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## Five Answers and Three Questions After United States v. Jones (2012), the Fourth Amendment "GPS case"

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# FIVE ANSWERS AND THREE QUESTIONS AFTER *UNITED STATES V. JONES* (2012), THE FOURTH AMENDMENT “GPS CASE”

BENJAMIN J. PRIESTER\*

## *I. Introduction*

Each year, the United States Supreme Court’s docket includes a range of “high profile” cases that attract attention not merely from law professors and others with an acquired fascination with the Court, but also from a general audience of law students, lawyers, scholars and commentators on American politics and society, as well as, occasionally, the public at large. During the 2011 Term, one of those cases was “the GPS case,” formally known as *United States v. Jones*.<sup>1</sup> Media coverage of the case spread far beyond the legal blogosphere to a wide variety of mainstream and popular sources, both in print and online.<sup>2</sup> Many people who had no familiarity with the legal doctrinal intricacies of Fourth Amendment law nevertheless waited with bated breath to hear what the Court would say about what limitations, if any, the Constitution might place on the authority of the police to use GPS technology for tracking criminal suspects—or, more broadly, the authority of the Government in general to maintain surveillance of the public movements of people in everyday life.

When the decision was announced in January 2012, nearly everyone—from the layperson reading a news update online to the law professor ready to thoroughly dissect the ramifications of the opinion with a criminal procedure class—was left underwhelmed by the Court’s resolution of the case, at least compared to the anticipation beforehand. In two respects, at least, the Court was unanimous and clear: the Defendant’s argument prevailed and the Fourth Amendment applied to what the police had done on the facts of the case.<sup>3</sup>

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1. 132 S. Ct. 945 (2012).

2. See, e.g., Adam Liptak, *Court Case Asks if ‘Big Brother’ Is Spelled GPS*, N.Y. TIMES, Sept. 11, 2011, at A1; Tom Goldstein, *Jones Confounds the Press*, SCOTUSBLOG (Jan. 25, 2012, 11:30 AM), <http://www.scotusblog.com/?p=137791> (discussing print and online media coverage).

3. See *Jones*, 132 S. Ct. at 949; *id.* at 954 (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring in the judgment). Technically speaking, the Court did not hold that both probable cause and a warrant were required to conduct the GPS surveillance presented on

Other than that, however, the Court did not provide very much guidance about the Fourth Amendment implications of GPS surveillance or similar tracking technologies in the future. The lack of clarity was particularly acute because the reasoning underlying the Court's holding revealed a 5-4 split among the Justices<sup>4</sup>—a division that differed from the stereotypical perception of the Justices' ideological divides<sup>5</sup>—as well as a concurring opinion that seemingly agreed with both of the other two camps while simultaneously staking out a position broader than either.<sup>6</sup> At first glance the three opinions revealed a Court seemingly intent on avoiding the complex and difficult issues of Fourth Amendment rights in a digital, Internet-interconnected age and putting off these tough judgment calls for another case on another day.

As is often true of the Court's decisions, though, the reality is more nuanced than initial appearances might suggest. While the opinions in *Jones* undeniably left open several significant questions for resolution in future cases, they actually provided answers to a number of subsidiary questions. Consequently, it is worth taking the time to carefully consider not only the issues the *Jones* decision leaves open, but also the questions it answers.

## II. A Brief Background to *Jones*

Others have thoroughly described and analyzed the factual and Fourth Amendment doctrinal background to *Jones*; there is no need to repeat it in great detail here.<sup>7</sup> The important point, for present purposes, is that legal

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the facts of the case; the only issue before the Court was whether the surveillance constituted a "search" at all for Fourth Amendment purposes. *See infra* Part III.A.; *see also* Tom Goldstein, *Why Jones Is Still Less of a Pro-Privacy Decision than Most Thought*, SCOTUSBLOG (Jan. 30, 2012, 10:53 AM), <http://www.scotusblog.com/?p=138066>.

4. *See Jones*, 132 S. Ct. at 949; *id.* at 954 (Sotomayor, J., concurring); *id.* at 957 (Alito, J., concurring in the judgment).

5. The majority opinion by Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor. *See id.* at 949 (majority opinion). Justice Sotomayor also filed a concurring opinion. *Id.* at 954 (Sotomayor, J., concurring). Justice Alito wrote the opinion concurring in the judgment, which was joined by Justices Ginsburg, Breyer, and Kagan. *Id.* at 957 (Alito, J., concurring in the judgment). Thus, the Justices' perspectives in *Jones* did not correspond to a "political" or "party line" voting alignment, compared to how other decisions are perceived. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

6. *See Jones*, 132 S. Ct. at 954-57 (Sotomayor, J., concurring).

7. *See, e.g.*, *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *aff'd in part sub nom.* *United States v. Jones*, 132 S. Ct. 945 (2012); Stephanie G. Forbes, *Following You*

scholars and other commentators had known for some time that a “GPS case” likely would have to make its way to the Court, and they had given a great deal of thought to both how the Court should approach the difficult doctrinal issues and how the Court should resolve them.

Doctrinally, the background to *Jones* was relatively straightforward, at least as constitutional law and Fourth Amendment controversies go. When the police have probable cause and obtain a search warrant, they can investigate just about anything—enter and thoroughly inspect the contents of a home, demand access to a bank vault or combination safe, or examine the digital files on a computer, to name just a few examples.<sup>8</sup> Without a warrant or probable cause, however, their authority to conduct investigations is far more constrained.<sup>9</sup> More specifically, if the police investigative activity qualifies as a “search” for purposes of the Fourth Amendment’s prohibition on unreasonable searches and seizures,<sup>10</sup> then that activity usually will be unconstitutional unless the police *already* had probable cause and a warrant before acting.<sup>11</sup> A variety of investigative tactics do *not* qualify as “searches” under the Court’s decisions, however, and consequently these techniques may be used to gather the evidence needed to establish the probable cause required for obtaining a warrant.<sup>12</sup> In a pair of cases in the early 1980s, *United States v. Karo* and *United States v. Knotts*, the Court considered the use of “beepers” to track the movements of vehicles on public roadways.<sup>13</sup> Comparatively simplistic technology in today’s hindsight, such a beeper device emitted a radio-signal pulse at regular intervals and could only be followed manually by a police officer

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*Here, There, and Everywhere: An Investigation of GPS Technology, Privacy, and the Fourth Amendment*, 45 J. MARSHALL L. REV. 1 (2011); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011); Ian Herbert, Note, *Where We Are with Location Tracking: A Look at the Current Technology and the Implications on Fourth Amendment Jurisprudence*, 16 BERKELEY J. CRIM. L. 442 (2011); Recent Case, *Constitutional Law—Fourth Amendment—D.C. Circuit Deems Warrantless Use of GPS Device an Unreasonable Search*, 124 HARV. L. REV. 827 (2011).

8. See generally WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 3.3-3.4 (Thomson Reuters, 5th ed. 2009) (1985).

9. See generally *id.* §§ 3.7-3.10 (discussing doctrinal limitations on searches or seizures conducted without probable cause, without a warrant, or with neither).

10. See *infra* Part III.A.

11. See generally 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 10.01 (5th ed. 2010) (discussing conceptual debate over the so-called “warrant requirement”).

12. See LAFAVE ET AL., *supra* note 8, § 3.2.

13. See *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983).

with a signal detector who stayed within signal range to avoid losing track of the device.<sup>14</sup> In each case, the Court held that this investigative tactic was not a Fourth Amendment “search” and therefore was permissibly conducted by the police in a preliminary investigation without first establishing probable cause or obtaining a warrant.<sup>15</sup>

By the turn of the twenty-first century, more sophisticated technology enabled more detailed and extensive tracking of public movements. In *Jones* itself, the police attached a small GPS device to the undercarriage of a Jeep Grand Cherokee; using access to satellites and cellular phone networks, the device transmitted its location to a police computer at frequent intervals, producing over 2000 pages of location-information data in four weeks.<sup>16</sup> Rather than requiring constant, real-time monitoring by an officer, the police could simply view the ongoing log of the device’s location transmissions at any time.<sup>17</sup> At Jones’s trial on federal narcotics conspiracy charges, the Government used the four-week log of Jones’s public movements to establish his connections to various locations and individuals involved in the conspiracy.<sup>18</sup> On appeal from his conviction, Jones argued that this evidence should have been excluded at trial as the fruit of an unconstitutional “search” in violation of the Fourth Amendment because the surveillance had not been conducted pursuant to a valid warrant.<sup>19</sup> The D.C. Circuit agreed and reversed his conviction, setting up a circuit split with other federal appellate courts.<sup>20</sup> The Government filed a

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14. See *Karo*, 468 U.S. at 707 n.1, 708-10; *Knotts*, 460 U.S. at 277-79.

15. *Karo*, 468 U.S. at 711-13; *Knotts*, 460 U.S. at 285. *But see Karo*, 468 U.S. at 714-18 (holding that monitoring a beeper when it was present inside a home constituted a “search”).

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

17. *See id.*

18. *Id.*

19. *United States v. Maynard*, 615 F.3d 544, 555 (D.C. Cir. 2010), *aff’d in part sub nom. Jones*, 132 S. Ct. 945. The police actually obtained a warrant to attach and monitor the GPS device, but they failed to comply with its terms. *See Jones*, 132 S. Ct. at 964 n.11 (Alito, J., concurring in the judgment). In the appellate litigation, the Government conceded the noncompliance and argued that no “search” had occurred. *Id.* at 948 & n.1 (majority opinion).

20. *Compare Maynard*, 615 F.3d at 568 (concluding that the Fourth Amendment applied to lengthy, continuous GPS surveillance of public movements), *with United States v. Marquez*, 605 F.3d 604, 609-10 (8th Cir. 2010) (concluding that no reasonable expectation of privacy existed in movements made on public streets, including when monitored by GPS surveillance), *and United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007) (same, at least when “mass surveillance” was not involved).

petition for certiorari, which was granted on June 27, 2011.<sup>21</sup> This action caught the attention of scholars and commentators, and the briefing in the case attracted significant amicus curiae participation, reflecting the conventional wisdom of the case’s importance.<sup>22</sup>

The oral argument in *Jones*—which took place on November 8, 2011—confirmed that the Justices themselves also recognized the importance of the case and the difficult doctrinal issues it presented.<sup>23</sup> On the one hand, the Justices expressed clear skepticism about the Government’s position, which seemingly amounted to the Orwellian proposition that law enforcement can track all the public movements of every American at all times without any limitations.<sup>24</sup> On the other hand, the Justices equally struggled to figure out how they could fit open movements on public roads back inside the doctrinal box of reasonable expectations of privacy.<sup>25</sup> Afterward, the most likely solution seemed to be that the Court would split the difference—a modest win for the Government or for the defendant,

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21. See *United States v. Jones*, 131 S. Ct. 3064, 3064 (2011) (“Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: ‘Whether the government violated respondent’s Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent.’”).

22. See, e.g., Clare Cochrane, *Supreme Court Takes D.C. Case Debating Warrantless GPS Use*, WASH. TIMES, June 28, 2011, at A4; Orin Kerr, *Supreme Court Agrees to Review Case on GPS and the Fourth Amendment*, THE VOLOKH CONSPIRACY (June 27, 2011, 10:46 AM), <http://volokh.com/2011/06/27/supreme-court-agrees-to-review-case-on-gps-and-the-fourth-amendment/>; see also *United States v. Jones*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/united-states-v-jones/> (last visited Apr. 7, 2013) (listing 13 amicus briefs filed in *Jones*).

23. See generally Transcript of Oral Argument, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1259.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf).

24. See, e.g., *id.* at 9-10, 21-23; *id.* at 10 (“CHIEF JUSTICE ROBERTS: So, your answer is yes, you could tomorrow decide that you put a GPS device on every one of our cars, follow us for a month; no problem under the Constitution?”); *id.* at 13 (“JUSTICE BREYER: . . . And no one, or at least very rarely, sends human beings to follow people 24 hours a day. That occasionally happens. But with the machines, you can. So, if you win, you suddenly produce what sounds like *1984* from their brief.”).

25. See, e.g., *id.* at 10-11, 35-45; *id.* at 21 (“CHIEF JUSTICE ROBERTS: . . . I give you that, that it’s in public. Does the reasonable expectation of privacy trump that fact? In other words, if we ask people, do you think . . . it violates your right to privacy to have this kind of information acquired, and everybody says yes, is it a response that, no, that takes place in public, or is it simply the reasonable expectation of privacy regardless of the fact that it takes place in public?”).

within a doctrinal constraint defining some outer boundary to either lengthy GPS surveillance or limited privacy expectations in public movements, respectively.<sup>26</sup> But even that outcome probably would have required at least some modification of preexisting doctrinal principles, and the oral argument showed that the Court had no clear ideas about how to accomplish that step without opening any number of Pandora's boxes or risking a variety of slippery slopes.<sup>27</sup>

For that reason, most observers expected the Court to take months to decide the case.<sup>28</sup> I told both my fall and spring sections of Criminal Procedure that I anticipated a decision late in the Term, possibly even after the spring semester final exam in early May. As recently as the Friday before the Court's decision was announced on Monday, January 23, 2012,<sup>29</sup> I confidently predicted to a colleague that the only way the decision would come down anytime soon was if the Court punted on resolving all of the difficult and interesting problems. Which is, of course, exactly what the Court did.

Nevertheless, this does not mean there is nothing interesting in the *Jones* decision, or that it provides no insight into how the Court is likely to approach the difficult issues when they recur in a future case. Yes, the Court did kick the can down the road and put off facing the most challenging aspects to another day. But this is hardly the first time the Justices have done that.<sup>30</sup> Fortunately, the opinions in *Jones* do provide some answers even as they leave open other questions.

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26. See Lyle Denniston, *Argument Recap: For GPS, Get a Warrant*, SCOTUSBLOG (Nov. 8, 2011, 2:12 PM), <http://www.scotusblog.com/?p=131423>.

27. See generally Transcript of Oral Argument, *supra* note 23.

28. See, e.g., Orin Kerr, *Reflections on the Oral Argument in United States v. Jones, the GPS Fourth Amendment Case*, THE VOLOKH CONSPIRACY (Nov. 8, 2011, 11:55 AM), <http://www.volokh.com/2011/11/08/reflections-on-the-oral-argument-in-united-states-v-jones-the-gps-fourth-amendment-case/> (assessing oral argument as indicating that "the outcome was too close to call"); Conor McEvily, *Wednesday Round-Up*, SCOTUSBLOG (Nov. 9, 2011, 12:37 PM), <http://www.scotusblog.com/2011/11/wednesday-round-up-109/> (linking to numerous reactions in the media to the oral argument in *Jones*).

29. See *United States v. Jones*, 132 S. Ct. 945 (2012).

30. See, e.g., Benjamin J. Priester, *Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants*, 37 RUTGERS L.J. 39 (2005) (discussing several significant constitutional issues left unresolved by the Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and proposing doctrinal resolutions to them).

### III. The Answers

Frustrating as it can be for scholars, lower court judges, and law students when the Court issues a narrow holding with sweeping dicta, the opinions in *Jones* in fact reveal a number of embedded nuances that are surprisingly interesting, and perhaps even helpful. In analyzing *Jones* and assessing its implications for the future, it is important not to lose sight of the answers the decision actually does offer.

#### A. The Court (Slightly) Modified the Doctrinal Definition of a “Search.”

Oddly enough, this aspect of the *Jones* decision is simultaneously the most interesting and the least important. It is the most interesting because it marked the first change in this particular subset of search doctrine in forty-five years. But it is the least important because the narrowness of the addition to search doctrine gave it minimal practical scope.

It has long been Fourth Amendment orthodoxy, grounded in the Constitution’s text, that the Amendment does not prohibit unreasonable law enforcement investigative activity of all kinds.<sup>31</sup> Rather, it governs only those police activities that qualify as “searches” or “seizures”<sup>32</sup>—just as the First Amendment only protects “speech” and the Eighth Amendment only proscribes cruel and unusual “punishments.”<sup>33</sup> For much of its interpretive history, the doctrinal definition of “search” relied upon principles of the law of property—a “search” involved a physical intrusion into a person’s property rights.<sup>34</sup> In the famous 1967 *Katz* decision, the Court abrogated the doctrine’s reliance on property law and adopted a new definition based in principles of privacy—a “search” involved an intrusion into a person’s

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31. See, e.g., 1 DRESSLER & MICHAELS, *supra* note 11, § 6.01 (“[I]f the police activity is not a ‘search’ at all (or a ‘seizure’ . . .), the Fourth Amendment simply does not apply to the governmental conduct.”).

32. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 624-25 (1991) (holding that foot pursuit of a yet-to-be-captured fleeing suspect was not a “seizure” for Fourth Amendment purposes); *California v. Greenwood*, 486 U.S. 35, 43 (1988) (holding that removal and inspection of contents of defendant’s curbside trash was not a “search” for Fourth Amendment purposes).

33. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 517-18 (2001) (holding that application of a wiretapping statute to prohibit media reporting of contents obtained through illegal interception of a phone call would constitute unconstitutional infringement of “speech” under the First Amendment); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (holding that conditions of a prisoner’s confinement constituted “punishment” for Eighth Amendment purposes only when prison officials acted with deliberate indifference).

34. *Kyllo v. United States*, 533 U.S. 27, 31-32 (2001); *Katz v. United States*, 389 U.S. 347, 352-53 (1967); see also 1 DRESSLER & MICHAELS, *supra* note 11, § 6.02.



reasonable expectation of privacy.<sup>35</sup> Since *Katz*, the Court has applied this doctrinal definition to numerous police investigative activities, including aerial flyovers of backyards of homes,<sup>36</sup> digging through curbside trash,<sup>37</sup> and canine sniffs of airport luggage or traffic-stopped cars.<sup>38</sup> This doctrinal definition was briefed and argued in *Jones*,<sup>39</sup> and five Justices wrote or joined opinions specifically discussing its application to the GPS surveillance at issue.<sup>40</sup>

But the opinion of the Court in *Jones*, with the support of five Justices, did not use the preexisting *Katz* definition as the basis for its holding.<sup>41</sup> Instead, the Court added a new component to its doctrinal definition of a Fourth Amendment “search”: an activity involving (1) an enumerated protected category from the text of the Amendment, (2) a physical intrusion, and (3) a purpose to obtain information.<sup>42</sup> The Court repeatedly emphasized that this new definitional component is a supplement to *Katz*, not a replacement for it.<sup>43</sup> Thus, police investigative activities that qualify as a “search” under *Katz* continue to be governed by the Fourth Amendment after *Jones*. The additional doctrinal component under *Jones* reaches situations where the defendant otherwise would lose under the *Katz* definition.

First, the *Jones* addition is limited to the enumerated protected categories in the Fourth Amendment: “persons, houses, papers, and effects.”<sup>44</sup> The *Jones* Court quickly noted that an automobile was indisputably an “effect” for Fourth Amendment purposes, and consequently did not elaborate on the potential outer contours of the scope of these four terms.<sup>45</sup> Many police

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35. See *Katz*, 389 U.S. at 351; *id.* at 361 (Harlan, J., concurring). See generally 1 DRESSLER & MICHAELS, *supra* note 11, §§ 6.03-6.04; LAFAYE ET AL., *supra* note 8, § 3.2.

36. *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

37. *California v. Greenwood*, 486 U.S. 35, 39 (1988).

38. *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005) (canine sniff of stopped automobile); *United States v. Place*, 462 U.S. 696, 706-07 (1983) (canine sniff of airport luggage).

39. See generally Brief for the United States, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259), 2011 WL 3561881; Brief for Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4479076.

40. See *Jones*, 132 S. Ct. at 954-56 (Sotomayor, J., concurring); *id.* at 957, 962-64 (Alito, J., concurring in the judgment).

41. See *id.* at 949-50 (majority opinion); *id.* at 954-55 (Sotomayor, J., concurring).

42. See *id.* at 951 (majority opinion).

43. See *id.* at 950, 951 n.5, 953-54.

44. See *id.* at 953 n.8 (quoting U.S. CONST. amend. IV) (internal quotation marks omitted).

45. *Id.* at 949.

investigations in a high-tech society, though, will implicate attempts to gather evidence from inside individual’s homes (“houses”), as well as from their computers, smartphones, and other electronic devices (“papers” or “effects” or both)—and possibly, as technology advances, even remotely investigating the body itself (“persons”).<sup>46</sup> Consequently, *Jones* will reach as far as these enumerated protected categories are expanded or contracted by the Court.

Second, the *Jones* addition requires a physical trespass into or upon the relevant protected category on the facts of each case.<sup>47</sup> The Court acknowledged that this marked a return to the pre-*Katz* version of Fourth Amendment protection, but grounded its justification in an originalist argument that physical trespasses upon persons, houses, papers, and effects were inherent in the scope of Fourth Amendment protections at the time of the Founding.<sup>48</sup> In particular, the Court emphasized that the *Jones* addition was necessary to preserve the scope of rights originally guaranteed by the Amendment.<sup>49</sup> Otherwise, the *Katz* definition would create the potential for reducing rights against physical intrusions even as it offers expanded protection against non-physical investigations.<sup>50</sup> Thus, whatever might be the scope of *Katz*’s protection against various forms of electronic surveillance and technological snooping, the Court maintained that *Jones* would ensure that the police will not “usurp” a person’s own property and exploit it “for the purpose of conducting surveillance on him.”<sup>51</sup>

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46. See, e.g., Amy Christey, *Law Enforcement’s Use of Nanotechnology—Science Fact or Science Fiction?*, SHERIFF, Jan. 1, 2010, at 70; Jamie Schram & Bill Sanderson, *NYPD New “Wave” of Friskless Search*, N.Y. POST, Jan. 18, 2012, at 7 (“The Defense Department is helping the NYPD develop the technology, which detects and distinguishes heat and other radiation emanating from people and objects they are carrying—including guns and explosives, said NYPD Commissioner Ray Kelly. The technology has proven effective from 15 feet away, although police hope to expand its range to 75 feet.”); see also *Kyllo v. United States*, 533 U.S. 27, 29 (2001) (police use of thermal imaging device to investigate a home); *United States v. Arnold*, 523 F.3d 941 (9th Cir. 2008) (border agents’ inspection of contents of laptop computer), *amended and superseded on denial of reh’g*, 533 F.3d 1003 (9th Cir. 2008).

47. See *Jones*, 132 S. Ct. at 949-50 & n.3, 951 n.5.

48. See *id.* at 949-50.

49. See *id.* at 953.

50. See *id.* at 950 & n.3, 953; see also *infra* Part III.D.

51. See *id.* at 954 (Sotomayor, J., concurring) (“The Government usurped Jones’ property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection.”).

Third, the trespass into an enumerated category must have been investigatory in nature.<sup>52</sup> At one point the Court described this requirement as a trespass “for the purpose of obtaining information”;<sup>53</sup> in another passage, the Court called it “an attempt to find something or to obtain information.”<sup>54</sup> Regardless of the exact wording, the key point is that mere trespass alone is not a “search” under the Fourth Amendment; the existence of a tort-law or property-law trespass must be accompanied by some governmental exploitation of the intrusion to seek to uncover evidence or discover facts.<sup>55</sup> Likewise, the police need not have succeeded in finding what they sought; it is enough that the trespass was carried out with an investigatory purpose.<sup>56</sup>

Thus, after *Jones*, defendants will now have two doctrinal bases to challenge a law enforcement investigation: either as an invasion of a reasonable expectation of privacy under *Katz* or as a trespassory investigative intrusion upon an enumerated protected category under *Jones*. If either is present, then a Fourth Amendment “search” occurred and, at least presumptively, probable cause and a warrant were required.<sup>57</sup>

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52. *Id.* at 949 (majority opinion).

53. *Id.*

54. *Id.* at 951 n.5.

55. *See id.*

56. *See id.* By defining a Fourth Amendment “search” of an enumerated protected category to require both a technical trespass *and* an attempt to obtain information, the Court also resolved what could have been potentially broad ramifications for civil liability under 42 U.S.C. § 1983, in addition to application of its new definition under the exclusionary rule. Longstanding precedent made clear that a technical trespass alone did not constitute a Fourth Amendment violation, *see, e.g., Jones*, 132 S. Ct. at 958-61 (Alito, J., concurring in the judgment) (citing and discussing cases), which meant that mere trespass therefore was not actionable under § 1983. By requiring the investigative intent as well as the technical trespass, Justice Scalia’s new additional definition in *Jones* preserves this principle because trespass alone still will not be enough to constitute a “search” for Fourth Amendment purposes. *See id.* at 951 n.5 (majority opinion). Likewise, the requirement of a trespass in addition to an attempt to obtain information parallels the longstanding doctrinal result under *Katz*, where an attempt to obtain information by investigative techniques not involving physical intrusion or trespass does not violate the Fourth Amendment—for purposes of either the exclusionary rule or § 1983 remedy—unless there is an intrusion into a reasonable expectation of privacy. *See id.*; *see also City of Ontario v. Quon*, 130 S. Ct. 2619, 2626-27, 2629-30 (2010) (addressing a § 1983 Fourth Amendment claim by a police department employee arguing that his employer had violated his reasonable expectation of privacy by reading his text messages on a department-issued phone).

57. *But see Goldstein, supra* note 3 (noting that the *Jones* decision did not preclude the adoption of Fourth Amendment requirements less stringent than probable cause or a warrant in a future case).

On the other hand, the practical impact of the *Jones* addition is likely to be minimal. By its terms, the *Jones* definition only restricts physical investigatory invasions.<sup>58</sup> Even if the principle subsequently is extended to more metaphorical invasions—such as installation of spyware into the operating software on a computer or smartphone—the reality remains that a great deal of the most helpful investigatory techniques in the digital age can be accomplished without ever making contact, either physical or electronic, with the person or property under investigation. For example, red-light cameras on streets and security cameras on buildings are purely external, and real-time continuous aerial observation is probably closer to feasible availability than most Americans realize.<sup>59</sup> Functionally, these technologies could provide exactly the same movement-pattern data as the GPS device did in *Jones*, but without any physical trespass of the automobile—as the *Jones* Court itself admitted.<sup>60</sup> Similarly, the third-party doctrine likely abrogates the need for technological intrusions into physical property or personal Internet accounts to obtain many types of information being sought by police.<sup>61</sup> Just like the phone numbers dialed or bank transactions undertaken in an earlier era,<sup>62</sup> online activities or content hidden from the public at large are nevertheless revealed to third-party service providers. Consequently, for example, the police would have no need to examine the physical smartphone itself when they could readily acquire the identical backup contacts list maintained by Android’s Gmail or Apple’s iCloud synergies. Likewise, investigators could bypass any need to hack a Facebook or Photobucket account’s personal password by obtaining access to the hosted content directly from the website operators.

In an age when law enforcement can conduct an investigation of incredible breadth and depth without any trespassory intrusions, the practical value of the limited *Jones* addition is likely to be small. The *Jones* test may decide the outlier cases and slightly constrain the use of certain investigative technology the police might otherwise be inclined to deploy,<sup>63</sup>

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58. See *Jones*, 132 S. Ct. at 948.

59. See, e.g., *Eyes in the Sky*, ARIZ. REPUBLIC, July 8, 2012, at A1, available at 2012 WLNR 20754784 (discussing increasing use of drones and other unmanned aircraft for public safety and law enforcement purposes within the United States).

60. See *Jones*, 132 S. Ct. at 953-54; *id.* at 955 (Sotomayor, J., concurring).

61. See *infra* Parts IV.A-B (discussing the third-party doctrine and its implications).

62. E.g., *Smith v. Maryland*, 442 U.S. 735, 737 (1979) (phone numbers); *United States v. Miller*, 425 U.S. 435, 436 (1976) (bank records).

63. For example, tiny radio-frequency identification (RFID) microchips can allow easy wireless tracking of the location of the object to which the chip is attached. See, e.g., Nancy J. King, *When Mobile Phones Are RFID-Equipped—Finding E.U.-U.S. Solutions to Protect*

but the *Katz* reasonable expectation of privacy test will continue to do the doctrinal work of determining which police investigative techniques trigger the Fourth Amendment.

*B. Kyllo Was Not a Fluke . . .*

Prior to *Jones*, the last case to present the Court with the question of how to apply the Fourth Amendment doctrinal definition of “search” to police use of advanced surveillance technology was *Kyllo v. United States*, involving police observation of the heat signature of a home with a thermal imager.<sup>64</sup> In both *Kyllo* and *Jones*, the Government argued that the technological devices only facilitated the observation of information already inevitably disclosed to the public by the individual—the home’s waste heat in *Kyllo*<sup>65</sup> and the car’s public movements in *Jones*.<sup>66</sup> Similarly, the defendants in each case argued that the technological sensory enhancements provided by the devices enabled the police to successfully gather information they could not have gathered on their own—the relative heat differentials of different rooms in the home in *Kyllo*<sup>67</sup> and the error-free detailed log of a month’s travels in *Jones*.<sup>68</sup> Ultimately, the Government lost both cases in opinions for the Court written by Justice Scalia that carried only 5-4 support for his analysis of Fourth Amendment “search” doctrine.<sup>69</sup>

Although Justice Scalia’s majority opinion in *Kyllo* nominally applied the *Katz* reasonable expectation of privacy test for determining whether a Fourth Amendment “search” had occurred,<sup>70</sup> the rationale of the opinion marked a radical departure from the typical reasoning of the Court’s *Katz* decisions. Rather than undertaking a normative inquiry into whether society would expect privacy from the challenged government intrusion,<sup>71</sup> Justice

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*Consumer Privacy and Facilitate Mobile Commerce*, 15 MICH. TELECOMM. & TECH. L. REV. 107 (2008) (describing benefits and risks of RFID chips installed in mobile phones). In light of the *Jones* test, though, physically attaching such a device to a person’s clothes or property for investigatory purposes would constitute a “search” under the Fourth Amendment.

64. 533 U.S. 27, 29 (2001).

65. *See id.* at 35-38; *see also id.* at 42-46 (Stevens, J., dissenting).

66. *See United States v. Jones*, 132 S. Ct. 945, 951-52 (2012).

67. *See Kyllo*, 533 U.S. at 39-40.

68. *See Jones*, 132 S. Ct. at 948-49.

69. *See id.* at 947, 952; *Kyllo*, 533 U.S. at 29, 40.

70. *See Kyllo*, 533 U.S. at 34.

71. *See, e.g., Bond v. United States*, 529 U.S. 334, 339 (2000) (concluding that defendant had reasonable expectation of privacy against squeezing of his duffel bag luggage aboard passenger bus); *California v. Greenwood*, 486 U.S. 35, 43 (1988) (concluding that

Scalia’s *Kyllo* opinion engaged in an originalist inquiry into the scope of common law rights of privacy in the home at the time of the Fourth Amendment’s adoption.<sup>72</sup> Concluding that investigating information about the interior of a home would have required a search warrant at common law, Justice Scalia then applied that principle to hold that the police could not simply deploy the use of advanced technology to evade those longstanding common law protections and obtain the same information without first getting a warrant.<sup>73</sup> Only if the sensory-enhancement device was in general public use—such that privacy could not be reasonably expected against its use (by anyone, whether police officer or private citizen) due to its pervasiveness—would the technological intrusion into the home not constitute a “search” for Fourth Amendment purposes.<sup>74</sup> The four-Justice dissent, written by Justice Stevens, rejected this originalist approach to *Katz* and concluded that the defendant could not reasonably expect that the waste heat generated by his home would not be technologically observed.<sup>75</sup>

After *Kyllo* was handed down, the decision’s ramifications for future investigations and suppression-motion litigation were unclear. Some commentators suggested that Justice Scalia’s originalist analysis only provided idiosyncratically strong protection for homes, and that thermal imagers and other sensory-enhancement devices would not qualify as “searches” when used to observe less-protected areas like automobiles or airport luggage<sup>76</sup>—a view bolstered by the Court’s 2005 decision in *Caballes*, which upheld the narcotics-detection canine sniff of an automobile during a lawful traffic stop.<sup>77</sup> Other commentators maintained

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defendant did not have reasonable expectation of privacy against removal and inspection of contents of his curbside trash).

72. See *Kyllo*, 533 U.S. at 34-35 & n.2, 37-38.

73. See *id.* at 40.

74. *Id.* at 34, 40.

75. See *id.* at 41-46 (Stevens, J., dissenting).

76. See, e.g., Tracey Maclin, *Katz, Kyllo, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 Miss. L.J. 51, 116-23 (2002) (discussing *Kyllo*’s emphasis on facts involving a home); David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 Miss. L.J. 143, 190-201 (2002) (same). Professor Maclin concludes that “[i]f the Court’s past precedents are predictive of future results, the odds are good that *Kyllo*’s protective reach will be confined to the home.” Maclin, *supra*, at 117-18.

77. See *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). On the other hand, the full implications of *Caballes* are clouded by the Court’s acknowledgement that the unique nature of canine sniffs may distinguish them from other forms of technological sensory enhancement. *Id.*; see also *United States v. Place*, 462 U.S. 696, 707 (1983) (“Thus, the manner in which information is obtained through this investigative technique is much less

that *Kyllo*'s principal rationale was to constrain the authority of the police to deploy non-public technologies in preliminary investigations, prior to building evidence to support a finding of probable cause.<sup>78</sup> This perspective was grounded in earlier decisions such as those involving aerial flyovers and physical manipulation of bus passengers' luggage, which relied on the proposition that society's reasonable expectations of privacy depend on ordinarily occurring behavior in everyday life, rather than what actions are hypothetically possible for another person to take.<sup>79</sup> The conventional wisdom, though, held that the important part of *Kyllo* was its analysis of how to treat advanced sensory-enhancing technologies for purposes of the Fourth Amendment "search" definition, rather than its originalist methodology in assessing the scope of Fourth Amendment rights.<sup>80</sup>

Yet in *Jones*, Justice Scalia once again persuaded a majority of the Court to join an originalist analysis of how the Fourth Amendment should apply to advanced technology.<sup>81</sup> Concluding that the application of the *Katz* reasonable expectation of privacy test was too complicated and indeterminate when applied to GPS surveillance,<sup>82</sup> Justice Scalia's majority opinion again turned to the basic foundational principles of common law search authority at the time of the Founding.<sup>83</sup> Just as the *Kyllo* opinion found that investigating the interior of a home would have required a warrant at common law,<sup>84</sup> so too the *Jones* opinion found that it would have

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intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. . . . In these respects, the canine sniff is *sui generis*."). *But see* Florida v. Jardines, No. 11-564, 2013 WL 1196577 (U.S. Mar. 26, 2013) (holding that a canine sniff at the front door of a home constituted a "search" and distinguishing *Caballes* in part based on *Kyllo*).

78. Sklansky, *supra* note 76, at 147 ("*Kyllo* treats the home as a special place for Fourth Amendment purposes—hardly a novel proposition for the Supreme Court, but one that throws into doubt not only the reasoning of *Katz*, as it usually has been understood, but also the narrow holding of the case, that electronic surveillance of telephone conversations constitutes a 'search.' I argue that the solution lies in recognizing that the Fourth Amendment protects communications as well as places—or, to use a modern metaphor, that virtual places as well as physical places can receive Fourth Amendment protection."); *see also id.* at 196-201 (arguing that *Kyllo*'s impact should not be limited to use of technology to investigate homes).

79. *See infra* Part IV.A.

80. *See, e.g.,* Maclin, *supra* note 76, at 66-71 (emphasizing *Kyllo*'s adoption of a bright-line rule as the important feature of the decision).

81. *See* United States v. Jones, 132 S. Ct. 945, 949-51 (2012).

82. *See id.* at 954.

83. *See id.* at 949-51.

84. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

been a clear violation of common law principles to obtain information from an individual’s automobile—indisputably his personal “effects” as enumerated in the Fourth Amendment—by means of trespassing upon it.<sup>85</sup> Justice Scalia conceded that the *Katz* test was still necessary to deal with investigations not involving physical trespass upon enumerated protected categories, but insisted that the additional *Jones* test was necessary “at a minimum” to preserve the same scope of rights originally guaranteed by the Amendment.<sup>86</sup> Similar to *Kyllo*, the four-Justice concurring-in-the-judgment opinion in *Jones*, written by Justice Alito, rejected an originalist approach to advanced-technology cases and insisted that *Katz* was the appropriate test.<sup>87</sup> That opinion also took issue with Justice Scalia’s originalist analysis on the merits and included one of the most amusing footnotes in recent Fourth Amendment case law.<sup>88</sup>

Although Justice Scalia’s originalist opinions in *Kyllo* and *Jones* stand as outliers in the broad span of Fourth Amendment “search” definition cases, the analysis in *Jones* probably does save *Kyllo* from being relegated to the status of a decisional fluke. Ultimately, their importance may not be in the originalist methodology as such—particularly as the Court continues to deal with the impact of emerging technologies, the likes of which could not have been contemplated in the era of the Founding—but rather in serving as a reminder that the core principles of the Fourth Amendment should continue to be enforced even as society, technology, and legal principles evolve.<sup>89</sup>

*C. . . . But Justice Scalia Still Has Trouble Holding Votes for His Analysis.*

Justice Scalia has been a controversial and polarizing figure for nearly three decades; his views on constitutional interpretation and his opinions in decided cases have been praised, criticized, and evaluated in a wide range

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85. *Jones*, 132 S. Ct. at 949-51.

86. *See id.* at 950 & n.3, 953-54.

87. *See id.* at 958-61 (Alito, J., concurring in the judgment).

88. *See id.* at 958 (“Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach’s owner?”); *id.* at 958 n.3 (“The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.”).

89. *See Crawford v. Washington*, 541 U.S. 36 (2004) (restoring the core principles of the Confrontation Clause to the Court’s doctrine); JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 178-95 (2001) (arguing for a “paradigm case interpretation” of the Constitution).



of areas of constitutional law. This has certainly been true in criminal procedure, where Justice Scalia has a particularly interesting track record.

In some doctrinal areas, Justice Scalia has been stuck in the mode of perpetual dissenter—or at least perpetual critic—when he has been unable to persuade a majority of the Court to his viewpoint. For example, Justice Scalia has been sharply critical of the several doctrines often referred to as “prophylactic rules” subordinate to the Self-Incrimination Clause. Most famously, he supported the call for overruling *Miranda* in the years leading up to *Dickerson v. United States*, often in agreement with two or three of his colleagues.<sup>90</sup> When *Dickerson* was decided, however, only Justice Thomas joined him in dissent<sup>91</sup>—and Chief Justice Rehnquist not only defected from their longtime mutual criticisms of *Miranda*, but actually wrote the opinion reaffirming the warning-waiver framework.<sup>92</sup> Similarly over Justice Scalia’s strident objections,<sup>93</sup> the Court has continued to reaffirm the *Griffin* doctrine, which prohibits an adverse inference at trial from the defendant’s exercise of his Self-Incrimination Clause privilege not to testify.<sup>94</sup> While his critiques were not without merit,<sup>95</sup> the other Justices have shown little willingness to join his perspective.

In several significant areas of criminal procedure though, Justice Scalia has, in recent years, successfully transformed dissenting arguments into controlling doctrinal holdings for the Court. In the constitutional law of sentencing, Justice Scalia led the charge to use the Sixth Amendment right to jury trial as the doctrinal basis to impose restrictions on the impact of judicial fact-finding in the sentencing hearing.<sup>96</sup> What began in his dissents in cases involving the application of enhanced statutory maximum sentences ultimately became the *Apprendi* rule, which led to the invalidation of the mandatory effect of the Federal Sentencing Guidelines in

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90. See *Dickerson v. United States*, 530 U.S. 428, 450-57 (2000) (Scalia, J., dissenting) (discussing prior *Miranda* precedent, both before and after Justice Scalia joined the Court).

91. See *id.* at 444.

92. See *id.* at 431-32 (majority opinion).

93. See *Mitchell v. United States*, 526 U.S. 314, 331-41 (1999) (Scalia, J., dissenting).

94. See *id.* at 327-30 (majority opinion).

95. See *id.* at 332 (Scalia, J., dissenting) (“The illogic of the *Griffin* line is plain, for it runs exactly counter to normal evidentiary inferences: If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear.”).

96. See Benjamin J. Priestler, *Structuring Sentencing: Apprendi, the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 873 (2004).

*Booker* and the return of significant judicial discretion at sentencing.<sup>97</sup> Under the Confrontation Clause, Justice Scalia also leveraged previous dissents<sup>98</sup> into his majority opinion in *Crawford v. Washington*, which reinvigorated the constitutional constraints on the admissibility of hearsay evidence at criminal trials.<sup>99</sup> In later cases, the *Crawford* rule invalidated longstanding procedures such as the admission of lab reports without appearances by the scientists who conducted the tests.<sup>100</sup> And in Fourth Amendment jurisprudence, Justice Scalia’s earlier criticisms of flaws in the rule authorizing warrantless searches incident to a lawful arrest played a significant role in the Court’s opinion in *Gant*, which dramatically reduced the scope of authorized search authority.<sup>101</sup> In adopting Justice Scalia’s analysis in each of these instances, the Court either overtly overruled precedent or significantly repudiated prior understanding.<sup>102</sup>

Yet as the case law in these areas has further developed, Justice Scalia often has witnessed the Court stray from his vision of the appropriate reach of the new doctrines. In sentencing, Justice Scalia’s viewpoint garnered five total votes to invalidate the New Jersey sentencing regime in *Apprendi*,<sup>103</sup> and the same Justices joined him in striking down the mandatory federal

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97. See Benjamin J. Priester, *The Canine Metaphor and the Future of Sentencing Reform: Dogs, Tails, and the Constitutional Law of Wagging*, 60 SMU L. REV. 209 (2007).

98. See *Maryland v. Craig*, 497 U.S. 836, 860-70 (1990) (Scalia, J., dissenting) (arguing that the Confrontation Clause requires specific trial procedures which cannot be subject to limitation by balancing-of-interests doctrinal tests); see also *White v. Illinois*, 502 U.S. 346, 358-66 (1992) (Thomas, J., concurring in part and concurring in the judgment) (arguing that existing Confrontation Clause precedents, including particularly *Ohio v. Roberts*, 448 U.S. 56 (1980), needed to be revisited and overruled). Justice Scalia joined in Justice Thomas’s *White* opinion. See *White*, 502 U.S. at 358.

99. See 541 U.S. 36, 42-69 (2004).

100. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

101. See *Arizona v. Gant*, 556 U.S. 332, 342-44 (2009) (citing and discussing *Thornton v. United States*, 541 U.S. 615, 625-32 (2004) (Scalia, J., concurring in the judgment)); *id.* at 351-52 (Scalia, J., concurring).

102. See *Gant*, 556 U.S. at 348 n.9 (“Justice Alito’s dissenting opinion also accuses us of ‘overrul[ing]’ *Belton* and *Thornton* . . . ‘even though respondent *Gant* has not asked us to do so.’ Contrary to that claim, the narrow reading of *Belton* we adopt today is precisely the result *Gant* has urged.” (alteration in original) (citations omitted)); *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring in the judgment) (“I dissent from the Court’s decision to overrule *Ohio v. Roberts*.”); *Apprendi v. New Jersey*, 530 U.S. 466, 487 n.13 (2000) (“The principal dissent accuses us of today ‘overruling *McMillan*.’ We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum . . . .” (citation omitted)).

103. See *Apprendi*, 530 U.S. at 468. The majority opinion in *Apprendi* was written by Justice Stevens and joined by Justices Ginsburg, Scalia, Souter, and Thomas. *Id.*

guidelines in *Booker*—but only three others agreed with his approach to the appropriate remedy as a matter of statutory interpretation on the issue of severability.<sup>104</sup> In later cases, Justice Scalia continued to urge a view of the Sixth Amendment constraints on fact-finding at sentencing that no longer holds a majority.<sup>105</sup> The same occurred under the Confrontation Clause, where the Court’s interpretation of *Crawford* diverged from Justice Scalia’s understanding to the point that, in *Michigan v. Bryant*, he found himself dissenting about the application of a doctrine he created.<sup>106</sup> Although it is too soon to know the future course of the *Gant* rule and related doctrines involving searches incident to arrest, Justice Scalia’s concurring opinion in *Gant* does not bode well for his control of the doctrine’s shape.<sup>107</sup>

In large part, this inability to hold votes for his analysis may flow from Justice Scalia’s consistent refusal to clearly define the doctrinal tests he intends to adopt, instead relying on generalities. In the *Apprendi* line of cases, for example, the Court declared that the Sixth Amendment requires the jury to perform the fact-finding which produces or increases the “statutory maximum” sentence to which the defendant is exposed.<sup>108</sup> While this principle was easy to apply to multi-tiered penalty provisions, its

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104. See *United States v. Booker*, 543 U.S. 220, 225 (2005); see also Benjamin J. Priester, *Apprendi Land Becomes Bizarro World: “Policy Nullification” and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 SANTA CLARA L. REV. 1, 32-33 (2011) (discussing the Court’s fragmented opinions and analyses in *Booker*); Priester, *supra* note 97, at 227-34 (same).

105. See, e.g., *Oregon v. Ice*, 555 U.S. 160, 173 (2009) (Scalia, J., dissenting); see also Priester, *supra* note 104, at 13-14, 33-35 (discussing cases).

106. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting) (“In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today’s opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Because I continue to adhere to the Confrontation Clause that the People adopted, as described in *Crawford v. Washington*, I dissent.” (citation omitted)); see also Marc McAllister, *Evading Confrontation: From One Amorphous Standard to Another*, 35 SEATTLE U. L. REV. 473, 526 (2012) (arguing that *Bryant* undercut *Crawford* by reintroducing a malleable doctrinal standard that is easily subject to evasion).

107. See *Gant*, 556 U.S. at 354 (Scalia, J., concurring) (“No other Justice, however, shares my view that application of *Chimel* in this context should be entirely abandoned. It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by JUSTICE STEVENS. . . . [T]he former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.”).

108. See Priester, *supra* note 96, at 884.

application was less clear when mapped over to mandatory sentencing guidelines systems—and even less clear in its implications for the legitimate scope of appellate review of sentencing determinations made by trial judges.<sup>109</sup> By not clearly defining what he meant by “statutory maximum”—or perhaps a principle even broader than that—Justice Scalia could not maintain the solidity of the doctrine he had meant to create. Similarly, Justice Scalia’s opinion for the Court in *Crawford* was notoriously bold in refusing to actually define which forms of hearsay count as “testimonial” for purposes of *Crawford*’s revived prohibition.<sup>110</sup> Given that, it is hardly surprising that the majority in *Bryant* interpreted that concept differently than Justice Scalia himself.<sup>111</sup> The *Gant* opinion, too, included a turn of phrase which has provoked much consternation for its lack of clarity.<sup>112</sup> It is not difficult to see why Justice Scalia might have difficulty holding the votes for his analysis when it is not clear what the other Justices really agreed to in the first place.<sup>113</sup>

These same sorts of patterns appear to have occurred in *Jones*. In several cases previously, Justice Scalia criticized the *Katz* reasonable expectation of privacy test as unclear and hopelessly interchangeable with the policy preferences of judges.<sup>114</sup> Prior to *Jones*, Justice Scalia had found almost no support on the Court for overruling or significantly modifying *Katz*.<sup>115</sup> Even by pitching the *Jones* trespassory investigative intrusion test as a supplement to *Katz*, he was still only able to persuade four other Justices to

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109. See Priester, *supra* note 104, at 5-35; Priester, *supra* note 97, at 213-26.

110. See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

111. Compare *Bryant*, 131 S. Ct. at 1156-62 (evaluating “primary purpose of the interrogation” to determine whether hearsay statement was testimonial), with *id.* at 1168-72 (Scalia, J., dissenting) (explaining why declarant’s intent should determine whether hearsay statement was testimonial).

112. See *Gant*, 556 U.S. at 343 (“[W]e also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment))).

113. Or perhaps the opacity of the doctrinal statement was necessary to pull together the votes in the first place. That is, it is possible that if Justice Scalia had straightforwardly stated his views, they would not have gained five votes even in the initial opinions like *Apprendi* or *Crawford*. If that is true, though, then Justice Scalia’s views are even less influential in these doctrines than they otherwise appear.

114. See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

115. For example, only Justice Thomas joined Justice Scalia’s opinion in *Carter* criticizing the *Katz* test. See *id.* at 91.

sign onto it.<sup>116</sup> And, as Justice Alito pointed out, Justice Scalia once again failed to provide very much clarity to what kinds of trespasses do and do not count as qualifying intrusions upon the enumerated protected categories.<sup>117</sup>

Thus, although Justice Scalia wrote the opinion of the Court in *Jones*, and the new trespassory investigative intrusion test gained the support of a majority, it seems likely that the future analytical framework for these sorts of Fourth Amendment cases will continue to be the traditional *Katz* test. Unless the *Jones* opinion fares better than his other analytical views in criminal procedure, the perspectives of the concurring opinions of Justices Sotomayor and Alito probably are poised to become more influential in the long term.

*D. The Court Still Recognizes the Disturbing Implications of Technology.*

The technology of the digital age allows us to do things that, just a decade or two ago, seemed to be the stuff of science fiction—instantaneous global text communication, real-time video conferencing by satellite phone to even the remotest locations on the planet, hand-held smartphones with high-speed Internet access, and social networking that facilitates business and friendship among people all around the world who might never meet in person. At the same time, this technology comes at the cost of increasingly reduced privacy; it is more difficult than ever to keep the details of one's life “off the grid,” especially when our daily activities so often leave an online footprint of website visits, e-commerce purchases, public social networking posts, and interpersonal communications. And just as this lessened privacy leaves us vulnerable to malicious private parties and their frauds, thefts, or even stalking, it also enables government agencies and law enforcement authorities to monitor a suspect's activities—and potentially *everyone's* activities at all times—with an ease of effort and minimal expense that was literally impossible even just a few years ago.

Although the Supreme Court Justices who decided *Katz* in 1967 could only have imagined what today's technology can accomplish, that did not stop them from worrying about the implications of technological advances for Fourth Amendment rights.<sup>118</sup> Even Justice Harlan, whose famous concurring opinion formulated the reasonable expectation of privacy test

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116. See *United States v. Jones*, 132 S. Ct. 945, 951-53 (2012).

117. See *id.* at 962 (Alito, J., concurring in the judgment).

118. See, e.g., *Katz v. United States*, 389 U.S. 347, 352 (1967) (“To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.”).

still used today,<sup>119</sup> found himself dissenting from the Court’s application of that test just a few years later in exactly that kind of case.<sup>120</sup>

This concern has persisted into contemporary cases such as *Kyllo*, the famous thermal imager case.<sup>121</sup> In his majority opinion in *Kyllo*, Justice Scalia addressed the problem by determining, consistent with prior cases,<sup>122</sup> that police should be held to the same standard as ordinary members of the public at large—if the device used in police surveillance was technology in general public use, then a Fourth Amendment search has not occurred.<sup>123</sup> Just as binoculars or a ladder have been used for decades as parts of police investigations, new technologies which become part of everyday life in society equally enhance or diminish everyone’s personal privacy, and therefore do not trigger Fourth Amendment restrictions.

Each of the three opinions in *Jones* noted the potentially disturbing implications of advanced technology for reducing privacy. Justice Scalia’s opinion for the Court in part justified the new *Jones* addition to the definition of a Fourth Amendment “search” by emphasizing the necessity of ensuring that a lessening of society’s reasonable expectations of privacy against certain forms of technology does *not* “eliminate[] rights that previously existed” with respect to trespassory investigative intrusions upon an enumerated protected category.<sup>124</sup> Justice Sotomayor’s concurring opinion described some of the investigative capabilities of contemporary technology and argued that failure to adapt existing doctrines to these new realities would leave them “ill suited to the digital age.”<sup>125</sup> And Justice Alito’s opinion also emphasized the challenge that new technologies pose to both empirical underlying social norms of privacy and the normative *Katz* reasonable expectation of privacy test, particularly the extent to which inexpensive computer technology has made it possible and practical to

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119. *See id.* at 361 (Harlan, J., concurring).

120. *See United States v. White*, 401 U.S. 745, 768-70 (1971) (Harlan, J., dissenting) (arguing that police use of a radio transmitter carried by a cooperating informant to listen live to a defendant’s conversations with the informant should constitute a Fourth Amendment “search” under *Katz* and distinguishing prior “false friend” informant cases because those cases did not involve police agents overhearing live conversations, instead involving only the informant’s own memory).

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

122. *See, e.g., Florida v. Riley*, 488 U.S. 445 (1989); *California v. Greenwood*, 486 U.S. 35 (1988); *Oliver v. United States*, 466 U.S. 170 (1984).

123. *See Kyllo*, 533 U.S. at 32-34, 39-40.

124. *United States v. Jones*, 132 S. Ct. 945, 953 (2012).

125. *Id.* at 955-57 (Sotomayor, J., concurring).

carry out police investigations of extensive breadth, depth, and detail that were previously inconceivable.<sup>126</sup>

At the same time, the opinions in *Jones* also recognized that figuring out how to address these implications within the boundaries of Fourth Amendment doctrine is an incredibly difficult intellectual endeavor. No doubt this played a part in leading Justice Scalia and Justice Alito to trade strongly worded critiques of each other's doctrinal analyses.<sup>127</sup> Similarly, both Justice Sotomayor and Justice Alito discussed the challenging balance between technological convenience and reduced privacy;<sup>128</sup> Justice Sotomayor emphasized that *Katz* should depend on a normative analysis of Fourth Amendment protections that does not equate secrecy with privacy,<sup>129</sup> while Justice Alito noted that social expectations evolve and may end up tolerating a loss of privacy in service of other values.<sup>130</sup> These doctrinal challenges are especially difficult because technological and social changes are themselves progressing so quickly. Nevertheless, acknowledging that the hard questions *are* hard is an important step in trying to frame a doctrinal solution.

*E. The Court Still Values Judicial Oversight (and Maybe Even Warrants).*

Constitutional theory is replete with debates over the appropriate scope of judicial review in interpreting and enforcing the Constitution.<sup>131</sup> Even apart from academic discourse, the public sphere frequently sees accusations of "judicial activism" leveled at judicial decisions with which a politician or commentator disagrees.<sup>132</sup> Criminal procedure decisions are certainly no stranger to such discussions, especially regarding the

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126. *See id.* at 962-63 (Alito, J., concurring in the judgment).

127. *See id.* at 953-54 (majority opinion); *id.* at 957-62 (Alito, J., concurring in the judgment).

128. *See id.* at 955-56 & n\* (Sotomayor, J., concurring); *id.* at 962-63 (Alito, J., concurring in the judgment).

129. *See id.* at 957 (Sotomayor, J., concurring).

130. *See id.* at 963-64 (Alito, J., concurring in the judgment).

131. *See, e.g.,* DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002) (discussing and critiquing theories of constitutional interpretation suggested by Robert Bork, Justice Antonin Scalia, Richard Epstein, Akhil Amar, Bruce Ackerman, and Ronald Dworkin).

132. *See, e.g.,* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (invalidating campaign-finance restrictions on corporations); Editorial, *Judicial Activism Inc.: The Supreme Court Tosses out Reasonable Limits on Campaign Finance*, WASH. POST, Jan. 22, 2010, at A20.

exclusionary rule’s effect of preventing the conviction of concededly guilty individuals.<sup>133</sup>

Yet criminal procedure is also quite different from most other areas of constitutional law in one important respect: by its very nature, criminal procedure questions are litigated when the Government is the plaintiff—coming into court to pursue the criminal conviction of a suspect—rather than the defendant trying to ward off a constitutional challenge to a statute, regulation, or other government action by an aggrieved citizen plaintiff. It is therefore much more natural for courts, including the United States Supreme Court, to view the Constitution as a shield—protecting the individual from the strong arm of the Government—when the Government is actively trying to wield its power against the criminal defendant. In that way, the Fourth Amendment has more similarity to, for example, the Takings Clause interposed in an eminent domain action or a First Amendment prior-restraint objection to the Government seeking an injunction to censor speech before it can be published or broadcast<sup>134</sup> than to a plaintiff seeking to enjoin enforcement of a statute under, for example, separation of powers principles or the Establishment Clause.<sup>135</sup> Consequently, the Court often appears willing to be more aggressive in enforcing the Fourth Amendment rights of criminal defendants—even at the cost of the exclusionary rule—compared to a much more deferential posture under, for example, the Commerce Clause.<sup>136</sup>

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133. *See, e.g.*, *Herring v. United States*, 555 U.S. 135, 141-42 (2009) (“The principal cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free . . .”).

134. *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010) (Takings Clause); *Tory v. Cochran*, 544 U.S. 734, 737-39 (2005) (prior restraint doctrine).

135. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (Establishment Clause); *Morrison v. Olson*, 487 U.S. 654 (1988) (separation of powers).

136. *Compare Arizona v. Gant*, 556 U.S. 332 (2009) (imposing Fourth Amendment restrictions on the authority of police to search automobiles incident to the arrest of the driver), *and Kyllo v. United States*, 533 U.S. 27 (2001) (imposing Fourth Amendment restrictions on police use of thermal imager technology to investigate a home), *with United States v. Comstock*, 130 S. Ct. 1949 (2010) (upholding Congress’s power under the Commerce Clause to authorize the civil commitment of sex offenders after the expiration of their criminal sentences), *and Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding Congress’s power under the Commerce Clause to criminalize home-grown marijuana for personal medicinal use even if it is lawful under state law). Occasionally, Fourth Amendment rights are litigated in an action under 42 U.S.C. § 1983, where the individual is the civil plaintiff and government agencies or actors are the civil defendants, but the fact patterns in these cases still mirror the factual posture of criminal cases and the exclusionary rule. In either



The Court's willingness to assert the importance of judicial review on Fourth Amendment issues has its roots in cases well before the Warren Court's dramatic expansion of criminal procedure case law in the 1960s.<sup>137</sup> Perhaps the most famous explanation of the need for judicial oversight of police investigative tactics comes from the 1948 decision in *Johnson v. United States*:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.* Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. *When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.*<sup>138</sup>

All three opinions in *Jones* reaffirmed the Court's commitment to judicial review in Fourth Amendment cases. Justice Sotomayor's concurring opinion overtly raised concerns about executive branch abuse of power as a reason for rigorous judicial oversight of individual rights.<sup>139</sup> Justice Scalia's opinion for the Court emphasized that neither the

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situation, the Government has actively and affirmatively engaged in a search or seizure toward the person, who is then reactively invoking the Fourth Amendment to remedy the alleged violation (either defensively by the exclusionary rule, if the Government proceeded with a criminal prosecution, or offensively by a § 1983 action, if not).

137. See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 379-444 (2000).

138. 333 U.S. 10, 13-14 (1948) (emphases added) (footnotes omitted).

139. See *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

development of contemporary judicial case law nor the inexorable march of technology available to law enforcement should be permitted to abrogate the protections originally afforded to the people by the Fourth Amendment at the time of its adoption.<sup>140</sup> And while Justice Alito’s concurring-in-the-judgment opinion for four Justices called upon the legislative branch to enact statutory rules governing the using of GPS surveillance devices, just as Congress did for wiretapping technology a generation earlier, his opinion also emphasized that the Court must not shrink from its duty to enforce Fourth Amendment rights.<sup>141</sup> As the Court confronts more complicated cases in the future—both in terms of the sophistication of the technology involved and the conceptual difficulty of framing and applying doctrinal tests—it is reassuring to see that the Court remains grounded in this important principle of Fourth Amendment law.

Finally, although the so-called “warrant requirement” sometimes seems to have more exceptions than controlling effect,<sup>142</sup> *Jones* also contained a reminder of the principle’s continuing significance under the Fourth Amendment. As noted above, the *Jones* case only came before the Court because the GPS surveillance had not been conducted pursuant to a valid warrant.<sup>143</sup> Had the police used a warrant, there would have been no Fourth Amendment controversy to litigate. And while Justice Alito conceded that the *Katz* analysis in his concurring opinion did not provide police with a bright line rule about when GPS surveillance is a Fourth Amendment “search” and when it is not, he concluded his opinion by emphasizing the default rule—*when in doubt, get a warrant*.<sup>144</sup>

The foundational guidance of *Johnson v. United States* apparently has some legs to it after all. Although the recognized exceptions to the warrant requirement often delegate to police the decision of whether to search or seize in the first instance, subject to post-hoc judicial review in a motion to suppress, getting judicial preclearance in advance with a warrant is still the

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140. *See id.* at 950-53 (majority opinion).

141. *See id.* at 962-64 (Alito, J., concurring in the judgment); *see also* Peter Swire, *A Reasonableness Approach to Searches After the Jones GPS Tracking Case*, 64 STAN. L. REV. ONLINE 57, 58 (2012) (“[T]he reasonableness doctrine offers the best opportunity to respond to the Justices’ concern about unconstrained discretion in high-tech searches. Longstanding precedents under this doctrine require ‘minimization’ of intrusive surveillance and procedural checks against standardless or discriminatory surveillance.”).

142. *See generally* 1 DRESSLER & MICHAELS, *supra* note 11, § 10.01[B]-[C] (discussing conceptual debate over the “warrant requirement” and its numerous exceptions).

143. *See supra* Part II.

144. *See Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment).

safer bet for police.<sup>145</sup> And this is particularly true in areas of doctrinal uncertainty. *Jones*, then, reaffirmed the best practice for law enforcement to follow—when in doubt, ask a judge.

#### *IV. The Questions*

While the *Jones* decision provided some interesting answers, it also left several significant questions open for the future. On one level, of course, the Court understandably was reluctant to wade into difficult issues when a simpler, more concise analysis could resolve the case. The Court has a long tradition of avoiding advisory opinions and a recent practice of often writing minimalist opinions tailored to the facts before it, and it generally avoids expansive dicta in controlling opinions.<sup>146</sup> On the other hand, by punting so many important principles to subsequent cases, the Court gave very little guidance to lower courts or law enforcement about what kind of analytical approach to use when confronting the Fourth Amendment implications of high-tech investigations. The three biggest questions left open by *Jones* all relate to how technological advances continue to change both society and the law.

##### *A. When Do Mosaics, Data Mining, and Other Forms of Technological Information Aggregation Constitute “Searches”?*

Perhaps the greatest conceptual challenge presented by *Jones* arose from the clash between two competing visions of how to describe the product of the Government’s month-long GPS surveillance. Each perspective was highly persuasive in its own right, making the Court’s task all the more difficult.

On one hand, both common sense and the Court’s precedent in *Knotts* and *Karo* validated the proposition that a person’s openly visible movements on public roads are not “private” in either the colloquial or legal

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145. See, e.g., *United States v. Leon*, 468 U.S. 897, 920 (1984) (holding that the exclusionary rule does not apply to evidence seized pursuant to a facially valid search warrant, later deemed defective, because the officers executing the warrant reasonably relied on a magistrate’s approval of the warrant).

146. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (“When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.”). See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161 (2011).

sense.<sup>147</sup> Even elementary school students learning the basics of multiplication know that a million times zero is still zero—so if each particular act of public travel is not private, neither is an accumulation of those acts. Under this view, it should make no doctrinal difference whether the police were manually tracking an emitted radio signal in *Knotts* or sitting at a computer checking a GPS data log in *Jones*. In either situation, the information being examined was the suspect’s public movement, and therefore it should not have any Fourth Amendment privacy protection.

On the other hand, common sense and the foundational values of American history and political philosophy also validated the proposition that there is a significant normative difference between the Government’s observation of isolated individual acts, like a police officer pulling over a speeding driver caught red-handed, and an Orwellian “Big Brother” environment in which the Government constantly watches everyone all the time.<sup>148</sup> In 2012, every American over the age of forty grew up during the Cold War<sup>149</sup> and intuitively understood that there is a very meaningful distinction between the way American law enforcement officers are supposed to build a criminal case and the way the Soviet-era KGB gathered and maintained extensive dossiers on millions of people. It is no coincidence that such totalitarian regimes often are called “police states” because of their pervasive monitoring of their citizens—and everyone is familiar with the cliché that a whole can be greater than the sum of its parts.

Under this perspective, then, there *is* an important distinction between *Knotts* and *Jones*.<sup>150</sup> In *Knotts*, the police used technology to reduce their error rate in real time, simply to make it less likely that the suspect would

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147. *United States v. Karo*, 468 U.S. 705, 712-14 (1984); *United States v. Knotts*, 460 U.S. 276, 281 (1983).

148. *See, e.g., Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (“The net result is that GPS monitoring . . . may ‘alter the relationship between citizen and government in a way that is inimical to democratic society.’” (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring))).

149. All nine Justices on the United States Supreme Court went to law school, and first learned the constitutional law of criminal procedure, during the Cold War. *See Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 7, 2013) (noting years of law school graduation, first legal employment, or both, for each Justice). In fact, Justice Kagan is the only Justice to have attended law school in the 1980s. *Id.*

150. *See Jones*, 132 S. Ct. at 952 n.6 (“*Knotts* . . . reserved the question whether ‘different constitutional principles may be applicable’ to ‘dragnet-type law enforcement practices’ of the type that GPS tracking made possible here.” (emphasis added) (quoting *Knotts*, 460 U.S. at 284)); *see also id.* at 956 n.\* (Sotomayor, J., concurring).

slip pursuit while they were actually in the process of physically tracking him.<sup>151</sup> By contrast, the police in *Jones* built a month-long dossier of all of the suspect's movements without any need for active participation by any human being during the surveillance.<sup>152</sup> In the scholarly literature, this view—that the aggregation of information might be covered by a reasonable expectation of privacy even though each particular discrete bit of data on its own would not—became known as the “mosaic theory” of Fourth Amendment protection.<sup>153</sup>

Both of these perspectives found support in the academic commentary on the *Jones* case specifically, as well as in broader analyses of Fourth Amendment issues, the briefing in *Jones*, and the Justices' questions from the bench at oral argument.<sup>154</sup> Professor Orin Kerr, for example, is a prominent critic of the mosaic theory and argued that the Government should win *Jones* because its surveillance only recorded public movements.<sup>155</sup> Professor Wayne Logan, by contrast, has written in support of mosaic theory and urged its expansion to other forms of pervasive government monitoring, as well.<sup>156</sup> Needless to say, there are good arguments on both sides.

It is not surprising, then, that the Court found a way to decide *Jones* without treading deeply into the intellectual thicket created by these contrasting perspectives. Justice Scalia's opinion for the Court relegated the problem to two paragraphs at the end of the opinion, noting that there was no reason to reach those questions because the new trespassory investigative intrusion test dispensed with the case cleanly.<sup>157</sup> Justice

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151. See *Knotts*, 460 U.S. at 285.

152. See *Jones*, 132 S. Ct. at 948.

153. See, e.g., Madelaine Virginia Ford, Comment, *Mosaic Theory and the Fourth Amendment: How Jones Can Save Privacy in the Face of Evolving Technology*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1351, 1359 (2011); Benjamin M. Ostrander, Note, *The “Mosaic Theory” and Fourth Amendment Law*, 86 NOTRE DAME L. REV. 1733, 1734-35 (2011).

154. See Brief for the United States, *supra* note 39; Reply Brief for the United States, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 5094951; Transcript of Oral Argument, *supra* note 23.

155. See Kerr, *supra* note 7; Orin Kerr, *D.C. Circuit Introduces “Mosaic Theory” of Fourth Amendment, Holds GPS Monitoring a Fourth Amendment Search*, THE VOLOKH CONSPIRACY (Aug. 6, 2010, 2:46 PM); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007).

156. See Wayne A. Logan, “Mosaic Theory” and Megan's Laws, 2011 CARDOZO L. REV. DE NOVO 95; see also Forbes, *supra* note 7; Erin Smith Dennis, Note, *A Mosaic Shield: Maynard, the Fourth Amendment, and Privacy Rights in the Digital Age*, 33 CARDOZO L. REV. 737 (2011); Herbert, *supra* note 7.

157. See *Jones*, 132 S. Ct. at 953-54.

Sotomayor’s opinion also allotted only a few paragraphs to the issue, expressing in dicta sentiments basically in accord with the mosaic theory.<sup>158</sup> She noted the ominous implications and chilling effects of permitting the Government to build dossiers on countless Americans, especially without judicial oversight.<sup>159</sup> Justice Alito’s opinion devoted the most space to discussing how the *Katz* reasonable expectation of privacy test should be applied to these sorts of situations.<sup>160</sup> In particular, Justice Alito emphasized that the GPS technology had essentially overridden the traditional practical limits on the scope of law enforcement investigations, making it possible to conduct extensive monitoring at minimal cost in dollars and manpower.<sup>161</sup> And like Justice Sotomayor, he agreed that Americans do not ordinarily expect the police to engage in extensive dossier-building except in unusually important investigations.<sup>162</sup> Yet Justice Alito declined to provide specific guidance on where to draw the line between a permissible ordinary investigation and an impermissible mosaic investigation, whether in terms of its duration, its breadth or depth of scope, or the seriousness of the crime.<sup>163</sup> Thus, although at least five Justices expressly gave their imprimatur to at least some version of the mosaic theory,<sup>164</sup> the *Jones* opinions gave very little guidance to lawyers, lower court judges, or law enforcement about the actual functional boundaries of this Fourth Amendment principle.

Some amount of basic information-gathering is readily anticipated and accepted in American society, and conducting it consequently does not constitute a “search” for Fourth Amendment purposes.<sup>165</sup> On the other hand, at some point the sheer quantity of information gathered and

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158. *See id.* at 955-56 (Sotomayor, J., concurring). This analysis is dicta because Justice Sotomayor joined Justice Scalia’s analysis in full. *See id.* at 955, 957.

159. *See id.* at 956.

160. *See id.* at 961-64 (Alito, J., concurring in the judgment).

161. *See id.* at 963-64.

162. *See id.* at 963.

163. *See id.* at 964; *see also id.* at 954 (majority opinion) (criticizing lack of doctrinal clarity in Justice Alito’s *Katz* analysis).

164. Three Justices—Chief Justice Roberts and Justices Kennedy and Thomas—joined Justice Scalia’s opinion for the court without separately explaining their views, but they also did not join Justice Sotomayor’s concurring opinion. *See id.* at 948 (majority opinion); *id.* at 954 (Sotomayor, J., concurring). Without additional explanation from these Justices, it is impossible to determine whether they do not support mosaic theory, or instead they simply chose not to opine on broader issues than necessary to decide the *Jones* case, as Justice Sotomayor did. *See id.* at 957 (Sotomayor, J., concurring).

165. *See supra* Part II.

analyzed—especially if the investigative process is automated electronically—may pass beyond accepted social norms to create a reasonable expectation that such a “search” will not occur except in compliance with the requirement of the Fourth Amendment.<sup>166</sup> Going forward, then, there is much left for the Court to address and resolve in future cases. One aspect of the Court’s analysis will involve fitting in *Jones* and mosaic theory to the broader lines of precedent defining what constitutes a Fourth Amendment “search.”

The line of precedent most closely related to *Jones* finds its root in the *Katz* decision itself, where the Court declared that information which a person “knowingly exposes to the public” is not shielded from discovery by the Fourth Amendment.<sup>167</sup> Although the Court ruled that the contents of *Katz*’s phone call were “searched” when the police used a listening device to snoop on his half of the conversation, *Katz* indisputably would have had no valid claim that the Government had “searched” him simply by observing his presence inside a glass-enclosed phone booth on a public street at the time he made the call.<sup>168</sup> In both *Knotts* and *Karo*, the Court held that the movements of vehicles on public roads were knowingly exposed to the public in the same way.<sup>169</sup> In other cases, the Court applied this principle to conclude that, among others, open fields and curbside trash qualified as information exposed to the public and, therefore, the police had not conducted a Fourth Amendment “search” by inspecting them.<sup>170</sup> In these cases, the information was exposed to the public at large—that is, everyone who happened to be at the relevant location would have been able to see the same things the police officer saw. Both the mosaic theory and the opinions in *Jones* recognize that a relatively small number of discrete observations of these kinds of publicly disclosed information are clearly permissible without triggering any Fourth Amendment scrutiny; the question remains where to draw the line determining how much is too much.

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166. See *supra* Part II.

167. See *Katz v. United States*, 389 U.S. 347, 351-52 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”); see also *id.* at 361 (Harlan, J., concurring) (requiring subjective expectation of privacy for Fourth Amendment protections to attach).

168. See *id.* at 352 (majority opinion).

169. *United States v. Karo*, 468 U.S. 705, 712-14 (1984); *United States v. Knotts*, 460 U.S. 276, 281-82 (1983).

170. See *California v. Greenwood*, 486 U.S. 35, 37-38 (1988) (curbside trash); *Oliver v. United States*, 466 U.S. 170, 173-74, 184 (1984) (open fields).

Importantly, an interesting nuance has lingered throughout this line of cases regarding the nature of the public accessibility to the information necessary to deem it to have been exposed to the public. In earlier decisions, the Court framed the question in terms of whether the information was *hypothetically* accessible to members of the public. For example, the Court used this reasoning to justify its conclusion that *Oliver*'s “open fields” (even when enclosed by a fence and guarded by a posted “No Trespassing” sign) and *Greenwood*'s curbside trash were exposed to the public.<sup>171</sup> In later cases, however, the Court reframed the question as whether the information was *ordinarily* accessible to the public in the regular course of everyday life. For example, in *Riley*, a 1989 case involving a helicopter flyover of a residential back yard, five Justices concluded that the proper analysis was not whether a flyover was possible (which it clearly was), but rather the frequency with which flyovers actually occurred (which was not established in the record).<sup>172</sup> By the time of *Bond*, a 2000 case involving an officer's hand-squeezing of a commercial bus passenger's duffel bag, a seven-Justice majority held that the officer's action constituted a “search” because, while incidental contact with luggage was to be expected, such a direct investigatory manipulation of the duffel bag was not within the ordinary course of public interactions.<sup>173</sup>

Justice Alito's *Katz* analysis in *Jones*, supported by four other Justices,<sup>174</sup> did not frame the reasonable expectation of privacy analysis in these terms or cite these cases, but his reasoning was entirely consistent with them.<sup>175</sup> Just as the decisions in *Riley*<sup>176</sup> and *Bond*<sup>177</sup> defined reasonable expectations of privacy in terms of what members of the *public* ordinarily do, Justice Alito's analysis in *Jones* asked what kind of duration, extensiveness, error rate, and level of detail *police* surveillance ordinarily involves.<sup>178</sup> While he noted that Americans would expect an investigation of exceptional

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171. See *Greenwood*, 486 U.S. at 37-38; *Oliver*, 466 U.S. at 173-74.

172. See *Florida v. Riley*, 488 U.S. 445, 452-55 (1989) (O'Connor, J., concurring in the judgment); *id.* at 456-61 (Brennan, J., dissenting).

173. *Bond v. United States*, 529 U.S. 334, 336-39 (2000).

174. See *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Alito, J., concurring in the judgment); *id.* at 955 (Sotomayor, J., concurring) (agreeing with Justice Alito's *Katz* analysis).

175. See *id.* at 963-64 & n.10 (Alito, J., concurring in the judgment).

176. See *Riley*, 488 U.S. at 452-55 (O'Connor, J., concurring in the judgment); *id.* at 456-61 (Brennan, J., dissenting).

177. See *Bond*, 529 U.S. at 337-39.

178. See *Jones*, 132 S. Ct. at 963-64 & n.10 (Alito, J., concurring in the judgment); see also *id.* at 955-56 (Sotomayor, J., concurring).



magnitude for crimes of great seriousness, social norms and the Court's interpretation of the Fourth Amendment previously were grounded in reliance on constraints of budget and manpower to limit how aggressive the police could be in their efforts to solve more mundane crimes.<sup>179</sup> If such resource constraints are no longer present, Justice Alito acknowledged, then the Court may need to adapt its doctrinal principles to this new reality.<sup>180</sup>

Thus, the Court in *Jones* appeared to indicate that it now will take seriously the distinction offered by the mosaic theory—that the discovery of basic information routinely revealed to the public at large lacks constitutional significance, but the building of an extensive dossier far beyond the scope of what other members of the public would ordinarily acquire about each other is a “search” governed by the Fourth Amendment.<sup>181</sup> While a bright-line rule is not readily apparent from *Jones*, cases like *Riley* and *Bond* provide further support for the development of a doctrinal standard centered on consideration of how the public reasonably expects ordinary police investigations to proceed.

But the problem of technological information aggregation extends beyond just the information that everyone exposes to everyone else in the course of daily life—it also encompasses information shared selectively with only certain other persons or entities. Such information runs the gamut from online transactions with Internet vendors like Amazon.com or credit card purchases of gasoline at the local filling station to word searches entered into Google's search engine or websites visited through Internet access from a service provider. This information is not exposed to the public at large in any meaningful sense, but it is also by definition not entirely private precisely because it has been shared with another.

Under the “third-party doctrine” line of cases, no *Katz* reasonable expectation of privacy exists for this information, and therefore no Fourth Amendment “search” occurs when the police obtain the information from the other party to the information exchange.<sup>182</sup> In *Miller*, for example, the Court held that neither probable cause nor a warrant was required to obtain records of the defendant's account transactions from his bank, notwithstanding the business confidentiality of such records, because the defendant by necessity revealed those transactions to the bank when they were processed through his accounts.<sup>183</sup> Similarly, in *Smith v. Maryland*,

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179. *See id.* at 963-64 & n.10 (Alito, J., concurring in the judgment).

180. *See id.*

181. *See id.*

182. *See, e.g.,* United States v. Miller, 425 U.S. 435, 443 (1976).

183. *Id.* at 440-43.

the Court held that no “search” occurred when the police obtained, with the phone company’s assistance, the pen register data of the outgoing phone numbers dialed from the defendant’s home phone, which the police then used as evidence to support the finding of probable cause for the search warrant that was ultimately executed at the defendant’s home.<sup>184</sup> In recent years, the lower courts have applied this same rationale to, among other situations, addressing information on emails, IP addresses visited on the Internet, and purchases made with credit and debit cards.<sup>185</sup>

Just as with information exposed to the public at large, the use of information disclosed to third parties presents a particularly challenging problem when it is aggregated and then thoroughly analyzed—a practice often referred to as “data mining.”<sup>186</sup> The practice of data mining is controversial enough when private companies engage in the practice with their own proprietary information data banks gathered from customers, account holders, or other service users, as companies like Google and Target have learned to their chagrin.<sup>187</sup> But under the third-party doctrine, all of this information is unprotected by the Fourth Amendment and the police can acquire the data and mine it without any individualized suspicion or any need to seek a warrant beforehand.<sup>188</sup>

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184. 442 U.S. 735, 742-45 (1979).

185. See *United States v. Perrine*, 518 F.3d 1196, 1204-05 (10th Cir. 2008) (“Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment’s privacy expectation.”); see also *Rehberg v. Paulk*, 611 F.3d 828 (11th Cir. 2010) (to and from addressing data from emails); *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008) (IP addresses visited); *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993) (credit card statements).

186. See, e.g., Ira S. Rubinstein et al., *Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches*, 75 U. CHI. L. REV. 261 (2008).

187. See, e.g., Charles Duhigg, *Psst, You in Aisle 5*, N.Y. TIMES MAG., Feb. 19, 2012, at 30 (discussing controversial data mining of customer purchases by Target, which resulted in coupons sent to her by mail revealing a teenage girl’s pregnancy to her parents before she had told them); Sam Grobart, *Google’s New Data-Sharing, and How to Deflect It*, N.Y. TIMES, Mar. 2, 2012, at B2 (discussing Google’s controversial new “privacy policy” for users, which provides for increased data mining of user usage).

188. The raw data itself would be unprotected by the Fourth Amendment due to the third-party doctrine. See *Miller*, 425 U.S. at 443. Were the police to seek already-mined data from a company, the request might run up against legal principles such as trade secret law, patent law, or other legal shields for proprietary technology like data-mining algorithms. Such obstacles might be overcome with a protective order or similar procedure, or by requesting access only to the outputs of the proprietary data-mining rather than the processes themselves. In any event, due to the third-party doctrine, there would be no *Fourth Amendment* protection against law enforcement’s acquisition of proprietary data-mining analysis of information gathered about suspects by third parties. Those suspects also

Consequently, the information deemed unprotected by the Fourth Amendment due to the third-party doctrine presents the same conceptual issues in addressing technological aggregation and analysis as information knowingly exposed to the public at large. In the latter, the police can gather the information themselves; in the former, they obtain it from the third party. In both situations, the Court must determine the point at which the sheer quantity of information becomes so great—or the prospect of highly specific data-mined analysis becomes so disturbing—that the protections of the Fourth Amendment will be triggered.

As noted above, it seems unlikely that the Court will be able to adopt a specific, bright-line rule to resolve the balance between permissible routine investigation and impermissible Orwellian dossier-building. This is particularly true because different technologies function in different ways, and they cannot all be governed by the same bright-line rule. For example, even if the Court were to declare that GPS surveillance for more than two weeks constitutes a “search” no matter the surrounding circumstances, such a rule would have no utility in addressing aggregation of public movements from data gathered by red-light cameras, business security cameras, or toll road E-ZPass devices. Likewise, a bright-line rule requiring the police to obtain a warrant before examining more than two weeks’ worth of IP addresses visited from a computer would have no utility in addressing more intermittent Amazon.com purchases or more frequent text messaging delivery information.

Whether the information is gathered by police observation or from third parties, *Jones* leaves unresolved the doctrinal solution for this exceedingly complex balance. Some amount of data-gathering or data mining is tolerable, but too much is intolerable. While a totality of the circumstances standard would not be at all unusual among the Court’s Fourth Amendment doctrines,<sup>189</sup> it also would not provide very much guidance to the lower courts or law enforcement about when the line between constitutionality and unconstitutionality has been crossed. Yet, such a multi-factor balancing test may be the best the Court can do—and it would certainly be better, from a civil liberties perspective, than having no doctrinal limit at all.

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presumably would lack Fourth Amendment standing to object even to a brazenly unconstitutional search of the third party’s data. *See, e.g.*, *United States v. Payner*, 447 U.S. 727 (1980).

189. *See, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273-76 (2002) (totality of circumstances test for “reasonable suspicion”); *Illinois v. Gates*, 462 U.S. 213, 233-38 (1983) (totality of circumstances test for “probable cause”); *Dunaway v. New York*, 442 U.S. 200, 211 (1979) (totality of circumstances test for informal arrest).

*B. Will Technological Change Lead the Court to Alter the Third-Party Doctrine and Adopt a Broader Definition of “Searches”?*

Even apart from the doctrinal challenges posed by information aggregation and data mining generally, the third-party doctrine itself may become a candidate for doctrinal revision in the face of the rapid technological change of the digital and Internet age.<sup>190</sup> Although Justice Sotomayor’s concurrence was the only opinion in *Jones* to expressly raise this possibility, and no other Justice openly signed on to her generalized suggestions relating to an issue not presented on the facts of the case,<sup>191</sup> her brief discussion of the doctrine nevertheless indicated the potential breadth of the Court’s impending conceptual struggles.<sup>192</sup>

As society becomes increasingly interconnected online, far more information than ever before is being shared with others, whether socially or commercially. Some of this information, of course, is exposed to the world at large, such as a public blog, an unprotected Twitter account’s tweets, or the viewable-by-everyone portions of a Facebook page. Much of it, though, is clearly “non-public,” such as purchases from Internet retailers or subscriptions to pay-for-access websites. When information is willingly shared with another party, the act of sharing often carries with it the expectation that the information will *not* be further shared with anyone else, at least without the information-giver’s permission, either at the time the information is given or later on. With or without a contractual or terms-of-service promise of confidentiality, this kind of non-public information sharing quite easily fits within the colloquial word usage that someone was told something “in private” in the sense that he was expected to keep it “just between us.” Under the third-party doctrine, however, all of this “non-

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190. See, e.g., Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 IOWA L. REV. BULL. 39 (2011); see also Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L.J. 1199 (2009); Orin S. Kerr, *Defending the Third-Party Doctrine: A Response to Epstein and Murphy*, 24 BERKELEY TECH. L.J. 1229 (2009); Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009); Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239 (2009).

191. Justice Sotomayor’s opinion was not joined by any other Justice. See *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., concurring).

192. See *id.* at 955, 957. Because the surveillance conducted in *Jones* involved a GPS device the police physically attached to the vehicle, the issue of using pre-installed GPS technology to track a vehicle or smartphone was not presented on the facts before the Court—but Justice Sotomayor noted that the implications of the third-party doctrine in such a scenario were clear. See *id.*

public” information is completely unprotected by the Fourth Amendment. Yet as Justice Sotomayor suggested, it is hard to believe that societal norms actually contemplate that all of this information is fair game for the police to investigate and gather with impunity—without the requirement of any individualized suspicion at all, much less probable cause or a warrant—simply because it was shared with someone else “in private” in that colloquial sense.<sup>193</sup>

Importantly, how to characterize the Fourth Amendment implications of information sharing in the digital age will be a normative judgment by the Court, not simply an empirical assessment of the practical treatment of information in daily life. Since the origins of the reasonable expectation of privacy test in the *Katz* decision itself, the Court has emphasized this distinction.<sup>194</sup> Of course, this does not mean that the actual views and behaviors of the American people are irrelevant to the consideration of the scope of legal protections; the more definitive the public’s perception of information as “public knowledge” or “nobody’s business,” the more likely it is the Court will conform the normative Fourth Amendment significance of law enforcement’s attempt to gain access to that information to those societal views. On the other hand, Justices have worried since the early years of *Katz* that society’s changing views on privacy might lead to the reduction of the scope of Fourth Amendment rights—particularly if the Government’s own behavior affects the public’s perceptions.<sup>195</sup> Interestingly, Americans have become accustomed to watching television police procedurals in which detectives routinely “pull the LUDs” on a suspect very early in the investigation, obtaining a comprehensive list of phone calls without first getting a warrant.<sup>196</sup> But does this apparent comfort level with the consequences of *Smith* as to phone calls necessarily

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193. *See id.* at 957.

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

195. *See, e.g., United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (“Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present. Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.”).

196. The acronym LUD stands for “local usage details,” another name for the “pen register” information analyzed in *Smith v. Maryland*, 442 U.S. 735 (1979). *See, e.g., Immunity Demand for Telecoms Raises Questions*, USA TODAY, Oct. 22, 2007, at 14A (“Anyone who has ever watched *Law & Order: SVU* knows how easy it is for police to get the bad guys’ LUDs—‘local usage details,’ better known as telephone calling records.”); *see also Smith*, 442 U.S. at 737.

carry over to the public’s views of their own smartphone activities and home Internet usage?

Thus, for example, the fact that in recent years the police have been obtaining—without warrants or probable cause—the cooperation of Internet service providers to pull the business records of IP addresses visited or files downloaded by a customer,<sup>197</sup> and that there has not yet been a backlash of court decisions granting motions to suppress the fruits of such cooperation nor a massive public outcry against such police activity, does not resolve the normative question. The lack of successful court challenges to date is consistent with the reasoning of *Miller* and *Smith*,<sup>198</sup> but lower court rulings have not somehow definitively entrenched this police investigative technique as a constitutionally permissible tactic that is not a “search” for Fourth Amendment purposes. Rather, it only means that the lower courts have not moved aggressively to redefine the third-party doctrine prior to indications from the Court to move in that direction. Likewise, the public at large very well may not be aware enough of the extent of the use of such tactics—or even of their existence—to realize that such use may already have risen to a problematic level.<sup>199</sup> The Court must approach the third-party doctrine from a normative perspective, asking whether individuals have a reasonable expectation of privacy in this particular kind of interaction with this specific kind of third party sufficient to trigger the requirements of the Fourth Amendment. As Justice Sotomayor suggested, it is possible that the dramatic increase in “non-public” information sharing in the Internet era will lead the Court to reconsider the third-party doctrine and hold that the mere revelation of information to a third party does not completely abrogate any Fourth Amendment protection against law enforcement investigations.<sup>200</sup>

Similarly, the Court need not view the doctrinal fate of the third-party doctrine as a binary, all-or-nothing choice. Police acquisition of “non-public” information given to a third party could be found to never constitute a “search,” or always constitute a “search,” or something in between. The current doctrinal test, grounded in *Smith* and *Miller*, has been applied as a bright-line rule to defeat the existence of any reasonable expectation of privacy in any information shared with others.<sup>201</sup> One alternative,

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197. See, e.g., cases cited *supra* note 185.

198. See *supra* notes 183-85 and accompanying text.

199. Cf. *supra* note 187 (citing articles discussing lack of public awareness of full extent of private corporations’ data mining of customer or user information).

200. See *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

201. See *supra* notes 183-85 and accompanying text.

obviously, is the opposite bright-line rule—abolishing the third-party doctrine entirely, such that information shared with a third party (or some small number of third parties) is treated as fully private for constitutional purposes unless and until it is exposed to the public at large (or some defined large number of people).<sup>202</sup> But there is no conceptual principle that would preclude an alternative version of the third-party doctrine which operates as a legal standard, rather than a rule, giving the doctrine nuance rather than definitiveness.

For example, just as information aggregation and data mining raise concerns on their own merits, the definition of the third-party doctrine could itself be revised to incorporate a similar principle. Under *Katz*, whether a “search” occurred is determined by evaluating whether the particular police investigative activity used violated society’s reasonable expectation of privacy.<sup>203</sup> Viewed through this lens, a normative and

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202. See articles cited *supra* note 190. Even if the third-party doctrine was eliminated, one limitation on the extent of Fourth Amendment protection for information shared with others might remain—the false friend doctrine. Under that doctrine, no Fourth Amendment “search” occurred if a third party to whom information voluntarily was given by the defendant chose to reveal that information to the police. See, e.g., *United States v. White*, 401 U.S. 745, 752-54 (1971) (informant wore radio transmitter to allow police to eavesdrop on conversations between informant and defendant); *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966) (cooperating informant had conversation with defendant, then reported contents of conversation to police); *Lopez v. United States*, 373 U.S. 427, 437-40 (1963) (undercover law enforcement officer covertly recorded conversations between officer and defendant). The false friend doctrine depends on a volitional act by the third party to choose to assist the police. Cf. *United States v. Ceccolini*, 435 U.S. 268, 279-80 (1978) (holding that exclusionary rule did not bar trial testimony of witness whose identity was discovered as fruit of an unconstitutional search because witness’s own volitional choice to testify broke causal connection between unconstitutional search and witness’s trial testimony); *Michigan v. Tucker*, 417 U.S. 433, 452 (1974) (holding that exclusionary rule did not bar trial testimony of witness whose identity was discovered from defendant’s confession obtained in violation of *Miranda* doctrine because additional deterrence from excluding it was outweighed by value of permitting use of reliable evidence). Thus, eliminating the third-party doctrine would not prohibit third parties, whether individuals or companies, from *choosing* to provide relevant evidence to law enforcement; on the other hand, doing so would allow the defendant to suppress the information if it was obtained *without* the cooperation of the third party, such as by compelling the monitoring of a smartphone’s location over the objection of the phone carrier. In other words, eliminating the third-party doctrine would restore the defendant’s Fourth Amendment standing to contest such an action by the police because the defendant now *would* have a reasonable expectation of privacy in the information held in the third party’s hands as against its acquisition by the police—unless and until the police obtained the volitional cooperation of that party under the false friend doctrine.

203. *Katz v. United States*, 389 U.S. 347, 351-52 (1967).

empirical argument could be made that the average person might reasonably expect that a small quantity of information about him might “leak” to the police from the third parties with whom he deals in his daily life, while simultaneously not reasonably expecting massive “data dumps” of information to be given to law enforcement. Framed another way, it might be viewed as one thing for the police to request the current location of a specific smartphone, the timestamp of the most recent email sent from one particular account to another specified account, or the duration of a single call known to have been placed from one phone number to another, and viewed as another thing entirely for the police to request an itemized log of every recorded location of a smartphone for a month in fifteen-second intervals, or a comprehensive list of the addressing information of every email sent and received by an account, or a full log of every phone call made from a phone number and their durations. The doctrine easily could be constructed so that the former request is not a “search” but the latter request is.

Finally, the potential ramifications of the extant version of the third-party doctrine in the Internet age could even lead the Court to reframe—or at least rephrase—the *Katz* test itself. In her concurring opinion in *Jones*, Justice Sotomayor noted that “societal expectations . . . can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy.”<sup>204</sup> But perhaps a reasonable expectation of “privacy” is not even the right choice of words. Are the relevant categories “public information” (a blog), “non-public information” (bank transactions), and “secret information” (a diary)? Or is the true distinction between information the police should be able to get just because they want it and information the police should need a warrant to get? In an interconnected, online society, this latter distinction may be very salient—while not lining up with traditional modes of thinking about information. Thus, rather than asking, as a *Katz* analysis does, whether a person has a reasonable expectation of privacy, the Court could reframe the test in overtly normative terms—asking whether individuals have a reasonable expectation that this particular kind of interaction with this specific kind of third party is something the police should be allowed to investigate with impunity, or instead that the requirements of the Fourth Amendment should be triggered before the investigation can proceed.

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



*C. Could Information, Rather Than Intrusion, Become the Core Concept in Defining What Constitutes a “Search”?*

In interpreting and applying the Fourth Amendment’s prohibition on unreasonable “searches,” the Court must decide what it means for a person to have been “searched” by a government agent. Is it possible that rapid advances in technology could not merely reshape Fourth Amendment doctrines on the edges—such as a new principle to address aggregation and data mining or revisiting the third-party doctrine—but lead to a wholesale rethinking of the Court’s analytical approach to defining a “search”?

So far, the Court has examined this issue through the lens of the concept of intrusion. Prior to *Katz*, a Fourth Amendment “search” occurred when the police intruded upon a property right; *Jones* reaffirmed that at least certain kinds of property-rights intrusions continue to constitute “searches” today.<sup>205</sup> Since *Katz*, a “search” has occurred when the police intrude into a reasonable expectation of privacy, and all three opinions in *Jones* reaffirmed that *Katz* doctrines continues to govern those situations.<sup>206</sup> In both conceptual visions of the Fourth Amendment, the dispositive features are (1) a protected interest of the individual and (2) an action by the police to intrude into that interest.

But what if, instead of asking what a “search” looks like, we ask what a “search” is for? That is, instead of asking *how* police “search,” we ask *why* police “search.” The answer, of course, is that police investigations—and searches in the colloquial, not doctrinal, usage of the word—are about obtaining evidence, whether physical items, electronic data, or other kinds of information that will help solve a crime or secure a conviction.

The rise of high-speed personal computing, digital technology, and the Internet have exponentially increased the amount of information that Americans create, consume, and share every day.<sup>207</sup> In this new reality, the

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205. See *supra* Part III.A.

206. See *supra* Part III.A.

207. See, e.g., Lauren Ann Ross, *A Comparative Critique to U.S. Courts’ Approach to E-Discovery in Foreign Trials*, 11 DUKE L. & TECH. REV. 313, 319 (2012) (“Discovery has evolved from boxes of hard-copy documents in a file room into a complex labyrinth of [electronically stored information] produced by internet communications and office automation. Globally, the amount of data is increasing exponentially. Between 2004 and 2007, the average amount of information stored by a Fortune 1000 company quintupled, while the average amount of data produced by American midsize companies increased fifty-fold.” (footnotes omitted)); Christopher S. Yoo, *The Changing Patterns of Internet Usage*, 63 FED. COMM. L.J. 67 (2010) (describing challenges posed by rapid growth of Internet usage for information-sharing).

kind and quantity of information acquired often may matter far more than how the information was acquired. Someone whose emails or SMS text messages were published for all to read on the Internet, or whose intimate photos or video chats were seen by unintended persons, may suffer comparable emotional anguish whether the exposure was carried out through a friend’s betrayal or by an unknown computer hacker. Likewise, a person whose money is stolen through theft of a password or a bank account personal identification number may endure the same financial hardships regardless of whether the fraud was committed by a friend, relative, or total stranger. In time, social norms may come to view interactions with police in much the same way. The affront felt toward the inappropriateness of a law enforcement investigation may follow not so much from *how* the police learned what they know, but *what* they know and *how much* they know. A blatant hacking of a smartphone may be seen as minor if only a trivial amount of insignificant information is acquired, while building a detailed dossier of thousands of pieces of aggregated data may be seen as deeply troubling even though the discrete data itself was gathered by rather innocuous and unobtrusive methods.

Thus, perhaps the Internet age will lead society—and the Court—to perceive that a person has been “searched” for Fourth Amendment purposes because of the kind and extent of information that the government has learned about him, rather than the particular investigative techniques and tactics used to acquire the information. Interestingly, the seeds of such a doctrinal shift may already have been sown in the concurring opinions in *Jones*. Although Justice Sotomayor joined Justice Scalia’s trespassory intrusion analysis for purposes of resolving the case narrowly, she noted that non-trespassory, non-intrusive methods already exist to accomplish exactly the same surveillance performed by the trespassory GPS device in the actual case.<sup>208</sup> Justice Alito also recognized the implications of such technologies, but he rejected the trespassory intrusion analysis in part because the real danger posed by the police investigation was not the attachment of the GPS device to the vehicle, but rather the month-long monitoring of all of the suspect’s public movements.<sup>209</sup>

Such a fundamental shift in doctrinal foundations, of course, would topple the entire edifice of current Fourth Amendment “search” definition doctrine and require building a new doctrinal structure in its place. From

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208. See *Jones*, 132 S. Ct. at 955-57 (Sotomayor, J., concurring).

209. See *id.* at 961, 963 (Alito, J., concurring in the judgment).

the perspective of today's entrenched *Katz* test, though, it is hard to even imagine the contours of such a reinvented Fourth Amendment.

#### *V. Conclusion*

By limiting its decision in *Jones* to a concise application of a narrow doctrinal test, the Court punted the most conceptually important—and conceptually difficult—Fourth Amendment questions implicated by law enforcement surveillance and information gathering in the digital age. Going forward, the Court inevitably will be confronted with future cases presenting all manner of challenges to electronic and Internet investigations, and the Justices may very well find it necessary to make significant modifications to Fourth Amendment doctrines to take account of an increasingly interconnected technological society. Nevertheless, until those cases come before the Court, it is important not to lose sight of the answers the Court did provide in *Jones*, both for resolving cases in the lower courts in the meantime and for considering how the Justices might approach these later cases when the day arrives. On first blush, the narrowness of *Jones* may seem to make it an insignificant way station on the road to more definitive rulings—but it turns out there may be more to *Jones* after all.