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"I Always Feel Like Somebody's Watching Me" Prolonged Use of Warrantless Video Surveillance and the Fourth Amendment

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"I ALWAYS FEELS LIKE SOMEBODY'S WATCHING ME" PROLONGED USE OF WARRANTLESS VIDEO SURVEILLANCE AND THE FOURTH AMENDMENT

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INTRODUCTION

As technology grows, privacy shrinks, but it does not have to. With the advent of small, affordable cameras, drones, and other such surveillance equipment, police departments have new, easy ways to monitor suspects without those suspects' knowledge.[1] These

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[1] *See, e.g.*, Ali Watkins, *How the NYPD is Using Post-9/11 Tools on Everyday New Yorkers*, N.Y. TIMES (Sept. 8, 2021), https://www.nytimes.com/2021/09/08/nyregion/nypd-9-11-police-surveillance.html (describing the application of antiterrorism technology to combat street crime); Monica Davey, *Chicago Police Try to Predict Who May Shoot or Be Shot*, N.Y. TIMES (May 23, 2016), http://www.nytimes.com/2016/05/24/us/armed-with-data-chicago-police-try-to-predict-who-may-shoot-or-be-shot.html?&moduleDetail=section-news-3&action=click&contentCollection=U.S.&region=Footer&module=MoreInSection&version=WhatsNext&contentID=WhatsNext&pgty (describing an algorithm that predicts who will be involved in violent crimes); Craig Tim-berg, *New Surveillance Technology Can Track Everyone in an Area for Several Hours at a Time*, WASH. POST (Feb. 5, 2014), https://www.washingtonpost.com/business/technology/new-surveillance-technology-can-track-everyone-in-an-area-for-several-hours-at-a-

technological advancements raise important questions about the Fourth Amendment's protections "against unreasonable searches."[2] The Seventh Circuit addressed one such question in *United States v. Tuggle*.[3] Following a line of Fourth Amendment challenges to lengthy surveillance without a warrant,[4] the Seventh Circuit held that nonstop surveillance by cameras attached to utility poles for eighteen months outside Tuggle's home—without a warrant—was not a violation of his rights.[5] The Seventh Circuit's analysis was shortsighted and flies in the face of Fourth Amendment jurisprudence. Not only is this decision contrary to the Supreme Court's *Katz* Test,[6] but it also opens the door for law enforcement to engage in broader technologically assisted surveillance in the absence of a warrant.

The issue presented here is whether the prolonged use of pole cameras in *Tuggle* comports with Fourth Amendment search jurisprudence; specifically, whether the Seventh Circuit's decision complies with a reasonable expectation of privacy that modern society is willing to accept. Because technology grows every day, the average person's expectations of privacy will naturally change.[7] Justice Scalia presciently summed up the issue when he wrote, "The question we confront . . . is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."[8] Prior to Justice Scalia's

time/2014/02/05/82fl556e-876f-11e3-a5bd-844629433ba3_story.html (describing the use of aerial cameras to surveil streets).

[2] U.S. CONST. amend. IV.

[3] 4 F.4th 505 (7th Cir. 2021).

[4] *E.g.*, Carpenter v. United States, 585 U.S. __, 138 S.Ct. 2206 (2018) (127 days of cell-site location data collected); United States v. Bucci, 582 F.3d 108 (1st Cir. 2009) (eight-month long video surveillance); United States v. Kay, No. 17-CR-16, 2018 WL 3995902 (E.D. Wis. Aug. 21, 2018) (eighty-seven days of pole camera surveillance); United States v. Mazzara, No. 16 CR 576, 2017 WL 4862793 (S.D.N.Y. Oct. 27, 2017) (twenty-one-month video surveillance).

[5] *Tuggle*, 4 F.4th at 528–29.

[6] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Supreme Court clarified the two-prong test in California v. Ciraolo, 476 U.S. 207, 211 (1986).

[7] United States v. Jones, 565 U.S. 400, 429 (2012) (Alito, J., concurring).

[8] Kyllo v. United States, 533 U.S. 27, 34 (2001).

description, Justice Brandeis wrote in dissent, "[d]iscovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."[9] Courts should be aware of changing expectations of privacy and adapt to them rather than strictly adhering to past cases involving old or different technology as the Seventh Circuit did here.

As Judge Flaum wrote in the unanimous opinion in *Tuggle*, "the *Katz* test as currently interpreted may eventually afford the government ever-wider latitude over the most sophisticated, intrusive, and all-knowing technologies with lessening constitutional constraints."[10] Instead of turning away from an interpretation that decreases protection from these "intrusive" and "all-knowing technologies," Judge Flaum chose to embrace outdated norms of what society accepts as private.

This note consists of three parts. First, it will provide a brief background of the Fourth Amendment from its inception at the Founding through the Supreme Court analysis used today. Second, this note will provide the facts of *United States v. Tuggle*. Third, it will analyze the Seventh Circuit's opinion arguing that the opinion does not comply with the Supreme Court's Fourth Amendment search analysis, sets a problematic precedent, and fails to consider the practical impact of allowing prolonged warrantless surveillance.

A. History and Precedent

This section will provide a brief history of the creation of the Fourth Amendment and the Supreme Court's past interpretations of it. It will first discuss the impetus behind creating the Amendment. Next, it will provide a brief overview of how the Court interpreted the Fourth Amendment prior to a shift in *Katz v. United States*. It will then

[9] Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting), overruled in part by Berger v. State of N.Y., 388 U.S. 41 (1967), and overruled in part by Katz v. United States, 389 U.S. 347 (1967).

[10] 4 F.4th at 510 (7th Cir. 2021).

outline the *Katz* test and finally how the *Katz* Test has been applied in recent cases with more advanced surveillance technology used by law enforcement.

1. The Origin of the Fourth Amendment

As is well-known, the Founders drafted the Fourth Amendment to protect themselves against British search and seizure practices.[11] Early Americans balked at British officials' use of writs of assistance which gave the officials latitude to search homes, stores, warehouses, and other places for contraband.[12] Specifically, from 1761 to 1791, British search and seizure practices were so aggressive that John Adams included language in the Fourth Amendment barring these practices.[13] Those same principles have informed Fourth Amendment jurisprudence for decades,[14] and should continue to do so.

In his dissent in *Olmstead v. United States*, Justice Brandeis aptly articulated why protections afforded by the Fourth Amendment are and should remain sacrosanct:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most

[11] Tiffany M. Russo, Esq., *Searches and Seizures as Applied to Changing Digital Technologies: A Look at Pole Camera Surveillance*, 12 SETON HALL CIR. REV. 114, 118 (2015).

[12] The Honorable M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave it Birth*, 85 N.Y.U. L.REV. 905, 907 (2010).

[13] Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 980 (2011).

[14] *See* Michael, *supra* note 12 at 912–14.

> valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[15]

While the interests of society to employ law enforcement for its protection are certainly important, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[16]

2. Traditional Fourth Amendment Search Analysis – Trespass

The seminal case that guided Fourth Amendment search analysis prior to *Katz* was *Olmstead v. United States*.[17] The question presented to the Supreme Court in *Olmstead* was "whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth . . .Amendment[]."[18] The defendants were convicted in district court of a conspiracy to violate the National Prohibition Act.[19] Four federal prohibition officers discovered and collected evidence in their investigation by intercepting telephone messages between the conspirators.[20] To tap the phone lines, officers inserted small wires along telephone wires from the homes of some of the defendants and the telephone wires leading from Olmstead's chief office from where

[15] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), overruled in part by Berger v. State of N.Y., 388 U.S. 41 (1967), and overruled in part by Katz v. United States, 389 U.S. 347 (1967).

[16] *Id.* at 479.

[17] Katz v. United States, 389 U.S. 347, 353 (1967).

[18] *Olmstead*, 277 U.S. at 455. The case also analyzed whether the Fifth Amendment was violated by the wire-tapping activity, but the Court stated that the Fifth Amendment could not be applied unless the Fourth Amendment was violated. *Id.* at 462.

[19] *Id.* at 455.

[20] *Id.* at 456.

he managed the conspiracy.[21] Officers inserted the wires without trespassing upon any property of the conspirators.[22] Evidence gathered over months included large business transactions, orders given for liquor by customers, difficulties the defendants faced, and bribes promised to officers by Olmstead—the chief conspirator—to secure the release of Olmstead's co-conspirators.[23]

The Supreme Court held that the "language of the amendment cannot 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."[24] To support its holding, the Court emphasized the language of the Fourth Amendment[25] itself which specifies "the right of the people to be secure *in their persons, houses, papers, and effects*."[26] Because the wiretapping at issue in *Olmstead* did not constitute a search of the defendants' person, papers, or "tangible material effects or an actual physical invasion of his house," there was no Fourth Amendment violation.[27] The Supreme Court has since departed from this interpretation of the Fourth Amendment to hold that "the reach of that Amendment cannot turn upon the presence or absence of a physical instruction into any given enclosure," [28] which brings us to the modern-day analysis.

3. Modern-Day Fourth Amendment Search Analysis: The *Katz* Test

The current standard applied when a search is challenged under the Fourth Amendment is whether an individual has a

[21] *Id.* at 456–57.
[22] *Id.* at 457.
[23] *Id.*
[24] *Id.* at 465.
[25] *Id.* at 464.
[26] U.S. CONST. amend. IV (emphasis added).
[27] *Olmstead*, 277 U.S. at 466.
[28] Katz v. United States, 389 U.S. 347, 353 (1967).

"'constitutionally protected reasonable expectation of privacy.'"[29] In his concurring opinion in *Katz v. United States*, Justice Harlan proposed a two-part guideline which the Supreme Court has since followed: "first that a person ha[s] exhibited an actual (subjective) expectation of privacy, and second, that the expectation [is] one that society is prepared to recognize as 'reasonable.'"[30] This guideline is now referred to as the *Katz* Test.[31]

In *Katz*, the prosecution was permitted, over the defendant's objection, to introduce evidence that Federal Bureau of Investigation ("FBI") agents collected, without a warrant, from an electronic listening and recording device attached to the outside of a public telephone booth.[32] The Supreme Court overturned the lower court, holding that law enforcement should have obtained a warrant prior to conducting this form of surveillance.[33] Specifically, the majority stated that what an individual "seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected."[34] Further, when someone enters a telephone booth, closes the door behind him or her, and pays for the call, that person "is surely entitled to assume that the words he [or she] utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."[35] It was not relevant to the analysis whether a law enforcement officer could stand outside the phone booth to listen or that the person using the phone booth could be seen from the outside because "the Fourth Amendment protects people, not places."[36]

[29] California v. Ciraolo, 476 U.S. 207, 211 (1986) (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring)).

[30] 389 U.S. at 361 (Harlan, J., concurring).

[31] *See id.*

[32] *Id.* at 348.

[33] *Id.* at 359.

[34] *Id.* at 351 (emphasis added).

[35] *Id.* at 352.

[36] *Id.* at 351.

4. *Katz* Progeny Responds to Technological Advances

More recent cases have considered technologically advanced methods of surveillance employed by law enforcement. The Supreme Court used the *Katz* Test in *United States v. Knotts*.[37] There, the Court held that placing a beeper in a five-gallon drum of chloroform to monitor a car carrying the drum from its place of purchase to a secluded cabin did not violate the defendant's Fourth Amendment rights.[38] Justice Rehnquist, writing for the majority, applied the first prong of the *Katz*:

> A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [Knotts's codefendant] travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.[39]

Rehnquist reasoned that the use of the beeper to track these movements did not alter the fact that the surveillance could have been done visually from public places along the route.[40] Notably, the Court attempted to assuage any fears of a growing surveillance state by emphasizing the limited use of the beeper's transmissions in that case.[41] The majority stated that nothing in the record demonstrated that the beeper was used after it indicated that the chloroform drum had reached its destination.[42] Police merely used the beeper to track the drum from where Knotts picked it up to transport it to his property and

[37] 460 U.S. 276, 280–81 (1983).
[38] *Id.* at 285.
[39] *Id.* at 281–82.
[40] *Id.* at 282.
[41] *Id.* at 284–85.
[42] *Id.*

then used that data to secure a search warrant.[43] Law enforcement did not use the beeper signal to track movement of the chloroform once it reached the defendant's property.[44]

Just three years later, the Supreme Court decided *California v. Ciraolo*.[45] There, the Court was asked to "determine whether the Fourth Amendment is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home."[46] Curtilage is defined in common law as the area immediately outside one's home where activity is considered related to the "sanctity of [one's] home and the privacies of life."[47] Law enforcement could not observe what was in the backyard from street-level because of a six-foot tall outer fence and ten-foot tall inner fence around it.[48] In response to an anonymous tip, police officers secured a private plane to fly over the defendant's house.[49] From overhead, the officers in the plane were able to identify marijuana plants in the defendant's yard.[50]

In its decision, the Court applied the *Katz* Test.[51] It found that the first prong was satisfied. Ciraolo had "met the test of manifesting his own subjective intent and desire to maintain privacy" by erecting a fence around his backyard.[52] When it turned to the second prong of *Katz*, the Court reasoned that the police's observations occurred within publicly navigable airspace in a physically nonintrusive manner.[53] The Court further wrote, "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these

[43] *Id.*
[44] *Id.* at 285.
[45] 476 U.S. 207 (1986).
[46] *Id.* at 209.
[47] Boyd v. United States, 116 U.S. 616, 630 (1886).
[48] *Id.*
[49] California v. Ciraolo, 476 U.S. 207, 209 (1986).
[50] *Id.*
[51] *Id.* at 211.
[52] *Id.*
[53] *Id.* at 213.

officers observed."[54] Because private and commercial flight had become a matter of routine, it was not reasonable for the defendant to expect privacy from being observed by a passing plane.[55] The Court did make it clear that the observation at issue here was only "visible to the naked eye" and a "simple visual observation[] from a public place" rather than a more advanced technology.[56]

The Supreme Court again evaluated the Fourth Amendment implications of more advanced technology in *Kyllo v. United States*.[57] In that case, the Court decided whether thermal-imaging technology aimed at a private home from a public street constituted a search under the Fourth Amendment.[58] The Court held that such actions constituted a search because "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained" without a trespass into the home constitutes a search.[59] Justice Scalia, writing for the majority, pushed back against the State's argument that law enforcement only detected heat that radiated from the exterior of the home.[60] Scalia rejected "such a mechanical interpretation of the Fourth Amendment" because changing the approach employed in *Katz*—where the surveillance only picked up sound waves from outside a telephone booth—"would leave the homeowner at the mercy of advancing technology."[61] He further reasoned that the rule the Court adopted in this case must take into account advanced technology that has yet to be developed.[62]

Reviewing another use of new technology, in *United States v. Jones*, the Court held that law enforcement's use of a Global-Positioning-System ("GPS") attached to an individual's vehicle to

[54] *Id.* at 213–14.
[55] *Id.* at 215.
[56] *Id.* at 214–15.
[57] 533 U.S. 27 (2001).
[58] *Id.* at 29.
[59] *Id.* at 34.
[60] *Id.* at 35.
[61] *Id.*
[62] *Id.* at 36.

monitor the vehicle's movements on public streets constituted a search within the meaning of the Fourth Amendment.[63] The government used the device for twenty-eight days.[64] The Court reasoned that the government "trespassorily inserted the information-gathering device" to conclude an improper search was conducted.[65] Justice Alito's concurring opinion is more informative because it relied on the *Katz* analysis rather than the outdated trespass theory of Fourth Amendment interpretation.[66]

Under the modern-day approach, Alito wrote that "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable."[67] Further emphasizing the length of the warrantless surveillance at issue, he went on to assert that prolonged GPS monitoring when investigating most criminal activity would intrude upon society's privacy expectations.[68] Alito concluded that "the lengthy monitoring that occurred in this case constituted a search."[69]

The Supreme Court again articulated the problem of prolonged surveillance without a warrant in *Carpenter v. United States*.[70] There, the Court held that the 127-day collection of defendant's cell-site location information was a Fourth Amendment search.[71] The Court reasoned that "an all-encompassing record of the holder's whereabouts," exposing "an intimate window into a person's life, revealing not only his particular movements, but through them" his

[63] 565 U.S. 400, 404 (2012).

[64] *Id.* at 403.

[65] *Id.* at 410.

[66] *Id.* at 418–19 (Alito, J., concurring) (explaining that the majority's analysis "has little if any support in current Fourth Amendment case law").

[67] *Id.* at 430 (Alito, J., concurring).

[68] *Id.*

[69] *Id.* at 431(Alito, J., concurring).

[70] 585 U.S. __, 138 S.Ct. 2206 (2018).

[71] *Id.* at 2211–12.

associations with family, friends, politics, a profession, and a religion violated the reasonable expectation of privacy.[72]

Justice Rehnquist put it best when he wrote—in response to the *Knotts* defendant's concern that the result of the holding would be that twenty-four-hour warrantless surveillance of anyone would be possible[73]—that "if such dragnet type of law enforcement practices as [Knotts] envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable."[74] Now is that time.

B. Facts of the Case

Between 2013 and 2016, law enforcement investigated a large methamphetamine distribution conspiracy in central Illinois which led to Travis Tuggle's prosecution.[75] The main evidence that the state used in its case against Tuggle was surveillance footage from cameras installed on public property on nearby utility poles, called pole cameras.[76] Law enforcement never sought a warrant for the cameras, and no exception to the warrant requirement applied.[77] The cameras could view the front of Tuggle's home, an adjoining parking area, and a shed owned by Tuggle's codefendant, Joshua Vaultonburg.[78]

These cameras recorded activity at Tuggle's home for nearly eighteen months around the clock.[79] Law enforcement could remotely

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[72] *Id.* at 2217.

[73] United States v. Knotts, 460 U.S. 276, 283 (1983).

[74] *Id.* at 284.

[75] United States v. Tuggle, 4 F.4th 505, 511 (7th Cir. 2021).

[76] *Id.* at 511–12.

[77] *Id.* at 512. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 14–15 (1948) (exceptional circumstances exist "in which, on balancing the need for effective law enforcement against the right of privacy" a search warrant may be "dispensed with"); Carroll v. United States 267 U.S. 132, 149 (1925) (search and seizure without a warrant is valid when "made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer").

[78] *Tuggle*, 4 F.4th at 511.

[79] *Id.*

zoom, pan, and tilt the cameras; they could also view the footage in real-time and review it from the FBI office in Springfield, Illinois.[80] Utilizing cameras in this way gave law enforcement a major advantage.[81] Officers monitored every moment of the activity at Tuggle's home completely unnoticed unlike warrantless in-person surveillance which could have signaled to Tuggle that he was being watched.[82] This advantage was particularly useful because Tuggle's neighborhood was lightly traveled and surveillance vehicles on the street would have been obvious.[83]

Because of the cameras, law enforcement agents were able to tally over 100 instances of what presumably was distribution of methamphetamine from Tuggle's residence.[84] The footage showed persons arriving at his home with various items and leaving with smaller items or nothing.[85] Later, other individuals supposedly arrived, paid for the drugs, and left.[86] Officers also reviewed footage of Tuggle leaving his home to put items in Vaultonburg's shed.[87]

Law enforcement then used the recordings to secure a search warrant for the inside of Tuggle's home.[88] As a result, a grand jury indicted Tuggle on two counts: (1) a violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) for conspiring to distribute, and possession with intent to distribute, at least fifty grams of methamphetamine and at least 500 grams of a mixture containing methamphetamine, and (2) a violation of 21 U.S.C. § 856(a)(1) for maintaining a drug-involved premises.[89]

Prior to trial, Tuggle moved to suppress the pole camera evidence, arguing its collection violated his Fourth Amendment rights against

[80] *Id.*
[81] *See id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 512.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*

unlawful search without a warrant.[90] The district court denied the motion and Tuggle's two motions to reconsider, explaining that the camera usage did not constitute a search.[91] The day before trial, Tuggle entered a conditional guilty plea to both counts in the indictment but reserved his right to appeal the court's denial of his motions to suppress.[92] He was sentenced to 360 months' imprisonment on count one and 240 months' imprisonment on count two to be served concurrently.[93] Tuggle timely appealed to the Seventh Circuit.[94]

C. Seventh Circuit Holding

The Seventh Circuit held in *Tuggle* "that the extensive pole camera surveillance in this case did not constitute a search under the current understanding of the Fourth Amendment."[95] The court stated that Supreme Court precedent and a lack of statutory or jurisprudential methods to curb law enforcement's use of the surveillance systems in Tuggle's case prohibited it from finding for Tuggle.[96] Further, the court suggested that "it might soon be time to revisit the Fourth Amendment test established in *Katz*" or that Congress should legislate to protect privacy rights as technology advances.[97]

D. How the Seventh Circuit Erred

This part details three principal arguments. First, that the Seventh Circuit's opinion in *Tuggle* does not follow the *Katz* Test because, under the second prong, society would consider eighteen months of continuous surveillance a violation of privacy. Second, by stating that

[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 511.
[96] *Id.*
[97] *Id.* at 528.

the Fourth Amendment may not protect individuals once a technology becomes widespread, the Seventh Circuit set a dangerous precedent. Third, the court failed to consider the practical impact of the type of surveillance at issue in *Tuggle*, especially in the age of COVID-19 lockdowns and remote work.

1. Contrary to *Katz*

The Seventh Circuit's holding in the instant case does not comply with the *Katz* Test. The court correctly notes that the first, subjective prong of the test has not been applied or used uniformly, and that some scholars question its significance in addressing these types of cases.[98] Because the court did not discuss the first prong in this case, neither will I; the court did not find that the first prong was dispositive for the Fourth Amendment analysis.[99] The second prong of *Katz* looks at whether "the expectation [of privacy is] one that society is prepared to recognize as 'reasonable.'"[100]

In evaluating Tuggle's claim under the second, objective prong of *Katz*, the court wrote, "Tuggle knowingly exposed the areas captured by the three cameras. . . . He therefore did not have an expectation of privacy that society would be willing to accept as reasonable in what happened in the front of his home."[101] To support this conclusion, the Seventh Circuit relied heavily on Supreme Court precedent with facts far removed from the case at bar.[102] Specifically, it cited *Kyllo* to distinguish the use of pole cameras here and *Ciraolo* to analogize to the use of pole cameras here. [103]

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[98] *Id.* at 514.

[99] It should be noted that Tuggle did not erect a fence around his property or otherwise shield it from public view, a typical sign of a subjective expectation of privacy, but the Seventh Circuit did not find that fact to be dispositive. *Id.* at 513.

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

[101] *Tuggle*, 4 F.4th at 514.

[102] *Id.* at 514–17.

[103] *Id.* (citing Kyllo v. United States, 533 U.S. 27, 40 (2001); *Ciraolo*, 476 U.S. at 213).

Contrary to the court's opinion, the prolonged use of pole cameras here is more akin to the former, where law enforcement used thermal imaging technology, than the latter, where officers conducted a flyover at 1,000 feet. Specifically, as Tuggle argued, using pole cameras for eighteen months nonstop gave law enforcement a view into his life that could not have been revealed by short-term surveillance.[104] While it is true that the pole cameras used did not allow the government to see inside Tuggle's house, nor did the cameras capture Tuggle's movements outside the home, the cameras recorded the comings and goings at his home which revealed a significant amount of information.[105]

The *Carpenter* holding applies to the eighteen-month camera surveillance of Tuggle. The Supreme Court's concern in *Carpenter* was that the cell-site location data provided law enforcement with "an all-encompassing record" of the holder's activity and associations with family and friends in violation of reasonable expectations of privacy.[106] The cameras at issue in the instant case viewed and recorded who came and went from Tuggle's home; law enforcement could see who his friends and family were, what deliveries were made, when he came and left, how long visitors stayed, etc. for a year and a half. That is certainly enough time to uncover "an intimate window" into and detailed record of Tuggle's life. By observing Tuggle for this long absent a warrant, law enforcement went too far, similar to the officers in the *Carpenter* case.

It is essential to note that the cameras here did not capture any activity that was illegal on its face. Rather, the officers counted occasions of "what they *suspected* were deliveries of

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[104] *Tuggle*, 4 F.4th at 517. This principle is called the mosaic theory which has been defined in various ways. Essentially, it is the theory that law enforcement "can learn more from a given sliver of information if it can put that information in the context of a broader pattern, a mosaic." Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectation of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205, 205 (2015). The Supreme Court has not bound lower courts to apply the theory.

[105] *Tuggle*, 4 F.4th at 511.

[106] 585 U.S. __, 138 S.Ct. 2211–12, 2217 (2018).

methamphetamine to Tuggle's residence."[107] Law enforcement did not collect footage of actual drugs or money changing hands nor did it have footage of manufacturing drugs at Tuggle's home.[108] The pole cameras captured people coming to Tuggle's home with items and later leaving with smaller items.[109] They also recorded others later entering the home to "*purportedly* pay for and pick up methamphetamine."[110] The Seventh Circuit wrote that "the recordings showed Tuggle carrying items to Vaultonburg's shed across the street" which was further evidence of a drug operation.[111] These activities do not necessarily demonstrate illegal activity, but may show that a person is running any type business from their home.[112] Without more, the activity recorded at Tuggle's home would likely not suggest a massive illegal drug operation. By concluding that this activity does evidence illegal behavior, the court takes for granted law enforcement's justification for surveilling Tuggle for as long as it did, but the Fourth Amendment was drafted in order to protect against this level of surveillance without a warrant.

The Seventh Circuit attempted to distinguish between tracking a person's movements outside the home and tracking who visits the home.[113] "[T]he cameras only highlighted Tuggle's *lack* of movement, surveying only the time he spent at home and thus not illuminating what occurred when he *moved* from his home," the court wrote.[114]

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[107] *Id.* at 511 (emphasis added).

[108] *Id.* at 511–12.

[109] *Id.*

[110] *Id.* at 512 (emphasis added).

[111] *Id.*

[112] For example, a person running a bakery from their house may receive shipments of ingredients such as flour, sugar, eggs, etc. from delivery persons which could appear to be "large items." Those persons would then leave the home with payment that may look like a "small item." Later, individuals may arrive at the home to pick up and pay for baked goods. The baker may keep extra supplies or leftover baked goods outside the home in a shed, so they have enough room in the kitchen to bake the next batch.

[113] *Id.* at 524.

[114] *Id.* at 511 (emphasis original).

This distinction is not convincing because the pole camera recordings provided a clear picture of Tuggle's activity at his home for eighteen months. That should be more than enough to put together an idea of the intimacies of Tuggle's life, a violation of society's reasonable expectations of privacy and therefore a violation of the Fourth Amendment. As the South Dakota Supreme Court rightly stated, "the fact that 'the public does not get exposed to the aggregate of another's comings and goings' was a factor that ought [to] be considered and weighed" against finding a permissible search.[115]

The use of warrantless camera surveillance should be limited. Allowing eighteen months of nonstop observation does not comport with the Supreme Court's contemplation in *Knotts*. Other cases, too, emphasize the short-term nature of warrantless pole camera use even where courts eventually found an acceptable search without a warrant.

In *United States v. Houston*, the district court for the Eastern District of Tennessee held that warrantless video surveillance beyond fourteen days violated reasonable expectations of privacy.[116] Specifically, the court stated it did not have "information that the agents attempted to limit the intrusiveness of the video surveillance, other than limiting monitoring of the camera primarily to 'daylight hours.'"[117] Even that minor limitation did not exist in *Tuggle*. Further, "neither the testimony at the hearings nor [law enforcement's] affidavits state that the agents stopped monitoring the camera when others besides the Defendant and his brother Rocky Houston were at the property."[118] From this opinion, it is difficult to determine what limitations on surveillance absent a warrant the court would prefer law enforcement apply in order to hold that a search did not violate the Fourth Amendment. The court found that warrantless surveillance of

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[115] Alayna Holmstrom, *Big Brother Isn't Watching: How State v. Jones Transformed What One Can See with a Naked Eye into a Fourth Amendment Search*, 63 S.D. L. REV. 450, 456 (2018) (quoting State v. Jones. 903 N.W.2d 101, ¶ 20 (2017)).

[116] 965 F.Supp. 2d 855, 871 (E.D. Tenn. 2013).

[117] *Id.* at 898.

[118] *Id.*

the defendant's curtilage for more than fourteen days was a violation of the Fourth Amendment.[119]

Similarly in *United States v. Anderson-Bagshaw*, the court "confess[ed] some misgivings about a rule that would allow the government to conduct long-term video surveillance of a person's backyard without a warrant."[120] In that case, the court reviewed twenty-four-day warrantless pole camera surveillance.[121] The Sixth Circuit addressed society's expectation when it wrote that "[f]ew people, it seems, would expect that the government can constantly film their backyard for over three weeks using a secret camera that can pan and zoom and stream a live image to government agents."[122] The surveillance at issue in *Tuggle* was twenty-six times longer than the three weeks the Sixth Circuit decided may be too far. The *Anderson-Bagshaw* court also distinguished *Ciraolo* by noting that case involved only a brief flyover rather than prolonged surveillance,[123] as the Seventh Circuit should have done in *Tuggle*.

The Supreme Court, through the cases discussed in this section, has emphasized the importance of protecting individuals from advancing technology and prolong warrantless surveillance. By permitting the type of surveillance at issue in *Tuggle*, the Seventh Circuit chose to depart from the underlying principles of the Supreme Court's precedent and wrote an opinion contrary to *Katz*.

2. Precedent-Setting Concerns

In addition to the issues with the Seventh Circuit's analysis, the opinion fails to adequately address its harmful precedential value. While the court state that its "confidence that the Fourth Amendment (as currently understood by the courts) will adequately protect individual privacy from government intrusion diminishes," it did not

[119] *Id.*

[120] 509 Fed.Appx. 396, 405 (6th Cir. 2012).

[121] *Id.*

[122] *Id.*

[123] *Id.*

seek to change tack with this case of first impression.[124] The court even went as far as to say, "[o]nce a technology is widespread, the Constitution may no longer serve as a backstop preventing the government from using that technology to access massive troves of previously inaccessible private information because doing so will no longer breach society's newly minted expectations."[125]

Looking back at the Founding era, simply because British soldiers intruded upon someone's house did not mean that they should not have expected privacy.[126] Aggressive searches by British officials were widespread.[127] That did not change a person's expectation that they would have privacy at home.[128] In fact, it was these expectations of privacy that birthed the Fourth Amendment.[129] Similarly, once public telephone booths became popular, people did not suddenly expect that their conversations would be recorded.[130] The *Katz* court decided that individuals would not want their words broadcast to the public.[131]

The issue of Fourth Amendment privacy has always developed with technology to protect individuals. By changing course solely because a certain technological tool is "widespread" opens up a much broader scope of what the government can do to surveille people in the United States without the judicial oversight that comes with a warrant. Drones affixed with cameras are now widely available, [132] but it is unlikely that most people would suggest they do not expect privacy

[124] United States v. Tuggle, 4 F.4th 505, 527 (7th Cir. 2021).

[125] *Id.*

[126] *See* Michael, *supra* note 12 at 919–20.

[127] *See id.* at 920.

[128] *See id.* at 919–21.

[129] *See id.* at 919–20.

[130] Katz v. United States, 389 U.S. 347, 352 (1967) (describing the "vital role" publicly available phone booths had come to play in communication).

[131] *Id.*

[132] Insider Intelligence, *Drone market outlook in 2021: industry growth trends, market stats and forecast*, BUS. INSIDER (Feb. 4, 2021) https://www.businessinsider.com/drone-industry-analysis-market-trends-growth-forecasts. ("Sales of US consumer drones to dealers surpassed $1.25 billion in 2020").

from drone surveillance almost anywhere they go. Ring brand doorbells which have cameras are rapidly becoming more common.[133] That does not mean that the average person expects for law enforcement to have access to recording of them every time they walk by a front door.

Each of these developments in technology do not mean that society's expectation of privacy dwindles as the devices become more popular. It means that the courts—and legislatures—have to do more to protect people from the government effecting searches that become more intrusive with new technology. As Andrew Guthrie Ferguson, law professor at American University told the Washington Post, "[i]f the police demanded every citizen put a camera at their door and give officers access to it, we might all recoil."[134] While that is not yet the case, that reality is close. Ring's terms of service states that users consent to the company providing law enforcement with the doorbell's recordings "if the company thinks [it is] necessary to comply with 'legal process or reasonable government request.'"[135] Further, the cameras provide a view of neighboring homes across from the camera and potentially down the street.[136] That should not mean that law enforcement can access these videos without a warrant to conduct lengthy surveillance.

Other technologies have come under fire—and been shut down in some cases—for being too invasive on the public's privacy. Facebook, which has used facial recognition technology since 2010, is shutting

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[133] Jack Narcotta & Bill Ablondi, *Strategy analytics: Amazon's Ring Remained atop the Video Doorbell Market in 2020*, BUS. WIRE (May 12, 2021) https://www.businesswire.com/news/home/20210512005336/en/Strategy-Analytics-Amazons-Ring-Remained-atop-the-Video-Doorbell-Market-in-2020 (detailing sales statistics of video doorbells, "Amazon's Ring sold more than 1.4 million video doorbells in 2020").

[134] Drew Harwell, *Doorbell-camera firm Ring has partnered with 400 police forces, extending surveillance concerns*, WASH. POST (Aug. 28, 2019). https://www.washingtonpost.com/technology/2019/08/28/doorbell-camera-firm-ring-has-partnered-with-police-forces-extending-surveillance-reach/.

[135] *Id.*

[136] *Id.*

down the tool due to increased concerns regarding personal privacy.[137] In 2020, Facebook settled for $650 million after it "was accused of illegally collecting biometric data" without users' consent.[138] With 2.8 billion users worldwide,[139] Facebook's technology would certainly be considered widespread but the company shut it down because users did not expect that their personal data to be tracked even by the company itself. There's no telling what law enforcement could do with access to that type of data collection and information.

In Chicago, ShotSpotter technology has recently been the subject of scrutiny and criticism.[140] This system works by attaching microphones to structures in a neighborhood.[141] When the microphone detects a loud bang, software analyzes the sound to classify it as a gunshot or something else.[142] Then, a human analyst reviews the software's decision by listening to the recording and studying the waveform is produces.[143] If the sound is determined to be a gunshot, police are dispatched to the area.[144] In Chicago, the Inspector General found that in only nine percent of alerts from ShotSpotter was there any physical evidence at the scene that a gun had been fired.[145] As a result, there have been calls to terminate Chicago's multimillion dollar

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[137] Kurt Wagner, *Facebook to Shut Down Use of Facial Recognition Technology*, BLOOMBERG (Nov. 2, 2021) https://www.bloomberg.com/news/articles/2021-11-02/facebook-to-shut-down-use-of-facial-recognition-technology.

[138] *Id.*

[139] John Gramlich, *10 facts about Americans and Facebook*, PEW RES. CTR. (Jun. 1, 2021) https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-facebook/

[140] John Garcia, *Chicago alderman question police about controversial ShotSpotter technology*, ABC7 CHI. (Nov. 12, 2021) https://abc7chicago.com/shotspotter-chicago-cpd-police/11229640/

[141] James Clayton, *Inside the controversial US gunshot-detection firm*, BBC NEWS (Oct. 29, 2021) https://www.bbc.com/news/technology-59072745.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

contract with ShotSpotter.[146] Critics point out that, in addition to accuracy problems, the ShotSpotter microphones are discriminatory as they are mostly put in predominately Black and brown neighborhoods.[147] Therefore, this technology results in increased police presence in those neighborhoods, making privacy a privilege that is assigned inequitably rather than enjoyed universally.

The Boston City Council, concerned about the public's privacy, recently passed a law which would require law enforcement to get approval before using a new technology for surveillance.[148] Further, "if city authorities want to use existing surveillance technology in a new way, they must receive council approval before deploying the new use."[149] Technologies requiring approval include gunshot detection devices, automatic license plate readers, biometric surveillance, X-ray vans, etc.[150]

Clearly the use of new technology to surveille the public has been an issue taken on by corporations, cities, and citizens. For the Seventh Circuit to find that once a technology is widespread, the expectation of privacy evaporates is against the public's actual response to widespread technological advances. These examples illustrate the opposite, and the courts should be aware of public and private responses to increased surveillance.

3. Practical Impact of Allowing Prolonged Surveillance

Today, it is truer than ever that seeing who arrives and departs from a home reveals intimate details about one's life. Simply by watching the outside of someone's house, you can learn how often a person gets groceries and what they eat; it is possible to learn whether

[146] Garcia, *supra* note 137.

[147] *Id.*

[148] Danny McDonald, *Boston ordinance gives city oversight of surveillance technology, sets limits on school information sharing*, BOS. GLOBE (Oct. 20, 2021) https://www.bostonglobe.com/2021/10/20/metro/boston-ordinance-gives-city-oversight-surveillance-technology-sets-limits-school-information-sharing/

[149] *Id.*

[150] *Id.*

a person is on any prescription medication; it is possible to learn whether a person is dating or in a relationship. With the advent of services such as grocery and prescription delivery and online dating, a person can choose to leave their house less frequently and have people come to them.

These concerns are more important now than ever with the COVID-19 pandemic and its associated lockdowns. On March 13, 2020, President Trump declared a national emergency, laying out a forecast for the virus's spread the same day.[151] In response, schools and offices closed and events were canceled.[152] These office closures required that workers remotely do their jobs. Researchers suggest that this new era of remote work "may portend a significant shift in the way a large segment of the workforce operates in the future."[153] As of December 2020, seventy-one percent of workers are doing their jobs remotely.[154] Approximately forty percent of adults say that their work can be done from home even after the pandemic ends.[155]

In 2016, 11 million adults—eighteen percent—in the United States were stay-at-home parents.[156] Two million individuals in the United States—six percent—are homebound, rarely or never leaving

[151] Peter Baker and Eileen Sullivan, *U.S. Virus Plan Anticipates 18-Month Pandemic and Widespread Shortages*, N.Y. TIMES (Mar. 17, 2020) https://www.nytimes.com/2020/03/17/us/politics/trump-coronavirus-plan.html

[152] Derek Hawkins, et al. *Trump declares coronavirus outbreak a national emergency*. WASH. POST (Mar. 13, 2020). https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/

[153] Kim Parker, Juliana Menasce Horowitz, & Rachel Minkin, *How the Coronavirus Outbreak Has – and Hasn't – Changed the Way Americans Work*, PEW RES. CTR. (Dec. 9, 2020). https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/.

[154] *Id.*

[155] *Id.*

[156] Gretchen Livingston, *Stay-at-homes moms and dads account for about one-in-five U.S. parents*, PEW RES. CTR. (Sept. 24, 2018) https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents/

their house.[157] This population includes those who receive Medicare, many of whom are elderly.[158] The reasons for being homebound include living in a walk-up apartment, no longer driving, or lacking mobility due to obesity.[159] Researchers suggest that this population with double within the next fifty years.[160] These people are especially vulnerable because they "have high disease and symptom rates, substantial functional limitations, and higher mortality than the non-homebound."[161]

Each of these groups—COVID-19 lockdown workers, remote workers, stay-at-home parents, and the homebound—could be subject to warrantless prolonged surveillance because of the Seventh Circuit's decision in *Tuggle*. That surveillance could potentially capture nearly every activity that person may engage in because they are almost always home. By doing so, it is possible to learn many intimate details about that person's life, which is impermissible without a warrant under the Supreme Court's rulings in Fourth Amendment cases.[162]

CONCLUSION

The use of camera surveillance without a warrant should be limited. While a bright line rule that addresses how long is acceptable will never be an appropriate way to handle prolonged surveillance, eighteen months is certainly longer than what society would consider reasonable. As technology develops, courts should be cognizant that Fourth Amendment analysis develops with it. Rather than strictly adhering to precedent regarding outdated technology, judges and

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[157] Roberta Alexander, *Researchers Say Number of Older 'Shut-Ins' Is a Major Concern*, HEALTHLINE (Aug. 1, 2019) https://www.healthline.com/health-news/researchers-say-number-of-older-shut-ins-is-a-major-concern-053015#Health-Issues-for-the-Homebound

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *See, e.g.*, Carpenter, 585 U.S. __, 138 S.Ct. 2206 (2018); Jones, 565 U.S. 400 (2012); Kyllo, 533 U.S. 27 (2001).

justices should adapt their analysis in order not to sacrifice individual rights as technology evolves.