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The Court Loses its Way with the Global Positioning System: United States v. Jones Retreats to the “Classic Trespassory Search”

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THE COURT LOSES ITS WAY WITH THE GLOBAL
POSITIONING SYSTEM: *UNITED STATES V. JONES*
RETREATS TO THE “CLASSIC TRESPASSORY SEARCH”

George M. Dery III*
Ryan Evaro**

This Article analyzes United States v. Jones, in which the Supreme Court considered whether government placement of a global positioning system (GPS) device on a vehicle to follow a person’s movements constituted a Fourth Amendment “search.” The Jones Court ruled that two distinct definitions existed for a Fourth Amendment “search.” In addition to Katz v. United States’s reasonable-expectation-of-privacy standard, which the Court had used exclusively for over four decades, the Court recognized a second kind of search that it called a “classic trespassory search.” The second kind of search occurs when officials physically trespass or intrude upon a constitutionally protected area in order to obtain information. This work examines the concerns created by Jones’s ruling. This Article asserts that, by emphasizing property rights in bringing back the decades-old physical trespass test, Jones potentially undermined the Katz standard. Further, Jones added an inquiry into motivation by asking if the government committed the intrusion to obtain information, thus creating a subjective inquiry that is inconsistent with much of Fourth Amendment doctrine. Finally, in its attempt to distinguish its facts from earlier vehicle-tracking cases, the Court created a loophole in Fourth Amendment application that law enforcement could exploit in the future.

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INTRODUCTION

If you learned that the federal government had attached a Global-Positioning-System (GPS) tracking device to the undercarriage of your car and monitored your every movement for a twenty-eight-day period, collecting more than two thousand pages of data that tracked your vehicle at all times to within fifty to one hundred feet of its location,¹ what would trouble you the most about this intrusion? Would it be the prospect of a government, formed for the purpose of protecting your rights, following you about as you travel wherever your private whim takes you, without your having even been aware of its presence? Would the concern be that Big Brother, employing its vast resources, including multiple satellites, has targeted you to watch and record your every move? Or would the idea that bothered you the most be that agents physically trespassed on your prop-

1. *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

erty by sticking a GPS device onto the mud-splattered undercarriage of your car?²

The Supreme Court was confronted with these concerns in *United States v. Jones*, a case in which a joint Federal Bureau of Investigation and Metropolitan Police Department task force investigating narcotics trafficking placed a GPS device on Antoine Jones's Jeep and followed it for so long that the GPS's battery had to be replaced.³ Rather than facing the "vexing problem" of whether such a four-week investigation was too long or intrusive, the Court in *Jones* chose to focus on the fact that the "Government physically occupied private property for the purpose of obtaining information."⁴ In doing so, the Court purposely pointed to the past, proudly following a 1765 case known as a "monument of English freedom."⁵ By anchoring its reasoning to the eighteenth century, *Jones* missed an opportunity to provide Constitutional guidance for technological intrusions of the twenty-first century. More specifically, by narrowing its inquiry to physical intrusions on private property, the Court failed to address the larger concerns of blanket and surreptitious government surveillance in public places.

This Article begins, in Part I, with a historical review of the Court's definition of a Fourth Amendment "search."⁶ Part II presents *Jones*: its factual background as well as the Court's opinion. Part III then explores the implications of the *Jones* decision. This work examines whether *Jones*'s resurrection of the decades-old physical trespass test will undermine the *Katz* privacy expectation definition that has been the standard for nearly a half-century. Also considered is whether *Jones*'s novel addition of a subjective element to the definition of a search can be reconciled with the rest of

2. *Id.*

3. *Id.*

4. *Id.* at 949.

5. *Id.* The case the *Jones* Court cited was *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.); 2 Wils. K.B. 275, an authority which "is a case we have described as a 'monument of English freedom' undoubtedly familiar to 'every American statesman at the time the Constitution was adopted.'" *Id.* *Entick*, of course, was decided centuries before the advent of GPS technology.

6. Included in this review is an exploration of the reasonable-expectation-of-privacy standard developed in *Katz v. United States*, 389 U.S. 347, 361 (1967) and consistently applied by the Court for decades. 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.

Fourth Amendment doctrine.⁷ Finally, this Article will assess whether, in distinguishing its facts from earlier vehicle-tracking cases, *Jones* unwittingly created a loophole to Fourth Amendment application that authorities might exploit. This Article endeavors to develop two key themes: (1) in trying to cope with the challenges that technology will create in the future, the Court confined itself to narrow doctrines of the past, and (2) in defining the privacy right protected by the Fourth Amendment, the Court clung to a focus on the visible and tangible, thus missing an opportunity to address the entire range of privacy concerns implicated by today's ever-increasing intrusions on the individual.

I. HISTORICAL BACKGROUND

A review of the long road the Court has taken to establish a meaningful definition of a Fourth Amendment "search" is necessary to fully understand the significance of the Court's reasoning in *Jones*. Since the Fourth Amendment itself does not explain what is a "search," the Court has attempted, since the nineteenth century, to provide guidance on this issue. At least before *Jones*, the arc of this history has bent toward an ever more sophisticated understanding of government incursion on privacy, causing the Court to eventually recognize intrusions occurring without physical invasion. The culmination of the Court's efforts was the recognition that the Fourth Amendment could be implicated by an intrusion on what a person could reasonably expect to be private, regardless of the lack of tangible trespass.

A. Early Interpretations of a Fourth Amendment "Search"

Although the Fourth Amendment was adopted in 1791,⁸ the Supreme Court did not fully consider the right against unreasonable search and seizure until 1886, in *Boyd v. United States*.⁹ In *Boyd*, a federal prosecutor, seeking forfeiture of thirty-five cases of glass imported without payment of taxes, moved for the court to order the defendant to produce an incriminating invoice for the glass.¹⁰ To assess the Fourth Amendment implications of the government's motion, the *Boyd* Court turned to *Entick v. Carrington*, the same 1765 case that the *Jones* Court so lauded.¹¹ In *Entick*, Nathan Carrington and other messengers of the King, "with force and arms," broke into the plaintiff's home.¹² Without consent, the messengers

7. As will be noted, before *Jones*, in *Whren v. United States*, 517 U.S. 806, 813 (1996), the Court refused to consider an officer's subjective viewpoint in its Fourth Amendment jurisprudence.

8. See *Katz*, 389 U.S. at 372 (Black, J., dissenting).

9. 116 U.S. 616 (1886).

10. *Id.* at 617–21.

11. See *id.* at 626; *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

12. *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) 807; 2 Wils. K.B. 275, 275.

remained for four hours, broke open “the doors to the rooms, the locks, iron bars,” and “read over, pryed into, and examined all the private papers, books, &c. of the plaintiff.”¹³ Carrying off “100 charts, 100 printed pamphlets, &c. &c.,” the messengers wrongfully exposed the plaintiff’s “secret affairs.”¹⁴ Plaintiff’s counsel urged that giving officials such a power to search would be equivalent to saying they had the “power to torture.”¹⁵ Believing the officials acted without proper authority, Lord Chief Justice Camden noted, “[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour’s ground, he must justify it by law.”¹⁶

Foreshadowing *Jones*, *Boyd* praised *Entick* as “one of the landmarks of English liberty” that was “applauded by the lovers of liberty in the colonies as well as in the mother country.”¹⁷ *Boyd* noted that Lord Camden in *Entick* had emphasized, “[t]he great end for which men entered into society was to secure their property.”¹⁸ Further, “every invasion of private property, be it ever so minute, is a trespass,” even if the only damage is “bruising the grass.”¹⁹ Even business papers, as an owner’s “goods and chattels,” were considered a person’s “dearest property.”²⁰ While “the eye cannot by the laws of England be guilty of trespass,” such an intrusion will occur in physically removing the papers.²¹ Thus, in its early interpretation of the Fourth Amendment, the Court anchored the right to the tangible concepts of property and trespass.

Boyd then warned, “constitutional provisions for the security of person and property should be liberally construed,”²² because “a close and

13. *Id.*

14. The Court specified, “whereby the secret affairs, &c. of the plaintiff became wrongfully discovered and made public.” *Id.*

15. *Id.* at 814; 2 Wils. K.B. at 285.

16. *Id.* at 817; 2 Wils. K.B. at 291.

17. *Boyd v. United States*, 116 U.S. 616, 626 (1886).

18. *Id.* at 627.

19. *Id.*

20. *Id.* at 627–28.

21. *Id.* at 628.

22. *Id.* at 635. *Black’s Law Dictionary* defines a “liberal construction” in reference to statutes as expanding:

the meaning of the statute to meet cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used It means, not that the words should be forced out of their natural meaning, but simply that they should receive a fair and reasonable interpretation with respect to the objects and purposes of the instrument.

literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.”²³ Referring to the government’s illegal intrusion, the Court famously warned: “It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure.”²⁴

Adherence to the visible and tangible made sense to Lord Camden in 1765 and even to our Founders while adopting the Fourth Amendment in 1791. The eighteenth century was a world that genuinely comprehended only the concrete. At the time, physics had existed as a modern science for just over a century after the printing of Isaac Newton’s *Principia Mathematica* in 1687.²⁵ While Europeans were first learning Newton’s universal laws of gravity, American colonists, still bogged down in the mysticism of the Middle Ages, held witch trials in 1692.²⁶ Even by the time of *Boyd*, science had not progressed sufficiently to enable scientists to rely on unseen forces. In the late nineteenth century, an editor in the *Medical Record* hesitated to embrace the germ theory, explaining, “Judging the future by the past, we are likely to be as much ridiculed in the next century for our blind belief in the power of unseen germs, as our forefathers were for their faith in the influence of spirits, of certain planets and the like, inducing certain maladies.”²⁷ Therefore, the scientific knowledge, or lack thereof, prevailing in the early history of our nation strongly recommended limiting decisions of practical consequence to what could be known by reliance upon things actually felt and seen.

B. *The Fourth Amendment “Search” as a Physical Trespass on a Constitutionally Protected Area*

The Court’s first Fourth Amendment cases stood on the firm foundation of physical trespass. In *Amos v. United States*, a case in which the defendant was convicted of concealing “whisky on which the revenue tax had not been paid,” agents searching the defendant’s home found bottles hidden in a barrel of peas and under a quilt on a bed.²⁸ Since agents had entered the home without a warrant, the Court had no trouble deeming

23. *Boyd*, 116 U.S. at 635.

24. *Id.* *Boyd* is also known for its curious claim that the Fourth and Fifth Amendments share such an “intimate relation” that they “run almost into each other.” *Id.* at 630, 633.

25. See JOHN GRIBBIN, *THE SCIENTISTS: A HISTORY OF SCIENCE TOLD THROUGH THE LIVES OF ITS GREATEST INVENTORS* 186 (2002).

26. See COTTON MATHER & INCREASE MATHER, *THE WONDERS OF THE INVISIBLE WORLD: BEING AN ACCOUNT OF THE TRYALS OF SEVERAL WITCHES LATELY EXECUTED IN NEW-ENGLAND*, at v (London, John Russell Smith 1862).

27. CANDACE MILLARD, *DESTINY OF THE REPUBLIC: A TALE OF MADNESS, MEDICINE, AND THE MURDER OF A PRESIDENT* 157 (2011).

28. 255 U.S. 313, 314–15 (1921).

their actions a violation of the Fourth Amendment.²⁹ *Amos* offered the Court a clear example of a Fourth Amendment search, for it involved an actual physical entry by government agents into a house. The Court's initial condemnations of Fourth Amendment intrusion involved the clearest of violations—actual invasion of the home by a person representing the State.

In *Hester v. United States*, another case involving the concealment of “distilled spirits,” the Court once again focused on physical trespass, but narrowed the scope of areas protected from government intrusion.³⁰ In *Hester*, revenue agents hid themselves at least fifty yards from the house where Hester lived and saw him hand a quart bottle to another person named Henderson.³¹ When Hester was alerted to the officers' presence, he ran, dropping a jug he was holding, which “broke but kept about a quart of its contents.”³² Police picked up the jug, the bottle which Henderson had discarded, and a jar thrown from a window of the home, all of which contained moonshine whiskey.³³ Even though officers recovered all the objects when outside of the home, they acted without a warrant and one officer admitted that “he supposed they were on Hester's land.”³⁴ The Court in *Hester* found no Fourth Amendment violation “even if there had been a trespass.”³⁵ Although *Hester* briefly considered the encounter in terms of privacy by noting that the defendant's own actions in abandoning the jug disclosed its existence, the Court mainly anchored its reasoning to

29. *Id.* at 315. The Court readily rejected the government's warrantless search due to the Fourth Amendment's long-held preference for warrants, as noted in *Weeks v. United States*:

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,” says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, “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.” In *Ex parte Jackson*, 96 U.S. 727, 733 (1878), this court recognized the principle of protection as applicable to letters and sealed packages in the mail, and held that consistently with this guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures such matter could only be opened and examined upon warrants issued on oath or affirmation particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.

232 U.S. 383, 390–91 (1914).

30. 265 U.S. 57 (1924).

31. *Id.* at 58 (noting agents were positioned “from fifty to one hundred yards away” from the home).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

the trespass that occurred in the case.³⁶ The Court noted that the evidence recovered was “not obtained by entry into the house.”³⁷ The fact that officials examined the evidence while on a citizen’s land was unavailing because the Fourth Amendment’s “special protection” applied only to “persons, houses, papers, and effects.”³⁸ The Fourth Amendment, quite simply, did not extend to “the open fields.”³⁹

Outside of the Fourth Amendment itself, the only authority *Hester* cited in support of this ruling was Blackstone, an English commentator of the eighteenth century.⁴⁰ The passage *Hester* relied upon involved Blackstone’s description of the particular elements of common-law burglary.⁴¹ Blackstone noted that burglary required that a break-in occur in “a mansion or dwelling house.”⁴² Breaking into a “distant barn” or “warehouse” would not constitute burglary, because such structures were not “looked upon as a man’s castle of defense.”⁴³ If instead the break-in implicated a barn, stable, or warehouse, which was “parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall.”⁴⁴ Blackstone did not himself define common-law burglary, but cited Sir Edward Coke, who began his reports in the late 1500s.⁴⁵ Thus *Hester*, a twentieth-century constitutional law case, based its ruling on criminal law at least as old as the sixteenth century.

As early as the 1920s, the Court began to consider issues of electronic surveillance. In these early cases, however, the Court continued to apply the legal rules it originally created for tangible searches by physical entry of homes. The Court’s first electronic surveillance case, *Olmstead v. United States*, demonstrated this dynamic.⁴⁶ Roy Olmstead, a bootlegger during prohibition, was the “leading conspirator” in illegally importing, possessing, and selling liquor in Washington State.⁴⁷ Olmstead’s business, which had aggregate annual sales exceeding \$2 million, sold some two hundred

36. *See id.*

37. *Id.*

38. *Id.* at 59.

39. *Id.*

40. *Id.* (“The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.”).

41. *See United States v. Dunn*, 480 U.S. 294, 300 n.3 (1987).

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* 4 BLACKSTONE, COMMENTARIES 225, available at http://avalon.law.yale.edu/subject_menus/blackstone.asp.

46. 277 U.S. 438 (1928).

47. *Id.* at 455–56.

cases of liquor per day to customers who ordered by phone.⁴⁸ To gather evidence of the conspiracy, prohibition agents wiretapped conversations by inserting small wires “along the ordinary telephone wires” from four homes and the main office.⁴⁹ Since officers placed taps in the office building’s basement and in phone lines “in the streets near the houses,” the evidence was gathered “without trespass upon any property of the defendants.”⁵⁰ The evidence, which was gathered for many months, revealed not only Olmstead’s bootlegging, but also illegal dealing with the Seattle police.⁵¹

In considering whether the wiretaps were illegal, the Court in *Olmstead* noted that the Fourth Amendment “itself shows that the search is to be of material things—the person, the house, his papers, or his effects.”⁵² Further, the particularity requirement presupposed a search or seizure of tangible things, for “[t]he description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.”⁵³ The case law indicated that the Fourth Amendment is simply not violated “unless there has been an official search and seizure of [defendant’s] person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure.”⁵⁴ Since agents used only their “sense of hearing and that only,” and since they refrained from actually entering the defendant’s houses or offices, “[t]here was no searching . . . [t]here was no seizure.”⁵⁵ Therefore, the Fourth Amendment did not forbid such electronic surveillance.⁵⁶

In so ruling, *Olmstead* revealed the Court’s fear that expanding the right against unreasonable search and seizure to include such nebulous things as electronic traces of conversations could open up the Fourth Amendment to limitless application.⁵⁷ The Court noted that the telephone, invented only fifty years earlier, extended communications to far distant places.⁵⁸ *Olmstead* declared, “The language of the Fourth Amend-

48. *Id.* at 456.

49. *Id.* at 456–57.

50. *Id.* at 457.

51. *Id.* at 471 (Brandeis, J., dissenting) (noting the surveillance “extended over a period of nearly five months,” resulting in a written record of “775 typewritten pages”).

52. *Id.* at 464 (majority opinion).

53. *Id.* (emphasis in original).

54. *Id.* at 466.

55. *Id.* at 464.

56. *Id.* The *Olmstead* case was decided five to four. Justice Frankfurter later characterized *Olmstead* as a case in which “this Court, by the narrowest margin, refused to put wiretapping beyond the constitutional pale where a fair construction of the Fourth Amendment should properly place it.” On *Lee v. United States*, 343 U.S. 747, 759 (1952) (Frankfurter, J., dissenting).

57. *See Olmstead*, 277 U.S. at 465–66.

58. *Id.* at 465.

ment can not be extended and expanded to include telephone wires reaching to the whole world” because the wires “are not part of his house or office any more than are the highways along which they are stretched.”⁵⁹

The Court’s next electronic surveillance case, *Goldman v. United States*, involved technology that had evolved beyond wiretaps.⁶⁰ In *Goldman*, federal agents investigating bankruptcy fraud entered a conspirator’s office at night to install a listening device.⁶¹ When that device failed to work, the agents instead simply placed a “detectaphone” against a wall enabling them to overhear the conversations from the next office.⁶² When the conspirators later claimed the electronic eavesdropping violated the Fourth Amendment, the *Goldman* Court first considered whether the agent’s physical trespass to install the original faulty listening apparatus tainted the later use of the detectaphone.⁶³ *Goldman* held that the earlier illegal trespass did not cause the later use of a different device to violate the Fourth Amendment because “the trespass did not aid materially in the use of the detectaphone.”⁶⁴ In assessing the separate issue of whether the detectaphone itself violated the Fourth Amendment, the Court rejected an argument by the defendants that anticipated the “reasonable expectation of privacy” analysis later created in *Katz v. United States*.⁶⁵ The defendants had contended that *Olmstead*, being a wiretapping case, was distinguishable from the use of a detectaphone because a person speaking on a phone “projects his voice beyond the confines of his home or office” and therefore assumes a risk that his “message may be intercepted.”⁶⁶ In contrast, the detectaphone picked up conversation from persons who expected their conversations to “be confined within the four walls of the room.”⁶⁷ Finding defendants’ reasoning “too nice for practical application,” the Court found the use of the detectaphone lawful under *Olmstead*.⁶⁸ Thus, when offered a chance to move beyond the materiality of the physical invasion test, the *Goldman* Court explicitly refused because such an option would open the Court to difficult line-drawing decisions.⁶⁹

The Court once again refused to venture into fine legal distinctions in *On Lee v. United States*, a case in which a “stool pigeon” was “wired for

59. *Id.*

60. 316 U.S. 129 (1942).

61. *Id.* at 131.

62. *Id.* at 131–32.

63. *Id.* at 132, 134.

64. *Id.* at 135.

65. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

66. *Goldman*, 316 U.S. at 135.

67. *Id.*

68. *Id.*

69. *Id.*

sound.”⁷⁰ In *On Lee*, an old acquaintance entered defendant’s laundry and prompted him to make incriminating statements.⁷¹ Since the acquaintance wore “a small microphone in his inside overcoat pocket and a small antenna running along his arm,” a Bureau of Narcotics agent overheard statements that led to On Lee’s being charged with conspiracy to sell opium.⁷² On Lee contended that the wired acquaintance violated the Fourth Amendment by entering with consent obtained only through the fraud of hiding the microphone, for the defendant would not have consented to entry had he known of the presence of the device.⁷³ The Court happily avoided any “niceties of tort law” and “fine-spun doctrines” by simply noting that there was no nonconsensual “physical entry” by force or unwilling submission,⁷⁴ and so “no trespass was committed.”⁷⁵ Moreover, the *On Lee* Court refused to apply cases involving unlawful seizures of tangible property to electronic surveillance, deeming it “farfetched” to liken a traditional search or seizure to eavesdropping on a conversation.⁷⁶ Any eavesdropping here was the fault of the defendant himself, who indiscreetly spoke with someone he should not have trusted.⁷⁷ Thus, agents did not violate the Fourth Amendment.⁷⁸

The tangible nature of the Court’s Fourth Amendment doctrine reached its logical extreme in *Silverman v. United States*, in which police physically penetrated the headquarters of an illegal gambling operation.⁷⁹ Police inserted a microphone attached to a foot-long spike through a party wall until the “spike mike” came into contact with a heating duct in defendant’s home, “converting the entire heating system into a conductor of sound.”⁸⁰ The device enabled police to overhear incriminating conversations on both floors of the house.⁸¹ The *Silverman* Court, considering the Fourth Amendment implications of the spike mike, avoided the “large questions” stemming from the “frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society,” because officers accomplished the eavesdropping in the case “by means of an unauthorized physical penetration into the premises occupied” by the de-

70. 343 U.S. 747, 749 (1952).

71. *Id.*

72. *Id.* at 748–49.

73. *Id.* at 751–52.

74. *Id.* at 752–53.

75. *Id.* at 751.

76. *Id.* at 753–54.

77. *Id.*

78. *Id.* at 754.

79. 365 U.S. 505, 506 (1961).

80. *Id.* at 506–07.

81. *Id.* at 507.

defendant.⁸² Such “physical intrusion” or “physical encroachment” into a “constitutionally protected area” distinguished *Silverman*’s eavesdropping from precedent, which had as a “vital factor” the “absence of a physical invasion” of the home.⁸³ The physical penetration offended the *Silverman* Court for “[a]t the very core” of the Fourth Amendment “stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”⁸⁴ *Silverman*, offering a cramped view of the Fourth Amendment, where a citizen exercised this right by hunkering down in their bunker of a home, thus specified:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man’s castle.⁸⁵

Perhaps conscious of the weakness of an argument hinging entirely on the crossing of a physical boundary, the *Silverman* Court admitted that the Court of Appeals had been “unwilling to believe that the respective rights are to be measured in fractions of inches.”⁸⁶ But, the Court responded that its decision was “based upon the reality of an actual intrusion into a constitutionally protected area.”⁸⁷ The Court might have sensed the increasing arbitrariness of measuring rights against electronic intrusion by a physical yardstick, for while it upheld its prior holding in *Goldman*, it declined “to go beyond it, by even a fraction of an inch.”⁸⁸

C. *The Court Rejected the Physical Trespass Rule in Favor of Defining a Fourth Amendment Search by Government Intrusion on a Reasonable Expectation of Privacy*

The rule focusing on physical trespass reached its breaking point in *Katz v. United States*, a case in which Federal Bureau of Investigation

82. *Id.* at 509.

83. *Id.* at 510. The *Silverman* Court continually relied on its distinction between eavesdropping involving an actual or physical intrusion and surveillance made without such invasions, noting that *Olmstead* involved “no entry of the houses or offices of the defendants,” while the conversations were gathered in *Silverman* by “usurping part of the [the defendant’s] house or office.” *Id.* at 511. Further, *Silverman* noted, “[t]his Court has never held that a federal officer may without a warrant and without consent physically entrench into a man’s office or home.” *Id.* at 511–12.

84. *Id.* at 511.

85. *Id.* at 511 n.4 (internal citations omitted).

86. *Id.* at 512.

87. *Id.*

88. *Id.*

agents recorded a caller's side of a phone conversation by attaching an electronic device "outside of the public telephone booth from which he placed his calls."⁸⁹ Relying on the Court's own precedent, the parties in the case, as well as the Court of Appeals, analyzed the case in terms of a physical entrance into, or a physical penetration of, a constitutionally protected area.⁹⁰ However, the Court in *Katz* "declined to adopt this formulation of the issues," disparaging the physical intrusion test as a misleading talismanic incantation.⁹¹ Instead, *Katz* declared, "the Fourth Amendment protects people, not places."⁹² The Court did concede that, "[i]t is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry," but it deemed *Olmstead's* and *Goldman's* underpinnings to have become so eroded that their trespass doctrine "can no longer be controlling."⁹³ Thus, *Katz* explicitly ruled, "the reach of the Fourth Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."⁹⁴

After dismantling its old doctrine, the *Katz* Court, casting about for a new rule, began to focus on privacy expectations. The Court believed that knowingly exposing something, even in the home or office, could cause a loss of Fourth Amendment protection, while seeking to preserve privacy, even in a public place, may still trigger Fourth Amendment protection.⁹⁵ *Katz* declared that a person who enters a phone booth, "shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world," and therefore, the government's electronic eavesdropping violated "the privacy upon which he justifiably relied."⁹⁶ It fell to Justice Harlan, in his concurrence, to craft the enduring definition of a Fourth Amendment search: "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."⁹⁷

Justice Black vehemently dissented from *Katz's* innovation. He criticized the "ingenuity of language-stretching judges" that distorted the plain meaning of the Fourth Amendment's language in a misguided attempt to

89. 389 U.S. 347, 348 (1967).

90. *See id.* at 348–50.

91. *Id.* at 351.

92. *Id.*

93. *Id.* at 352–53.

94. *Id.* at 353.

95. *Id.* at 351.

96. *Id.* at 352–53.

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

“keep the Constitution up to date.”⁹⁸ The Fourth Amendment was meant to address the palpably violent physical intrusion of “breaking in, ransacking and searching homes and other buildings and seizing people’s personal belongings without warrants issued by magistrates.”⁹⁹ Justice Black could “see no way in which the words of the Fourth Amendment can be constructed to apply to eavesdropping”¹⁰⁰ because it “does not automatically apply to evidence obtained by ‘hearing or sight.’”¹⁰¹ Just as Justice Black preferred grounding rulings in “the meaning of words” rather than on “philosophical discourses on such nebulous subjects as privacy,” he viewed the Fourth Amendment, in protecting “persons, houses, papers, and effects against unreasonable searches and seizures,” as limited to “tangible things with size, form, and weight, things capable of being searched, seized, or both.”¹⁰² Since an overheard conversation lacked this tangibility, it could neither be searched nor seized under the Fourth Amendment.¹⁰³ Further, the Amendment’s requirement that “persons or things to be seized” be particularly described was not only meant to limit protection to seizure of tangible items, but to objects already in existence so they could be described.¹⁰⁴ Describing a future conversation simply was impossible, and thus overheard discussions were not things the Founders meant to be covered by the right against unreasonable searches and seizures.¹⁰⁵

D. *The Primacy of Katz’s Reasonable Expectation of Privacy Definition of a Fourth Amendment Search*

Despite Justice Black’s objections, Justice Harlan’s formulation of what constituted a Fourth Amendment search became the accepted standard for over four decades in a vast variety of cases. By 1979, the Court declared that, “[i]n determining whether a particular form of government-initiated electronic surveillance is a ‘search’ within the meaning of the Fourth Amendment, our lodestar is *Katz v. United States*.”¹⁰⁶ More broadly, the Court described the “question whether a person has a ‘constitutionally protected reasonable expectation of privacy’” as the “touch-

98. *Id.* at 366, 373 (Black, J., dissenting).

99. *Id.* at 367.

100. *Id.* at 373.

101. *Id.* at 368–69. Justice Black explained, “My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today’s decision, and (2) I do not believe it is the proper role of the Court to rewrite the Amendment in order to ‘bring it into harmony with the times’ and thus reach a result that many people believe to be desirable.” *Id.* at 364.

102. *Id.* at 365.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Smith v. Maryland*, 442 U.S. 735, 739 (1979), *superseded by statute*, Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848.

stone” of Fourth Amendment analysis.¹⁰⁷ After nearly two decades of reliance on *Katz*, the Court stated unequivocally that a government intrusion into a particular area “cannot result in a Fourth Amendment violation unless the area is one in which there is a ‘constitutionally protected reasonable expectation of privacy.’”¹⁰⁸ *Katz* had thus become the standard for determining what constituted a Fourth Amendment “search.”

Katz’s ascendancy, however, meant the demise of the previous test focusing on physical invasion into a constitutionally protected area. In explicitly recognizing that it had “overruled *Olmstead* and *Goldman*,” the Court declared that *Katz* “finally swept away doctrines that electronic eavesdropping is permissible under the Fourth Amendment unless physical invasion of a constitutionally protected area produced the challenged evidence.”¹⁰⁹ As early as 1978, the Court deemed *Olmstead* to be repudiated because Fourth Amendment protection turned on privacy expectations rather than on “a property right in the invaded place.”¹¹⁰ Since the Fourth Amendment’s “essential purpose” was to “shield the citizen from unwarranted intrusions into privacy,”¹¹¹ this right applied “as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”¹¹²

E. *The Court Refined Katz’s Test by Determining that Individual Actions Can Impact One’s Reasonable Expectation of Privacy*

Unlike the Court’s previous reliance on the physical trespass test, *Katz*’s emphasis on privacy often caused Fourth Amendment application to turn on an individual’s own actions. Knowingly exposing one’s possessions to the public could undermine one’s Fourth Amendment protection—even in the home—while exercising discretion could extend privacy into public places.¹¹³ Such reasoning had far-reaching consequences, as illustrated by *United States v. Miller*, where the Court applied *Katz* to banking records, which included financial statements, checks, and

107. *Oliver v. United States*, 466 U.S. 170, 177 (1984). The Court repeated its characterization of *Katz*’s focus on privacy as its “touchstone” in *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974).

108. *New York v. Class*, 475 U.S. 106, 112 (1986).

109. *United States v. White*, 401 U.S. 745, 748 (1971).

110. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). In *United States v. Knotts*, 460 U.S. 276, 280 (1983), the Court again declared, “the Court overruled *Olmstead* saying that the Fourth Amendment’s reach ‘cannot turn upon the presence or absence of a physical intrusion into any given enclosure.’” In *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968), the Court determined that the crucial metric was not title or property rights in the invaded place, but the “reasonable expectation of freedom from governmental intrusion.” Finally, in *Cardwell*, the Court reiterated, “[r]ather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy.” 417 U.S. at 589.

111. *Cardwell*, 417 U.S. at 589.

112. *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

113. *Katz v. United States*, 389 U.S. 347, 351 (1967).

deposit slips.¹¹⁴ *Miller* reasoned that since the defendant voluntarily conveyed his financial information to the banks and its employees in the ordinary course of business, he ran the risk that, “in revealing his affairs to another,” those employees might share such information with the government.¹¹⁵ Therefore, the depositor’s Fourth Amendment interests were not implicated by the government’s subpoena of such records.¹¹⁶ The Court relied on *Miller* to rule in *Smith v. Maryland* that the use of a pen register to collect the numbers dialed from a phone implicated no reasonable expectation of privacy because the caller “voluntarily conveyed numerical information to the phone company” when placing the call.¹¹⁷

The doctrine of undermining one’s own privacy expectations by conveying information to a third person took on a life of its own. In *Couch v. United States*, the Court determined that a client providing an accountant with tax records could not claim Fourth Amendment privacy because “there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return.”¹¹⁸ Similarly, an employee arrested after a controlled buy at an adult bookstore could not reasonably expect privacy “in areas of the store where the public was invited to enter and to transact business.”¹¹⁹ The defendant’s own actions, in exposing his wares “to all who frequent the place of business” prevented police examination of the materials from constituting a Fourth Amendment search.¹²⁰ In *California v. Greenwood*, the Court applied the same standard to persons who placed trash on the curb for collection, for “having deposited their garbage in an area particularly suited for public inspection, and, in a manner of speaking, public consumption, for the express purpose of having strangers take it” destroyed the reasonableness of any privacy expectations, and hence any Fourth Amendment claim of a search.¹²¹ The Court’s logic in *Miller* reached its extreme, however, in *United States v. Dionisio*, where a defendant claimed that a grand jury’s receipt of recordings of his voice violated the Fourth Amendment.¹²² In

114. *United States v. Miller*, 425 U.S. 435, 442 (1976).

115. *Id.* at 443.

116. *Id.*

117. *Smith v. Maryland*, 442 U.S. 735, 735 (1979). A pen register is a device that employees of a phone company can install that records the numbers dialed from one phone to another. *Id.* at 737. Since it only discloses the numbers dialed, “neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers.” *Id.* at 741.

118. 409 U.S. 322, 335 (1973).

119. *Maryland v. Macon*, 472 U.S. 463, 469 (1985).

120. *Id.*

121. 486 U.S. 35, 40–41 (1988).

122. 410 U.S. 1, 2–3 (1973). In *Dionisio*, a special grand jury convened to investigate illegal gambling had received voice recordings lawfully obtained by court order. *Id.* at 2. The grand jury

Dionisio, the defendant refused to read a transcript into a recorder to provide a voice exemplar for purposes of identification.¹²³ The Court found that the Fourth Amendment provided no protection against the grand jury's hearing the recordings because the defendant knowingly exposed his voice whenever he spoke to others.¹²⁴ Since the "physical characteristics of a person's voice, its tone and manner, as opposed to the content of specific conversation, are constantly exposed to the public," no one could have "a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world."¹²⁵

Katz's standard required vigilance not only from one's own exposure of secrets, but from revelations by others as well. In *United States v. White*, the Court considered whether the Fourth Amendment applied to conversations between the defendant and a government informant, who wore a radio transmitter.¹²⁶ Agents monitoring the informant's radio overheard conversations the defendant and the informant had in various places, including defendant's own home.¹²⁷ The *White* Court found no Fourth Amendment protection because the defendant's expectation that his coconspirator would keep their conversations secret was not justifiable.¹²⁸ Since there is no honor among the guilty, one contemplating criminal activity must assume the risk that his companions may be reporting to, or even recording conversations for, the police.¹²⁹

A person's reasonable expectation of privacy could even be frustrated unintentionally. In *United States v. Jacobsen*, a private freight carrier accidentally ripped open a package with a forklift and found it filled with bags of white powder.¹³⁰ The carrier alerted the Drug Enforcement Administration, whose agent reexamined the contents of the opened package.¹³¹ The Court concluded that this reexamination was not a Fourth Amendment search because it "infringed on no legitimate expectation of privacy."¹³² Once a non-governmental third party frustrates the original

subpoenaed *Dionisio* to provide a voice exemplar for comparison with the lawfully recorded conversations already received in evidence. *Id.* at 3. He refused, arguing, in part, that compelling such exemplars would violate his Fourth Amendment rights. *Id.*

123. *Id.* at 3.

124. *Id.* at 14.

125. *Id.*

126. 401 U.S. 745, 746–47 (1971).

127. *Id.* at 747.

128. *Id.* at 752.

129. *Id.*

130. 466 U.S. 109, 111 (1984).

131. *Id.* at 111, 119.

132. *Id.* at 120.

privacy expectation,¹³³ “the Fourth Amendment does not prohibit governmental use of the now nonprivate information.”¹³⁴ Thus, third parties could reduce the scope of our Fourth Amendment rights simply by making freely available items for government inspection.¹³⁵ These third parties could be neighboring snoops, scavenging homeless, tabloid reporters, or coupon clippers, all rummaging through trash left on the curb.¹³⁶ Indeed, those who diminish Fourth Amendment privacy need not even be human, for dogs have destroyed a person’s Constitutional rights by dragging trash into a neighbor’s yard “at the behest of no one.”¹³⁷

F. *The Court Altered Katz’s Standard by Considering the Identity of the Object of the Government Intrusion*

Katz’s focus on reasonable expectations of privacy also caused the Court to focus on the identity of the object claimed to be private. If the item in question was contraband, then the Fourth Amendment might not protect against government intrusions to detect it.¹³⁸ Such a distinction relied on the Court’s shift from protecting people’s “reasonable” expectations of privacy to protecting their “legitimate” expectations of privacy.¹³⁹ In *United States v. Place*, the Court found a trained canine’s sniff of luggage in public “did not constitute a ‘search’ within the meaning of the Fourth Amendment” because it exposed “only the presence or absence of narcotics, a contraband item.”¹⁴⁰ No “noncontraband items” risked being revealed, so no legitimate privacy interests were implicated.¹⁴¹

The Court applied similar reasoning when it assessed the government’s chemical testing of the white powder agents found in *Jacobsen*.¹⁴² In *Jacobsen*, when presented with a package of white powder by the freight

133. *Id.* at 111 (noting specifically that “the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police.”).

134. *Id.* at 117 (“[T]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.”).

135. *Id.* at 119.

136. *California v. Greenwood*, 486 U.S. 35, 40 nn.3–4 (1988).

137. *Id.* at 40 n.2.

138. *See United States v. Place*, 462 U.S. 696, 706 (1983) (“Given the fact that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing government interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime.”); *Jacobsen*, 466 U.S. at 123 (“Congress has decided . . . to treat the interest in ‘privately’ possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest.”).

139. *See Place*, 464 U.S. at 706–07; *Jacobsen*, 466 U.S. at 123.

140. *Place*, 464 U.S. at 707.

141. *Id.*

142. *Jacobsen*, 466 U.S. at 123.

carrier, the government agent immediately field-tested the substance, determining that it was cocaine.¹⁴³ Since the government test merely disclosed whether the substance was contraband without exposing any other “arguably ‘private’ fact,” it compromised “no legitimate privacy interest.”¹⁴⁴ The agent’s test was therefore not a Fourth Amendment search.¹⁴⁵

The Court has treated government intrusions seeking contraband quite differently when the methods used could also expose lawful activity, however. In *Kyllo v. United States*, an agent suspecting a homeowner of growing marijuana at home used a thermal imager to determine whether heat emanating from the house was consistent with the use of high-intensity lamps typically employed in marijuana cultivation.¹⁴⁶ While sitting in his car, the agent detected heat emanating from the garage and sidewall of the home, which ultimately led to the recovery of over one hundred marijuana plants.¹⁴⁷ *Kyllo* deemed the information gathered by the imager to be the product of a search, despite the fact that its focus was contraband.¹⁴⁸ The Court was troubled by the imager’s potential to gather other information besides the existence of contraband, noting that the camera “might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail many would consider ‘intimate.’”¹⁴⁹ Lacking the ability of a canine sniff or a field-test to hone in solely on contraband, the thermal imager could not operate without triggering a Fourth Amendment search. Thus, a *Katz* search could be triggered by an intrusion insufficiently tailored to detect only illegality.

G. *The Court Added a New Factor to Katz by Considering Whether the Technology the Government Employed in its Intrusion was Generally Available to the Public*

The Court has long noted the privacy implications of advancing technology. As early as 1967, in *Berger v. New York*, the Court traced electronic eavesdropping back to interception of telegraph messages.¹⁵⁰ When it first applied *Katz*’s standard to various technologies, the Court assessed these technologies with appropriate concern. In *Katz* itself, the Court worried about technology eroding the common sense belief that a caller

143. *Id.* at 112.

144. *Id.* at 123 (“Congress has decided—and there is no question about its power to do so—to treat the interest in ‘privately’ possessing cocaine as illegitimate.”).

145. *Id.* at 124.

146. 533 U.S. 27, 29 (2001).

147. *Id.* at 30.

148. *Id.* at 34–35.

149. *Id.* at 38.

150. 388 U.S. 41, 45 (1967).

from a phone booth should be “entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.”¹⁵¹

The Court, however, recognized that not every technology implicated Fourth Amendment privacy. For example, it found no Fourth Amendment interests implicated by the use of pen registers, which recorded only the numbers dialed from a phone,¹⁵² or the shining of a flashlight into the interior of a stopped car.¹⁵³ In *United States v. Knotts*, government use of an electronic beeper to track a car as it moved on public highways did not cause Fourth Amendment application because, “[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.”¹⁵⁴ Similarly, “naked-eye observations” of a home’s curtilage¹⁵⁵ from flyovers of planes or helicopters in “navigable airspace” implicated no reasonable privacy expectations.¹⁵⁶

As technology advanced, however, the Court’s Fourth Amendment concerns rose. In *Dow Chemical Co. v. United States*, the Court confronted government use of a “floor-mounted, precision aerial mapping camera” to investigate a chemical manufacturing facility.¹⁵⁷ The Court held that taking precision aerial photographs from a plane in navigable airspace did not constitute a Fourth Amendment search.¹⁵⁸ The Court did acknowledge, however, that use of “highly sophisticated surveillance equipment not gen-

151. *Katz v. United States*, 389 U.S. 347, 352 (1967).

152. *Smith v. Maryland*, 442 U.S. 735, 744 (1979).

153. *Texas v. Brown*, 460 U.S. 730, 739–40 (1983) (holding that the shining of a flashlight to illuminate the interior of a vehicle “trenched upon no right secured . . . by the Fourth Amendment.”).

154. 460 U.S. 276, 281–82, 285 (1983).

155. The Court has described “curtilage” as “the land immediately surrounding and associated with the home.” *Oliver v. United States*, 466 U.S. 170, 180 (1984). The Court has ruled that curtilage “warrants the Fourth Amendment protections that attach to the home” because “the curtilage is the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Curtilage has become so important that the Court has developed a four-factor test defining it:

[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301 (1987).

156. See *Florida v. Riley*, 488 U.S. 445, 450 (1989) (helicopters); *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986) (planes).

157. 476 U.S. 227, 229 (1986).

158. *Id.* at 239.

erally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant.”¹⁵⁹ *Dow Chemical* predicted that a more advanced device, which enabled the government to learn what was happening behind walls or windows “would raise very different and far more serious questions.”¹⁶⁰ When such technology appeared in *Kyllo*, the Court drew a line, deeming thermal imaging of a home to be a search.¹⁶¹ *Kyllo* declared, “It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”¹⁶² Fearing that the homeowner would be “at the mercy of advancing technology,”¹⁶³ the Court held that using “sense-enhancing technology” to obtain information about the “interior of the home” amounted to a search, “at least where (as here) the technology in question is not in general public use.”¹⁶⁴

Application of *Katz* to emerging technology is perhaps becoming increasingly difficult for the Court. In *City of Ontario v. Quon*, the Court was presented with a government audit of “alphanumeric pagers” provided to SWAT team members to use in mobilizing in emergency situations.¹⁶⁵ Concerned about “[r]apid changes in the dynamics of communication and information transmission,” the Court warned that “[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”¹⁶⁶ *Quon*, therefore, avoided analyzing the privacy issues raised by pagers by assuming without deciding that the Fourth Amendment applied to such communications.¹⁶⁷ The Court therefore has received criticism for failing to assess the Fourth Amendment implications of pagers, “a technology whose use had peaked in the 1990s and was largely replaced by mobile phone text messaging long before 2010.”¹⁶⁸

H. *When the Court has Previously Applied Katz to the Tracking of Automobiles in Public, it has Found No Fourth Amendment Search*

Jones is far from the first case in which the Court has addressed the Fourth Amendment implications of government intrusions on automobiles. In *Cardwell v. Lewis*, the Court employed *Katz* in deciding that “the

159. *Id.* at 238.

160. *Id.* at 239.

161. *Kyllo v. United States*, 533 U.S. 27, 35 (2001).

162. *Id.* at 33–34.

163. *Id.* at 35.

164. *Id.* at 34.

165. 130 S. Ct. 2619, 2625–26 (2010).

166. *Id.* at 2629.

167. *Id.* at 2630.

168. Karson Thompson, *Luddites No Longer: Adopting the Technology Tutorial at the Supreme Court*, 91 TEX. L. REV. 199, 206 (2012).

examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in a public parking lot” infringed on no expectation of privacy.¹⁶⁹ The Court, in considering the privacy rights of a driver stopped at a license checkpoint in *Brown v. Texas*,¹⁷⁰ found “no legitimate expectation of privacy” from an officer bending down and adjusting his angle of vision so he could see what was inside a stopped car.¹⁷¹ In *Knotts*, where the government used a tracking device to follow a car to an amphetamine lab, the Court characterized the intrusion as amounting “principally to the following of an automobile on public streets and highways.”¹⁷² Recognizing that a person has lessened privacy in a motor vehicle because the driver has little chance to escape public scrutiny, *Knotts* concluded that “[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”¹⁷³ Any motorist should know that whenever he is traveling on 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.”¹⁷⁴ The Court has therefore found in *Katz* little protection for drivers on the street.

I. *The Significant Variety of Circumstances to Which the Court has Applied Katz Showed the Dominance of its Privacy Standard*

For nearly a half-century, *Katz*’s privacy expectation test has defined what is a Fourth Amendment search. This rule has stood unchallenged in a whole host of cases of striking variety. The Court has employed *Katz*’s reasonable expectation of privacy standard to determine whether the Fourth Amendment applied as a “search” to the tactile squeezing of soft luggage in the overhead bin of a bus,¹⁷⁵ to an officer’s viewing of a dashboard VIN number,¹⁷⁶ and to an employer’s intruding into a doctor’s of-

169. 417 U.S. at 583, 591 (1974). *Cardwell* reiterated that “[r]ather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy.” *Id.* at 589.

170. 460 U.S. 730, 733 (1983).

171. *Id.* at 740.

172. *United States v. Knotts*, 460 U.S. 276, 281 (1983).

173. *Id.*

174. *Id.* at 281–82.

175. See *Bond v. United States*, 529 U.S. 334, 338–39 (2000) (holding that physical manipulation of a bus passenger’s carry-on luggage constitutes a Fourth Amendment search).

176. See *New York v. Class*, 475 U.S. 106, 114 (1986) (holding that an officer’s viewing of a dashboard VIN number does not constitute a Fourth Amendment search).

office in a state hospital.¹⁷⁷ *Katz* has been relied upon to assess intrusions into tax records,¹⁷⁸ into trash,¹⁷⁹ and upon places as diverse as barns,¹⁸⁰ adult bookstores,¹⁸¹ burned buildings,¹⁸² and prison cells.¹⁸³

As a consequence, the Court has recognized as a given the resulting “decoupling” of the Fourth Amendment from trespassory violation of property rights.¹⁸⁴ Instead of simply looking for a physical intrusion, the Court, in applying *Katz*, has considered a variety of factors in assessing the reasonableness of a privacy expectation. The Court has given weight to the intention of the Framers, the uses to which a location has been put, and societal understandings.¹⁸⁵ When the Court did bother to imagine a situation when “*Katz*’s two-pronged inquiry would provide an inadequate index of Fourth Amendment protection,” it had to resort to extreme situations, such as “if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry.”¹⁸⁶ Thus, on the eve of the *Jones* case, a Fourth Amendment search was whatever *Katz* said it was.

II. *UNITED STATES v. JONES*

A. *Facts*

In 2004, a joint Safe Streets Task Force of the Federal Bureau of Investigation (FBI) and the Metropolitan Police Department began investigating Antoine Jones,¹⁸⁷ an owner and operator of a nightclub in Washing-

177. See *O’Connor v. Ortega*, 480 U.S. 709, 722 (1987) (holding that public employers’ searches of employee offices should be judged by reasonableness standard and do not require warrants).

178. See *Couch v. United States*, 409 U.S. 322, 335 (1973) (finding no legitimate expectation of privacy in tax records provided to accountant).

179. See *California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (finding no legitimate expectation of privacy in garbage left outside on the curb for collection).

180. See *United States v. Dunn*, 480 U.S. 294, 298 (1987) (holding that illuminating with a flashlight a barn not within the curtilage of a home is not a search under the Fourth Amendment).

181. See *Maryland v. Macon*, 472 U.S. 463, 469 (1985) (holding that police officer’s entering into an adult bookstore and examining materials available to all store clientele did not constitute a search).

182. See *Michigan v. Clifford*, 464 U.S. 287, 292 (1984) (holding that a criminal warrant is required to search a burned building for evidence of criminal activity).

183. See *Hudson v. Palmer*, 468 U.S. 517, 524–25 (1984) (finding no legitimate expectation of privacy in prison cells).

184. *Kyllo v. United States*, 533 U.S. 27, 32 (2001).

185. See *Oliver v. United States*, 466 U.S. 170, 178 (1984); *O’Connor v. Ortega*, 480 U.S. 709, 715 (1987).

186. *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979).

187. *United States v. Jones*, 132 S. Ct. 945, 948; Brief of Appellant–Petitioner at 2, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10–1259) [hereinafter Appellant–Petitioner’s Brief].

ton D.C., whom was suspected of trafficking cocaine.¹⁸⁸ Hoping to link Jones to conspirators as well as locate any stash locations for illegal drugs,¹⁸⁹ the task force employed a variety of investigative techniques, “including visual surveillance of the nightclub, installation of a camera focused on the front door of the club, and a pen register and wiretap covering Jones’s cellular phone.”¹⁹⁰ The investigators also used informants who knew Jones and obtained warrants to review text messages between Jones and other suspects.¹⁹¹

On September 16, 2005,¹⁹² the task force obtained a search warrant enabling it to install a GPS tracking device on the Jeep Grand Cherokee registered to Jones’s wife, although driven primarily by Jones himself.¹⁹³ Even though the district court authorized the government to install the device in the District of Columbia within ten days, the task force attached the GPS tracker on the eleventh day, outside the District in Maryland.¹⁹⁴ After placing the GPS device on the undercarriage of the Jeep, law enforcement received updates every ten seconds that could locate Jones’s vehicle within fifty to one hundred feet.¹⁹⁵ The GPS tracking device automatically communicated with orbiting satellites, transmitting data to “remote law enforcement computers in real time” and storing the information for later use.¹⁹⁶ For the following twenty-eight days, the device recorded every movement of Jones’s vehicle, including speed and current locations.¹⁹⁷ “When the Jeep was not moving, the GPS device went into ‘sleep mode’ to conserve its battery, thus providing police with information even when the vehicle remained in place.”¹⁹⁸ Despite this energy-saving feature, the task force used the device for so long that it once had to change the battery as the vehicle was parked in a Maryland parking lot.¹⁹⁹ The government, making no effort to minimize intrusion when the vehicle was driven by other family members or left in the enclosed garage, collected over two thousand pages of GPS data.²⁰⁰ The device, however,

188. *Jones*, 132 S. Ct. at 948; Appellant-Petitioner’s Brief, *supra* note 187, at 2.

189. Appellant-Petitioner’s Brief, *supra* note 187, at 2.

190. *Jones*, 132 S. Ct. at 948.

191. See *United States v. Jones*, 451 F. Supp. 2d 71, 74 (2006).

192. *Id.* at 87.

193. *Jones*, 132 S. Ct. at 948.

194. *Id.* See also Brief for Appellee-Respondent at 5, *Jones*, 132 S. Ct. 945 (No. 10-1259) [hereinafter Appellee-Respondent’s Brief] (noting that since the government failed to execute the warrant within its terms regarding time and place, the warrant became invalid).

195. Appellee-Respondent’s Brief, *supra* note 194, at 4.

196. *Id.* at 3–4.

197. *Jones*, 132 S. Ct. at 948; Appellee-Respondent’s Brief, *supra* note 194, at 4.

198. Appellee-Respondent’s Brief, *supra* note 194, at 4.

199. *Jones*, 132 S. Ct. at 948.

200. Appellee-Respondent’s Brief, *supra* note 194, at 4.

“[did] not reveal who [was] driving the car [or] what the driver and occupants were doing” or with whom they met at their destinations.”²⁰¹

The GPS device tracked Jones’s Jeep to the “vicinity of a suspected stash house in Fort Washington, Maryland.”²⁰² Jones’s presence at the stash house was confirmed by videotape and photographic evidence of him driving his vehicle to and from the location.²⁰³ Learning from intercepted calls that Jones was expecting a “sizable shipment of cocaine,” the task force “executed warrants at various locations” on October 24, 2005.²⁰⁴ The search at the Fort Maryland stash house revealed “97 kilograms of cocaine, 3 kilograms of crack cocaine,” and over \$800,000 in cash.²⁰⁵ The task force recovered \$70,000 in the Jeep Jones had been driving.²⁰⁶

A federal grand jury charged Jones and others²⁰⁷ with conspiracy to distribute and possession with the intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base.²⁰⁸ The indictment alleged that Jones and his coconspirators “acquired, repackaged, stored, processed, sold, and redistributed large quantities of cocaine and cocaine base, in the District of Columbia, the States of Maryland and Texas, the Republic of Mexico and elsewhere.”²⁰⁹ The indictment also alleged Jones was the “primary supplier” to conspirators in the District of Columbia and Maryland.²¹⁰ Jones unsuccessfully moved to suppress the evidence on Fourth Amendment grounds, and he was ultimately convicted and sentenced to life imprisonment.²¹¹

B. *The Court’s Opinion*

Justice Scalia, who wrote the Court’s opinion in *Jones*, signaled the direction of the entire opinion in his first sentence framing the issue: “We decide whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual’s vehicle, and subsequent use of that device to monitor the vehicle’s movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.”²¹² By narrowing the focus to the physical placement of a government object and

201. Appellant-Petitioner’s Brief, *supra* note 187, at 10.

202. *Id.* at 4.

203. *Id.*

204. *Id.*

205. *United States v. Jones*, 451 F. Supp. 2d 71, 74 (2006).

206. *Id.* at 77.

207. *United States v. Jones*, 132 S. Ct. 945, 948 (2012) (noting Jones worked with “several alleged co-conspirators”).

208. *Id.*; Appellant-Petitioner’s Brief, *supra* note 187, at 5.

209. *Jones*, 451 F. Supp. 2d at 73–74.

210. *Id.* at 74.

211. *Jones*, 132 S. Ct. at 948–49.

212. *Id.* at 948.

subsequent monitoring, the *Jones* Court anchored its analysis to material and tangible concepts. Justice Scalia emphasized, “It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information.”²¹³ *Jones*’s spotlight is thus on the actual occupation of a piece of private property by the government. The Court addressed the tangible aspect of the task force’s intrusion by declaring, “We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”²¹⁴

The Court then specifically linked attaching the GPS device on the Jeep to the constitutional right against unreasonable search and seizure by noting that a vehicle amounted to an “effect” as listed in the Fourth Amendment.²¹⁵ An effect is clearly property, which comes with a well-established history of rights. *Jones* therefore compared the use of GPS in 2005 with English law of 1765, *Entick v. Carrington*.²¹⁶ Justice Scalia was relieved to note that *Entick* “expressed in plain terms” the importance of property rights to the analysis of search and seizure:

[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour’s ground, he must justify it by law.²¹⁷

Jones emphasized the Fourth Amendment’s “close connection to property,” noting the Court had tied its jurisprudence “to common-law trespass, at least until the latter half of the 20th century.”²¹⁸

Justice Scalia described *Katz*’s privacy expectation test as a deviation “from that exclusively property-based approach.”²¹⁹ *Jones* aimed to return Fourth Amendment law to its proper course because, “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.”²²⁰ The *Jones* Court resurrected the standard *Katz* had disparaged as “misleading”²²¹ and “talismanic”²²² by deeming government acquisition of information by “physically intruding on a con-

213. *Id.* at 949.

214. *Id.*

215. *Id.*

216. *Id.* (citing *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.); 2 Wils. K.B. 275).

217. *Id.*

218. *Id.*

219. *Id.* at 950.

220. *Id.*

221. *Katz v. United States*, 389 U.S. 347, 351 (1967).

222. *Id.* at 352 n.9.

stitutionally protected area”²²³ to be the “classic trespassory search.”²²⁴ Relying on physical intrusion enabled the Court to simply avoid the implications of GPS monitoring under the *Katz* rule.²²⁵ Although it did not need to employ *Katz* in the case, the Court emphasized that it was not overturning this decades-old standard, but merely supplementing it. The Court explicitly declared that “the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”²²⁶

In applying its alternative to *Katz*, the Court in *Jones* concluded that, in attaching the GPS device to the Jeep, “officers encroached on a protected area,”²²⁷ necessitating that the Court hold that “the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’”²²⁸ The Court, therefore, resolved a troubling question about the implications of a newly intrusive and ubiquitous technology by focusing on the fact that the government physically placed an item on a car.

III. THE IMPLICATIONS OF *JONES*’S RETURN TO PHYSICAL INTRUSIONS

A. *Jones*’s Exhumation of the Government’s Physical Intrusion or Trespass on a Constitutionally Protected Area Test Saddled Courts with Two Fourth Amendment Definitions of a “Search,” Potentially Undermining the *Katz* Standard

The Court in *Jones* emphatically and repeatedly contended that it was not ridding itself of *Katz*, but merely recognizing that two definitions of a Fourth Amendment search existed all along: (1) *Katz*’s privacy expectation test and (2) *Olmstead*’s physical trespass standard.²²⁹ *Jones*’s assertion becomes strained, however, when contrasted with the Court’s actual language in *Katz* and its progeny. The *Katz* Court roughly treated *Olmstead*’s

223. *Jones*, 132 S. Ct. at 951 n.3.

224. *Id.* at 954.

225. *See id.* at 950 (“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 “[w]e need not address the Government’s contentions, because Jones’s Fourth Amendment rights do not rise or fall with the *Katz* formulation.”).

226. *Id.* at 952 (emphasis in original). The Court repeated, “We do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.” *Id.* at 953 (emphasis in original).

227. *Id.* at 952.

228. *Id.* at 949.

229. The Court literally emphasized this point by italicizing key language. Specifically, it declared, “The *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.” *Id.* at 952 (emphasis in original). The Court declared it was refusing to create an “*exclusive*” test. *Id.* at 953.

physical penetration test by dismissing it as misleading and famously intoning, “the Fourth Amendment protects people, not places.”²³⁰ The Court declared flatly in *Rakas v. Illinois* that *Olmstead* was repudiated²³¹ and went even further in *White*, plainly deeming both *Olmstead* and *Goldman* “overruled.”²³² *Smith*, in characterizing *Katz* as “our lodestar,”²³³ and *Oliver*, in labeling *Katz* as “the touchstone of (Fourth) Amendment analysis,” both made the repudiated physical trespass test conspicuous in its absence.²³⁴ Finally, Justice Harlan, the author of the currently recognized form of the *Katz* rule, himself viewed *Katz* as overruling the *Olmstead* rule²³⁵ and disparaged *Goldman* as “bad physics as well as bad law.”²³⁶

By resurrecting *Olmstead* without addressing the Court’s previous criticism of the prior emphasis on the physical invasion of property, *Jones* created a lack of clarity that could undermine the *Katz* rule. Having two definitions for such a crucial Fourth Amendment term as a “search” is at minimum inelegant, leaving officers in each case having to determine which rule a court will later decide guided their actions. More troubling, the two rules offer competing views about what the Fourth Amendment is actually supposed to protect, because *Katz* focuses on privacy while *Olmstead* on property.

In his dissent, Justice Black did not hesitate to contrast *Katz*’s innovation with the rejected trespass standard. He declared that the nebulous privacy test simply lacked a textual basis because the phrase, “persons, houses, papers, and effects,” along with the Amendment’s particularity requirement, connoted “tangible things with size, form, and weight” which were actually physically capable of being searched or seized.²³⁷ Conversations yet to be spoken could not be the subject of the particularity requirement because they were not “already in existence” and thus subject to being described.²³⁸ He regretted that *Katz*, in an effort to provide Fourth Amendment protection for the spoken word, used language “in a completely artificial way.”²³⁹

Jones favored textual anchoring and, as the Court did in *Olmstead*, focused on tangibility. The Court specifically linked *Jones*’s Jeep to the Fourth Amendment by noting it was an “effect.”²⁴⁰ *Jones* framed its in-

230. *Katz v. United States*, 389 U.S. 347, 351 (1967).

231. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

232. *United States v. White*, 401 U.S. 745, 748–49 (1971).

233. *Smith v. Maryland*, 442 U.S. 735, 739 (1979).

234. *Oliver v. United States*, 466 U.S. 170, 177 (1984).

235. *Katz*, 389 U.S. at 362 n.* (Harlan, J., concurring).

236. *Id.* at 362.

237. *Id.* at 365 (Black, J., dissenting).

238. *Id.*

239. *Id.* at 366.

240. *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

quiry in terms of physical occupation or intrusion of private property.²⁴¹ The Court focused on the actual attachment of a piece of hardware onto a vehicle, viewing this act itself as the relevant intrusion because it was an actual encroachment on a protected area.²⁴² Justice Scalia lauded the Court's long adherence to a "property-based approach."²⁴³ *Jones's* refuge in tangibility is even more troubling when the Court's reticence to confront new technologies is considered. As previously noted, the Court hesitated to rule on whether review of messages sent on alphanumeric pagers constituted a Fourth Amendment search, warning that "prudence counsels caution" against creating "far-reaching premises" about the privacy expectations of employees using employer-provided pagers.²⁴⁴

The *Jones* Court has thus created an unstable situation where two rules, each premised upon fundamentally differing judicial philosophies, vie to define Fourth Amendment searches. Further, *Jones's* rationales for reanimating *Olmstead* promote the physical intrusion test at *Katz's* expense. The Court declared that the Fourth Amendment was firmly tied to trespass for most of our nation's history.²⁴⁵ Justice Scalia declared that "Fourth Amendment rights do not rise or fall with the *Katz* formulation," itself a deviation from the Court's own precedent.²⁴⁶ *Katz's* privacy expectation rule could thus have an uncertain future, particularly with a Court that prides itself on adhering to the text of the Constitution.

Jones's de-emphasis of *Katz* has already had practical consequences. Chances are that when Antoine Jones learned that a task force had been tracking him for four weeks,²⁴⁷ his most pressing concern was not that the government had physically occupied a small space on the undercarriage of his Jeep. In all likelihood, what caused most distress was the prospect of the federal government focusing its vast resources, including multiple satellites and government computers, to generate two thousand pages of data recording every move he made in his car.²⁴⁸ This privacy intrusion is not addressed by the Court, leaving the real possibility that if the government had committed the same surveillance, yet somehow avoided physical intrusion, *Knotts*,²⁴⁹ left undisturbed by *Jones*, would have found no Fourth Amendment application, and therefore no Constitutional protection,

241. *Id.*

242. *Id.* at 952.

243. *Id.* at 950.

244. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010).

245. 132 S. Ct. at 949 ("Our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."); *Id.* at 950 ("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.").

246. *Id.* at 950.

247. *Id.* at 948.

248. *Id.*

249. *United States v. Knotts*, 460 U.S. 276, 281–82 (1983).

against this constant and intrusive invasion of a person's right to be left alone.²⁵⁰ *Jones*'s focus on the physical left unresolved the question of how a driver's individual behavior, in conveying information about the location, direction, and speed of his car, could undermine his own privacy expectations against continuous GPS surveillance.²⁵¹ Similarly, *Jones*'s avoidance of *Katz* failed to provide guidance on another factor deemed relevant in the reasonable privacy expectation analysis: the general availability to the public of a particular technology.²⁵² GPS, a technology that consumers, whether with their phones, cars, or other devices, come into contact with on a daily basis, is not merely available but ubiquitous. The *Jones* Court, however, rushed to protect the driver from the government attaching a device onto the exterior of his vehicle, an intrusion originally outside the notice, and probably not among the primary concerns, of *Jones* himself.

The *Jones* Court apparently welcomed the *Katz* deviation²⁵³ as much as the public enjoyed the introduction of "New Coke." In April 1985, the Coca-Cola Company committed "one of the most famous blunders in marketing history" when it replaced its original flagship drink with the sweeter tasting "New Coke."²⁵⁴ Ten weeks after introducing New Coke, in response to a consumer revolt which involved 1,500 calls a day to Coca-Cola's complaints hotline, hoarding of original Coke, and boycotts, the

250. Justice Brandeis noted:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the *right to be let alone*—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting) (emphasis added).

251. Such an issue stems from the Court's examination of how individual sharing of information impacts reasonable expectation of privacy, as discussed in Part I.E *supra*.

252. This issue stems from the Court's discussion regarding a technology's availability in impacting privacy expectations, as discussed in Part I.G *supra*.

253. *Jones*, 132 S. Ct. at 950 ("As we 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 . . . *Katz* did not repudiate that understanding. '[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home.'" (citing *Alderman v. United States*, 394 U.S. 165, 180 (1969))).

254. Stephanie Clifford, *Coca-Cola Deleting 'Classic' From Coke Label*, N.Y. TIMES, Jan. 31, 2009, at B2, available at http://www.nytimes.com/2009/01/31/business/media/31coke.html?_r=0; see also Robert M. Schindler, *The Real Lesson of New Coke: The Value of Focus Groups for Predicting the Effects of Social Influence*, 4.4 MARKETING RESEARCH 22 (1992).

company brought the original formula back.²⁵⁵ To distinguish the original drink from New Coke, cans and bottles of the traditional product were labeled as “Classic.”²⁵⁶ Over the years, Coca-Cola quietly shrank the font size of the “Classic” designation until it simply omitted it from its labels in 2009.²⁵⁷ In *Jones*, Justice Scalia might have been taking a page out of Coca-Cola’s playbook. Seeing *Katz* as a mistaken detour from the proper path of “most of our history” when the Court interpreted a Fourth Amendment search as a physical trespass upon a protected area,²⁵⁸ he aimed to make a course correction by bringing back the old formula. Such an intention is betrayed by the Court’s choice of language; Justice Scalia referred to the physical intrusion standard as the “classic trespassory search.”²⁵⁹

Jones’s retrenchment might actually have been long in the making. The Court, although ever careful to remain explicitly within *Katz*’s privacy expectation framework, has become increasingly reliant upon drawing a distinction between tangibly physical intrusions and investigations avoiding physical trespass. As early as 1983, the Court in *United States v. Place* favored a canine’s sniff of luggage because it did not require “opening the luggage” and therefore was “much less intrusive than a typical search.”²⁶⁰ In *California v. Ciraolo*, the Court noted that the over-flight of a “fenced-in backyard within the curtilage of a home”²⁶¹ took place “in a physically nonintrusive manner,”²⁶² while in *Florida v. Riley*, the Court warned that the home and curtilage were not necessarily protected from inspection involving no physical intrusion.²⁶³ In *Dow v. United States*, the Court considered an “actual physical entry” onto a company’s property to raise “significantly different questions” from a flyover.²⁶⁴ Finally, in *Bond v. United States*, the Court again distinguished between intrusions that were “only visual” and those that involved “tactile observation.”²⁶⁵ In each of these cases, however, the Court took for granted that *Katz* and its progeny provided the ruling standard.²⁶⁶ *Jones*, in resurrecting *Olmstead*’s physical

255. Clifford, *supra* note 254.

256. *Id.*

257. *Id.*

258. *Jones*, 132 S. Ct. at 950.

259. *Id.* at 954.

260. *United States v. Place*, 462 U.S. 696, 707 (1983).

261. *California v. Ciraolo*, 476 U.S. 207, 209 (1986).

262. *Id.* at 213.

263. *Florida v. Riley*, 488 U.S. 445, 449 (1989).

264. *Dow Chem. Co. v. United States*, 476 U.S. 227, 237 (1986).

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

266. See *Bond*, 529 U.S. at 337 (“First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that ‘he [sought] to preserve [something] as private . . . Second, we inquire whether the individual’s expectation of privacy is ‘one that society is prepared to recognize as reasonable.’”) (citations omitted); *Riley*, 488 U.S. at 449 (“What a person knowingly exposes to the public, even in his own home or

trespass test, made no similar assumption, thus fundamentally changing what a “search” means.

B. *In Reviving the Physical Intrusion Standard, Jones Injected a Subjective Element into Fourth Amendment Analysis That is Inconsistent with Much of Fourth Amendment Doctrine.*

In *Jones*, Justice Scalia aimed to clarify precisely what the government intended when it intruded on property by noting that agents made a physical occupation “for the purpose of obtaining information.”²⁶⁷ In reviving *Olmstead’s* focus on trespass, the Court therefore explicitly added to this traditional rule an element assessing the intent or motivation of the government official who is performing the intrusion. *Jones* specified, “Trespass alone does not qualify,” but instead must be “conjoined with” an “attempt to find something or to obtain information.”²⁶⁸ The trespass, here the “installation of the device,” alone did not trigger a Fourth Amendment search without the key ingredient of intent “to obtain information.”²⁶⁹

Even more strikingly, *Jones* altered the *Katz* rule itself by adding intent to obtain information as a necessary element, for the Court explicitly stated: “A trespass on ‘houses’ or ‘effects,’ or a *Katz* invasion of privacy, is not alone a search, unless it is done to obtain information, and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.”²⁷⁰ If the Court genuinely meant what it said, Justice Harlan’s concurrence in *Katz* requiring a government intrusion on a privacy expectation that is both actual and reasonable is no longer an accurate description of a Fourth Amendment search.²⁷¹ To complete this definition, *Jones* would now attach the official purpose or intent to “obtain information.”²⁷²

This added element would so alter the *Katz* definition of a search as to potentially force a reconsideration of the last four decades of search precedent. Government agents could now exploit *Jones’s* additional intent re-

office, is not a subject of Fourth Amendment protection.’”) (concurring opinion) (citations omitted); *Ciraolo*, 476 U.S. at 212 (“*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?”); *Dow Chem.*, 476 U.S. at 236 (“*Dow* plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe.”); *United States v. Place*, 462 U.S. 696, 706–07 (1983) (“The Fourth Amendment ‘protects people from unreasonable government intrusions into their legitimate expectations of privacy.’”) (citations omitted).

267. *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

268. *Id.* at 951 n.5. *Jones* also described a “search” as a “physical intrusion of a constitutionally protected area in order to obtain information.” *Id.* at 951 (emphasis added).

269. *Id.*

270. *Id.*

271. *United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

272. *Jones*, 132 S. Ct. at 951 n.2.

quirement by designing searches based on motives other than the motive to obtain information. With the aim of crime prevention rather than criminal investigation, officials could claim the intent to simply deter rather than prosecute criminal activity. Such a contention has great credence in the Age of Terror, when victory can only genuinely be claimed when a plot is foiled rather than when one is successfully prosecuted. Further, established case law could be circumvented. For example, officers could end-run *Kyllo* by arguing that they only meant to send a message of deterrence against the manufacture of drugs when they pointed an infrared camera at a home. The federal government could electronically trawl all banking and other financial records, pushing beyond the limits of *Miller* by claiming only to be deterring money laundering. Police departments could push *Ciraolo* and *Riley* to the breaking point by arguing that continuous overflights of residential neighborhoods by planes, or even drones, could be simply to deter all sorts of illegality rather than to collect evidence against any one individual. This argument would be all the more credible with drones, which can collect reams of data that would swamp analysts' efforts to review all the resulting information. The addition of an intent element could thus have a wealth of unintended consequences.

Since *Jones's* holding focused on the physical installation of a GPS device on a vehicle,²⁷³ perhaps its remarks about *Katz* were merely harmless dicta. The intent ingredient, however, is part and parcel of the Court's retreading of *Olmstead's* trespass test, and therefore could have uncertain and even disturbing implications for government searches by physical intrusion. The problem created by *Jones's* reliance on an officer's intent in defining a search is that it injects subjectivity into Fourth Amendment analysis, an approach "repeatedly rejected" by the Court in the past.²⁷⁴

In *Whren v. United States*, the Court warned that "the subjective intentions of the law enforcement officer are irrelevant in determining whether that officer's actions violate the Fourth Amendment" because the issue was "not his state of mind, but the objective effect of his actions."²⁷⁵ *Whren* considered whether the Fourth Amendment was violated rather than whether it applied in the first place.²⁷⁶ Still, the subjective inquiry for the application issue should be considered "fundamentally inconsistent with our Fourth Amendment jurisprudence" because it is simply less fair.²⁷⁷ The Court has recognized that it "has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the sub-

273. *Id.* at 949.

274. *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).

275. 517 U.S. 806, 813 (1996).

276. *Id.* at 808.

277. *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011).

jective state of mind of the officer.’”²⁷⁸ Probing an officer’s subjective mental state burdens the Court with the difficult task of unraveling the motives of an individual’s mind.²⁷⁹ The Court’s wariness of divining subjective motivations is so profound that it has avoided making such “post hoc findings at a suppression hearing” in an entirely distinct area of Constitutional law, the Fifth Amendment privilege against self-incrimination.²⁸⁰ Therefore, aware of the subjective standard’s shortcomings, the Court typically narrows its Fourth Amendment analysis to the effect of an officer’s actions rather than his or her state of mind.²⁸¹

In spite of these concerns, *Jones* has chosen to alter the threshold issue of Fourth Amendment application by adding a subjectivity element to its search definition. *Jones* has injected subjectivity into its analysis with little explanation as to its use for future officers and courts. This innovation could create confusion in search and seizure practice and litigation.

In a sense, it already has. The subjectivity problem in *Jones*’s rule forced the Court to defend this novelty in a case that came down in the 2013 term, *Florida v. Jardines*.²⁸² In *Jardines*, a trained canine handler, as part of a Drug Enforcement Administration joint surveillance team, followed up an unverified tip that marijuana was being grown at a home by approaching the home’s front porch with a drug-detecting dog.²⁸³ When the dog alerted to the presence of drugs, police obtained a warrant for the home, which ultimately led to the discovery and seizure of several marijuana plants.²⁸⁴ This case presented the Court with the issue of “whether using a drug-sniffing dog on a homeowner’s porch to investigate the contents of the home is a ‘search’ within the meaning of the Fourth Amendment.”²⁸⁵ *Jardines* held that the canine sniff of the home in this case did indeed constitute a search.²⁸⁶

The Court, in an opinion written by Justice Scalia, reached its conclusion by relying on the *Jones* rule that “[w]hen the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred.”²⁸⁷ The officers made such a physical intrusion in *Jardines* because they could only gather information by physically intruding

278. *Id.* (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)).

279. *Stuart*, 547 U.S. at 405.

280. *New York v. Quarles*, 467 U.S. 649, 656 (1984).

281. *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000). The Court has also declared that “the Fourth Amendment regulates conduct rather than thoughts.” *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

282. 133 S. Ct. 1409 (2013).

283. *Id.* at 1413.

284. *Id.*

285. *Id.*

286. *Id.* at 1417–18.

287. *Id.* at 1414 (internal quotation marks omitted).

on the home's "curtilage" which, as previously noted, is the area immediately surrounding the house and which shares the same Fourth Amendment protection provided the home itself.²⁸⁸

Since the investigation therefore "took place in a constitutionally protected area," the Court then inquired whether such an intrusion was permitted by the homeowner or instead "accomplished though an unlicensed physical intrusion."²⁸⁹ While an implied license "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave,"²⁹⁰ there is no such invitation to have a police dog "explore the area around the home in hopes of discovering incriminating evidence."²⁹¹ In describing the license offered to visitors by the homeowner, *Jardines* declared that the "scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose."²⁹²

The "purpose" reasoning had earlier caught the attention of the government, who relied on *Whren* in noting, "the subjective intent of the officer is irrelevant."²⁹³ Justice Scalia, finding himself confronted with the subjectivity problem, attempted to distinguish *Jardines* and *Jones* from *Whren*. In *Whren*, Justice Scalia contended that the Court merely held that "a stop or search *that is objectively reasonable* is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason."²⁹⁴ In contrast, in *Jardines*, "the question before the court is precisely *whether* the officer's conduct was an objectively reasonable search."

Justice Scalia's argument, however, was blind to the fact that walking a dog up to the door of a home is, by itself, an objectively reasonable act. As one of the dissents in *Jardines* noted:

[I]n the entire body of common-law decisions, the Court has not found a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog on a leash. On the contrary, the common law allowed even unleashed dogs to wander on private property without committing a trespass.²⁹⁵

Thus, like the officers in *Whren*, the dog handler in *Jardines* was performing objectively reasonable conduct—walking a dog to the door—that should

288. *Id.*

289. *Id.* at 1415.

290. *Id.*

291. *Id.* at 1416.

292. *Id.*

293. *Id.*

294. *Id.* (emphasis in original).

295. *Id.* at 1424 (Alito, J., dissenting).

not be “vitiating by the fact that the officer’s real reason” had nothing to do with the outwardly objectively reasonable act of bringing a dog to another’s door.²⁹⁶ Thus, try as it might, the Court could not distinguish its subjective test in *Jardines* from what it prohibited in *Whren*. Divining an officer’s intent requires a subjective inquiry whether the officer is stopping a car in *Whren*, walking a dog to a porch in *Jardines*, or attaching a GPS device to a car in *Jones*.

C. *In Attempting to Distinguish Earlier Vehicle-Tracking Cases, Jones Unwittingly Created a Significant Loophole in Fourth Amendment Application Which Law Enforcement Could Exploit*

The *Jones* Court practiced some curious parsing of the Fourth Amendment, separating its analysis into distinct steps that might create a loophole allowing officials to avoid the Amendment’s constraints.²⁹⁷ This compartmentalized approach occurred while *Jones* court was distinguishing one of the “beeper” car tracking cases, *United States v. Karo*, from the facts in its own case.²⁹⁸ In *Karo*, Drug Enforcement Administration (DEA) agents, with the owner’s consent, placed an electronic tracking device, known as a beeper, on a can of ether before the owner sold it to James Karo.²⁹⁹ The *Karo* Court held that installation of the beeper on the can of ether with the original owner’s consent was not a search.³⁰⁰ Therefore, aiming to distinguish its facts from *Karo*, *Jones* noted that in *Karo*, “at the time the beeper was installed the container belonged to a third party [the ether owner and seller], and it did not come into possession of the defendant [Karo] until later.”³⁰¹ The Court explained:

Thus, the specific question we considered was whether the installation “with the consent of the original owner constitute[d] a search or seizure . . . when the container is delivered to a buyer having no knowledge of the presence of the beeper . . . We held not . . . [T]he transfer of the container with the unmonitored beeper inside did not convey any information and

296. *Id.* at 1416 (majority opinion).

297. Ironically, in *United States v. Jones*, 132 S. Ct. 945, 951 n.5 (2012), Justice Scalia himself criticized the artificiality that comes with parsing Fourth Amendment concepts. In response to Justice Alito’s criticisms in his concurring opinion, Justice Scalia showed some irritation with his critics’ segregation of legal concepts into discrete components. Scalia criticized Justice Alito for pointing out that “if analyzed separately, neither the installation of the device nor its use would constitute a Fourth Amendment search” by acidly agreeing, “of course not,” before explaining that the trespass must be done “to obtain information.” *Id.*

298. *Id.* at 952.

299. *United States v. Karo*, 468 U.S. 705, 708 (1984). Knowing that chemical smugglers use ether to extract cocaine from clothing imported into the country, the DEA attached a beeper to the can in hopes of following it to the cocaine. *Id.*

300. *Id.* at 712.

301. *Jones*, 132 S. Ct. at 952.

thus did not invade Karo's privacy . . . Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location.³⁰²

Karo did not control *Jones* because, unlike James Karo, Antoine Jones "possessed the Jeep at the time the Government trespassorily inserted the information-gathering device," and thus was "on much different footing."³⁰³ The key difference was ownership of the vehicle when the government physically invaded it by attaching a device to it. So long as the person being monitored did not own the property at the moment when the physical trespass upon it occurred, a Fourth Amendment search was not created by attachment of the device. This was true even though no one informed the new owner that the government has previously planted a tracking device on property he now owned; the duty of full disclosure played no part in this analysis.

At minimum, the *Jones* Court's reasoning fails to punish government officials who adulterate products with secret additions meant only to benefit the government. Officers who lie by omission will be in a stronger position to have evidence admitted into court than those who honestly disclose to purchasers that their items have an electronic passenger sending information to the government. At worst, it encourages police to seek a new loophole to Fourth Amendment protection. If the government wished to avoid committing a *Jones* search, it need only attach the tracking device, whether an old-fashioned beeper or a tracker employing the latest GPS technology, on the vehicle before the customer's purchase. The government could swamp dealerships with secret GPS devices for all vehicles sold, without bothering to inform car purchasers of the physical intrusion. The government could go one better and have the devices installed at the factory while the car is being built. The installation-before-purchase gambit need not be limited to vehicles, for the government could insert GPS tracking into any product, be it jewelry, knickknacks, appliances, or groceries, before such items hit the shelves for sale. This loophole is so large that it would enable the government to track cell phones, already equipped with GPS technology before sold to the customer. Thus, while implying that it was adding to Fourth Amendment protection,³⁰⁴ *Jones* might have created a backdoor that government could exploit to severely limit our privacy.

302. *Id.* (emphasis in original).

303. *Id.*

304. *Id.* at 951–52.

CONCLUSION

When warning against the dangers of government wiretapping, Justice Brandeis quoted Chief Justice John Marshall in declaring that constitutions were “designed to approach immortality as nearly as human institutions can approach it.”³⁰⁵ Therefore, in interpreting a constitution, “our contemplation cannot be only of what has been but of what may be.”³⁰⁶ Otherwise, a national charter’s general principals would be reduced to “impotent and lifeless formulas,” promising rights in words but not in reality.³⁰⁷ He rejected making distinctions between the visible and tangible on one hand and the invisible and intangible on the other.³⁰⁸ Justice Brandeis recognized, in 1928, a time when technological progress was not nearly as rapid as it is today, that the “progress of science” would only enhance government’s ability to intrude on individual privacy.³⁰⁹ He understood that the inventive mind would create “objects of which the [founding] Fathers could not have dreamed.”³¹⁰ Similarly, in his dissenting opinion in *Goldman v. United States*, the case in which agents placed a “detectaphone” on a wall to overhear conversations in the next room, Justice Murphy criticized the Court’s “narrow, literal construction of the search and seizure clause of the Fourth Amendment adopted in *Olmstead*,” noting that such cramped reasoning paradoxically would protect “the most mundane observations entrusted to the permanence of paper,” but fail to safeguard thoughts “too intimate” to be written down.³¹¹

The Court, in *Jones*, has lost sight of these lessons. Justice Scalia noted, “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.”³¹² This assertion missed the point that, for that same time period of our history, technology simply had not advanced to a state that could threaten our basic privacies in the way it does today. *Jones* further urged that until as recently as the “latter half of the 20th century,” the Court had tied the Fourth Amendment to “common-law trespass.”³¹³ This point fails to mention that the Court’s abandonment of the common-law trespass rule was directly caused by new

305. *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

306. *Id.*

307. *Id.*

308. *Id.* at 475.

309. *Id.* at 474.

310. *Id.* at 472.

311. 316 U.S. 129, 141–42 (1942) (Murphy, J., dissenting). In *Tennessee v. Garner*, 471 U.S. 1, 13 (1985), the Court also warned that adherence to common-law rules in the face of sweeping technological change could lead to “a mistaken literalism that ignores the purposes of a historical inquiry.”

312. *United States v. Jones*, 132 S. Ct. 945, 950 (2012).

313. *Id.* at 949.

threats to privacy occasioned by advancing technology the founders could not have foreseen.³¹⁴

When the Fourth Amendment became Constitutional law, one of the foremost scientists of the time, Benjamin Franklin, had recently introduced the world to the electrical battery by connecting together a series of Leyden jars.³¹⁵ It is surmised that Franklin described the harnessing of the ephemeral energy of electricity in tangible terms by coining the word “battery” to liken a line of Leyden jars to the easily envisioned idea of a row of cannons.³¹⁶ Nearly a century after the adoption of the Fourth Amendment, American scientists scoffed that Joseph Lister’s argument urging antiseptics as a means to combat invisible germs was “absurd.”³¹⁷ The idea that everything on Earth is made of imponderably tiny particles called atoms, themselves including even smaller “corpuscles” (electrons), had to wait for the discoveries of J.J. Thomson and Ernest Rutherford at the turn of the twentieth century.³¹⁸ As thinkers of the Enlightenment, the Founders relied on reasoned arguments based on what was known at the time. Since the state of technology and science at the time of the Founders did not expose them to intrusions beyond physical trespass, they had no reason to make legal rules that would address the invisible and intangible.

Jones seemed to have forgotten that the intrusion the *Katz* Court concerned itself with was the electronic interception of a conversation, not the attachment of a device “to the outside of a public telephone booth.”³¹⁹ Undue focus on the trespass rule of the past could prevent the Court from meeting the goal *Jones* set for itself: “At bottom, we must ‘assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’”³²⁰ Technological progress will not allow the Court to stand still. *Jones* might wish to focus on the intrusion stemming from a physical attachment of a device to a car, but advances in government surveillance techniques will continue despite the Court’s resolution to consider only the past. The larger issues of privacy invasion caused by GPS and other increasingly intrusive technologies temporarily dodged by *Jones* will have to be faced by the Court if the Fourth Amendment is to maintain meaningful protection of privacy.

314. The Founders did not see the invention of the telephone, let alone the invention of surveillance technology used to intrude upon the telephone, as employed in *Katz v. United States*, 389 U.S. 347, 348 (1967).

315. 3 J.A. LEO LEMAY, *THE LIFE OF BENJAMIN FRANKLIN: SOLDIER, SCIENTIST, AND POLITICIAN, 1748–1757*, at 76 (2009).

316. *Id.* at 76–77.

317. Millard, *supra* note 27, at 15.

318. Gribbin, *supra* note 25, at 491, 504–05.

319. *Katz*, 389 U.S. at 348.

320. *United States v. Jones*, 132 S. Ct. 945, 950 (2012).