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Orwell, Jones and the New York Times:

Conversations Shaping the Fundamental Rights of Privacy

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Winston Smith, near the end of George Orwell's *Nineteen Eighty-Four*, finds himself in prison for "thoughtcrime." Winston asks fellow cellmate Parsons, "who denounced you," to which Parsons replies: "'It was my little daughter';" he then continues, "with a sort of doleful pride. 'She listened at the keyhole. Heard what I was saying, and nipped off to the patrols the very next day. Pretty smart for a nipper of seven, eh? I don't bear her any grudge for it. In fact I'm proud of her. It shows I brought her up in the right spirit, anyway'" (165).

In the actual year 1984, Apple introduced its Macintosh line of computers, while also creating the modern Super Bowl ad. Ridley Scott, still relatively new but successful with both *Alien* and *Blade Runner* to his credit, directed the ad, which was the first in Super Bowl history to become an event within the event, spawning decades of imitations. The ad took its inspiration from *Nineteen Eighty-four*, while simultaneously being an homage to the book. Anya Major, an unknown athlete and aspiring actress, clad in a white tank top and bright red gym shorts – the only color in the entire ad – runs through a gray, oppressive Orwellian landscape while a Big Brotheresque figure on a telescreen spouts conformity propaganda to human drones seated in gray rows. She carries a sledgehammer, and upon reaching the telescreen, performs an Olympic hammer throw, releasing the hammer into the screen, thus destroying the tyranny through which she ran. That year, Apple still held a small market share of the computer business and was considered the alternative to the PC-dominated landscape. The idea, of course, was that Apple would save consumers from the conformity and oppression of a world in which there was only one choice of computer. Ironically, Apple would, over the next four decades, be at the forefront of developing technology that would, with the help of its competitors, ensure there was a telescreen in every room, vehicle, and pocket, capable of listening to our every sound with built-in microphones, watching our every motion with built-in cameras, tracking our every movement with GPS, and learning our habits with built-in AI. In this world of constant sur-

veillance, it is the decisions of the Supreme Court and their consideration of novel models like mosaic theory that can help curtail incessantly invasive electronic scrutiny. Mosaic theory considers the relation between apparently harmless individual pieces of data which, when accumulated, might build up into a more harmful picture (like the way an image in a mosaic is built up of individual tiles which, on their own, have no clear representative meaning). Under the mosaic model, the totality of a data set gives more information than just one data point, or the sum of the data points. In this way, apparently harmless consumer data such where we are at a given moment on a mapping app might, in totality, build up to a more pernicious image. The Orwell metaphor, used first in arguments and then in the *New York Times*, misses the true issue at hand. It is not Apple that will save us from a totalitarian government, contrary to the advertisement, but Apple that watches us in much more effective ways, ways that allow the government to get around both the trespass definition of the Fourth Amendment and potentially *Katz*.

The bulk and remainder of my commentary traces the scholarly reaction to the decision, and I argue against conclusions which side with Justice Scalia in moving away from discussions of fundamental privacy rights. Instead, I argue, along with the minority in *Jones*, that post-*Katz* precedent (I will turn to *Katz* in a moment) better equips our law to scrutinize immanent cases of technological surveillance in the enforcement of criminal law. Only through this kind of conscious resistance can we ensure we slip no further toward a situation once contemplated by Orwell in *Nineteen Eighty-Four*. Perhaps, one relevant distinction that we must consider is that a large proportion of the most intrusive surveillance we now experience is corporate, rather than governmental or state-sponsored. While state surveillance remains a crucial focus of the legal right to privacy, we need to question the ways that governments might use corporate data, like GPS records, especially in the pursuit of criminal case convictions.

Before scrutinizing the *Jones* case and its legal and academic repercussions, we should first more precisely recall the historical significance of Orwell's dystopian text. Nominating a particular thing as "Orwellian," or arguing over its lack of Orwellian character, necessarily entails at least a rudimentary understanding of the totalitarian state Orwell creates in *Nineteen Eighty-Four*. The OED defines "Orwellian" as "[c]haracteristic or suggestive of the writings of George Orwell, esp. of the totalitarian state depicted in his dystopian account of the future,

Nineteen Eighty-four (1949)." This definition's circular aspects, at best, create a misimpression for the reader approaching the text today. Instead, the opening of the novel helps define the "Orwellian" context in ways that the OED cannot capture:

> The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it, moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live — did live, from habit that became instinct — in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized. (4)

The question is, of course, do we live with the "firm knowledge" that our every movement and sound is being surveilled and scrutinized, and perhaps even our thoughts, because our web searches are tracked and used for corporate ends? The subsequent question is then: do we assume that only state or governmental surveillance is nefarious, since the corporate interest is to sell and deliver goods and services? I argue that the answer is double-edged. Surveillance is both inflected by the Orwellian idea of power and by the precedent and experience of state surveillance, revealed, for instance, through the Snowden affair. In other words, it is influenced by both fiction and fact. How then, does a character in the novel contest the surveillance state? The way that Winston subverts this technological wonder of his time is simple:

> For some reason the telescreen in the living-room was in an unusual position. Instead of being placed, as was normal, in the end wall, where it could command the whole room, it was in the longer wall, opposite the window. To one side of it there was a shallow alcove in which Winston was now sitting, and which, when the flats were built, had probably been intended to hold bookshelves. By sitting in the alcove, and keeping well back, Winston was able to remain outside the range of the screen, so far as sight went. He could be heard, of course, but so long as he stayed in his present position he could not be seen. It was partly the unusual geography of the room that had suggested to him the thing he was now about to do. [...] The thing that he was about to do was to open a diary. This was not illegal (nothing was illegal, since there were no longer any laws), but if detected it was reasonably certain that it would be punished by death, or at least twenty-five years in a forced labor camp. (6)

For those unfamiliar with the text, or those who have forgotten its details, these passages are probably surprising. The way Winston escapes what is supposed to be totalitarian-state surveillance is by simply stepping into the alcove of his small apartment. Here, he can peruse his diary, write, and, most importantly, think unobserved and undetected by the Thought Police, or so he reasons, until much later in the novel. But there is another aspect here that is of crucial importance, namely that surveillance is not used in Oceania to enforce totalitarian laws, but rather it acts in the place of the law. The narrator points out that "there were no longer any laws" (6), meaning that surveillance becomes the enforcement of a totalitarian ideology and, significantly, opposed to a legal system.

The word "surveillance" occurs only once in the entirety of *Nineteen Eighty-Four*, and it appears in a passage most apropos to our discussion of GPS technology. However, Orwell traces technological advancement, and the effects of its having evolved unchecked, across the novel:

> [...in] the past no government had the power to keep its citizens under constant surveillance. The invention of print, however, made it easier to manipulate public opinion, and the film and the radio carried the process further. With the development of television, and the technical advance which made it possible to receive and transmit simultaneously on the same instrument, private life came to an end. Every citizen, or at least every citizen important enough to be worth watching, could be kept for twenty-four hours a day under the eyes of the police and in the sound of official propaganda, with all other channels of communication closed. The possibility of enforcing not only complete obedience to the will of the State, but complete uniformity of opinion on all subjects, now existed for the first time. (144)

Almost complete uniformity, in fact, is realized in this dystopian state. When the narrator describes a member of the ruling class of Oceania, a Party member, he submits:

> He has no freedom of choice in any direction whatever. On the other hand his actions are not regulated by law or by any clearly formulated code of behaviour. In Oceania there is no law. Thoughts and actions which, when detected, mean certain death are not formally forbidden, and the endless purges, arrests, tortures, imprisonments, and vaporizations are not inflicted as punishment for crimes which have actually been committed, but are merely the wiping-out of persons who might perhaps commit a crime at some time in the future. (149)

Again, the narrator stresses the opposition between formal law and the world in which the characters in the novel live. There is, however, another crucial difference between their fictional reality and ours: even in this state of near-total surveillance, Winston does not wonder, as we might now do, whether his diary, even though read, is tracking his every keystroke, whether the advertising banners on his websites, or the browsers themselves, too closely trace his internet browsing history, or whether the telescreen camera has facial recognition software that will help advertisers, or his nefarious government, detect joy or disdain for their ad campaigns. He worries neither that his pencil might contain a GPS tracking system that easily traces every step he will make throughout the day, nor that it will report and publicize these movements to social media. Neither will it measure his pulse, daily rates of activity and rest, and report these to software that will both monitor and coach his progress toward a healthier body. He will never use this data in litigation, to evidence the ways his life has changed after another individual has committed a tortious or criminal act against him. Drones will not follow him from high in the sky, and satellites from even higher. For all its prophetic value, Orwell's text, written in 1948, cannot but fail to capture the extent of the forthcoming technological advance, and the remarkably invasive measures which such advanced technologies will make possible in our everyday lives. This, of course, is not a critique of Orwell, as most of these marvels have only come to fruition within the last two decades, at an exponential pace that is truly astonishing. This pace of change created a seemingly insurmountable problem for the Justices in *Jones* and will continue to create similar problems for the Justices in future cases.

If unfamiliar with the United States legal landscape regarding both criminal law and the Constitution, readers will benefit from a brief contextualization of the Fourth Amendment. The original text was part of the American Bill of Rights and dates to the ratification of those ten amendments in 1791. It was used to guard against unreasonable search and seizure in a home or of the person of a U.S. citizen. This amendment also helped develop the notions of probable cause and search warrants in the U.S. context. Early cases seem rather simple from today's perspective, as the questions were focused on physical evidence and the means the state used to obtain it. Before recording devices, for example, only something like a letter could be used against an accused criminal as evidence of guilt. If such evidence was obtained illegally, a trespass to property occurred, which would render the evidence inadmissible in the criminal proceedings.

The seminal case regarding the Fourth Amendment and surveillance was *Katz*. In 1967, the U.S. Supreme Course ruled that an unreasonable search did not have to involve a violation of property in the strict sense. The Court in *Jones* cites *Katz* and explains:

> In *Katz* [...] we said that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy." (5)

Summarizing the case, the Court in *Jones* held that: "*Katz* did not repudiate the understanding that the Fourth Amendment embodies a particular concern for government trespass upon the areas it enumerates. The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test" (2). As Justice Alito explains in *Jones*, "[i]n the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical" (12). *Jones*, I argue, was seminal too, because it occurred at a time when not all cars came with preinstalled GPS systems, and when the reasonable expectation of privacy was developing in a positive way in the U.S. So, while *Jones* was a seminal case dealing with GPS surveillance in 2012, a decade of new technology has already outstripped the idea that a GPS device is a credit card-sized object easily stuck to the bottom of a vehicle. Cars and cell phones are no longer the only smart appliances. Few of the new electronic devices in our home come without computer chips. Surveillance cameras have never been cheaper, easier to install, or more ubiquitous. Facial recognition is already part of many commercial enterprises, and countries like China use it to enforce their laws (a situation different from Oceania, in that surveillance here supports a legal system, but perhaps little different in the everyday experience of the state). Other biometric data, including fingerprint and retinal scans, are no longer science fiction, but commonplace as security measures. With these developments in mind, it is crucial to see what exactly *Jones* did, in the historical context from which it sprung, one decade ago.

Before turning to the *Jones* case, there is one more Orwellian framing mechanism that needs to be considered. Ingsoc, Orwell's dystopian projection of English Socialism, and the name of the totalitarian party ruling Oceania, ensures that "all history was a palimpsest, scraped clean and reinscribed exactly as often as was necessary" (35). The three paradoxical slogans that the government employs to rewrite history are: "war is peace, freedom is slavery, and ignorance

is strength" (3). On their faces, as is the case for all paradoxes, these slogans seem absurd. Yet by working through the text, we see that the totalitarian state makes sense of the slogans through the way it controls its citizenry. We see, for example, that the ignorance of citizens ensures total obedience, which in turn ensures both an unquestioning workforce and military. The strength of the Ingsoc State depends, in part, on its ability to keep people ignorant of their own history and united in whatever causes the state adopts, with whatever justification it invents. While we might argue that "freedom is slavery" implies an underlying legal order of some kind, there is no slogan that specifically mentions the law. This is unsurprising, given that the government in Oceania has officially abolished law and replaced it with state surveillance. By turning to *Jones* and its legal implications and limitations, I argue that a different paradox might be apt for our time. I will formulate this paradox in a moment to distinguish the Orwellian surveillance state from our own.

Antoine Jones was a suspected drug dealer. The United States Government obtained a search warrant permitting GPS tracking on Jones's wife's vehicle. The warrant allowed a tracking device to be installed within a period of 10 days in the District of Columbia. In violation of the warrant's parameters, it was installed on the 11th day in Maryland. Law enforcement tracked the vehicle for 28 days. The district attorney secured an indictment of Jones and others on drug trafficking and conspiracy charges based on the information produced by the tracking device. The District Court suppressed the GPS data while the vehicle was parked at Jones's residence, but it held that the remaining data was admissible. The Court found that Jones had no reasonable expectation of privacy when the vehicle was on public streets. The D.C. Circuit Court reversed the opinion, concluding that admission of the evidence obtained by expired warrant regarding the use of the GPS device violated the Fourth Amendment. The Supreme Court heard oral arguments on November 8, 2011. In the transcripts of *United States v. Antoine Jones* (2012), Michael Dreeben argued for the United States in his capacity as the Deputy Solicitor General. The case produced a vigorous argument. The government position was that the GPS device was not a search, or, in the alternative, if it was a search, it was reasonable. Jones's position was that it was an unlawful and unconstitutional search. The conversation was peppered with allusions to *Nineteen Eighty-Four*. The unedited arguments follow, and it is crucial to note the style and structure of the oral arguments. These are not legal briefs or reasoned decisions: they are oral conversations, and the rhetorical styles reflect the very human

tendencies to stop, stutter, and generalize. I will contrast this later with both the *New York Times* coverage of the case and the Supreme Court's decision. The first mention of the novel, however, came from Justice Breyer, as he was addressing Dreeben:

> What – what is the question that I think people are driving at, at least as I understand it and certainly share the concern, is that if you win this case, then there is nothing to prevent the police or the government from monitoring 24 hours a day the public movement of every citizen of the United States. And - and the difference between the monitoring and what happened in the past is memories are fallible; computers aren't. And no one, or at least very rarely, sends human beings to follow people 24 hours a day. That occasionally happens. But with the machines, you can. So, if you win, you suddenly produce what sounds like 1984 from their brief. I understand they have an interest in perhaps dramatizing that, but – but maybe overly. But it still sounds like it. (12-13)

Later in the exchange, Dreeben warns the Justices that they need not extend the scope of the argument to all kinds of possible government surveillance, but they should rather focus on the particular surveillance at hand. He states: "All right. Justice Breyer, two things on that. First of all, I think the line-drawing problems that the Court would create for itself would be intolerable, and better that the Court should address the so-called 1984 scenarios if they come to pass, rather than using this case as a vehicle for doing so" (25).

While criminal trial lawyers understand the importance of keeping the issue at trial as narrow as the facts require, it is also clear that Dreeben's attempts to narrow the issue are equally efforts to quell the Justice's aversion to intrusive technology. In other words, Dreeben's goal is simply to find a way to convince the Justices that Jones is guilty. Arguing over the surveillance device, and keeping the issue narrowly focused on its potential legality, was what Dreeben, it seems, thought the best and narrowest line of argument. Yet, the ways the media or the public would view the case, and did view the case, were far more sensational and terrifying: the potential for state totalitarian control through technology seemed very real. While we may not be subjected to the kinds of thought control and torture Orwell describes in *Nineteen Eighty-Four*, our technologies, like GPS, information clouds, and ubiquitous video cameras in small electronic devices, far outstrip anything Orwell could have contemplated. Again, Dreeben's goal was simply to convince judges that an external GPS device, attached to a vehicle by law enforcement, was either not a search under the Fourth Amendment, or, in the alternative, if it was a search, that it was reasonable. From the tenor of Justice Breyer's comments, Dreeben's arguments were thus far unconvincing.

Dreeben next suggested that the legislature, not the judiciary, should worry about protecting against potential *Nineteen Eighty-Four* scenarios:

> As in most reasonable suspicion cases, it's the police at the front end and it's the courts at the back end if there are motions to suppress evidence. But fundamentally, just as in the pen register example and the financial records example, if this Court concludes, consistent with its earlier cases, that this is not a search, yet all Americans find it to be an omen of 1984, Congress would stand ready to provide appropriate protection. (26-27)

Here, Dreeben attempts to argue that legislation, rather than judicial precedent, is the key to ensuring either protection from an unreasonable search or a reasonable expectation of privacy. A pen register was an early surveillance device that could track and trace a number dialed, but not record the content of the call. Though the device itself is archaic, computer programs that perform the same function are often still dubbed "pen registers," or dialed number recorders. The mention of the pen register is Dreeben's attempt to offer an example of using something nearer computer surveillance, as when law enforcement uses these registers to track telephone numbers dialed and the duration of calls. By mentioning financial records, he again tries to persuade the Court that GPS tracking is no more invasive than subpoenaing financial records that paint a picture of a person's or company's financial health over time. At this point in the arguments, Dreeben tries to fit GPS surveillance into precedent, and is doing a reasonable job. It is when his arguments move more wholeheartedly into the area of reasonable expectation of privacy that the Justices intervene. Dreeben begins: "Today perhaps GPS can be portrayed as a 1984-type invasion, but as people use GPS in their lives and for other purposes, our expectations of privacy surrounding our location may also change. For that –" (57). At this point, Justice Kagan interjects:

> Mr. Dreeben, that – that seems too much to me. I mean if you think about this, and you think about a little robotic device following you around 24 hours a day anyplace you go that's not your home, reporting in all your movements to the police, to investigative authorities, the notion that we don't have an expectation of privacy interests would be violated by this robotic device, I'm – I'm not sure how one can say that. (58)

Justice Kagan's comments are typical reactions of all the Justices. Unlike cases in which there is a clear split between left and right, in the *Jones* case the Justices were united in their skepticism toward warrantless GPS technology tracking, divided only by the rationale for their positions.

Much of the reasoning in *Jones* turns on the reasoning in *Katz*. We must remember, again, that *United States v. Katz* was a pivotal case that established a reasonable-expectation-of-privacy test as an addendum to the already established protection against unreasonable search and seizure of the Fourth Amendment. Pre-*Katz*, jurisprudence focused solely on trespass, while post-*Katz* decisions expanded this judicial interpretation. This will become clear as we analyze the decision, presently, but for the moment, we need only remember that the expectation of which Justice Kagan speaks is developed after, and in conjunction with, the 1967 *Katz* decision.

Justice Alito, earlier in the arguments in *Jones*, summarizes exactly what is at stake in the case. Because the court had not been called upon to decide a GPS case in these or similar circumstances before, Justice Alito asks the questions that we will consider for the remainder of this analysis as we examine the *New York Times* coverage and the *Jones* decision that the Supreme Court wrote months later. Justice Alito opines:

> Well, that seems to get -- to me to get to what's really involved here. The issue of whether there's a technical trespass or not is potentially a ground for deciding this particular case, but it seems to me the heart of the problem that's presented by this case and will be presented by other cases involving new technology is that in the pre-computer, pre-Internet age, much of the privacy – I would say most of the privacy – that people enjoyed was not the result of legal protections or constitutional protections; it was the result simply of the difficulty of traveling around and gathering up information. (10)

Here, Justice Alito is not only the most cogent of the speakers during the arguments, but also the most persuasive. He sees the technological challenges that the GPS tracking in *Jones* presents, and does not shy away from arguing about the case in a way that would serve as a useful precedent, thus moving beyond trespass and toward defining rights of privacy:

> But with computers, it's now so simple to amass an enormous amount of information about people that consists of things that could have been observed on the streets, information that was made available to the public. If -- if this case is decided on the ground that there was a technical trespass, I don't have much doubt that in the near future, it will be possible – I think it's possible now in many instances -- for law enforcement to monitor people's movements on – on public streets without committing a technical trespass. So, how do we deal with this? Do we just say, well, nothing is changed, so that all the information that people expose to the public is -- is fair game? There's no -- there's no search or seizure when that is -- when that is obtained because there isn't a reasonable expectation of privacy, but isn't there a real change in -- in this regard? (11)

The change is real. Attempting to group *Jones* into cases like pen register taps, financial record analysis, or garbage pulls, as Dreeben does, is spurious at best. Dreeben strives to expand the power of law enforcement far beyond the purview of any precedent. The warrant, issued to expire in ten days in the District of Columbia, was effected on the eleventh day in Maryland. If the warrant were not void, the surveillance would have been admissible. Justice Ginsburg makes this clear in his questions to Dreeben (cf. 16-17). Yet, Dreeben continues to fight for an extension of what we might consider a reasonable search under the Fourth Amendment.

Like Justice Alito, Chief Justice Roberts attempts to underscore that this is not a difference of degree, but of kind: “Well, you're talking about the difference between seeing a little tile and seeing a mosaic. The one gives you information; the other doesn't” (16). His comment is not only erudite, but eloquent. In reactions to this case, which we will deal with shortly, much of the scholarly production considers mosaic theory, and the ways that law needs to both address big data issues and abandon approaches that ignore mosaic data. This brings us to what must be the “post-Orwellian” or “ultra-Orwellian” state of law and technology. It is a situation where the traditional thinking about surveillance and trespass breaks down, and where an idea like mosaic theory becomes intrinsically useful. While mosaic theory was used previously in the context of national security and *The Freedom of Information Act*, *Jones* was the first U.S. Supreme Court case that considered the term of art.[1] The conclusions to this discussion will address the ramifications of using mosaic data in legal contexts, and compare these to the Orwellian metaphors that both pervade the transcripts of the case and our cultural understanding of what a state governed by Big Brother might entail. However, before we enter this arena, we should further consider the reporting of these arguments. The same day that the oral arguments were heard, the *New York Times* detailed the events under the headline “*Court Casts a Wary Eye on Tracking by GPS*.” The *Times* reported:

1. See David Pozen’s "The Mosaic Theory, National Security, and the Freedom of Information Act." In this instance, the U.S. government denied access to information based on the idea that "apparently harmless pieces of information that when assembled together could reveal a damaging picture."

> WASHINGTON — In an argument studded with references to George Orwell's "1984" and the possibility that rapid advances in technology would soon allow the government to monitor everyone's movements, the Supreme Court on Tuesday struggled to articulate how the Fourth Amendment's ban on unreasonable searches and seizures should apply to the tracking of cars using GPS devices. The fit between 18th-century principles and 21st-century surveillance seemed to leave several justices frustrated.

The relevant idea here is not just that the Court found itself dealing with novel technology and had a difficult time doing so, but that, of myriad issues raised in the case, the *Times* chose to lead the article with a sentence emphasizing the importance of Orwell's *Nineteen Eighty-Four* to the jurisprudence. That the *Times* embraced the sensational by leading with Orwell is perhaps not surprising given that its readership would find the allusion disquieting and perhaps read on. But the treatment of the arguments is somewhat bizarre, since, when the article was reported, GPS was already a part of so many lives. Mobile phone technology had already wholeheartedly embraced GPS tracking in its mapping functions, and applications like "Find My iPhone" were already prominent parts of the cultural landscape. That we were, at the time, already long past anything contemplated in *Jones* was never mentioned in the *Times*. This is significant because the *Times* is implying that we would not expect the government to track our movements with GPS before *Jones*. We need to return to the trial transcripts to uncover exactly what the Justices thought was at stake. The trial transcripts contain six references to "1984," made by both judges and lawyers. At issue, it would seem, was whether GPS tracking might be a gateway to an Orwellian state of constant surveillance, a state that, in one sense, had already arrived. The *Times* suggests, that like Winston Smith of the novel, the Court is wary of limitless surveillance. Yet, if the news reporting agency checks itself against details of how the Court deals with the GPS issue at trial, and instead focuses on the *Nineteen Eighty-Four* references, it necessarily creates further media sensationalism. In other words, the *Times* chose to focus on the Orwellian references, without thoroughly reporting the Justice's revulsion to arguments that normalize the erosion of privacy. Meanwhile, the *Times* makes little of the fact that warrants of these kinds are already in operation and easy to obtain by law enforcement. The *Times* reader, then, is left with the impression that the Court is protecting civilians from unwanted intrusion but ignores that this is only the case in warrantless situations. The *Times* reported that law enforcement cannot arbitrarily use GPS, but that they can with a warrant. The newspaper reporting choices might have been directed by the understanding that these

were simply the oral arguments, and that the eventual decision would probably clarify the complexity of the situation and offer better guidance, which, in fact, it does. The *Times* reader is rightly left with the uncomfortable feeling that individual privacy is indeed at risk, and that technology, at least in part, is responsible. While this achieves a laudable end, the means seem convoluted, since the article achieves its cautionary ends through sensationalizing Orwell, rather than dealing with Justice's reticence to accept the behaviour of law enforcement in violating the accused's Constitutional rights.

The decision came down in January of 2012. The Supreme Court held that the GPS tracking *did* constitute a search. It upheld the appeal and went further to state that the government cannot argue that the search was reasonable in these circumstances because such an argument was not raised in a timely fashion. Though the issue of whether the United States was sliding toward a *Nineteen Eighty-Four*-like surveillance state was disputed back and forth so vehemently in the oral arguments, there is not a single mention of this idea in the formal opinion of the Supreme Court of the United States. This is not surprising, since the Supreme Court's mandate is to decide the issue at bar and not to provide sensational material as the *New York Times* might, material that might also persuade its readership to remain engaged. Regardless of the Orwellian omission, however, it is clear that the Court was not settled on the ways that it might most usefully decide *Jones* in the present, and the ways that it might most usefully apply it in the future.

Justice Scalia, in the five-justice majority, argued that pre-*Katz* (1967) jurisprudence which linked the Fourth Amendment to the law of trespass was most applicable here. Justice Sotomayor, the deciding vote, concurred, adding that information disclosed to the public for a limited purpose does not necessarily lose Fourth Amendment protection. Justice Alito, while concurring, sided with the remaining four Justices, rejecting the common law of trespass as the basis for the decision and returning to *Katz*'s reasonable expectation of privacy test.

Justice Scalia's prose is original and rhetorically defensive because he believes that both the law of trespass and the right to privacy need consideration. He writes:

> The concurrence begins by accusing us of applying "18th-century tort law." *Post*, at 1. That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at a minimum the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply exclusively [*Katz*'s] reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed. (10-11)

Justice Alito, in his arguments, reiterates what he sees as the need for the Court to use the Fourth Amendment as an arbiter of the reasonable expectation of privacy, and not, as he conceives it, a reactionary position such as trespass to chattels. In other words, he sees the issue as firmly within the confines of privacy law in *Katz*, and not a matter that turns on the two-hundred-year-old precedent which, itself, turns on whether there was or was not a trespass, as would be the case with the GPS monitor installed on the car. He writes:

> This holding, in my judgment, is unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial. I would analyze the question presented in this case by asking whether the respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove. (2)

Alito, here, seems most convincing, for many reasons including his steadfast approach to ensuring the relevance of the decision. If the case was decided on the narrowest of grounds, attaching the GPS monitor to the bottom of Jones' vehicle would need to be deemed either a trespass or not. Whether a different device, attached to a different part of the vehicle would similarly be a violation would not factor into the reasons. Similarly, GPS tracking of vehicles with factory-installed devices would not be contemplated, though this is now omnipresent in the motor industry.

Justice Sotomayor added that there were at least two problems with warrantless GPS tracking by the government, one was ideological, the other, practical: "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" (3). The Court did not take up associational and expressive freedoms in any meaningful way, although Justice Alito's opinion was clearly concerned with the idea that reasonable expectation of privacy might foster expressive freedoms. The main dissonant chord between the judicial camps was whether trespass or privacy rights should govern the decision.

Justice Alito was clear in his opinion that post-*Katz* jurisprudence no longer used trespass for the basis of determining unreasonable search. Again, in *Katz*, law enforcement used a surveillance eavesdropping device attached to the exterior of a public telephone booth to record illegal gambling bets that Katz made from Los Angeles to Miami and Boston. The Supreme Court held that not only

was this, in fact, a search, and that physical intrusion was not necessary, but that "a person has a constitutionally protected reasonable expectation of privacy" (388). Justice Alito argues that trespass, therefore, is no longer a relevant part of the test under the Fourth Amendment, while applying *Katz*:

> *Katz v. United States*, 389 U. S. 347 (1967), finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation. Katz involved the use of a listening device that was attached to the outside of a public telephone booth and that allowed police officers to eavesdrop on one end of the target's phone conversation. This procedure did not physically intrude on the area occupied by the target, but the Katz Court "repudiate[d]" the old doctrine, *Rakas v. Illinois*, 439 U. S. 128, 143 (1978), and held that "[t]he fact that the electronic device employed . . . did not happen to penetrate the wall of the booth can have no constitutional significance." (5)

Justice Alito's commentary, of course, turns on the premise that trespass is necessarily a physical act, which we will explore later.

Justice Scalia, in contrast, refused to abandon the trespass approach, and argued for its relevance to the case at bar: "But as we have discussed, the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test" (8). The majority of the Court agreed, and Scalia's attitudes helped drive the majority opinion. But this seems to be of very limited application. Justice Alito, again proactively looking forward to protection, conceded that for the law to address technology and surveillance in the future, it should probably have the weight of Congressional legislation.

Much of the reaction to *Jones* is positive. Most scholarly production, thus far, lauds the case for various reasons, but each suggests that *Jones* is a step in the right direction in helping clarify Fourth Amendment law. Christopher Slobogin, for example, extols the Court's fortitude in breaking from previous surveillance cases[2] and realizing that new technologies pose novel problems never contemplated in previous jurisprudence:

2. See, for example, "United States v. Knotts, 460 U.S. 276 (1983)," or "United States v. Karo, 468 U.S. 705 (1984)" where the use of a concealed beeper helped law enforcement track and eventually convict suspects. In Knotts, the short-range beeper over a single trip was held to be neither a search, nor violate a right to privacy, since the tracking occurred on public streets. In Karo, the beeper was hidden in a can of ether, and was found to be a search, because the concealment of the beeper in the can differentiated the situation from one on public streets. The Court held that the warrant affidavit had enough information to uphold the conviction, since it established probable cause, and therefore neglected the beeper data.

> In *United States v. Jones*, the Supreme Court took a giant step into the modern age. Ignoring the insinuation of its own precedent, the entire Court, albeit in three separate opinions, signaled that technological tracking of a car can be a search under the Fourth Amendment. Even more importantly, all three opinions in Jones made statements that call into question the Court's "third party doctrine," the controversial notion that government officials need no justification under the Constitution to view or access any activities or information that can be viewed or accessed by third parties outside the home. (1-2)

Clearly, the problem with third party doctrine in an age where almost any sort of information can be mined through electronic means is that this blows open the government's surveillance capabilities. These capabilities are so vastly beyond anything contemplated in *Nineteen Eighty-Four* that they require us to rethink what we might mean by calling something "Orwellian."

While turning to the physical instances of trespass would surely make cases where external GPS units are attached to vehicles obvious trespasses,[3] this is already a moot point. At an auto show in January of 2014, the global vice president of Ford's marketing and sales division, Jim Farley, talked about GPS units installed in his company's automobiles. "'We know everyone who breaks the law, we know when you're doing it. We have GPS in your car, so we know what you're doing,' [thus he] told a Vegas crowd on Wednesday, according to Business Insider reporter Jim Edwards, [before adding,] "'[b]y the way, we don't supply that data to anyone,' (RT). This same website estimated that, of all the mass-produced vehicles of 2013, up to ninety six percent include event data recorders, namely devices similar to airline black boxes. Today, almost every car has this capability. Obviously, governments no longer need to use their own GPS trackers, they only need a warrant. If a government turns to a court, and a court issues a warrant, then Ford must supply the data or risk criminal sanction. Since factory-installed units already track virtually every new car on the road, and since the manufacturers of these cars log this data, law enforcement need only to obtain GPS data from these third parties. Older vehicles, without onboard GPS, are almost always piloted by drivers with smart phones, thus achieving the same GPS ends. The trespass to property test, only three years after *Jones*, was already empirically useless.

3. See Erica Goldberg and her discussion of the ways she believes the physical trespass is still crucial in applying Katz.

A more informed consideration of the ways we might re-examine GPS and the Fourth Amendment must come, therefore, from Justice Alito's approach to reasonable expectation of privacy. Lauren Elena Smith relates: "Under the mosaic theory, the core argument is that a person's interest in privacy regarding the totality of their movements is greater than that in each individual movement" (1030). She then appropriately looks at the ways Justice Alito's opinion mirrors mosaic theory when she says, "five justices took issue with this sort of long-term surveillance in *Jones* precisely because of the way in which information can now be aggregated in a way that people do not anticipate— as Justice Alito mentioned in *Jones*, the surveillance methods may 'involve[ ] a degree of intrusion that a reasonable person would not have anticipated'" (1031). What is of crucial importance here is at least twofold: first, surveillance has fundamentally changed since computers can "trace" and "remember" far better than any individual, or group of individuals; and, second, the law simply did not anticipate that this would become the case. What was reasonable in the 1980s in the midst of cases like *Knotts* or *Karo* is no longer reasonable in cases like *Jones*, not because the character of public streets has changed, but because the character of technology has.

Smith's analysis takes positive steps toward a more useful iteration of reasonable expectation. Her study further suggests complicating the reasonableness test with the aspect of voluntariness:

> Despite the absence of an explicit endorsement of the mosaic theory by either concurrence, the close relation of their alternative long-term surveillance arguments, endorsed by five justices, creates the possibility that the mosaic theory could prove successful in future cases. Moreover, both the Supreme Court and D.C. Circuit's treatments of Jones present crucial questions about "voluntariness" generally that the Court will undoubtedly need to address in future cases implicating technology-enabled search without a trespass. If the Court considers reasonable expectations of privacy and "voluntariness" in the context of both aggregation arguments and the third-party doctrine, the Court would likely be able to adopt an understanding of Fourth Amendment searches that reflects reasonable expectations of privacy in the Information Age. (1032)

Adopting an understanding that allows mosaic data into judicial decisions would unavoidably need further guidelines to ensure that we are not facing what we might call a post-Orwellian state of twenty-four-hour surveillance. Voluntariness could be a helpful mitigating consideration, as we face further and further instances where electronic data becomes easier and easier to access and use in long-term surveillance operations. From *Jones*, we see that third party doctrine needs reconsideration, and voluntariness could be pivotal to the ways that we

decide law enforcement will interact with third party data. If cell phone providers and auto manufacturers, for example, log enormous amounts of mosaic data into their computers, how can we regulate the use of that data that will protect privacy?

Like Smith, Slobogin seeks to clarify and detail mosaic theory as suggested by Justice Alito. In his approach, Slobogin proposes using proportionality and political process theory. He explains:

> Taking a different tack than the voluminous literature that has grappled with this issue both before and after [*Jones*], [we] proffer a statute that attempts to operationalize mosaic theory, relying on two more basic concepts that I have explored in other work. The first concept is the proportionality principle, the idea that the justification for a search should be roughly proportional to the intrusiveness of the search. The second is John Hart Ely's political process theory. As applied to searches, this theory counsels that courts should generally defer to legislation authorizing searches of groups when the affected groups have meaningful access to the legislative process and the search is implemented in an even-handed fashion. (4)

While neither of these principles has seen explicit application since *Jones*, they are, nonetheless, further avenues for the Court to consider narrower definitions of reasonableness. That a highly intrusive search, as in such cases as *Jones*, where a device tracks twenty-four hour movement over an entire month, should carry a higher burden of justification seems more than reasonable. In fact, the questions asked by the Justices in *Jones* suggest that they are implicitly thinking along these proportionality lines as they grapple with the ways new GPS technology is changing the way we conduct surveillance, although these questions are not explicitly reflected in the Jones' opinions. As we have previously considered, Justice Kagan's interjection signals that the public find it very difficult to believe that being tracked every second for an entire month is somehow reasonably expected because we are on public streets. Like Justice Alito, Slobogin's second suggestion is to further the legislative basis for what is reasonable in situations where privacy is paramount by ensuring access and transparency in enforcement.[4]

4. Kevin Bankston and Ashkan Soltani have detailed an inventive approach to determining reasonability in such cases. Unlike the theoretical approaches considered by the Supreme Court Justices and the academics we have considered here, Bankston and Soltani propose an empirical method of using cost to determine whether a demonstrable shift has occurred in surveillance tracking. Using a chart to compare techniques, they show that 28 days of surveillance, which is equivalent to the time in Jones, would

While all of this seems still somewhat removed from our daily lives, the introduction of twenty-four-hour surveillance to that forum is immanently jarring. David Gray and his colleges opine that while both Justices and scholars are represented well in this debate, there remains an ignored issue:

> The concurring Justices in [*Jones*], joined by academic commentators, have described at length the privacy interests implicated by technologies capable of gathering large quantities of data. Almost absent from the discussion so far, however, has been any accounting of the legitimate governmental and law enforcement interests served by these technologies. That is unfortunate. (Gray 748)

Can we have sympathy for restricting law enforcement in situations like *Jones*? The question gestures toward the original circumstances of the case for its answer: the information could have easily been obtained with a valid warrant. Warrantless GPS tracking simply cannot be reasonable, and we must ensure that this kind of behavior by law enforcement does not go unchecked. Yet, this is an extremely narrow reading of the implications of *Jones*. As we have seen, and while it is encouraging that the Court curtailed the GPS monitoring in Jones, this kind of external GPS technology is already virtually obsolete. The idea of something being "Orwellian" has presence and purchase in American life. The Hoover years were equally fraught with properly placed governmental mistrust. More recently, the Edward Snowden affair has made clear that legality and governmental action are often not *ad idem* (in agreement), or, at least, that something in the name of national security can trump individual rights. Again, our technology is no longer invasive in the sense that it has been "forced" upon us. We have embraced the convenience and leisure that so much of this technology affords, happily agreeing to the terms and conditions that weaponize our data against us for corporate gain.[5] We need only reach into our pockets to find our very own GPS tracking systems. Although we might not have reached an Orwellian state of thought control today, at least as it relates specifically to state control, corporations are already exercising far more intrusive means of manipulation[6]. We might, then, alternatively suggest merely that if our reasonable expectation of privacy is eviscerated, with social media, with GPS, with omnipresent video, we might find ourselves in

cost between $184,800, using a covert car, and $33,600, using foot pursuit (350). Similarly, they calculate that mining the same data with mobile phone providers would cost between $2,800 with T-mobile, down to $30 using Sprint (350). The per hour cost of the car, then is $275, while the per hour cost of using the Sprint cellular service is $0.04 (350).

5. See Margaret Hu regarding the ways the Court might apply Jones and replace the reasonable expectation of privacy test in Katz.

a state where it is decided that, like Oceania, we no longer require laws.[7] Surveillance might surpass law, turning us into automatons like Winston Smith. Thus, our fourth paradox might come to pass: law is anarchy. This may seem bleak, but we must underscore the very real need for law to protect individual privacy in a technological world that outstrips anything even Orwell could have imagined. Perhaps we should also abandon "Orwellian" in favor of "Jonesian" in our future dystopian conversations.

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6. Though these cases are beyond the scope of this examination, see Matthew E. Cavanaugh regarding the ways surveillance, like that already in place in China, threaten even the protection a case like Jones affords the public against street surveillance. And see Andrew Guthrie Ferguson regarding the ways AI is employed by police departments when using facial recognition, and with smart devices. Last, see Rebecca L. Scharf regarding drones and further invasions of privacy. Since Jones, the Carpenter case has considered the Fourth Amendment in relation to cell phone tower data and geo-positioning, and where South Dakota Supreme Court uses the phrase "Orwellian" in one of its opinions.
7. This was written before Dobbs. The paradigmatic shift away from privacy rights in that case is terrifying, at best.

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