



What Can Big Brother See? The Legal Implications of ALPR

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Visit the Apple Store

Apple AirTag 4 Pack

★★★★★ (54,887)

Amazon's Choice for "airtags 4 pack"



-9% \$89⁹⁹ (\$22.50 / Count)



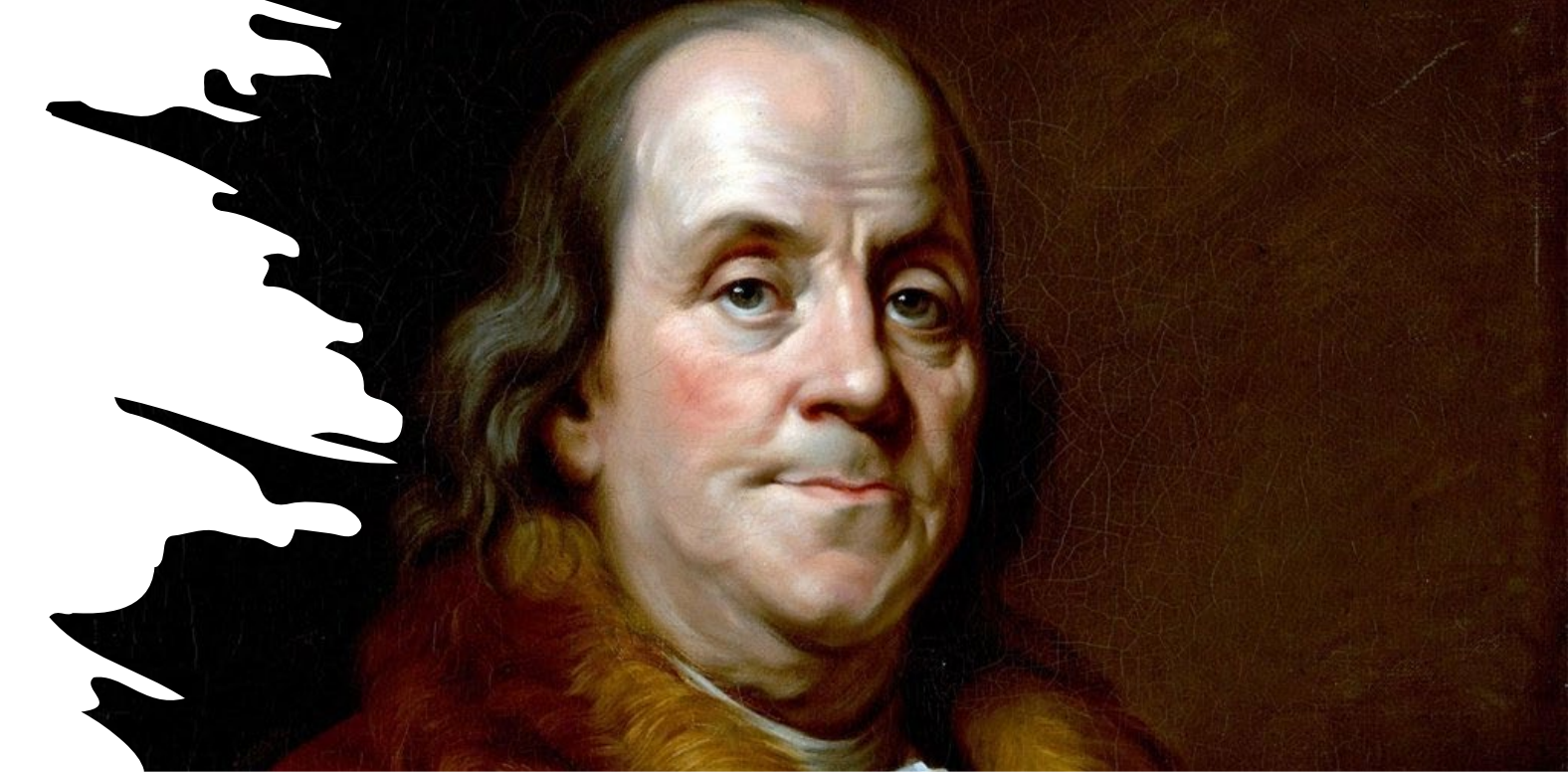
George Orwell, *1984*

“It was one of those pictures which are so contrived that the eyes follow you about when you move. BIG BROTHER IS WATCHING YOU...”



**They who can give up
essential liberty to obtain a
little temporary safety,
deserve neither liberty nor
safety.**

Benjamin Franklin



GPT-4

- “We’ve created GPT-4, the latest milestone in OpenAI’s effort in scaling up deep learning. GPT-4 is a large multimodal model (accepting image and text inputs, emitting text outputs) that, while less capable than humans in many real-world scenarios, exhibits human-level performance on various professional and academic benchmarks.”
- Efforts to push back





“Advanced AI could represent a profound change in the history of life on Earth, and should be planned for and managed with commensurate care and resources.”

March 22, 2023, Open Letter from 1500+ tech giants, including Elon Musk, calling for an immediate pause on the training of AI systems more powerful than GPT-4.

<https://futureoflife.org/open-letter/pause-giant-ai-experiments/>

Topics

- History
- Issues
- Case Law
- State Laws
- Texas Legislation
- Policy concerns



History

- 1976 – invented; 1981—1st arrest
- London’s “Ring of Steel”
 - 1993 – Automated Number Plate Recognition (ANPR) to combat terrorism
 - 1997 – Police National ANPR Data Centre centralized all ANPR data
- 2003 – charges those in London a surcharge to drive in the zone





History

- 1998 – US Customs and Border Patrol
 - Monitor border entrances
 - Increase border security
 - Went as far inland as possible to combat border-related crime
- DHS started investing
- Local law enforcement starts utilizing



History

- 2005 – 1st murder arrest in UK
- 2006 – 1st camera deployed for traffic management
- 2022 IACP report – 40% of agencies surveyed were using ALPR in 2020, up from 23% in 2009



Major market players

- Motorola (Atlanta based)
 - Boasts 2,000+ active customers
 - 15,000+ cameras deployed
 - 44B+ license plate scans
 - 600k+ daily hot hit alerts



Major market players

- Flock Safety
 - Boasts >70% reduction in crime
 - 2,000+ law enforcement agency partners
 - 2,500+ communities made safer
 - 1 B+ vehicle captures per month



Capabilities

- Flock cameras
 - Solar and battery operated models
 - Takes picture of back of vehicle
 - Works day and night
 - LTE connection



Capabilities

- Flock can capture the following:
 - License plate
 - Vehicle type
 - Unique vehicle alterations (bumper stickers, roof racks, decals)
 - Color
 - Screeching tires
 - Frequent visitor (timestamp, associated vehicles, # of time seen in last 30 days)
 - Called “Vehicle Fingerprint” technology



Where to use ALPR

- Neighborhoods
- Law enforcement – roving or fixed
- Businesses
- Residential
- Improvement districts



Concerns


- Location can reveal religious, political, sexual, medical, and social activities of driver
- Third parties walking by
- Data retention / use of data
- Claims of racial disparity
- Accuracy of information
- Capturing identities of those in vehicle





4th Amendment

- 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.



Traditional Fourth Amendment violations based on common law trespass

- English law
- “[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.”
 - *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)

Katz v. U.S.,
389 U.S.
347 (1967)

- Agents violated the 4th Amendment by attaching an eavesdropping device to a public telephone without a warrant
- The Court took a step away from a trespass-based approach
- “The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”

Katz v. U.S.,
389 U.S.
347 (1967)

- “For the Fourth Amendment protects people, not places.”
- “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”
- “But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”

Fourth Amendment REP test

1 - whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he sought to preserve something as private.



2 - whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable.

**Bond v. U.S., 529 U.S. 334, 338
(2000)**

Kyllo v. US,
533 U.S. 27
(2001)

A thermal imaging device aimed at home from public street to detect relative amounts of heat within the home is a search

SCOTUS recognized that it had “decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property”

Using *Katz*, “[a] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.”

*U.S. v.
Jones*, 565
U.S. 400
(2012)

- Law enforcement suspected Antoine Jones of drug trafficking
- Obtained a warrant for a GPS device for Jones' wife's Jeep Cherokee
- The warrant was good for 10 days
- LE placed the GPS on the 11th day
- Logged movements for 4 weeks, produced 2,000 pages of data
- Crucial piece of evidence tying Jones to stash house
- Jones and other charged with several drug related charges

*U.S. v.
Jones*, 565
U.S. 400
(2012)

- Motion to suppress the GPS evidence
- District court –
 - Suppressed data obtained while vehicle was parked at Jones residence based on REP
 - Data obtained while not at residence was admissible under *Katz*
 - “ ‘[a]person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.’ ”
- DC Circuit Court reversed, 4th Amendment violation under mosaic theory

*U.S. v.
Jones*, 565
U.S. 400
(2012)

- Scalia wrote the opinion, joined by Roberts, Kennedy, Thomas, Sotomayor
- SCOTUS – 4th Amendment violation, vehicle is an “effect” under the 4th Amendment
- “We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a ‘search.’”
- Without dispensing of *Katz*, majority reasoning in this case was based on common-law trespass and its application to 4th Amendment

U.S. v. Jones, 565 U.S. 400 (2012) (conurrence)

- Justice Sotomayor’s concurrence takes the opportunity to forecast some issues
 - “GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. *See, e.g., People v. Weaver*, 12 N.Y.3d 433, 441–442, 882 N.Y.S.2d 357, 909 N.E.2d 1195, 1199 (2009) (“Disclosed in [GPS] data ... will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on”).”

There is a second concurrence
in *Jones* that is very instructive
as well – who wrote it?

Justice Alito



U.S. v. Jones, 565 U.S. 400 (2012) (Alito concurrence)

- Concurrence by Alito, Ginsburg, Breyer, Kagan that states *Katz* did away with the old trespass approach
 - *Katz* is the way to go, although fraught with its own problems
 - “[t]he *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations.”
-

U.S. v. Jones, 565 U.S. 400 (2012) (Alito concurrence)

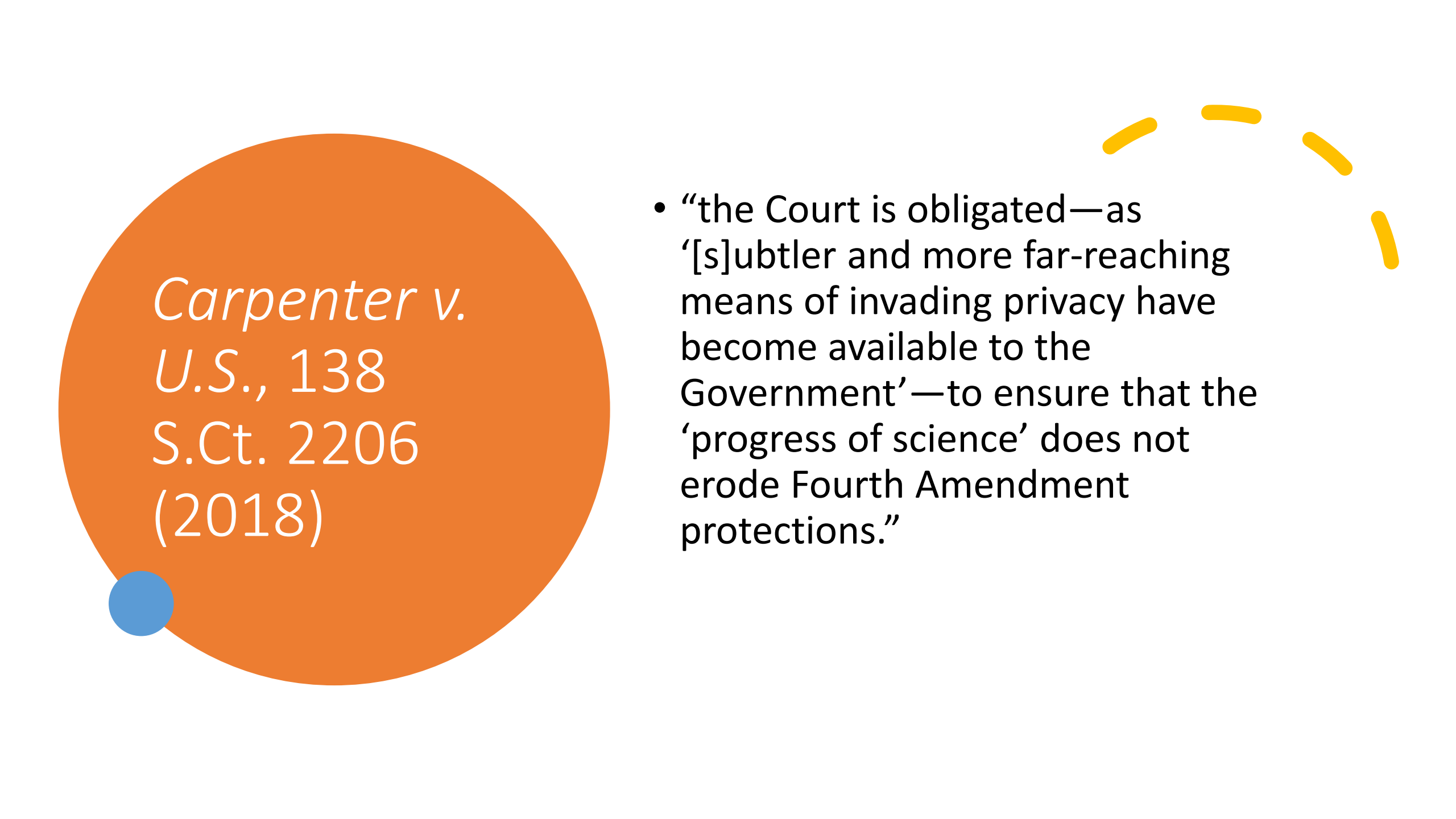
- “But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.”

Confusion

- “But in 2012, *United States v. Jones* revived the property approach that most, including our court, thought *Katz* had jettisoned.” *U.S. v. Richmond*, 915 F.3d 352, 356 (5th Cir. 2019).
- “*Jones* fundamentally altered [the] legal landscape by reviving—after a forty-five year hibernation—the Supreme Court’s trespass theory” *U.S. v. Katzin*, 769 F.3d 163, 181 (3d Cir. 2014) (en banc).
- Courts are stuck analyzing under both *Jones* and *Katz*

Carpenter v. U.S., 138 S.Ct. 2206 (2018)

- An individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through Cell Site Location Information (CSLI), business records which are by a third party;
- Seven days of historical CSLI obtained from defendant's wireless carrier, pursuant to an order issued under the Stored Communications Act (SCA), was the product of a “search”;
- Government's access to 12,898 location points over 127 days of historical CSLI (average of 101 per day) which showed defendant was in close proximity to the robberies invaded defendant's reasonable expectation of privacy; and
- Government must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier.



Carpenter v.
U.S., 138
S.Ct. 2206
(2018)

- “the Court is obligated—as ‘[s]ubtler and more far-reaching means of invading privacy have become available to the Government’—to ensure that the ‘progress of science’ does not erode Fourth Amendment protections.”

Jones/Katz in the 5th Circuit - *U.S. v. Richmond*, 915 F.3d 352 (5th Cir. 2019)

- Trooper sees truck with wobbly tires and pulls it over, taps tires with finger to do a safety check and to see if something inside tires
- Suspect's truck could be hauling narcotics—it was.
- Court easily found no REP in tapping the tires because driver has no REP to believe tires would not be touched
- Court takes more time to perform *Jones* trespass analysis, that tapping the tires was a trespass under *Jones*, and thus subject to the 4th Amendment, but the trooper had probable cause as a safety concern to tap tire momentarily, so the search was reasonable.
- Court seems to imply a preference, at least under this set of facts, for the *Katz* REP test

U.S. v. Duncan, 2023 WL 2403444 (E.D. Louisiana, March 8, 2023)

- Suspect ran from New Orleans police officers after bailing out of his car and officers caught up to him
- Suspect had a gun, substantial amount of money, and a key fob to his vehicle
- Officers weren't sure where his vehicle was located so they used the key fob and pressed the buttons to find it
- After locating the vehicle, they could see dope in plain view, they obtained a warrant

U.S. v. Duncan, 2023 WL 2403444 (E.D. Louisiana, March 8, 2023)

- Court analyzes under both Jones common law trespassory doctrine and Katz REP
- Using a key fob to locate a vehicle and fob was validly seized from a suspect is not a *Katz* violation
- No violation under the Jones trespass test, the officers did not gain access to the vehicle but merely located it with the fob

Outside the Fifth Circuit

- U.S. v. Yang, 958 F.3d 851 (9th Cir. 2020)
 - Court held that LE did not violate defendant's REP in using ALPR database to plot defendant's whereabouts, but their holding is contingent on the fact that defendant was driving a rental vehicle with an expired rental contract.
 - Court left it open that a person in their POV could allege an REP violation
 - Concurrence – holding should not have been contingent on the rental car issue: “the search of the LEARN database did not require a warrant because the information in the database did not reveal ‘the whole of [Yang's] physical movements,’ and therefore did not infringe on that reasonable expectation of privacy.” *Carpenter v. United States*, — U.S. —, 138 S. Ct. 2206, 2219, 201 L.Ed.2d 507 (2018).

U.S. v. Tuggle, 4 F.4th 505 (7th Cir. 2021)

- **Facts**

- Three cameras trained on defendant's home, 18 months of footage.

- **Isolated use**

- “[T]he isolated use of pole cameras here did not run afoul of Fourth Amendment protections.”
- The cameras captured what the naked eye could see, they did not penetrate walls or otherwise peer into the private lives of individuals

U.S. v. Tuggle, 4 F.4th 505 (7th Cir. 2021)

- **Mosaic theory**

- Defendant argues 18 months of continuous use of LPR was unconstitutional.
- Mosaic theory is based on the idea that the sum is greater than the parts—connecting dots.
- The cameras captured what the naked eye could see, they did not penetrate walls or otherwise peer into the private lives of individuals, and they mainly captured what the defendant did not do, that is not leaving his home.
- In this case, the use of pole cameras to watch defendant's home was not unconstitutional, but it is concerning
- Citing ALPR as a concern, Court calls for reevaluation of Katz and for legislation

First Amendment

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



First Amendment Concerns

- No case law thus far
- Freedom of association, religion – tracking a person's movements, where they travel, whom they visit, and when
- Advocates of ALPR pushing back, asserting that laws curtailing ALPR use restrict speech in violation of the First Amendment.

Where do
the courts
go from
here with
ALPR?

- “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” *U.S. v. Knotts*, 460 U.S. 276 (1983)
- When considering the search of an automobile – “Ever mindful of the Fourth Amendment and its history, the Court has viewed with disfavor practices that permit ‘police officers unbridled discretion to rummage at will among a person's private effects.’” *Byrd v. U.S.*, 138 S.Ct. 1518, 1526 (2018) *citing Arizona v. Gant*, 556 U.S. 332, 345, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

Where do the courts go from here with ALPR?

- “[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Rakas v. Illinois*, 439 U.S. 128, 144 n. 12 (1978)
- What does society expect or require in terms of the use of ALPR?
- “[w]e are heading toward an environment of piecemeal and inconsistent regulation that will be fertile ground for litigation for many years to come.” Randy L. Dryer, *Automatic License Plate Readers: An Effective Law Enforcement Tool or Big Brother*, 55 *Jurimetrics* 225 (2015).

Texas Legislation

The background of the slide is a photograph of the Texas State Capitol building in Austin. The image shows the iconic white dome with its ornate architecture and the statue of the Lady Justice on top. To the right, the American flag and the Texas state flag are flying on a tall pole against a clear blue sky. The building's facade features classical columns and arched windows.

- HB 3999
 - Would limit ALPR use to investigating violent offenses
 - Would require a warrant
 - Require LEAs to report annually number of plates scanned
 - 3/20/23 - Referred to Homeland Security & Public Safety Cmte

State laws on retention of ALPR data

- Arkansas – 150 days
- California – 60 days
- Colorado – 3 years
- Florida – 3 years
- Georgia – 30 days
- Maine – 21 days
- New Hampshire – 3 minutes
- Tennessee – 90 days
- Texas, according to TX State Library and Archives Commission – **as long as administratively valuable**
(https://www.tsl.texas.gov/slrml/localretention/schedule_ps)
 - HPD – 180 days

Policy recommendations

- **Audit accuracy of hits**
 - Anti-ALPR advocates claims that there is a substantial percentage of mis-reads
 - Some claim to be able to confuse, defeat ALPR cameras
- **Consider number, placement of cameras**
 - The more cameras, the more it looks like GPS tracking
- **Audit retention schedules**
 - Is what should be deleted getting deleted

Policy recommendations

- **Use objective crime statistics for placement**
 - Allegations of racial disparity
 - Review periodically to ensure that placement aligns with current crime trends
- **Consider rotating cameras for periods of time**
 - Allegations of long-term surveillance leading to secret dossiers filled with data

The background of the slide features a stylized American flag with red and white stripes and a blue field with white stars. Overlaid on the flag is a large, semi-transparent image of the scales of justice, showing the central pillar and two pans hanging from a horizontal beam. The scales are rendered in a dark, muted color, possibly bronze or dark green.

Thank you!

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