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Protecting Elites: An Alternative Take on How *United States V. Jones* Fits into the Court's Technology Jurisprudence

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**PROTECTING ELITES:
AN ALTERNATIVE TAKE ON HOW *UNITED STATES V. JONES*
FITS INTO THE COURT'S TECHNOLOGY JURISPRUDENCE**

Tamara Rice Lave*

This Article argues that the Supreme Court's technology jurisprudence can be best understood as protecting the privacy interest of elites. After providing an overview of the major technology cases from Olmstead to Kyllo, the Article focuses on the recent case of United States v. Jones. The Article does not contend that the Court intended to protect elites, but instead posits that this motive likely operated at a more unconscious level because of the Justices' greater relative affluence and elevated social position.

I. INTRODUCTION

CHIEF JUSTICE ROBERTS: You think there would also not be a search if you put a GPS device on all of our cars, monitored our movements for a month? You think you're entitled to do that under your theory?

MR. DREEBAN: The Justices of this Court?

CHIEF JUSTICE ROBERTS: Yes.

(Laughter.)

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MR. DREEBAN: Under our theory and under this Court's cases, the Justices of this Court when driving on public roadways have no greater expectation of—

CHIEF JUSTICE ROBERTS: So, your answer is yes, you could tomorrow decide that you put a GPS device on every one of our cars, follow us for a month; no problem under the Constitution?¹

Psychologists have long observed that an individual's ability to identify and empathize with another's situation plays a key role in how he perceives a situation.² Studies have suggested that judges, not surprisingly, are subject to this basic human trait in their judging,³ although perhaps not as overtly as in Chief Justice Roberts' above questioning. This Article argues that the Court's Fourth Amendment rulings involving technology have been particularly influenced by the Justices' ability or inability to identify with the citizens who are being monitored. As a result,

¹ Transcript of Oral Argument at 9–10, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259).

² See Lynda Olsen-Fulero & Solomon M. Fulero, *Commonsense Rape Judgments: An Empathy-Complexity Theory of Rape Juror Story Making*, 3 PSYCHOL. PUB. POL'Y & L. 402, 409–10 (1997) (discussing the literature on juror empathy); see also Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998); Scott Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003).

³ See Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES MAG., July 7, 2009, available at <http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html?pagewanted=all> (interviewing Justice Ginsburg about Justice Rehnquist's decision in *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), in which the Court ruled that the Family Medical Leave Act applies to state employers for both male and female employees). In the interview, Justice Ginsberg stated:

That opinion was such a delightful surprise. . . . I was very fond of my old chief. I have a sense that it was in part his life experience. When his daughter Janet was divorced, I think the chief felt some kind of responsibility to be kind of a father figure to those girls. So he became more sensitive to things that he might not have noticed.

Id.; see also Adam Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues* (July 26, 2012) (unpublished manuscript) (finding that judges with daughters consistently vote in a more pro-woman fashion on gender issues than judges who only have sons), available at <http://scholar.harvard.edu/files/msen/files/daughters.pdf>.

whether the Justices were able to empathize with the individual under surveillance has determined not only what activity is protected under the Amendment but also who is protected. And, as will be demonstrated, this has meant that, until recently, the Court's Fourth Amendment rulings have shown a bias towards regulating only those government activities that could affect "elites."⁴ This, however, may be changing, not because the Court's empathies are changing, but because, as we begin to see in *United States v. Jones*,⁵ new technologies are making everyone, elites and non-elites alike, vulnerable to the Government's scrutiny.

In *Jones*, the Supreme Court held that attaching a Global Positioning System ("GPS") monitor to a car and tracking its movements for twenty-eight days constituted a search under the Fourth Amendment.⁶ Although the Justices unanimously agreed that the Government's conduct was a search, they could not agree on the reason why. The result was a majority opinion authored by Justice Scalia resting on the common-law trespassory test,⁷ a concurring opinion by Justice Alito contending that the long-term monitoring was unreasonable under *Katz v. United States*⁸ even though the *same* monitoring conducted on a shorter term would not

⁴ Christopher Slobogin makes a similar argument in *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003). However, he does not discuss technology cases, nor does he make the more radical argument that the Court actually *changes* Fourth Amendment jurisprudence if doing so is necessary to protect elites.

⁵ 132 S. Ct. 945 (2012).

⁶ *Id.*

⁷ *Id.* at 949–52 ("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted. . . . [A]s we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

⁸ 389 U.S. 347 (1967).

have been,⁹ and a concurring opinion by Justice Sotomayor essentially agreeing that it was a search under both rationales.¹⁰ Only Sotomayor was willing to tangle with the tough technology cases sure to come in the not-so-distant future.¹¹ Although she did not hash out how those cases should be decided, she did question whether, in light of commonplace practices in the digital age like disclosing the websites people visit to their internet service providers, “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”¹²

Many have criticized the reasoning in *Jones*. Supreme Court Justices,¹³ scholars,¹⁴ and pundits¹⁵ alike knocked the majority’s

⁹ “[R]elatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society as recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.” *Jones*, 132 S. Ct. at 964.

¹⁰ *Id.* at 954 (“I join the Court’s opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, ‘[w]here as here, the Government obtains information by physically intruding on a constitutionally protected area.’”); *id.* at 956 (“I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques.”).

¹¹ *Id.* at 955 (“With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory-or owner installed vehicle tracking devices or GPS-enabled smartphones.”).

¹² *Id.* at 957.

¹³ *Id.* at 961 (Alito, J., concurring) (“In sum, the majority is hard pressed to find support in post-*Katz* cases for its trespass-based theory.”).

¹⁴ See Caren Myers Morrison, *The Drug Dealer, the Narc, and the Very Tiny Constable: Reflections on United States v. Jones*, 3 CALIF. L. REV. CIRCUIT 113, 117 (2012) (“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. . . . It is a measure of the audacity of the *Jones* opinion that Justice Scalia does not acknowledge the revisionism of its reasoning.”); Erin Murphy, *Back to the Future: The Curious Case of United States v Jones*, 10 OHIO ST. J. CRIM. L. 325, 327 (2012) (“Although he splices enough hairs to make it work in his opinion, the precedent that he wrangles had

reliance on the trespass doctrine, which they argued had been jettisoned after *Katz*.¹⁶ At the same time, Justice Alito's opinion has been chided for being too conclusory¹⁷ and for flatly ignoring existing precedent from *United States v. Knotts*,¹⁸ in which the Court held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."¹⁹ Although Justice Sotomayor has been lauded for asking the tough questions that the

fairly settled that property law no longer stood as a gateway to Fourth Amendment protection.").

¹⁵ Dahlia Lithwick, *Alito v. Scalia*, SLATE (Jan. 23, 2012, 6:38 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/u_s_v_jones_supreme_court_justices_alito_and_scalia_brawl_over_technology_and_privacy_single.html ("Maybe it's enough simply to know for now that at least five justices have a good sense—and a whumping, healthy fear—that what's barreling down the road requires more than merely wondering what would have happened in a horse-drawn carriage.").

¹⁶ *Jones*, 132 S. Ct. at 959 ("Katz v. *United States* finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation.").

¹⁷ Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 327 (2012) ("Justice Alito's analysis is cryptic, in part because this section of his opinion cites no authority."); Murphy, *supra* note 14, at 332 ("The greatest disappointment of the concurring opinion, therefore, is its refusal to even attempt a theory of Fourth Amendment applicability that would have buttressed the same ultimate holding, but with a test that might apply beyond the particular facts of this case."); Lithwick, *supra* note 15 ("It's not clear that the court served the reasonable person at all today by handing down an opinion that gives no sense whatsoever of when and how a warrant would be required for government surveillance in the hands-free world of the 21st century, or how long such surveillance could endure before privacy concerns are raised . . .").

¹⁸ 460 U.S. 276 (1983).

¹⁹ *Id.* at 276; *Jones* at 953–54 (arguing from *Knotts* that "even assuming that the concurrence is correct to say that '[t]raditional surveillance' of Jones for a 4-week period 'would have required a large team of agents, multiple vehicles, and perhaps aerial assistance,' our cases suggest that such visual observation is constitutionally permissible.").

others avoided, she has been faulted for merely hinting at the way they should be resolved.²⁰

In the wake of *Jones*, it has become difficult to determine when the use of technology will constitute a search. Law enforcement officials do not know what degree of tracking creates Fourth Amendment concerns, and so, in an abundance of caution, the FBI has turned off almost three thousand GPS devices.²¹ The problem is not complying with Justice Scalia's majority opinion, but the ambiguous rationale put forth by Justice Alito. While giving a presentation at the University of San Francisco in early 2012, FBI General Counsel Andrew Weissmann said:

I just can't stress enough . . . what a sea change that is perceived to be within the department. . . . I think the court did not wrestle with the problems their decision creates Usually the court tends to be more careful about cabining its decision . . . [but] [g]uidance which consist[s] of "two days might be good, 30 days is too long" is not very helpful.²²

Some scholars have tried to fill in the gap by articulating comprehensive theories for this brave, new, post-*Jones* world.²³

²⁰ See Murphy, *supra* note 14, at 337 ("In short, [Justice Sotomayor's] opinion is the only one that contains any trace of vision, even as she admits to struggling with how precisely to realize it.").

²¹ Ariane de Vogue, *Supreme Court Ruling Prompts FBI to Turn Off 3,000 Tracking Devices*, ABC NEWS (Mar. 7, 2012, 10:40 AM), <http://abcnews.go.com/blogs/politics/2012/03/supreme-court-ruling-prompts-fbi-to-turn-off-3000-tracking-devices/>.

²² *Id.*

²³ David C. Gray & Danielle Keats Citron, A Technology-Centered Approach to Quantitative Privacy 5 (Aug. 14, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129439 ("Taking inspiration from information privacy law, we propose as an alternative a technology-based approach under which the threshold question would be whether a technology has the capacity to facilitate broad programs of indiscriminate surveillance that intrude upon reasonable expectations of quantitative privacy. If it does, then its use amounts to a 'search,' and should be subject to the crucible of Fourth Amendment reasonableness, including the warrant requirement."); see also Susan Freiwald, *First Principles of Communications Privacy*, 2007 STAN. TECH. L. REV. 3, 17–20 (contending that the reasonable expectation of privacy test should be replaced with a test that looks at the following four factors: how hidden or secretive the surveillance is, how intrusive it is, whether it is indiscriminate and how continuous it is.); Peter

Yet no one is sure how the Court will address the difficult cases that are certain to arise in the future—such as what happens when the Government uses information that a person has voluntarily made available through his cellphone or via an OnStar navigation system that a driver has knowingly installed in her vehicle.

These are interesting and important questions, but they will not be addressed in this Article, except in passing at the end. The goal here is much more modest. Unlike other articles, this Article will argue that the *Jones* case *does* fit in with prior technology cases. In making this argument, this Article will look beyond the rationale put forth by the Court to the animating principle that lurks beneath. Specifically, this Article will contend that the technology cases from *Katz* to *Jones* can be best understood as reaching resolutions that best protect the interests of elites, even if this requires changing existing Fourth Amendment jurisprudence to do so.

By “elites,” this Article refers mostly to those who enjoy greater relative affluence and elevated social position. Although the Justices may not all have been born into wealthy families,²⁴ their current income places them above the top five-percent

B. Swire & Erin Murphy, *How To Address Standardless Discretion after Jones* 1 (Ohio St. Pub. Law, Working Paper No. 77, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122941 (“In summary, courts would test reasonableness under the Fourth Amendment by examining the adequacy of and compliance with procedural safeguards. In a range of settings involving new technologies, the state would need to craft reasonable safeguards against standardless discretion, and then comply with those safeguards.”). Susan Freiwald had the foresight to propose this four-part test for evaluating when electronic surveillance implicated the Fourth Amendment years *before* *Jones* was decided. Freiwald, *supra*.

²⁴ See, e.g., ALEJANDRO PORTES, *ECONOMIC SOCIOLOGY: A SYSTEMATIC INQUIRY* 84–85 (2010) (noting that “[p]owerless individuals may thus improve their class position through the selective marketing of rare and desirable skills. Any skill that, for any reason, is in high demand becomes relevant as a class-conferring resource. It can be the surgical ability of a physician, the legal acumen of a lawyer, the sensibility and originality of a painter, or the batting prowess of a baseball player. . . . All that matters is that skills are of such a kind that they hold the potential to lift their possessors across the fundamental class divide in capitalist society.”).

income bracket,²⁵ and as long as they retire no earlier than age sixty-five after fifteen years of service, they will continue to earn their full salary for the rest of their lives.²⁶ More significant than their salaries, however, is the fact that Supreme Court Justices are elites in terms of their more extensive education, broader political influence, and more rarified social connections.²⁷ As Robert A. Carp, Ronald Stidham, and Kenneth L. Manning put it:

²⁵ In 2013, the Chief Justice will earn an annual salary of \$223,500 and Associate Justices will earn \$213,900 per year. Robert Langley, *Annual Salaries of Top US Government Officials*, ABOUT.COM, <http://usgovinfo.about.com/od/governmentjobs/a/Annual-Salaries-Of-Top-US-Government-Officials.htm> (last visited Apr. 1, 2013). This places them between the top five-percent (\$159,619) and the top one percent (\$380,354) of American salaries. *How Much Money Do the Top Income Earners Make?*, FINANCIAL SAMURAI, <http://www.financialsamurai.com/2011/04/12/how-much-money-do-the-top-income-earners-make-percent/> (last visited Apr. 1, 2013).

²⁶ Laurent Belsie, *John Paul Stevens: Supreme Court Retirees Keep Lifetime Pay*, CHRISTIAN SCIENCE MONITOR (Apr. 9, 2010), <http://www.csmonitor.com/Business/2010/0409/John-Paul-Stevens-Supreme-Court-retirees-keep-lifetime-pay>.

²⁷ “Judges occupy an elite subculture, which is characterized by greater education and relative affluence.” MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 6 (Oxford University Press 2004). This is true, to different degrees, for each of the Justices who decided *Jones*. Justice Scalia grew up with a highly educated father and other successful and well-educated relatives, and went to Georgetown University and Harvard Law School. David Niose, *No Agenda? A Humanist View of Justice Scalia*, THE HUMANIST, Mar./Apr. 2010, available at http://www.thehumanist.com/humanist/10_mar_apr/Niose.html. Both Justices Thomas and Sotomayor came from extremely humble beginnings and went on to attend Holy Cross and Yale Law School and Princeton and Yale Law School, respectively. Jodi Kantor & David Gonzalez, *For Sotomayor and Thomas, Paths Diverge at Race*, N.Y. TIMES (June 6, 2009), http://www.nytimes.com/2009/06/07/us/politics/07affirm.html?pagewanted=all&_r=0. Justice Alito’s father was an Italian immigrant and high school teacher (who later went to law school and became executive director of New Jersey’s bill-drafting Office of Legislative Service), while his mother was a former schoolteacher and principal; Alito went to Princeton and Yale Law School. Allegra Hartley, *10 Things You Didn’t Know About Samuel Alito*, U.S. NEWS & WORLD REP. (Oct. 1, 2007), <http://www.usnews.com/news/national/articles/2007/10/01/10-things-you-didnt-know-about-samuel-alito>. Justice Roberts was the son of a steel executive and attended Harvard College and then Harvard Law School. John Fox, *Biographies*

America's jurists come from a narrow segment of the social and economic strata. To an overwhelming degree they are offspring of upper- and upper-middle-class parents and come from families with a tradition of political, and often judicial, service. They are the men and women to whom the U.S. system has been good, who fit in, and who have succeeded.²⁸

The focus of this Article will be on the bias of the Court's Fourth Amendment technology jurisprudence towards protecting elites. Carp *et al.* suggest that it is the Justices' status as the top jurists in the country that leads to this partiality, for "[s]eldom bitten is the hand of the economic system that feeds them. . . . [M]ost judges are basically conservative, in that they hold dear the traditional institutions and rules of the game that have brought success to them and their families."²⁹ The resulting bias transcends even

of the Robes: John Glover Roberts, Jr., PBS, http://www.pbs.org/wnet/supremecourt/future/robes_roberts.html (last visited Apr. 1, 2013). Justice Breyer was born into a middle-class family and to a father who served as legal counsel for the San Francisco Board of Education. *Stephen G. Breyer*, THE OYEZ PROJECT, http://www.oyez.org/justices/stephen_g_breyer (last visited Apr. 1, 2013). He later married into a well-established family of the British aristocracy and thus possessed great wealth. *Id.* He attended Stanford University, Oxford University (as a Marshall Scholar), and Harvard Law School. *Id.* Justice Kagan was "the middle child in a New York family whose intellectual dynamism and embrace of liberal causes provide a window onto the social milieu and culture that shaped her." Lisa W. Foderaro & Christine Haughney, *The Kagan Family: Left-Leaning and Outspoken*, N.Y. TIMES (June 18, 2010), <http://www.nytimes.com/2010/06/20/nyregion/20kagans.html?pagewanted=all>. She attended Princeton University, Oxford University and Harvard Law School. CNN Library, *Elena Kagan Fast Facts*, CNN (Feb. 19, 2013, 2:59 PM), <http://www.cnn.com/2013/02/19/us/elena-kagan-fast-facts>. Justice Kennedy's father was a well-established lawyer, and his mother was involved in many local civil activities; Kennedy went to Stanford University and Harvard Law School. *Anthony Kennedy*, USA TODAY, http://conlaw.usatoday.findlaw.com/supreme_court/justices/kennedy.html (last visited Apr. 1, 2013). Justice Ginsburg's father sold furs and was later a haberdasher; she attended Cornell University and graduated from Columbia Law School. Danielle Burton, *10 Things You Didn't Know About Ruth Bader Ginsburg*, U.S. NEWS & WORLD REP. (Oct. 1, 2007), <http://www.usnews.com/news/national/articles/2007/10/01/10-things-you-didnt-know-about-ruth-bader-ginsburg>.

²⁸ ROBERT A. CARP ET AL., JUDICIAL PROCESS IN AMERICA 403 (8th ed. 2011).

²⁹ *Id.*

political affiliation, as “America’s elite has its fair share of both liberals and conservatives, but it does not have many who would use their discretionary opportunities to alter radically the basic social and political system.”³⁰ Interestingly, in this brave new world of ever-pervasive technological surveillance, those with high-tech expertise may not need the Court to protect them from government monitoring because they will be able to harness cutting edge software to protect their privacy.³¹ Unfortunately, due to the “digital divide,” the poor are significantly less likely to have access to these sorts of privacy protections and thus will need to rely upon the Court.³²

In making this argument, there is no contention that the Court *intended* to protect elites; to the contrary, this motive likely operated at a more unconscious level. Indeed, Justice Scalia recognized as much in a concurring opinion in *Minnesota v. Carter*³³ in which he argued that because the *Katz* test was not tethered to anything concrete, it has become a proxy for the Justices’ own expectations of privacy: “In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those ‘actual (subjective) expectations of privacy’ ‘that society is prepared to recognize as “reasonable,” ’

³⁰ *Id.*

³¹ *Surveillance Self-Defense*, ELECTRONIC FRONTIER FOUND., <https://ssd EFF.org> (last visited Feb. 24, 2013) (“The Electronic Frontier Foundation (EFF) has created this Surveillance Self-Defense site to educate the American public about the law and technology of government surveillance in the United States, providing the information and tools necessary to evaluate the threat of surveillance and take appropriate steps to defend against it.”).

³² A 2012 Pew Internet Project Report found that, “[o]ne in five American adults does not use the internet. Senior citizens, those who prefer to take our interviews in Spanish rather than English, adults with less than a high school education, and those living in households earning less than \$30,000 per year are the least likely adults to have internet access.” Kathryn Zickuhr & Aaron Smith, *Digital Differences*, PEW INTERNET & AM. LIFE PROJECT (Apr. 13, 2012), http://pewinternet.org/~media/Files/Reports/2012/PIP_Digital_differences_041312.pdf.

³³ 525 U.S. 83 (1998).

bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”³⁴

Two important caveats before beginning: First, this argument will not be aided by in-depth interviews with Justices or their law clerks. Although an ethnographic approach would undoubtedly be useful, it is not entirely necessary. There is an extensive literature demonstrating how unconscious biases affect people’s perception, judgment, and behavior.³⁵ Thus, this project has value even if the cited animating principles cannot be proven as true. Second, this Article presents preliminary thoughts with the hope they will spark conversation and be developed at greater depth in the future.

II. ELECTRONIC EAVESDROPPING

It is fitting to begin with the grandfather of all of these cases, *Olmstead v. United States*.³⁶ The Fourth Amendment states, 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, and no warrants shall issue, but upon . . . particularly describing the place to be searched, and the persons or things to be seized.”³⁷ Determining whether conduct constitutes a “search” for Fourth Amendment purposes is cardinal, albeit complex,³⁸ because it places important constraints on the

³⁴ *Id.* at 97 (Scalia, J., concurring); see also *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring) (“The *Katz* expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties. It involves a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks.” (citations omitted)).

³⁵ Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

³⁶ 277 U.S. 438 (1928).

³⁷ U.S. CONST. amend. IV.

³⁸ See *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“[T]he antecedent question whether or not a Fourth Amendment ‘search’ has occurred is not so simple under our precedent.”).

Government.³⁹ If conduct is a search, then the Government, with some exceptions, must first obtain a warrant from a neutral magistrate and must then conduct the search reasonably.⁴⁰ If conduct does not constitute a search, however, the Government is free to engage in it without these limitations.⁴¹

In *Olmstead*, a divided Court held that tapping the telephone lines of a house and gathering information by listening to the calls over a period of months did not constitute a search because the police never penetrated the walls of the house to access the phone lines.⁴² Chief Justice Taft, writing for the majority, concluded that “[t]he amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.”⁴³

In a famous dissent, Justice Brandeis argued that the majority was interpreting the Fourth Amendment too narrowly:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy

³⁹ See Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 122 (2002) (discussing the process by which the Court determines what constitutes a search).

⁴⁰ See *Katz v. United States*, 389 U.S. 347, 357 (1967) (“‘Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,’ and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions” (citations omitted)).

⁴¹ See *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979) (“The installation and use of a pen register . . . was not a ‘search,’ and no warrant was required.”); Colb, *supra* note 39, at 122 (“Absent a search, police may observe the thing that is ‘exposed’ without having to obtain a warrant or otherwise justify their observations.”).

⁴² *Olmstead v. United States*, 277 U.S. 438 (1928).

⁴³ *Id.* at 464.

of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.⁴⁴

Although it took almost forty years, Brandeis was finally vindicated. In *Katz v. United States*,⁴⁵ the Court held that electronically listening to and recording a defendant's conversation in a public telephone booth constituted a search even though the police had not penetrated the walls of the phone booth:

[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. We conclude that the underpinnings of *Olmstead* . . . ha[s] been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling.⁴⁶

Instead, the Court trumpeted a more expansive notion of the Fourth Amendment, one *directly* shaped by Brandeis' legendary dissent.⁴⁷ "[T]he Fourth Amendment protects people, not places,"⁴⁸ and so it was that the protection of a person's privacy became the fundamental purpose of the Fourth Amendment.

In a concurring opinion, Justice Harlan articulated what would become the test for this new doctrine: A person would have to show both that he had manifested a true subjective expectation of privacy, and that the expectation of privacy was one that society was prepared to deem reasonable.⁴⁹

What is worth considering is *why* this more expansive view of the Fourth Amendment was ever conceived of in the first place. After all, as Justice Black points out in his dissent in *Katz*, "The first clause protects 'persons, papers, and effects, against unreasonable searches and seizures.' These words connote the idea of tangible things with size, form, and weight, things capable

⁴⁴ *Id.* at 478–79.

⁴⁵ 389 U.S. 347 (1967).

⁴⁶ *Id.* at 353.

⁴⁷ See *id.* at n.6 (citing Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) for the proposition that a "person's general right to privacy" is his "right to be let alone by other people"); see *infra* notes 52–53 and accompanying text.

⁴⁸ *Katz*, 389 U.S. at 351.

⁴⁹ *Id.* 361.

of being searched, seized, or both.”⁵⁰ The seeds for Justice Brandeis’ famous dissent can be traced back to *The Right to Privacy*,⁵¹ which he co-authored with Samuel D. Warren in 1890.⁵² Published thirty-eight years before his dissent in *Olmstead*, it was here that Brandeis first argued that the law recognizes the right of people to be “let alone.”⁵³

Warren and Brandeis contended that “[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”⁵⁴ The specific changes that Brandeis and Warren had in mind were the ability of newspapers and magazines to publish intimate details about people’s lives, writing that “[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”⁵⁵ They then tried to find a legal principle with which to guard against these technological invasions, and they dismissed potential sources such as “breach of confidence, and of an implied contract.”⁵⁶ Yet they didn’t feel that these sources provided enough protection, so they turned to the right to privacy, which they argued should be extended from “personal writings and any other productions of the intellect or of the emotions”⁵⁷ to “the

⁵⁰ *Id.* at 365.

⁵¹ Warren & Brandeis, *supra* note 47.

⁵² See Robert B. McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 260–61 (1965) (“In 1928, long after the 1890 article, Brandeis wrote his celebrated dissent in *Olmstead v. United States*, in which he objected strongly to the majority ruling that messages passed along telephone wires are not within the fourth amendment’s protection against unreasonable searches and seizures. . . . In emphasizing the urgent necessity of protecting against ‘every unjustifiable intrusion by the Government upon the privacy of the individual,’ Mr. Justice Brandeis borrowed extensively from what Mr. Brandeis had written thirty-eight years earlier.” (footnote omitted)).

⁵³ Warren & Brandeis, *supra* note 47, at 193.

⁵⁴ *Id.*

⁵⁵ *Id.* at 195.

⁵⁶ *Id.* at 211.

⁵⁷ *Id.* at 213.

personal appearance, sayings, acts, and to personal relations, domestic or otherwise.”⁵⁸

And what motivated this passion for privacy? Samuel D. Warren married the daughter of a senator, and as a result, intimate details about his life, and more significantly, the life of his wife and her family were published in newspapers.⁵⁹ In an interesting article published in the *Michigan State Law Review*, Amy Gajda sought proof for what many had believed—that the impetus for *The Right to Privacy* was gossip mongering by the press about Warren.⁶⁰ After examining over sixty articles about Warren’s family, she concluded that “Samuel D. Warren married into what he would surely consider a media maelstrom. Indeed, if Samuel D. Warren had not married a United States senator’s daughter, ‘The Right to Privacy’ might not have been written.”⁶¹ It is worth emphasizing what an important point this is: Core Fourth Amendment jurisprudence was challenged, and the meaning of a search was changed, because Samuel D. Warren, and by proxy Louis Brandeis, had an unpleasant experience with a form of technology not protected against by existing law—the type of “paparazzi” that would be directed almost exclusively at a member of the elite.

III. BEEPERS

In the Court’s next major tangle with technology, the petitioner fared less well. In *United States v. Knotts*,⁶² the Court held that monitoring beeper signals from a vehicle on public streets did not constitute a search because “a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in

⁵⁸ *Id.*

⁵⁹ See Amy Gajda, *What Ifs and Other Alternative Intellectual Property and Cyberlaw Stories: What if Samuel D. Warren Hadn’t Married a Senator’s Daughter?: Uncovering the Press Coverage that Led to “The Right to Privacy”*, 2008 MICH. ST. L. REV. 35, 44–59 (2008).

⁶⁰ *Id.*

⁶¹ *Id.* at 42.

⁶² 460 U.S. 276 (1983).

his movements from one place to another.”⁶³ In *Knotts*, the Government suspected codefendant Armstrong of buying chemicals to manufacture methamphetamine.⁶⁴ The owner of a chemical company gave the Government permission to install a beeper inside a chloroform container that was then sold to an unsuspecting Armstrong.⁶⁵ Agents monitored the canister by both visual and beeper surveillance, and when they lost sign of it, they used the beeper to locate it outside of the petitioner’s cabin.⁶⁶ Using information that they obtained through this surveillance as well as other sources, the police applied for and received a warrant to search the cabin.⁶⁷ Inside, they found a clandestine drug laboratory, which led to the prosecution of Knotts and his codefendants.⁶⁸ Knotts’s motion to suppress the evidence was denied and he was subsequently convicted.⁶⁹ The Supreme Court granted certiorari.⁷⁰

All of the Justices agreed that the use of the beeper in this case did not constitute a search.⁷¹ This was not particularly surprising, considering how the Court has treated cars as less deserving of Fourth Amendment protection,⁷² and more significantly, because of the holding in *Katz* that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth

⁶³ *Id.* at 281.

⁶⁴ *Id.* at 278.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 279 (discussing that the officers relied on the “location of the chloroform derived through the use of the beeper and additional information obtained during three days of intermittent visual surveillance of respondent’s cabin” to secure a search warrant).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 280.

⁷¹ *Id.* at 276.

⁷² *See id.* at 281 (“We have commented more than once on the diminished expectation of privacy in an automobile: ‘One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effect. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its content are in plain view.’” (citations omitted)).

Amendment protection.”⁷³ As previously discussed, the notion that public conduct does not warrant Fourth Amendment protection would pose a problem for Justice Alito and those joining with him in his analysis of *Jones*.⁷⁴ Yet, as much of a problem as *Knotts* would pose, it also offered guidance into how the Court might handle more intrusive technologies. For example, although Justices Stevens, Brennan, and Marshall concurred in the decision, they wrote separately to emphasize what would become a harbinger of things to come—the fact that technological enhancement could pose a problem: “Although the augmentation in this case was unobjectionable, it by no means follows that the use of electronic detection techniques does not implicate especially sensitive concerns.”⁷⁵

Furthermore, in response to *Knotts*’s argument that upholding the GPS would allow the Government to engage in “twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision,”⁷⁶ Justice Rehnquist, on behalf of the majority, wrote:

[I]f such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. Insofar as respondent’s complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.⁷⁷

One year later in *United States v. Karo*,⁷⁸ the Court held that use of a beeper *did* constitute a search because the beeper had allowed the police to locate a canister inside a house.⁷⁹ The reason why the Court came out differently in the two cases is that in *Knotts*, the beeper only enabled the police to monitor defendants in public

⁷³ *Katz v. United States*, 389 U.S. 347, 351 (1967).

⁷⁴ See *supra* notes 5–12 and accompanying text.

⁷⁵ *Knotts*, 460 U.S. at 287.

⁷⁶ *Id.* at 283.

⁷⁷ *Id.* at 284.

⁷⁸ 468 U.S. 705 (1984).

⁷⁹ *Id.*

places, whereas in *Karo*, the beeper allowed the police to in effect see inside the house, something they would not have had the right to do without a warrant.⁸⁰

IV. AIRPLANES AND HELICOPTERS

Twenty years after *Katz*, the Court grappled with another technology in the Fourth Amendment context—this time, airplanes. The Court had previously held that the curtilage of a home is subject to Fourth Amendment protection, which means that the police are not allowed to enter it to without a warrant or exigency.⁸¹ The Court had also held that “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”⁸² The question remained: Were an officer’s naked-eye aerial observations of a person’s curtilage admissible without a warrant?

In *California v. Ciraolo*,⁸³ the police received an anonymous telephone tip that Mr. Ciraolo was growing marijuana in his backyard.⁸⁴ The Santa Clara police attempted to look into the yard, but they could not see over the six-foot outer fence and the ten-foot inner fence that Mr. Ciraolo had erected.⁸⁵ Getting creative, the police secured a private airplane and flew over the yard.⁸⁶ From a distance of one thousand feet, they were able to see marijuana plants, and they used these observations to secure and execute a warrant, and then successfully prosecute Mr. Ciraolo for cultivation of marijuana.⁸⁷ Although the California Court of Appeals held that this search violated the Fourth Amendment, the

⁸⁰ *Id.* at 715. The Court concluded that *Karo* was “not like *Knotts*, for there the beeper told the authorities nothing about the interior of *Knotts*’ cabin. The information obtained in *Knotts* was ‘voluntarily conveyed to anyone who wanted to look’” *Id.*

⁸¹ *Hester v. United States*, 265 U.S. 57 (1924).

⁸² *Katz v. United States*, 389 U.S. 347, 351 (1967).

⁸³ 476 U.S. 207 (1986).

⁸⁴ *Id.* at 209.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

Supreme Court disagreed.⁸⁸ In an opinion authored by Chief Justice Burger, the Court held that naked-eye observation from an aircraft lawfully operating did not violate an expectation of privacy that was reasonable.⁸⁹ “In an age where private and commercial flight in the public airways is routine,” Burger wrote, “it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1000 feet.”⁹⁰

Similarly, in *Florida v. Riley*,⁹¹ the Court held that naked-eye observation from a helicopter lawfully *hovering*⁹² some four hundred feet over a person’s fenced in backyard did not constitute a search.⁹³ Just as in *Ciraolo*, law enforcement received an anonymous tip that Riley was growing marijuana on his property.⁹⁴ When the sheriff was unable to look into the greenhouse from the ground, he took to the sky.⁹⁵ Although the Florida Supreme Court had held that this action constituted a search under the Fourth Amendment, the U.S. Supreme Court disagreed. In an opinion authored by Justice White and joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, the plurality wrote:

In this case, as in *Ciraolo*, the property surveyed was within the curtilage of respondent’s home. Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation. Because the sides and roof of his greenhouse were left partially open, however, what was growing in the greenhouse was subject to viewing from the air. . . . We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other

⁸⁸ *Id.* at 210. The California Supreme Court denied the State’s petition for review. *Id.*

⁸⁹ *Id.* at 215; *see also id.* at 211–12 (suggesting that respondent might not have even passed the first hurdle in *Katz*).

⁹⁰ *Id.* at 218.

⁹¹ 488 U.S. 445 (1989).

⁹² Justice White used the more neutral term of, “circled twice over respondent’s property at a height of 400 feet.” *Id.* at 448.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 448.

aircraft. Any member of the public could legally have been flying over Riley's property in a helicopter at an altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more.⁹⁶

Although Justice O'Connor agreed that there was no search in this case, she wrote separately to emphasize that in determining whether a person has a reasonable expectation of privacy in aerial observation, the issue was not whether the helicopter was where it had the legal right to be under FAA regulations, but instead "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not 'one that society is prepared to recognize as "reasonable." ' "⁹⁷

Although the Court didn't acknowledge it, judges and people like them would never be subject to such observation. Mr. Ciraolo's house was worth approximately \$23,529 in 1982, which was almost one-fourth the median value of a home in California at that time.⁹⁸ Mr. Riley, in turn, was living in a mobile home in a rural area.⁹⁹ Because both were living in a flight path, studies show that they had less desirable and thus lower priced houses.¹⁰⁰

⁹⁶ *Id.* at 450–51.

⁹⁷ *Id.* at 454.

⁹⁸ The author's research assistant found Mr. Ciraolo's address (2085 Clark Avenue) in an article from the San Jose Mercury News. Brad Kava, *Supreme Court Pot Case Figure Arrested Again*, SAN JOSE MERCURY NEWS, Sept. 27, 1985, at 1B, available at NewsBank, Record No. 8502020740. On February 6, 2013, she contacted the property assessor in Santa Clara, California. The property assessor stated that the value of Mr. Ciraolo's was \$22,172 in 1979. Telephone interview with Santa Clara County Assessor (Feb. 6, 2013). To calculate its value in 1982, the property assessor stated that a two-percent increase per year should be added, which equaled \$23,529. *Id.* The property assessor told the research assistant that the house was sold in 2005 for \$750,000 by the Mary Ciraolo trust. *Id.* According to the census, the median price of a home in California was \$84,500 in 1980. *Historical Census of Housing Tables: Home Values*, U.S. CENSUS BUREAU (June 6, 2012), <http://www.census.gov/hhes/www/housing/census/historic/values.html>. Assuming the same two-percent increase in value per year, the median price of a home in California would have been \$87,913.80. Thus, \$87,913.80/23,529 is equal to 3.74.

⁹⁹ *Riley*, 488 U.S. at 448.

¹⁰⁰ See M. Rahmatian & L. Cockerill, *Airport Noise and Residential Housing Valuation in Southern California: A Hedonic Pricing Approach*, 1 INT'L J.

Thus, although the curtilage around a home is a constitutionally protected space, the curtilage around a home where the residents are wealthy enough to be able to live outside of the flight path is worth more under the Fourth Amendment than the curtilage of a home that is within the flight path.

V. THERMAL-IMAGING DEVICES

In *Kyllo v. United States*,¹⁰¹ the Court was faced with deciding whether the use of a thermal-imaging device aimed at a home from a public street for the purpose of detecting relative amounts of heat in the home constituted a search for Fourth Amendment purposes.¹⁰² An agent with the Department of the Interior suspected that Mr. Kyllo was growing marijuana in his home.¹⁰³ He knew that indoor marijuana growers often relied on high intensity heat lamps, and so he used the thermal device to see whether the heat emanating from the house was consistent with such use.¹⁰⁴ The scan showed that two areas were particularly hot, and the agent then used those findings to help secure a warrant that eventually led to Mr. Kyllo entering a conditional guilty plea while he litigated the denial of his motion to suppress the evidence.¹⁰⁵

On appeal, the Ninth Circuit ruled against Mr. Kyllo, holding that the action in question was not a search under either prong of

ENVTL. SCI. & TECH. 17, 25 (2004) ("Homes located within 5,000 meters (3.10 miles) of a large airport have an average price that is estimated to be 4% to 10% lower than homes located greater than 5,000 meters from a large airport. Homes located within 5,000 meters of a small airport have a mean price that is 1.75% to 7.5% lower than homes outside the 5,000-meter perimeter."); see also Daniel P. McMillen, *Airport Expansions and Property Values: The Case of Chicago O'Hare Airport*, 55 J. OF URB. ECON. 627 (finding that homes located around Chicago O'Hare airport were sold at almost a ten-percent discount if located within a sixty-five decibel noise contour band).

¹⁰¹ 533 U.S. 27 (2001).

¹⁰² *Id.* at 29.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 30.

the *Katz* test.¹⁰⁶ Luckily for Mr. Kyllo, the Supreme Court disagreed. In a decision authored by Justice Scalia, the Court held that the thermal gun violated Mr. Kyllo's reasonable expectation of privacy because it revealed the contents of the house.¹⁰⁷ In so doing, the Court rejected the idea that the Fourth Amendment only protected "intimate" activities: "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."¹⁰⁸ Furthermore, Scalia wrote, even though the thermal gun only revealed differential heat in this case, it had the capability of revealing much more, as "[t]he Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate.'"¹⁰⁹ Consequently, the Court held that the use of the thermal heat device did constitute a search, stating that "[w]here as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."¹¹⁰

Scalia's comment about the lady in the sauna certainly reflects a concern that would exist only among the "upper crust" (after all, how many people have saunas in their homes), but the problem is more fundamental. The telling part of *Kyllo* is not the lady, but the caveat of "us[ing] of a device that is not in general public use."¹¹¹ The implication of this statement is that if many people had thermal heat devices, then it would no longer be reasonable to believe that the activities revealed by the device inside the home were private because people would be able to anticipate and protect against it.

¹⁰⁶ *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999), *rev'd*, 533 U.S. 27 (2001).

¹⁰⁷ *Kyllo*, 533 U.S. at 34.

¹⁰⁸ *Id.* at 37.

¹⁰⁹ *Id.* at 38.

¹¹⁰ *Id.* at 40.

¹¹¹ *Id.* at 38.

This perspective was reflected during oral argument in *Kyllo*. In an exchange between Justice Scalia¹¹² and Kenneth Lerner (appearing on behalf of Danny Lee Kyllo), Scalia repeatedly emphasized how a person's reasonable expectation of privacy was related to the measures he could take to protect himself:

QUESTION: Why don't your reasonable expectations include technology? Why don't your reasonable expectations include the fact that you know there are such things as binoculars, so that even if your house is a long distance away from where anybody else can stand, you pull your curtains if you want privacy because you know people have binoculars?

MR. LERNER: Right.

QUESTION: And so also you know there are things such as thermal image, and so if you're really concerned about that degree of privacy, I'm sure there are means of preventing the heat escape from the house, and therefore preventing that technology from being used. Why do we have to assume that we live in a world without technology?

MR. LERNER: We don't have to assume that we do, Your Honor, but technology has the ability to penetrate into our private lives, and that's the problem.

QUESTION: Yes, it does and we have the ability to protect our private lives as well if we really have expectations of privacy.¹¹³

But *who* exactly could do something about it? If someone is a renter, she is unlikely to spend tens of thousands of dollars putting a new roof on a house or investing in extra insulation. And even if she is a homeowner, the odds are that she is unlikely to have the extra resources to do something about it. In other words, the Court has set up a test that provides maximum protection for the rich and does not even see the implications for the poor.

¹¹² Since the transcript did not contain the name of the Justice, the author asked her research assistant to listen to the oral argument. Oral Argument at 20:19, *Kyllo*, 533 U.S. 27 (No. 99-8508), available at http://www.oyez.org/cases/2000-2009/2000/2000_99_8508. In so doing, the research assistant concluded that it was Justice Scalia and then confirmed her conclusion by listening to an interview with Justice Scalia. CNN, *Justice Antonin Scalia Talks About Roe v. Wade*, YOUTUBE (July 18, 2012), http://www.youtube.com/watch?v=Rj_MhS2u-Pk. On a separate occasion, the author then confirmed her research assistant's conclusion by repeating these steps.

¹¹³ Transcript of Oral Argument at 10, *Kyllo*, 533 U.S. 27 (No. 99-8508).

VI. GPS MONITORING

As detailed in this Article, up until this point, the *more* widely available a specific technology, the *less* protection it received under the Fourth Amendment.¹¹⁴ This approach explains the Court's holdings in *Ciraolo* and *Riley* that it was not a search for the Government to look for contraband while flying, or even hovering, over curtilage, but it was a search for the police to use a thermal gun in *Kyllo*.¹¹⁵ Such a distinction would surely baffle the average person because he would undoubtedly find it more invasive to have a government official hovering four hundred feet above his yard in a noisy helicopter than pointing a thermal device at his house for a few minutes from across the street.

Logically, it follows that the “general public use” approach always affected the poor more than the rich because the rich had the ability to protect themselves against the incursions of technology by living in houses, building taller fences, and buying better blinds. New technology, however, has changed all that: The rich cannot shield themselves in the same way that they could from binoculars. Unless elites plan to live off the grid, never own a smart phone, or never buy a new car, they cannot protect themselves from being monitored by GPS.

In *Jones*, the Court grappled with the reality of around-the-clock technological surveillance for the first time.¹¹⁶ The police suspected Mr. Jones of distributing cocaine.¹¹⁷ As part of their investigation, they affixed a GPS tracking device to his wife's car and used it to monitor Jones for twenty-eight days.¹¹⁸ The device allowed the police to establish the car's location within fifty to one hundred feet, which was then passed on to a government cell phone.¹¹⁹ Over the four-week period, the GPS relayed in excess of two thousand pages of data, which was used to convict Jones of

¹¹⁴ See *supra* Part II–V.

¹¹⁵ See *supra* Part III.

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

¹¹⁷ *Id.* at 948.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

multiple drug related offenses.¹²⁰ Jones appealed his conviction on the grounds that use of the GPS device constituted a search under the Fourth Amendment.¹²¹

It was clear from oral argument that the Justices did not approve of the Government's conduct. As the exchange between Chief Justice Roberts and Deputy Solicitor General Michael R. Dreeben quoted at the beginning of this article made abundantly clear,¹²² the Justices did not like what the police had done. Much of that displeasure seemed to focus on the fact that the Justices *themselves* were now vulnerable to government surveillance.¹²³

The conundrum for the Justices, however, was how to find the GPS monitoring unconstitutional *despite* existing Supreme Court jurisprudence.¹²⁴ Scalia's general antipathy for the *Katz* two-part test aside, it is not surprising that he resuscitated the trespass doctrine,¹²⁵ as it gave an easy answer to whether the conduct in question was a search.

It also becomes more understandable why Justice Alito was willing to argue that the Government's observations of Mr. Jones constituted a search *even though* the observations were of conduct that Jones knowingly exposed to the public.¹²⁶ Even if Alito can appeal to the caveat in *Knotts* regarding how "dragnet-type law enforcement practices"¹²⁷ might result in a different constitutional analysis, he still cannot avoid the fact that GPS devices are widely available. A simple Google search for "GPS tracking device" came up with over five million hits, with many advertised for less

¹²⁰ *Id.* at 948–49.

¹²¹ *Id.* at 949.

¹²² See Transcript of Oral Argument, *supra* note 1, at 9–10.

¹²³ *Id.*

¹²⁴ E.g., *Jones*, 132 S. Ct. at 951–53 (distinguishing *Jones* from *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984)).

¹²⁵ *Id.* at 949–50.

¹²⁶ *Id.* at 964 (Alito, J., concurring) ("[R]elatively short-term monitoring of a person's movement on public streets accords with expectations privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." (citation omitted)).

¹²⁷ *United States v. Knotts*, 460 U.S. 276, 284 (1981).

than \$100.¹²⁸ Thus, if Alito follows the holdings of *Ciraolo*, *Riley*, and *Kyllo*, their use by law enforcement should not constitute a search.

At the same time, it makes sense that it was Sonia Sotomayor—a Justice with the experience of being both a racial minority and growing up poor¹²⁹—who was the most comfortable articulating the limitations of the Court’s Fourth Amendment jurisprudence.¹³⁰

VII. CONCLUSION

This Article has argued that the Court’s technology jurisprudence can be best understood as protecting the privacy interests of elites. If this is true, then predicting how the Court will handle future technology cases may not be so difficult. Right now it appears that a majority of the Court may be willing to say that long term GPS tracking is a search even if the tracker was installed without a physical trespass.¹³¹ Yet if a new counter-tracking device becomes publically available, one that is extremely expensive but able to scramble such GPS devices or immediately and irrevocably delete the information, then the Court may no longer deem such long-term GPS tracking a search under the Fourth Amendment. In such a case, the rationale would likely follow that either: (1) if an individual *really* had a subjective expectation of privacy, he would buy such a device to protect himself; or (2) with such a device available in the marketplace, a reasonable person would not believe that she would be protected unless she purchased it, *regardless* of how much it costs. Whatever the future holds, one can expect that the protection of the Fourth Amendment will be dictated to some degree by the biases inherent in human decision-

¹²⁸ GOOGLE SHOPPING, <http://www.google.com/shopping> (last visited Feb. 24, 2013) (search for “GPS tracking device”).

¹²⁹ See, e.g., Scott Shane & Manny Fernandez, *A Judge’s Own Story Highlights Her Mother’s: A Rising Out of Hardship*, N.Y. TIMES, May 27, 2009, at A16.

¹³⁰ *Jones*, 132 S. Ct. at 954–57 (Sotomayor, J., concurring).

¹³¹ Based on the concurrences in *Jones*, Justices Sotomayor, Alito, Ginsburg, Breyer, and Kagan would constitute this hypothetical majority.

making, and more particularly, by the special empathies and interests of the Supreme Court Justices themselves.