Advancing a Unified Approach to Disjointed Fourth Amendment Jurisprudence

April 5, 2019

Download this Response here:

Cloyd Response

Response Piece | 107 KY. L. J. ONLINE | Volume 107

Advancing a Unified Approach to Disjointed Fourth Amendment Jurisprudence

Justin Cloyd[1]

In his article, *A Unified Approach To Fourth Amendment Search Doctrine*, Professor Mannheimer attempts to reconcile the two different approaches courts take when determining whether the government violates the Fourth Amendment by committing an unreasonable search and seizure.[2]He argues for this reconciliation based not upon a compromise between the two doctrines, but by showing that the doctrines contain the same history.[3]This approach allows Professor Mannheimer to unravel the law to suggest a better path. [4]

The two approaches at issue here are the "trespass" approach and the "reasonable expectation of privacy" approach.[5]In the early stages of Fourth Amendment jurisprudence, the Court relied on the "trespass" approach. Professor Mannheimer demonstrates this by contrasting *Goldman v. United States*with *Silverman v. United States*.[6]In both cases, the government attempted to get information by listening in on people's conversations. In one, the government used a device that could listen through walls by placing it on a wall in an adjoining room; in the other, the government had to insert a microphone into the house it wanted to listen in on.[7]The Court determined that while placing something against the wall did not violate the First Amendment, inserting a microphone into the house did.[8]The distinguishing fact between these cases was the actual trespass onto the premises.

After years of slowly chipping away at the trespass doctrine, the Court seemingly did away with it in *Katz v. United States*. In *Katz*, the government placed a listening device on the outside of a phone booth to listen to the conversation on the inside of the booth.[9]This microphone did not go inside the phone booth, so if the Court followed the precedent of the trespass doctrine, no violation of the Fourth Amendment would have occurred. In *Katz*, the Court broke from precedent to create the "reasonable expectation of privacy" test. This test seemingly replaced the trespass doctrine until the Court relied upon the "physical intrusion" test to decide *United States v. Jones*.[10]

In piecing together the two laws, Professor Mannheimer gleans the meaning behind the Supreme Court's decisions. He does this by pointing out that in close cases, it does not matter whether the Court uses a test of trespass or one of "reasonable expectation of privacy."[11]After all, the common law tort of trespass comes from custom, which comes from social norms hardened through years of practice, and then that custom becomes an enforceable right. The difference between trespass and reasonable expectation of privacy, he claims, is that trespass has had enough time to become law, while our reasonable expectations of privacy adapts as the world changes. [12]

Professor Mannheimer articulates his unified law by saying that "a Fourth Amendment search occurs when, for the purpose of gathering information, government agents act contrary to law" no matter what stage of "evolutionary development" the law is in.[13]Under this rule, a violation of the law against trespass would be sufficient cause for finding that the government violated the Fourth Amendment.[14]However, not violating a positive law would not necessarily mean that the Government did not conduct an unreasonable search and seizure.[15]

Focusing the Fourth Amendment analysis on law, both positive and developing, allows Professor Mannheimer to make an argument to, in some close cases, put the issue to juries.[16]This approach makes sense. While judges can determine whether or not a search and seizure violates positive law, they do not have the

Contact Us

620 S. Limestone
40508 Lexington, Kentucky

editors@kentuckylawjournal.org

(859) 257-1678

capabilities of discerning by themselves the standards in each individual community. By creating an issue of fact out of Fourth Amendment violations, the courts could align the Fourth Amendment with its original purpose, putting the decision of whether something crosses a community's line in the hands of members of that community.

[1]Justin Cloyd, *Online Committee Member*, University of Kentucky College of Law, J.D. Expected May 2019.

[2]Michael J. Zydney Mannheimer, *A Unified Approach to Fourth Amendment Search Doctrine*, 107 Ky L.J.172 (2019).

[3]*Id.*

[4]*Id.* at 173.

[5]*Id.* at 172.

[6]*Id.* at 175.

[7]*Id.*

[8]*Id.*

[9]Katz v. United States, 389 U.S. 347, 348.

[10]United States v. Jones, 565 U.S. 400, 404–405.

[11]Mannheimer, *supra* note 2, at 212.

[12]*Id.*

[13]*Id.* at 209.

[14]*Id.*

[15]*Id.*

[16]*Id.* at 217.

Related Posts

Professional Sports Franchises Enforce Measures to Keep Out Opposing Fans, but Are They Legal?

The Death Penalty in Kentucky: Is it Worth the Cost?

Could Fleetwood Mac Be Liable for Lindsey Buckingham Going His Own Way?

About The Author

Nicole Pottinger

Back to Top ↑