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The More Things Change: An Analysis of Recent Fourth Amendment Jurisprudence

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Abstract

Perhaps no Constitutional amendment gets tried and tested more than the Fourth Amendment. Each year, thousands of criminal defendants bring legal challenges to the proceedings against them rooted in claimed Fourth Amendment violations. Changing technology and its use fuels a large part of this as new technology intersects with individual privacy in new ways. An oft heard argument in Fourth Amendment jurisprudence is that the Fourth Amendment must change in order to keep up with the progress of time and societal change. Through an analysis of recent case law examining Fourth Amendment protections and technology, this article concludes that the United States Supreme Court has not changed its basic Fourth Amendment analytical model.

Introduction

The rapid advancement of technology, particularly in the past 100 years, has affected every aspect of our lives. The use of such technology in both the commission of crime, and in crime fighting, has been no exception. Modern criminal enterprises are increasingly using computer networks and electronic devices to advance their nefarious activities. From identity theft to mobile communication among criminal networks, the criminal world is advancing through technology. Consequently, modern police agencies are now commonly equipped with the latest technological advancements in criminal detection and apprehension. From surveillance to weaponry, the police arsenal is also advancing.

With every added device or technique, regardless of the user, much is written about the use of the given technology and its impact on the criminal law. The discussion becomes more focused when the question is how the given technology intersects with individual rights protected by the Fourth Amendment. Courts have increasingly been asked to interpret how the Fourth Amendment should apply when law enforcement searches or seizes in ways not previously contemplated. Often this has occurred when police deploy new technologies. At other times it has arisen from simply communicating in new ways – from telephones, to pagers, to cellphones, to “smart” phones. Regardless of how the technology and the criminal law intersect, each such intersection results in learned voices lamenting that the Fourth Amendment has outlived its purpose and usefulness and calling for new protections of our venerated liberties. One example is from the esteemed Professor of Constitutional Law, Erwin Chemerinsky. He has argued in the *American Bar Association Journal* on more than one occasion that courts need to do a better job of protecting liberties in light of technological advances.¹ Last year, urging the Court to adopt new categorical protections for what he called “informational privacy,” Chemerinsky wrote, “Emerging technology gives the police unprecedented ability to gather information about all of us. It is essential that the court do much better in this century in providing Fourth Amendment protection for our privacy.”² Others have suggested alternative or

¹ Chemerinsky, E. (2013). Does the Fourth Amendment Still Fit the 21st Century? *ABA Journal*, http://www.abajournal.com/news/article/chemerinsky_does_the_fourth_amendment_still_fit_the_21st_century/.

Chemerinsky, E. (2014). Is it Time to Go High-tech on the Fourth Amendment?, *ABA Journal*, http://www.abajournal.com/news/article/chemerinsky_is_it_time_to_go_high_tech_on_the_fourth_amendment/.

² Id.

“new” approaches to Fourth Amendment jurisprudence in an effort to address emerging technologies.

Yet, despite the advancement of technology and its application to crime fighting in all of its various manifestations, the text of the Fourth Amendment has not changed. And the courts that have interpreted it, including most importantly, the Supreme Court of the United States, have not drastically changed the basic analytical approach when applying the Amendment’s protections. A review of two forms of technology – and recent cases that analyze their impact on the Fourth Amendment – will demonstrate that wholesale change has not occurred and that liberties are still being protected by the Fourth Amendment. And this protection is occurring long after, and in ways never contemplated, by the men who drafted the Amendment’s language.

GPS and *United States v. Jones*

The use of satellites to navigate the earth, through the Global Positioning System, or GPS, started in the mid-1970s.³ The Federal Aviation Administration (FAA) describes GPS as “a space-based radio-navigation system consisting of a constellation of satellites and a network of ground stations used for monitoring and control.”⁴ Currently, according to the FAA, “32 GPS satellites orbit the Earth at an altitude of approximately 11,000 miles providing users with

³http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/techops/navservices/history/. For a comprehensive explanation of the technology behind GPS, see http://geology.isu.edu/geostac/Field_Exercise/GPS/GPS_basics_u_blox_en.pdf

⁴http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/techops/navservices/gnss/gps/

accurate information on position, velocity, and time anywhere in the world and in all weather conditions.”⁵ This network and its capabilities allow humans to pinpoint our location in real time all around the globe. Such technology is great for the average traveler; however, it is also very advantageous to law enforcement in the tracking of criminal suspects. Of course, law enforcement must square its actions with the Fourth Amendment, and recently the Supreme Court of the United States had occasion to consider the intersection of the Fourth Amendment and GPS technology.

In early 2012, the Court decided a case from the District of Columbia circuit entitled *United States v. Jones*.⁶ The defendant in the case, Antoine Jones, had been the target of a drug trafficking investigation conducted jointly by the Federal Bureau of Investigation (FBI) and the District of Columbia Metropolitan Police Department.⁷ In an effort to track Jones’s whereabouts and establish a pattern of trafficking, officers applied to the United States District Court for the District of Columbia for a search warrant. The warrant request sought permission to place a tracking device on a vehicle owned by Jones’s wife, so that the vehicle’s location could be tracked via Global Positioning (Satellite) Systems (GPS).⁸ Although the warrant issued, officers installed the device outside of the permitted time frame and outside of the District of Columbia. (The device was installed while the vehicle was parked in Maryland.)⁹ Over the following four

⁵ Id.

⁶ *United States v. Jones*, 132 S. Ct. 945, 565 U.S. ____ (2012).

⁷ Id., 132 S. Ct. at 948.

⁸ Id.

⁹ Id.

weeks, officers tracked the vehicle's movements, collecting more than two thousand pages of data from multiple satellites. The data purported to connect Jones to a drug trafficking conspiracy, including the location of the conspirators' "stash house" where law enforcement seized large amounts of cocaine and cash. Ultimately, Jones was convicted and sentenced to life in prison.¹⁰

When the case reached the Supreme Court, the sole question the Court considered was whether the government's attachment of the GPS device to a vehicle, and its subsequent monitoring of the vehicle's movements using that device, constituted a search within the meaning of the Fourth Amendment.¹¹ The Court unanimously answered that precise question in the affirmative.¹² The Court was rather fractured, however, on the rationale leading to that conclusion, resulting in two concurring opinions. Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, disagreed with the rationale provided by Justice Scalia's majority opinion. Justice Sotomayor wrote separately, seemingly agreeing with the rationale of both camps.

Justice Scalia's opinion for the Court based its rationale on the common law doctrine of trespass. He reasoned that the police efforts in Jones's case constituted a search because the government "physically occupied private property for the purpose of obtaining information."¹³ In classic "originalist" fashion, he notes that the Court's approach would have undoubtedly been the common understanding at the time of the Amendment's adoption, even citing the historic

¹⁰ Id.

¹¹ Id.

¹² Id. at 949.

¹³ Id.

English case of *Entick v. Carrington*.¹⁴ Scalia further notes that Fourth Amendment jurisprudence was aligned with the law of trespass until the late 20th century, when the Court began to adopt a “privacy” based approach through *Katz v. United States* and the cases that followed it.¹⁵ Those cases, as Scalia notes, built upon a concurrence in *Katz* to set the standard for Fourth Amendment analysis thus: Has a person’s reasonable expectation of privacy been violated? *Katz* is oft-cited for the proposition that the Fourth Amendment protects people, not places (a phrase derived directly from the text of *Katz*). Scalia clearly challenges the exclusivity of that proposition and asserts that a place-based approach to the Fourth Amendment has always been understood and still has effect.¹⁶ This is where Alito and others part company with the Scalia opinion.

Justice Alito, in his concurrence, asserts that the Scalia analysis is unwise and has “little if any support in *current* Fourth Amendment case law.... (Emphasis added)”¹⁷ Alito, thus, asserts that the Court should analyze the case along the more modern formulary created by *Katz* and the cases that followed and ask whether the defendant’s reasonable expectations of privacy were violated. In essence, Alito is disagreeing with Scalia that the trespass doctrine is still viable

¹⁴ *Id.* *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), is often noted among scholars as influential in Fourth Amendment history.

¹⁵ *Id.* at 950, citing *Katz v. United States*, 389 U.S. 347 (1967).

¹⁶ *Id.*

¹⁷ *Id.* at 958.

for Fourth Amendment purposes, asserting that *Katz* “did away with the old approach, holding that a trespass was not required....”¹⁸

Justice Sotomayor, in her solo concurrence, lands squarely on both sides. She asserts that the placement of the GPS on Jones’s vehicle was a search because of the physical trespass, yet she agrees that the reasonable expectation of privacy analysis also applies.¹⁹ She maintains this cautious approach because she agrees with Alito’s assertion that much government surveillance can now be done without physical intrusion, so the *Katz* formulary must remain intact.²⁰ Indeed, the odd posture of the several opinions in this case have led one commentator to conclude that there is, in essence, two majority opinions because Justice Sotomayor expressly agrees with Scalia’s trespass approach, but also lends a fifth vote to Alito’s advocacy for the privacy approach.²¹

Other commentators have weighed in on the oddity of the Court’s posture. John Whitehead, writing for the Rutherford Institute, argues that the ruling does not go far enough to protect various forms of surveillance such as drones, “smart dust” devices, and a host of other techno-gadgetry.²² And Professor Sherry Colb, of Cornell Law School, expresses in an analysis

¹⁸ *Id.* at 959.

¹⁹ *Id.* at 955.

²⁰ *Id.*

²¹ See Tom Goldstein, *Reactions to Jones v. United States: The government fared much better than everyone realizes*, SCOTUSBLOG (Jan. 23, 2012), <http://www.scotusblog.com/2012/01/reactions-to-jones-v-united-states-the-government-fared-much-better-than-everyone-realizes/>

²² https://www.rutherford.org/publications_resources/john_whiteheads_commentary/us_v_jones_the_battle_for_the_fourth_amendment_continues

for Justia.com's *Verdict* publication that Justice Alito's analysis is compelling, yet she expresses confidence in the Scalia approach as a minimal one.²³ As with each Supreme Court opinion, numerous voices will opine on what the new state of the law is. As we consider the state of the Fourth Amendment and the various doctrines it has produced, let us do so from the perspective of one other form of ubiquitous technology – the cellular phone.

Mobile phones and *Riley v. California*

With the pervasive nature of mobile phones, more and more criminals and police officers are utilizing the devices as they go about their trades. Coupled with the rapidly evolving state of cell phone technology, courts began to split on just how to analyze the cases before them. Specifically, the recurring question became when, if ever, is it permissible for police to conduct a warrantless search of a suspect's cell phone? In the latter part of the last decade, several federal courts analyzed the issue. In *United States v. Finley*, the Fifth Circuit held that a warrantless search of an arrestee's cell phone was lawful incident to his arrest.²⁴ The Fourth Circuit held similarly in *United States v. Murphy*.²⁵ However, two state supreme courts considered the question and arrived at opposite conclusions. In *State v. Smith*, the Supreme Court of Ohio held

²³ Colb's analysis appeared in two parts: Part 1 - <http://verdict.justia.com/2012/02/08/the-supreme-court-decides-the-gps-case-united-states-v-jones-and-the-fourth-amendment-evolves>; and Part 2 - <http://verdict.justia.com/2012/02/15/the-supreme-court-decides-the-gps-case-united-states-v-jones-and-the-fourth-amendment-evolves-2>

²⁴ *United States v. Finley* (5th Cir. 2007) 477 F.3d 250.

²⁵ *United States v. Murphy* (4th Cir. 2009) 552 F.3d 405; see also, *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996).

that such warrantless searches violate the Fourth Amendment.²⁶ Thirteen months later, in *People v. Diaz*, the Supreme Court of California held in accordance with the previous federal court holdings.²⁷ Throughout this time period, there were multiple suggestions in various legal publications urging alternative solutions to the question and urging the Supreme Court of the United States to settle the issue.²⁸ Ultimately, the Supreme Court did settle the question squarely in 2014 when it decided *Riley v. California*.²⁹ A review of the *Riley* decision indicates that although technology changes the Fourth Amendment has not and that the Court does not appear poised to change the basic analytical approach to search and seizure jurisprudence.

The *Riley* case actually consisted of two, consolidated appeals, *Riley v. California* from the state courts of California, and *United States v. Wurie*, a federal court appeal from the First Circuit. In *Riley*, the defendant was arrested for driving on a suspended license, and an officer seized a cell phone from Riley's pants pocket during a search incident to the arrest.³⁰ Following transport to the police station, a police detective examined the contents of Riley's phone because law enforcement suspected Riley was involved in gang activity. The detective found

²⁶ *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426; *Cert. denied*, *Smith v. State* (2010), 131 S.Ct. 102, 178 L.E.2d 242.

²⁷ *People v. Diaz*, 51 Cal. 4th 84, 244 P.3d 501, 119 Cal. Rptr. 3d 105 (Cal. January 3, 2011).

²⁸ See Gershowitz, *The iPhone Meets the Fourth Amendment* (2008), 56 *UCLA L. Rev.* 27; Stillwagon, *Note, Bringing an End to Warrantless Cell Phone Searches* (2008), 42 *Ga. L. Rev.* 1165; and Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence* (2010), 50 *Santa Clara L. Rev.* 183.

²⁹ *Riley v. California*, 134 S.Ct. 2473 (2014).

³⁰ *Riley*, *supra*, at 2480.

photographs and videos linking Riley to both gang activity and a prior criminal offense.³¹ He was charged in connection with that offense, along with an added gang specification that increased the potential penalty for the crime.³²

In the *Wurie* case, the defendant was arrested for a drug trafficking offense and officers seized two cell phones from his possession.³³ One of the phones was getting repeated calls from a number identified as “my house” on the phone’s call log, which the officers used to trace and locate the home so identified.³⁴ Officers secured a warrant to search the home and found evidence therein of drugs, drug trafficking, weapons, and cash.³⁵ Based on this evidence, *Wurie* was charged with multiple drug trafficking related offenses.³⁶ In both of the underlying appeals, the lower courts held that the warrantless searches of the defendants’ cell phones did not violate the Fourth Amendment. The Court in *Riley* disagreed.

Unlike the issue in *Jones*, there was no doubt in both *Riley* cases that the access of the phones’ data by law enforcement amounted to a search of the phones. The core issue in *Riley*, instead, was whether or not the searches of the cell phones amounted to a search “incident to arrest” as the Court had long held was an exception to the warrant requirement. The Court’s previously pronounced rule on the search incident to arrest doctrine was most famously

³¹ *Id.* at 2481.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 2482.

discussed decades prior in *Chimel v. California*.³⁷ The search incident to arrest doctrine is fairly straight-forward: Once an officer lawfully arrests a suspect it is reasonable (and thus does not violate the Fourth Amendment) for the officer to search and seize the person and the immediately surrounding area of the suspect for any weapons or contraband, so as to protect the officer and prevent the destruction of evidence. This seemingly simple rule was, of course, stretched and tested by later cases whose facts did not fit neatly into that analysis. The first case to do so was *United States v. Robinson*, in which the arresting officer seized – and proceeded to further search – a cigarette package found on a suspect.³⁸ The Court in *Robinson* found that search to be reasonable. The Court later refused to extend the principle to other personal property of a suspect - namely, a locked footlocker which was in the trunk of a vehicle - in *United States v. Chadwick*.³⁹ The question, as it pertains to cell phones, then, could be framed thus: Is a cell phone like a cigarette package or other “container” on a suspect’s person, or is it more akin to a locked footlocker? However, the issue need not be analyzed strictly in that fashion. The underlying question is not what “category” of property the cell phone fits into; rather, what privacy interest does it possess? The essence of the inquiry is the privacy interest involved in the various items to be searched and seized balanced against the governmental interests at stake. This is precisely how the *Riley* court analyzed the issue.

At the outset of the Court’s analysis in *Riley*, this balancing analysis is clearly displayed:

³⁷ *Chimel v. California*, 395 U.S. 752 (1969).

³⁸ *United States v. Robinson*, 414 U.S. 218 (1973).

³⁹ *United States v. Chadwick*, 433 U.S. 1 (1977).

“Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). Such a balancing of interests supported the search incident to arrest exception in *Robinson*, and a mechanical application of *Robinson* might well support the warrantless searches at issue here. But while *Robinson*’s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*-harm to officers and destruction of evidence-are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*. We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.”⁴⁰

The above citation is just a small indication of the Court’s commitment to traditional Fourth Amendment analysis. In fact, the Court spends approximately the next ten pages of its opinion discussing why cell phones have heightened privacy interests. And it spends significant time examining why the governmental interests are lessened or not at all present. So does this suggest that the Court is creating a “special rule” for cell phones, or changing the Fourth Amendment in order to keep up with advances in technology? I suggest not. The Court is merely doing Fourth Amendment analysis the same as it always has – balancing competing interests in order to decide if officers acted reasonably in light of the circumstances.

⁴⁰ *Riley*, *supra*, at 2484-2485.

“The More Things Change...”

There is an old saying that “The more things change, the more they stay the same.”⁴¹ I think the saying rings true if it be said of the Fourth Amendment. For the “touchstone” of all Fourth Amendment analysis is reasonableness.⁴² The language gives us one clear protection – a protection from the *unreasonable* actions of governmental agents. And whether the government action is viewed as one of trespass (*Jones*), or one that intrudes upon an expectation of privacy (*Katz*, *Riley*), the bottom line analysis is whether that government action was reasonable in light of the totality of the circumstances. Stated another way, is there sufficient governmental interest at hand to outweigh the privacy interests of the individual so affected by the governmental action? Presumably, a trespass can have such sufficient interests. The *Jones* court noted that the Government raised such a proposition at the Supreme Court but failed to raise the argument below, thus forfeiting it. Accordingly, the Court declined to consider it.⁴³ Similarly, the warrantless search of a cell phone may be justified by heightened governmental interests that outweigh the privacy interests of the phone’s owner. In *Riley* the Court stated: “If “the police are truly confronted with a ‘now or never’ situation,” - for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt - they may be able to rely on exigent circumstances to search the phone immediately.”⁴⁴

⁴¹ This saying has been attributed by several sources to French novelist Alphonse Karr. See, e.g., http://www.phrases.org.uk/bulletin_board/8/messages/679.html

⁴² *Riley*, 134 S.Ct. at 2482; citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

⁴³ *Jones*, 132 S. Ct. at 954.

⁴⁴ *Riley*, supra, at 2487, citing *Missouri v. McNeely*, 269 U.S. ____ (2013).

In either of these scenarios, if the governmental interest is great and the privacy interest is lesser, reasonableness is found. Conversely, if the governmental interest is diminished and the privacy interest is great, then the search will be deemed unreasonable. It is this balancing of interests that the court has always done.⁴⁵ Why is this so? - Because the fulcrum on which the balance rests is the word “reasonable.” The Fourth Amendment tilts to and fro on this fulcrum, and each case presents unique facts which may tip the balance in one direction or the other - change one fact, change the outcome. This formulary frustrates law enforcement – and indeed many of my students. They would prefer clear rules, categories, and doctrine. However, as the inimitable Judge Richard Posner of the 7th Circuit Court of Appeals recently remarked with respect to the Fourth Amendment, “I don’t start with doctrine... That’s backward looking.”⁴⁶ Academics and commentators may decry the “usefulness” of the Amendment in the modern age and demand that it be updated to keep in step with modern technology.⁴⁷ But in the end, the Fourth Amendment demands only that officers act reasonably in light of the circumstances. As noted by Judge Posner, the text of the Amendment is rather “empty” and looking at past cases is “unhelpful.”⁴⁸ The only real inquiry is whether or not the officers in the case acted reasonably – that is all the Fourth Amendment demands.

⁴⁵ *Riley*, supra, at 2484; citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

⁴⁶ The forum at which Judge Posner made these remarks was hosted by the Georgetown Law Center and was entitled “Cybercrime and the Fourth Amendment. See <http://www.c-span.org/video/?323068-3/discussion-cyber-crime-fourth-amendment>, for the full video of the symposium. For a view of Judge Posner’s opening comments, see the video from minutes 10:00 through 17:30.

⁴⁷ See Notes 1 and 28, supra.

⁴⁸ See Note 46, supra.

So at the end of the day, regardless of what new technology comes our way, the Fourth Amendment has not changed, nor has the Court's basic analysis of the reasonableness standard. Indeed, the more things change, the more the Fourth Amendment stays the same. And it is unlikely to be altered any time soon.

Conclusion

Scholars often attempt to analyze court opinions to determine in which "direction" the courts are driving a given legal principle. Admittedly, two select Fourth Amendment cases from the Supreme Court do not definitively point us in the "direction" of our Fourth Amendment jurisprudence. But perhaps they do indicate that there is no driving or direction to be had. Technology, phraseology, and people may change, but the text of the Fourth Amendment has not.

It is claimed that cartoonist Charles M. Schulz wrote, in the voice of his canine character, Snoopy: "Yesterday I was a dog. Today I'm a dog. Tomorrow, I will probably still be a dog. Sigh! There's so little hope for advancement."⁴⁹ I suppose that if the Fourth Amendment had a voice, it might lament in similar fashion. Perhaps it would groan, along with others, that its simple text has, and is, and always will be, simple, seeing little hope for advancement. On the other hand, it just might rejoice in its simplicity, its timelessness, and its great effectiveness throughout our American centuries to keep us free from abusive governmental agents.

⁴⁹ Charles M. Schulz. (n.d.). BrainyQuote.com. Retrieved January 6, 2015, from BrainyQuote.com Web site: <http://www.brainyquote.com/quotes/quotes/c/charlesms189858.html>

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