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A seismic change may be on the horizon for Fourth Amendment law

Technology is redefining the way we look at the world. So we should not be surprised that it is also changing the way we look at the Constitution.

A case in point is how police use of GPS devices impacts our understanding of the Fourth Amendment. Two recent decisions — one from the U.S. Supreme Court and another from the Wisconsin Supreme Court — illustrate the changes taking place.

First a little history. Prior to the 1960s, the U.S. Supreme Court took a very literal view of what constituted a "search" under the Fourth Amendment. It held, for example, that using listening devices outside a home to hear conversations occurring within would not be considered a "search." A search would occur only if there was an actual physical trespass into the house. *Olmstead v. U.S.*, 277 U.S. 438 (1928).

But the Warren Court changed this in its decision in *Katz v. U.S.*, 389 U.S. 347 (1967). The court held that whether a trespass occurred or not is not dispositive in a "search" analysis because the Fourth Amendment protects "people, not places." Thus, a search occurs when the police have infringed on a person's "reasonable expectation of privacy."

Hopes that this new paradigm would increase rights of individuals against the government were never really fulfilled. This is because the Burger and Rehnquist courts narrowly equated "privacy" with "secrecy." Anything a person exposed to the public in any way lost its Fourth Amendment protection.

For example, police could ignore high fences around private property and simply hire a plane for a flyover. Since the enclosed property was exposed to the sky, the owner could have no reasonable expectation of privacy. *California v. Ciraolo*, 476 U.S. 207 (1986).

Or consider a person's claim that he has an expectation of privacy concerning the telephone numbers he "dials" on his own phone. The court held that by using his phone he reveals the numbers to the phone company and he cannot have any reasonable expectation of privacy as to information he reveals to a third party. Therefore, the police do not engage in a search when they secretly make a list of all numbers he calls. *Smith v. Maryland*, 442 U.S. 735 (1979).

A noted commentator has recently zeroed in on why these decisions are so wrong. "(For the government) to insist that information is private only when it remains completely secret is preposterous," writes New York University School of Law professor Stephen J. Schulhofer in his 2012 book "More Essential Than Ever: The Fourth Amendment in the Twenty-First Century." This is because "privacy has never been equated with mere secrecy ... (Privacy) is the right to control knowledge about our personal lives, the right to decide how much information gets revealed to whom and for which purposes."

Last year, the U.S. Supreme Court took a step in Schulhofer's direction in *U.S. v. Jones*, 132 S.Ct. 945 (2012). Police attached a GPS to Antoine Jones' car while it was parked in a public parking lot. Over the next month, the police tracked the car 24/7 and compiled 2,000 pages of data on its movements. All of this was done without a warrant. The government argued that Jones could have no reasonable expectation of privacy while using his car in public.

The court decided the case narrowly by holding that the installation of the GPS on the car constituted a trespass on an "effect" that clearly was a "search" that required a warrant and probable cause under the Fourth Amendment. The court emphasized that the *Katz* "reasonable expectation of privacy" test "has been added to, not substituted for, the common-law trespassory test." Thus, the fact that the police clearly trespassed on an effect without a warrant constitutes a Fourth Amendment violation without any need to consider whether a "reasonable expectation of privacy" was violated.

CRIMINAL PROCEDURE

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All the justices concurred in the judgment. But in a concurring opinion stating the views of four justices, Justice Samuel A. Alito criticized the majority opinion for focusing solely on the trespass to the car, which he characterized as "relatively minor."

Instead, Alito urged the court to rethink its prior cases holding that, simply because a car is driven in public, police could use a tracking device to follow the vehicle without violating the driver's reasonable expectation of privacy. *U.S. v. Knotts*, 460 U.S. 276 (1983). Alito conceded that perhaps short-term monitoring of a person's public movements may not impinge on any reasonable expectation of privacy. But he found the warrantless monthlong monitoring in this case to be qualitatively different.

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Alito's position would be a striking break from Fourth Amendment interpretation. Currently, as long as something takes place in public — whether for 10 seconds or 10 years — there is no expectation of privacy. But Alito calls for a nuanced test that would look at both the quality and quantity of the surveillance.

Commentators refer to this as the "mosaic" approach. A mosaic is made up of many small chips. Perhaps a one-hour surveillance in public may not impinge on a reasonable expectation of privacy, but if you put many of these small one-hour chips together, you could have a much different picture.

Justice Sonia M. Sotomayor wrote an equally provocative concurrence. Speaking only for herself, she went beyond Alito — and channeled Schulhofer — by arguing that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."

Does Justice Sotomayor mean that any use of GPS, regardless of length, is a search? That is how the Wisconsin Supreme Court recently interpreted her concurrence. The court specifically relied on the Sotomayor concurrence in *Jones* to hold that a warrant was required for any government use of a GPS. *State v. Brereton*, decided on Feb. 6.

For years, exposing something to the public meant that you categorically gave up any claim of a reasonable expectation of privacy in the item. *Jones* and *Brereton* show that we may be on the verge of a seismic change in Fourth Amendment law.