

## Class 2: Location Privacy

**Concepts:** How location-tracking works. Third party doctrine.

**Readings:**

1. Chaoming Song, Zehui Qu, Nicholas Blumm, and Albert-László Barabási. Limits of predictability in human mobility. *Science*, 327(5968):1018–1021, 2010.
2. Yves-Alexandre de Montjoye, César A. Hidalgo, Michel Verleysen, and Vincent D. Blondel. Unique in the crowd: the privacy bounds of human mobility. *Scientific Reports*, 2013.
3. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). URL: <https://www.law.cornell.edu/supremecourt/text/16-402>.
4. *United States v. Jones*, 565 U.S. 400 (2012). URL: <https://www.law.cornell.edu/supremecourt/text/10-1259>.
5. *United States v. Knotts*, 460 U.S. 276 (1983). URL: <https://www.law.cornell.edu/supremecourt/text/460/276..>

### **The law of location tracking**

1. *United States v. Knotts* (1983)
  - a. First major Supreme Court case on location tracking
  - b. **Basic facts:** Investigation of former 3M employee for allegedly stealing chloroform (which is a precursor to methamphetamine)
  - c. **Technology involved:** rather primitive, just a radio transmitter that had been installed in a container of chloroform before the container was sold to one of the co-conspirators. (with agreement of the chemical company — Hawkins)
  - d. **Analytic framework:**
    - i. Was it a search or a seizure?
    - ii. Seizure — Knotts didn't challenge the *installation* of the beeper, just the later *use* of it to track him
    - iii. Search — did it violate a reasonable expectation of privacy?
  - e. **Key holding:** no reasonable expectation in movements on the public highway, even when the observation of those movements is conducted using a beeper

- i. Third party doctrine (note the citations to *Smith*, which we'll discuss next week)
- f. **What's the key analytic leap the court makes from the third-party doctrine to its application in this particular case?**
  - i. **From this:** "A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."
  - ii. **To this:** "The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."
    - 1. "But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise."
  - iii. ZERO + ZERO = ZERO
- g. **Key caveat of the opinion:**
  - i. Respondent does not actually quarrel with this analysis, though he expresses the generalized view that the result of the holding sought by the government would be that "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision." Br. for Resp., at 9 (footnote omitted). But the fact is that the "reality hardly suggests abuse," *Zurcher v. Stanford* \*284 Daily, 436 U.S. 547, 566, 98 S.Ct. 1970, 1982, 56 L.Ed.2d 525 (1978); if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. Ibid.
  - ii. Does this caveat make sense? Isn't it an implicit acknowledgment that the majority is not fully committed to its reasoning?
    - 1. Does it suggest that the principle the majority is really describing is more limited?
- 2. *United States v. Jones* (2012) — 29 years later
  - a. 5–1–4
  - b. Explain the terminology and breakdown
    - i. Justice Scalia — majority opinion

- ii. Justice Sotomayor — concurrence
- iii. Justice Alito — concurrence
- iv. How to determine the controlling opinion?
  - 1. In this case, not hard because 4 justices joined Justice Scalia’s opinion, making it the clear majority opinion.
  - 2. In cases where it’s not so clear, the courts generally treat the narrowest opinion as the controlling one.
- c. **Basic facts:** drug trafficking investigation
- d. **Technology involved:** GPS tracking device attached to a car; tracking for 28 days. (Accuracy = 50–100 feet)
- e. **Majority opinion:** trespass theory
- f. **Concurrences:**
  - i. Key reasoning: at least long-term surveillance invades REP (“longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy”)
  - ii. What justifications do the concurrences offer for breaking with *Knotts*?
    - 1. Long-term surveillance chills speech/association and may alter the relationship b/w citizen and government
      - a. **[Justice Sotomayor’s concurrence]** Awareness that the government may be watching chills associational and expressive freedoms. And the government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring--by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track--may “alter the relationship [\*\*\*\*28] between citizen and government in a way that is inimical to democratic society.” *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (CA7 2011) (Flaum, J., concurring).
    - 2. Long-term surveillance in investigations of most offenses is not what people expect

- a. **[Justice Alito]** Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. See *Knott*, 460 U.S., at 281-282, 103 S. Ct. 1081, 75 L. Ed. 2d 55. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not--and indeed, in the main, simply could not secretly monitor and catalogue every single movement of an individual's car for a very long period.

3. Equilibrium adjustment theory (from Orin Kerr)

- a. "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'

iii. Why didn't Justice Alito go along with the majority? (here are the reasons he offers)

1. First, the Court's reasoning largely disregards what is really important
2. Second, the Court's approach leads to incongruous results. If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.
3. Third, under the Court's theory, the coverage of the Fourth Amendment may vary from [\*\*\*\*44] State to State.
4. Fourth, the Court's reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked.

- g. VIDEO: (exchange that begins shortly after the 7-minute mark)  
<https://www.youtube.com/watch?v=v4-OQMPBdYg>

- i. Why didn't Chief Justice Roberts join the concurrences?

3. *Carpenter v. United States* (2018) (5–3–1)

- a. **Basic facts:**

- i. Investigation of 9 robberies in MI and OH (Radio Shack and T-Mobile). Police arrested several suspects; one confessed and identified his co-conspirators.
  - ii. Police sought cell-site location information (CSLI) through a so-called “(d) order” under the Stored Communications Act (SCA)
    1. SCA: “offers specific and articulable facts showing that there are reasonable grounds to believe” that the records sought “are relevant and material to an ongoing criminal investigation.” 18 U. S. C. §2703(d)
  - iii. Magistrate ordered Carpenter’s cell-phone providers to turn over:
    1. “cell/site sector [information] for [Carpenter’s] telephone[] at call origination and at call termination for incoming and outgoing calls” — 152 days for MetroPCS, 7 days for Sprint
    2. “Altogether the Government obtained 12,898 location points cataloging Carpenter’s movements—an average of 101 data points per day.”
  - iv. CSLI used to show Carpenter was at the scene of 4 of the crimes
- b. **Holding:** accessing seven days of CSLI constitutes a Fourth Amendment search. (see n.3)
- c. **What does Court say about how to assess an individual’s “reasonable expectation of privacy”?**
- i. Although no single rubric definitively resolves which expectations of privacy [\*2214] are entitled to protection,<sup>1</sup> the analysis is informed by historical understandings “of what was deemed an [\*\*518] unreasonable search and seizure when [the Fourth Amendment] was adopted.” ...
    1. **[arbitrary power]** First, that the Amendment seeks to secure “the privacies of life” against “arbitrary power.” *Boyd v. United States*, 116 U. S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746 (1886).
    2. **[too permeating police surveillance]** Second, and relatedly, that a central aim of the [\*\*\*14] Framers was “to place obstacles in the way of a too permeating police surveillance.” *United States v. Di Re*, 332 U. S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210 (1948).
    3. **[equilibrium adjustment]** this Court has sought to “assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”

- d. [Court goes through location-tracking cases and then third-party doctrine cases.]
- e. **How did the Court distinguish these past cases?**
  - i. “cell phone location information is detailed, encyclopedic, and effortlessly compiled”
  - ii. “Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection.”
  - iii. **[not what we expect — Justice Alito’s opinion in *Jones*]** “society’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period.”
  - iv. **[extremely revealing — Justice Sotomayor’s opinion in *Jones*]** “Mapping a cell phone’s location over the course of 127 days provides an all-encompassing record of the holder’s whereabouts. . . . [T]he time-stamped data provides an intimate window into a person’s life, revealing not only his particular movements, but through them his “familial, political, professional, religious, and sexual associations.””
    - 1. [And even more revealing than GPS monitoring in *Jones*]
  - v. **[easy, cheap, efficient]** “And like GPS monitoring, cell phone [\*2218] tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier’s deep repository of historical location information at practically no expense.”
  - vi. **[retrospective]** “Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable.”
    - 1. “Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government’s view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.”
  - vii. **[infallible]** “Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible.”
  - viii. **[not truly voluntary]** In the first place, cell phones and the services they provide are “such a pervasive and insistent part of daily life” that carrying one is indispensable to participation in modern society. *Riley*, 573 U. S., at

\_\_\_\_, 134 S. Ct. 2473, 189 L. Ed. 2d 430, 441. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up.

- f. How does he answer Justice Kennedy's argument that CSLI is not that precise?
  - i. Inferences based on the data still very revealing
  - ii. Court must account for technology in development, not just technology of today
- g. **Discussion of subpoena vs. warrant**
  - i. How do you reconcile Justice Alito's dissent with his concurrence in *Jones*?
  - ii. Justice Alito takes more binary view of subpoenas vs. warrants; Justice Kennedy leaves room for an exception for information akin to "persons, papers, houses, and effects"
- h. **Notice Chief Justice Roberts' careful wording:** "We decline to extend *Smith* and *Miller* to cover these novel circumstances."
  - i. "The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information."
- i. **Justice Gorsuch's dissent:**
  - i. Do you find Justice Gorsuch's alternative proposal persuasive?
    - 1. He says *Smith* and *Miller* can't really mean what they say (otherwise email would not be protected by the Fourth Amendment), and that *Katz* is unworkable and gives judges too much power to decide what privacy the public reasonably expects.
    - 2. But he argues that property interests might be a more administrable and sensible foundation for determining application of the Fourth Amendment.
      - a. How well would this framework to apply to the internet?

#### 4. Questions

- a. What is the actual legal principle that emerges from *Carpenter*?
  - i. [specific] long-term collection of CSLI is a search
  - ii. [general] ???

1. What factors are most relevant?
  - a. You can easily imagine variations on *Carpenter* where each of the salient factors is different. When would the differences be determinative?
2. How many of these factors are unique to location information and wouldn't apply, for example, to financial records (*Miller*) or call records (*Smith*)?
  - a. [This is Justice Kennedy's first criticism, questioning whether CSLI are a "distinct category of information."]
- b. How do you apply *Carpenter* to other technologies?
  - i. Tower dumps? IMSI catchers? Automated license plate readers? Pervasive aerial surveillance?
  - ii. Baltimore example — *Leaders of a Beautiful Struggle vs. Baltimore Police Department*
    1. Aerial Investigative Research program (company = Persistent Surveillance Systems)
    2. "The program operates by flying three small planes over Baltimore during daytime hours, weather permitting. The planes are equipped with cameras that cover about ninety percent of the city at any given time. The cameras employ a resolution that reduces each individual on the ground to a pixelated dot, thus making the cameras unable to capture identifying characteristics of people or automobiles."
    3. Flies during daytime hours, weather permitting; one pixel per person; only look at past movements; 45-day cache
    4. [https://www.aclu.org/sites/default/files/field\\_document/lbs\\_4th\\_cir\\_opinion.pdf](https://www.aclu.org/sites/default/files/field_document/lbs_4th_cir_opinion.pdf)
  - iii. **Held (post *Carpenter* and over a dissent):** "AIR is merely a tool used to track short-term movements in public, where the expectation of privacy is lessened. Such an activity is lawful in light of *Knotts* and *Jones*."