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Privacy in the Panopticon: The Fourth Amendment Case Against Perpetual Surveillance

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Cover Page Footnote

I would like to thank my parents, Kim and Frank, and my brother Michael, for their support.

PRIVACY IN THE PANOPTICON: THE FOURTH AMENDMENT CASE AGAINST PERPETUAL SURVEILLANCE

*John P. Jarecki**

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“Our society is one not of spectacle, but of surveillance”¹

I. INTRODUCTION

Contemporary approaches to punishment and justice fluctuate as society evolves, discreetly keeping pace with the impressive speed of technological advancement. In his groundbreaking 1975 book, *Discipline and Punish: The Birth of the Prison*, French philosopher Michel Foucault presented a critical analysis of several theoretical societal shifts which occurred in Western penal institutions during the modern age.² Foucault delineated three stages of gradual evolution.³ In the first, and perhaps most primitive, punishment largely manifested as a visible display of corporal harm

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¹ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 217 (Alan Sheridan trans., Pantheon Books 1977).

² See generally *id.*

³ *Id.* at 1, 71, 133.

to the body.⁴ Physical mutilations and disfigurement, inflicted on those who committed violent crimes, were the default mode of state punitive action.⁵ Next, partly attributable to humanistic concerns, publicity of punishment became less common; discipline aimed at the mind, not the body, became preferred—the stockade was traded for the windowless cell.⁶ Finally, “self-regulation” emerged as society began to internalize punishment.⁷ For Foucault, this last stage is the result of a connection between knowledge and power, “as knowledge grows, the techniques of discipline and surveillance multiply, such that power takes on an ever-increasing number of forms and circulates throughout society everywhere without originating in any single location or source.”⁸ At the height of a complete proliferation of power, where systems of justice are indistinguishable from their surroundings and are essentially self-executing, societies will finally create, borrowing Foucault’s terminology, the “disciplinary individual”—a new kind of citizen whose obedience to the state is as disturbing as it is absolute.⁹

Foucault illustrated the final stage through writings on the Panopticon, a fictional prison design first described in Jeremy Bentham’s 1791 book *Panopticon, or The Inspection House* and in other writings.¹⁰ Since, hotly contested debates about the Panopticon have become the center of many philosophical circles.¹¹ Bentham described the Panopticon’s structural design:

The Building circular – an iron cage, glazed – a glass lantern about the size of Ranelagh – The Prisoners in their Cells, occupying the Circumference – The Officers, the Centre. By Blinds, and other contrivances, the Inspectors concealed from the observation of the Prisoners: hence the sentiment of a sort of invisible omnipresence. – The whole circuit reviewable with little, or, if necessary, without any, change of place.¹²

For Foucault, “[t]he exercise of discipline presupposes a mechanism that coerces by means of observation[.]”¹³ Prisoners could never be sure if they were being watched by guards and would therefore assume they always

⁴ FOUCAULT, *supra* note 1, at 3–31.

⁵ *Id.*

⁶ *Id.* at 73–74.

⁷ *Id.* at 136–38.

⁸ SCOTT APPELROUTH & LAURA DESFOR EDLES, SOCIOLOGICAL THEORY IN THE CONTEMPORARY ERA 395 (2010).

⁹ FOUCAULT, *supra* note 1, at 227.

¹⁰ See generally JEREMY BENTHAM, PANOPTICON, OR THE INSPECTION HOUSE (1791).

¹¹ See e.g., Scott O’Reilly, *Philosophy and the Panopticon*, PHILOSOPHY NOW (2002), https://philosophynow.org/issues/36/Philosophy_and_the_Panopticon.

¹² JEREMY BENTHAM, PROPOSAL FOR A NEW AND LESS EXPENSIVE MODE OF EMPLOYING AND REFORMING CONVICTS 3 (1796).

¹³ FOUCAULT, *supra* note 1, at 170.

were; accordingly, “the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power.”¹⁴

Of course, Foucault’s concept of “Panopticism” goes far beyond the physical design of effective prison facilities. Indeed, it speaks to a new, autonomous political and legal system that states may employ to ensure compliance with state governance. Twenty-first century America is Foucault’s final stage made manifest. Today, surveillance technologies empower state transformation of community infrastructure to turn communities into instruments of compliance.¹⁵

A brief anecdote illustrates the prolific power of state policing technology. Imagine you are a criminal in the present moment. You call a dense urban landscape somewhere in the United States home. Until now, your life has been plagued by a series of unfortunate circumstances and to make ends meet you have resorted to selling illicit drugs. You are careful, though. You calculate when to conduct drug transactions, only scheduling them at night to mitigate the chance of your neighbors catching on. You keep your curtains drawn to guard against the passive glances of bored retirees across the street. Perhaps you leave your apartment only when you are certain there are no cars passing by whose drivers might catch a glimpse of you and later testify to your movements. To be sure, such hermit-like measures make Dostoevsky’s *Raskolnikov* seem like a socialite in comparison. Despite these exhaustive measures, the government has been surveilling you.

To your surprise, the FBI has been watching your residence carefully through the tireless and all-seeing lens of a camera mounted to a utility pole above your doorstep. What is more, two similar cameras, positioned to capture different vantages, have been deployed—recording activity around your apartment for at least the past eighteen months. Using these advanced technologies, law enforcement has a sophisticated, near-comprehensive record of your movements: when you enter your home, when you leave, with what, and with whom, over the past year and a half. “Wouldn’t they need a warrant for something like that?” you may ask in exasperated disbelief. In the end, despite your lawyer’s best efforts, the court answers in the negative. Although the court acknowledges the extended use of cameras in your case is concerning, it holds that the incessant, perpetual, round-the-clock surveillance of your home did not constitute a search under the Fourth Amendment. No warrant was needed. You prepare to serve a lengthy prison sentence.

The scenario above is not a depiction of some future Orwellian dystopia. A nearly identical set of events played out in the Seventh Circuit’s

¹⁴ *Id.* at 201.

¹⁵ *See id.* at 160.

July 2021 decision in *United States v. Tuggle*.¹⁶ In *Tuggle*, Travis Tuggle was charged with two offenses: count one was conspiracy to distribute and possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A), and count two was maintaining a drug-involved premises in violation of 21 U.S.C. § 856.¹⁷ The prosecution's case relied heavily on video footage obtained from three cameras mounted to utility poles located on public property near Tuggle's residence.¹⁸ Although the government surveilled Tuggle nonstop for eighteen months without a warrant, his motion to suppress the footage, which asserted its acquisition violated the Fourth Amendment, was unsuccessful.¹⁹

Rapid technological developments have made omnipresent cameras and recording devices the status quo. Yet, this Comment will specifically focus on unwarranted, lengthy surveillance conducted by law enforcement and targeted at a specific defendant. Even at first pass, the surveillance conducted in *Tuggle* is boldly distinct from automobile surveillance by pesky traffic cameras. In *Tuggle*, the devices used were set up by law enforcement to be trained on Tuggle individually and pointed towards his home.²⁰ As this Comment illustrates, however, the more immediate concern is the sheer length of time the cameras were focused on Tuggle's residence and the "perpetual nature" of the observance.

This issue could not be timelier. With doorbell cameras and other videotaping equipment becoming ubiquitous in our everyday landscapes, law enforcement will surely rely on similar devices to assist in prosecuting cases.²¹ In turn, defendants will more frequently challenge the admissibility of this evidence. The solemn responsibility of protecting privacy rights in this new, panoptic landscape will undoubtedly fall to the Supreme Court. This Comment explores the necessity of greater privacy protections in this area and argues for a stronger commitment to ensuring they are not infringed, even as technological developments make this kind of surveillance more likely.

Before considering the legal or practical concerns at the heart of perpetual surveillance, it is worth recognizing the split of intuitions that exists.

¹⁶ See generally *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021).

¹⁷ *United States v. Tuggle*, No. 16-CR-20070-JES-JEH, 2019 WL 3915998, at *1 (C.D. Ill. Aug. 19, 2019), *aff'd*, 4 F.4th 505 (7th Cir. 2021).

¹⁸ *Tuggle*, 4 F.4th at 510.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Kevin Strom, *Research on the Impact of Technology on Policing Strategy in the 21st Century*, NAT'L CRIM. JUST. REFERENCE SERV. 2.3–2.4 (May 2016), <https://www.ojp.gov/pdffiles1/nij/grants/251140.pdf>. According to that study, "[r]esults demonstrate that technology use is expected to increase not only among the largest agencies but across most U.S. LEAs. The technologies expected to increase most sharply were predictive analytics software (15% of all agencies and 22% of large agencies have plans to obtain and use within 2 years), BWCs (15% and 17%, respectively), and in-car electronic ticketing (11% and 38%, respectively). Also notable were the intentions to acquire next-generation 9-1-1 (14% and 11%, respectively) or unmanned aerial vehicles (UAVs, or drones) (7% and 9%, respectively)." *Id.* at 2.2.

On the one hand, some may believe that a truly guilty defendant should be found guilty, regardless of what iniquitous tactics law enforcement might utilize to establish criminal liability.²² Further, there is some empirical evidence to suggest the presence of surveillance technologies deter criminals from committing unlawful actions or that community members feel safer under their gaze.²³ Others, however, might rightly focus on the unconstitutionality of excessive surveillance and express concern over what a government's rampant use of extended monitoring may mean for law-abiding citizens.²⁴ To be sure, the latter view may be adopted without engaging in some tragic misadventure into conspiracy thinking. The fundamental question becomes: what is lost when citizens live in a perpetual state of surveillance?²⁵ This Comment argues that citizens lose a great deal

²² "It is of paramount importance that law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science. Such real evidence has the inestimable value of cogency and objectivity. It is in large measure not affected by the subjective defects of other testimony. It enables the guilty to be detected and the innocent to be rapidly eliminated from enquiries." Regina v. Chief Constable of South Yorkshire Police [2004] UKHL 39 (appeal taken from Eng.). See generally Katerina Hadjimatheou, *Surveillance Technologies, Wrongful Criminalisation, and the Presumption of Innocence*, 30 PHIL. & TECH. 39, 39–54 (2017). The position that surveillance technologies might help exonerate the innocent is admittedly compelling. The presumption of innocence is axiomatic to basic principles of law across its development. *Id.* at 41. As Blackstone's ratio states, "the law holds that it is better that ten guilty persons escape, than that one innocent suffer." Jeffrey Reiman & Ernest Van Den Haag, *On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con*, 7 SOC. PHIL. & POL. 226, 226 (1990).

²³ Brandon C. Welsh & David P. Farrington, *Public Area CCTV and Crime Prevention: An Updated Systematic Review and Meta-Analysis*, 26 JUST. Q. 716, 717 (2009). While studies have generally demonstrated the tendency of technologies like CCTV to deter criminals in specific locations from committing specific crimes, the deterrence effect is not absolute and does not outweigh the inherent concerns arising from perpetual surveillance which are described in this Comment. Manne Gerell, *Hot Spot Policing With Actively Monitored CCTV Cameras: Does it Reduce Assaults in Public Places?*, 26 (2) INT'L CRIM. JUST. REV. 187, 190 (2016). For instance, one study found that a combination of increased lighting and CCTV was needed to reduce instances of crimes against property but that the same did not have any effect on the instances of violent crimes. Brandon C. Welsh et al., *Effectiveness and Social Costs of Public Area Surveillance for Crime Prevention*, 11 ANN. REV. L. & SOC. SCI. 111, 120 (2015). Another study found that CCTV is effective mostly in the context of "car parks," but the study qualified that cameras are most effective when combined with other tools to reduce property crimes. *Id.* at 117. Notably, yet another study on the deterrence value of CCTV concluded that these technologies were "not a strategy in-and-of themselves." Aundrea Cameron et al., *Measuring the Effects of Video Surveillance on Crime in Los Angeles*, USC SCH. OF POL'Y, PLAN., AND DEV. 53 (May 5, 2008), <https://popcenter.asu.edu/sites/default/files/210-Cameron.pdf>.

²⁴ See generally Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1934–35, 1956 (2013).

²⁵ For instance, it is well documented that government surveillance technologies have a disproportionate impact on minority groups, even in cases where the technology was deployed in part to guard against such disparate impacts. *High-Tech Surveillance Amplifies Police Bias and Overreach*, THE CONVERSATION (June 12, 2020, 8:15 am) <https://theconversation.com/high-tech-surveillance-amplifies-police-bias-and-overreach-140225>. In 2014, following the police killing of Michael Brown in Ferguson, Missouri, the already strained relations between police and the communities they operated in were at a fever pitch and the subsequent deaths of Michael Brown, Eric Garner, Philando Castile, Tamir Rice, Walter Scott, Sandra Bland, Freddie Gray and George Floyd instigated protests and cries for racial justice nationwide. *Id.* In an attempt to ease these conditions, many police departments turned to body cameras to demonstrate a commitment to accountable policing and other, more advanced surveillance technologies were employed to achieve similar ends. *Id.* Unfortunately, the implementation of these devices has not had its desired effect. Rather, "[t]he harms of big data policing have been repeatedly exposed. Programs that attempted to predict individuals' behaviors in Chicago and Los Angeles have been shut down after devastating audits cataloged their discriminatory impact and practical failure. Place-based predictive systems have been shut down in Los Angeles and other cities that initially had adopted the technology.

when subjected to these conditions. Privacy rights are axiomatic to a free society, and the evidence of this fact is enshrined in our Constitution and reflected in our legal traditions.²⁶

The legal right to privacy is entrenched in American jurisprudence.²⁷ Twenty-six years before joining the United States Supreme Court, a young Louis Brandeis wrote:

[r]ecent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right “to be let alone” . . . Numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.”²⁸

Later, Brandeis published *The Right to Privacy* in the *Harvard Law Review*, the first major legal publication concerning the right to privacy.²⁹ While on the Supreme Court, he became the first Justice to divine a legal right to privacy in the Fourth Amendment.³⁰ Brandeis’ prophetic concern about the relationship between technological advancement and the degradation of privacy rights lies at the heart of the problem of perpetual surveillance.

The law of continuous digital surveillance has rightly grown around Fourth Amendment jurisprudence.³¹ The *Tuggle* court grappled, rather unhappily, with the issue of whether the defendant’s constitutional rights had been infringed; it expressed a deep concern over the length of the surveillance

Scandals involving facial recognition, social network analysis technology and large-scale sensor surveillance serve as a warning that technology cannot address the deeper issues of race, power and privacy that lie at the heart of modern-day policing.” *Id.* It should also be noted that body cameras only serve as a check on police action in the field if they actually record what transpires during police-community member interactions, and in an alarming number of cases, the footage recorded does not do so. Elizabeth Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. 19, 30-1, (2017). <https://www.nyulawreview.org/online-features/the-undue-influence-of-surveillance-technology-companies-on-policing/>. In response to the most recent instances of highly publicized police killings and the subsequent calls to “defund the police,” many high-profile public interest groups are concerned that, even if police units do receive less funding, they may turn to surveillance technologies which may be a less expensive alternative to on-the-ground police work. Chad Marlow, *Stop the Police Surveillance State Too*, AM. C.L. UNION (Aug. 19, 2020) <https://www.aclu.org/news/criminal-law-reform/stop-the-police-surveillance-state-too/>. For example, the ACLU voiced concern about the use of such “persistent surveillance” arguing that “[i]ncreasing the mass surveillance of communities of color will increasingly make residents feel like they live in an open-air prison. Even worse, it would place those residents at extreme risk, because all police encounters begin with surveillance. Increased community surveillance always leads to increased encounters between residents and the police, and as we know too well, more police encounters with Black people lead to more injury and death. In other words, the rise in this kind of persistent surveillance will help maintain or further increase the racial disparities in whom police officers harass, arrest, and kill.” *Id.*

²⁶ See U. S. CONST. amend. IV; see also *infra* Section II.i.

²⁷ See U. S. CONST. amend. IV; see also *infra* Section II.i.

²⁸ Leah Burrows, *To be let Alone: Brandeis Foresaw Privacy Problems*, BRANDEIS NOW (2013), <https://www.brandeis.edu/now/2013/july/privacy.html>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *United States v. Tuggle*, 4 F.4th 505, 510, 527 (7th Cir. 2021).

Tuggle was subjected to but was ultimately unwilling to create a circuit split or defy *stare decisis*.³² One should not, however, read this hesitancy to suggest that the case law in this area is a monolith standing in favor of unfettered perpetual surveillance. The Fifth Circuit, as well as the Colorado and South Dakota Supreme Courts, currently maintain that extended surveillance qualifies as a Fourth Amendment search.³³ Further, several Justices of the United States Supreme Court have flirted, at times, with concepts such as the *Mosaic Theory* which acknowledge that lengthy surveillance may be distinguished from shorter periods of digital monitoring because it yields a more complete “mosaic” of the subject’s activity in a manner shorter-spanned observations do not.³⁴ Notwithstanding the current state of the law in this area, unwarranted extended surveillance by law enforcement poses serious constitutional harm to defendants that will only balloon as technology becomes more advanced.³⁵ This Comment explores these topics in a more nuanced fashion. Section II offers a history of the Fourth Amendment in the context of surveillance and reviews the development and pitfalls of the famous *Katz* test. It also recounts how courts have fractured in their efforts to apply *Katz* to cases involving lengthy video monitoring and considers the oft-cited *Mosaic Theory* in more detail. Section III argues that the United States Supreme Court, as the final arbiter of disputes among the circuit courts, is in the best position to reboot the now wearied *Katz* test to preserve privacy rights in the modern landscape and argues that *Katz* should be replaced with a test better suited to contend with the challenges of perpetual video surveillance in the modern age. Finally, Section IV briefly concludes.

II. BACKGROUND

A. *The Effect of Katz on Fourth Amendment Protections*

The Fourth Amendment to the United States Constitution provides that: “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”³⁶ A chief objective of the Framers was “to place obstacles in the way of a too permeating police surveillance”³⁷ Yet, until recently, it was largely understood the Fourth Amendment only protects against unreasonable

³² *Id.* at 522, 526; Tim Cushing, *Seventh Circuit Says (Reluctantly) That 18 Months Of Pole-Mounted Camera Surveillance Isn’t Unconstitutional*, TECHDIRT (Jul. 21, 2021), <https://www.techdirt.com/2021/07/21/seventh-circuit-says-reluctantly-that-18-months-pole-mounted-camera-surveillance-isnt-unconstitutional/>.

³³ Petition for Writ of Certiorari, at 3, *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1107.

³⁴ See generally Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012).

³⁵ *Id.* at 527–28.

³⁶ U.S. CONST. amend. IV.

³⁷ *United States v. Di Re*, 332 U.S. 581, 595 (1948).

searches involving physical touch, or in other words, common law trespass.³⁸ Eventually, technological advances enabled law enforcement officers to conduct invasive searches without the need for physical inspection. The Court explored the full scope of Fourth Amendment protections in the context of these non-touch searches in *Katz v. United States*.³⁹ In *Katz*, the Supreme Court held that the government's electronic surveillance of a defendant in a public telephone booth violated the privacy rights he reasonably relied on while using the booth, and thus constituted a "search" under the Fourth Amendment.⁴⁰ The Court found it legally insignificant that the electronic device deployed did not penetrate the physical wall of the booth, thus heralding a legally cognized expectation of privacy not dependent on the existence of tangible boundaries.⁴¹

Concurring in *Katz*, Justice Harlan articulated the now-famous *Katz* test.⁴² The test requires courts to engage in a two-part analysis to determine whether a defendant has a reasonable expectation of privacy.⁴³ It requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁴⁴ Unfortunately, the same framework intended to reboot the Fourth Amendment and prevent it from becoming a dead-letter has not only failed at its task but is actively contributing to the erosion of privacy rights as technologies become more advanced.⁴⁵ As the *Tuggle* court artfully noted, the *Katz* test has resulted in a "perilous circularity."⁴⁶ Due to the current trend in applying the *Katz* test, which turns heavily on a defendant's expectation of privacy, a court's ultimate determination as to whether a search warrant is needed will depend on the degree the technology has become widely available.⁴⁷ In other words, "as society's uptake of a new technology waxes . . . expectations of privacy in those technologies wane."⁴⁸ From a privacy perspective, this self-executing erosion of Fourth Amendment rights certainly appears more bug than feature. After all, by the time a technology is widespread enough to the point that a defendant might make use of it, they will be presumed to have relinquished any expectation of privacy. As the *Tuggle* court noted:

[a]s long as the government moves discreetly with the times,
its use of advanced technologies will likely not breach

³⁸ *United States v. Tuggle*, 4 F.4th 505, 510 (7th Cir. 2021).

³⁹ See generally *Katz v. United States*, 389 U.S. 347 (1967).

⁴⁰ *Id.* at 353.

⁴¹ *Id.*

⁴² *Id.* at 361 (Harlan, J., concurring).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *United States v. Tuggle*, 4 F.4th 505, 510 (7th Cir. 2021).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

society's reconstituted (non)expectations of privacy. The upshot: 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.⁴⁹

In light of these facts, *Katz* today certainly appears to paint a rather bleak picture of privacy rights in the United States. Yet, the Supreme Court has taken positions which strengthened privacy rights under *Katz*.⁵⁰ In 2018, for instance, the Court held in *Carpenter v. United States* that an individual may have a reasonable expectation of privacy over location data collected by cell-site location information.⁵¹ In addition, the Court found that seven days of historical cell-site location information did constitute a search under the Fourth Amendment.⁵² A primary focus in *Carpenter* was the fact the defendant's cell phone data was collected and stored by a third party.⁵³ However, in highlighting the distinctions between traditional witnesses of crime and wireless cell carriers, Chief Justice John Roberts made several observations salient to a discussion of lengthy surveillance.⁵⁴ The Chief Justice noted: “[u]nlike the nosy neighbor who keeps an eye on comings and goings, [cell towers] are ever alert, and their memory is nearly infallible.”⁵⁵ Like cell towers, the memory of pole cameras is immaculate and irrefutable, and there are constitutional dangers inherent in relying on both technologies without a proper search warrant.

Another important case which has somewhat restrained the government's ability to use advanced technologies in their unwarranted surveillance efforts is *Kyllo v. United States*. In *Kyllo*, police used a thermal-imaging device trained at Kyllo's home to determine if the heat signatures from the structure were an indication of the use of heat lamps often used for indoor marijuana cultivation.⁵⁶ The images showed that Kyllo's roof and one particular side wall was hotter than the rest of the home; this thermal imaging formed the probable cause basis to issue a search warrant for the dwelling.⁵⁷ Upon inspection, the police found a marijuana-growing operation.⁵⁸ The Court held that a surveillance is a search under the Fourth Amendment where “the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without

⁴⁹ *Id.*

⁵⁰ *See generally* *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

⁵¹ *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

⁵² *Id.*

⁵³ *See id.* at 2212–13.

⁵⁴ *Id.* at 2219.

⁵⁵ *Id.*

⁵⁶ *Kyllo v. United States*, 533 U.S. 27, 30 (2001).

⁵⁷ *Id.*

⁵⁸ *Id.*

physical intrusion”⁵⁹ Since the decision, *Kyllo* has played a crucial role in curbing the use of such technologies in the absence of a search warrant.

B. A Mix of Decisions in the Realm of Unwarranted, Lengthy Video Surveillance

A shallow canvassing of circuit court, Fourth Amendment case law seems to suggest that unwarranted lengthy government surveillance is permissible in all jurisdictions. Indeed, the First, Sixth, and Seventh Circuits maintain that warrantless, lengthy surveillance of a home does not implicate Fourth Amendment concerns.⁶⁰ Generally speaking, courts have found that a camera which is mounted in a position where an officer would have a right to be physically does not undermine a defendant’s legitimate expectation of privacy, and therefore, does not necessitate a warrant.⁶¹ The Supreme Court has also held that “[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them”⁶² Many courts have likewise considered pole cameras to be mere extensions of a police officer’s senses, like binoculars or a similar tool.⁶³ As will be described in greater detail, however, an increasing number of courts find pole cameras to be unreasonable when they perpetually and surreptitiously surveil hidden areas falling within the curtilage of the home, such as in the Fifth Circuit case of *United States v. Cuevas-Sanchez*.⁶⁴ Although the Seventh Circuit *Tuggle* decision underplayed *ad nauseam* the degree to which some circuit courts and several state supreme courts have disagreed, it is nevertheless true that more circuit courts than not permit the practice.⁶⁵

The Sixth Circuit first endorsed an instance of lengthy government surveillance in *United States v. Houston*.⁶⁶ In that case, law enforcement verified the constitutionality of pole camera surveillance which lasted ten weeks.⁶⁷ The case centered around Rocky Houston’s conviction of “being a felon in possession of a firearm” in violation of federal law while on his brother’s farm in rural Tennessee.⁶⁸ Law enforcement officers installed a stationary video camera, without a warrant, atop a public utility pole located approximately 200 yards away from the property.⁶⁹ The footage captured

⁵⁹ *Id.* at 40.

⁶⁰ *United States v. Tuggle*, 4 F.4th 505, 511 (7th Cir. 2021).

⁶¹ *United States v. Jackson*, 213 F.3d 1269, 1281 (10th Cir. 2000), *cert. denied*, 531 U.S. 1033 (2000); *see also*, *State v. Augafa*, 922 P.2d 723, 734 (Haw. Ct. App. 1999).

⁶² *United States v. Knotts*, 460 U.S. 276, 282 (1983).

⁶³ *United States v. McIver*, 186 F.3d 1119, 1125 (9th Cir. 1999) (citing *United States v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978); and then citing *United States v. Knotts*, 460 U.S. 276, 284 (1983)).

⁶⁴ *United States v. Cuevas-Sanchez* 821 F.2d 248, 251 (5th Cir. 1987).

⁶⁵ *United States v. Tuggle*, 4 F.4th 505, 513 (7th Cir. 2021).

⁶⁶ *Id.* at 521 citing *United States v. Houston*, 813 F.3d 282, 285 (6th Cir. 2016).

⁶⁷ *Houston*, 813 F.3d at 285.

⁶⁸ *Id.*

⁶⁹ *Id.*

Houston in possession of the firearms and was used against him.⁷⁰ Interestingly, agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) first tried to conduct their surveillance simply by driving by the property.⁷¹ They elected not to continue this, however, because they were unable to record for any substantial length of time because the agents’ vehicles “[stuck] out like a sore thumb” on the Houston’s property.⁷² At the direction of the ATF, the agents then turned to the use of unwarranted pole cameras.⁷³ The surveillance camera sent its recordings to law enforcement through an encrypted signal and “could move left and right and had a zoom function.”⁷⁴ The agents focused the camera on Houston’s brother’s trailer and a barn situated close by because they believed that Houston spent a majority of his time in these locations.⁷⁵

The Sixth Circuit did not find the surveillance violated the Fourth Amendment “because Houston had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads.”⁷⁶ The court also all but disregarded the constitutional significance of the length of the surveillance.⁷⁷ The Sixth Circuit opined that “the ATF theoretically could have staffed an agent disguised as a construction worker to sit atop the pole or perhaps dressed an agent in camouflage to observe the farm from the ground level for ten weeks[,]” but that “the *Fourth Amendment* does not require law enforcement to go to such lengths when more efficient methods are available.”⁷⁸ The Sixth Circuit recently reaffirmed this holding in *United States v. Trice*.⁷⁹

The First Circuit has also historically approved the practice. In *United States v. Bucci*, the court considered the surveillance of defendant Sean Bucci, who was convicted of, *inter alia*, conspiring to possess 100 kilograms of marijuana with intent to distribute and possessing 100 kilograms of marijuana with intent to distribute.⁸⁰ Law enforcement then installed a video camera on

⁷⁰ *Id.*

⁷¹ *Id.* at 286.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 287–88.

⁷⁷ *Id.* at 288.

⁷⁸ *Id.* at 289.

⁷⁹ *United States v. Trice*, 966 F.3d 506, 516 (6th Cir. 2020). In *Trice*, law enforcement entered the common area of the defendant’s apartment building and installed a camera disguised as a smoke detector on the wall near the front door of his apartment. *Id.* at 509. The camera had a motion detector function and was set up to activate whenever the door to his apartment opened. *Id.* The camera recorded the defendant as he went in and out of his apartment, and the resulting footage was used in an affidavit in support of a search warrant. *Id.* Law enforcement executed the warrant and seized drugs and other paraphernalia which were found to be consistent with distribution. *Id.* The defendant argued, unsuccessfully, that the use of the camera violated his Fourth Amendment rights. *Id.*

⁸⁰ *United States v. Bucci*, 582 F.3d 108, 112 (1st Cir. 2009).

a utility pole across the street from Bucci's home and surveilled the front of his house for a total of eight months without a warrant.⁸¹ The camera was set up to capture activity taking place on Bucci's driveway and garage door, and the agents could see inside the garage when the door was open.⁸² Unlike the device deployed against Houston, the camera here "had no remote capabilities that allowed agents to either change the view or magnification of the camera without being physically at the scene."⁸³ The court found that Bucci had failed to satisfy the objective and subjective expectations of privacy contemplated by the *Katz* test.⁸⁴ The court reasoned that Bucci failed to demonstrate a reasonable expectation of privacy over the front of his home and those areas which were observed by the camera.⁸⁵ The court noted that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public[]" and that there were "no fences, gates or shrubbery located in front of [Bucci's residence] that obstruct the view of the driveway or the garage from the street."⁸⁶ Following the Supreme Court's decision in *Carpenter*, a First Circuit panel reaffirmed *Bucci* in light of that holding which, as described prior, placed restrictions on unwarranted cell-tower surveillance.⁸⁷

The Fifth Circuit, on the other hand, reached the opposite conclusion and took somewhat of a stance against lengthy surveillance when it was confronted with these issues in *United States v. Cuevas-Sanchez*.⁸⁸ In that case, the government used a pole camera to observe the defendant's property, some of which was within a fenced-in backyard, for around two months which resulted in the defendant being convicted of possession of marijuana with an intent to distribute.⁸⁹ In the early months of 1986, federal agents began to suspect that the defendant's home was being used as a "drop house" for drug traffickers.⁹⁰ The prosecuting attorney then sought an order authorizing surveillance of the exterior of the property from the district court.⁹¹ In support of this order, the prosecuting attorney provided an affidavit which contained false information about the defendant and asserted that he had been arrested for a prior cocaine charge.⁹² Further, this affidavit mentioned that more conventional surveillance methods had been deployed but were

⁸¹ *United States v. Bucci*, 03-CR-10220-MEL, 2004 U.S. Dist. LEXIS 32452, at *3-4,12 (D. Mass. Dec. 22, 2004).

⁸² *Bucci*, 582 F.3d at 116.

⁸³ *Id.*

⁸⁴ *Id.* at 116-17.

⁸⁵ *Id.* at 116.

⁸⁶ *Id.* at 116-17.

⁸⁷ *United States v. Moore-Bush*, 36 F. 4th 320, 359-60 (2022) citing *Bucci* at 124. *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018).

⁸⁸ *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987).

⁸⁹ *Id.* at 249-250.

⁹⁰ *Id.* at 249.

⁹¹ *Id.*

⁹² *Id.*

unsuccessful.⁹³ The order was granted, although it limited the surveillance to a maximum of thirty days and directed law enforcement to minimize the “observation of innocent conduct and to discontinue the surveillance when none of the suspected participants were on the premises.”⁹⁴ The camera was then installed and was trained to look over a ten-foot fence which the defendant had erected.⁹⁵ The initial thirty day order was eventually extended, and based off of the inculpatory footage captured by the cameras, law enforcement conducted a warrantless search of Cuevas’ car and found twenty-two pounds of marijuana.⁹⁶

The court found that the surveillance conducted in Cuevas-Sanchez was a search under the Fourth Amendment.⁹⁷ Applying the Katz test, it seemed evident to the court that Cuevas had manifested the requisite subjective expectation of privacy in his backyard because he erected fences around the property and kept the illegal activity away from the views of passersby.⁹⁸ Turning next to the objective component of whether society could find the defendant’s subjective expectation of privacy to be reasonable, the court said yes because “[t]his type of surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state.”⁹⁹ Although the Fifth Circuit’s analysis held that the government’s extended use of pole cameras constituted a search under the Fourth Amendment, it found that the district court complied with the normal procedures for granting the order and therefore protected the defendant’s Fourth Amendment rights.¹⁰⁰ Further, this decision is often thought of as being limited by the fact that the defendant had erected an unusually tall privacy fence and the surveillance did not target views observable to a passerby.¹⁰¹ As a result, *Cuevas-Sanchez* did not pave the way for a complete prohibition on the government’s use of extended video monitoring.¹⁰²

Several state courts of last resort have also considered this issue and found it constituted a search under the Fourth Amendment. For instance, in *State v. Jones*, the South Dakota Supreme Court found there to be a search under facts that are strikingly like those in *Tuggle*.¹⁰³ In *Jones*, a pole camera was installed on a public streetlight near the defendant’s home the same day that officers received a tip that a known drug dealer was visiting the defendant’s home to acquire marijuana.¹⁰⁴ For about two months, the camera

⁹³ *Id.*

⁹⁴ *Id.* at 249–250.

⁹⁵ *Id.* at 250.

⁹⁶ *Id.*

⁹⁷ *Id.* at 251.

⁹⁸ *Id.* at 251.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 252.

¹⁰¹ *United States v. Tuggle*, 4 F.4th 505, 522 (7th Cir. 2021).

¹⁰² *Id.*

¹⁰³ *State v. Jones*, 903 N.W.2d 101, 113 (S.D. 2017).

¹⁰⁴ *Id.* at 103–04.

recorded the defendant's activities outside of his home, and officers later used this footage to obtain a search warrant which later resulted in his arrest.¹⁰⁵ Considering the first step of *Katz*, the court found that Jones did have a subjective expectation of privacy even though he apparently made no efforts "to conceal the front of his home from public observation."¹⁰⁶ Despite his lack of concealment, Jones successfully claimed that he maintained a subjective expectation of privacy in the "aggregate" of his movements outside of his home.¹⁰⁷ Particularly, "he asserted that he expected to be free from 24/7 targeted, long-term observation of his comings and goings from his home, his guests' comings and goings, the types of cars coming and going from his home, etc."¹⁰⁸ The court agreed that Jones had such an expectation, noting that to find otherwise would be "to ignore the method of surveillance used in this case and look only to whether Jones attempted to conceal every activity outside his home."¹⁰⁹ The court also referenced the harms posed by long-term surveillance in particular, noting that:

traditional law enforcement surveillance techniques cannot accumulate the vast array of information that targeted, long-term video surveillance can capture. The information gathered through the use of targeted, long-term video surveillance will necessarily include a mosaic of intimate details of the person's private life and associations. At a minimum, it could reveal who enters and exits the home, the time of their arrival and departure, the license plates of their cars, the activities of the occupant's children and friends entering the home¹¹⁰

Recently, an *en banc* Colorado Supreme Court has joined the choir of decisions finding Fourth Amendment searches in cases of extended pole camera surveillance.¹¹¹ In *People v. Tafoya*, decided on September 13, 2021, a warrantless pole camera was mounted by law enforcement near the home of Rafael Tafoya, who was suspected of drug trafficking.¹¹² The camera captured three months of footage of Tafoya's property, including areas in his backyard which would have otherwise been protected by a six-foot-high privacy fence.¹¹³ The camera had the ability to "pan left and right, tilt up and down, and zoom in and out—all features that police could control while viewing the footage live."¹¹⁴ Using the footage obtained from the pole

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 110–11.

¹⁰⁷ *Id.* at 110.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See generally *People v. Tafoya*, 494 P.3d 613 (Colo. 2021).

¹¹² *Id.* at 614.

¹¹³ *Id.*

¹¹⁴ *Id.*

camera, the police obtained a warrant and searched Tafoya's property.¹¹⁵ During the search, law enforcement found large quantities of methamphetamine and cocaine, and Tafoya was charged with two counts of possession with intent to distribute and two counts of conspiracy.¹¹⁶ On appeal to the Colorado Supreme Court, the state argued that Tafoya could not have a reasonable expectation of privacy because it was possible for a passerby to peer through the gaps in Tafoya's privacy fence.¹¹⁷ The court disagreed, finding that the "public exposure" question was not the dispositive issue of the case but rather that the crux of the issue was the long-term nature of the surveillance.¹¹⁸ Finally, when considering the United States Supreme Court's pronouncements and concurrences on the issue, the Colorado Supreme Court noted that "the pole camera surveillance at issue here—continuous surveillance of Tafoya's curtilage for more than three months—shares many of the troubling attributes of GPS tracking that concerned Justice Sotomayor in *Jones*."¹¹⁹ The Colorado Supreme Court went on to write that

"[t]ogether, Jones and Carpenter suggest that when government conduct involves continuous, long-term surveillance, it implicates a reasonable expectation of privacy. Put simply, the duration, continuity, and nature of surveillance matter when considering all the facts and circumstances in a particular case."¹²⁰

Although the case law in this area fails to identify a clear answer to the constitutional permissibility of long-term surveillance, it is clear that a genuine split of authority exists and that the Supreme Court of the United States or Congress must step in to resolve this conflict and protect Fourth Amendment rights in this space. Travis Tuggle's Petition for a Writ of Certiorari was denied by the Supreme Court on February 22, 2022.¹²¹ In doing so, the Court refused to consider whether long-term, continuous, and surreptitious video surveillance of a home and its curtilage constitutes a search under the Fourth Amendment, an issue that was ripe for review.¹²² Time will tell if the Court takes the opportunity presented by a future case to settle this crucial constitutional question, or if Congress must take up this task. To be sure, the Court's refusal to reconsider *Tuggle* is by no means dispositive of the issue of perpetual surveillance.¹²³ Indeed, the Court's ideological

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 623.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 622.

¹²⁰ *Id.* at 620.

¹²¹ *Tuggle v. United States*, 142 S. Ct. 1107, 1107 (2022).

¹²² Gillian Vernick, *Supreme Court Asked to Consider Whether Long-term Pole Camera Surveillance Constitutes Search Under Fourth Amendment*, REP. COMM. FOR FREEDOM OF THE PRESS (Oct. 18, 2021), <https://www.rcfp.org/scotus-pole-camera-surveillance/>.

¹²³ See *Seventh Circuit Holds Long Term, Warrantless Video Surveillance is Not an Illegal Search*, 135 HARV. L. REV. 928, 935 (2022).

support for the *Mosaic Theory*, discussed *infra*, coupled with the Seventh Circuit's disquiet with their own ruling suggests an eventual sea change is as possible as it is necessary.

C. *The Mosaic Theory and Expectations of Privacy*

One of the most important scholarly concepts in the realm of unwarranted lengthy surveillance is the so-called *Mosaic Theory*. In essence, the theory suggests that as far as a person's reasonable expectation of privacy goes, "the whole is greater than the sum of its parts."¹²⁴ In other words, the theory highlights the fact that the government can learn more from a specific piece of information if it is able to orient that piece within a broader context.¹²⁵ Lengthy surveillance can offer this inclusive, more comprehensive record which can help law enforcement assemble a "mosaic" of a person's activities or whereabouts. For example,

[r]epeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story.¹²⁶

Importantly, the *Mosaic Theory* has become far more than an academic exercise, helpful illustration, or persuasive argument in favor of restrained surveillance. Rather, the theory could change the landscape of what constitutes a reasonable expectation of privacy under Katz and has even gained traction in the Supreme Court.¹²⁷ The nation's highest court first flirted with the theory in the context of *United States v. Jones*, when it determined that installing a Global Positioning Device ("GPS") on a vehicle and then using that device to record the vehicle's movements constituted a search under the Fourth Amendment.¹²⁸ Four Justices, including Justices Alito, Breyer, Ginsburg, and Kagan, signed on to a concurring opinion that largely embraced the core tenants of the *Mosaic Theory* in the context of geolocation.¹²⁹ Writing for his colleagues, Justice Alito found:

[u]nder this approach, relatively short-term monitoring of a person's movements on public streets accords

¹²⁴ Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205, 205 (2015).

¹²⁵ *Id.*

¹²⁶ *United States v. Maynard*, 615 F. 3d 544, 562 (D.C. Cir. 2010), *aff'd in part sub nom. United States v. Jones* 565 U.S. 400, 404 (2012).

¹²⁷ Kugler & Strahilevitz, *supra* note 124, at 205–06.

¹²⁸ *United States v. Jones*, 565 U.S. 400, 404 (2012).

¹²⁹ Kugler & Strahilevitz, *supra* note 124, at 206–07.

with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not--and indeed, in the main, simply could not--secretly monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark.¹³⁰

Still other members of the Court have seemed to endorse the *Mosaic Theory*. Justice Sotomayor filed her own concurring opinion in *Jones* which focused on “the conclusions that could be drawn from prolonged surveillance.”¹³¹ In addition, writing for the majority in *Riley v. California*, Chief Justice Roberts used mosaic-like reasoning to explain the difference between a warrantless search of a person’s cell phone and other objects which might be kept on a defendant’s person: “[t]he sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet.”¹³²

It seems now that most Justices of the Supreme Court either implicitly or explicitly subscribe to the idea that searches which target aggregated information about a person over long periods of time can constitute Fourth Amendment searches.¹³³ Currently, these Supreme Court endorsements of the *Mosaic Theory* have not been extended to cases involving lengthy video surveillance via pole cameras.¹³⁴ On the one hand, this seems reasonable- the *Mosaic Theory* arguably is most compelling in the context of GPS tracking and cell-phone searches. As described in *Jones* and *Riley*, there is a certain undeniable sense of comprehensiveness when a state has access to the totality of a person’s movements over a given period or if it is able to reach their personal photos and email accounts.¹³⁵ Admittedly, lengthy pole camera

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Riley v. California*, 573 U.S. 373, 394 (2014).

¹³³ Kugler & Strahilevitz, *supra* note 124, at 208.

¹³⁴ *See United States v. Tuggle*, 4 F.4th 505, 524 (7th Cir. 2021) (holding that the mosaic theory does not support the argument that the use of pole cameras over an 18-month period constitutes a search); *see also United States v. Houston*, 813 F.3d 282, 287–88 (6th Cir. 2016) (holding that use of pole cameras installed on public property and trained on defendant's home for ten weeks did not constitute a Fourth Amendment search).

¹³⁵ *See United States v. Jones*, 565 U.S. 400, 414 (2012) (Sotomayor J., concurring); *see also Riley*, 573 U.S. at 394.

searches seem to offer less “comprehensiveness” to law enforcement officials because they are stationary and can only capture what transpires in their field of view. However, might the sheer duration of their use make the deployment of pole cameras even more invasive than techniques like cell-site location information tracking, which might intuitively seem more intrusive? In other words, what is the greater invasion of privacy: seven months of relentless pole camera surveillance or four weeks of GPS monitoring?

If the Supreme Court held that “the line was surely crossed before the 4-week mark” for *Jones* in the case of GPS monitoring, where is the line in the context of pole camera surveillance?¹³⁶ It seems clear that the incessant and unwarranted observation of a person’s home for months has at least the potential to be as harmful to a defendant as the unwarranted GPS monitoring of his location over a several week span. Because the degree to which a defendant is harmed by unwarranted observation really turns on the specific facts of the case such as where the crime takes place; for example, it seems absurd to allow one manner of perpetual surveillance in an indiscriminate manner and yet restrict the other. If courts are to continue to treat these surveillance methods differently, as perhaps they should, the constitutional harms posed by pole camera surveillance cannot be ignored any longer. At the very least, using the *Mosaic Theory* as a guide, courts should develop a maximum length of time, such as thirty days, that law enforcement can deploy these technologies without first ascertaining search warrants.

For now, the *Mosaic Theory*’s application to pole camera surveillance is merely academic. The Seventh Circuit in *Tuggle* went further than this, noting that the *Mosaic Theory* was not binding and that “current Supreme Court precedent does not support *Tuggle*’s argument.”¹³⁷ The court opined that while the pole cameras positioned near *Tuggle*’s home “captured an important sliver of *Tuggle*’s life . . . they did not paint the type of exhaustive picture of his every movement that the Supreme Court has frowned upon. If the facts and concurrences of *Jones* and *Carpenter* set the benchmarks, then the surveillance in this case pales in comparison.”¹³⁸ Perhaps unsurprisingly, *Tuggle*’s petition for certiorari does not mention the *Mosaic Theory*. At present, it is not in and of itself a useful weapon against the dangers of unwarranted video surveillance. However, the *Mosaic Theory* may be useful when forming a cognizable test better suited to protect Fourth Amendment rights in the ever-expanding technological Panopticon that is our modern world.

¹³⁶ *Jones*, 565 U.S at 430.

¹³⁷ *Tuggle*, 4 F.4th at 524.

¹³⁸ *Id.*

III. FUTURE RESTRICTIONS ON UNWARRANTED PERPETUAL SURVEILLANCE

A. *The United States Supreme Court is Best Suited to Formulate a New Test*

As Chief Justice Charles Evans Hughes once observed, the Supreme Court is “distinctly American in conception and function.”¹³⁹ The Court’s unique power is attributable to the principle of judicial review which has granted the Court imprimatur on nearly all issues of constitutional interpretation and conflict since the landmark case of *Marbury v. Madison*.¹⁴⁰ It is well established that this principle has bestowed upon the Court the important responsibility of protecting individual rights and “in maintaining a ‘living Constitution’ whose broad provisions are continually applied to complicated new situations.”¹⁴¹ There are few issues of law better suited for Supreme Court review than the problem of unwarranted perpetual surveillance. The Supreme Court is in the best position to protect the privacy rights of individuals as these “complicated new situations” of technology arise.¹⁴² In many ways, Congress is more limited in its ability to enact laws which apply to all jurisdictions, not to mention other serious limits on policy change.¹⁴³ Simply, future interpretive issues regarding the Fourth Amendment have already been delegated to the Supreme Court; after handing down the important *Katz* decision, the Court assumed the mantle of protecting privacy rights in recognition of changing societal realities. It is once again incumbent on the Court to provide a necessary update of *Katz*.

B. *A New Test to Protect Fourth Amendment Rights in the Age of Panoptic Surveillance*

As this Comment has illustrated, the *Katz* test, as it is currently applied, has resulted in an erosion of the Fourth Amendment freedoms it was designed to protect. This is especially true in cases involving unwarranted and lengthy government surveillance, as well as other instances in which searches are conducted with emerging technologies.¹⁴⁴ To be sure, the “perilous circularity” of the *Katz* test that the *Tuggle* court identified is an immediate concern at the present moment. With new information technologies only beginning to reveal their roles in society, any cognizable expectation of privacy in relation to them is difficult to divine and almost

¹³⁹ Richard L. Worsnop, *Supreme Court: Legal Storm Center*, CQ RESEARCHER (Sep. 28, 1966), <http://library.cqpress.com/cqresearcher/cqresre1966092800>.

¹⁴⁰ The Court and Constitutional Interpretation, Sup. Ct. Of The U.S., <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Sep. 9, 2022).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See generally MICHAEL T. HAYES, *THE LIMITS OF POLICY CHANGE: INCREMENTALISM, WORLDVIEW, AND THE RULE OF LAW* (Geo. Univ. Press 2001).

¹⁴⁴ See, e.g., *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021); *United States v. Knotts*, 460 U.S. 276 (1983).

certain to be outdated once identified. Other issues exist too. Harlan's *Katz* test is formulated as a two-step analysis, with an objective as well as subjective component.¹⁴⁵ However, a significant number of courts do not even inquire into a defendant's actual expectation of privacy.¹⁴⁶ Further, although not particularly within the scope of this Comment, the very application of the *Katz* test has resulted in two destructive corollaries which move today's jurisprudence even further from the plain meaning of the Fourth Amendment. Firstly, a doctrine has emerged that treats searches for illegal objects as non-searches; secondly, the so-called "third-party doctrine" maintains that shared objects can be unreasonably searched or seized.¹⁴⁷

A new test is needed to preserve Fourth Amendment privacy rights in the information age. This Comment proposes three alterations to *Katz* generally and additionally offers a new test which should be used in cases of unwarranted perpetual video surveillance. First, for all its flaws, Justice Harlan's reasonable expectations formulation has been effectively and fairly applied to many, and perhaps most, cases over the last sixty years of its use; it has only had difficulty keeping up with evolving technologies. As a result, any new test the Court adopts should focus on resolving this issue without throwing the baby out with the bathwater. This is true especially given the strong probability that our current pace of technological advancement will increase exponentially as the future unfolds.¹⁴⁸ Second, future *Katz* analyses should more strongly embrace the *Mosaic Theory* and respond to the reality that instances of lengthy surveillance create a broader picture of a defendant's movements or actions and should therefore receive stricter scrutiny when conducted in the absence of a warrant. Finally, a reboot of *Katz* should strive to eliminate any vestigial steps of the analysis which has not been proven useful or relevant over the many years of its application. The subjective expectations consideration should be eliminated, because it is often ignored by courts, is hard to properly identify, and almost never changes the outcome of a *Katz* analysis.¹⁴⁹

In view of these three general alterations, this Comment further proposes that *Katz*'s reasonable expectations test be particularly enhanced in cases like *Tuggle*. Specifically, courts should find there to be a strong rebuttable presumption when a defendant manifests an objective, reasonable expectation of privacy in cases of unwarranted, lengthy, or surreptitious surveillance (or in cases of unwarranted use of a technology that leads to the

¹⁴⁵ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹⁴⁶ *Id.*

¹⁴⁷ Brief of the Cato Institute and Rutherford Institute as Amici Curiae Supporting Petitioner at 17, *Tuggle v. United States*, 142 S. Ct. 1107 (2022) (No. 21-541).

¹⁴⁸ Charles Warnock, *Exponential Technology Continues to Accelerate- but Why?*, SINGULARITY GROUP (Dec. 24, 2018), <https://www.su.org/blog/exponential-technology-continues-to-accelerate-but-why>.

¹⁴⁹ See Orin S. Kerr, *Katz Only Has One Step: The Irrelevance of Subjective Expectations*, 82 U CHI L. REV. 113 (2015).

same issues without the defendant's knowledge or consent). The presumption should be rebutted if the facts suggest that the defendant knew of the surveillance or if the observation was not sufficiently continuous or long-lasting. Under this framework, thirty days of unwarranted observation might very well constitute lengthy surveillance and certainly the eighteen months of perpetual surveillance in Tuggle's case should.¹⁵⁰ This new presumption is effective at eliminating *Katz's* "perilous circularity" because it would hinge on the issue of consent. If a defendant is surreptitiously observed for a long stretch of time without their knowledge or assent, that government action should violate the defendant's Fourth Amendment rights. Including consent in this formulation is necessary because it would prevent law enforcement from taking advantage of a citizen's ever-illusory expectation of privacy as more and more information is shared about that person in the digital space. Of course, the notion of consent is relevant here as even large technology companies require assent before a person can use a social media platform or otherwise engage with an application that collects personal data.¹⁵¹ Crucially, a person's relinquishment of their personal data in one transaction should not be grounds for the government to presume that they have surrendered an expectation of privacy over similar data in the context of a criminal investigation. Although technology will change, the fundamental goal of the Fourth Amendment, for citizens "to be secure in . . . persons, houses, papers, and effects . . ." will not change under this framework in cases of perpetual surveillance.¹⁵²

Admittedly, the amended *Katz* test would place a higher burden on law enforcement and probably require warrants in most instances of lengthy and surreptitious observation. Yet, the limitations imposed by this test would not limit law enforcement from physically observing the locations they wish to investigate or from conducting less lengthy periods of video surveillance. After all, the true constitutional harm of perpetual surveillance is found at the confluence of surreptitious police work and continuous digital recording. These harms are not as severe where a defendant is on notice or if the observation is so brief as to not craft for law enforcement a mosaic of a defendant's activities. It is undisputed that the status quo benefits law enforcement.¹⁵³ Such steps may seem to be a drastic move away from the

¹⁵⁰ Of course, it will ultimately fall to the courts to elucidate what might constitute an impermissible length of video surveillance. In Tuggle, the appellate court found eighteen months to be disturbing. *United States v. Tuggle*, 4 F.4th 505, 541 (7th Cir. 2021); Cushing, *supra* note 32. In the GPS monitoring case of *United States v. Jones*, Justice Alito argued that "the line was surely crossed before the 4-week mark." *United States v. Jones*, 565 U.S. 400, 430 (2012).

¹⁵¹ See, e.g., Brian X. Chen, *To Be Tracked or Not? Apple Is Now Giving Us the Choice*, THE N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/04/26/technology/personaltech/apple-app-tracking-transparency.html>.

¹⁵² U.S. CONST. amend. IV.

¹⁵³ See *How Rapid Deployment Pole Cameras Benefit Law Enforcement*, WCCTV WIRELESS CCTV, <https://www.wcctv.com/how-rapid-deployment-pole-cameras-benefit-law-enforcement/> (last visited Sept. 9, 2022).

status quo, but they are necessary to lay a foundation which will protect privacy rights as the country moves forward into an unknown technological future. To be sure, the support these ideas have garnered within the Supreme Court itself suggests that these changes are not a bridge too far.¹⁵⁴

C. *Tuggle Revisited*

If the Seventh Circuit used the modified *Katz* test, the result in *Tuggle* would be an about-face from the actual holding. Firstly, the court would not engage in the irrelevant and unjudicial exercise of determining subjective expectations. Secondly, if courts accepted the strong rebuttable presumption that a defendant manifested an objective reasonable expectation of privacy against such actions in cases of unwarranted lengthy or surreptitious surveillance, the court would likely have found that *Tuggle* did exhibit such an expectation. Therefore, the eighteen months of unwarranted surveillance in *Tuggle*'s case violated his Fourth Amendment protections, rendering the subsequent searches of his home fruit of the poisonous tree. Under the modified *Katz* test, *Tuggle*'s case would be remanded back to the district court to determine the impact that this finding would have on his charges.

IV. CONCLUSION

The United States has lagged far behind the rest of the world in protecting privacy rights in the information age. While American jurisprudence anxiously wrestles with privacy conceptions of eighteenth century vintage, the European Union (“EU”) has recognized privacy as a fundamental right.¹⁵⁵ Specifically, rights to privacy and data protection are enshrined in a myriad of EU Treaties as well as in the EU Charter of Fundamental Rights, which embraces an explicit right to protect personal data.¹⁵⁶ In addition, the oft-mentioned right to be forgotten—in which a person has a right to remove themselves from internet searches and databases in some circumstances—has been put into practice in the EU, Argentina, and the Philippines.¹⁵⁷

In the American tradition, constitutional protections and especially “rights” are often seen through an individualistic lens.¹⁵⁸ This may explain why the right to health care—as well as other ‘collective rights’—have not

¹⁵⁴ Kluger & Strahilevitz, *supra* note 124, at 207–08.

¹⁵⁵ *Data Protection*, EU DATA PROT. SUPERVISOR, [HTTPS://EDPS.EUROPA.EU/DATA-PROTECTION/DATA-PROTECTION_EN](https://edps.europa.eu/data-protection/data-protection_en) (last visited Sept. 9, 2022).

¹⁵⁶ *Id.*

¹⁵⁷ *See Implementing Rules and Regulations of the Data Privacy Act of 2012*, NAT'L PRIV. COMM'N, <https://www.privacy.gov.ph/implementing-rules-regulations-data-privacy-act-2012/> (last visited Sept. 9, 2022).

¹⁵⁸ *See generally* Claude S. Fischer, *Paradoxes of American Individualism*, 23 *SOCIO. F.*, 363 (2008).

materialized.¹⁵⁹ Paradoxically, this attitude cannot explain why rights to privacy over personal information in America have not garnered the attention they have in other jurisdictions around the world. To be sure, there is a grave violation of personal, individualistic privacy committed in cases of unwarranted perpetual surveillance. In this sense, such monitoring of individuals seems abhorrent to the American way of life, and very possibly, to a Framers' understanding of the Fourth Amendment.¹⁶⁰ Notwithstanding these problems and the Supreme Court's recent refusal to grant certiorari in *Tuggle*, there are reasons to be hopeful. Although currently dicta, the positive treatment of the *Mosaic Theory* among Supreme Court Justices may be an indication that future instances of even lengthier video surveillance will be considered for review.¹⁶¹ A foundational test like *Katz* is not likely to be disposed of, or even amended, overnight. Yet, the continued and increased police reliance on these technologies across even longer time scales will likely bring these issues powerfully to the foreground. Only then will Americans be truly free from the dangers posed by the panoptic state.

¹⁵⁹ See generally Mary Gerisch, *Health Care As a Human Right*, AM. BAR ASS'N (Nov. 19, 2018), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/health-care-as-a-human-right/; https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/health-care-as-a-human-right/

¹⁶⁰ See generally Frazelle & Gray, *What the Founders Would Say About Cellphone Surveillance*, ACLU (Nov. 17, 2017), <https://www.aclu.org/blog/privacy-technology/location-tracking/what-founders-would-say-about-cellphone-surveillance>.

¹⁶¹ See *Seventh Circuit Holds Long-Term, Warrantless Video Surveillance Is Not An Illegal Search*, *supra* note 123, at 935.