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Reason And Privacy: Applying The Fourth Amendment In The Digital Age

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Reason And Privacy: Applying The Fourth Amendment In The Digital Age

In late 2010, twenty-year-old college student Yasir Afifi posted a picture on Reddit (a user-generated social news and entertainment website) of a device he had found under his car during a routine oil change.[1] After the object was identified as a GPS tracking model sold exclusively to the military and law enforcement agencies, Afifi was visited in his home by members of the FBI who demanded the tracking unit be returned. Afifi is a U.S.-born citizen whose father was a former leader of a regional Muslim Community Association. When I first saw this story I was shocked; it violated my sense of justice and privacy. Afifi's vulnerability is one we all share in this age of largely unregulated surveillance technology. At the time of Afifi's discovery of the device under his car, all Americans were equally vulnerable to warrantless GPS tracking. Although the Supreme Court recently ruled against police installing GPS devices to track suspects without a warrant in the case *United States v. Jones*[2], this ruling has done little to protect our Fourth Amendment rights and ensure the privacy of law abiding citizens in the 21st century.

Defining the boundaries of the Fourth Amendment in the digital age is a complex and often controversial task, but one that is needed if we are to ensure due process and a semblance of privacy today and in times to come. With a myriad of evolving surveillance technologies and data-basing tools available both commercially and to law enforcement agencies, the exposure of our personal information has never been available through so many unregulated means. The methods are vast and range from the commonplace and familiar to what could seem like Orwellian science fiction. Automatic License Plate Recognition[3] and Facial Recognition software allow for the potential of automated indiscriminate data collection[4], and growing biometric databases are beginning to encompass genetic material with intimate private health and hereditary information[5]. Factory-installed Global Positioning Systems in our cars and smart phones provide government entities with the ability to track our every movement over prolonged periods of time without physical intrusion.[6] Drones first introduced in military contexts are being brought home for domestic security and law enforcement as well as commercial applications.[7] Third-party databases store an unprecedented amount of personal

information that is obtainable without probable cause and sold on the open market.[8] These challenges were unforeseen a generation ago and inconceivable to the framers of the Constitution. Clearly we need bold, new judicial and legislative action if we are to preserve the notion of privacy we are accustomed to and maintain the integrity and functioning of the democratic process.

While the constitution makes no explicit reference to privacy, the Fourth Amendment provides the broadest protections against unreasonable searches and seizures in the U.S. Constitution. In Justice Scalia's words, "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."[9] To the framers of the constitution, this Amendment, with its highly specific wording and demanding criteria for warrants to be issued only on "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"[10] must have seemed to comprehensively secure their privacy from government intrusion. The language of the Fourth Amendment, however, was eventually outpaced by the technological innovations which permeated our world and made a standard of common law trespass irrelevant to preserving the essence of what the Fourth Amendment was aimed at protecting.

In *Olmstead v. United States*, Prohibition officers wiretapped a suspected bootlegger's phone by inserting several wires among outside telephone wires of the party line without any trespass upon the defendant’s property.[11] The Supreme Court found that "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."[12] By emphasizing the standard of physical intrusion the Supreme Court limited the threshold of Fourth Amendment protection to physical invasion and asserted in the words of Chief Justice Taft that "The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched."[13]

While the *Olmstead* ruling excluded telephone conversations from Fourth Amendment protections, the court's emphasis on property trespass would soon come to jeopardize private conversations issued from within the confines of one's own home as well. The 1942 Supreme Court case *Goldman v. United States* saw an officer use a device called a detectaphone to listen to the defendant's conversations through an adjoining wall.[14] Though the defendant never "projected his voice beyond the confines of his home or office" the Supreme Court held to their standard of physical invasion.[15] Under this standard, technological innovations could have potentially eliminated the ability to have a private conversation so long as there was no tangible physical invasion involved in the interception of the communication. For the Fourth Amendment to be relevant in the modern world it would take a Copernican shift in jurisprudence, one that would come in 1967 with the ruling of *Katz v. United States*.

In *Katz v. United States*, the Supreme Court found, in Justice Stewart's words, that although in *Olmstead* "surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution" that the court had since developed and "departed from the narrow view on which that decision rested."[16] Now the Fourth Amendment "extend[ed] as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law'".[17] This opinion reinvigorated the Fourth Amendment by reasserting that "the Fourth Amendment protects people -- and not simply "areas" -- against unreasonable searches and seizures," and that the "reach of that Amendment cannot turn upon the presence or absence of a physical intrusion."[18] The new standard and criteria for what protections were afforded to people was addressed expressly in Justice Harlan's concurrence. "There is a twofold requirement", he wrote, "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'".[19]

The standard of a reasonable expectation of privacy is one of two guiding principles for modern Fourth Amendment interpretation concerning surveillance, the second being the distinction between efficiency improving technology and those that provide extrasensory capabilities.[20] In *United States v. Knotts* the court

found that a beeper placed into a container of chloroform used to track the defendant was not a violation of his Fourth Amendment rights on the grounds that it did not A) violate the standard set forth in *Katz* because "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements"[21] and B) did not represent an extrasensory ability that would substitute for a search requiring a warrant. In the words of the court, "Nothing in the Fourth Amendment prohibited the police from augmenting their sensory faculties with such enhancement as science and technology afforded them in this case" and there was "no indication that the beeper was used in any way to reveal information . . . that would not have been visible to the naked eye from outside".[22] Subsequent rulings such as *Kyllo v. United States* have found some technologies not in general public use and used by the government "to explore details of a private home that would previously have been unknowable without physical intrusion"[23] to constitute a Fourth Amendment "search" that would be unreasonable without a warrant. In the case of *Kyllo* this was a thermal imaging device used to detect sources of heat from within the home. With a clear understanding of modern criteria for Fourth Amendment protection we can now turn our analysis toward the issue of non-physically intrusive searches and apply to it the dual standards of reasonable expectation to privacy and limitation of extrasensory ability.

Before the 2012 Supreme Court case *United States v. Jones* unanimously established that "the Government's installation of a GPS device on a target's vehicle . . . to monitor the vehicle's movements, constitutes a 'search'"[24] the court's interpretation of societally-recognized reasonable expectation to privacy was at times badly misaligned with the expectations of the general public. For example, in the 2007 case *United States v. Pineda-Moreno*, the Ninth Circuit held that there was no reasonable expectation to privacy in the driveway of one's residence, or in the

undercarriage of their vehicle and that the use of a tracking device was not a search.[25] These opinions viscerally sit poorly for most people and for good reason. Had the Supreme Court upheld this view, we might all be vulnerable to having our movements tracked by a GPS installed under our vehicle. Unfortunately, the ruling of *United States v. Jones* was based on the oldest interpretation of the Fourth Amendment, that of 18th century tort

law and so fails to address and protect the public from the many non-physically invasive surveillance methods that have emerged in recent years.

When the government affixed a GPS tracker on the undercarriage of Antoine Jones's vehicle in a public parking lot after the warrant had expired, the Supreme Court had "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment".[26] In placing the tracker on the car, the government failed the basic common law trespassory test, and because of this, Jones's Fourth Amendment rights did not "rise or fall with the *Katz* formulation."[27] In his majority opinion, Justice Scalia says that rushing to applying Harlan's standard expressed in *Katz* would have introduced several "vexing problems" including what duration of observation constitutes a search and issues relating to the constitutionality of noninvasive electronic surveillance.[28] While acknowledging that it "may be" that long term visual observation "through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy," Scalia reaffirmed "the present case does not require us to answer that question."[29]

This holding was, to borrow from the opinion of Justice Alito, "unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial."[30] In their concurring opinions, Justices Sotomayor and Alito developed several paths of analysis which could effectively be applied to the issue of long term surveillance without having to revert back to antiquated tort law. Sotomayor expressed concern that the looming suspicion of constant surveillance could "chill associational and expressive freedoms".[31] She also notes the obvious threat of abuse in having "such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track" and warns that it "may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'"[32] The tact taken by Justice Alito applied the *Katz* standard of reasonable expectation to privacy and concluded "the lengthy monitoring that occurred in this case constituted a search".[33] However, he elaborated on persistent problems associated with this approach, including the

propensity for judges to "confuse their own expectations of privacy with those of the hypothetical reasonable person"[34] and the moving standard of expectation to privacy that can shift with technological change.

These are all legitimate concerns. Though Alito concludes that "we need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark"[35] unless a standard of unreasonable duration is established, determining when surveillance becomes a search is an arbitrary decision. Most compelling is his insight that "New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile

themselves to this development as inevitable".[36] This is particularly relevant to personal data possessed by a third party, a realm where the public's expectations are currently in tumultuous development (observe the recent public outrage over planned changes in Facebook and Instagram privacy policies).[37] These changes may limit the relevance of the judicial interpretation of the *Katz* standard as certain technologies like GPS-enabled phones and cars become ubiquitous. Acknowledging all these issues, it is possible that the standard established in *Katz* may alone be insufficient to address the issue of warrantless surveillance. Sotomayor's concern over the chilling effect of surveillance and the lawsuit Yasir Afifi is now pursuing against the FBI introduce a new and compelling way to help interpret the Fourth Amendment.

Afifi is pursuing legal action against the FBI based not on a Fourth Amendment violation but a First Amendment one.[38] Just as Sotomayor warned, Afifi is arguing that the "unlawful intrusions into [his] life . . . create an objective chill on Afifi's First Amendment activities."[39] Using a test of "Constitutional reasonableness" as described by Yale Professor and Constitutional Law scholar Akhil Amar in which "thinking about the broad command of Fourth Amendment, we . . . examine other parts of the Bill of Rights to identify constitutional values that are part of constitutional *reasonableness*"[40], we can use the independent clauses of the Bill of Rights as "benchmarks against which to measure reasonableness and components of reasonableness

itself."[41] This suggests that the Constitution is not a series of isolated hurdles outlying our rights, but that the parts must be viewed in context of one another in order to affect the full extent of our rights as intended by the law.

The "chilling effect" is a part of the legal lexicon that most would recognize intuitively as the Orwellian self-policing that occurs under the fear of constant surveillance. Influential French social theorist Michel Foucault philosophizes extensively on how constant surveillance in a 'panoptic' society[42] induces individuals to change their behavior to conform to the non-suspect standards held by those in power. Applying the standard of Constitutional Reasonableness to Fourth Amendment issues that affect free speech could help provide a rationale for the reasonable expectation of privacy established by the *Katz* standard. Viewing First Amendment considerations in conjunction with the "Mosaic Theory", which holds that prolonged surveillance and data amalgamation can produce an intimately detailed picture of an individual's life[43], a guide for reasonable expectation to privacy can be more explicitly specified. The mosaic theory is key to interpreting privacy expectations in the 21st century because it allows for the distinction that an individual can have a privacy interest in the aggregated whole of their information while consenting to making individual pieces of personal information publicly available in a limited form. The Supreme Court has itself recognized the "distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole"[44] as Justice Stevens said in his majority opinion in *United States Department of Justice v. Reporters Committee for Freedom of the Press*. Unwarranted surveillance techniques and data aggregation that can produce intimately detailed pictures of our lives can reasonably be expected to chill our associative freedoms, particularly with unpopular political and religious affiliations. In this fashion the mosaic theory and First Amendment considerations can help define the conditions when long-term surveillance becomes a search.

The First Amendment is not the only clause in the Bill of Rights which can help us interpret the Fourth Amendment under the rubric of "Constitutional Reasonableness". The Fifth and Fourteenth Amendments both

contain Due Process Clauses which declare "nor shall any person be deprived of life, liberty or property without due process of law."[45] These due process clauses provide the avenue through which Substantive Due Process is exercised to protect substantive rights. In *Griswold v. Connecticut*, a landmark case involving state prohibition of contraceptive use, the Supreme Court found that within the penumbra of various Amendments in the Bill of Rights a "zone of privacy" was created and that the Fourth Amendment created a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[46] In Justice Harlan's view, the state infringed "the Due Process Clause of the Fourteenth Amendment because [their] enactment violated basic values implicit in the concept of ordered liberty'".[47] Substantive due process is applicable to Fourth Amendment doctrine when considering the notion of "substantive reasonableness"[48] which would "'take account of the strength or weakness of the interests supporting an allegedly unreasonable search or seizure' and 'weigh these interests against the intrusiveness of challenged police activity.'"[49]

Substantive privacy rights, though not explicitly enumerated in the Constitution, nonetheless fall under the aegis of Substantive Due Process. In Justices Warren and Brandeis's *Right to Privacy* the Justices considered "whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual" and found throughout the law that "The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."[50] In *Delaware v. Prouse* the Supreme Court acknowledged "Were the individual subject to unfettered government intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed."[51] This implies a substantive privacy right for movements in public and government intrusions which violate this right could be characterized as an infringement of due process similar to that described by Justice Harlan in his opinion on *Griswold*.

There is good reason to consider GPS and other emerging tracking techniques as sense-augmenting tools that replace a physically intrusive search. While the beeper used to track *Knotts* emitted a periodic signal

that police could follow, it "had a limited range and could be lost if the police did not stay close enough".[52] Unlike GPS trackers, it could not track on its own nor could it record and store locational data.[53] The persistence and storage abilities of GPS trackers mark them as distinct from ordinary sense-enhancing tools that increase efficiency because they can provide a detailed amount of information that is unknown even to close personal confidants such as spouses. The precision of GPS tracking in phones can reveal movements inside the home, which would have been unknowable without physical intrusion.[54] These reasons may support applying the restrictions established in *Kyllo* to GPS trackers.

If none of these perspectives are found to be compelling arguments for indiscriminate data collection being considered a search under the Fourth Amendment, then a legislative alternative may present itself as the best solution for securing the privacy of the sum of our public movements. If the Supreme Court does not find long-term tracking to fall under due process, then "concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions".[55] Indeed, when in his *Olmstead* opinion Justice Taft acknowledged, "Congress may protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation,"[56] he was accurately predicting the enactment of comprehensive congressional statutes after the *Katz* ruling that regulated wiretapping to the current day. In the words of Justice Alito: "Congress did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject."[57]

Leaving these pivotal privacy issues up to the legislature may prove to be insufficient for a number of reasons. Religious and racial minorities continue to be proportionately underrepresented in Congress and the reluctance of elected officials to appear soft on crime along with their eagerness to provide law enforcement agencies with effective tools, could lead to legislative action which may "reify majoritarian preferences and insufficiently protect the privacy concerns of certain politically unpopular minorities like Muslim-Americans".[58] Furthermore, fragmented legislative action may lead to inconsistent regulation across jurisdictions which would insufficiently protect a surveillance and data collection system that is increasingly centralized and national.[59]

Conversely, the legislature possesses a large bureaucracy which can be wielded to research and craft detailed and specific regulation. Unfortunately, complications in recent litigation over privacy concerns has slowed the court's ability to address Fourth Amendment and privacy issues.

Since being signed into law by President Carter in 1978, the Foreign Intelligence Surveillance Act has explicitly delineated the procedures for surveillance of a "foreign power or agent of a foreign power" and regulates wiretaps for the collection of foreign intelligence. After the September 11th terrorist attacks Congress passed the USA Patriot Act which eased some restrictions on foreign intelligence gathering within the United States and expanded the range of objects subject to FISA jurisdiction such as records from libraries, department stores and schools.[60] Attempts to challenge these laws, along with the secretive National Security Agency's surveillance program, as unconstitutional are frequently foiled by the inherently non-public and clandestine nature of intelligence gathering. In 2007, the American Civil Liberties Union lawsuit challenging the NSA's wiretapping program was dismissed by the Court of Appeals for the 6th Circuit on the reasoning that the ACLU and others who brought the case "did not have the standing to sue because they could not demonstrate that they had been direct targets of the clandestine surveillance."[61] In 2008, the Supreme Court declined to review the challenge without comment.[62] Surmounting this legal challenge is made all the more difficult by the nondisclosure orders built into FISA. These prevent persons to whom a FISA Court subpoena is served from disclosing information about the entities whose information is being obtained.[63] In 2013, a lawsuit filed on behalf of the American Civil Liberties Union and a coalition of human rights groups and journalists was dismissed in a 5-4 Supreme Court ruling.[64] The majority held that the ACLU has "no actual knowledge of the Government's targeting practices" and can "merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired"[65] and so did not have the article III standing which requires an injury to be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."[66] For the plaintiffs, including among them Amnesty International, Global Fund for Women, Human Rights Watch, PEN American Center, Service Employees

International Union, journalists and several defense attorneys whose work requires them to communicate with dissidents overseas and makes them vulnerable targets of warrantless wiretapping, this decision created, in the words of ACLU Deputy Legal Director Jameel Jaffer, a "hurdle that is insuperable . . . a barrier to judicial review."[67]

Technological change is actively altering our lives at work and home, our interpersonal communications and our relationship with private information. As our standard of living evolves, so do our expectations of privacy. Scientific innovations can increase convenience, efficiency, and allow for the spread of information that has immensely positive potential in private, commercial, and law enforcement applications. Current DARPA (the Defense Advanced Research Projects Agency) research strikes at the heart of the anxiety over cutting-edge scientific developments. Scientists have built "cyborg remote controlled beetles" and "remote controlled roaches"[68] in an effort to create miniaturized drones which are essentially "flying insect cyborgs."[69] This is a technological development that is as strikingly dystopic and Orwellian as it is incredible and inspiring. Soon drones will be commonplace in commercial and law enforcement spheres with uses as benign as agricultural applications and surveying, to being potentially wielded as invasive tools of the paparazzi.[70] Some experts estimate that over 100,000 GPS trackers are sold to private individuals each year with increasing annual demand, being used to track impulsive teenagers, unfaithful spouses and suspicious employees.[71] These new capabilities cannot be willed away or ignored and as they become commonplace, the need for regulation and oversight becomes all the more urgent.

It is crucial that we preserve a semblance of privacy in the sum total of our public movements and our communications, while still enabling technological advances to improve our day-to-day lives. Recognizing the positive potential in surveillance and data aggregation makes it all the more important to oversee and regulate these technologies so that we can begin to utilize them to our benefit without fear of needlessly compromising our privacy. Surveillance technology can deter crime and provide evidentiary data "that is not readily apparent at the time of collection."[72] Perhaps most compelling is that the use of surveillance technology and data

collection could conceivably "limit police discretion, which may reduce racial or ethnic profiling."[73] By obtaining specific and relevant data, policing agencies could potentially identify and apprehend criminal suspects while mitigating the intrusiveness to bystanders. Specific regulations detailing the circumstances under which information can be collected, limiting the length of time that information can be stored and specifying the conditions under which information may be accessed would allow us to benefit from these technological developments while securing the privacy that is fundamental to normalcy and a thriving democracy. Congress is best enabled to research and establish these detailed and specific regulations and craft into them more transparency, while the judiciary is best positioned to establish baseline protections and guarantee that due process applies to new forms of long-term indiscriminate surveillance and data collection.

Despite a nearly universal desire for privacy, many individuals find themselves at a loss when they try to articulate the justification for this principle. The old and pervasive adage "if you don't have anything to hide you should have nothing to fear" is initially compelling and the common rejoinder that "surely everyone has something they wish kept secret" lacks the moral potency our sense of justice craves. It is well to remember that the practices discussed above are indiscriminate and can affect innocent people beyond the narrow scope of their target. The threat of constant surveillance and the lack of clear recourse to address these concerns has already manifested in tangible damages to attorneys in their obligations to defend their clients and to the exercising of political freedoms by those targeted by these unwarranted searches. The complete unregulated discretion of law enforcement to ascertain personal information has the potential to undermine judicial independence and integrity. Without privacy barriers as safeguards against employment and other forms of discrimination, unpopular political, religious or racial minorities may become further disenfranchised and vulnerable. As we have lowered the standards for surveillance and access to private information from "probable cause" to the less stringent "reasonable grounds"[74], we have lowered our expectations to privacy and lowered our ability to exercise our First Amendment rights.

Surveying the history of case law, it is clear that justice is not an absolute or pure concept, but a process full of change and dissent. What should guide the hand of justice is not as much a strict adherence to text or precedent but more a sense of right and wrong that we can corroborate through broad consensus. Influential 18th century Scottish philosopher David Hume advanced that our morals derived ultimately from sentiment and what must essentially inform justice is our moral sense. "The final sentence . . . which pronounces characters and actions praise-worthy or blameable; that which stamps on them the mark of approbation or censure: this final sentence depends on some internal sense or feeling, which nature has made universal in the whole species."[75] A reasonable expectation to privacy should be clear and universal, the test reproducible and immediately demonstrable: Who among us would not find an unmitigated, omniscient eye upon them at all hours to be an invasion of their privacy? Who does not feel a visceral, internal sense that repudiates such unconstrained use of power? If a near universal sentiment desiring a more comprehensive standard of privacy exists, then it is borne not out of malice or will to deny from others their rights, but out of a desire to recognize and extend the protection of the law to all subjects and conditions that arise. In the end, as Hume says, "Truth is Disputable; not taste"[76] and if the Fourth Amendment is interpreted and applied with common sense then our sense of justice will be satisfied.

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