

WARRANTLESS GPS IN *UNITED STATES V. JONES*: IS 2011 THE NEW 1984?

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I. INTRODUCTION

With technology rapidly changing police capabilities, the Supreme Court must continually harmonize technological advances with Fourth Amendment safeguards. *United States v. Jones*¹ challenges the Court to balance such Fourth Amendment considerations by presenting the questions of whether the Fourth Amendment protects against the warrantless attachment of a Global Positioning System (GPS) tracking device to a vehicle and whether an individual has a reasonable expectation of privacy in the location information recorded by the device. This case stands to push the boundaries of the Court's Fourth Amendment jurisprudence and will test the Court's ability to weigh "1984" concerns against law enforcement surveillance techniques. The Court likely will decide that the warrantless attachment of a GPS device violates the Fourth Amendment, but will hold that an individual does not have a reasonable expectation of privacy in publicly exposed location information.

II. FACTS

In 2004, FBI agents and the D.C. Metropolitan Police Department formed a joint task force and began investigating Antoine Jones for cocaine trafficking.² In addition to conducting visual surveillance, obtaining a pen register for Jones's dialed numbers, and installing fixed cameras near Jones's nightclub, the joint task force obtained a

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1. *United States v. Jones*, No. 10-1259 (U.S. argued Nov. 8, 2011).

2. Brief for United States at 2, *Jones*, No. 10-1259 (U.S. Aug. 11, 2011).

warrant to install a GPS tracking device on a jeep registered to Jones's wife but frequently used by Jones.³ The warrant required the agents to install the GPS device in the District of Columbia within ten days of the warrant's issuance.⁴ The agents, however, installed the device on the *eleventh* day in a public parking lot in Maryland, outside the sanctioned jurisdiction.⁵ The GPS device recorded Jones's movements and transmitted the data in real time back to law enforcement for a four-week period.⁶

Using the transmitted data to pattern Jones's repeated presence at suspected stash houses, the joint task force obtained warrants and conducted several raids, finding narcotics, cash, and firearms at various locations.⁷ A federal grand jury then indicted Jones for conspiracy to distribute cocaine.⁸ The District Court denied Jones's motion to suppress the GPS evidence but excluded any evidence obtained while the jeep was parked in his garage.⁹ Though jury hung on the conspiracy charge in the first trial,¹⁰ a second trial led to Jones's conviction for conspiracy to distribute cocaine and a sentence of life imprisonment.¹¹ The D.C. Circuit reversed Jones's conviction and denied a rehearing en banc, holding that the prolonged warrantless GPS tracking violated Jones's reasonable expectation of privacy.¹²

III. LEGAL BACKGROUND

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures”¹³ As Justice Harlan explained in his concurrence in *United States v. Katz*,¹⁴ a warrantless

3. *Id.* at 3.

4. *Id.*

5. *Id.*

6. Brief for Respondent at 4, *Jones*, No. 10-1259 (U.S. Sep. 26, 2011).

7. Brief for the United States, *supra* note 2, at 4.

8. Brief for Respondent, *supra* note 6, at 5.

9. *Id.*

10. *Id.* at 6.

11. Brief for the United States, *supra* note 2, at 5-6.

12. *Id.* at 6-9.

13. U.S. CONST. amend. IV (“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.”).

14. 389 U.S. 347 (1967) (Harlan, J., concurring). In *Katz*, FBI agents attached an electronic listening device outside a phone booth to record the defendant's conversations. *Id.* at 348 (majority opinion). Even though the phone booth was in public, the Court held that attaching

law enforcement activity is considered a search if the person targeted has manifested a subjective expectation of privacy and society recognizes that expectation as reasonable.¹⁵ As an expectation's "reasonableness" must be referenced to a source outside the Fourth Amendment, courts look not only to property law concepts but also to societal understandings.¹⁶ If the warrantless law enforcement activity is considered a search, it requires a judicially approved warrant to be held reasonable unless the government is able to prove one of a few recognized exceptions, such as "hot pursuit" or "incident to arrest."¹⁷ According to the Supreme Court, the *ex ante* approval of warrants serves as an important judicial bulwark against the abuse of power.¹⁸ In fact, the Court has rejected the retroactive approval of warrants, even if law enforcement had probable cause, because it would hinge on the "far less reliable procedure of an after-the-event justification."¹⁹

In determining what constitutes a reasonable expectation of privacy, *Katz* and subsequent cases focus on what a person seeks to protect as private, even in a public area, rather than looking solely to the place where the private conduct was observed by public authorities.²⁰ An individual has no reasonable expectation of privacy in publicly exposed information because anyone can observe that information.²¹ Even though *Katz* focuses on the individual, homes still receive heightened protection, and thus, anything not in plain view in the home is generally considered protected against government observation.²² Further, law enforcement may in some cases conduct warrantless searches of otherwise protected areas if the search would

the listening device without a warrant constituted a "search" and violated the defendant's reasonable expectation of privacy because what the defendant sought to exclude was the "uninvited ear." *Id.* at 352. One who occupies a phone booth would conclude that his conversation "will not be broadcast to the world" upon closing the door and paying the toll. *Id.*

15. *Id.* at 361 (Harlan, J., concurring).

16. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

17. *Katz*, 389 U.S. at 357–58. "Hot pursuit" means that police can enter into private areas during an emergency or while pursuing someone who has committed a crime. *United States v. Santana*, 427 U.S. 38, 42–43 (1976). "Incident to arrest" refers to the ability of the police to arrest a person and search for weapons or other objects that would endanger the officer. *Chimel v. California*, 395 U.S. 752, 762–64 (1969).

18. *Katz*, 389 U.S. at 357.

19. *Id.* at 357–58 (quoting *Beck v. Ohio*, 379 U.S. 89, 96 (1964)) (internal quotation marks omitted).

20. *Id.* at 351 ("For the Fourth Amendment protects people, not places.").

21. *United States v. Knotts*, 460 U.S. 276, 281–82 (1983).

22. *Kyllo v. United States*, 533 U.S. 27, 35, 40 (2001).

not reveal intimate details.²³

A. *Public Exposure and the Reasonable Expectation of Privacy*

In *Katz*'s person-focused approach, the extent to which someone exposes himself to the public affects whether his subjective expectation of privacy is reasonable. When someone travels in public, and notably on public thoroughfares, law enforcement may engage in visual surveillance without a warrant because an individual in public "voluntarily convey[s] to anyone who want[s] to look" where he is travelling and what he is doing.²⁴ Technology that "augments" this visual surveillance does not necessarily violate the Fourth Amendment.²⁵ In *Knotts v. United States*,²⁶ Minnesota law enforcement suspected the defendant of manufacturing illegal drugs and used a beeper to track the transportation of a five-gallon drum of chloroform via public highways.²⁷ The Court held that the beeper tracking did not amount to a search because the beeper revealed the same information that could have been obtained by an officer conducting visual surveillance.²⁸

Public exposure may not be dispositive, however, for the Supreme Court also looks to what an individual expects another to do. In *Bond v. United States*,²⁹ for example, although "a bus passenger clearly expects that his bag may be handled," the Supreme Court nonetheless concluded that the defendant had a reasonable expectation of privacy when a border patrol agent squeezed the defendant's luggage because passengers do not expect others to "feel the bag in an exploratory manner."³⁰ By contrast, the defendant in *California v. Greenwood*³¹ had no reasonable expectation of privacy when police, in search of narcotics evidence, searched the defendant's opaque garbage bags left on the curb.³² The Court found that the trash bags were accessible to

23. *United States v. Jacobsen*, 466 U.S. 109, 121 (1984).

24. *Knotts*, 460 U.S. at 281–82.

25. *Id.* at 282.

26. 460 U.S. 276 (1983).

27. *Id.* at 277.

28. *Id.* at 285.

29. 529 U.S. 334 (2000).

30. *Id.* at 338–39. The Supreme Court also noted that "tactile" observation differs from visual observation in that tactile observation involves a more "serious intrusion upon the sanctity of the person." *Id.* at 337 (quoting *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968)) (internal quotation marks omitted).

31. 486 U.S. 35 (1988).

32. *Id.* at 40.

“animals, children, scavengers, [and] snoops” in an area “particularly suited for public inspection” and “for the express purpose of having strangers take it.”³³

B. “Plain View” and the Reasonable Expectation of Privacy in Homes

Despite the emphasis on the person and his subjective expectation of privacy, homes still receive heightened protection under the Fourth Amendment.³⁴ Any details within the home not in plain view are considered intimate and are therefore shielded from “prying government eyes.”³⁵ For example, in their attempt to uncover a marijuana operation, the police in *Kyllo v. United States*³⁶ violated the defendant’s reasonable expectation of privacy when they used a thermal-imaging device to detect heat emitting from inside the defendant’s house.³⁷ By employing technology “not in general public use” without a warrant, the police acquired information attainable only with an unlawful physical intrusion into the home.³⁸

Police may, however, conduct surveillance without a warrant, even when the home is implicated, if the information is visible from a public vantage point. In *California v. Ciraolo*,³⁹ Santa Clara police received a tip that the defendant was growing marijuana and, acting on the tip, used a plane to photograph the defendant’s backyard at an altitude of 1,000 feet.⁴⁰ Because “private and commercial flights in the public airways” are routine and any member of the public flying at that altitude could have looked down and observed what the officers saw, the Court held that this warrantless aerial surveillance was not a search.⁴¹ The Fourth Amendment does not require police to “shield their eyes” when observing activities visible from a “public vantage point.”⁴² Similarly, in *Florida v. Riley*,⁴³ the Court held that the use of a helicopter at 400 feet to observe the backyard of a defendant was permissible for two reasons: the officer complied with all flight

33. *Id.* at 40–41 (quoting *United States v. Reicherter*, 647 F.2d 397, 399 (3d Cir. 1981)) (internal quotation marks omitted).

34. *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

35. *Id.*

36. 533 U.S. 27 (2001).

37. *Id.* at 29, 40.

38. *Id.* at 40.

39. 476 U.S. 207 (1986).

40. *Id.* at 213.

41. *Id.* at 213–14.

42. *Id.* at 213.

43. 488 U.S. 445 (1989).

regulations⁴⁴ and the observation revealed “no intimate details connected with the use of the home or curtilage.”⁴⁵

C. The Permissibility of Searches Revealing Only Non-Intimate Details

The potential of a search to reveal intimate or private details is another factor courts consider in determining whether police violated an individual’s reasonable expectation of privacy. For example, in *United States v. Jacobsen*,⁴⁶ a FedEx supervisor, pursuant to the company’s insurance policy, opened a damaged package to inspect it.⁴⁷ After discovering a white powdery substance, the employee rewrapped the package and alerted the Drug Enforcement Administration (DEA).⁴⁸ Two DEA field tests confirmed that the powder was cocaine.⁴⁹ The Court held that the DEA field tests were not an unreasonable search because the tests determined only whether the substance was cocaine and revealed no other private details.⁵⁰

Nonetheless, law enforcement cannot use a defendant’s property without his knowledge and consent to reveal even non-intimate details. In *Silverman v. United States*,⁵¹ the officers attached a spike microphone to the heating duct on the defendant’s house to investigate a suspected gambling operation.⁵² The Court held that the officers violated the Fourth Amendment because they “usurp[ed] part of the petitioners’ house . . . without their knowledge and without their consent.”⁵³

44. *Id.* at 451.

45. *Id.* at 452.

46. 466 U.S. 109 (1984).

47. *Id.* at 111.

48. *Id.*

49. *Id.* at 111–12.

50. *See id.* at 123 (noting that Congress already determined that no one has a legitimate privacy interest in cocaine because of its illegality); *see also* *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that the use of narcotics-sniffing dogs violates no legitimate privacy interest because such a search does not involve opening luggage or revealing noncontraband items); *Dow Chem. Co. v. United States*, 476 U.S. 227, 233–34, 236 (1986) (holding that aerial photography of Dow Chemical’s industrial complex was legal because the company was already subject to heavy environmental regulation, the government is generally granted greater latitude in inspecting commercial property, and the photographs did not reveal intimate activities such as chemical formulas, trade secrets, or individual privacy).

51. 365 U.S. 505 (1961).

52. *Id.* at 506–07.

53. *Id.* at 511.

IV. HOLDING

In *United States v. Maynard*,⁵⁴ the D.C. Circuit held that GPS tracking of respondent Jones for twenty-four hours a day over a four-week period violated Jones's reasonable expectation of privacy.⁵⁵ Analyzing whether the use of GPS-enhanced surveillance constituted a search, the court first determined that *Knotts* was not controlling precedent.⁵⁶ According to the court, *Knotts* applied only to "limited" technological tracking on a "discrete journey" and reserved the question of prolonged, twenty-four hour surveillance for cases like the one at issue.⁵⁷

The court then discussed whether Jones had exposed his movements to the public,⁵⁸ reiterating that the reasonable expectation of privacy regarding publicly exposed information depends on what an individual expects another to do.⁵⁹ The court ruled that Jones had neither "actually" nor "constructively" exposed his movements.⁶⁰ First, because the likelihood that an individual would observe "all those movements" over the course of a month was "essentially nil," the court held that Jones's movements were not "actually" exposed.⁶¹ Second, employing the "mosaic" theory articulated in *People v. Weaver*,⁶² the court also held that Jones movements were not "constructively" exposed.⁶³ The D.C. Circuit noted that prolonged surveillance by a GPS device reveals a holistic and intimate picture of a person's private life by disclosing a large volume of personal details that an individual would not expect to be pieced together.⁶⁴ Although

54. 615 F.3d 544 (D.C. Cir. 2010), *cert. granted sub nom.* *United States v. Jones*, No. 10-1259 (U.S. argued Nov. 8, 2011).

55. *Id.* at 555–56.

56. *Id.* (citing *United States v. Knotts*, 469 U.S. 276, 283 (1983)).

57. *Id.* at 556 (citing *Knotts*, 469 U.S. at 283–84 (noting that the case did not involve twenty-hour surveillance and that "if such dragnet type law enforcement . . . should eventually occur, there will be time enough to determine whether different constitutional principles may be applicable"))).

58. *Id.* at 558–63.

59. *Id.* at 559.

60. *Id.* at 558.

61. *Id.* at 558–59. The court contrasted the highly unlikely scenario of following someone day after day over the course of the month with the more likely situation of an individual observing another for a single journey. *Id.* at 560.

62. 909 N.E.2d 1195 (N.Y. 2009).

63. *Maynard*, 615 F.3d at 561–62 (citing *Weaver*, 909 N.E.2d at 1199).

64. *See id.* at 563 ("A reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those movements to remain 'disconnected and anonymous.'").

Jones's individual movements were exposed, the whole of his movements were not, and therefore, the court held that Jones had a subjective expectation of privacy.⁶⁵

Finally, the court concluded that society would recognize Jones's expectation of privacy as reasonable.⁶⁶ As the Supreme Court had stated previously, "[e]xpectations of privacy must have a source outside the Fourth Amendment, such as 'understandings that are recognized or permitted by society.'"⁶⁷ The D.C. Circuit pointed to state criminal codes that exclude warrantless GPS evidence as an indication that society recognizes Jones's expectation of privacy as reasonable.⁶⁸ The court also distinguished permissible visual surveillance from the prolonged GPS tracking in this case.⁶⁹ Unlike visual surveillance, which is naturally constrained by the time and expense of manpower, along with the risk of being sighted, the low cost of GPS tracking "occasion[s] a heretofore unknown type of intrusion into an ordinarily and hitherto private enclave."⁷⁰ The court ultimately held that the warrantless GPS evidence should have been excluded.⁷¹

V. ARGUMENTS

The government and Jones focus on three main issues. First, whether Jones had a reasonable expectation of privacy in the location information gathered by the GPS device. Second, whether Jones had a reasonable expectation of privacy against the actual attachment of the GPS device to the jeep. Last, whether the government should be permitted to use a reasonable suspicion standard when employing GPS tracking without a warrant.

A. *Petitioner Government's Arguments*

The government appeals the D.C. Circuit's decision on three grounds: first, Jones had no reasonable expectation of privacy in his jeep's location information because the information was already

65. *Id.*

66. *Id.*

67. *Id.* at 563 (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 n.22 (1984)).

68. *Id.* at 564.

69. *Id.* at 565–66.

70. *Id.* at 565.

71. *Id.* at 568 (stating that the error of admitting the GPS evidence was not harmless because the evidence was "far from 'overwhelming'").

publicly exposed; second, Jones had no reasonable expectation of privacy against the actual attachment of the GPS device to the jeep; and third, even if a search or seizure occurred, it was reasonable because the government's interest in uncovering a large narcotics operation outweighs the minimal intrusion on Jones's privacy interest.

First, the government contends that no search occurred when agents used a GPS tracking device to record the jeep's location information on public roads because Jones did not have a reasonable expectation of privacy regarding movements that he exposed to the public.⁷² The government argues that *Katz* and its progeny emphasize the distinction between private details and publicly exposed information.⁷³ The government asserts that, like in *Knotts*, the GPS merely tracked the movements of Jones's vehicle on public roads, which were exposed to "anyone who wanted to look."⁷⁴

According to the government, it is immaterial that no one would have observed all of Jones's movements over the course of a month.⁷⁵ Neither *Greenwood* nor *Bond* depended on the likelihood that someone would observe the information.⁷⁶ The government also rejects the D.C. Circuit's "mosaic theory," arguing that no case has found a reasonable expectation of privacy in the "totality of [one's] public movements" when each movement is publicly exposed.⁷⁷ Both the "likelihood" standard and the "mosaic" theory present unworkable tests because they provide guidance for neither predicting the likelihood that one would observe a set of movements nor analyzing how prolonged the surveillance must be before it

72. Brief for United States, *supra* note 2, at 37–38.

73. See *id.* at 18–22. In *Knotts*, the Court sanctioned the warrantless use of a beeper to track the defendant while he traveled on public thoroughfares because the defendant conveyed to "anyone who wanted to look" the fact that he was traveling on such public thoroughfares. *Id.* at 19–20 (citing *United States v. Knotts*, 460 U.S. 276, 277–78, 281–82 (1983)). According to the government, the Court in *Kyllo* likewise focused on the distinction between private details and publicly exposed information when it determined that the use of a thermal-imaging device was a search because the device revealed private information inside the home not obtainable without physical intrusion. *Id.* at 22 (discussing *Kyllo v. United States*, 533 U.S. 27, 29, 34, 40 (2001)).

74. *Id.* at 38 (quoting *Knotts*, 460 U.S. at 281–82) (internal quotation marks omitted).

75. *Id.* at 22–23.

76. See *id.* at 24–25. The government reasoned that *Greenwood*'s outcome depended not on the likelihood that someone would sort through the opaque trash bags, but rather the ready access to the trash bags by any member of the public because of their location. *Id.* at 24 (citing *California v. Greenwood*, 486 U.S. 35, 39–41 (1988)). Similarly, *Bond* distinguished "physical" and "tactile" observation and highlighted the fact that the physical manipulation of the luggage revealed private information that had not already been publicly exposed. *Id.* at 25 (citing *Bond v. United States*, 529 U.S. 334, 337–39 (2000)).

77. *Id.* at 27–28.

becomes “mosaic.”⁷⁸

The government also argues that “hypothetical misuses” and “dragnet surveillance” are inappropriate considerations in a case limited to the GPS tracking of one individual.⁷⁹ Though the Court in *Knotts* reserved the question of “dragnet surveillance,” such surveillance refers to “mass or widespread search or seizures conducted without individualized suspicion,” which is not the case with Jones.⁸⁰ Even if GPS tracking raises such concerns, prophylactic measures should be taken through the legislative process rather than through the “distortion of Fourth Amendment doctrine.”⁸¹

Second, with respect to the exterior of the vehicle, the government contends that Jones had no reasonable expectation of privacy against the attachment of the GPS device to his vehicle.⁸² The attachment of the GPS device revealed no private information and therefore did not constitute a search.⁸³ The attachment also did not meaningfully interfere with Jones’s possessory interest in the jeep—so as to constitute a seizure—because the GPS device did not affect the vehicle’s “driving qualities.”⁸⁴ As the Court stated in *United States v. Karo*,⁸⁵ trespass alone is “neither necessary nor sufficient to establish a [seizure].”⁸⁶

Finally, even if the Court finds a search or seizure, the government contends that the attachment of the GPS device was reasonable.⁸⁷ The government argues that current Fourth Amendment jurisprudence dictates that the Court conduct a balancing test to determine the reasonableness of a search or seizure by comparing the “degree to which it intrudes upon an individual’s privacy” to the need to promote “legitimate government interests.”⁸⁸ Here, according to the

78. *Id.* at 31.

79. *Id.* at 37.

80. *Id.* at 34.

81. *Id.* at 35.

82. *Id.* at 39.

83. *Id.* at 41. The government distinguished between the GPS device’s *potential* to reveal private information, achieved upon installation of the device, and *actual* revelation of the information, not realized until after it started transmitting. *Id.* at 42.

84. *Id.* at 44.

85. 468 U.S. 705 (1984).

86. Brief for United States, *supra* note 2, at 43 (quoting *Karo*, 468 U.S. at 712) (internal quotation marks omitted).

87. *Id.* at 47.

88. *Id.* at 48 (quoting *Samson v. California*, 547 U.S. 843, 848 (2006)) (internal quotation marks omitted). The government relies on the reasoning in *Terry v. Ohio*, 392 U.S. 1 (1968), in which the Court looked to the “reasonableness in all the circumstances of the particular

government, the individual privacy interest remains “minimal” because the only information revealed by the GPS device is the vehicle’s location, which is already obtainable through visual surveillance.⁸⁹ Also, requiring a warrant would impair the “government’s ability to investigate leads and tips on drug trafficking, terrorism, and other crimes.”⁹⁰ The government argues that because its interest in uncovering a large-scale narcotics operation outweighed the minimal intrusion on Jones’s privacy, the “particularized suspicion was more than adequate to support the warrantless attachment of a mobile tracking device” to Jones’s vehicle.⁹¹

B. Respondent Jones’s Arguments

Jones’s brief centers on three main arguments: first, the information collected by the GPS device violated his reasonable expectation of privacy; second, the installation itself violated his reasonable expectation of privacy and meaningfully interfered with his possessory interest in the vehicle; and third, the reasonable suspicion standard for GPS tracking should not be used in lieu of a warrant supported by probable cause.

First, asserting that the agents violated his reasonable expectation of privacy, Jones argues that the government recorded the whole of his movements to a “degree not feasible through visual surveillance.”⁹² Even though each separate movement itself might be publicly exposed, the whole of one’s movements is not because the “likelihood a stranger would observe all those movements is . . . essentially nil.”⁹³ Because of the uniquely private nature of an individual’s “pattern of movements and locations,” prolonged monitoring presents the danger of the “twenty-four hour surveillance” espoused in *Knotts*, an argument that resembles the “mosaic theory” used by the D.C. Circuit in *Maynard*.⁹⁴

governmental invasion of a citizen’s personal security” during a street stop and frisk. Brief for United States, *supra* note 2, at 48 (internal quotation marks omitted).

89. *Id.* at 49–50.

90. *Id.* at 50.

91. *Id.* at 51.

92. Brief for Respondent, *supra* note 6, at 43.

93. *Id.* (quoting *United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010), *cert. granted sub nom.* *United States v. Jones*, No. 10-1259 (U.S. argued Nov. 8, 2011)).

94. Compare *id.* at 43–44 (citing *United States v. Knotts*, 460 U.S. 276, 283 (1983)) with *Maynard*, 615 F.3d at 562 (describing the “mosaic” theory).

Second, Jones argues that the warrantless attachment of the device itself was an unreasonable search because the attachment usurped Jones's property.⁹⁵ Based on the Court's holding in *Silverman* that "usurpation of property [is] a search," Jones argues that the agents misappropriated his property by converting the jeep into a mobile tracking device for the government's purposes.⁹⁶ Because attaching a GPS device without another's consent can lead to both a trespass claim and criminal liability under anti-stalking statutes, Jones argues that society would consider his subjective expectation against GPS attachment to be reasonable.⁹⁷ Jones cautions that such unrestrained GPS tracking presents the danger of "indiscriminate monitoring" because the low marginal cost of GPS attachment, as compared to the high cost of visual surveillance, permits police to conduct "suspicionless GPS monitoring of networks of individuals and even entire neighborhoods, towns, or cities."⁹⁸

Jones also maintains that the agents conducted an unreasonable seizure because the GPS device "meaningfully interfered with Jones's possessory interest" in the jeep.⁹⁹ Jones argues that the government's attachment changed the character of the vehicle by undermining Jones's possessory right to exclude others from the use of the jeep.¹⁰⁰ Because "a private individual's surreptitious use of a GPS device against another would constitute trespass to chattels and possibly even criminal conduct," Jones reasonably believed that his right to exclude others would not be violated by law enforcement.¹⁰¹ Contrary to the government's position, meaningful interference need not involve damage or destruction to the property.¹⁰² Rather, the Fourth Amendment protects against "purposeful" interference and abuses of power.¹⁰³

95. See Brief for Respondent, *supra* note 6, at 16–17 (arguing that the government's "usurpation" of Jones's property "supports the conclusion that his privacy expectations were reasonable," and therefore that the search was unreasonable).

96. *Id.* at 18–19 (citing *Silverman v. United States*, 365 U.S. 505, 506–07 (1961)).

97. *Id.* at 20.

98. *Id.* at 26–27. Jones also notes that unlike GPS monitoring, an equivalent level of human surveillance would require an extraordinary amount of personnel and resources, which acts as a check against the kinds of indiscriminate abuses and monitoring that the Fourth Amendment was designed to protect. *Id.* at 25.

99. *Id.* at 46.

100. *Id.* at 48–49.

101. *Id.* at 49.

102. *Id.* at 50.

103. *Id.* at 51.

Finally, Jones claims that the government's balancing test for the warrantless use of a GPS device is inappropriate.¹⁰⁴ Not only does the government's reasonable suspicion standard have no basis in the Fourth Amendment as a workaround to probable cause,¹⁰⁵ but the government, in justifying the balancing test in its favor, mistakenly assumes that the intrusion was minor and exaggerates the efficiency gains law enforcement would enjoy as a result of GPS use.¹⁰⁶ Jones further maintains that the reasonable suspicion standard is unworkable because the government is not required to record its reasons for warrantless GPS tracking and, even if it were required, the innocent would never know whether their rights were violated.¹⁰⁷ By contrast, a "neutral magistrate" deciding *ex ante* whether a search or seizure is justified can better ensure protection against surreptitious GPS monitoring.¹⁰⁸

VI. ANALYSIS AND DISPOSITION

Unfettered GPS monitoring portends a world enveloped by unforgettable images of "1984." In the most probable scenario, the Court will rule in favor of Jones and will attempt to strike a balance between the "1984" concerns of unfettered GPS monitoring and the need of law enforcement to use visual surveillance and video camera techniques. First, the Court likely will hold that Jones did not have a reasonable expectation of privacy in the location information gathered by the GPS device. Second, the Court probably will decide that the actual affixing of the GPS on the jeep violated Jones's reasonable expectation of privacy. Third, the Court is likely to reject the reasonable suspicion standard proposed by the government as undermining the constitutional safeguards of requiring a warrant, noting that the warrant requirement is more feasible and less burdensome than law enforcement suggests.

104. *Id.* at 56.

105. *Id.* at 57–58.

106. *Id.* at 58. In retort to the "minor intrusion" argument, Jones points to the GPS device's infringement on property rights as well as its ability to generate a holistic view of an individual's life. *Id.* Jones also explains the exaggeration of efficiency gains by noting the government's admission that it cannot know ahead of time whether the device will generate private data. *Id.*

107. *Id.* at 60.

108. *See id.* ("[Fourth Amendment rights] would be all the more difficult to protect if the government were free to engage in surreptitious GPS monitoring without first persuading a neutral magistrate that a search or seizure is justified.").

First, the Court likely will hold that Jones did not have a reasonable expectation of privacy over his location information because his movements were actually exposed. Here, *Knotts* is the most analogous case.¹⁰⁹ GPS tracking devices, like the beeper in *Knotts*, transmit publicly exposed information—in this case, Jones’s travels on public roads.¹¹⁰ *Bond* suggests that Jones had a reasonable expectation of privacy in his movements because these expectations may be borne from what an individual expects another to do.¹¹¹ That proposition is likely limited, however, to “tactile” or more physically intrusive observation, considering that *Ciraolo* and *Riley* depended on the ability of an individual to observe the defendant’s private property while flying overhead, not whether an individual was likely to do so.¹¹² During oral argument, the Court strongly hinted at the trouble of finding a search by inviting Jones’s counsel to distinguish GPS tracking from a string of video cameras or thirty deputies monitoring public streets.¹¹³ As the Seventh Circuit noted, unlike the thermal-imaging device in *Kyllo*, a GPS device is merely a substitute for “following a car on a public street”—a permissible act under the Fourth Amendment.¹¹⁴

Second, the Court is likely to be more persuaded by Jones’s arguments regarding the usurpation and physical intrusion of his jeep. Reasonable expectations of privacy must be referenced to a source outside the Fourth Amendment, such as property law and societal understandings.¹¹⁵ Jones argues that if anti-stalking laws and trespass claims prohibit private individuals from affixing a GPS device to track another private individual, then it would be amiss to permit police, under the auspice of the Fourth Amendment, to do what private individuals cannot.¹¹⁶

109. See generally *United States v. Knotts*, 460 U.S. 276 (1983) (discussing the warrantless use of a beeper to track the defendant).

110. See *id.* at 281–82 (“[H]e voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction.”).

111. See *Bond v. United States*, 529 U.S. 334, 338–39 (2000) (“[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.”).

112. See *id.* at 337 (emphasis added) (distinguishing *California v. Ciraolo*, 476 U.S. 207 (1986), and *Florida v. Riley*, 488 U.S. 445 (1989), from *Bond*, 529 U.S. 334, and noting that “any member of the public *could have* fully observed the defendant’s property by flying overhead”).

113. Transcript of Oral Argument at 33–35, *United States v. Jones*, No. 10-1259 (U.S. Nov. 8, 2011).

114. *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007).

115. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

116. Brief for Respondent, *supra* note 6, at 20.

Several cases support this argument. In *Riley* and *Ciraolo*, no search occurred when law enforcement merely did what members of the public could already do: observe property made visible from a particular public vantage point.¹¹⁷ In *Greenwood*, the police officers' search of the defendant's garbage was permissible because of the trash bags' placement on the side of a public street and accessibility by any member of the public.¹¹⁸ If the Fourth Amendment limits warrantless police conduct to what members of the public may do, then consistency may compel the Court to find that Jones's subjective expectation of privacy against the agents' attachment of the device to the jeep was reasonable because the action would be illegal for private individuals. Further, *Silverman* demonstrates that the Fourth Amendment may prohibit police officers from usurping a defendant's property for their own investigative ends.¹¹⁹ The Court in *Bond* also recognized that physical invasions¹²⁰ are more intrusive than mere visual surveillance and considered what an individual expects others to do in those cases.¹²¹ Both propositions, then, appear to militate against police usurping Jones's jeep as their own tracking device and undermining Jones's property right to exclude others from its use.

Finally, the Court likely will reject the government's call for a reasonable suspicion standard. The government argues for such a standard in the context of GPS-enhanced surveillance because a probable cause standard would unduly burden investigations.¹²² This argument ignores the justification for the judicial bulwark between law enforcement and private citizens.¹²³ The government, in arguing that the warrant requirement would be too burdensome, assumes that expectations of privacy are unimportant in the context of GPS surveillance. Because "reasonable" expectations of privacy determine the scope of Fourth Amendment protection, the "burden" of the

117. *Riley*, 488 U.S. at 454–55; *Ciraolo*, 476 U.S. at 213–14.

118. *California v. Greenwood*, 486 U.S. 35, 41 (1988).

119. *See Silverman v. United States*, 365 U.S. 505, 511 (1961) (holding that officers could not usurp the heat duct serving the defendant's property by attaching a spike microphone to eavesdrop on the defendant's gambling operation).

120. *Bond v. United States*, 529 U.S. 334, 338–39 (2000) (quoting *Riley*, 488 U.S. at 449) (internal quotation marks omitted).

121. *See id.* (“[P]hysical manipulation of his luggage ‘far exceeded the casual contact [petitioner] could have expected from other passengers.’”).

122. Brief for United States, *supra* note 2, at 50.

123. *See United States v. Karo*, 468 U.S. 705, 717 (1984) (citation omitted) (“The primary reason for the warrant requirement is to interpose a ‘neutral and detached magistrate’ between the citizen and ‘the officer engaged in the often competitive enterprise of ferreting out crime.’”).

warrant is actually irrelevant to the inquiry of whether a warrant should be required in the first place. To analogize, one could not argue that intrusions into the home should be on a lesser “reasonable suspicion” standard simply because requiring a warrant for the search of the home would unduly burden investigations.¹²⁴ Instead, courts require police to furnish additional evidence and establish probable cause before issuing a warrant to search a house because these searches invade reasonable expectations of privacy.¹²⁵ The Chief Justice emphasized this point by asking why the government wanted a different rule to apply to GPS tracking.¹²⁶ A court could simply require police to gather additional evidence and establish probable cause before installing a GPS device.

Moreover, the Court is likely to find that a warrant requirement for GPS tracking is not overly burdensome on law enforcement. Justice Ginsburg addressed this point during oral argument by noting that the agents in this case had already received a warrant as required by their surveillance manual.¹²⁷ Unlike visual surveillance, where beneficial and warrantless use can stem from on-the-spot surveillance of suspicious acts, GPS tracking requires advanced preparation and planning due to the coordination of the GPS’s installation, possible battery replacement, and ultimate analysis of the information.¹²⁸ This advanced preparation and planning suggests that police might not otherwise invest in GPS surveillance against an individual unless they already possess enough information to prompt the belief that it would uncover more evidence.¹²⁹ Thus, a warrant requirement for GPS tracking would not present the extraordinary burdens that the government suggests,¹³⁰ especially because police have capably conducted such investigations prior to the advent of GPS technology.

124. *Cf. Katz v. United States*, 389 U.S. 347, 356, 358 (1967) (noting that retroactive approval of search warrants “bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification” (quoting *Beck v. Ohio*, 379 U.S. 89, 96 (1964))).

125. *See id.* (articulating the Court’s disfavor of law enforcement bypassing the constitutional safeguard of the warrant requirement).

126. Transcript of Oral Argument, *supra* note 113, at 17–18.

127. *Id.* at 16–17.

128. *See, e.g., United States v. Marquez*, 605 F.3d 604, 607–08 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1213–14 (9th Cir. 2010); *United States v. Garcia*, 474 F.3d 994, 995–96 (7th Cir. 2007); *People v. Weaver*, 909 N.E.2d 1195, 1196 (N.Y. 2009); *State v. Jackson*, 76 P.3d 217, 220–21 (Wash. 2003).

129. *See, e.g.,* cases cited *supra* note 128.

130. Brief for United States, *supra* note 2, at 50.

In essence, the Court manifested grave “1984” concerns over unfettered, warrantless GPS tracking and expressed a desire for a limiting principle.¹³¹ The Court had trouble, however, distinguishing visual surveillance and video cameras from Jones’s case.¹³² By deciding Jones’s reasonable expectation of privacy on “usurpation” grounds rather than on location information grounds, the Court can strike a balance. On one hand, the Court safeguards against “1984” mass-surveillance scenarios by prohibiting law enforcement from converting a person’s car, coat, or cell phone into a tracking device in derogation of his property rights. On the other hand, the government could still use visual surveillance and public video cameras because individuals have no legitimate privacy expectation in publicly exposed location information.

By deciding that Jones’s movements were actually exposed, however, the Court avoids opining on the “mosaic theory” of constructive exposure put forth by both the D.C. Circuit and Jones. The consequence could be that the Court ironically leaves open the possibility that law enforcement may compile complete profiles of individuals through Internet data mining.¹³³ Although the Court may have avoided “1984” with respect to GPS monitoring, the threat of mass data collection programs means that “Big Brother” still looms to cast a pall over Fourth Amendment protections.

131. See Transcript of Oral Argument, *supra* note 113, at 12–13. (“[A]s I understand it and certainly share the concern . . . if [the government wins] the case then there is nothing to prevent the police or the government from monitoring 24 hours a day the public movements of every citizen in the United States.”).

132. *Id.* at 34–35, 38.

133. See Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 121 (Summer 2010) (discussing the Total Information Awareness program and other government mass-collection efforts to create profiles through data-mining of “credit-card purchases, tax returns, driver’s license data, work permits, travel itineraries,” and more).