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Secrecy, Intimacy, and Workable Rules: Justice Sotomayor Stakes Out the Middle Ground in *United States v. Jones*

Miriam H. Baer

In this Essay, Professor Miriam Baer focuses on Justice Sotomayor's concurrence in United States v. Jones, which has attracted widespread notice due to Justice Sotomayor's suggestion that the Court reconsider its reasonable expectation of privacy test and the related third-party doctrine. Professor Baer argues that Justice Sotomayor's opinion exemplifies an attempt to stake out a "middle ground" approach to Fourth Amendment debates over surveillance and technology, one which foregrounds intimacy and common-sense rules as guiding principles.

One can hardly consider criminal procedure without contemplating the Fourth Amendment's reasonable expectation of privacy test and its partner in crime, the third-party doctrine. These doctrines work in tandem to strip an individual of Fourth Amendment protection she might otherwise claim over the information she "knowingly exposes to the public."¹ Over the past half century, the two doctrines have enabled the government to develop and undertake a broad variety of investigative techniques with virtually no judicial oversight. Not surprisingly, both doctrines increasingly have come under attack as rapidly changing technology renders surveillance cheaper and more invasive.²

The Supreme Court recently reflected these surveillance-related concerns in its resolution of *United States v. Jones*.³ Prosecutors may ruefully recall *Jones* as the case that should never have been. A joint task force investigating narcotics activity placed a global positioning system device (GPS) on the undercarriage of a car and used it to track the car and its driver's movements for twenty-eight

1. Katz v. United States, 389 U.S. 347, 351 (1967).

2. See, e.g., Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008) (decrying Fourth Amendment jurisprudence's doctrinal obsession with declaring what is and is not an invasion of "privacy" deserving of Fourth Amendment protection); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1521 (2010) (declaring the reasonable expectation of privacy test "doomed" and deserving of abandonment).

3. 132 S. Ct. 945 (2012).

days.⁴ Ironically, the officers investigating the case already had probable cause to believe the car was being used for illegal activity; they had secured a warrant to place the GPS on the car and monitor its movements.⁵ But they violated the terms of the warrant by acting outside its geographic and temporal limits.⁶ Conceding that they had violated the warrant, the police invoked their fallback argument that no warrant was required in the first place. Nine Justices disagreed.

The majority opinion that disposed of Jones' case is narrow; writing for five members of the Court, Justice Scalia concludes that the attachment of the GPS constitutes a "search" because it physically intrudes upon the defendant's "effects," namely his car.⁷ The opinion thus revives the property-based definition of Fourth Amendment searches and effectively discards previous holdings that had severed the connection between a Fourth Amendment "search" and local property law.⁸ Despite this jurisprudential development, the majority's opinion bears far less potential significance for law enforcement agencies than the two concurrences in the case—one penned solely by Justice Sotomayor, and the other authored by Justice Alito and joined by Justices Ginsburg, Breyer, and Kagan.⁹

Justice Alito's opinion, which concurs only in the judgment, sounds far more like a dissent.¹⁰ Criticizing the majority for its originalist approach,¹¹ Justice Alito's opinion embraces the mosaic theory that emerged in Judge Ginsburg's appellate decision below: however proper warrantless monitoring of a single trip through public streets may be, that propriety disappears when the monitoring becomes a four week dragnet.¹² In other words, the *sum* of the

4. *Id.* at 948.

5. *Id.*

6. *Id.*

7. *Id.* at 949. The car was in fact owned in the defendant's wife's name, but this was not of import to the majority.

8. See *Oliver v. United States*, 466 U.S. 170, 183-84 (1984); *Katz v. United States*, 389 U.S. 347, 353 (1967).

9. *Jones*, 132 S. Ct. at 954-57 (Sotomayor, J., concurring); *id.* at 957-64 (Alito, J., concurring in the judgment).

10. See, e.g., *id.* at 958 (Alito, J., concurring in the judgment) (criticizing the majority opinion as "highly artificial" and "strain[ing] the language of the Fourth Amendment"). As one observer quipped, Alito "spent more ink criticizing the majority than analyzing the case." Stephen E. Henderson, *After United States v. Jones, After the Fourth Amendment Third Party Doctrine*, 14 N.C. J.L. & TECH. 431, 452 (2013).

11. *Jones*, 132 S. Ct. at 958 (Alito, J., concurring in the judgment) ("[I]t is almost impossible to think of late-18th-century situations that are analogous to what took place in this case.").

12. *Id.* at 964 ("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.").

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government's monitoring activity can become a Fourth Amendment search, even if its component *parts* do not.¹³

Justice Sotomayor's opinion, in which she concurs with the majority but simultaneously endorses some of Justice Alito's reasoning, reveals much about the Fourth Amendment's possible evolution. Despite its brevity and its sole authorship, Justice Sotomayor's concurrence has already been cited numerous times by scholars and lower courts.¹⁴ A *Harvard Law Review* comment analyzing the case strongly praises Justice Sotomayor's opinion as "offering ideas for reform and preserving a full doctrinal toolkit for posterity."¹⁵

While agreeing with Justice Scalia's majority opinion that the government had "usurped Jones' property for the purpose of conducting surveillance on him," Justice Sotomayor opines that future government actions could very well intrude upon privacy, "even in the absence of a trespass."¹⁶ She then goes on to consider how the Fourth Amendment's reasonable expectation of privacy test (articulated nearly fifty years ago in *Katz v. United States*¹⁷) can best take into account changes wrought by technology—and, in doing so, bluntly questions the continuing viability of a doctrine that leaves evidence held by third parties unprotected by the Fourth Amendment.¹⁸ Thus, in fewer than ten paragraphs, Justice Sotomayor questions and reframes two of the oldest and most criticized doctrines in modern Fourth Amendment jurisprudence.¹⁹

Commendably, Justice Sotomayor's opinion stops short of creating the drastic change in Fourth Amendment jurisprudence that some scholars seek.²⁰

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13. Justice Alito's analysis embraced the approach taken by Judge Ginsburg in the D.C. Circuit opinion below. See *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff'd sub nom.* *United States v. Jones*, 132 S. Ct. 945 (2012); see also Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 313 (2012) (labeling Justice Alito's concurrence an example of the mosaic approach).
 14. A search on February 7, 2014, for "sotomayor /p Jones /p concur!" through WestlawNext yielded over 212 citations in the "Journals and Law Reviews" (JLR) library and over 70 citations in the "Allcases" (federal and state courts) library.
 15. Case Comment, *Search and GPS Surveillance*, 126 HARV. L. REV. 226, 226 (2012).
 16. *Jones*, 132 S. Ct. at 954 (Sotomayor, J., concurring).
 17. 389 U.S. 347, 351 (1967).
 18. *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).
 19. See Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563-64 (2009) (summarizing critiques of the third-party doctrine); Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 9-16 (2012) (surveying weaknesses in current Fourth Amendment privacy doctrines).
 20. See, e.g., Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1336 (2012) (declaring that "the age of using privacy as a measuring stick for Fourth Amendment protection is likely soon to draw to a close"); Solove, *supra* note 2, at 1511-15 (2010) (arguing that the Court should replace the reasonable expectation of privacy test with

Her concurrence poses a series of difficult questions, but stops short of definitively resolving them. Nevertheless, if one looks closely enough, one can find within Justice Sotomayor's opinion a more plausible conception of Fourth Amendment privacy and a useful framework to implement it.

Crafted with an eye towards devising workable pragmatic rules, Justice Sotomayor's discussion of GPS monitoring's attributes offers a template for deciding future cases. On a superficial level, her opinion states simply why certain law enforcement activities invoke the average citizen's concern. On a much deeper level, her observations form the core of a framework that can be employed to distinguish future "searches" from non-searches. More useful to courts and law enforcement agents than Justice Alito's declaration that four weeks of real-time surveillance transgresses some imaginary boundary, Justice Sotomayor's opinion begins the hard work of accommodating society's need for effective law enforcement and its conflicting concern with preserving privacy in an increasingly sophisticated technological world.

The need for pragmatic, workable rules becomes particularly salient when one considers the category of misconduct known as white-collar crime. Harmful misconduct such as fraud relies on and is often proven by reference to information contained in documents, which in turn are often collected and maintained by third parties. Until now, prosecutors have been able to prove these types of cases by using a wealth of information obtained via grand jury and administrative subpoenas, not to mention statutes that impose a variety of recordkeeping obligations on corporate and commercial institutions.²¹ Accordingly, the adoption of mosaic theory²² might well unleash a set of unintended consequences—not only relating to the continued prosecution of garden-variety mail frauds, but also for the continuing viability of the modern administrative state, which relies almost entirely on the collection,

a "coverage" question and a "procedure" question that would make most enforcement activity fall under the Fourth Amendment's coverage).

21. For an extensive treatment of the government's power to obtain documents via grand jury subpoena, as well as statutes mandating the collection of said documents, see CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 139-67 (2007), which criticizes the relatively lax standards for securing information through grand jury subpoena. For an earlier treatment, see Christopher Slobogin, *Subpoenas and Privacy*, 54 *DEPAUL L. REV.* 805, 839-41 (2005).
22. Although its label implies a single "theory," the mosaic concept lumps two distinct enforcement problems into the same category. First, sometimes the government acquires too much information about a single citizen. This is the "depth problem" in Fourth Amendment analysis, and it was on display in *Jones*. Second, sometimes the government collects a relatively shallow amount of information about massive groups of people. This is the Fourth Amendment's "breadth problem," and it arises out of a number of mass surveillance practices. Although the two mosaics share certain characteristics, they arise out of different enforcement aims and often trigger different concerns.

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maintenance, and production of documents, often with little to no individualized suspicion of wrongdoing.²³

The Supreme Court has long sought to provide *ex ante* guidance to law enforcement agents and *ex post* guidance to trial courts. Whereas the more expansive notions of mosaic theory threaten interpretive anarchy,²⁴ Justice Sotomayor's sober and pragmatic analysis avoids such conceptual uncertainty and sets in place the beginnings of a framework that may prove valuable for both those who apply Fourth Amendment principles on the ground and those who do so from the bench. As a result, one should not be surprised if Justice Sotomayor's *Jones* concurrence eventually attains the same recognition as Justice Harlan's concurrence in *Katz* commanded almost five decades ago.

The remainder of this Essay unfolds as follows. Part I explores historical precedent by considering Justice Harlan's concurring opinion in *Katz*,²⁵ which lays the foundation for the reasonable expectation of privacy test, and Harlan's later dissent in *United States v. White*,²⁶ wherein he expressed disappointment with the way his test appeared to unfold. Part II then goes on to consider Justice Sotomayor's concurrence in *Jones*. I argue that it is significant because it conceptualizes privacy not as a form of secrecy, but rather as an expression of *intimacy*. Rhetorically asking a series of questions, the opinion then offers a set of guidelines that courts might utilize in distinguishing between intimate and non-intimate conduct.

Finally, Part III assesses this framework's usefulness by considering its application to white-collar crime. Any rollback of either the *Katz* test or its related third-party doctrine would seriously constrain the government's ability to investigate and prosecute document-intensive crimes such as fraud.²⁷ Some might conclude that this concern is misplaced or simply irrelevant.²⁸ Others, however, are likely to respond just as strongly that *stare decisis* matters, and

23. Professor William Stuntz warned of this clash nearly two decades ago. William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1034 (1995).

24. See, e.g., David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381, 402-11 (2013) (outlining doctrinal and conceptual objections to mosaic theory); Kerr, *supra* note 13, at 330-31 (analyzing several of the "ambiguities" created by mosaic theory).

25. *Katz v. United States*, 389 U.S. 347, 359-62 (1967) (Harlan, J., concurring).

26. 401 U.S. 745, 768-95 (1971) (Harlan, J., dissenting).

27. See, e.g., Kerr, *supra* note 19, at 564 (arguing that protection for "third party" sources would enable criminals to hide their criminal activity); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 859-60 (2001) (explaining that white-collar prosecutions would be stymied if document requests were served on third parties subject to either reasonable suspicion or probable cause requirements).

28. See, e.g., SLOBOGIN, *supra* note 21, at 164 (concluding that the "impossibility rationale" for keeping the third-party doctrine intact "is not based on reason but on tradition").

that the Court should be careful not to rewrite the Fourth Amendment in a way that severely constrains the modern administrative state. Justice Sotomayor's opinion is useful precisely because it offers an analytical compromise between these two arguments. To that end, one should not be surprised if Justice Sotomayor's middle ground approach eventually attracts the support of her fellow Justices.

I. PRIVACY AS SECRECY

One of the most enduring—and criticized—tests in Fourth Amendment jurisprudence arises out of another Supreme Court concurrence. The “reasonable expectation of privacy” test—the standard by which courts have long decided whether a Fourth Amendment “search” has occurred—was articulated not by Justice Stewart's majority opinion in *Katz v. United States*, but by the concurring opinion authored by Justice Harlan.²⁹ *Katz* held that the government's placement of a listening and recording device outside a telephone booth in order to intercept a suspected gambler's bets violated his Fourth Amendment rights.³⁰ Prior to *Katz*, the Court had decided wiretapping cases by inquiring into whether the conduct violated protected property interests (and, in particular, whether the government technology intruded upon a particular structure, such as an apartment or house).³¹ The majority rule did away with this analysis, concluding that technology-assisted eavesdropping violated the telephone-caller's rights, regardless of whether the detectaphone was placed inside or outside the telephone booth from which he placed his call.³²

While supporting the majority's contention that the Fourth Amendment “protects people, not places,”³³ Justice Harlan went a step further by offering his own two-part test for deciding just how much protection those “people” deserved. “My understanding of the rule that has emerged from prior decisions is 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.’”³⁴ Although offered only to clarify his “understanding” of previous cases, Justice Harlan's analysis quickly filled the void left by the Court's abandonment of its previous “physical

29. *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring).

30. *Id.* at 359 (majority opinion).

31. *Id.* at 352 (“It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry.” (citing *Olmstead v. United States*, 277 U.S. 438, 457, 464, 466 (1928), and *Goldman v. United States*, 316 U.S. 129, 134-36 (1942))).

32. *Id.*

33. *Id.* at 351.

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

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invasion” and “tangible property” tests.³⁵ The reasonable expectation of privacy test—at least on its face—offered lower courts and government investigators a memorable and ostensibly simple, two-pronged test that could be applied to numerous investigative techniques across multiple enforcement contexts. Moreover, even as the majority opinion denied it was doing so,³⁶ the test affirmed the Court’s embrace of “privacy” as a constitutional concept, whose existence extended as far back as the seminal law review article written by Samuel Warren and Louis Brandeis, in which they had conceptualized privacy as a legal right and defined it as a “right to be left alone.”³⁷

All tests have their limitations; Justice Harlan’s reasonable expectation of privacy test was no exception. Since its articulation, many observers (including authors of numerous Supreme Court dissents) have questioned the test’s descriptive accuracy,³⁸ its circularity and subjectivity,³⁹ and its disquieting normative implications.⁴⁰

Indeed, four years after issuing his concurring opinion in *Katz*, Justice Harlan himself expressed discomfort with his own test in *United States v. White*.⁴¹ *White* followed a series of cases in which the government had used either an undercover officer or a cooperating witness to secure information from an unsuspecting defendant, culminating with the use of a secretly worn

35. See Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1889 (2006) (observing that, along with *Warden v. Hayden*, 387 U.S. 294 (1967), the majority opinion in *Katz* opened a “doctrinal void” in privacy law). For examples of the Court’s earlier reliance on physical invasion and tangible property, see, for example, *On Lee v. United States*, 343 U.S. 747, 753 (1952); *Olmstead*, 277 U.S. at 466.

36. Justice Stewart’s majority opinion explicitly rejected the effort to engraft upon the Fourth Amendment “a general constitutional ‘right to privacy.’” *Katz*, 389 U.S. at 350.

37. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For discussions of Warren and Brandeis’s piece and how it influenced the Court, see Rubinfeld, *supra* note 2, at 115-18. For a broader analysis of how the piece influenced privacy law in general, see Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1099-1102 (2002).

38. See, e.g., Solove, *supra* note 2, at 1521-23 (contending that Court’s application of *Katz* test is without an empirical basis).

39. *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (“The *Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable.”). For an account of the test’s circularity and the Court’s ultimately unsuccessful attempt to avoid it, see Rubinfeld, *supra* note 2, at 106-09.

40. *California v. Greenwood*, 486 U.S. 35, 55 (1988) (Brennan, J., dissenting) (“In holding that the warrantless search of Greenwood’s trash was consistent with the Fourth Amendment, the Court paints a grim picture of our society.”).

41. 401 U.S. 745, 769 (1971) (Harlan, J., dissenting).

“wire” to transmit the conversation to the police as it occurred in real time.⁴² *White’s* plurality opinion effectively placed both tactics—the use of the undercover informant generally, and the wearing of a transmittal device—outside the Fourth Amendment’s ambit. Since the defendant had already assumed the risk his compatriot would report information to the police, he also accepted the risk that the same turncoat would conspire with the government to record and transmit their conversations in real time.⁴³ Society retained no expectation of privacy in information provided to third parties, be they friend, foe, or false friend. This proved too much for Harlan, who feared the Court was “saddling” society with pernicious expectations and risks.⁴⁴ Notwithstanding these and other criticisms, the “assumption of risk” concept flourished over the next several decades, paving the way for a variety of procedures that most laymen would be surprised to learn are not “searches.”⁴⁵

For most privacy and Fourth Amendment scholars, the *Katz* test has failed miserably in protecting the public’s privacy.⁴⁶ Critics ascribe this failure to its emphasis on secrecy.⁴⁷ To the extent that individuals fail to conduct their affairs in secret, they cede any objection to the government’s efforts to see, watch, or hear them.⁴⁸ In a world that is increasingly networked and dependent on one’s partial disclosure of information to numerous commercial third parties, the protection once afforded by *Katz* appears quaint.⁴⁹ As Professor

42. See *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952).

43. *White*, 401 U.S. at 751-52.

44. *Id.* at 786 (Harlan, J., dissenting).

45. See, e.g., *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that a trained dog sniffing the exterior of a car does not constitute a search); *Greenwood*, 486 U.S. at 55-56 (holding that an analysis of a resident’s trash does not constitute a search); *United States v. Miller*, 425 U.S. 435 (1976) (holding that obtaining bank records does not constitute a search).

46. See sources cited *supra* note 2.

47. Solove, *supra* note 37, at 1107 (“Privacy is thus viewed as coextensive with the total secrecy of information. . . . [M]atters that are no longer completely secret can no longer be private.”); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1086 (2002) (“The Court’s current conception of privacy is as a form of total secrecy.”); Stuntz, *supra* note 23, at 1021-22 (arguing that a secrecy norm best explains Fourth Amendment doctrine and that “privacy-as-secrecy dominates the case law”).

48. See, e.g., *Miller*, 425 U.S. at 443 (citing *White*, 401 U.S. at 751-52). For the few, somewhat inconsistent exceptions to this rule, see Henderson, *supra* note 10, at 438-42, which analyzes five cases in which the Court chose not to apply the third-party doctrine even though “total secrecy” arguably was lacking.

49. For a relatively early recognition of this point, see Scott E. Sundby, “Everyman’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?”, 94 COLUM. L. REV. 1751, 1758-60 (1994), which describes the challenges of respecting privacy in the modern world.

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Daniel Solove observes, life on the grid makes secrecy, and therefore privacy, all but impossible to secure.⁵⁰

II. PRIVACY AS INTIMACY

As discussed in Part I, Justice Harlan's reasonable expectation of privacy test in *Katz* eventually morphed into a dissatisfying secrecy test. As Professor Orin Kerr has argued in defense of the third-party doctrine, however, it is one thing to critique a test and quite another to articulate a viable alternative.⁵¹ Despite criticism, the Court has more or less adhered to *Katz*'s formulation, even as newer and more powerful instruments enable cheaper and more intrusive surveillance by the police and government agencies.

Jones thus provided the Court with the opportunity to rewrite *Katz*. As noted earlier, Judge Ginsburg's opinion for the D.C. Circuit (rendered under a different caption, *United States v. Maynard*⁵²) invoked the "mosaic theory"—according to which the investigative sum is greater than its constituent parts—that has now become the subject of much discussion among Fourth Amendment scholars.⁵³ Tracking a person's single journey from point A to point B may not be a search, Judge Ginsburg explained, but the same could not be said for the extended, multi-day surveillance of a person's daily activities.⁵⁴

For *Katz*'s strongest critics, mosaic theory evokes the possibility of erasing decades of jurisprudence and vastly transforming the Fourth Amendment's reach.⁵⁵ The theory has a number of drawbacks, however, as *Jones* itself illustrates.⁵⁶ It does not easily guide future courts or enforcement agents in determining *when* GPS-assisted surveillance has triggered the Fourth Amendment's various procedural requirements. Rather, it leaves the government guessing whether it has gone too far.

Justice Sotomayor's concurrence improves upon the mosaic theory in two respects. First, she anchors her opinion in an alternate conception of privacy,

50. As Solove notes, "life in modern society demands that we enter into numerous relationships with professionals . . . , businesses . . . , merchants . . . , publishing companies . . . , organizations . . . , financial institutions . . . , landlords, employers, and other entities." Solove, *supra* note 47, at 1089.

51. Kerr, *supra* note 19, at 583 ("[I]f it takes a theory to beat a theory, then surely it takes a doctrine to beat a doctrine. And it turns out to be quite difficult to devise a replacement for the third-party doctrine . . .").

52. 615 F.3d 544 (D.C. Cir. 2010).

53. See David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62 (2013); Kerr, *supra* note 13; Slobogin, *supra* note 19.

54. *Maynard*, 615 F.3d at 565.

55. See, e.g., Slobogin, *supra* note 19.

56. For a careful and exhaustive critique, see Kerr, *supra* note 13, at 328-36.

conceptualizing it in terms of intimacy rather than secrecy. Second, she lays the groundwork for a multi-pronged test that lower courts might use in deciding what government activity is or is not a Fourth Amendment search.

Throughout her concurrence, Justice Sotomayor poses a series of questions that a hypothetical trial court judge might ask when reviewing a particular type of enforcement activity. In doing so, she queries “whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.”⁵⁷ Thus, the problem with GPS monitoring is that it discloses highly *intimate* information. Later, Justice Sotomayor muses that it may be time for “our Fourth Amendment jurisprudence [to] cease[] to treat secrecy as a prerequisite for privacy.”⁵⁸ She then follows up by stating, “I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.”⁵⁹

Justice Sotomayor’s discussion shifts the definition of Fourth Amendment “privacy” away from secrecy and instead toward intimacy. The definition of this abstract idea lies far beyond the scope of this Essay.⁶⁰ As used by Justice Sotomayor, however, the term “intimacy” appears to refer both to intimate relationships and to some notion of bodily integrity.⁶¹ This conception, though it has been criticized by scholars as either too narrow or overly abstract,⁶²

57. *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

58. *Id.* at 957.

59. *Id.*

60. For philosophical treatments of intimacy and its interaction with privacy, see, for example, JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 86-87 (1992) (arguing that intimacy derives value from an agent’s “love, care, or liking”); Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 490 (1968) (arguing that electronic monitoring, “in depriving one of privacy, destroys the possibility of bestowing the gift of intimacy, and makes impossible the essential dimension of love and friendship”).

61. For extended analyses of constitutional privacy and intimacy, see Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 *IND. L. REV.* 311 (2013). Reamer “plots” intimacy across two dimensions, one “spatial” and the other “bodily.” *Id.* at 316-21. Professor Solove cites and discusses a number of philosophers who have equated privacy with a protection of intimate relationships, see Solove, *supra* note 37, at 1121-24, as well as accounts of privacy as control over personhood, *id.* at 1116-19, and control over one’s personal information, *id.* 1109-15. As used by Justice Sotomayor, the “substantial quantum of intimate information” phrase likely touches on all of these concepts. See, e.g., *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) (GPS monitoring conveys a “wealth of detail” regarding a person’s “familial, political, professional, religious and sexual associations”); *id.* at 957 (raising concern that online purchases reveal information such as the medications one takes).

62. Solove, *supra* note 37, at 1124 (concluding that “privacy as intimacy” is either too broad or too narrow depending on how the abstract concept is defined). Solove prefers to conceptualize privacy not as a single abstract idea, but rather as a constellation of overlapping and related concepts. *Id.* at 1126-27 (advocating a “pragmatic approach”).

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represents a normative and descriptive improvement over *Katz*'s privacy-as-secrecy conception. First, it offers more stable protection in a dynamic world. As technology changes, our shared understanding of what is and is not intimate is more stable than our understanding of what is and is not "secret."

Second, "privacy as intimacy" better explains some of the Court's prior Fourth Amendment jurisprudence, such as the protection that is afforded to the curtilage of a home but not to the open field.⁶³ An emphasis on protecting intimacy provides a solid justification for the home's status as "first among equals" in Fourth Amendment analysis.⁶⁴ The *home* is the singular location in which we are most likely to engage in intimate activities.⁶⁵ A rule that protects the *home* prophylactically protects intimacy.⁶⁶

Outside the home, the protected veil of intimacy is more difficult to locate.⁶⁷ It is wrong to say we cast off that veil whenever we act outside the home, but it is equally wrong to say that we retain it in the same manner. Dichotomous, categorical approaches (public versus private, workplace versus "personal," metadata versus content) tend not to work very well.⁶⁸ We thus find ourselves in need of an analytical tool to distinguish *protected* intimacy from *unprotected* intimacy.

Justice Sotomayor's opinion contains the beginnings of such a framework. In explaining the problems with GPS monitoring, she observes that it generates a "*precise, comprehensive* record" of the person's public movements, which in turn convey intimate information such as her "familial, political, professional, religious, and sexual associations."⁶⁹ Embedded in these observations are the components for a test that separates "intrusions on intimacy"—and therefore "searches"—from ordinary public observations—and therefore non-searches. Thus, going forward, a trial court might analyze an enforcement activity's Fourth Amendment status by considering:

63. See *Oliver v. United States*, 466 U.S. 170, 180 (1984).

64. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

65. *Kyllo v. United States*, 533 U.S. 27, 37 (2001) ("In the home, . . . *all* details are intimate details, because the entire area is held safe from prying government eyes.").

66. Of course, it also protects non-intimate activities, but that is an inherent characteristic of any prophylactic rule.

67. Inness refers to it as a "conventionally defined zone in which others cannot do such things as freely gain access to the agent's body, thoughts, personal information, letters, and so forth." INNESS, *supra* note 60, at 109.

68. See Nita Farahany, *Searching Secrets*, 160 U. PA. L. REV. 1239, 1249-53 (2012) (criticizing "content" versus "no content" approach); Dana Raigrodski, *Property, Privacy and Power: Rethinking the Fourth Amendment in the Wake of U.S. v. Jones*, 22 B.U. PUB. INT. L.J. 67, 78-91 (2013) (rejecting "public-private dichotomy" between the home and workplace).

69. *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring) (emphasis added).

1. how *comprehensively* it generates information regarding an individual who is the target of such investigative activity; and
2. the *degree of precision* with which it has generated that information regarding a single target or group of targets.

The analysis does not end here. The issue is not simply that the government's investigative activity generates a "substantial quantum of intimate information"⁷⁰ about an individual, but that it does so in a way that is wholly unregulated by a "coordinate branch."⁷¹ Justice Sotomayor's reference to a "coordinate branch" is curious, as it suggests she is amenable to sources of oversight other than the "neutral and detached magistrate," who has long served as the unchallenged hero of the Fourth Amendment canon.⁷² This more forgiving language hints at a pragmatic willingness to widen the Fourth Amendment's regulatory tent.

Finally, as Justice Sotomayor points out, in addition to the lack of oversight, the secrecy of the government's conduct matters as well.⁷³ Secret, panoramic surveillance undermines democratic ideals by chilling speech and association.⁷⁴ Accordingly, a lower court judging a particular type of activity might also consider:

3. the extent to which the activity in question proceeds *surreptitiously* and is *regulated by a coordinate branch* and therefore more or less prone to abuse.

Concededly, a framework such as the one above is sure to generate questions and criticisms. Reasonable people will disagree on terms like "comprehensiveness" and "precision," and courts still will need to locate the

70. *Id.* at 956.

71. *Id.*

72. As Justice Jackson famously observed, the Fourth Amendment's protection resides in the requirement that inferences of criminality "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

73. The ABA Standards include a provision requiring the government to publicize its frequency and use of surveillance techniques. *ABA Standards for Criminal Justice: Law Enforcement Access to Third Party Records*, ABA (2013), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/third_party_access.authcheckdam.pdf. See also SLOBOGIN, *supra* note 21, at 135. The ABA's standards have been the source of much debate. See Andrew E. Taslitz, *Cybersurveillance Without Restraint? The Meaning and Social Value of the Probable Cause and Reasonable Suspicion Standards in Governmental Access to Third-Party Electronic Records*, 103 J. CRIM. L. & CRIMINOLOGY 839 (2013).

74. *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring).

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proper “unit” of enforcement activity subject to this test. Do we look at the single subpoena, a day’s worth of surveillance, or the “whole” of the government’s investigation up to a given point in time? However vexatious these questions may seem in the abstract, there is no reason to believe that courts cannot answer them, or that the answers the Supreme Court and lower courts generate will leave us in a worse position than the one we appear to have reached under *Katz*.

III. AN EXAMPLE: THE WHITE-COLLAR PROBLEM IN FOURTH AMENDMENT ANALYSIS

If the opinions issued in *Jones* should have struck fear in the heart of anyone, it was that of the white-collar criminal prosecutor. Imagine the standard fraud: a Ponzi schemer sells stakes in a fraudulent real estate scheme, and over the years, he sends his dupes quarterly statements purporting to tell them how well their investment is faring. During that time, he pockets their money, spends a fair amount of it on fancy clothing and restaurants, and feeds his growing gambling problem.

How does a prosecutor build a case against this schemer? How too does she determine if the schemer is acting on his own or working in concert with others? Presumably, at a bare minimum, she serves a grand jury subpoena on the schemer’s local bank, his credit card issuers, and the local telephone company. Oft-criticized cases decided decades ago, such as *Smith*,⁷⁵ *Miller*,⁷⁶ and *Schultz*,⁷⁷ place this information easily within her grasp, regardless of whether she has “probable cause” or even “reasonable suspicion” that the defendant has committed any crime.⁷⁸

How, then, might a privacy-as-intimacy framework treat the average white-collar case? Would a prosecutor suddenly find herself unable to assemble the evidence necessary to secure an arrest warrant? Viewed from the opposite perspective, would application of this new test *still* leave individuals prone to the very types of intrusions Justice Sotomayor viewed as potentially abusive in *Jones*?

Recall the framework: a district court applying a privacy-as-intimacy test might first consider the *comprehensiveness* of the government activity in

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

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

77. *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21 (1974).

78. Stuntz, *supra* note 27, at 860 (“[I]f the government is to regulate business and political affairs—the usual stuff of white-collar criminal law—it must have the power to subpoena witnesses and documents before it knows whether those witnesses and documents will yield incriminating evidence. This point holds true for a large slice of the activities the government regulates.”).

question; she might then go on to consider its *precision*, including the extent to which it threatens to dredge up intimate details of the target's life; finally, she should also consider whether the activity has been performed *surreptitiously*, as well as its corresponding *lack of oversight* by coordinate branches and consequent *risk for abuse*. Does a standard grand jury subpoena served on JPMorgan Chase for several months' worth of historical bank records—or even a series of subpoenas, if we define the unit of enforcement activity expansively—transgress society's reasonable expectation of privacy-as-intimacy?

Admittedly, the answer likely depends on one's baseline. Compared to extended twenty-four-hour GPS monitoring, the grand jury subpoena for historical information seems rather tame. Subpoenas seeking several months' worth of banking or credit card records provide far less comprehensive information than around-the-clock surveillance. We may become aware of disparate acts that one may deem "intimate," but we are not as likely to penetrate a person's "zone" of intimacy as we would be if we watched that person intently for twenty-four hours a day, weeks at a time.

Grand jury subpoenas also may provide "precise" information in some instances, but surely not in all. As for likelihood of abuse, the grand jury subpoena—although not particularly difficult to obtain or serve—offers marginally more oversight than the purely discretionary and surreptitious investigatory program.⁷⁹ Accordingly, under a privacy-as-intimacy test, the grand jury subpoena seeking historical records arguably falls on the "non-search" side of a revised Fourth Amendment privacy test. It may well disclose the name of the target's doctor (if, for example, she paid her doctor by check), or the restaurant where she ate dinner with her family (if she paid with her bank's debit card). Still, the information collected is not so comprehensive and precise that we would conclude that a government agent has penetrated the target's veil of intimacy outside the home.

Privacy scholars likely would disagree with the foregoing analysis,⁸⁰ and perceive it cynically as the replacement of an old ineffective test with an equally bad one. Moreover, they might argue that this multi-pronged analysis invokes exactly that level of uncertainty Justice Scalia sought to avoid when he declined to parse the information obtained from a thermal imager in *Kyllo v. United States*.⁸¹ The locus of the search in *Kyllo*, however, permitted Justice Scalia this

79. Nevertheless, the legal standard for serving and enforcing a subpoena is admittedly quite generous. See, e.g., SLOBOGIN, *supra* note 21, at 180 (summarizing requirements for, and types of, subpoenas).

80. Professor Henderson, for example, pronounces the widespread use of subpoenas "Orwellian." See Henderson, *supra* note 10, at 456.

81. See Danielle Keats Citron & David Gray, *Addressing the Harm of Total Surveillance: A Reply to Professor Neil Richards*, 126 HARV. L. REV. F. 262, 268 (2013) (noting that Justice Scalia

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luxury, as the thermal imager was aimed at a *home*. Outside the home, however, bright-line rules are far more likely to yield either to standards or multi-pronged tests. Moreover, even those most skeptical of government power should welcome the emergence of a privacy-as-intimacy test. It would do away with the privacy-as-secrecy rubric and, with the guideposts suggested by Justice Sotomayor's concurrence in *Jones*, it would focus the judiciary's energies on those law enforcement activities that trigger the most alarm: dragnets that surreptitiously detect massive amounts of information with little to no oversight; extended surveillance of individuals as they go about their daily activities; and under-supervised use of cooperating informants and undercover agents, whose prolonged interaction with targets and their families all but assure the disclosure of intimate information. These are the very activities that are least regulated, most likely to convey comprehensive intimate information about our daily lives, and most susceptible of abuse.

At the same time, this middle-ground test would best ensure the prosecution's access to those potent but more limited law enforcement devices that Professor William Stuntz long ago declared necessary in order to commence investigation of difficult-to-prove frauds.⁸² Although the Fourth Amendment presumptively requires a warrant and probable cause for "searches," it does not go so far as to regulate all aspects of a criminal investigation.

Technology follows no ideology; it can cause as much harm in the criminal's hands as it can in the hands of the police. It would be the ultimate irony if, in attempting to protect itself from "big government," the Court left society more vulnerable to the corporate criminal. If Fourth Amendment law is, as Professor Kerr has argued, a form of "equilibrium-adjustment," it would be a shame for the Court to adjust its jurisprudence in a direction that leaves the populace prone to more, and not less, harm.⁸³

"thought the Court had neither the qualifications nor the authority to determine what is and is not 'intimate,'" citing *Kyllo v. United States*, 533 U.S. 27, 38-39 (2001), which reasoned that a rule premised on whether technology reveals "intimate details" would be "impractical in application" as it would offer police little ability to predict in advance whether a given law enforcement technique constituted a Fourth Amendment search).

82. Stuntz, *supra* note 27, at 859-60.

83. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011).

CONCLUSION

In recent times, the Supreme Court has been criticized for its “proliferation of separate opinions,”⁸⁴ as they allegedly confuse the populace and weaken the rule of law.⁸⁵ But Justice Sotomayor’s concurrence in *Jones* demonstrates their potential long-term value.⁸⁶ She embraces the majority’s view that physical intrusions on property implicate the Fourth Amendment, but then uses her concurrence to express the emerging consensus that the reasonable expectation of privacy and third-party doctrines have outlived their usefulness. Drawing on the common-sense outlook that resonates with both legal and lay audiences, she has laid a foundation upon which later courts may develop a more fulsome conception of privacy and a workable framework for protecting it.

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84. James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 518 (2011) (quoting Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 148 (1990)).

85. See, e.g., *id.*

86. *Id.* at 538 (observing that “a strategic Justice knows that a separate opinion concurring in the judgment has the potential to provide a binding legal rule”).