

Winter 2013

United States v. Jones: The Foolish revival of the "Trespass Doctrine" in Addressing GPS Technology and the Fourth Amendment

Brittany Boatman

Recommended Citation

Brittany Boatman, *United States v. Jones: The Foolish revival of the "Trespass Doctrine" in Addressing GPS Technology and the Fourth Amendment*, 47 Val. U. L. Rev. 277 (2013).

Available at: <http://scholar.valpo.edu/vulr/vol47/iss2/28>

This Comment is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Comment

UNITED STATES V. JONES: THE FOOLISH REVIVAL OF THE "TRESPASS DOCTRINE" IN ADDRESSING GPS TECHNOLOGY AND THE FOURTH AMENDMENT[†]

I. INTRODUCTION

The Fourth Amendment has generally been interpreted to protect individuals from warrantless government searches and seizures.¹ The Supreme Court's determination as to what constitutes a "search" has become increasingly complex in light of advances in surveillance technology.² During the beeper age, the Court considered whether the government's use of these electronic tracking devices constituted a search.³ However, with the decrease in beeper popularity due to its limited technology, the emergence and widespread use of advanced Global Positioning System ("GPS") technology as a new government

[†] Winner of the 2012 Valparaiso University Law Review Case Comment Competition.

¹ Ramya Shah, Recent Development, *From Beepers to GPS: Can the Fourth Amendment Keep up with Electronic Tracking Technology?*, 2009 U. ILL. J.L. TECH. & POL'Y 281, 282 (2009) (footnotes omitted) ("The Fourth Amendment of the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures by the government. . . . The Fourth Amendment also has been interpreted to generally include a warrant requirement."); see *Katz v. United States*, 389 U.S. 347, 357 (1967) (explaining that searches conducted without court-issued warrants are per se unreasonable under the Fourth Amendment with few exceptions). The Fourth Amendment provides in part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. amend. IV.

² See Patrick B. McGrath, Note, *Tracking Knotts: How GPS Technology Is Influencing Traditional Fourth Amendment Jurisprudence*, 12 J. HIGH TECH. L. 231, 231-33 (2011) (discussing the government's increased usage of electronic tracking devices to increase the efficiency of investigations and the Supreme Court's struggle in interpreting the Fourth Amendment in light of modern surveillance technology).

³ See, e.g., *United States v. Karo*, 468 U.S. 705, 707-10 (1984) (considering whether the government's installation and use of a beeper to gather information concerning a conspiracy to possess and distribute cocaine constituted a "search"); *United States v. Knotts*, 460 U.S. 276, 277-80 (1983) (considering whether the government's use of a beeper to gather information concerning a conspiracy to manufacture controlled substances constituted a search); see also McGrath, *supra* note 2, at 248 (recalling the popularity of beepers in the 1970s and 1980s). Once beepers are attached to an object, they work by emitting "beeping" sounds to indicate that item's location. *Id.* Beeper capabilities are limited in surveillance, however, because of the device's short battery life and limited signal, which requires officers to actively track the device's location. *Id.*

surveillance tool now presents the Court with a novel issue under Fourth Amendment analysis.⁴

Since its decision in *Katz v. United States*, the Court has typically analyzed the government's use of surveillance technology under the Fourth Amendment using the reasonable expectation of privacy test.⁵ In *United States v. Jones*, the Court granted certiorari to determine whether the government's attachment of a GPS device to a vehicle and use of the device to monitor the vehicle's movements constituted a Fourth Amendment search or seizure.⁶ In a surprising opinion,⁷ the Court strayed from recent precedent and analyzed *Jones* under a "trespass test," holding simply that the government's physical intrusion on the

⁴ See Shah, *supra* note 1, at 293. Shah points out how the popularity of beepers used in the 1980s and 1990s has disappeared with the emergence of GPS technology. *Id.* at 283. Shah notes that GPS technology allows law enforcement officers to conduct surveillance with more precision and efficiency because devices can collect data continually without necessitating active police tracking. *Id.* at 289-90. Shah argues that in light of the availability and advanced capabilities of such technology, courts should consider the use of GPS technology as a novel area of law under Fourth Amendment analysis. *Id.* at 293-94. See also Renée McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 414-21 (2007) (providing a brief overview of the advanced capabilities of GPS technology and its uses in law enforcement).

⁵ *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (defining the reasonable expectation test). The Fourth Amendment protects an individual's actual, or subjective, expectation of privacy when society recognizes that expectation as reasonable. *Id.* When that individual's reasonable expectations of privacy are violated, a Fourth Amendment search has occurred. *Id.* at 353 ("[I]t is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable search and seizures[; therefore,] it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."); see, e.g., *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001) (holding that the use of a thermal-imaging device to measure radiation emanating from inside petitioner's home violated the petitioner's reasonable expectation of privacy and constituted a search); *Karo*, 468 U.S. at 711-14, 719 (holding that the government's placement of a beeper into a canister not belonging to the defendant did not violate any legitimate expectation of privacy; however, using the beeper to monitor the canister that was in a dwelling occupied by co-defendants did violate their legitimate expectation of privacy); *Knotts*, 460 U.S. at 281, 285 (holding that the government's use of a beeper to monitor the co-defendant's car on public roads from one place to another did not violate any legitimate expectation of privacy).

⁶ *United States v. Jones*, 132 S. Ct. 945, 948-49 (2012). Although Justice Scalia, writing for the majority, did not consider whether the government's actions constituted a "seizure," Justice Alito considered the issue and concluded the government's actions did not constitute a seizure because the government had not interfered with Jones's possessory rights in the vehicle. *Id.* at 958 (Alito, J., concurring).

⁷ See McGrath, *supra* note 2, at 257-58. McGrath predicted the Supreme Court would find the installation and use of the GPS to monitor a vehicle on public streets was not a search under the Fourth Amendment. *Id.* According to McGrath, the use of electronic tracking devices for vehicle surveillance is constitutional under *Knotts* and *Karo*, because an individual does not have a legitimate expectation of privacy when driving on public roads. *Id.* at 258.

vehicle for surveillance purposes constituted a search under traditional Fourth Amendment interpretation.⁸

This Comment first introduces the facts present in *United States v. Jones*.⁹ Second, this Comment examines the Court's use of the reasonable expectation test and traditional notions of Fourth Amendment privacy in evaluating electronic surveillance technology under the amendment.¹⁰ Finally, this Comment presents the Court's holding in *Jones*, arguing the Court's use of the "trespass doctrine" constituted a misapplication of precedent that ignored the novel and complex issues relating to GPS technology, thus, creating unintended consequences for future Fourth Amendment analysis.¹¹

II. STATEMENT OF THE FACTS IN *UNITED STATES V. JONES*

In 2004, Antoine Jones came under suspicion of narcotics trafficking and became the target of a government investigation.¹² Using information gathered through various surveillance techniques, the government applied for a warrant authorizing the installation and use of an electronic tracking device on Jones's vehicle.¹³ Although a warrant was issued, the police failed to comply with the warrant's stipulations when installing the GPS tracking device.¹⁴ The government closely monitored the vehicle's movements and location over a period of twenty-eight days through voluminous data received from the device.¹⁵

⁸ *Jones*, 132 S. Ct. at 949. *But see supra* note 5 and accompanying text (providing examples of the Court's use of the reasonable expectation of privacy theory in recent cases involving electronic surveillance technology).

⁹ *Jones*, 132 S. Ct. at 948-49.

¹⁰ *See infra* Part III (explaining the traditional notions of Fourth Amendment privacy set forth in precedent).

¹¹ *See infra* Part IV (arguing that the Court misapplied the trespass doctrine in the context of GPS tracking devices).

¹² *Jones*, 132 S. Ct. at 948. The investigation was conducted by both the Federal Bureau of Investigation and the District of Columbia Metropolitan Police Department as a joint task force. *Id.*

¹³ *Id.* Law enforcement agents obtained information through visual surveillance at Jones's place of business and through use of a pen register and wiretap on Jones's cellphone. *Id.* Although the vehicle was registered to Jones's wife, Jones was the exclusive driver of the vehicle. *Id.* at 949 n.2.

¹⁴ *See id.* at 948. The warrant authorized the government to install the tracking device within ten days and in the District of Columbia. *Id.* Government agents did not install the device until the eleventh day and attached the GPS to the undercarriage of the vehicle while it was parked in a public parking lot in Maryland. *Id.*

¹⁵ *Id.* The data, collected by means of satellite signals, established the vehicle's location within fifty to one hundred feet and relayed over 2,000 pages of information over the twenty-eight day period. *Id.*

In 2007, the government obtained an indictment charging Jones with “conspiracy to distribute and possess with intent to distribute” cocaine and cocaine base.¹⁶ At trial, the government introduced evidence collected from the GPS device that connected Jones to the conspiracy.¹⁷ The jury found Jones guilty and the district court sentenced him to life imprisonment.¹⁸ On appeal, Jones argued that the trial court erred in admitting evidence obtained through the government’s warrantless use of the GPS device, which continuously tracked his vehicle for a month.¹⁹ The court of appeals reversed Jones’s conviction, holding that the trial court had based its decision on evidence obtained in violation of the Fourth Amendment.²⁰ The Supreme Court granted certiorari in 2011 to consider whether the installation and use of the GPS device constituted a search.²¹ The following section discusses Fourth Amendment precedent that is relevant to the *Jones* opinion.

III. LEGAL BACKGROUND OF *UNITED STATES V. JONES*

Traditionally, the Supreme Court used a property-based trespass theory when faced with challenges to government surveillance techniques under the Fourth Amendment.²² Under the trespass approach, a search occurred when there had been a physical intrusion on an individual’s “person,” “house,” “papers,” or “effects.”²³ Although the *Katz* Court is credited with repealing the traditional trespass test,²⁴ the

¹⁶ *Id.* Although Jones was previously indicted in 2006 on multiple charges for the same conspiracy, the trial produced a hung jury on the conspiracy count. *Id.*

¹⁷ *Id.* at 948–49.

¹⁸ *Id.* at 949.

¹⁹ *United States v. Maynard*, 615 F.3d 544, 549 (D.C. Cir. 2010), *aff’d in part sub nom. Jones*, 132 S. Ct. at 945.

²⁰ *Maynard*, 615 F.3d at 568. The court, utilizing the reasonable expectation of privacy test, reasoned that the government had violated Jones’s reasonable expectation of privacy by using the GPS device to monitor his movements for an entire month. *Id.* at 563.

²¹ *Jones*, 132 S. Ct. at 948–49.

²² See *Olmstead v. United States*, 277 U.S. 438, 464 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). In *Olmstead*, law enforcement agents placed wiretaps along telephone lines connected to the defendants’ homes and office. *Id.* at 457. When the defendants challenged the government’s use of the wiretaps as a violation of the Fourth Amendment, the Court held that the government’s actions did not constitute a Fourth Amendment search because officers had not trespassed on the defendants’ property when installing the wiretaps. *Id.* at 455, 457. See also Hutchins, *supra* note 4, at 423 (attributing the Court’s theory in *Olmstead* as the first method of dealing with enhanced surveillance technology under the Fourth Amendment).

²³ See *Olmstead*, 277 U.S. at 464, 466.

²⁴ Compare *United States v. Knotts*, 460 U.S. 276, 280 (1983) (“[I]n *Katz* . . . [.] the Court overruled *Olmstead* saying the Fourth Amendment’s reach ‘cannot turn upon the presence or absence of a physical intrusion into any given enclosure.’” (quoting *Katz*, 389 U.S. at

Court questioned the theory in an even earlier opinion.²⁵ In *Silverman v. United States*, the Court explained that the Fourth Amendment secures personal rights, not measurable by notions of property law, of which the most fundamental is the right to privacy from unreasonable government intrusion in the home.²⁶

Nonetheless, *Katz* marked a shift in the Supreme Court's approach to government surveillance techniques under the Amendment when it introduced the reasonable expectation of privacy test.²⁷ The Court's subsequent opinions have adhered to the *Katz* reasonable expectation test when considering the use of surveillance technology.²⁸ However, the Court has also continued to recognize the fundamental privacy-of-the-home theory explained in *Silverman* when deciding these subsequent challenges under the Fourth Amendment.²⁹ For example, in *Kyllo v. United States*, the Court considered the expectation of home privacy when it held that the use of surveillance technology to obtain information from inside the home constitutes a search if that information "could not otherwise have been obtained without physical 'intrusion

353)), with *Katz*, 389 U.S. at 353 ("We conclude that the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.").

²⁵ See *Silverman v. United States*, 365 U.S. 505, 512 (1961) ("But [our] decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law.").

²⁶ *Id.* at 511. In *Silverman*, police officials used a "spike mike" to listen to the conversations taking place in the defendant's house by inserting the mike under the baseboard until it made contact with the heating duct. *Id.* at 506-07. The Court held that the eavesdropping was accomplished by invading the defendant's house and thus constituted a Fourth Amendment search. *Id.* at 511-12. The Court reasoned that the "core" of the Amendment was man's right to be free from unreasonable governmental intrusion in the home, which was "a constitutionally protected area." *Id.*

²⁷ See *Hutchins*, *supra* note 4, at 425-27 (explaining that the Court in *Katz* departed from its earlier reliance on property rights and reformulated its theory to encompass government activity other than common law trespass); see also *supra* note 5 and accompanying text (providing the reasonable expectation of privacy standard derived from *Katz*).

²⁸ See *supra* note 5 and accompanying text (discussing examples of the Court's use of the reasonable expectation test in *Kyllo*, *Karo*, and *Knotts*). In *Katz*, FBI agents attached an electronic listening device to the outside of a public telephone booth where the defendant placed phone calls. *Katz*, 389 U.S. at 348. The Court rejected the government's contention that a search had not occurred because there had been no physical penetration of the telephone booth and reasoned that the Fourth Amendment may extend to that which a man seeks to keep private. *Id.* at 351-53. The Court ultimately held that the government's surveillance activity constituted a search, because it "violated the privacy upon which [the defendant] justifiably relied." *Id.* at 353.

²⁹ See *Alderman v. United States*, 394 U.S. 165, 178, 180 (1969) (interpreting the right adjudicated in *Silverman* as the "Fourth Amendment right to be secure in one's own home" and explaining that the right had not been diminished by the *Katz* holding).

into a constitutionally protected area.”³⁰ The Court rested its decision on the proposition that an individual is presumed to have a reasonable and subjective expectation of privacy in his home.³¹

Similarly, in *United States v. Knotts*, the Court considered the notion of privacy expectations in the home when deciding cases involving electronic tracking devices.³² In *Knotts*, the Court primarily considered whether an individual has a reasonable expectation of privacy when travelling on public roads from one destination to another.³³ However, the Court reasoned that an individual would have a “traditional expectation of privacy” in his home if a device were used to gather information in that area.³⁴ Only one year later, the Court was presented with this issue in *United States v. Karo* and held that a violation of the inherently legitimate expectation of privacy in the home constituted a search under the Fourth Amendment.³⁵

In *Knotts*, however, the Court foresaw the potential issues associated with “twenty-four hour surveillance” but reserved such issues for future

³⁰ *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (quoting *Silverman*, 365 U.S. at 512). In *Kyllo*, the government used thermal-imaging technology to measure radiation emanating from inside the defendant’s house. *Id.* at 29. The Court held the use of the device to obtain information constituted a search. *Id.* at 34–35. The Court reasoned that when applying the *Katz* test to alleged searches of the home, there is an established supposition that a subjective expectation of privacy exists and is also presumed to be reasonable. *Id.* at 34.

³¹ *Id.*

³² *See generally* *United States v. Knotts*, 460 U.S. 276 (1983) (considering whether using a beeper to monitor the defendant in a home violated a reasonable expectation of privacy).

³³ *Id.* at 281–82. In *Knotts*, law enforcement officers planted a beeper in a container, which subsequently ended up in the co-defendant’s vehicle, and then used the beeper to track the vehicle’s movements from the co-defendant’s home to the defendant’s cabin. *Id.* at 278. The Court held the monitoring of the beeper was not a search. *Id.* at 285. The Court reasoned that the co-defendant voluntarily conveyed his movements to the public so that he had no reasonable expectation of privacy. *Id.* at 281–82.

³⁴ *Id.* at 282, 285. Absent an indication that officials had gathered information by monitoring the tracking device while the canister was inside the defendant’s cabin or in the surrounding area, the Court held that the surveillance did not violate any reasonable expectation of privacy. *Id.* at 285; *see also, e.g.,* *Oliver v. United States*, 466 U.S. 170, 179–81 (1984) (distinguishing the curtilage of the home, which is considered part of the home and thus presumed protected under the Fourth Amendment, from “open fields” where society does not recognize an expectation of privacy as reasonable).

³⁵ *United States v. Karo*, 468 U.S. 705, 714 (1984). In *Karo*, law enforcement officials used a beeper, installed in a container of ether owned by the DEA and subsequently transferred to the defendant, to monitor the container’s movements and locate it in a house occupied by the co-defendants. *Id.* at 708–10. The Court first held that the installation of the beeper did not constitute a search because the defendant had no legitimate expectation of privacy in a container belonging to the DEA. *Id.* at 711. Conversely, the Court held monitoring the beeper inside the house occupied by the codefendants constituted a search by recognizing that “private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.” *Id.* at 714–15.

analysis.³⁶ In recent years, lower courts have attempted to interpret the “*Knotts* exception” when analyzing government use of GPS technology under the Fourth Amendment.³⁷ Prior to the Court’s decision in *Jones*, circuit courts disagreed as to whether warrantless government use of GPS tracking technology constituted a search.³⁸ In 2011, the Supreme Court granted certiorari in *Jones* to determine whether the attachment of a GPS tracking device to an individual’s vehicle and subsequent use of that device to monitor the vehicle’s movements on public roads constitutes a Fourth Amendment search.³⁹

IV. ANALYSIS OF THE DECISION IN *UNITED STATES V. JONES*

A. *The United States v. Jones Opinion*

In a 5-4 decision,⁴⁰ the Supreme Court held that the government’s installation of a GPS tracking device on an individual’s vehicle and

³⁶ *Knotts*, 460 U.S. at 283-84 (“[I]f such drag-net-type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.”).

³⁷ See McGrath, *supra* note 2, at 250-56 (discussing the role GPS technology plays in federal circuit courts interpreting the “*Knotts* exception” to determine whether GPS surveillance constitutes a search); see, e.g., *United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010), *aff’d in part sub nom. United States v. Jones*, 132 S. Ct. 945 (2012). On *Jones*’s appeal, the court held that *Knotts* did not control, because the government’s use of a GPS device to track *Jones*’s movements for twenty-four hours each day over a twenty-eight day period fell within the “dragnet” type of surveillance reserved in that decision. *Id.* at 555-56, 558.

³⁸ Compare *Maynard*, 615 F.3d at 555-56 (holding that the government’s warrantless use of a GPS device attached to the defendant’s car to track the vehicle’s movements twenty-four hours a day for four weeks amounted to a Fourth Amendment search), and *United States v. Pineda-Moreno*, 591 F.3d 1212, 1214, 1217 (9th Cir. 2010), *vacated*, 132 S. Ct. 1533 (2012) (holding the government’s warrantless use of a “mobile tracking device” attached to the defendant’s vehicle to monitor its location over a four month period did not amount to a Fourth Amendment search), with *United States v. Garcia*, 474 F.3d 994, 995, 998 (7th Cir. 2007) (holding the government’s warrantless use of a GPS device attached to the defendant’s vehicle to track its movement did not constitute “mass surveillance” and thus did not amount to a Fourth Amendment search). See generally McGrath, *supra* note 2, at 250-56 (providing an in-depth discussion of the circuit split regarding warrantless use of GPS devices in government investigations).

³⁹ *Jones*, 132 S. Ct. at 948-49. While the Court presented the issue as whether the government’s actions constituted “a search or seizure within the meaning of the Fourth Amendment,” the majority opinion focused only on whether that activity had amounted to a “search.” *Id.* at 948-54.

⁴⁰ The majority in *Jones* consisted of Justice Scalia, who delivered the opinion of the court, Chief Justice Roberts, and Justices Kennedy, Thomas, and Sotomayer. *Id.* at 948. Justice Sotomayer also filed a concurring opinion. *Id.* at 954. Justice Alito filed an opinion concurring in the judgment in which Justices Ginsburg, Breyer, and Kagan joined. *Id.* at 957.

subsequent use of the device to monitor the vehicle's movements constituted a Fourth Amendment search under the "trespass test."⁴¹ Justice Scalia, writing for the majority, began by providing text from the Fourth Amendment and proposed that a vehicle is undisputedly an "effect" as enumerated therein.⁴² Justice Scalia claimed the government physically occupied a constitutionally protected area when installing the device to obtain information and further maintained that such an intrusion would have been considered a search at the time the Fourth Amendment was adopted.⁴³ In support of his argument, Justice Scalia construed the Fourth Amendment to reflect an intimate connection with property rights and used earlier Court opinions to illustrate his interpretation.⁴⁴

After a brief explanation of the reasonable expectation of privacy test set forth in *Katz*, the Court rejected the government's argument that its installation and use of the GPS device did not constitute a search under such test.⁴⁵ Justice Scalia urged that fundamental Fourth Amendment principles encompassed Jones's rights against unreasonable searches so that the *Katz* test was irrelevant.⁴⁶ Justice Scalia, citing to the Court's *Kyllo* opinion for support, stated that the Court should preserve, at minimum, the degree of privacy afforded to individuals at the time the Amendment was adopted.⁴⁷ Justice Scalia also utilized the Court's opinion in *Alderman v. United States* to further argue that *Katz* did not do away with the Fourth Amendment's concern for governmental trespass on the areas enumerated in the provision.⁴⁸

⁴¹ *Jones*, 132 S. Ct. at 949.

⁴² *Id.*; see *supra* note 1 and accompanying text (providing the text of the Amendment quoted in the Court's opinion).

⁴³ *Jones*, 132 S. Ct. at 949, 950 n.3.

⁴⁴ *Id.* at 949-50. Specifically, Justice Scalia cited to *Olmstead v. United States*, where the Court held that the government's use of wiretaps did not constitute a Fourth Amendment search because there was "no entry of the houses or offices of the defendants." *Id.* at 950 (quoting *Olmstead v. United States*, 277 U.S. 438, 464 (1928)).

⁴⁵ *Id.* at 950. The government argued that Jones did not have a socially recognizable expectation of privacy in the exterior of the vehicle, where the GPS device was attached, or in the vehicle's movement on public roads, because both were visible to the public. *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* In *Kyllo*, the Court held that the use of a thermal-imaging device to measure heat emanating from inside the defendant's home constituted a search. *Kyllo v. United States*, 533 U.S. 27, 29, 34 (2001). The portion of the *Kyllo* opinion cited referred directly to the Court's longstanding recognition of a reasonable expectation of privacy in the home. *Id.* at 34.

⁴⁸ *Jones*, 132 S. Ct. at 950-51. For support, Justice Scalia cited to *Alderman* for the proposition that *Katz* did not diminish Fourth Amendment protection afforded to the home. *Id.* at 951. In further supporting his proposition, Justice Scalia quoted the concurrence in *Knotts*, providing that "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion

Further, Justice Scalia also distinguished both *Knotts* and *Karo* from Jones's situation on the basis that the trespass test had not been applicable in those previous cases where the government did not intrude on defendants' persons, homes, papers, or effects.⁴⁹ In discussing the *Knotts* decision, Justice Scalia argued that the *Katz* reasonable expectation of privacy test utilized in *Knotts* was meant to supplement the trespass test, rather than replace it, when common-law trespass was not at issue in a Fourth Amendment case.⁵⁰ Additionally, Justice Scalia also regarded the Court's decision in *Oliver v. United States* as inapplicable to Jones, because it involved a governmental intrusion on an "open field" rather than a constitutionally protected area like that in *Jones*.⁵¹ Finally, Justice Scalia criticized Justice Alito's insistence on exclusively applying the reasonable expectation of privacy test in Fourth Amendment analysis.⁵² Such an exclusive approach, Justice Scalia argued, would create complex issues that are unnecessary to consider when the traditional trespass test applies.⁵³

may constitute a violation of the Fourth Amendment." *Id.* (Brennan, J., concurring) (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983)). That portion of the *Knotts* opinion referred directly to the Court's holding in *Silverman*. See *Knotts*, 460 U.S. at 286 (Brennan, J., concurring) (referencing the *Silverman* opinion).

⁴⁹ *Jones*, 132 S. Ct. at 951–52. Justice Scalia contended that Jones's situation differed from the defendants in *Knotts* and *Karo* because he possessed the vehicle at the time the government attached the tracking device, while the defendants in *Knotts* and *Karo* did not possess the containers at the time of the beeper installation. *Id.*

⁵⁰ *Id.* at 952. In her concurring opinion, Justice Sotomayor proposed a framework for determining when to apply either the trespass or the reasonable expectation test. *Id.* at 955 (Sotomayor, J., concurring). Under this framework, government surveillance techniques involving a physical trespass should be analyzed under the trespass test, while "novel" forms of surveillance not requiring a physical trespass should be analyzed under the *Katz* test. *Id.*

⁵¹ *Id.* at 953. In *Oliver*, the Court clarified that "open fields," as distinguished from the "curtilage" immediately surrounding the home, are not constitutionally protected under the Fourth Amendment because they do not entail a reasonable expectation of privacy. *Oliver v. United States*, 466 U.S. 170, 173, 180 (1984). In *Jones*, Justice Scalia distinguished the open field doctrine at issue in *Oliver* from constitutionally protected areas, such as the home or an effect, to demonstrate the significance of the government's intrusion on Jones's vehicle under the Fourth Amendment. *Jones*, 132 S. Ct. at 953.

⁵² *Jones*, 132 S. Ct. at 953–54. In an opinion concurring in the judgment, Justice Alito applied the *Katz* reasonable expectation of privacy standard to *Jones* and concluded the government's activity constituted a search. *Id.* at 958, 964 (Alito, J., concurring). Justice Alito reasoned that long-term GPS surveillance used in a typical criminal investigation, such as the *Jones* case, differs from the short-term electronic tracking like that in *Knotts* and violates reasonable expectations of privacy. *Id.* at 964.

⁵³ *Id.* at 953–54. Justice Scalia specifically argued that the concurrence's analysis under *Katz* would cause the Court to deviate from Fourth Amendment jurisprudence to consider new factors. *Id.* at 954. But see *id.* at 961–62 (Alito, J., concurring) (discussing issues found in the Court's reasoning). Justice Alito argued the majority's reliance on the trespass test

B. *Appraisal of the United States v. Jones Trespass Test*

In applying the “trespass test” to the facts presented in *Jones*, the Supreme Court alluded to the *Olmstead v. United States* doctrine.⁵⁴ However, the Court also borrowed the phrase “constitutionally protected area” from the *Silverman* Court in discussing Jones’s rights under the Fourth Amendment.⁵⁵ Further, in supporting its application of the trespass test, the Court continually referenced the principle set forth in *Silverman* concerning an individual’s fundamental right to privacy in his home.⁵⁶ Thus, although the Court revived the old trespass language in *Olmstead*, the Court’s use of precedent created an inference that the doctrine encompassed only the Fourth Amendment’s deference to sanctity of the home. However, the Court attempted to fit *Jones* within the bounds of this protection by comparing the government’s physical intrusion on Jones’s effects to a governmental intrusion on a home rather than an “open field.”⁵⁷ When the Court categorized Jones’s vehicle as an effect and compared it to the home, it implied that a vehicle should receive the same degree of protection from governmental intrusion as the home under the Fourth Amendment.⁵⁸

would present difficult problems in future cases involving electronic surveillance accomplished without a physical trespass. *Id.* at 962.

⁵⁴ See *supra* notes 22, 24 and accompanying text (providing the holding in *Olmstead* under the trespass test and the holding in *Katz* overruling the application of that trespass doctrine in Fourth Amendment jurisprudence).

⁵⁵ Compare *Jones*, 132 S. Ct. at 950 n.3 (“[T]he Government obtains information by physically intruding on a constitutionally protected area . . .”) (emphasis added), with *Silverman v. United States*, 365 U.S. 505, 512 (1961) (stating that the decision in *Silverman* was “based upon the reality of an actual intrusion into a constitutionally protected area”) (emphasis added).

⁵⁶ Justice Scalia utilized language from *Alderman* to establish that *Katz* had not eroded the strong protection afforded to the home under the Fourth Amendment. *Jones*, 132 S. Ct. at 951. Justice Scalia also cited a portion of *Kyllo* that referred to the Court’s longstanding recognition of a reasonable expectation of privacy in the home. *Id.* at 950. Further, Justice Scalia cited the concurrence in *Knotts*, which used *Silverman* to illustrate that a physical intrusion on a “constitutionally protected area” may constitute a search. *Id.* at 951. See *supra* note 26 and accompanying text (providing a synopsis of the issue in *Silverman*); *supra* note 29 and accompanying text (noting the Court’s recognition that *Silverman* was concerned with the Fourth Amendment right to privacy in the home).

⁵⁷ See *Jones*, 132 S. Ct. at 953 (distinguishing Jones’s situation from *Oliver v. United States*); *supra* note 51 and accompanying text (discussing Justice Scalia’s use of *Oliver* to establish that an open field does not receive the same constitutional protection as an individual’s home or effects like the vehicle in *Jones*).

⁵⁸ See *Jones*, 132 S. Ct. at 949 (holding that a vehicle is undisputedly an effect under the Fourth Amendment without further analysis); see also *id.* at 949, 953 (referring to Jones’s vehicle as an effect enumerated in the Fourth Amendment, just as a home is also enumerated therein).

The theory that the Fourth Amendment protects an individual's right to privacy from unreasonable governmental intrusion in his home has been reinforced throughout Fourth Amendment jurisprudence.⁵⁹ However, the Court in *Jones* used the trespass test to expand the theory to include one's vehicle without providing adequate support for its action.⁶⁰

C. *Consequences of the United States v. Jones Opinion*

The Supreme Court's misapplication of precedent in *United States v. Jones* has effected a revival of the repealed trespass doctrine.⁶¹ In a recent opinion from the Southern District of Florida, the court applied both the trespass and reasonable expectation of privacy test to determine whether the government's installation of a GPS tracking device on an individual's vehicle constituted a Fourth Amendment search.⁶² Despite the Supreme Court's attempt to simplify Fourth Amendment analysis in cases

⁵⁹ See generally *supra* Part III (discussing the Court's tendency to consider privacy expectations in the home as reasonable in its decisions concerning the government's use of surveillance under the Fourth Amendment).

⁶⁰ Compare *Jones*, 132 S. Ct. at 950 ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates.") (emphasis added), and *id.* at 949 ("It is beyond dispute that a vehicle is an 'effect' as that term is used in the [Fourth] Amendment."), with *Kyllo v. United States*, 533 U.S. 27, 34 (2001) ("[I]n the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*."), and *United States v. Karo*, 468 U.S. 705, 714-15 (1984) ("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. . . . Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances."). But see *United States v. Knotts*, 460 U.S. 276, 281 (1983) ("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 effects." (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion))).

⁶¹ See *United States v. Hanna*, No. 11-20678-CR., 2012 WL 279435, at *3 (S.D. Fla. Jan. 30, 2012) (recognizing the "re-emergence of a trespass theory for Fourth Amendment searches" in *United States v. Jones*); *supra* note 24 and accompanying text (providing the text in *Katz* overruling the trespass doctrine).

⁶² *Hanna*, 2012 WL 279435, at *3-4. In *Hanna*, the court held that the governmental intrusion did not constitute a search under the trespass theory, because neither defendant had a property interest in the vehicle. *Id.* at *3. The court further held that there was no search under the reasonable expectation of privacy test, because neither defendant had a legitimate expectation of privacy in a vehicle in which he did not have ownership or possessory interests. *Id.* at *4.

involving a trespass, it seems courts will now have difficulty in determining which standard to apply.⁶³

V. CONCLUSION

In the wake of the *Knotts* exception, legal commentators and professionals hoping for a clear resolution to the role of GPS technology under the Fourth Amendment will likely find themselves disappointed by the majority in *United States v. Jones*.⁶⁴ While the Supreme Court recognized that the dragnet surveillance reserved in *Knotts* was at issue in *Jones*, the Court failed to consider the novelties of GPS technology altogether when reaching its decision.⁶⁵ Rather, the Court attempted to simplify future Fourth Amendment analysis by foolishly reviving an outdated doctrine in an age consumed with ever-advancing technology.⁶⁶ Ironically, the Court's holding correctly reflected societal privacy expectations regarding GPS surveillance. Contrary to the Court's intent, the revived trespass doctrine will likely further complicate Fourth Amendment analysis.

Brittany Boatman*

⁶³ See *Jones*, 132 S. Ct. at 954 (noting that potential "vexing problems" with GPS surveillance are irrelevant where a "classic trespassory search" is involved); see also *supra* note 50 and accompanying text (providing Justice Sotomayor's proposed framework for determining when to apply the trespass test rather than the reasonable expectation test).

⁶⁴ See McGrath, *supra* note 2, at 256-57 (predicting that the Supreme Court's decision in *Jones* would resolve the circuit court split regarding warrantless GPS technology and clearly interpret the "*Knotts* exception").

⁶⁵ See *Jones*, 132 S. Ct. at 952 n.6 (recognizing that the kind of surveillance made possible by GPS devices fell within the "dragnet-type law enforcement practices" reserved in *Knotts* for later analysis).

⁶⁶ In *Kyllo*, Justice Scalia himself, writing for the majority, stated that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001).

* J.D. Candidate, Valparaiso University Law School (2014). I would like to thank my family, friends, and loved ones for their constant love, support, and encouragement. My law school experience would not have been possible without you.