

# Saint Louis University Public Law Review

---

Volume 31

Number 1 *A New Era for Plea Bargaining and Sentencing?: The Aftermath of Padilla v. Kentucky* (Volume XXXI, No. 1)

Article 14

---

2011

## The Fourth Amendment and Unwarranted GPS Surveillance: An Analysis of the D.C. Circuit Court of Appeals' Decision in *United States v. Maynard*

Margaret C. Eveker  
meveker@slu.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>



Part of the [Law Commons](#)

---

### Recommended Citation

Eveker, Margaret C. (2011) "The Fourth Amendment and Unwarranted GPS Surveillance: An Analysis of the D.C. Circuit Court of Appeals' Decision in *United States v. Maynard*," *Saint Louis University Public Law Review*: Vol. 31 : No. 1 , Article 14.

Available at: <https://scholarship.law.slu.edu/plr/vol31/iss1/14>

This Note is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**THE FOURTH AMENDMENT AND UNWARRANTED GPS  
SURVEILLANCE: AN ANALYSIS OF THE D.C. CIRCUIT COURT OF  
APPEALS' DECISION IN *UNITED STATES v. MAYNARD***

INTRODUCTION

In one of the earliest Supreme Court cases to deal with modern technology and its implications on the Fourth Amendment to the United States Constitution, Justice Brandeis expounded the Framers' purpose behind adopting the Amendment in his famous dissent, stating:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>1</sup>

Modern day advances in technology have pushed the limits of the Fourth Amendment's protection, challenging courts to face these limits head on. The conflict between the public interest in protecting citizens against criminal activity and the preciousness of individual privacy has come to a head in cases involving electronic surveillance.<sup>2</sup> In *United States v. Maynard*, the D.C. Circuit Court of Appeals faced the issue of whether the warrantless use of a global positioning system (hereinafter "GPS") tracking device on a criminal suspect's car for a month long period of time constituted a search within the meaning of the Fourth Amendment, and, therefore, whether or not this was a violation of the suspect's constitutional rights.<sup>3</sup> The D.C. Circuit Court distinguished its case from relevant Supreme Court jurisprudence<sup>4</sup> and numerous other circuits<sup>5</sup> by holding that the tracking did constitute a search and violated the suspect's reasonable expectation of privacy.<sup>6</sup>

---

1. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

2. Renee M. Pomerance, *Redefining Privacy in the Face of New Technologies: Data Mining and the Threat to the "Inviolate Personality"*, 9 CAN. CRIM. L. REV. 273, 277 (2005).

3. 615 F.3d 544, 555 (D.C. Cir. 2010).

4. *United States v. Knotts*, 460 U.S. 276, 285 (1983).

5. *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007); *United States v. Marquez*, 605 F.3d 604, 609–10 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216–17 (9th Cir. 2010).

6. *Maynard*, 615 F.3d at 563–65. This Article was written prior to the Supreme Court's grant of certiorari. The United States Supreme Court granted certiorari on June 27, 2011. *Maynard*,

This Note explores the Supreme Court's Fourth Amendment jurisprudence and the recent circuit split regarding warrantless use of GPS devices. The first section of this paper lays out the relevant precedent on Fourth Amendment searches with respect to the *Maynard* decision. The second section explores decisions by circuit courts that have found that the warrantless use of GPS trackers does not constitute a search within the meaning of the Fourth Amendment. The third section of this Note explains the D.C. Circuit Court's analysis and decision in *Maynard*. This Note concludes by analyzing *Maynard* and discusses the reasons why the D.C. Circuit's holding in *Maynard* was correct.

## I. FOURTH AMENDMENT JURISPRUDENCE

### A. *The General Framework of the Fourth Amendment*

The Fourth Amendment to the U.S. Constitution protects citizens from unwanted governmental intrusions.<sup>7</sup> It grants people the right to be free from governmental intrusion and to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>8</sup> The usual principal inquiry when the Fourth Amendment is implicated is whether or not the governmental action constituted a search.<sup>9</sup>

If an action amounts to a search, then the Fourth Amendment requires that search to be reasonable in order to be constitutionally valid.<sup>10</sup> What is reasonable depends on the context within which the search takes place.<sup>11</sup> Once it is established that a search has occurred, a search conducted without a warrant is "*per se* unreasonable under the Fourth Amendment — subject only

---

615 F.3d 544 (D.C. Cir. 2010), *cert. granted sub nom.* United States v. Jones, 131 S. Ct. 3064 (2011). Oral arguments took place on November 8, 2011. United States v. Jones, 2011 WL 5360051. The Supreme Court decided *United States v. Jones* on January 23, 2012. United States v. Jones, 2012 WL 171117. All nine Justices concluded that a search occurred in *Jones*. *Id.* Justices Alito, Ginsburg, Breyer, and Kagan agreed that Jones' reasonable expectation of privacy was violated. *Id.* at \*17 (Alito, J., concurring).

7. There is debate over whether the Court or Congress is better suited to police technology enhanced searches. See Renée McDonald Hutchins, *The Anatomy of a Search: Intrusiveness and the Fourth Amendment*, 44 U. RICH. L. REV. 1185, 1189 n.22 (2010). For the purposes of this Article, I will only explore the Court's regulation of searches.

8. U.S. CONST. amend. IV. The Fourth Amendment, in full, provides the following:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.*

9. See *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

10. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

11. *Id.*

to a few specifically established and well-delineated exceptions.”<sup>12</sup> Warrants are required to protect individuals from the harms the Fourth Amendment was meant to protect against and as a practical measure, to force police to make a record before a search rather than allowing them to conduct a search without prior investigation or without oversight from a neutral judicial magistrate.<sup>13</sup> If police obtain evidence from a warrantless search, any such evidence may be excluded later at the defendant’s criminal trial.<sup>14</sup> Therefore, defining certain police actions as searches “yields significant implications for police investigative techniques and procedure, as well as the conduct of any resulting criminal trial.”<sup>15</sup>

The presumption for requiring a warrant, however, does not even come into play unless there is a search within the meaning of the Fourth Amendment, so the most pertinent issue when beginning the Fourth Amendment analysis is whether or not an action constitutes a search.<sup>16</sup> A search occurs when a governmental intrusion infringes on an individual’s legitimate expectation of privacy.<sup>17</sup> That expectation of privacy must be one which society considers reasonable.<sup>18</sup> In other words, a legitimate expectation of privacy must have a source outside the Fourth Amendment, such as an understanding that is recognized or permitted by society.<sup>19</sup>

#### B. *Defining a Reasonable Expectation of Privacy*

In *United States v. Katz*, the United States Supreme Court overruled *Olmstead v. United States*<sup>20</sup> and held that the reach of the Fourth Amendment

12. *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted). As Justice Thomas recognized in his dissent in *Groh v. Ramirez*, the Supreme Court has “vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard.” 540 U.S. 551, 572 (2004) (Thomas, J., dissenting). He listed some of the common exceptions to the warrant requirement in his dissent and highlighted the debate among Supreme Court Justices as to whether there actually is a warrant requirement or whether the Fourth Amendment merely requires that searches and seizures be reasonable, and obtaining a warrant is a factor in that analysis. *Id.* at 571–72.

13. *United States v. Garcia*, 474 F.3d 994, 996 (7th Cir. 2007).

14. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Evidence may not be excluded if it was obtained in a manner which satisfies an exception to the warrant requirement. See *Ramirez*, 540 U.S. at 571–72 (Thomas, J., dissenting).

15. April A. Otterberg, *GPS Tracking Technology: The Case for Revisiting Knotts and Shifting the Supreme Court’s Theory of the Public Space Under the Fourth Amendment*, 46 B.C. L. REV. 661, 671 (2005).

16. *Garcia*, 474 F.3d at 996.

17. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

18. *Id.*

19. *United States v. Jacobsen*, 466 U.S. 109, 122–23 n.22 (1984).

20. 277 U.S. 438, 466 (1928) (holding that the interception of private telephone conversations by means of wiretapping was not a violation of the Fourth Amendment).

does not turn upon the presence or absence of a physical intrusion into any given enclosure.<sup>21</sup> Rather, the Court found that the Fourth Amendment protects *people*, not places.<sup>22</sup> The Court explained this, saying, “[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.”<sup>23</sup> In *Katz*, the government was permitted to introduce evidence at trial of the defendant’s telephone conversations in a public phone booth, which had been taped by FBI agents.<sup>24</sup> The Court emphasized that these calls occurred in the public sphere, stating, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not the subject of Fourth Amendment protection.”<sup>25</sup> The Court did state that there may be some privacy and Fourth Amendment protection when a defendant sought to preserve something as private, even in an area accessible to the public.<sup>26</sup> For instance, the defendant did not lose his right to exclude the *uninvited* ear simply because he placed his telephone call from a public place, and the Court stressed that to read the Constitution more narrowly “is to ignore the vital role that the public telephone has come to play in private communication.”<sup>27</sup>

In his concurrence, Justice Harlan elaborated on the Court’s explanation, laying out the seminal test for what constitutes a reasonable expectation of privacy.<sup>28</sup> The application of the Fourth Amendment depends, at the outset, on whether or not the person invoking its protection can claim a justifiable, reasonable, or legitimate expectation of privacy that has been invaded by government action.<sup>29</sup> Justice Harlan split this inquiry into two parts.<sup>30</sup> First, courts must determine whether the individual, by his conduct, has exhibited an actual subjective expectation of privacy;<sup>31</sup> that is, whether the individual has shown that he seeks to preserve something as private.<sup>32</sup> Second, the test

---

21. 389 U.S. at 353 (1967).

22. *Id.* at 351.

23. *Id.* at 359.

24. *Id.* at 348.

25. *Id.* at 351.

26. *Id.* at 351–52.

27. *Katz*, 389 U.S. at 352.

28. *Id.* at 360–62 (Harlan, J., concurring).

29. *Id.* at 361. Justice Harlan believed that when a person makes a phone call from a public phone booth, that booth becomes a “temporarily private place” that can be intruded on by eavesdropping. *Id.* (“The critical fact in this case is that ‘[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume’ that his conversation is not being intercepted. The point is not that the booth is ‘accessible to the public’ at other times, but that it is a temporarily private place whose momentary occupant’s expectations of freedom from intrusion are recognized as reasonable.” (citations omitted)).

30. *Id.*

31. *Id.*

32. *Id.*

requires an individual's subjective expectation of privacy to be one that "society is prepared to recognize as 'reasonable'" and is justifiable under the circumstances.<sup>33</sup> Therefore, the two prongs create both subjective and objective elements of the test for a reasonable expectation of privacy.

### C. *Expectations of Privacy in the Public Sector*

#### 1. *United States v. Knotts* and Technological Enhancement of Surveillance Powers

In the 1983 decision *United States v. Knotts*, the Supreme Court applied *Katz* in holding that the use of a beeper device to track a vehicle was not a search within the meaning of the Fourth Amendment and, therefore, was not a violation of the criminal suspect's constitutional rights.<sup>34</sup> In *Knotts*, a beeper that transmitted periodic signals to a radio receiver was placed in a drum of chemicals purchased by one of the suspect's codefendants.<sup>35</sup> The suspect was under investigation for drug manufacturing.<sup>36</sup> The drum was placed in the suspect's car, allowing police to follow the car and maintain contact, both by visual surveillance and a monitor that received the beeper signals.<sup>37</sup> Police officers pursued the suspect's car and at times lost the signal from the beeper, but with the assistance of a monitoring device in a helicopter, they were able to relocate it.<sup>38</sup> Using the beeper, police obtained information on the location of the chemicals during three days of surveillance at the suspect's house.<sup>39</sup>

In its analysis, the Court first acknowledged the *Katz* test defining reasonable expectation of privacy.<sup>40</sup> The Court stated that the government surveillance essentially amounted to following the automobile on public streets and highways.<sup>41</sup> The Court reasoned that because the surveillance took place on public streets and highways, and, therefore, in the public sphere, there was a diminished expectation of privacy.<sup>42</sup>

The Court relied on the 1974 decision *Cardwell v. Lewis*<sup>43</sup> to articulate its reasoning concerning the expectation of privacy on public streets.<sup>44</sup> In *Cardwell*, when deciding whether the examination of a car without a warrant

---

33. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

34. 460 U.S. 276, 285 (1983).

35. *Id.* at 277.

36. *Id.*

37. *Id.* at 278.

38. *Id.*

39. *Id.* at 279.

40. *Knotts*, 460 U.S. at 280.

41. *Id.* at 282.

42. *Id.* at 281.

43. 417 U.S. 583 (1974) (plurality opinion).

44. *Knotts*, 460 U.S. at 281.

violated the Fourth Amendment, Justice Blackmun stated, “[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation . . . . It travels public thoroughfares where both its occupants and its contents are in plain view.”<sup>45</sup> The *Knotts* Court reasoned that someone traveling in a car on public streets had no reasonable expectation of privacy in his movements from one place to another.<sup>46</sup> The fact that the police relied on their own ability to follow his car and on the beeper’s signal to find the suspect was immaterial to the Fourth Amendment claim.<sup>47</sup> The Court famously stated that the Fourth Amendment did not prohibit scientific and technological augmentation of the police’s natural sensory abilities.<sup>48</sup>

The *Knotts* Court articulated an important caveat relevant to the issue of potential twenty-four hour surveillance.<sup>49</sup> The respondent in *Knotts* argued that the holding sought by the government would allow twenty-four hour police surveillance of anyone in the country without judicial intervention or oversight.<sup>50</sup> The Court rejected that argument, disbelieving that result would occur but stating that, “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.”<sup>51</sup> The Court ultimately held that the use of the beeper raised no constitutional issues distinct from those raised with visual surveillance and there was no search under the Fourth Amendment, as monitoring the beeper signals did not invade a legitimate expectation of privacy.<sup>52</sup>

## 2. *Kyllo v. United States* and Exposure to the Public

A further modification to the Supreme Court’s Fourth Amendment jurisprudence came in *Kyllo v. United States*.<sup>53</sup> In *Kyllo*, the Supreme Court faced the issue of whether the use of a thermal imaging device aimed at a private home from a public street, when the police suspected that defendant was growing marijuana within the home, constituted a search of the home within the meaning of the Fourth Amendment.<sup>54</sup> The police scanned the defendant’s home for several minutes to determine whether or not he was

45. 417 U.S. at 590 (plurality opinion).

46. *Knotts*, 460 U.S. at 281–83. The Court actually went even further than this, holding that even once the car was off public streets and on the person’s private premises, there was no expectation of privacy that extended to the visual surveillance of his car. *Id.* at 282.

47. *Id.*

48. *Id.*

49. *Id.* at 283–84.

50. *Id.* at 283.

51. *Id.* at 284.

52. *Knotts*, 460 U.S. at 285.

53. 533 U.S. 27 (2001).

54. *Id.* at 29. The thermal imaging device at issue detected heat and infra-red radiation. *Id.*

growing marijuana.<sup>55</sup> In its analysis of the case, the Court focused on the defendant's presence in the home at the time of the scan, stating that the right to be free from governmental intrusion within one's own home is at the core of the Fourth Amendment.<sup>56</sup> In prior cases, the Court had held that visual surveillance was not a search at all;<sup>57</sup> it stated that the case before it presented more than just naked-eye surveillance.<sup>58</sup> The Court articulated the issue as a problem of ascertaining the limits upon the power of technology to shrink the realm of guaranteed privacy.<sup>59</sup> Advancements in technology have affected the degree of privacy secured to citizens by the Fourth Amendment, and the Court stated it would "be foolish to contend" otherwise.<sup>60</sup>

The ultimate holding of *Kyllo* suggested that there are differing degrees of permissible intrusion when it comes to technology. The Court stated that using advanced technology to obtain any information from the inside of the home, which could not have been obtained otherwise without a physical intrusion, amounts to a search where the technology in question is not in general public use.<sup>61</sup> The technology used in *Kyllo* was not incredibly advanced, and the Court made a point to account for more sophisticated systems that were in use or development.<sup>62</sup> Justice Scalia, writing for the Court, held that where the government used a device "that is not in general public use" to explore the details of the home that otherwise would have required physical intrusion, the surveillance is a search within the meaning of the Fourth Amendment and is presumptively unreasonable without a warrant.<sup>63</sup>

## II. ANALYZING UNWARRANTED USE OF GPS TRACKING: A LOOK AT DIFFERING CIRCUITS

Circuit courts have been faced with the issue of whether or not warrantless GPS tracking is a search within the meaning of the Fourth Amendment.<sup>64</sup> A considerable number have found that it is not.<sup>65</sup>

55. *Id.*

56. *Id.* at 31.

57. *See, e.g.,* *Dow Chemical Co. v. United States*, 476 U.S. 227, 239 (1985) (holding that enhanced aerial photography of a chemical plant by the Environmental Protection Agency, without a warrant, was not a search within the meaning of the Fourth Amendment).

58. *Kyllo*, 533 U.S. at 33.

59. *Id.* at 34.

60. *Id.* at 33–34.

61. *Id.* at 34.

62. *Id.* at 36.

63. *Id.* at 40.

64. For the purposes of this Article, I will not be exploring the issue of the placement of GPS devices on criminal suspects' vehicles. A number of courts have analyzed the issue, including the Ninth Circuit Court of Appeals in *United States v. Pineda-Moreno*, where the court faced the



### A. *Seventh Circuit*

In *United States v. Garcia*, the Seventh Circuit faced the issue of whether evidence obtained from a tracking device attached to defendant's car should have been excluded at trial as illegally obtained evidence.<sup>66</sup> The defendant in *Garcia* was found buying products to create methamphetamine.<sup>67</sup> The police, without a warrant, placed a GPS device underneath the rear bumper of his car, allowing them to monitor the car's travel history.<sup>68</sup>

In deciding that the use of the GPS did not constitute a search, the court focused on the car's presence in the public sphere when the police were tracking it.<sup>69</sup> The court pointed out that if the police followed a car on streets or observed its route on "Google Earth," there would be no search within the meaning of the Fourth Amendment.<sup>70</sup> The court stated that GPS tracking was the same, for the purposes of a Fourth Amendment search, as the police trying to follow a car on a public street or by using cameras.<sup>71</sup> However, the court limited its holding by emphasizing that it would be unjustified for the police to randomly affix GPS devices to cars to analyze suspicious driving patterns or to pass a law requiring all cars to have GPS devices.<sup>72</sup> "It would be premature to rule that such a program of mass surveillance could not possibly raise a question under the Fourth Amendment . . . ."<sup>73</sup>

The court acknowledged the implications of its holding and its potential effect on an individual's privacy, stating, "[t]here is a tradeoff between security and privacy, and often it favors security."<sup>74</sup> The Seventh Circuit seemed to suggest in its analysis, however, that the tradeoff could very well favor privacy if the police actions went too far, for it ended its opinion stating, "[s]hould government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search."<sup>75</sup>

---

issue of whether the placement of a GPS on the suspect's vehicle undercarriage while on his private property violated his constitutional rights. 591 F.3d 1212, 1214–15 (9th Cir. 2010).

65. The Seventh, Eighth, and Ninth Circuits have all previously dealt with this issue. *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007); *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010); *Pineda-Moreno*, 591 F.3d at 1212.

66. 474 F.3d at 995.

67. *Id.*

68. *Id.*

69. *Id.* at 997.

70. *Id.*

71. *Id.*

72. *Garcia*, 474 F.3d at 998.

73. *Id.*

74. *Id.*

75. *Id.*

### B. Eighth Circuit

The Eighth Circuit Court of Appeals joined the Seventh Circuit in the decision to hold warrantless GPS tracking outside of the meaning of a Fourth Amendment search.<sup>76</sup> In *United States v. Marquez*, the Eighth Circuit found that GPS devices placed on a suspect's car did not violate a person's reasonable expectation of privacy.<sup>77</sup> In *Marquez*, investigators observed the defendant participating in a drug ring conspiracy and arrested him after tracking his movements with a GPS device attached to his car and cameras set up around the area.<sup>78</sup> The defendant attempted to suppress the evidence gathered from the GPS device.<sup>79</sup> The district court denied the motion to suppress, holding that the defendant had no standing to challenge the action because he did not own the car to which the device was attached.<sup>80</sup>

Despite the district court's determination at the outset that the defendant had no standing to challenge the GPS surveillance, the Eighth Circuit Court of Appeals still engaged in an analysis of whether or not the action in question constituted a search.<sup>81</sup> The court held that even if the defendant had standing to challenge the use of the GPS, he would have lost the challenge because his reasonable expectation of privacy had not been violated.<sup>82</sup> The court quoted *Knotts*, emphasizing that a person traveling in a car on public streets has no reasonable expectation of privacy, and no search occurs where electronic monitoring does not invade a legitimate expectation of privacy.<sup>83</sup> Like in *Kyllo*, the court found that surveillance in the public sphere did not raise the same concerns as warrantless electronic monitoring within a private residence.<sup>84</sup> In sum, the court held that no reasonable expectation of privacy was thwarted because the police reasonably suspected that the vehicle was involved in interstate transport of drugs, the vehicle was not tracked while in private structures or on private lands, and the device merely allowed the police to reduce the cost of lawful surveillance.<sup>85</sup>

### C. Ninth Circuit

In 2010, the Ninth Circuit Court of Appeals held that the use of a GPS device in tracking a drug criminal suspect's car was not a search within the

---

76. *United States v. Marquez*, 605 F.3d 604, 609–10 (8th Cir. 2010).

77. *Id.*

78. *Id.* at 607.

79. *Id.* at 608.

80. *Id.*

81. *Id.* at 609.

82. *Marquez*, 605 F.3d at 609–10.

83. *Id.* at 609.

84. *Id.* at 609–10.

85. *Id.*

meaning of the Fourth Amendment, and, therefore, the failure to obtain a warrant did not prevent the evidence gathered from being used at trial.<sup>86</sup> In *United States v. Pineda-Moreno*, drug enforcement agents observed Juan Pineda-Moreno purchasing a large amount of a certain type of fertilizer, known to be used in the growth of marijuana.<sup>87</sup> The agents followed Pineda-Moreno to his home, and after learning where he lived, they began attaching GPS devices to his car.<sup>88</sup> Over a four-month period, the agents attached tracking devices to his vehicle on seven different occasions.<sup>89</sup> Some of those devices allowed the agents to access information regarding Pineda-Moreno's whereabouts from remote locations, while others required the agents to remove the devices and download information directly.<sup>90</sup> Law enforcement agents eventually used the information from the GPS devices to track Pineda-Moreno as he was leaving a marijuana growth site.<sup>91</sup> They arrested him and charged him with conspiracy to grow marijuana.<sup>92</sup> When Pineda-Moreno moved to suppress the evidence gained from the GPS tracker, his motion was denied.<sup>93</sup> He appealed that decision to the Ninth Circuit Court of Appeals.<sup>94</sup>

Pineda-Moreno argued on appeal that the use of mobile tracking devices to monitor the location of his car violated his Fourth Amendment rights because the devices were not generally used by the public.<sup>95</sup> Pineda-Moreno acknowledged the *Knotts* holding but argued it should not be controlling because of the court's holding later holding in *Kyllo* regarding advances in technological devices.<sup>96</sup>

Pineda-Moreno argued that police conduct a search within the meaning of the Fourth Amendment whenever they obtain information using sense-enhancing technology not available to the general public.<sup>97</sup> The court rejected this argument, quoting the Seventh Circuit Court of Appeals' decision that *Knotts* established following a car on a public street was "unequivocally *not* a search within the meaning of the amendment."<sup>98</sup> According to the Ninth Circuit, Pineda-Moreno had misstated the relationship between *Knotts* and

---

86. *United States v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010).

87. *Id.* at 1213.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1214.

92. *Pineda-Moreno*, 591 F.3d at 1214.

93. *Id.*

94. *Id.*

95. *Id.* at 1216.

96. *Id.*

97. *Id.*

98. *Pineda-Moreno*, 591 F.3d at 1216 (quoting *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007)). A prior section of this Article addresses the Seventh Circuit's analysis in *Garcia*. See *supra* Part II.A.

*Kyllo* because he failed to understand the importance of the distinction between the settings where the surveillance had taken place in those two cases.<sup>99</sup> The court stated that in *Kyllo*, the thermal imaging was a substitute for a search of the home, which was unequivocally within the meaning of a Fourth Amendment search, however, in *Knotts*, the substituted activity (following a car) was outside the meaning of the Fourth Amendment.<sup>100</sup> Distinguishing on this point, the court stated that Pineda-Moreno failed to argue that the agents used tracking devices to intrude into a constitutionally protected area, since they were not intruding his home, and the information they collected could have been obtained by following his car.<sup>101</sup> The Ninth Circuit Court of Appeals ultimately held that the use of mobile tracking devices by agents was not a search within the meaning of the Fourth Amendment.<sup>102</sup>

### III. THE D.C. CIRCUIT'S SPLIT IN *UNITED STATES V. MAYNARD*

#### A. *The D.C. Circuit's Analysis of Warrantless GPS Tracking and Fourth Amendment Searches*

Antoine Jones and Lawrence Maynard owned and managed, respectively, the "Levels" nightclub in the District of Columbia.<sup>103</sup> In 2004, a local FBI task force began investigating the two for narcotics violations.<sup>104</sup> That investigation culminated in searches, arrests, and charges for conspiracy to distribute and possession with intent to distribute cocaine, among other things, on October 24, 2005.<sup>105</sup> At a trial ending in January 2008, a jury found both men guilty.<sup>106</sup> On appeal to the D.C. Circuit Court, Jones and Maynard jointly argued for five points of error by the trial court.<sup>107</sup> Jones also argued that the trial court erred in admitting evidence gathered from the warrantless use of a GPS device to track his movements continuously of a month.<sup>108</sup> The prosecution's evidence gathered from the GPS device showed that Jones used his vehicle to store illicit

99. *Pineda-Moreno*, 591 F.3d at 1216.

100. *Id.* The Court affords the highest constitutional protection to the inside of the home. *See Kyllo v. United States*, 533 U.S. 27, 28 (2001) (stating that "in the sanctity of the home, all details are intimate details").

101. *Pineda-Moreno*, 591 F.3d at 1216.

102. *Id.* at 1217. This case was subsequently denied for rehearing en banc, but a vigorous dissent to that denial was filed by Judges Kozinski, Reinhardt, Wardlaw, Paez, and Berzon. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1121–26 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc).

103. *United States v. Maynard*, 615 F.3d 544, 549 (D.C. Cir. 2010).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

drugs and money, transport money to his drug suppliers, and transport drugs.<sup>109</sup> Jones argued that the warrantless use of GPS violated his Fourth Amendment rights because it tracked his movements twenty-four hours a day for four weeks, defeating his reasonable expectation of privacy.<sup>110</sup> On appeal, the D.C. Circuit Court agreed with Jones and held that the continuous surveillance using a GPS tracker without a warrant defeated his reasonable expectation of privacy and was a violation of his Fourth Amendment rights.<sup>111</sup>

The court first considered the question of whether the use of GPS was a search.<sup>112</sup> The prosecution argued that *United States v. Knotts* was directly on point because “a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”<sup>113</sup> The court disagreed.<sup>114</sup> Straying from the Seventh, Eighth, and Ninth Circuits, it held that *Knotts* was not controlling.<sup>115</sup> It reasoned that *Knotts* did not control because *Knotts* dealt with more limited information discovered through police use of a beeper, as opposed to the more comprehensive, long-term GPS monitoring at issue.<sup>116</sup> According to the D.C. Circuit, the factors distinguishing the situation in *Maynard* from *Knotts* were the amount and procedures of gathering the relevant information.<sup>117</sup> The court relied on the fact that the *Knotts* Court specifically distinguished between the limited information discovered by the use of a beeper during discrete journeys and more comprehensive, sustained monitoring using a device like a GPS.<sup>118</sup> Moreover, the D.C. Circuit cited the *Knotts* Court’s reservation on the question of whether a warrant would be required in a case involving “twenty-four hour surveillance,” and its assertion that if such dragnet type law enforcement practices should eventually occur, constitutional issues may be implicated.<sup>119</sup> The court pointed to the recognition in *Knotts* that if a warrant was not required, then prolonged “twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.”<sup>120</sup>

109. *United States v. Jones*, 451 F. Supp. 2d 71, 87–88 (D.D.C. 2006).

110. *Maynard*, 615 F.3d at 555.

111. *Id.* at 555–56.

112. *Id.* at 555.

113. *Id.* at 556 (quoting *United States v. Knotts*, 460 U.S. 276, 281 (1983)).

114. *Id.*

115. *Id.* at 556–58.

116. *Maynard*, 615 F.3d at 556.

117. *Id.*

118. *Id.*

119. *Id.* at 556–57.

120. *Id.* at 556 (quoting *United States v. Knotts*, 460 U.S. 276, 283 (1983) (relying on the defendant’s argument that the beeper surveillance should have defeated his reasonable expectation of privacy)).

The court held that *Knotts* actually had a more limited scope than other circuits were willing to recognize.<sup>121</sup> It emphasized that *Knotts* solely held that there was not a reasonable expectation of privacy in a person's movements from one place to another, *not* that the person had no reasonable expectation of privacy in his movements at all, or "world without end, as the Government would have it."<sup>122</sup> The court distinguished its holding from the Seventh Circuit's holding in *Garcia* because there the defendant's challenge solely raised the question of whether the warrantless tracking with a GPS in and of itself violated the Fourth Amendment, without ever contending that he had a reasonable expectation of privacy.<sup>123</sup> The court rebuked the Seventh Circuit's use of *Knotts* to bless all tracking of cars on public streets and liken GPS tracking to hypothetical practices it assumed were not searches, such as satellite imaging.<sup>124</sup>

In addressing the other circuits, the D.C. Circuit Court also criticized the Ninth Circuit for failing to distinguish between long and short-term surveillance in *Pineda-Moreno*.<sup>125</sup> It highlighted that the Seventh, Eighth and Ninth Circuits, in holding that the Fourth Amendment was not violated by warrantless GPS tracking, each expressly reserved the issue of whether "wholesale" or mass electronic surveillance requires a warrant.<sup>126</sup> In addition, the court cited other jurisdictions which have acknowledged *Knotts*' limited holding in relation to surveillance cases.<sup>127</sup>

In the court's discussion supporting their finding that the GPS tracking violated a reasonable expectation of privacy, it began with an application of the *Katz* test and stated that the totality of Jones' movements over the course of a month was neither actually, nor constructively, exposed to the public.<sup>128</sup> The government contended Jones' movements were actually exposed to the public because the police lawfully could have followed him everywhere he went on public roads.<sup>129</sup> In the court's view, the government had posed the wrong question.<sup>130</sup> The relevant question in considering whether something was

121. *Id.* at 557.

122. *Maynard*, 615 F.3d at 557.

123. *Id.*

124. *Id.*; see *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) (stating that using "Google Earth" to track a suspect would not be a search).

125. *Maynard*, 615 F.3d at 557–58.

126. *Id.* at 558; see *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216 n.2 (9th Cir. 2010); *Garcia*, 474 F.3d at 996.

127. *Id.* at 557; see also *United States v. Butts*, 729 F.2d 1514, 1518 n.4 (5th Cir. 1984) ("As did the Supreme Court in *Knotts*, we pretermitted any ruling on worst-case situations that may involve persistent, extended, or unlimited violations of a warrant's terms."); *People v. Weaver*, 909 N.E.2d 1195, 1199–1201 (N.Y. 2009).

128. *Maynard*, 615 F.3d at 560–61.

129. *Id.* at 559.

130. *Id.*

exposed to the public was not what another person can physically and may lawfully do, but rather what a reasonable person expects another might actually do.<sup>131</sup> “[T]he whole of one’s movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil.”<sup>132</sup>

The court itself raised the issue of whether the whole of Jones’ movements were *constructively* exposed to the public.<sup>133</sup> “When it comes to privacy, however, precedent suggests that the whole may be more revealing than the parts.”<sup>134</sup> All of Jones’ movements were not constructively exposed to the public because, “like a rap sheet, that whole reveals far more than the individual movements it comprises.”<sup>135</sup> The court made a bright distinction between long-term and short-term surveillance when analyzing constructive exposure and concluded that prolonged surveillance reveals more information.<sup>136</sup> It explained this proposition, stating that prolonged surveillance can reveal intimate details about a person’s life, details not otherwise exposed through limited surveillance.<sup>137</sup> Prolonged surveillance can enable the police to learn whether a suspect, for example, “is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.”<sup>138</sup>

Of course, the finding that Jones’ actions were not exposed to the public and that he had an expectation of privacy did not alone suffice; the court had to find that Jones’ expectation of privacy was a reasonable one.<sup>139</sup> The prosecution argued that since Jones was in public, his expectation of privacy in his movements was not reasonable.<sup>140</sup> The court rejected this argument, stating, “[a] person does not leave his privacy behind when he walks out his front door.”<sup>141</sup> It cited *Katz* for the proposition that actions which a person

---

131. *Id.*

132. *Id.* at 558.

133. *Id.* at 560–61.

134. *Maynard*, 615 F.3d at 561; *see also* *Smith v. Maryland*, 442 U.S. 735, 742–43 (1979) (stating that there is an implicit distinction between the whole and the sum of the parts in the case of the Fourth Amendment).

135. *Maynard*, 615 F.3d at 561–62.

136. *Id.* at 562.

137. *Id.* The “intimate details” argument can be traced to Justice Stewart’s dissent in *Smith*, where he stated that “such a list [of all the telephone numbers one called] . . . could easily reveal . . . the most intimate details of a person’s life.” *Smith*, 442 U.S. at 748 (Stewart, J., dissenting).

138. *Maynard*, 615 F.3d at 562.

139. *Id.* at 563.

140. *Id.*

141. *Id.*

seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>142</sup> The court found there is a societal recognition of a reasonable expectation of privacy in the movements over the course of a month.<sup>143</sup> It supported this finding by explaining that GPS monitoring revealed intimate details of people's lives and by citing various state laws, which it called "indicative that prolonged GPS monitoring defeats an expectation of privacy that our society recognizes as reasonable."<sup>144</sup> The court further distinguished *Knotts* and backed its argument that *Knotts*' limited holding was not applicable to its case by pointing out the intrusion that such prolonged GPS tracking makes into a subject's private affairs "stands in stark contrast to the relatively brief intrusion at issue in *Knotts*."<sup>145</sup>

The government criticized the court's potential holding, arguing that the effect would be to prohibit even visual surveillance of persons or vehicles located in public places and exposed to public view.<sup>146</sup> The court countered this argument, stating that the government had not pointed to any actual examples of visual surveillance that would be affected by their holding.<sup>147</sup> The court explained that practical considerations prevented visual surveillance from lasting very long and the money and manpower required to simulate the results of month long GPS tracking would be enormous, whereas GPS was relatively affordable.<sup>148</sup> The D.C. Circuit Court of Appeals felt that the introduction of the GPS into police investigations had created an "unknown type of intrusion into an ordinarily and hitherto private enclave."<sup>149</sup> In sum, the court held that a search without a warrant is presumptively unreasonable, the GPS tracking here was a search within the meaning of the Fourth Amendment, and Jones' conviction should be reversed because the evidence convicting him was procured in violation of his constitutional rights.<sup>150</sup>

#### B. *Author's Analysis of United States v. Maynard*

The D.C. Circuit Court was correct in concluding that the warrantless GPS tracking of Jones violated his reasonable expectation of privacy and was a

142. *Id.*

143. *Id.*

144. *Maynard*, 615 F.3d at 563–64. The court cited various state codes that impose penalties for the use of electronic tracking devices and expressly require exclusion of evidence obtained from such devices unless the police procured a warrant prior to tracking. *See, e.g.*, CAL. PENAL CODE § 637.7 (West 2010); UTAH CODE ANN. §§ 77-23a-4, 77-24a-7, 77-24a-15.5 (West 2003); MINN. STAT. §§ 626A.35, 626A.37 (2010); FLA. STAT. §§ 934.06, 934.42 (2010).

145. *Maynard*, 615 F.3d at 563.

146. *Id.* at 565.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 566, 568.



search within the meaning of the Fourth Amendment.<sup>151</sup> There are several reasons why the analysis in *Maynard* is preferable to the analysis of the Seventh, Eighth, and Ninth Circuits and why warrantless GPS tracking violates one's reasonable expectation of privacy. First, in applying *Knotts*, the three circuits erred in their failure to distinguish between prolonged and short-term surveillance.<sup>152</sup> The D.C. Circuit Court was correct to recognize that *Knotts* had a limited holding.<sup>153</sup> Second, Justice Harlan's test for a reasonable expectation of privacy in *Katz* that the majority in *Maynard* relied on has evolved, now focusing more on the objective reasonable expectation of privacy, instead of the subjective, and this has important implications for GPS tracking cases.<sup>154</sup> When focusing on an objective reasonable expectation to privacy, it becomes obvious that society is coming to recognize an expectation with regards to GPS tracking.<sup>155</sup> Finally, the differences between the rudimentary beeper technology used in *Knotts* and the GPS tracking technology used in the later cases has an important impact on the Fourth Amendment search analysis. The "substituting activities" argument made in *Pineda-Moreno* and the other cases cannot stand when one considers the practical impact of more advanced GPS technology.<sup>156</sup>

#### 1. The Limited Holding of *United States v. Knotts*

The D.C. Circuit Court was correct to split from other circuits and hold that *Knotts* had a limited scope which did not apply to the facts of Jones' surveillance.<sup>157</sup> There is an admittedly sound rationale behind the idea that the activities exposed to the public world should not be subject to a reasonable expectation of privacy. Namely, it is logical to say that when an individual

151. *Maynard*, 615 F.3d at 568.

152. See *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007); *United States v. Marquez*, 605 F.3d 604, 609 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216 (9th Cir. 2010).

153. *Maynard*, 615 F.3d at 563–64.

154. Hutchins, *supra* note 7, at 1190–91.

155. Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 277 tbl.1 (2002) (citing a survey which revealed that people were more concerned with police camera surveillance on a public street where the tapes were not destroyed); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 136 (2002) ("People thus perceive the act of tracking everywhere a person drives in public as meaningfully distinct from temporarily following a person, an activity which is itself a step removed from simply noticing the person because he or she is driving out in public."); Reader Poll on the Growing Use of GPS by Police, WASH. POST (Aug. 13, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/12/AR2008081203275.html> (indicating sixty percent of 3,008 responders believed that the use of GPS technology to track criminal suspects marks a troubling trend).

156. *Pineda-Moreno*, 591 F.3d at 1216.

157. *Maynard*, 615 F.3d at 557.

takes something that otherwise is private and reveals it in public (like their location), the individual invites the public to gain that knowledge and invites a certain amount of public scrutiny.<sup>158</sup> The level of public scrutiny that the reasonable person actually invites when they enter the public sphere, however, is not as high as the Seventh, Eighth, and Ninth Circuits would like to say it is.<sup>159</sup> While it may include the limited information that the police obtained from the beeper used in *Knotts*, it is not likely to include the long-term and detailed information the police gained from their month long, twenty-four hour surveillance of Jones via a GPS tracker.<sup>160</sup> This is because simply stepping out of one's home and onto a public street does not necessarily expose a great amount of detail about personal life.<sup>161</sup> Moreover, the public sphere does offer some protections, as the dissent in *Pineda-Moreno* recognized: "You can preserve your anonymity from prying eyes, even in public, by traveling at night, through heavy traffic, or in crowds . . ."<sup>162</sup> With the employment of a GPS device, these protections are gone, as there is no hiding from the "all-seeing network" of GPS satellites.<sup>163</sup>

The D.C. Circuit Court's recognition that there is a need to distinguish between long-term and short-term surveillance shows that it better understood the necessary analysis for deciphering what constitutes a reasonable expectation of privacy.<sup>164</sup> It recognized that the GPS surveillance was a prolonged search because it was long-term surveillance as opposed to the limited information the police received from the use of the beeper.<sup>165</sup> Other courts have also pointed to this difference in their analysis on the shortcomings of *Knotts*' limited holding to justify the conclusion that GPS tracking does not constitute a search.<sup>166</sup> An important distinction between the facts in *Knotts* and

158. Otterberg, *supra* note 15, at 686.

159. *Id.*

160. *Id.* at 675; *Maynard*, 615 F.3d at 556.

161. See Nancy Danforth Zeronda, Note, *Street Shootings: Covert Photography and Public Privacy*, 63 VAND. L. REV. 1131, 1146 (2010) ("When a person steps outside the four walls of her home, she still expects to control what personal 'information' gets conveyed to the public.").

162. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc); Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1419–20 (2004) (noting that the physical environment of the public space can provide substantial opportunity for privacy, such as by merging into a crowd or by interacting with different groups of people in different contexts).

163. *Pineda-Moreno*, 591 F.3d at 1126 (Kozinski, J., dissenting from the denial of rehearing en banc).

164. *Maynard*, 615 F.3d at 558.

165. *Id.*

166. The New York Court of Appeals recently recognized the limited scope of *Knotts* in its decision that the prolonged use of GPS tracking device on a suspect's car constituted a search and its use without a warrant violated the state constitution. *People v. Weaver*, 909 N.E.2d 1195,

in *Maynard* was that the beeper in *Knotts* could not perform tracking on its own, and if no one was close enough to pick up the signal, it was lost forever.<sup>167</sup> In his concurrence in *Knotts*, Justice Stevens, joined by Justices Brennan and Marshall, suggested that the holding in *Knotts* could potentially be construed as overly broad.<sup>168</sup> Justice Stevens urged that the majority was not entirely correct in suggesting that the Fourth Amendment did not inhibit the police from augmenting the “sensory facilities bestowed upon them at birth” with such enhancement as science and technology afforded them.<sup>169</sup> He stated that while the augmentation in *Knotts* of using a beeper to aid in actual physical tracking was unobjectionable, “it by no means follows that the use of electronic detection techniques does not implicate especially sensitive concerns.”<sup>170</sup> This language in his concurrence advocated applying *Knotts* in a more limited way, especially when the augmentation of police powers could be considered objectionable, as in the case of twenty-four hour GPS surveillance.

By declining to apply *Knotts* to Jones’ surveillance, the D.C. Circuit Court in *Maynard* protected against the very concern that the Supreme Court deferred in *Knotts*.<sup>171</sup> The necessary distinction between long-term and short-term surveillance becomes even more obvious when one looks closely at *Knotts*. There, the court articulated that its holding would not permit twenty-four hour surveillance without judicial supervision and that, “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.”<sup>172</sup> The Seventh and Ninth Circuits acknowledged that there may be an important difference in constitutionality when it comes to a heightened level of surveillance.<sup>173</sup> For example, neither circuit would extend its holding that warrantless GPS tracking does not constitute a search if the government were to initiate a massive surveillance campaign.<sup>174</sup> In this concession and refusal to apply their holdings to such a

---

1198–99 (N.Y. 2009). The Fifth Circuit Court of Appeals also suggested the limited holding of *Knotts*, stating, “*Knotts* deliberately left unanswered not only the question of whether the police conduct that made the monitoring possible violated the Fourth Amendment, but also the question of how such conduct, if illegal, will be dealt with.” *United States v. Butts*, 729 F.2d 1514, 1517 (5th Cir. 1984); *see also* *State v. Jackson*, 76 P.3d 217, 223 (Wash. 2003) (en banc) (reaching a similar, limited scope conclusion).

167. *Pineda-Moreno*, 617 F.3d at 1124 (Kozinski, J., dissenting from the denial of rehearing en banc). This distinction will be explored in more detail in Part III.B.3.

168. 460 U.S. 276, 288 (1983) (Stevens, J., concurring).

169. *Id.*

170. *Id.*

171. *Id.* at 284 (majority opinion).

172. *Id.*

173. *United States v. Pineda-Moreno*, 591 F.3d 1212, 1217 n.2 (9th Cir. 2010).

174. *Id.* (“We, like the Seventh Circuit, believe that ‘[s]hould [the] government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough

situation, they fail to realize that it may not take a “massive surveillance campaign” to trigger a violation of constitutional rights. The Ninth Circuit pointed to the New York Court of Appeals case, *People v. Weaver*,<sup>175</sup> and that court’s fear that permitting warrantless GPS tracking would support the unsupervised intrusion by the police into personal privacy.<sup>176</sup> It then quoted *Knotts*, saying, “reality hardly suggests abuse.”<sup>177</sup> The problem is that reality is actually beginning to suggest abuse, as evidenced by the warrantless prolonged surveillance of Jones in the *Maynard* case. The Ninth Circuit’s reliance on *Knotts* for the proposition that there is not modern day abuse is further illogical because *Knotts* was decided in 1983, before the use of GPS tracking devices by the police had begun.<sup>178</sup> In fact, in stating that “reality hardly suggests abuse,” the *Knotts* Court was quoting a 1978 decision regarding a search of a newspaper office.<sup>179</sup> Searching a newspaper office is a far cry from the continuous, unwarranted tracking of an individual’s location in 2010.

The Supreme Court has recognized differing degrees of intrusion into privacy in its Fourth Amendment jurisprudence.<sup>180</sup> By acknowledging differing degrees of privacy, the Court has recognized that different levels of justification are necessary in order to protect against constitutional violations.<sup>181</sup> These differing degrees of intrusion into privacy come to light especially when analyzing the distinction between short-term and long-term surveillance.<sup>182</sup> A higher degree of intrusion into someone’s privacy requires a higher level of justification, and it logically follows that the limited information gathered from the beeper in *Knotts* would not require as high of a burden of justification as the prolonged surveillance in *Maynard*.

While an individual may be unconcerned about certain public activities being viewed in isolation or for a limited period of time, that same person may feel his or her privacy has been violated when those details are collected and

---

to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search.” (quoting *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007)).

175. *People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009).

176. *Pineda-Moreno*, 591 F.3d at 1217 n.2.

177. *Id.* (quoting *Knotts*, 460 U.S. at 284).

178. President Reagan first granted civilian access to GPS in 1983. See Otterberg, *supra* note 15, at 666.

179. 460 U.S. at 283–284 (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978)).

180. See Bennett L. Gershman, *Privacy Revisited: GPS Tracking as Search and Seizure*, 30 PACE L. REV. 927, 955 (2010).

181. *Id.*; *Terry v. Ohio*, 392 U.S. 1, 19–20, 25 (1968) (recognizing that while the government interest in investigating reasonably suspicious behavior authorized police to forcibly detain an individual for a period of time, the temporary detention did not justify the greater intrusion of a search).

182. Blitz, *supra* note 162, at 1408–10.

viewed in the aggregate.<sup>183</sup> Such prolonged surveillance and subsequent aggregation reveals far more details. It may reveal more than many citizens would be comfortable with revealing, regardless of whether they were participating in illegal behavior or not,<sup>184</sup> and the D.C. Circuit Court correctly recognized that in *Maynard*.<sup>185</sup> A reasonable person does not expect anyone to monitor and retain a record of every car ride, route, destination, and how long he stays at each destination.<sup>186</sup> Rather, he expects his movements to remain “disconnected and anonymous.”<sup>187</sup> In sum, exposing one’s actions to the public may diminish an expectation of privacy, but it does not eliminate that expectation altogether. The Seventh, Eighth and Ninth Circuits failed to make that distinction.<sup>188</sup> The decision in *Maynard* correctly distinguishes between the prolonged surveillance of Jones and the short-term and limited beeper surveillance used in *Knotts*. For this reason, the D.C. Circuit Court was correct to hold that *Knotts*’ limited scope did not apply and that Jones did have a reasonable expectation of privacy in his movements over the course of a month.<sup>189</sup>

## 2. The Disappearing Subjective Analysis of a Reasonable Expectation of Privacy

In applying the *Katz* test for a reasonable expectation of privacy, the D.C. Circuit Court was correct to conclude that Jones had such an expectation in his movements.<sup>190</sup> While the *Katz* test has both subjective and objective prongs, the D.C. Circuit Court relied more heavily on the objective prong, with good reason.<sup>191</sup> In the time since Justice Harlan formed the test for a reasonable expectation of privacy, many courts have come to consider mainly the objective prong, leaving the subjective expectation of privacy to fall by the wayside.<sup>192</sup> There is strong evidence that even the Supreme Court gives more credence to the objective reasonableness prong.<sup>193</sup> In *United States v. White*, the Court articulated that the main consideration for the test is “not what the privacy expectations of particular defendants in particular situations may be . . . . Our problem, in terms of the principles announced in *Katz*, is what

183. *Id.* at 1409.

184. *Id.* at 1408–10.

185. *United States v. Maynard*, 615 F.3d 544, 562–63 (D.C. Cir. 2010).

186. *Maynard*, 615 F.3d at 563.

187. *Id.* (citation omitted).

188. Otterberg, *supra* note 15, at 687.

189. *Maynard*, 615 F.3d at 558, 563.

190. *Id.* at 563.

191. *See id.* 563–64; Hutchins, *supra* note 7, at 1190.

192. *Id.* at 1191–92.

193. *Id.*; *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

expectations of privacy are constitutionally ‘justifiable’—what expectations the Fourth Amendment will protect in the absence of a warrant.”<sup>194</sup>

It is impractical to heavily rely on the subjective element of this test because as a practical matter, most criminals will subjectively desire to shield their wrongdoings from the public eye. Courts should instead focus on what society overall deems to be a justifiable expectation of privacy rather than lending too much importance to the subjective expectation of a particular person. The D.C. Circuit Court’s discussion of “the whole of one’s movements” and how prolonged GPS tracking can lead to discovery of the most detailed aspects of a person’s life is in line with the current trend to consider the objective reasonableness prong more seriously.<sup>195</sup> Courts must mainly analyze what kind of expectations a reasonable person has when traveling in the public sphere.<sup>196</sup> Most reasonable persons would consider the constant tracking of their movements for a prolonged period and the subsequent ability to learn such personal details of their everyday life to be a violation of their reasonable expectation of privacy.

When analyzing the objective prong, it is important to note that the general availability of GPS devices to the public also does not defeat the objective societal expectation of privacy. In *Kyllo*, the Court distinguished between technology that was generally available to the public and technology that was available only to the government, such as the thermal imaging device at issue in that case.<sup>197</sup> This distinction, however, is not dispositive in the case of GPS devices. While useful in *Kyllo*, the narrow holding of that case regarding collecting information from inside a home does not define society’s expectation of privacy when it comes to GPS tracking.<sup>198</sup> For example, most people reasonably expect that when they drive to the store, bystanders may notice them doing so. Conversely, people generally do not *reasonably* expect a bystander to observe all of their actions in the aggregate over the course of a month. Similarly, regardless of the fact that GPS devices are available for purchase to the public, most people do not reasonably expect someone to attach a GPS device to their vehicle and create a detailed log of all of their

---

194. *White*, 401 U.S. at 751–52 (plurality opinion).

195. *Maynard*, 615 F.3d at 558.

196. For one author’s definition of privacy, see Zeronda, *supra* note 161, at 1146 (quoting Professor Alan Westin’s widely accepted definition of privacy, as “the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”).

197. *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001).

198. *See id.* at 40 (holding that where “the Government uses a device that is not in general public use, to explore the details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’”).

activities over the course of a month.<sup>199</sup> If one were to place all emphasis on the distinction of technology available for public use, the results could be disastrous, as many types of highly intrusive mechanisms which people would not expect to be in general use are realistically easily available to the public.<sup>200</sup>

The notion that someone may be tracking individual movements using a GPS device generally offends society's expectation of privacy in the public sphere.<sup>201</sup> The likelihood that a bystander will observe all of one's movements for a month and the likelihood that someone has attached a GPS device to their car in order to track all of those movements is slim enough to justify a reasonable expectation of privacy when traveling in a private vehicle in the public sphere.<sup>202</sup> In order to define a reasonable expectation of privacy and, in essence, to decide if use of a certain technology offends such an expectation in a certain case, emphasis should not be placed solely on the availability and use of that technology *in general* but on the specific factual circumstances of the surveillance.<sup>203</sup> Society may recognize that GPS devices are readily available and used frequently, but it does not follow that the norm is for people to expect such a device to be attached to their car.

---

199. See Talia E. Neri, *Privacy in the Age of Tracking Technology: Why G.P.S. Technology Should Not Be Used to Track Process Servers*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 209, 247 (2009) (examining society's reasonable expectation of privacy in public spaces and citing activities such as staring and stalking as crossing that boundary).

Admittedly, a reasonable person cannot expect complete secrecy of their actions and words in a public arena, but there is some threshold boundary that we expect other people to respect when we are in their presence. . . . Essentially, we have a certain expectation about the level of observation that is acceptable in public.

. . . [T]he person who is on the receiving end of the stare or who is being followed is placing himself in the public eye, yet societal standards afford a base level of privacy not to be crossed.

*Id.*

200. Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 400 (1997) (noting that it is illogical to rely too heavily on the availability of technology to the public in defining what constitutes a search because, for example, a map-making camera that costs \$22,000 is both highly intrusive and also generally available to the public).

201. Neri, *supra* note 199, at 247 (noting that while the GPS does not *openly* violate our sense of decency, it may have profound psychological and emotional effects and inhibit our ability to operate in the public sphere).

202. *United States v. Maynard*, 615 F.3d 544, 560 (D.C. Cir. 2010).

203. See *Florida v. Riley*, 488 U.S. 455, 450 (1989); *id.* at 455 (O'Connor, J., concurring) (finding an inspection made from a helicopter did not constitute a search under the Fourth Amendment). In her essential concurrence, Justice O'Connor explained, "[i]f the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have 'knowingly expose[d]' his greenhouse to public view." *Id.* (O'Connor, J., concurring).

Moreover, to say that since GPS devices are available for general public use and, therefore, that unwarranted use by law enforcement of the devices does not encroach on Fourth Amendment rights is to run the risk of giving law enforcement a *carte blanche* when it comes to using technology. Simply because a device is available to the public for misuse does not mean that courts should sanction any government use of the technology. Technological advances in electronic surveillance are invading and posing a great threat to the privacy of individuals, and the utmost care must be given when defining the boundaries of society's reasonable expectation of privacy.<sup>204</sup>

Empirical evidence supports the conclusion that society is coming to recognize an objective expectation of privacy with regards to warrantless GPS tracking. Studies have shown growing concern with warrantless GPS tracking and similar surveillance techniques.<sup>205</sup> Such concerns illustrate that society indeed is coming towards recognizing an expectation of privacy in the public sphere, because that concern would not be present if they did not believe there was a privacy expectation in public.<sup>206</sup> The dissent in *Pineda-Moreno* recognizes this societal interest, aptly stating, "[t]here is something creepy and un-American about such clandestine and underhanded behavior."<sup>207</sup> One author has acknowledged the expansion of society's expectation of privacy, saying, "it is also time to consider whether the public-private distinction, as it has developed over the past century and a half, makes sense in a digital age."<sup>208</sup> The D.C. Circuit Court recognized the need to reconsider such a distinction, and was therefore, correct in finding that Jones had a reasonable objective expectation to privacy which society recognizes as legitimate.

### 3. The Implications of the Technological Differences Between *Knotts'* Beeper and *Maynard's* GPS

The technological differences between using a beeper to track a suspect's whereabouts and using a GPS device to do the same are substantial and have significant ramifications on the Fourth Amendment analysis and whether or not an action constitutes a search. The Seventh and Ninth Circuit Courts, in arguing that GPS tracking was simply a substitute for normal police surveillance, failed to recognize the importance of these ramifications resulting

204. Pomerance, *supra* note 2, at 277.

205. See, e.g., Colb, *supra* note 155, at 135–36; Slobogin, *supra* note 155, at 277 tbl.1; Reader Poll on the Growing Use of GPS by Police, WASH. POST (Aug. 13, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/12/AR2008081203275.html>.

206. Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 568 (1990) (noting the concern about police intrusions on privacy in the public sphere).

207. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc).

208. John Palfrey, *The Public and the Private at the United States Border with Cyberspace*, 78 MISS. L.J. 241, 294 (2008).



from the differences between the two technologies.<sup>209</sup> That such an argument was a large part of their reasoning in holding that GPS tracking did not constitute a search shows shortsightedness in their Fourth Amendment analysis.<sup>210</sup> In *Maynard*, the D.C. Circuit Court correctly refrained from categorizing GPS tracking as a substitute for police surveillance.

The Seventh, Eighth, and Ninth Circuits all relied heavily on the proposition in *Knotts* that “[n]othing 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.”<sup>211</sup> The Ninth Circuit Court in *Pineda-Moreno* reasoned, relying on *Knotts*, that where the information was gathered by an electronic device and that device was the substitute for an activity, like the police following the car on the streets, it was not a search.<sup>212</sup> They further stated that since the only information the police obtained from the tracking device was a log of the locations the car traveled to, the police could have obtained this by following the car, and that fact also precluded the court from holding the action was a search.<sup>213</sup> To drive home the point, the Ninth Circuit Court quoted *Knotts*, saying, “[w]e have never equated police efficiency with unconstitutionality and decline to do so now.”<sup>214</sup>

The *Garcia* court made a similar argument, focusing more on the technological side.<sup>215</sup> It looked at the differences between old technology (police following a suspect in a car) and new technology (cameras mounted on lampposts or using satellites to capture images of suspects on land).<sup>216</sup> The court equated GPS with the new technology of mounting cameras on lampposts and using satellites to take pictures.<sup>217</sup> They simply stated that if what the old technology did was not a search under the Fourth Amendment, neither was the new technology and thus, using the GPS was not a search.<sup>218</sup> In summary, both the Ninth and Seventh Circuit Courts argued that using a GPS to track a suspect’s location was not a search because it was solely

209. *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216 (9th Cir. 2010); *United States v. Garcia*, 474 F.3d 994, 997–98 (7th Cir. 2007).

210. *See Pineda-Moreno*, 617 F.3d at 1126 (Kozinski, J., dissenting from the denial of rehearing en banc) (stating that the holding in *Pineda-Moreno* takes “quite a leap from what the Supreme Court actually held *Knotts*, which is that you have no expectation of privacy as against police who are conducting visual surveillance”).

211. 460 U.S. 276, 282 (1983).

212. *Pineda-Moreno*, 591 F.3d at 1216.

213. *Id.* at 1216–17.

214. *Id.* at 1216 (quoting *Knotts*, 460 U.S. at 284).

215. 474 F.3d 994, 997 (7th Cir. 2007).

216. *Id.*

217. *Id.*

218. *Id.*

substituting new technology for what the police could have done in person by following the suspect in a car.<sup>219</sup>

The *Knotts* Court stated that it was acceptable for police to augment their sensory faculties with science and technology.<sup>220</sup> Nevertheless, to extend this statement to include GPS tracking would be to take too many liberties with the facts and ignore certain realities that have significant impact on the Fourth Amendment analysis. According to the Court, on the surface, police efficiency clearly does not equate with unconstitutional activity.<sup>221</sup> However, one cannot solely rely on that argument from *Knotts* to justify any and all augmentations of police efficiency. Of course, just because something is more advanced technologically does not mean that it is automatically unconstitutional or that the police will abuse the technology. However, the Court has previously taken into account the fact that the Fourth Amendment implications might change when the technology does. For instance, in *Kyllo*, the Court stated, “[w]hile the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.”<sup>222</sup> GPS tracking devices are a prime example of “more sophisticated systems” that require closer scrutiny in their use.

The Seventh, Eighth and Ninth Circuit Courts all relied heavily on *Knotts* in deciding that the use of a GPS was not a search, and, as such, it is necessary to analyze the actual differences between the beeper used in *Knotts* and GPS tracking devices, such as the one at issue in *Maynard*. After that analysis, one can see that those circuits erred in relying on *Knotts* to the extent they did. The *Knotts* Court predicated their argument on the fact that the technology used was very primitive,<sup>223</sup> as compared to the vastly superior GPS technology that pinpoints an exact location at any time.<sup>224</sup> The beeper device in *Knotts* was a battery operated radio transmitter that issued intermittent signals which police could pick up when they used a radio receiver.<sup>225</sup> In contrast, a GPS device provides continuous, highly accurate, and reliable positioning and timing information to users, available to police over the Internet.<sup>226</sup> The system functions through satellites that broadcast precise time signals, giving GPS devices more accurate readings than the signals received from beeper devices.<sup>227</sup> In light of the considerable differences in accuracy between a GPS

219. *Id.*; *Pineda-Moreno*, 591 F.3d at 1216.

220. *United States v. Knotts*, 460 U.S. 276, 282 (1983).

221. *Id.* at 284.

222. 533 U.S. 27, 36 (2001).

223. 460 U.S. at 284–85.

224. See *How Accurate is GPS?*, GARMIN, <http://www8.garmin.com/aboutGPS/> (last visited Feb. 15, 2011) (noting that this technology is “extremely accurate”).

225. *Knotts*, 460 U.S. at 277–78.

226. Otterberg, *supra* note 15, at 665.

227. *Id.*

device and a beeper, the two cannot be compared on equal grounds with respect to their use in police surveillance, and the holding regarding beepers in *Knotts* cannot, with good conscience, be used to support an analysis that equates beepers to the highly more accurate GPS devices.<sup>228</sup>

Another critical distinction between a GPS device and a beeper is that the GPS functions entirely on its own, whereas the beeper in *Knotts* required police to be in the vicinity with a receiver in order to gain the information they wanted about the suspect's whereabouts.<sup>229</sup> Therefore, when the police activity at issue is using a GPS device to track a suspect, a court cannot logically make the argument that police are simply substituting one activity for another because the GPS does not require police presence to function; rather it only requires police presence at the time of attachment. Since a GPS is fundamentally different from a beeper, that makes it even less similar to actual visual surveillance, and the *Knotts* analogy is inapplicable.<sup>230</sup> This has incredible implications for the Fourth Amendment analysis and for courts' ability to rely on *Knotts* in GPS cases. For this reason, the *Maynard* court was correct not to equate the GPS and beeper technology.

The view that using a GPS device is synonymous with police maintaining visual surveillance or using a beeper also ignores the practical and logistical difficulties police would have in duplicating the results of the month long, continuous tracking of a suspect using a GPS. While it may be theoretically possible for the police to engage in such tracking without using a GPS, it is an unsustainable position given common limitations on police investigations, such as budgetary, time, and personnel issues.<sup>231</sup> The drain on resources that would occur should police attempt to duplicate the results of GPS surveillance by actual visual surveillance would almost necessarily ensure a curtailed visual surveillance. When surveillance techniques become so extensive that they cannot realistically be maintained by actual police personnel themselves, then the argument that police are simply augmenting their natural capabilities fails.<sup>232</sup> GPS allows for prolonged surveillance that provides law enforcement

---

228. Tarik N. Jallad, Comment, Recent Development, *Old Answers to New Questions: GPS Surveillance and the Unwarranted Need for Warrants*, 11 N.C. J.L. & TECH. 351, 358 (2010) (arguing that differences in GPS technology and beeper technology are similar enough in their results to justify the same Fourth Amendment analysis, however, "[u]nlike the beeper, GPS remains accurate even from great distances, both in congested areas and throughout various weather elements. And the beeper's location estimation pales in comparison to satellite's pinpoint accuracy" (footnotes omitted)).

229. *Id.*

230. *Knotts*, 460 U.S. at 282.

231. Gershman, *supra* note 180, at 951.

232. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc) (noting that GPS satellites "never sleep, never blink, never get confused and never lose attention").

with a comprehensive, detailed, and lengthy record of one's movements—a kind of record virtually impossible to obtain through visual surveillance or even beeper-attended surveillance, unless police resources were unlimited.<sup>233</sup> As a result of these differences, GPS tracking cannot be equated to beeper technology or to actual police surveillance, and, therefore, the D.C. Circuit Court was correct to decline to rely on this argument.<sup>234</sup>

#### CONCLUSION

The D.C. Circuit Court properly appreciated the limited holding of *United States v. Knotts* and declined to apply it to the situation in *Maynard* because, among other reasons, there is a significant difference between short-term surveillance and prolonged surveillance when defining a reasonable expectation of privacy.<sup>235</sup> Moreover, the D.C. Circuit Court appropriately abstained from engaging in a “substituting activities” argument that both the Ninth and Seventh Circuit Courts relied on when they held that the unwarranted use of GPS tracking devices was not a search under the Fourth Amendment.<sup>236</sup> As these activities are not comparable because of the practical realities of police capabilities and the advanced technology of GPS devices, they cannot be given the same status within the Fourth Amendment search analysis.<sup>237</sup> Indeed, using a GPS device without a warrant to track a suspect's movements twenty-four hours a day over the course of a month violates one's reasonable expectation of privacy and should be defined as a search within the Fourth Amendment, thus requiring law enforcement officials to obtain a warrant before such an investigation is initiated.

The issue of modern technology's impact on the Fourth Amendment presents courts with a difficult challenge, and the number of conflicts resulting will surely grow in the coming years as technology continues to develop as an integral part of life, crime, and crime prevention. It will become increasingly important for courts to ensure law enforcement officials have the continued ability to protect the community against crime, while also recognizing and protecting the constitutional rights the Fourth Amendment is meant to bestow upon citizens. The D.C. Circuit Court of Appeals took a step in the right direction on August 6, 2010, in holding that the unwarranted use of a GPS device to track a suspect's movements over the course of a month was a search

---

233. Otterberg, *supra* note 15, at 696.

234. *United States v. Maynard*, 615 F.3d 544, 565 (D.C. Cir. 2010).

235. *Id.* at 558.

236. *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007); *United States v. Pineda-Moreno*, 617 F.3d at 1126 591 F.3d 1212, 1216 (9th Cir. 2010).

237. Gershman, *supra* note 180, at 951.

within the meaning of the Fourth Amendment and, therefore, violated the suspect's constitutional rights.<sup>238</sup>

MARGARET C. EVEKER\*

---

238. *Maynard*, 615 F.3d at 568.

\* J.D. Candidate 2012, Saint Louis University School of Law.