UNIVERS STATES V. JONES: REVIVING THE PROPERTY FOUNDATION OF THE FOURTH AMENDMENT

Herbert W. Titus & William J. Olson*

On January 23, 2012, in United States v. Jones, the United States Supreme Court handed down the surprisingly unanimous opinion that the warrantless attachment of a GPS tracking device to a private automobile violated the Fourth Amendment.

Just four months prior, following a moot court proceeding conducted at the William and Mary School of Law’s annual Supreme Court Preview, a panel of distinguished lawyers, journalists, and law professors voted almost unanimously that, based on current Supreme Court precedent, there was no such violation. How could the panel, said to be selected from the “nation’s leading legal scholars ... [and] lawyers who have argued a combined total of more than 200 cases before the Court,” have been so wrong? Doubtless the participants

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2 Institute of Bill of Rights Law, IBRL Hosts Annual Supreme Court Preview Sept. 23-24, WILLIAM & MARY LAW SCHOOL (Sept. 20, 2011), 243
read the U.S. Court of Appeals for the D.C. Circuit panel’s August 6, 2010 opinion that favored Mr. Jones, certainly they were privy to the winning arguments that Jones had made before that court, and no doubt they had the benefit of the exchange of opinions in the court of appeals which had denied the Government’s motion for a rehearing.

Perhaps more importantly, available to the moot court participants was the Government’s petition seeking a rehearing, had stated that the Fourth Amendment protects property as well as privacy, and that the property issue was “an important and close question.” The Government’s Reply Brief gave even less attention to Jones’ second issue, rejecting out of hand the notion that installation could be a search or a seizure, and never even mentioning the word property.

Despite only passing consideration of this “property-based” Fourth Amendment question from the parties, the Supreme Court had the benefit of an amicus brief urging the Court that, if it were to grant the petition, it should do so because the case presented “a historic opportunity to reconsider the rationale for its current Fourth Amendment jurisprudence based upon reasonable privacy expectations, and to restore its earlier Fourth Amendment jurisprudence based upon protecting both the sanctity of private property and the civil sovereignty of the people.” In short, the amicus brief urged the Court to discard the modern “reasonable expectation of privacy” test, and replace it with a more comprehensive view of privacy. The Court agreed, granting review and reversing the decision of the D.C. Circuit.

I. THE SUPREME COURT DEFINES THE ISSUE AT THE PETITION STAGE: PROPERTY, NOT JUST PRIVACY

Jones’ claim that the installation of the GPS tracking device was an unreasonable search because the Government agents had trespassed onto Jones’s private property was only briefly sketched out in the last page and a half of Jones’ response brief. However, Jones expressly asked the Court to “also grant review of the alternative argument [which] Jones raised in the D.C. Circuit . . . that the court had no occasion to resolve.” The question whether the installation itself was constitutional, Jones contended, turned on a “‘property-based Fourth Amendment argument’ . . . antecedent to the question on which the government seeks review.” In support, Jones cited D.C. Circuit Court Judge Kavanaugh who, in dissent to the court of appeals’ denial of the Government’s petition for a rehearing, had stated that the Fourth Amendment “protects property as well as privacy,” and that the property issue was “an important and close question.”

The Government’s Reply Brief gave even less attention to Jones’ second issue, rejecting out of hand the notion that installation could be a search or a seizure, and never even mentioning the word property. Despite only passing consideration of this “property-based” Fourth Amendment question from the parties, the Supreme Court had the benefit of an amicus brief urging the Court that, if it were to grant the petition, it should do so because the case presented “a historic opportunity to reconsider the rationale for its current Fourth Amendment jurisprudence based upon reasonable privacy expectations, and to restore its earlier Fourth Amendment jurisprudence based upon protecting both the sanctity of private property and the civil sovereignty of the people.” In short, the amicus brief urged the Court to discard the modern “reasonable expectation of privacy” test, and replace it with a more comprehensive view of privacy. The Court agreed, granting review and reversing the decision of the D.C. Circuit.
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4 The United States’ Petition for Reconsideration and the Jones opposition brief was appended to the Government’s Petition for Certiorari. See Petition for Writ of Certiorari, Appendix at 45a-52a, Jones, 132 S. Ct. 945 (No. 10-1259), 2011 WL 1462758. Although the petition for rehearing en banc was denied, Chief Judge David B. Sentelle and Circuit Judges Janice Rogers Brown and Brett M. Kavanaugh would have granted the petition. Jones, 625 F.3d at 767.

5 Petition for Writ of Certiorari, supra note 4, at 1 (emphasis added).

6 Brief in Opposition to Petition for Writ of Certiorari at 1, Jones, 132 S. Ct. 945 (No. 10-1259), 2011 WL 2263561 (emphasis added). Jones’s counsel Stephen C. Leckar, Esq. recruited former acting Solicitor General Walter Dellinger to join him as co-counsel on the briefs at both the petition and merits stages, but Mr. Leckar argued the case for Mr. Jones on November 8, 2011.
turn the Fourth Amendment to the textual and historic protection of private property. 13 On June 27, 2011, the Supreme Court granted the Government’s petition and, in addition, directed the parties “to brief and argue” the property issue sought by Jones in his Brief in Opposition. 14

At the William and Mary moot court proceeding, the arguments of counsel, questions posed by the court, and the court’s explanation of its decision all presumed that the case would be decided by application of the Court’s privacy test to the Government’s first issue. However, that was not to be the basis on which the Jones case would be decided.

II. THE TREATMENT OF THE PROPERTY ISSUE AT THE MERITS STAGE

The property question—the second issue on which certiorari had been granted—was addressed, after a fashion, in both parties’ briefs on the merits. The Government’s opening brief trivialized the installation of the tracking device as neither a search nor a seizure—a meaningless interference with Jones’s “possessory interest in [his] vehicle.” 15 The Government mentioned the word “property” three times in its four-page analysis. 16 Jones’s Brief for Respondent stressed his common law right to exclude others from any interference with his possessory interest. 17 The Government replied: “[w]hile the GPS device was in place, respondent remained free to use his vehicle however he wanted. He went where he wanted, he transported anyone and anything he wanted, and none of the operational systems of the vehicle were affected in any way.” 18

Despite this one exchange, and Jones’s discussion of property interests generally, Jones’s property claim did not play a major role in either party’s merits brief. Rather, both parties were understandably preoccupied with winning their case under established Supreme Court

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13 See id at 7-23.
19 Fourth Amendment jurisprudence—whether the GPS tracking device infringed upon Jones’s reasonable expectation of privacy.
20 Such was also the case in all but three of the thirteen amicus curiae merits briefs filed. Ten of those briefs focused almost exclusively upon the Fourth Amendment privacy test. 19 Only three, filed by the Fourth Amendment Historians, the Constitution Project, and Gun Owners of America, addressed Jones’s property claim as a substantial one. 20 Of these three, only the Gun Owners of America brief urged the revival of the Fourth Amendment text as one designed to protect the people’s private property, rejecting the Court’s revisionist “reasonable expectation of privacy” test. 21 It came as no surprise that, at oral argument, counsel for the Government began with a citation to Katz v. United States, 22 the seminal modern Fourth Amendment privacy case, stating “that visual and beeper surveillance of a vehicle traveling on the public roadways infringed no Fourth Amendment expectation of privacy.” 23 What was surprising, however, was how quickly the property question came into play. Just minutes after Government counsel had come to the podium,

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Justice Scalia interrupted with a revealing historical "prologue" to a simple question:

[W]hen wiretapping first came before this Court, we held that it was not a violation of the Fourth Amendment because the Fourth Amendment says that the . . . people shall be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. And wiretapping just picked up conversations. That's not persons, houses, papers and effects. Later on, we reversed ourselves, and, as you mentioned, 

Katz established the new criterion, which is, is there an invasion of privacy? Does -- are you obtaining information that a person had a reasonable expectation to be kept private? I think that was wrong. I don’t think that was the original meaning of the Fourth Amendment. But nonetheless, it’s been around for so long, we’re not going to overrule that. However, it is one thing to add that privacy concept to the Fourth Amendment as it originally existed, and it is quite something else to use that concept to narrow the Fourth Amendment from what it originally meant. And it seems to me that when that device is installed against the will of the owner of the car on the car, that is unquestionably a trespass and thereby rendering the owner of the car not secure in his effects -- the car is one of his effects -- against an unreasonable search and seizure. It is attached to the car against his will, and it is a search because what it obtains is the location of that car from there forward. Now, why -- why isn’t that correct? Do you deny that it’s a trespass? 24

Government’s counsel readily admitted that “[i]t may be a technical trespass,” but that “the purpose of the Fourth Amendment is to protect privacy interests and meaningful interferences with possessory interests, not to cover all technical trespasses.” 25 To which, Justice Scalia responded: “So . . . the privacy rationale doesn’t expand [the Fourth Amendment] but narrows it in some respects.” 26 Fudging the question, counsel replied: “It changes it.” 27

Just as quickly as the property/privacy issue arose it disappeared, as the Government counsel and various members of the Court wres-

tled with the contours of the Court’s privacy test in a search for principled limitations on the use of modern technological developments. 28 Although the property issue reappeared at various times in the dialogue between Jones’s counsel and the Court, 29 Jones’s property claim failed to come to focus as it had with Government counsel. Nor did the property issue reappear during Government counsel’s rebuttal. 30 Indeed, a reading of the transcript might give rise to the impression that the Court would probably stay the course, assessing the constitutionality of the GPS tracking device by the Katz privacy test, not by a revitalized private property one. Not surprisingly, in his recap of the oral argument, Lyle Denniston, a seasoned legal reporter now with SCOTUSBlog, saw absolutely no chance for the case to be decided on the theory that the installation of the GPS tracking device was a trespass upon private property of the kind forbidden by the Fourth Amendment. 31

III. THE SUPREME COURT REVITALIZES THE FOURTH AMENDMENT PRIVATE PROPERTY PRINCIPLE

Just two and one-half months after oral argument, the Supreme Court announced its decision. Although all nine Justices voted in favor of Jones, the Court was divided five to four on the reasons why.

Sticking with the modern, Katz-based “reasonable expectation of privacy” rationale, four Justices found in favor of Jones because “a reasonable person would not have anticipated” the “degree of intru­sion” found here: “four weeks . . . tracking every movement that respondent made in the vehicle he was driving.” 32

The concurring Justices candidly recognized that they could not draw a firm line as to when GPS tracking would cross over the constitutional privacy line. Indeed, they acknowledged that their test was “not without . . . difficulties,” and “involves a degree of circularity,” which tempted “judges . . . to confuse their own expectations of priva-

24 Transcript of Oral Argument, supra note 23, at 6-7 (emphasis added).
26 Transcript of Oral Argument, supra note 23, at 8.
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29 See, e.g., Transcript of Oral Argument, supra note 23, at 28, 30, 36.
30 See generally, Transcript of Oral Argument, supra note 23, at 57-61.
31 Lyle Denniston, Argument recap: for GPS, get a warrant, SCOTUSBlog (Nov. 8, 2011, 2:12 PM), http://www.scotusblog.com/?p=131423 (noting that Jones’s attorney seemed “to get bogged down, at least early in his argument, on whether the police had engaged in a ‘trespass’ simply by putting the device on the vehicle in the first place. Most of the members of the Court were not totally impressed with seeing the case through that perspective.”).
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[O]ur law holds the property of every man so sacred, that

no man can set his foot upon his neighbor’s close without his

leave; if he does he is a trespasser, though he does no dam­

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must justify it by law."

In her separate concurrence, Justice Sotomayor (who also joined wholeheartedly with the majority) emphasized the doctrinal signifi­
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Justice Alito’s approach, which discounts altogether the constitutional relevance of the Government’s physical intrusion on Jones’ Jeep, erodes that longstanding protection for pri­

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stitutional minimum: When the Government physically in­

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Having established the property principle as the base standard by which claims of search and seizure under the Fourth Amendment are to be measured, Justice Scalia turned to the role that the *Katz* reasona­
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Next, he explained why: "The *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test. 45 Thus, Justice Scalia’s approach—in contrast to the way Justice Alito portrays it—would apply both the *Katz* reasonable-expectation-of-privacy test and the rekindled trespassory test.

33 *Id.* at 962.

34 *Id.* at 957.

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Justice Scalia's majority opinion met this sharp critique head-on:

That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at a minimum the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply exclusively Katz's reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed. 35

This exchange reveals that the five-member majority did not subscribe to its opinion solely to dispose of the case before them (unlike the concurring opinion), but to take a first step toward restoring the Court's Fourth Amendment jurisprudence to its textual and historic foundation—a foundation rooted in the common law of private property. 36 On this point, Justice Scalia and his four colleagues were adamant; after quoting the Fourth Amendment, Justice Scalia observed:

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. 37

Immediately preceding this textual analysis, Justice Scalia appealed to history. Citing Entick v. Carrington, 38 as quoted in Boyd v. United States, 39 and as affirmed in Brower v. County of Inyo, 40 Justice Scalia declared Entick to be a "monument of English freedom" . . . with regard to . . . the significance of property rights in search-and-seizure analysis . . . " 41 Justice Scalia went on to quote from that decision to say:

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42 Id. (quoting Entick, 95 Eng. Rep. at 817).
43 Jones, 132 S. Ct. at 955 (Sotomayor J., concurring) (emphasis added).
44 Id. at 951.
45 Id. at 952. Justice Sotomayor characterized the majority's approach as claiming that "Katz's reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it." Id. at 955 (Sotomayor J., concurring).
IV. PROPERTY PRINCIPLES PLUS JUDICIAL EXPEDIENCY

Rather than expressing concern that the Jones majority's originalist trespassory theory was too broad, Justice Alito feared it would provide no Fourth Amendment protection against "long-term monitoring of electronic, as opposed to physical, contact with the item to be tracked." Of special concern was the "vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked."

Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. But may such decisions be followed in applying the Court's trespass test? Assuming that what matters under the Court's theory is the "existence of a property right [as] but one element in the law of trespass as it existed at the time of the adoption of the Fourth Amendment, do these recent decisions represent a change in the law or simply the application of the old tort to new situations?"

Apparent for this reason, the four concurring justices opted for the "Katz expectation-of-privacy" as the sole Fourth Amendment test, relegating "existence of a property right as but one element in determining whether expectations of privacy are legitimate." While not completely confident that this privacy test would be effective in protecting privacy in a changing technological world, Justice Alito was convinced that the majority's property-based approach certainly would not.

According to both Justices Scalia and Sotomayor, however, the majority's trespassory test does not displace the Katz privacy test, the latter having been "added to, not substituted for, the common law trespassory test." Thus, both Justices contradicted Justice Alito's assumption that the majority's trespassory test would preclude utilization of the Katz test where electronic surveillance was conducted without physical trespasses on a person's property. To be sure, Justice Scalia's opinion acknowledges that Katz "deviated from [previous Court opinions] exclusively property-based approach" but that does not mean that it "deviated" from the Fourth Amendment text. To the contrary, Justice Scalia makes it clear that he finds the Katz holding to be consistent with the text, namely, "that the Fourth Amendment protects persons and their private conversations . . . ." What concerned Justice Scalia about Katz was that its test, while derived from the property-based text, could be applied to narrow the Fourth Amendment's protection. Hence, the Jones opinion is designed as a corrective adjustment to ensure that the privacy test does not stray from the "minimum . . . degree of protection it afforded when it was adopted."

While the majority opinion seeks to marry property and privacy, there is considerable tension in the relationship. Justice Scalia's originalist return to the textual property foundation of the Fourth Amendment is now joined with an atextual privacy test to be employed whenever the Court chooses to use it to protect the People from electronic surveillance. In short, the majority endorsed a fixed constitutional principle supplemented by a judicially-forged pragmatic balancing test.

The fundamental problem with the Katz test is that it is an artificial judicial construct with no connection to the Fourth Amendment.

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46 Id. at 961 (Alito, J., concurring).
47 Id. at 962.
48 Jones, 132 S. Ct. at 962 (emphasis added) (citations omitted).
49 Id. at 960 (quoting Oliver v. United States, 466 U.S. 170, 183 (1984)).
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51 Id. at 953-54. See also Id. at 954-55 (Sotomayor, J., concurring).
IV. PROPERTY PRINCIPLES PLUS JUDICIAL EXPEDIENCY

Rather than expressing concern that the Jones majority’s originalist trespassory theory was too broad, Justice Alito feared it would provide no Fourth Amendment protection against “long-term monitoring of electronic communications” without committing a technical trespass... Of special concern was the “vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked”...

Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. But may such decisions be followed in applying the Court’s trespass theory? Assuming that what matters under the Court’s theory is the existence of a property right, 46 modern courts would agree that this type of communication is not a trespass to chattels. Trespass to chattels has traditionally required a physical touching of the property. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. But may such decisions be followed in applying the Court’s trespass theory? Assuming that what matters under the Court’s theory is the existence of a property right, modern courts would agree that this type of communication is not a trespass to chattels.

Apparently for this reason, the four concurring justices opted for the Katz expectation-of-privacy test as the sole Fourth Amendment test, relegating “existence of a property right [as] but one element in determining whether expectations of privacy are legitimate.” While not completely confident that this privacy test would be effective in protecting privacy in a changing technological world, Justice Alito was convinced that the majority’s property-based approach certainly would not.

According to both Justices Scalia and Sotomayor, however, the majority’s trespassory test does not displace the Katz privacy test, the latter having been “added to, not substituted for, the common law trespassory test.” Thus, both Justices contradicted Justice Alito’s assumption that the majority’s trespassory test would preclude utilization of the Katz test when electronic surveillance was conducted without physical trespasses on a person’s property. To be sure, Justice Scalia’s opinion acknowledges that Katz “deviated from [previous Court opinions] exclusively property-based approach” but that does not mean that it “deviated” from the Fourth Amendment test. To the contrary, Justice Scalia makes it clear that he finds the Katz holding to be consistent with the text, namely, “that the Fourth Amendment protects persons and their private conversations ...” What concerned Justice Scalia about Katz was that its test, while derived from the property-based test, could be applied to narrow the Fourth Amendment’s protection. Hence, the Jones opinion is designed as a corrective adjustment to ensure that the privacy test does not stray from the “minimum . . . degree of protection it afforded when it was adopted.”

While the majority opinion seeks to marry property and privacy, there is considerable tension in the relationship. Justice Scalia’s originalist return to the textual property foundation of the Fourth Amendment is now joined with an atextual privacy test to be employed whenever the Court chooses to use it to protect the People from electronic surveillance. In short, the majority endorsed a fixed constitutional principle supplemented by a judicially-forged pragmatic balancing test.

The fundamental problem with the Katz test is that it is an artificial judicial construct with no connection to the Fourth Amendment.
The Court did not purport to adopt privacy because of some new insight or scholarship as to the original meaning of the Fourth Amendment in 1791. Indeed it could not have, as the seed of what has become the "right of privacy" was contained in a law review article by Samuel D. Warren and Louis D. Brandeis published nearly a century after the Fourth Amendment's ratification. In that article, Warren and Brandeis proposed that the "next step" in the development of common law was to create a cause of action for violation of a person's "right to privacy."—a right not then in existence (in the common law or as a right contemplated by the authors of the Constitution), but one that should be fashioned for the future. Over the years, the Court has tried to justify the right to privacy as one of the "rights—a right to be let alone."' 61

While Justice Scalia's decision is exemplary—so far as it goes—the Court has not yet come to grips with rectifying the full measure of damage that was done to the Fourth Amendment's protection of the People by the reasonable expectation-of-privacy test. The modern test did not just narrow the scope of the Fourth Amendment's property principle by overriding the common-law trespassory test, it also eviscerated the Fourth Amendment's protection against "searches and seizures" for "mere evidence" in violation of the private property interests that the Fourth Amendment originally protected. It remains to be seen whether returning the Fourth Amendment to its property foundation in Jones will lead to a decision reestablishing the Fourth Amendment's protection of the people that, as discussed below, long had been known as the "mere evidence rule."

62 Id. at 195 ("Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.'").
63 Id. at 193 ("That the individual shall have full protection in person and in property is a principle as old as the common law, but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.").
64 Gouled v. United States, 255 U.S. 479, 484 (1921).
66 See Orin S. Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Cautious, 102 MICH. L. REV. 801, 816 (2004) ("It is generally agreed that before the 1960s, the Fourth Amendment was focused on the protection of property rights against government interference.").
68 U.S. CONST. amend. IV (emphasis added). The second provision of the Fourth Amendment states: "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." Id.
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V. THE NEED TO RETURN TO THE MERE EVIDENCE RULE

Although there is no way to anticipate the future direction of the Court, a principled way of escape from the Court’s simultaneous embrace of textual property principles and the atextual privacy test can be found: a complete return to the Founders’ Fourth Amendment as generally adhered to by the Court until the late 1960s. This includes a return to the “mere evidence rule” first comprehensively articulated in a seminal case that Justice Scalia cited only in passing—Boyd v. United States.

The first provision of the Fourth Amendment limits the government 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 . . . .” From the ratification of the Constitution until 1967, the mere evidence rule provided that certain types of searches were “unreasonable” per se, and could not be cured even by a warrant which met the test of the second provision of the Fourth Amendment. According to the Court, even search warrants:

may not be used as a means of gaining access to a man’s house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

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So unquestioned was this rule, that the *Boyd* decision observed that it was not until 1863 that there even was any law in England or the United States:

> which authorized the search and seizure of a man's private papers... for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the... obnoxious writs of assistance... did not go as far as this...

The *Boyd* Court "noticed the intimate relation between" the Fourth Amendment and the prohibition against compelled self-incrimination in the Fifth Amendment, both of which were protected by the rule it adopted:

> For the 'unreasonable' searches and seizures' condemned in the [Fourth] Amendment are almost always made for the purpose of compelling a man to give evidence against himself...

In explaining the property principle underlying the first freedom, as protected by the Fourth Amendment, the *Boyd* Court warned that, although the evidence seized in that case complied with the warrant requirement:

> [I]llegitimate and unconstitutional practices get their first footing... by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right... It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.

Thirty-six years later, in *Gouled v. United States*, the Court reaffirmed its belief that such a rule was required "to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by..."

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70 *Boyd*, 116 U.S. at 622-23.
71 Id. at 633 (emphasis added).
72 Id. at 635 (emphasis added) (discussing how constitutional rights can be slowly eroded, and what courts should do to prevent such erosion).
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Thirty-six years later, in *Gouled v. United States*, the Court reaffirmed its belief that such a rule was required “to prevent stealthy encroachment upon or ‘gradual depreciation’ of the rights secured by

them, by imperceptible practice of courts or by well-intentioned, but mistakenly over-zealous, executive officers.” Thus, the *Gouled* Court ruled:

[S]earch warrants . . . may not be used as a means of gaining access to a man’s house or office and papers solely for the purpose of making search to secure evidence to be used against him . . . .  

In a day when “over-zealous” and increasingly militarized law enforcement officers make tens of thousands of “dynamic entries” into homes annually, the full scope of the people’s original Fourth Amendment protections demonstrate the Founder’s prescience.

**VI. THE KATZ PRIVACY RULE WAS BASED ON A REPUDIATION OF THE PROPERTY PRINCIPLE**

Six months prior to *Katz*, the Supreme Court had abandoned its well-established Fourth Amendment jurisprudence based upon proper-

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71 *Id.* at 633 (emphasis added).
72 *Id.* at 635 (emphasis added) (discussing how constitutional rights can be slowly eroded, and what courts should do to prevent such erosion).

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74 *Gouled*, 255 U.S. at 309 (emphasis added) (discussing the acceptable use of search warrants).
75 See RADLEY BALKO, CATO INST., OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 11 (2006), available at http://www.cato.org/pubs/wtpapers/balko_whitepaper_2006.pdf (indicating that in addition to innumerable news articles and web stories, a series of studies and popular books have focused renewed attention on the militarization of police and the increasing use of “dynamic entry” by SWAT teams into homes and businesses by law enforcement at all levels of government—estimated to be as high as 40,000 per year). Videos detailing abusive SWAT team raids into homes and businesses circulate widely on the Internet. See, e.g., WCCO Television Report, SWAT Team Honored for Raiding Wrong House, YOUTUBE (July 29, 2008), http://www.youtube.com/watch?v=ofrEzn2ZKWEA (depicting a SWAT team that mistakenly raided the wrong home). See also Gibson Guitar Corp. Responds to Federal Raid, GIBSON (Aug. 25, 2011), http://www.gibson.com/en-us/Lifestyle/News/gibson-0825-2011/ (observing the SWAT style entries utilized at the Gibson guitar factory in order to seize Indian wood that was allegedly improperly imported). See generally GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy, ed., CATO INST. 2004); IN THE NAME OF JUSTICE, (Timothy Lynch, ed., CATO INST. 2009); PAUL CRAGG ROBERTS & LAWRENCE M. STRATTON, THE TYRANNY OF GOOD INTENTIONS: HOW PROSECUTORS AND LAW ENFORCEMENT ARE TRAMPLE THE CONSTITUTION IN THE NAME OF JUSTICE, (Forum 2000); PAUL ROSENZWEIG AND BRIAN W. WALSH, ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY (Heritage Foundation 2010); HARVEY A. SILVERGLATE, THERE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT, (Encounter Books 2011);
ty rights in favor of one rooted in an emerging right of privacy. In *Warden v. Hayden*, Justice William J. Brennan—writing for a bare majority of five Justices—claimed dissatisfaction with the “fictional and procedural barriers rest[ing] on property concepts,”77 and jettisoned the time-honored rule that a search for “mere evidence” was per se “unreasonable.”78 Justice Brennan claimed that the distinction between (i) “mere evidence” and (ii) “instrumentalities [of crime], fruits [of crime] or contraband” was “based on premises no longer accepted” as rules governing the application of the Fourth Amendment.79 Discarding the notion that the Fourth Amendment requires the Government to demonstrate a “superior property interest”80 in the thing to be seized, Justice Brennan promised that his new privacy rationale would free the Fourth Amendment from “irrational,”81 “discredited,”82 and “confus[ing]”83 decisions of the past, and more meaningfully ensure “the protection of privacy rather than property,” which is “the principal object of the Fourth Amendment.”84

Joined by Chief Justice Earl Warren, Justice Fortas concurred in the result, but disagreed with “the majority’s broad—and . . . totally unnecessary—repudiation of the so-called ‘mere evidence’ rule.”85 Resting his concurrence on the long-established “hot pursuit” exception to the warrant requirement,86 Justice Fortas sought to avoid “an enormous and dangerous hole in the Fourth Amendment”87:

[O]pposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to “writs of assistance,” were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. I fear that in gratuitously striking down the “mere evidence” rule, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amend-

77 *Id.* at 304.
78 *Id.* at 305.
79 *Id.* at 300-01 (emphasis added).
80 *Id.* at 303-04.
81 *Id.* at 302.
82 *Id.* at 306.
83 *Id.* at 309.
84 *Id.* at 304.
85 *Id.* at 310 (Fortas, J., concurring).
86 *Id.* at 312.
87 *Id.* (emphasis added).
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81 Id. at 306.
82 Id. at 309.
83 Id. at 304.
84 Id. at 303-04.
85 Id. at 302.
86 Id. at 300-01 (emphasis added).
87 Id. at 304.
88 Id. at 295-97.
89 Id. at 302.
90 Id. at 303-04.
91 Petition for Writ of Certiorari, supra note 4, at 4.
Just as Justice Fortas forecast, Justice Brennan’s privacy rationale has undermined the “Fourth Amendment’s prohibition against general searches.” The Government informed the Court in Jones “federal law enforcement agencies frequently use tracking devices early in investigations, before suspicions have ripened into probable cause.” As the Government also argued, applying the Fourth Amendment would “prevent[] law enforcement officers from using GPS devices in an effort to gather information to establish probable cause.” And as the Government asserted, as a consequence, “the government’s ability to investigate leads and tips,” will be “seriously impede[d].” In short, the Government demanded that the Court sanction its unbridled discretion to search suspected driving activities, seizing data as to the movement of vehicles on the public highways, in order to gather enough information to establish probable cause to institute criminal proceedings. The GPS technology, then, serves the Government in the same way as the discredited general warrant—legitimizing intrusions upon property without first having to demonstrate before a judicial magistrate that it has “probable cause.” Indeed, if there is no reasonable expectation of privacy, as the Government argued, then the warrant requirement would not even come into play, much less would the Government be required to have “probable cause,” or even “reasonable suspicion” to install a GPS on one’s automobile.

The expectation of privacy rationale is deeply problematic. If the Government were to announce and make known that it was recording all cell phone calls, preserving copies of all e-mails, intercepting all faxes, using cell phones to monitor conversations in a room even when no call was in progress, and that it had entered into an agreement with OnStar, TomTom, and Garmin to monitor in real time the position of all cars using that GPS equipment, one could say that no American would have any reasonable expectation of privacy. According to the privacy theory then, no American would be able to claim that a Fourth Amendment search or a seizure of those communications or data transmissions was occurring.

Under the reasonable expectation of privacy test the Supreme Court has overridden property rights by allowing warrantless searches of commercial property, and closely regulated industries, and a private residence for violations of a housing code, among others. The Court’s “expectation of privacy” test has proven wholly inadequate to the task of protecting the American people against invasions of their privacy through unreasonable searches and seizures. Paradoxically, a return to the text and property basis of the Fourth Amendment would provide the people with the protection envisioned by the Fourth Amendment’s authors.

As the Boyd Court recalled, the Fourth Amendment’s prohibition against “unreasonable searches and seizures” was the direct product of the government practice:

of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book.”

In his classic Treatise on Constitutional Limitations, renowned constitutional scholar, Thomas Cooley, ranked the Fourth Amendment guarantee of “citizen immunity in his home against the prying eyes of the Government, and protection in person, property, and papers against even the process of law” next in importance to the constitutional ban on personal slavery.

The Fourth Amendment pronounces that “persons,” “houses,” “papers,” and “effects” are equally secured from unreasonable searches and seizures. Each is a right of the people best protected by the enduring, unchanging common law rules of private property, not by a modern privacy chameleon invented by judges.

92 See Hayden, 387 U.S. at 312 (Fortas, J., concurring).
93 See Petition for Writ of Certiorari, supra note 4, at 23.
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NOTES

"HOSTILE LEARNING ENVIRONMENT:” DEVELOPING STUDENT SPEECH REGULATION BY APPLYING THE HOSTILE WORK ENVIRONMENT ANALYSIS TO CYBERBULLYING

By Carla DiBlasio*

INTRODUCTION

Lindsey is a sixteen-year-old sophomore who logs onto her Facebook page once she gets home from school. Lindsey updates her status and writes on her Facebook wall, “Amy is a fat cow. Don’t ever talk to that cow, just tell her MOO.” Katie is a fourteen-year-old eighth grade student at the same school. She decides to update her Facebook status after school and writes, “In case you didn’t already know it, I’m the S*#%. Everyone else should go to hell.” Are these instances where Lindsey and Katie are protected by their First Amendment free speech rights? Or, may their public school district punish them for their cyber speech?

* J.D. candidate, 2012, Case Western Reserve University School of Law. Associate Coordinator, Journal of Law, Technology & the Internet; President, International Law Society. I offer special thanks to my sister, Christina DiBlasio, whose incredible strength and integrity helped to inspire the topic of this Note. I would like to extend additional thanks to a mentor, Beth Rankin, who always inspires grammatical diligence and academic excellence.

1 Facebook is a social networking website that is operated and privately owned by Facebook, Inc. In addition to other functions, users may create a personal profile, add other users as friends, exchange messages, and join common interest groups. As of December 2011, Facebook has more than 845 million active users, which is about one person for every eight in the world. See Facebook Fact Sheet, at http://www.facebook.com/press/info.php?factsheet.