

**AFTER *UNITED STATES V. JONES*,
AFTER THE FOURTH AMENDMENT THIRD PARTY DOCTRINE**

Stephen E. Henderson*

In United States v. Jones, the Supreme Court unanimously rejected the proposition that the Government can surreptitiously electronically track vehicle location for an entire month without Fourth Amendment restraint. While the Court's three opinions leave much uncertain, in one perspective they fit nicely within a long string of cases in which the Court is cautiously developing new standards of Fourth Amendment protection, including a rejection of a strong third party doctrine. This Article develops that perspective and provides a cautiously optimistic view of where search and seizure protections may be headed.

I. INTRODUCTION

United States v. Jones,¹ in which the Court unanimously held that month-long Global Positioning System (GPS) tracking of a vehicle constitutes a Fourth Amendment search, did not in itself tell us much. The Government took an egregious position, and therefore lost nine to zero.² The Court now applies a resurrected trespass-based conception of search, but we know extremely little about its application and what results it will alter. Five Justices

* Professor of Law, The University of Oklahoma College of Law. Yale Law School (J.D., 1999); University of California at Davis (B.S., 1995). The author is grateful to the *North Carolina Journal of Law & Technology*, and in particular to Symposium Editor Brandy Barrett, for the invitation to participate in its Symposium on *U.S. v. Jones: Defining a Search in the 21st Century* (Jan. 25, 2013), and for the exceptional hospitality during that event. The author is also grateful to Christopher Slobogin and Leonard Sosnov for comments on an earlier version of this Article.

¹ 132 S. Ct. 945 (2012).

² See discussion of the Government's argument and the opinions of the Justices, *infra* Part III.

believe long-term location tracking is typically a search because it invades a reasonable, seemingly empirical, expectation of privacy. And one Justice, Justice Sotomayor, is willing to reconsider the entire third party doctrine, which holds that one typically retains no Fourth Amendment expectation of privacy in information conveyed to another.

But in the broader view, it is not merely one Justice who will not apply the third party doctrine in a strong form, and thus the author has previously written the doctrine's obituary.³ *Jones* fits nicely within a string of cases in which the Court is cautiously developing new standards of Fourth Amendment protections, rather than declaring generally applicable categorical rules.⁴ Given that it was a grand pronouncement of an allegedly categorical rule in *United States v. Miller*⁵ that has caused much of the trouble, this strikes the author⁶ as a sensible way to proceed. One can expect the road will not be smooth, but we are used to zigs and zags in Fourth Amendment jurisprudence. It is hard to imagine anything less when the High Court is attempting to ferret out what is reasonable,⁷ which requires balancing private and law enforcement

³ See Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 IOWA L. REV. 39 (2011).

⁴ See *infra* Part II.

⁵ 425 U.S. 435 (1976). “[We] ha[ve] held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [the third party] to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.” *Id.* at 443.

⁶ The author recognizes that avoiding the first person can be stultifying, and to some is arrogant, but the convention is required by the Journal. See Stephan Pastis, *Sgt. Piggy's Lonely Hearts Club Comic* 28 (2004).

⁷ See U.S. CONST. amend. IV; *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011). The Fourth Amendment provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

interests,⁸ and when technology, policing, crime, and social norms are constantly in flux.

Much of the ground has been plowed before, including in articles dating back many years,⁹ which calls for brevity here. Indeed, *Jones* will surely spark a new crop of Fourth Amendment papers, the authors of some of which will read what has gone before and some of whom will not. But *Jones* provides a nice hinge around which to discuss where the Fourth Amendment has been and where it might be going—and more generally where citizens' protections against unreasonable searches and seizures, which do not depend solely upon the Fourth Amendment, might be going. This Article will analyze that relatively high level, and, like many others, the author will begin in other fora to drill down into specifics of how the Fourth Amendment should apply to the particular techniques of location tracking.¹⁰ Part II describes the relevance of modern technologies and social norms, and how the third party doctrine has fared in the courts in the last quarter century. It reveals a doctrine that is more limited and nuanced than some might think, or at least one that can be so read. Part III describes the opinions in *Jones* and analyzes how they fit within

⁸ See *Samson v. California*, 547 U.S. 843, 848 (2007).

⁹ See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 390–95 (1974) (discussing a sliding scale proportionality principle, but worrying “it converts the fourth amendment into one immense Rorschach blot”); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 555, 581 (1990) (proposing a proportionality framework under which lesser “intrusions” are permissible upon reasonable suspicion, and thus are less restricted than “full” searches); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 4, 75 (1991) (explicitly terming a proportionality test a “proportionality principle,” and advocating it along with an “exigency principle” typically requiring third party—meaning not merely police officer—review).

¹⁰ E.g., Stephen E. Henderson, *Real-time and Historic Location Tracking after United States v. Jones: An Administrable, Mildly Mosaic Approach*, 103 J. CRIM. L. & CRIMINOLOGY (forthcoming June 2013); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 110 MICH. L. REV. (forthcoming); Christopher Slobogin, *Making the Most of Jones v. United States in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, DUKE J. CONST. L. & PUBLIC P. (forthcoming).

this greater context. Part IV presents a cautiously optimistic view of where the law, meaning not only the Fourth Amendment law but also the statutory law, might be headed.

II. THE THIRD PARTY DOCTRINE BEFORE *JONES*

A. *Origin and Uncertainties*

One can debate precisely which cases fall within the third party doctrine. Indeed, because the doctrine has always been under-theorized by the Court, it is difficult to know what to make of information that is provided to a particular party only in the role of conduit or bailee, and what to make of information that is not actually provided to any one party, but rather that is potentially available to all comers. But the following certainly make the potential list: the “false-friend” cases of *Hoffa v. United States*¹¹ and *United States v. White*,¹² the bank records case of *United State v. Miller*,¹³ the phone records case of *Smith v. Maryland*,¹⁴ the beeper cases of *United States v. Knotts*¹⁵ and *United States v. Karo*,¹⁶ the flyover cases of *California v. Ciraolo*¹⁷ and *Florida v. Riley*,¹⁸ the open fields cases of *Oliver v. United States*¹⁹ and *United States v. Dunn*,²⁰ and the garbage case of *California v. Greenwood*.²¹

The first thing to notice is that the most recent of these cases is approaching a quarter-century old. Of course, if a doctrine is well settled and well understood, there is no need to relitigate, especially at the Supreme Court. But based on the discussion that follows, this is at least not accurate on the margins, and changed

¹¹ 385 U.S. 293 (1966).

¹² 401 U.S. 745 (1971).

¹³ 425 U.S. 435 (1976).

¹⁴ 442 U.S. 735 (1979).

¹⁵ 460 U.S. 276 (1983).

¹⁶ 468 U.S. 705 (1984).

¹⁷ 476 U.S. 207 (1986).

¹⁸ 488 U.S. 455 (1989).

¹⁹ 466 U.S. 170 (1984).

²⁰ 480 U.S. 294 (1987).

²¹ 486 U.S. 35 (1988).

social norms and technologies might require even an original supporter to reconsider the core.

We now live in a world of ubiquitous third party information. Cash is anonymous, at least if not accompanied by closed-circuit television recordings and other records, but many rarely use it.²² More and more people, and in more and more places, pay in an identified and recorded manner.²³ Offline library and bookstore browsing are practically anonymous, but many have replaced them with online recorded alternatives.²⁴ The same goes for dictionary and encyclopedia browsing.²⁵ Over-the-air broadcast television is anonymous, but few use it.²⁶ Even many assumedly ephemeral

²² See *Credit, Debit, Smart, Electronic Bill Pay – It's All in the Cards: More Consumers Going Cashless Citing Convenience, Budgeting*, PLAIN DEALER (Cleveland), Sept. 25, 2000, available at 2000 WLNR 9020258

²³ See Graham Hiscott, *Dawn of the Debit: Cards Now Used More Than Cash*, THE MIRROR, Dec. 3, 2010, available at <http://www.thefreelibrary.com/DAWN+OF+THE+DEBIT%3B+Cards+now+used+more+than+case.-a0243404780>; Aaron Smith et al., *The Future of Money in a Mobile Age*, PEW INTERNET & AM. LIFE PROJECT (Apr. 17, 2012), <http://www.pewinternet.org/Reports/2012/Future-of-Money.aspx>. Some businesses no longer accept cash. See Richard Newman, *Judge Dismisses Challenge to Airline's No-Cash Policy*, THE RECORD (Aug. 20, 2011), http://www.northjersey.com/news/128114693_Airline_s__cash_less_cabin_passes_muster.html.

²⁴ See *Bookstores in Decline: Internet Having the Last Word as Readers Embrace E-Books*, SUN SENTINEL, May 13, 2011, available at 2011 WLNR 9561644; Lee Rainie & Maeve Duggan, *E-book Reading Jumps; Print Book Reading Declines*, PEW INTERNET & AM. LIFE PROJECT (Dec. 27, 2012), <http://libraries.pewinternet.org/2012/12/27/e-book-reading-jumps-print-book-reading-declines/>. Not all the news is negative for offline libraries, but much of what they offer will be online services. See Kathryn Zickuhr et al., *Library Services in the Digital Age*, PEW INTERNET & AM. LIFE PROJECT (Jan. 22, 2013), <http://libraries.pewinternet.org/2013/01/22/library-services/>.

²⁵ See Sue Gardner, *The People's Encyclopedia*, TULSA WORLD (Jan. 20, 2013), http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20130120_222_G3_ULNSne175793&PrintComments=1.; *About Wikipedia*, WIKIPEDIA <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Mar. 29, 2013).

²⁶ See *According to CEA, Over-the-Air TV Households Slip to 8 Percent of Total*, BROADCAST ENGINEERING (June 7, 2011), <http://broadcastengineering.com/hdtv/cea-over-the-air-tv-households-slip-to-8-percent>. But see Phil Kurz, *46 Million Americans Still Watch TV Exclusively*

conversations, or at least what would have once been ephemeral conversations, are now held by third parties, because they are typed rather than spoken, or because a phone or other device records them.²⁷ What would have been on the hard drive in the home is now stored in the cloud.²⁸ One could go on and on listing the vast records that are now generated and stored about each of us, and the effects of digital storage and retrieval, but the point is amply made: The increase in third party records is not some minor movement, but rather a tectonic shift. According to Eric Schmidt, CEO of Google, humanity now generates as much information every two days as it did from the dawn of civilization up to the year 2003,²⁹ and much of that information resides with third parties. Thus, as Paul Ohm has noted, police will do less and less traditional investigation, and more and more requesting of information.³⁰ Either the Fourth Amendment outside the home becomes a relic dependent upon secrecy, or it adapts to this changed landscape of what affects our security and privacy.

The core of the third party doctrine would seem to be these words of the *Miller* Court in refusing Fourth Amendment protection for bank records:

Over the Air, Says Report, BROADCAST ENGINEERING (June 8, 2011), <http://broadcastengineering.com/ott/46-million-americans-still-watch-tv-exclusively-over-air-says-report>. For a discussion of online providers tracking viewing habits see David Carr, *Giving Viewers What They Want*, N.Y. TIMES, Feb. 25, 2013, at B1.

²⁷ See Martha Irvine, *Is Texting Ruining the Art of Conversation?*, TULSA WORLD (June 10, 2012), http://www.tulsaworld.com/article.aspx/Is_texting_ruining_the_art_of_conversation/20120610_46_e4_cutlin758609.

²⁸ See Janna Anderson & Lee Rainie, *The Future of Cloud Computing*, PEW INTERNET & AM. LIFE PROJECT (June 11, 2010), <http://www.pewinternet.org/Reports/2010/The-future-of-cloud-computing.aspx>.

²⁹ See MG Siegler, *Eric Schmidt: Every 2 Days We Create As Much Information As We Did Up To 2003*, TECHCRUNCH.COM (Aug. 4, 2010), <http://techcrunch.com/2010/08/04/schmidt-data/>. No doubt much of this generated data is practically meaningless, but even a small fraction of the whole leaves an enormous amount that people consider private.

³⁰ See Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L. J. 1309, 1321–25 (2012).

[We] ha[ve] held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [the third party] to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.³¹

But even this statement of the core might be too expansive. Before the doctrine made it off the ground, in a series of decisions the Court granted Fourth Amendment protection to the content of conversations, including telephone conversations.³² In none of those cases did the Government obtain those conversations from a third party provider, and in the most directly relevant case the Court reached out to decide the issue by deciding a facial challenge to a state law.³³ Thus, as Orin Kerr has developed, it is fair to say that the Fourth Amendment protection of telephone conversations is actually less certain than perhaps we assume it to be.³⁴ But if it is right to assert Fourth Amendment protection for the contents of telephone conversations even if obtained via the provider—which the Court’s pen register case seems to assume³⁵—then we have a “limited” third party doctrine that only removes constitutional protection from information provided for a third party’s use.³⁶ In

³¹ *United States v. Miller*, 425 U.S. 435, 443 (1976).

³² See *Alderman v. United States*, 394 U.S. 165 (1969); *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967).

³³ See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 847–50 (2004).

³⁴ See *id.*

³⁵ See *Smith v. Maryland*, 442 U.S. 735, 741–42 (1979) (contrasting a pen register from acquisition of conversation contents).

³⁶ See Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 526–28 (2005). Courts in other contexts have recognized a reasonable expectation of privacy in something left with a bailee. See *United States v. Most*, 876 F.2d 191, 198 (D.C. Cir. 1989) (bag left with store clerk); *United States v. Barry*, 853 F.2d 1479, 1481–84 (8th Cir. 1988) (luggage left with airline); *United States v. Presler*, 610 F.2d 1206, 1213–14 (4th Cir. 1979) (briefcase left with friend).

other words, it is possible that the Court has intended the doctrine not to apply where the third party is a mere conduit or bailee.³⁷

When information is not directed to a particular third party but is, in theory, observable by the general public, the Court has not made clear whether we should look to what a member of the public *could* do or to what people *actually* do. Thus, in providing the critical fifth vote in the flyover case of *Florida v. Riley*,³⁸ and concurring only in the judgment, Justice O'Connor urged as follows:

[T]he relevant inquiry . . . is not whether the helicopter was where it had a right to be under FAA regulations. Rather, . . . we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not one that society is prepared to recognize as reasonable.³⁹

What unrelated private persons *actually* do is a much more limited universe than what they are theoretically able or permitted to do.

B. *The Last Twenty-Five Years*

Aside from these uncertainties, how has the third party doctrine fared in the last quarter century? Although we have not had a “core” third party case in the Supreme Court for many years, there have certainly been cases which some of the Justices believed to be governed by the doctrine. Interestingly, the doctrine has not fared well.

In *Bond v. United States*,⁴⁰ decided in 2000, the question was whether law enforcement's squeeze of overhead luggage on a bus constituted a Fourth Amendment search. Despite Justice Breyer's objection that the holding departed from settled doctrine,⁴¹ the

³⁷ This would mean, for example, that there would be Fourth Amendment protection for email held by a service provider. The Sixth Circuit so held despite service provider algorithms scanning the email content. *See United States v. Warshak*, 631 F.3d 266, 286–87 (6th Cir. 2010).

³⁸ 488 U.S. 445, 454 (1989).

³⁹ *Id.* at 454.

⁴⁰ 529 U.S. 334, 335 (2000).

⁴¹ *See id.* at 342 (Breyer, J., dissenting) (“If we are to depart from established legal principles, we should not begin here.”).

Court held that it was a search, alleging the dubious distinction that “[p]hysically invasive inspection is simply more intrusive than purely visual inspection.”⁴² The author’s Criminal Procedure students year after year would prefer that their overhead luggage be squeezed as opposed to a helicopter being flown over their backyard, not to mention the many other invasions the Court has traditionally allowed under the auspices of the third party doctrine. The holding is, however, consistent with O’Connor’s urged limitation: Although the bag is accessible to the public and *could* be squeezed in this manner, we in fact do not handle each other’s bags in this way.⁴³ The holding is also consistent with a normative limitation in that we should be able to expect more from others in our society, and certainly from police. Either way, it is the product of a more nuanced third party doctrine.⁴⁴

In *Ferguson v. City of Charleston*,⁴⁵ decided in 2001, the question was whether the Fourth Amendment restricted a state hospital from obtaining urine samples of pregnant patients, testing those samples for illegal drugs, and passing on the results to police. Although the dissent urged the false-friend cases of the third party doctrine,⁴⁶ the Court focused on why the case did not fit under its “special needs” doctrine that sometimes permits suspicionless drug testing, and remanded the case for a determination of consent.⁴⁷

⁴² *Id.* at 337.

⁴³ The *Bond* Court explained as follows:

When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent’s physical manipulation of petitioner’s bag violated the Fourth Amendment.

Id. at 338–39.

⁴⁴ The holding in *Bond* is also consistent with the trespass theory resurrected in *Jones*. See *infra* notes 95–105 and accompanying text.

⁴⁵ 532 U.S. 67, 69–70 (2001).

⁴⁶ See *id.* at 93–96 (Scalia, J., dissenting).

⁴⁷ See *id.* at 76, 79–86. Justice Kennedy wrote separately to critique the Court’s special needs analysis. See *id.* at 86–88 (Kennedy, J., concurring in the judgment). The dissenters also took issue with that analysis. See *id.* at 98–103.

But under the false-friend cases, there was consent: Undercover agents and moles do not obtain “informed consent” either, and under *Miller* the doctrine is to apply “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”⁴⁸ Hence, while the majority did not wish to admit it, *Ferguson* is inconsistent with a robust third party doctrine: There appear to be circumstances in which voluntarily conveying information for a third party’s use does *not* vitiate a reasonable expectation of privacy.⁴⁹

In *Kyllo v. United States*,⁵⁰ also decided in 2001, the question was whether law enforcement use of a thermal imager to view the heat emanating from a private residence constituted a Fourth Amendment search. Although four Justices believed it did not—this merely captures what is in the public domain⁵¹—a majority of the Court held otherwise so long as the thermal imaging technology was “not in general public use.”⁵² On this theory, it is therefore not determinative that information is made publicly available, at least where access requires technology. As Justice O’Connor urged in *Riley*,⁵³ the majority looked not to what persons *could* do, but to what they *actually* do.

In *Georgia v. Randolph*,⁵⁴ decided in 2006, the question was whether a cotenant’s consent was effective as against a present, objecting cotenant. Although the dissenters urged the assumption of risk of the third party doctrine,⁵⁵ a majority held that we must look to the societal expectation, and the expectation is that a party rejected by one cotenant will not enter.⁵⁶ There is certainly much

⁴⁸ *United States v. Miller*, 425 U.S. 435, 443 (1976).

⁴⁹ On remand, the Fourth Circuit found a lack of “informed consent.” *See Ferguson v. City of Charleston*, 308 F.3d 380 (4th Cir. 2002).

⁵⁰ 533 U.S. 27, 29 (2001).

⁵¹ *See id.* at 41–43 (Stevens, J., dissenting).

⁵² *Id.* at 34–35, 40 (majority opinion).

⁵³ *See supra* note 39.

⁵⁴ 547 U.S. 103, 106 (2006).

⁵⁵ *See id.* at 128, 132–33 (Roberts, J., dissenting).

⁵⁶ *See id.* at 111, 113–14 (majority opinion).

left to be desired when we get an empirically-based opinion without any empirics, but once again the third party doctrine did not prevail, and in the records context the societal expectation is very often—if not typically—that records shared with another for a limited purpose *not* be further shared outside of that relationship.⁵⁷ The *Randolph* Court also discussed that one retains a reasonable expectation of privacy in hotel rooms despite the entrance of others, and the same rule applies to apartments and shared office space.⁵⁸

In *City of Ontario v. Quon*,⁵⁹ decided in 2010, the question was whether a pager customer retained a reasonable expectation of privacy in communications residing with the service provider.⁶⁰ If we accept a “limited” third party doctrine, this would be answered in the affirmative.⁶¹ Rather than decide that issue, for purposes of the decision the Court unanimously assumed that one does retain such an expectation,⁶² and reaffirmed the broad application of the Fourth Amendment: “The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government, without regard to

⁵⁷ For example, consider phone records. When it came to light that employees of Hewlett Packard had obtained the phone records of board members in order to investigate alleged information leaks, the backlash cost chairwoman Patricia Dunn her job, resulted in the passage of anti-pretexting legislation at both the state and federal level, a \$14.5 million civil settlement, and the filing of both state and federal criminal charges. See 18 U.S.C. § 1039 (2006) (federal anti-pretexting legislation); Damon Darlin, *Ex-Chairwoman Among 5 Charged in Hewlett Case*, N.Y. TIMES, Oct. 5, 2006, at A1; Jim Hopkins & Jon Swartz, *Investigations Continue at HP*, USA TODAY, Oct. 5, 2006, at B2; Ellen Nakashima, *HP, Calif. Settle Spying Lawsuit*, WASH. POST, Dec. 8, 2006, at D1; Jordan Robertson, *U.S. Wins First Guilty Plea in HP Boardroom Spy Probe*, PHIL. INQUIRER, Jan. 13, 2007, at C2. It is readily apparent that people and their elected representatives expect phone records to remain private despite their retention by one’s telecommunications provider.

⁵⁸ See *Randolph*, 547 U.S. at 112.

⁵⁹ 130 S. Ct. 2619, 2624–25 (2010).

⁶⁰ The pager was owned by a public employer, but that nuance is not relevant to the arguments of this Article. See *id.* at 2624.

⁶¹ See *supra* note 36.

⁶² See *Quon*, 130 S. Ct. at 2630.

whether the government actor is investigating crime or performing another function.”⁶³ Although Justice Scalia opted not to sign on to what he considered “[t]he-times-they-are-a-changin’ ” dicta,⁶⁴ eight Justices expressed cautionary language that is far from mechanical application of a categorical third party doctrine:

The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. . . .

Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. . . . At present, it is uncertain how workplace norms, and the law’s treatment of them, will evolve. . . .

Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy.⁶⁵

Thus, in at least five decisions the Supreme Court has shied away from applying a strong third party doctrine, while also not very clearly articulating an alternative rule. Moreover, as James Dempsey has pointed out, in a 1989 decision the Court rejected a third party doctrine in interpreting a Freedom of Information Act exception.⁶⁶ Albeit in a different context, the Court’s unanimous rejection of what it considered to be a “cramped notion of personal privacy” is significant.⁶⁷

⁶³ *Id.* at 2627 (internal quotation marks omitted).

⁶⁴ *See id.* at 2635 (Scalia, J., concurring in part and concurring in the judgment).

⁶⁵ *Id.* at 2629–30 (majority opinion).

⁶⁶ *See* James X. Dempsey, *The Path to ECPA Reform and the Implications of United States v. Jones*, 47 U.S.F. L. REV. 225, 242–43 (2012) (citing U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)). The Court distinguished information privacy and decisional privacy, and with respect to the former recognized the control theory of information privacy. *Reporters Comm.* at 763 (“To begin with, both the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person.”).

⁶⁷ *Reporters Comm.* at 763. Justices Blackmun and Brennan concurred only the judgment, but in a manner that similarly rejects a third party doctrine. *See*

C. Other Courts

There are two other sources that deserve mention. First, while lower federal courts are of course beholden to what the Supreme Court decides, until more clear instruction is received, it is relevant how they have interpreted the third party doctrine. Second, if we care not solely about the federal Constitution but rather more broadly about what constitutional rights people have, we must also look to state constitutions as they have been interpreted by the respective highest courts.

Lower federal courts should arguably follow the High Court's third party doctrine even if they were to believe the Supreme Court has begun to shift.⁶⁸ So, what have lower courts held? Where another right or interest is implicated, they have granted constitutional protection. Thus, at least three district courts have rejected subpoenas or other requests seeking book or movie purchases.⁶⁹ As one court sagely noted:

[I]f word were to spread over the Net—and it would—that the FBI and the IRS had demanded and received Amazon's list of customers and their personal purchases, the chilling effect on expressive e-commerce would frost keyboards across America. Fiery rhetoric quickly would follow and the nuances of the subpoena (as actually written and served) would be lost as the cyberdebate roiled itself to a furious boil. One might ask whether this court should concern itself with blogger outrage disproportionate to the government's actual demand of Amazon. The logical answer is yes, it should: well-founded or not, rumors of an

id. at 780–81.

⁶⁸ *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

⁶⁹ See *Amazon.com v. Lay*, 758 F. Supp. 2d 1154, 1167–69 (W.D. Wash. 2010) (rejecting request for expressive records under the First Amendment); *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. Section 1461*, 706 F. Supp. 2d 11, 16–23 (D.D.C. 2009) (rejecting grand jury subpoena under the First Amendment); *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 572–74 (W.D. Wis. 2007) (rejecting grand jury subpoena under the First Amendment and using a creative opt in procedure to avoid the problem).

Orwellian federal criminal investigation into the reading habits of Amazon's customers could frighten countless potential customers into canceling planned online book purchases, now and perhaps forever.⁷⁰

Courts have similarly granted Fourth Amendment protection to medical records residing with a third party provider.⁷¹ It is not immediately clear whether it is best to approach such cases as First Amendment cases, due process cases, or Fourth Amendment cases informed by those other rights, but there has lately been some scholarly work on how to conceptualize these relationships,⁷² and at the very least the cases demonstrate that any third party doctrine is effectively not absolute.

Nor are such decisions limited to where another constitutional right is at stake. Courts have also looked to statutes and the common law in granting Fourth Amendment protections.⁷³ Although some might object to such a feedback loop in

⁷⁰ *In re Grand Jury Subpoena to Amazon.com* Dated August 7, 2006, 246 F.R.D. at 573.

⁷¹ *See, e.g., Doe v. Broderick*, 225 F.3d 440, 450–52 (4th Cir. 2000) (requiring a warrant, or at the very least probable cause, to access medical records); *State v. Skinner*, 10 So. 3d 1212, 1218 (La. 2009) (requiring a warrant to obtain prescription and/or medical records); *Commonwealth v. Riedel*, 539 Pa. 172, 182–83 (1994) (typically requiring a warrant to access medical records). *But see Williams v. Commonwealth*, 213 S.W.3d 671 (Ky. 2006) (finding no reasonable expectation of privacy in limited search of pharmacy records); *People v. Perlos*, 436 Mich. 318–31 (1990) (finding no reasonable expectation of privacy for blood alcohol records in the context of an automobile accident).

⁷² *See Daniel J. Solove, The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007); Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741 (2008); *see also New York v. P.J. Video, Inc.*, 475 U.S. 868, 873–75 (1986) (recognizing First Amendment relevance in searches and seizures of literary materials but rejecting a higher standard of probable cause).

⁷³ *See, e.g., Warshak v. United States*, 490 F.3d 455, 474–75 (6th Cir. 2007) (looking to federal statute in requiring warrant for e-mail), *vacated on other grounds by* 532 F.3d 521 (6th Cir. 2008); *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000) (looking to federal statute in requiring warrant for medical records); *DeMassa v. Nunez*, 770 F.2d 1505, 1506–07 (9th Cir. 1985) (looking to other constitutional provisions, federal and state statutes, case law, and codes of professional responsibilities in requiring warrant for attorney files); *People v. Gutierrez*, 222 P.3d 925, 932–36 (Colo. 2009) (looking to federal and state statutes and case law in requiring warrant for tax preparer records).

constitutional analysis, given that the criterion is the “reasonableness” of police conduct, it is eminently sound. Whether one takes an empirical view of reasonableness—meaning what persons actually expect—or whether one takes a normative view of reasonableness—meaning what persons are entitled to expect in a free and open society—it is relevant what the law permits and prohibits. For example, whether the thermal imager of *Kyllo* is in “general public use”⁷⁴ will depend not solely upon developments in technology and consumer choice, but also upon any statutory restrictions on the sale or use of such devices.

Finally, a few words on state constitutions: Not only do they potentially add constitutional rights to the federal Fourth Amendment floor, but they are themselves relevant in determining that floor. In deciding whether warrantless arrests in public were constitutional, the Supreme Court looked to state practice.⁷⁵ In considering warrantless home entry, the Court looked to state practice.⁷⁶ Indeed, because the overall numbers were not very persuasive to its conclusion, the Court gave credence to the *trend* in state practice,⁷⁷ as it did to justify its about-face regarding the constitutionality of the Fourth Amendment’s exclusionary rule.⁷⁸ State practice is helpful “when the constitutional standard is as amorphous as the word ‘reasonable,’ and when custom and contemporary norms [thus] necessarily play such a large role in the constitutional analysis.”⁷⁹ This is especially true of state constitutional decisions: “[B]y invoking a state constitutional provision, a state court immunizes its decision from review by [the federal Supreme] Court. This heightened degree of immutability underscores the depth of the principle underlying the result.”⁸⁰

Every state has a cognate or analog to the federal Fourth Amendment, and while the jurisprudence might not be as

⁷⁴ 533 U.S. 27, 34, 40 (2001).

⁷⁵ See *United States v. Watson*, 423 U.S. 411, 421–22 (1976).

⁷⁶ See *Payton v. New York*, 445 U.S. 573, 598–600 (1980).

⁷⁷ See *id.*

⁷⁸ See *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

⁷⁹ *Payton*, 445 U.S. at 600.

⁸⁰ *Id.*

developed as we might like, a significant number of states deviate from the Fourth Amendment's third party doctrine.⁸¹ On the precise issue in *Jones*, namely location tracking, several states took the lead.⁸² In 1988, a unanimous Supreme Court of Oregon deviated from the federal beeper cases and held that using a radio transmitter to locate an automobile constitutes a search typically requiring a warrant.⁸³ In 2003, a unanimous Supreme Court of Washington agreed and required a warrant for GPS tracking under the Washington constitution.⁸⁴ In 2009, the New York high court required a warrant for GPS tracking under its state constitution:

The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods Disclosed in the data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment

⁸¹ See Stephen E. Henderson, *Learning from All Fifty States: How To Apply the Fourth Amendment and Its State Analogs To Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 395 (2006).

⁸² See *People v. Weaver*, 12 N.Y.3d 433, 445 (2009) (requiring warrant); *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003) (requiring warrant); *State v. Campbell*, 759 P.2d 1040, 1049 (Or. 1988) (requiring warrant). This is not to say that all states agree. See *Osburn v. State*, 44 P.3d 523, 526 (Nev. 2002) (holding no search).

⁸³ *Campbell*, 759 P.2d at 1049 (“[I]f the state’s position in this case is correct, no movement, no location and no conversation in a ‘public place’ would in any measure be secure from the prying of the government. There would in addition be no ready means for individuals to ascertain when they were being scrutinized and when they were not. That is nothing short of a staggering limitation upon personal freedom.”).

⁸⁴ *Jackson*, 76 P.3d at 223 (“[T]he intrusion into private affairs made possible with a GPS device is quite extensive as the information obtained can disclose a great deal about an individual’s life. For example, the device can provide a detailed record of travel to doctors’ offices, banks, gambling casinos, tanning salons, places of worship, political party meetings, bars, grocery stores, exercise gyms, places where children are dropped off for school, play, or day care, the upper scale restaurant and the fast food restaurant, the strip club, the opera, the baseball game, the ‘wrong’ side of town, the family planning clinic, the labor rally. In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one’s life.”).

center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits.⁸⁵

The Massachusetts Supreme Court has held similarly under its state constitution, though focusing on the intrusion as a seizure rather than a search.⁸⁶ Not all states have agreed,⁸⁷ but these decisions make a forceful case for constitutionally restricting location surveillance.

So, on the eve of *Jones* we had a potentially “limited” third party doctrine that might constitutionally protect information provided to a conduit or bailee, that might constitutionally protect information exposed to the public but not regularly obtained by that public, that might constitutionally protect information that enjoys other constitutional or statutory protection, and that might be ripe for change given developments in technology and social norms and trends in state constitutional law.

III. *UNITED STATES V. JONES*

Police (in particular a joint FBI and District of Columbia Metropolitan Police task force) believed Antoine Jones to be involved in trafficking narcotics.⁸⁸ Based on information gathered in a significant investigation,⁸⁹ they applied for and received a warrant to install, and then monitor, a GPS tracking device on a Jeep Grand Cherokee registered to Jones’s wife. Police thereafter installed just such a device, and remotely monitored the location of that vehicle to within fifty to one hundred feet over a twenty-eight-day period. The tracker broadcast the location of the vehicle to a government computer, generating more than two thousand pages

⁸⁵ *Weaver*, 909 N.E.2d at 1199–1200.

⁸⁶ *Commonwealth v. Connolly*, 913 N.E.2d 356, 369–70 (Mass. 2009).

⁸⁷ *See Osburn*, 44 P.3d at 526 (holding that tracking is not a search).

⁸⁸ *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

⁸⁹ Ultimately, the investigation included physical surveillance, wiretaps, camera surveillance, and the GPS tracking. *Id.*

of location data. Based on this investigation, the Government linked Jones to a stash house containing \$850,000 in cash and at least that much value in cocaine and cocaine base.⁹⁰

Unfortunately, when police installed the device, they failed to follow the warrant's instructions. They installed it on the eleventh day, when the warrant permitted a ten-day window, and they installed it outside of the District of Columbia.⁹¹ In response to Jones's motion to suppress, the Government argued that the Fourth Amendment was not implicated.⁹² Jones had no reasonable expectation of privacy in his vehicle's location while that vehicle was in any public place: Any member of the public could see the vehicle, and thus so could the police.

It was not difficult for the Court to understand the implications of the Government's theory. At oral argument, Chief Justice Roberts inquired whether the Government's position was genuinely that it could, for any reason or no reason, monitor the movements of the Justices for a month without Fourth Amendment restraint.⁹³ The Government believed it could,⁹⁴ and it lost nine to zero. The Court was not unanimous, however, in its reasoning.

A. *Scalia Five*

Justice Scalia's opinion for the Court, joined by Chief Justice Roberts and by Associate Justices Kennedy, Thomas, and Sotomayor, held that the *Katz* reasonable expectation of privacy criterion *added to*, but did not eliminate, the former trespass conception of Fourth Amendment search.⁹⁵ In a nutshell, at one time the Court held that the Fourth Amendment was only

⁹⁰ *Id.* at 948–49.

⁹¹ *Id.* at 948. The Government did not argue that such failures do not require suppression, a position it might now regret. *See id.* at 964 n.11 (Alito, J., concurring) (pointing out this lack of argument).

⁹² *Id.* at 948 n.1, 950 (majority opinion)

⁹³ Transcript of Oral Argument at 9–10, *Jones*, 132 S. Ct. 945 (No. 10-1259), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf.

⁹⁴ *Id.*

⁹⁵ *Jones*, 132 S. Ct. at 950–52.

implicated by a tangible interference with “persons, houses, papers, and effects.”⁹⁶ Thus, for example, a wiretap could implicate the Fourth Amendment, but only if its installation included a trespass into a constitutionally protected area, namely a “house.”⁹⁷ Similarly, eavesdropping did not implicate the Fourth Amendment absent such a trespass,⁹⁸ but upon such a trespass—even merely that of a spike microphone intruding by an inch—there was a Fourth Amendment search.⁹⁹ Under this conception, law enforcement placing and monitoring a recording device upon the public telephone booth in which Katz infamously placed a call would not implicate the Fourth Amendment.¹⁰⁰ But the Court found a Fourth Amendment violation in *Katz* in an opinion strong on rhetoric but weak on legal rules, and the Court ultimately adopted Justice Harlan’s reasonable expectation of privacy criterion for what constitutes a Fourth Amendment search.¹⁰¹

Jones thus resurrects the dormant trespass criterion: When police placed the GPS device upon the vehicle, they physically trespassed upon a constitutionally protected area (an “effect”) in order to obtain information, and thereby engaged in a Fourth Amendment search.¹⁰² Unfortunately, nobody has a clue what

⁹⁶ U.S. CONST. amend. IV; see *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001).

⁹⁷ *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928).

⁹⁸ *Goldman v. United States*, 316 U.S. 129, 134–36 (1942).

⁹⁹ *Silverman v. United States*, 365 U.S. 505, 510–12 (1961).

¹⁰⁰ See *Katz v. United States*, 389 U.S. 347, 348 (1967).

¹⁰¹ See *id.* at 361 (Harlan, J., concurring) (articulating test); *United States v. Jones*, 132 S. Ct. 945, 950 (recognizing adoption by Court). For an articulation of this history, see *Jones*, 132 S. Ct. at 959–60 (Alito, J., concurring) and Henderson, *supra* note 36, at 511–21. For an alternative telling, see Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, SUP. CT. REV. (forthcoming).

¹⁰² In order to avoid reversing *Knotts* and *Karo*, the Court distinguished installing a device *before* Jones possessed the vehicle. See *Jones*, 132 S. Ct. at 952. This would seem to permit the Government to install GPS tracking devices in all vehicles upon the consent of car manufacturers, and is unpersuasive.

The Court did not decide what restraint renders the *Jones* trespass reasonable. See *id.* at 954; see also *State v. Brereton*, 2013 WI 17, ¶43 (Wis. 2013) (requiring warrant for vehicle location tracking); *State v. Zahn*, 812 N.W.2d

theory of trespass to chattel the Court was invoking, and thus we do not know what will suffice in other circumstances.¹⁰³ For example, say police lay hands upon a person and ask her a question. We know this likely constitutes a so-called “Terry stop,” which is a Fourth Amendment seizure, and we know that such a stop is permissible upon reasonable suspicion.¹⁰⁴ But since this also seems a physical trespass upon a constitutionally protected area (a “person”), and it is for the purpose of obtaining information, is it also a search? Does it matter? How about the examination of the exterior of a vehicle in a parking lot? Purely visual inspection would seem to remain unregulated, but what of taking fingerprints, tire impressions, or paint scrapings? These techniques are probably searches, since they interfere with the property at least as significantly as did the magnetic installation of a GPS device. That is not to say, of course, that they necessarily require a warrant or other judicial preclearance before they are reasonable; the author suspects we will learn the contrary. The point is merely that many new questions now arise.¹⁰⁵

Fortunately, those questions can be set aside in discussing the third party doctrine. The Court made very clear that this trespass-

490, 499 (S.D. 2012) (requiring warrant for vehicle location tracking); *United States v. Ortiz*, 878 F. Supp. 2d. 515, 536–37 (E.D. Pa. 2012) (requiring warrant for vehicle location tracking).

¹⁰³ See *Jones*, 132 S. Ct. at 957 n.2, 961–62 (Alito, J., concurring in the judgment); Peter A. Winn, *Trespass and the Fourth Amendment: Some Reflections on Jones*, USVJONES.COM (June 4, 2012), <http://usvjones.com/2012/06/04/trespass-and-the-fourth-amendment-some-reflections-on-jones/#more-199>.

¹⁰⁴ See *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁰⁵ For example, does the result in *California v. Greenwood*, 486 U.S. 35 (1988), change because collection of trash awaiting collection is a trespass to the trash receptacle? See *United States v. Weston*, No. 2:12-CR-79 JVB, 2012 WL 3987291 (N.D. Ind. Sept. 10, 2012) (holding that the result does not change). Does writing in chalk on a tire to monitor a limited-time parking space constitute a Fourth Amendment search? Does the search of stolen property (for example, a laptop) constitute a search because trespass is an offense against possession? Does running a hash function on computer files and comparing the results only to known child pornography constitute a search under the trespass conception?

based conception is merely the *minimum* protection afforded by the Fourth Amendment:

The concurrence faults our approach for “present[ing] particularly vexing problems” in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.¹⁰⁶

The Court’s opinion depends upon a trespass rationale, and thus leaves the third party doctrine right where it found it. As an aside, it is interesting to ponder whether *Jones* might be a first step in the Court jettisoning the reasonable expectation of privacy criterion, and instead using a dictionary-definition of “search”¹⁰⁷ and relying upon the protection against “unreasonable” searches and seizures to do most all of the work. Certainly Justice Scalia would favor this change, as would this author.¹⁰⁸ Much of the Court’s reasonable expectation of privacy jurisprudence would remain relevant, but it would inform whether the dictionary-definition search was reasonable.

¹⁰⁶ *Jones*, 132 S. Ct. at 953. The Court concluded, “It 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.” *Id.* at 954.

¹⁰⁷ For example, Webster’s defines search as “to look into or over carefully or thoroughly in an effort to find . . . something.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2048 (2002).

¹⁰⁸ See *Kyllo v. United States*, 533 U.S. 27, 32–33 (2001) (criticizing *Katz*’s reasonable expectation of privacy on this basis); *Minnesota v. Carter*, 525 U.S. 83, 91–92 (1998) (Scalia, J., concurring) (same); Henderson, *supra* note 36, at 544–46. Whereas Justice Scalia favors reasonableness keyed to history, the author favors a more flexible empirical approach with an ultimate normative backdrop of what should be permissible in a free and open society. Justice Harlan, the author of the reasonable expectation of privacy criterion, ultimately favored something more like the author’s approach. See *United States v. White*, 401 U.S. 745, 786–90 (1971) (Harlan, J., dissenting).

B. *Alito Four*

Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, concurred only in the judgment.¹⁰⁹ Alito found the Court's application of "18th-century tort law" to this "21st-century surveillance" to be misguided and ironic—so much so that he spent more ink criticizing the majority than analyzing the case.¹¹⁰ Ultimately, Alito used the *Katz* reasonable expectation of privacy criterion, and concluded that the long-term monitoring of the movements of Jones's vehicle constituted a Fourth Amendment search.¹¹¹

Alito adopted an empirical notion of the reasonable expectation, commenting upon the potential for technological developments to place "popular expectations" in flux, and upon the potential that people will "eventually reconcile themselves" to those changes or will adopt legislation to push back.¹¹² With respect to location information in particular, Alito noted closed-circuit television cameras, toll road transponders, and cell phone location tracking, and concluded that "[t]he availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements."¹¹³

Although Alito, channeling and citing Orin Kerr, might deem legislatures best equipped to regulate in the midst of technological change,¹¹⁴ in the absence of that legislation Alito—now channeling Daniel Solove¹¹⁵—had to decide the constitutional question without that legislative assist.¹¹⁶ Alito framed the question as "whether the

¹⁰⁹ *Jones*, 132 S. Ct. at 957.

¹¹⁰ *Id.* at 957–62.

¹¹¹ *Id.* at 962–94.

¹¹² *Id.* at 962.

¹¹³ *Id.* at 963.

¹¹⁴ *Id.* at 964 (citing Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805–06 (2004)).

¹¹⁵ See Daniel Solove, Essay, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1515, 1535–37 (2010).

¹¹⁶ *Jones*, 132 S. Ct. at 964.

use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated,” and answered in the affirmative as to long-term tracking for anything but the most significant of crimes.¹¹⁷ For those most serious crimes (“extraordinary offenses”¹¹⁸), police might have engaged in non-technologically enhanced visual long-term surveillance despite the very significant resource expenditure, but otherwise—now channeling William Stuntz¹¹⁹—Alito believed that only short-term surveillance would be expected. Alito did not identify “the point at which the tracking of [Jones’s] vehicle became a search,”¹²⁰ an issue that raises problems in implementation.¹²¹

What does the opinion of the Alito four mean for the third party doctrine more generally? As the Court has often done, Alito’s is an empirical opinion without any empirics.¹²² If the four Justices would therefore look to the opinions in *Smith*, *Miller*, and their progeny¹²³ as accurately describing the empirical societal expectations at that time, presumably the same result should hold unless those expectations have changed. But those expectations were never what the Court claimed them to be. When the Court gave no constitutional protection to banking records, Congress responded with statutory protection.¹²⁴ When the Court gave no constitutional protection to telephone dialing records, Congress

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1278-80 (1999).

¹²⁰ *Jones*, 132 S. Ct. at 964.

¹²¹ See sources cited *supra* note 10.

¹²² For example, in *Smith v. Maryland*, the Court assumed what persons knew and expected regarding phone company records. See *Smith v. Maryland*, 442 U.S. 735, 742-43 (1979). In *Oliver v. United States*, the Court assumed that persons do not engage in intimate activities in “open fields” and that persons routinely ignore “No Trespassing” signs and the laws of criminal trespass. See *Oliver v. United States*, 466 U.S. 170, 179 (1984). In *Georgia v. Randolph*, the Court assumed that a would-be visitor confronted with conflicting covenants would stay out. See *Georgia v. Randolph*, 547 U.S. 103, 113 (2006).

¹²³ See *supra* Part II.A.

¹²⁴ See Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2006).

responded with statutory protection.¹²⁵ The reason courts have diverged as a matter of state constitutional law,¹²⁶ and that many relevant state statutes have been passed,¹²⁷ is because in the 1960s, 1970s, and 1980s, reasonable persons *did* expect privacy in these records. But whether such expectations are merely a continuation of the status quo or represent a societal shift, there is certainly evidence to urge that reasonable persons today do not anticipate or approve of private or public persons having unrestricted access to all information they trust to third parties.

C. *Sotomayor Solo*

Can you have your cake and eat it too? Justice Sotomayor joined Scalia's opinion, thus creating a Court majority for reinvigorating the dormant trespass analysis, but also wrote a separate concurrence that potentially goes farther than the Alito opinion, and is the only opinion to specifically address the core third party doctrine.

First, Sotomayor agrees with Scalia: “[A] search within the meaning of the Fourth Amendment occurs, at a minimum where, as here, the Government obtains information by physically intruding on a constitutionally protected area.”¹²⁸ Second, she agrees with Alito: “Under [the *Katz*] rubric, I agree with Justice Alito that, at the very least, longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”¹²⁹ Indeed, to Sotomayor even short-term GPS monitoring is potentially of Fourth Amendment concern because it gathers a wealth of information, is surreptitious, is no longer resource constrained, and chills associational and expressive

¹²⁵ See 18 U.S.C. §§ 3121–3127 (2006).

¹²⁶ See Henderson, *supra* note 81.

¹²⁷ See, e.g., 9 C.J.S. Banks and Banking § 269 (2008) (summarizing restrictions on government access to bank records); Tracy A. Bateman, *Search and Seizure of Bank Records Pertaining to Customer as Violation of Customer's Rights Under State Law*, 3 A.L.R. 5th 453 (1995).

¹²⁸ *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., concurring) (internal quotation marks omitted).

¹²⁹ *Id.* at 955 (internal quotation marks omitted).

freedoms.¹³⁰ Like Alito, Sotomayor would consider an empirical conception of reasonable expectation, but one with a normative overlay:

I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. . . . I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power . . . and [to] prevent a too permeating police surveillance.¹³¹

Finally, Sotomayor directly confronts the third party doctrine:

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice Alito notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. 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.¹³²

While it was not necessary to the resolution of *Jones*, it seems there is one relatively secure vote for abolishing any strong form of the third party doctrine.

¹³⁰ See *id.* at 955–56.

¹³¹ *Id.* at 956 (internal quotation marks omitted).

¹³² *Id.* at 957 (citation omitted).

IV. LOOKING FORWARD – A CAUTIOUS OPTIMISM

Jones was a major victory for those desiring some restraint on very invasive government surveillance. It is (wonderfully) hard to imagine an America in which *Jones* comes out the other way, and thus this author was not a bit surprised at the outcome. Until the oral argument, it might have been foolhardy to predict a 9-0 result, but that argument made very clear that the Justices “got it,” and in retrospect everyone should have predicted such a result. It is, of course, far too easy to throw around such labels, but there is not much that seems more Orwellian than law enforcement tracking all of our movements without restraint.

But then it seems equally Orwellian for law enforcement to peruse all of our banking records, telecommunications records (other than content of conversations), medical records, media consumption records, and commercial records without restraint. Indeed, in working with different government officials in the course of six years as Reporter for a relevant volume in the American Bar Association (“ABA”) Criminal Justice Standards, the author has not met a single one who advocates such law enforcement behavior. There were, at times, significant disagreements about *how* best to regulate law enforcement, but nobody seems to advocate carte blanche access. For those who believe the Fourth Amendment should have some role, there is something seriously wrong with a robust third party doctrine.

Hopefully this Article has demonstrated that said “wrong” is not as pervasive in existing law as some might think, because even the existing doctrine has some significant limitations. And there is good cause to be cautiously optimistic about the future. The states have always been our laboratories. They “road tested” the principles that became our Fourth Amendment and the rest of our Constitution, and in recent years they have once again taken up that mantle in the interpretation of their own constitutions. Legislatures have also stepped into the breach, and will continue to do so.¹³³ For example, the California legislature recently

¹³³ Despite the utility of legislative regulations, we must always have a constitutional backstop. In the words of Anthony Amsterdam: “Even if our

overwhelmingly approved legislation typically requiring a warrant to access location records.¹³⁴ Although the bill was vetoed by the governor,¹³⁵ it will not be the last word on the matter. Respected organizations will contribute their ideas, like the newly adopted ABA Criminal Justice Standards on Law Enforcement Access to Third Party Records.¹³⁶ As Reporter, the author is thoroughly biased, but the Standards reflect wise compromises and a very promising template for legislatures, courts, and administrative agencies confronting how best to regulate law enforcement access to information. So, again, there is some cause for cautious optimism.

V. CONCLUSION

United States v. Jones raises many questions, but hopefully in time it will be seen as helping to answer one: that the Fourth Amendment will continue to have a meaningful role in regulating twenty-first century searches. It would be foolish to think the Supreme Court will ultimately adopt the “right” answer, if that is defined by precisely the world as any one commentator would have it. And perhaps in a few years the author will be sufficiently

growing crime rate and its attendant mounting hysteria should level off, there will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control.” Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 379 (1974). The author might not be as down on legislatures as Professor Amsterdam was, but there comes a point at which his observation will prove true.

¹³⁴ See Cal. S.B. 1434 (Apr. 9, 2012). The Assembly approved the bill by a vote of 63-11 and the Senate by a vote of 33-3. See *Around the Capitol*, SB 1434, http://www.aroundthecapitol.com/Bills/SB_1434/20112012/ (last visited Apr. 20, 2013). Similar legislation has been introduced in Congress. See ECPA 2.0 Act of 2012, H.R. 6529, 112th Cong. (2012).

¹³⁵ James Temple, *Brown Vetoes Bill on Location Privacy*, SAN FRAN. CHRON. (Oct. 4, 2012, 5:59 PM), <http://blog.sfgate.com/techchron/2012/10/02/gov-brown-vetoes-cell-phone-privacy-bill/>.

¹³⁶ The Standards are available from the American Bar Association. *Law Enforcement Access to Third Party Records Standards*, AM. BAR ASS’N, http://www.americanbar.org/groups/criminal_justice/policy/standards/law_enforcement_access.html.

disappointed in what has come to pass that he will return, like Anthony Amsterdam, to reading “Supreme Court search and seizure cases with the righteous indignation that only academics can consistently sustain.”¹³⁷ But here there are no easy “just right” answers. So, it is encouraging to see the Supreme Court taking a case-by-case approach. *Jones* can be read as a return to the more flexible approach of *Katz*, which is more likely to get the “right” result in a particular case, even if it also leaves the doctrine a bit nebulous for future cases.¹³⁸ It is encouraging that there are many

¹³⁷ Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974). For a terrific description of some inherent court limitations, including those particular to the limited government norm of the Fourth Amendment, see *id.* at 350–55. If inspired to pull Amsterdam’s magnificent article, be sure to read his fifth footnote.

¹³⁸ Again we can turn to the wise words of Professor Amsterdam: “[T]he *Katz* decision was written to resist captivation in any formula. An opinion which sets aside prior formulas with the observation that they cannot ‘serve as a talismanic solution to every Fourth Amendment problem’ should hardly be read as intended to replace them with a new talisman.” *Id.* at 385. Professor Amsterdam continues:

Katz is important for its rejection of several limitations upon the operation of the amendment, but it offers neither a comprehensive test of fourth amendment coverage nor any positive principles by which questions of coverage can be resolved. The fourth amendment is not limited to protection against physical trespass, although the pre-constitutional history of the amendment was concerned with trespasses. “Searches” are not particular methods by which government invades constitutionally protected interests: they are a description of the conclusion that such interests have been invaded. . . . In the end, the basis of the *Katz* decision seems to be that the fourth amendment protects those interests that may justifiably claim fourth amendment protection.

Of course this begs the question. But I think it begs the question no more or less than any other theory of fourth amendment coverage that the Court has used.

Id. Justice Breyer has similarly urged:

[T]he Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever-changing complexity of human life. It consequently uses the general terms “unreasonable searches and seizures.” And this Court has continuously emphasized that “[r]easonableness is measured by examining the totality of the circumstances.”

alternative decision makers even if the federal Supreme Court ultimately provides little Fourth Amendment protection. Perhaps the author's expectations are too low, but with a little perspective and some more time, perhaps the bumpy road of protections against unreasonable search and seizure will not appear quite so bad.

Georgia v. Randolph, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) (internal ellipses omitted).

