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The Drug Dealer, the Narc, and the Very Tiny Constable: Reflections on United States v. Jones

Caren Myers Morrison*

On January 23, 2012, the Supreme Court held unanimously that the installation and use of a GPS tracker on a suspected drug dealer's Jeep constituted a search under the Fourth Amendment.¹ The outcome had been fairly well foreshadowed: at oral argument, the Justices had seemed perturbed by the thought that police could put trackers on cars—even the *Justices's own* cars—seemingly at will.² Overall, there seemed to be a thread running through the questions that the practice smacked a little too much of George Orwell's *1984*.³

Although the Justices all agreed that the government's conduct amounted to a search, the reasoning of the case was hotly disputed, with Justice Scalia and Justice Alito penning sparring opinions⁴ and Justice Sotomayor

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1. United States v. Jones, No. 10–1259 (U.S. Jan. 23, 2012).

2. See Transcript of Oral Argument at 9–10, United States v. Jones, No. 10–1259 (U.S. Jan. 23, 2012) [hereinafter Oral Argument], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf.

3. See *id.* at 13, 57–58.

4. Justice Scalia's opinion was joined by Chief Justice Roberts, and Justices Kennedy, Thomas, and Sotomayor; Justice Alito's concurrence was joined by Justices Ginsburg, Breyer, and Kagan.

contributing a separate concurring opinion. Justice Scalia's opinion for the Court held that monitoring the suspect with a GPS device was a search because, by attaching the device to the car in the first place, the government had committed an act that would have constituted a trespass at common law. Justice Alito argued that the four-week monitoring was a search because it went on for too long. Justice Sotomayor agreed with both views, but asked whether the Court should reconsider the premise that people forgo their expectations of privacy by sharing information with third parties.

Amid all this contention, I argue that *United States v. Jones* represents a missed opportunity to bring a measure of clarity to an uncharted area of Fourth Amendment jurisprudence. Specifically, I advance the following two critiques. My first critique rests with the Court's methodology. Although the Court professed allegiance to common law practice, it broke faith with the common law method by not engaging in a reasoned elaboration of its own precedents. Commentators have argued that the great strength of the common law approach is that it "gives relatively clear guidance about how we are to weigh the claims of tradition against our current assessment of the justice or appropriateness of a legal rule. . . . The challenge is to give as illuminating an account as we can of how that decision is to be made."⁵ *Jones* is not such an account. Moreover, the Court's trespassory test is no less subjective or troublesome than the reasonable expectation of privacy test it seeks to supplant.

My second critique is leveled at the Court's refusal to answer the larger question posed by the case: whether the police actions in *Jones* constituted a search, given contemporary realities regarding technology and social norms, regardless of whether a common law trespass was committed. Instead, by insisting that it needed to look no further than its trespassory test, the Court avoided making a reasoned normative pronouncement in the inadequately theorized area of contemporary electronic surveillance.

I.

THE *JONES* "MAJORITY" OPINION

In *Jones*, the government relied on the "reasonable expectation of privacy" inquiry from *Katz v. United States*⁶ to contend that Jones had no reasonable expectation of privacy either in the underbody of his Jeep or in the locations of his Jeep on the road.⁷ But according to Justice Scalia, that was the wrong inquiry. "We need not address the Government's contentions," he asserted, "because Jones's Fourth Amendment rights do not rise or fall with the

5. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 895 (1996).

6. The test, taken from Justice Harlan's concurrence, asks whether a person has exhibited "an actual (subjective) expectation of privacy" and whether "the expectation [was] one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

7. *United States v. Jones*, No. 10-1259, slip op. at 5 (U.S. Jan. 23, 2012).

Katz formulation.”⁸ Instead, Scalia formulated a new, trespassory test.⁹ A government intrusion constitutes a search under the Fourth Amendment if the intrusion (a) would have qualified as a trespass at common law, (b) invaded a constitutionally protected area enumerated in the Fourth Amendment (“persons, houses, papers, and effects”), and (c) was committed for the purpose of gathering information.¹⁰

Scalia painted his new test not as an abrupt turn away from modern Fourth Amendment understandings but as the continuation of an uninterrupted strand of property-based jurisprudence that *Katz* had not “repudiate[d],” but from which later cases had simply “deviated.”¹¹ With this sleight of hand, Justice Scalia reinterpreted the *Katz* inquiry as a residual test, to be used if property norms could not decide a case, while “[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to the *Katz* analysis.”¹²

Justice Alito lost no time in mocking Scalia’s approach of applying “18th century tort law” to resolve questions of twenty-first-century surveillance.¹³ Alito noted that it was “almost impossible to think of late-18th-century situations that are analogous to what took place in this case.”¹⁴ The only scenario he could imagine was one 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.”¹⁵ Scalia allowed that the analogy was “not far afield,”¹⁶ prompting the tastiest *bon mot* of the collective opinions, as Alito retorted, “this would have required either a gigantic coach, a very tiny constable, or both.”¹⁷ However, none of this deflected Scalia from his self-appointed task of “‘assur[ing] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’”¹⁸

II.

JONES AND ITS AMBIGUOUS RELATIONSHIP TO THE COMMON LAW

A. The Jones Court’s Divergence from Precedent

What is striking about the Court’s adherence to its vision of common law

8. *Id.*

9. *Id.* at 3–4, 10 n.8.

10. *Id.* at 7 n.5 (“A trespass on ‘houses’ or ‘effects,’ or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information . . .”).

11. *Id.* at 5–6.

12. *Id.* at 11.

13. *Id.* at 1 (Alito, J., concurring).

14. *Id.* at 3.

15. *Id.*

16. *Id.* at 5 n.3 (majority opinion).

17. *Id.* at 3 n.3 (Alito, J., concurring). One might point out further that a tiny constable would only have approximated the usefulness of a tracking device if he also had been able to signal his location in real time, perhaps by using a trail of breadcrumbs.

18. *Id.* at 5 (majority opinion) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

practice is its lack of deference for the common law method. In its search for an authoritative basis for its ruling, the Court could have relied on stare decisis and simply built on the cases that came before.¹⁹ But it did not do this. Instead, *Jones* is remarkable for its doctrinal transmogrification.

Many lines of precedent could have informed *Jones*, foremost among them *Katz v. United States*, which established the now-famous reasonable expectation of privacy test.²⁰ Additionally, the cases that succeeded *Katz* have given some guidance on what kinds of surveillance the police could conduct on public roads and spaces. In these cases, the Court typically found that if information was “knowingly exposed to the public,” there could be no Fourth Amendment claim.²¹ Accordingly, police conduct was found not to be a search in cases dealing with beepers²² (arguably the closest precursor to GPS technology) and in cases minimizing a person’s expectation of privacy in her vehicle. In addition, there is at least some language indicating that sense-enhancing technology might not offend the Fourth Amendment if the technology was in “general public use.”²³ This Section shall consider each of these issues in turn.

1. *The Court’s Devaluation of Katz*

The most salient aspect of the *Jones* decision was its rejection of the “reasonable expectation of privacy” test from *Katz* in favor of a return to an unabashedly property-driven conception of the Fourth Amendment exemplified by early twentieth-century cases such as *Olmstead v. United States*²⁴ and *Goldman v. United States*.²⁵ In *Olmstead*, the Court held that a wiretap run by federal prohibition agents was not a search because there was no trespass onto the suspects’ property;²⁶ in *Goldman*, the Court held that the use of a detectaphone on the partition wall of the defendant’s office was not a search because there was no trespass involved in its use.²⁷ In *Katz*, the Court considered a situation in which federal agents had attached a microphone and a

19. See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 256 (1984) (arguing that that case-by-case adjudication “can give law enforcement officers significant guidance” by giving “expression to a set of values” that communicates to the public and to law enforcement).

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

21. See *id.* at 351 (majority opinion) (“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.”).

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

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

24. 277 U.S. 438 (1928).

25. 316 U.S. 129 (1942).

26. *Olmstead*, 277 U.S. at 465 (“The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant’s house or office. The intervening wires are not part of his house or office.”).

27. *Goldman*, 316 U.S. at 134–35.

tape recorder to the outside of a public phone booth to eavesdrop on a bookie placing bets.²⁸ Under *Olmstead*, there would have been no search because, even if the phone booth had been considered a constitutionally protected area, the listening device did not penetrate the walls of the phone booth. But the Court instead broke with *Olmstead's* property-driven view to find that agents had contravened the Fourth Amendment because their actions “had violated the privacy on which [Katz] justifiably relied.”²⁹

Four decades of legal scholarship and jurisprudence consequently understood *Katz* as replacing a property-based view of Fourth Amendment rights with one based on privacy.³⁰ Yet to the surprise of at least four members of the Court, Justice Scalia announced that “the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”³¹ This interpretation is certainly not discernible from the face of the *Katz* opinion. The *Katz* Court explicitly refused to decide the case based on the trespass theory advanced by the litigants.³² Instead, the Court stated in no uncertain terms that “the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.”³³ It is a measure of the audacity of the *Jones* opinion that Justice Scalia does not acknowledge the revisionism of its reasoning.³⁴

28. *Katz v. United States*, 389 U.S. 347, 353 (1967).

29. *Id.*

30. See, e.g., William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1268 (1999) (stating that Fourth Amendment searches are “defined as anything agents of the government do that infringes a reasonable expectation of privacy”); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment Reasonableness*, 98 COLUM. L. REV. 1642, 1643 (1998) (“Searches are defined as governmental inspection of activities and locations in which an individual has a reasonable expectation of privacy from observation.”); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 827–28 (1994) (acknowledging the “move away from the common law categories of ‘property’ and ‘trespass’ to a normative conception of constitutional ‘privacy’ as the Fourth Amendment’s life-giving rationale”); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727, 729 (1993) (“An action by law enforcement officers that does not infringe on ‘reasonable expectations of privacy’ is not a ‘search’” under the Fourth Amendment). For a notable exception to this interpretation, see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–27 (2004) (arguing that property norms, rather than privacy, have driven the Court’s post-*Katz* jurisprudence).

31. *United States v. Jones*, No. 10–1259, slip op. at 8 (U.S. Jan. 23, 2012).

32. See *Katz*, 389 U.S. at 349–50. The petitioner had framed the constitutional questions in terms of intrusion into tangible spaces: first, whether a public telephone booth was “a constitutionally protected area” and second, “[w]hether physical penetration of a constitutionally protected area” was necessary to constitute a search under the Fourth Amendment. *Id.* His efforts were rebuffed, as the Court “decline[d] to adopt this formulation of the issues.” *Id.* at 350.

33. *Id.* at 353. The Court further quoted Justice Brennan’s pronouncement in *Warden v. Hayden* that “[t]he premise that property interests control the right of the Government to search and seize has been discredited.” *Id.* (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)).

34. Then again, as David Sklansky has remarked, “cloaking innovation as tradition has itself been a familiar tactic of the common law since at least the time of Coke.” David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1762 (2000) [hereinafter,

2. *The Court's Dismissal of Its Post-Katz Jurisprudence*

Justice Scalia displayed equally little deference for the Court's post-*Katz* jurisprudence. The cases most closely analogous to the situation in *Jones* seemed to be the "beeper" cases, *United States v. Knotts*³⁵ and *United States v. Karo*,³⁶ on which the government had relied in *Jones*. In *Knotts*, the Court held that tracking an individual's car via a beeper, which had been attached to a drum of chloroform the defendant purchased from an informant, was not a search because "[a] person traveling in an automobile on public thoroughfares has no expectation of privacy in his movements from one place to another."³⁷ *Karo* reaffirmed this principle on similar facts.³⁸ Indeed, before *Jones*, three Circuit Courts of Appeals had recently relied on *Knotts* to hold that GPS monitoring, even over a prolonged period, was not a search.³⁹

Justice Scalia agreed that in *Knotts* the information obtained about the target's itinerary "had been voluntarily conveyed to the public."⁴⁰ However, Scalia differentiated *Jones* from *Knotts* and *Karo* based on the fact that the government had trespassed on Jones's personal property by attaching a GPS to his Jeep for the purpose of obtaining information.⁴¹ Therefore, *Knotts* and *Karo*—both situations in which the suspects were given cans of chemicals already fitted with beepers—were not controlling.

While this is true, to distinguish *Jones* from *Knotts* and *Karo* on the basis that the former involved a trespass and the latter two did not seems to deliberately ignore the more salient difference between the cases. The surveillance in *Knotts* lasted a single trip⁴² and the surveillance in *Karo* only a couple of trips.⁴³ The surveillance in *Jones* was a 24-hour a day, 28-day operation, with only a short break to replace the device's battery when it ran down.⁴⁴ Instead of acknowledging these differences, the Court held that the real difference—the *only* difference that it deemed worthy of discussion—was that in *Knotts* and *Karo* the defendants accepted the drums of chemicals with the

Sklansky, *Common Law*].

35. 460 U.S. 276 (1983).

36. 468 U.S. 705 (1984).

37. *Knotts*, 460 U.S. at 277, 281.

38. See *Karo*, 468 U.S. at 721 ("[I]t is evident that under *Knotts* there was no violation of the Fourth Amendment . . . while [the beeper] was located in Horton's truck.").

39. See *United States v. Marquez*, 605 F.3d 604, 609–10 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216 (9th Cir. 2010), *vacated* No. 10-7515, 2012 WL 538278 (U.S. Feb. 21, 2012); *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007).

40. *United States v. Jones*, No. 10–1259, slip op. at 8 (U.S. Jan. 23, 2012).

41. The GPS was attached to the Jeep while it was parked in a public parking lot; the trespass was strictly limited to the interference with the car itself, and did not involve entry onto private property. See *id.* at 2.

42. *United States v. Knotts*, 460 U.S. 276, 278–79 (1983).

43. *United States v. Karo*, 468 U.S. 705, 721 (1984). While the Court found that the government's monitoring the beeper while it was in private residences did amount to a search, it upheld the monitoring of the beeper from a warehouse to one residence and then to another. See *id.*

44. See *Jones*, No. 10–1259, slip op. at 2.

beepers already in them, while in *Jones* the defendant already had possession and control of the car when the government installed its tracker.⁴⁵

The Court's reliance on common law trespass as the key to *Jones* seems all the more questionable in view of its earlier holding that police interference with a suspect's car in a public parking lot does not violate the Fourth Amendment. In *Cardwell v. Lewis*, the Court held that the government's warrantless collection of paint scrapings from a car's exterior—a situation that falls squarely within Scalia's new trespassory test⁴⁶—was “not the product of a ‘search’ that implicates traditional considerations of the owner's privacy interest.”⁴⁷ Citing the diminished expectation of privacy that attaches to automobiles,⁴⁸ Justice Blackmun wrote in *Cardwell* that “with the ‘search’ limited to . . . the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed.”⁴⁹ The same could be said of the “trespass” onto Jones's Jeep. Whatever the invasion of privacy that Jones suffered, it was due to the monitoring, not to the fact that someone had attached a device to the underbody of his car. But Scalia shrugged *Cardwell* off in a footnote, noting only that the Court hadn't been clear whether it upheld the police action because it wasn't a search or because it was reasonable.⁵⁰ This is a thin basis on which to distinguish the case—regardless of the ambiguity, the Court had found the police action in *Cardwell* not to violate the Fourth Amendment.

Finally, Justice Scalia was strangely silent on an aspect of technological innovation that he had previously intimated was important: the extent to which a particular technology is in “general public use.”⁵¹ In *Kyllo v. United States*, Scalia had specifically made the point that there was something distinctive, and more offensive to the Fourth Amendment, about technology that was James Bond-like in its exoticism as opposed to run-of-the-mill technology (such as binoculars) that was “in general public use.”⁵² In *Kyllo*, the police had, without a warrant, used an Agema Thermovision 210 thermal imager to detect heat emanations from Kyllo's house.⁵³ Justice Scalia wrote that the use of the sense-enhancing device was a search, “at least where (as here) the technology in question is not in general public use.”⁵⁴

Given the fact that anyone could have slapped a GPS on Jones's car with

45. *Id.* at 8–9.

46. More specifically, the *Cardwell* facts fall within Scalia's trespass-on-enumerated-effect-plus-information-gathering test.

47. *Cardwell v. Lewis*, 417 U.S. 583, 588–89 (1974).

48. *Id.* at 591.

49. *Id.*

50. *Jones*, No. 10–1259, slip op. at 10 n.7.

51. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

52. *Id.* at 33–34.

53. *See id.* at 29–30.

54. *Id.* at 34. The Court used the phrase “not in general public use” twice in its opinion. *See id.* at 40.

as little effort as it took the police, as thousands of people apparently already do,⁵⁵ one might have expected the Court to address this issue. But rather than answering the question left open in *Kyllo*, “whether ‘general public use’ does in fact render a device immune from Fourth Amendment regulation,”⁵⁶ the Court simply ignored it, leaving one to wonder whether the “general public use” caveat has been abandoned.

Based on existing case law, then, it seems that the Court should have come out differently in *Jones*. Since it did not, the Court might have acknowledged that there was a qualitative difference between following someone on a single trip or scraping paint off their car’s exterior and engaging in the kind of surveillance operation at issue here. Ultimately, this was a normative judgment that needed to be made openly, rather than *sub rosa*, on the purported basis that this would have violated people’s privacy in 1791.

B. The Elusive Goal of Objectivity

Justice Scalia’s refusal to engage seriously with contrary caselaw appears to be an effort to find a higher source of authority than the conflicting mass of precedent the Court has generated in the Fourth Amendment area. For over two decades, Justice Scalia’s approach to the Fourth Amendment has been guided by the idea that eighteenth-century common law should determine the scope of Fourth Amendment protection.⁵⁷ Scalia has been openly contemptuous of *Katz*’s reasonable expectation of privacy test for years,⁵⁸ and had stated his views again during oral argument in *Jones*.⁵⁹ His primary criticism of *Katz* is that its test is so malleable that “those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable,”’ bear an uncanny resemblance to those expectations of privacy that this Court considers

55. See Erik Eckholm, *Private Snoops Find GPS Trail Legal to Follow*, N.Y. TIMES (Jan. 28, 2012), available at <http://www.nytimes.com/2012/01/29/us/gps-devices-are-being-used-to-track-cars-and-errant-spouses.html>. Eckholm writes that for \$300, people can buy a GPS device, “attach it to a car without the driver’s knowledge and watch the vehicle’s travels—and stops—at home on [their] laptop.” *Id.* By his estimate, “[t]ens of thousands of Americans are already doing just that.” *Id.*

56. David A. Sklansky, *Back to the Future* *Kyllo*, *Katz*, and *Common Law*, 72 MISS. L.J. 143, 201 (2002) [hereinafter, Sklansky, *Back to the Future*].

57. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (holding that the Court’s first inquiry should be whether the government’s action was “regarded as an unlawful search or seizure under the common law when the Amendment was framed”); *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (the Fourth Amendment’s purpose was “to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted”); *California v. Acevedo*, 500 U.S. 565, 581, 583 (1991) (Scalia, J., concurring) (arguing that the way to fix the Court’s “anomalous” jurisprudence was “by returning to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded”).

58. See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (deriding the reasonable expectation of privacy test as “self-indulgent” and without any “plausible foundation in the text of the Fourth Amendment”).

59. Oral Argument, *supra* note 2, at 6.

reasonable.”⁶⁰

However, it is not clear that attempting to match the degree of “protection that the common law afforded”⁶¹ is any less subjective than the *Katz* test.⁶² Despite the tendency of lawyers and Supreme Court Justices “to speak knowingly of ‘the common law’ as though the phrase, standing alone, were utterly unambiguous,”⁶³ the common law was not a unified doctrine, but was instead highly indeterminate.⁶⁴ As one commentator summarized it, “whether a specific practice ‘was regarded as an unlawful search or seizure under the common law when the Fourth Amendment was framed’ frequently depends on where one looks—England or America, Massachusetts or Maryland—and on what materials one examines—cases, statutes, commentaries, or practice manuals.”⁶⁵ Therefore, the much-vaunted “certainty” that resorting to history gives us may be illusory. As Carol Steiker has observed, “[i]f colonial practices are the sole or primary guide to constitutional interpretation, our constitutional jurisprudence will only be as good as our history.”⁶⁶

So when Justice Scalia writes of preserving the “degree of protection that the common law afforded,” this begs the question: afforded to whom, exactly? Eighteenth-century search and seizure law was profoundly undemocratic and elitist.⁶⁷ As David Sklansky points out, the “‘degree of privacy’ [that] people enjoyed in the eighteenth century, even inside their own homes, depended strongly on who they were.”⁶⁸ The propertied men of the colonies were “secure” in their homes, persons, and possessions in a much different way than the poor,⁶⁹ who were subject to peremptory entry at any time.⁷⁰ This disparity

60. *Carter*, 525 U.S. at 97 (Scalia, J., concurring).

61. *Acevedo*, 500 U.S. at 583 (Scalia, J., concurring).

62. This argument has been made most persuasively by David Sklansky in his excellent article on what he calls “New Fourth Amendment Originalism.” See Sklansky, *Common Law*, *supra* note 34, at 1795.

63. *Id.*

64. William Cuddihy & B. Carmon Hardy, *A Man’s House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 375–400 (1980) (describing how search and seizure rules varied among the colonies and over time).

65. Sklansky, *Common Law*, *supra* note 34, at 1796.

66. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 827 n.40 (1994). Consequently, writes Professor Steiker, “the resort to history ultimately fails to create the neutral and authoritative source for constitutional decisionmaking sought by many ‘intentionalists’ or ‘originalists.’” *Id.*

67. See Cuddihy & Hardy, *supra* note 64, at 380 (“The freedom with which the government might penetrate a subject’s dwelling varied roughly in accord with his location on the social pyramid.”).

68. Sklansky, *Back to the Future*, *supra* note 56, at 185.

69. Professor Sklansky notes that in England, “peers and members of Parliament received special protections against search and seizure, while the homes of the poor were freely examined for vagrants, poached game, and morals violations.” *Id.*

70. See Sklansky, *Common Law*, *supra* note 34, at 1805. Sklansky notes that colonial statutes followed British practices, with the addition, in the south, of the slave patrol: “military squads that, operating largely at night, rounded up drifters and routinely invaded ‘Negro Houses’ and other dwellings that might harbor or provide arms to escaped slaves.” *Id.* at 1805–06.

in common law protection was even more stark if the poor were not white.⁷¹ If Scalia means to preserve the degree of protection afforded to the most privileged segment of society at the time of the Founding, he may well be choosing the most desirable interpretation, but it is clearly a normative choice and not one dictated by “neutral” historical investigation.⁷²

Worse, this resort to history also suffers from a lack of forthrightness. As David Strauss has observed, approaches that rely on the Framers’ intentions tend to elevate those intentions into such a position of priority that judges can pretend that their own views of morality or policy need not be consulted.⁷³ As a result, “[d]isputes that in fact concern matters of morality or policy masquerade as . . . historians’ disputes about what the Framers did.”⁷⁴ If the Court had instead employed the common law method of following and distinguishing precedent, it would have had to confront the question of how the Fourth Amendment limits government surveillance of people’s movements in their cars directly.⁷⁵

III.

THE *JONES* COURT’S MISSED OPPORTUNITY

Even if the degree of privacy people enjoyed “at common law” could be ascertained, Scalia’s approach enabled the Court to avoid making a reasoned normative pronouncement on the limits that the Fourth Amendment should place on electronic surveillance. Reliance on the common law definition of trespass makes little sense in the interconnected world we now live in. Justice Marshall once wrote that “[t]he common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable,”⁷⁶ but “[t]he significance accorded to such authority, however, must be kept in perspective.”⁷⁷ His call for caution is still well taken today:

The common-law rules governing searches and arrests evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper.⁷⁸

So analogizing a GPS device to an eighteenth-century constable, be he

71. *Id.*

72. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 743 (1999) (“[I]f common law is not embraced entirely, the choice of which pieces to embrace may come down to little more than personal preference.”).

73. See Strauss, *supra* note 5, at 928.

74. *Id.*

75. See *id.*

76. *Stegald v. United States*, 451 U.S. 204, 217 (1981).

77. *Id.* at 217 n.10.

78. *Id.*

ever so tiny, does not help us answer the overarching question that the *Jones* case presented: What are the practices that we, as a society, now regard as proper? While it is not unusual for the Justices to craft narrow opinions, the Court's refusal to engage with any of the thorny but nonetheless pressing issues raised by new technology—what if the government were simply to commandeer a vehicle's own GPS system or its On-Star service?—deliberately leaves the lower courts, law enforcement, and the public in the dark.

IV. THE CONCURRING OPINIONS

Justice Alito's concurring opinion offers little guidance on the issue. While the "dissent" portions of his concurrence are incisive,⁷⁹ the alternatives he presents are vague. He argues that the Court should apply *Katz*, instead of Scalia's trespassory test,⁸⁰ but then spends the bulk of his opinion criticizing Scalia's approach. When he finally gets around to discussing the reasonable expectation of privacy test (after acknowledging its difficulties, particularly in view of changing technologies that can diminish the public's privacy expectations),⁸¹ he concludes that installing a GPS and monitoring it for a short time is not a search, but that as time passes it becomes one. He relies on *Knotts* to determine that "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable."⁸²

In contrast, "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy" because people wouldn't expect to be monitored in this way for so long.⁸³ How long, exactly? Justice Alito doesn't say: "We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark."⁸⁴ You can almost feel Justice Scalia's delight as he pounces on the conclusory nature of this pronouncement, noting archly that "it remains unexplained why a 4-week investigation is 'surely' too long."⁸⁵

One would think that the duration of the monitoring would bear on whether a search was reasonable and not on whether it was a search *at all*. But neither the Court nor the concurring opinions made any effort to determine whether the search was "unreasonable" or whether a warrant was required. They were not procedurally obligated to do so because the government had

79. As Alito assesses Scalia's reasoning, "[i]t strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial." *United States v. Jones*, No. 10-1259, slip op. at 2 (U.S. Jan. 23, 2012) (Alito, J., concurring).

80. *Id.*

81. *Id.* at 12-13.

82. *Id.*

83. *Id.* at 13.

84. *Id.*

85. *Id.* at 12.

forfeited the argument when it failed to raise the issue of reasonableness in the District Court.⁸⁶ However, the analysis would have been substantially more complete if this issue had been discussed. As the Fourth Amendment does not prohibit all searches, just “unreasonable searches,”⁸⁷ it seems plausible that the Court found the police action unreasonable in the absence of a warrant,⁸⁸ but it never answered the question directly.

Only Justice Sotomayor addressed the fact that the sheer quantity of information the government was able to collect on Jones was what was troubling about the case. Sotomayor noted that “GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”⁸⁹ Faced with all the ways in which technology has eroded the private sphere, “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”⁹⁰

While not giving specifics, Sotomayor hinted at a more comprehensive theory of the values that the Fourth Amendment protects. She seemed to suggest that when the government records and aggregates a person’s movements “in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on,”⁹¹ it represents a state invasion of a person’s basic expectations of personal integrity and privacy that the Amendment says “shall not be violated.”⁹² But none of the other Justices joined her opinion.

CONCLUSION

Ultimately, what is so dissatisfying about the majority opinion in *Jones* is that, despite its doctrinal boldness, it is devoid of normative judgment. The police committed a trespass to get information; therefore the investigation was

86. *Id.*; United States v. Maynard, 615 F.3d 544, 567 (D.C. Cir. 2010), *aff’d sub nom.* United States v. Jones, No. 10–1259 (U.S. Jan. 23, 2012). Although the Court of Appeals had noted that it would have found the search unreasonable because it did not fall under the automobile exception, which allows warrantless searches of cars on probable cause, see *Maynard*, 615 F.3d at 567, the Supreme Court simply affirmed the Court of Appeals’s decision on the basis that the police conduct was a search. See *Jones*, No. 10–1259, slip op. at 3–4, 12.

87. The Fourth Amendment provides, in relevant part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV.

88. The FBI apparently read the opinion that way, assuming that its warrantless use of GPS devices was unlawful and turning them all off. See Julia Angwin, *FBI Turns Off Thousands of GPS Devices after Supreme Court Ruling*, WSJ BLOGS (Feb. 25, 2012), available at <http://blogs.wsj.com/digits/2012/02/25/fbi-turns-off-thousands-of-gps-devices-after-supreme-court-ruling/>. This then left the Bureau unable to locate many of the devices, causing it to petition courts for permission to turn the devices back on briefly just to find and retrieve them. See *id.*

89. *Jones*, No. 10–1259, slip op. at 3 (Sotomayor, J., concurring).

90. *Id.* at 5.

91. *Id.* at 4.

92. U.S. CONST. amend. IV.

a search. Had the police not committed the trespass (or what Justice Scalia calls “a *Katz* invasion of privacy”), it would not have been a search. Justice Scalia would doubtless say that his approach is superior in that it is “objective,” but it only seems arbitrary.

Whatever the shortcomings of *Katz*, the Court read the Fourth Amendment in light of “the vital role that the public telephone has come to play in private communication[s].”⁹³ The *Katz* Court went beyond the limits of common law trespass to engage with what now seems obvious—that there was some profound invasion by the government of *Katz*’s security in his conversations that offended the Fourth Amendment. Forty-five years later, we are at a similar moment of social and technological change. GPS technology has made concrete a previously unrecognized privacy interest in the sum total of a person’s movements—something that, like telephone conversations, used to be intangible. Twenty years ago, no one would have thought they had a right to “privacy” in their public travels from one place to another. Before satellites orbited the earth and enabled everything to be photographed and tracked, people enjoyed the comparative anonymity that came with practical obscurity; given the time and effort that needed to be expended following anyone, most people could be fairly sure, most of the time, that they weren’t being watched. But the GPS has made such surveillance nearly effortless, and in the process has given shape to an interest that no one had really considered before. Now that people’s movements have become susceptible of being recorded, aggregated, and stored, the interest in keeping the sum of these movements private needs to be addressed. But the Court did not say anything of substance. Instead, the Justices contented themselves with kicking the can down the road—satellite technology, tiny constable, and all.

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