Stanford Law Review Online

Volume 69 March 2017

ESSAY

Judge Gorsuch and the Fourth Amendment

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Introduction

Before Justice Scalia, pragmatic balancing tests dominated the Court's Fourth Amendment doctrine.[1] But by 2008, Justice Scalia had succeeded in reframing the Court's analysis. In an opinion joined by seven other Justices, he wrote: "In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."[2]

Like Justice Scalia, Judge Gorsuch has advocated an originalist interpretation of the Fourth Amendment. But he has not applied that originalist approach to all Fourth Amendment questions. This Essay traces Judge Gorsuch's jurisprudence in two areas of Fourth Amendment doctrine. Part I considers his decisions regarding searches of homes and personal property, where he has adopted and extended Justice Scalia's common law approach. Part II contrasts that approach with Judge Gorsuch's decisions regarding *Terry* stops, where he has proven even more willing than many of his peers to employ the sort of totality of the circumstances inquiry that Justice Scalia so eschewed. In each Part, we also consider how Judge Gorsuch's particular brand of originalism might impact Fourth Amendment issues looming on the Court's horizon.

I. Trespassory Searches of Personal Property

Between 2001 and 2013, Justice Scalia resurrected the Supreme Court's pre-1967 trespass test for Fourth Amendment searches. Over three opinions—*Kyllo v.*

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1. *See* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1739-43 (2000).

2. Virginia v. Moore, 553 U.S. 164, 168 (2008).

United States,[3] *United States v. Jones*,[4] and *Florida v. Jardines*[5]—he developed an alternative to *Katz*'s "reasonable expectations of privacy" test[6] rooted in eighteenth-century tort law. When Justice Scalia passed away in 2016, many commentators thought this strain of doctrine might die with him.[7] But Judge Gorsuch, as his opinions in *United States v. Carloss*[8] and *United States v. Ackerman*[9] show, is likely not just to preserve Justice Scalia's trespass test, but to expand it.

A. *United States v. Carloss*

In *Jardines*, the Court explained that even though a home's curtilage is a Fourth Amendment protected space, police are permitted to walk up to your door and knock on it based on an implied license—the same implied license granted to Girl Scouts selling cookies.[10] In *Carloss*, the Tenth Circuit addressed whether that implied license persists when a homeowner places three "No Trespassing" signs along the path from the street to the door and a fourth on the door itself.[11] Judge Gorsuch, dissenting, argued that it does not.

Relying on Justice Scalia's originalist reasoning in *Jardines*, Judge Gorsuch observed that the implied license enjoyed by police is the same as that enjoyed by private visitors.[12] At common law, that implied license could be revoked at will by the homeowner.[13] And once revoked, police as well as private visitors were liable for trespass.[14] Because the "No Trespassing" signs communicated the homeowner's intent to revoke this license, Judge Gorsuch argued, police violated the Fourth Amendment when they entered the home's curtilage without a warrant.[15]

B. *United States v. Ackerman*

Whereas *Carloss* dealt with physical property, in *Ackerman*, Judge Gorsuch applied Justice Scalia's trespass theory to searches of digital property: e-mails. In

3. 533 U.S. 27 (2001).

4. 132 S. Ct. 945 (2012).

5. 133 S. Ct. 1409 (2013).

6. United States v. Katz, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

7. *See, e.g.*, Lawrence Rosenthal, *The Court After Scalia: Fourth Amendment Jurisprudence at a Crossroads*, SCOTUSBLOG (Sept. 9, 2016, 5:31 PM), https://shar.es/1UYXYc.

8. 818 F.3d 988 (10th Cir. 2016).

9. 831 F.3d 1292 (10th Cir. 2016).

10. *Jardines*, 133 S. Ct. at 1415-16.

11. *Carloss*, 818 F.3d at 1003-04 (Gorsuch, J., dissenting).

12. *Id.* at 1006 (describing the implied license as "one entitling the officers to do 'no more than any private citizen might'" (quoting *Jardines*, 133 S. Ct. at 1416)).

13. *Id.*

14. *Id.*

15. *Id.* at 1005-06.

Jones, the Court held that the government conducts a search when it "obtains information by physically intruding on a constitutionally protected area"—including when, as in *Jones* itself, police place a GPS tracking device on the underside of suspect's car.[16] In *Ackerman*, Judge Gorsuch applied *Jones* to e-mail searches for child pornography, writing that "the warrantless opening and examination of . . . private correspondence . . . seems pretty clearly to qualify as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment."[17]

In applying the trespass test to digital searches, Judge Gorsuch takes *Jones* further than Justice Scalia himself was willing to go. In *Jones*, Justice Scalia had written that "[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis," not the *Jones* trespass test.[18] But Judge Gorsuch concluded differently in *Ackerman*. True, he conceded, the Framers had been concerned with physical, not virtual, correspondence.[19] Nevertheless, he wrote, "a more obvious analogy from principle to new technology is hard to imagine."[20]

C. Implications

In *Jones*, Justice Scalia explained that "the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test."[21] *Katz* and *Jones*, then, are alternative theories of Fourth Amendment protection. But because *Jones* was not decided until 2012, it is in tension with portions of the Court's doctrine decided between 1967 (*Katz*) and 2012 (*Jones*). Judge Gorsuch, relying on *Jones*, might look to resolve that tension in at least two areas of Fourth Amendment law—searches of open fields and testing of potential contraband—and to expand *Jones*'s approach into a third (digital searches).

In *Oliver v. United States*, a 1984 case, the Court held that police had not violated the Fourth Amendment when they bypassed a "No Trespassing" sign to enter a suspect's farmland.[22] The Court distinguished open fields from curtilage, which is afforded the same protection as the home.[23] Judge Gorsuch, for his part,

16. United States v. Jones, 132 S. Ct. 945, 948, 950 n.3 (2012).

17. United States v. Ackerman, 831 F.3d 1292, 1307-08 (10th Cir. 2016) (citing *Ex parte* Jackson, 96 U.S. 727, 733 (1878)).

18. *Jones*, 132 S. Ct. at 953 (emphasis omitted).

19. *Ackerman*, 831 F.3d at 1308.

20. *Id.*

21. *Jones*, 132 S. Ct. at 952 (emphases omitted).

22. *See* 466 U.S. 170, 176 (1984) (invoking the Fourth Amendment's language protecting "persons, houses, papers, and effects" (quoting Hester v. United States, 265 U.S. 57, 59 (1924))).

23. *Id.* at 176-81.

does not dispute that distinction.[24] But he nevertheless suggested in *Carloss* that curtilage historically encompassed a space much larger than just the areas, like the front porch, immediately surrounding the home.[25]

In *United States v. Jacobsen*, another 1984 case, police conducted a field test for cocaine on white powder found in a damaged package.[26] The Court, invoking *Katz*, upheld the search, concluding that there could be no reasonable expectation of privacy in contraband.[27] But in *Ackerman*, Judge Gorsuch suggested that *Jacobsen* was wrongly decided.[28] Because police destroyed a trace amount of private property to conduct their test, "in light of *Jones*, it seems at least possible the Court today would find a 'search' *did* take place."[29]

Judge Gorsuch might also seek to expand the *Jones* approach to digital searches, as he did in *Ackerman*. In that case, he applied common law principles to digital searches, relying on the "obvious analogy" from letters to e-mails.[30] But *Ackerman* is at odds with the Court's method in *Riley v. California*[31]—a post-*Jones* decision. In *Riley*, the government proposed a similar approach to the one employed by Judge Gorsuch, arguing that the Fourth Amendment permits searching cell phone data incident to arrest "if [police] could have obtained the same information from a pre-digital counterpart."[32] But the *Riley* Court rejected that "analogue test" because it "would launch courts on a difficult line-drawing expedition."[33] The Court then asked, in a question suggesting that Judge Gorsuch's analogy is not so obvious: "Is an e-mail equivalent to a letter?"[34]

Judge Gorsuch's *Ackerman* opinion came after *Riley*, so he clearly has not rejected extending *Jones* through an analogue test. Convincing the Court to adopt that approach, however, will likely prove more difficult.

II. *Terry* Stops and Frisks

Judge Gorsuch's highly originalist approach to the Fourth Amendment in *Carloss* and *Ackerman* is difficult to reconcile with his wholesale acceptance of

24. United States v. Carloss, 818 F.3d 988, 1009 (10th Cir. 2016) (Gorsuch, J., dissenting).

25. *See id.* at 1005 n.1 ("At common law the curtilage was far more expansive than the front porch, sometimes said to reach as far as an English longbow shot—some 200 yards—from the dwelling house.").

26. 466 U.S. 109, 111-12 (1984).

27. *Id.* at 122-23, 122 n.22.

28. *See* United States v. Ackerman, 831 F.3d 1292, 1307 (10th Cir. 2016).

29. *Id.*

30. *Id.* at 1308.

31. 134 S. Ct. 2473 (2014).

32. *Riley*, 134 S. Ct. at 2493.

33. *Id.*

34. *Id.*

the stop-and-frisk doctrine under *Terry v. Ohio*.[35] *Terry* allows an officer to stop and, in some cases, frisk a person on the street if the officer "reasonably . . . conclude[s] . . . that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous."[36] But *Terry* was a pragmatic—not an originalist—decision. Scholars and judges seeking a historical hook for *Terry* have uncovered little evidence linking *Terry*'s stop and frisks to police actions at common law.[37]

Despite the doctrine's shaky originalist footing, Judge Gorsuch has consistently ruled in favor of the government when criminal defendants have challenged the legality of stop and frisks[38] and traffic stops.[39] As his opinion in *United States v. Nicholson*[40] makes clear, he is more likely to protect and expand existing stop-and-frisk doctrine than he is to offer a new, originalist critique of *Terry*.

A. *United States v. Nicholson*

In *Nicholson*, a police officer pulled over the defendant's vehicle, mistakenly believing that a city ordinance prohibited a left turn he had made.[41] Applying Tenth Circuit precedent, the majority held the officer's mistaken understanding of the law rendered the stop categorically unreasonable.[42]

Judge Gorsuch dissented, arguing that mistakes of law are per se unreasonable only where "the law is unambiguous, [and] the error plain."[43] He emphasized that under *Terry*, the central Fourth Amendment inquiry is "whether the government has acted *reasonably*"[44]—whether "a 'reasonable and

35. 392 U.S. 1 (1968).

36. *Id.* at 30.

37. *See* Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 TEX. TECH L. REV. 299, 330-37 (2010); Sklansky, *supra* note 1, at 1804-06. For a tentative originalist explanation of *Terry*'s stops, if not its frisks, see Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring).

38. *See, e.g.*, United States v. Willis, 533 F. App'x 849, 850-51 (10th Cir. 2013) (finding reasonable suspicion to stop and frisk an African American man when a caller reported a "disturbance with a gun" involving a black man wearing a gray shirt).

39. *See, e.g.*, United States v. Lopez, 518 F.3d 790, 797-800 (10th Cir. 2008). For a longer discussion of *Lopez*, see note 54 below.

40. 721 F.3d 1236 (10th Cir. 2013).

41. *Id.* at 1237.

42. *Id.* at 1238, 1241-42; *see also* United States v. Tibbetts, 396 F.3d 1132, 1138 (10th Cir. 2005) ("[F]ailure to understand the law by the very person charged with enforcing it is *not* objectively reasonable."); United States v. DeGasso, 369 F.3d 1139, 1144-45 (10th Cir. 2004) (holding that an officer's "failure to understand the plain and unambiguous law he is charged with enforcing . . . is not objectively reasonable").

43. *See Nicholson*, 721 F.3d at 1248 (Gorsuch, J., dissenting).

44. *Id.*

prudent' officer would have acted as [the officer] did in the circumstances."[45] He explained this approach will rarely "yield '. . . a neat set of legal rules'"[46] or "bright-line tests."[47] Rather, the analysis will typically "favor a case-by-case approach" that "takes a realistic view of human capacities and limitations."[48] He concluded, therefore, that an officer's mistaken understanding of the law should be assessed based on the totality of the circumstances.[49]

At the time, the Fifth, Seventh, Ninth, and Eleventh Circuits had all held categorically that an officer's mistake of law could not justify a stop.[50] Only the Eighth Circuit had held otherwise.[51] But in an 8-1 decision, the Supreme Court ultimately adopted the minority approach—Judge Gorsuch's approach—in *Heien v. North Carolina*.[52]

B. Implications

Legal scholars and advocates have frequently criticized *Terry* and its amorphous reasonableness standard for granting police too much discretion.[53] But Judge Gorsuch's jurisprudence suggests that rather than introducing originalist limits on *Terry*, he will protect and expand the substantial discretion *Terry* grants to police officers.

In *Nicholson*, Judge Gorsuch both emphasized Terry's pragmatic focus on the reasonableness of a stop and encouraged courts to conduct *case-by-case* analyses. This approach is unlikely to generate new, bright-line rules cabining police discretion under *Terry*. Judge Gorsuch also appears willing to show officers a great deal of deference when evaluating the reasonableness of their conduct,[54] suggesting that, as a practical matter, he may not see bright-line rules as useful or desirable.

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45. *Id.* at 1249 (quoting Ornelas v. United States, 517 U.S. 690, 695 (1996)).

46. *Id.* at 1248 (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)).

47. *Id.* (quoting Florida v. Harris, 133 S. Ct. 1050, 1055 (2013)).

48. *Id.*

49. *Id.* at 1248-49.

50. *See* United States v. McDonald, 453 F.3d 958, 962 (7th Cir. 2006); United States v. Chanthasouxat, 342 F.3d 1271, 1279-80 (11th Cir. 2003); United States v. King, 244 F.3d 736, 741 (9th Cir. 2001); United States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998).

51. *See* United States v. Rodriguez-Lopez, 444 F.3d 1020, 1022-23 (8th Cir. 2006).

52. 135 S. Ct. 530 (2014).

53. *See* Rosenthal, *supra* note 37, at 300-01, 300 n.7 (collecting literature).

54. *See, e.g.*, United States v. Lopez, 518 F.3d 790, 797-800 (10th Cir. 2008). In *Lopez*, officers stopped the defendant's truck after seeing a man place a cooler in the bed of the truck. *Id.* at 798. The trial court determined the officers' observations were insufficient to create reasonable suspicion that there were drugs in the cooler; they amounted to "inchoate suspicions and unparticularized hunches." United States v. Lopez, 485 F. Supp. 2d 1226, 1236 (D. Kan. 2007). Judge Gorsuch overturned that finding, emphasizing the officers' training and experience in detecting drug sales. *See Lopez*, 518 F.3d at 792, 797-800.

One specific *Terry* challenge the Court may soon confront is the tension between more expansive Second Amendment rights[55] and broad police discretion to conduct stop and frisks. In an opinion joined by Judge Gorsuch, the Tenth Circuit in *United States v. Rodriguez*[56] held that officers can stop and frisk individuals simply because they are carrying concealed firearms, even if the jurisdiction allows for permitted concealed carry.[57] Similarly, the Fourth Circuit recently held in *United States v. Robinson*[58] that in concealed-carry jurisdictions, once an officer has legally stopped a person, the officer can frisk him if he is armed.[59] But in tension with those holdings, the Sixth, Fourth, and Third Circuits have held that where state law allows *open* carry of firearms, the police cannot conduct a *Terry* stop simply because a person visibly carries a gun.[60]

The Court is likely to confront this growing tension in the coming years. The *Robinson* dissent urged the court to adopt a rule that officers cannot conduct frisks of armed individuals without evidence that they are not only armed but also dangerous.[61] But as he did in *Rodriguez*, Judge Gorsuch would likely uphold the legality of the frisk in *Robinson*. In *Rodriguez*, the Tenth Circuit reasoned that "an officer making a lawful investigatory stop [must have] the ability to protect himself from an armed suspect whose propensities are unknown."[62] Instead of the dissent's rule, Judge Gorsuch is likely to favor an approach that prioritizes officer safety by considering "the totality of the circumstances" and "tak[ing] a realistic view of human capacities and limitations," as he did in *Nicholson*.[63]

Conclusion

It is too simple, then, to say that Judge Gorsuch is an originalist or that he will merely preserve Justice Scalia's common law approach to the Fourth Amendment. True, Judge Gorsuch has adopted Justice Scalia's bright-line trespass test for searches of personal property. But while Justice Scalia never conclusively resolved whether stop and frisks would have been permitted at common law,[64] he was always frank regarding his preference for bright-line

55. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 635-36 (2007).

56. 739 F.3d 481 (10th Cir. 2013).

57. *Id.* at 486-87, 491 (citing N.M. STAT. ANN. § 30-7-2).

58. 846 F.3d 694 (4th Cir. 2017) (en banc).

59. *Id.* at 701.

60. *See* Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1131-33 (6th Cir. 2015); United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013); United States v. Ubiles, 224 F.3d 213, 218 (3d Cir. 2000).

61. *See Robinson*, 846 F.3d at 707, 709 (Harris, J., dissenting).

62. *Rodriguez*, 739 F.3d at 491.

63. United States v. Nicholson, 721 F.3d 1236, 1248 (10th Cir. 2013) (Gorsuch, J., dissenting).

64. *See* Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring).

rules over "th'ol' 'totality-of-the-circumstances.'"[65] Conversely, Judge Gorsuch seems not just to tolerate but to prefer case-by-case reasonableness inquiries when it comes to stop and frisks.[66] So although Judge Gorsuch could, if confirmed, posit an originalist answer to *Terry* and thereby develop a unified originalist approach to the Fourth Amendment, there is nothing in his record to indicate that such a project interests him.

65. *See* United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting); *see also* Justice Antonin Scalia, The Rule of Law as a Law of Rules, Oliver Wendell Holmes, Jr. Lecture at Harvard University (Feb. 14, 1989), *in* 56 U. CHI. L. REV. 1175, 1186 (1989).

66. *See* United States v. Nicholson, 721 F.3d 1236, 1248-49 (2013) (Gorsuch, J., dissenting) (arguing for a "case-by-case approach" that considers "the totality of the circumstances" and "takes a realistic view of human capacities and limitations").