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Using GPS Devices in Inspector General Investigations after
Cunningham v. New York State Department of Labor¹

Wesley Cheng²

I. Introduction

When the New York State Office of the Inspector General (“NY-OIG”) suspected that a New York State employee named Michael Cunningham was submitting false time reports, its investigators turned to electronic surveillance to assist in their collection of evidence.³ Without obtaining a judicial warrant, NY-OIG investigators covertly attached a global positioning system (GPS) device to Cunningham’s car and collected data on Cunningham’s vehicular movements twenty-four hours a day for a month, including during his vacation.⁴ Ultimately, the GPS data was used in a disciplinary hearing leading to Cunningham’s termination.⁵

After litigation below, the New York State Court of Appeals in *Cunningham v. New York State Dept. of Labor* ruled on the constitutionality of NY-OIG’s warrantless collection of data in this case.

In a nutshell, the Court of Appeals ruled that the search in the



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³ See *Cunningham v. New York State Dept. of Labor*, 21 N.Y.3d 515 (2013).

⁴ *Id.*

⁵ *Id.* at 519.

Cunningham case fell under the workplace exception to the warrant requirement, but that the search was unreasonable in its scope, requiring suppression of the obtained evidence.

Cunningham thus provides some limited guidance to investigative agencies considering the utilization of GPS devices, namely: (1) a search warrant is likely unnecessary when using electronic surveillance to investigate government employees in workplace-related matters; and (2) a reasonable search must involve constraints on the data collection.⁶

Cunningham does not explain the parameters of those constraints, however, nor does it tackle the logistical and technical difficulties in limiting data collection from GPS devices.

This article examines the *Cunningham* case and discusses its implications for practitioners. It also provides suggestions for managing some of the uncertainties caused by the still-unsettled state of the law in this area, even after *Cunningham*, and surveys possible developments that will impact this issue in the upcoming years.

II. Historical Background

A. Search and Seizure Under the Fourth Amendment

The Fourth Amendment to the Constitution of the United States provides that:

⁶ *Cunningham*, 21 N.Y.3d at 518.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁷

Initially, courts limited Fourth Amendment analysis to common-law trespass intrusions.⁸ Over time, courts expanded the scope of the Fourth Amendment beyond merely trespasses into brick-and-mortar physical spaces like residences. In *Katz v. United States*, the Supreme Court explicitly recognized that individuals may have reasonable expectations of

⁷ U.S. CONST. amend. IV. New York State's equivalent is found in N.Y. Const. art. I, section 12:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

⁸ See Lauren Elena Smith, *Jonesing for a Test: Fourth Amendment Privacy in the Wake of United States v. Jones*, 58 BERKELEY TECH. L.J. 1003, 1007 (2013) (citing *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (discussing the Supreme Court using a physical invasion test, also referred to as the trespass test, to decide early search cases)). The Court held that an action must involve a physical imposition on material entities belonging to a person to constitute a Fourth Amendment search, noting that “the well-known historical purpose of the Fourth Amendment ... was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will.” *Id.* (quoting *United States v. Katz*, 389 U.S. 347, 353 (1967)).

privacy in arenas beyond just their homes.⁹ Moreover, the *Katz* Court determined that although property law played a significant role in determining the reasonableness of a warrantless search of premises, widely-shared social expectations were also relevant.¹⁰ The formulation of this view became the standard that we now know as the “reasonable expectation of privacy,” requiring: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹¹

This shift in the interpretation of the Fourth Amendment provided courts with a framework for analyzing electronic searches and ultimately electronic surveillance.¹² In 2009, the New York State Court of Appeals in *People v. Weaver* applied the *Katz* reasonable expectation standard in deciding whether the use of a GPS device to track an individual’s

⁹ 389 U.S. 347, 352-53 (1967) (discussing the nature of the “right to privacy” and the legal definition of a “search.” The Court’s ruling refined previous interpretations of the unreasonable search and seizure clause of the Fourth Amendment to count intangible intrusion with technology as a search, overruling *Olmstead v. United States* and *Goldman v. United States*. Thus *Katz* definitively extended Fourth Amendment protection to all areas where a person has a “reasonable expectation of privacy”).

¹⁰ *Katz* was convicted of transmitting wagering information by telephone. *Id.* At trial, the government introduced statements made by Katz during telephone conversations that had been overheard by FBI agents. *Id.* The agents had attached an electronic listening and recording device to the outside of the public telephone booth Katz was using. *Id.* While the government argued that no intrusion had occurred since Katz was clearly visible from outside the booth as he was speaking, the majority dismissed this argument, stating that Katz intended to keep his words private, not his actions, and that he was entitled to assume that his words would not be broadcast to the world. *Id.* After deciding that the interception of the telephone conversations constituted a search and seizure, the Supreme Court concluded that because no warrant had been obtained, Katz’s Fourth Amendment rights had been violated. *Id.*

¹¹ *Katz*, 347 U.S. at 353.

¹² Smith, *Jonesing for a Test*, at 1006.

movements constituted a Fourth Amendment search.¹³ In suppressing evidence derived from a GPS device affixed to a private vehicle for 65 days without a warrant, the *Weaver* court reasoned that the GPS readings were not a mere enhancement of human sensory capacity, and that the defendant retained a privacy expectation while in his vehicle.¹⁴ While declining to decide the issue as a matter of federal law, the Court of Appeals concluded that as a matter of New York state law, the use of the GPS device in Weaver’s case constituted a search that was unconstitutional absent a warrant.¹⁵

The United States Supreme Court similarly found in 2013 in *United States v. Jones* that the installation and use of a GPS device constituted a Fourth Amendment search, though it took a different route to that conclusion.¹⁶ The *Jones* Court explained that the common law trespass test was not displaced by the “reasonable expectations” test, and that either theory could support a determination that an investigatory action constituted a search.¹⁷ In the particular circumstances of the *Jones* case, the Court suppressed evidence from a GPS device that had been

¹³ 12 N.Y.3d 433 (2009).

¹⁴ *Id.* at 441. “GPS ... facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period. The potential for a similar capture of information or ‘seeing’ by law enforcement would require, at a minimum, millions of additional police officers and cameras on every street lamp.” *Id.*

¹⁵ *Id.* at 445.

¹⁶ 132 S.Ct. 945 (2012).

¹⁷ *Id.* at 950-51.

affixed to the defendant’s vehicle, reasoning that investigators physically occupied the defendant’s private property for the purpose of obtaining information. Because this was a physical intrusion that would have been considered a “search” within the meaning of the Fourth Amendment when it was adopted, the *Jones* Court ruled it a search that – being warrantless and not within any exception to the warrant requirement – mandated suppression.¹⁸

B. The Workplace Exception to the Warrant Requirement

At the same time that Fourth Amendment jurisprudence defining what constituted a “search” was evolving, well defined exceptions to the warrant requirement also emerged, including the “workplace” exception.¹⁹ In 1987, the Supreme Court in a plurality opinion in *O’Connor v. Ortega* carved out an exception to the warrant requirement for searches targeting public employees, reasoning that it would be unduly burdensome to obtain a warrant whenever an employer wished to enter an employee’s office, desk or filing cabinets for a work-related purpose.²⁰ The plurality opinion

¹⁸ *Id.* at 954.

¹⁹ See *O’Connor v. Ortega*, 480 U.S. 709, 722 (1987) (plurality opinion).

²⁰ See E. Miles Kilburn, *Work-Related Searches by Government Employers Valid on “Reasonable” Grounds*, 78 J. Crim. L. & Criminology 792 (1988). In arriving at an appropriate standard to review the search of a government employee’s work area, a plurality of the Court attempted to balance the intrusions on the privacy interests of the individual against the government’s need to conduct its business in an efficient and proper manner, holding that “public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the

also noted that failing to carve out a warrant exception would impose unwieldy procedural burdens on supervisors unfamiliar with the relevant standards, and emphasized the strong governmental interest in an efficient workplace.²¹ The exception applied notwithstanding the fact that some personal items such as personal photographs or letters might be part of a search.²² To fall under the workplace exception to the warrant requirement, however, the following requirements must be met: (1) the workplace search must be based on a reasonable suspicion of employee misconduct that was justified at its inception; and (2) the workplace search must be reasonable in its scope.²³

In 1988, the New York State Court of Appeals in *Caruso v. Ward* followed the *O'Connor* standard for determining the constitutionality of workplace searches conducted by public employers.²⁴ As had the

standard of reasonableness under all the circumstances.” *Id.* (citing *O'Connor*, 480 U.S. at 725-26).

²¹ See *O'Connor*, 480 U.S. at 720.

²² *Id.* at 722. The *O'Connor* plurality reasoned that certain areas of the workplace such as the “hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace” and did not become personal areas through the actions of an employee. *Id.*

²³ See *O'Connor*, 480 U.S. 709, 722 (citing *Terry v. Ohio*, 392 U.S. 1 (1968), *New Jersey v. TLO*, 469 U.S. 325 (1985)).

²⁴ See *Caruso v. Ward*, 72 N.Y.2d 432, 435 (1988). In *Caruso*, the police commissioner issued an order establishing random drug testing for a particular unit of the police force that served primarily in narcotics-related operations. *Id.* Respondent police association sued and obtained an injunction against enforcement of the order on constitutional grounds. *Id.* The police commissioner appealed and the court reversed, stating that individualized reasonable suspicion was not required for the group of police officers. *Id.* The court noted that the unit was voluntary and that members had already been subjected to three drug tests as a condition of joining the unit. *Id.* at 436. The police officers had a reduced expectation of privacy, and the department had established a justifiable interest

O'Connor Court, the Court of Appeals in *Caruso* applied the exception to all workplace searches for non-investigatory, work-related purposes as well as for investigations of work-related misconduct.²⁵

III. *Cunningham v. New York State Department of Labor*

In 2008, the New York State Department of Labor (“DOL”) initiated an investigation of Cunningham, a DOL employee, after management received allegations that Cunningham had taken unauthorized absences from duty and falsified records to conceal those absences.²⁶ That investigation resulted in a disciplinary proceeding, after which Cunningham was suspended for two months.²⁷ It also led to a second investigation after Cunningham eluded an investigator who was following Cunningham’s personal vehicle.²⁸ The Department of Labor referred the case to the NY-OIG, which attached a GPS device to Cunningham’s personal vehicle while the car was parked in a parking lot near DOL.²⁹ The device, along with two later replacement devices,

and responsibility in random testing because the officers were exposed daily to drug users and traffickers and to offers of drugs and money. *Id.*

²⁵ *Id.* at 437 (citing *O'Connor*, 480 U.S. at 729).

²⁶ *See Cunningham*, 21 N.Y.3d at 518.

²⁷ *See id.*

²⁸ *See id.* at 518-19.

²⁹ *See id.* at 519.

recorded Cunningham's vehicular movements for a month, including nights, weekends and during a Massachusetts vacation.³⁰

Based on the NY-OIG's investigation and report, DOL brought new charges against Cunningham, eleven of which were sustained by a hearing officer.³¹ Of the eleven sustained charges, four were based exclusively on evidence obtained by the GPS device.³² Four other charges were supported by evidence that included the GPS information among other things, and three charges did not utilize any of the GPS evidence.³³

Following his hearing, Cunningham's employment was terminated. Cunningham filed a petition to challenge the ruling; the petition was dismissed by the Appellate Division.³⁴ Cunningham then appealed to the New York State Court of Appeals, arguing that the GPS evidence should have been suppressed because the GPS search did not fall within the workplace exception and, in the alternative, was excessively intrusive.³⁵

The Court of Appeals decided the case in two parts: first, the court considered whether the search fell within the workplace exception; and

³⁰ *See id.* Other investigative methods utilized by NY-OIG later in the investigation included physical surveillance, the obtaining of E-ZPass records, and interviews of Cunningham and his secretary. *Id.*

³¹ *See id.*

³² *See id.*

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.* at 517, 521.

second, it determined whether the requirements of that exception were met in this case. With respect to whether a GPS search was permissible in the absence of a search warrant, the *Cunningham* court first noted that, consistent with its decision in *Weaver*, and the Supreme Court’s ruling in *United States v. Jones*, the attachment of a GPS device to a vehicle for the purpose of gathering information fell under the purview of the Fourth Amendment and N.Y. Const. art. I, section 12.³⁶ In other words, as had been determined previously in other cases, the attachment and use of the GPS device against Cunningham constituted a “search.”³⁷ *Cunningham*, however, given the defendant’s public employment, presented an issue of first impression in New York: namely, whether a GPS search fell within the workplace search warrant exception.³⁸

Cunningham argued that the workplace exception should be narrowly confined to the workplace itself or should relate only to workplace-issued property that could be seen as an extension of the workplace.³⁹ Cunningham therefore reasoned that a warrant was required in his case because the GPS device at issue was placed on his personal vehicle.⁴⁰ In rejecting Cunningham’s argument, the Court of Appeals followed the reasoning from *O’Connor* that items such as a personal

³⁶ See *Cunningham*, 21 N.Y.3d at 518.

³⁷ *Id.* at 520.

³⁸ See *id.* (citing *Weaver*, 12 N.Y.3d at 443, *Jones*, 132 S. Ct. at 954).

³⁹ See *id.* at 520.

⁴⁰ See *id.*

photograph on an employee’s desk, or a personal letter posted on an employee’s bulletin board were deemed to be within the workplace context.⁴¹ A personal car, the Court of Appeals reasoned, was in important ways like a personal letter or personal photograph.⁴² The Cunningham court also endorsed the *O’Connor* plurality’s reasoning that a warrant requirement for public employers would impose a burden on supervisors who were not well-versed in investigating criminal laws.⁴³ Thus, the Court of Appeals concluded that the NY-OIG did not violate the State or Federal Constitutions by failing to seek a warrant before attaching a GPS device to Cunningham’s private vehicle.⁴⁴

The *Cunningham* court next turned to the two-pronged *O’Connor* test to determine the reasonableness of the warrantless use of the GPS device in Cunningham’s case.⁴⁵ As to the first prong, a workplace searched based on reasonable suspicion of employee misconduct must be “justified at its inception.”⁴⁶ Justice Smith determined that the NY-OIG had satisfied this requirement, as DOL suspected Cunningham of

⁴¹ *See id.* (citing *O’Connor*, 107 S. Ct. at 1508).

⁴² *See id.* at 520. Specifically, the *Cunningham* court noted that Cunningham was required to report his arrival and departure times to his employer, which diminished the expectation of privacy he had over the movements of his personal vehicle. *Id.*

⁴³ *See id.* (citing *O’Connor*, 107 S. Ct. at 1500).

⁴⁴ *See id.*

⁴⁵ *See id.* at 519-20.

⁴⁶ *See id.* (citing *O’Connor*, 107 S. Ct. at 1508).

submitting false time records.⁴⁷ The Cunningham court then turned to the second prong: whether the search was reasonable in its scope.⁴⁸ In finding that the search was “excessively intrusive,” the Court of Appeals listed all of the activity that the NY-OIG was able to track that had no relation to its investigation.⁴⁹ For example, using the GPS device the NY-OIG was able to track Cunningham’s whereabouts on nights, weekends and even while he was on vacation, none of which had anything to do with whether Cunningham was actually working when he was supposed to be doing so.⁵⁰ The *Cunningham* court admitted that it might be “unreasonably difficult” to eliminate all surveillance of an employee’s private activity, but asserted that the NY-OIG could have taken steps to minimize its tracking activity so that Cunningham would not have been tracked twenty-four hours a day, seven days a week, for a full month.⁵¹ Specifically, the Court of Appeals noted that investigators on three separate occasions were able to access the GPS device on the vehicle during the month of surveillance, so it did not seem unreasonably difficult for investigators to have engaged in some sort of minimization, presumably by removing the

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.* (citing *O’Connor*, 107 S. Ct. at 1508).

⁵⁰ *See id.*

⁵¹ *See id.* The Court of Appeals acknowledged that it might even be “impossible” to limit a GPS search of an employee’s car so as to avoid capturing purely private activity. *Id.* at 522.

device during times when it was unlikely to capture evidence of improper conduct.⁵²

In discussing the remedy for NY-OIG’s unreasonable search, the *Cunningham* court determined that although no evidence of Cunningham’s movements on nights, weekends or vacation was used against him, the “extraordinary capacity” of the GPS device rendered all evidence – including evidence obtained during work hours – inadmissible.⁵³ Thus, when an employer conducts an unreasonable search using a GPS device “without making a reasonable effort to avoid tracking an employee outside of business hours,” the search as a whole will be deemed unreasonable.⁵⁴ While the court did not specify what amount of minimization would suffice as a constitutional matter, it suggested that “surely it would have been possible to stop short of seven-day, 24-hour surveillance for a full month.”⁵⁵

⁵² *See id.* at 523. Investigators had removed the device twice to replace it with a new device, and a third time when the surveillance period ended. *Id.*

⁵³ *See id.* In describing the “extraordinary capacity” of the GPS device, the Court of Appeals described the GPS’s ability to relentlessly track “anything.” *Id.* (quoting *Weaver*, 12 N.Y.3d at 441).

⁵⁴ *See id.*

⁵⁵ *Id.* at 522-23.

Four of the counts against Cunningham that relied exclusively on the GPS device were dismissed, and the matter was remanded to the Commissioner for Labor for redetermination of the penalty.⁵⁶

IV. What *Cunningham* Means for Practitioners

The Court of Appeals' decision in *Cunningham* has implications for Fourth Amendment law and practitioners. On the one hand, the decision established that government investigators may track employees through the use of a GPS device without first obtaining a judicially authorized warrant, so long as the investigation meets the standards of the workplace exception to the warrant requirement.⁵⁷ On the other hand, the *Cunningham* decision did not provide clarity on what sort of minimization would suffice to ensure that the GPS search would meet the workplace exception's second prong of being reasonable in scope.⁵⁸

Specifically, the Court of Appeals declined to provide a bright-line rule that would guide government employers in conducting GPS investigations.⁵⁹ The only guidance the *Cunningham* court provided in this area was a statement that in its investigation of whether Cunningham was claiming that he worked when he did not, the NY-OIG should have

⁵⁶ *Id.* at 523. While four counts relied solely on the GPS device, the remaining seven counts either did not stem from the use of the GPS device at all or the GPS evidence was duplicative of other evidence supporting the charge. *Id.*

⁵⁷ *See Cunningham*, 21 N.Y.3d at 515.

⁵⁸ *See id.* at 520-21.

⁵⁹ *See id.* at 522-23.

stopped short of seven-day, 24-hour surveillance for a month.⁶⁰ The suggestion from the court’s language is that it would be ideal in an investigation of this sort for a GPS device to be affixed every morning and removed when the workday ends. This, however, as any investigator who has worked with an attachable GPS device knows, is logistically unworkable. It is difficult enough to find an opportunity to covertly place a device on an employee’s car in the first place and to replace the unit when it malfunctions or its batteries expire; having to affix and remove it on a daily basis would require significant “tech team” resources and would almost certainly lead to the subject’s discovery of the surveillance. Nevertheless, when dealing with the type of GPS device that must be attached to a car, the most conservative approach given the current state of the law would be to attach it only for those time periods that are relevant to the investigation (or, of course, to obtain a warrant to cover the surveillance).⁶¹

⁶⁰ *Id.* The court also asked rhetorically: “Why could [NY-OIG] not also have removed the device when, for example, petitioner was about to start his annual vacation?” *Id.* at 523.

⁶¹ A more generous (to law enforcement) reading of *Cunningham* suggests that a court might accept as effective minimization the removal of the device when an employee is away on vacation, at least to the extent that the impending vacation is known to the investigators in advance. *See id.* It is not at all clear, however, that this level of minimization would satisfy New York courts given the language in *Cunningham* that appeared to disapprove of the GPS’s collection of data after work hours and on weekends as well. *See id.* at 522-23. In any case, there are potential logistical problems with minimizing this way. For example, investigators may not know of a vacation in advance. Another wrinkle emerges with respect to certain government employees like emergency responders, who must be available at all times for work.

Nor did the *Cunningham* court consider whether a different kind of minimization, other than physically removing the GPS device, would meet the reasonable scope test – namely, electronic minimization whereby either the device would be set to transmit data only during times relevant to the investigation, or data would be transmitted at all times but only relevant data would be retrieved and/or reviewed by the investigatory team. Thus, it is at least possible that if this type of remote minimization is or becomes technically feasible with the kind of device that is physically affixed to a vehicle, courts might find that it satisfies the workplace exception test.⁶²

Counting on this would be a gamble, given the ruling in *Jones*. There, the Supreme Court made clear that a trespass combined with the gathering of information constitutes a search.⁶³ When considering, then, whether a search was reasonable in scope as part of the workplace exception, it may be that the search as defined in *Jones* (a device affixed to a car that is collecting information) cannot be reasonable when it continues into periods not relevant to the investigation. Accordingly, it

⁶² Currently it appears that while it might be possible to set a commercial GPS device to transmit only a limited amount of information, such as when a vehicle leaves a designated area (a so-called “geofence,” *see, e.g.*, www.motosafety.com/index_gs_plug.html, (last visited 07/31/14)), most of the devices on the market now collect all of the locational information from the vehicle whether or not the customer programs the device to transmit it to him/her for review. This scenario would likely constitute a search under *Jones*, *see infra* & note.62.

⁶³ 132 S.Ct. 945, 950-51 (2012).

would be quite risky to utilize a GPS device that investigators attached to a car that collects information at all times, including times not relevant to the investigation, even if that information did not ultimately make its way to the investigators.⁶⁴

One seemingly would be on firmer ground in a situation where investigators placed a device that could be programmed not to collect information during irrelevant periods, although the devices currently on the market do not appear to have this capacity.⁶⁵ In that case, the search as defined by *Jones* arguably would end at the end of the workday when the information gathering stopped, and would resume the next workday morning when information gathering started again. While this scenario has not been tested in the courts and does not appear to be currently supported by the available technology, if the technology becomes available it would seem that this type of search would satisfy both *Jones* and *Cunningham*.

⁶⁴ Even where data collected by the device during irrelevant periods was not transmitted to the investigators by the device, or where some sort of a wall team was utilized to shield the investigative team from the irrelevant information, the search would still be going on during irrelevant time periods because of the intrusion of the device coupled with the collection of data, rendering the search unreasonable in its scope according to *Jones*.

⁶⁵ See *supra* note 60.

Notwithstanding *Cunningham*'s uncertainties, however, there is some good news ahead for the use of GPS on private vehicles⁶⁶ in workplace investigations. As indicated above, *Cunningham* dealt solely with the type of GPS device that must be physically installed by investigators on a subject's car. But GPS devices that are built-in, *i.e.*, installed by the factory before purchase, are increasingly common. Indeed, "telematics" systems, which provide geo-location data to third-party providers, are standard on nearly 75% of cars now sold in the United States.⁶⁷

In those situations, where investigators obtain location information through a third party without physically intruding upon an employee's car, *Jones*'s trespass theory of searches would not apply,⁶⁸ and the intrusion would be analyzed entirely under the reasonable expectation of privacy theory of *Katz*⁶⁹ and its progeny. With appropriate minimization to coincide with the scope of the investigation, it is likely that this investigatory method will pass constitutional muster, both

⁶⁶ Of course, government employees cannot assert privacy rights with respect to government-owned vehicles they use as part of their jobs. *See O'Connor*, 480 U.S. at 717. There are many systems that track government vehicular fleets that can be readily utilized by public agencies, *see, e.g.* www.networkfleet.com, (last visited 07/31/14).

⁶⁷ Six manufacturers supply approximately 75% of cars sold in this country, *see In-Car Location Based Services: Companies are Taking Steps to Protect Privacy, but Some Risks May Not Be Clear to Consumers*, Gov't Accountability Office, Dec. 2013, pp. 2-3, available at <http://www.gao.gov/assets/660/659509.pdf>, and a review of those manufacturers' websites indicates that GPS technology is standard on all but the lowest level models.

⁶⁸ *See* 132 S.Ct. at 954.

⁶⁹ 389 U.S. 347 (1967).

because having consented to the data collection, the employee has no reasonable expectation of privacy in his vehicular movements, and because even if deemed a “search,” the workplace exception should apply.

V. Conclusions

Cunningham provides some limited guidance to investigators using GPS devices to track the private cars of government employees. We now know that the workplace exception to the warrant requirement applies to such searches, although the lack of clarity in the *Cunningham* opinion concerning minimization makes the holding of limited utility to practitioners. Technology will ultimately make this problem a less meaningful one, as more and more cars have built-in GPS systems that can be accessed for law enforcement purposes without the need for physically affixing a GPS device. In the meantime, the conservative practice in an investigation of a government employee would be for the investigators to obtain a warrant to physically place a GPS device on an employee’s private car. Otherwise, given the language of *Cunningham* and *Jones*, it is unlikely that investigators will be able to satisfy the minimization requirements of the workplace exception for a physically affixed device such as the one used in the *Cunningham* case. If obtaining a warrant is undesirable for some reason and the GPS data is designed to be merely supplementary to other evidence, investigators could try to

minimize electronically as described above, although with the technology currently in place there is a not insignificant risk that this would be deemed insufficient to support the workplace exception in a court challenge.