

Body Snatchers

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In United States v. Jones, five concurring justices expressed their forward-looking discomfort with law enforcement's warrantless use of surveillance technologies in public. The source of the justices' discomfort was two-dimensional—"easy and cheap" search technologies were problematic because they increased the intrusiveness of, and the duration of, public surveillance. Although the justices carefully explained their concerns, they did not identify any Fourth Amendment precedential hooks on which to hang those concerns. Accordingly, the concurrences left two key questions unanswered: (i) what is it about extended, warrantless public tracking that makes it feel so intuitively unreasonable, and (ii) is there support for that intuitive feeling in prior Fourth Amendment cases?

In this essay, I suggest that extended, warrantless public tracking feels so intuitively unreasonable because it equates to virtual "body snatching." Body snatching occurs when warrantless tracking is so personally intrusive, over such a long period of time, that it feels very much like a physical detention in public. Thus, in searching for the missing Fourth Amendment precedential support for the Jones concurrences' intrusion and duration concerns, I suggest that the Court consider United States v. Place. In Place, the Court required a finding of probable cause prior to the seizure and dog sniff of luggage due to the intrusiveness of, and length of detention associated with, the luggage seizure. Similarly, the Court soon could find that warrantless, public tracking is not a search unless the intrusiveness and duration of the tracking cross lines similar to those crossed in Place. Using Place in this fashion would provide a solid foundation for restricting warrantless GPS tracking while also providing familiar certainty to law enforcement.

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INTRODUCTION

Law enforcement's use of surveillance technology in public has reached a tipping point. Before this point, law enforcement inefficiencies served as guardians of individual liberty.¹ Due to cost and time constraints, comprehensive public tracking methods like global positioning service [GPS] transmitters or aerial drones previously were reserved for only the most dangerous suspects and areas.² Now, technological advances have lowered public surveillance's costs.³ As a result, the number of people subjected to intrusive and lengthy public surveillance is growing. It no longer is an impersonal and distant "they" that's being tracked anymore; it is all of us.⁴

This two-pronged concern over the increased breadth and depth of public surveillance was at the core of the two concurring opinions in *U.S. v. Jones*.⁵ Both concurrences noted that the Fourth Amendment's analytical landscape had shifted now that tracking technologies were so "easy and cheap."⁶ Both concurrences also

¹ See *U.S. v. Jones*, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring) ("In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken."). For an in-depth discussion of the majority and concurring opinions in *Jones*, see *infra* Part I.

² See *id.* at 963–64 (Alito, J., concurring) ("The surveillance at issue in this case—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance. Only an investigation of unusual importance could have justified such an expenditure of law enforcement resources.").

³ See *id.* at 964 (Alito, J., concurring) ("[GPS tracking] [d]evices like the one used in the present case, however, make long-term monitoring relatively easy and cheap."); *id.* at 956 (Sotomayor, J., concurring) ("[B]ecause GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility.") (citing *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)).

⁴ See Stephen E. Henderson, *Real-time and Historic Location Surveillance after United States v. Jones: An Administrable, Mildly Mosaic Approach*, 103 J. CRIM. L. & CRIMINOLOGY, 803, 808 (2013) ("Now that technology has removed the formerly significant resource restraints on tracking location, it is possible to track all of us."). This concern regarding the use of search technologies on everyone, including the Supreme Court justices themselves, emerged multiple times in the oral arguments in *Jones*. See Peter Swire, *A Reasonableness Approach to Searches after the Jones GPS Tracking Case*, 64 STAN. L. REV. ONLINE 57, 57 (2012) (noting how "Chief Justice Roberts asked, 'You think there would also not be a search if you put a GPS device on all of [the Justices'] cars, monitored our movements for a month?"); *id.* (citing *Jones*, 132 S. Ct. at 964) (quoting Justice Breyer's remark that, if the government won its case, "then there is nothing to prevent the police or the government from monitoring 24 hours a day the public movement of every citizen of the United States" which "suddenly produce[s] what sounds like 1984").

⁵ In *Jones*, all nine justices agreed that the government's warrantless use of a GPS tracking device for over a month violated the Fourth Amendment's protections against unreasonable searches and seizures. *Jones*, 132 S. Ct. at 949 (2012); see *infra* Part I for an in-depth discussion of *Jones*.

⁶ *Jones*, 132 S. Ct. at 964 (Alito J., concurring); see also *id.* at 956 (Sotomayor, J., concurring).

emphasized the potentially “intimate” picture painted by these technologies when used over a long period of time.⁷ Although the justices carefully explained these forward-looking concerns, they did not clearly identify the Fourth Amendment precedential hooks on which to hang them. Accordingly, the concurrences left two key questions unanswered: (i) what is it about extended, warrantless public tracking, that makes it feel so intuitively unreasonable, and (ii) is there support for that intuitive feeling in prior Fourth Amendment cases?⁸

In this Essay, I argue that extended, warrantless public tracking feels so intuitively unreasonable because it equates to virtual “body snatching.” Body snatching occurs when the effects of tech-savvy public tracking are comparable to the effects of more familiar, physical searches and detentions of a person in public. Accordingly, when looking for precedential hooks for the body snatching concerns voiced in the *Jones* concurrences, courts and legislators should look to physical search and seizure cases like *United States v. Place*, which focus on the intrusiveness and duration of the search and/or seizure.⁹ I recommend reliance on *Place* because it likely would provide a solid foundation for what currently feels like mere intuition, while also providing familiar certainty to law enforcement.

The remainder of this Essay unfolds in three parts. In Part I, I discuss the majority and concurring opinions in *Jones*. I conclude that what seemed to trouble the concurring justices the most was the intrusiveness and duration of the public tracking. In Part II, I show how these intrusiveness and duration concerns generally align with the concerns at the core of *Place*. First, in Part II.A, I explain the Court’s overall decision and key reasoning in *Place*.¹⁰ Next, in Part II.B, I show how the concerns expressed in the *Jones* concurrences dovetail nicely with the constitutional concerns and analytical framework already established in *Place*. Finally, in Part III, I briefly conclude that *Place* could help the Court properly restrict the warrantless use of public surveillance technologies without crippling the effectiveness of law enforcement.

⁷ See *infra* Part I.B.

⁸ See Swire, *supra* note 4 (“The split in the [*Jones*] Court revealed ongoing uncertainty about the broader questions raised in the *Jones* argument—particularly regarding how ‘to prevent the police or the government from monitoring 24 hours a day.’ *Jones* could be decided narrowly because the case involved a physical intrusion of a defendant’s car. Much of modern surveillance, however, occurs without any similar type of physical intrusion. The unanswered questions from the *Jones* argument thus suggest that the Court is seeking a new, as-yet unarticulated way to constrain police and government discretion to conduct unprecedented surveillance.”).

⁹ 462 U.S. 696 (1983) (dog sniff of a person’s seized personal property); see *infra* Part II.A for a summary of the Court’s reasoning in *Place* and Part II.B for a discussion of how that reasoning connects to the concerns expressed in the *Jones* concurrences.

¹⁰ *Id.* (discussed in Part II.A, *infra*).

I. THE TWO KEY CONCERNS IN *JONES*—INTRUSIVENESS AND DURATION OF PUBLIC SURVEILLANCE

This Part briefly dissects the majority and concurring opinions in *Jones*.¹¹ Regarding the latter, this part shows how the intrusiveness and duration of the public tracking of the defendant were what the concurring justices found most troubling. Understanding the two main rationales in *Jones* is a necessary prerequisite to seeing how the concurrences connect to the precedent of *Place*, as discussed in Part II. The majority opinion in *Jones* is the first step toward reaching that understanding.

A. *The Majority Opinion in Jones*

In *United States v. Jones*, the Supreme Court ruled that the government's warrantless, GPS-based tracking of a drug suspect's vehicle was an unconstitutional "search."¹² Some initial commentary on *Jones* focused on the majority's surprising reliance on physical trespass as its precedential hook.¹³ Justice Scalia, writing for that majority, emphasized how law enforcement "physically occupied private property" when it attached the GPS device to Jones's car.¹⁴ Because the government "encroached on a [constitutionally] protected area," a search had occurred.¹⁵ The majority did not address whether that search was "reasonable" because the government had forfeited that argument below.¹⁶ The majority also neglected to apply the familiar reasonableness test from *Katz* because it believed that the physical trespass negated the need for that test.¹⁷ Although all nine justices joined in ruling for the defendant, five justices joined two concurrences—one penned by Justice Sotomayor and another penned by Justice Alito, joined by Justices Breyer, Ginsburg, and Kagan.

¹¹ 132 S. Ct. 945 (2012).

¹² *Id.* at 949 ("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.'").

¹³ See, e.g., Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2013 SUP. CT. REV. 67 (2013). Orin Kerr convincingly suggests that the *Jones* Court's reliance on trespass was misplaced given the Court's previous mischaracterizations of the alleged trespass test as expressed in prior property-related search and seizure cases. *Id.* at 74–79 (chronicling the disconnect between Justice Scalia's use of prior cases and the actual principles set forth in those cases).

¹⁴ *Jones*, 132 S. Ct. at 949. The vehicle technically was registered to Jones's wife. *Id.* at 946.

¹⁵ *Id.* at 952.

¹⁶ *Id.* at 954.

¹⁷ *Id.* at 951.

B. *The Importance of the Jones Concurrences*

Because the *Jones* concurrences reflect the current thinking of a five-member majority, they may illustrate how the court is likely to rule when a public tracking case with no physical intrusion presents itself. At least one commentator believes that this “shadow majority” could usher in a fundamental change in the way Fourth Amendment cases are evaluated.¹⁸ Specifically, Orin Kerr has suggested that the concurring opinions endorse a new theory of the Fourth Amendment.¹⁹ According to Kerr, courts previously asked whether each “isolated step[]” used by law enforcement was a search, regardless of how much or what kind of information ultimately was collected by that step or sequence of steps.²⁰ The *Jones* concurrences allegedly deviated from that previous step-by-step approach. According to Kerr, instead of examining each step individually, the concurring justices in *Jones* were willing to consider “whether a set of nonsearches aggregated together amount to a search because their collection and subsequent analysis creates a revealing mosaic.”²¹ Kerr labeled this new aggregate approach to the Fourth Amendment the “mosaic theory.”²²

Although it is possible that the concurring justices were signaling their willingness to embrace an entirely new theory of the Fourth Amendment, I believe they more likely were signaling something less revolutionary. I believe that the concurring justices remain relatively content with the traditional, step-by-step approach to evaluating whether a search occurred under the Fourth Amendment. However, they may no longer be content with evaluating the reasonableness of those searches under the “no privacy in public” rule as currently applied to virtual searches.²³ The primary source of that discomfort is not the mere aggregation of

¹⁸ See Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 313 (2012) (“The concurring opinions in *Jones* raise the intriguing possibility that a five-justice majority of the Supreme Court is ready to endorse a new mosaic theory of Fourth Amendment protection.”); Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CON. L. & PUB. POL’Y 1, 3–4 (2012) (noting that because “both concurring opinions endorsed . . . the ‘mosaic theory’ of the Fourth Amendment The opinions in *Jones* thus open the door to a more expansive Fourth Amendment”). The term “shadow majority” is my creation and not that of Kerr or Slobogin.

¹⁹ See Kerr, *supra* note 18, at 313 (“When the Supreme Court reviewed *Maynard* in *United States v. Jones*, concurring opinions signed or joined by five of the justices endorsed some form of the D.C. Circuit’s mosaic theory.”). The D.C. Circuit borrowed the term “mosaic theory” from national security surveillance cases in an effort to describe its belief that law enforcement’s warrantless tracking of “[t]he whole of one’s movements” presented different concerns than less comprehensive tracking. *U.S. v. Maynard*, 615 F.3d 544, 561 (D.C. Cir. 2010), *aff’d sub nom* *U.S. v. Jones*, 132 S. Ct. 945 (2012).

²⁰ Kerr, *supra* note 18, at 320.

²¹ *Id.*

²² *Id.* Other scholars have used the term “mosaic theory” in their analyses. See, e.g., Slobogin, *supra* note 18.

²³ See Heidi Reamer Anderson, *The Mythical Right to Obscurity: A Pragmatic Defense of No*

information from various search-like steps. Instead, it is the intimacy of the information now revealed by even a single, intrusive step taken by law enforcement in public, such as that revealed via the attachment of the GPS device to Jones's car.

The Court's likely solution to the current "no privacy in public" problem need not be a re-working of the Fourth Amendment to accommodate the "mosaic theory." Rather, a less upsetting solution would be a new link to existing cases regarding physical searches and seizures in public. In Part II, this Essay specifically suggests that the shadow majority in *Jones* consider connecting its current concerns over intrusiveness and duration to physical seizure cases like *United States v. Place*.²⁴ Before attempting to make that connection, one must understand exactly what concerns the concurring justices expressed in *Jones*. Subpart C provides that necessary understanding.

C. *The Jones Concurrences—The Concerns of Justices Sotomayor and Alito*

Justice Sotomayor agreed with the *Jones* majority that the warrantless, GPS-based tracking of Jones was unconstitutional because the government "physically intrud[ed] on a constitutionally protected area" without a warrant.²⁵ Justice Sotomayor was concerned, however, that the majority's "trespassory test" would offer "little guidance" to courts evaluating "modes of surveillance that do not depend upon a physical invasion."²⁶ Accordingly, Justice Sotomayor felt compelled to repeat the adage from *Katz* that "the reach of the Fourth Amendment does not 'turn upon the presence or absence of a physical intrusion.'"²⁷ More specifically, Justice Sotomayor suggested how she would apply the familiar "reasonable expectation of privacy" test from *Katz*. She, like Justice Alito, would conclude that some "longer term GPS monitoring" likely would "imping[e] on expectations of privacy."²⁸

Although duration was relevant to her, the primary source of Justice Sotomayor's discomfort with the public GPS tracking in *Jones* appears to be the intimacy of the picture potentially painted by that type of surveillance.²⁹ Specifically, Justice Sotomayor was worried about the "precise, comprehensive record of a person's public movements" generated by GPS monitoring.³⁰ This

Privacy in Public, 7 I/S: J.L. & POL'Y FOR INFO. SOC'Y 543, 553–63 (2012) (chronicling the motivations for, and effects of, the "no privacy in public" rule).

²⁴ See *infra* notes 59–70 and accompanying text.

²⁵ *U.S. v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., concurring).

²⁶ *Id.* at 955.

²⁷ *Id.* at 955 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967) (Harlan, J., concurring)).

²⁸ *Id.* at 964.

²⁹ For a discussion of the importance of intimacy in the Supreme Court's privacy cases, see Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311 (2013).

³⁰ *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

record was alarming because it would “reflect[] a wealth of detail about [one’s] familial, political, professional, religious, and sexual associations.”³¹ Thus, even so-called “public” tracking would intrude into more traditionally intimate spaces, such as those shared with one’s “psychiatrist” or “plastic surgeon” and other intimate spaces such as “the abortion clinic, the AIDS treatment center, the strip club [. . . and] the gay bar.”³²

These specific examples supported Justice Sotomayor’s more general concerns about the government’s unrestrained ability to collect and use information that “reveal[ed] private aspects of identity.”³³ Justice Sotomayor later reiterated her concern about the government’s ability to “ascertain, more or less at will, [one’s] political and religious beliefs, sexual habits, and so on.”³⁴ Finally, Justice Sotomayor’s last citation highlighted the following intimacy-focused dicta from *Katz*: “What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”³⁵ Collectively, these excerpts illustrate Justice Sotomayor’s primary concern—that the government’s newfound ability to watch everyone’s every move necessarily enabled the government to collect information about one’s most intimate activities.³⁶ Secondly, Justice Sotomayor was concerned about the duration of the search in *Jones*. The duration of the search was the primary concern of Justice Alito.

Justice Alito, unlike Justice Sotomayor, did not endorse the majority’s use of physical trespass.³⁷ Instead of that test, Justice Alito would have applied the traditional *Katz* test and asked whether Jones’s “reasonable expectations of privacy were violated.”³⁸ To Justice Alito and the three justices joining him, “what [was] really important” was not the trespass but “the *use* of a GPS for the purpose of long-term tracking.”³⁹ In fact, Justice Alito emphasized the duration of the tracking at least sixteen times in his concurrence, describing that duration as “lengthy,” “long-term,” “prolonged,” “four weeks” long, “longer” than usual, “constant,” “a much longer period” and for “an extended period of time.”⁴⁰

³¹ *Id.* (citing *People v. Weaver*, 12 N.Y.3d 433, 441–42 (2009)).

³² *Id.* at 955.

³³ *Id.* at 956.

³⁴ *Id.*

³⁵ *Id.* at 957 (citing *Katz v. U.S.*, 389 U.S. 347, 351–52 (1967)).

³⁶ *Id.* at 956. Even Justice Sotomayor’s use of the term “GPS monitoring” in lieu of the less expansive term, “GPS tracking,” indicated that her concerns were more connected to the intimacy of the information revealed than to the mere aggregation of a significant amount of information.

³⁷ To say that Justice Alito merely *did not join* the majority’s opinion is putting it mildly. *See id.* at 958 (Alito, J., concurring) (“This holding, in my judgment, is unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.”).

³⁸ *Id.* at 958.

³⁹ *Id.* at 961 (emphasis in original).

⁴⁰ *Id.* at 961–64.

Applying the *Katz* reasonableness test to the tracking in *Jones*, Justice Alito concluded that “the use of longer term GPS monitoring in investigations of most offenses” impinges on expectations of privacy.⁴¹ Although Justice Alito refrained from specifying a precise line between a reasonable versus unreasonable amount of time, he declared that “the line was surely crossed before the 4-week mark.”⁴² Thus, due to the “lengthy monitoring that occurred,” there was a “search” even though *Jones* was in public the entire time he was tracked.⁴³

Together, the *Jones* concurrences emphasized two troubling aspects of law enforcement’s warrantless use of GPS tracking in public: (i) the seemingly limitless duration of permissible tracking; and (ii) the intimate picture painted by that lengthy tracking. Through thematic repetition and specific, tangible examples, Justices Sotomayor and Alito showed how law enforcement officers could infringe upon reasonable privacy interests even if they only tracked people’s movements in public. However, neither opinion provided clear precedential support for those concerns. As Orin Kerr has noted, the duration-focused section of Justice Alito’s opinion “cites no authority” at all.⁴⁴ Similarly, Justice Sotomayor cited no Supreme Court precedent to support her intimacy or intrusion concerns.⁴⁵ This Essay attempts to fill this precedential gap in Part II.

II. BODY SNATCHING—CONNECTING THE *JONES* CONCURRENCES’ CONCERNS TO EXISTING PRECEDENT

In Part I, I explained how concerns over the duration of permissible tracking and the intimate picture painted by that intrusive tracking were at the heart of the *Jones* concurrences. Part II demonstrates how the justices or legislators could connect those “body snatching” concerns to existing Fourth Amendment precedent. Specifically, this Essay suggests that the Court evaluate the reasonableness of public tracking similarly to how the Court evaluated the dog sniff in *U.S. v. Place*.⁴⁶ Sub-part A briefly explains the Court’s ruling in *Place*. Sub-part B shows how *Place* could serve as the doctrinal hook for the intrusiveness and duration concerns shared in the *Jones* concurrences.

⁴¹ *Id.* at 964. For a discussion of applying a different Fourth Amendment standard based on the nature of the offense involved, see Christopher Slobogin, *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN’S L. REV. 1053 (1998).

⁴² *Id.* at 964.

⁴³ *Id.*

⁴⁴ Kerr, *supra* note 18, at 327 (“Justice Alito’s analysis is cryptic, in part because this section of his opinion cites no authority.”).

⁴⁵ *Jones*, 132 S. Ct. at 955, 954–57 (Sotomayor, J., concurring).

⁴⁶ 462 U.S. 696 (1983); see *infra* notes 47–70 and accompanying text.

A. *U.S. v. Place*

In *U.S. v. Place*, law enforcement detained the defendant's personal luggage based on a "reasonable suspicion" that it contained narcotics, versus the more stringent standard of "probable cause."⁴⁷ Officers later exposed the luggage to a sniff test by a drug-sniffing dog, which alerted officers to the presence of cocaine.⁴⁸ The *Place* Court analyzed what happened to the defendant in two steps. First, the Court considered whether the dog sniff was a search protected by the Fourth Amendment. Second, the Court considered whether the warrantless seizure of *Place*'s personal property was permissible under the Fourth Amendment.

Regarding the dog sniff, the Court reasoned that the Fourth Amendment generally protects the privacy of the contents of one's personal luggage.⁴⁹ However, that privacy interest did not bar a dog sniff because the sniff did not require the opening of the luggage, did not involve an officer "rummaging through" the contents of the luggage, and did not disclose the presence of anything other than narcotics.⁵⁰ Because both the "manner in which the information [was] obtained" and the "content of the information revealed" were "so limited," the dog sniff was not a "search" under the Fourth Amendment.⁵¹

Having decided that no search occurred, the remaining issue was whether there was an unconstitutional seizure. Prior to analyzing that issue, the Court had to decide whether to apply "the general rule requiring probable cause" or to permit an exception to that standard, as the Court had done in *Terry v. Ohio*.⁵² In *Terry*, the Court stated that law enforcement could conduct a warrantless "stop and frisk" of someone who they suspected of engaging in criminal activity.⁵³ In *Place*, the Court extended the *Terry* rationale to seizures. Specifically, the Court stated that the same Fourth Amendment rationale that permitted some warrantless stops of a person also applied to permit some warrantless seizures of a person's personal property.⁵⁴ Thus, "reasonable suspicion" regarding whether *Place*'s luggage contained narcotics could support the property equivalent of a "stop and frisk" of his luggage in certain circumstances.

To determine exactly when a warrantless seizure was permissible under this extension of *Terry*, the Court would need to balance "the nature and quality of the intrusion" against "the importance of the governmental interests" that necessitated

⁴⁷ *Place*, 462 U.S. at 700.

⁴⁸ *Id.* at 699.

⁴⁹ *Id.* at 706–07.

⁵⁰ *Id.* at 707.

⁵¹ *Id.* at 706–07.

⁵² *Id.* at 708.

⁵³ *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

⁵⁴ *Place*, 462 U.S. at 705–06.

the intrusion.⁵⁵ Application of this balancing test to the seizure of Place's luggage led the Court to find that law enforcement had "exceeded the permissible limits of a *Terry*-type investigative stop."⁵⁶ In deciding that law enforcement had gone too far, the Court relied heavily on "the length of the detention."⁵⁷ Given that "the brevity of the invasion . . . is an important factor in determining" intrusiveness, the ninety-minute detention of Place's luggage was too long to be "justifiable on reasonable suspicion," especially when law enforcement easily "could have minimized the intrusion."⁵⁸

B. *Connecting the Jones Concurrences' Concerns to the Framework in Place*

In *Place*, the Supreme Court concluded that the seizure and dog sniff of the defendant's luggage was the kind that required a warrant.⁵⁹ In *Jones*, five justices of the Supreme Court appeared to believe that the virtual seizure of a person's vehicle, and the remote tracking thereof, also required a warrant. What is particularly striking about the concurrences in *Jones* is how the reasoning largely tracked the reasoning in *Place* yet neither concurring opinion mentioned *Place*. This Part suggests that the shadow majority of concurring justices in *Jones*, position its concerns within the *Place* framework the next time the Court considers a warrantless tracking in public case. Further details on exactly how to do so are discussed below. Sub-part II.B.1 shows how to connect Justice Sotomayor's concerns to *Place* while Sub-part II.B.2 shows how to connect Justice Alito's concerns to *Place* as well.

1. Aligning Justice Sotomayor's Concerns with *Place*

In *Place*, the Court found that law enforcement's seizure and subsequent dog sniff of defendant's luggage required probable cause for two reasons. The first reason was the level of intrusiveness that infringed upon one's liberty. For example, the *Place* Court concluded that "the police [seizure] conduct *intrude[d]* on both the suspect's possessory interest in his luggage as well as on his liberty interest in proceeding with his itinerary."⁶⁰ In *Jones*, Justice Sotomayor similarly was concerned that GPS tracking would intrude upon "private aspects of identity" in a way that infringed on one's liberty interest in making private "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,

⁵⁵ *Id.* at 703.

⁵⁶ *Id.* at 709.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 709–10.

⁶⁰ *Id.* at 708 (emphasis added).

the mosque, synagogue or church, the gay bar and on and on.”⁶¹ Thus, Justice Sotomayor’s concerns regarding effective constraints on liberty could be connected to the *Place* framework.

The *Place* Court further noted that the seizure of the defendant’s luggage simultaneously operated as a virtual seizure of the defendant himself.⁶² Although “the person whose luggage is detained is technically still free to continue his travels or carry out personal activities pending release of the luggage,” the seizure of property “can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage.”⁶³ Justice Sotomayor was concerned that the tracking in *Jones* operated as an effective seizure of the person as well. Just like the defendant in *Place*, the defendant in *Jones* was “technically still free to continue his travels or carry out personal activities” while law enforcement were tracking his vehicle’s every move via a GPS device. However, the extent of the tracking in *Jones*, like the extent of the intrusion in *Place*, operated like a seizure of Jones’s person. Specifically, due to the “close relationship” that a car shares with its owner, “[a] car’s movements . . . are its owner’s movements.”⁶⁴ The same was true in *Place*—the close relationship between the target and his luggage meant that the seizure of the luggage was like a seizure of the person. Accordingly, *Place* again serves as a doctrinal hook for Justice Sotomayor’s concerns in *Jones*.

2. Aligning Justice Alito’s Concerns with *Place*

The second primary reason that the *Place* Court found that law enforcement’s seizure and subsequent dog sniff of defendant’s luggage required probable cause was the duration of the seizure. Specifically, the *Place* Court stated that “[t]he length of the detention of respondent’s luggage alone” was enough to mandate a warrant based on probable cause versus mere reasonable suspicion.⁶⁵ In his *Jones*

⁶¹ *United States v. Jones* 132 S. Ct. 945, 954–56, (2012) (Sotomayor, J., concurring).

⁶² *Place*, 462 U.S. at 708–09 (“The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage. Moreover, he is not subjected to the coercive atmosphere of a custodial confinement or to the public indignity of being personally detained. Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return.”).

⁶³ *Id.* at 708–09 (“Therefore, when the police seize luggage from the suspect’s custody, we think the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person’s luggage on less than probable cause. Under this standard, it is clear that the police conduct here exceeded the permissible limits of a *Terry*-type investigative stop.”).

⁶⁴ *Jones*, 132 S. Ct. at 956. Justice Sotomayor distinguished the tracking of a car in *Jones* from the beeper-based surveillance done through a bugged container in *Karo v. U.S.* because the container in *Karo* “lacked the close relationship with the target that a car shares with its owner.” *Id.* at n.8.

⁶⁵ *Place*, 462 U.S. 696 at 709.

concurrence, Justice Alito expressed a similar preference for line-drawing based on time elapsed. For Justice Alito, what was most important about law enforcement's methods regarding Jones was their "use of a GPS for the purpose of long-term tracking."⁶⁶ Thus, both the *Place* majority and Justice Alito concluded that the duration of a seizure or virtual seizure was particularly relevant to determining that seizure's reasonableness.

In elaborating on its concerns regarding duration, the *Place* Court acknowledged that "seizures longer than . . . momentary ones" had been found reasonable; however, "the brevity of the invasion" remained "an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion."⁶⁷ Thus, "some brief detentions of personal effects may be so minimally intrusive"⁶⁸ as to not trigger Fourth Amendment protection. Yet, in contrast, "a seizure of the person for the prolonged 90-minute period" in *Place* was "sufficient to render the seizure unreasonable."⁶⁹

Justice Alito likely would have applied his duration-based test in a similar fashion as the *Place* Court applied its duration-based test. Specifically, Justice Alito opined that the "constant monitoring" of Jones over an "extended period of time" of "four weeks" "impinge[d] on expectations of privacy" for "most offenses" like his.⁷⁰ Thus, to Justice Alito, the "lengthy monitoring" of Jones without a warrant, like the lengthy detention of the defendant in *Place*, violated the Fourth Amendment's protections against unreasonable searches and seizures.⁷¹ Accordingly, Justice Alito like Justice Sotomayor, could have relied upon *Place* as a doctrinal hook for his concerns regarding the GPS tracking of Jones.

III. CONCLUSION

This brief essay attempts to isolate the two primary concerns at the heart of the concurring opinions in *U.S. v. Jones*⁷² and connect those concerns to existing precedent—namely, to *U.S. v. Place*.⁷³ In doing so, it has shown how both lines of cases are about protecting the public from overly intrusive and overly long, seizures of one's property and one's person, whether that seizure is actual or virtual. Although reasonable suspicion may justify minimally intrusive and short searches and seizures, the duration and intrusiveness of the law enforcement methods used in *Jones*, like those used in *Place*, likely triggered the warrant requirement under the Fourth Amendment.

⁶⁶ *Jones*, 132 S. Ct. at 961 (Alito, J., concurring).

⁶⁷ *Place*, 462 U.S. at 709.

⁶⁸ *Id.* at 706.

⁶⁹ *Id.* at 710.

⁷⁰ *Jones*, 132 S. Ct. at 963–64.

⁷¹ *Id.* at 964.

⁷² 132 S. Ct. 945 (2012); *see supra* Part I.

⁷³ 462 U.S. 696 (1983); *see supra* Part II.

In its most recent term, the Court again considered whether a warrantless dog sniff, like that in *Place*, was a search. The facts in that case, *Florida v. Jardines*, differed from *Place* in part because the *Jardines* dog sniff occurred on the defendant's home porch instead of in a public airport.⁷⁴ The *Jardines* Court announced, as it had in *Jones*, that “[w]hen ‘the Government obtains information by physically intruding’ on persons, houses, papers or effects, ‘a “search” within the original meaning of the Fourth Amendment’ has ‘undoubtedly occurred.’”⁷⁵ However, *Jardines* was an even easier case than *Jones* because the area searched always has been “‘intimately linked to the home, both physically and psychologically . . .’ where ‘privacy expectations are most heightened.’”⁷⁶

The key to the Court's decision in *Jardines* was the oft-repeated sentiment that home or home-like intrusions are special. When the home is involved, no other factors—even the Court's prior dog-sniff decisions like *Place*—need be considered.⁷⁷ When the location searched changes from one's home porch to another more public location, I hope that the Court returns to *Place*. Specifically, I hope that the Court considers using *Place*'s emphases on intrusiveness and duration as guideposts. Doing so would provide much-needed certainty to law enforcement and much-craved protection from warrantless tracking to the public at large.

⁷⁴ *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013).

⁷⁵ *Id.* at 1414 (citing *Jones*, 132 S. Ct. at 950–51).

⁷⁶ *Id.* at 1415 (citing *California v. Ciraolo*, 476 U.S. 207, 213 (1986)); *see also id.* at 1417. (“One virtue of the Fourth Amendment’s property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on *Jardines*’ property to gather evidence is enough to establish that a search occurred.”).

⁷⁷ *See Anderson, supra* note 23, at 560–63 (documenting the Court’s consistently special treatment of the home in Fourth Amendment cases).

