judges would likely be limited when other *judges'* impartiality were in question, and would likely be eroded if reviewing courts were to uphold decisions that appeared to the (less well-informed) public to be tainted by bias. It is unsurprising, therefore, that conventional wisdom holds that public confidence is best secured by adopting a test that, in this sphere, synchronises judicial decision-making with public perception—and that this, in turn, is best achieved by requiring the reviewing court to approach matters through the eyes of the ordinary person. To the extent that it gave life in English law to the reviewing-court-as-guarantor model, *Gough* is now seen as a wrong-turning. Yet the majority's analysis in *Belize Bank* comes close to reinstating such an approach in practice, since the fair-minded observer assumes a degree of judge-like omniscience that results in substantial misalignment of the court's evaluation and the perception of the "ordinary person in Queen Square Market". This is not to suggest that courts should construct the observer in the image of an ill-informed, unthinking cynic: but if legal doctrine in this sphere is to reflect the policy that underpins it, reviewing judges should certainly make greater efforts to avoid (as Lord Rodger put it extra-judicially) "holding up a mirror" to themselves.

MARK ELLIOTT

SURVEILLANCE AND THE INDIVIDUAL'S EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT

IN the decade since the Human Rights Act 1998 came into force, the English courts' approach to the law of privacy has been transformed. Much has changed since Sir Thomas Bingham observed that "the recognition of a right to privacy as such has been more generously accorded in almost every developed country than in our own": [1996] E.H.R.L.R. 455. This experience reflected, in part, the historically narrow "Anglo-American idea of privacy, with its emphasis on the secrecy of personal information and seclusion" (Harris *et al., Law of the European Convention on Human Rights*, 2nd ed., 2009, p. 304.) The incorporation of Article 8 ECHR into English law encouraged not only the development of a specifically privacy-oriented action in tort (*Campbell v MGN* [2004] 2 A.C. 457), but also a profound alteration in the way in which the right to private life is itself conceived. The recent decision of the United States Supreme Court in *US v Jones* 565 U.S. (2012) suggests that American constitutional jurisprudence may be on the point of pursuing a similar path.

Jones concerned a challenge to the admissibility of evidence obtained from a GPS device which had been attached by law enforcement

officers to a suspected drug dealer's car. The issue before the Court was whether the use of warrantless information obtained in this way represented a breach of the Fourth Amendment's guarantee of "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures…".

The Supreme Court's early Fourth Amendment jurisprudence had tended to focus on common law notions of property and trespass. This ultimately led the Court to adopt a rigidly categorical approach to Fourth Amendment claims which was ill-equipped to cope with technological developments. This meant that the Court's analysis of what constituted a search within the meaning of the Fourth Amendment distinguished, for example, between audio surveillance where the device used made physical contact with a heating duct inside the claimant's home (*Silverman v US* 365 U.S. 505 (1961)) and situations where the audio surveillance equipment employment made contact only with the outer side of the claimant's wall (*Goldman v US* 316 U.S. 129 (1942)).

In *Katz v US* 389 U.S. 347 (1967) the Court appeared to abandon this approach in favour of an interpretation of the Fourth Amendment which emphasised its purpose as being to protect against the violation by government officials of the citizen's "reasonable expectation of privacy". However, later decisions such as *US v Knotts* 460 U.S. 276 (1983) often seemed to adopt the earlier property-oriented approach.

Delivering the decision of the Court in *Jones*, Scalia J. concluded that the accused's Fourth Amendment rights had been breached by reason of the trespass committed when installing the GPS device. This represented a return, once again, to the Court's pre-*Katz* case law. He explained that "[t]he Government physically occupied private property for the purpose of obtaining information", adding, in express reliance on *Entick v Carrington* (1765) 95 E.R. 807, that he had "no doubt such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted".

The majority's concentration on the Government's interference with property echoes the way in which pre-Human Rights Act English law provided only piecemeal protection for privacy claims. The law's concern for privacy interests, such as there was, focused primarily upon situations in which they intersected with proprietary actions for breach of confidence or trespass.

It is important to observe that Scalia J. was clear in his judgment that the property-oriented approach adopted by the majority did not necessarily represent the only permissible interpretation of the Fourth Amendment. In his view, this narrowly traditional application of this "18th century guarantee against unreasonable searches" was appropriate in circumstances where it was sufficient to dispose of

the issues raised by the particular facts before the Court. As Scalia J. acknowledged, this approach also allowed the majority to avoid the broader and more difficult question of the extent to which technological advances require a re-consideration of the right to a "reasonable expectation of privacy" under the Fourth Amendment privacy rights.

The remainder of the Court, however, directly addressed these issues in a manner which calls into question the Court's traditionally cautious conception of Fourth Amendment privacy. Alito J. (who was joined in his concurring judgment by Ginsberg, Breyer and Kagan JJ.) criticised the majority's trespass-based analysis of the legal issue. In his view, this artificially treated a relatively minor interference with property as the trigger for the application of Fourth Amendment protection, thereby overlooking the substantive and substantial interference with privacy which had actually occurred. This failed to engage with the core constitutional question facing the Court: how the Fourth Amendment privacy should be developed to respond to "dramatic technological change" that "make long-term monitoring relatively easy and cheap".

The concurring judgments anticipate a number of possible responses to this issue. Sotomayor J.'s judgment specifically raised the possibility of abandoning the binary public-private distinction that still characterises American constitutional law on this issue. For her, treating information voluntarily disclosed to another as no longer private is "ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks". In an era of smartphones and social networking, the individual's reasonable expectations may only be vindicated if, in her view, "our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy".

This would represent a firm break with Anglo-American tradition and bring American law into line with the more nuanced and context-sensitive approach to privacy that characterises European attitudes to privacy (*Peck v UK* (2003) 36 E.H.R.R. 41). Of course, a flexible conception of privacy lacks the certainty and predictability associated with a bright line division between public and private information. However, it also more accurately reflects the reality that, as Feldman has observed, "privacy can usefully be considered to have more to do with social … action and interaction than with the behaviour of hermetically isolated individuals" (Feldman in Birks (ed.), *Privacy and Loyalty* (1997), p. 49). This would bring Fourth Amendment jurisprudence closer to a conception of privacy as a social and relational interest which is more clearly concerned with autonomy rather than property interests.

Yet, the decision in *Jones* should not simply be seen as a belated American aping of the European approach. There are also elements in both Sotomayor and Alito JJ.'s judgments which suggest dissatisfaction with the "reasonable expectation of privacy" test that presently applies under both systems.

Both decisions refer to the ambiguities inherent in a test based on reasonable expectations of privacy. While this test assumes that the "hypothetical reasonable person has a well-developed and stable set of privacy expectations", there are reasons to doubt that this may be the case.

The scale of technological change in recent years has created substantial disparities in the way in which different groups engage with different technologies. This is particularly so in the field of communications where the sequential emergence of the internet, of social media and latterly of always-on mobile connectivity has re-defined how many users organise and manage their inter-personal relationships. While some technologies have become relatively ubiquitous, others may attract smaller, if more committed, groups of users. This makes it more difficult to identify a convincingly representative reasonable person or to assess their putative expectations.

This is particularly so given the extent to which exposure to such technologies may colour an individual's expectations. Variations in the use of technology may introduce substantial variations into what one group of users might regard as a reasonable expectation.

Furthermore, the fact that expectations may be disrupted or distorted by technological innovations raises a more fundamental concern about the standard of privacy protection provided by an expectation-based approach. Both Sotomayor and Alito JJ.'s judgments query the extent to which technological developments may themselves shape the content of what the law regards as a "reasonable expectation". Expectations of privacy may be diminished by the convenience, ubiquity or perceived inevitability of regular intrusions. This casts doubt on the efficacy of a purely expectation-based threshold in the future.

Sotomayor and Alito JJ.'s judgments demonstrate an acute awareness of how changes in the capacity for surveillance have the potential to significantly "chil[l] associational and expressive freedoms", and to even "alter the relationship between citizen and government in a way that is inimical to democratic society". There are clear signs in *Jones* of a willingness on the part of at least half the Court to develop Fourth Amendment jurisprudence in a manner which moves beyond the narrow traditions of Anglo-American thought to directly confront the complex challenges of "preserv[ing] that degree of privacy … that existed when the Fourth Amendment was adopted" in a more

technologically advanced age. While the majority avoided these difficult questions for the moment, the property-based approach which they adopted is unlikely to be of assistance in cases concerning contactless forms of surveillance, such as access to data from mobile phone masts. If faced with cases involving that sort of alleged encroachment on a person's privacy, the Court will have to return to the issues anticipated by Sotomayor and Alito JJ.

EOIN CAROLAN

POLICE OFFICERS ON JURIES

ANDY CAPP, the cartoon character in the *Daily Mirror*, was once shown as the referee in a football match. Not only was his lower lip adorned, as always, by the ever-present half-smoked cigarette: his referee's shirt was ornamented by a big rosette, as worn by team supporters. To a player, who had noticed it, he was saying "Sumthin' botherin' yer?" Translated into legal terms, this was *Hanif and Khan v UK* [2012] E.C.H.R. 2247.

On the second day of the defendants' trial in 2007 for conspiracy to supply heroin, a juror warned the judge that he was a police officer and knew one of the police witnesses, whose evidence was crucial against Hanif. The judge, astonishingly, ruled this did not matter and in due course his fellow jurors made him foreman. The jury, readers will be unsurprised to learn, convicted – and long prison sentences were imposed.

The defendants appealed, arguing that the presence of the police officer meant that the tribunal which had tried them was not independent. In 2008 a strong Court of Appeal, containing both the Lord Chief Justice and the President of the Queen's Bench Division, upheld their convictions.

Three years later the Fourth Division of the Strasbourg Court took a very different view. In its judgment, given on 20 December 2011, it said:

> [148] … leaving aside the question whether the presence of a police officer on a jury could ever be compatible with Article 6, where there is an important conflict regarding police evidence in the case and a police officer who is personally acquainted with the police officer witness giving the relevant evidence is a member of the jury, jury directions and judicial warnings are insufficient to guard against the risk that the jury may, albeit subconsciously, favour the evidence of the police …

It followed, said the Court, that Hanif's right to a fair trial under Article 6(1) of the Convention had been violated because the tribunal