


2011

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## eCommons Citation

Goldberg, Erica, "How United States v. Jones Can Restore Our Faith in the Fourth Amendment" (2011). *School of Law Faculty Publications*. 93.

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## HOW *UNITED STATES V. JONES* CAN RESTORE OUR FAITH IN THE FOURTH AMENDMENT

Erica Goldberg\*†

*United States v. Jones*,<sup>1</sup> issued in January of this year, is a landmark case that has the potential to restore a property-based interpretation of the Fourth Amendment to prominence. In 1967, the Supreme Court abandoned its previous Fourth Amendment framework, which had viewed the prohibition on unreasonable searches in light of property and trespass laws, and replaced it with a rule protecting the public's reasonable expectations of privacy.<sup>2</sup> Although the Court may have intended this reasonable expectations test to provide more protection than a test rooted in property law, the new test in fact made the Justices' subjective views about privacy paramount, resulted in circular logic, and over time diminished Fourth Amendment protection. *Jones*, which held that attaching a GPS device to a suspect's car without a proper warrant violates the Fourth Amendment because attachment of the device constitutes a physical intrusion upon the car,<sup>3</sup> reinvigorates the pre-1967 property-based framework. The case indicates that a governmental intrusion is a search if it violates a reasonable expectation of privacy *or* constitutes a physical intrusion of property. *Jones* is itself rather limited in scope, but it could provide the foundation for a paradigm shift in the interpretation of the Fourth Amendment.

Most of the commentary on *Jones* has focused on the impact of the decision on the scope of Fourth Amendment rights. However, *Jones*'s potential impact is far broader than outcomes in particular Fourth Amendment cases. *Jones* should restore our faith in the Fourth Amendment—not necessarily because it is more protective of Fourth Amendment rights, but because it gives the Justices a more concrete framework to determine whether the government has executed a search. Because *Jones* has supplemented the reasonableness inquiry with a physical trespass test, the determination of whether government action constitutes a search can be based on objective factors. Over time, this should make the results of Fourth Amendment cases more predictable and defensible and perhaps will reduce much of the cynicism surrounding Fourth Amendment jurisprudence.

*Jones* is hardly the last word in the evolution of Fourth Amendment doctrine. As the concurrence in *Jones* points out, *Jones* itself does not apply to

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† Suggested Citation: Erica Goldberg, Commentary, *How United States v. Jones Can Restore Our Faith in the Fourth Amendment*, 110 MICH. L. REV. FIRST IMPRESSIONS 62 (2012), <http://www.michiganlawreview.org/assets/fi/110/goldberg.pdf>.

1. *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259).
2. *See Katz v. United States*, 389 U.S. 347 (1967).
3. *Jones*, 132 S. Ct. at 946.

the common scenario where the government engages in intrusive behavior that does not involve physical intrusion onto property (e.g., utilizing GPS technology to track the location of an individual's cell phone).<sup>4</sup> For now, such intrusions are examined only under the "reasonable expectations" test. However, if the Court fully embraces the logic of *Jones*, such intrusions could be considered searches, regardless of whether any particular Justice believes the government's action to be reasonable, because they rise to the level of trespass to chattels.

#### A. *The Pre-Jones Test for Searches*

The Fourth Amendment's ban on "unreasonable searches and seizures"<sup>5</sup> offers little guidance to judges on how to protect individuals from overzealous criminal investigations. The text does not provide any coherent principles for determining when a search or seizure is unreasonable, or even whether a search or seizure has occurred at all. As a result, the Supreme Court has been sharply divided on questions as fundamental as the nature of the right being protected by the Fourth Amendment and whether this right sounds in concerns for property or privacy.

Assessing the constitutionality of a purported search occurs in two stages. First, the court must determine whether the government's action constitutes a "search," requiring Fourth Amendment protection. The Fourth Amendment thus does not apply to a wide swath of intrusive government action that cannot be deemed a search. Once government action is considered a search, the court then analyzes whether the search is reasonable. This analysis, which often involves a balancing of the individual privacy interest at stake against the government's reason for performing the search, has allowed "a shifting majority of th[e Supreme] Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good."<sup>6</sup>

Over the past several decades, the Justices have rightfully expressed cynicism about the analysis used to adjudicate our Fourth Amendment rights. Prior to *United States v. Jones*, the threshold question of whether a governmental intrusion was deemed a search depended solely on the highly subjective question, first articulated in *Katz v. United States*, of whether the government had intruded upon a reasonable expectation of privacy. Like *Jones*, *Katz* effectuated a paradigm shift in understanding the basis for our Fourth Amendment rights. By holding that attaching an electronic surveillance device to a public telephone booth constitutes a search for which the government must first obtain a warrant even though there was no physical trespass, the Supreme Court in *Katz* discarded a textual analysis of the Fourth Amendment based on property rights and instead hinged the Amendment upon evolving notions of privacy.

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4. *Id.* at 961 (Alito, J., concurring).

5. U.S. CONST. amend. IV.

6. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 370 (1985) (Brennan, J., dissenting).

Previously, the textualist and originalist interpretations of the Fourth Amendment had defined searches as intrusions upon physical property. This is because the Fourth Amendment explicitly protects “persons, houses, papers, and effects,” and the common law at the time of the Framing concerned itself with protecting property rights against the ransacking of houses by the government.<sup>7</sup> *Olmstead v. United States*, later repudiated by *Katz*, had held that tapping telephone wires on public streets did not constitute a Fourth Amendment search because “[t]here [i]s no entry of the houses or offices of the defendants.”<sup>8</sup> Breaking from tradition, *Katz* held that the Fourth Amendment is instead concerned with protecting the individual from infringements upon an “expectation of privacy . . . that society is prepared to recognize as ‘reasonable.’”<sup>9</sup>

*Katz* was intended to broaden Fourth Amendment protections and unmoor it from *Olmstead*’s rigid connection to property. The dissenting Justices in *Olmstead* believed that wedding the Fourth Amendment to property rights was misguided in an era where technological advancements could mean great intrusions into personal privacy without any physical trespass.<sup>10</sup> However, reliance on the value-laden notion of “reasonable expectation of privacy” actually has eroded Fourth Amendment rights and our faith in the Fourth Amendment’s ability to provide meaningful protection. The Justices have sparred about what privacy rights citizens reasonably expect. The Court has resorted to the use of balancing tests, and often the government’s interest in investigating and deterring crime has won out over the individual’s interest against unreasonable intrusions.<sup>11</sup> In a series of cases, the Court held that there was no reasonable expectation of privacy (1) in private fields, fenced in and guarded by a no-trespassing sign,<sup>12</sup> (2) in an individual’s garbage in opaque bags left on the curb for the trash collector,<sup>13</sup> and (3) when a helicopter flew 400 feet above an individual’s mobile home.<sup>14</sup> If the Court had used a Fourth Amendment framework based on invasions of property, the result of these cases might have been quite different. The Court could have determined, for instance, that garbage remains

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7. See *Olmstead v. United States*, 277 U.S. 438, 463 (1928).

8. *Id.* at 464.

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

10. Justice Brandeis, dissenting in *Olmstead*, noted that

[t]he progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.

*Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting). “Can it be,” he asked, “that the Constitution affords no protection against such invasions of individual security?” *Id.*

11. See *Adams v. Williams*, 407 U.S. 143, 151–53 (Brennan, J., dissenting).

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

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

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

one's property so long as it sits on one's curb for exclusive transfer to the garbage collector. Regardless of the outcome, using a property-based approach would certainly have put the Court's opinion on a firmer foundation that would have allowed it to render decisions based on generally applicable rules instead of ad hoc analysis. The Court could have determined that flying a helicopter at 400 feet above someone's home did not constitute a trespass because helicopters are permitted into that airspace and because "there [i]s no undue noise, and no wind, dust, or threat of injury."<sup>15</sup> Instead, the Court based its decision on the public being legally permitted to fly at that low of an altitude over someone's home, but could (or would) not hold "that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law."<sup>16</sup>

Perhaps worse than curtailing our Fourth Amendment protections, *Katz*'s reasonable expectation of privacy test became a way for the Justices to appoint themselves arbiters of which privacy expectations to afford society. Instead of determining whether privacy expectations were reasonable, based on empirical notions of when most citizens regard their possessions or conversations as being private, the Justices applied *Katz* normatively, based on how privacy *should* operate. Justice Harlan, whose concurring opinion in *Katz* established the reasonable expectation of privacy test, later wrote, "[s]ince 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."<sup>17</sup> By deciding when the government had intruded upon a reasonable expectation of privacy, the Justices had assigned themselves the power to dictate to society when society's assumptions about privacy were acceptable. This normative view could be both broader and narrower than society's actual expectations of privacy, and decisions were often based on the Justices' own experiences, which may have been similar to each other's but which were not the norm for society.<sup>18</sup>

Of course, the Justices have differed on the normative question of when individuals should be permitted to assume that their possessions and conversations are private. In *California v. Greenwood*, for instance, the majority believed that there was no reasonable expectation of privacy in one's garbage left on the curb outside one's home, because "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other

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15. *Id.* at 452.

16. *Id.* at 451.

17. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

18. *See United States v. Pineda-Moreno*, 617 F. 3d 1120 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc) ("No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don't live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live.").

members of the public.”<sup>19</sup> The dissent contended instead that “scrutiny of another’s trash is contrary to commonly accepted notions of civilized behavior.”<sup>20</sup> Justice Brennan in dissent argued that “members of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public.”<sup>21</sup>

By the Justices’ own design, there is no touchstone for determining whether the dissent or the majority had the correct position in *Greenwood*. The question of whether we have a reasonable expectation of privacy in any dimension of our lives was, prior to *Jones*, entirely circular. If the Supreme Court held that individuals had no reasonable expectation of privacy in their garbage, for example, then individuals could not reasonably assume that their garbage was secure against warrantless, suspicionless police intrusion. We could reasonably expect privacy from police intrusions only when the Court deemed our expectations of privacy are reasonable.

### B. Justice Scalia’s New (Old) Approach

Justice Scalia’s majority opinion in *Jones*, over a four-judge concurrence authored by Justice Alito, consolidated the competing approaches of *Olmstead* and *Katz*. A search now occurs either when there is a state-law trespass upon property, as in *Olmstead*, or when the government infringes upon a reasonable expectation of privacy, per *Katz*. The majority opinion in *Jones* thus resurrects the pre-*Katz* link between the Fourth Amendment and property rights without changing the rule that the Fourth Amendment is also violated by intrusions upon privacy. According to Justice Scalia, “We have no doubt that such a physical intrusion [as attaching a GPS device to an individual’s car] would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”<sup>22</sup> The majority’s return to a textual and historical analysis of the Fourth Amendment has the potential to force the Justices to answer to something more concrete than the “reasonableness” standard. This opinion adds much needed clarity and objectivity to Fourth Amendment analysis. By focusing on property rights, the Justices may now use property intrusions as a proxy for when privacy has been unconstitutionally violated.

Ironically, to achieve this properly principled framework, the opinion distorts precedent in unrecognizable ways, without ever acknowledging that it is doing so. As Justice Alito notes in his concurrence, the connection between the Fourth Amendment and property was abandoned in *United States v. Katz*, and it “has little if any support in current Fourth Amendment case

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19. *California v. Greenwood*, 486 U.S. 35, 40 (1988).

20. *Id.* at 45 (Brennan, J., dissenting).

21. *Id.* at 46.

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

law.”<sup>23</sup> The Court previously noted that it had “decoupled violation of a person’s Fourth Amendment rights from trespassory violation of his property.”<sup>24</sup>

To be fair, the Court in prior cases has looked to property law in assessing whether a reasonable expectation of privacy exists (or whether a search is reasonable),<sup>25</sup> but Justice Scalia’s major contribution in *Jones* is holding that a physical trespass in and of itself, when performed to acquire information, constitutes a search *regardless* of reasonable expectations of privacy. Although the *Jones* test is currently a supplement to the *Katz* test, this move away from the normative reasonableness inquiry will render Fourth Amendment jurisprudence more certain for individuals, police officers, and judges, and ultimately may prove more protective of Fourth Amendment rights. The results in any particular case may still require courts to exercise their own judgment and interpretation of property rights, but their decisions will be guided by something other than their own personal evaluations of reasonableness.

### C. Beyond the Physical

As Justice Alito remarks, Justice Scalia’s addition of the more definitive physical trespass test provides no extra protection against nonphysical searches, such as GPS tracking performed through cell phones. Concerns like Justice Alito’s regarding non-physical searches are what led the *Katz* majority to abandon the property-based framework. Perhaps the best solution to this problem is the one presented by Justice Alito himself. Although Justice Alito disputes this, a historical understanding of the Fourth Amendment is not inconsistent with an updating of society’s notions of property rights. The Justices can undertake a property-based Fourth Amendment analysis, as intended by the Framers, while incorporating modern-day property law, which applies to electronic trespasses such as spamming one’s email account.<sup>26</sup> Justice Alito recognizes that courts have held that “the

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23. *Id.* at 958 (Alito, J., concurring). In *Greenwood*, for example, the Court did not examine whether an individual’s trash is abandoned property because “the reach of the Fourth Amendment is not determined by state property law.” 486 U.S. at 51 (Brennan, J., dissenting).

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

25. *See Georgia v. Randolph*, 547 U.S. 103, 111 (2006) (“The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules.”); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (noting that an expectation of privacy is reasonable if it has “a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society”).

26. Courts have held that sending spam email and using automated robots to download information from websites can constitute a “trespass to chattels.” *See, e.g., eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

transmission of electrons that occurs when a communication is sent from one computer to another is enough” to constitute trespass to chattels.<sup>27</sup>

Even in the *Katz* electronic surveillance case, the Court could have retained the connection between property rights and privacy rights by holding that an electronic connection to an individual’s property (or to the phone company’s property) is a physical intrusion, albeit on a microscopic level. In *Olmstead v. United States*,<sup>28</sup> overturned by *Katz*, the phone companies argued that wiretapping, even on lines outside one’s home, technically trespasses upon telephone lines belonging to private phone companies and devoted to the exclusive use of the callers.<sup>29</sup> Similarly, Internet Service Providers (“ISP”) turning over emails stored or transmitted through an ISP’s systems involves a trespass upon the ISP’s microchips.<sup>30</sup> Justice Scalia’s rationale, if updated to consider electronic penetration a form of trespass, would permit the labeling of more intrusions as searches, whether they look like traditional trespasses or modern-day, electronic trespasses.

One problem with this approach is that states might differ in what property rights they afford their citizens, while Fourth Amendment protections must be uniform across the country. However, the Court could simply use a physical-occupation test. There are also nonsubjective, empirical ways to measure which property rights are the most frequently granted throughout the country, have existed for the longest, or are in some way the most analogous to those contemplated by the Framers. The Fourth Amendment can be interpreted using its historical connection to property while modernizing our notions of property rights.

#### CONCLUSION

The best way to safeguard Fourth Amendment rights against political pressures and shifting majorities’ notions of the social good is to make the first prong of Fourth Amendment analysis—whether government action constitutes a search—more concrete. *Jones*’s resurrection of the link between searches and property, though a significant and somewhat disingenuous departure from precedent, is a substantial step toward this end. Although Justice Scalia merely supplemented *Katz*’s reasonable expectation of privacy test with *Olmstead*’s property-based approach and did not eradicate *Katz* entirely, further development of the jurisprudence and a more explicit focus on property rights as an objective proxy for privacy expectations has the potential to diminish the subjectivity and circularity currently plaguing Fourth Amendment analysis. Over time, especially if trespass to chattels is considered a search, *Jones* may cover most of the territory

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27. *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring).

28. 277 U.S. 438 (1928).

29. SAM KAMIN & RICARDO J. BASCUAS, INVESTIGATIVE CRIMINAL PROCEDURE: A CONTEMPORARY APPROACH 15-16 (2011).

30. Instead, the Sixth Circuit decided a case involving these facts based on the *Katz* formulation. *See United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).



currently protected by *Katz* and could ultimately replace *Katz* as a clearer, cleaner metric of when the Fourth Amendment is implicated. There is too much room for debate about whether rifling through one's garbage is "contrary to commonly accepted notions of civilized behavior," but there is no doubt that attaching a GPS device to Antoine Jones' car constituted a physical intrusion upon his property.