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COMMENT

“REASONABLE SUSPICION PLUS”: A FRAMEWORK TO ADDRESS CHIEF JUDGE ALEX KOZINSKI’S CONCERNS OF MASS SURVEILLANCE WITHOUT COMPROMISING POLICE EFFECTIVENESS

*TYLER R. SMITH**

And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.¹

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¹ *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

INTRODUCTION

Global Positioning Systems² (GPS) provide law enforcement³ with a powerful tool to covertly investigate criminal networks.⁴ These networks, however, are often themselves technologically sophisticated and thus able to elude police surveillance.⁵ GPS monitoring has drawn substantial criticism recently as police, in many jurisdictions, may utilize the technology without a search warrant; the issue has boiled down to whether the Fourth Amendment requires a search warrant in the first place.⁶

² See generally 18 U.S.C.A. § 3117(b) (Westlaw 2011) (defining a mobile tracking device as “an electronic or mechanical device which permits the tracking of the movement of a person or object”). The United States Department of Defense began development of GPS in the mid-1970s. The technology, which went into operation in 1995 under management of the United States Air Force, utilizes satellite “constellations” to communicate “highly accurate, real-time, all weather” information to military and civilian users. U.S. DEP’T OF DEF., NAVSTAR GLOBAL POSITIONING SYSTEM (GPS), at V-144 (1999), available at <http://www.dote.osd.mil/pub/reports/FY1999/pdf/99gps.pdf> (“DoD approved the NAVSTAR GPS program in December 1973. Full-scale development began in June 1979.”).

³ Law enforcement agencies include federal agencies such as the Drug Enforcement Administration and the Federal Bureau of Investigation as well as state and local law enforcement. Although “law enforcement” and “police” are used interchangeably throughout this Comment, “agent” is used to denote a DEA or FBI agent, whereas “officer” denotes a state or local police officer. The distinction is important in order to accurately discuss facts of actual cases. For simplicity, however, “officer(s)” and “police” will be used instead of “agent(s)” in any hypothetical discussion or general analysis of the rules.

⁴ The court of appeals decisions that this Comment discusses each involved a fact pattern in which the defendant was involved in either a drug manufacturing operation or drug trafficking (supply) operation. These drug rings typically require vehicular movement, whether it be back and forth to a marijuana grow site (or methamphetamine laboratory), or to transport the contraband from one location to another. See, e.g., *United States v. Moran*, 349 F. Supp. 2d 425, 458 (N.D.N.Y. 2005) (discussing the difficulty of surveilling Hell’s Angels: “They frequently reside at locations owned or rented by others, and use other people’s names to register vehicles and obtain utilities and services, in an attempt to avoid identification by law enforcement. Jecko stated that Hell’s Angels often reside in rural locations, where stationery surveillance could easily be detected. They monitor police frequencies using scanners and use counter-surveillance techniques, such as periodically photographing surrounding areas in order to discover law enforcement surveillance equipment such as pole cameras.”); see also *United States v. Dadanovic*, No. 09-63-ART, 2010 WL 3620251, at *2 (E.D. Ky. Sept. 10, 2010) (discussing how several suspects of a particular investigation lived in rural areas so that officers following the suspects in a police car could have easily alerted the suspects).

⁵ See Frank J. Marine, *The Threats Posed by Transnational Crimes and Organized Crime Groups*, in CURRENT PROBLEMS IN THE COMBAT OF ORGANIZED TRANSNATIONAL CRIME 25 (1999), available at www.unafei.or.jp/english/pdf/PDF_rms/no54/no54.pdf (“[M]odern advanced telecommunications and information systems that are used in legitimate . . . activity can also be used by criminal networks to improve their own communication and to quickly carry out criminal transactions . . .”).

⁶ See *United States v. Hernandez*, 647 F.3d 216 (5th Cir. 2011) (concluding that neither the installation of the GPS device nor the subsequent monitoring violated the defendant’s Fourth Amendment rights); *United States v. Pineda-Moreno* (*Pineda-Moreno I*), 591 F.3d 1212 (9th Cir.

The United States Court of Appeals for the Ninth Circuit recently held in *United States v. Pineda-Moreno*, that police do not need a warrant in order to utilize GPS devices in a criminal investigation.⁷ In his dissent to denial of rehearing en banc,⁸ Chief Judge Alex Kozinski fervently forewarned of the dangerous new precedent created by the court's decision: "The needs of law enforcement . . . are quickly making personal privacy a distant memory. 1984 may have come a bit later than predicted, but it's here at last."⁹ But *Nineteen Eighty-Four*,¹⁰ George Orwell's dystopian novel that prognosticates a police state where the government—"Big Brother"—keeps a close watch over its citizens, is an unfair comparison to the current reality of GPS monitoring.¹¹ Nevertheless, for many immigrants to this country, including Judge Kozinski,¹² living under a police state has been more reality than fiction, and the admonition should not be ignored. This Comment addresses the concern about "mass surveillance" with a proposed rule that would require police, as a condition precedent, to articulate their reasonable

2010) (holding that attachment of a GPS device to a vehicle while parked in the suspect's driveway was not a violation of his Fourth Amendment rights), *petition for cert. filed* (U.S. Nov. 10, 2010) (No. 10-7515); *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010) (holding that the prolonged surveillance aided by GPS technology was a search because it painted a detailed picture of the suspect's life), *cert. granted sub nom.* *United States v. Jones*, 131 S. Ct. 3064 (2011) (Nos. 10-1259, 10A760); *United States v. Marquez*, 605 F.3d 604, 609 (8th Cir. 2010) (stating, in dictum, that had the defendant not lacked standing to contest the matter, a search would still not be found to have occurred when police used GPS to monitor a truck they believed was being used in a drug trafficking operation); *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) (holding that a search did not take place when police used a GPS device to learn where their suspect had traveled).

⁷ *Pineda-Moreno I*, 591 F.3d at 1215.

⁸ En banc means, "With all judges present and participating; in full court." BLACK'S LAW DICTIONARY 606 (9th ed. 2009). Because of its size, the Ninth Circuit ordinarily uses a limited en banc court, consisting of the Chief Judge of the circuit plus ten additional judges drawn by lot from the pool of active judges. Rarely, a case heard by a limited en banc court may be reheard by the full court. See 9th Cir. R. 35-3; see also 28 U.S.C.A. § 46(c) (Westlaw 2011); Pub. L. No. 95-486, § 6, 92 Stat. 1629 (1978) (authorizing limited en banc courts for courts of appeals having more than fifteen active judges).

⁹ See *United States v. Pineda-Moreno (Pineda-Moreno II)*, 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc), *petition for cert. filed* (U.S. Nov. 10, 2010) (No. 10-7515).

¹⁰ GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

¹¹ *United States v. Knotts*, 460 U.S. 276, 284 (1983) ("[I]f 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.")

¹² Judge Kozinski was born in Communist Romania, where he lived until he was twelve. Emily Bazelon, *The Big Kozinski*, LEGAL AFFAIRS (Jan./Feb. 2004), available at www.legalaffairs.org/issues/January-February-2004/feature_bazelon_janfeb04.msp; *Pineda-Moreno II*, 617 F.3d at 1126 (Kozinski, C.J., dissenting) ("To those of us who have lived under a totalitarian regime, there is an eerie feeling of déjà vu.")

50 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

suspicion and need for the device in a written declaration and to comply with temporal and spatial limitations on use of the device.

The Supreme Court held in *United States v. Knotts* that a person's Fourth Amendment rights are not violated when police electronically monitor his or her movements on public roads without a search warrant.¹³ The Court reasoned that when individuals travel on public roads they "voluntarily convey[] [information about their travels] to anyone who want[s] to look."¹⁴ Since the privacy protections afforded by the Fourth Amendment¹⁵ cannot be applied when there is no reasonable expectation of privacy,¹⁶ the *Knotts* Court held that the monitoring that took place with a beeper device was constitutionally valid.¹⁷

Despite the Supreme Court's seemingly unambiguous ruling regarding warrantless¹⁸ use of electronic tracking devices in *Knotts*, today there is ardent disagreement about the constitutional limitations on GPS monitoring.¹⁹ In *Pineda-Moreno*, the Ninth Circuit likened the four-month-long GPS surveillance operation to the beeper monitoring that had occurred in *Knotts*, and accordingly held that the warrantless surveillance did not violate the Fourth Amendment.²⁰ In *United States v. Maynard*, however, the United States Court of Appeals for the District of Columbia distinguished *Knotts* from the facts before it involving a

¹³ See *Knotts*, 460 U.S. at 285 (holding that monitoring of a suspect's movements on public roads is "neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment").

¹⁴ *Id.* at 281-82 ("When [the suspect] travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.").

¹⁵ The Fourth Amendment provides: "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." U.S. CONST. amend. IV.

¹⁶ *Katz v. United States*, 389 U.S. 347 (1967).

¹⁷ *Knotts*, 460 U.S. at 281-82.

¹⁸ The semantic difference between "unwarranted" and "warrantless" is important to note: "warrantless" refers to police actions conducted in the absence of a search warrant, whereas "unwarranted" means unfounded.

¹⁹ See *Knotts*, 460 U.S. at 281-82; compare *Pineda-Moreno I*, 591 F.3d 1212 (9th Cir. 2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515), with *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), cert. granted sub nom. *United States v. Jones*, 131 S. Ct. 3064 (2011) (Nos. 10-1259, 10A760).

²⁰ Compare *Knotts*, 460 U.S. at 281 (concluding that one does not have a reasonable expectation of privacy when one travels on public thoroughfares), with *Pineda-Moreno I*, 591 F.3d at 1216 n.2 ("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 to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search.'").

twenty-eight-day surveillance operation. “The intrusion such [prolonged] monitoring makes into the subject’s private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts*.”²¹ The evident circuit split prompted the United States Supreme Court to settle the matter;²² on November 8, 2011, the Court heard oral arguments in *United States v. Jones* (formerly *United States v. Maynard*).²³

However, if the Court rules that GPS monitoring constitutes a per-se search²⁴—that is, that it requires a search warrant regardless of the amount of time for which it is used²⁵—then this powerful surveillance tool would be sapped of its utility in many situations.²⁶ The Justice Department argued this important point in its petition to the Supreme Court:

Although in some investigations the government could establish probable cause and obtain a warrant before using a GPS device, federal law enforcement agencies frequently use tracking devices early in investigations, before suspicions have ripened into probable cause. The court of appeals’ decision prevents law enforcement officers from using GPS devices in an effort to gather information to *establish*

²¹ Compare *Knotts*, 460 U.S. at 284-85 (discussing the monitoring of a suspect’s movements with a beeper device during a single journey), with *Maynard*, 615 F.3d at 558 (discussing the monitoring of a suspect’s movements with a GPS device continually over a twenty-eight-day period).

²² See Lyle Denniston, *Police and High-Tech Monitoring*, SCOTUSBLOG (Nov. 22, 2010, 6:32 PM), www.scotusblog.com/2010/11/police-and-high-tech-monitoring/ (“What the Court is now being asked to decide is, first, whether a GPS track is a ‘search,’ under the Constitution’s Fourth Amendment, and when might the continuous monitoring of a track become an invalid search if police do it without having a search warrant.”).

²³ Transcript of Oral Argument, *United States v. Jones*, No. 10–1259 (U.S. argued Nov. 8, 2011), available at www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf; see Lyle Denniston, *Police and High-Tech Monitoring*, SCOTUSBLOG (Nov. 22, 2010, 6:32 PM), <http://www.scotusblog.com/2010/11/police-and-high-tech-monitoring/> (“Lawrence Maynard’s companion case did not raise the GPS issue; that was an issue for Antoine Jones in a consolidated case. The government sought rehearing only as to Jones and the GPS question.”).

²⁴ A “per-se search” means that regardless of the duration or the manner in which it is used, GPS monitoring is a search for all purposes and thus requires a showing of probable cause before any GPS monitoring can occur. For example, in *Maynard*, 615 F.3d at 564 n.6, the D.C. Circuit stated that “[o]ne federal district court and two state courts have also held use of a GPS device is not *per se* a search, but none was presented with the argument that prolonged use of a GPS device to track an individual’s movements is meaningfully different from short-term surveillance.”

²⁵ There are, concededly, instances where the probable cause requirement would not create this dilemma for police. For example, in *Maynard*, 615 F.3d 544, the investigating officers did have probable cause to believe that their suspects were involved in an intricate criminal drug conspiracy. The validity of the monitoring was challenged because the search warrant they obtained in order to utilize the GPS device expired after ten days, but the monitoring lasted for twenty-eight days.

²⁶ See Petition for Writ of Certiorari at 24, *United States v. Jones*, No. 10-1259 (U.S. filed Apr. 15, 2011), 2011 WL 1462758 at *24.

52 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42

probable cause, which will seriously impede the government's ability to investigate leads and tips on drug trafficking, terrorism, and other crimes.²⁷

It is imperative that the Court recognize these consequences of a per-se ruling and articulate a prophylactic rule that delineates when, where, and how police may use GPS without a search warrant.²⁸

This Comment argues that the Supreme Court should establish a new rule, "Reasonable Suspicion Plus," that would require police to state in a sworn declaration particularized reasoning for use of a GPS device, but that would not require them to obtain a search warrant. The benefits of the proposed rule would be threefold: (1) temporal and spatial limitations would assure that GPS technology is utilized responsibly; (2) the declaration would serve as a procedural obstacle requiring police to show good cause for using the device; and (3) when the declaration is registered with the district attorney's office it would provide a tangible record, facilitating judicial review if a defendant later contests the legitimacy of the operation.

Part I examines the concept of "a reasonable expectation of privacy" in the context of how the police use new technologies to monitor suspects' movements. Part II dissects the shortcomings of those decisions but also points to valid considerations and concerns that arose in those cases. Part III proposes a model rule that can serve as a guidepost for appropriate use of GPS surveillance: "Reasonable Suspicion Plus." There are valid concerns on both sides of the argument,²⁹ and the rule that this Comment proposes would address

²⁷ See *id.*

²⁸ See generally *City of Ontario v. Quon*, 130 S. Ct. 2619, 2635 (2010) (Scalia, J., concurring) ("Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication . . . that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty.").

²⁹ Proponents of GPS monitoring worry that if a warrant is required before police can utilize the device, then their ability to use the device "before suspicions have ripened into probable cause" will be diminished. *Petition for Writ of Certiorari at 24, United States v. Jones*, No. 10-1259 (U.S. filed Apr. 15, 2011), 2011 WL 1462758 at *24. Advocates of requiring a warrant for GPS surveillance worry that without the procedural safeguards required by the Fourth Amendment, police will arbitrarily use GPS technology. See *Pineda-Moreno II*, 617 F.3d 1120, 1126 (Kozinski, C.J., dissenting from denial of rehearing en banc) ("We are taking a giant leap into the unknown, and the consequences for ourselves and our children may be dire and irreversible. Some day, soon, we may wake up and find we're living in Oceania."), *petition for cert. filed* (U.S. Nov. 10, 2010) (No. 10-7515).

those concerns, while maintaining constitutionality and deference to Supreme Court precedent.

I. BACKGROUND

A. THE CIRCUIT SPLIT: FACTS AND ANALYSES

In *United States v. Pineda-Moreno*, the Ninth Circuit examined whether the attachment of a GPS device to a suspect's vehicle, which was parked in the suspect's driveway at the time, constituted a search.³⁰ The case involved Drug Enforcement Agency agents whose suspicions were aroused upon observing a group of men purchasing a large quantity of a particular fertilizer commonly used to help grow marijuana.³¹ Without a search warrant, the agents went onto the driveway of one of the suspects and attached a GPS device to the undercarriage of his vehicle.³² The subsequent GPS monitoring lasted four months.³³

Although the agents had also attached GPS devices while the Jeep of the defendant had been parked on public streets, the court correctly distinguished those instances from the attachment that took place in the defendant's driveway.³⁴ Surprisingly,³⁵ the government conceded that the vehicle was parked within the curtilage³⁶ but nevertheless maintained

³⁰ If these actions were a search, then the agents would not have been permitted to take such actions in the absence of a warrant. *Pineda-Moreno I*, 591 F.3d 1212, 1214-15 (9th Cir. 2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515).

³¹ *Id.* at 1213.

³² Although the agents in *Pineda-Moreno I*, 591 F.3d at 1214, attached the devices "both while [it] was parked in his driveway and while it was parked public areas, such as a street and a public parking lot," the Ninth Circuit was interested only in those instances where the agents had attached the devices to the vehicle while it was parked in the driveway.

³³ *Id.* at 1213.

³⁴ See generally *id.* at 1215 (finding that the instances where the agents had attached the GPS devices to the vehicle while it was parked on public streets to be an issue foreclosed by *United States v. McIver*, 186 F.3d 1119, 1126 (9th Cir. 1999)).

³⁵ See Orin Kerr, *Petition for Certiorari Filed in Pineda-Moreno, the Ninth Circuit GPS Case*, THE VOLOKH CONSPIRACY (Nov. 22, 2010, 3:00 PM), <http://volokh.com/2010/11/22/petition-for-certiorari-filed-in-pineda-moreno-ninth-circuit-gps-case/> ("The puzzling part about the panel decision in *Pineda-Moreno* was that it essentially undid the government's concession: It held that the warrantless search was okay even though the driveway was concededly part of the curtilage. That's wrong, in my view. The government's concession should have lost the case for them, and the Ninth Circuit was wrong to bend over backwards to undo the concession.")

³⁶ In *Pineda-Moreno I*, 591 F.3d at 1215, the Ninth Circuit noted that this concession had been made earlier by the government before the United States District Court for the District of Oregon.

54 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

that the agents' actions did not intrude upon the defendant's constitutionally protected privacy rights.³⁷

The curtilage of the home is the part of property that so immediately surrounds the home that courts will afford it the same Fourth Amendment protections as the home itself.³⁸ However, the Ninth Circuit agreed with the government's assessment and held that despite the agents' entry upon the defendant's curtilage to attach the device, there was no invasion of privacy.³⁹ Since the defendant had not taken any preventive measures to keep people away—his curtilage displayed no “features to prevent someone standing in the street from seeing the entire driveway”—he had effectively surrendered his privacy expectation with respect to that area, according to the Ninth Circuit.⁴⁰ Likening the GPS monitoring that took place over the subsequent months to that which occurred with the beeper device in *Knotts*, the court quickly found the matter to be foreclosed and upheld the conviction.⁴¹

In a case with facts similar to *Pineda-Moreno*, the D.C. Circuit concluded that “prolonged”⁴² warrantless GPS surveillance violates the Fourth Amendment.⁴³ In *United States v. Maynard*, officers believing two men were involved in a drug-selling conspiracy attached a GPS device to one of the men's vehicles and monitored its movements continually over a twenty-eight-day period.⁴⁴ The D.C. Circuit found

³⁷ *Id.* at 1215 (“In sum, Pineda-Moreno cannot show that the agents invaded an area in which he possessed a reasonable expectation of privacy when they walked up his driveway and attached the tracking device to his vehicle. Because the agents did not invade such an area, they conducted no search, and Pineda-Moreno can assert no Fourth Amendment violation.”).

³⁸ See *United States v. Karo*, 468 U.S. 705, 715 (1984) (“In this case, had a [government] agent thought it useful to enter the [suspect's] residence to verify that the [property] was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house.”).

³⁹ *Pineda-Moreno I*, 591 F.3d at 1215 (“In sum, Pineda-Moreno cannot show that the agents invaded an area in which he possessed a reasonable expectation of privacy when they walked up his driveway and attached the tracking device to his vehicle. Because the agents did not invade such an area, they conducted no search, and Pineda-Moreno can assert no Fourth Amendment violation.”).

⁴⁰ *Id.*

⁴¹ See generally *id.* at 1216-17 (“We conclude that the police did not conduct an impermissible search of Pineda-Moreno's car by monitoring its location with mobile tracking devices.”).

⁴² *United States v. Maynard*, 615 F.3d 544, 563 (D.C. Cir. 2010) (“[P]rolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse.”), cert. granted sub nom. *United States v. Jones*, 131 S. Ct. 3064 (2011) (Nos. 10-1259, 10A760).

⁴³ *Id.*

⁴⁴ In *Maynard*, 615 F.3d at 555, the officers did, in fact, have probable cause to believe that

that, despite the Supreme Court's holding in *Knotts*,⁴⁵ when data about one's movements is compiled over a prolonged period of time, the aggregate of that information paints an "intimate" portrait of one's life.⁴⁶

Since the GPS monitoring in *Maynard* lasted twenty-eight days, it was, according to the D.C. Circuit, prolonged and consequently an unreasonable search under the Fourth Amendment.⁴⁷ The D.C. Circuit reversed the conviction of the registered owner of the vehicle, Antoine Jones.⁴⁸ In November 2011, the Justice Department argued the matter before United States Supreme Court in *United States v. Jones*;⁴⁹ the Court's decision, it is hoped, will settle both *Maynard* and *Pineda-Moreno*.⁵⁰

B. THE FOURTH AMENDMENT: WHEN IT APPLIES AND WHEN A VIOLATION IS EXCUSED

It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable.⁵¹

Jones was involved in the operation and were issued a search warrant to use the GPS device to monitor his movements in order to learn more about the criminal network in which he was involved. Jones challenged the use of the device because the warrant had expired but police continued to use the tracking device to collect evidence after its expiration.

⁴⁵ Compare *United States v. Knotts*, 460 U.S. 276, 278 (1983) (discussing the monitoring of a suspect's movements with a beeper device during a single journey), with *Maynard*, 615 F.3d at 563 (discussing the monitoring of a suspect's movements with a GPS device continually over a twenty-eight-day period).

⁴⁶ *Maynard*, 615 F.3d at 556.

⁴⁷ *Id.* at 563.

⁴⁸ *Id.*

⁴⁹ Transcript of Oral Argument, *United States v. Jones*, No. 10-1259 (U.S. argued Nov. 8, 2011), available at www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf.

⁵⁰ See *United States v. Jones*, 131 S. Ct. 3064 (2011) (granting certiorari); *Pineda-Moreno I*, 591 F.3d 1212, 1215 (9th Cir. 2010), *petition for cert. filed* (U.S. Nov. 10, 2010) (No. 10-7515); see also Lyle Denniston, *Police and High-Tech Monitoring*, SCOTUSBLOG (Nov. 22, 2010, 6:32 PM), www.scotusblog.com/2010/11/police-and-high-tech-monitoring/ ("What the Court is now being asked to decide is, first, whether a GPS track is a 'search,' under the Constitution's Fourth Amendment, and when might the continuous monitoring of a track become an invalid search if police do it without having a search warrant.")

⁵¹ *Trupiano v. United States*, 334 U.S. 699, 705 (1948) (referring to searches and seizures conducted incident to arrest), *overruled by* *United States v. Rabinowitz*, 339 U.S. 56, 65-66 (1950). Despite *Trupiano* being overruled by *Rabinowitz*, in *Terry v. Ohio*, 392 U.S. 1, 20 (1968), the Court recognized the need to retain a variation of the "wherever reasonably practicable" principle that *Trupiano* had articulated.

56 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42

The Fourth Amendment has long been a cherished keystone buttressing our right to live free of the unwarranted prying eyes of the government.⁵² The amendment provides:

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.⁵³

In the context of GPS monitoring, whether the Fourth Amendment applies should depend on where the device is attached and the duration for which the monitoring lasts.⁵⁴ This section points to Court-created exceptions to the Fourth Amendment and instances in which the Court has drawn a line and declared the amendment does not apply.⁵⁵

⁵² See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (“The Fourth Amendment gives protection against unlawful searches and seizures Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property . . .”).

⁵³ U.S. CONST. amend. IV.

⁵⁴ See Brief for the United States at (I), *United States v. Jones*, No. 10-1259 (U.S. filed Aug. 11, 2011), available at www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-1259_petitioner.authcheckdam.pdf (addressing both “[w]hether the warrantless use of a GPS tracking device on respondent’s vehicle to monitor its movements on public streets violated the Fourth Amendment [and w]hether the government violated respondent’s Fourth Amendment rights by attaching the GPS tracking device to his vehicle without a valid warrant and without his consent”); see generally *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 n.5 (1986) (“Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. ‘[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.’”) (quoting *United States v. Karo*, 468 U.S. 705, 712 (1984)).

⁵⁵ This Comment explores the landmark Supreme Court cases *Terry v. Ohio*, 392 U.S. 1 (1968), *Chimel v. California*, 395 U.S. 752 (1969), abrogated by *Davis v. United States*, 131 S. Ct. 2419 (2011), and *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979), in which the Court established exceptions to the general proscription against warrantless searches. This Comment also looks at *Karo*, 468 U.S. 705, in which the Court refused to carve out an exception to the rule, and explains how the rule from that case applies to the context of GPS monitoring. Throughout this Comment, however, the holding from *United States v. Knotts*, 460 U.S. 276, 281-82 (1983), that people do not maintain a reasonable expectation of privacy with respect to public movements is not looked at as an exception to the warrant requirement but rather as a helpful reminder of what exactly the Fourth Amendment aims to protect. It provides a starting point that the *Jones* Court should be loath to oversimplify as the D.C. Circuit did in *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), cert. granted sub nom. *United States v. Jones*, 131 S. Ct. 3064 (2011) (Nos. 10-1259, 10A760).

1. *The Limited Purpose of the Fourth Amendment and Policy-Based Exceptions*

A search or seizure occurs when a government agent intrudes upon an individual's "constitutionally protected reasonable expectation of privacy."⁵⁶ However, the right to be free from searches and seizures is not absolute.⁵⁷ As Justice Harlan first explained in *Katz v. United States*, one must maintain an actual expectation of privacy that society would recognize as reasonable before the protections of the Fourth Amendment are triggered.⁵⁸ While warrantless searches are presumptively unreasonable,⁵⁹ and thus generally prohibited by the amendment, the Supreme Court has recognized exceptions where the "societal costs of obtaining a warrant, such as danger to law officers or risk of loss or destruction of evidence, [have] outweigh[ed] the reasons for prior recourse to a neutral magistrate."⁶⁰

The warrant requirement of the Fourth Amendment dictates that "no Warrants shall issue, but upon [a showing of] probable cause."⁶¹ Searches conducted in the absence of a warrant are *per se* unreasonable.⁶² If an officer conducts a warrantless search and needs to use evidence procured by that search at trial in order to convict, then the prosecutor must show that a recognized exception to the Fourth Amendment justified the warrantless intrusion.⁶³ If the government

⁵⁶ See *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

⁵⁷ See generally U.S. CONST. amend. IV (prohibiting only those searches deemed to be unreasonably intrusive).

⁵⁸ See *Katz*, 389 U.S. at 361 (1967) (Harlan, J., concurring) (outlining the two-part test for whether courts will apply the Fourth Amendment's protections: whether the individual who is challenging the government's actions maintained an "actual (subjective) expectation of privacy and, [if that] expectation [was] one that society is prepared to recognize as 'reasonable.'"). When a reviewing court finds that the individual's expectation of privacy was in fact reasonable, the Fourth Amendment requires that the government agent must have first obtained a search warrant before interfering with the individual. See generally U.S. CONST. amend. IV (prohibiting only those searches deemed to be unreasonably intrusive).

⁵⁹ *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) ("Time and again, this Court has observed that searches and seizures conducted outside the judicial process, without prior approval of a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.") (internal quotation marks omitted).

⁶⁰ *Sanders*, 442 U.S. at 759.

⁶¹ U.S. CONST. amend. IV.

⁶² *Dickerson*, 508 U.S. at 372 (1993) ("Time and again, this Court has observed that searches and seizures conducted outside the judicial process, without prior approval of a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.") (internal quotation marks omitted).

⁶³ See *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) ("[O]nly in 'a few specifically established and well-delineated' situations may a warrantless search of a dwelling withstand constitutional

58 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

cannot meet this burden, the exclusionary rule precludes the evidence from being admitted at trial.⁶⁴ Oftentimes, any other evidence collected after the constitutional violation is also prohibited from being used to prosecute the defendant.⁶⁵ An early violation of the Fourth Amendment can thus prevent an otherwise sound criminal investigation from proceeding to trial.⁶⁶

The exclusionary rule is a court-created remedy for Fourth Amendment violations that aims to deter unjustified police intrusions.⁶⁷ Because of this design, the Court has recognized instances in which the exclusion of evidence would not help deter similar future actions.⁶⁸ In these few instances, the Court has created exceptions to the warrant requirement.⁶⁹ Justice Rehnquist expressed this in *Arizona v. Evans*, stating, “As with any remedial device, the rule’s application has been restricted to those instances where its remedial objectives are thought most efficaciously served. Where the exclusionary rule does not result in appreciable deterrence, then, clearly, its use is unwarranted.”⁷⁰ The notion of deterrence is thus inseparable from any Fourth Amendment analysis.⁷¹ In the context of GPS monitoring, the exclusionary rule

scrutiny, even though the authorities have probable cause to conduct it. The burden rests on the State to show the existence of such an exceptional situation.”) (citation omitted).

⁶⁴ See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

⁶⁵ See *id.* at 391-92 (establishing what has come to be known as the “fruit of the poisonous tree” concept).

⁶⁶ See *Murray v. United States*, 487 U.S. 533, 536 (1988) (“The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search and of testimony concerning knowledge acquired during an unlawful search.”) (citation omitted); see generally *Silverthorne*, 251 U.S. at 391-92 (1920) (establishing what has come to be known as the “fruit of the poisonous tree” concept).

⁶⁷ See *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (“The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule’s general deterrent effect.”). *But cf.* *Terry v. Ohio*, 392 U.S. 1, 14-15 (1968) (“The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.”).

⁶⁸ See, e.g., *Evans*, 514 U.S. 1; *Ryder v. United States*, 515 U.S. 177, 185-86 (1995) (“[T]he practice of denying criminal defendants an exclusionary remedy from Fourth Amendment violations when those errors occur despite the good faith of the Government actors does not require the affirmance of petitioner’s conviction in this case. Finding the deterrent remedy of suppression not compelled by the Fourth Amendment specifically relied on the ‘objectionable collateral consequence of [the] interference with the criminal justice system’s truth-finding function’ in requiring a blanket exclusionary remedy for all violations and the relative ineffectiveness of such remedy to deter future Fourth Amendment violations in particular cases.”) (citations omitted).

⁶⁹ See, e.g., *Evans*, 514 U.S. 1; *Ryder*, 515 U.S. at 185-86.

⁷⁰ *Evans*, 514 U.S. at 11.

⁷¹ See generally *United States v. Calandra*, 414 U.S. 338, 347 (1974) (“[T]he [exclusionary] rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee

should be used to prevent only those government actions that are unreasonable.⁷²

The Supreme Court has established exceptions to the Fourth Amendment by balancing the restrictions of the amendment against policy concerns such as police officer safety and the practicalities of law enforcement.⁷³ The single-purpose-container rule was established in *Arkansas v. Sanders* as an adjunct to the plain-view doctrine.⁷⁴ If an officer can infer the contents of a container based on its outward appearance, then the contents, like the container itself, are said to be in plain view, and the defendant is said to have forfeited his or her reasonable expectation of privacy with regard to the container and its contents.⁷⁵ Accordingly, an officer in such a situation does not need a search warrant in order to search or seize the container.⁷⁶

In *Chimel v. California*,⁷⁷ the Court established the search-incident-to-arrest doctrine as an exception to the warrant requirement primarily in reaction to concerns about officer safety.⁷⁸ The search-incident-to-arrest doctrine permits officers to conduct warrantless searches provided they are conducted incident, in both time and place, to the arrest.⁷⁹ The

of the Fourth Amendment against unreasonable searches and seizures: ‘The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’”) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

⁷² *But cf.* *United States v. Maynard*, 615 F.3d 544, 566 (D.C. Cir. 2010) (“This case does not require us to, and therefore we do not, decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment.”), *cert. granted sub nom.* *United States v. Jones*, 131 S. Ct. 3064 (2011) (Nos. 10-1259, 10A760).

⁷³ *See, e.g.*, *Chimel v. California*, 395 U.S. 752 (1969) (excusing a search and seizure if the place searched might contain destructible evidence or a weapon and it was within the lunging distance of the arrestee), *abrogated by* *Davis v. United States*, 131 S. Ct. 2419 (2011); *Terry v. Ohio*, 392 U.S. 1, 24 (1968) (justifying a warrantless, but brief, stop and pat down for weapons provided the officer had reasonable suspicion that the individual was involved in criminal activity).

⁷⁴ The Court explained in *Robbins v. California*, 453 U.S. 420, 427 (1981), that a container can make its contents obvious to an observer by its distinctive configuration or otherwise.

⁷⁵ *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979).

⁷⁶ In the footnote credited with formally establishing the rule, *Sanders*, 442 U.S. at 764 n.13, the Court provided two examples of single-purpose containers: a burglary kit and a gun case. “Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to ‘plain view,’ thereby obviating the need for a warrant.” *Id.*

⁷⁷ *Chimel*, 395 U.S. 752.

⁷⁸ *See id.* at 762-63 (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated.”).

⁷⁹ *Chimel*, 395 U.S. 752.

60 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

rationale of the rule is to protect officers from arrestees who might, out of desperation, lunge for a weapon to effect their escape.⁸⁰ Despite the persistence of the search-incident-to-arrest doctrine from *Chimel*, the rule leaves police with little practical guidance;⁸¹ an officer cannot truly know whether constitutional boundaries have been crossed until a judge later makes the determination.⁸² Nevertheless, exceptions to the warrant requirement generally require that the scope of the intrusion be limited to the need.⁸³

The public's right to be free from unnecessary intrusions is best met with carefully drawn preconditions.⁸⁴ In *Arizona v. Gant*, Justice Stevens stated, "That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers"⁸⁵ The Supreme Court held in *Terry v. Ohio* that "[t]he Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation."⁸⁶ *Terry* reflected the Court's belief that a prophylactic rule that retains the traditional reasonableness standard is important in order for the exception to serve as a helpful guideline for police.⁸⁷ In the context of

⁸⁰ *Id.*

⁸¹ A motion to suppress is granted when the search is not proximate in time and place to the arrest. *See, e.g.*, *United States v. Caseres*, 533 F.3d 1064, 1070 (9th Cir. 2008) ("[T]he search of [the defendant's] car was characterized by neither the spatial nor the temporal proximity to the place and time of the arrest required to constitute a valid search incident to arrest."); *United States v. Johnson*, 16 F.3d 69, 72 (5th Cir. 1994) (finding the defendant's briefcase was not seized incident to the arrest because it was not in the area of his immediate control at the time of arrest).

⁸² *See* Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 *CARDOZO L. REV.* 1663, 1664 (2007) ("As with a police officer's (or magistrate's) before-the-fact assessment of the legality of a planned search, it is not ex post reality (that the defendant was or was not committing a crime or hiding evidence of crime) that determines the substantive outcome of the suppression motion; it is the ex ante perspective of the officer. If the officer did not reasonably expect to find evidence, then the evidence that she did in fact find should be suppressed at trial."); *see generally* Michael Abramowicz, *Constitutional Circularity*, 49 *UCLA L. REV.* 1, 60-61 (2001) ("Fourth Amendment doctrine, moreover, is circular, for someone can have a reasonable expectation of privacy in an area if and only if the Court has held that a search in that area would be unreasonable.").

⁸³ *See generally* *Terry v. Ohio*, 392 U.S. 1, 29 (1968) ("Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation.").

⁸⁴ *See generally* *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009) ("When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant 'reasoning' is the weighing of the rule's benefits against its costs.").

⁸⁵ *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009).

⁸⁶ *Terry*, 392 U.S. at 28-29.

⁸⁷ *See id.* at 31 (Harlan J., concurring) ("[W]hat is said by this Court today will serve as initial guidelines for law enforcement authorities and courts throughout the land as this important

GPS monitoring, that wisdom should endure, since spatial and temporal limitations could easily be identified in a new rule.⁸⁸

2. *Reasonable Suspicion: A Practical Standard*

When an investigation is in its early stages, it would be prudent to allow police to take minimally intrusive yet proactive steps to corroborate their suspicions rather than requiring that they demonstrate probable cause⁸⁹ sufficient for the issuance of a search warrant.⁹⁰ In *Terry*, the Supreme Court analyzed whether an officer's actions of stopping and frisking two men after observing their suspicious behavior outside a storefront window violated their Fourth Amendment right to be free from unreasonable searches and seizures.⁹¹ The need for the officer to take preventive measures was plain, and the *Terry* Court recognized the dilemma the probable cause requirement could create.⁹² Although the officer's observations hardly amounted to probable cause, the Court held that the officer's actions of detaining the men and patting them down for weapons—actions that would ordinarily be considered a search triggering the warrant requirement—were nonetheless justified.⁹³ If an officer were to be prohibited from searching a suspicious individual who the officer suspected—but lacked probable cause to believe—was about

new field of law develops.”).

⁸⁸ GPS monitoring, like a search incident to arrest, involves both temporal parameters (“prolonged surveillance”) and spatial parameters (attachment of a GPS device to a suspect’s vehicle while it is parked in his or her curtilage). See generally *City of Ontario v. Quon*, 130 S. Ct. 2629, 2635 (2010) (Scalia, J. concurring) (“Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court’s implication . . . that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin’ is a feeble excuse for disregard of duty.”).

⁸⁹ In *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949), the Supreme Court attempted to define probable cause: “[Probable cause] mean[s] more than bare suspicion: Probable cause exists where ‘the facts and circumstances within their (the officers’) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” (citing *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

⁹⁰ See, e.g., *Terry*, 392 U.S. 1.

⁹¹ *Id.* at 6. The officer in *Terry* observed the men alternately walk back and forth past a storefront, peering in through the windows, appearing to scope the store out for a robbery.

⁹² See *id.* at 20 (“[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.”).

⁹³ *Id.* at 21 (“And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”).

62 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

to commit a crime, then the officer might be left with no other option but to wait until actual criminal behavior began.⁹⁴ In such a situation, the warrant requirement is both impractical and runs counter to the public's interest in law enforcement.⁹⁵

The Court's solution to the dilemma was to lower the prerequisite probable cause standard to a less-stringent one of "reasonable suspicion."⁹⁶ Under *Terry*, if an officer reasonably suspects an individual of wrongdoing, based on specific and articulable facts,⁹⁷ then the officer can temporarily detain that person and pat him or her down for weapons.⁹⁸ A *Terry* stop is thus a warrantless but founded investigation that is constitutionally permissible in the interest of proactive police work.⁹⁹

3. *A Balancing Test to Meet Constitutional Requirements*

The *Terry* Court derived its authority to create the new reasonable-suspicion standard from an earlier Supreme Court decision, *Camara v. Municipal Court*.¹⁰⁰ In *Camara*, the Court used a balancing approach to circumvent the Fourth Amendment in a matter involving health inspectors and their need to enter and inspect residences without warrants.¹⁰¹ These particular intrusions, the Court noted, were justified only because the harm caused was minimal when compared to the need for city officials to conduct these health inspections in the absence of search warrants.¹⁰²

⁹⁴ See *id.* at 35 n.1 (Douglas, J., dissenting) ("Police officers need not wait until they see a person actually commit a crime before they are able to 'seize' that person.").

⁹⁵ *Id.* at 15 (majority opinion) ("Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.").

⁹⁶ *Id.*; accord *Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("We have described reasonable suspicion simply as a 'particularized and objective basis' for suspecting the person stopped of criminal activity and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.") (citation omitted).

⁹⁷ An officer's reasonable suspicion may not be based simply on a hunch or predicated on behavior like nervousness. "And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27.

⁹⁸ *Id.*

⁹⁹ See *id.*

¹⁰⁰ *Camara v. Municipal Court*, 387 U.S. 523 (1967) (involving the right of city health inspectors to make warrantless inspections of home).

¹⁰¹ *Id.*

¹⁰² *Terry*, 392 U.S. at 15 ("Under our decision, courts still retain their traditional

The balancing test is fundamentally a sliding scale of reasonableness.¹⁰³ “[T]he Supreme Court indicated that the level of cause required for such inspections could be determined only by balancing the need to search against the scope of the invasion.”¹⁰⁴ If an officer’s actions are unnecessarily invasive, and that invasion is not offset by a greater government need,¹⁰⁵ then the search or seizure is unreasonable and, consequently, cannot be justified in the absence of a warrant.¹⁰⁶ If, on the other hand, there exists a compelling need to investigate, and the officer’s actions intrude only to the extent necessary to corroborate his or her suspicions, then a court will find those actions reasonable.¹⁰⁷

Despite these Fourth Amendment caveats, the Supreme Court decisions all reflect instances where particular needs outweighed threats to the protected interests.¹⁰⁸ In *Chimel*, the need for officer safety¹⁰⁹ prompted the Court to construct the search-incident-to-arrest exception.¹¹⁰ And in *Terry*, the lower reasonable-suspicion standard was justified by the requirement that the intrusion be limited.¹¹¹ The Court recognized that the all-or-nothing implications of the probable cause

responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.”).

¹⁰³ See Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1011 (2004) (“[T]he balancing test [from *Camara*] has devolved into an assessment of the relative strength of the governmental and individual interests, with the Court’s thumb pressing heavily on the government’s side of the scale.” (footnote omitted)).

¹⁰⁴ JOSEPH D. GRANO & LESLIE W. ABRAMSON, *PROBLEMS IN CRIMINAL PROCEDURE* 28 (4th ed. 2004).

¹⁰⁵ The limitations upon the scope are a malleable border proportionate to an officer’s need. See *Terry*, 392 U.S. at 15 (“Under our decision, courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.”).

¹⁰⁶ See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009) (“When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant ‘reasoning’ is the weighing of the rule’s benefits against its costs.”).

¹⁰⁷ See *id.* (“When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant ‘reasoning’ is the weighing of the rule’s benefits against its costs.”).

¹⁰⁸ See *id.*

¹⁰⁹ In *Chimel v. California*, 395 U.S. 752 (1969), *abrogated by Davis v. United States*, 131 S. Ct. 2419 (2011), the Court also considered the need for officers to be able to prevent arrestees from destroying evidence.

¹¹⁰ *Id.*

¹¹¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

64 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

requirement could run counter to more important policy considerations.¹¹²

4. *Modern Technologies Compounding Traditional Problems*

In the rapidly evolving world of modern technology, the Fourth Amendment becomes vulnerable to the subjective whims and knowledge of the presiding judge.¹¹³ The Supreme Court has, nevertheless, continued to apply Justice Harlan's reasonableness test¹¹⁴ to newly developed technology utilized in surveillance operations.¹¹⁵ In *Knotts*, officers used a beeper device to monitor their suspect's vehicular movements, eventually pinpointing the clandestine location of the suspect's drug lab.¹¹⁶ Writing for the majority, Justice Rehnquist stated, "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."¹¹⁷ The Court thus held that the use of the beeper device did not intrude upon the suspect's Fourth Amendment rights, since the technology did not raise any "constitutional issues which visual surveillance would not also raise."¹¹⁸

In *United States v. Karo*, the Court drew another bright line with respect to technology and the Fourth Amendment.¹¹⁹ This decision, however, underscored the principle that the home—and the area

¹¹² See generally *id.*

¹¹³ The problem is that the test is "largely circular: a person has a reasonable expectation of privacy when the courts decide to protect it through the Fourth Amendment. . . . [I]n a high-tech world, a judge must ruminate over the importance of privacy and the meaning of 'reasonableness.'" Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 808-09 (2004) (citing Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 60-61 (2001)).

¹¹⁴ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

¹¹⁵ See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the use of a thermal imaging device to detect the temperature inside a home defeats the occupant's reasonable expectation of privacy); *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (finding that police use of an airplane to view marijuana plants in defendant's backyard from 1,000 feet overhead was not a search under the Fourth amendment); *United States v. Karo*, 468 U.S. 705, 715 (1984) (evaluating an electronic monitoring device to reveal details about the interior of a suspect's home); *United States v. Knotts*, 460 U.S. 276 (1983) (evaluating the use of an electronic beeper device to monitor movement on public roadways).

¹¹⁶ *Knotts*, 460 U.S. 276.

¹¹⁷ *Id.* at 282.

¹¹⁸ *Id.* at 285.

¹¹⁹ See *Karo*, 468 U.S. 705.

immediately surrounding it—deserves the utmost Fourth Amendment protection.¹²⁰ In *Karo*, officers placed a tracking device inside a can of ether as part of their investigation.¹²¹ When the suspect carried the can into his home, the device transmitted information about the interior of the residence.¹²² The Court found this kind of surveillance to be an unreasonable intrusion because “the Government surreptitiously employ[ed] an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house.”¹²³ With respect to tracking devices, one of the constitutional limitations is the border of the curtilage.¹²⁴

What remains unclear, however, is whether going onto the curtilage to install a tracking device is constitutionally valid when officers can see the area from beyond the curtilage.¹²⁵ In *Pineda-Moreno*, the Ninth Circuit held that these actions do not automatically violate the Fourth Amendment.¹²⁶ Also unclear is how the D.C. Circuit’s decision in *Maynard* can be reconciled with the long-held understanding that one does not maintain a reasonable expectation of privacy with respect to one’s movement on public thoroughfares.¹²⁷ Since 2007, five federal

¹²⁰ See *Kyllo*, 533 U.S. at 34 (holding that the use of a thermal imaging device to detect heat emanating from the home was a search because it was not something that could be done by ordinary human senses and because the technology was not in general use). But see *United States v. Dunn*, 480 U.S. 294, 301 (1987) (“[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.”).

¹²¹ *Karo*, 468 U.S. at 708.

¹²² *Id.* at 727.

¹²³ *Id.* at 715.

¹²⁴ *Id.* But see *Dunn*, 480 U.S. at 301 (“[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.”).

¹²⁵ Compare *United States v. Pineda-Moreno (Pineda-Moreno I)*, 591 F.3d 1212, 1214-15 (9th Cir. 2010) (holding that attachment of a GPS device to a vehicle while parked within the curtilage was not a violation of his Fourth amendment rights in part because “the driveway had no . . . features to prevent someone standing in the street from seeing the entire driveway”), *petition for cert. filed* (U.S. Nov. 10, 2010) (No. 10-7515), with *Karo*, 468 U.S. 705, 715 (concluding that the officers actions were constitutionally impermissible because they learned information with the tracking device that they otherwise could not have from beyond the curtilage).

¹²⁶ *Pineda-Moreno I*, 591 F.3d at 1215, 1217.

¹²⁷ Compare *United States v. Maynard*, 615 F.3d 544, 563 (D.C. Cir. 2010), *cert. granted sub nom.* *United States v. Jones*, 131 S. Ct. 3064 (2011) (Nos. 10-1259, 10A760), with *United States v. Knotts*, 460 U.S. 276, 285 (1983) (holding that monitoring of a suspect’s movements on public roads is “neither a ‘search’ nor a ‘seizure’ within the contemplation of the Fourth Amendment.”).

66 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

courts of appeals¹²⁸ have addressed the issue of GPS surveillance, yet no uniform principle has emerged.¹²⁹ But although the Ninth and D.C. Circuit cases involved curious analyses that contorted traditional understandings of how surveillance technology interacts with the Fourth Amendment,¹³⁰ the rift can and should be mended with a blend of pertinent Supreme Court precedent.¹³¹

II. ANALYSIS

In 1983, when “the world [was] explosive and hence, more difficult and unfavorable”¹³² than it had been since World War II, the Supreme Court held that the *possibility* of mass surveillance was insufficient reason to require police to obtain search warrants before monitoring a suspect with an electronic device.¹³³ The idea of using the warrant requirement of the Fourth Amendment to prevent a police state

¹²⁸ See *United States v. Hernandez*, 647 F.3d 216, 219 (5th Cir. 2011); *Pineda-Moreno I*, 591 F.3d 1212; *Maynard*, 615 F.3d 544; *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007).

¹²⁹ See *Hernandez*, 647 F.3d at 219 (concluding that neither the installation of the GPS device nor the subsequent monitoring violated the defendant’s Fourth Amendment rights); *Pineda-Moreno I*, 591 F.3d at 1215, 1217 (holding that attachment of a GPS device to a vehicle while parked in the suspect’s driveway was not a violation of his Fourth Amendment rights); *Maynard*, 615 F.3d at 558 (holding that the prolonged surveillance aided by GPS technology was a search because it painted a detailed picture of the suspect’s life); *Marquez*, 605 F.3d 604, 609 (stating, in dictum, that had the defendant not lacked standing to contest the matter, a search would still not be found to have occurred when police used GPS to monitor a truck they believed was being used in a drug trafficking operation); *Garcia*, 474 F.3d 994, 997 (holding that a search did not take place when police used a GPS device to learn where their suspect had traveled to).

¹³⁰ See *Pineda-Moreno I*, 591 F.3d at 1215; *United States v. Jones*, No. 08-3034, slip op. at 4 (D.C. Cir. Nov. 19, 2010) (Sentelle, J., dissenting from denial of rehearing en banc) (“The reasonable expectation of privacy as to a person’s movements on the highway is, as concluded in *Knotts*, zero. The sum of an infinite number of zero-value parts is also zero.”).

¹³¹ The “Reasonable Suspicion Plus” rule that this Comment proposes would restore the more traditional understanding of the curtilage from *United States v. Dunn*, 480 U.S. 294, 300 (1987) (noting that under common law, the curtilage is afforded the same sacrosanct Fourth Amendment protection as the home itself), and would apply the reasonable-suspicion standard from *Terry* to permit limited intrusions. Moreover, if the Court identifies the point at which a GPS monitoring lasts an unreasonable period of time, the *Knotts*, 460 U.S. 276, decision could be respected without expressly discounting the D.C. Circuit’s concern about prolonged surveillance.

¹³² “Never, perhaps, in the postwar decades was the situation in the world as explosive and hence, more difficult and unfavorable, as in the first half of the 1980s.” Benjamin B. Fischer, *A Cold War Conundrum: The 1983 Soviet War Scare*, CENTRAL INTELLIGENCE AGENCY, (Jul. 7, 2008, 11:28 AM), www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/a-cold-war-conundrum/source.htm (quoting Mikhail Gorbachev, Feb. 1986).

¹³³ See generally *Knotts*, 460 U.S. at 284 (“[I]f 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.”).

reminiscent of George Orwell's *Nineteen Eighty-Four*¹³⁴ from becoming a reality seems prudent.¹³⁵ But just as every motion to suppress must be based upon the particular facts of the case, so too should the Supreme Court evaluate GPS monitoring cautiously, with an eye toward what is actually occurring, not what could potentially occur.¹³⁶ The current Court should recognize the Cold War context of *Knotts* and be wary of agreeing with the D.C. Circuit that the era of "dragnet type" mass surveillance is indeed upon us.¹³⁷

When the Court agreed to review *United States v. Jones* on June 27, 2011, it posed an additional question to be addressed at oral argument, one that the D.C. Circuit had not asked: "Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent."¹³⁸ The Court likely posed this question so that it may address what the D.C. Circuit did not: the point in time at which a search goes from the "relatively brief intrusion at issue in *Knotts*"¹³⁹ to an unreasonable intrusion that requires a search warrant.¹⁴⁰

To resolve this question, the Court cannot simply conclude that GPS monitoring is or is not a search. If the Court concludes that GPS monitoring is not a search under the Fourth Amendment, liberal minds would rightly fear further deterioration of the amendment,¹⁴¹ and

¹³⁴ GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

¹³⁵ See *United States v. Pineda-Moreno (Pineda-Moreno II)*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc) ("We are taking a giant leap into the unknown, and the consequences for ourselves and our children may be dire and irreversible. Some day, soon, we may wake up and find we're living in Oceania."), *petition for cert. filed* (U.S. Nov. 10, 2010) (No. 10-7515).

¹³⁶ See *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 n.5 (1986) ("Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. '[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.'") (quoting *Karo*, 468 U.S. at 712).

¹³⁷ *Knotts*, 460 U.S. at 281-82 ("[I]f 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.")

¹³⁸ *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *cert. granted sub nom. United States v. Jones*, 131 S. Ct. 3064 (2011) (Nos. 10-1259, 10A760).

¹³⁹ *Maynard*, 615 F.3d at 563.

¹⁴⁰ For analysis of what the Court's intent might have been in posing this question, see Orin Kerr, *Supreme Court Agrees to Review Case on GPS and the Fourth Amendment*, THE VOLOKH CONSPIRACY (Jun. 27, 2011, 10:46 AM), <http://volokh.com/2011/06/27/supreme-court-agrees-to-review-case-on-gps-and-the-fourth-amendment/>.

¹⁴¹ See, e.g., *United States v. Pineda-Moreno (Pineda-Moreno II)*, 617 F.3d 1120 (9th Cir. 2010) (Reinhardt, J., dissenting from denial of rehearing en banc) ("I concur in Chief Judge Kozinski's dissent. I have served on this court for nearly three decades. I regret that over that time the courts have gradually but deliberately reduced the protections of the Fourth Amendment to the point at which it scarcely resembles the robust guarantor of our constitutional rights we knew when I

68 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

unchecked “dragnet type” mass surveillance might become an all-too-real concern. On the other hand, if the Court distinguishes *Jones* from *Knotts* in order to say GPS monitoring is a per-se search, law enforcement throughout the country could be deprived of the essential surveillance tool when it may be needed most: the early stages of an investigation.¹⁴² Either way, legitimate public policy concerns would ferment. Requiring police to show “Reasonable Suspicion Plus” would prevent police from using GPS technology in violation of the Fourth Amendment.

A. THE DILEMMA CREATED BY REQUIRING PROBABLE CAUSE

The principle objective of most surveillance operations is to gather evidence amounting to probable cause sufficient to obtain a search or arrest warrant.¹⁴³ If an officer cannot state with any particularity the location of the intended search, it is unlikely that a warrant will be issued.¹⁴⁴ With GPS, the information (i.e., location) needed for the affidavit is the very information the officer seeks to learn from the device.¹⁴⁵ In its petition for certiorari, the Department of Justice explained the problematic implications of *Maynard*:

[T]he court of appeals’ opinion gives no guidance to law enforcement officers about when a warrant is required. Use of a GPS device for a few hours (or perhaps a few days) is presumably still acceptable under *Knotts*. But the court’s opinion offers no workable standard for law enforcement officers to determine how long a GPS device must remain in place before their investigation reveals enough information to offend a reasonable expectation of privacy (and therefore become a Fourth Amendment search).¹⁴⁶

joined the bench. . . . Today’s decision is but one more step down the gloomy path the current Judiciary has chosen to follow with regard to the liberties protected by the Fourth Amendment. Sadly, I predict that there will be many more such decisions to come. I dissent.”) (paragraph breaks and citations omitted), *petition for cert. filed* (U.S. Nov. 10, 2010) (No. 10-7515).

¹⁴² Res judicata is “[a]n issue that has been definitively settled by judicial decision.” The Latin phrase translates to “a thing adjudicated.” BLACK’S LAW DICTIONARY 1425 (9th ed. 2009).

¹⁴³ See generally *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

¹⁴⁴ See generally U.S. CONST. amend. IV (requiring a “particular[] descri[ption] [of] the place to be searched, and the persons or things to be seized”); accord *Steagald v. United States*, 451 U.S. 204, 213 (1981) (“A search warrant, in contrast[,] is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place . . .”).

¹⁴⁵ See *Petition for Writ of Certiorari at 24–25, United States v. Jones*, No. 10-1259 (U.S. filed Apr. 15, 2011), 2011 WL 1462758 at *24-25.

¹⁴⁶ *Id.*

When the Supreme Court decides *Jones*,¹⁴⁷ it should take heed of this point and provide practical parameters as to how long GPS monitoring may last before it becomes prolonged.¹⁴⁸ The discord amongst the circuits shows the need for Supreme Court clarification. However, overly simplified clarification (e.g., GPS monitoring automatically violates the Fourth Amendment)¹⁴⁹ would ignore the possibility that GPS monitoring can be limited in such a way as not to infringe upon a reasonable expectation of privacy.¹⁵⁰

B. A SOLUTION FOR A CONVOLUTED MATTER

Requiring officers to articulate their reasonable suspicion in a written declaration before they are permitted to use GPS would help prevent unfettered abuse of the technology.¹⁵¹ A lower standard than probable cause, such as reasonable suspicion, would maintain constitutionality, provided the officers' actions are not overly intrusive, and permit officers to perform the essential functions of their duty.¹⁵² The *Terry* Court applied the reasonable-suspicion standard because the logistics of the warrant requirement in the context of that case ran

¹⁴⁷ *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *cert. granted sub nom. United States v. Jones*, 131 S. Ct. 3064 (2011) (Nos. 10–1259, 10A760). The D.C. Circuit upheld the conviction of Lawrence Maynard but reversed the conviction of Antoine Jones. Because the Department of Justice only petitioned the Supreme Court for review the reversal of Jones's conviction, the name of the case changed.

¹⁴⁸ See Brief for the United States at (I), *United States v. Jones*, No. 10-1259 (U.S. filed Aug. 11, 2011), 2011 WL 3561881 at *1 (addressing both “[w]hether the warrantless use of a GPS tracking device on respondent’s vehicle to monitor its movements on public streets violated the Fourth Amendment [and w]hether the government violated respondent’s Fourth Amendment rights by attaching the GPS tracking device to his vehicle without a valid warrant and without his consent”).

¹⁴⁹ See generally *Maynard*, 615 F.3d at 565 n.6 (“One federal district court and two state courts have . . . held use of a GPS device is not *per se* a search, but none was presented with the argument that prolonged use of a GPS device to track an individual’s movements is meaningfully different from short-term surveillance.”) (citing *United States v. Moran*, 349 F. Supp. 2d 425, 467-68 (N.D.N.Y. 2005); *State v. Sveum*, 769 N.W.2d 53 (Wis. Ct. App. 2009); *Stone v. State*, 941 A.2d 1238 (Md. Ct. Spec. App. 2008)).

¹⁵⁰ See *Maynard*, 615 F.3d at 566-67.

¹⁵¹ See generally Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 CARDOZO L. REV. 1663, 1664 (2007) (“As with a police officer’s (or magistrate’s) before-the-fact assessment of the legality of a planned search, it is not ex post reality (that the defendant was or was not committing a crime or hiding evidence of crime) that determines the substantive outcome of the suppression motion; it is the ex ante perspective of the officer. If the officer did not reasonably expect to find evidence, then the evidence that she did in fact find should be suppressed at trial.”).

¹⁵² See *Terry v. Ohio*, 392 U.S. 1 (1968).

70 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

counter to public policy.¹⁵³ The logistical policy considerations of GPS monitoring are similar to those in *Terry* in that law enforcement personnel should be permitted to safely corroborate, through minimally intrusive investigation,¹⁵⁴ suspected criminal activity.

The Supreme Court should adopt guidelines that would allow GPS devices to be used for defined periods of time before the warrantless monitoring must be discontinued. The Court has previously demonstrated its willingness to draw bright-line temporal limitations on criminal procedure matters, and such a bright-line limitation in this context would alleviate the D.C. Circuit's concern about prolonged GPS surveillance.¹⁵⁵ Despite that concern, the D.C. Circuit expressly refused to specify the point at which the surveillance became prolonged.¹⁵⁶ When the Supreme Court granted the Justice Department's request for review, and asked "[w]hether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent,"¹⁵⁷ it indicated its discomfort with the all-or-nothing implications of the D.C. Circuit's holding.¹⁵⁸ The concern that prolonged GPS surveillance may be unconstitutional by virtue of its duration and intensity, however, is

¹⁵³ *Id.* at 20 (1968) ("But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.").

¹⁵⁴ The rule from *Terry*, 392 U.S. at 19, rested on the presumption that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)). This Comment proposes a rule with express limitations on the scope of a warrantless GPS investigation, but these limitations proceed under the presumption that utilization of the device is permissible *ab initio*.

¹⁵⁵ See generally *Maynard*, 615 F.3d at 563. This Comment proposes a limitation on the number of days for which GPS could be used without a warrant. In *Maynard*, 615 F.3d 544, the D.C. Circuit noted that the police had actually obtained a GPS search warrant, but that it had expired after ten days. The Supreme Court recently set a fourteen-day limitation to an issue involving Miranda rights. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010) ("The 14-day limitation meets [the defendant]'s concern that a break-in-custody rule lends itself to police abuse.").

¹⁵⁶ *Maynard*, 615 F.3d at 566 ("This case does not require us to, and therefore we do not, decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment.").

¹⁵⁷ *United States v. Jones*, 131 S. Ct. 3064, 3064 (2011).

¹⁵⁸ See Orin Kerr, *Supreme Court Agrees to Review Case on GPS and the Fourth Amendment*, THE VOLOKH CONSPIRACY (Jun. 27, 2011, 10:46 AM), <http://volokh.com/2011/06/27/supreme-court-agrees-to-review-case-on-gps-and-the-fourth-amendment/> (discussing what the Court intended by posing this question).

legitimate,¹⁵⁹ and the Court should adopt a rule that addresses this concern.

The Ninth Circuit, in *Pineda-Moreno*, was correct to evaluate the curtilage issue, but its decision departed from traditional understandings of that constitutionally protected area of the home.¹⁶⁰ Regardless, entering onto a suspect's driveway in order to attach a GPS device is the kind of unnecessary constitutional risk that could be avoided. When it appears to an officer that a suspect's vehicle may be parked within the curtilage, he or she should wait for the vehicle to be parked in a public area.¹⁶¹ Instead of viewing this as a hindrance to their surveillance operations, law enforcement should favor a bright-line rule that would help avoid the exclusionary rule's crippling effect—dismissal of the charges against a defendant.

III. THE COURT SHOULD ADOPT NEW STANDARDS: REASONABLE SUSPICION PLUS AND TEMPORAL LIMITS

The proposed rule begins with the premise that an officer has observed someone's activities that led the officer to reasonably suspect that the individual is involved in criminal activity. That the level of suspicion might not rise to the higher level of probable cause, however, would not preclude the officer from using a GPS device to facilitate the investigation. However, at the outset of the investigation, the officer would be required to set forth an investigative need—in a written declaration under penalty of perjury¹⁶²—articulating both what those

¹⁵⁹ *Maynard*, 615 F.3d 544; accord *Terry*, 392 U.S. at 18 (“[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.”).

¹⁶⁰ See Orin Kerr, *Petition for Certiorari Filed in Pineda-Moreno, the Ninth Circuit GPS Case*, THE VOLOKH CONSPIRACY (Nov. 22, 2010, 3:00 PM), <http://volokh.com/2010/11/22/petition-for-certiorari-filed-in-pineda-moreno-ninth-circuit-gps-case/> (“The puzzling part about the panel decision in *Pineda-Moreno* was that it essentially undid the government's concession: It held that the warrantless search was okay even though the driveway was concededly part of the curtilage. That's wrong, in my view. The government's concession should have lost the case for them, and the Ninth Circuit was wrong to bend over backwards to undo the concession.”).

¹⁶¹ This Comment does not address issues of standing. For instance, if an officer knows that a suspect's vehicle is parked in the curtilage of someone else's home, the suspect at trial would not be able to contest the officer's intrusion since it was not upon his own curtilage. For detailed analysis of standing in this context, see Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 CARDOZO L. REV. 1663 (2007).

¹⁶² “Unsworn declarations under penalty of perjury” are described in 28 U.S.C.A. § 1746 (Westlaw 2011):

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a

72 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

suspicions are based upon and why utilizing GPS would be more beneficial than traditional approaches.¹⁶³ Requiring this written declaration is the “plus” condition precedent aimed at preventing arbitrary, and hence unreasonable, intrusions. It would furthermore increase judicial economy by providing a tangible record that would be admissible at any suppression motion. If an officer can in good faith¹⁶⁴ attest to his or her investigative need for GPS technology and articulate specific factors and observations amounting to reasonable suspicion, then the limited utilization of GPS monitoring would be presumptively constitutional.¹⁶⁵

Disallowing the attachment of GPS devices to vehicles parked on, or to vehicles that reasonably appear to be parked on, the curtilage of a suspect’s home would serve as a bright line for officers.¹⁶⁶ This restriction would prevent officers from trampling the Fourth Amendment by ensuring that they do not cross the constitutional boundary protecting

deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: “I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)”.

(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)”.

¹⁶³ The proposed “Reasonable Suspicion Plus” rule could borrow language from 18 U.S.C.A. § 2518(c) (Westlaw 2011), which provides that, when applying for a warrant to employ electronic surveillance, the affiant should clearly state “whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.”

¹⁶⁴ Each enumeration of the rule is intended to incorporate the good-faith requirement; the officer must subjectively believe the facts he or she writes on the declaration amount to reasonable suspicion in each section of the rule.

¹⁶⁵ See generally *Terry v. Ohio*, 392 U.S. 1, 24 (1968) (necessitating that reasonable suspicion be specific and articulable).

¹⁶⁶ See generally Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1026-27 (2004) (“[A]bsent objective criteria for measuring reasonableness, progressively intrusive actions have been and will continue to be allowed. This tendency is fundamentally inconsistent with the framers’ intent to protect individuals from unreasonable governmental intrusions. To avoid undermining that fundamental purpose, government officials need objective criteria to measure reasonableness. Justice Frankfurter was correct when he observed: ‘To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an ‘unreasonable search’ is forbidden—that the search must be reasonable.’”).

the home.¹⁶⁷ In conjunction with this spatial limitation, the new rule would also restrict the duration of GPS use to a reasonable period of time.

The written declaration, the “plus” aspect, would inquire into the legitimacy of the officer’s purpose by requiring that he or she attest to four aspects of the proposed investigation. These “Reasonable Suspicion Plus” declarations might resemble the following:

1. The officer seeking to utilize a GPS monitoring device explains what led to his or her reasonable suspicion that a particular subject has recently engaged in, is engaging in, or is about to engage in criminal activity.
2. The officer articulates how monitoring the suspect’s vehicular movement and location would further the investigation or corroborate the suspicion.
3. The officer explains why employing a GPS monitoring device in this situation is superior, not just preferable, to traditional surveillance tactics.
4. The officer attests that he or she will attach and activate the GPS device within ten days of submitting this declaration to the prosecuting attorney for the relevant jurisdiction,¹⁶⁸ and that the device will be manually or automatically deactivated no later than fourteen days after the device is activated.

The first aspect of the declaration would require the officer to express, in specific terms, what type of crime he or she suspects the subject is involved in. Simply stating, however, that the officer suspects an individual of “illicit drug activity” would be insufficient because it is too vague; drug activity could mean drug use, manufacture, distribution, or simply association with known drug users. If, on the other hand, the suspected criminal activity is the “manufacture of illicit drugs” or “trafficking in illegal drugs,” that could suffice because of its greater

¹⁶⁷ See generally *United States v. Dunn*, 480 U.S. 294, 301 (1987) (“These factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.”).

¹⁶⁸ In its petition for certiorari in *Jones*, the Justice Department recognized that “[t]he warrant authorized the agents to install the device on the Jeep within ten days of the issuance of the warrant and only within the District of Columbia, but the agents did not install the device until 11 days after the warrant was issued.” Petition for Writ of Certiorari at 3, *United States v. Jones*, No. 10-1259 (U.S. filed Apr. 15, 2011), 2011 WL 1462758 at *3.

74 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 42]

specificity, but the matter would still depend on the accompanying facts that the officer presents.

The second aspect goes to the officer's investigatory need for a GPS device. There should be a sufficient nexus between the officer's need for the device and the suspected criminal activity.¹⁶⁹ For example, it would not be permissible for the officer to state a suspicion that the subject is "using an illicit drug" if later in the declaration the officer's reason for requesting GPS is that he or she wants to learn where a drug lab may be located. The relationship between suspected drug use and the officer's need for a GPS device would be too attenuated, as tracking a suspected drug user's movements is unlikely to reveal a clandestine site where the drug use occurs. In this regard, the declaration should be consistent throughout: the means (GPS monitoring) should correlate with the ends (the need to covertly learn of a suspect's whereabouts or movements).

The third aspect aims to limit utilization of GPS to aiding those investigations for which it is clearly needed. The prevalence of sophisticated and heavily financed criminal networks necessitates that law enforcement agencies have access to GPS technology.¹⁷⁰ When surveillance operations involve clever and powerful cartels or violent subjects, GPS would provide a tactical advantage for the police by allowing them to monitor their subjects from a safe distance.¹⁷¹

The fourth factor addresses the issue of prolonged surveillance and would make the officer aware of the bright-line limitation. Any information gathered after the deactivation date should be subject to

¹⁶⁹ See generally *United States v. Feliz*, 182 F.3d 82, 86 (1st Cir. 1999) ("A warrant application must demonstrate probable cause to believe that (1) a crime has been committed—the 'commission' element, and (2) enumerated evidence of the offense will be found at the place to be searched—the so-called 'nexus' element.").

¹⁷⁰ Frank J. Marine, *The Threats Posed by Transnational Crimes and Organized Crime Groups*, in CURRENT PROBLEMS IN THE COMBAT OF ORGANIZED TRANSNATIONAL CRIME 25 (1999), available at www.unafei.or.jp/english/pdf/PDF_rms/no54/no54.pdf ("[M]odern advanced telecommunications and information systems that are used in legitimate . . . activity can also be used by criminal networks to improve their own communication and to quickly carry out criminal transactions . . .").

¹⁷¹ See, e.g., *United States v. Moran*, 349 F. Supp. 2d 425, 458 (N.D.N.Y. 2005) (discussing the difficulty of surveilling Hell's Angels: "They frequently reside at locations owned or rented by others, and use other people's names to register vehicles and obtain utilities and services, in an attempt to avoid identification by law enforcement. Jecko stated that Hell's Angels often reside in rural locations, where stationery surveillance could easily be detected. They monitor police frequencies using scanners and use counter-surveillance techniques, such as periodically photographing surrounding areas in order to discover law enforcement surveillance equipment such as pole cameras."); see also *United States v. Dadanovic*, No. 09-63-ART, 2010 WL 3620251, at *2 (E.D. Ky. Sept. 10, 2010) (discussing how several suspects of a particular investigation lived in rural areas so that the officers following the suspects in a police car might easily have alerted the suspects).

exclusion. If a defendant later wishes to challenge the search, the defense attorney could subpoena the declaration from the prosecutor's office. With access to the declaration, a prosecutor could readily determine when an officer's express reasoning for employing GPS devices is unfounded and dismiss the charges before the suppression motion, thereby improving judicial economy.

Lastly, when the officer initiates the GPS surveillance, he or she would be required to attach the device while the vehicle is parked in a public place, not in the curtilage of the suspect's home. This procedural declaration written under penalty of perjury would force the officer to evaluate the need for GPS and thereby help to confine its usage within constitutional boundaries. Requiring reasonable suspicion, as opposed to probable cause, would allow police to utilize the technology during the early stages of their investigations when they are still gathering evidence on their suspects.

CONCLUSION

When the Court considers *Jones*, it must be careful not to deprive the police of the practical benefits of GPS technology. Requiring officers to obtain search warrants before utilizing GPS technology to help them covertly investigate criminal networks would, in many instances, defeat the purpose of the device.¹⁷² *Maynard* and *Pineda-Moreno* demonstrated that Supreme Court case law provides inadequate guidance when it is applied to GPS surveillance operations.¹⁷³ "Reasonable Suspicion Plus" would permit law enforcement to utilize GPS technology only when doing so would help advance a legitimate purpose, and thus would alleviate fears that officers might abuse the technology.

¹⁷² See Petition for Writ of Certiorari at 24, *United States v. Jones*, No. 10-1259 (U.S. filed Apr. 15, 2011), 2011 WL 1462758 at *24 ("Although in *some* investigations the government could establish probable cause and obtain a warrant before using a GPS device, federal law enforcement agencies *frequently* use tracking devices early in investigations, before suspicions have ripened into probable cause.") (emphasis added).

¹⁷³ *United States v. Garcia*, 474 F.3d 994, 996-97 (7th Cir. 2007) (citing to *Knotts*, 460 U.S. at 284-85, the 7th Circuit noted "the Court left open the question whether installing the device in the vehicle converted the subsequent tracking into a search").