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## KATZ V. UNITED STATES: BACK TO THE FUTURE?

Michael Vitiello \*

### INTRODUCTION

Fifty years ago, in *Katz v. United States*,<sup>1</sup> the United States Supreme Court developed a flexible approach to assessing when the police's use of modern technology became a search within the meaning of the Fourth Amendment. *Katz* abandoned the importance of trespass law and reframed the debate in terms of expectations of privacy.<sup>2</sup>

Decided towards the end of the Warren Court era,<sup>3</sup> *Katz*, like other progressive Warren Court decisions, has undergone a retrenchment over most of the past fifty years.<sup>4</sup> In a series of post-Warren Court cases, the Court routinely found that when a suspect exposed information to third parties, society did not recognize the suspect's expectation of privacy as reasonable.<sup>5</sup> Thus, when the police sought similar access, the police conduct did not amount to a search.<sup>6</sup> The post-Warren Court did not focus on how much privacy is essential to a free society. The post-Warren Court

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1. 389 U.S. 347 (1967).

2. *Id.* at 353; *id.* at 360–61 (Harlan, J., concurring).

3. The Warren Court criminal procedure revolution began with *Mapp v. Ohio*, holding that the exclusionary rule was applicable to the states as the remedy for a violation of the Fourth Amendment. 367 U.S. 643, 657 (1961). *Duncan v. Louisiana* was the last Warren Court decision, holding that specific provisions of the Bill of Rights applied to the states through the process of selective incorporation. 391 U.S. 145, 154, 156 (1968).

4. See MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 15* (2016); see generally *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983) [hereinafter *BURGER COURT*] (discussing the various consolidations and retrenchments of different Warren Court doctrines).

5. See *infra* Part II.

6. *Infra* Part II.

cases had the effect of allowing technological innovation to determine how much privacy the Fourth Amendment protects.<sup>7</sup> Framed differently, when companies developed technology that required us to expose information to third parties—for example, when we use cell phones or global monitoring technology—the act of sharing information with the technology company eroded Fourth Amendment protection.<sup>8</sup>

Members of the *Katz* majority almost certainly did not see the inquiry as a matter of what ordinary members of the public believe. Instead, the question of reasonable expectations should be a value judgment about the level of privacy that is necessary for a society to be free.<sup>9</sup> Thus, even if a form of technology is readily available to members of the public, members of the *Katz* majority seemed ready to ask whether, despite widespread availability of technology, its use by police nonetheless required compliance with the Fourth Amendment.<sup>10</sup> That approach would have provided more Fourth Amendment protection than Americans have received during the past fifty years of retrenchment.

The post-*Katz* retrenchment seemed nearly complete not all that long ago. At least until close to the end of his career, Justice Scalia seemed ready to assemble a majority of the Court to abandon *Katz*'s approach in favor of a return to property concepts, consistent with his jurisprudence following the original understanding of the Fourth Amendment.<sup>11</sup>

Not long before his death, Justice Scalia seemed to come to peace with *Katz*. Instead of arguing for its demise, Justice Scalia argued, rather unconvincingly, that *Katz* added to Fourth Amendment protection and did not supersede trespass analysis.<sup>12</sup> *United States v. Jones*<sup>13</sup> demonstrated the importance of Justice Scalia's return to trespass analysis. Had the defendant there been

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7. *Infra* Part III.

8. *Infra* Part IV.

9. *Infra* Part III.

10. See *Katz v. United States*, 389 U.S. 347, 353–54 (1967).

11. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001); Lawrence Rosenthal, *The Court After Scalia: Fourth Amendment Jurisprudence at a Crossroads*, SCOTUSBLOG (Sept. 9, 2016, 5:31 PM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-fourth-amendment-jurisprudence-at-a-crossroads/>.

12. *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (citing *Soldal v. Cook County*, 506 U.S. 56, 64 (1992); *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)); *United States v. Jones*, 565 U.S. 400, 406–07 (2012).

13. 565 U.S. 400 (2012).

able to rely only on *Katz* and the cases that narrowed *Katz*, he would have faced significant barriers in establishing that the police conduct amounted to a search.<sup>14</sup> Nevertheless, *Jones* demonstrates *Katz*'s importance. Indeed, some Justices, notably including Justice Sotomayor, have suggested that the Court may need to reexamine some of the cases that narrowed *Katz*.<sup>15</sup>

Faced with technology that has eroded privacy expectations, the Court may be ready to reexamine its post-*Katz* case law. Indeed, the Court may be ready to go back to what would appear to be the Court's original understanding of how *Katz* was supposed to work.<sup>16</sup> As suggested by the title, this article addresses the theme: how can the Warren Court's approach to the *Katz* analysis set limits on law enforcement when police agents use invasive technology? Cases are now working their way through the lower courts that will give the Supreme Court a chance to revisit that question.<sup>17</sup>

Part I reviews the evolution that led to *Katz*. Part II focuses on a number of post-*Katz* decisions that narrowed its potential scope. Notably, this article argues that the result of the post-Warren Court cases allows technology companies, not the Court, to define the scope of the Fourth Amendment. That seems flagrantly inappropriate. Part III discusses *Jones*, which demonstrates the problems resulting from the Court's cases narrowing *Katz*. Part IV deals with the emerging problems in cases like *Jones* and examines how the Court might respond to the risk created by pervasive technology that erodes Americans' right to privacy. Additionally, Part IV reviews some of the cases that emerged in lower courts that invite a reexamination of both *Katz* and some of the cases that narrowed *Katz*.

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14. That was so because, as the government argued, on each day that Jones drove his vehicle, he knowingly exposed his activity to members of the public. *Id.* at 406. In effect, although the monitoring took place over a four-week period, the Court in *United States v. Knotts* held that the use of a beeper to follow a suspect who drove on public highways was not a search. 460 U.S. at 285.

15. See, e.g., *Jones*, 565 U.S. at 413–17 (Sotomayor, J., concurring); *id.* at 418–19, 426–27 (Alito, J., concurring).

16. *Infra* Part III.

17. *Infra* Part IV.

## I. *KATZ v. UNITED STATES* AND THE MODERN ERA

Absent statutory protection, is wiretapping legal? The obvious constitutional protection, if it exists, would be within the Fourth Amendment. Reframed, is that activity a search within the meaning of the Fourth Amendment?<sup>18</sup> The Court addressed that issue in *Olmstead v. United States*.<sup>19</sup>

Specifically, the Fourth Amendment protects “persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>20</sup> When first confronted with the amendment’s applicability to wiretapping, the Court found that the Fourth Amendment was not a limitation on the government’s conduct.<sup>21</sup> It did so for two reasons. First, authorities placed the listening device on a phone line outside the defendant’s home.<sup>22</sup> Hence, the conduct at issue did not amount to a trespass, a minimum threshold for a search to occur. Second, in reliance on the text of the amendment, the Court found that words are not subject to seizure.<sup>23</sup>

One might question the latter point for at least two reasons. Notably, the Fourth Amendment protects people.<sup>24</sup> Seemingly, the amendment protects them when they speak. In addition, such a close parsing of the language of the Fourth Amendment was almost certainly inconsistent with the Framers’ view of how the amendment should be interpreted.<sup>25</sup>

Indeed, *Olmstead*’s second holding did not survive for long. By the early 1940s, members of the Court recognized that words are capable of being seized.<sup>26</sup> Despite that, the Court continued to re-

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18. If the conduct amounted to a search for evidence, seemingly, the police would need to demonstrate probable cause to search. A separate question would be whether police needed a search warrant. Given that *Jones* involved the search of a vehicle, it probably would come within the expanded vehicle exception to the warrant requirement.

19. 277 U.S. 438, 466 (1928).

20. U.S. CONST. amend. IV.

21. *Olmstead*, 277 U.S. at 466.

22. *Id.* at 456–57.

23. *Id.* at 464.

24. U.S. CONST. amend. IV.

25. See *Boyd v. United States*, 116 U.S. 616, 641 (1886) (Waite, C.J., concurring); *Entick v. Carrington*, 95 Eng. Rep. 807, 812; 2 Wils K.B. 275, 283 (1765); Orin Kerr, *How Should an Originalist Rule in the Fourth Amendment Cell-site Case?*, WASH. POST (June 13, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/03/how-should-an-originalist-rule-in-the-fourth-amendment-cell-site-case/?utm\\_term=.278f00486bfe](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/03/how-should-an-originalist-rule-in-the-fourth-amendment-cell-site-case/?utm_term=.278f00486bfe).

26. See, e.g., *Goldman v. United States*, 316 U.S. 129, 136–37 (1942) (Murphy, J., dissenting).

quire a technical trespass as controlling on whether police conduct amounted to a search.<sup>27</sup> Thus, comparing *Goldman v. United States*<sup>28</sup> and *Silverman v. United States*,<sup>29</sup> one sees a frail distinction. In *Silverman*, the police used a listening device that penetrated a wall, allowing the police to overhear conversations within Silverman's home.<sup>30</sup> Absent that technical trespass, the police were free to engage in such conduct, at least within the terms of the Fourth Amendment.<sup>31</sup>

Such a distinction might satisfy formalists. But the distinction suggests a technical nicety with disturbing implications. Listening devices that were in use during the 1940s and 1950s, when cases like *Goldman* and *Silverman* were working their way through the courts, were unsophisticated.<sup>32</sup> The Cold War, the Soviet Union's launch of Sputnik, and the increased attention to science in the United States helped accelerate technological change.<sup>33</sup> While still rudimentary by today's standards, technology was evolving by the 1960s.<sup>34</sup>

Looking backwards, one can understand why Federal Bureau of Investigation ("FBI") agents attached a listening device to a phone booth where they expected Charles Katz to transmit illegal gambling information.<sup>35</sup> The agents used a device that did not penetrate the phone booth.<sup>36</sup> *Goldman* and *Silverman* likely guided the agents' plan, believing that, absent penetration into a constitutionally protected area like a home, their conduct was not a Fourth Amendment search.<sup>37</sup> Looking forward, the Court rejected such a begrudging approach.

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27. *Id.* at 134.

28. 316 U.S. 129 (1942).

29. 365 U.S. 505 (1961).

30. *Id.* at 506–07.

31. *See id.* at 512.

32. *See, e.g.*, Brian Hochman, *Eavesdropping in the Age of The Eavesdroppers; or, The Bug in the Martini Olive*, POST45 (Feb. 3, 2016), <http://post45.research.yale.edu/2016/02/eavesdropping-in-the-age-of-the-eavesdroppers-or-the-bug-in-the-martini-olive/>.

33. *Id.*; *see* Paul Dickson, *Sputnik's Impact on America*, NOVA (Nov. 6, 2007), <http://www.pbs.org/wgbh/nova/space/sputnik-impact-on-america.html>.

34. *See* Hochman, *supra* note 32.

35. *See* *Katz v. United States*, 389 U.S. 347, 348 (1967).

36. *Id.* at 348–49.

37. *Id.* at 352; Oral Argument at 1:02, *Katz*, 389 U.S. 347 (No. 35), <https://www.oyez.org/cases/1967/35>.

Famously, Justice Stewart framed the debate, rejecting the government's argument that the phone booth was not a constitutionally protected area: "[T]he Fourth Amendment protects people, not places."<sup>38</sup> Justice Stewart's analysis focused on privacy expectations.<sup>39</sup> But subsequent courts, including the Supreme Court, reframed the test in reliance on Justice Harlan's concurring opinion.<sup>40</sup> In his concurring opinion, Justice Harlan identified two distinct questions: Does the defendant demonstrate a subjective expectation of privacy?<sup>41</sup> And if so, is that a reasonable expectation of privacy, recognized by society?<sup>42</sup>

Whatever other implications one might find in *Katz*, it proposed a new method of analysis for determining whether police conduct amounted to a search. Consistent with many courts and commentators post-*Katz*, the Court rejected the law of trespass as the relevant model for analysis.<sup>43</sup> As developed in Parts III and IV, taking *Katz's* approach seriously might have expanded the relevance of the Fourth Amendment in a number of meaningful ways. However, that was not to be.

## II. NARROWING *KATZ*

Scholars have noted the political storm that cases like *Miranda v. Arizona*<sup>44</sup> created.<sup>45</sup> In the 1968 presidential campaign, candidates Richard Nixon and George Wallace made law and order a major campaign issue.<sup>46</sup> As President, Nixon was able to carry through on his campaign promise. He appointed four Justices to the Court.<sup>47</sup> While Justice Harry Blackmun would moderate to the left over time,<sup>48</sup> those four Justices curtailed the Warren

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38. *Katz*, 389 U.S. at 351.

39. *See id.* at 351–52.

40. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

41. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

42. *Id.*

43. *Id.* at 353 (majority opinion) (“We conclude 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.”).

44. 384 U.S. 436 (1966).

45. JOSHUA DRESSLER & GEORGE C. THOMAS, III, *CRIMINAL PROCEDURE: INVESTIGATING CRIME* 590–92 (5th ed. 2013).

46. *Id.* at 591.

47. *Id.* at 592–93.

48. *See, e.g.*, Linda Greenhouse, *The Supreme Court: The Legacy; Justice Blackmun's Journey: From Moderate to a Liberal*, N.Y. TIMES (Apr. 7, 1994), <http://www.nytimes.com/>

Court's criminal procedure revolution. While legal scholars note the Burger Court did not engage in a counter-revolution, that Court cabined many Warren Court cases.<sup>49</sup> That was the case with *Katz*.<sup>50</sup> The Rehnquist Court continued that trend.<sup>51</sup>

Several cases demonstrate how the Court contained *Katz*. FBI agents overheard *Katz*'s conversation with someone else involved in illegal gambling.<sup>52</sup> But what if the government was working with the person who was on the other end of the line with *Katz*, and that person recorded the conversation with *Katz*? Would that have amounted to a search?

When first confronted with participant monitoring, a deeply divided Court found that the government conduct did not amount to a search.<sup>53</sup> In *On Lee v. United States*, one of *On Lee*'s friends entered *On Lee*'s laundromat and engaged him in a conversation that implicated *On Lee* in drug trafficking.<sup>54</sup> *Chin Poy*, *On Lee*'s friend, was armed with a radio transmitter, which allowed a federal agent to confirm the conversation.<sup>55</sup> In a 5-4 decision, the majority found that *Chin Poy*'s entry onto *On Lee*'s premises was not a trespass and, therefore, was not a search.<sup>56</sup>

Even as the Court eroded its reliance on trespass law, the Court continued to uphold cases involving participant monitoring. For example, in *Lopez v. United States* and *Hoffa v. United States*, the Court underscored that an offender cannot claim a Fourth Amendment violation when he has a misplaced belief that a person in whom he confides will not reveal those confidences.<sup>57</sup>

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1994/04/07/us/supreme-court-legacy-justice-blackmun-s-journey-moderate-liberal.htm?pagewanted=all.

49. BURGER COURT, *supra* note 4, at xii; *see, e.g.*, Peter Arenella, *Burger Court Took a Different Road: It Let Other Goals Supplant Fairness in Individual Rights Cases*, L.A. TIMES (June 27, 1986), [http://articles.latimes.com/1986-06-27/local/me-20680\\_1\\_burger-court](http://articles.latimes.com/1986-06-27/local/me-20680_1_burger-court).

50. *See supra* notes 3–4 and accompanying text.

51. *Infra* Part II.

52. *Katz v. United States*, 389 U.S. 347, 348 (1967).

53. *See On Lee v. United States*, 343 U.S. 747, 751–54 (1952); *see also id.* at 758, 760 (Frankfurter, J., dissenting); *id.* at 762, 765 (Douglas, J., dissenting); *id.* at 765 (Burton, J., dissenting).

54. *Id.* at 749–50 (majority opinion).

55. *Id.* at 749.

56. *Id.* at 751–52.

57. *See Hoffa v. United States*, 385 U.S. 293, 302–03 (1966); *Lopez v. United States*, 373 U.S. 427, 437–38 (1963).



Would that analysis change once *Katz* reformulated the analysis?<sup>58</sup> Almost certainly, but for the change in Court personnel, the answer would have been yes. *United States v. White* involved a case in which an undercover operative engaged White in various conversations that federal agents overheard.<sup>59</sup> The Seventh Circuit Court of Appeals read *Katz* as having overruled *On Lee*.<sup>60</sup>

In a plurality opinion, Justice White disagreed with the court of appeals.<sup>61</sup> Justice Black concurred in the result, relying on his dissent in *Katz*.<sup>62</sup> Justice Brennan concurred, but reiterated his disagreement with the majority in *Lopez*.<sup>63</sup> For him, the nature of the risk assumed by a defendant changed depending on the manner of recording.<sup>64</sup> Justices Douglas, Harlan, and Marshall each dissented.<sup>65</sup>

Most important was Justice Harlan's dissent.<sup>66</sup> He urged that electronic monitoring without constraint has no place in a free society.<sup>67</sup> Indeed, his dissenting opinion suggested a weakness in his earlier formulation of the two-pronged *Katz* test: unregulated police conduct may erode individuals' subjective sense of privacy.<sup>68</sup> Further, Justice Harlan suggested that an assessment of reasonable expectations of privacy is ambiguous.<sup>69</sup> Does it mean what members of society generally come to expect, or is it a normative judgment for the Court to say what is essential to a free society?<sup>70</sup>

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58. See *United States v. White*, 405 F.2d 838, 843 (7th Cir. 1969), *rev'd*, 401 U.S. 745 (1971) ("The trespass doctrine . . . which provided the basis for prior Supreme Court decisions in this area, such as *On Lee v. United States*, 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1270 (1952), was squarely discarded by the Court in *Katz* . . .").

59. *Id.* at 840–41.

60. *Id.* at 843.

61. *United States v. White*, 401 U.S. 745, 749 (1971).

62. *Id.* at 754 (Black, J., concurring).

63. *Id.* at 755–56 (Brennan, J., concurring).

64. *Id.* at 755.

65. *Id.* at 756–68 (Douglas, J., dissenting); *id.* at 768–95 (Harlan, J., dissenting); *id.* at 795–96 (Marshall, J., dissenting).

66. See, e.g., Catherine Hancock, *Warrants for Wearing a Wire: Fourth Amendment Privacy and Justice Harlan's Dissent in United States v. White*, 79 MISS. L.J. 35, 37 (2009).

67. *White*, 401 U.S. at 786 (Harlan, J., dissenting).

68. See *id.* at 786–87.

69. See *id.* at 786.

70. See *id.*

Professor Anthony Amsterdam captured the point in an important article published in 1974.<sup>71</sup> There, he offered a hypothetical, later summarized in a footnote in *Smith v. Maryland*: “[What] if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry[?]”<sup>72</sup> The hypothetical highlights two possible problems with Harlan’s *Katz* formulation. The first is that, as a matter of fact, individuals may not have a subjective expectation of privacy because the government or other actors routinely intrude into citizens’ privacy.<sup>73</sup> The second poses a question about the meaning of “reasonable.” Does reasonable mean merely what ordinary individuals believe?<sup>74</sup> Or is “reasonable” a normative judgment, a judicial determination about what expectations of privacy are essential to a free society?<sup>75</sup> Many commentators have been troubled by the post-*Katz* case law with regards to both questions, although the second question has surfaced more frequently.<sup>76</sup>

*Smith*’s discussion of the offender’s subjective expectation of privacy is particularly illuminating. There, at the request of the police, the phone company provided the police with numbers that Smith dialed from his home.<sup>77</sup> The phone company used a pen register to collect that data.<sup>78</sup> Smith argued that the police conduct amounted to a search within the meaning of the Fourth Amendment.<sup>79</sup> In addition to a discussion of whether a person who believed that numbers dialed would not be shared with the government, the Court addressed whether Smith had a subjective expectation of privacy: “Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.”<sup>80</sup> In con-

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71. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

72. *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979); Amsterdam, *supra* note 71, at 384.

73. Amsterdam, *supra* note 71, at 384.

74. See, e.g., Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U.L. REV. 19, 46 (1997).

75. See *id.* at 26, 51.

76. See *id.* at 19, 21.

77. *Smith*, 442 U.S. at 737.

78. *Id.*

79. *Id.* at 742.

80. *Id.* at 743.

text, the Court seemed to infer a lack of a subjective expectation of privacy based largely on what reasonable people might know, largely conflating the two prongs of the test.<sup>81</sup>

The Court's assessment of what expectations of privacy are reasonable demonstrates how the post-Warren Court eroded *Katz's* protection. The Court has not assessed what protections are consonant with a free society. Instead, the Court has almost always looked at what a reasonable person might actually believe.<sup>82</sup> That analysis has led to far less privacy than one might expect and certainly less than would result if the Court focused on the normative inquiry concerning the needs of a free society.

In case after case where the Court resolved whether police conduct was a search (i.e., did the defendant have a reasonable expectation of privacy violated by the police conduct?), the Court found that expectation was lacking.<sup>83</sup> Its reasoning followed a pattern seen in cases like *Smith* and other cases described below.<sup>84</sup>

Apart from whether *Smith* had a subjective expectation of privacy, his expectation of privacy in his phone records was unreasonable.<sup>85</sup> That was so, in part, because he was aware that the phone company had access to that information.<sup>86</sup> Thus, if members of the public have access to information, police conduct in securing that information does not violate reasonable expectations of privacy.

Similarly, in *United States v. Knotts*, the police attached a beeper to a drum of chloroform, used in the manufacture of methamphetamines, prior to *Knotts's* purchase of the drum.<sup>87</sup> The beeper allowed drug enforcement agents to follow *Knotts*.<sup>88</sup> In part, the Court rejected *Knotts's* claim that the police conduct

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81. *See id.*

82. *See, e.g.,* Patrick T. Costello, *California v. Hodari D.: The Demise of the Reasonable Person Test in Fourth Amendment Analysis*, 12 N. ILL. U.L. REV. 463, 471 (1992); Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment From the Supreme Court*, 59 CASE W. RES. L. REV. 1, 19 (2008).

83. *See, e.g.,* *United States v. Knotts*, 460 U.S. 276, 285 (1983); *Smith*, 442 U.S. at 745-46.

84. *See, e.g., Smith*, 442 U.S. 735.

85. *Id.* at 743.

86. *Id.* at 744.

87. *See Knotts*, 460 U.S. at 278.

88. *Id.*

was a search because *Knotts* knowingly exposed his movement to members of the public.<sup>89</sup>

In *Oliver v. United States*, the Court extended that argument to a situation where private individuals who might gain access to an area were violating the law.<sup>90</sup> That case involved a marijuana growing operation on Oliver's property.<sup>91</sup> Oliver fenced his isolated property with "No Trespassing" signs.<sup>92</sup> Some similar cases involved even more elaborate efforts to limit public access to the offenders' marijuana crops.<sup>93</sup>

Pre-*Katz*, the Court found that areas not within the curtilage of the home did not receive constitutional protection. For example, in *Hester v. United States*, the Court found that the Fourth Amendment did not extend to an open field.<sup>94</sup> Post-*Katz*, some courts focused on the facts of individual cases: depending on the "open" field's location and efforts taken to exclude the public, seemingly one might have an expectation of privacy worthy of protection.<sup>95</sup> *Oliver* rejected such a case-by-case analysis.<sup>96</sup> Among other arguments that the Court relied on, it found that "as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be."<sup>97</sup> As in *Smith* and *Knotts*, public access gives equal access to the police, without more.

The Court has reached that conclusion even in situations in which members of the public may have little interest in a defendant's conduct but the police would. Thus, in *California v. Ciraolo*, officers sought to corroborate a tip that Ciraolo was growing marijuana in his fenced backyard.<sup>98</sup> The officers did so by flying over

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89. *Id.* at 282.

90. 466 U.S. 170, 182–83 (1984).

91. *Id.* at 173.

92. *Id.*

93. *See, e.g.*, *Pennsylvania v. Hunt*, 389 A.2d 640, 645–46 (Pa. Super. Ct. 1978) (Hoffman, J., dissenting) (noting that the officers found marijuana in an enclosed porch and inside a closet within the house).

94. *Hester v. United States*, 265 U.S. 57, 59 (1924).

95. *See, e.g.*, *United States v. Reilly*, 76 F.3d 1271, 1273–75, 1283 (2d Cir. 1996) (ruling that the curtilage of Defendant's home included the cottage located approximately 375 feet from the main residence because that area was used for private activities, making it apparent to observers that the area was private).

96. *Oliver*, 466 U.S. at 179.

97. *Id.*

98. 476 U.S. 207, 209 (1986).

Ciraolo's property.<sup>99</sup> The majority found that the police conduct was not a search, in part, in reliance on the fact that members of the public flew over the property and could observe activities taking place in the backyard.<sup>100</sup> The Court rejected the relevance of the qualitative difference between police overflight and that of the general public.<sup>101</sup> Members of the public are not in commercial airspace in order to observe activity on the ground, but that did not matter to the majority.<sup>102</sup>

One final example demonstrates the erosion of privacy that flows from the Court's post-*Katz* case law. *Kyllo v. United States* seemed to be a victory for Fourth Amendment liberals.<sup>103</sup> There, police corroborated a tip that Kyllo was growing marijuana in his home.<sup>104</sup> Using a thermal imager, agents learned that certain rooms were much hotter than other parts of the house.<sup>105</sup> That led to the inference that Kyllo was using high intensity lamps to grow marijuana.<sup>106</sup> Writing for a five-Justice majority, Justice Scalia distinguished cases like *Knotts* from *Kyllo*; *Knotts* involved only information about activity in public.<sup>107</sup> In *Kyllo*, police learned about activity within the home.<sup>108</sup> As a result, the use of technology to discover any (not simply intimate) activity in the home is a search, triggering Fourth Amendment protections.<sup>109</sup>

Despite *Kyllo*'s victory, Justice Scalia's opinion raised concerns among Fourth Amendment proponents. Taken out of context, some of Justice Scalia's statements seemed to endorse a robust limitation on technology that might erode privacy.<sup>110</sup> Thus, he expressed concern that the Court not allow "police technology to erode the privacy guaranteed by the Fourth Amendment."<sup>111</sup> However, almost in the same breath, he stated that the use of sense-enhancing technology amounts to a search if it reveals in-

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99. *Id.*

100. *Id.* at 213-14.

101. *Id.*

102. *Id.*

103. See 533 U.S. 27, 40 (2001); see also Jeffrey Rosen, *A Victory for Privacy*, WALL ST. J., June 18, 2001, at A18.

104. *Kyllo*, 533 U.S. at 30.

105. *Id.* at 29-30.

106. *Id.* at 30.

107. See *id.* at 40; see also *United States v. Knotts*, 460 U.S. 276, 281 (1983).

108. *Kyllo*, 533 U.S. at 40.

109. *Id.*

110. See *id.* at 34-35.

111. *Id.* at 34.

formation about activity in a constitutionally protected area, “at least where (as here) the technology in question is not in general public use.”<sup>112</sup>

Justice Stevens’s dissent raised concern about that language as technology, such as that involved in the case, was becoming readily available to members of the general public.<sup>113</sup> Indeed, in 2001, a thermal imager was “just an 800-number away.”<sup>114</sup>

Justice Scalia’s discussion underscores the difference between the two approaches to the meaning of reasonable expectation of privacy. Seemingly, under Justice Scalia’s analysis, reasonableness equates with what is ordinary.<sup>115</sup> If members of the public are using such devices, one is unreasonable to expect Fourth Amendment protection. The alternative approach would be to ask whether a particular intrusion is consistent with a free society. The latter question might require Justices to engage in value judgments, which are hardly unique in American constitutional history. For example, prior to the Warren Court’s reliance on selective incorporation, the Supreme Court routinely asked whether a particular protection was basic to the concept of “ordered liberty.”<sup>116</sup> Under such an approach, whether police conduct amounted to a search would not involve “bean-counting” to determine what has become sufficiently ordinary. The Court would assess what a free society requires and might hold that, despite widespread access to technology, a free society could not tolerate technological surveillance.

Almost certainly, the Warren Court envisioned a more robust protection under *Katz* than was developed by the Burger and Rehnquist Courts. Justice Harlan indicated his displeasure with the formulation of the test in his dissent in *White*, where he signaled the need for Justices to identify basic norms for a free society.<sup>117</sup> He warned against police practices akin to “Big Brother.”<sup>118</sup>

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112. *Id.* (emphasis added).

113. *Id.* at 47 (Stevens, J., dissenting).

114. *Id.* at 47 n.5.

115. *See id.* at 40 (majority opinion).

116. *See, e.g.,* *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) (“[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.”).

117. *See United States v. White*, 401 U.S. 745, 772, 789, 793 (1971) (Harlan, J., dissenting).

118. *Id.* at 770.

Further, he criticized the *Katz* formulation explicitly: "The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. 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."<sup>119</sup> Instead of focusing on societal expectations, he made clear that the job of defining Fourth Amendment protections belonged to the courts:

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. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.<sup>120</sup>

He was willing to decide the level of security needed in a free society, as reflected in the Fourth Amendment.

While Justice Stewart, the author of the lead opinion in *Katz*, joined in some of the opinions that narrowed its holding, other members of the original *Katz* majority dissented when President Nixon's appointees began to narrow *Katz*. And Nixon's appointees did indeed generally vote to narrow *Katz*. For example, Chief Justice Burger and Justice Blackmun joined Justice White's plurality opinion in *White*.<sup>121</sup> Justice Rehnquist joined those Justices in helping to build the majority in *Smith v. Maryland*.<sup>122</sup> Justice Powell wrote the *Oliver* majority opinion.<sup>123</sup> Almost certainly, however, Justices who joined the *Katz* majority would have joined Justice Harlan in deciding the needs of a free society.

### III. SETTING THE STAGE TO REIMAGINE *KATZ*

The Fourth Amendment technology cases decided between 1967 and the early part of the twenty-first century involved increasingly sophisticated technology. At least initially, the technology was relatively unsophisticated. Accordingly, cases like *Knotts* and *United States v. Karo* involved a beeper that allowed

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119. *Id.* at 786.

120. *Id.*

121. *Id.* at 745, 746 (majority opinion).

122. 442 U.S. 735, 736 (1979).

123. *Oliver v. United States*, 466 U.S. 170, 173 (1984).

police to track a car or an object.<sup>124</sup> The technology used by officers in *Kyllo* allowed them to determine the rough temperature of the interior of a building.<sup>125</sup> Obviously, more recent technological innovation has revolutionized data collection. This change in technology is forcing some members of the Court to rethink the Court's post-*Katz* case law. This part reviews some of those changes.

In *Jones*, the FBI and members of the District of Columbia Metropolitan police force suspected Antoine Jones of trafficking narcotics.<sup>126</sup> The police engaged in several investigatory techniques, including getting a warrant allowing the police to attach a tracking device to one of Jones's cars.<sup>127</sup> The warrant lapsed after ten days.<sup>128</sup> On the eleventh day, police placed a GPS tracking device on Jones's car.<sup>129</sup> Police monitored the vehicle over the next twenty-eight days, during which time police were aware of the location of the vehicle within 50 to 100 feet.<sup>130</sup> The device relayed over 2000 pages of data to a police computer during the four-week period.<sup>131</sup>

The United States used the GPS data in its case against Jones.<sup>132</sup> Convicted of drug-related offenses and sentenced to life in prison, Jones appealed to the United States Court of Appeals for the District of Columbia.<sup>133</sup> That court reversed Jones's conviction because it found that the use of the GPS device was a violation of the Fourth Amendment.<sup>134</sup>

Before the Supreme Court, the government argued that cases like *Knotts* controlled.<sup>135</sup> That is, the defendant, like the offender in *Knotts*, had no reasonable expectation of privacy. He, like

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124. *United States v. Karo*, 468 U.S. 705, 707–08 (1984); *United States v. Knotts*, 460 U.S. 276, 277 (1983).

125. *Kyllo v. United States*, 533 U.S. 27, 29–30 (2001).

126. *United States v. Jones*, 565 U.S. 400, 402 (2012).

127. *Id.* at 402–03.

128. *Id.*

129. *Id.* at 403.

130. *Id.*

131. *Id.*

132. *Id.* at 403–04.

133. *Id.*

134. *Id.* at 404.

135. See, e.g., Oral Argument at 0:40, *Jones*, 565 U.S. 400 (No. 10-1259), <http://www.oyez.org/cases/2011/10-1259> (arguing visual and beeper surveillance of a vehicle traveling on public roadways does not infringe on Fourth Amendment expectations of privacy).



Knotts, drove on the public highways.<sup>136</sup> Thus, all that the police collected was information that they could have collected by observing Jones as he traveled in public.<sup>137</sup> One obvious difference between Knotts's and Jones's cases was that the beeper in *Knotts* was installed before Knotts's co-defendant took possession of the drum in which the beeper was installed.<sup>138</sup>

The Court unanimously affirmed the judgment of the court of appeals.<sup>139</sup> However, Justice Scalia secured a narrow majority for his position.<sup>140</sup> Justice Sotomayor joined his opinion to give him a 5-4 majority, but she wrote separately to highlight some of the important issues that the Court has yet to face.<sup>141</sup>

To get at some of the difficult problems posed by *Jones*, consider how it differs from *Knotts*. In *Knotts*, police used the beeper to tail the defendant.<sup>142</sup> Officers lost sight of the defendant and were able to continue monitoring his movements because of the beeper.<sup>143</sup> However, the length of the surveillance was over a short period of time.<sup>144</sup> Although the Justices who concurred in the judgment argued that police were able to do far more than merely enhance their senses, the majority treated the case as one in which police were doing just that.<sup>145</sup>

*Jones* presented a more complex set of facts. As suggested by Justice Alito's concurring opinion, the twenty-eight-day surveillance was not merely an enhancement of the officers' senses.<sup>146</sup> For him, it amounted to a search because the prolonged period involved a degree of intrusion that a reasonable person would not anticipate.<sup>147</sup> At the same time, Justice Alito recognized difficulties with that conclusion.<sup>148</sup> Short-term monitoring, consistent with *Knotts*, would not be a search.<sup>149</sup> As was clear during oral

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136. *Jones*, 565 U.S. at 403; *United States v. Knotts*, 460 U.S. 276, 281 (1983).

137. *See Jones*, 565 U.S. at 403.

138. *Knotts*, 460 U.S. at 278.

139. *Jones*, 565 U.S. at 402, 413.

140. *Id.* at 402, 413, 418.

141. *Id.* at 413–18 (Sotomayor, J., concurring).

142. *Knotts*, 460 U.S. at 278.

143. *Id.* at 278.

144. *Id.* at 278–79.

145. *Id.* at 282; *id.* at 288 (Stevens, J., concurring).

146. *Jones*, 565 U.S. at 425 (Alito, J., concurring).

147. *Id.* at 430.

148. *Id.*

149. *Id.*

argument, such a position invites arbitrary line-drawing.<sup>150</sup> If, as in *Knotts*, brief monitoring through electronic surveillance is not a search, at what point does that conduct trigger the Fourth Amendment? Justice Scalia summarized the problem at one point during oral argument when he stated, “[I]f there is no invasion of privacy for one day, there is no invasion of privacy for 100 days.”<sup>151</sup> Suggesting that Congress might be the better body to define the limits of such surveillance, Justice Alito nonetheless agreed with the lower court that police conduct did amount to a search.<sup>152</sup> He did not attempt to draw the line as to when short-term surveillance becomes long-term surveillance.<sup>153</sup>

Despite his view that monitoring did not amount to a search, Justice Scalia found that a search occurred when the police attached the GPS tracking device on Jones’s vehicle.<sup>154</sup> For him, that was an intrusion into a constitutionally protected area.<sup>155</sup> He took his language from pre-*Katz* case law, seemingly rejecting *Katz* in favor of the concept of expectations of privacy.<sup>156</sup> Justice Scalia explained—contrary to what most commentators believed—that *Katz* did not replace traditional trespass law.<sup>157</sup> Instead, it supplemented traditional law.<sup>158</sup> So holding, the Court evaded the hard questions about line-drawing.

Justice Alito highlighted a problem with Justice Scalia’s resolution of the case. He posed an example, basically involving the same facts as in *Jones*, but where the police made no physical intrusion.<sup>159</sup> What result, asked Justice Alito, if the police monitored Jones by use of a GPS tracking device installed on the car originally?<sup>160</sup>

Evident from the beginning of oral argument, the Justices were now concerned about modern technology. That was clear from

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150. See *id.*; see also Oral Argument at 42:40, *Jones*, 565 U.S. 400 (No. 10-1259), <https://www.oyez.org/cases/2011/10-1259>.

151. Oral Argument at 42:40, *Jones*, 565 U.S. 400 (No. 10-1259), <https://www.oyez.org/cases/2011/10-1259>.

152. *Jones*, 565 U.S. at 429–30 (Alito, J., concurring).

153. *Id.* at 430–31.

154. *Id.* at 404–05, 410 (majority opinion).

155. *Id.* at 410.

156. *Id.* at 404–05, 411.

157. *Id.* at 406–08.

158. *Id.*

159. See *id.* at 425 (Alito, J., concurring).

160. See *id.*

Chief Justice Roberts's question at the outset of the Deputy Solicitor General's oral argument. The Deputy argued that *Knotts* controlled.<sup>161</sup> The Chief Justice stated,

*Knotts*, though, seems to me much more like traditional surveillance. You're following the car and the beeper just helps you follow it . . . from a slightly greater distance. That was thirty years ago. The technology is very different and you get a lot more information from the GPS surveillance than you do from following a beeper.<sup>162</sup>

Other Justices shared the Chief Justice's concerns. As developed in the next part, Justice Sotomayor joined Justice Scalia's opinion, giving him a majority.<sup>163</sup> Importantly, that opinion established that *Katz* added Fourth Amendment protection and did not supersede trespass analysis.<sup>164</sup> However, she also raised important questions about modern technology.<sup>165</sup> She, like Justice Alito, was concerned about police monitoring that can take place without a technical trespass.<sup>166</sup> Her opinion did not answer those questions, but set the stage for a thoughtful inquiry into a new method of analysis in cases involving technology.<sup>167</sup>

#### IV. BACK TO THE FUTURE?

The *Jones* Court's concern about technology and the Fourth Amendment seems genuine. Not only was the result in *Jones* unanimous, but two years later, the Court was again unanimous in the judgment of *Riley v. California*.<sup>168</sup> There, the Court narrowed the search-incident-to-lawful-arrest doctrine as it applied to smart phones.<sup>169</sup> The common thread was the way in which technology threatens privacy expectations.<sup>170</sup> Those cases suggest the Court's willingness to rethink its Fourth Amendment case law. Justice Sotomayor's concurring opinion in *Jones* is a good

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161. Oral Argument at 0:41, *Jones*, 565 U.S. 400 (No. 10-1259), <https://www.oyez.org/cases/2011/10-1259>.

162. Oral Argument at 0:56, *Jones*, 565 U.S. 400 (No. 10-1259), <https://www.oyez.org/cases/2011/10-1259>.

163. *Jones*, 565 U.S. at 409 (majority opinion).

164. *Id.* at 413–14 (Sotomayor, J., concurring).

165. *Id.* at 415–16.

166. *Id.* at 414–15.

167. *See id.* at 413–18.

168. 573 U.S. \_\_, \_\_, 134 S. Ct. 2473, 2479 (2014); *Jones*, 565 U.S. at 402, 413.

169. *See Riley*, 573 U.S. at \_\_, 134 S. Ct. at 2493–94.

170. *See id.* at \_\_, 134 S. Ct. at 2484–85.

starting point for a discussion of some of the difficult questions that courts must face.<sup>171</sup> That requires revisiting *Katz*.

As in *Katz*, at least five Justices in *Jones* recognized the limitations of an interpretation of the Fourth Amendment narrowly focused on traditional common trespass concepts.<sup>172</sup> As the Justices in *Jones* recognized, the government no longer needs to rely on devices attached to vehicles to monitor drivers' movements.<sup>173</sup> That kind of monitoring is available with GPS equipment installed in cars and GPS-enabled smart phones.<sup>174</sup> But determining the point at which police monitoring becomes a search is by no means self-evident.

Justice Scalia's majority avoided the hard questions because it could rely on the trespass.<sup>175</sup> Justice Alito and the Justices joining his concurring opinion raised the line-drawing problem discussed above, but, given the four-week period of surveillance, they were able to accept the lower court's finding that a search occurred.<sup>176</sup> Justice Sotomayor summarized her agreement with Justice Alito as follows: "As Justice Alito incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations."<sup>177</sup> But only Justice Sotomayor addressed problems arising in non-trespass cases when police engaged only in short-term surveillance.<sup>178</sup> She left the answers to those questions unresolved, but hinted at some solutions.

As discussed previously, the post-*Katz* case law almost certainly narrowed *Katz* inconsistently with the views of most of the Justices in the *Katz* majority.<sup>179</sup> Those cases did so in a number of

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171. See *Jones*, 565 U.S. at 413–18 (Sotomayor, J., concurring).

172. See *id.* at 413, 418–19 (Sotomayor, J., concurring); *id.* at 418–19 (Alito, J., concurring); *Katz v. United States*, 389 U.S. 347, 353 (1967) ("[T]he reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."). In *Jones*, this view was shared by Justice Sotomayor in her concurrence, as well as by Justice Alito in his concurrence, which was joined by Justices Ginsburg, Breyer, and Kagan. See *Jones*, 565 U.S. at 413, 418–19 (Sotomayor, J., concurring); *id.* at 418–19 (Alito, J., concurring).

173. *Jones*, 565 U.S. at 428 (Alito, J., concurring).

174. *Id.*

175. See *id.* at 411–12 (majority opinion).

176. *Id.* at 430–31 (Alito, J., concurring).

177. *Id.* at 415 (Sotomayor, J., concurring).

178. See *id.* at 415–16.

179. *Supra* Part II.

ways. Notably, they did so by relying on the argument that, when members of the public have access to information revealed by the defendant, society does not recognize expectations of privacy as reasonable.<sup>180</sup> That includes cases where members of the public may not have the same interest in the defendant's activities as do the police.<sup>181</sup> In addition, when one is in public and the police monitor an individual's activities, the Court has characterized the police's use of technology as mere sense-enhancement.<sup>182</sup>

The government relied on those principles in arguing before the Court in *Jones*.<sup>183</sup> Jones drove in public, thereby knowingly exposing his activity to the public.<sup>184</sup> Each observation by the police amounted to sense-enhancement akin to the police activity in *Knotts*.<sup>185</sup> The Deputy Solicitor General could argue with a straight face that the Court had yet to focus on the different level of intrusion of newer technologies, as long as the police did not use technology to determine in-home activity.<sup>186</sup>

Justice Sotomayor raised doubts about all of the premises. The first question that she raised was whether short-term monitoring today is the same as it was in cases like *Knotts*.<sup>187</sup> A beeper allowed police to follow a suspect like *Knotts* but not much more than that.<sup>188</sup> By comparison, GPS monitoring allows the government to store information learned during its monitoring for years; it can then mine that data well into the future.<sup>189</sup> In addition, the monitoring is inexpensive, thereby expanding the amount of information stored for future use.<sup>190</sup> That kind of information is subject to abuse and erosive to associational and expressional freedom.<sup>191</sup>

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180. *Jones*, 565 U.S. at 411–12 (majority opinion).

181. *See id.*

182. *See United States v. Knotts*, 460 U.S. 276, 282 (1983).

183. *See* Oral Argument at 0:19, *Jones*, 565 U.S. 400 (No. 10-1259), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2011/10-1259.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-1259.pdf).

184. *Jones*, 565 U.S. at 403.

185. *See Knotts*, 460 U.S. at 282.

186. Oral Argument at 9:26, *Jones*, 565 U.S. 400 (No. 10-1259), <http://www.oyez.org/cases/2011/10-1259>.

187. *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring).

188. *Knotts*, 460 U.S. at 282.

189. *Jones*, 565 U.S. at 415–16 (Sotomayor, J., concurring).

190. *Id.*

191. *Id.*

In her words, Justice Sotomayor raised a more fundamental concern as well. That concern strikes at the core of the post-*Katz* case law. The Court repeatedly found that an individual lost privacy protection if she voluntarily disclosed information to third parties.<sup>192</sup> The argument may have been weak at its inception, but “is ill suited to the digital age.”<sup>193</sup> One cannot function in the digital age without revealing information.<sup>194</sup>

Although not framed expressly in these terms, Justice Sotomayor suggested that the assessment of whether an expectation of privacy is reasonable is a normative judgment for the Court. Thus, she stated, “I do not regard as dispositive the fact that the government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques.”<sup>195</sup> In the same paragraph, she repeatedly stated “I would take,” “I would ask,” “I would also consider.”<sup>196</sup> Her focus is on her evaluation, not the expectations measured by what ordinary individuals may expect.

What would that legal regime look like? Predicting results in individual cases is difficult. What is clear is that in cases like *Oliver* or *Ciraolo*, inquiry would go beyond whether members of the public have access to the land in *Oliver* or the view into the backyard in *Ciraolo*. In GPS monitoring, police might have to use more conventional investigatory techniques to develop probable cause before using GPS data.<sup>197</sup>

One might object that the standard is subjective, open to the whims of the Court. Indeed, Justices in *Jones* seemed to invite congressional action to set the standards.<sup>198</sup> Hoping for congressional action in these toxic times seems vain. With regard to subjectivity, eliminating reliance on judges’ value judgments is unlikely, especially in interpretation of an amendment framed in terms of reasonableness. Further, I would urge that relying on Justices’ assessment of the needs of a free society is a better alternative than allowing the development of technology to erode privacy in this country.

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192. *Id.* at 417 (citing *Smith v. Maryland*, 442 U.S. 735, 742 (1979); *United States v. Miller*, 425 U.S. 435, 443 (1976)).

193. *Id.*

194. *See id.*

195. *Id.* at 416.

196. *Id.*

197. *See id.* at 403–04 (majority opinion).

198. *See id.* at 429–30 (Alito, J., concurring).

Let me underscore the previous point: under the post-*Katz* case law, that is exactly what happens today. Private enterprises develop new technologies that become widely available. Gaining access to the technology requires individuals to expose information to the public, leading to erosion of their privacy expectations.<sup>199</sup> Here is an example that I use in my Criminal Procedure class. When I teach *Katz*, I bring an inexpensive listening device that I purchased online for under \$50 (had I spent a few hundred dollars, I could have purchased much more sophisticated devices). In *Katz*, the FBI used a listening device on a telephone booth to collect evidence that *Katz* was gambling in violation of federal law.<sup>200</sup> At the time, technology allowing members of the public to eavesdrop was not readily available.<sup>201</sup> Today, as my demonstration makes clear, that kind of technology is readily available.<sup>202</sup> If the Court relied on the ready availability of technology as the measure of Fourth Amendment protection, one might argue that *Katz* should come out differently.<sup>203</sup> That underscores this point: *Katz* left the assessment of worthy privacy expectations to the Court, not to private individuals.<sup>204</sup>

Not surprisingly, cases are working their way through the lower courts that will test whether the Court is ready to revisit its post-*Katz* analysis and reinvigorate *Katz*. In *Jones*, the concurring Justices identified a not-so-hypothetical case: What if the police used a built-in GPS device to track *Jones*?<sup>205</sup> In such a case, Justice Scalia's trespass analysis would provide no help to the defendant.

A number of cases have involved a similar fact pattern. Instead of relying on GPS data, law enforcement agents have obtained

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199. See *supra* Part III.

200. *Katz v. United States*, 389 U.S. 347, 348 (1967).

201. See *id.* at 366; see generally Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J., 1303, 1306 (2002) (discussing the technological advances that have occurred since *Katz* was decided in 1967).

202. See, e.g., *Spy Listening Devices*, WALMART.COM, <https://www.walmart.com/c/kp/spy-listening-devices> (last visited Nov. 15, 2017).

203. Cf. *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001).

204. See *Katz*, 389 U.S. at 357 (discussing the courts' role in assessing what searches are unreasonable under the Fourth Amendment).

205. *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

phone company records known as “cell site location information” (“CSLI”).<sup>206</sup> As described by the Third Circuit,

CSLI is generated every time a cell phone user sends or receives a call or text message; when the call or message is routed through the nearest cell tower, the user’s service provider generates and retains a record identifying the particular tower through which the communication was routed. In more densely populated areas, cell towers are able to triangulate an individual’s approximate location based on the individual’s distance from the three nearest towers. Thus, while less precise than traditional GPS systems, historic CSLI records can nonetheless generate a rough profile of an individual’s approximate movements based on the phone calls that individual makes over a period of time.<sup>207</sup>

Federal legislation authorizes the government to “require a provider of electronic communication service . . . to disclose a record or other information pertaining to a subscriber to or customer of such service . . . when the governmental entity . . . obtains a court order for such disclosure.”<sup>208</sup> The government needs only to demonstrate “‘specific and articulable facts showing that there are reasonable grounds to believe’ that the records ‘are relevant and material to an ongoing criminal investigation.’”<sup>209</sup>

In *United States v. Stimler*, police secured phone information for fifty-seven days.<sup>210</sup> In *United States v. Carpenter*, police obtained records for several months.<sup>211</sup> In both cases, the Third and Sixth Circuits found that the police conduct was lawful because the police conduct was not a search.<sup>212</sup>

One needs a brief historical note to put *Stimler* and *Carpenter* in context. In *Smith v. Maryland*, as discussed above, the Court rejected the defendant’s claim that police did not conduct a search when they secured phone records collected by a pen register.<sup>213</sup> Congress enacted legislation that provides phone customers some protection.<sup>214</sup> Federal law requires police to make a showing, in

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206. See, e.g., *United States v. Stimler*, 864 F.3d 253, 260 (3d Cir. 2017).

207. *Id.*

208. *Id.* at 262 (quoting 18 U.S.C. § 2703(c)(1)(B) (2012)).

209. *Id.* (quoting 18 U.S.C. § 2703(d) (2012)).

210. *Id.* at 260.

211. 819 F.3d 880, 886 (6th Cir. 2016), cert. granted, 137 S. Ct. 2211 (June 5, 2017) (No. 16-402).

212. *Id.* at 884, 890; *Stimler*, 864 F.3d at 264–67.

213. 442 U.S. 735, 742, 745–46 (1979).

214. See *Stimler*, 864 F.3d at 262 (quoting 18 U.S.C. § 2703(c)(1)(B), (d)).



effect, that the police have articulable suspicion of criminal activity.<sup>215</sup> The issue that has surfaced post-*Jones* is, again, whether the data collection is a search.<sup>216</sup> If the conduct amounts to a search, almost certainly, the police need probable cause, not mere articulable suspicion. To date, the Court has not allowed an evidentiary search based only on articulable suspicion.<sup>217</sup>

Defense attorneys see these cases as testing the Court's willingness to rethink its approach to modern technology. Thus, in *Stimler*, counsel argued that *Riley v. California*, rethinking the search-incident-to-lawful-arrest doctrine as it applied to cell phones, and *Jones* "taken together, strongly imply that an individual has a reasonable expectation of privacy in his or her aggregated movements over a period of time."<sup>218</sup>

The Third and Sixth Circuits have rejected the defendants' arguments.<sup>219</sup> Unconvincingly, the Third Circuit distinguished *Riley* on the grounds that *Riley's* focus was on the contents of the phone, not merely on metadata generated by the phone.<sup>220</sup> More to the point, the Third Circuit rejected the analyses of Justices Alito and Sotomayor in *Jones* and concluded that "CSLI is less intrusive on individuals' privacy rights than GPS tracking."<sup>221</sup>

The Sixth Circuit's analysis was substantially the same as the Third Circuit with regards to *Riley's* applicability.<sup>222</sup> It differed from the Third Circuit's analysis, but also found no search.<sup>223</sup> The phone company collected the information in the "ordinary course of business," and thus, the defendant did not have an expectation of privacy vis-à-vis the phone company.<sup>224</sup> Notably, the Sixth Circuit's analysis harkens back to the Court's original *Smith* analysis: because the defendant voluntarily turned over information to the phone company, the defendant lacked a reasonable expecta-

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215. 18 U.S.C. § 2703(d).

216. *Supra* Part III.

217. That is because, to date, the Supreme Court has never held that police may conduct an evidentiary search based merely on reasonable suspicion. See DRESSLER & THOMAS, *supra* note 45, at 151 (discussing the probable cause requirement).

218. *Stimler*, 864 F.3d at 264.

219. *See id.* at 266–67; *United States v. Carpenter*, 819 F.3d 880, 884 (6th Cir. 2016).

220. *Stimler*, 864 F.3d at 264–65.

221. *Id.* at 265.

222. *Carpenter*, 819 F.3d at 889–90.

223. *See id.*

224. *Id.* at 887–88.

tion of privacy in that information if the phone company decides to turn it over to the police.<sup>225</sup>

Both circuits read *Riley* narrowly. Yes, the Court focused on content revealed in a cell phone.<sup>226</sup> That was relevant to assessing the scope of a search incident to a lawful arrest and helped explain why that doctrine did not justify access to phone information.<sup>227</sup> The circuit courts missed *Riley*'s theme: the unanimous Court recognized the need to rethink its Fourth Amendment analysis in light of new technology.<sup>228</sup>

The Third Circuit's conclusion that CLSI tracking is less intrusive than GPS tracking seems like a thin reed. The concurring Justices focused primarily on the police's ability to track Jones over the extensive period of time, far longer than was involved in the beeper cases.<sup>229</sup> In *Stimler*, police had fifty-seven days' worth of information about the defendant, far in excess of the twenty-eight days of information in *Jones*.<sup>230</sup>

The Sixth Circuit's reliance on *Smith* highlights the importance of Justice Sotomayor's position in *Jones*. There, she urges reexamination of the direction the Court took in post-*Katz* case law.<sup>231</sup> The focus, according to Sotomayor, should be on normative judgments made by Justices about the needs of a free society.<sup>232</sup>

The Court's decision to grant review in *Carpenter* will give the Court its chance to reexamine its post-*Katz* case law.<sup>233</sup> I do not want to understate the complexities of the issue. As questioning during oral argument in *Jones* suggested, how can the Court assess when a *Knotts* analysis (short monitoring by use of a beeper is not a search) crosses the Fourth Amendment threshold and becomes a search?<sup>234</sup> Even posing the question hints that an answer

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225. *Id.*; *Smith v. Maryland*, 442 U.S. 735, 742–45 (1979).

226. *Riley v. California*, 573 U.S. \_\_\_, \_\_\_, 134 S. Ct. 2473, 2480 (2014).

227. *Id.* at \_\_\_, 134 S. Ct. at 2483–85.

228. *See id.* at \_\_\_, 134 S. Ct. at 2494–95.

229. *United States v. Stimler*, 864 F.3d 253, 265 (3d Cir. 2017); *United States v. Jones*, 565 U.S. 400, 415 (Sotomayor, J., concurring); *id.* at 430 (Alito, J., concurring).

230. *Stimler*, 864 F.3d. at 260; *Jones*, 565 U.S. 400, 403 (majority opinion).

231. *Jones*, 565 U.S. at 414–15 (Sotomayor, J., concurring).

232. *Id.* at 416–17.

233. *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (June 5, 2017) (No. 16-402).

234. *See generally* Oral Argument, *Jones*, 565 U.S. 400 (No. 10-1259), <https://www.oyez.org/cases/2011/10-1259>.

to where the line is drawn may involve an arbitrary judgment.<sup>235</sup> But in the modern digital world, the Court's post-*Katz* analysis has failed and provides a chance to reinvigorate what this article views as *Katz*'s original meaning.

#### CONCLUSION

We are approaching the fiftieth anniversary since the end of the Warren Court criminal procedure revolution. Many commentators have identified failures of the Warren Court, especially in light of post-Warren Court developments. Cases like *Miranda v. Arizona* lost credibility as they were cabined, narrowed beyond recognition.<sup>236</sup>

*Katz* seemed slated for a similar fate.<sup>237</sup> But, if I am correct, *Katz*, as originally conceived, holds promise for the future. Its core holding, not limited by property-trespass concepts, provides a framework for the Court to vitalize privacy protections, even in an era of increasingly invasive technologies.<sup>238</sup>

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235. See *Jones*, 565 U.S. at 430 (Alito, J., concurring).

236. *Supra* Parts I–II.

237. *Supra* Parts II–III.

238. *Supra* Part III.