CONTEMPORARY ISSUES IN LOUISIANA LAW: CRIMINAL PROCEDURE—IS TECHNOLOGY CREATING A BRAVE NEW KAFKAESQUE/ORWELLIAN WORLD?[1]

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[1] *See* Aldous Huxley, A BRAVE NEW WORLD (1932); George Orwell, NINETEEN EIGHTY-FOUR (1949); and Franz Kafka, DAS SCHLOSS (THE CASTLE) (1926).

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I. INTRODUCTION

With the advent of each new form of technology, criminals receive an enormous boost in their ability to commit–and cover up–crimes. The Internet[3] and cellphones[4] allow for an exponentially greater range of communication and victims. However, law enforcement has been quick to develop and/or use new surveillance technologies to discover criminal behavior. For example, there are various software applications to discover and monitor computer transmissions,[5] to intercept telephone calls,[6] and to copy hard drives.[7] Historical cell-site-location information (CSLI)[8] and the increased usage of global positioning systems in cellphones and vehicles allow the police to recreate, or track in real time,[9] a defendant's

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[3] *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001 (2015) (Can postings on Facebook constitute a criminal threat?) (More detailed discussion *infra* notes 250 - 288); State v. Green, 164 So.3d 331 (La. Ct. App. 2015) (computer-aided solicitation of a minor); State v. Cooley, 165 So.3d 1237 (La. Ct. App. 2015), *reh'g denied* (July 8, 2015) (child pornography), State v. Haley, 169 So.3d 804 (La. Ct. App. 2015) (child pornography).

[4] *See, e.g.*, State v. Haley, 169 So.3d 804 (La. Ct. App. 2015) (images of child pornography on cellphone).

[5] *See, e.g.*, State v. Cooley, 165 So.3d 1237 (La. Ct. App. 2015), 1241-42, *reh'g denied* (July 8, 2015) (a computer forensic examiner used a program called the Wyoming Tool Kit to search for activity involving child pornography in her geographic area. Child pornography is identified by a "SHA Value" or "Hash Value" – a string of alphanumeric characters provided to law enforcement by the Missing and Exploited Children's organization. Each computer modem has an IP address. The police are then able to see what IP address is uploading files with these SHA values.)

[6] *See, e.g.*, State v. Short, 2015-0029, 2015 WL 3614144 (La. Ct. App. 2015) (federal court issued wire interception order authorizing interception of phone calls on defendant's and others cellphones to bust drug ring).

[7] *See, e.g.*, United States v. Forrester, 512 F.3d 500 (9th Cir. 2008) (the government contacted the defendant's internet service provider and asked them to install a "mirror port" on defendant's account to record the to/from addresses of defendant's email messages, the total volume of information sent to or from his account, and the internet provider (IP) addresses of the websites that defendant visited.)

[8] *See, e.g.*, State v. Washington, 168 So. 3d 746 (La. Ct. App. 2015) (information obtained from defendant's cellphone records contradicted his alibi); State v. Nelson, 169 So.3d 493 (La. Ct. App. 2015) (cellphone records indicated defendant in area of murder); State v. Douglas, No. 2014KA1399, 2015 WL 3935939 (La. Ct. App. June 26, 2015) (detective used cellphone records to determine defendant's movements on night of shooting); State v. Ramirez, No. 2015KA0065, 2015 WL 3551886 (La. Ct. App. June 5, 2015) (custodian of records at AT&T testified that records confirmed that victim's cellphone was hitting on the cell site that would be used if he was at defendant's residence); State v. Griffin, 169 So. 3d 473 (La. Ct. App. 2015) (defendant's cellphone records put him and accomplice in the area of the murder); State v. Marx, 163 So. 3d 44 (La. Ct. App. 2015) (defendant's cellphone records confirmed he was *not* in the vicinity of the crime scene); State v. Humbles, 169 So. 3d 547 (La. Ct. App. 2015) (cellphone records traced movement of defendant on the night of the murder); State v. Stipe, 167 So. 3d 942 (La. Ct. App. 2015) (cellphone records used to corroborate victim's testimony); State v. Estes, 168 So. 3d 847 (La. Ct. App. 2015) (use of cellphone while police asking questions showed defendant not in custody).

[9] *See, e.g.* Grady v. North Carolina, 135 S. Ct. 1368 (2015) (GPS placed on sex offender as condition of release); U.S. v. Jones, 132 S. Ct. 945 (2012) (tracking device placed on car);

movements. Furthermore, records from a cellphone,[10] especially given the large amount of information now stored thereon,[11] can provide a plethora of information about a person[12] while the camera on the phone allows citizens to monitor and record police activity.[13] And now, with the increased use of unmanned aerial vehicles (drones), have we finally truly entered George Orwell's world?[14]

In the last few years, the courts and legislatures throughout the country have been increasingly challenged with balancing a citizen's privacy and the needs of law enforcement, given this rapid advancement in technologies. What expectations of privacy[15] are reasonable, given the availability and widespread use of these various items? Or given the sharing of our information with third parties?[16] Is it valid that expectations may differ depending on who receives the shared information? What information is actually being revealed in a search?[17] Whose responsibility should it be to keep up with advances

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Lemoine v. Wolfe, 168 So. 3d 362 (La. 2015) (GPS tracking bracelet imposed as part of bail release).

[10] *See, e.g.* State v. Griffin, 168 So. 3d 362 (La. Ct. App. 2015) (defendant's cellphone records showed he and accomplice exchanged phone calls minutes before murder); State v. Newton, No. 2014KA1301, 2015 WL 996250 (La. Ct. App. Mar. 6, 2015) (regarding whether shooting was accidental, cellphone records of defendant, victim, and witness showed calls to 911 from victim and witness but not defendant).

[11] *See discussion* in Riley v. California, 134 S. Ct. 2473 (2014).

[12] *See e.g.* State v. Baker, 166 So. 3d 1152 (La. Ct. App. 2015) (defendant accidentally activates victim's cellphone by leaning on button on steering wheel allowing receiver to overhear assault and screams for help); State v. Eaglin, No. 2014KA1729, 2015 WL 1893276 (La. Ct. App. Apr. 24, 2015) (police locate picture of defendant on victim's phone to use for identification); State v. Lloyd, 161 So. 3d 879 (La. Ct. App. 2015) (relating to claim of accident, records showed defendant made no call to 911 or to seek medical assistance for victim); State v. Senegal, No. 14-1163, 2015 WL 914705 (La. Ct. App. Mar. 4, 2015) (lack of use of cellphone by victim while defendant out of car indicated victim not kidnapped); State v. Jackson, 163 So. 3d 98 (La. Ct. App. 2015) (in aggravated battery case, victim's phone log indicated victim and defendant were acquainted).

[13] *See* discussion of recording police interaction *infra* at notes 119 - 141.

[14] *See* George Orwell, NINETEEN EIGHTY-FOUR (1949) (*See* discussion of Orwell's world i*nfra* Part VI).

[15] *See* Katz v. United States, 389 U.S. 347, 358 (1967) (government surveillance is a Fourth Amendment search if the surveillance infringes on the suspect's "reasonable expectation of privacy").

[16] *See, e.g.*, Smith v. Maryland, 442 U.S. 735 (1979) (involving a pen register held not to be a search) where the Supreme Court first made a distinction between the content of the conversation recorded in Katz and the identification of the phone number where a call is made. Lower courts have since enlarged upon this distinction distinguishing between "address" information, defined as non-content information used to facilitate communications and not, generally protected, and content information, to which most people maintain a reasonable expectation of privacy. *See*, *e.g.*, United States v. Forrester, 512 F.3d 500 (9th Cir. 2008) (involving a mirror port which recorded the to/from email and IP addresses and the total volume of information sent from the defendant's computer—not a search); United States v. Warshak, 631 F.3d 266 (2010) (government obtained an order compelling NuVox Communications, the defendant's internet service provider, to copy the content of every email and turn them over to the government—this was a search).

[17] *See, e.g.*, Riley v. California, 134 S. Ct. 2473 (2014) (see detailed discussion *infra* notes 21-55), where a unanimous Supreme Court recently recognized that a cell phone contains immense amounts of information reflecting all aspects of a person's personal

in technology and carve out new rules to develop a proper balance between privacy and law enforcement? Finally, although not a topic covered in this paper, what rules of evidence apply to the admission of this type of information?[18]

II. CELLPHONES

A. Search of Contents Incident to Arrest

Imagine you are arrested for a drug violation and, incident to that arrest, police officers reach into your pocket and remove your cellphone. It starts ringing so they flip it open to see who is calling. The phone shows "my house" with a picture of a woman holding a baby. They access the phone log, hit the information button, and determine the phone number from which the call came. They then use an online phone book and determine the address for that phone number. They visit the address, determine it's your house, secure it while getting a search warrant, search the home, and seize 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash. You are subsequently also charged with distributing crack cocaine, possessing crack cocaine with intent to distribute, and being a felon in possession of a firearm.[19] You file a motion to suppress the evidence in your home because it is fruit of an unconstitutional search of your cellphone. Do you win?

In an alternative example, imagine that you are stopped for driving with an expired license. Your car is impounded and searched and two guns are found. You are arrested for possession of a concealed handgun. You are searched incident to that arrest and a cellphone is found in your pocket. The officer accesses information on your phone and notices that certain words used in your text messages and contact list are associated with gang membership. Two hours later, at the police station, an officer specializing in gang violence reviews all of the information on your phone and finds videos and photographs indicating gang membership and tying you to a gang-related drive-by shooting a few weeks earlier. You are subsequently charged with firing at an occupied vehicle, assault with a semi-automatic firearm, and attempted murder.[20] You file a motion to suppress the video and photographs taken from your cellphone. Do you win?

Those are the two scenarios which were considered by the United States Supreme Court in *Riley v. California.*[21] Both raise the issue of whether law enforcement officers can search the contents of a cellphone without a warrant pursuant to the warrant exception

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life and, therefore, was not analogous to a purse, wallet, or suitcase that might be searched without a warrant or probable cause when a person is arrested.

[18] *See, e.g.*, State v. Green, 164 So. 3d 331 (La. Ct. App. 2015) (whether screen shots of a social media account or a transcript of email messages constitute hearsay).

[19] *See* Riley v. California, 134 S. Ct. 2473, 2481-82 (2014).

[20] *See* United States v. Wurie, 134 S. Ct. 2473, 2481 (2014).

[21] 134 S. Ct. 2473 (2014). The reported decision concerned two grants of certiorari: one to the defendant in *Riley v. California* who challenged his conviction in the California state courts and one to the United States government in *United States. v. Wurie* in which the First Circuit Court of Appeals had reversed the defendant's conviction.

known as a search incident to arrest.[22] The Supreme Court *unanimously* held they cannot.[23]

After setting forth the history of the "search incident to arrest" exception,[24] the Court framed the issue: "These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[25] Determining digital information was something entirely different from a physical object,[26] the Court applied the long-used balancing test[27] to these two situations by assessing, on the one hand, the degree to which the search intruded upon Riley and Wurie's privacy and, on the other hand, the degree to which the intrusion was needed for the promotion of legitimate governmental interests.[28]

The Court first considered the governmental interests. Focusing on the two purposes of a search incident to arrest—safety of the officer and prevention of concealment or destruction of evidence[29]–the Court found neither justification applied to a search of a cellphone.[30] In a normal case, once seized, the phone presents no further danger to an officer.[31] Should there be specific facts justifying a fear on the part of the police that the phone could be used as a weapon, for example to detonate a bomb,[32] the officer could examine the phone based on the exigent circumstances exception to the warrant requirement.[33] As to preventing concealment or destruction of evidence on the phone—the stronger argument made by the governments–the Court found that once the phone is seized and the

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[22] This exception was first set out in *Chimel v. California*, 395 U.S. 752 (1969) (involving a search in a home) ("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 *see*k 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. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.... There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.") *Id.* at 762–763. *See also* United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L.Ed.2d 427 (1973) (search of a person outside of a home) and Arizona v. Gant, 556 U.S. 332, 350 (2009) (search of a vehicle).

[23] *Riley,* 134 U.S. 2473, 2485 (2014).

[24] *Id.* at 2483.

[25] *Id.* at 2484.

[26] *Id.* at 2485.

[27] *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 654 (1979) ("[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.") *See also* Wyoming v. Houghton, 526 U.S. 295 (1999).

[28] *Riley,* 134 S. Ct. 2473, 2484.

[29] *Id*. at 2485 *citing* Chimel v. California, 395 U.S. 752(1969) (search of a home incident to arrest) and United States v. Robinson, 414 U.S. 218 (1973) (search of individual incident to arrest; *Robinson* is the only decision applying *Chimel* to a search of contents of an item found on the arrestee's person).

[30] *Riley,* 134 S. Ct. 2473, 2485.

[31] *Id.*

[32] *Id.* at 2494.

[33] *Id.* at 2486.

suspect arrested, there is no risk that the arrestee could delete any data on the phone.[34] The governments argued there were two types of evidence destruction unique to digital data–remote wiping and data encryption.[35] In a well-researched and detailed part of the decision, the Court determined that: (1) destruction of evidence *by third parties* was not part of the concern in *Chimel*;[36] (2) such problems are hardly prevalent;[37] and (3) there are less invasive ways to prevent a wipe of the data such as disconnecting the phone from the network, which can be done by turning the phone off, removing its battery, or putting the phone in a "Faraday bag" of aluminum foil.[38]

The most interesting aspect of this case, though, and the one that may have other far-reaching consequences,[39] was the Court's discussion of the privacy interests in the contents of a cellphone. Noting that the term "cellphone" is misleading, the Court described cellphones as "minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."[40] According to the Court, cellphones contain more information than could, arguably, be found in the most exhaustive search of a home.[41] Furthermore, data located elsewhere, i.e., "in the cloud," can now be accessed with a tap of the screen.[42] As the Court said, such a search would be like finding a key in a suspect's pocket and arguing it allowed law enforcement to unlock and search a home.[43]

Also interesting was the fact that the unanimous Court appears to adopt an argument from Justice Sotomayor's concurrence in *United States v. Jones,*[44] a case decided two years earlier involving the use of a global positioning system (GPS) device to monitor a car's movements.[45] Referred to by many as a "mosaic search,"[46] Justice Sotomayor argued the monitoring of a GPS device over a substantial period of time "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her

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[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*. at 2486.
[38] *Id.* at 2487.
[39] *Id.* at 2488-2491.
[40] *Id.* at 2489.
[41] *Id.* at 2491.
[42] *Id.*
[43] *Id.*
[44] *See* United States v. Jones, 132 S. Ct. 945, 955-956 (2012) (Sotomayor, J., concurring).
[45] *See* further discussion of *Jones* and the use of a *GPS infra* notes 96-98, 163-164, and 180-185.
[46] *See* Benjamin M. Ostrander, *The "Mosaic Theory" and Fourth Amendment Law*, 86 NOTRE DAME L. REV. 1733 (2011); Steven M. Bellovin et. al., *When Enough Is Enough: Location Tracking, Mosaic Theory, and Machine Learning,* 8 NYU J.L. & LIBERTY 556, 557 (2014); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012). *See also* United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972); People v. Sporleder, 666 P.2d 135, 141-42 (Colo. 1983) (determining that using a pen register could be a search under Colorado Constitution).

familial, political, professional, religious, and sexual associations" and thus, constitutes a search.[47]

Similarly, the *Riley* court noted that, unlike peering at a photo or two found in a wallet, an officer can reconstruct "[t]he sum of an individual's private life" by searching through "a thousand photographs labeled with dates, locations, and descriptions"[48] and, by searching his internet browsing history, he can reveal an individual's most private interests.[49] Furthermore, the Court recognized that historic location information is a standard feature on many smart phones today, citing Justice Sotomayor's concurrence in *Jones*, and could be used to "reconstruct someone's specific movements down to the minute, not only around town but also within a particular building."[50] Even the average cellphone user's choices of applications (commonly referred to as "apps") on their phone can "form a revealing montage of the user's life."[51]

Finally, the Court rejected the governments' argument that officers should always be able to observe a phone's call log since it is the same thing as a pen register,[52] the viewing of which was held not to be a search in *Smith v. Maryland*.[53] Distinguishing a pen register, which contains no more than the digits dialed, from a call log—which can also include identifying information that an individual might add (such as the label "my house" in Wurie's case)—the Court held that the viewing of the call log is a search.[54]

The Court ended by stressing that its holding was not that the information on a cell phone is immune from search but that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Furthermore, in answer to concerns that this ruling would greatly thwart law enforcement, the Court appears to finally recognize that recent technological advances have also made the process of obtaining a warrant itself more efficient.[55]

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[47] United States v. Jones, 132 S. Ct. 945, 955, 181 L.Ed.2d 911 (2012) (Sotomayor, J., concurring).

[48] *Riley,* 134 S. Ct. at 2489.

[49] *Id.* at 2490.

[50] *Id.*

[51] *Id.*

[52] A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed. A pen register is "usually installed at a central telephone facility [and] records on a paper tape all numbers dialed from [the] line" to which it is attached. *See* Smith v. Maryland, 442 U.S. 735, n. 1 (1979) *citing* United States v. New York Tel. Co., 434 U.S. 159, 161 n. 1 (1977).

[53] Smith v. Maryland, 442 U.S. 735 (1979).

[54] *Riley,* 134 S. Ct. at 2492-93.

[55] *Id.* at 2493 *citing* Missouri v. McNeely, 133 S. Ct. 1552, 1573 (2013) (noting the ability to obtain warrants by telephonic or radio communication, electronic communication such as e-mail, and video conferencing) (Roberts, C.J., concurring in part and dissenting in part) (describing jurisdiction where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes").

B. Historical Cell-Site-Location Information ("CSLI")

In California v. Riley, the Court did not discuss whether obtaining the information from the phone was a search or not since the parties had stipulated that it was;[56] rather, the issue was whether the search was reasonable without a warrant.[57] Thus, the Court explicitly left unanswered the question of whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.[58] However, the Fifth Circuit Court of Appeals tackled that issue in *United States. v. Guerrero*.[59]

In *Guerrero*, the defendant, who was a member of the Texas-Mexican Mafia, was accused of participating in a number of brutal murders.[60] At trial, a co-conspirator testified that it annoyed him that Guerrero began making cellphone calls immediately after one of the murders,[61] and Guerrero's brother, although not present at the murder, testified about Guerrero's statements and activities that afternoon, including a trip to San Antonio.[62] Without a warrant, the police obtained the cell-site-location information (CSLI)[63] from Guerrero's cellphone service-provider.[64] That CSLI indicated Guerrero made a number of phone calls at approximately the time of one of the murders through a cellphone-receiving tower located within the vicinity of the murder site.[65] The CSLI further indicated that between 4:30 and 5:00 p.m., Guerrero was moving east, and by 5:42, he was receiving service in the San Antonio area, corroborating testimony from Guerrero's brother of their activities that afternoon.[66]

Guerrero argued on appeal that these phone records should have been suppressed for two reasons: (1) they were obtained in violation of the Stored Communications Act,[67] and (2) obtaining them

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[56] The United States and California had agreed that it was a search. *See* 134 S. Ct. 2473 at 2489, n. 1.

[57] *Riley,* 134 S. Ct. at 2492, n.1.

[58] *Id.*

[59] United States v. Guerrero, 768 F.3d 351 (5th Cir. 2014) *cert. denied*, 135 S. Ct. 1548, 191 L. Ed. 2d 643 (2015).

[60] *Id.* at 354-356.

[61] *Id.* at 355.

[62] *Id.*

[63] Historical cell-site-location information provides "the antenna tower and sector to which the cell phone sends its signal." *See* In re U.S. for Historical Cell Site Data, 724 F.3d 600, 609 (5th Cir. 2013). The records also show the date, time called, and number called when a call is made. *See also* FCC Commercial Mobile Services, 47 C.F.R. § 20.18(h) (1) (2012) (requiring cell phone carriers to have, by 2012, the ability to locate phones within 100 meters of 67% of calls and 300 meters for 95% of calls for network based calls, and to be able to locate phones within 50 meters of 67% of calls and 150 meters of 95% of calls for hand-set based calls).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *See* 18 U.S.C. §2703(d) (2009). In the Stored Communications Act, Congress has mandated a specific procedure that the government must follow to obtain that data. It requires that when the government seeks such records from a service provider, it must obtain a court order after submitting an application identifying "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." *See* 768 F.3d 351, 358.

without a warrant violated his constitutionally protected expectation of privacy under the Fourth Amendment.[68]

As to the Stored Communications Act, the Fifth Circuit held that the Act had been violated since the government admitted that the proper procedures were not followed.[69] However, the court further held that suppression of evidence is not a remedy for a violation of the Act[70] and there was no other basis for excluding evidence for a statutory violation.[71]

Thus, the Fifth Circuit held that for Guerrero to suppress the CSLI, he had to show that it was obtained in violation of the Fourth Amendment.[72] Relying on *Smith v. Maryland*,[73] the court held that when a cellphone owner uses his phone, he voluntarily conveys location information to his service provider with the understanding that the service provider records this information. Thus, they have no expectation of privacy in the information.[74] Guerrero argued that the mosaic theory of the search doctrine, as discussed in *California v. Riley*,[75] should govern the outcome in his case.[76] The Fifth Circuit declined to follow *Riley* for two reasons: (1) it did not unequivocally overrule a prior ruling by the Fifth Circuit[77] and (2) it did not involve

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[68] 768 F.3d at 358-359.

[69] *Id.* at 358.

[70] *Guerrero,* 768 F.3d at 358. The Act has a narrow list of remedies, and—unlike the Wiretap Act, *See* 18 U.S.C. § 2515—suppression is not among them. *See* 18 U.S.C. § 2707(b) (listing "appropriate relief" as "equitable or declaratory relief," "damages," and "reasonable attorney's fee and other litigation costs reasonably incurred"); 18 U.S.C. § 2708 (providing that the "remedies and sanctions described in this chapter are the only judicial remedies and sanctions for non-constitutional violations of this chapter"). *See also* United States v. Smith, 155 F.3d 1051, 1056 (9th Cir. 1998) (concluding that suppression is not available under the Act); United States v. Jones, 908 F.Supp. 2d 203, 209 (D.D.C. 2012) (same).

[71] *Id. citing* United States v. Clenney, 631 F.3d 658, 667 (4th Cir. 2011) ("[T]here is no exclusionary rule generally applicable to statutory violations." *quoting* United States v. Abdi, 463 F.3d 547, 556 (6th Cir. 2006)); *cf*. Davis v. United States, 131 S. Ct. 2419, 2426 (2011) (explaining that the exclusionary rule "is a 'prudential' doctrine created by this Court to 'compel respect for the constitutional guaranty,'" and is aimed at "deter[ring] future Fourth Amendment violations").

[72] *Id.*

[73] *Smith,* 442 U.S. 735 (1979) (In *Smith*, the Supreme Court held that the use of a pen register, which records every telephone number that the phone subscriber dials, was not a search because Smith did not have a legitimate, reasonable expectation of privacy in the numbers he dialed from his phone. He knew he was conveying dialing information to his telephone company and it was a voluntary act on his part assuming the risk it would be shared with others, in particular, the police.) *See also*, In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 615 (5th Cir. 2013) (holding that "Section 2703(d) orders to obtain historical cell site information for specified cell phones at the points at which the user places and terminates a call are not categorically unconstitutional.")

[74] *Guerrero,* 768 F.3d at 358-359.

[75] 134 S. Ct. 2473, 2489-2490 (2014). *See also* United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J. concurring) and articles listed at *supra* note 46.

[76] *Id.* at 359 (arguing that an intervening change in the law required the court to depart from its prior holding).

[77] *Id.* (referring to its decision in In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 615 (5th Cir. 2013).

the issue of what constituted a search but only the issue of how the search incident to arrest exception applied to cellphones.[78]

The Supreme Court recently denied writs in *Guerrero*.[79] However, as of November 2015, there is a split in the circuits on this issue. In an extensive and well-reasoned decision, a panel of the Fourth Circuit in *United States v. Graham*[80] recently held that the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical CSLI *for an extended period of time*.[81] Relying on the mosaic search arguments in *U.S. v. Jones*,[82] the Fourth Circuit held that a person has a reasonable expectation of privacy in historical CSLI because the examination of these records can enable the government to trace the movements of the cell phone and its user across public and private spaces and thereby discover the private activities and personal habits of the user.[83] Its inspection by the government, therefore, requires a warrant, unless an established exception to the warrant requirement applies.[84] Unfortunately, the government sought a hearing en banc

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[78] *Id.*

[79] *See also* United States v. Davis, 785 F.3d 498 (11th Cir. 2015) *cert denied* 2015 WL 4600402 (11/9/15) (The Eleventh Circuit also held that requiring a cellphone company to turn over records indicating the location of a cellphone is not a search. This was an *en banc* decision reversing a panel of the Eleventh Circuit which had determined that using CSLI was a search, relying on a person's reasonable expectation of privacy and the mosaic theory found in the concurrences in *U.S. v. Jones.* It specifically also found that a person does not lose this expectation of privacy by giving this information to the cell phone service provider because the average person is not aware that they are giving the company their location when they make a call and certainly not when they receive a call.)

[80] United States v. Graham, 796 F.3d 332 (4th Cir. 2015).

[81] *Id*. at 344-345, 350. The government obtained a court order for this information through the Stored Communications Act. The court, however, found the order was not based on probable cause, which it should have been; nevertheless, it held that the officers executed the order were in good faith so that suppression of the evidence was not required. The information obtained through the court order allowed the government to examine historical CSLI pertaining to a period of 14 and 221 days, both of which the court found to be "extensive," and the records revealed 29,659 location data points for Graham and 28,410 for Jordan, amounting to well over 100 data points for each defendant per day on average.

[82] *See* discussion of the mosaic search theory at *supra* notes 46-47.

[83] 796 F.3d 332, 348 *citing* U.S. v. Jones, 132 S. Ct. 945 (2012) as well as Commonwealth v. Augustine, 4 N.E.3d 846, 865–66 (Mass. 2014) (reasonable expectation of privacy in location information shown in historical CSLI records); State v. Earls, 70 A.3d 630, 632 (N.J. 2013) (reasonable expectation of privacy in location of cell phones); Tracey v. State, 152 So.3d 504, 526 (Fla. 2014) (objectively reasonable expectation of privacy in "location as signaled by one's cell phone"); In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel., 849 F.Supp. 2d 526, 539 (D. Md. 2011) ("reasonable expectation of privacy both in [subject's] location as revealed by real-time [CSLI] and in his movement where his location is subject to continuous tracking over an extended period of time, here thirty days"); In re Application of U.S. for an Order Authorizing the Release of Historical Cell–Site Info. (In re Application (E.D.N.Y.), 809 F.Supp. 2d 113, 120 (E.D.N.Y. 2011) ("reasonable expectation of privacy in long-term cell-site-location records").

[84] 796 F.3d 332, 345.

and it was granted.[85] Given the fact that the Supreme Court has denied writs in two similar cases in 2015, it's likely the Fourth Circuit will reverse the panel. Hopefully, the defendant will not be deterred by the Court's repeated rebuffs on this issue and will be able to distinguish his case to get a hearing before the Court on this very important issue. The distinction the appellate courts are making between CSLI and GPS tracking[86] is not well reasoned and needs to be explored by the Supreme Court.

1. Louisiana

The one Louisiana circuit court to consider a cellphone search since *Riley* and *Jones*, completely ignored both cases and the law created therein! In *State v. Green*,[87] a victim's mother contacted the Springhill Police Department upon finding that her twelve-year-old daughter had been contacted through Facebook by an adult male.[88] By using the victim's cellphone and posing as the young girl, an officer arranged a meeting with the defendant. Upon defendant's arrival at the agreed upon location, he was placed under arrest.[89] He had an ear bud in his ear that connected to a cell phone in his pocket, which the officer seized.[90] At the police station, the officer removed the back of the cell phone and its battery to obtain the serial number and information about the data card.[91] A week later, he applied for and obtained a search warrant for the phone seized from Green.[92] Then, the officer turned on defendant's phone and was able to take pictures of text messages between the defendant and the minor, which were introduced as evidence at trial.[93] Green was charged with computer-aided solicitation of a minor[94] and indecent behavior with juveniles.[95]

Before trial, the defendant filed a motion to suppress, asserting the partial disassembly of Green's cell phone was a search under *United States v. Jones*[96] because the officer physically "occupied Green's private property" to obtain information.[97] In *Jones,* a majority of the Supreme Court held that the government's installation of a GPS tracking device on a vehicle and the use of that device to monitor the vehicle's movements constituted a "search" under the Fourth Amendment because the government had "physically occupied private

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[85] ___ Fed. Appx. ___, 2015 WL 6531272 (4th Cir. 2015). The court also denied the defendants' motions for rehearing en banc. Oral argument is tentatively scheduled for March 22-25, 2016.

[86] *See* discussion of GPS tracking, *infra* notes 158-202.

[87] 164 So. 3d 331 (La. Ct. App. 2015) (*See* further discussion of *Green* regarding Facebook posts at *infra* notes 322-330.)

[88] *Id*. at 335.

[89] *Id*. at 336.

[90] *Id.*

[91] *Id.* at 344.

[92] *Id*. at 336.

[93] *Id.*

[94] LA. REV. STAT. ANN. § 14:81.3 (2015).

[95] LA. REV. STAT. ANN. § 14:81 (2015).

[96] *Jones,* 132 S. Ct. 945 (2012).

[97] *Green,* 164 So.3d at 342.

property for the purpose of obtaining information."[98] Rather than focusing on whether the defendant had a reasonable expectation of privacy in his movements,[99] the majority focused on whether there had been a common-law trespass, a "physical intrusion of a constitutionally protected area."[100] However, the trial court, ignoring *Jones*, ruled that the defendant had no expectation of privacy in the serial number on the phone and admitted the evidence.[101] The Second Circuit upheld this decision.[102]

The Second Circuit upheld the trial court and, remarkably, did not rely on, or even cite for that matter, either *Riley*[103] or *Jones*[104] despite the facts that *Riley* had been rendered by the United States Supreme Court nine months prior to its decision and the defendant explicitly argued *Jones*.[105] Instead, it relied on *Katz v. United States*,[106] the 1967 United States Supreme Court case that created the "unreasonable expectation of privacy" test, and two unreported federal district court cases outside of the Fifth Circuit.[107]

Relying on *Katz*, the Second Circuit held that the "protections from unreasonable searches and seizures apply *only* if the defendant seeking to invoke them has a reasonable expectation of privacy in the

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[98] *Jones,* 132 S. Ct. at 951. *See also* Florida v. Jardines, 133 S. Ct. 1409 (2013) (police dog sniffing around front porch of a home was a search because the dog physically occupied private property for the purpose of obtaining information; *citing Jones)*.

[99] Four justices based their determination that the placement of the GPS on the vehicle constituted a search on the fact that he had a reasonable expectation of privacy in their movements. Justice Sotomayor based her determination on both theories.

[100] *Id.* at 953. The Court made clear, however, that this trespass test should apply in addition to the "reasonable expectation of privacy" test. ("[W]e do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to Katz analysis."); *See also*, Arizona v. Hicks, 107 S. Ct. 1149 (1987) (officer's actions in moving equipment to locate serial number constituted a search).

[101] *Id.* at 337.

[102] *Id.* at 344.

[103] *Riley*, 134 S. Ct. 2473 (2014).

[104] *Jones*, 132 S. Ct. 945 (2012). Nor did it consider Florida v. Jardines, 133 S. Ct. 1409 (2013) (further explicating the trespass theory of search).

[105] Only one Louisiana case has cited *Riley* since its publication. In State v. Carter, 171 So.3d 1265 (La. Ct. App. 2015), defendant argued that the cell phone registered to him and his wife was illegally seized without a warrant and should not have been admitted into evidence. Unfortunately, the record reflected that while defendant had filed omnibus motions, including a motion to suppress, he did not move to suppress *the cell phone in question* in either motion. Furthermore, it did not appear that there was any hearing on the motions that were filed. The Fifth Circuit held that when a defendant does not object to the trial court's failure to rule on a motion prior to trial, the motion is considered waived. State v. Rivera, 134 So. 3d 61, 66 (La. Ct. App. 2015).

[106] Katz v. United States, 389 U.S. 347 (1967).

[107] *See* U.S. v. Green, No. 09-10183-GAO, 2011 WL 86681 (D. Mass. Jan. 11, 2011) (defendant did not have a reasonable expectation of privacy in the International Mobile Subscriber Identifier (IMSI) numbers, which are analogous to serial numbers, associated with his cellphone) and U.S. v. Rodriguez, No. 11-205, 2012 WL 73008 (D. Minn. Jan. 10, 2012) (officer's removal of the back of the defendant's cellphone to obtain the FCC ID number for use in a search warrant was not improper because the phone was being held pursuant to a lawful arrest).

place searched."[108] However, after the *Jones* decision[109] this is no longer true. The main point of *Jones* was that "Fourth Amendment rights do not rise or fall with the *Katz* formulation"[110] and physical intrusion on a person's property is also a search.[111]

In *Green* the initial physical intrusion was the seizure of the phone, which, pursuant to *Riley*, would have been allowed without a warrant based on the search incident to arrest exception.[112] However, an additional intrusion took place when the officers opened the back of the phone to find the serial number. According to *Arizona v. Hicks*,[113] a decision also not discussed in the Second Circuit's opinion, taking any action unrelated to the objectives of the authorized intrusion (arrest) which exposes to view a concealed portion of an object produces a new invasion of a citizen's privacy unjustified by the initial intrusion. Thus, a search warrant or exception to the search warrant requirement would be needed. Nevertheless, the opening of the back of the phone was, arguably, a *de minimus* further intrusion necessary to obtain the descriptive identifying information needed for a search warrant application.[114]

The Second Circuit's distinction between obtaining "address," or non-content information, and content information[115] was correct

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[108] State v. Green, 164 So. 3d 331, 343 (emphasis added). According to the Court, Green did not have such expectation.

[109] *See also* Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) ("When 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. By reason of our decision in Katz v. United States, 389 U.S. 347, property rights "are not the sole measure of Fourth Amendment violations—but though Katz may add to the baseline, it does not subtract anything from the Amendment's protections when the Government does engage in [a] physical intrusion of a constitutionally protected area.") [citations omitted]).

[110] United States v. Jones, 132 S. Ct. 945, 950 (2012).

[111] *Id.*

[112] *See* Riley v. California, 134 S. Ct. at 2486 (Both defendants conceded that the officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. The Court found that to be a "sensible concession," *citing* Illinois v. McArthur, 531 U.S. 326, 331–33 (2001) and United States v. Chadwick, 433 U.S. 1, 13 (1977).

[113] 107 S. Ct. 1149 (1987) (In *Katz*, after entering an apartment under exigent circumstances, officers moved stereo equipment around in order to see and record their serial numbers and call them in to see if the equipment was stolen. This was held to constitute an additional search not justified by the exigent circumstances.)

[114] *See* State v. Green, 164 So.3d at 337 (Officer testified that he got the serial number for purposes of identifying the cell phone and that by retrieving the serial number, he did not obtain any of Green's personal information.)

[115] Courts are increasingly using the analogy of electronic communications to an old fashioned letter – the address of the letter is open to view by the post office so the sender/receiver has no expectation of privacy in the address. On the other hand, the government is not entitled to open the letter and read the contents without a search warrant. Much the same, the information about who is sending and receiving electronic communications (among a few other things) is open to view by the internet service/email/cellphone provider so a person has no expectation of privacy in it. And, despite the fact that many third party providers might also be able to see the contents of an email/text, most courts find this to be "content" and subject to a search warrant requirement. *See, e.g.*, United States v. Forrester, 512 F.3d 500 (9th Cir. 2008) (installation of mirror port to record to/from email addresses not a search); United

even if it relied on unreported federal district court cases for its analysis. Noting the many lower court cases protecting cellphone *contents* from discovery without a search warrant,[116] the court distinguished them from the facts in *Green* by noting that the serial numbers merely served to identify the particular phone and did not contain any information relative to electronic data actually stored on the phone.[117] Thus, the court held, the defendant did not have a reasonable expectation of privacy in the serial number of his cellphone and, removal of the back and battery to obtain this information was not a search within the meaning of the Fourth Amendment.[118]

C. Recording Police Interactions

It has been true for decades that law enforcement officers can watch citizens and record their activities from any public place.[119] However, is the same true for citizens recording police officers in public places, often with cellphones?

Ask Therese Richard, a Crowley woman arrested in December 2013 for "remaining while being forbidden" because she recorded a video in the Crowley police department lobby after being asked to leave. She was arrested again, in May 2014, for "interfering with a law enforcement investigation" and "public intimidation" because she

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States v. Warshak, 631 F.3d 266 (6th Cir. 2010) (obtaining content of emails was a search); Quon v. Arch Wireless Operating Co., 529 F.3d 892 (9th Cir. 2008) (texts sent from pager are content information even though service provider was able to access the contents so that warrant was necessary) *reversed and remanded,* City of Ontario, California v. Quon, 560 U.S. 746, 760-64 (2010) (wherein the Supreme Court refused to rule on the argument that looking at the text messages was a search, but assumed that an employee has such an expectation of privacy and it's reasonable, but compared the search of an employer issued phone to the search of an office and concluded that such search, without a warrant, was reasonable.)

[116] Again, without referring to *California v. Riley*. *See* State v. Green, 164 So. 3d at 343 *citing* U.S. v. Zavala, 541 F.3d 562 (5th Cir.2008) (stating that an individual has a reasonable expectation of privacy in the "wealth of private information" within a cell phone, including emails, text messages, call histories, address books, and subscriber numbers); U.S. v. Finley, 477 F.3d 250 (5th Cir. 2007) (finding that defendant had a reasonable expectation of privacy in the call history and text messages on his cell phone); U.S. v. Quintana, 594 F.Supp.2d 1291 (M.D.Fla. 2009) (stating that a cell phone owner has a reasonable expectation of privacy in the electronic data stored on the phone, thus, a search warrant is required to search the contents of a cell phone unless an exception to the warrant requirement exists); U.S. v. Davis, 787 F.Supp.2d 1165 (D.Or. 2011) (stating that an individual has a reasonable expectation of privacy in his personal cell phone, including call records and text messages); State v. Bone, 107 So.3d 49 (La. Ct. App. 2012) (finding that the defendant had a reasonable expectation of privacy in the text messages sent and received on his cell phone); City of Ontario v. Quon, 560 U.S. 760 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-*Id*entification. That might strengthen the case for an expectation of privacy.")

[117] State v. Green, 164 So. 3d at 344.

[118] *Id.*

[119] *See* Kyllo v. United States, 533 U.S. 27, 32 (2001) (We have held that visual observation is no "search" at all.) *citing* Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

was videotaping her neighbor's interaction with a police officer.[120] All charges were ultimately dismissed.[121] In December 2014, she filed suit against the city, the police chief, and the two officers who arrested her seeking monetary damages under 42 U.S.C. § 1983, and under state law for mental anguish related to her false arrest, malicious prosecution, and false imprisonment.[122] She asserted a First Amendment right to video record the police doing their official job.[123] Although her suit was ultimately dismissed due to expiration of the statute of limitations,[124] her experience is an example of what appears to be happening in Louisiana[125] and across the country,[126] as people increasingly use their cellphones, cameras, and drones to record police activity. In fact, an entire website has been set up to monitor and discuss photographing law enforcement.[127]

Do citizens have a First Amendment right to record the police while they are doing their job? The United States Supreme Court has never directly ruled on this, but numerous circuit courts have recognized such a right exists.[128] No court has found otherwise.[129]

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[120] *See* Richard v. Gibson, No. 14-CV-03439, 2015 WL 3791619 (W. D. La. June 16, 2015) (information found in her complaint *available at* Theresa RICHARD, v. Kelly P. GIBSON, individually and in his official capacity as police chief of the Crowley Police Department, Scott Fogleman, individually and in his Official capacity as a lieutenant for the Crowley Police Department, and Skeat Thibodeaux, individually and in his official capacity as a police officer for the Crowley Police Department, and City of Crowley, No. 6:14-cv-03439, 2014 WL 7717594 (W.D. La. Dec. 12, 2014). *See also* Lanie Lee Cook, *Lawsuit Filed Against Crowley Police After Arrests for Video Recording Officers*, THEADVOCATE.COM. Dec. 22, 2014, a*vailable at* http://theadvocate.com/news/11100755-123/lawsuit-filed-against-crowley-police last visited on Aug. 25, 2015).

[121] *See* Richard v. Gibson, No. 14-cv-03439, 2015 WL 3791619 (W. D. La. June 16, 2015).

[122] *Id.*

[123] *Id.*

[124] *Id.* at *2.

[125] *See, e.g.,* Laura Maggi, *Videotaping of Police Activity at Core of Federal Lawsuit, available at* http://www.nola.com/crime/index.ssf/2010/03/vIdeotaping_of_police_activity.html (last visited Aug. 27, 2015); Mac Slavo, *State Laws Ban Recording of Police Officers*, *available at* http://www.shtfplan.com/headline-news/state-laws-ban-recording-of-police-officers_06142010 (last visited Aug. 27, 2015). *See also* Griffith v. Hughes, No. 07-9738, 2009 WL 2355769 at *1 (E.D. La. July 29, 2009); Carlos Miller, *Louisiana Cops Arrest Man For Video-recording Them in Public II*, *available at* http://photographyisnotacrime.com/2013/04/louisiana-cops-arrest-man-for-vIdeo-recording-them-in-public/ (last visited Aug. 25, 2015).

[126] *See, e.g.*, the list of 17 prosecutions in Chicago, Illinois found in American Civil Liberties Union of Ill. v. Alvarez, 679 F.3d at 583, 593 (7th Cir. 2012).

[127] *See* PINAC (Photography Is Not a Crime) *available at* http://photographyisnotacrime.com/2013/04/louisiana-cops-arrest-man-for-vIdeo-recording-them-in-public/ (last visited Aug. 25, 2015).

[128] *See* American Civil Liberties Union of Ill v. Alvarez, 679 F. 3d 583, 608 (7th Cir. 2012) *cert. denied* 133 S. Ct. 651 (2012) (invalidating a state eavesdropping statute as applied to the recording of police officers in the performance of their duties in traditional public fora); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing a First Amendment right to photograph or videotape police conduct); Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011) (holding that there is a constitutionally protected right to videotape police carrying out their duties in public and that the right was clearly established); Fordyce v. City of Seattle, 55 F. 3d 436, 439 (9th Cir. 1995) (recognizing a First Amendment right to film matters of public interest – the plaintiff was filming the activities of police officers at a protest). *See also* Adkins v. Limtiaco, 537 Fed. Appx. 721, 722 (9th Cir. 2013) (there is a clearly established constitutional right to photograph the

The Fifth Circuit has not decided this issue,[130] but recently a district court within the Fifth Circuit agreed with the "robust consensus among circuit courts of appeal" and held such a right exists.[131]

The strong American concepts of free speech and free press have always encompassed a citizen's right to express himself, as well as the right to obtain and disseminate information about matters of public concern.[132] The First Amendment, subject to time, place, and manner restrictions,[133] protects a citizen's right to assemble in a public forum, receive information on a matter of public concern (such as police officers performing their duties), and to record that information for the purpose of later conveying it to third parties.[134] The right to make an audio or video recording of public matters is a corollary to this right to gather and disseminate information.[135] As the Seventh Circuit has stated, "The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected."[136] Justice Breyer has noted that this right is similar to the right to contribute money to a campaign—the action is protected "not because money *is* speech, but because it *enables* speech."[137]

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scene of an accident during a police investigation). Furthermore, the United States Department of Justice has openly stated its position that the First Amendment protects all U.S. citizens who record the activities of the police in public, and has intervened in at least one civil rights lawsuit against police officers to support that First Amendment right. *See* Sharp v. Balt. City Police Dep't, No. 1:11-cv-02888-BEL, 2012 WL 9512053 (D. Md. Jan. 10, 2012) (Statement of Interest filed January 10, 2012).

[129] Two other U.S. Courts of Appeals have declined to hold that a First Amendment right to record was "clearly established" as of particular dates in the past. S*ee* Kelly v. Borough of Carlisle, 622 F. 3d 248, 261-62 (3d Cir. 2010); Szymecki v. Houck, 353 Fed. App'x 852, 852 (4th Cir. 2009) (per curiam).

[130] *But see* Shillingford v. Holmes, 634 F. 2d 263, 264, 266 (5th Cir. 1981) (stating that police officer's unprovoked and unjustified assault on plaintiff who was photographing what the policeman did not want to be memorialized and who was not involved in the arrest incident and who didn't interfere with the police in any way established a deprivation of a constitutional right); Enlow v. Tishomingo County, 962 F. 2d 501, 513 (5th Cir. 1992) (arrest for photographing police raid where claimant did not interfere was unconstitutional).

[131] *See* Buehler v. City of Austin, No. A-13-CV-1100-ML, 2015 WL 737031 at *4 (W.D. Tex. Feb. 20, 2015). A number of other district courts have also recognized such a right. *See, e.g.*, Fleck v. Trustees of Univ. of Pennsylvania, 995 F. Supp. 2d 390 at 403 (E.D. Pa. 2014); Hudkins v. City of Indianapolis, ___ F. Supp. 2d ___, 2015 WL 4664592 (S.D. Ind. 2015); Higginbotham v. City of New York, ___ F. Supp. 2d ___, 2015 WL 2212242 at *5 (S.D.N.Y. 2015).

[132] *See* Hudkins v. City of Indianapolis, ___ F. Supp. 2d ___, 2015 WL 4664592 at *6 (S.D. Ind. 2015).

[133] *See* Smith v. City of Cumming, 212 F. 3d 1332, 1333 (11th Cir. 2000). *See also* Glik v. Cunniffee, 655 F.3d at 84; Crawford v. Geiger, 996 F. Supp. 2d 603 (N.D. Ohio 2014).

[134] Buehler v. City of Austin, 2015 WL 737031, at *3.

[135] *See* ACLU of Ill. V. Alvarez, 679 F. 3d 583, 595, 608 (7th Cir. 2012).

[136] *Id.* at 595.

[137] *Id*. at 597 (citing Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897 (2000) (Breyer, J. concurring)).

Last year, Illinois became the first state in the nation to address publicly filming police activity.[138] Illinois' eavesdropping statute requires that all parties consent to any recording made.[139] The law[140] was revised in numerous ways, one of which was to make it clear that it only applied to "private" conversations, thus allowing filming of police performing their public duties, none of which are considered private. During 2015, legislatures in ten states have considered, or will be considering, measures that clarify which behaviors are legal and illegal while filming police.[141] Louisiana was not one of those legislatures, but given the increased number of incidents where police make an arrest, confiscate a cellphone, delete the video, and then dismiss the charges, it is time for our legislators to clarify this right under the federal and state constitutions. Despite what law enforcement officers may think or like, citizens have a constitutional right to audio and video record them while they are performing their duties, as long as they do not unduly interfere with the officer's official duties. Clarifying the law should serve to ease what could become volatile situations between law enforcement and Louisiana citizens.

1. Body cameras

What about an officer's right, or duty, to record an incident while on duty? Another contemporary issue in the last two years has been whether law enforcement officers should be required to wear body cameras. Given the numerous cases of alleged police misconduct in that time,[142] should governmental entities be required to provide each officer with a body camera to record all encounters with citizens?

Many people believe that recording interactions between the police and the public will not only provide the best evidence of police misconduct but would also document any defense someone might have to any accusations of improper conduct by citizens.[143] Those who support the use of body cameras by the police also believe the knowledge that the interaction is being recorded will reduce the tension between police officers and the public.[144] As the National

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[138] *See Law Enforcement Overview: The Public's Ability to Film Law Enforcement Activities*. NCSL.ORG May 29, 2015 *available at* http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx (last visited Aug. 25, 2015.)

[139] *Id.*

[140] 720 ILCS 5/14-1 *et seq* (2014).

[141] *See Law Enforcement Overview: The Public's Ability to Film Law Enforcement Activities*. NCSL.ORG. May 29, 2015 a*vailable at* http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx (last visited Aug. 25, 2015.)

[142] *See Law Enforcement Overview: Police Use of Deadly Force, Investigations Involving Police Involved Deaths, Statistics on Police Use of Force, and Police Use of Chokeholds*. NCSL.ORG. May 29, 2015 a*vailable at* http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx (last visited Aug. 25, 2015).

[143] *See Law Enforcement Overview: Police Use of Body Cameras*. NCSL.ORG. May 29, 2015 a*vailable at* http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx (last visited Aug. 25, 2015).

[144] *Id.* For example, a field experiment conducted on body cameras with the Rialto, Calif. Police Department found that incidents where police used force and where citizens

Conference of State Legislatures has found, "While many are enthusiastic about the potential benefits of body cameras, there are practical and constitutional hurdles to their implementation. These include funding,[145] data storage and retention,[146] open records laws, recording in areas protected by the Fourth Amendment, and appropriate regulations for police use."[147] Many of these and other issues have been addressed in state legislation.

Louisiana has no statewide[148] law requiring use of body cameras by police. However, in 2015, a bill was introduced in the Louisiana legislature[149] to require every law enforcement officer to wear a body camera on his or her chest or at eye level to record all contacts with any individual or group of people while in the performance of his or her official duties.[150] It was considered in Committee but tabled; a task force, though, was created to study the issue.[151] The task force is to make recommendations regarding the development and implementation of two things: 1) procedures for the use of body cameras and 2) policies relating to access to and use of the recordings taken by such cameras.[152] A report from the task force is to be provided to the legislature no later than sixty days prior to the 2016 regular session.[153]

Before 2015, only four states had enacted laws that addressed the use of body-worn cameras.[154] As of August 2015, nineteen states

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registered complaints against police officers were reduced by 50 and 90 percent respectively compared to the previous year.

[145] For example, Sheriff Newell Normand, Jefferson Parish, Louisiana sheriff, estimated that use of body cameras would cost his department about $2 million a year, which is 2% of his budget. *See NOPD Looks To Improve Use of Body Cameras in Wake of High-Profile Cases*, The Louisiana Weekly (12/8/14) ("NOPD Body Cameras") available at http://www.louisianaweekly.com/nopd-looks-to-improve-use-of-body-cameras-in-wake-of-high-profile-cases/ (last visited November 29, 2015).

[146] *Id.*

[147] *See Law Enforcement Overview: Police Use of Body Cameras*. NCSL.ORG. May 29, 2015 available at http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx (last visited Aug. 25, 2015).

[148] However, in 2014, the New Orleans Police Department (NOPD) adopted a body-camera policy as part of its 2012 federally mandated 492-point consent decree. The Consent Decree resulted from a federal probe conducted by the Department of Justice at the request of Mayor Mitch Landrieu which Eric Holder called "one of the most extensive investigations of a law enforcement agency ever conducted by the (Justice) Department" and which resulted in a "jarring March 2011 report that condemned the NOPD on virtually every aspect of police work." Brendan McCarthy, *Sweeping NOPD Reform Strategy Outlined in Federal Consent Decree*. The Times Picayune (7/24/2012). Available at http://www.nola.com/crime/index.ssf/2012/07/federal_consent_decree_outline.html (last visited 11/29/15).

[149] *See* HB 183, 2015 Reg. Legis. Sess. (La. 2015).

[150] *Id.* The text of the bill can be accessed at http://www.legis.la.gov/legis/ViewDocument.aspx?d=931637 (last visited Aug. 27, 2015).

[151] *See* H. Con. Res. 180, 2015 Reg. Legis. Sess. (La. 2015).

[152] *Id.*

[153] *Id.* The 2015 regular session of the Louisiana legislature begins March 7, 2016. The text of the bill is *available at* http://www.legis.la.gov/legis/ViewDocument.aspx?d=959386 (last visited Aug. 27, 2015).

[154] Pennsylvania, Oklahoma, Vermont, New Hampshire. *See Law Enforcement Overview: Police Use of Body Cameras*. NCSL.ORG. May 29, 2015. *Available at*

have enacted such laws or adopted resolutions concerning body-worn cameras for police.[155] Thirty-seven states considered body-worn camera legislation, and fifteen of those states enacted new measures.[156] Issues addressed in body-camera legislation include: creating study committees, as Louisiana has, setting standards for police use of such cameras, protecting the privacy of the individuals recorded, creating funding opportunities for law enforcement agencies, and considering how the use of such cameras affect eavesdropping and open records laws.[157] It will be interesting to see if this spate of new legislation—and the use of body cameras in those states providing for same—will reduce some of the tension currently existing between the public and law enforcement.

III. GLOBAL POSITIONING SYSTEMS (GPS)

The Global Positioning System (GPS) is a U.S. owned utility that provides users with positioning, navigation, and timing (PNT) services through a constellation of twenty-four active satellites,[158] which cost the United States' government over $1 billion in fiscal year 2015.[159] It originated as a 1973 Cold War military program[160] and continues to be operated today by the United States Air Force.[161] Although it was not available for non-military applications until 1983,[162] today it is an all-pervasive presence that operates in vehicles, on cellphones and mobile computers, and within tracking devices.

As mentioned above, in *United States v. Jones*,[163] the United States Supreme Court held that the placement of a GPS device on the undercarriage of a car and the monitoring of the car's movement over a period of days, qualified as a search. The majority based their decision on the fact the government physically occupied privately

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http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx (last visited Aug. 25, 2015).

[155] *See* NCSL Legislative Summit, *State Body-Worn Camera Overview.* NCSL.ORG. A*vailable at* http://www.ncsl.org/documents/summit/summit2015/onlineresources/body-camera-handout.pdf (last visited Aug. 25, 2015).

[156] *Id.*

[157] *Id.*

[158] *Space Segment*. GPS. GOV. A*vailable at* http://www.gps.gov/systems/gps/space/ (last visited Aug. 24, 2015).

[159] *Fiscal Year 2015 Program Funding*. GPS. GOV. A*vailable at* http:// www.gps.gov/policy/funding/2015/ (last visited Aug. 24, 2015).

[160] Note, *GPS Monitoring: A Viable Alternative to the Incarceration of Nonviolent Criminals in the State of Ohio*, 54 CLEV. ST. L. REV. 637, 641 (2006) (*citing* Sameer Kumar & Kevin B. Moore, *The Evolution of Global Positioning System Technology*, 11 J. SCI. EDUC. & TECH. 59, 69 (2002)). *See also* Jordan Miller, *New Age Tracking Technologies in the Post-United States v. Jones Environment: The Need for Model Legislation*, 48 CREIGHTON L. REV. 553, 560-61 (2015).

[161] *GPS Overview*. GPS. GOV. *Available at* http://www.gps.gov/systems/gps/ (last visited Aug. 24, 2015).

[162] *See A Technological Dream Turned Legal Nightmare: Potential Liability of the United States Under the Federal Tort Claims Act for Operating the Global Positioning System*, 33 VAND. J. TRANSNAT'L L. 371, 379 (2000). *See also* Miller, *New Age Tracking Technologies in the Post-United States v. Jones Environment: The Need for Model Legislation*, 48 CREIGHTON L. REV. 553, 560-61 (2015).

[163] United States v. Jones, 132 S. Ct. 945 (2012)

owned property for the purpose of obtaining information, thus, constituting a trespass.[164] However, what if the tracking device is put *on a person* rather than on physical property? Whether that should make a difference was the issue raised in *Grady v. North Carolina*.[165]

Following completion of Grady's sentences for two sex offenses, he was ordered by the state court to be monitored through a satellite-based-monitoring (SBM) system in which he would be forced to wear a tracking device, containing a GPS, at all times.[166] Grady appealed this order arguing that it violated the Fourth Amendment proscription of unreasonable searches because forcing him to wear this device was a trespass[167] and tracking his movements at all times violated his reasonable expectation of privacy,[168] thereby constituting a search under the Fourth Amendment.

In a *per curiam* opinion,[169] the Court found the use of a GPS device in this manner constituted a search. In reaching this conclusion, the Court relied on *Jones*[170] but also relied on *Florida v. Jardines*.[171] *Jardines* is another recently decided case where the Court found that law enforcement had engaged in a search because they had trespassed on property, i.e. they physically intruded upon the curtilage of the home, a constitutionally protected area, to gather information. In *Jardines*, law enforcement officers had used a police dog to sniff around the suspect's front porch to determine if drugs were inside the home.[172] The Court expressed that based on its holdings in *Jones* and *Jardines*, "it follow[ed] that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."[173]

The lower courts had, apparently, based their decisions to uphold the use of the monitoring system on the fact that the program was civil in nature and, thus, not a search for constitutional purposes.[174] The Supreme Court reminded the lower courts, however, that "it is well settled [ ] that the Fourth Amendment's protection extends beyond the sphere of criminal investigations"[175] and noted

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[164] *Id.* at 949. In the concurrence, four justices held it to be a search because the tracking violated the citizen's expectation of privacy. *Id*. at 957, 964. Justice Sotomayor agreed that it was both a trespass and violated a reasonable expectation of privacy. *Id*. at 954-955.

[165] Grady v. North Carolina, 135 S. Ct. 1368 (2015)

[166] *Id.* at 1369.

[167] *Id.* at 1369.

[168] *Id.*

[169] *Per curiam* is Latin for "by the court." It is an opinion from an appellate court that does not identify any particular judge as having written the opinion. *Per curiam* decisions tend to be short and, usually deal with issues the Court views as relatively non-controversial. Nevertheless, they are not always unanimous; some *per curiam* decisions are accompanied by dissenting opinions. *See* Legal Information Institute. Cornell University Law School. "Per Curiam." Accessible at https://www.law. cornell. edu/wex/per_curiam (last accessed 12/11/15).

[170] United States v. Jones, 132 S. Ct. 945 (2012).

[171] Florida v. Jardines, 133 S. Ct. 1409 (2013).

[172] *Id.* at 1417-18.

[173] *Grady*, 135 S. Ct. at 1370.

[174] *Id.* at 1371.

[175] *Id*. *citing* Ontario v. Quon, 130 S. Ct. 2619 (2010).

that the government's *purpose* in collecting information does not control whether the *method* it uses constitutes a search.[176] Once the Court determined that placing a GPS device on a sex offender upon release is a search, even though civil in nature, it remanded the case to the North Carolina court to determine if it was reasonable.[177]

The most interesting aspect of *Grady* is that, in three years, the Court appears to have gone from being divided, in *Jones* and *Jardines*, about whether a trespass constitutes a search[178] to issuing a *per curiam* opinion[179] in a case where the issue of what constitutes a search should have been discussed by the Court.

In *Jones*, the majority (Justice Scalia joined by Justices Thomas, Kennedy, Sotomayor, and Roberts)[180] concluded that the placement of the GPS on the undercarriage of a car constituted a search because it was a trespass.[181] Justice Sotomayor filed a separate concurrence to express her opinion that the search *also* violated the defendant's reasonable expectation of privacy.[182] Justice Alito (joined by Justices Ginsburg, Breyer, and Kagan) concurred in the decision,[183] but opined that the majority's reasoning was antiquated[184] and asserted that the decision should be strictly based on the expectation of privacy that was violated by the *lengthy* monitoring of the car's movements.[185] In all opinions, the justices criticized each other's reasoning.

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[176] *Grady*, 135 S. Ct. at 1371.

[177] *Id.*

[178] *See* United States v. Jones, 132 S. Ct. 945 (2012) and Florida v. Jardines, 133 S. Ct. 1409 (2013).

[179] *See* Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1199 (2012). According to Professor Ira Robbins, the per curiam "is a misused practice that is at odds with the individualized nature of the American common law system, frustrating efforts to hold individual judges accountable and inhibiting the development of the law." *Id.* Professor Robbins argues that the use of a *per curiam* should be limited to a very narrow class of opinions that do not expound on the particular facts or law at issue. *Id*.

[180] *Jones*, 132 S. Ct. at 947.

[181] Id. at 949.

[182] *Id.* at 954-955. Justice Sotomayor noted that "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." *Id. citing* 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"). *See* further discussion of the "mosaic" concept of a search *supra* notes 46-47. Justice Sotomayor further noted that "because 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." *Id.* at 955-956 *citing* Illinois v. Lidster, 540 U.S. 419, 426 (2004).

[183] *Jones,* 132 S. Ct. at 957.

[184] 132 S. Ct. at 957-58.

[185] 132 S. Ct. at 964 (noting that a relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable (citing United States v. Knotts, 103 S. Ct. 1081, 1085)). In *Knotts*, the Court further noted that the fact that the officers in the case relied not only

In *Jardines*, the majority (Justice Scalia joined by Thomas, Kagan, Ginsburg, and Sotomayor) held that a trespass constitutes a search,[186] and Justice Kagan (joined by Justices Ginsburg, and Sotomayor) concurred in the result based on privacy *as well as* property grounds.[187] Justice Alito (joined by Justices Roberts, Kennedy, and Breyer) dissented, again criticizing the use of the trespass doctrine, only in even stronger language.[188] In all opinions, the justices criticized each other's reasoning.

Thus, prior to *Grady*, the scorecard on whether a search is based on a combined trespass/privacy theory or solely on a privacy theory was: three justices clearly supporting the trespass theory (Justices Scalia, Thomas, and Sotomayor); four justices who had not made it clear (Justices Ginsburg and Kagan joined Justice Alito's non-trespass opinion in *Jones* but Justice Scalia's trespass theory in *Jardines*; Justices Roberts and Kennedy joined Justice Scalia's trespass opinion in *Jones* but joined Justice Alito's non-trespass opinion in *Jardines*); and two justices who had rejected the trespass theory altogether while relying on a limited expectation of privacy theory (Justices Alito and Breyer).

Despite this clear division on the Court regarding the philosophical basis of the search doctrine, no individual judge chose to take a position on the issue in *Grady*, even though a person's physical integrity was involved. How do Justices Alito and Breyer allow this opinion to be issued, *based strictly on trespass,* with no discussion of the expectation of privacy in extended monitoring of movement? Why did Justices Alito or Breyer not write a concurrence or a dissent? For this reason, other than to make it clear that the Fourth Amendment applies to civil proceedings, this opinion adds nothing more than increased speculation to the jurisprudence on the underlying theory of the Fourth Amendment.

The concept of the government tracking its citizens is sure to become even more relevant and complicated as devices become smaller,[189] more people willingly use GPS devices in their cellphones

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on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. 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. *Id.* at 1086.

[186] *Jardines,* 133 S. Ct. at 1414.

[187] 133 S. Ct. at 1418 (Justice Kagan focused on the use of a drug-detection dog, likened to a pair of high-powered binoculars, as a "specialized device" for discovering objects not in plain view [or plain smell]. That device was aimed at a home—the most private and inviolate of all places the Fourth Amendment protects. She distinguished such a dog as different from your neighbor's poodle ["which you might expect to visit at your front door"] and noted that this was both a trespass and an invasion of privacy. *Id.)*

[188] *Id*. at 1420 ("The Court's decision in this important Fourth Amendment case is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo–American jurisprudence.")

[189] Through advances in technology, a GPS chip is now small enough to be inserted under a person's skin. *See* Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1143 (2006). *See also* Note, *Privacy Implications of GPS Tracking Technology*, 4 I/S: J.L. & POL'Y FOR INFO. SOC'Y 755, 756 (2008). Nevertheless, it still requires the installation of a device on/in the item to be tracked, although recent developments now allow officers to attach GPS chips remotely by shooting sticky darts –

and vehicles allowing the government to monitor movement in real time,[190] and more and more people own and operate unmanned aerial vehicles.[191] The focus of concerns will necessarily shift from governmental trespass to the reasonableness of our expectation of privacy in this increasingly technological and less private world. *Grady* would have been an excellent vehicle within which to have that discussion.

A. Legislation

In *Jones*, Justice Alito recognized, "In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative.[192] A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."[193] He further noted that, as of 2012, Congress and most states had not enacted statutes regulating the use of GPS tracking technology.[194]

Perhaps receiving that message, bipartisan bills relating to GPS privacy have been introduced in Congress since 2012.[195]

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containing an embedded GPS chip, battery source/, and transmitter – from their police vehicle onto a target vehicle. *See* Jordan Miller, *New Age Tracking Technologies in the Post-United States v. Jones Environment: The Need for Model Legislation*, 48 CREIGHTON L. REV. 553, 563-64 (2015) *citing* Renée McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 418-419 (2007).

[190] *See* United States v. Jones, 132 S. Ct. at 955 (Sotomayor, J. concurring) where Justice Sotomayor notes that "[w]ith increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones." *See also* United States v. Pineda–Moreno, 617 F.3d 1120, 1125 (C.A.9 2010) (Kozinski, C.J., dissenting from denial of rehearing *en banc*)*; See also* Justice Alito's concurrence in *Jones* noting that "[m]any motorists purchase cars that are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen. Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road. Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements." *See* 132 S. Ct. at 963.

[191] *See* discussion of unmanned aerial *vehicles infra* notes 203-249.

[192] 132 S. Ct. at 964 *citing* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805 (2004) (Courts should place a thumb on the scale in favor of judicial caution when technology is in flux, and should consider allowing legislatures to provide the primary rules governing law enforcement investigations involving new technologies.)

[193] 132 S. Ct. at 964.

[194] *Id*.

[195] *See, e.g.* H.R. 983 (2014) (The Online Communication and Geolocation Protection Act, originally introduced in 2012 as the ECPA 2.0 Act, contained many of the same provisions as the currently pending GPS Act, but also included safeguards for online communications.); S. 2171 (2014) (The "Location Privacy Protection Act of 2014," originally introduced in 2012, would have prohibited companies from collecting or

Introduced in January 2015, and currently pending before Congress, is the Geolocation Privacy and Surveillance (GPS) Act.[196] The GPS Act seeks to establish a legal framework by giving government agencies, commercial entities, and private citizens clear guidelines for when and how geolocation information can be accessed and used.[197] It would also create a process by which government agencies could get a warrant, based on probable cause, to obtain geolocation information.[198] This process would be similar to the way government agencies currently get warrants for wiretaps or other types of electronic surveillance.[199] In addition, the Act would prohibit businesses from disclosing geographical tracking data about their customers without the customers' permission or a warrant.[200] The bill purports to cover ALL law enforcement agencies, including state and local.[201] Given that the global positioning system is operated by the federal government and crosses all state lines, it would appear that federal legislation would preempt any state legislation in this area.[202]

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disclosing geolocation information from an electronic communications device without the user's consent. It provided exceptions for parents tracking their children, emergency services, law enforcement, and other cases. The bill would also have prohibited development and distribution of "stalking apps," established an Anti-Stalking Fund at the Department of Justice, and taken other steps to prevent geolocation-enabled violence against women). *See generally*, *Geolocation Privacy Legislation*. GPS.GOV. Updated July 22, 2015. *Available at* http://www.gps.gov/policy/legislation/gps-act/ (last visited Aug. 25, 2015).

[196] *See* S. 237 (2015) and H.S. 491 (2015). For an excellent and detailed discussion of the Act, *see* GPS Act. Ron Wyden. Senator for Oregon. *Available at* https://www.wyden.senate.gov/priorities/gps-act (last visited Aug. 25, 2015).

[197] *See GPS Act*. Ron Wyden. Senator for Oregon. *Available at* https://www.wyden.senate.gov/priorities/gps-act (last visited Aug. 25, 2015).

[198] *See Geolocation Privacy Legislation*. GPS.GOV. Updated July 22, 2015. *Available at* http://www.gps.gov/policy/legislation/gps-act/ (last visited Aug. 25, 2015).

[199] *See GPS Act*. Ron Wyden. Senator for Oregon. *Available at* https://www.wyden.senate.gov/priorities/gps-act (last visited Aug. 25, 2015). *See also Geolocation Privacy Legislation*. GPS.GOV. Updated July 22, 2015. *Available at* http://www.gps.gov/policy/legislation/gps-act/ (last visited Aug. 25, 2015).

[200] *See Geolocation Privacy Legislation. GPS.GOV. Updated July 22, 2015. Available at http://www.gps.gov/policy/legislation/gps-act/ (last visited Aug. 25, 2015). See also GPS Act. Ron Wyden. Senator for Oregon. Available at https://www.wyden.senate.gov/priorities/gps-act (last visited Aug. 25, 2015).*

[201] *See* the proposed 18 USCA §2601 (7) ("The term 'investigative or law enforcement officer means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of, or to make arrests for, offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.") *available at* https://www.wyden.senate.gov/download/?Id=1ce29f18-8a62-4721-84af-5f8d61ff23c6&download=1 (last visited on Aug. 25, 2015).

[202] The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (sic) U.S. Const. art. VI, cl. 2. *See also* Arizona v. United States, 132 S. Ct. 2492, 2500-01 (2012) which provides, "There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision. *See, e.g.,* Chamber of Commerce of United States of America v. Whiting, 131 S. Ct. 1968, 1974–1975 (2011)."

With the all-invasive use of global positioning systems today, combined with the advances in its technology, it is extremely important that, at least until Congress passes legislation providing for rules for using GPS information, the courts develop a test that gives clear guidance to law enforcement and citizens as to the protection of their privacy. At present, this has not been done.

IV. UNMANNED AIRCRAFT SYSTEMS (UAS) *AKA* DRONES

In July of 2014, Jacqueline L. Whitaker, resident of Bossier City, Louisiana, claimed in federal court[203] that beginning in January 2011, she became the victim of "unauthorized aerial surveillance" when "military planes from Barksdale Air Force base, unmarked small planes/helicopters, and unmanned drones" were regularly dispatched to her home to conduct surveillance on her, sometimes multiple times in a single day.[204] She claimed Barksdale Air Force Base, the FBI, the U.S. Attorney's Office, the Louisiana State Police, and Michael Huerta, chief administrator of the FAA, violated her rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. She also claimed the government violated the Foreign Intelligence Surveillance Act ("FISA")[205] and the Electronic Communications Privacy Act ("ECPA")[206] and requested $3.5 million in punitive damages. Although both of her suits were dismissed,[207] her concerns about covert surveillance through the use of unmanned aircraft

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Section 5 of the Act provides: "No person may acquire the geolocation information of a person for protective activities or law enforcement or intelligence purposes except pursuant to a warrant issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure, as amended by section 3, or the amendments made by this Act, or the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)." *See* The GPS Act *available at* https://www.wyden.senate.gov/download/?id=1ce29f18-8a62-4721-84af-5f8d61ff23c6&download=1 (last visited Aug. 25, 2015). This would appear to preempt state law in this area. *See also* State v. Sarrabea, 126 So. 3d 453, 458 (La. 2013).

[203] *See* Whitaker v. Barksdale Air Force Base, No. 14-2342, 2015 WL 574697, at *1 (W.D. La. Feb. 11, 2015); Whitaker v. Huerta, No. 15-644, 2015 WL 4112220, at *1 (W.D. La. July 7, 2015).

[204] Whitaker v. Huerta, CIV. A. No. 15-644, 2015 WL 4112220, at *1 (W.D. La. July 7, 2015).

[205] *See* 50 U.S.C.A. § 1810 (1978) ("An aggrieved person … who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation….")

[206] *See* 18 U.S.C.A. § 2511 (2008) ("Except as otherwise specifically provided in this chapter any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication … shall be punished….")

[207] Her claims in the first suit were dismissed due to state sovereign immunity pursuant to the Eleventh Amendment, governmental immunity, and lack of subject matter jurisdiction. *See* Whitaker v. Barksdale Air Force Base, No. 14-2342, 2015 WL 574697, at *3-8 (W.D. La. Feb. 11, 2015). Her claims in the second suit were dismissed for failure to make a plausible claim. *See* Whitaker v. Huerta, CIV. A. No. 15-644, 2015 WL 4112220, at *3 ("Even accepting Whitaker's allegations as true, she fails to state a plausible claim that a constitutional violation has taken place.")

systems ("UAS"), more colloquially referred to as drones, [208] are becoming more common.[209]

Drones are one of the newest[210] and most rapidly developing technologies.[211] In fact, ongoing technological advancements have increased the popularity of drones with local law enforcement agencies so much that Congress recently passed regulations on drones[212] in the Federal Aviation Administration ("FAA")

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[208] Also known as "UAS" or "unmanned aerial vehicles" (UAV). *See* Fact Sheet –*Federal Aviation Administration Support of Super Bowl XLIX*. Federal Aviation Administration. Accessible at http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18177 (last visited 10/11/15).

[209] *See* also, *e.g.* Raoul v. City of New York Police Dep't, No. 14-CV-1787 RRM CLP, 2015 WL 1014204, at *2 (E.D.N.Y. Mar. 6, 2015), *appeal dismissed* (May 21, 2015) (claiming drones were being used to survey him); Credico v. Unknown Official for U.S. Drone Strikes, 537 F. App'x 22 (3d Cir. 2013) (complaint sought an injunction against the United States' drone program because the program violates the Eighth Amendment and inflicts emotional distress by "putting one in fear of being drone attacked."); Allums v. Dep't of Homeland Sec., No. 13-CV-00807 JSC, 2013 WL 4426258, at *3 (N.D. Cal. Aug. 14, 2013) (Plaintiff alleged that he has been the target of drone surveillance and attacks at the hands of government agents); United States v. Nava-Arellano, 525 F. App'x 635, 636 (9th Cir.) *cert. denied*, 134 S. Ct. 658 (2013) (discovery request for eight pages of website printouts concerning the U.S. government's general capability to conduct surveillance of the U.S.-Mexico border using unmanned aircraft—had almost no probative value with regard to whether a surveillance aircraft actually observed Nava–Arellano continuously from the moment he crossed the border until the moment he was apprehended); Jacobus v. Huerta, No. 3:12-02032, 2013 WL 1723631, at *1 (S.D.W. Va. Apr. 22, 2013) *aff'd*, 540 F. App'x 208 (4th Cir. 2013) (Plaintiff claims that surveillance and harassment was conducted by a drone, among other things). *See also* Am. Civil Liberties Union v. Dep't of Justice, No. 12 CIV. 794 (CM), 2015 WL 4470192 (S.D.N.Y. July 16, 2015) (FOIA request for records of use of drones by U.S. government overseas); Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014) (Relatives of United States citizens who were killed in drone strikes, including one who was a leader of a terrorist organization, brought action as estate representatives against various government officials, alleging violations of the Fourth and Fifth Amendments in authorizing the drone strikes); United States v. Hamidullin, No. 3:14CR140-HEH, 2015 WL 4241397 (E.D. Va. July 13, 2015) (Defendant, a leader of Taliban-affiliated insurgent group that conducted attack on police compound near the Afghanistan border, was charged with providing or conspiring to provide material support to terrorists, referenced the use of drones in Afghanistan).

[210] *See* Matthew Henshon, Gil Whittemore. *Drones on the Horizon! Getting Ready for Unmanned Aerial Vehicles (UAVs),* 11 The SciTech Lawyer 4 (American Bar Association Summer 2015) *accessible at* http://www.americanbar.org/publications/scitech_lawyer/2015/summer/drones_on_the_horizon_getting_ready_unmanned_aerial_vehicles.html (last visited 12/10/15).

[211] According to the FAA, about one million drones will be purchased at Christmas 2015. *See* Jake Swearingen. *1 Million Drones Will Be Sold This Christmas, and the FAA is Terrified*. Popular Mechanics (9/29/15) *accessible at* http://www.popularmechanics.com/flight/drones/news/a17535/the-faa-is-terrified-that-1-million-drones-will-be-sold-this-christmas/ (last accessed 12/11/15). UASs come in a variety of shapes and sizes and serve diverse purposes. They may have a wingspan as large as a jet airliner or smaller than a radio-controlled model airplane. Fact Sheet – Unmanned Aircraft Systems. FAA. Issued 2/15/15. *Available at* http:/www.faa.gov/news/fact_sheets/news_story.cfm?news*Id*=18297 (last visited Aug. 24, 2015).

[212] Flying model aircraft/UAS for a hobby or recreational purpose does not require FAA approval, but all model aircraft operators must fly according to the law. *Id.*

Modernization and Reform Act of 2012 ("Act").[213] As part of the plan, Congress empowered the FAA to develop standards[214] for issuing Certificates of Authorization ("COA") for UAS.[215] Active COAs have been issued to over one hundred different entities within the United States, including military branches, federal law enforcement agencies,[216] seventeen police or sheriff departments, and nine additional state, local, or tribal departments[217] where drone technology is potentially useful for law enforcement purposes.[218] The most well-known law enforcement use is by the Department of Homeland Security, particularly to monitor our southern border[219] with Mexico.[220] Currently pending before the FAA is a framework of regulations that would allow routine use of certain UASs for small (under 55 pounds) UASs conducting non-recreational operations.

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[213] Pub. L. No. 112-95, 126 Stat. 11 (2012) (The Act required the FAA to address safety concerns with the operation of UAS and to create "a plan to integrate 'civil unmanned aircraft systems into the national airspace system.)

[214] *See FAA Unmanned Aircraft System (UAS) Regulations and Policies*, *available at* http://www.faa.gov/uas/regulations_policies/. There are three types of UAS Operations with various levels of regulation: Public Operations (Governmental), Civil Operations (Non-Governmental), and Model Aircraft (Hobby or Recreation Only). *Id*.

[215] FAA Modernization and Reform Act of 2012 § 332(a) (2) (A) (i). The FAA issues COAs that permit public agencies and organizations to operate a particular aircraft, for a particular purpose, in a particular area. The COA allows an operator to use a defined block as airspace and includes special safety provisions unique to the operator. COAs are usually issued for a specific period – up to two years in many cases. *See FAA Unmanned Aircraft System (UAS) Regulations and Policies*, *available at* http://www.faa.gov/uas/regulations_policies/.

[216] Ohnemus v. Thompson, 594 F. App'x 864, 865 (6th Cir. 2014) *cert. denied*, 135 S. Ct. 2844 (2015). This was a case involving a contract dispute between the president of a company which designed and manufactured remote-controlled gas and electric powered helicopters (also known as "drones") equipped with cameras and thermal imaging units and the law enforcement agency which purchased such a unit. It contains an interesting discussion of the technology and use of such drones.

[217] *See* Natasha Leonard, *Which Police Departments Want Drones?* (February 11, 2013) *available at* http://www.salon.com/2013/02/11/which_police_departments_want_drones/ (last visited Aug. 24, 2015).

[218] *See* 2011-2012 FAA List of Drone License Applicants, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/document/2012-faa-list-drone-applicants (last visited Aug. 24, 2015). *See also*, Jordan Miller, *New Age Tracking Technologies in the Post-United States v. Jones Environment: The Need for Model Legislation*, 48 CREIGHTON L. REV. 553, 567-68 (2015).

[219] The 2,000 mile long border is the busiest in the world, with over 350 million crossings a year. Hernandez v. United States, 757 F.3d 249, 266-67 (5th Cir. 2015) *reh'g* and *reh'g en banc* granted, 771 F.3d 818 (5th Cir. 2014) (*citing* the Brief of the United Mexican States as Amicus Curiae in Support of Appellants).

[220] *See* discussion in *Hernandez v. United States*, 757 F.3d 249, 266-67 (5th Cir. 2015) *reh'g* and *reh'g en banc granted*, 771 F.3d 818 (5th Cir. 2014) and *adhered to in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015) (noting that DHS now uses mobile surveillance units, thermal imaging systems, large and small scale "non-intrusive inspection equipment" [basically scanners and x-ray machines], as well as aircraft and unmanned aircraft systems along the southwest border which carry with them a host of Fourth Amendment implications that could "plunge Border Patrol agents into a sea of uncertainty as to what might be reasonable in the way of searches and seizures").

These regulations would limit flights to daylight and visual-line-of-sight operations, among other things.[221]

As the use of unmanned aircraft systems has increased, concerns about their impact on privacy, like those of Ms. Whitaker and others, have grown.[222] Although some may seem like "tinfoil hat"[223] concerns, there are actual differences between drones and other aircrafts that make it easier for a drone to intrude into the private lives of citizens. In particular, drones are relatively inexpensive and easy to operate, they can be very small, and can fly very low. All of these features, taken together, make drones available to a wide range of people who can operate them in places where most people heretofore had an expectation of privacy.

The courts have not directly considered the use of unmanned aerial vehicles in a criminal procedure context.[224] It did, however, consider the use of *manned* aerial vehicles at lower levels in *Florida v. Riley*.[225] In Riley, law enforcement agents engaged in surveillance of the interior of a partially covered greenhouse in defendant's backyard by a helicopter flying at four hundred feet.[226] Relying on its ruling in an earlier fixed-wing aircraft case,[227] the Court held that the law enforcement agents did not conduct a search because the defendant did not have an objectively reasonable expectation that someone flying within the *navigable* airspace would not see into his backyard.[228]

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[221] *See* FAA. *Small UAS Notice of Proposed Rulemaking (NPRM),"* accessible at www. Faa.gov/uas/nprm (last visited 12/10/15).

[222] *See generally,* David E. Schaffer, *Is Legislation Needed to Prevent Invasions of Privacy by Unmanned Aircraft? The Law and Some Modest Legislative Proposals*, FED. LAWYER, July 2015, at 52.

[223] The term "tinfoil hat" is used "in allusion to the belief that wearing a hat made from tinfoil will protect one against government surveillance or mind control by extraterrestrial being." *See* Oxford Dictionary. *Tinfoil Hat*. http://www.oxford dictionaries.com/definition/english/tinfoil-hat (last visited Aug. 28, 2015).

[224] In a recent unreported criminal decision out of Kentucky, one district court considered whether William Meredith could be held criminally responsible for shooting down a quadcopter over his property that he believed was spying on his family, even peeping in his windows. Mr. Meredith was arrested for and charged with firing his gun within city limits, criminal mischief, and wanton endangerment. After a two hour hearing in October 2015, Judge Ward ruled that Meredith had a right to shoot down the drone because it invaded his privacy. Ryan Cummings. "Judge Dismisses Charges For Man Who Shot Down Drone." WDRB.com. accessible at www. wdrb.com/story/ 30354128/judge_dismisses_charges_for_man_who_shot_down_drone/ (last visited 12/11/15).

[225] Florida v. Riley, 488 U.S. 445 (1989). *See also* California v. Ciraolo, 476 U.S. 207 (1986) (regarding a fixed-wing airplane at 1,000 feet).

[226] *Riley,* 109 S. Ct. at 447-448.

[227] California v. Ciraolo, 476 U.S. 207(1986) (regarding a fixed-wing airplane at 1,000 feet).

[228] 109 S. Ct. at 696-697. Riley was a plurality decision. Four justices, including Scalia and Kennedy (the only justices currently on the Court), appeared to base their ruling on the legality of the aircraft in the airspace and appeared to create what some lower courts have used as a test: 1) the helicopter was not violating the law, 2) there was nothing to suggest that helicopters flying at 400 feet are sufficiently rare, 3) the helicopter did not interfere with the normal use of the curtilage, 4) no intimate details connected with the use of the home or curtilage were observed, and 5) there was no undue noise, wind, dust, or threat of injury. *Id.* at 697. The plurality, however, preferred the straightforward

Although not directly on point, two other Supreme Court cases should play into consideration of Fourth Amendment privacy concerns regarding the use of drones by law enforcement. The issue of "new technology" was addressed in *Kyllo v. United States*[229] where the Court considered the use of thermal imaging equipment to read the amount of heat emanating from certain parts of a home, thereby revealing the use of high-intensity heat lamps to grow marijuana.[230] The scan was conducted by a police officer while in his car across the street from the defendant's house, on public property, thus, not physically trespassing on the defendant's property. The Court found this new technology allowed the officer to intrude into an area he had no right to be—the interior of the home. The Court held that where the Government uses a device that is not in general public use, to explore details of "a constitutionally protected area" that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.[231]

Kyllo left the question of what constitutes a "constitutionally protected area" somewhat open. However, in *Florida v. Jardines*,[232] the Court made it clear the curtilage surrounding the home is such a protected area.[233] The Court defined curtilage to include the area "immediately surrounding and associated with the home,"[234] "to which the activity of home life extends."[235] In Louisiana, that area would also include "everything that is directly above or under it,"[236] including the airspace.[237] The issue in these cases is, as Justice Brennan has said, "how tightly the Fourth Amendment permits people to be driven back into the recesses of their lives by the risk of surveillance."[238] Surely the common use of drones by law enforcement

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"reasonable expectation of privacy" test and would resolve the issue based on how frequently non-law enforcement aircraft flew in that airspace. *Id.,* 488 U.S. 445, 467.

[229] Kyllo v. United States, 533 U.S. 27 (2001) ("The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.").

[230] Kyllo, 533 U.S. at 29.

[231] *Id.* at 34, 40.

[232] 133 S. Ct. 1409 (2013) (In *Jardines,* the area at issue was the front porch).

[233] *Id.* at 1417 ("[W]hen the government uses a physical intrusion to explore details of the home (including its curtilage), the antiquity of the tools that they bring along is irrelevant.")

[234] 133 S. Ct. at 1414 *citing* Oliver v. United States, 104 S. Ct. 1735 (1984).

[235] 133 S. Ct. at 1415.

[236] LA. CIV. CODE ANN. art. 490. *See also* LA. CIV. CODE ANN art. 477 ("The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.")

[237] *See* Walker Louisiana Properties v. Broussard, 813 So.2d 487 (La. Ct. App. 2002), *rehearing denied,* 825 So.2d 1175 (La. 2002), *writ denied* 825 So.2d 1180 (La. 2002), *cert. denied,* 538 U.S. 944 (2003) (Flying helicopter at less than 1,000 feet over landowner's property interfered with landowner's use and enjoyment of his land, and thus trial court had authority to enjoin adjoining landowner from flying over landowner's property at altitudes of less than 1000 feet despite the fact that the airspace above the appellee's property was navigable and subject to regulation. FAA regulations were not at issue in the matter.).

[238] *See* Florida *v.* Riley, 488 U.S. 445, 466, 705 (1989) (Brennan, J. dissenting) (*quoting* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 402).

would drive us inside of our houses and places of employment. It reminds one of the passage from George Orwell's novel, 1984:

> "The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said.... In the far distance a [drone] skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows."[239]

As Justice Brennan said, once again, "Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours?"[240]

A. Legislation

Whatever the courts end up deciding on the constitutionality of the use of drones by law enforcement, Congress and the state legislatures can provide citizens with more protection and increase their expectation of privacy above what the federal constitution provides.[241] For example, Congress is considering a bill, called the Drone Aircraft Privacy and Transparency Act of 2015,[242] which would amend the FAA Modernization and Reform Act of 2012. It will direct the Secretary of Transportation to study and identify any potential threats to privacy posed by the integration of drones into the national airspace system.[243]

Most states, including Louisiana,[244] have responded more quickly than the federal government to restrict the scope and uses of unmanned aircrafts. As of the summer of 2015, eighteen states have

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[239] George Orwell. NINETEEN EIGHTY–FOUR 4 (1949) (the word "drone" has been substituted for "helicopter").

[240] Florida v. Riley, 488 U.S. 445, 467 (1989) (Brennan, J. dissenting).

[241] *See, e.g.,* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) (noting that "a state court is entirely free to [either] read its own State's constitution more broadly than this Court . . ., or to reject the mode of analysis used by this Court in favor of a different analysis"'); Oregon v. Hass, 420 U.S. 714, 728 (1975) (Marshall, J., dissenting) ("It is peculiarly within the competence of the highest court of a State to determine that in its jurisdiction the police should be subject to more stringent rules than are required as a federal constitutional minimum."'); Lego v. Twomey, 404 U.S. 477, 489 (1972) ("Of course the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values at stake."'); Cooper v. California, 386 U.S. 58, 62 (1967) (admitting that the Court's "holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution").

[242] *See* H.R. 1229. GovTrack.US gives it a 1% chance of enactment. *See H.R. 1229: Drone Aircraft Privacy and Transparency Act of 2015 available at* https://www.govtrack.us/congress/bills/114/hr1229 (last visited Aug. 24, 2015).

[243] *See Id.* at https://www.govtrack.us/congress/bills/114/hr1229/summary (last visited Aug. 24, 2015).

[244] *See* Act 661 §1, 2014 La. Acts 1116.

enacted laws[245] ranging from moratoriums on drones to prohibiting any government official from using a UAV without first obtaining a warrant.[246] Unfortunately, Louisiana chose to enact a very limited law,[247] although a much more protective one was filed.[248] The enacted bill only relates to the use of UAVs by private persons[249] to survey "targeted facilities," a term that only includes petroleum and alumina refineries, chemical and rubber manufacturing facilities, and nuclear power electric generation facilities. The rejected bill was quite detailed and would have provided protection from intrusive drone use in most situations, including by law enforcement.

V. SOCIAL MEDIA AND THE INTERNET

In June of 2015, the United States Supreme Court rendered a decision in the much-anticipated case of *Elonis v. United States*.[250] Argued, in part, as a First Amendment right to say things on Facebook without criminal consequences, it came in like a lion but came down like a lamb. The Supreme Court avoided the First

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[245] All but two states have proposed bills and resolutions to regulate the use of unmanned aircraft systems. Almost all of these proposed laws would require a warrant for government surveillance. *See* Hillary B. Farber, *Eyes in the Sky & Privacy Concerns on the Ground*, ABA SCITECH LAW, Summer 2015, at 6, 8. *See also*, *Resolution Supporting Usage of Unmanned Aircraft Systems*, The Council of State Governments, *available at* http://knowledgecenter.csg.org/kc/system/files/csg_resolution_supporting_audited_usage_of_unmanned_aircraft_systems_-_approved_9-22-2013.pdf (last visited Aug. 25, 2015).

[246] *See* H.B. 255, 28th Leg. (Alaska 2014); H.B. 1349, 90th Gen. Assemb. (Ark. 2015); S.B. 92, 2013 Leg., 115th Reg. Sess. (Fla. 2013); S.B. 1134, 62nd Leg., 1st Reg. Sess. (Idaho 2013); Freedom from Drone Surveillance Act, S.B. 1587, 98th Gen. Assemb., 1st Reg. Sess. (Ill. 2013); H.B. 1009, 118th Gen. Assemb. (Ind. 2014); H.B. 2289, 85th Gen. Assemb. (Iowa 2014); H.B. 1029, 2014 Reg. Sess. (La. 2014); S.B. 196, 63rd Leg. (Mont. 2013); S.B. 744, 2013 Gen. Assemb. (N.C. 2014); H.B. 1328, 64th Leg. Assemb. (N.D. 2015); H.B. 2710, 77th Leg. Assemb. (Or. 2013); Freedom from Unwarranted Surveillance Act, S.B. 796, 108th Gen. Assemb., 1st Reg. Sess. (Tenn. 2013); Texas Privacy Act, H.B. 912, 83rd Leg. (Tex. 2013); S.B. 167, 2014 Gen. Sess. (Utah 2014); S.B. 1331, 2013 Gen. Assemb., Reg. Sess. (Va. 2013); S.B. 18, 2015-16 Reg. Sess. (Vt. 2015); S.B. 196, 2013-2014 Reg. Sess. (Wis. 2014). Because of the Meredith case discussed *at supra* note 224, a Kentucky state representative has prefiled a "drone harassment bill" which will make a person guilty of harassment when they hover over or land on someone's property or use a drone for no legitimate purpose, to commit acts that alarm or seriously annoy someone. *See* Cummings, *supra* note 224.

[247] LA. REV. STAT. ANN. § 14:337 ("Unlawful Use of an Unmanned Aircraft System"). *See* also SB 183, Act 166 (2015) enacting a chapter on "Unmanned Aerial Systems" for agricultural use at LA. REV. STAT. ANN. §§ 3:41 through 47.

[248] *See* S.B. 330, 2014 Gen. Sess. (La. 2014) (the "Deterrence of Reconnaissance Over Noncriminal Entities (DRONE) Act"). It would have restricted the use of UAVs to capture images by law enforcement, and others, with some exceptions. Although it passed the Senate (22-16), it was opposed in the House Committee on the Administration of Justice by journalists and environmentalists and was involuntary deferred by a vote of 7-6. The video of the committee hearing is available on the Louisiana legislative website at http://house.louisiana.gov/H_V*Id*eo/2014/May2014.htm (you will need to click on May 6 and the Criminal Justice Committee) and provides a good example of the concerns over such laws on both sides of the issue of drone use.

[249] The law specifically excludes federal, state, and local law enforcement. *See* LA. REV. STAT. ANN. § 14:337(4).

[250] 135 S. Ct. 2001 (2015).

Amendment argument altogether,[251] narrowly focusing on the *mens rea* requirement of 18 U.S.C. §875(c)[252] and the inadequacy of the jury instructions used. In a convoluted and unclear opinion,[253] the Supreme Court casts the "general intent" standard, used by at least six courts of appeal, as negligence and appears to hold that the *mens rea* for this crime is determined by a subjective test, rather than an objective one. Therefore, a person can only be convicted for transmitting a "threat" in interstate commerce when he makes the communication for the specific purpose of issuing a threat, or with actual knowledge that the communication will be viewed as a threat.[254] A strong dissent argued that the standard should, at least, be one of "reckless disregard."[255]

The facts of the case are shocking. In May 2010, Anthony Douglas Elonis' wife left him, taking their two children.[256] According to Elonis, for therapeutic and cathartic purposes, i.e. to "deal with the pain" of a wrenching event,[257] he began posting self-styled rap lyrics on his Facebook page. Such lyrics included the following:

> If I only knew then what I know now ... I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek and made it look like a rape and murder.[258]

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[251] *Id.* at 2012 ("Given our disposition, it is not necessary to consider any First Amendment issues.")

[252] There is a slight division in the circuits regarding this issue. Nearly all circuits require a showing of general intent proved through an objective test ("majority approach"). *See* United States v. Francis, 164 F.3d 120, 123 (2d Cir. 1999) ("[T]here are no... concerns that require departure from the principle that a statute that does not specify a *mens rea* level requires only general intent."); United States v. Whiffen, 121 F.3d 18, 21 (1st Cir. 1997) (establishing that § 875(c) requires only a general intent); United States v. Myers, 104 F.3d 76, 81 (5th Cir. 1997) ("[W]e decline to hold that § 875(c) requires specific intent."), *cert denied*, 520 U.S. 1218 (1997); United States v. Himelwright, 42 F.3d 777, 783 (3d Cir. 1994) ("[S]ection 875(c) requires proof of a defendant's general intent to threaten injury."); United States v. Darby, 37 F.3d 1059, 1063 (4th Cir. 1994) (concluding that § 875(c) requires only general intent to threaten); United States v. DeAndino, 958 F.2d 146, 150 (6th Cir. 1992) ("Section 18 U.S.C. § 875(c) does not require specific intent in regard to the threat element of the offense, but only general intent."). The United States Court of Appeals for the Ninth Circuit prefers a showing of specific intent proved through a subjective test ("Ninth Circuit approach"). United States v. Twine, 853 F.2d 676, 680 (9th Cir. 1988) (holding that 18 U.S.C. § 875(c) requires specific intent).

[253] *See* 135 S. Ct. at 2018 (Thomas, J. dissenting) ("This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty.") *See also,* 135 S. Ct. at 2014 (Alito, J. dissenting) ("While this Court has the luxury of choosing its docket, lower courts and juries are not so fortunate. They must actually decide cases, and this means applying a standard.")

[254] 135 S. Ct. at 2012.

[255] *Id.* at 2017. The majority, though, found that there was no circuit conflict over whether recklessness suffices for liability under Section 875(c) and declined to be the first appellate tribunal to do so. 135 S. Ct. at 2013.

[256] 135 S. Ct. at 2004.

[257] 135 S. Ct. at 2005; 135 S. Ct. at 2016 (Alito, J. dissenting).

[258] 135 S. Ct. 2001, 2016-17 (2015) (citing United States v. Elonis, 730 F.3d 321, 324 (C.A.3 2013)).

> There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts.[259]

After viewing some of Elonis's posts, his wife felt "extremely afraid for [her] life;"[260] so much so that she petitioned for, and was granted, a three-year protection-from-abuse order.[261] Apparently in response, Elonis posted, "Fold up your [protection from abuse order] and put it in your pocket[.] Is it thick enough to stop a bullet?"[262]

Apparently not satisfied with rapping about his ex-wife, Elonis also included the judiciary and law enforcement in his "lyrics:"

> Try to enforce an Order that was improperly granted in the first place. Me thinks the Judge needs an education on true threat jurisprudence. And prison time'll add zeros to my settlement ...And if worse comes to worse, I've got enough explosives to take care of the State Police and the Sheriff's Department.[263]

Elonis also published rap lyric posts about school shootings,[264] fellow employees at work,[265] and his workplace[266] –the last of which caused him to be fired and reported to the FBI.[267] Interspersed among his posts were disclaimers that the lyrics were "fictitious," with no intentional "resemblance to real persons."[268]

Elonis was charged with five counts of violating 18 U.S.C. §875(c),[269] which makes it a federal crime to transmit in interstate commerce "any communication containing any threat … to injure the

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[259] *Id.*

[260] 135 S. Ct. at 2006 (citing the appellate record at p. 156).

[261] *Id.* citing the appellate record at p. 148-150.

[262] *Id.* citing the appellate record at p. 334. *See also* 135 S. Ct. at 2016-17 (citing United States v. Elonis, 730 F.3d 321, 325 (C.A.3 2013)).

[263] 135 S. Ct. at 2006. Defendant's reference to the police was the basis for Count Three of his indictment, threatening law enforcement officers.

[264] *Elonis,* 135 S. Ct. at 2006 (citing the appellate record at p. 335). ("That's it, I've had about enough. I'm checking out and making a name for myself. Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined. And hell hath no fury like a crazy man in a Kindergarten class. The only question is ... which one?").

[265] Elonis posted a photograph of himself and a co-worker at a "Halloween Haunt" event at the amusement park where they worked. In the photograph, he was holding a toy knife against the co-worker's neck, and wrote, "I wish." The chief of park security was a Facebook "friend" of Elonis, saw the photograph, and fired him. 135 S. Ct. at 2005 (citing the appellate record at pp. 114–116).

[266] Apparently in response to his firing, Elonis posted, "Y'all sayin' I had access to keys for all the f***in' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be so f***in' scary?" *Elonis,* 135 S. Ct. at 2005 (citing the appellate record at p. 332).

[267] *Elonis,* 135 S. Ct. at 2006.

[268] 135 S. Ct. at 2005 (citing the appellate record at pp. 331, 329). Hauntingly, this author handled a divorce and child custody case in 2014 that was very similar to this case.

[269] 135 S. Ct. at 2007.

person of another."[270] He was convicted of four of the five counts. The Supreme Court reversed his convictions.

At trial, Elonis requested a jury instruction that "the government must prove that he intended to communicate a true threat."[271] On appeal, he argued the jury should have been required to find that he *intended* his posts to be threats.[272] The district court denied his request and informed the jury that "[a] statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual."[273]

The Supreme Court found this instruction stated a negligence standard[274] and that negligence was not sufficient to support a conviction under §875(c).[275] After a rather long-winded discussion of the basic law surrounding scienter, and apparently relying on the prosecutor's closing argument rather than the jury instruction given,[276] the Court erroneously determined Elonis' conviction was premised solely on how his posts *would be understood* by a reasonable person.[277] The Court held that a "reasonable person" standard, although a familiar feature of civil liability in tort law, was inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing."[278] According to the Court, having liability turn on whether a reasonable person *regards* the communication as a threat, regardless of what the defendant thinks, reduces culpability on the all-important element of the crime to negligence.[279]

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[270] 18 U.S.C.A. §875 (1994) ("(c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.").

[271] 135 S. Ct. at 2007 (citing the appellate record at pp. 21, 267-269, 303). The term "true threat" is a legal term of art found in First Amendment jurisprudence. *See* Virginia v. Black, 538 U.S. 343 (2003) (internal citations omitted) ("True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat." 538 US at 359-60.

[272] *Id.*

[273] *Id.* (citing the appellate record at 301).

[274] *Id.* at 2011.

[275] *Id.* at 2013.

[276] According to the Court, the government's closing argument emphasized that it was irrelevant whether Elonis intended the postings to be a threat and noting that, at some point, the government stated that it didn't matter what Elonis thought. *Id.* at 2007 *citing* the appellate record at p. 286.

[277] *Id.* at 2007.

[278] *Id.* at 2011 *citing* Staples v. United States, 511 U.S. 600, 606–607.

[279] *Id. citing* Rogers v. United States, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) *citing* Morissette v. United States, 342 U.S. 246 (1952). *See also* Cochran v. United States, 157 U.S. 286, 294 (1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind").

The Court completely missed the boat in this opinion failing to clarify the *mens rea* requirement[280] or to end the split in the circuits on the issue.[281] In attempting to avoid ruling on the constitutional issue, it rendered a tortured interpretation of this statute, and in doing so, completely muddied the water as to what constitutes the general intent, specific intent, and negligence scienter standards, particularly when the crime involves speech. Rather than focus on the definition of the word "threat,"[282] it read into the statute a scienter meaning at odds with the text, history, and jurisprudence of the word and of *mens rea* requirements.[283] The instruction given by the trial court correctly stated the level of intent required when the intent is not specifically stated in that statute – general intent.[284] It did not focus on what the victim perceived, but instead, on the perpetrator's intention to do the act (communication) with the reasonable understanding that the understood consequences would result – a classic general intent definition.[285]

Although the majority failed to consider the First Amendment issue, Justice Alito was unafraid to broach the subject and may have given us some guidance. Justice Alito held that requiring proof of recklessness in the communication was sufficient.[286] Elonis claimed that interpreting §875(c) to require no more than recklessness would violate the First Amendment and that his words were "protected works of art."[287] In answer, Justice Alito outright rejected the first argument and, in answer to the second, pointed out that "context matters.…[Compared to music that is performed or sold for the public,] [s]tatements on social media that are pointedly directed at their victims … are much more likely to be taken seriously. To hold otherwise would grant a license to anyone who is clever enough to

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[280] As Justice Alito stated, "Today, the Court announces: It is emphatically the prerogative of this Court to say only what the law is not." *Elonis,* 135 S. Ct. at 2013 (Alito, J. dissenting).

[281] *See, e.g.,* the extensive discussions of the scienter requirement in this statute found in Michael Barrett Zimmerman, *One-Off & Off-Hand: Developing an Appropriate Course of Liability in Threatening Online Mass Communication Events*, 32 CARDOZO ARTS & ENT. L.J. 1027 (2014); Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339 (2011); Karen Rosenfield, *Redefining the Question: Applying A Hierarchical Structure to the Mens rea Requirement for Section 875(c*), 29 CARDOZO L. REV. 1837 (2008); Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1226 (2006); Justin Myer Lichterman, *True Threats: Evolving Mens rea Requirements for Violations of 18 U.S.C. S 875(c),* 22 CARDOZO L. REV. 1961, 1965 (2001).

[282] *See e.g.,* 11 Oxford English Dictionary 353 (1933) ("to declare (usually conditionally) one's intention of inflicting injury upon"); Webster's New International Dictionary 2633 (2d ed. 1954) ("*Law,* specif., an expression of an intention to inflict loss or harm on another by illegal means"); Black's Law Dictionary 1519 (8th ed. 2004) ("A communicated intent to inflict harm or loss on another"); cited at 135 S. Ct. at 2008.

[283] *Elonis,* 135 S. Ct. at 2028 (Thomas, J. dissenting).

[284] *Id.* at 2018-19 (Thomas, J. dissenting).

[285] *See also* LA. REV. STAT. ANN. § 14:10 (General criminal intent is present … when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.)

[286] 135 S. Ct. at 2017; *See also* 135 S. Ct. at 2018-2019 (Thomas, J. dissenting).

[287] 135 S. Ct. at 2016.

dress up a real threat in the guise of rap lyrics, a parody, or something similar."[288]

A. Importance in Louisiana.

Whereas the interpretation of a federal statute may have no significance to Louisiana law, a determination of what is required for a criminal statute to pass First Amendment constitutional muster does. Louisiana has numerous criminal statutes that consider threats to be criminal activity: stalking,[289] cyberstalking,[290] extortion,[291] intimidating witnesses,[292] obstruction of justice,[293] public intimidation,[294] unlawful disruption of operation of a school,[295] and assault on a school teacher,[296] to name a few.[297] Furthermore, every temporary restraining order, injunction, and protective order related to family and dating violence contains a provision restraining the defendant from committing further acts of abuse or *threats* of abuse.[298] Violation of such order constitutes a crime.[299] Thus, a

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[288] *Id.* Justice Alito also made a strong point regarding domestic violence: "Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace. A fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech." 135 S. Ct. at 2017.

[289] LA. REV. STAT. ANN. § 14:40.2 (2007 and Supp. 2015).

[290] LA. REV. STAT. ANN. § 14:40.3 (2007 and Supp. 2015). *See also, State v. Baker*, App. 2 Cir. 2014, 49, 175 (La. Ct. App. 2014).

[291] LA. REV. STAT. ANN. § 14:66. *See also* LA. REV. STAT. ANN. § 14:136 (2004) (public salary extortion).

[292] LA. REV. STAT. ANN. § 14:129.1 (2004 and Supp. 2015). *See also* LA. REV. STAT. ANN. § 14:92.3 (2012) (retaliation by a minor against a parent, legal custodian, witness, or complainant).

[293] LA. REV. STAT. ANN. § 14:130.1 (2004). *See also* LA. REV. STAT. ANN. § 14:133.1 (2004) (obstruction of court orders).

[294] LA. REV. STAT. ANN. § 14:122 (2004).

[295] LA. REV. STAT. ANN. § 14:40.6 (2007 and Supp. 2014); *See also*, LA. REV. STAT. ANN. § 14:328 (2004) (obstruction or interference with members of staff, faculty, or students of an educational institution).

[296] LA. REV. STAT. ANN. § 14:38.2 (2007 and Supp. 2015).

[297] *See, e.g.,* LA. REV. STAT. ANN. §14: 285 (2004) (telephone communications); LA. REV. STAT. ANN. § 46.2 (2007 and Supp. 2015) (human trafficking); LA. REV. STAT. ANN. § 14:122.2 (2004) (threatening a public official); LA. REV. STAT. ANN. § 18:1461.4 (threatening voters); LA. REV. STAT. ANN. § 14:54.1 (2007) (communicating false information of planned arson); LA. REV. STAT. ANN. § 14:54.6 (2007) (communicating false information of planned bombing); LA. REV. STAT. ANN. § 14:81.3 (2012 and Supp. 2015) (computer-aided solicitation of a minor where coercion includes threats). *See also* various whistleblower statutes (*e.g.* LA. REV. STAT. ANN. §§ 39:2163, 39:2165:12, 42:1169, 23:967 (2015)), various mental health proceeding statutes (*e.g.* La. Child. Code Ann. art. 1404 and 1432, LA. REV. STAT. ANN. §§ 28:2, 28:53.2 (2011), all defining what constitutes being a danger to self or others), and the Louisiana Code of Military Justice (*e.g.* LA. REV. STAT. ANN. §29:220a (2007 and Supp. 2015), (§229a, art. 120a on stalking)). Furthermore, attorneys can be disciplined for "threatening to present criminal or disciplinary charges to obtain an advantage in a civil matter." Louisiana Rules of Professional Conduct Rule. 8.4(g).

[298] If checked, they also contain a provision ordering the defendant not to "threaten" the plaintiff in any manner. *See* Louisiana Uniform Abuse Prevention Orders, *available at* http://www.lasc.org/court_managed_prog/LPOR/pro_forms.asp (last visited 12/11/2015). *See also,* Shirley v. Shirley, App. 2 Cir. 2012, 107 So.3d 99 (issuance of TRO

determination of what *mens rea* a person must have to avoid a First Amendment violation is very important.

In today's world, people—particularly young people—are continually finding and adapting new ways of communicating electronically to fit their needs.[300] Eighty-five percent of adults are Internet users and sixty-seven percent are smartphone users.[301] Facebook remains the most popular social media site—seventy-two percent of online adults are Facebook users, amounting to sixty-two percent of all American adults.[302] With this increase in the use of social media to communicate,[303] numerous new and novel legal issues are arising.[304] In addition to the above criminal statutory construction and First Amendment issues, the Louisiana criminal courts have recently dealt with three other issues: identification of a defendant by a witness through his Facebook page,[305] authentication,[306] and hearsay.[307]

In *State v. Carvin*,[308] the defendant was convicted of second degree kidnapping[309] and armed robbery[310] for hiding in the victim's car, pointing a gun to her head, and making her drive around to various banks to get money for him.[311] About a month after the crime was committed, the victim received a Facebook message from a woman she had never met who said she had found a job application

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based on telephonic threats that husband would burn down former wife's home with their children in it and that he would have wife killed, violating cyberstalking and telephone harassment statutes); Davis v. Williams, No. 15-46, 2015 WL 3404910 (La. App. 3d Cir. May 27, 2015) (threats on Facebook, in addition to other behavior, were sufficient to obtain protective order).

[299] *See* LA. REV. STAT. ANN. §14:79 (2012 and Supp. 2015).

[300] Maeve Duggan. *Mobile Messaging and Social Media 2015.* PewInternet.org (Aug. 22, 2015 5:55 PM), http://www.pewinternet.org/2015/08/19/mobile-messaging-and-social-media-2015/.

[301] *Id.*

[302] Those on Facebook remain highly engaged with 70% saying they log on daily, including 43% who do so several times a day. *Id.*

[303] Since the beginning of the social media era in 2005, social media usage has increased by 800 percent. Steve Olenski, *Social Media Usage Up 800% For U.S. Online Adults In Just 8 Years*, Forbes.com (Aug. 22, 2015 5:44 PM), http:// www.forbes.com/sites/steveolenski/2013/09/06/social-media-usage-up-800-for-us-online-adults-in-just-8-years/. Numerous legal issues relate to the use of these computer based communication applications.

[304] For a more detailed discussion of some of these issues, *see* Pamela W. Carter & Shelley K. Napolitano, *Social Media an Effective Evidentiary Tool*, 61 LA. B.J. 332, 335 (2014); Grant J. Guillot, *Evidentiary Implications of Social Media an Examination of the Admissibility of Facebook, Myspace and Twitter Postings in Louisiana Courts*, 61 LA. B.J. 338, 339 (2014); David E. Aaronson, Sydney M. Patterson, *Modernizing Jury Instructions in the Age of Social Media*, CRIM. JUST., WINTER 2013, at 26; Agnieszka A. Mcpeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887 (2013).

[305] *See* State v. Carvin, No. 2014KA1017, 2015 WL 224063 (La. Ct. App. Jan. 15, 2015).

[306] *See* State v. Green, 164 So.3d 331 (La. Ct. App. 2015).

[307] *Id.*

[308] State v. Carvin, No. 2014KA1017**,** 2015 WL 224063 (La. Ct. App. Jan. 15, 2015).

[309] LA. REV. STAT. ANN. § 14:44.1 (2007).

[310] LA. REV. STAT. ANN. § 14:64 (2007).

[311] *Carvin* at *1.

with the victim's name on it in her boyfriend's wallet.[312] The victim realized the job application had been in the glove compartment of her car and was no longer there. She asked this person for her boyfriend's name and, upon receiving it, looked up the defendant's Facebook profile and recognized him as the perpetrator. She contacted the police and identified him.[313] Then she went to the police station at which point the police pulled up the Facebook page and asked her if this was the person who robbed her. Upon saying yes, the police prepared a photo lineup in which the victim, again, identified the defendant. She also unequivocally identified him at trial.[314]

The defendant filed a motion to suppress the photo identification, which was denied.[315] He contended that the detective used a suggestive procedure by showing the victim an isolated Facebook picture of him prior to showing the victim the six-person lineup.[316] The First Circuit disagreed ruling that an identification procedure is suggestive only if, during the procedure, the witness's attention is unduly focused on the defendant, which in this case it was not.[317] Furthermore, even if the identification could have been considered suggestive, it was only the likelihood of misidentification that violated due process, not merely the suggestive identification procedure.[318] The question was whether the procedure was so conducive to irreparable misidentification that due process was denied.[319]

The First Circuit held, considering the record as a whole, that the trial court did not err.[320] The facts indicated the victim had unequivocally identified the defendant as soon as she saw his Facebook page and it was not the police, but the defendant's girlfriend, who brought this to the victim's attention. Furthermore, she identified the defendant in a six-person lineup without hesitation. Thus, the detective's action of showing the victim a screenshot of defendant's Facebook page prior to the second lineup was not so conducive to irreparable misidentification that due process was denied.[321]

Numerous evidence issues relating to Facebook arose in the case of *State v. Green,*[322] along with the cellphone search issues discussed above.[323] In *Green*, the defendant was convicted of

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[312] *Id.* at *2.
[313] *Id.*
[314] *Id.* at *6.
[315] *Id*. at *6. The motion was denied. The defendant also filed a Motion for New Trial. At that hearing, the court again considered the testimony from the suppression hearing, as well as the trial testimony, and upheld the use of the Facebook photo at identification and at trial. *Id.* at *7.
[316] *Id.* at *6.
[317] *Id.* at *11 *citing* State v. Thibodeaux, 750 So.2d 916, 932 (La. 1999) *cert. denied*, 120 S. Ct. 1969 (2000).
[318] *Id. citing* Johnson, 775 So.2d at 677; *see also* State v. Reed, 712 So.2d 572, 576 (La. Ct. App. 1998) *writ denied*, 729 So.2d 572 (La. 1998).
[319] *Id. citing* State v. Bright, 776 So.2d 1134, 1145 (La. 2000).
[320] *Id.* at *7.
[321] *Id.*
[322] 164 So.3d 331 (La. Ct. App. 2015).
[323] *See* discussion at *supra* notes 87-118.

computer-aided solicitation of a minor.[324] The victim was twelve years old.[325] Her mother contacted police after learning that her daughter had been contacted on Facebook by an adult male. She provided the police with her daughter's Facebook account information. The defendant was listed as one of the minor's "friends," and his profile page reflected a series of messages between the two, as well as a photograph showing the defendant and the minor on a merry-go-round.[326] At trial, during the detective's testimony, the state offered screen shots of defendant's Facebook page into evidence.[327] The defense objected, arguing it was hearsay[328] and not properly authenticated.[329] The First Circuit correctly held the contested evidence was not hearsay because it was not introduced to show the truth of the communications, but rather to show the communications took place, which is a necessary element of the crime of computer-aided solicitation of a minor.[330] The Court, however, never directly dealt with the issue of authentication; it noted only that the records simply corroborated other testimony and held their admission was, at worst, harmless error.

VI. CONCLUSION

Three authors of dystopian novels written in the early Twentieth century apparently had psychic abilities that enabled them to see into the future: George Orwell, Frank Kafka, and Aldous Huxley. In 1984,[331] George Orwell described a world where no one was free to enjoy the rights of liberty and privacy; all were unified together under the all-seeing watch of Big Brother and the Thought Police. In the Orwellian society, the people were all aware of their current predicament; the problem was that they did not feel that they had the capacity to fight it.

In Das Schloss (The Castle),[332] Frank Kafka created a world in which the people did not know who was in control. They did not know who was accountable and, thus, accountability became meaningless. All they could do was try as hard as they could to fight against the system suspecting all along that it might be hopeless.

In A Brave New World,[333] Aldous Huxley created a world where the nightmare was not that the people would be forced into coercion with a 'ruling minority' but that they would be unaware of their own subservience, or they would be happy to accept it. As Huxley told George Orwell, "[t]he lust for power can be just as

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[324] *Id.* at 335.
[325] *Id.*
[326] *Id.*
[327] *Id.* at 337.
[328] *Id.* at 345.
[329] *Id.*
[330] *Id.* at 346.
[331] George Orwell, NINETEEN EIGHTY-FOUR (1949).
[332] Frank Kafka, DAS SCHLOSS (THE CASTLE) (1926).
[333] Aldous Huxley, A BRAVE NEW WORLD (1932).

completely satisfied by suggesting people into loving their servitude as by flogging and kicking them into obedience."[334]

Is it possible these three worlds have finally collided? Drones flying by person's homes looking into their windows and GPS chips tiny enough to imbed under a person's skin allowing the government to know their location at any time are certainly just two current examples of Big Brother capabilities. But more frightening might be the increasing attitude of the American people that appears to divide between those who are unaware of their own subservience or who are happy to accept it and those who are trying as hard as they can to fight the system with the increasing feeling of hopelessness because they don't know who or how to fight.

In all three of these dystopian futures, government is all controlling. We are not there yet. It would appear the United States Supreme Court has begun to recognize that the "old" rules are increasingly insufficient to deal with the government's use of rapidly developing technology. Will they be able to craft constitutional rules that can keep up with the changes and protect Americans from this level of government control?

Given this rapid development of technology, it would appear impossible for the judicial system to create uniform First and Fourth Amendment rules of law in which law enforcement and citizens can feel any sense of security. But, as Justice Alito has said, "In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."[335]

The people, through their legislative representatives at both the federal and state levels, seem to be slowly taking back control over their privacy rights. In particular, Louisiana has taken a number of steps to broach issues relating to unmanned aircraft systems and the use of body cameras, although in neither case have they gone far enough. More thought needs to be given to these two issues and specific laws need to be enacted relating to obtaining location and non-content information from cellphones and GPS providers and clarifying when a person can record police interactions. Although some of the technology seen in these novels may exist, with proper legislation they won't fall into "Big Brother's" hands and we will not develop into a hopeless, emasculated society.

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[334] *See* Letter to George Orwell dated October 21, 1949. Letters of Note. "1984 v. Brave New World." Accessible at http://www.lettersofnote.com/2012/03/1984-v-brave-new-world.html (last visited 12/11/15).

[335] United States v. Jones, 132 S. Ct. at 964 (2012) ("Courts should place a thumb on the scale in favor of judicial caution when technology is in flux, and should consider allowing legislatures to provide the primary rules governing law enforcement investigations involving new technologies.") (*citing* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805 (2004)).