

2012

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Will Stancil

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## Recommended Citation

Stancil, Will, "Warrantless Search Cases Are Really All the Same" (2012). *Minnesota Law Review*. 341.  
<https://scholarship.law.umn.edu/mlr/341>

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## Note

### Warrantless Search Cases Are Really All the Same

*Will Stancil\**

Reading Fourth Amendment case law is a lot like watching a *Law & Order* marathon: by the second or third hour, all the storylines start to repeat themselves. Real-life police investigations, like police procedurals, tend to recycle and interchange key elements. A police dog sniffs a car;<sup>1</sup> a radio beeper monitors a home.<sup>2</sup> A police dog sniffs a home;<sup>3</sup> a radio beeper monitors a car.<sup>4</sup> As a result, Fourth Amendment cases have a certain mix-and-match quality, and after a while, careful observers might begin to notice that the old scenarios and new scenarios are built out of many of the same pieces. But Fourth Amendment cases often share another trait with cop shows: twist endings. The writers are always finding new ways to surprise, and even a minor change in the facts can flip established rules on their heads, generating outcomes that seem contrary to decades of

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\* JD/MPP Candidate 2013, University of Minnesota; MA 2008, Queens University Belfast; BS 2007, Wake Forest University. Thanks to Professor Barry Feld for his work as this Note's advisor, Professor Richard Frase for getting excited enough about the original idea that it did not end up in the trash heap, and to the editors and staff of *Minnesota Law Review* for their help bringing the whole thing to publication. Especially Christina McSparron, Jamie Ling, Carl Engstrom, Dan Iden, and whoever left that bottle of top-shelf whiskey in the freezer (probably Carl Engstrom, again). Additionally, the author would like to thank Jim Morrison (not *that* Jim Morrison), his parents (for pretending they enjoyed reading this thing), and Hero Captain Chesley "Sully" Sullenberger. The author believes that legally-actionable imitation is the sincerest form of flattery, and therefore disclaims all copyright in this work. He would, however, appreciate attribution for any borrowed bits, particularly if you are famous.

1. See *Illinois v. Caballes*, 543 U.S. 405, 406 (2005); *City of Indianapolis v. Edmond*, 531 U.S. 32, 34–35 (2000).

2. See *United States v. Karo*, 468 U.S. 705, 708–10 (1984).

3. See *Jardines v. State*, 73 So. 3d 34, 35 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (2012).

4. See *United States v. Knotts*, 460 U.S. 276, 277–78 (1983).

case law.<sup>5</sup> The result is paradoxical: limited factual variation produces almost limitless doctrinal ambiguity.

When even inveterate observers are unable to predict a case's outcome, the effects can be far-ranging. Without clear precedent to rely upon, trial judges struggle to consistently apply the Fourth Amendment to the variety of police actions being challenged in their courtrooms.<sup>6</sup> Likewise, the Fourth Amendment informs the actions of cops on the beat, who need to know what rules constrain their behavior.<sup>7</sup> And at a time when both scholars and laymen alike have expressed concern over "the incredible shrinking Fourth Amendment,"<sup>8</sup> elusive search and seizure rules do little to allay fears that privacy is being eroded.

Because the Supreme Court has always held that warrantless searches are presumptively unconstitutional, many Fourth Amendment claims revolve around the question of what constitutes a search.<sup>9</sup> One major and often-overlooked source of Fourth Amendment ambiguity is the absence of any means of systematizing and comparing the various answers to this question. Judges now generally rely on the standard described by Justice Harlan in *Katz v. United States*<sup>10</sup>: a search occurs when

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5. To use one recent example, after no fewer than three major Supreme Court cases holding that drug dogs were unique investigatory tools that did not trigger constitutional protections, *Caballes*, 543 U.S. at 405; *Edmond*, 531 U.S. at 32; *United States v. Place*, 462 U.S. 696 (1983), the Florida Supreme Court nonetheless found that use of a drug dog at a suspect's residence created an unconstitutional search. *Jardines*, 73 So. 3d at 55–56.

6. See, e.g., Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1470–71 (1985) (arguing that lower courts cannot consistently apply the Fourth Amendment absent an explicit interpretative model).

7. See, e.g., David Rossman, *Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution*, 26 GA. ST. U. L. REV. 417, 466 (2010) ("Much of the Court's recent Fourth Amendment analysis is driven by its desire to make things simple for the police officers who have to translate their legal doctrine into action out on the street.")

8. Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 257 (1984); jeffgolin, Comment to *Jesse Ventura Sues TSA Over Body Scans, Pat Downs*, THE HUFFINGTON POST (Jan. 25, 2011, 7:27 AM), [http://www.huffingtonpost.com/social/jeffgolin/jesse-ventura-sues-tsa-ov\\_n\\_813460\\_75090159.html](http://www.huffingtonpost.com/social/jeffgolin/jesse-ventura-sues-tsa-ov_n_813460_75090159.html) ("The Incredible Shrinking Fourth Amendment! How we need it now.")

9. *Kyllo v. United States*, 533 U.S. 27, 32 (2001) ("One might think that . . . examining the portion of a house that is in plain public view, while it is a search . . . is not an unreasonable one under the Fourth Amendment. But in fact we have held that visual observation is no search at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional." (internal quotation marks omitted)).

10. *Id.* at 32–33 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

police action violates a person's reasonable expectation of privacy.<sup>11</sup> But this standard allows deciding courts to approach Fourth Amendment questions holistically, rather than addressing the component factual elements that make up a case.<sup>12</sup> Too often, these decisions leave the distinction between a reasonable and unreasonable expectation of privacy bewilderingly ethereal.

In order to make that distinction more straightforward, this Note proposes a new procedure for writing and organizing search and seizure jurisprudence. Part I examines case law to illustrate that courts following *Katz* have refused to systematize Fourth Amendment precedent or integrate it into a workable schema. Part II then describes a model which classifies Fourth Amendment holdings by breaking them into two conceptual elements: the subject of an investigation and the method of an investigation. It uses the model to explain how the defective *Katz* standard encourages the corrosion of protections against warrantless searches. Finally, Part III suggests that courts adopt a more mechanical approach to search and seizure cases. It argues that law enforcement and the general public alike would be better served if courts abandoned judicial minimalism and holistic reasoning in favor of compartmentalized rulemaking. This Note concludes that an analytical framework which breaks Fourth Amendment searches into a limited set of conceptual components would promote judicial consistency and forestall the erosion of privacy protections.

### I. A BRIEF AND TROUBLED HISTORY OF THE FOURTH AMENDMENT

The confusion currently surrounding warrantless searches and seizures may have been inevitable. The entire body of law is derived from one brief phrase in the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."<sup>13</sup> Over a century of jurisprudential uncertainty has stemmed from warring interpretations of those twenty-four words.

11. *Id.* at 33; *see also Katz*, 389 U.S. at 361 (Harlan, J., concurring).

12. *See Note, The Fourth Amendment's Third Way*, 120 HARV. L. REV. 1627, 1636 (2007) ("The *Katz* test, by depending on factual particulars and necessitating the interpretation of ambiguous social norms, functions just like a traditional totality-of-the-circumstances test . . . .").

13. U.S. CONST. amend. IV.

## A. PRE-KATZ: THE PROPERTY RIGHTS ERA

Until the middle of the twentieth century, the Supreme Court maintained a narrow conception of the Fourth Amendment's protections, arguing that they were, in essence, a defense against government abrogation of property rights.<sup>14</sup> The logic behind this approach was clear: before the development of remote surveillance or communications devices, government agents were physically incapable of conducting a search without trespassing into private property, whether by intruding into a locked house, or surreptitiously opening a letter.<sup>15</sup> This early formulation of Fourth Amendment protections also eased the task of courts, which could answer the question of whether a search had occurred by simply determining whether a trespass had also occurred.

The Court clung to a property rights interpretation of the Fourth Amendment long after new technology had begun to threaten its usefulness. In *Olmstead v. United States*, it held that the Fourth Amendment did not protect telephone conversations from government wiretapping at a remote location, because the conversation was travelling across lines in which the defendant maintained no property interest.<sup>16</sup> Even in 1928, the intuitive wrongness of the *Olmstead* decision was apparent. The decision was "not well received" and backlash against it contributed to the passage of the Federal Communications Act, which outlawed wiretapping.<sup>17</sup> Clearly, the Court and the public had very different ideas about the sort of government activity the Fourth Amendment should protect against.

Nonetheless, the Court doubled down on its interpretation, and over the following decades churned out elaborate rules about the bounds of proper police surveillance. For example, one line of cases determined that monitoring devices could be used if they were placed *against* the wall of a private resi-

14. See Daniel Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1517–18 (2010). Property rights had not always been central to the Fourth Amendment; in the nineteenth century, the Court relied on other conceptualizations of its protections. See generally Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978–90.

15. Solove, *supra* note 14, at 1517–18.

16. *Olmstead v. United States*, 277 U.S. 438, 465 (1928) ("The language of the amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office . . . ."), *overruled by Katz*, 389 U.S. at 347.

17. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 247 (3d ed. 2009).

dence,<sup>18</sup> but not if they were driven *into* the wall.<sup>19</sup> To modern sensibilities, these distinctions may seem inane, but it is important to remember that they also arise from a formally coherent view of the Fourth Amendment. In the Court's view, the conceptual area protected by the Amendment was clearly defined: defendants could expect freedom from physical intrusion into certain private property and personal effects. Except to the extent they encroached into these sharply bounded subjects, the actions of police were irrelevant to the constitutional question.<sup>20</sup> But whatever theoretical clarity this interpretation lent to search and seizure jurisprudence, it seemed more and more a relic in an age when the government could use new technology to intrude into privacy without any sort of physical invasion.

#### B. *KATZ* AND AFTERMATH

In 1967, the Supreme Court finally addressed the flaws in its Fourth Amendment jurisprudence. In *Katz v. United States*, the Court explicitly overruled *Olmstead*, stating bluntly that the Constitution “protects people, not places,” and that while “[w]hat a person knowingly exposes to the public” is not protected, “what he seeks to preserve as private, even in an area accessible to the public,” is shielded from government eyes by the Fourth Amendment.<sup>21</sup> *Katz*, in short, represented a paradigm shift in Fourth Amendment law, swapping out the property rights rationale for a privacy-based principle. Justice Harlan's famous concurrence described an individual's “reasonable expectation of privacy” as the lynchpin of this new regime,<sup>22</sup> a formulation that has become shorthand for the *Katz* test.<sup>23</sup>

18. *Goldman v. United States*, 316 U.S. 129, 135–36 (1942).

19. *Silverman v. United States*, 365 U.S. 505, 511–12 (1961).

20. Other commentators have described these cases as focusing *primarily* on the actions of government agents. See, e.g., Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1308–09 (2002) (arguing that *Olmstead* and its progeny focused on the “method of search” of government agents). It is important, however, to distinguish between the facts discussed by the court and the interests the court is seeking to protect. The question of whether a protected subject had been impinged upon might turn entirely on the actions of government agents, conveying to the careless reader the impression that the actions of government agents are the central subject of inquiry.

21. *Katz v. United States*, 389 U.S. 347, 351 (1967).

22. *Id.* at 360 (Harlan, J., concurring).

23. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (“The touchstone of Fourth Amendment analysis is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’” (citing *Katz*, 389 U.S. at 360 (Harlan, J., concurring))).

A voluminous amount of scholarly ink has been spilled documenting the many and varied difficulties posed by the *Katz* decision.<sup>24</sup> But for the purposes of the following analysis, the most important problem is how *Katz* altered the interests underlying the Fourth Amendment, and therefore changed the factual focus of interpreting courts. While the *Katz* court arguably succeeded in realigning the effect and the purpose of the Fourth Amendment, this change has come at the cost of clarity. The reasoning in *Olmstead* and its successors may have seemed formalistic, but it was a formalism enabled by clearly delineated, protected subject matter. By comparison, what does *Katz* protect (or protect against)? Nearly forty-five years after the decision, nobody can say for certain. In the words of one scholar, “The reasonable expectation of privacy test is the central mystery of Fourth Amendment law . . . . [N]o one seems to know what makes an expectation of privacy constitutionally reasonable.”<sup>25</sup> *Olmstead* notably disregarded the conduct of the law officer when determining whether the Fourth Amendment was implicated. But “reasonable expectations of privacy” might well refer to expectations about the behavior of government agents, *as well as* expectations that a certain subject matter will remain private.<sup>26</sup> In this sense, the *Katz* test has lengthened the list of factors that courts might take into account when deciding a Fourth Amendment case, without providing any guidance as to whether one concern should predominate.

### C. KATZ’S CONFUSING PROGENY

Fourth Amendment jurisprudence is still haunted by *Katz*’s omission of critical information about which specific factors to consider in warrantless search cases. A quick survey of notable post-*Katz* search and seizure cases, as well as a few extant theories of Fourth Amendment protection, reveals that concerns about doctrinal ambiguity are well-founded.

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24. For a brief catalogue of some of the most common complaints, see Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 105–15 (2008).

25. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504 (2007) (internal quotation marks omitted).

26. *But see Ciraolo*, 476 U.S. at 211 (describing the *Katz* test as addressing “expectation[s] of privacy in the *object* of a challenged search” (emphasis added)); Simmons, *supra* note 20, at 1305–06 (arguing that *Katz* was intended to exclude the method of search from Fourth Amendment analyses altogether).

1. *Kyllo, Caballes, and Bond*

*Kyllo v. United States*<sup>27</sup> is one of the most well-known recent search and seizure decisions. Because the case revolved around the use of an advanced thermal imaging device to investigate a private home, it is commonly cited as a landmark decision regulating new surveillance technologies.<sup>28</sup> The *Kyllo* holding, however, actually indicates very little of the Supreme Court's reasoning. While Justice Scalia, writing for the majority, held the search unconstitutional,<sup>29</sup> he failed to identify with particularity the fact or facts that violated the Fourth Amendment. Instead, he declared that when "[g]overnment uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance . . . is presumptively unreasonable without a warrant."<sup>30</sup> This language suggests that the Court took both the subject of the search (the interior of a private home) and the officer's method of conducting the search (a heat-sensing device) into account when making its decision; it provides little guidance as to how the decision might have differed if the facts had varied along one of these two dimensions.

In *Illinois v. Caballes*, the Supreme Court held that the use of a drug dog during an otherwise lawful traffic stop did not run afoul of the Fourth Amendment.<sup>31</sup> The Court explicitly reconciled its decision with *Kyllo*, noting that while a dog might be analogous to a heat sensor, in the earlier case the "device was capable of detecting lawful activity."<sup>32</sup> The Court explained that "[t]he legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from . . . expectations concerning the nondetection of contraband in the trunk of [one's] car."<sup>33</sup> It concluded that a dog search only reveals "a substance that no individual has any right to possess" and therefore does not trigger constitutional protections.<sup>34</sup> Oddly, the rationale behind the *Caballes* drug-dog

27. *Kyllo v. United States*, 533 U.S. 27 (2001).

28. See, e.g., Amy Miller, Note, *Kyllo v. United States: New Law Enforcement Technologies and the Fourth Amendment*, 51 U. KAN. L. REV. 181, 182 (2002) ("The Supreme Court's holding in *Kyllo* will implicate other sense-enhancing technologies by necessity . . .").

29. *Kyllo*, 533 U.S. at 40.

30. *Id.*

31. *Illinois v. Caballes*, 543 U.S. 405, 405 (2005).

32. *Id.* at 409.

33. *Id.* at 410.

34. *Id.*

rule mirrors the reasoning of *Olmstead*: by effectively refusing to extend the question of constitutional protection beyond the nature of the search's subject, the Court necessarily remains agnostic about the actual conduct of the government officers.

Other cases, however, demonstrate that the conduct of a government agent can be determinative in a Fourth Amendment challenge, even when the subject of a search does not necessarily raise privacy concerns. In *Bond v. United States*, a police officer felt around the outer layer of a bag, searching for the shape of contraband.<sup>35</sup> Although the Court conceded that a member of the public could have moved or handled the bag, it upheld the defendant's constitutional challenge, noting that the "physically invasive inspection" was itself especially intrusive and could not be reasonably expected.<sup>36</sup> Notably, its analysis never touched on whether the bag's owner could have reasonably expected the contents of the bag to remain private even from other, less intrusive searches.<sup>37</sup> A recent Florida Supreme Court decision, *Jardines v. State*, took a similar approach.<sup>38</sup> In *Jardines*, police conducted a search of the outside of a private residence with a drug dog.<sup>39</sup> Although none of the constituent elements of the search seemed to rise to the level of a constitutional violation, the court held for the defendant on the grounds that the search method "entail[ed] a degree of public opprobrium, humiliation and embarrassment."<sup>40</sup> Once again, the analysis focused on the conduct of government agents instead of the subject of the search.<sup>41</sup>

## 2. The Third-Party and Public Exposure Doctrines

In addition to simple factual holdings like those described in the cases above, a handful of more elaborate theories of Fourth Amendment protection have been adopted by the courts. Although they sometimes seem to overlap or conflict with each other, and are not consistently applied, scholars have

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35. *Bond v. United States*, 529 U.S. 334, 335–36 (2000).

36. *Id.* at 337–39.

37. *Id.*

38. *Jardines v. State*, 73 So. 3d 34 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (2012).

39. *Id.* at 37–39.

40. *Id.* at 48.

41. *See id.* at 45–49 (discussing the conduct of government agents when performing dog "sniff tests").

recognized several such doctrines emerging in the wake of *Katz*.<sup>42</sup>

One of the most-criticized variations of Fourth Amendment law is the so-called “risk assumption theory” or “third-party doctrine.”<sup>43</sup> This doctrine is sometimes evoked when a government search recovers information that the defendant had willingly transferred to a third party. The information can take a variety of forms: a conversation with a secret prison snitch,<sup>44</sup> financial records conveyed to a bank,<sup>45</sup> or even a dialed telephone number (necessarily transmitted to a phone company in order to complete the call).<sup>46</sup> The Supreme Court has reasoned that the defendant, “in revealing his affairs to another, [assumes the risk] that the information will be conveyed by that person to the Government.”<sup>47</sup> Importantly, the mere *possibility* of third party conveyance may sometimes defeat a defendant’s expectation of privacy—even if the government actually obtained the information through more sophisticated (and more unexpected) means. For instance, in *United States v. White*, a police informant talked to a defendant while wearing a hidden microphone and recorder.<sup>48</sup> The Court held that the defendant had no reasonable expectation of privacy in the conversation, because the informant could have written it down from memory; the recordings were admitted into evidence.<sup>49</sup>

A similar vein of logic underlies the “public exposure” doctrine.<sup>50</sup> Relying on *Katz*’s pronouncement that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,” some courts have thrown out challenges on the basis that the defendant took insufficient precautions to protect private information

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42. For an overview of the two theories described in this Note, see, for example, Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 667–76 (1988) (critiquing the “risk assumption” and “public exposure” models of constitutional protection).

43. See, e.g., *id.* at 667–76; Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 570–73 (2009) (cataloguing common scholarly critiques of the third-party doctrine).

44. *United States v. White*, 401 U.S. 745, 746–47 (1971).

45. *United States v. Miller*, 425 U.S. 435, 437–39 (1976).

46. *Smith v. Maryland*, 442 U.S. 735, 737–38 (1979).

47. *Miller*, 425 U.S. at 443.

48. *White*, 401 U.S. at 746–47.

49. *Id.* at 751–52.

50. See, e.g., Gutterman, *supra* note 42, at 673–76.

from the public.<sup>51</sup> In *California v. Greenwood*, police snoopied through the contents of opaque garbage bags the defendants had placed on the curbside for disposal.<sup>52</sup> Although the Supreme Court conceded that members of the public were unlikely to inspect the defendants' garbage, it nonetheless held that no constitutional violation occurred, reasoning that the bags had been theoretically accessible to the public.<sup>53</sup> The public exposure rule focuses on where a defendant may reasonably expect the public to go, not where a member of the public is legally permitted to go. For example, one offshoot of the public exposure rule—the “open fields” doctrine—explicitly disclaims any expectation of privacy in open outdoor areas, even when those areas cannot be observed without crossing into clearly marked private property.<sup>54</sup>

### 3. *United States v. Jones*

One recent case seems destined to shake up Fourth Amendment doctrine even further, though its full implications have yet to be felt. In *United States v. Jones*, the courts addressed the warrantless installation of a GPS tracking device on a suspect's car.<sup>55</sup> The tracking device was left in operation for weeks, continuously monitoring the suspect's movements over that span.<sup>56</sup> Although previous decisions had held that the Fourth Amendment could not protect publicly observable automotive travel<sup>57</sup>—an approach that comports well with the “public exposure” doctrine described above—the D.C. Circuit court in *Jones* avoided that precedent by reframing the facts.<sup>58</sup> It differentiated public travel in the short term from the

51. *Katz v. United States*, 389 U.S. 347, 351 (1967).

52. *California v. Greenwood*, 486 U.S. 35, 37–38 (1988).

53. *Id.* at 39–41.

54. *Oliver v. United States*, 466 U.S. 170, 179 (1984) (“[A]s a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or “No Trespassing” signs effectively bar the public from viewing open fields in rural areas.”).

55. *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

56. *Id.*

57. *See United States v. Knotts*, 460 U.S. 276, 281–86 (1983).

58. *United States v. Maynard*, 615 F.3d 544, 557 (D.C. Cir. 2010), *aff'd sub nom. Jones*, 132 S. Ct. at 945 (“*Knotts* held only that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another, not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end . . . .” (quoting *Knotts*, 460 U.S. at 281)).

aggregate of all travel over a prolonged period, and extended Fourth Amendment protection to the latter subject.<sup>59</sup>

While the Supreme Court affirmed the Circuit Court's judgment, it appears to have partially abandoned its rationale.<sup>60</sup> Instead, Justice Scalia, writing for the majority, adopted a trespass-based approach evocative of the *Olmstead*-era property rights regime.<sup>61</sup> Scalia maintained that the suspect's car was, as a personal "effect," an explicitly protected subject of the Fourth Amendment; the placement of the tracking device on the car therefore constituted an impermissible trespass against private property.<sup>62</sup> Confusingly, the opinion never firmly establishes whether trespasses are unreasonable under the *Katz* rubric, or if Scalia believes that the property-based conception of the Fourth Amendment is a separate strand of law coexisting with *Katz*.<sup>63</sup> Adding to the jumble, at least five concurring justices seem to argue that long-term GPS monitoring would be unconstitutional—though they seem split on whether the problem is the duration or the use of GPS.<sup>64</sup>

Even this small selection of cases and theories reveals disagreement and confusion over the interests that the Fourth Amendment seeks to protect. But the confusion gets much worse when the precedential effect of the decisions is considered.

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59. *Id.* at 561–64.

60. *Jones*, 132 S. Ct. at 954 (asserting that *Jones* "does not require [the Court] to answer" whether GPS tracking is unconstitutional).

61. *Id.* at 951 ("*Katz* . . . established that property rights are not the sole measure of Fourth Amendment violations, but did not snuff out the previously recognized protection for property." (citation omitted) (internal quotation marks omitted)).

62. *Id.* at 950.

63. The opinion provides support for both conceptions. Scalia argues that "Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation," that "*Katz* did not repudiate that [property-based] understanding" of the Amendment, and that the "reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test." *Id.* at 950, 952. But he also describes how expectations about property rights are embedded within reasonable expectations of privacy, suggesting that *Katz* still anchors Fourth Amendment law. *Id.* at 951 ("We have embodied that preservation of past rights in our very definition of 'reasonable expectation of privacy' which we have said to be an expectation 'that has a source outside of the Fourth Amendment . . . by reference to concepts of real or personal property law . . .'" (citation omitted)).

64. *Id.* at 954–57 (Sotomayor, J., concurring); *id.* at 957–64 (Alito, J., concurring, joined by Ginsburg, J., Breyer, J., and Kagan, J.).

## D. THE FAILURE OF FOURTH AMENDMENT PRECEDENT

Many scholars have expressed concern that *Katz* and modern Fourth Amendment doctrine will allow new technology to erode traditional boundaries of privacy from government intrusion.<sup>65</sup> But the simple truth is that, under *Katz*, those boundaries were never very clear in the first place. The forward-looking focus on technology obscures an even more fundamental weakness of Fourth Amendment doctrine: the inability of courts and scholars to consistently interpret prior decisions. This defect frustrates not only attempts to control the use of sophisticated GPS trackers and thermal imaging devices, but also attempts to prevent rudimentary police rummaging of the sort that has existed for centuries.

The problem is most visible in the lower courts. Consider *Coffin v. Brandau*, an unremarkable Fourth Amendment case decided in the Eleventh Circuit during the spring of 2011.<sup>66</sup> In *Coffin*, the court spent a significant portion of its decision determining whether government agents violated the Fourth Amendment by entering an open garage to knock on an interior door to a home.<sup>67</sup> After discussing at length three earlier cases in which entry into a garage had been deemed an unconstitutional search, the court nonetheless decided that prior Fourth Amendment decisions provide no clear rule regarding the constitutional status of attached garages.<sup>68</sup> Although the court eventually determined that the Fourth Amendment was indeed violated, it relied on an ambiguous “totality of the circumstances” test to reach its holding.<sup>69</sup>

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65. See, e.g., Adam W. Brill, Note, *Kyllo v. United States: Is the Court's Bright-Line Rule on Thermal Imaging Written in Disappearing Ink?*, 56 ARK. L. REV. 431, 454 (2003) (“Regardless of how future courts address this issue, technology remains an inherent threat to the sanctity of the home.”); Jeffrey W. Childers, Comment, *Kyllo v. United States: A Temporary Reprieve from Technology-Enhanced Surveillance of the Home*, 81 N.C. L. REV. 728, 762 (2003) (“[A]t best *Kyllo* offers a temporary reprieve from the governmental intrusion of technology-enhanced surveillance.”).

66. *Coffin v. Brandau*, 642 F.3d 999 (11th Cir. 2011). Although *Coffin* was picked at random for the purpose of illustration, it exemplifies many of the problems this Note seeks to discuss. This is no great coincidence. The conceptual uncertainties that plague Fourth Amendment jurisprudence are deeply rooted, and manifest themselves equally in cases related to garage doors, drug dogs, third-party informants, and other common search and seizure questions.

67. *Id.* at 1009–13.

68. *Id.* at 1011 (discussing *Taylor v. United States*, 286 U.S. 1 (1932); *United States v. Sokolow*, 450 F.2d 324 (5th Cir. 1971); *Kauz v. United States*, 95 F.2d 473 (5th Cir. 1938)).

69. *Id.* at 1012.

Tellingly, the officers in *Coffin* successfully raised a qualified immunity defense, because there was no constitutional rule that “with obvious clarity” forbade them from entering the garage.<sup>70</sup> The court drily noted that few Fourth Amendment cases will ever meet the “obvious clarity” standard, because the “expectation of privacy context is inherently fact-specific, thus not lending itself to clearly established law.”<sup>71</sup>

*Coffin* and the other post-*Katz* decisions reveal a Fourth Amendment jurisprudence that is failing in several directions at once. Search and seizure rules are difficult to predict, and difficult to interpret. They force valuable judicial resources to be spent pursuing minor factual questions. They are too fluid to provide much comfort to private individuals, and too fact-specific to provide guidance to police officers.

## II. THE MECHANICS OF FOURTH AMENDMENT LAW

For decades, legal scholars have hoped to bring some measure of order to the chaos surrounding the Fourth Amendment. Countless law review articles have attempted to build models that reconcile the contradictions in search and seizure jurisprudence.<sup>72</sup> A great many of these models begin with a search for first principles; they cast about for the one legal theory (or the small set of theories) that can unify the many cases that make up Fourth Amendment doctrine.<sup>73</sup> As Orin Kerr has astutely observed, these efforts are all doomed to at least partial failure: “With so many decided cases and so few agreed-upon principles at work, trying to understand the Fourth Amendment is a bit like trying to put together a jigsaw puzzle

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70. *Id.* at 1014–15 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

71. *Id.* at 1015.

72. See, e.g., Clancy, *supra* note 14, at 978 (describing five separate models of reasonableness used by the Court and proposing a unified objective model of reasonableness); Kerr, *supra* note 25, at 508 (“There are four different models of Fourth Amendment protection—four relatively distinct categories of argument used to justify whether a reasonable expectation of privacy exists.”); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 384 (1988) (redefining the concept of reasonableness to “reflect the [Fourth] [A]mendment’s underlying values and purposes”).

73. For an article that demonstrates both the appeal and the limitations of this approach, see generally Gutterman, *supra* note 42 (depicting pre- and post-*Katz* tensions in Fourth Amendment jurisprudence as the interplay between competing values-based and means-based interpretations of limitations on government power).

with several incorrect pieces: no matter which way you try to assemble it, a few pieces won't fit."<sup>74</sup>

This Note also proposes a model to help deconstruct the Fourth Amendment, but it is a model with a somewhat different focus than most. At least initially, it discards the question of first principles. Instead, it categorizes Fourth Amendment decisions by their practical meaning. In doing so, it views each Fourth Amendment decision as, first and foremost, the result of a collection of intertwining rules—for instance, a rule that allows police to use dogs to sniff out drugs, or a rule that forbids warrantless entry into a home—and asks how best to parse out those rules from the complex factual patterns presented by the case.

The proposed model does not attempt to deconstruct the social or practical values that form the basis for these rules. Instead, it focuses as much as possible on the mechanical and logical structure of the rules, and how best to describe their interactions with each other and with the Fourth Amendment's theoretical framework. In doing so, it seeks to create a descriptive taxonomy that can be applied to multiple strands of Fourth Amendment analysis.

Once its groundwork is laid, this model can be expanded to predict the precedential effect of particular Fourth Amendment holdings. It explains why rules that expand the scope of the constitutional protections may be less robust and influential than rules that limit protections. Finally, the model suggests at least one pathway out of the legal cul-de-sac that is the *Katz* regime.

#### A. THE UNIVERSAL STRUCTURE OF SEARCHES

At first glance, the endless variety of searches that could potentially fall under the Fourth Amendment's purview may seem to have nothing in common. But that initial perception is not quite correct. All Fourth Amendment searches—in fact, all searches of any kind—share a common conceptual structure. So far, this Note has only hinted at those shared features; in order to proceed any further, they must now be described in detail.

All searches contain two distinct elements: a passive, protected subject and an active method of investigation. These are the two basic components from which the concept of a “search” is formed. Taken alone, the mere presence of each element in a

74. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809 (2004).

fact pattern does not have any predictive power; indeed, both are *always* present in every Fourth Amendment case, whatever the outcome. Without them, there could be no cognizable Fourth Amendment question at all. The key feature of this Note's proposed model is its bifurcation of all Fourth Amendment fact patterns into these two components. Each component has unique properties that distinguish it from the other.

First, all searches begin with a protected subject of some description. In this definition, both the words "protected" and "subject" must be given their broadest possible meanings. The subject could be a physical space,<sup>75</sup> a private fact,<sup>76</sup> or some artificial category of information, such as the aggregate of an individual's movements over time.<sup>77</sup> And the subject might be afforded its protection by both tangible barriers (fences, geographic remoteness, or computer security)<sup>78</sup> and intangible ideas (public warnings, social norms, or even just a person's unfounded belief that a certain subject will remain unknown to the government).<sup>79</sup> The protected subject can be described as the set of features or facts that existed prior to any investigatory action. Without a subject, there can be no search, but only government action targeted at nothing, affecting nobody.

The second component of a search is the method by which it was undertaken. When a search occurs, the protected subject suffers some intrusion. The combined set of actions, devices, techniques, and procedures used to effect the intrusion comprise the method of the search. Once again, this component

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75. See, e.g., *Oliver v. United States*, 466 U.S. 170, 180–81 (1984) (discussing the distinction between "open fields" and a dwelling's "curtilage" for Fourth Amendment purposes).

76. See, e.g., *United States v. Miller*, 425 U.S. 435, 437 (1976) (denying challenge to government collection of bank records).

77. See *United States v. Maynard*, 615 F.3d 544, 560–61 (D.C. Cir. 2010) (suggesting that the "whole may be more revealing than the parts"), *aff'd sub nom.* *United States v. Jones*, 132 S. Ct. 945 (2012).

78. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 209 (1986) ("Police were unable to observe the contents of respondent's yard from ground level because of a 6-foot outer fence and a 10-foot inner fence completely enclosing the yard."); *Oliver*, 466 U.S. at 174 ("[T]he court noted that the field itself is highly secluded: it is bounded on all sides by woods, fences, and embankments and cannot be seen from any point of public access."); *United States v. Andrus*, 483 F.3d 711, 721 (10th Cir. 2007) ("[Defendant] argues his computer's password protection indicated his computer was 'locked' to third parties . . .").

79. See *Ciraolo*, 476 U.S. at 211 ("Respondent contends he has done all that can reasonably be expected to tell the world he wishes to maintain the privacy of his garden . . . . [H]e asserts he has not 'knowingly' exposed himself to aerial views."); *Oliver*, 466 U.S. at 173 ("He had posted 'No Trespassing' signs at regular intervals . . .").

must be defined as broadly as possible. It includes any and all government action, even if that action has not traditionally been seen as an investigative technique giving rise to constitutional protections. Without a method of investigation, there can also be no search.

Importantly, while the two components are distinct, they cannot be fully disconnected. Neither element can be described in isolation without omitting important information about the search as a whole. The breadth of the intrusion into a particular subject depends largely on the method of investigation (recall *Olmstead's* wiretaps, which uncovered private phone conversations but left private property untouched).<sup>80</sup> Similarly, the nature of an investigatory method may depend on how the subject of an investigation is defined.<sup>81</sup>

Because both subject and method are conceptual characterizations of a physical action, a single real-life search can usually be described as having multiple subjects and methods. For instance, if the government intercepts a sealed doctor's note, the subject of its search might be described both as a letter, and as private medical information. Either possibility (or both!) may have constitutional consequences. A high-profile example of this dynamic occurred in the recent *Jones* case, where the circuit court and Supreme Court portrayed the subject *and* method of the search differently.<sup>82</sup> While the circuit court described a GPS search of the suspect's aggregated movements,<sup>83</sup> Justice Scalia's majority opinion employed a different characterization: "It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information."<sup>84</sup> All discussions of constitutionality aside, the important thing to note here is that both descriptions are correct. The search method involved both GPS and a physical trespass, and the subject was both private property and the suspect's aggregated travel.

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80. See *supra* note 16 and accompanying text.

81. One recent example of this relationship can be seen in *Maynard*, 615 F.3d at 556. In *Maynard*, the court rejected the government's contention that GPS tracking was functionally identical to earlier forms of monitoring a suspect's movement, noting that GPS trackers could monitor movements over a longer period of time than earlier technologies. By broadening the subject of the search to include a larger timeframe, the court reframed the method used.

82. Compare *Jones*, 132 S. Ct. at 945, with *Maynard*, 615 F.3d at 544.

83. See *Maynard*, 615 F.3d at 563.

84. *Jones*, 132 S. Ct. at 949.

These observations can be generalized even further, and developed into a basic conceptual structure for all real-life searches. As with *Jones* above, any event constituting a search can be perceived as utilizing many different methods, and targeting many different subjects. Each subject can then be paired off with each and every method, and the sum total of possible pairings represents all the conceivable ways the search might be described. For example, using *Jones*'s two methods and two subjects, four pairings are possible: (1) GPS and private property, (2) GPS and aggregated movement, (3) physical trespass and aggregated movement, and (4) physical trespass and private property. (Common sense suggests that most searches will have more than four possible pairings, however.) For a court to reject any search, one or more of the constituent pairings must prove offensive to the Fourth Amendment. In theory, all Fourth Amendment rules can be reduced to two independent variables, and a third dependent variable: a subject and a method, and a corresponding determination of the search's overall constitutionality or unconstitutionality.

This model describes search and seizure rules at the highest level of abstraction, but causes major practical difficulties. It is an inefficient and unnatural way of creating usable legal principles because it requires an individual determination for each and every conceivable variation of subject and method—an effectively infinite number of possible combinations. In order to surmount this obstacle, courts utilize decision principles—what we popularly conceive as Fourth Amendment rules. These can take many forms. For instance, under the *Olmstead* principle, any constituent pairing which did not include some form of private property as the subject was deemed constitutional.<sup>85</sup> *Kyllo* suggests that any pairing with the interior of a house as the subject is probably unconstitutional.<sup>86</sup> The third-party rule excludes from protection any pairing in which the subject was revealed to a third party.<sup>87</sup> And so on.

While somewhat ancillary to the remainder of the discussion, this model is still important. It describes, in the most basic terms, the challenge courts face when they make Fourth Amendment rules, and when they interpret Fourth Amend-

85. See Simmons, *supra* note 20, at 1309.

86. See *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

87. *United States v. Miller*, 425 U.S. 435, 443 (1976) (“This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third person and conveyed by him to Government authorities . . . .”); see *supra* note 43 and accompanying text.

ment precedent. Many of the difficulties posed arise directly from the process laid out above: the need to somehow transform discrete conceptualizations of individual fact patterns into broad rules that can be applied in many different circumstances.

#### B. THE ROLE OF SUBJECT AND METHOD IN FOURTH AMENDMENT CASES

All Fourth Amendment rules (and therefore, cases) necessarily collapse into two independent questions: Is the subject of the search acceptable? Is the method of the search acceptable?

This principle is difficult to prove conclusively, but simple to illustrate with a very straightforward hypothetical. Imagine a police officer peeping through the keyhole of a locked house. One could imagine any number of reasons why this action might prove unconstitutional. The house may be a specially protected area, and any government entry into it might violate the Fourth Amendment.<sup>88</sup> Alternatively, keyhole spying might be so fundamentally unreasonable a method of information gathering that the search is automatically unconstitutional.<sup>89</sup> A court might decide that, because a house is locked, the owner has manifested a subjective desire for privacy in that space that ought to be recognized and protected.<sup>90</sup> Or a court might find that the house being locked leaves it shielded against any otherwise appropriate method of observation—but that would first require a determination of which methods are and are not appropriate.<sup>91</sup>

This brief hypothetical demonstrates two ideas. First, it shows how quickly the complexity of Fourth Amendment rea-

88. See, e.g., *Payton v. New York*, 445 U.S. 573, 590 (1980) (“[T]he Fourth Amendment has drawn a firm line at the entrance to the house.”).

89. This might be analogous to the “physically invasive inspection” in *Bond v. United States*, 529 U.S. 334, 337 (2000). There, the Court found that tactile manipulations were significantly more intrusive than visual searches or light frisks, and so an agent’s probing of a passenger’s bag on a bus was inherently unconstitutional. *Id.*

90. Cf. *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (“By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination.”); *Katz v. United States*, 389 U.S. 347, 351-52 (1967) (“[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

91. Cf. *State v. Smith*, 181 A.2d 761, 769 (N.J. 1962) (“Peering through a window or a crack in a door or a keyhole is not, in the abstract, genteel behavior, but the Fourth Amendment does not protect against all conduct unworthy of a good neighbor.”).

soning can grow, as straightforward, values-based determinations are replaced by more complex inquiries. Second, it suggests the way in which, no matter how complex its reasoning gets, the court ultimately must evaluate the facts along the two basic dimensions described above. In a sense, search and seizure fact patterns can be reduced to two binary variables, each of which can be addressed independently of the other.

Of course, breaking all the features of a Fourth Amendment case into two mutually exclusive variables is of little use, absent some guidance on what those variables mean and how they interrelate. The subject/method model does not make any assumptions about the relative importance of one variable over another; instead, it relies on case law and precedent to determine which features of a search are important and which are not. In theory, Fourth Amendment case law should provide a set of instructions that helps judges and police officers integrate the two independent components. So far, there are three great unknowns in the model, all of which should be resolved by precedent: first, *how* do you determine which subjects are protected? Second, *how* do you determine what methods are allowable? Third, what is the relationship *between* the two variables?

*Olmstead's* school of property-based Fourth Amendment rights illustrates how case law can provide answers to all three of these questions.<sup>92</sup> Under the *Olmstead* regime, subjects in which the defendant had a property right were protected.<sup>93</sup> Any method that intruded upon those property rights was proscribed.<sup>94</sup> And the relationship was hierarchical, with the boundaries of the protected area determining the limits of police action.<sup>95</sup>

That same analytical lens, when turned on *Katz* and its progeny, quickly reveals the conceptual chaos that defines modern Fourth Amendment jurisprudence. *Katz's* privacy-based system can answer none of the three questions that *Olmstead* addressed so straightforwardly.<sup>96</sup> Under *Katz*, the answer is always the same: a search is unconstitutional when it runs afoul of "expectation[s] of privacy . . . that society is pre-

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92. See *Olmstead v. United States*, 277 U.S. 438, 464 (1928), *overruled by Katz*, 389 U.S. at 347.

93. See *id.*

94. See *id.*

95. See *supra* note 16 and accompanying text.

96. See *The Fourth Amendment's Third Way*, *supra* note 12, at 1636.

pared to recognize as ‘reasonable.’”<sup>97</sup> Presumably, this formulation applies equally to the component elements of a search, so that a subject is protected if it attracts reasonable expectations of privacy, and a method is proscribed if it violates reasonable expectations of privacy. The relationship between the two variables remains undefined.

It is little surprise that this absence of specifics has given birth to all manner of competing interpretations and seeming contradictions. Receiving so little direction on the fundamental questions raised by the Fourth Amendment, courts have been forced to simply make up rules as they go. The correct technique for determining whether the method or subject of a search is unconstitutional has drifted about, as courts have wrestled to fit the confusing precedent together. So in *Caballes*, the dog sniff case, the Court seems to ignore the method of investigation altogether, instead basing its entire analysis on an evaluation of the protectedness of the subject (in this case, contraband).<sup>98</sup> In *Bond*, the bag handling case, the Court avoided any discussion of the degree to which bags were subject to Fourth Amendment protection, grounding its decision in the unforeseeably intrusive method used by the police officer.<sup>99</sup> *Jardines* also focused heavily on police conduct, reserving harsh words for the unnecessarily embarrassing method with which officers carried out a dog sniff.<sup>100</sup>

More complex manifestations of modern Fourth Amendment case law—for example, the “assumption of risk” and “public exposure” theories—land somewhere between *Olmstead* and *Katz* in terms of providing helpful guidance. Like *Olmstead*, these doctrines supply principles for evaluating the constitutionality of a search’s components, and help pin down the relationship between the search’s subject and method. But because they are only part of the perplexing collection of rules that defines the *Katz* regime, they are haunted by uncertainty about the scope of their application.

97. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

98. See *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005).

99. See *Bond v. United States*, 529 U.S. 334, 338–39 (2000). Although the Court noted that “[a] travelers’ personal luggage is clearly an ‘effect’ protected by the Amendment,” in doing so it only allowed for the *possibility* of Fourth Amendment protection of personal luggage, rather than suggesting that the subject’s characteristics were in any way dispositive in the case. *Id.* at 336.

100. See *Jardines v. State*, 73 So. 3d 34, 48 (Fla. 2011) (“[S]uch dramatic government activity in the eyes of many-neighbors, passers-by, and the public at large-will be viewed as an official accusation of crime.”).

The “assumption of risk” analysis focuses on the subject variable. It primarily functions as a procedure for determining whether a subject can receive constitutional protection. It provides a criterion for making that determination: did the defendant intentionally communicate the subject to a third party?<sup>101</sup> If so, the subject receives no protection. The deciding court might then address the “method” variable separately. Alternatively, it might hold, as in *White*, that the Constitution does not provide protection from methods of investigation that only uncover what could have been revealed by the third party.<sup>102</sup>

The public exposure doctrine takes a parallel form. Although the rule is most often stated in terms of a search’s subject—i.e., subjects are not protected if a defendant takes inadequate precautions to protect them from the public’s eyes<sup>103</sup>—the doctrine actually asks the court to make a determination about different *methods* of search. In order to decide whether a defendant took reasonable precautions, a court must first decide what methods of observation could be reasonably expected from the public. (For instance, the public might ignore a “No Trespassing” sign,<sup>104</sup> but probably would not be scanning houses with heat sensors.)<sup>105</sup>

Here again, as in the cases described above, the complicated doctrinal questions facing courts collapse into a straightforward, factual, and somewhat arbitrary assessment of the search’s subject or method. While case law describes any number of winding paths towards a Fourth Amendment holding—some better marked than others—all of these paths require courts to eventually reckon with the two fundamental features of every search.

### C. THE SUBJECT/METHOD MODEL AND PRECEDENT

*Katz*’s lack of theoretical clarity could be excused if courts offered a strong system of precedent-based rules as an alternative. Instead of relying on a strong, predictable set of principles, trial courts and police officers could consult an extensive, well-

101. Gutterman, *supra* note 42, at 667–68 (discussing the assumption of risk analysis).

102. *United States v. White*, 401 U.S. 745, 746–47 (1971).

103. Gutterman, *supra* note 42, at 672–75 (discussing the public exposure doctrine after *Katz*).

104. *Oliver v. United States*, 466 U.S. 170, 179 (1984).

105. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (describing a heat sensor as a “device . . . not in general public use”).

defined set of search and seizure rules. Although the rationales for these rules might be fuzzy, their universal applicability could, at least, provide guidelines with which private citizens and law enforcement could protect themselves.

Unfortunately, *Katz* seriously frustrates efforts to create a working body of precedent. The fundamental problem is simple: because courts often do not appreciate or answer the full, two-dimensional question raised by search and seizure cases, even well-known Fourth Amendment fact patterns are often functionally devoid of concrete information. These famous cases—and their less-famous peers—provide little guidance to interpreting courts. Worse still, the problem is asymmetric. Factual features that do not raise constitutional issues can be described with considerable specificity, while features that *do* implicate the Fourth Amendment remain hidden behind a fog of interpretative ambiguity. This dynamic creates straightforward exceptions to the warrant requirement, but few equivalently straightforward rules proscribing government conduct. As a result, the number of allowable searches available to the government has increased over time, without strong, simple boundaries or protections to act as counterweights.

The asymmetry created in Fourth Amendment precedent is a consequence of the vagueness of the *Katz* “reasonable expectation of privacy” test. There are multiple routes by which a court might reach the holding that a search was in violation of the Fourth Amendment; broadly speaking, a search might violate expectations of privacy related to a particular subject or a particular method of search. But there is only one route to finding that no violation occurred at all: none of the facts of the search were sufficient to create a constitutional problem. This dynamic is illustrated in the table below.

Table 1

Subject	Method	Search is . . .
<b>Unreasonable</b>	<b>Unreasonable</b>	<b>Unconstitutional</b>
<b>Unreasonable</b>	Reasonable	<b>Unconstitutional</b>
Reasonable	<b>Unreasonable</b>	<b>Unconstitutional</b>
Reasonable	Reasonable	<b>Unconstitutional</b> <sup>106</sup>
Reasonable	Reasonable	Constitutional

Table 1: The constitutional status of the elements of the underlying search can only be predicted if the search is itself held to be constitutional. Without additional information, the four shaded unconstitutional scenarios are indistinguishable to an outside observer.

The logic of *Katz*, however, does not require courts to report which particular element of a search violated reasonable expectations of privacy; instead, decisions are often decided by “the facts of the case”<sup>107</sup> or based in “the totality of the circumstances.”<sup>108</sup> If, at a later date, another court wishes to use the earlier decision as guidance, the only useful pieces of information available are the facts of the case and the holding itself. But because the holding could have arisen from more than one fact, no clearly defined rule can be parsed out of the earlier decision.

### 1. A Demonstration of How *Katz* Precedent Fails

The problem is perhaps most easily illustrated with a hypothetical. Imagine that a police helicopter, flying low and slow through a residential subdivision, spies a neighborhood bully conducting a drug deal inside his backyard treehouse. The bully is arrested and convicted, and he appeals his conviction on Fourth Amendment grounds.

106. This row represents the possibility of a *sui generis* holding—a search that is unconstitutional only because of the unique interaction of an otherwise-acceptable subject and method. *Katz*, after all, does not force courts to find a search constitutional simply because the court believes all of the search’s underlying elements are constitutional when they are viewed in isolation.

107. *United States v. Maynard*, 615 F.3d 544, 557 (D.C. Cir. 2010) (citing *United States v. Knotts*, 460 U.S. 276, 283 (1983)), *aff’d sub nom.* *United States v. Jones*, 132 S. Ct. 945 (2012); *see also* *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 n.5 (1986) (“Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations.”).

108. *See, e.g., Coffin v. Brandau*, 642 F.3d 999, 1012 (11th Cir. 2011) (“We hold . . . under the totality of the circumstances, the Deputies’ entry . . . was a violation of the Fourth Amendment.”).

First, assume that the circuit court upholds the challenge, citing *Katz*. The decision is brief, and merely notes that, on the facts of the case, the defendant's reasonable expectations of privacy have been violated. Later that year, the police arrest the same defendant for conducting a drug deal in the same treehouse. This time, however, the police are cautious to use a clearly permissible method of observation and watch the treehouse from a public street. When a second constitutional challenge is raised, the trial court looks to the earlier case in order to decide the only extant issue: whether treehouses receive Fourth Amendment protection.

As it turns out, the earlier case provides no help. This is because the circuit court, following *Katz*, never made clear the true basis of its decision. It never said whether the treehouse received special constitutional protection from prying eyes, or if the Constitution simply forbade police observation from low-flying helicopters. Unfortunately, the choice between these two rationales might prove determinative. The trial court is forced to relitigate the issue as a question of first impression.

Now, assume instead that the circuit court rejected the initial challenge, albeit with a similarly thin explanation. Suddenly, however, the second case becomes simple to resolve. Because the first search did not trigger constitutional protections, it follows that no component of that search, standing alone, could have been sufficient to trigger constitutional protections. The district court throws out the challenge, confident that it has correctly interpreted existing case law.

## 2. Where *Katz* Precedent Already Has Failed

This is not a fanciful hypothetical. Instead, it describes the exact problem that faced the *Coffin* court, which was similarly frustrated in its attempts to consult case precedent.<sup>109</sup> Unable to determine whether attached garages have special constitutional protection of the sort that has been given to houses—in other words, unable to decide whether previous courts had used a subject-based or method-based rationale—the court was obligated to simply consider the case without any real guidance.<sup>110</sup>

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109. *Id.* at 1011 (“[Prior cases] establish that Fourth Amendment protection is afforded to certain garages under certain circumstances, but they cannot and do not control the answer to the question of whether this garage was entitled to Fourth Amendment protection under the circumstances of this case.”).

110. *Id.*

The *Coffin* decision should give pause. Given the ubiquity of attached garages, and the frequency of Fourth Amendment challenges, it strains belief that the Eleventh Circuit had not developed a clear rule for attached garages. Even more disturbing is the apparent uselessness of the preexisting precedent. Although the facts of *Coffin* only narrowly distinguished it from the earlier cases—the primary difference was whether the interior door had been visible from the exterior of the garage—the *Coffin* court was unable to divine the rationales behind the earlier decisions and was therefore unable to determine whether the slight factual distinction should also alter the outcome.<sup>111</sup> And rather than resolving the garage problem, *Coffin* perpetuates it: its “totality of the circumstances” test provides perilously little assistance to any lower court unlucky enough to need guidance on the question.<sup>112</sup> *Coffin* provides strong evidence that *Katz*’s theoretical flaw has indeed manifested itself in the real world.

*Kyllo* creates a similar dilemma.<sup>113</sup> The decision describes a multi-faceted privacy violation: it bases its holding on the observation of the interior of a private home, *and* the use of a heat-sensing device in the course of the investigation.<sup>114</sup> Despite Justice Scalia’s extensive discussion of the facts, the *Kyllo* decision could be used to support three very different holdings: first, that the location of the search is determinative, and that the use of heat-sensing devices elsewhere is allowed; second, that the heat-sensing device is determinative, and less invasive means of observing a home are allowed; third, that neither are allowed, and the search created two separate Fourth Amendment violations.

The same problem manifests anytime a court decides a Fourth Amendment case using a “totality of the circumstances” test—or any time a court justifies an ambiguous Fourth Amendment holding by broad reference to *Katz*’s “reasonable expectations of privacy” test. If the constitutional protections are extended, uncertainty over which facts actually triggered them will prevent the creation of a strong precedent. If, however, the Fourth Amendment is not invoked, subsequent courts

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111. *Id.* at 1010–11.

112. *Id.* at 1012.

113. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

114. *Id.* (upholding a challenge to a search in which the “Government use[d] a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion”).

can safely assume that none of the case's factual elements are worthy of protection.

### 3. The Cost of *Katz*'s Failure

The inbuilt lopsidedness of Fourth Amendment precedent under *Katz* threatens privacy protections. First and foremost, it allows the same constitutional question to appear in front of a court multiple times without ever receiving a conclusive resolution. In fact, a court could theoretically address the same set of facts an indefinite number of times. But the first time a court finds that the facts do not implicate the Fourth Amendment, the question is resolved with finality. Those factual circumstances, standing alone, will never again carry the possibility of constitutional protection.

Second, the structural asymmetry of the *Katz* test favors the government over private citizens. The model above predicts that, as the case law develops, the known set of variables that *do not* constrain government action will grow at a much faster rate than the set of variables that *do* constrain government action. The government may eventually—if it has not already—find itself at a marked advantage when determining what sort of searches it can safely conduct. On the other hand, to the extent that private citizens are relying on rules derived from *Katz*, they will not be able to point with much confidence to areas that are free from government intrusion, or types of surveillance from which they are safe.

Finally, the *Katz* test contains a subjective element: reasonable expectations of privacy are not possible without subjective expectations of privacy.<sup>115</sup> Concerns have been raised about the circularity of this requirement.<sup>116</sup> If the government gives citizens no reason to expect privacy, does the Fourth Amendment lose all its potency? The difficulty in identifying clear-cut Fourth Amendment protections adds a twist to this problem. An overview of Fourth Amendment case law reveals many areas that are categorically unprotected, and very few that are categorically protected. Depending on how strictly courts inter-

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115. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980) (requiring a defendant to show that he had a "legitimate expectation of privacy," of which a subjective expectation of privacy is a prerequisite); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy . . .").

116. See Rubinfeld, *supra* note 24, at 106 ("Commentators have long condemned the 'reasonable expectations of privacy' test as ineluctably circular.").

pret the subjective requirement in the future, the struggle to build strong Fourth Amendment protections via case law could have a detrimental effect on the very scope of the Amendment itself.

#### D. WHAT THE MODEL REVEALS

In a way, the subject/method model only confirms what seems intuitively wrong about the *Katz* test from the very beginning. It demonstrates that *Katz* has encouraged courts to rely on a reliably fluid non-standard, and created a Fourth Amendment jurisprudence that is as malleable as it is unpredictable. Scholars have been making the same observation for decades, even without the help of fancy models like the one in this Note.<sup>117</sup>

But the subject/method model also reveals several other interesting facts. First, it shows how *Katz*, as applied, is uniquely ill-suited to the construction of strong, privacy-oriented case precedent. Second, it suggests that, at times, *Katz*'s privacy language may just serve as a gloss. Judges applying *Katz* are required to look at the same facts as judges under any other Fourth Amendment regime. Third, it highlights the way in which analyzing search and seizure rules can become complex no matter what value or interest those rules ostensibly support. Intricate Fourth Amendment rules are not a product of *Katz* alone and could form almost as easily even if another case was governing search jurisprudence.

Even at this point, one nagging criticism of the model remains: what if it is incomplete? While the division between subject and method seems natural enough, has a logical basis, and often appears—both implicitly and explicitly—in Fourth Amendment cases, one might still envision a different taxonomy for government searches. Perhaps, instead of method and subject, two other characteristics are chosen. Or perhaps a third characteristic is added, or even a fourth. (Two possible culprits: the party who conducted the search, and the crime that triggered the search.)<sup>118</sup>

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117. See, e.g., Kerr, *supra* note 74, at 822 (“*Katz* is a Rorschach test. Its vague language can support a narrow or broad reading equally well.”).

118. Some basis for this idea is found in *Jones*, where the concurring Justices suggested that the crime being investigated might have some bearing on the constitutionality of warrantless GPS tracking. *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring) (“[T]he use of longer term GPS monitoring in investigations of *most offenses* impinges on expectations of privacy.” (emphasis added)).

Surprisingly, most of the analysis above would not change. Any system that describes searches as the combination of mutually exclusive characteristics would create most of the problems this Note depicts. Indeed, the reasoning behind this conclusion would be almost perfectly analogous to the reasoning above. In short, no matter which components of a search one deems essential, the court's current jurisprudence does a poor job of finding them and explaining them with any particularity. Instead, they remain hidden behind linguistic and conceptual fog.

### III. THE WAY OUT

The question posed, then, is whether there is any way to remedy the problems that plague *Katz* without completely abandoning the privacy interests that led the Supreme Court to overrule *Olmstead* and its property rights rationale. Do privacy and ambiguity go hand-in-hand?

For some, the challenge of defining expectations of privacy has proven too daunting. Daniel Solove, for instance, recently argued that courts should abandon the *Katz* standard altogether.<sup>119</sup> Instead of seeking to uphold expectations of privacy, he proposes that courts bar government searches that create "a problem of reasonable significance," ignoring the hunt for first principles in favor of a totally pragmatic rule.<sup>120</sup> While this simplified approach has considerable merit, the confusion following *Katz* does not instill confidence in the ability of judges to reliably weigh and protect private interests in the absence of strict guidance.

There is, however, a middle ground. For all the chaos it has created, *Katz's* central conceit—that the Fourth Amendment seeks to protect individual privacy and that Fourth Amendment rules should be tailored to that end—is worth preserving. The defect in *Katz* lies not in its focus on privacy, but in its failure to articulate any means of weighing the privacy interests implicated by any given set of facts.

This flaw can be repaired by altering the way Fourth Amendment opinions are written. Most of the side effects of the *Katz* decision arise from the way it shields from scrutiny the true building blocks of a search: the passive subject and the active method. These important components are removed from sight—but not from consideration—and it becomes very diffi-

119. Solove, *supra* note 14, at 1511–12.

120. *Id.* at 1514.

cult to find the foundations of any Fourth Amendment law. Efforts to delve into the nuts and bolts of a search and seizure end not in enlightenment, but in a confusing miasma.

The solution is for Fourth Amendment courts to reference these elements explicitly, and explain how they each relate to the holding. Directly connecting the subject and the method of a search to a Fourth Amendment rule would prevent information from getting lost in interpretation. It would also place solid, proactive rules on the books, helping to cabin government invasions of privacy long before they reach a courtroom.<sup>121</sup>

The easiest way to do this would be to develop a universal, formulaic procedure for writing Fourth Amendment opinions. Each of the two elements of a search would be addressed in turn, and the privacy interests threatened by each would be discussed systematically. Judicial minimalism, appearing so often in search and seizure cases as “decisions on the facts,” would need to be abandoned. In its place, there would be an ever-expanding catalogue of clearly identified subjects of searches, and clearly described search methods, each connected to a determination of constitutionality. Judges confronted with new facts could simply locate the closest analogues and conduct a straightforward comparison. Police officers, unsure of the proper way forward, could do the same. And the private individual could finally know exactly what his government might be up to.

Practically speaking, how could this shift occur? There are two broad possibilities: a top-down approach, and a bottom-up approach. The former is more complete, but far less likely. It would involve an explicit instruction from an appellate court—ideally, the Supreme Court—to begin reframing Fourth Amendment decisions. Lower courts would be compelled to focus on the constituent elements of each decision, and reviewing courts would frown on “totality of the circumstances” tests. Of course, given the Supreme Court’s generally erratic course in the field of search and seizure, the odds of it adopting a highly structured new approach seem low.

More gradual, but more plausible, is a bottom-up shift in the way Fourth Amendment decisions are written, driven mostly by lower courts’ interest in writing stronger, more compre-

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121. Of course, as long as the test for warrantless searches allows for a *sui generis* holding limited to a particular set of facts, cases of first impression will generate some uncertainty. See *supra* note 106 and accompanying text. Nevertheless, addressing the underlying elements of a search will at least force judges to identify *sui generis* holdings as such, which may in turn limit their frequency.

hensible opinions. The recommendations provided above are not an all-or-nothing proposition. They can also be read as guidelines for writing clearer, more narrowly targeted, and more jurisprudentially robust Fourth Amendment holdings. Because the recommendations are about understanding the structure of searches and take no position on which set of principles should be used to evaluate those searches, they can be safely used by any court without fear of contravening substantive law. There are considerable incentives to adopt this new approach: any trial court or appeals court that takes these proposals to heart should find its preferences easier to express in the present, and its precedent easier to follow in the future. If more and more of Fourth Amendment law were written according to these guidelines, the end result would ultimately be much the same as if the change had been enacted by judicial fiat.

This Note's proposal is simultaneously broad in scope and conservative in nature. It is true that, if it were fully embraced, the proposal would necessarily affect virtually all warrantless search holdings. As many of the cases referenced by this Note demonstrate, judges today take a somewhat free-wheeling approach to answering Fourth Amendment questions. With so many lines of reasoning to choose from, and so many confusing standards and rules to follow, a judge confronting a Fourth Amendment problem often has considerable discretion. That discretion would be displaced by the more systematic approach suggested here. Writing Fourth Amendment decisions to formula would greatly constrain the ability of judges to cut their own way through the nettle of search and seizure precedent. Instead, they would be encouraged to mechanically address a handful of fundamental questions about the parameters of the search.

But in many ways, the change this proposal envisions is less fundamental than the changes envisioned by other proposals to reorganize the Fourth Amendment.<sup>122</sup> Unlike many competing approaches, it leaves untouched the current dominant rationales for Fourth Amendment jurisprudence—whatever they may be. It does not force courts to devise logically consistent search protections, reject any extant line of Fourth Amendment case law, or alter the underlying interests protected by the current regime. Its strength is not dependent on its ability to parse out the “true” justification for any particular

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122. See, e.g., Solove, *supra* note 14, at 1514.

rule. Instead, the proposal accepts the Amendment's tendency to produce a mass of overlapping rules and seeks only to categorize those rules so that they remain straightforward and robust. By limiting itself to the *mechanics* of Fourth Amendment decisions, it leaves judges free to devise their own policies—or follow preexisting ones—and merely counsels judges to change the way they talk about those rules.

At the very least, reconciling judicial opinions with the basic conceptual structure of government searches would encourage a deeper understanding of the stakes in any given Fourth Amendment case. The current tendency to limit the scope of decisions by rooting them in the “totality of the circumstances” enables judges to resolve constitutional disputes without ever addressing the broader issues posed by those disputes.<sup>123</sup> While there is nothing inherently wrong with approaching legal questions on a case-by-case basis, this practice, in the aggregate, has eroded privacy and created uncertainty.<sup>124</sup> Judges writing mechanistic decisions would be compelled to abandon the “totality of the circumstances” test in favor of more nuanced deliberation, but otherwise, the judicial process would suffer only minimal disruption. After all, questions relating the subject and the method of a search are bound to occur in any Fourth Amendment case, regardless of whether they are explicitly acknowledged.<sup>125</sup>

### CONCLUSION

There is always something utopian about any proposal to change a body of law as large and ubiquitous as search and seizure. The Fourth Amendment has remained bewildering for many years, and there are few signs of immediate improvement. But eventually, the *Katz* standard and the Court's current approach will need to be simplified, or something more rigid and reliable will need to be substituted in their place. As it stands, reading Fourth Amendment cases is often less about analysis than it is about divination. That is an unacceptable state of affairs for an area of law that represents some of the most basic, common interactions between people and their government.

Fortunately, many of the problems with the law surrounding Fourth Amendment arise from identifiable and predictable

123. See, e.g., *Coffin v. Brandau*, 642 F.3d 999, 1012 (11th Cir. 2011).

124. See *supra* Part II.C.

125. See *supra* Part II.B.

sources. The *Katz* test allows too much judicial discretion when deciding which searches to permit, and provides too little historical guidance. In an unlucky historical accident, *Katz* precedent creates structural pressure on attempts to limit the government's ability to conduct searches. Judicial minimalism exacerbates both these trends. Social change has resulted in a hodgepodge of competing ideas about the Fourth Amendment.

And potential reformers have several advantages. The fact patterns that make up Fourth Amendment cases are often simple variations on a theme, with most of the key elements recurring time after time. Searches themselves take a universal binary form, and can always be divided into two components: subject and method. Although Fourth Amendment rules are tangled, they can be untangled with dedicated analysis.

In the end, the simplest way to reorient the Fourth Amendment is to change the way we talk about it. Its complexities feed on the vagaries of the *Katz* test, so those vagaries should be rooted out. In their place courts should substitute a simple, universal vocabulary of search and seizure. We have already wasted far too much time trying to parse simple rules out of hazy reasoning. Whatever interests lie behind the Fourth Amendment—property, privacy, or something else—they'll only be safe once we have got a search jurisprudence that is accessible and comprehensible.