

UNITED STATES V. JONES: RETURN TO TRESPASS—GOOD NEWS OR BAD

Arnold H. Loewy

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I. THE WAY IT WAS

For the first two-thirds of the twentieth century, trespass was king in regard to Fourth Amendment searches. If there was a trespass, with rare exceptions,¹ there was a search requiring Fourth Amendment protection.² Conversely, if there was no trespass, there could be no search.³ Then, in 1967, the Court, in the landmark though poorly reasoned *Katz v. United States*, held that trespass was no longer necessary to constitute a search.⁴

Why do I describe *Katz* as poorly reasoned? Primarily, because the Court objects to the term “constitutionally protected area,”⁵ opining instead that “the Fourth Amendment protects people not places.”⁶ Certainly this is high-sounding rhetoric. One is tempted to say, “Gee, how wonderful. The stupid technicalities

¹ See *Hester v. United States*, 265 U.S. 57, 59 (1924) (holding that a trespass on open fields did not constitute a search).

² See, e.g., *Silverman v. United States*, 365 U.S. 505, 510-11 (1961).

³ See, e.g., *Goldman v. United States*, 316 U.S. 129, 134 (1942) (holding that eavesdropping through electronic means was not trespass); *Olmstead v. United States*, 277 U.S. 438, 457 (1928) (ruling that wiretapping lines in the basement of an office building did not constitute trespass onto the defendant’s property).

⁴ 389 U.S. 347, 353 (“[T]he underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.”).

⁵ See *id.* at 350 (“[T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase ‘constitutionally protected area.’”).

⁶ *Id.* at 351.

of trespass are gone. We can now realistically construe the Fourth Amendment in all its pristine glory, unencumbered by the old trespass doctrine.”

But think for a moment. How empty is the high sounding phrase: “The Fourth Amendment protects people not places?” Both before and after *Katz*, the amount of protection a person received had been completely dependent upon “place.” For example, a person’s home nearly always requires probable cause and a warrant,⁷ as opposed to a car, which rarely requires a warrant,⁸ and sometimes not even probable cause.⁹ Further, a person can be searched in public by police, absent a warrant, on nothing more than “reasonable suspicion.”¹⁰ So, while the Fourth Amendment may protect people, the amount of protection, if any, that a person gets is dependent upon where he is.¹¹

Though claiming to fully concur with the majority in *Katz*, Justice Harlan tried to give it intellectual coherence. He read the decision as saying, “[A]n enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected expectation of privacy”¹² Of course, the Court had gone out of its way to say that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’”¹³

But Justice Harlan’s opinion, which candidly is what people generally think of when they think of *Katz*, has its own set of problems. In particular, his most quoted sentence: “My understanding of the rule that has emerged from prior decisions is

⁷ *But cf.* *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011) (allowing a search of a home in a perceived emergency situation without a warrant).

⁸ *But cf.* *Coolidge v. New Hampshire*, 403 U.S. 443, 472 (1971) (requiring a warrant for a car seized from the driveway of a home).

⁹ *See, e.g.*, *Colorado v. Bertine*, 479 U.S. 367, 371-72 (1987) (upholding a warrantless inventory search of a vehicle as reasonable under the Fourth Amendment).

¹⁰ *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

¹¹ *See, e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 143-46 (1978) (discussing a person’s legally sufficient interest in places that the Fourth Amendment protects against unreasonable governmental intrusion). Persons have no protection if they are not in a place that the Court recognizes as having a Fourth Amendment attachment. *See id.* at 148.

¹² *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (citations omitted).

¹³ *Id.* at 350.

that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹⁴

Well, what’s wrong with that? First, the prior decisions never invoked this rule; Harlan made it up for the first time in *Katz*. Second, it quite clearly is not what the majority said. Third, subjective expectation of privacy cannot be taken seriously. If it were, all the government would have to do is announce that they were going to search houses randomly whenever they felt like it. Thus, nobody would have a subjective expectation of privacy in their home. Indeed, the Court came close to saying as much in *Rawlings v. Kentucky*, where it held that a man who saw the police coming to the door could not have had a subjective expectation that his friend’s handbag would not be searched.¹⁵ Of course, by that reasoning, nobody in Nazi Germany was ever subject to an unreasonable search because the citizenry knew they could be searched at any time.¹⁶ Thus they lacked Harlan’s first criterion: a subjective expectation.

More importantly, the societal reasonable expectation of privacy has proven to be so malleable as to be nearly worthless. A person has no reasonable expectation of privacy that the police will not come over or around his high fence marked with no trespassing signs,¹⁷ but he does have a reasonable expectation that the police will not squeeze his luggage on a public bus.¹⁸ Similarly, a person has no reasonable expectation that the police will not put a pen register on her home phone and learn every number that she dials,¹⁹ but she does have a reasonable expectation that the police will not use a thermal imager to detect heat escaping from her house, lest they determine what time of the day she takes her sauna.²⁰

¹⁴ *Id.* at 361 (Harlan, J., concurring).

¹⁵ 448 U.S. 98, 104-05 (1980).

¹⁶ *See generally* *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

¹⁷ *Oliver v. United States*, 466 U.S. 170, 179 (1984).

¹⁸ *Bond v. United States*, 529 U.S. 334, 336-38 (2000).

¹⁹ *Smith v. Maryland*, 442 U.S. 735, 742 (1979).

²⁰ *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

II. ALONG CAME JONES

These decisions raise questions about whether the Supreme Court understands what the populace views as reasonable.²¹ Nevertheless, before 2012, *Katz* was the law in determining what constituted a search. But, in early 2012, in the words of the fifty-plus-year-old hit song from a group called the Coasters: “And then . . . and then . . . Along came Jones.”²² *Jones* probably does not

²¹ See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727, 740-41 (1993). But cf. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 542-43 (2011) (arguing that most of the decisions can be justified as a return to equilibrium).

²² *United States v. Jones*, 132 S. Ct. 945 (2013); THE COASTERS, *Along Came Jones* (Atco 6141 1959).

I plopped down in my easy chair and turned on Channel 2
 A bad gunslinger called Salty Sam was chasin’ poor Sweet Sue
 He trapped her in the old sawmill and said with an evil laugh,
 “If you don’t give me the deed to your ranch
 I’ll saw you all in half!”
 And then he grabbed her (and then)
 He tied her up (and then)
 He turned on the bandsaw (and then, and then...!)

(Chorus)
 And then along came Jones
 Tall thin Jones
 Slow-walkin’ Jones
 Slow-talkin’ Jones
 Along came long, lean, lanky Jones

Commercial came on, so I got up to get myself a snack
 You should’ve seen what was goin’ on by the time that I got back
 Down in the old abandoned mine, Sweet Sue was havin’ fits
 That villain said, “Give me the deed to your ranch
 Or I’ll blow you all to bits!”
 And then he grabbed her (and then)
 He tied her up (and then)
 He lit the fuse to the dynamite (and then, and then...!)

(Chorus)
 And then along came Jones
 Tall thin Jones
 Slow-walkin’ Jones
 Slow-talkin’ Jones
 Along came long, lean, lanky Jones

change everything, but it does require a different look of the legal landscape created by *Katz* and its progeny.

One is tempted to analogize the Fourth Amendment to the plight of Sweet Sue, in the Coasters' song, tied to the railroad tracks with a train approaching just before being rescued by Jones. While that surely overstates the case, two aspects of *Jones* are noteworthy. First, although the justices were closely divided on rationale, they were unanimous in upholding the Fourth Amendment claim. And, the Court reached the conclusion that it did even considering two analogous pre-*Jones* cases, *United States v. Knotts*²³ and *United States v. Karo*,²⁴ which suggest, though they do not compel, a contrary result. Second, based on some of the questioning, particularly Chief Justice Roberts's query as to whether the Government's theory of the case meant that the Government could install and monitor a GPS on all the Justices' cars,²⁵ the Court appears to be concerned with the rights of individuals rather than the rights of criminals. Needless to say, the reasoning of *Jones* represents a substantial upgrade.²⁶

I got so bugged I turned it off and turned on another show
 But there was the same old shoot-'em-up and the same old rodeo
 Salty Sam was tryin' to stuff Sweet Sue in a burlap sack
 He said, "If you don't give me the deed to your ranch
 I'm gonna throw you on the railroad tracks!"
 And then he grabbed her (and then)
 He tied her up (and then)He threw her on the railroad tracks (and then)
 A train started comin' (and then, and then...!)

(Chorus)
 And then along came Jones
 Tall thin Jones
 Slow-walkin' Jones
 Slow-talkin' Jones
 Along came long, lean, lanky Jones

Id.

²³ See 460 U.S. 276, 284 (1983).

²⁴ See 468 U.S. 705, 721 (1984).

²⁵ See Transcript of Oral Argument at 9, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259) (inquiring if "there would also not be a search if you put a GPS device on all of our cars, monitored our movements for a month? You think you're entitled to do that under your theory?"), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf.

²⁶ See generally Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

The significance of *Jones* is that it brought the concept of trespass to the forefront. To be sure, *Katz* had not totally dispensed with trespass. As Justice Scalia so cogently demonstrated in his opinion for the Court, the Court relied specifically on trespass in at least two post-*Katz* cases. In one, the police overheard conversations in a person's home implicating the homeowner but arguably not implicating his reasonable expectation of privacy.²⁷ In the other, a mobile home was towed away (seized), and the Court invalidated the seizure entirely on trespass grounds.²⁸

But, unlike *Solal* and *Alderman*, *Jones* adopted a trespass-first rule. That is, first we look to see if there was a trespass to a person, paper, house, or effect. If the answer is, "Yes," and the trespass was for the purpose of finding evidence, then there is a search, and we do not go to the *Katz* analysis. On the other hand, if there was not a trespass, as was the situation in *Katz*, then we ask about the reasonable expectation of privacy.

This "order of battle" rule seems salutary and, in my mind, a net gain for the Fourth Amendment. When the police deliberately trespass on a person's house or car for the purpose of obtaining evidence, the Fourth Amendment is violated. While it may not always be clear what constitutes a trespass, as the four-Justice concurrence in *Jones* emphasizes,²⁹ there are times where it is clear. While the trespass in *Jones* may seem trivial, relative to the harm done to privacy by monitoring, there nevertheless was a trespass. And, at least now, it is clear that once there is a trespass, the amorphous privacy question does not even have to be reached. I regard this as salutary.

Of course, this leaves open several questions. What if the police now (or at some time in the future) are able to monitor someone, like *Jones*, without attaching the GPS to his car, either through his own GPS (on his phone or car) or simply through a new methodology yet to be invented (perhaps an invisible spy satellite placed over, but not on, his car)? The Court was correct to note that we will worry about that later. For now, we can resolve this by simply using the trespass doctrine.

²⁷ *Alderman v. United States*, 394 U.S. 165, 176 (1969).

²⁸ *Soldal v. Cook County*, 506 U.S. 56, 72 (1992).

²⁹ 132 S. Ct. 945, 960 (2012) (Alito, J., concurring).

III. POTENTIAL IMPACT ON OLD CASES

Although I applaud the step, I would have liked to have seen the Court reject two prior cases that I think are somewhat in tension with, albeit distinguishable from, the Court's analysis. The first is *Karo v. United States*, where the Court upheld the Government's installation of a beeper in a can of chloroform that was to be sold by a merchant to Karo.³⁰ The Court distinguished *Karo* on the ground that in *Jones*, the GPS was installed on the car after Jones, or more accurately Jones's wife, owned it; whereas, in *Karo* the beeper was installed before Karo owned the can of chloroform.³¹

However, there are ways for police to sidestep this distinction. For example, what if after tracking a suspect's movement, the police learn that he has agreed to purchase a car from a particular dealership? Suppose further that the police ask the dealership for permission (which is granted) to install a GPS on the car that the suspect was planning to buy. Or alternatively, suppose that the police learn that a suspect is having a house built. Would it be a trespass if they install a listening device in the attic before title to the house is passed to the defendant?

Under *Karo*, the answer to both of these questions would seem to be, "No." Of course, in these situations, the *Katz* fallback position would be available. My best guess is that the defendant would win on that basis in the house situation because of the classically greater expectation of privacy in a house. And, if one combines the votes of Alito, Ginsburg, Breyer, Kagan, and Sotomayor from *Jones*, the defendant would probably win under *Katz* in the car situation as well, at least if the GPS was monitored for an appreciable length of time.

My fondest hope would be that, in the future, on the authority of *Jones*, the Court recognizes that *Karo* and the hypothetical illustrations I have described are the functional equivalent of trespasses and consequently subsumed under the new *Jones* doctrine. If not, the *Katz* backup will have to take care of it.

³⁰ 468 U.S. 705, 717 (1984).

³¹ *Jones*, 132 S. Ct. at 952.

The second case that is problematic when viewed through the lens of *Jones* is *Oliver v. United States*.³² The trespass in *Oliver* could hardly have been clearer. The police circumvented a fence with a locked gate marked with “No Trespassing” signs, and, when they finally encountered some people on the land, the first thing they were told was, “No hunting is allowed.”³³ Yet, the Court, alluding to the earlier *Hester* case,³⁴ held that “open fields” were not an area where a person had a reasonable expectation of privacy, nor were they “persons, houses, papers, and effects” which were entitled to Fourth Amendment protection.³⁵

Unsurprisingly, the *Jones* Court distinguished *Oliver* as a case not involving a “person, paper, house, or effect.”³⁶ To be sure, that makes perfect sense when talking about a true open field. For example, in *Hester*, the case that created the open field doctrine, the police supposed that they were on Hester’s land, but they really could not tell. There was no evidence of a “no trespassing” sign. Indeed, it was truly an open field, fifty to one hundred yards from the defendant’s house.

On the other hand, in *Oliver*, the defendants clearly made an effort to treat their land as a private enclave rather than open space. Indeed, one might presume that anybody other than the police could have been prosecuted for trespass, which was most likely not the case in *Hester*. Hence, the only way that *Oliver* makes sense, if we do not define “open fields” in an *Alice-in-Wonderland* way, as the Court did, is that an open field is not a “person, house, paper, or effect.”

But, if we took that seriously, we gut the Fourth Amendment of much of its vitality. Would an office lose its constitutional protection? For that matter, to paraphrase Justice Marshall, who so cogently asked in his *Oliver* dissent: “What about the phone booth in *Katz*?”³⁷ The plain truth is that “houses and effects”

³² 466 U.S. 170 (1984).

³³ *Id.* at 173.

³⁴ *Hester v. United States*, 265 U.S. 57 (1924).

³⁵ *Id.* at 180-81.

³⁶ *See Jones*, 132 S. Ct. at 953.

³⁷ *See Oliver*, 466 U.S. at 185 (Marshall, J., dissenting) (“[N]either a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; yet we have held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation.”).

ought to be construed as real and personal property except where the owner makes no effort to exclude others.

So, in the *Hester* fact pattern, there was no trespass because Hester never made any effort to keep the populace off his land. Oliver, on the other hand, did, and thus, should have been protected by the Fourth Amendment. Candidly, *Jones* does not compel the rethinking of *Oliver*, but it would be a happy byproduct of *Jones* if the Court were to move in that direction.

IV. POTENTIAL IMPACT ON UNDECIDED CASES

The Supreme Court will decide *Florida v. Jardines* this year.³⁸ *Jardines* involved a group of policemen, who, without a warrant or probable cause, brought a drug sniffing dog to the front door of Jardines's home.³⁹ The police walked the dog up Jardines's entrance way to his door, whereupon the dog alerted, causing the policeman to attempt a similar sniff that the officer said confirmed the dog alert.⁴⁰ Based on this information, the police obtained a warrant.⁴¹

In *Jardines*, the Florida Supreme Court held that the Supreme Court's prior holdings that dog sniffs are not searches did not apply to this case because it involved a home.⁴² The Court distinguished *United States v. Place*,⁴³ which involved a dog sniff of luggage at an airport, and *Illinois v. Caballes*, which involved a dog sniff of an automobile.⁴⁴ The dissent, on the other hand, took the majority to task for drawing a distinction that the Supreme Court had not drawn.⁴⁵ In its view, so long as the dog was in a

³⁸ 132 S. Ct. 995 (2012).

³⁹ *Jardines v. State*, 73 So. 3d 34, 35-36 (Fla. 2011). The only evidence that Jardines was growing drugs came from an uncorroborated anonymous tip that Jardines was growing marijuana in his house and the almost meaningless observation (given that this was Miami, Florida) that his air conditioner was continuously running. *Id.* at 37.

⁴⁰ *Id.*

⁴¹ *Id.* at 37-38.

⁴² *Id.* at 55-54.

⁴³ 462 U.S. 696, 699 (1983).

⁴⁴ 543 U.S. 405, 410 (2005).

⁴⁵ *Jardines*, 73 So. 3d at 61 (Polston, J., dissenting).

place where he had a right to be, there was no search even though a home was involved.⁴⁶

Before *Jones*, the Court would have had two choices. It could have affirmed the Florida Supreme Court on the ground that *Place* and *Caballes* did not apply to a home, or it could have reversed the Florida Supreme Court on the grounds that the Florida Supreme Court misapplied its prior holdings and reaffirm its holding that a dog sniff is not a search because it cannot detect any innocent conduct.

Jones gives the Court a third choice. The Court could hold that under *Jones* the dog was not where he had a right to be because he was in the curtilage of the house for the purpose of obtaining evidence. Hence, its presence was trespassory.

Of course, the State could argue that it would not be trespassory for a neighbor or a merchant to walk up the defendant's walkway and, therefore, the police dog had a right to be on the property. *Jones*, however, clearly distinguishes between evidence gathering and other interferences with possession. For example, if the police in *Jones* had placed a flier on Jones's car advertising the policemen's ball, that would not have been a trespass. But when the police placed an even smaller GPS card on Jones's car, that was a trespass. Why? Because the GPS was there to gather evidence, exactly like the dog in *Jardines*.

CONCLUSION

In response to the title question, *Jones* represents a logical addition to the current Fourth Amendment analysis. First, the Fourth Amendment was given proper deference by the entire Court. Second, the Court revitalized a historic attribute of the Fourth Amendment, trespass, that had lain largely moribund during the checkered reign of *Katz*. Third, the Court retained such value as *Katz* may have in avoiding the procedural pitfalls of the trespass doctrine. And finally, the Court showed a willingness to take seriously the impact that modern technology might have on privacy, especially an innocent person's privacy. So, while *Jones* may not resolve every Fourth Amendment question, it does

⁴⁶ *Id.* at 70 (Polston, J., dissenting) ("Franky's sniff, while lawfully present at Jardines'[s] front door, cannot be considered a search under the Fourth Amendment.").

provide a helpful roadmap to the resolution of future issues, and perhaps will compel the Court to reconsider some of its less consistent prior jurisprudence.

In short, what is not to like?

