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United States v. Jones: Big Brother and the "Common Good" versus the Fourth Amendment and Your Right to Privacy

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ARTICLE

UNITED STATES V. JONES: BIG BROTHER AND THE "COMMON GOOD" VERSUS THE FOURTH AMENDMENT AND YOUR RIGHT TO PRIVACY

By Melanie Reid[*]

I. Introduction

In the center of the town of Siena, Italy, lays the Palazzo Publico which was built between 1297 and 1310. Inside the Palazzo Publico is the Sala della Pace, the Hall of Peace, which houses an early piece of Italian secular art- a fresco that illustrates the effect government has on the city, its people, and the countryside.[1] The painter, Ambrogio Lorenzetti, depicted the "Common Good" as a king, sitting tall and strong above a line of smaller-sized, everyday people who are slowly making their way towards the "Common Good."[2] This picture represents the subordination of private interest to the common good.[3]

Lorenzetti, who painted the fresco between 1338 and 1339, was one of the first of many who began to ponder what makes a good government;[4] he concluded that all citizens must make personal sacrifices for the common

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[1] MARIA LUISA MEONI, UTOPIA AND REALITY IN AMBROGIO LORENZETTI'S GOOD GOVERNMENT 9 (2005).

[2] *Id.* at 16.

[3] *Id.*

[4] *Id.* at 13.

good of the town.[5] Most modern day democracies struggle with the concept of the rights of individuals versus the needs of the state. In light of rapid technological advancement of the past fifty years, one of the biggest issues citizens of the world face today is whether to sacrifice some right to privacy for the common good, so that the scales of Justice may remain in balance and to promote the order Lorenzetti painted centuries ago.

In 1787, the United States Constitution was drafted to establish mechanisms for an effective federal government, which would become the "Common Good". However, the Constitution contained few guarantees as to what private interests would be protected in this new government. Without the protection of individual rights, this new central government had the potential to create tyranny and transform into a police state of some sort. James Madison stated that a declaration of rights would help install the judiciary as "guardians" of individual rights.[6] And so, in 1789, the first Congress proposed 12 amendments to the Constitution. The Fourth Amendment was the most important of these for the protection of privacy rights.

This article will trace the evolution of Fourth Amendment law, what constitutes a "search" which evolved from English property law and notions of trespass, to the reasonable expectation of privacy under *United States v. Katz*.[7] The Supreme Court's recent decision in *United States v. Jones*,[8] which relied upon historical property law, impacts law enforcement's future ability to use tracking devices, especially when exigent

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[5] *Id.* at 16.

[6] John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1394-95 (1997) (citing James Madison, Remarks to the House of Representatives (June 8, 1789), *in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY REVIEW (1971)).

[7] Katz v. United States, 389 U.S. 347 (1967).

[8] 132 S. Ct. 945 (2012).

circumstances exist.[9] The *Jones* case forces law enforcement and the courts to reevaluate the extent of an individual's right to privacy in the age of new technology and the complications this may have on the ability of law enforcement to utilize warrantless electronic monitoring, technical surveillances, and other investigative techniques.

The Supreme Court's unanimous decision in *Jones* based its decision on early Fourth Amendment law; therefore, Part II of this article will provide a brief overview and history of the Fourth Amendment and the concerns of the Framers. It is important to review what constitutes a "search" under the Fourth Amendment and provide a history of how the Court has viewed tracking devices and other law enforcement tools that enhance criminal investigations.

Part III of this article will examine the *Jones* decision and its impact on law enforcement, as trespass is now considered an additional argument towards what is considered a "search." The *Jones* decision raises legal and ethical issues for law enforcement working with companies such as OnStar, which allow for monitoring without installation, any type of factory- or owner-installed tracking device, or GPS-enabled smartphones and raises issues for law enforcement who find themselves in exigent circumstances without the ability to place tracking devices on automobiles and other such "effects." The *Jones* decision may also have implications on other investigatory tools, such as trash pulls, stationary cameras, open fields, and undercover agent or informant non-consensual recordings.

Part IV will explore private investigators' tort liability, specifically the tort of trespass and invasion of privacy, which can, in turn, enlighten the discussion as to the impact of *Jones* on law enforcement. Post-*Jones*, the Supreme Court should consider similar trespass and

[9] *Id.*

privacy laws but in the civil context. Private investigators frequently utilize similar techniques and resources which are the stock and trade of law enforcement, but private investigators are governed by state licensing requirements. Private investigators are also concerned with potential civil tort liability and the admissibility of evidence collected by them in any future criminal proceeding.

Previously, the rules which govern trespass in a criminal context and civil proceeding were quite different. The decision in *Jones* brings the common law tort of trespass back into the criminal context. It can be argued that there is an unwarranted dichotomy between what the public, e.g., private investigator, is entitled to view versus what law enforcement is entitled to view. The torts of "trespass" and "invasion of privacy" used in the civil, public context may now come into the forefront in determining similar legal guidelines and constraints for law enforcement. Investigative techniques such as open fields, aerial surveillance, trash searches, undercover recordings, and database searches may now be scrutinized under the tort "trespass" theory.

The Court acknowledged in *Jones* that there may be an "end to privacy" and the law of trespass may take its place as society's subjective expectations of privacy are becoming more and more reduced.[10] This article will discuss the relationship between Fourth Amendment law for public officers, tort law for private investigators, and the impact of *Jones* in their respective duties and investigatory behavior. The trespass model should be considered in the application of other methods of investigation, and due to the ever-fluctuating state of individual privacy expectations, an analysis similar to the tort of invasion of privacy should supplement the *Katz* analysis.

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[10] *Jones*, 132 S. Ct. at 962.

II. The Fourth Amendment and What Constitutes a "Search"

When drafting the Fourth Amendment, the Framers were concerned with the exercise of discretionary authority by public officers and abusive warrants, such as writs of assistance and general warrants.[11] The Framers wanted to ensure that the right to privacy extended to an individual's home; they recalled the practice of British customs agents who were authorized via the writs of assistance to search colonists' homes for taxable goods which included small items such as salt, soap, paper, and glass.[12] The writ was effective during the entire lifetime of the reigning sovereign, and the delegation to the official to enforce the writ was absolute and unlimited. Therefore, the Framers believed the chief evil was the physical entry into one's home without a proper warrant.[13] To rectify this abuse, henceforth, any intrusion into one's home without a warrant, i.e., without judicial scrutiny, would constitute a "search" and a violation under the Fourth Amendment.

The Framers decided the Fourth Amendment would apply to "persons, houses, papers, and effects."[14] Scholars, over the years, determined that the Fourth Amendment contains three separate requirements: a warrant requirement, a reasonableness requirement, and a particularity requirement.[15] The Fourth Amendment does not explicitly discuss an individual's right to privacy.

While courts may remain confident that any warrantless, government-sponsored intrusion into the home would violate the Framer's intent behind the Fourth Amendment, new technologies have evolved that now

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[11] 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 52 (5th ed. 2010).
[12] *Id.*
[13] *Id. at 53.*
[14] *Id.*
[15] *Id.* at 50-51.

allow law enforcement to secure evidence within the home without physically entering the home. The question now being considered is whether this non-intrusive government technique qualifies as a "search" and if so, whether this "search" triggers the warrant requirement of the Fourth Amendment.

The courts originally looked to property law and the common law tort of trespass to frame what constitutes a "search." In *Boyd v. United States*,[16] the Supreme Court quoted Lord Camden, stating "every invasion of private property, be it ever so minute is a trespass."[17] The Court also used "trespass" as a trigger for the Fourth Amendment to apply when it reviewed the case against Roy Olmstead, who ran a large bootleg operation in the Puget Sound area.[18] Olmstead, a former police lieutenant, sold a substantial amount of illegal liquor in the Seattle, Washington area after the Volstead Act was passed in 1925.[19] Olmstead sold his liquor out of an office in downtown Seattle and had six telephone numbers that buyers could use to contact his operation.[20]

Prohibition Bureau agents wiretapped the phones in Olmstead's office and home by placing devices in the basement of his office and in phone installations near his and other employees' homes.[21] The Ninth Circuit upheld Olmstead's eventual conviction.[22] Justice Taft later wrote

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[16] 116 U.S. 616 (1886).
[17] *Id.* at 627.
[18] Olmstead v. United States, 277 U.S. 438, 455-56 (1928).
[19] *Id.*
[20] *Id.* at 456.
[21] *Id.* at 456-57.
[22] Olmstead v. United States, 19 F.2d 842 (Wash. Ct. App. 1927). Justice Frank H. Rudkin dissented and wrote:

> What is the distinction between a message sent by letter and a message sent by telegraph or by telephone? True, the one is visible, the other invisible; the one is tangible, the other intangible; the

the Supreme Court's majority opinion in *Olmstead*, Taft relied upon the trespass precedent, stating that the wiretapping that occurred outside Olmstead's office and home did not constitute a "search" under the Fourth Amendment because there was no trespass or no physical invasion of a protected location such as the home or office.[23]

> one is sealed, and the other unsealed; but these are distinctions without a difference. A person using the telegraph or telephone is not broadcasting to the world. His conversation is sealed from the public as completely as the nature of the instrumentalities employed will permit, and no federal officer or federal agent has a right to take his message from the wires, in order that it may be used against him. Such a situation would be deplorable and intolerable, to say the least. Must the millions of people who use the telephone every day for lawful purposes have their messages interrupted and intercepted in this way? . . . If ills such as these must be borne, our forefathers signally failed in their desire to ordain and establish a government to secure the blessings of liberty to themselves and their posterity.

Id. at 850 (Rudkin, J dissenting).

[23] *Olmstead*, 277 U.S. at 465. Justice Taft explains:

> 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 house or offices of the defendants. . . The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

Id. at 464-66.

This rationale held firm in the *Goldman*[24] case in 1942 and the *Silverman* case of 1961.[25] In *Goldman*, agents placed a detectaphone[26] against the outside wall of an office and monitored the conversation from the outside wall using the detectaphone.[27] The Court found that there had been no physical trespass into the office, and therefore, there was no search or seizure.[28] In *Silverman*, a spike mike was inserted into the wall of an adjoining row house to capture Silverman's conversations.[29] Since the mike made contact with the targeted row house's heating duct, the Court found that a physical intrusion occurred which constituted a search under the Fourth Amendment.[30]

The year 1967 began the *Katz* revolution, which fundamentally altered the Court's understanding of Fourth Amendment privacy protections.[31] Katz, a professional gambler, used a bank of telephones on Sunset Boulevard to place bets for himself and others.[32] The Federal Bureau of Investigation ("FBI") attached a tape recorder to the roof of the middle phone booth, placed a microphone on the back of two of the booths and attached an "out of order" sign on the other booth.[33] Since the FBI placed the listening device on the outside of the phone booth, the government could argue there was no physical intrusion, no trespass, inside

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[24] Goldman v. United States, 316 U.S. 129 (1942).
[25] Silverman v. United States, 365 U.S. 505 (1961).
[26] A detectaphone is a telephonic apparatus with an attached microphone transmitter used especially for listening secretly. *Detectaphone – Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/detectaphone (last visited June 18, 2012).
[27] *Goldman*, 316 U.S. at 131-32.
[28] *Id.* at 134.
[29] *Silverman*, 365 U.S. at 506.
[30] *Id.* at 511-12.
[31] *Katz*, 389 U.S. at 347.
[32] *Id.* at 348.
[33] Brief of Petitioner at *5, Katz v. United States, 389 U.S. 347 (1967) (No. 35), 1967 WL 113605.

the booth.[34] Justice Stewart disagreed and seemed to overturn years of Fourth Amendment law by arguing the Fourth Amendment protected "people, not places."[35] It did not matter whether the device was placed inside or outside the booth, "what a person seeks to preserve as private even in an area accessible to the public may be constitutionally protected."[36] Justice Harlan, in his concurrence, set the stage for future Fourth Amendment cases. The pertinent question for future Fourth Amendment cases was to become whether the governmental action violated the defendant's subjective expectation of privacy and if so, was that expectation of privacy one that society considers reasonable.[37]

Law enforcement's invasion of privacy in the 18th century was limited to physical searches of homes and businesses. Once technology advanced, the Court seemed to abandon the tort of trespass as the sole standard, and the invasion of property was now possible without an accompanying trespass. Police now have the ability to invade one's privacy through wiretaps, informant or undercover recordings, pen registers, aerial surveillance, trash searches, thermal imaging, tracking devices, etc.

By the 20th century, the trespass doctrine alone provided inadequate protection of Fourth Amendment rights because technology had reached the point that it was now possible for law enforcement to intercept communications and monitor individuals without the requirement of physical trespass. The trespass doctrine was substituted for *Katz* in 1967, which said that a violation of the Fourth Amendment occurs when government officers violate a "reasonable expectation of privacy."[38] Under

[34] *Katz*, 389 U.S. at 352.
[35] *Id.* at 351.
[36] *Id.* (internal citations omitted).
[37] *Id.* at 360-62 (Harlan, J. concurring).
[38] *Id.* at 360 (Harlan, J. concurring).

Katz, the expectation of privacy doctrine was born, and using this new analysis, the Court decided what constituted a "search"[39] under the Fourth Amendment.[40]

III. The *Jones* decision and its Impact on Law Enforcement

As the Court began to consider various investigatory tools and whether these tools constituted a "search" that would require a warrant, the issue of electronic beepers and tracking devices arose. In *United States v. Knotts*,[41] police placed a radio transmitter[42], also called a beeper, in a container and traced the beeper in the

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[39] Kyllo v. United States, 533 U.S. 27, 37 at n. 4 (2001) (use of thermal imaging is a "search"); United States v. Dunn, 480 U.S. 294, 300 (1987) (trespassing on curtilage is a "search"); *Katz*, 389 U.S. at 358 (wiretapping is a "search").

[40] Florida v. Riley, 488 U.S. 445, 451 (1989) (aerial surveillance is not a "search"); California v. Ciraolo, 476 U.S. 207, 215 (1986) (aerial surveillance is not a "search"); California v. Greenwood, 486 U.S. 35, 40-41 (1988) (looking through trash is not a "search"); Oliver v. United States, 466 U.S. 170, 183 (1984) (says searches of open fields is not a 4th Amendment violation but searches of curtilage would be a violation); Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (use or inspection of pen registers is not a "search"); Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 55 (1974) (looking at bank records is not a "search"); United States v. White, 401 U.S. 745, 753-54 (1971) (use of false friends or wired confidential informants are not "searches"); United States v. Lee, 274 U.S. 559, 563 (1927) (use of searchlights does not create a "search" that implicates the 4th Amendment); United States v. Wright, 449 F.2d 1355, 1363 (D.C. Cir. 1971) (use of a flashlight did not create a search, but was a plain view search); People v. Vermouth, 116 Cal. Rptr. 675, 680 (Cal. Ct. App. 1974) (use of binoculars to confirm what is seen with unaided observation is not a "search").

[41] United States v. Knotts, 460 U.S. 276, 277 (1983).

[42] A radio transmitter, which is usually battery operated, emits periodic signals that can be picked up by a radio receiver. Marshall Brian, *How Radio Works*, HOW STUFF WORKS, http://howstuffworks.com/radio.htm (last visited August 6, 2012).

container to Knotts' cabin.[43] The Court focused on the site of the information disclosed by the beeper.[44] The Court held this monitoring did not constitute a search under the Fourth Amendment, since the beeper disclosed the location of the container in public places and revealed nothing to the police about the interior of Knotts' cabin.[45]

In *United States v. Karo*,[46] the Court addressed the issue of whether the installation of a beeper in a container constituted a "search" if the original owner gave consent to the monitoring yet the buyer had no knowledge of the presence of the beeper.[47] In this instance, the Court found that the person who possessed the container at the time of the installation was the confidential informant; therefore, the police had the consent of the owner prior to installing the tracking device.[48] This is the first mention of installation possibly triggering the Fourth Amendment.[49]

The Court also considered the monitoring of the container as it moved from a public area to inside a private residence as it had in *Knotts*.[50] Since the beeper in *Karo* disclosed information not available from visual surveillance but rather revealed critical facts about the interior of the premises, the Court decided the monitoring violated the Fourth Amendment.[51] The Court felt that requiring a warrant to monitor private areas would have the effect of ensuring that the use of electronic beepers or tracking devices would not be abused.[52]

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[43] *Knotts*, 460 U.S. at 277.
[44] *Id.* at 281-82.
[45] *Id.* at 285.
[46] 468 U.S. 705 (1984).
[47] *Id.* at 707.
[48] *Id.* at 711.
[49] *Id.* at 713.
[50] *Id.* at 713-14.
[51] *Id.* at 714.
[52] *Id.* at 716.

Knotts and *Karo* created the framework for law enforcement to follow when using electronic beepers and tracking devices. Tracking devices were divided into "slap-on" devices which are battery operated and placed on the undercarriage of vehicles, and devices that are installed or hard wired into the car so that the device no longer needs a battery. Monitoring also became divided into two areas: those instances in which there would only be monitoring in public places and those with monitoring in private areas.

Congress gave the courts the authority to review warrants for mobile tracking devices in Title 18, United States Code, section 3117. In instances in which the tracking device was to be installed or hard wired into the car and/or instances in which the tracking device was to monitor private areas, a warrant containing probable cause was needed.[53] Thus, the only time law enforcement would not be required to seek a court order would be in a situation where a "slap-on" tracking device would be used or law enforcement intended to monitor only public areas.

Knotts and *Karo* were decided in the 1980's and much has changed in tracking device technology. Law enforcement used to place a tracking device on a vehicle and follow a blip on the screen as they attempted to maintain surveillance a block or two away. The global positioning system (GPS) tracking technology that the Court in *Jones* examined in 2012 is much more sophisticated and extensive.[54] The Court was suddenly faced with advanced technology and the only area of tracking device law still in dispute was the warrantless utilization of a "slap-on" device and the monitoring of only public areas. Many assumed the Court would follow the D.C. Circuit court's argument and use the mosaic theory of privacy to justify a warrant requirement. Under the mosaic theory of privacy, extensive monitoring of a vehicle for

[53] 18 U.S.C. § 3117 (2012).
[54] United States v. Jones, 132 S.Ct. 945 (2012).

twenty-eight days constituted more than just a day's surveillance of a vehicle in public thoroughfares and when all of the vehicle's movements were taken together after the twenty-eight day period, the defendant had a reasonable expectation of privacy in the sum of his movements.[55]

Instead, the majority of the Court chose a different route. The Court explained that it had never truly abandoned the argument that a physical trespass triggers the Fourth Amendment, but that the centuries-old torts of trespass to land and trespass to chattel merely supplemented the *Katz* reasonable expectation of privacy analysis.[56] Therefore, utilizing a "slap-on" tracking device constitutes a "search" because it is a trespass of a person's "effect", chattel, which is protected by the Fourth Amendment.[57] Justice Scalia likened a GPS "slap-on" tracking device, which is approximately the size of a credit card, to an 18th century constable "concealing himself in the target's coach in order to track its movements."[58] Both investigatory tools would constitute a trespass on a person's effect or chattel.[59]

The majority decided not to utilize the *Katz* analysis in *Jones* because "[the Court's] cases suggest that such visual observation is constitutionally permissible."[60] However, the majority did not close the door to further

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[55] United States v. Maynard, 615 F.3d 544, 562-63 (D.C. Cir. 2010) (using mosaic theory to conclude that individuals have a reasonable expectation of privacy in collective movements).
[56] *Jones*, 132 S.Ct. at 952.
[57] *Id.* at 953. Justice Scalia mentions in footnote 5 that "[t]respass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information." Id. at 951 n.5. Since law enforcement is usually going to trespass on land or a person's property when they are conducting an investigation, this point that you need "trespass +" is somewhat diminished. *Id.* at 951.
[58] *Id.* at 950 n. 3.
[59] *Id.*
[60] *Id.* at 953-54.

argument if this extensive monitoring by GPS tracking devices was to arise again in a separate case under different circumstances, "[i]t may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question. And answering it affirmatively leads us needlessly into additional thorny problems."[61]

In a nutshell, it was questionable to the majority whether this sort of monitoring actually violated Jones' right to privacy. In an age of Facebook, Twitter, Google, iPads, smartphones, etc., the Court was not ready to decide how much government monitoring of information placed in the public domain would trigger protections under the Fourth Amendment. However, the majority did note that "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis."[62] So owner- or factory-installed tracking devices such as Onstar or GPS tracking using smartphones would be subject to the *Katz* analysis since the trespass argument would not apply.

Although *Jones* is a 9-0 decision, the concurrences by Justice Sotomayor and Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, demonstrate divergent views as to the use of trespass and the *Katz* analysis in determining which investigatory tools constitute a "search" and which do not. Justice Alito criticized the majority's decision to re-introduce the idea of trespass through property law into the Fourth Amendment context and preferred to examine the problem utilizing the *Katz* analysis.[63] Justice Alito first argued that the placement of a "slap-on" tracking device on the undercarriage of Jones'

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[61] *Jones*, 132 S.Ct. at 954.
[62] *Id.* at 953 (emphasis in original).
[63] *Id.* at 957-58 (Alito, J., concurring).

vehicle was not a true trespass to chattel.[64] Liability for a trespass to chattel occurs when an actor intentionally dispossesses another of the chattel or intermeddles with a chattel in the possession of another.[65] The elements of trespass to chattel include an act, intent, an invasion of chattel interest (either an intermeddling or dispossession[66]), and the plaintiff must be in possession or entitled to immediate possession, causation, and damages.[67]

In the *Jones* case, the placement of the GPS device would be considered "intermeddling" as no substantial invasion of the chattel interest occurred. As Justice Alito pointed out in his concurrence, "there was no actual damage to the vehicle to which the GPS device was attached."[68] Under the common law definition of trespass to chattel, the intermeddling would not constitute a trespass to chattel and therefore would not be a search under the Fourth Amendment because no actual damage occurred to the vehicle.[69] Justice Alito also disagreed that the Court should look to 18th century law and apply it to advanced technology.[70] Referring to Justice Scalia's 18th century example of trespass, Justice Alito argued that a constable in 1791 could not have possibly hidden inside a stage coach to survey the target's activities. Therefore, the Court need not concern itself with exploring the past to provide insight on present-day technological dilemmas.[71] According to Justice

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[64] *Id.*
[65] *Id.* at 957, n. 2.
[66] RESTATEMENT (SECOND) OF TORTS § 217 (1965). A dispossession would include a wrongful acquisition of the chattel, wrongful transfer, wrongful detention, substantially changing the chattel, severely damaging or destroying the chattel, or misusing the chattel.
[67] RESTATEMENT (SECOND) OF TORTS § 218 (1965).
[68] *Jones,* 132 S.Ct. at 957 n. 2 (Alito, J., concurring).
[69] *Id.* (Alito, J. concurring).
[70] *Id.* at 958 (Alito, J. concurring).
[71] *Id.* at 958 n. 3 (Alito, J. concurring).

Alito, as technology advanced and physical intrusion was no longer at issue trespass no longer applied.[72]

The issue in Justice Alito's mind was the government's long-term monitoring of Jones' movements in his car and whether this long term monitoring "involved a degree of intrusion that a reasonable person would not have anticipated."[73] Alito argued "the use of longer term GPS monitoring in investigations of most offenses[74] impinges on expectations of privacy."[75] Justice Alito applied the *Katz* analysis, rather than trespass law, in his concurrence and arrived at the same result as Justice Scalia[76]. However, it is interesting to note that Alito questioned a reasonable person's set of privacy expectations in our advanced technological age. Noting:

> [T]echnology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they

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[72] *Id.* at 960 ("The premise that property interests control the right of the Government to search and seize has been discredited." quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)) (Alito, J. concurring). Citing *Oliver*, Justice Alito also pointed out that it is unclear how the placement of a tracking device constitutes a "search." *Id.* citing Oliver v. United States, 466 U.S. 170, 183 (1984).

[73] *Id.* at 964 (Alito, J. Concurring).

[74] It is unclear what offenses Justice Alito is speaking of – would long-term monitoring of a terrorist suspect be acceptable but not of a suspected drug trafficker?

[75] *Id.* (Alito, J. concurring)

[76] Jones, 132 S. Ct. at 962 (Alito, J. concurring).

> may eventually reconcile themselves to this new development as inevitable.[77]

Alito appeared to question in an age of advanced technology, where one's personal comments, preferences, and behavioral information can be so easily exploited by citizens, companies, and internet entities, whether a reasonable person can have any expectation to the right of privacy.

Justice Sotomayor took a different stance on the privacy issue. While agreeing with both Scalia's and Alito's reasoning and conclusions, she took the opportunity in her concurrence to express her concern that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[78] In fact, Sotomayor warned "[a]wareness that the Government may be watching chills associational and expressive freedoms," and this relatively inexpensive, easy mechanism of monitoring is "susceptible to abuse."[79] Justice Sotomayor agreed with the appellate court's mosaic privacy theory where there is a reasonable "expectation of privacy in the sum of one's public movements."[80]

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[77] *Jones,* 132 S.Ct. at 962 (footnote omitted).

[78] *Id.* at 955 (Sotomayor, J.. concurring).

[79] *Id.* at 956. James Otis made a similar expression of abuse when British customs officials abused the writs of assistance granted by the King. When King George II died in 1760, Otis represented a group of colonists who opposed the writs, arguing in a Boston court that the writs were unconstitutional and violated the right to property protected by the British Constitution. Otis argued it infringed on colonists' liberty because the writs allowed government officials to enter any citizen's home without cause. UNITED STATES HISTORY: JAMES OTIS, http://www.u-s-history.com/pages/h1204.html (last visited July 26, 2012).

[80] *Jones*, 132 S. Ct. at 956.

While Sotomayor concurs with the majority, she disagrees with Alito's comments that citizens should come to terms with their diminishing right to privacy. In fact, Sotomayor asks in light of this new digital age where people now disclose a great deal of information about themselves in many different venues, if the Court should reconsider the third-party doctrine.[81] The third-party doctrine allows law enforcement to request bank records, company records, hotel records, electronic toll collection systems, email subscriber and address information, phone numbers dialed or received, and the like, on the premise that people have no reasonable expectation of privacy to information which is willingly provided to these third parties, thus transferring the information into the public domain.[82]

Law enforcement is required to submit a grand jury subpoena in order to receive this type of information. However, law enforcement need only demonstrate that the information is "relevant to the general subject of the grand jury investigation."[83] Thus, grand jury subpoenas are merely a tool to obtain evidentiary material that can be used without having to worry that the Fourth Amendment requirements of probable cause or reasonable suspicion will not be satisfied.

Sotomayor requested a reconsideration of the third-party doctrine which, in a sense, was not at issue in the *Jones* case. "I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."[84] One thing is clear from the *Jones* decision: the Court is re-introducing the

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[81] *Id.* at 957.
[82] *Id.*
[83] United States v. R. Enterprises, Inc., 498 U.S. 292, 301 (1991). *See* FED. R. CRIM. PRO. 17(c).
[84] *Jones*, 132 S.Ct. at 957.

common-law tort of trespass as an argument to be made under the Fourth Amendment. The standard expectation of privacy is now under debate, and all technical investigatory tools currently not considered a "search" will more than likely be revisited.

The immediate impact of *Jones* on law enforcement activities was minimal, or at least should have been, since *Jones* only dealt with the narrow category of small, "slap-on" devices monitored in public areas. The majority of the GPS tracking devices already needed a warrant if installed or if the monitoring was to include private areas. The fact that so many GPS trackers needed to be pulled from vehicles post-*Jones* demonstrates that many agents felt that "slap-on" devices intended to monitor public areas were acceptable without a warrant.

Further, many agents followed their legal counsel's guidance, intending to remember to turn the device off when it appeared as though the target was traveling into a private area. It is certainly easier to slap on a tracking device in the field rather than travel to the U.S. Attorney's office and a judge's chamber to obtain a warrant in the off chance the vehicle may be monitored in a private area. Agents followed the *Karo* and *Knotts* case law to the letter rather than take the precaution of obtaining a warrant. This guidance was reflected when FBI General Counsel Andrew Weismann commented that in light of *Jones,* over 3,000 tracking devices had to be removed from various vehicles by the FBI.[85]

Certain aspects of the *Jones* decision will negatively impact law enforcement's ability to place a tracking device on a vehicle when exigent circumstances arise. If agents need to monitor an informant or undercover agent during a

[85] Ariane de Vogue, *Supreme Court Ruling Prompts FBI to Turn Off 3,000 Tracking Devices*, ABC NEWS (Mar. 7, 2012), http://news.yahoo.com/supreme-court-ruling-prompts-fbi-turn-off-3-154046722--abc-news.html.

sting operation or drug buy bust, and an unexpected third party arrives on the scene, agents will no longer be able to follow these other unexpected targets via a tracking device without comprising the planned operation.

Similar circumstances arise in situations where law enforcement is listening to a target's phone conversations via a Title III court order[86] and learn that the target plans to drive to a location to pick up contraband. Unfortunately, if the target owns three different vehicles, and agents are unsure of which vehicle the target plans to take; the authorities are also unsure which vehicle they should mention in their request to the judge for placement and monitoring of a tracking device. In the previous scenario, post-*Jones*, law enforcement will be unable to place a tracking device on the three vehicles without a court order.

Will it be possible for law enforcement to receive an "anticipatory" tracking order to place tracking devices on all three cars and the monitoring of which depends upon whether the target decides to take that particular vehicle to his destination? Exigent circumstances will always exist for the quick placement of tracking devices during an investigatory operation and legislators should step forward and create a 24-hour waiver rule that would allow for these unplanned contingencies.[87] There should also be allowances made for the quick slap-on of the device and brief monitoring while in the field conducting surveillance, but which would require a court order for its subsequent monitoring hours later. This type of rule would allow law enforcement the freedom to make quick decisions in the field and prevent the type of long-term monitoring that concerned the Justices in *Jones*.

Jones' long-term impact on future case law is difficult to assess, since there are many unanswered

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[86] 18 U.S.C. §§ 2510-2522.

[87] This was alluded to by Justice Alito in his concurring opinion. *See Jones*, 132 S.Ct. at 964.

questions about technology and privacy issues. Is Justice Alito correct in his conclusion that as people embrace more technology, their expectation of privacy diminishes? Or is Justice Sotomayor correct in her argument that the increase of private information collected by third parties should not correlate to the government's ability to access this vast amount of private information without due process? Should different rules apply to the government and private entities in their collection of our electronic information?

Such an assumption creates a false dichotomy. Yes, government has a different motive for the analysis and review of collected electronic data than does a company such as Google. Since Google collects what users search for on the Internet, what websites users visit, and what news and blog posts users read, does this constitute an intrusion into a user's expectation of privacy? Should motive play a role in what constitutes trespass or expectation of privacy?

In some instances, private entities have similar motives to that of the government. Private investigators are similar to law enforcement when they conduct investigations in cases of infidelity, divorce, family, criminal, and civil concerns. Law enforcement and private entities should both be bound by the same constraints and legal limitations when it comes to their access to technical investigative techniques or third party data. Thus, civil law that limits the actions of the private investigator should be examined to determine how it differs from the criminal law that applies to government.

IV. Private Investigators, Trespass, and the Invasion of Privacy

Private investigators typically utilize surveillance either using photography or video to document, database searches, GPS tracking to locate people or assets, and perform crime scene reviews. Private investigators are

concerned with two things: licensing requirements and tort liability. The prerequisites to become a licensed private investigator are not difficult. For example, in Tennessee, an applicant must be twenty-one years of age, a United States' citizen, not been declared incompetent by reason of mental defect or disease, not be suffering from habitual drunkenness or narcotics addiction, be of good moral character, possess or employ at least one person who has at least 2,000 hours of "compensated verifiable investigatory experience,"[88] and score at least a seventy percent on a multiple choice exam consisting of fifty questions.[89]

The sparse licensing requirements do not pose serious obstacles to private investigators; however, potential tort liability is a problem. Not surprisingly, the torts of trespass and invasion of privacy are at the forefront of the investigators' concerns, invasion of privacy more so than trespass, since trespass requires actual damages to the land or chattel whereas invasion of privacy can be subjective. Often, private investigators have intruded on another's land or chattel but have not caused any actual damage; therefore, the plaintiff cannot recover. It is when the investigator intrudes upon a plaintiff's "seclusion, solitude, or private affairs,"[90] that the line is crossed, and investigators begin worry about being sued personally by the plaintiff seeking restitution.

In the civil context, many courts have defined a citizen's right to privacy and have followed the Second Restatement of Torts' definition of invasion of privacy.

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[88] Apprenticeships qualify under this requirement. TENN. COMP. R. & REGS. 1175-01-.19 (2012); TENN. CODE ANN. § 62-26-206 (2009); TENN. CODE ANN. § 62-26-207 (2009).

[89] Priometric, *Canidate Information Bulletin State of Tennessee Private Investigation and Polygraph Examinations*, https://www.prometric.com/en-us/clients/Tennessee/Documents/TN25PrivateInvestigationCIB_20120809.pdf. *See generally,* TENN. CODE ANN. § 62-26-205 (2012).

[90] RESTATEMENT (SECOND) OF TORTS § 652A (1977).

The Supreme Court of Georgia described the right to privacy as:

> [A] personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. The principle is fundamental, and essential in organized society, that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others.[91]

The intrusion upon one's seclusion, solitude, or private affairs is described in the Second Restatement as "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be *highly offensive to a reasonable person*."[92] In order to recover, the plaintiff must show that the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about the plaintiff, and he or she had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.[93]

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[91] Pavesich v. New England Life Ins. Co., 50 S.E. 68, 78 (1905) (Internal citations omitted).
[92] RESTATEMENT (SECOND) OF TORTS § 652B (1977) (emphasis added).
[93] Sanchez-Scott v. Alza Pharmaceuticals, 86 Cal. App. 4th 365, 372 (Cal. Ct. App. 2001)(citing Shulman v. Group W Productions, Inc., 955 P.2d 469 (Cal. 1998).

This interference into one's seclusion must also be substantial and result from conduct that would be offensive and objectionable to the ordinary person.[94] In determining the "offensiveness" of an invasion of a privacy interest, common law courts consider, among other things: "the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded."[95] The Restatement further provides a few examples of invasion of privacy, such as: "(1) taking the photograph of a woman in the hospital with a rare disease that arouses public curiosity over her objection, and (2) using a telescope to look into someone's upstairs bedroom window for two weeks and taking intimate pictures with a telescopic lens."[96]

In *Villanova v. Innovative Investigations, Inc.*,[97] "a private investigator suggested that Mrs. Villanova place a GPS device in one of the family vehicles regularly driven by the plaintiff/husband in order to assist in tracking his whereabouts."[98] The husband could not sue the investigator for trespass because the investigator had obtained the wife's consent, and the vehicle was joint marital property.[99]

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[94] RESTATEMENT (SECOND) OF TORTS § 652B, comt. d (1977). "The thing into which there is intrusion or prying must be private . . . on the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there." PROSSER & KEETON ON THE LAW OF TORTS 808-09 (W. Page Keeton et al. eds., 4th ed. 1971).

[95] Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994) (quoting Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 678 (Cal. Ct. App. 1986)).

[96] RESTATEMENT (SECOND) OF TORTS § 652B, comment b (1977).

[97] Villanova v. Innovative Investigations, Inc. 21 A.3d 650 (N.J. Super. Ct. App. Div. 2011).

[98] *Id.* at 651.

[99] Mrs. Villanova paid the vehicle's insurance premiums out of a joint account held by her and plaintiff. *Id.* at 652.

However, installation was not at issue. Rather, the husband sued the investigator for invasion of privacy. The court learned that the GPS device had remained in the vehicle for about forty days.[100] After reviewing the investigator's invoice, which reflected that a total of twenty-seven hours were devoted to monitoring the plaintiff via GPS for six weeks, the court determined that the GPS device did not capture any movements in a secluded location that was not in public view.[101] Since the plaintiff's movements were not continuously monitored and no monitoring "extended into private or secluded locations that were out of public view and in which plaintiff had a legitimate expectation of privacy," no invasion of privacy occurred.[102]

Upon review of cases in which private investigators are sued for trespass and/or invasion of privacy, it appears as if the invasion of privacy must be substantial in order for the plaintiff to prevail. For example, the plaintiff prevailed when a private investigator gained admittance to the plaintiff's hospital room and, by deception, secured the address of the man who had accompanied the plaintiff on a shopping trip to Sears.[103] Plaintiffs also prevailed when an investigator peered through the plaintiff's bedroom and bathroom windows,[104] when a private investigator entered the home and installed a hidden videotape camera in the bedroom ceiling which recorded the plaintiff undressing,

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[100] *Id.*

[101] *Id.* at 653-55.

[102] *Id.* at 656. Interestingly, the court referred to *Knotts. Villanova,* 21 A.3d. at 657. "[T]he placement of a GPS device in plaintiff's vehicle without his knowledge, but in the absence of evidence that he drove the vehicle into a private or secluded location that was out of public view and in which he had a legitimate expectation of privacy, does not constitute the tort of invasion of privacy." *Id. at* 651-52.

[103] Noble v. Sears, Roebuck and Co., 33 Cal. App. 3d 654, 657 (Cal. Ct. App. 1973).

[104] Pappa v. Unum Life Insurance Company of America, No. 3:07-CV-0708, 2008 WL 744820, *2 (M.D. Pa. March 18, 2008).

showering, and going to bed,[105] and when a private investigator repeatedly followed a pregnant woman who was frequently alone or with her small children, photographing her at least 40 times, repeatedly causing her to become frightened, resulting in her fleeing her home and to call the police seeking help.[106]

However, courts did not find an invasion of privacy in instances where investigators placed a camera against a pharmacy window, used spotlights to illuminate the interior of the pharmacy, and videotaped the plaintiff talking on the telephone inside the store for approximately thirteen seconds,[107] where a private investigator was across the road from plaintiffs' property so that he could see the front and side of the house, including plaintiffs' bedroom windows which were not covered by curtains,[108] where private

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[105] Miller v. Brooks, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996). "To prove trespass, a plaintiff must show that the defendants intentionally and without authorization entered real property actually or constructively possessed by him at the time of the entry." *Id.* There was sufficient evidence to show that defendants intentionally entered the premises and that plaintiff had possession at that time. As to the invasion of privacy claim, "[p]laintiff has every reasonable expectation of privacy in his mail and in his home and bedroom. A jury could conclude that these invasions would be highly offensive to a reasonable person." *Id.* at 354.

[106] Anderson v. Mergenhagen, 642 S.E.2d 105, 110 (Ga. App. Jan. 17, 2007).

[107] Mark v. Seattle Times, 635 P.2d 1081, 1085 (1981). The place from which the film was shot was open to the public and thus any passerby could have viewed the scene recorded by the camera. *Id.* at 1095. "Since the intrusion in the present case was a minimal one, publication lasted only 13 seconds, Mark was not shown in any embarrassing positions, his facial features were not recognizable, we hold there could be no actionable claim in these circumstances." *Id.* Compare to Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), where the court found an actionable intrusion when the press gained entrance by subterfuge to the home of an accused and photographed him there.

[108] Hall v. InPhoto Surveillance, 649 N.E. 2d 83 (Ill. App. Ct. 1995) (finding that no trespass was committed). "In the absence of any evidence to support the claim of actual trespass or the taking of

investigators conducted visual surveillance while in a car parked on the street and the plaintiff was on the balcony and a videotape was made showing the plaintiff walking around her apartment without the use of crutches or a cane,[109] and when a private investigator drove to a yacht club, waited until a club member opened the gate, drove onto the grounds before the gate closed, parked his vehicle in a parking lot for guests and videotaped the plaintiffs without their consent.[110] In *Nunez v. S. Melgar investigations, Inc.*,[111] pretext telephone calls, pretext door knocks, and incidents of climbing the back yard fence to

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photographs, summary judgment was properly granted to defendants." *Id.* at 86.

[109] Digirolamo v. D.P. Anderson & Assocs., No. Civ. A. 97-3623, 1999 WL 345592, at *1 (Mass. Supp. May 26, 1999). "[C]ourts are expected to define the scope of the right to privacy 'on a case-by-case basis, by balancing relevant factors, . . . and by considering prevailing societal values and the ability to enter orders which are practical and capable of reasonable enforcement." *Id.* at *2 (quoting Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 N.E.2d 912, 915 (1991)). Visual surveillance which consists only of observing, photographing, or videotaping a person in a public place violates no right of privacy. *Id.* (citing Cefalu v. Globe Newspaper Co., 391 N.E.2d 939, Since plaintiff was in plain view of anyone on the street while on the balcony, she enjoyed no greater right to be free of enhanced viewing than she did while standing on the street. *Id.* at *5. Therefore, the observation and photographing of the plaintiff with enhanced vision while on that balcony did not by itself constitute an unreasonable and substantial or serious interference with privacy under G.L. c. 214, s 1B. *Id.* at *4.

[110] Furman v. Sheppard, 744 A.2d 583 (Md. Ct. Spec. App. 2000). "Not every trespass constitutes an unreasonable search or intrusion. A trespass 'becomes relevant only when it invades a defendant's reasonable expectation of privacy.'" *Id.* at 586 (quoting *McMilliam v. State*, 584 A.2d 88, 97 nt. 5(Md. Ct. Spec. App. 1991)). Business and commercial enterprises generally are not as private as a residence. Since the surveillance was nothing more than observations while they were on or near a yacht situated in a public waterway and in open view of the public, there was no invasion of privacy. *Id.* at 587.

[111] Nunez v. S. Investigations Inc., No. B162945, 2004 WL 1926794 at *9 (Cal. Ct. App. 2004),.

peer into her window created a triable issue as to whether the defendants intruded into a private place.

V. Applying Civil Tort Liability to Fourth Amendment Law

Much can be learned from the development of trespass and invasion of privacy in the civil context. First, trespass is infrequently proven as plaintiffs can rarely demonstrate actual damages. It is interesting to see how the Court's reliance on trespass in *Jones*, which now exacts the power of the exclusionary rule, is not as important in the civil arena. A civil action for trespass seeks compensation for damages to property.[112] An intrusion of privacy "is a claim that is 'broad enough to include recovery for economic injuries, as well as mental or physical injuries.'"[113] Trespass is no longer in fashion in the civil world as it is gearing up for prominence in the criminal context. If trespass is now in vogue, other investigatory tools may be in jeopardy.

The FBI General Counsel commented that they were considering the impact of *Jones* as it pertained to trash pulls.[114] If the lid of the trash can is considered an "effect" under the Fourth Amendment, an agent's act of touching the lid may be considered a trespass and would be a Fourth Amendment violation without first acquiring a warrant. In the civil context, documents which are placed in an outdoor trash barrel no longer retain their character as the plaintiff's personal property, the items discarded are considered abandoned.[115] Under the civil precedent, agents need not

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[112] Hawkes v. Commercial Union Ins. Co., 764 A.2d 258 (Me. 2001).
[113] *Id.* at 263.
[114] de Vogue, *supra* note 83 (Weissman is quoted as saying "there is not reason to think this is just going to end with GPS").
[115] Ananda Church of Self Realization v. Mass. Bay Ins. Co., 116 Cal. Rptr. 2d 370, 376 (Cal. Ct. App. 2002). *But See* Misseldine v. Corporate Investigative Servs., Inc., No. 1771, 2003 WL 21234928, at

worry about the retrieval of the abandoned items; however, they must wait until the trash is in a public area or face trespass issues on private property.

The open fields doctrine may also not withstand scrutiny under a trespass analysis. The open fields doctrine states that people do not have an expectation of privacy in activities occurring in open fields, even if the police drive past a locked gate, a no trespassing sign, and owners tell them it is private property; what a person knowingly exposes to the public is not protected.[116] In the civil context, a similar set of facts would clearly constitute a trespass if damages as a result of the physical invasion of the land were proven.[117] The majority in *Jones* provided a preview of how the court would rule on an open field question, stating in the opinion that "an open field, unlike the curtilage of a home is not one of those protected areas enumerated in the Fourth Amendment."[118] This comment is contrary to the idea that personal property is a "place" protected under the Fourth Amendment just as the vehicle in Jones was considered an "effect" protected under the Fourth as well. A trespass on the undercarriage of one's vehicle is just as much a trespass as entering one's personal property to conduct surveillance. Based on this premise, the open fields doctrine is in jeopardy.

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*4-5 (Ohio Ct. App. May 29, 2003) (holding that a trespass was committed when the private investigator stepped out of the car, took the garbage, and physically invaded the plaintiff's property without invitations). However, in Misseldine v. Corporate Investigative Servs., Inc., No. 81771, 2003 WL 21234928 (Ohio App. May 29, 2003), a trespass was committed when the private investigator stepped out of the car and took his garbage. *Id.* at *4. The investigator physically invaded the plaintiff's property without invitation or inducement. *Id.* at *5.

[116] Oliver v. United States, 466 U.S. 170 (1984) (citing Hester v. United States, 265 U.S. 57, 59 (1924)).

[117] Monsanto Co. v. Scruggs, 342 F.Supp.2d 602, 606 (N.D. Miss. 2004).

[118] *Jones*, 132 S. Ct. at 953Icitations omitted).

Some undercover law enforcement recordings of criminal suspects, currently legal under the one-party consent rule, may now be jeopardized under certain circumstances. The Court may adopt a civil invasion of privacy standard or consider capturing a party's words without their knowledge through the use of a recording device a "trespass." Federal law permits private citizens to record unknowing third parties except if the "communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State."[119] Various states have banned eavesdropping of confidential communications criminally and civilly under the invasion of privacy tort.[120] While some civil cases of

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[119] 18 U.S.C. §§ 2511(2)(d), 2520 (2012) (civil action).

[120] Kersis v. Capital Cities/ABC Inc., 1994 WL 774531 (Cal. App. Dep't Super. Ct. 1994). Ca. Penal Code § 632(a) regarding "confidential communications" states that "every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished . . ." The following is a list of eavesdropping laws by state: ALA. CODE § 13A-11-31 (2012); ALASKA STAT. ANN. §§ 42.20.300, 42.20.310 (West 2012); ARIZ. REV. STAT. ANN. § 13-3005 (2012); ARK. CODE ANN. § 5-60-120 (West 2012); CAL. PENAL CODE § 632 (West 2012); COLO. REV. STAT. ANN. § 18-9-304 (West 2012); CONN. GEN STAT. ANN. § 53a-189 (West 2012); DEL. CODE ANN. tit.11, § 1335 (West 2012); FLA. STAT. ANN. § 934.03 (West 2012); GA. CODE ANN. § 16-11-62 (West 2012); HAW. REV. STAT. § 803-42 (West 2012); IDAHO CODE ANN. § 18-6702 (West 2012); 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2012); IND. CODE ANN. § 35-33.5-5-4 (West 2012); IOWA CODE ANN. § 727.8 (West 2012); KAN. STAT. ANN. § 21-6101 (West 2012); KY. REV. STAT. ANN. § 526.020 (West 2011); LA. REV. STAT. ANN.§ 15:1303 (2011); ME. REV. STAT. tit. 15, § 710 (2011); MD. CODE ANN., Interceptions, Procurements, Disclosures or use of Communication § 10-402 (West 2012); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2012); MICH. COMP. LAWS ANN. § 750.539 (West 2012); MINN. STAT. ANN. §

surreptitious recordings were found to contain a triable issue of fact for the jury whether the plaintiff had a reasonable expectation of privacy at the place of their employment or home,[121] most of the time, courts (despite the state ban on eavesdropping) determine that no invasion of privacy exists when one is videotaped or recorded even inside their own home by one party in the presence of another. The plaintiffs simply have no reasonable expectation that the conversation would be kept in

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626A.02 (West 2012); MISS. CODE ANN. § 41-29-533 (West 2011); MO. ANN. STAT. § 542.402 (West 2012); MONT. CODE ANN. § 45-8-213 (2011); NEB. REV. STAT. § 86-290 (2012); NEV. REV. STAT. ANN §§ 200.620, 200.650 (West 2011); N.H. REV. STAT. ANN. § 570-A:2 (2012); N.J. STAT. ANN. § 2A:156A-3 (West 2012); N.M. STAT. ANN. § 30-12-1 (West 2012); N.Y. PENAL LAW § 250.05 (McKinney 2012); N.C. GEN. STAT. ANN. § 15A-287 (West 2012); N.D. CENT. CODE ANN. § 12.1-15-02 (West 2011); OHIO REV. CODE ANN. § 2933.52 (West 2012); OKLA. STAT. tit. 21, § 1202 (West 2012); OR. REV. STAT. ANN. § 165.540 (West 2012); 18 PA. CONS. STAT. ANN. § 5703 (West 2012); R.I. GEN. LAWS ANN. § 12-5.1-13 (West 2012); S.C. CODE ANN. § 16-17-470 (2011); S.D. CODIFIED LAWS §§ 22-21-1, 23A-35A-20 (2012); TENN. CODE ANN. § 39-13-601 (West 2012); TEX. CODE CRIM. PROC. ANN. art 18.20 (West 2011); UTAH CODE ANN. § 76-9-402 (West 2012); VA. CODE ANN. § 19.2-62 (West 2012); WASH. REV. CODE ANN. § 9.73.030 (West 2011); W. VA. CODE ANN. § 62-1D-3 (West 2012); WIS. STAT. ANN. § 968.31 (West 2011); WYO. STAT. ANN. § 7-3-702 (West 2012). The only state that did not have an eavesdropping criminal or civil statute is Vermont. Vermont does reference the United States Code's prohibition on eavesdropping, but this is included only in the statute that prohibits disturbing the peace by use of telephones or electronic devices. VT. STAT. ANN. tit. 13, § 1027

[121] Capital Cities/ABC Inc., 1994 WL 774531 at *8 ; Hawkes v. Private Investigation Services of Maine and New England, Inc., 2000 WL 33721625 at *4 (Me. Super. 2000). Hawkes alleges that the private investigator twice gained access to his home under false pretenses and without identifying himself. *Id.* at *1. Summary judgment on the invasion of privacy claim was denied. *Id.* at*4. Summary judgment on the plaintiff's claim of trespass was also denied because consent for those entries was obtained by misrepresenting the identity of the visitor and the purpose of entry.

confidence or recorded to later share with others.[122] The invasion of privacy is found to be *de minimis*, especially if the recording was made in public view in a public place.[123]

It would be a significant blow to law enforcement if warrants were required to record conversations between informants/undercover agents and potential targets. As it currently stands in the criminal context, the Court in *Hoffa v. United States*, 385 U.S. 293, 303 (1966), decided that

> [t]he risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak . . . no right protected by the Fourth Amendment was violated in the present case.[124]

In 1971, the Court affirmed this decision in *United States v. White* and has never reverted back to the trespass theory when revisiting the issue.[125] Comparing the federal criminal stance to the civil stance on surreptitious recordings, and taking the state criminal eavesdropping statutes out of the mix, it is clear that most courts permit surreptitious recordings in the civil context as long as it does not rise to the level of an invasion of privacy an act

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[122] Deteresa v. Am. Broad. Co., Inc., 121 F.3d 460 (9th Cir. 1997) (holding that the plaintiff had no reasonable expectation that the conversation with the ABC reporter would not be divulged to anyone else) *Id* at 465.

[123] *Id* at 466.

[124] The Court clarified its decision in *Heffa v. United States*, 385 U.S. 293, 303(citing Lopez v. U.S. 373 U.S. 427, 465 (1963)) that surreptitious recordings by "false friends" were not a search in *United States v. White*, 401 U.S. 745 (1971).

[125] White, 401 U.S. 745.

which is highly offensive to the reasonable person.[126] The requirement that the intrusion be "highly offensive to a reasonable person" would be a welcome addition/supplement to the *Katz* analysis. Not only would there need to be an objective and subjective expectation of privacy, but law enforcement's actions would have to be highly offensive and objectionable to the ordinary person. This would make the *Katz* analysis more difficult to prove, but it would limit the types of tools and actions that would be considered a "search" requiring a warrant.

Lastly, third party database searches which are clearly of concern to Justice Sotomayor are not a concern in the civil context. Private investigators have access to a plethora of information while conducting background checks, financial and insurance fraud investigations, workers compensation investigations, and asset/property searches.[127] The searches range from residential history searches, area demographics, aliases/date of birth and other names used, federal litigation searches, motor vehicle ownership, watercraft ownership, aircraft ownership, real property ownership, corporation ownership, judgment and lien search, bankruptcy search, criminal history search, incarceration history search, employment search, UCC

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[126] *See* Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc., 306 F.3d 806 (9th Cir. 2002). Although the plaintiff argued that he had a subjective expectation of privacy in Medical Laboratory's administrative offices, he extended the invitation to the three ABC representatives who were strangers to him. *Id.* at 813 His willingness to invite strangers into the offices for a meeting and tour indicated that he did not have an objectively reasonable expectation of privacy. *Id.* The plaintiff did not reveal any information about his personal life, but rather his business operations. Thus, the plaintiff had no expectation of privacy in the contents of his conversations with ABC representatives. *Id.* at 814. Any intrusion by ABC representatives in secretly recording their meeting with the plaintiff was de minimis and not highly offensive to a reasonable person. *Id.* at 819.

[127] *See* CRISPIN SPECIAL INVESTIGATIONS, INC., www.crispininvestigations.com (last visited July 30, 2012).

filings, Internet domain ownership search, driver's licenses, FAA pilots, professional licenses, voter registration, concealed weapons permits, relative searches, hunting/fishing permits, sexual offender lists, etc.[128] The ability for private parties to retrieve personal information from other third parties has become relatively easy–if one pays for the database search.[129] As citizens use more technology and expose themselves to the collection of additional data, their expectation of privacy decreases. Therefore, the majority in *Jones* seems to identify that the *Katz* expectation of privacy analysis may soon no longer apply as citizens' privacy is lost. Technology has become a double-edged sword. However, if private investigators have the ability to sort through databases to collect a target's information, law enforcement should have the same ability.

The third party doctrine that Sotomayor wants to revisit should remain intact unless Congress intervenes and decides to enact a consumer "privacy bill of rights."[130] To

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[128] *Id.*

[129] Telephone Interview with Robert Crispin, CEO, Crispin Special Investigations, Inc. Very few records can be accessed by law enforcement via subpoena during the investigative phase that private investigators cannot access. Database search companies such as Avent and AutoTrack sweep millions of public records every day gathering all sorts of data on private individuals. Bank or financial (ie, money wire transfer) records, cell phone or cell tower records, and power bill records are some of the few records private investigators may have difficulty accessing (unless they conduct a series of trash pulls). However, once the investigative phase is complete and the defendant is charged, the defense also has subpoena power and can access those records as well. Oftentimes, those types of records can be found within a divorce case file in the public database, and the private investigator no longer needs any type of subpoena power to access this type of information.

[130] Alexei Alexis, *Consumer Protection – Privacy: White House Releases Report Urging New U.S. Privacy Framework*, BLOOMBERG BNA: THE UNITED STATES LAW WEEK, Feb. 28, 2012 (also found at 80 U.S.L.W. 1164). On February 23, 2012, the Obama administration requested that Congress pass a privacy plan which would require

the extent that private entities can access, collect and analyze sensitive third-party database information, then law enforcement should enjoy similar unfettered access without being subjected to scrutiny under the third party doctrine.

If some of these investigatory tools that are currently not considered a "search" soon become a search under the trespass analysis, this may pose a significant burden on law enforcement. These types of tools are utilized in order to develop sufficient probable cause in order to obtain a warrant. These tools may fall by the wayside as did thermal imaging devices after the *Kyllo* decision.[131] Agents simply did not have sufficient probable cause before using the device; it was merely an aid to ensure that the home indeed was a marijuana grow-house prior to requesting a search warrant.

VI. Conclusion

The role of trespass took precedence in *Jones,* a decision which diminishes, at least temporarily, the importance of *Katz* and the expectation of privacy doctrine for future decisions on what constitutes a violation of our Fourth Amendment rights. Until the 20th century, the

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businesses to be "transparent about their data-collection practices and giv[e] consumers the right to access and correct their personal information," "to exercise control over the collection of their personal data and how it is used," and to have the right "to 'reasonable' limits on the collection and retention of personal data." *Id.* at 1. "'While I look forward to working with President Obama and Secretary Bryson on this critically important issue, any rush-to-judgment could have a chilling effect on our economy and potentially damage, if not cripple, online innovation,' Rep. Mary Bono Mack (R-Calif.), leader of a House Energy and Commerce subcommittee that oversees privacy issues, said in a statement issued after the White House unveiled its report." *Id.* at 3.

[131] Kyllo, 533 U.S. 27 (holding that thermal imaging is an unlawful search as it could leave the homewowner at the mercy of advanced technology that could discern all human acitivities in the homes).

trespass doctrine was sufficient to determine what constituted an unlawful search and seizure, an invasion of our privacy. With the advance of technology, it became clear that "an actual trespass is neither necessary nor sufficient to establish a constitutional violation."[132] The *Katz* decision introduced the reasonable expectation of privacy doctrine which supplemented the trespass doctrine. The Supreme Court's decision on *Jones* upheld the D.C. Circuit finding that an attachment of a GPS device to the defendant's vehicle to monitor the vehicle's movements, constituted a search under the Fourth Amendment on different grounds. Since the *Jones* decision was so narrowly focused on one singular issue, future controversial cases involving law enforcement use of technology to monitoring citizens where trespass is not present remain unresolved. The potential for new intrusions of privacy absent trespass was a controversy addressed by Congress when it enacted 18 U.S.C. §§ 2510-2522, a comprehensive guide to wiretapping.[133]

Going forward in the post-Jones era, it is highly probable to foresee the outcome when both a trespass and a person's reasonable expectation of privacy is triggered. It is also highly probable to predict the outcome when a trespass does not occur but a person's reasonable expectation of privacy is triggered. What is most difficult to predict is the scenario in which a trespass occurs but a person's reasonable expectation of privacy is not triggered. Will the open fields doctrine suffer the same fate as tracking devices? And in the scenario in which a trespass does not occur but a person's reasonable expectation of privacy is triggered, will, in time, the Court surrender to the idea that citizens are giving up their expectation of privacy in the digital age or will the Court fight this uphill battle and

[132] *Jones*, 132 S. Ct. at 960 (Alito, J. concurring) (quoting United States v. Karo, 468 U.S. 705, 713 (1984)).
[133] *Id.* at 963 (Alito, J. concurring).

strike down the third party doctrine? As suggested by Justice Alito in his concurrence on *Jones,* the difficulties inherent in applying the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st century surveillance technique is problematic, and possibly best left to Congress which has the authority to write legislation on the topic.[134]

Hopefully, either the Court or Congress will also utilize the well-developed civil case law concerning trespass and invasion of privacy in the civil context as it pertains to private investigators, and close the gap between civil and criminal laws and the limitations placed on the actions of law enforcement and private investigators. The United States and its court system strive to uphold the rights of individuals but not at the expense of the republic. We strive for Lorenzetti's utopia, a city that is well-governed, orderly, bright, calm, joyful, hard-working, and safe – balancing law and order with civil liberties. Lorenzetti's depiction of a failed government wherein Tyranny defeats Lady Justice and the "Common Good" is allegorical and emblematic of this eternal struggle for balance. Finding the right balance between societal order and an individual's right to privacy is obviously difficult. When we sacrifice some of our privacy rights, we hope we are doing so for the "Common Good."

[134] *Id.* at 958, 964 (Alito, J. concurring).