 WL 4382755, at *2.

9. *Patel v. City of Los Angeles*, 738 F.3d 1058, 1063 (9th Cir. 2013) [hereinafter *Patel IV*] (en banc).

collected for rental of the room assigned to each guest,” and “the method of payment for the room.”¹⁰

Second, the court considered a subsection entitled “Maintenance of Hotel Record” that mandated this guest registry log be maintained at the hotel and kept for at least ninety days.¹¹ Most important, this registry “shall be made available to any officer of the Los Angeles Police Department for inspection. Whenever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business.”¹² In addition, any failure by a motel owner to comply with a police officer’s request to review the records would subject the violator to a misdemeanor with a potential penalty of a \$1,000 fine and up to six months in jail.¹³

The issue before the district court consisted solely of a facial challenge to the Los Angeles ordinance pursuant to the Fourth Amendment.¹⁴ After a bench trial in 2008, the court concluded that the city may conduct administrative searches of a “closely regulated” business,¹⁵ but that exception to the Fourth Amendment did not apply.¹⁶ Next, the court addressed whether there was a reasonable expectation of privacy in the hotel guest registries. It concluded that hotel guests had no expectation of privacy in their hotel’s registration records.¹⁷ Furthermore, although the motel owners had an expectation of privacy in these records, the ordinance was sufficiently reasonable in its scope and time such that it did not violate the owners’ privacy interests. Therefore, the ordinance was not unconstitutional on its face.¹⁸

The motel owners appealed to the U.S. Court of Appeals for the Ninth Circuit. On July 12, 2012, a three-judge panel affirmed the district court’s decision.¹⁹ This panel first explained that the motel owners do not have a reasonable expectation of privacy because the information the police officers sought is the motel guest’s information.²⁰ However, the court further

10. *Patel I*, 2008 WL 4382755, at *1 (discussing § 41.49.2).

11. *Id.* at *1–2 (discussing § 41.49.3)

12. *Id.*

13. *Patel IV*, 738 F.3d at 1061 (discussing L.A. MUN. CODE § 11.00(m)).

14. *Patel I*, 2008 WL 4382755, at *2.

15. *Id.*

16. *Id.* at *2–3.

17. *Id.* at *3 (citing *United States v. Cormier*, 220 F.3d 1103, 1107–08 (9th Cir. 2000)).

18. *Id.* at *3 (discussing *United States v. Miller*, 425 U.S. 435, 440 (1976)).

19. *Patel v. City of Los Angeles*, 686 F.3d 1085 (9th Cir. 2012) [hereinafter *Patel II*].

20. *Id.* at 1087–89.

explained that the guests do not have any reasonable expectation of privacy in this information based in part on the third-party doctrine.²¹

After granting a rehearing en banc,²² the Ninth Circuit reversed and remanded the panel's decision. In a decision by Chief Judge Alex Kozinski, the Ninth Circuit held that not only does a police officer's nonconsensual inspection of the guest registries constitute a Fourth Amendment search, but that the ordinance was facially invalid pursuant to the Fourth Amendment.²³

First, the Ninth Circuit reiterated that guests would not retain any privacy interest in the information that they provided to the owners.²⁴ Next, it concluded that the motel owners have a privacy interest in these guest registries that are entitled to Fourth Amendment protection such that any nonconsensual search of them by a police officer would constitute a Fourth Amendment search.²⁵

The Ninth Circuit then considered whether the searches authorized by the city ordinance were reasonable.²⁶ Although Los Angeles can mandate that motel owners maintain records regarding their guest registration, the court reasoned there were insufficient procedural protections because the same police making the inspection request also enforce any purported violations.²⁷ Thus, the en banc court determined that the ordinance was facially invalid because there was no opportunity for judicial review of the inspection demand.²⁸ Essentially, law enforcement could march into any hotel in Los Angeles without a warrant or even the slightest degree of suspicion and demand to search the hotel's guest registry. If the hotel owner refuses, he or she could go to prison.

On October 20, 2014, the Supreme Court granted the city's petition for a writ of certiorari.²⁹ On March 3, 2015, the Court heard oral argument. The city had seven amicus briefs filed on its behalf, including one by the United States, whereas the motel owners had ten amicus briefs filed on their behalf, and one amicus brief was filed in support of neither party. There were two issues presented to the Court: (1) whether the Ninth Circuit erred in finding

21. *Id.* at 1088 (discussing *United States v. Cormier*, 220 F.3d 1103, 1108 (9th Cir. 2000) and *United States v. Miller*, 425 U.S. 435, 441–43 (1976)).

22. *Patel v. City of Los Angeles*, 708 F.3d 1075 (9th Cir. 2013) [hereinafter *Patel III*].

23. *Patel IV*, 738 F.3d 1058.

24. *Id.* at 1062 (discussing *United States v. Cormier*, 220 F.3d 1103, 1108 (9th Cir. 2000) and *United States v. Miller*, 425 U.S. 435, 440 (1976)).

25. *Id.* at 1061–63.

26. *Id.* at 1063.

27. *Id.* at 1064.

28. *Id.* at 1065.

29. *City of Los Angeles v. Patel*, 135 S. Ct. 400 (2014) [hereinafter *Patel V*].

that the ordinance violated the Fourth Amendment as unreasonable, and (2) whether the Ninth Circuit erred in finding the ordinance was facially invalid based on the lack of judicial review prior to any police inspection.³⁰

On June 22, 2015, the Supreme Court issued a decision affirming the en banc decision.³¹ Specifically, the Court held “that facial challenges under the Fourth Amendment are not categorically barred or especially disfavored.”³² Additionally, it concluded that the Los Angeles municipal code violated the Fourth Amendment.³³

II. THE IMPLICATIONS OF *UNITED STATES V. JONES* AND *RILEY V. CALIFORNIA*

Patel was an unusual case for two reasons. First, it provided the Court with a good opportunity to reconsider the third-party doctrine, particularly in the context of widespread, warrantless, and unregulated searches. Second, the Justices could have analyzed the case differently, based on the fact that the Justices had a very personal stake in the outcome. If, for example, Chief Justice Roberts, who dissented in *Patel*, checks into the Beverly Hills Hotel, law enforcement officers would have access to, among other things, the dates that he checks in and checks out, the length of his stay, the room in which he is staying, and his license plate number. When it comes to Fourth Amendment jurisprudence, the politics of personal interest can—and do— influence Supreme Court Justice decisionmaking.³⁴

Indeed, a few recent Fourth Amendment cases support the argument that the Justices are prone to making decisions that interpret the Fourth Amendment in a manner that fully protects them in their day-to-day lives. In *Jones*, for example, the Court held that law enforcement’s installation and use of a GPS tracking device on the defendant’s vehicle constituted a Fourth Amendment search and thus required a warrant.³⁵ During the *Jones* oral argument, Chief Justice Roberts had an exchange with the attorney arguing on behalf of the United States:

CHIEF JUSTICE ROBERTS: You think there would also not be a search if you put a GPS device on all of our cars, monitored our movements for a month? You think you’re entitled to do that under your theory?

30. See Brief for Petitioner, *City of Los Angeles v. Patel*, 135 S. Ct. 400 (2014) (No. 13-1175), 2015 WL 737955; Brief of Respondent, *City of Los Angeles v. Patel*, 135 S. Ct. 400 (2014) (No. 13-1175), 2015 WL 309077.

31. *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015).

32. *Id.* at 2449.

33. *Id.* at 2451.

34. Brian L. Owsley, *TriggerFish, StingRays, and Fourth Amendment Fishing Expeditions*, 66 HASTINGS L.J. 183, 224 (2014).

35. 132 S. Ct. at 948.

MR. DREEBEN: The Justices of this Court?

CHIEF JUSTICE ROBERTS: Yes.

(Laughter.)

MR. DREEBEN: Under our theory and under this Court's cases, the Justices of this Court when driving on public roadways have no greater expectation of —

CHIEF JUSTICE ROBERTS: So, your answer is yes, you could tomorrow decide that you put a GPS device on every one of our cars, follow us for a month; no problem under the Constitution?

MR. DREEBEN: Well, equally, Mr. Chief Justice, if the FBI wanted to, it could put a team of surveillance agents around the clock on any individual and follow that individual's movements as they went around on the public streets³⁶

As the above colloquy demonstrates, Chief Justice Roberts had a visceral reaction to the government's argument that a GPS tracking device could be placed on his personal car without any judicial authorization.³⁷

This reaction contrasted sharply with Chief Justice Roberts' approach to the Court's decision in *Georgia v. Randolph*, in which the Court tackled the question of whether the Fourth Amendment protected the defendant's express refusal of consent to search his residence notwithstanding that police officers obtained consent from the defendant's wife.³⁸ The majority held that when a resident is physically present and refuses to consent to a search by police officers, that express refusal cannot be overridden by consent from another resident.³⁹

In a dissenting opinion, Chief Justice Roberts asserted that “[t]he correct approach to the question presented is clearly mapped out in our precedents: The Fourth Amendment protects privacy. If an individual shares information, papers, *or places* with another, he assumes the risk that the other person will in turn share access to that information or those papers *or*

36. Owsley, *supra* note 34, at 224 (quoting Transcript of Oral Argument at 9–10, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259)); *see also* Fabio Arcila, Jr., *GPS Tracking Out of Fourth Amendment Dead Ends: United States v. Jones and the Katz Conundrum*, 91 N.C. L. Rev. 1, 40 (2012); Brief of Amicus Curiae Professors Adam Lamparello and Charles E. MacLean in support of the Respondent, at 23–24, *City of Los Angeles v. Patel* (No. 13-1175).

37. Owsley, *supra* note 34, at 224.

38. 547 U.S. 103, 107 (2006).

39. *Randolph*, 547 U.S. 103 at 122–23.

places with the government.”⁴⁰ In discussing the difference between Chief Justice Roberts’s approach in *Randolph* compared to *Jones*, he was no doubt “more certain that he and his wife are of one mind regarding such potential intrusion” than he was confident of the rectitude of police officers deciding whether to place a tracking device on his vehicle.⁴¹

Likewise, in *Riley*, the politics of personal interest appeared to play a significant role. Writing for the majority, Chief Justice Roberts concluded that law enforcement officials must obtain a warrant prior to searching a cell phone recovered incident to arrest.⁴² As an initial matter, the Court concluded that cell phones and the data they hold generally are not capable of being used as a weapon against police officers.⁴³ Turning to a discussion of privacy concerns, Chief Justice Roberts also emphasized the enormous amounts of data and personal information that cell phones hold, characterizing them as small computers.⁴⁴ In addition to the volume of personal information and data that most cell phones contain, Chief Justice Roberts stressed that people carry their cell phones with them all of the time and that this pervasive nature of cell phones further bolsters the need for a search warrant.⁴⁵ Here, again all of the Supreme Court Justices presumably have cell phones and thus recognize their sensitive nature in light of how much personal information they hold.

III. THE COURT’S PERSONAL STAKE IN *PATEL* AND THE MISSED OPPORTUNITY TO IMPACT THE THIRD-PARTY DOCTRINE

That brings us back to *Patel* and its privacy implications. The Los Angeles City Council enacted section 41.49 to provide law enforcement with another tool to fight crime, most notably the narcotics trafficking and prostitution that often occur in low budget motels throughout the city.⁴⁶

40. *Id.* at 128 (Roberts, C.J., dissenting).

41. Owsley, *supra* note 34, at 224.

42. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014).

43. *Id.*

44. *Id.* at 2489; see also Charles E. MacLean, *But Your Honor, a Cell Phone is not a Cigarette Pack: An Immodest Call for a Return to the Chimel Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 Fed. Cts. L. Rev. 41, 62 (2012) (“Cell phones are more like extensive computers than wallets.”); Owsley, *supra* note 34, at 226–27 (the Court viewed cell phones as “essentially small computers that stored immense amounts of data and information”).

45. *Riley*, 134 S. Ct. at 2490.

46. Transcript of Oral Argument at 25:5–9, *City of Los Angeles v. Patel* 135 S. Ct. 400 (2014) (No. 13-1175), 2015 U.S. Trans LEXIS 18, at 2. (“The place where they are frequently conducting it are low-budget motels that have a strong incentive to take cash and not fill out a registry and allow this kind of criminal activity to flourish.”).

In the jurisprudence of the personal, the Justices would likely be unconcerned about their own privacy if police officers were limited to searching the guest registries at cheap motels. However, section 41.49 is far broader. It gives law enforcement the authority to conduct warrantless searches of the guest registries of any hotel in Los Angeles. If the guest registry at issue was for the Beverly Hills or Hollywood Hotels, a Supreme Court Justice visiting Los Angeles could potentially be one of the guests. Indeed, imagine that a reporter for the gossip pages teams up with a police officer to obtain a scoop as to where a celebrity like Jennifer Aniston or Brad Pitt are spending the night.⁴⁷ If a Supreme Court Justice is staying in a hotel that is targeted by an investigative reporter, then that Justice's room and license plate number, payment information, and check-in and check-out dates will be freely accessible. Certainly, the Justices would not appreciate having their sleeping arrangements publicized. For example, Justice Scalia is notorious for not even allowing recordings of his speeches by broadcast media.⁴⁸

In fact, at oral argument in *Patel*, Justice Scalia appeared to have this issue on his mind. He specifically asked the city's counsel to identify whose reasonable expectation of privacy is being addressed, to which counsel responded that it was just the motel owner's expectation.⁴⁹ The attorney then further submitted that the city is not invading the reasonable expectation of privacy by any guests.⁵⁰ Later in the argument, Justice Scalia sought and received a similar assurance from Michael Dreeben, the Deputy Solicitor General, appearing as amicus curiae on behalf of the city.⁵¹

In addition to Justice Scalia's concerns, counsel for the Patels pointed out that "this is an ordinance that applies to the Four Seasons and the Ritz-Carlton and everything else."⁵² Thus, any warrantless search is not limited to cheap motels prone to narcotics and prostitution offenses; they also apply to hotels where Chief Justice Roberts and the rest of his Court might stay.

47. See Conor Friedersdorf, *A Motel-Sized Victory for Privacy at the Supreme Court*, THE ATLANTIC (June 23, 2015), <http://www.theatlantic.com/politics/archive/2015/06/an-motel-sized-victory-for-privacy-at-the-supreme-court/396542/> [http://perma.cc/5P77-PDBA] (discussing such a scenario after the Supreme Court's decision).

48. See, e.g., Adam Liptak, *Scalia Apologizes for Seizure of Recordings*, N.Y. TIMES (Apr. 13, 2004), <http://www.nytimes.com/2004/04/13/us/scalia-apologizes-for-seizure-of-recordings.html> [http://perma.cc/U5HP-MEN6].

49. Transcript of Oral Argument at 13:22–25, *City of Los Angeles, v. Patel* 135 S. Ct. 400 (2014) (No. 13-1175), 2015 U.S. Trans LEXIS 18, at 2.

50. *Id.* at 14:1–12.

51. *Id.* at 22:7–19.

52. *Id.* at 57:23–24; see also Friedersdorf, *supra* note 51.

CONCLUSION

Sadly, Chief Justice Roberts did not have the epiphany during the *Patel* oral argument that he did in *Jones*. Instead, he joined in a dissent written by Justice Scalia arguing that the motel registry searches were sufficiently limited in nature such that they were reasonable pursuant to the Fourth Amendment.⁵³ Meanwhile, Justice Sotomayor, writing for the majority, established that litigants may bring facial challenges to statutes pursuant to the Fourth Amendment. However, if Chief Justice Roberts had such an epiphany, then *Patel* could have opened up an attack on the third-party doctrine based on the concerns by Supreme Court Justices that their hotel habits may be available to curious California cops. Despite *Patel*'s outcome, the Justices are human beings who have emotional sides to their personalities, which in turn can affect how they view the cases before them. For practitioners before the Court, there is still some benefit in putting Fourth Amendment cases in a context that personalizes it for the Justices.

53. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2457 (2015).

