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Mission Impossible: Applying Arcane Fourth Amendment Precedent to Advanced Cellular Phones

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MISSION IMPOSSIBLE: APPLYING ARCANE FOURTH AMENDMENT PRECEDENT TO ADVANCED CELLULAR PHONES

I. ENTERING THE REALM OF CELLULAR PHONES AND THE FOURTH AMENDMENT

Ron Smith was a hard-working high school student who consistently earned good grades.¹ In fact, he hoped to enroll in college, making him the first in his family to attend a higher educational institution. Instead, Ron and his girlfriend became pregnant his junior year in high school, and soon Ron was the proud father of a baby girl, Kay. Ron knew his life would forever change, but he never could have imagined loving someone as much as he loved Kay.

Ron worked two jobs to support his family. His daily schedule started at 7:00 a.m., when he arrived at the factory, and he worked on the assembly line until 4:00 p.m. Then, he grabbed a quick dinner and kissed his girlfriend and daughter on the cheek as he rushed out the door to his night job, where he drove a taxicab until 2:00 a.m. Ron and his family survived on love; they hardly had any money and lived from paycheck to paycheck. They stayed in an old, run-down apartment in the dilapidated parts of Chicago, paying only \$350 per month in rent. Ron did not own a car, as he used public transportation to get virtually everywhere, never ate in restaurants, and did not have cable or a telephone line. He and his girlfriend did keep one of their cellular phones so they could still communicate with each other when needed.

One morning, Ron could not find his cellular phone. Unfortunately, losing his phone had dramatic effects throughout the week. While his daughter was at school, she became ill. She called and called, leaving message after message; her father never answered. Though Kay was not in danger, she was extremely upset and Ron felt terrible after hearing what happened. Later that week, Ron's brother visited. Ron immediately knew something was wrong as his brother entered the apartment with red, swollen eyes. He informed Ron that their mother passed away during the night. His brother said he kept trying to call Ron's cellular phone to tell him to come to the hospital immediately, but Ron never answered. His brother got to the hospital in time to say goodbye to his mother; unfortunately, Ron was not so lucky.

¹ This hypothetical is completely fictional and any resemblance to real persons or facts is coincidental.

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One early morning a few days later, as Ron was pouring Kay a glass of orange juice, FBI agents knocked at Ron's door and immediately arrested him. Kay was terrified and bawled at the sight of her father being carried away in handcuffs. The agents told Ron that they had evidence that he was dealing marijuana. When Ron asked the officers to elaborate, they curtly stated that they obtained the evidence from his cellular phone, which an agent apparently found on the subway one week earlier. The cellular phone contained pictures of marijuana, and it appeared that the possessor of the phone took them.

Ron asked to speak with an attorney. After Ron met with the public defender and expressed his disgust that the agents searched his cellular phone without his permission, the public defender filed a motion to suppress the cellular phone evidence, claiming the search was unconstitutional under the Fourth Amendment. The FBI agents disclosed that most of the evidence they had against Ron was contained within the cellular phone. Currently, Ron is sitting in the federal district courtroom, where his attorney stands and requests the court to grant the motion to suppress the evidence.

The Fourth Amendment rests at the cornerstone of search and seizure law.² As a result, it is implicated when attempting to suppress evidence obtained from searches and seizures of cellular phones. Today, people are more technologically dependent than ever.³ As features on these technological devices advance, they literally become clones of their owners' minds by containing and being able to convey intimate details.⁴ So, even though people are aware that it is now easier than ever to track their every move, they expect a high amount of privacy with their technological items and depend on courts to protect that privacy.⁵ Yet,

² United States v. Martinez-Fuerte, 428 U.S. 543, 578 (1976) (Brennan, J., dissenting).

³ Christopher J. Banks, Note, *The Third Generation of Wireless Communications: The Intersection of Policy, Technology, and Popular Culture*, 32 LAW & POL'Y INT'L BUS. 585, 585-87 (2001). There is growing dependence on cellular phones as evidenced by the fact that mobile phone use in the United States is growing. *Id.* at 642. In the United States alone, the number of people who access the Internet through their phone was predicted to grow seven hundred percent between the years 1999 and 2003, jumping from seven million to over sixty-one million. *Id.* at 588. Interestingly, Europe and Japan are ahead of the United States in the mobile phone market. *Id.* at 586.

⁴ *Id.* For example, cellular phones are becoming much smaller in size, cost less, but are capable of "new and innovative services." *Id.* People can use a cellular phone to "communicate by voice, . . . access phone mail, voice mail, stock prices, sports scores, and even restaurant reviews." *Id.*

⁵ *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). "It would be foolish to contend that the degree of privacy secured to citizens . . . has been entirely unaffected by the advance of technology." *Id.*

people are not conscious of what exactly is searchable within their cellular phones. Questions arise regarding whether an officer can explore the contents of a cellular phone by investigating the phone book, call history, pictures taken, text messages sent, or websites visited. All of these items are easily accessible to the person who possesses the cellular phone. Therefore, once a government agent searches and seizes a cellular phone, the government possesses an astronomical amount of personal information about the user.

Privacy concerns with technological devices are not an innovative concept.⁶ As early as 1968, Chief Justice Earl Warren insightfully recognized the difficulty of applying Fourth Amendment precedent to technology, stating “the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual.”⁷

With each improvement of cellular phones, the law regarding these devices is increasingly more outdated.⁸ In an effort to formulate a rule of law dealing with Fourth Amendment rights and technology, Justice Louis Brandeis’s dissent in *Olmstead v. United States*⁹ acknowledged that the Court must adopt a construction susceptible of “meeting modern conditions.”¹⁰ However, the courts have struggled to keep the Fourth Amendment search and seizure principles up to date with the advancement of cellular phones.¹¹ For example, officers are legally permitted to seize cellular phones because they are signs of drug activity;

⁶ *Lopez v. United States*, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring). Diminishing privacy, which is due to advancing technology, has not gone unnoticed. *Id.*

⁷ *Id.* (referring to Justice Brennan’s dissenting opinion). “[I]ndiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth . . . Amendment.” *Id.*

⁸ *Berger v. New York*, 388 U.S. 41, 71 (1967) (stating that part of its reasoning was based on a fear that technological improvements would later render the law outdated).

⁹ 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

¹⁰ *Katz* overruled *Olmstead* because *Olmstead* utilized a different test, called the Trespass Doctrine, which was deemed “so eroded . . . that [it] . . . can no longer be regarded as controlling.” *Katz v. United States*, 389 U.S. 347, 353 (1967). The Court explained that “once it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” *Id.*

¹¹ *Cf.* John A. Burtis, *Towards a Rational Jurisprudence of Computer-Related Patentability in Light of In re Alappat*, 79 MINN. L. REV. 1129, 1130 (1995).

this contention is outdated, as today many non-drug dealers also have cellular phones.¹²

Current cellular phones have advanced capabilities and accordingly need to be afforded a high degree of privacy.¹³ Continual developments with cellular phones require a re-examination of Fourth Amendment principles. First, this Note provides the history of the Fourth Amendment along with definitions of a “search” and “seizure” and court interpretations of these terms.¹⁴ Second, this Note examines the state of the law and how it applies to cellular phones.¹⁵ Third, this Note provides a solution to the problems raised by suggesting a new test called the “Dissemination Doctrine,” which entails determining whether the information was voluntarily dispersed to others and whether the government agents utilized the proper search approach.¹⁶

II. THE FOURTH AMENDMENT: ITS HISTORY, MEANING, AND CURRENT STATUS

The Fourth Amendment applies to victims of illegal searches and seizures, but it also serves as a reflection of this country’s ideals of privacy and freedom.¹⁷ First, this Part offers a history of the Fourth Amendment by identifying the original intent of its creation.¹⁸ Second, this Part provides rules supplied explicitly by the text of the Fourth

¹² United States v. Merritt, No. 96-1343, 1997 U.S. App. LEXIS 22571, at *3 (7th Cir. Aug. 21, 1997) (stating that “a beeper and cellular telephone . . . are typical instrumentalities of the drug trade”); United States v. Battle, No. 97-40005-01-04-SAC, 1997 U.S. Dist. LEXIS 11572, at *27 (D. Kan. June 27, 1997) (“Money and cellular phones are common items associated with narcotics trafficking.”). A conservative estimate is that over ninety million Americans have cellular phones. Banks, *supra* note 3, at 585–86.

¹³ Banks, *supra* note 3, at 585–88. In fact, it was predicted that by this time, more people would “access the internet through a mobile device than with a personal computer.” *Id.* at 588.

¹⁴ See *infra* Part II. This Part explains the ideals behind the Fourth Amendment by supplying an understanding of life as it was at the time of the Fourth Amendment’s composition. This Part also supplies Court interpretations of the terms “seizure” and “search” and focuses on the current test, called the *Katz* test.

¹⁵ See *infra* Part III. This Part explains why the *Katz* test should no longer be used and suggests that the file cabinet approach should be followed.

¹⁶ See *infra* Part IV. A new test, created by the author, is offered in this Part. The test is called the Dissemination Doctrine, which hinges on whether the individual actually divulged the information to others.

¹⁷ Benjamin A. Swift, *The Future of the Exclusionary Rule: An Alternative Analysis for the Adjudication of Individual Rights*, 16 N. ILL. U. L. REV. 507, 515 (1996). “Finally, it must be remembered that the Fourth Amendment right to privacy is unlike any other privacy guarantees in that there is no way to give back that privacy.” *Id.* It is suggested that Fourth Amendment privacy should be considered a “fundamental right.” *Id.* at 534.

¹⁸ See *infra* Part II.A.

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Amendment.¹⁹ Third, this Part briefly outlines the judicial interpretations of the words “search” and “seizure.”²⁰ Finally, this Part demonstrates how courts apply the Fourth Amendment to different pieces of technology, specifically conventional telephones and computers.²¹

A. *The Heart of the Fourth Amendment: Its History*

The beginnings of the Fourth Amendment do not lie in one person’s thoughts or passive activity, but in the struggle from which the United States of America emerged.²² The Fourth Amendment “did not emerge in a vacuum” but was created as a consequence of intrusive activity by the British government.²³ Prior to America’s independence, the British crown, through documents called Writs of Assistance, often ordered local officials to search colonists’ homes, looking for evidence of smuggled goods or sedition.²⁴ The main purpose of issuing Writs of Assistance, which resembled a very loose and vague search warrant, was to prevent colonists from trading with any non-British industry.²⁵

¹⁹ See *infra* Part II.B.

²⁰ See *infra* Part II.C.

²¹ See *infra* Part II.D.

²² See *infra* Part II.A. “President John Adams traced the origins of our independence from England to James Otis’ impassioned argument in 1761 against the British writs of assistance, which allowed revenue officers to search American homes wherever and whenever they wanted.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 286 n.8 (1990) (Brennan, J., dissenting).

²³ Rachel Gader-Shafran, *Crimes and Errors Impossible To Commit: Defining Away the Fourth Amendment*. *Wyoming v. Houghton*, 56 U.S. 295 (1999), 47 CLEV. ST. L. REV. 575, 584 (1999). “The text [of the Fourth Amendment] articulated ideas that had percolated through Anglo-American law for centuries.” Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1724 (1996).

²⁴ *Verdugo-Urquidez*, 494 U.S. at 266. The framers originally decided not to include a provision like the Fourth Amendment because they believed the national government lacked power to conduct searches and seizures. *Id.*

²⁵ James Leonard, Note, *Criminal Procedure—Oliver v. United States: The Open Fields Doctrine Survives Katz*, 63 N.C. L. REV. 546, 548–49 (1985). The Writs of Assistance were created to sustain Great Britain’s status as a wealthy nation. *Id.* As with most of the grievances that the colonists had with the British crown, the activity of issuing Writs of Assistance was not new, as the Star Chamber had been issuing them since the fifteenth century. Tracy A. McCloskey, Note, *A Sobriety Checkpoint Program that Seizes Automobiles on a Public Highway in the State of Michigan Without Suspicion Violates Article 1, Section 11 of the Michigan Constitution*. *Sitz v. Department of State Police*, 506 N.W.2d 209 (Mich. 1993), 71 U. DET. MERCY L. REV. 1095, 1098 (1994). The Writs of Assistance allowed the king’s messengers to search “any and all places agreeable to themselves, where they searched and seized papers and goods at their will.” *Id.*

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Many abuses were associated with the Writs of Assistance, and two of the extremely offensive abuses were the lack of particularity and the lack of probable cause necessary for issuance of a Writ.²⁶ First, the Writs were not particular, “authoriz[ing] the search of any place for any item.”²⁷ Second, the local officials needed virtually no probable cause to completely tear apart the homes they were searching.²⁸ In some instances, general warrants were issued by the Secretary of State, leaving full discretion in the hands of the local officials to conduct random, general, and unsubstantiated searches in the colonists’ homes.²⁹ As a result, the colonists were belittled to a state of helplessness in a place of utmost privacy: their homes.³⁰

In 1761, debates in Boston erupted, and the main focus of these debates was the seizure of possessions without probable cause.³¹ Regarding these debates, John Adams said: “Then and there was . . . the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”³² Consequently, the Writs of Assistance sparked a driving passion within the colonists that ultimately lead to the start of the American Revolution.³³ Even though the ideals of

²⁶ Leonard, *supra* note 25, at 548. Under this type of system, abuses were common and searches and seizures went unchecked because the officials were permitted to perform them whenever they deemed it necessary, with no one regulating abuses of discretion. *Id.*

²⁷ *Id.* Also, the Writs of Assistance were virtually permanent, as they did not cease until six months after the sovereign’s death. *Id.*

²⁸ Gader-Shafran, *supra* note 23, at 584. It has been stated that “[t]he Framers of the Constitution created the Fourth Amendment as a direct response to the practically unrestrained and judicially unsupervised searches associated with general warrants and Writs of Assistance.” *Id.*

²⁹ *Boyd v. United States*, 116 U.S. 616, 625 (1886). The general purpose of the Writs of Assistance was to seize unlawful cargo and make sure the importation duties were paid to Great Britain. J. Michael Keyes, Note, *State v. Rose: The Re-emergence of Colonial Writs?*, 32 GONZ. L. REV. 177, 177 (1996).

³⁰ Thomas K. Clancy, *Coping with Technological Change: Kyllo and the Proper Analytical Structure To Measure the Scope of Fourth Amendment Rights*, 72 MISS. L.J. 525, 526 (2002). The framers’ fear resulted in Court decisions phrasing individual rights in terms of property rights, and the analogy that a “man’s house [is] his castle” soon followed. *Weeks v. United States*, 232 U.S. 383, 390 (1914). As if the wide discretion given to the local authorities was not oppressive enough, the Sugar Act of 1764 prohibited ship-owners from bringing a claim of an illegal search or seizure so long as a judge found that probable cause existed. Gader-Shafran, *supra* note 23, at 583.

³¹ Gader-Shafran, *supra* note 23, at 583. The Boston debates arose after cargo was seized from ships owned by John Hancock and other prominent political figures. *Id.*

³² *Boyd*, 116 U.S. at 625. This quotation illustrates the extreme influence the issue the Fourth Amendment addresses had on our nation gaining its independence from Great Britain. *Id.*

³³ Bradley L. Leger, Note, *Thermal Imaging and the Fourth Amendment: The Government’s “High-Tech Assault” on “A Once Treasured Haven”* *Kyllo v. United States*, 533 U.S. 27 (2001),

the Fourth Amendment incited the American Revolution, the Supreme Court only decided a handful of cases dealing primarily with the Fourth Amendment within one hundred years of America's independence.³⁴

*Boyd v. United States*³⁵ is the first Supreme Court decision to thoroughly discuss the elements of the Fourth Amendment.³⁶ Decided in 1885, Justice Joseph Bradley authored an opinion that investigated the history of the Fourth Amendment.³⁷ After reviewing Britain's history with the Writs of Assistance, the Supreme Court announced the issuing of the Writs as "the worst instrument of arbitrary power, the most destructive of English liberty."³⁸ To elaborate, Justice Joseph Bradley stated: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; *but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . .*"³⁹ He further declared that these intrusions and debates were "fresh

43 S. TEX. L. REV. 837, 839-40 (2002). "The concerns over general warrants and Writs of Assistance 'were front and center in the petition which the Continental Congress addressed to the King of England in 1774.'" *Id.*

³⁴ The Supreme Court cases from 1776-1890 dealing with the Fourth Amendment are *Ex parte Jackson*, 96 U.S. 727 (1878) and *Boyd*, 116 U.S. at 625. There are three other cases between the years 1776-1890 decided by the Supreme Court that mention the Fourth Amendment. *Den ex dem. Murray v. Hoboken Land & Improv. Co.*, 59 U.S. 272 (1856); *Livingston v. Moore*, 32 U.S. 469 (1833); *Ex parte Bollman*, 8 U.S. 75 (1807).

³⁵ 116 U.S. 616 (1886).

³⁶ *Stone v. Powell*, 428 U.S. 465, 497 (1976) (referring to *Boyd* as defining the "original path" in Fourth Amendment analysis).

³⁷ *Boyd*, 116 U.S. at 617. Most of the majority opinion is a long recitation of Lord Camden's discussion from *Entick v. Carrington and Three Other King's Messengers*, in which he states that nothing in the law gives or should give magistrates open discretion and that there should be proper checks in place in order to adhere to the Fourth Amendment. *Id.* at 626, 628.

³⁸ *Id.* at 625. In this case, the federal government seized thirty-five people's plate glass because they violated a federal statute by failing to pay an importation duty. *Id.* at 617. The claimants were required to produce the original invoice, which they originally objected to but eventually handed over due to the court order. *Id.* at 618. The claimants argued that they should not have been compelled to provide evidence against themselves, thus bringing in a Fifth Amendment issue as well. *Id.* The lower courts found in favor of the federal government, but the Supreme Court overruled them, stating that the claimant was entitled to protection under both the Fourth and Fifth Amendments and that the order to produce the invoice was unconstitutional. *Id.*

³⁹ *Id.* at 630 (emphasis added). Knowing the original purpose of the Fourth Amendment, courts attempted to prevent broad abuses by taking discretion away from the local officials. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 5.02 (3d ed. 2002). The Fourth Amendment's interpretation is an attempt to "police the police," but it has been difficult for the courts to fully understand what exactly was to be conveyed by each word of the Fourth Amendment. *Id.* For example, there is a struggle to determine whether the Fourth Amendment was intended to protect the home only or to go beyond the home. *Id.*

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in the memories of those who achieved our independence and established our form of government.”⁴⁰ Remembering the abuses of the British crown, the Founders expounded an amendment with clear textual language in hopes of preventing future abuses.⁴¹

B. *Rules Provided by the Text of the Fourth Amendment*

As a result of Britain’s abuses with the Writs of Assistance, America’s founders created the Fourth Amendment to implement ideals of reasonableness, particularity, and probable cause.⁴² Ratified in 1791, the underlying foundation of the Fourth Amendment protects individuals from unreasonable searches and seizures.⁴³ It states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴⁴

There are two clear sections within the Fourth Amendment, and the Court has provided several clauses and tests from these sections.⁴⁵

The first part of the Fourth Amendment is referred to as the “Reasonableness Clause”; it explains who and what the Fourth Amendment covers, with the “who” being “the people” and the “what”

⁴⁰ *Boyd*, 116 U.S. at 625. States began to pass their own laws that dealt with the rights of people regarding searches and seizures, and by 1787 most states had a law that addressed this issue. Tracy Maclin, *The Complexity of the Fourth Amendment: A Historical Overview*, 77 B.U. L. REV. 925, 972–73 (1997). Even before States passed their own laws, in the 1760s, legislative bodies were formed that outlawed the issuance of general warrants, which evidenced that the colonists knew they were being treated unfairly. *Id.* at 942–44. In fact, documented activity against general warrants dates back to 1644 when a sheriff, without a warrant, entered a boarding house to arrest a drunk, but the sheriff was faced with an angry mob who unsuccessfully tried to rescue the man. *Id.* at 942 n.94.

⁴¹ Maclin, *supra* note 40, at 942 n.94. “Much of what the Supreme Court has said in the last half century [is] that the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence.” Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

⁴² See *supra* Part II.A.

⁴³ U.S. CONST. amend. IV, The U.S. Constitution Online, available at <https://www.usconstitution.net/const.html> (last visited Nov. 11, 2005).

⁴⁴ *Id.* There are fifty-four words in the Fourth Amendment. *Id.*

⁴⁵ *Michigan v. Clifford*, 464 U.S. 287, 302 (1984) (referring to “the text of the two clauses of the Fourth Amendment”).

being “persons, houses, papers, and effects.”⁴⁶ The second part is called the “Warrant Clause” because it relates to warrants.⁴⁷ It explains what is required for a warrant to be issued (“probable cause, supported by oath or affirmation”), and what the warrant itself must say (“particularly describing the place to be searched and the persons or things to be seized”).⁴⁸

The warrants that are referenced within the Fourth Amendment have two standards that must be met: (1) there must be probable cause for a warrant to issue and (2) the warrants must be particularly described.⁴⁹ First, probable cause is an objective concept that requires “a nexus between (1) the criminal activity under investigation; (2) the items to be seized; and (3) the place to be searched.”⁵⁰ The Supreme Court strongly favors officers obtaining warrants before conducting a search or seizure.⁵¹ In fact, the Court asserted that the same amount of probable

⁴⁶ *New Jersey v. T. L. O.*, 469 U.S. 325, 359 (1985). The Court said that the word “privacy” can be used to replace the Reasonableness Clause. *Berger v. New York*, 388 U.S. 41, 86 (1967).

⁴⁷ *T. L. O.*, 469 U.S. at 359. The Court suggests applying the “literal particularity requirements of the second clause.” *Berger*, 388 U.S. at 86.

⁴⁸ *T. L. O.*, 469 U.S. at 359. Both the Reasonableness Clause and Warrant Clause exist simultaneously, but some scholars opine that they really are separate and distinct clauses that do not fit together effectively. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999). The current debate is whether a warrant is necessary for a police search to be reasonable or, on the other hand, whether reasonableness should be assessed separately from a warrant, allowing circumstances in which the police can use their own discretion. *Id.* It is clear that the intent of the Fourth Amendment was to prevent general warrants and unreasonable searches and seizures. *Id.* Beyond these basic ideals is a gray area that allows for debate. *Id.*

⁴⁹ *United States v. Place*, 462 U.S. 696, 701 (1983). When a magistrate looks at probable cause in an attempt to discern whether a warrant should issue, he looks to see whether the information is trustworthy and whether there is enough information to rely upon. *Id.* When no warrant is obtained by a police officer, the court looks to determine if there is sufficient probable cause at the time of the search or seizure to find that a magistrate would have issued a warrant. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001).

⁵⁰ Hon. Robert H. Bohn, Jr. & Lynn S. Muster, *The Dawn of the Computer Age: How the Fourth Amendment Applies to Warrant Searches and Seizures of Electronically Stored Information*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 63, 65 (2003) (citing *Commonwealth v. Jean-Charles*, 500 N.E.2d 1332 (Mass. 1986)). *Jean-Charles* involved an insurance fraud claim brought against a physician in which it was found that probable cause was lacking because there was no evidence that the patient did not need the medical treatment that the doctor claimed to have provided. 500 N.E.2d 1332.

⁵¹ *United States v. Ventresca*, 380 U.S. 102, 109 (1965). “[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” *Id.* Probable cause is viewed as “fixed and unvarying” because it is an “objective concept.” Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 954–56 (2003). No amount or lack of subjective belief by a police officer is sufficient to meet the demands of probable cause; there must be “objective probable cause.” DRESSLER,

cause that is sufficient for a magistrate to issue a warrant may not be enough to justify a warrantless search; hence, a search without a warrant is more likely to be rejected as lacking probable cause than if the officers conducted the same search but first obtained a warrant.⁵²

supra note 39, § 9.02. The police officer's motive is not a factor when determining probable cause. *Whren v. United States*, 517 U.S. 806, 813 (1996). For example, in *Whren*, the Supreme Court held that if a driver breaks a traffic law and the officer stops him because of his race, the fact that the driver broke the traffic law is sufficient to satisfy probable cause under the Fourth Amendment. *Id.* The police officer's possible malicious intent is not a factor when looking at probable cause. *Id.* The courts do not look at the police officer's motives for probable cause, but they do consider the police officer's motives when looking at the reasonableness of the search, the manner the search was conducted, or the extent of the search. *Id.* at 818.

⁵² *Ventresca*, 380 U.S. at 109. It could be argued that not all searches turn on probable cause, but on the reasonableness of the search, which factors in the degree of intrusion and the severity of the possible harm. Lerner, *supra* note 51, at 954-56 (referring to probable cause as the "North Star of Fourth Amendment jurisprudence"). In fact, people are constantly being searched where no probable cause exists. *Id.* at 956. Examples include airport searches, DUI checkpoints, and urine tests. *Id.* These searches are widely accepted as necessary to prevent a potential great harm, which is outweighed by the momentary inconvenience. *Id.* Understandably, the courts allow more latitude if the probable cause is pointing to a more severe crime, such as an attack by terrorist groups, as opposed to a less severe crime, such as a minor burglary. *See id.* at 961-62. When the seizure of technological devices leads to a terrorist being brought to justice or to the prevention of a possible terrorist attack, it is easy for people to agree that it is necessary. *See id.* Conversely, when a police officer seizes an individual's technology that contains personal information, it is less likely the owner will be as understanding. *Id.* For example, since the September 11, 2001, attacks, the authorities are not willing to give latitude to possible terrorists. *Id.* In one instance, the seizure of a laptop used by an al-Qaeda operational planner yielded at least six hiding places of terrorist leaders. Jack Kelley, *Seized Laptop Lists al-Qaeda Hideouts*, USA TODAY, Mar. 13, 2003, at 9A, available at LEXIS, News, ALLNWS File. By seizing his computer, satellite phone, and cellular phone, a man who was influential in planning the September 11th attacks, the bombing of the USS Cole near Yeomen in October 2000, and other recent terrorist actions against the United States, was arrested. *Id.* Another example is when officials seized four laptops from an organizer of the September 11th attacks that contained images of potential future targets of terrorist attacks. Richard Sisk, *Laptops IDD U.S. Targets Seized After Shootout*, DAILY NEWS, Sept. 18, 2002, at 9, available at LEXIS, News, ALLNWS File. It is easy to agree with authoritative action when such positive results surface, but it is hard to draw the line of what is appropriate for the interest of justice and what is downright intrusive. *See generally* *United States v. Al-Marri*, 230 F. Supp. 2d 535 (S.D.N.Y. 2002). In *Al-Marri*, a man from Qatar, who was pursuing his academic studies of computer science in the United States, was accused of being a terrorist. *Id.* at 536. He voluntarily consented to the search of his apartment, which the police implied as consent to search his laptop because it was within the apartment. *Id.* at 537. The police took his laptop from his home and searched it for several days. *Id.* The court determined that this search and seizure was constitutional for several reasons. *Id.* at 539-41. First, because the suspect consented to the search, a warrant was not necessary. *Id.* at 539. Second, the defendant did not place any explicit limits on the search. *Id.* at 539-40. The court held that because he was a computer science graduate student, the defendant could have given specific instructions on how he wanted them to search his computer and if there were any

Second, unlike the probable cause element, the particularity requirement of the Warrant Clause is more difficult to define because it is limited by words.⁵³ For example, it has been held that the “degree of specificity required will depend on the circumstances of the case and on the type of items involved.”⁵⁴ In *United States v. Horn*,⁵⁵ the Eighth Circuit concluded that a general warrant is sufficient if the items “to be seized cannot be more precisely identified at the time that the warrant is issued.”⁵⁶

The Supreme Court determined that the goals served by the particularity requirement are “to prevent general searches, to prevent the seizure of one thing under a warrant describing another, and to prevent warrants from being issued on vague or dubious information.”⁵⁷ Thus, it is intended to be flexible and only requires “reasonable specificity.”⁵⁸ Accordingly, if a “specific item characteristic of a generic class of items

files he wanted them to refrain from searching. *Id.* at 540. Third, because the defendant requested his computer back and the FBI agents told him he could not have his computer back that night and he did not ask for it back within any certain period of time, he did not effectively set a limit on how long the agents could keep his computer. *Id.*

⁵³ *United States v. Johnson*, 541 F.2d 1311, 1314 (8th Cir. 1976) (stating that the Supreme Court has employed a “practical accuracy” standard with the particularity requirement).

⁵⁴ *United States v. Horn*, 187 F.3d 781, 788 (8th Cir. 1999). “Applications and affidavits should be read with common sense and not in a grudging, hyper technical fashion.” *Walden v. Carmack*, 156 F.3d 861, 870 (8th Cir. 1998) (citing *United States v. Ventresca*, 380 U.S. 102, 109 (1965)).

⁵⁵ 187 F.3d at 788.

⁵⁶ *Id.*; see also *United States v. Rabe*, 848 F.2d 994, 997-98 (9th Cir. 1988) (holding that a warrant allowing for the search of a residence that was limited to materials “depicting minors engaged in sexually explicit conduct as those terms are defined in [the statute]” was sufficiently particular).

⁵⁷ *Groh v. Ramirez*, 540 U.S. 551, 560 (2004). The place that is to be searched must be described effectively so that the officer can identify it by using only reasonable effort. *Steele v. United States*, 267 U.S. 498, 503 (1925). Thus, it is particular enough to simply give the street address of a home to be searched, but more than just the street address is necessary if it is a multiple-unit structure. See *id.* at 502-03. The warrant will not be automatically declared unconstitutional if only a street address is given and the executing officer finds that it is a multiple unit structure, but the executing officer cannot search the entire unit. See *id.* Rather, he must use reasonable effort to limit the search, such as checking names on mailboxes or asking neighbors. See *id.*

⁵⁸ *Bohn, Jr. & Muster*, *supra* note 50, at 65. Even still, the Supreme Court upheld a search of the wrong premises because there must be “some latitude for honest mistakes.” *Maryland v. Garrison*, 480 U.S. 79, 87 (1987). In *Garrison*, the police officers were executing a valid warrant and upon entering what they thought was the only apartment that was on the third floor, they discovered there were actually two apartments and they were in the wrong one. *Id.* at 80. However, before realizing they were in the incorrect apartment, they had already found the marijuana that was the basis of the defendant’s conviction. *Id.* at 86-89. The Court upheld this seizure as reasonable because the warrant was detailed and they had no reason to know that they were in the wrong apartment. *Id.*

defined in the warrant" is seized, the seizure will most likely be upheld as constitutional.⁵⁹ For instance, in *United States v. Reyes*,⁶⁰ the warrant allowed for a seizure of business records, and because some of the business records were being kept on cassette tape, the Tenth Circuit held that the seizure of the tapes was constitutional.⁶¹

The particularity requirement serves two functions.⁶² First, it informs the officers of what they are allowed to specifically search and seize.⁶³ Second, it notifies the person who is being searched or seized of what the officers are allowed to take.⁶⁴ In *Katz v. United States*,⁶⁵ the Supreme Court concluded that no discretion should be left up to the executing officers when conducting a search or seizure.⁶⁶ Thus, if it is found that a warrant lacked particularity but the officers acted with restraint, the officers' actions still may be held unconstitutional because the restraint is to be imposed by the magistrate, not the officers.⁶⁷

⁵⁹ *United States v. Reyes*, 798 F.2d 380, 383 (10th Cir. 1986). A federal district court case in North Dakota involved child pornography in which a warrant authorized seizing any items that could contain evidence of child pornography, including a computer. *United States v. Gleich*, 293 F. Supp. 2d 1082, 1089 (D.N.D. 2003). Not only one, but three computers were found and seized during the search. *Id.* The court did not suppress the evidence found on the three computers because it reasoned that the warrant was not to be read "so narrowly as to limit the search and seizure to only one computer." *Id.*

⁶⁰ 798 F.2d 380.

⁶¹ *Id.* at 383. This case involved a conspiracy to possess with intent to distribute cocaine. *Id.* at 381. Reyes received shipments of cocaine and provided financial backings for the transactions. *Id.* at 382. The tapes contained conversations between Reyes and the co-conspirators. *Id.* at 383.

⁶² Bohn, Jr. & Muster, *supra* note 50, at 65. "A particular warrant also 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" *Groh*, 540 U.S. at 561 (citing *United States v. Chadwick*, 433 U.S. 1, 9 (1977)).

⁶³ Bohn, Jr. & Muster, *supra* note 50, at 65.

⁶⁴ *Id.*

⁶⁵ 389 U.S. 347, 356 (1967).

⁶⁶ *Id.*; see *Groh v. Ramirez*, 540 U.S. 551, 575 (2004) ("The Warrant Clause's principal protection lies in the fact that the 'Fourth Amendment has interposed a magistrate between the citizen and the police . . . so that an objective mind might weigh the need to invade [the searchee's] privacy in order to enforce the law.'" (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1998))).

⁶⁷ *Groh*, 540 U.S. at 575. Otherwise, discretion is left up to the police officers, which is precisely from whom it was meant to be eliminated. *Id.* Along with the rules provided by the text of the Warrant Clause, another rule is that warrantless searches and seizures are presumptively unconstitutional. Lerner, *supra* note 51, at 954-55. Conceptually, these unconstitutional warrantless searches and seizures automatically trigger the Exclusionary Rule. *Id.* According to the Exclusionary Rule, any evidence that is obtained through a method that violates the Fourth Amendment is excluded from the trial. DRESSLER, *supra* note 39, § 21. *Weeks v. United States* was the first case to hold that there is a federal

Even though the Fourth Amendment is divided into clear sections, it proves to be problematic when applied, but the courts have attempted to make it manageable by providing specific tests and definitions.⁶⁸ Since

Exclusionary Rule. 232 U.S. 383 (1914). *Mapp v. Ohio* extended this rule to the state courts. 367 U.S. 643 (1961). The purpose behind the Exclusionary Rule is to remove the “incentive to disregard” the Fourth Amendment, and so deterrence of intrusive police searches and seizures is its primary goal. DRESSLER, *supra* note 39, § 21. Three main exceptions to the Exclusionary Rule are the Plain View Doctrine, the Good Faith Exception, and the Fruit of the Poisonous Tree Doctrine. *Id.* First, the Plain View Doctrine establishes that evidence that is of an obvious incriminating nature can be seized without a warrant if it is in plain view of the police officer lawfully present at the scene. *Id.* § 15. The Plain View Doctrine is logical because without it, more time and energy would be needed to obtain obviously incriminating evidence, and it would be dangerous not to obtain the evidence because it may subsequently be stolen, hidden, or destroyed. *See generally* Donald Resseguie, Note, *Computer Searches and Seizures*, 48 CLEV. ST. L. REV. 185, 191 (2000). Also, the police could later be harmed by weapons discovered that were in plain view and not seized. *Id.* Yet, if the evidence is moved even slightly, the Plain View Doctrine is not applicable. *Arizona v. Hicks*, 480 U.S. 321, 328–29 (1987). In *Hicks*, a police officer was helping with the authorized search of an apartment, and he recognized a stereo within the apartment that matched the description of one recently stolen in a robbery that was separate from the crime he was investigating. *Id.* at 323. The police officer moved the stereo slightly so he could see the serial number, and this movement was enough to render the Plain View Doctrine inapplicable, and consequently the evidence was suppressed. *Id.* at 328–29. If he could have read the serial number without moving the stereo, there would have been no constitutional problem, but because the serial number was not in the officer’s plain view, he violated the Fourth Amendment. *Id.* The dissent in *Hicks* determined that the decision “trivializes the Fourth Amendment” by making a distinction that determines a constitutional outcome based upon moving an item an inch versus not moving it at all. *Id.* at 333 (Powell, J., dissenting). Second, and probably the most well-known, is the Good Faith Exception, which provides that evidence obtained pursuant to a warrant that later is declared unconstitutional can still be admitted if the warrant would be believed to be valid by a well-trained police officer. *United States v. Leon*, 468 U.S. 897, 905 (1984). This is an objective standard that does not encompass improperly executed warrants. *Id.* The third influential exception to the Exclusionary Rule is the Fruit of the Poisonous Tree Doctrine, which states that evidence that is not a fruit of the poisonous tree is admissible. *Nardone v. United States*, 308 U.S. 338, 341 (1939). In this case, the prosecution attempted to use evidence that was obtained in a manner that violated a state law, and the evidence was suppressed because the prosecution could not prove it could get it in an independent way. *Id.* There are three main exceptions to the Fruit of the Poisonous Tree Doctrine: (1) the independent source doctrine, (2) the inevitable discovery rule, and (3) the attenuated connection principle. *Id.* The independent source doctrine states that so long as evidence was found in a legally seized manner, it is admissible. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). Next, the inevitable discovery rule states that evidence can be admitted so long as the prosecutor proves by a preponderance of the evidence that the challenged evidence ultimately would have been discovered by lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984). Finally, the attenuated connection principle asserts that evidence secured by illegal police conduct still can be admitted if the connection between the illegality and the challenged evidence has become so “attenuated as to dissipate the taint.” *Nardone*, 308 U.S. at 341.

⁶⁸ *See infra* Part II.C. For example, a major topic of concern includes the numerous exceptions to the warrant requirement, which have generated many holes in the Fourth

the enactment of the Fourth Amendment, the courts have endeavored to define exactly what is meant by the terms search and seizure and what is necessary for a valid warrant to issue.⁶⁹

C. Defining a Search and a Seizure

Despite the fact that the Fourth Amendment has two main sections, referred to as the Reasonableness and Warrant Clauses, the Constitution fails to specifically define “search” and “seizure.”⁷⁰ The Supreme Court attempted to define both of these terms, but the Court’s drastic changes in Fourth Amendment analysis illustrate that the definitions of these

Amendment, making it “basically unrecognizable.” *California v. Acevedo*, 500 U.S. 565, 582 (1991). In Justice Scalia’s concurrence, he pointed out that there are at least twenty-two exceptions to the warrant requirement. *Id.* Eleven of these exceptions are: “searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to non-arrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . [and] school search[es].” *Id.* (citing Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985)). Scalia pointed out that since the time of that article, two more exceptions have been added, including searches of mobile homes and searches of government employees’ offices. *Acevedo*, 500 U.S. at 582–83. The number of exceptions suggests that the rule works in the opposite direction, with people first looking for an exception before even considering the rule. Lerner, *supra* note 51, at 954–56. Further, many of the warrant exceptions are inapplicable to technological devices. Darla W. Jackson, *Protection of Privacy in the Search and Seizure of E-Mail: Is the United States Doomed to an Orwellian Future?*, 17 TEMP. ENVTL. L. & TECH. J. 97, 102 (1999) (stating that the laws regarding electronic communication are confusing because they have come from “‘patchwork legislation’ resulting from additions to existing laws,” and these statutes are “famous . . . for a ‘lack of clarity’”). An example of an exception to the warrant requirement that is inapplicable to technology is called a search incident to an arrest. *Id.* This allows for the search of a person being arrested and the seizure of items within his immediate control without first obtaining a warrant. *Id.* Originally, this exception was created to protect the arresting police officer by allowing him to seize weapons near the arrestee and to prevent the suspect from destroying or concealing evidence. *Chimel v. California*, 395 U.S. 752, 763 (1969). In its examples, the Court made references to guns. *Id.* However, in the case of technology, unless the computer or cellular phone is used to hit the officer over the head, seizing the item for the protection of the officer is not necessary. Jackson, *supra*, at 107. Preserving evidence is a noble cause, but in the case of technology, it is not necessary to do so without first obtaining a warrant. *Id.* The same information can be gathered after a warrant is first obtained. *Id.* at 115.

⁶⁹ Jackson, *supra* note 68, at 115; see *Minnesota v. Carter*, 525 U.S. 83 (1998) (Scalia, J., concurring). In his concurrence, Justice Scalia stated that “the answer is not remotely contained in the Constitution, which means it is left—as many, and indeed most, important questions are left—to the judgment of state and federal legislators,” which shows that in many instances the Constitution has allowed for analysis and explanation by legislators and judges. *Id.* at 98.

⁷⁰ See *infra* Part II.C.

terms are not concretely settled.⁷¹ Originally, the Supreme Court laid out the Trespass Doctrine, which provided that a search did not occur unless there was a physical intrusion into a “constitutionally protected area.”⁷² Utilizing the Trespass Doctrine in *Olmstead v. United States*,⁷³ the Supreme Court held that interception of conversations using a wiretap was not a search because conversations are not “persons, papers or effects” and consequently are not constitutionally protected.⁷⁴

However, the validity of the Trespass Doctrine began to deteriorate by the Supreme Court’s decision in *Silverman v. United States*,⁷⁵ where it decided that a search occurred when a microphone was inserted in a wall, which barely intruded into the speaker’s side, not because of the physical trespass of the wall, but for other reasons: “Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law.”⁷⁶ The Trespass Doctrine was eventually overruled by *Katz*, where the Supreme Court provided a definition of a search through a two-prong test.⁷⁷ Even though the law has undergone a metamorphosis, the Court attempts to provide current definitions of “seizure” and “search” through *Katz* and its prodigy.

⁷¹ See Randolph S. Sergent, Note, *A Fourth Amendment Model For Computer Networks and Data Privacy*, 81 VA. L. REV. 1181, 1185-90 (1995).

⁷² *Lanza v. New York*, 370 U.S. 139, 142 (1962). In this case, the Court determined that a jail is not a constitutionally protected place and thus recording a conversation within does not violate the Fourth Amendment. *Id.* at 143; see also *Silverman v. United States*, 365 U.S. 505, 510 (1961). The Court held that offices and homes are constitutionally protected but that there has to be a physical intrusion. DRESSLER, *supra* note 39, § 7.02. Therefore, “eyes and ears cannot ‘search’ or ‘seize,’ as neither can trespass.” *Id.*

⁷³ 277 U.S. 438 (1928).

⁷⁴ *Id.* at 472. The defendants sought to suppress evidence of telephone conversations in which they discussed selling liquor, which was illegal. *Id.* at 456. The case dealt with a conspiracy involving over fifty individuals. *Id.* The Court held that wiretaps can trespass, but because the lines were not on the property, there was no trespass in this case. *Id.* at 466. In its holding, the Court acknowledged that the act was unethical but declared that ethics cannot drive the determination of the constitutionality of an act. *Id.* at 468. The Court stated that the absence of an intrusion on the person’s premises was a “vital factor” in finding there was not a search. *Id.* Also, the Supreme Court held that a search done on a boat by utilizing a searchlight did not constitute a search because a searchlight cannot trespass. *United States v. Lee*, 274 U.S. 559, 563 (1927).

⁷⁵ 365 U.S. 505, 511 (1961).

⁷⁶ *Id.* Instead, the Court focused on the importance of protecting the home by stating that “[a]t the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” *Id.* The Court held that because the police did not have a warrant and entered the home, the Fourth Amendment was violated. *Id.* at 512.

⁷⁷ *Katz v. United States*, 389 U.S. 347 (1967). *Katz* completely ended the life of the Trespass Doctrine by holding that the fact that the recording device “did not happen to penetrate the wall of the booth can have no constitutional significance.” *Id.* at 353.

1. Seizure

The Supreme Court has defined a seizure as a “meaningful interference with an individual’s possessory interests in that property.”⁷⁸ For example, a seizure occurs when police remove or destroy property or when they secure the premises where property is contained.⁷⁹ Conversely, a seizure does not occur when an officer picks up and immediately replaces or slightly moves an object because there is no meaningful infringement of the possessory interest.⁸⁰

In *United States v. Jacobsen*,⁸¹ the Supreme Court held that the police officer taking a small trace of a sample of white powder from a package for testing, which subsequently turned out to be cocaine, did not constitute a seizure because there was no “meaningful interference [of the] individual’s possessory interests in that property.”⁸² Similarly, in *Arizona v. Hicks*,⁸³ the Supreme Court held that no seizure occurred even though the officer moved a stereo to read its serial number because, again, the individual’s possessory interest was not meaningfully

⁷⁸ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Part of the reason the Court held there was no meaningful interference is because the respondents did not even notice that any of the substance was taken. *Id.* at 113, 125.

⁷⁹ *Maryland v. Macon*, 472 U.S. 463, 469 (1985). In this case, the defendant was convicted of distributing obscene materials, which was a violation of Maryland law. *Id.*

⁸⁰ *Id.* In *Macon*, the officer bought a magazine from the defendant who was selling obscene materials. *Id.* It was determined that no seizure occurred:

[The seller] voluntarily transferred any possessory interest he may have had in the magazines to the purchaser upon the receipt of the funds. Thereafter, whatever possessory interest the seller had was in the funds, not the magazines. At the time of the sale the officer did not “interfere” with any interest of the seller; he took only that which was intended as a necessary part of the exchange.

Id. at 469 (citations omitted).

⁸¹ 466 U.S. 109 (1984).

⁸² *Id.* at 113. Another area of concern discussed in *Jacobsen* is referred to as government action. *Id.* (citing *Walter v. United States*, 447 U.S. 649, 662 (1980)). The Court determined that Fourth Amendment protection is only afforded in cases where there is governmental action. *Id.* Any government participation, including encouraging, monitoring, or advising, implicates governmental involvement. Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 HARV. J.L. & TECH. 75, 79 (1994). Yet, the Supreme Court held that private party searches can implicate the Fourth Amendment but only when the government has the knowledge and intent to assist. *Jacobsen*, 466 U.S. at 113. In this case, a private party opened a package and found white powder in it. *Id.* at 111. Then, a federal agent was called to inspect the questionable substance, and the Court held that there was no government action because the inspection by the federal agent came after a private search was already conducted and the government did not know about the private search before it occurred. *Id.* at 111, 126. Any privacy interest was already frustrated by the private party search. *Id.*

⁸³ 480 U.S. 321, 321 (1987).

affected.⁸⁴ Also, in *United States v. Criminal Triumph Capital Group, Inc.*,⁸⁵ a federal district court held that so long as the original item is not harmed, making copies of that item is not considered a seizure.⁸⁶ As illustrated by these cases, the Supreme Court has provided a logical definition of a seizure, but a seizure is only one part of the Fourth Amendment.

2. Search

Unlike seizures, the judicial system has struggled in defining a search, as evidenced by its lack of an explicit definition.⁸⁷ In *Katz*, the Supreme Court handed down the current determination of a search through a two-prong test.⁸⁸ *Katz* established that the Fourth Amendment protects people and not places, and in order to find that a constitutionally protected search occurred, both a subjective and objective standard must be met.⁸⁹ Therefore, under the *Katz* test, the person must have a subjective expectation of privacy, and it has to be objectively determined that this expectation of privacy is one that “society is prepared to recognize as ‘reasonable.’”⁹⁰

⁸⁴ *Id.* Even though there was no seizure, it was determined that this action was a search that was unconstitutional because the serial number was not in plain view and there was no probable cause. *Id.* at 328–29. The Plain View Doctrine exists so police officers can protect themselves and seize obviously incriminating items, such as a gun in plain view. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

⁸⁵ 211 F.R.D. 31 (D. Conn. 2002).

⁸⁶ *Id.* In this case, the attorney made a copy, or “mirror image” of the hard drive. *Id.* The court held that “[i]t is a reasonable and routine procedure for a computer examiner to save or back up the mirror image to another medium . . . for examination purposes. The fact that he created a [copy] does not mean that he seized the entire hard drive.” *Id.* at 48. In another case, officers searched and seized the defendant’s computer, and it was held reasonable for the officers to make a “safeback” copy of the hard drive. *Fenton v. Pellitier*, No. 03-281-P-H, 2004 U.S. Dist. LEXIS 20101 (D. Me. Oct. 5, 2004).

⁸⁷ *Sergent*, *supra* note 71, at 1187 n.24. One reason it is hard to define is because there are many possible ways a police officer can perform a search. *Id.* A second reason it is hard to define is because the definitions have drastically changed. *Id.*

⁸⁸ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This case has not been expressly overruled by the Supreme Court and is currently used as the test for determining whether a Fourth Amendment violation occurred. *Id.*

⁸⁹ *Id.* Subjective expectations are influenced by what the laws currently are. *Clancy*, *supra* note 30, at 531; *Sergent*, *supra* note 71, at 1189.

⁹⁰ *Katz*, 389 U.S. at 361. It was directly asserted that the Fourth Amendment does not protect items that were exposed to the public, but it does protect items that a person sought to keep protected, even if it is accessible to the public. *Id.* at 361–62. The Court provided this standard because if people seek to protect items, they have a reasonable subjective and objective expectation of privacy. *Id.* Conversely, if information is exposed to the public, even though a person may have a subjective expectation of privacy, the objective

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In *Katz*, FBI agents obtained evidence, without first acquiring a warrant, of a man's illegal gambling activity by placing a recording device on a telephone booth and listening to his conversations.⁹¹ The Court held that the evidence was not admissible because it violated the Fourth Amendment.⁹² As part of the Court's reasoning, it found that even though the agents showed restraint, that restraint should not have been self-inflicted but should have been ordered by a magistrate through a warrant, which was not obtained.⁹³

Overall, the judicial system has struggled in defining both the subjective and objective standards of the *Katz* test.⁹⁴ When applying the subjective standard, its definition varies because it depends on the citizen's understanding of technology as well as society's ever-changing attitudes.⁹⁵ For example, because people are now aware that computers can track their actions, purchases, and whereabouts, citizens' subjective expectations of privacy with respect to computers are less than they were prior to widespread computer use.⁹⁶

Unlike the subjective prong, the Supreme Court has provided three factors to consider within the objective prong of the *Katz* test.⁹⁷ When determining if there is a reasonable objective expectation of privacy, the Court examines the following: (1) the nature of the property inspected;

expectation of privacy cannot be met because it is unreasonable. *Id.* at 351-52. Even though the Fourth Amendment does not contain the word "privacy," the test is based on both the subjective and objective expectations of privacy. Michael P. Jewkes, Note, *Just Scratching the Surface: DNA Sampling Prior to Arrest and the Fourth Amendment*, 35 SUFFOLK U. L. REV. 125, 128 (2001).

⁹¹ *Katz*, 389 U.S. at 348. The defendant was convicted of wagering gambling bets. *Id.* at 354. The FBI agents who were investigating him saw the man place calls from a telephone booth at the same time every day, and, without first obtaining a warrant, the agents attached a device that allowed them to listen to and record the man's conversations that took place in the telephone booth. *Id.* at 348, 357.

⁹² *Id.* at 353. The government's actions "violated the privacy upon which he justifiably relied" and thus there was a search and seizure. *Id.*

⁹³ *Id.* at 356; see also *Illinois v. McArthur*, 531 U.S. 326, 330 (2001).

⁹⁴ See *infra* Part III.C.

⁹⁵ Clancy, *supra* note 30, at 531; Sergeant, *supra* note 71, at 1189. Therefore, if the law allows for the government to monitor people constantly by having video cameras on every streetlight, subjective expectations of privacy naturally decrease. DRESSLER, *supra* note 39, § 7.03.

⁹⁶ *Bell v. Wolfish*, 441 U.S. 520, 590 n.21 (1979) ("The reasonableness of the expectation must include an objective component that refers to those aspects of human activity that the 'reasonable person' typically expects will be protected from unchecked Government observation."). "[T]hese three variables—regulatory policy decisions, existing technical infrastructure, and popular culture—are neither exogenous, nor independent; rather, they are intertwined." DRESSLER, *supra* note 39, § 7.03.

⁹⁷ DRESSLER, *supra* note 39, § 7.04.

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(2) the extent to which a person has attempted to keep the property private; and (3) the degree of intrusion inflicted by the police.⁹⁸ First, the Court heavily considers the nature of the property, despite previously stating that the Fourth Amendment protects people and not places.⁹⁹ For example, the Fourth Amendment does not protect activity that occurs in an open field.¹⁰⁰ However, activity that occurs within a person's home is protected.¹⁰¹

Second, the Supreme Court determined that no Fourth Amendment protection is afforded to items a person allowed the public to see or hear.¹⁰² In *California v. Ciraolo*,¹⁰³ the defendant, who was growing

⁹⁸ *Id.* The objective prong is based on a reasonableness standard. *Id.*

⁹⁹ *Minnesota v. Carter*, 525 U.S. 83, 90 (1998). In this case, a drug deal occurred within a home, and the Court held that because the home was being used as a commercial meeting place for a drug transaction, it was to be treated as a commercial place, which brings a different outcome than if it was treated as a residence. *Id.* at 90-91. The Supreme Court held that the home is still to be considered a special place in which "all details are intimate details." *Kyllo v. United States*, 533 U.S. 27, 37 (2001). In 2004, the Supreme Court decided that, "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion' stands '[a]t the very core of the Fourth Amendment.'" *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (citing *Kyllo v. United States*, 533 U.S. 27, 31 (2001)). Probably the best summation of contemporary views on the Fourth Amendment was proclaimed by William Pitt:

The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT 1.1(a) at 4 (3d ed. 1996) (citing N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 49-50 (1937)). Therefore, commercial structures are treated differently than residential structures because expectations of privacy are greater in the home than anywhere else. DRESSLER, *supra* note 39, § 6.03. Society's reasonable expectation of privacy drives the objective prong, and because society teaches the importance of the sanctity of the home, this view has been accepted. *Id.* For example, the objective expectation of privacy within the home exists even if the home's windows and doors are not locked. *Id.*

¹⁰⁰ *Hester v. United States*, 265 U.S. 57, 59 (1924). This case occurred during the Prohibition, and a man was convicted for concealing liquor. *Id.* He disposed of the jug in a field while running. *Id.* at 58. The defendant tried to claim that the police violated his Fourth Amendment right to privacy because they went onto his father's open field without a warrant. *Id.* However, the Court found that there is no Fourth Amendment protection in an open field. *Id.* at 59.

¹⁰¹ *Minnesota v. Carter*, 525 U.S. 83, 94 (1998) (Kennedy, J., concurring) ("[P]ersonal security in one's home [is] an assurance which has become part of our constitutional tradition."). "Entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972).

¹⁰² *California v. Ciraolo*, 476 U.S. 207, 213 (1986). This case has been distinguished, but for the most part other courts have followed it. *Id.*

marijuana in his backyard, attempted to hide it by building a ten-foot-high fence around his property.¹⁰⁴ The evidence was not suppressed because, even though the Court acknowledged the defendant's effort to veil the plants by building a fence, the Court also noted that the police should not have to "shield their eyes" to illegal activity.¹⁰⁵ Also, when determining if a person took steps to ensure his privacy, the Supreme Court found that once someone gives another information, he "assumes the risk" that the person receiving the information is either a police officer or that the information will be turned over to the police.¹⁰⁶

Third, the Supreme Court declared that the amount of police intrusion is also a factor in the objective prong of the *Katz* test.¹⁰⁷ *Florida v. Riley*,¹⁰⁸ which factually resembled *Ciraolo*, involved the police, who did not first obtain a warrant, using aerial surveillance in an attempt to discover marijuana growing in the person's greenhouse.¹⁰⁹ The Court determined that a search did not occur because the defendant exposed his greenhouse to the view of anyone flying overhead, and therefore the Fourth Amendment was not violated.¹¹⁰ The Supreme Court reasoned that neither the police nor their equipment interfered with the defendant's normal use of the greenhouse because the helicopter did not make any "undue noise, and no wind, dust, or threat of injury."¹¹¹

Fourth Amendment analysis does not end with an understanding of its history, definitions, and current status. As with most standards, the true test lies in its application. To fully understand the meaning of the Fourth Amendment with technology, it is beneficial to examine how the

¹⁰³ 476 U.S. 207 (1986).

¹⁰⁴ *Id.* at 209. After receiving an anonymous tip, the police were performing an aerial search of his home and noticed the cultivation of marijuana plants. *Id.*

¹⁰⁵ *Id.* at 213. The Court pointed out that someone sitting on top of a bus or in a tree would have been able to see the marijuana plants as well. *Id.* at 211.

¹⁰⁶ *Goldman v. United States*, 316 U.S. 129, 135 (1942). The Court recognized that this principle is sound and has been rightfully followed for years. *Id.*

¹⁰⁷ *Florida v. Riley*, 488 U.S. 445, 453 (1989). Compliance with the laws alone is not enough to prove that the government search was not intrusive. *Id.*

¹⁰⁸ 488 U.S. 445 (1989).

¹⁰⁹ *Id.* at 448. In this case the police used a helicopter instead of an airplane. *Id.* The Court determined that helicopter use is common because every state uses helicopters in police work. *Id.* at 451 n.2.

¹¹⁰ *Id.* at 451-52. In this case, the police flew the helicopter extremely close to the ground. *Id.* at 451. The altitude flown was forbidden by government regulation for airplanes but was not forbidden for helicopters. *Id.* at 451 n.3. The result would have been different if the officers were flying an airplane and broke the law. *Id.* at 451.

¹¹¹ *Id.* at 452.

courts actually utilize it with technological devices, such as conventional telephones and computers.

D. Applying the Fourth Amendment to Technology

As technology rapidly advances, the courts have difficulty keeping Fourth Amendment standards of a search and seizure current and applicable.¹¹² The Supreme Court has defined the intent of the Fourth Amendment by continually referencing its historical roots and establishing precedent regarding its key terms.¹¹³ Additionally, the Court has provided the *Katz* test, which created both a subjective and objective component, to aid in the analysis of the Fourth Amendment.¹¹⁴ An instructive way to analyze advancing technology, including cellular phones, is to look at how the courts dealt with similar devices in the past.¹¹⁵

1. Conventional Telephones

The main principle regarding telephones and the Fourth Amendment is that no protection is afforded to a person who mistakenly believes that a person in whom he confides will keep the information confidential.¹¹⁶ Hence, most actions taken by police officers with telephones, including listening in, recording, or obtaining information from an informant, are upheld because they typically involve a person's erroneous belief in the trustworthiness of another.¹¹⁷ The Supreme Court noted that "dangers . . . are present in executing a warrant for the 'seizure' of telephone conversations" because "responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy."¹¹⁸ A thorough examination of case precedent is warranted to determine which types of searches lessen privacy intrusions.¹¹⁹

¹¹² See *infra* Part III.

¹¹³ See *supra* Parts II.A, II.B.

¹¹⁴ See *supra* Part II.C.

¹¹⁵ See *infra* Part II.D.

¹¹⁶ *Hoffa v. United States*, 385 U.S. 293, 302 (1966). In this case, the defendant made statements about trying to bribe a juror in his trial to a third party who turned him into the authorities. *Id.*

¹¹⁷ See *infra* Part II.D.

¹¹⁸ *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). It is inevitable that the officers will hear conversations that are not within the limits of the warrant because the only way to determine if the conversation is relevant is to listen to it. *Id.*

¹¹⁹ *Maryland v. Buie*, 494 U.S. 325, 331 (1990) ("Our cases show that in determining reasonableness, we have balanced the intrusion on the individual's Fourth Amendment

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The courts established clear rules pertaining to who can claim a Fourth Amendment right with telephones.¹²⁰ First, Fourth Amendment rights are personal and so to successfully establish them in a telephone conversation, the person asserting the right must be a party to the conversation.¹²¹ For example, if the only parties involved in the telephone conversation are a police officer and a party other than the drug dealer attempting to raise a Fourth Amendment violation, the drug dealer cannot successfully seek Fourth Amendment protection.¹²²

Second, because courts have consistently held that there is no reasonable expectation of privacy when placing a telephone call, it is constitutionally permissible for officers to listen to conversations either personally or through the assistance of third parties.¹²³ Further, in *United*

interests against its promotion of legitimate governmental interests.”); see also *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (“In considering that balance, we acknowledge that some intrusions on privacy are more offensive than others.”).

¹²⁰ See *infra* Part II.D.

¹²¹ *United States v. Fernandez-Roque*, No. 96-4351, 1997 U.S. App. LEXIS 2716 (4th Cir. Feb. 14, 1997). The personal interest being described is more commonly referred to as standing. *Id.* at *2. In order to bring a constitutional claim in any court, the person must prove he has standing, and to show that one has standing in a Fourth Amendment claim, the person must prove he has a personal interest involved. *Id.* To establish that one has a personal interest, the person must prove both that an unreasonable search or seizure occurred and that he was personally victimized. *DRESSLER, supra* note 39, § 20.01. Thus, if something was unreasonably taken from X’s home that incriminates D and is introduced at D’s trial, D cannot attempt to suppress the evidence unless he can show that he was a victim of the unconstitutional activity. *Id.* This is true even though X could suppress it at his own trial. *Id.* In *Fernandez-Roque*, the Fourth Circuit held that it is not enough for the defendant to show that the prosecution utilized incriminating evidence against the defendant to establish a personal interest. 1997 U.S. App. LEXIS 2716, at *2.

¹²² *Fernandez-Roque*, 1997 U.S. App. LEXIS 2716, at *2. In this case, the police officer was in the defendant’s hotel room pursuant to a search warrant and answered the telephone. *Id.* at *1. The defendant sought to suppress the evidence based on Fourth Amendment grounds, but the court held he had no Fourth Amendment rights because he was not a party to the conversation. *Id.* at *2.

¹²³ *Hoffa v. United States*, 385 U.S. 293, 302 (1966). Contradictory to most case precedent, a recent decision by the Washington Supreme Court found that the defendant’s expectation of privacy in a telephone call was reasonable. *State v. Christensen*, 102 P.3d 789 (Wash. 2004). In that case, after being informed by the police that her daughter’s boyfriend was the suspect in a recent robbery, the mother listened in on a telephone conversation her daughter had with her boyfriend by employing the speakerphone function on the cordless phone’s console. *Id.* at 791. The daughter did not know her mother was listening because the daughter took the cordless phone up to her room and shut the door. *Id.* During the course of the conversation, the boyfriend admitted that he knew about the robbery, but he did not explicitly admit that he committed the robbery. *Id.* The mother testified to these statements, and the Washington Supreme Court held that the testimony was inadmissible. *Id.* at 796. The court decided that it was irrelevant that the daughter knew her mother had listened in on conversations in the past because it was not concerned with the daughter’s expectation of privacy, but instead it was concerned with the defendant’s privacy. *Id.* at

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States v. White,¹²⁴ the Supreme Court decided that only one party to the conversation must agree for a police officer to legally listen to or record the conversation.¹²⁵ Similarly, the Kansas Court of Appeals deemed evidence obtained from a telephone conversation admissible because “any party to a private conversation may waive the right of privacy and the non-consenting party has no Fourth Amendment . . . right to challenge that waiver.”¹²⁶

Not only is it constitutional for officers to listen to telephone conversations, they can also answer the phone and engage in a conversation, even if the officer pretends to be someone else.¹²⁷ This contention respects the Supreme Court decision that states that the test is whether the agent had probable cause to believe that the evidence will aid in the solution of the crime under investigation.¹²⁸ The Fourth

792. Also, the mere possibility of intrusion is not enough to find that there is no expectation of privacy. *Id.* Finally, there is no minor exception when privacy interests are at risk. *Id.*

¹²⁴ 401 U.S. 745 (1971).

¹²⁵ *United States v. White*, 401 U.S. 745, 752 (1971). The Supreme Court held that if an informant allows his conversations to be electronically monitored or recorded, no Fourth Amendment rights have been violated. *Id.*

¹²⁶ *State v. Roberts*, 774 P.2d 378, *7-8 (Kan. Ct. App. June 2, 1989). In this case, while officers were investigating an alleged assault, the defendant called the residence and asked to speak with Chrislip, who was the man he previously assaulted. *Id.* at *2-3. Instead of giving the phone to Chrislip, the phone was handed to the police officer who subsequently heard the defendant make threatening statements intended for Chrislip to hear. *Id.* When one decides to engage in a private conversation, he has the burden of making certain that he can trust the person with whom he is communicating. *Id.* at *8. Simply put, the court stated that “it is clear that defendant had no justifiable expectation of privacy when he placed the call . . . [and] the defendant was taking a risk that Chrislip would relay this conversation to the police or would cooperate with the police concerning the conversation.” *Id.* It is important to note that individual states can employ a more strict rule than the federal rule that only one party must consent for the police to listen to a telephone conversation. *Id.* at *16.

¹²⁷ *State v. Goucher*, 881 P.2d 210, 213 (Wash. 1994). In this case, officers were legally carrying out a search warrant when the phone rang. *Id.* at 211. The officer answered it, and the person on the other line asked for the homeowner. *Id.* The officer indicated that the homeowner was not there but that he was handling the homeowner’s business. *Id.* The caller asked for an eighth of cocaine, and the officer arranged for the sale. *Id.* When the caller came over to execute the drug deal, the officers arrested him. *Id.* at 211-12. The admission of the phone call into evidence was held constitutional because people do not have an expectation of privacy in strangers. *Id.* at 213. Also, the defendant claimed that the answering of the telephone violated the Fourth Amendment because it exceeded the scope of the warrant. *Id.* at 215. However, the court dismissed this argument because Fourth Amendment rights are personal and cannot be vicariously asserted. *Id.* at 215-16.

¹²⁸ *Warden v. Hayden*, 387 U.S. 294, 306 (1967) (“[I]t is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals.”); *see*

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Circuit established that it would be illogical to not allow an officer to answer a phone call during a search.¹²⁹ As a result, most information voluntarily conveyed on the telephone is not afforded Fourth Amendment protection.¹³⁰

Third, it is acceptable for officers to obtain phone records without a warrant.¹³¹ The Sixth Circuit indicated that the type of information in “[t]hese records contain no information as to the persons participating in the call or the subject matter of the conversation,” and therefore it is not an interception of a message.¹³² Also, the Second Circuit concluded that

United States v. Passarella, 788 F.2d 377, 381 (6th Cir. 1986) (“[O]nce lawfully present, the police may answer a ringing telephone.”); United States v. Ordonez, 737 F.2d 793, 810 (9th Cir. 1983) (stating that “the telephone is highly necessary to an unlawful organization selling cocaine out of private residences”); see also State v. Freeman, No. 10500, 1982 Ohio App. LEXIS 14437 (Ohio Ct. App. June 23, 1982). In *Freeman*, the police officers were in the immediate pursuit of a person who had just committed a robbery. *Id.* at *4. They followed the person into the hotel in which he was staying. *Id.* The front desk phone rang and was answered by the receptionist, who told police that the caller asked for the person they were trying to find. *Id.* The police took the call, pretending to be the person they were pursuing, and they acquired further evidence about the matter. *Id.* at *4-5. Even though the police did not obtain a warrant, the court held that there was no violation of the Fourth Amendment because the police knew that the person was connected with the robbery and was registered at the hotel: “[S]uch evidence has a nexus with the crime under investigation [and so] it may be seized.” *Id.* at *9 (citing United States v. Kane, 450 F.2d 77 (5th Cir. 1971)).

¹²⁹ United States v. Fernandez-Roque, No. 96-4351, 1997 U.S. App. LEXIS 2716 (4th Cir. Feb. 14, 1997). In fact, this practice is so common that it is reported freely in the media. One article reported that while the police were searching a home where drugs and money were found, the Vice Squad Sergeant was busy arranging drug deals on a cellular phone he found ringing in the couch. Lee Hammel, *Drugs Stings Score Big for Worcester Police; Seized Cellular Phone Key to Several Arrests*, WORCESTER TELEGRAM & GAZETTE, Nov. 6, 2002, at A1, available at LEXIS, News, ALLNWS File. Because they could not decipher the meeting codes that came into the phone, the officers were only able to arrest two of the seven people with whom they set up meetings. *Id.*

¹³⁰ Smith v. Maryland, 442 U.S. 735, 743-44 (1979) (“This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”).

¹³¹ DiPiazza v. United States, 415 F.2d 99, 101 (6th Cir. 1969). The numbers dialed from and received by a phone in association with an identified account is known as a “toll analysis.” Figueroa v. State, 870 So. 2d 897, 899 (Fla. App. 2004). “Subscriber information” is information such as the name, address, telephone number, type of service, and other similar information for the subscriber’s account. *Id.*

¹³² DiPiazza, 415 F.2d at 101. The type of information contained in the records includes the date of the call, the destination of the call, the telephone number that was placed, the telephone number where the call originated, and the amount charged for the call. *Id.* In this case, the court did not suppress the telephone records obtained by the police to prove that the defendant partook in illegal gambling. *Id.* No person is able to reasonably assume that his making a call will remain a secret because just as the person on the other line may allow others to listen without violating the Fourth Amendment, so may a phone company

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when people place calls, they know that the phone company must make some type of record of the conversation, and, consequently, they give consent for the company to make such a record.¹³³ Because there is no interception and consent is given by the caller to create the record, obtaining phone records does not amount to a search and no Fourth Amendment protections are available.¹³⁴

The only Supreme Court case to date dealing with the Fourth Amendment and cellular phones is *Bartnicki v. Vopper*.¹³⁵ *Bartnicki* dealt with other issues, such as the First Amendment, but it did note the principles pertaining to conventional telephones and applied them to cellular phones.¹³⁶ The Court pointed out that “sophisticated (and not so sophisticated) methods of eavesdropping on oral conversations and

turn over phone records without violating the Fourth Amendment. *Id.* at 103–04. There is no government involvement, which is necessary to raise a Fourth Amendment question, when the government did not request the interception of the calls. *United States v. Villanueva*, 32 F. Supp. 2d 635, 639 (S.D.N.Y. 1998).

¹³³ *United States v. Gallo*, 123 F.2d 229, 231 (2d Cir. 1941). Even if it is considered an interception, consent was given to intercept the call for this purpose, and the “reasonable business practice” of making a record of call is constitutional. *Id.*

¹³⁴ *Figueroa*, 870 So. 2d at 899. Because the caller voluntarily conveys this numeric information to the telephone company, there is no expectation of privacy, and the Constitution does not restrict access to it. *Id.* There is no search “unless the individual seeking to invoke the constitutional protection ‘manifested a subjective expectation of privacy’ in the subject matter of the challenged search, and ‘society [is] willing to recognize that expectation as reasonable.’” *Id.* at 899 (quoting *Kyllo v. United States*, 533 U.S. 27, 33 (2001)).

¹³⁵ 532 U.S. 514, 541 (2001) (Scalia, J., dissenting). In his dissenting opinion, Justice Scalia asserted:

Technology now permits millions of important and confidential conversations to occur through a vast system of electronic networks. These advances, however, raise significant privacy concerns. We are placed in the uncomfortable position of not knowing who might have access to our personal and business e-mails, our medical and financial records, or our cordless and cellular telephone conversations.

Id. In this case, a union was engaged in negotiations, and the chief negotiator for the union was Bartnicki. *Id.* at 518. Kane, president of the union, allowed Bartnicki to use her cellular phone to have a lengthy conversation regarding the negotiations, including plans to strike. *Id.* This conversation was intercepted by an unknown party, turned over to a radio station, and aired. *Id.* at 519.

¹³⁶ *Id.* The Court ultimately held that first, the interests of “removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted” did not outweigh the First Amendment restrictions on speech with the press. *Id.* at 529.

intercepting telephone calls have been practiced for decades, primarily by law enforcement authorities.”¹³⁷

By examining case law, it becomes obvious that most actions undertaken by police officers regarding telephones are upheld as constitutional.¹³⁸ The police can listen to or engage in a telephone conversation as well as obtain phone records. As devices advance, the amount of retrievable information increases, and privacy concerns are maximized. Accordingly, case law concerning pieces of technology with more capabilities becomes more complex.¹³⁹

¹³⁷ *Id.* at 522. There is no expectation of privacy in audible messages on an answering machine. *United States v. Whitten*, 706 F.2d 1000, 1011 (9th Cir. 1983). Also, there is no expectation of privacy in a cassette tape. *United States v. Bonfiglio*, 713 F.2d 932, 937 (2d Cir. 1983).

¹³⁸ *United States v. Passarella*, 788 F.2d 377, 380 (6th Cir. 1986) (“Every federal and state court which has addressed facts similar to those here has also concluded that an agent’s conduct in answering a telephone while lawfully on the premises is not violative of the Fourth Amendment.”); *see also* *United States v. Congote*, 656 F.2d 971, 976 (5th Cir. 1981).

¹³⁹ The pager is an example of a device that has advanced over time and correspondingly received different treatment from the courts. Some pagers are less advanced and can only receive incoming numbers, but others are more advanced and allow the incoming caller to have options, including the opportunity to send his own message. *Figueroa v. State*, 870 So. 2d 897, 899 (Fl. App. 2004). In general, people have less of an expectation of privacy with pagers than with telephones because with a telephone, the caller can hear the voice and decide if he wants to converse. *United States v. Meriwether*, 917 F.2d 955, 959 (6th Cir. 1990). However, with a pager, the sender has no idea who possesses the pager or to whom the message will be shown. *Id.* Because there is generally no expectation of privacy regarding pagers, there is typically no protection granted by the Fourth Amendment. *Id.* at 959. Consequently, the Fourth Amendment usually cannot be violated when obtaining information from pagers. *Id.* For some courts, the analysis depends upon the pager’s capabilities. *Figueroa*, 870 So. 2d at 901. Pagers that only have the capacity to indicate the number of the incoming caller have been treated in a similar way to telephone records because with both, the caller has no control over the numbers being sent and displayed. *Meriwether*, 917 F.2d at 958. The Sixth Circuit stated that it is within the scope of a warrant authorizing the seizure of phone numbers for the officer to record numbers displayed on a pager because the officer can seize the numbers, regardless of their form. *Id.* The digital display pager has been termed a “contemporary receptacle for telephone numbers,” and the court even decided that a pager that originally was turned off can be activated by the police because “[t]he later, off-the-premises activation of the pager to obtain [Meriwether’s] number is no more intrusive than the later, off-the-premises opening of a personal telephone book to obtain what might be incriminating evidence.” *Id.* More advanced pagers allow the caller to have control over what numbers appear on the display, and courts disagree over whether this capability necessitates a different analysis. *Id.* For example, some pagers allow the caller to type in a message or code following the number that appears, or to even type in a number that may not reflect the location of the caller. *Id.* In a Florida Supreme Court case, the officers monitored the display on a pager without first obtaining a warrant. *State v. Jackson*, 650 So. 2d 24 (Fla. 1995). The numbers intercepted included a two-to-three digit code that would identify the caller, the caller’s telephone

2. Computers

Computers are more advanced than conventional telephones because they have storage capacity and thus have an elevated probability of conveying intimate details. Technology that contains a high level of individual activity is afforded a high level of protection.¹⁴⁰ Two clear analogies to computers have emerged: closed containers and file cabinets.¹⁴¹

First, the Fourth Circuit has recognized that closed containers, such as lockers, briefcases, and pieces of luggage, are given a correspondingly high amount of protection as a result of people's high expectations of privacy with them.¹⁴² A warrant should be sought before looking into the container, but once authority is granted to look into the container, the

number, and the amount of drugs the caller wanted to purchase. *Id.* at 25–26. As a result of these complex pagers, the Florida Supreme Court held that different results would arise depending on whether the caller had control over the number or message sent because when the caller has control, the message sent is a communication and the sender has a subjective expectation of privacy. *Id.* at 26. The court held that the owner of a pager may have a subjective expectation of privacy regarding the content of the messages being sent, but the owner may not have a subjective expectation of privacy regarding the actual numbers received by the pager that are recorded by the phone company. *Id.* However, the Sixth Circuit refused to follow this logic, holding that a person has no reasonable expectation of privacy when sending a message to a pager, no matter how much control the sender has over what is sent. *Meriwether*, 917 F.2d at 959. The reason that the sender has no expectation of privacy is because the sender has no way of determining who is in possession of the pager and thus has no reason to believe that the owner has it or will keep it private. *Id.* Agreeing with the Sixth Circuit's judgment, the California Court of Appeals determined that even the highly advanced pagers that allow for a ten-second recording are afforded no Fourth Amendment protection because no conversation occurs. *State v. Medina*, 189 Cal. App. 3d 39 (1987).

¹⁴⁰ Winick, *supra* note 82, at 81. A home computer that has a mere 100-megabyte storage capacity limit can hold more than over 100,000 typewritten pages of information. *Id.*

¹⁴¹ See *infra* notes 141–50 and accompanying text. For the sake of discussion, it is also important to note that computers are not being compared to sealed containers, which require force to open. *United States v. Al-Marri*, 230 F. Supp. 2d 535, 541 n.2 (S.D.N.Y. 2002). This distinction is important because with sealed documents, it has been held that if it is necessary to break or damage the property to open it, it may not fall under the scope of a general consent. *Id.* The court held that because documents can be copied from a computer with no damage to the computer, it does not compare to the sealed container analogy. *Id.*

¹⁴² *United States v. Block*, 590 F.2d 535, 541 (4th Cir. 1978). The court calls for the officers to consider the “common experience of life” to determine whether people reasonably had an expectation of privacy in regards to the closed container. *Id.* Not every closed container, such as pants pockets, can be afforded such protection, but containers in which people truly have an expectation of privacy must be afforded protection. *Id.* at 541 n.8.

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police are not limited in what they can search.¹⁴³ They are not limited because it is relatively easy to determine if pieces of incriminating evidence, such as weapons or drugs, are present when rummaging through a closed container.¹⁴⁴ Closed containers are compared to computers because they must be opened and they contain private information.¹⁴⁵

Second, computers are compared to file cabinets because they contain an intermingling of relevant and irrelevant material.¹⁴⁶ The contents of many file cabinets are like the contents of a computer hard drive.¹⁴⁷ Both a file cabinet and a computer typically have an organizational system and contain a vast amount of information.¹⁴⁸

¹⁴³ Resseguie, *supra* note 67, at 188. The analysis then goes back to the concerns raised in *Hayden* because a defendant typically claims that incriminating items seized while performing a search for evidence of another crime should be suppressed because it is irrelevant to the current charge. *Andresen v. Maryland*, 427 U.S. 463, 482 (1976).

¹⁴⁴ *Andresen*, 427 U.S. at 482 n.11 (stating that “a warrant to search for physical objects whose relevance is more easily ascertainable” is simpler to justify).

¹⁴⁵ Resseguie, *supra* note 67, at 213.

¹⁴⁶ *United States v. Hunter*, 13 F. Supp. 2d 574, 583 (D. Vt. 1998). It is important to note that though the file cabinet analogy has been cited in cases, the predominant method is to use the closed container analogy. Resseguie, *supra* note 67, at 213; *see United States v. Al-Marri*, 230 F. Supp. 2d 535, 541 (S.D.N.Y. 2002) (“Courts have uniformly agreed that computers should be treated as if they were closed containers.”).

¹⁴⁷ *Trulock v. Freeh*, 275 F.3d 391, 410 (4th Cir. 2001). Another element for discussion is that relevant material may exist on a computer and may be in “plain view” when the officers are performing a search. *See supra* note 67 for a discussion on the Plain View Doctrine. For the Plain View Doctrine to apply to computers, the computer must “prominently display the evidence of crime” without any interference from authorities, and it requires a new warrant upon finding evidence of a crime outside the scope of the warrant already obtained. Resseguie, *supra* note 67, at 197. When lawfully searching computers, it has been held that police do not have to disregard file names that suggest evidence of criminal activity. *Bohn, Jr. & Muster, supra* note 50, at 65 (citing *Commonwealth v. Viriyahiranpaiboon*, 588 N.E.2d 643, 647 (Mass. 1992)). Also, when someone surrenders his computer to another, his expectations of privacy are lowered because he voluntarily turned the computer and its contents to another for viewing. *Andresen*, 427 U.S. at 482 n.11. A successful application of the Plain View Doctrine is where the police were executing a search warrant looking for evidence of gambling when the words “advanced, declined, unchanged” appeared on the computer screen. *City of Akron v. Patrick*, No. 10428, 1982 Ohio App. LEXIS 11472, at *3 (Ohio Ct. App. June 16, 1982). These words were ones the officer knew to be commonly used in a gambling game regarding stock quotations. *Id.* The court upheld the seizing of the computer because the words were in plain view and the officers were legally in the apartment. *Id.* at *5-8. The Plain View Doctrine does not apply to closed computer files on a hard drive and does not allow extensions of general exploratory searches. Resseguie, *supra* note 67, at 197. The slight moving of a stereo to read its serial number was enough to not allow the Plain View Doctrine to be invoked. *Arizona v. Hicks*, 480 U.S. 321 (1987). Thus, in a situation where

When looking at how much Fourth Amendment protection a piece of technology receives, a major factor to consider is the technological capabilities the device possesses.¹⁴⁹ With conventionally low-technological items, such as telephones, becoming more advanced, courts should consider the most advanced device when determining how to fairly apply current law.¹⁵⁰ The lack of a practical test exemplifies that current standards are outdated and illogical, and as technology quickly advances, courts struggle to keep its standards applicable, and the time has come to re-examine them.¹⁵¹

III. THE FAILING FOURTH AMENDMENT PRECEDENT

The focus of Fourth Amendment precedent is its protection from government intrusion.¹⁵² In an attempt to ensure that result, the *Katz* test has emerged, which provides a two-prong test to find whether Fourth Amendment protection is warranted.¹⁵³ The text of the Fourth

the police randomly open computer files, there is too much affirmative police action and the Plain View Doctrine will not be applicable. *See id.*

¹⁴⁸ *Trulock*, 275 F.3d at 410. Further continuing the explanation of the Plain View Doctrine with computers requires the realization that the Plain View Doctrine is abundantly used with child pornography on computers. DRESSLER, *supra* note 39, § 15. There are countless cases where a person took his computer to be repaired and the repairman found evidence of child pornography on the computer and called police. *United States v. Caron*, No. 03-79-P-H, 2004 U.S. Dist. LEXIS 3663 (D. Me. Mar. 9, 2004). Yet, the Plain View Doctrine has limitations when applied to computers. The First Circuit determined that an image coming into view on a computer is not necessarily enough to authorize an expansion of the search. *United States v. Turner*, 169 F.3d 84 (1st Cir. 1999). In *Turner*, a man allowed the police to search his home for evidence of an assault on his neighbor, and, while doing so, an image of a nude woman, who was physically similar to his neighbor, appeared on the computer. *Id.* at 86. The court held that the image appearing on the computer did not authorize the officer to begin searching the contents of the computer without first obtaining a warrant. *Id.* Similarly, the Tenth Circuit decided that when a warrant specifically states that the police are to look for evidence of names or addresses, they should not begin looking in image or graphics files in computers. *United States v. Carey*, 172 F.3d 1268, 1272-73 (10th Cir. 1999). In *United States v. Carey*, police were searching for evidence of drug activity on a computer when the detective discovered a file containing child pornography. *Id.* at 1271. He abandoned his search for the drug activity and began looking for more evidence of child pornography without first obtaining a warrant. *Id.* The court held that he unconstitutionally went beyond the scope of the warrant, finding that the pornographic images were in "closed files" and thus "not in plain view" of the officer, and ultimately suppressing the evidence. *Id.* at 1273, 1276.

¹⁴⁹ *See supra* Part II.D.

¹⁵⁰ *See infra* Part III.B.

¹⁵¹ *See infra* Part III.

¹⁵² *See supra* Part II.A.

¹⁵³ *See supra* Part II.C. The test came from the ruling in *Katz v. United States*. 389 U.S. 347 (1967). Both prongs hinge on the determination of what a reasonable expectation of privacy is for that particular case. *Id.*

Amendment articulates some of the applicable principles, and other principles are interpreted from court precedent.¹⁵⁴ Those principles based on the text of the Fourth Amendment include the Reasonableness Clause, which provides exactly what the Fourth Amendment covers, and the Warrant Clause, which supplies the probable cause and particularity requirements.¹⁵⁵ A search is defined as a meaningful interference with a person's possessory interest, and a seizure is defined through the *Katz* test, which has both a subjective and objective prong.¹⁵⁶ Together, all of these ideas formulate the current significant standards of privacy protection.

Though the elements of the Fourth Amendment seem clear, its application is confusing. There are two considerable problems with the Fourth Amendment's principles that render them obsolete. First, when applying it to cellular phones, the *Katz* test is impractical and outdated.¹⁵⁷ The courts have explicitly stated that the subjective prong is unhelpful, and the objective prong is too flexible.¹⁵⁸ Illogically, this test remains the standard of Fourth Amendment jurisprudence regarding technological devices, including cellular phones.¹⁵⁹ Second, the closed container analogy that is used with computers is too simplistic to apply to cellular phones, and the analogy that should be used, the file cabinet approach, is not being applied effectively.¹⁶⁰

A. *The Impractical Katz Test*

The *Katz* test has a subjective prong that is based on an individual's belief and an objective prong that is based on society's recognition of what is reasonable.¹⁶¹ Yet, when applying these standards, the practicalities of both the subjective and objective prongs crumble for two reasons. First, courts determine whether a search occurs on a case-by-

¹⁵⁴ See *supra* Parts II.B, II.D.

¹⁵⁵ See *supra* Part II.B.

¹⁵⁶ See *supra* Part II.C.

¹⁵⁷ See *infra* Part III.A.

¹⁵⁸ See *infra* Part III.A.

¹⁵⁹ See *infra* Part III.A.

¹⁶⁰ See *infra* Part III.B.

¹⁶¹ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Douglas, Brennan, JJ., concurring). The Supreme Court directly asserted that the Fourth Amendment does not protect items that were exposed to the public, but it does protect items that a person sought to keep protected, even if it is accessible to the public. *Id.* at 361-62. The Court provided this standard because if people seek to protect items, they have a reasonable subjective and objective expectation of privacy. *Id.* However, if information is exposed to the public, even though a person may have a subjective expectation of privacy, the objective expectation of privacy cannot be met because it is unreasonable. *Id.* at 351-52.

case basis, making it challenging to predict what the courts will rule in each instance.¹⁶² Second, based on the outcomes of prior cases, courts “value[] crime control over individual privacy.”¹⁶³ It appears that the discretion given to the courts in determining the subjective and objective expectations of privacy has provided them with the opportunity to deny Fourth Amendment protection.¹⁶⁴ The *Katz* test should not be applied to cellular phones, as there are clear problems with both the subjective and objective prongs.

The subjective prong of the *Katz* test has been inconsistently applied, dismissed as useless, ignored, and explicitly termed ineffective.¹⁶⁵ By casually dismissing the subjective prong with no explanation, the Supreme Court implicitly confirmed that it does not find it necessary to scrutinize the subjective prong when executing a privacy analysis.¹⁶⁶ There are even holdings in which the Court basically ignored the subjective prong altogether by automatically determining that there was a subjective expectation of privacy, without any explanation, forging into a discussion of the objective prong.¹⁶⁷

Also, the Supreme Court went beyond ignoring the Fourth Amendment by announcing that no person ever has a subjective expectation of privacy.¹⁶⁸ In *Smith v. Maryland*,¹⁶⁹ the Supreme Court declared that it “doubt[ed] that people in general entertain any actual

¹⁶² See *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987) (“[T]he question whether an [individual] has a reasonable expectation of privacy must be addressed on a case-by-case basis.”); *Cressman v. Ellis*, 77 Fed. Appx. 744, 746 (5th Cir. 2003) (“[S]uch privacy expectations must be evaluated on a case by case basis.”); *United States v. King*, 227 F.3d 732, 744 (6th Cir. 2000) (“Whether a legitimate expectation of privacy exists in a particular place or item is a determination to be made on a case-by-case basis.”); see also *United States v. Brown*, 635 F.2d 1207, 1211 (6th Cir. 1980).

¹⁶³ *Sergent*, *supra* note 71, at 1193.

¹⁶⁴ *Id.*

¹⁶⁵ See *infra* Part III.A.

¹⁶⁶ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 654 (1995) (stating that “[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as ‘legitimate,’” and illustrating that it does not matter what the subjective prong determines, all that matters is the objective prong); see also *United States v. White*, 401 U.S. 751–52 (1971) (concluding that most people do not think the people with whom they converse will go to the police with the information they disclose, or else the individual never would have disclosed it).

¹⁶⁷ *Oliver v. United States*, 466 U.S. 170, 177 (1984) (stating only that the subjective idea of privacy could not determine the constitutional outcome).

¹⁶⁸ *Smith v. Maryland*, 442 U.S. 735, 742 (1979).

¹⁶⁹ *Id.*

expectation of privacy."¹⁷⁰ Not only does this statement show that the Court concluded that no one has a real expectation of privacy in that instance, but this statement also defines the subjective prong with the exact language used to define the objective prong.¹⁷¹ The determination of what "people in general" would expect is exactly what the objective prong considers.¹⁷² Thus, the Supreme Court bases the subjective expectation of privacy on what the "people in general" do, and so the subjective and objective prongs are virtually identical.¹⁷³ Deciding the expectation of the "people in general" twice, once in the subjective prong analysis and once in the objective prong analysis, is redundant.¹⁷⁴ Justice John Harlan decided that a person's subjective expectation of privacy is really determined by the current objective expectation of privacy.¹⁷⁵

In addition to the courts' inconsistent holdings and virtual disregard for the subjective prong, some courts have explicitly declared that the subjective prong is irrelevant in Fourth Amendment privacy analysis.¹⁷⁶ Though the subjective standard is still good law, the Supreme Court has gone as far as to assert that the subjective prong "obviously could play no meaningful role" in privacy analysis when expectations can be "'conditioned' by influences alien to well-recognized Fourth

¹⁷⁰ *Id.* at 742. This case dealt with the subjective expectation of privacy in telephone numbers. *Id.* The Court stated that in reference to expectations conditioned by influences foreign to common Fourth Amendment concepts "those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was." *Id.* at 741 n.5.

¹⁷¹ See *supra* Part II.C.2.

¹⁷² *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) ("[T]he only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those 'actual [subjective] expectation[s] of privacy' 'that society is prepared to recognize as "reasonable"' bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.").

¹⁷³ *Smith v. Maryland*, 442 U.S. 735, 742 (1979).

¹⁷⁴ John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1147-48 (1989).

¹⁷⁵ *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). Justice Harlan declared that in privacy analysis, the "search for subjective expectations" should be "transcend[ed]" because "[o]ur expectations . . . are . . . reflections of laws that translate into rules the customs and values of the past and present." *Id.* Interestingly, Justice Harlan was one of the Justices that agreed with the majority in *Katz*. *Katz v. United States*, 389 U.S. 347, 347 (1967).

¹⁷⁶ *White*, 401 U.S. at 781 n.16 ("[T]he Court emphasized the importance of 'an objective predetermination' uncomplicated by a presentation not 'subtly influenced by the familiar shortcomings of hindsight judgment.'").

Amendment freedoms.”¹⁷⁷ The fact that this prong still exists when the Supreme Court has implicitly determined it moot is irrational.¹⁷⁸

Similar to the subjective prong, the objective prong is difficult to apply to technology because of its lack of clarity and indeterminate standards.¹⁷⁹ First, it is not clear by whose standards the “reasonable expectation of privacy” is to be judged.¹⁸⁰ It is impractical for a court to take a national survey every time it has to decide a Fourth Amendment privacy issue, and the Supreme Court has never attempted to use scientific literature or tests to determine a true objective expectation of privacy.¹⁸¹ Due to practicality, it appears that the reasonableness is not determined by an objective opinion of the “people in general,” but is determined by the judge.¹⁸² Conceivably, Fourth Amendment determinations turn on the judge’s technological inclinations.

Second, the objective expectation of the privacy prong proclaims that reasonableness is based on the expectation that “society is prepared to recognize as reasonable.”¹⁸³ As explained above, “[o]ur expectations . . . are . . . reflections of laws that translate into rules [consisting of] the customs and values of the past and present.”¹⁸⁴ The objective expectation is constantly changing with every new law approved and

¹⁷⁷ *Smith*, 442 U.S. at 740 n.5. The Court gave specific examples of when there could be no subjective expectation of privacy. *Id.* “[I]f the Government were suddenly to announce on nationwide television that all homes . . . would be subject to warrantless entry, individuals thereafter might not . . . entertain any actual expectation or privacy regarding their homes, papers, and effects.” *Id.* The Court gave another example of “a refugee from a totalitarian country” whose government previously monitored all of his telephone conversations. *Id.* If that refugee came to the United States and was uninformed about the policies and practices of this nation, he understandably would assume that because his telephone conversations were recorded in his country, they would be recorded by this government as well. *Id.* Therefore, he would not have a subjective expectation of privacy regarding his telephone conversations. *Id.*

¹⁷⁸ *Id.* The Court acknowledged that “[s]ituations can be imagined, of course, in which *Katz*’ two-pronged inquiry would provide an inadequate index of Fourth Amendment protection.” *Id.*

¹⁷⁹ DRESSLER, *supra* note 39, § 7.03.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Minnesota v. Carter*, 525 U.S. 83, 97 (1998). Justice Scalia stated that “expectation[s] of privacy . . . bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.” *Id.*

¹⁸³ *See supra* Part II.C.

¹⁸⁴ *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). “[R]egulatory policy may be based upon existing cultural preferences and the level of technological development, and vice versa.” *Banks*, *supra* note 3, at 591.

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every new piece of technology created.¹⁸⁵ Therefore, with this constant change in attitudes and expectations in technology comes a correspondingly varying Fourth Amendment jurisprudence that makes predicting outcomes virtually impossible.¹⁸⁶ When it lacks uniformity, the law becomes unpredictable and people lose confidence in it.¹⁸⁷ Society's view of reasonableness is appropriate in many instances, but it is not appropriate with computers and cellular phones because technology changes too rapidly and many people are limited in their knowledge—reasonableness cannot be the standard when determining the privacy interest involved with technology.¹⁸⁸

Thus, the *Katz* test is impractical to apply to technology because the subjective and objective prongs are outdated and unable to provide a concrete rule of law.¹⁸⁹ The contradictory foundation of cellular phone precedent is inadequate and a new foundation must be laid.¹⁹⁰ However, for any rule to be effective, it cannot simply exist, it must also be followed.

B. Choosing the Correct Analogy for Cellular Phones

For a rule to be effective, it not only has to work in the present, it also must have the capability to remain updated and apply in the future. The Supreme Court's interpretation of the Fourth Amendment and technology, including the *Katz* test and the closed container analogy, is archaic, and a new standard must be established.

Clear and accurate analogies to computers are essential because these analogies affect the precedent of all types of technology. Computers have been compared to closed containers and file cabinets. They resemble closed containers, which include lockers, briefcases, and luggage, because people have a high expectation of privacy with all of these items.¹⁹¹ They likewise are compared to file cabinets because they

¹⁸⁵ DRESSLER, *supra* note 39, § 7.03. "The detriment of this approach is that the law may end up mirroring current attitudes, which have themselves been conditioned by prior incursions authorized by the courts, rather than projecting a twenty-first view of the proper relationship between the government and citizenry." *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Veronica M. Dougherty, *Absurdity and the Limits of Liberalism: The Absurd Result Principle in Statutory Interpretation*, 44 AM. U.L. REV. 127, 133 n.26 (1994) (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989)).

¹⁸⁸ Raymond Nimmer & Patricia A. Krauthaus, *Copyright and Software Technology Infringement: Defining Third Party Development Rights*, 62 IND. L.J. 13, 22 (1986).

¹⁸⁹ *See supra* Part III.A.

¹⁹⁰ *See infra* Part IV.

¹⁹¹ *See supra* Part II.D.

hold a large amount of information in an organized manner.¹⁹² Currently, cellular phones have the same capabilities as computers, possessing the capacity to perform duties that go far beyond simply sending and receiving phone calls.¹⁹³ With a cellular phone, a person can send emails and text messages, take pictures, save files, and create phone books. As technology advances, the capabilities and characteristics that previously allowed a computer to demand more privacy are now available in cellular phones as well.¹⁹⁴ Hence, computers and cellular phones must be judged according to the same standards.

Due to the development of modern technology, cellular phones and computers are closely related. Consequently, the same standards should be applied to both devices.¹⁹⁵ However, the analysis should not end there because the current standards utilized to analyze computers are not appropriate for either form of technology.¹⁹⁶ In fact, the principle

¹⁹² See *supra* Part II.D.

¹⁹³ Banks, *supra* note 3, at 586–87. People can use a cellular phone to “communicate by voice, . . . access phone mail, voice mail, stock prices, sports scores, and even restaurant reviews.” *Id.* at 586.

¹⁹⁴ *Id.* at 586–87.

¹⁹⁵ In fact, some courts have realized how related cellular phones and computers are and have applied the closed container approach to cellular phones. *United States v. Villanueva*, 32 F. Supp. 2d 635, 638 (S.D.N.Y. 1998). In *Villanueva*, the court held that because the officers made a vehicular stop, they could “examine the contents of any container found therein.” *Id.* In this instance, the court was referring to a cellular phone. *Id.*

¹⁹⁶ Another area of concern weighing heavily on searches and seizures of technology is the inadequate training police receive to perform the searches. *United States v. Hunter*, 13 F. Supp. 2d 574, 583 (D. Vt. 1998). Courts have acknowledged that part of the reason that on-site searches of technological devices are not practical is because law enforcement expertise will not allow it. *Id.* Sometimes, with little guidance, police begin to perform searches on files when many of them do not even know what distinguishes a text file from an image file. *United States v. Carey*, 172 F.3d 1268, 1273 (10th Cir. 1999). Police officers that have insufficient knowledge of computers will most likely conduct overbroad searches. Resseguie, *supra* note 67, at 195. The government either needs to train the officers on computers or allow experts to do it. *Id.* However, even though they may not possess a strong technological understanding, because the police are the people with in-depth and practical knowledge of the Fourth Amendment, the answer cannot be to completely eliminate them from the process. *Id.* However, some courts shockingly have held that police participation in technological searches is bothersome. *United States v. Bach*, 310 F.3d 1063, 1066 (8th Cir. 2002). “The Fourth Amendment does not explicitly require official presence during a warrant’s execution, therefore it is not an automatic violation if no officer is present during a search.” *Id.* at 1066–67. The court finally stated that the presence of a police officer “may have hindered” the search and consequently held that the search not out of the presence of an officer was constitutional. *Id.* at 1067. Preventing the presence of police officers during searches is illogical because the officers are a part of the safeguard that is promised to citizens, and these are the people most likely to know the intricacies of Fourth Amendment protection. Orin S. Kerr, *The Fourth Amendment and New Technologies:*

most widely applied to computers, the closed container approach, has several defects.¹⁹⁷

The first problem is that the closed container approach allows overbroad searches.¹⁹⁸ The established precedent with closed containers is that once the warrant is obtained, the police have authority to look through and search the entire container.¹⁹⁹ However, when dealing with physical documents, courts invalidated warrants that merely acknowledged they were to search for “all documents in paper form” because this type of searching was deemed dangerous.²⁰⁰ In keeping with the analogy of closed containers, the effect of comparing cellular phones to computers is to allow a search of “all information stored on [the] computer.”²⁰¹ It is impractical to allow technology to be compared

Constitutional Myths and the Case for Caution, 102 MICH. L. REV. 801, 878 (2004). Kerr reasons:

In a search of physical property, an untrained person would be likely to destroy more property and invade more privacy than a trained officer. Applying this rationale to a search of a computer, the court reasoned that an officer’s physical presence was required to protect privacy and comply with the Fourth Amendment.

Id.

¹⁹⁷ See *infra* Part III.B.

¹⁹⁸ *United States v. Villanueva*, 32 F. Supp. 2d 635, 638 (S.D.N.Y. 1998) (stating that the common way to talk about searches with a closed container is to say they can look at the “entire container”).

¹⁹⁹ *Id.* “We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person’s papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable.” *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976).

²⁰⁰ *Andresen*, 427 U.S. at 482 n.11. The Second Circuit also determined that an investigation aimed at “the contents of all three file cabinets” was overly broad because there needs to be some direction as to the category of documents that the cabinet may contain. *In re Horowitz*, 482 F.2d 72, 74 (2d Cir. 1973). The Court pointed out that it is easier to determine if a physical object is within the limits of a warrant because it is obvious when you look at it. *Andresen*, 427 U.S. at 482 n.11. In order to determine if a document is relevant, a person must first read the document, and inevitably some information will be discovered that was not intended to be searched. *Id.* The Court also noted the same inherent danger in listening to telephone conversations, finding that one must first listen to at least a part of the conversation to discover if it is relevant. *Id.*

²⁰¹ *Winick*, *supra* note 82, at 110. The closed container analogy has been used by the Tenth Circuit to uphold the seizure of a computer, videos, diskettes, and documents when searching for evidence of child pornography. *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998). The court held that once the warrant was issued to allow for the search of child pornography files, the computer and any components are within the scope of the warrant, effectively allowing for an exploratory search. *Id.* at 1248. This is much like what happens in a closed container search. *Winick*, *supra* note 82, at 110. The object itself, the container, is given much protection because there is a high expectation of privacy, but once the warrant is issued, there appears to be no limit to the search, which is dangerous, especially when dealing with the contents of computers. *Id.* The courts are also willing to uphold the

to a closed container because this would give the police, upon obtaining a warrant, the ability and authority to search freely throughout the entire contents of a cellular phone.²⁰²

The second problem with the closed container approach is that both computers and cellular phones do not properly fit in the category. Items typically characterized as closed containers are lockers, briefcases, and pieces of luggage.²⁰³ It is a great leap to claim that a cellular phone is in the same league as those items typically associated with closed containers because cellular phones have many more capabilities.²⁰⁴ The key to finding a rational principle is to acknowledge that there are two different interests at stake with technological devices: (1) the interest in the physical device and other media used to store information and (2) the interest in the actual informational contents.²⁰⁵ There are several substantial differences between closed containers and cellular phones. First, cellular phones have the potential to hold a vast amount of information, whereas closed containers are not as extensively inclined. Second, many closed containers cannot physically be searched in a police station because they are heavy or affixed to their locations. Yet, something as small and light as a cellular phone can easily be searched in another location if circumstances render it absolutely necessary. Third, closed containers have not advanced significantly over the years but cellular phones have. Closed containers may have stronger locks than

closed container approach when a description of the documents is impossible. *United States v. Musson*, 650 F. Supp. 525, 532 (D. Colo. 1986). Due to the difficulty in describing all files associated with transactions of a company, the District of Colorado held that police could seize the entire computer and allowed the seizure of a large volume of intermingled documents. *Id.* Nonetheless, the closed container analogy, when applied to computers allowing the police to look at anything within the computer, is “too simplistic and allows for search and seizure of computer [sic] to proceed in a very intrusive manner and should be abandoned.” *Resseguie*, *supra* note 67, at 213. The District of Maine stated that a warrant “could not authorize the seizure of every text document and every digital image, no matter how innocent.” *United States v. Clough*, 246 F. Supp. 2d 84, 87-88 (D. Me. 2003); *see also* *United States v. Hunter*, 13 F. Supp. 2d 574, 583 (D. Vt. 1998). In *Clough*, the court held that a description in a warrant calling for the seizure of “all computers, computer related components[,] and other digital storage devices” lacked sufficient limitation because such catchall phrases are too broad. 246 F. Supp. 2d at 88 n.3.

²⁰² *Winick*, *supra* note 82, at 111. Application of the closed container analogy “ignores the reality of modern computer use and allows officers to gain a window into all aspects of a suspect’s life merely because the officers suspect that one piece of relevant information may be stored on a computer.” *Id.*

²⁰³ *See supra* Part II.D.3.

²⁰⁴ These capabilities provide readily available intimate details that are easily conveyed. *See supra* Part I.

²⁰⁵ *Bohn, Jr. & Muster*, *supra* note 50, at 65.

ever before, but this slight advancement is not comparable to the substantial developments with cellular phones.

The third problem with the closed container analogy concerns the timing of when the expectation of privacy is lost.²⁰⁶ According to closed container precedent, the expectation of privacy is automatically lost if a person abandons or disclaims interest in the property.²⁰⁷ Applying this idea to conventional telephones, which typically cannot save information, is understandable because with conventional telephones, once the information is supplied to third parties, the individual's privacy interest deteriorates to the point that he is no longer provided Fourth Amendment protection.²⁰⁸ In these instances, the person loses his expectation of privacy because the information was in his control and he voluntarily turned the information over to others.²⁰⁹ However, the voluntary handing over of information does not occur when a police officer rummages through a cellular phone without the consent of its owner.

Based on the principles applied to telephones, once a person provides information to another, his expectation of privacy should diminish.²¹⁰ Conversely, if the person does not voluntarily provide the information, the expectation of privacy is not lost. Cellular phones, which have as much potential as a computer, should be afforded more protection than what the closed container analogy provides.²¹¹ Because computers, and ultimately cellular phones, are analogized inappropriately as closed containers, the police are allowed to delve into many other areas that go beyond the communication, into an "unlimited intrusion into the contents of a computer's storage without a showing of relevance."²¹² The closed container approach may work for lockers, briefcases, and pieces of luggage, but this approach cannot be applied appropriately to cellular phones because they have the capabilities of a conventional telephone and they resemble computers. Therefore, the file cabinet approach should be applied.

The file cabinet approach is a more appropriate analogy than the closed container approach when considering both computers and

²⁰⁶ Resseguie, *supra* note 67, at 189.

²⁰⁷ *Id.*

²⁰⁸ See *supra* Part II.D.

²⁰⁹ See *supra* Part II.D.

²¹⁰ Resseguie, *supra* note 67, at 189.

²¹¹ Banks, *supra* note 3, at 585-88.

²¹² Resseguie, *supra* note 67, at 212.

cellular phones. According to the file cabinet approach, computers are compared to file cabinets because they both contain a high amount of information in an organized fashion.²¹³ Based on precedent with this analogy, police are not allowed to take an entire file cabinet from an office, reasoning that such a seizure is overbroad and cumbersome.²¹⁴ Thus, police are forced to sort through the volumes of documents on site, separating relevant information from irrelevant information.²¹⁵ By keeping the file cabinet on site, the owner is still able to access important documents, allowing the company to continue its normal operations and minimizing the effects of a possible Fourth Amendment violation.

The contents of many file cabinets are similar to the contents of a computer hard drive.²¹⁶ Thus, the courts should follow file cabinet precedent and not allow computers to be taken off site to another location. Nonetheless, that standard is not reflected in case precedent because it is more convenient for the police to take them off site; consequently, due to convenience, computers are often removed from the office even though the searches allowed on computers, such as keyword searches, are less time consuming than manual searches through file cabinets.²¹⁷

²¹³ *Id.* at 213.

²¹⁴ *Id.*

²¹⁵ *Id.* (citing *In re Horowitz*, 482 F.2d 72, 79–80 (2d Cir. 1973) (indicating that subpoenas should not be directed at whole file cabinets but at categories of documents)).

²¹⁶ *Trulock v. Freeh*, 275 F.3d 391, 410 (4th Cir. 2001) (“[T]he differences between computer files and physical repositories . . . are legally insignificant. Courts . . . apply established Fourth Amendment principles to computers and computer files, often drawing analogies between computers and physical storage units such as file cabinets and closed containers.”).

²¹⁷ *Resseguie*, *supra* note 67, at 213. Even though the warrant is meant to limit the officers in their searches, including searches of technological devices, it is extremely tempting to do a general, exploratory search. *Bohn, Jr. & Muster*, *supra* note 50, at 76–77. Instead of rummaging around aimlessly, specific methods should be used by officers to get at the information quickly, such as keyword searches, temporal delineations, or examination of a printout that contains all of the filenames. *Id.* at 76. The keyword search typically is considered the best option because if the term searched for is anywhere within the computer, it will be found and pulled up. *Id.* at 77. Nevertheless, there are major limitations to keyword searches. *Id.* Just as easily as a drug dealer can call his files something besides “cocaine.doc,” he can also come up with code words as a way of referring to the items tracked on a document within the computer. *Id.* Another drawback is that a person can never be sure to have found everything. *Id.* Because not one method is guaranteed to work, police are not currently limited to using only one method, and the lack of a specific method unfortunately brings one full-circle, back to the ever-tempting possibility of exploratory searches. *Id.* at 76.

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Even though it may be convenient for police to take computers off site, it is terribly inconvenient for the company or person whose computer is taken.²¹⁸ Many businesses and individuals rely on computers for daily functions and not having them could drastically inhibit business and productivity.²¹⁹ This problem is the same for cellular phones. In today's society, due to concerns regarding cost and lack of necessity, many people abandon the old-fashioned landline telephone and only possess a cellular phone.²²⁰ People no longer memorize phone numbers and other pieces of information about themselves or their acquaintances because they store this information in their cellular phones. Consequently, these people only have one phone, a cellular phone, and they store a large quantity of information in it. Therefore, by taking a person's cellular phone, the police are taking that person's chief mode of communication and no one can contact them and they cannot contact anyone.²²¹

By liberalizing searches and seizures for the government's convenience, Fourth Amendment protections are eroded. It is a mockery to those who fought for, composed, and ratified the amendment as well as to those that continue to seek its protection. The file cabinet approach is conceptually logical because the similarities between cellular phones and file cabinets are significant, but the manner in which the Court has applied it is simply unacceptable.²²² When utilizing the file cabinet approach, the method of searching is less likely to be intrusive and the owners are not as likely to be inconvenienced to a point of helplessness so long as they are permitted to keep the device. Due to the failing *Katz* test and inappropriately applied analogies, privacy interests with cellular phones are unprotected and emergence of a new test has become necessary.²²³

²¹⁸ *United States v. Hunter*, 13 F. Supp. 2d 574, 583 (D. Vt. 1998) ("The wholesale removal of computer equipment can undoubtedly disable a business or professional practice and disrupt personal lives, and should be avoided when possible. . . . At the very least, the government should copy and return the equipment as soon as possible.").

²¹⁹ *Id.*

²²⁰ *Banks*, *supra* note 3, at 586. "[A]s common and hightech as these wireless devices may appear today, in a few short years they will look positively antique." *Id.*

²²¹ *Id.* Off-site computer searches should only take place when on-site sorting is "infeasible and no other practical alternative exists." *United States v. Tamura*, 694 F.2d 591, 596 (9th Cir. 1982). If the officers cannot perform an on-site search, the officers may "seal[] and hold [] the documents pending approval by a magistrate of [the conditions and limitations on] a further search [through the documents]." *Id.* at 595-96. The wholesale removal must be monitored by the judgment of a magistrate. *Id.*

²²² *See supra* Part III.B.

²²³ *See infra* Part IV.

IV. REFOCUSING: BRINGING BACK THE FOURTH AMENDMENT

Problems exist with both the interpretation and application of the Fourth Amendment. First, the *Katz* test is impractical and outdated, as courts have explicitly stated that the subjective prong is unhelpful and the objective prong is too flexible.²²⁴ Second, the closed container analogy is too simplistic to apply to cellular phones, and the analogy that should be used, the file cabinet approach, is not being applied effectively.²²⁵ This Part establishes how to deal with search and seizure precedent with cellular phones by abandoning the *Katz* test that has been used for privacy analysis and suggesting a new test, the Dissemination Doctrine.²²⁶

The *Katz* test is inadequate for cellular phones. To satisfy the *Katz* test, a person claiming a Fourth Amendment violation has to actually possess a subjective expectation of privacy, and it has to be objectively determined that this expectation of privacy is one that "society is prepared to recognize as reasonable."²²⁷ The subjective prong has been ignored and disregarded as virtually nonexistent.²²⁸ Conversely, the objective prong is unpredictable and malleable.²²⁹ The law needs to be established and dependable. Currently, the *Katz* test does not provide these characteristics to Fourth Amendment precedent.

Moving beyond *Katz*, the Dissemination Doctrine, which applies to cellular phones, is based on two factors: (1) whether the information was disseminated to others and (2) whether the file cabinet approach was followed.²³⁰ Thus, the Dissemination Doctrine merges recognized telephone precedent and the file cabinet approach. Initially, the new test discards the typical *Katz* analysis, though it utilizes the phrase "expectation of privacy."

The first prong of the Dissemination Doctrine is that the court must consider whether the information was sent voluntarily, or whether it was contained solely within the cellular phone. If the information was sent to another source, established telephone precedent asserts that the expectation of privacy has diminished, and the evidence will not be

²²⁴ See *supra* Part III.A.

²²⁵ See *supra* Part III.B.

²²⁶ See *infra* Part IV.A. The name "Dissemination Doctrine" and the factors of this test were created solely by the author.

²²⁷ *Katz v. United States*, 389 U.S. 347, 361 (1967).

²²⁸ See *supra* Part III.A.

²²⁹ See *supra* Part III.A.

²³⁰ *United States v. Hunter*, 13 F. Supp. 2d 574, 583 (D. Vt. 1998).

suppressed. For example, if a person used the cellular phone to call a third party or send him a picture or text message, the courts should apply existing telephone precedent, which states that the Fourth Amendment does not protect a person's mistaken belief that a third party will not disclose information to the police.²³¹ That person loses his expectation of privacy because a person can never be sure to whom the recipient will show the message or even who is in possession of the cellular phone at the time he sends the message.

However, if the information was not sent to another party but instead was solely contained within the cellular phone, the expectation of privacy still exists and the file cabinet approach must be used, which is the second prong of the Dissemination Doctrine.²³² Because the file cabinet approach must be followed to ensure fair searching within the cellular phone, this prong prescribes such an approach. Cellular phones have an organizational scheme, just like a file cabinet.²³³ The documents contained within a cellular phone and those contained in a file cabinet are equally significant and should be afforded equal protection.²³⁴ Therefore, as with a file cabinet, a police officer should not be allowed to rummage through a cellular phone without a plan.²³⁵ Also, as the file cabinet approach requires, the cellular phone should remain with its owner after the police have downloaded its contents or used an efficient method to conduct the search on site.²³⁶ Ultimately, if the search is done in a manner that respects the file cabinet approach and no other Fourth Amendment violations exist, the evidence should not be suppressed.

The Dissemination Doctrine is capable of keeping up with ever-advancing technology. Its principles will be effectively applied to any cellular phone because it does not ground itself in the cellular phone's capabilities, but instead it bases its outcomes on the actions of the individual. The Dissemination Doctrine applies to all cellular phones,

²³¹ See *supra* Part II.D.

²³² See *supra* Part III.B.

²³³ *Trulock v. Freeh*, 275 F.3d 391, 410 (4th Cir. 2001).

²³⁴ See *supra* Part III.B.

²³⁵ *Trulock*, 275 F.3d at 410. A major problem with searching cellular phones, which is the same problem that exists when searching documents in a file cabinet, arises because the officer must look at and read at least a portion of the contents to discern if it is relevant or not. *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). Therefore, if the search is performed methodologically, less items will be read and more privacy will be protected. *Id.*

²³⁶ See *supra* Part III.B.

regardless of their capabilities. After all, the Court previously decided that the Fourth Amendment protects people and not places.²³⁷

In the end, there are many problems with the current state of the Fourth Amendment when applied to cellular phones. It is true that those who authored the Fourth Amendment never could have foreseen today's technological successes. In spite of this fact, the Fourth Amendment will again become the powerful protector the colonists intended if courts follow the Dissemination Doctrine. The new test appreciates that a person regards his cellular phone as an intimate receptacle of personal information, but it simultaneously recognizes a person's diminished privacy interest once that information is disseminated to others.

V. CONCLUSION

The mission of applying the current precedent to cellular phones is virtually impossible because it cannot account for continued advancements. This difficulty exemplifies the necessity of a new test. It is worth the time to consider changes, especially because the current state of the law is failing all Americans. Yet, Americans should not despair because, so long as the Dissemination Doctrine is followed, privacy protections are in the individual's control, hinging on each person's actions. The courts regard a true expectation of privacy as paramount to ascertaining whether a Fourth Amendment protection should be afforded, and the Dissemination Doctrine provides a fair way to determine whether an expectation of privacy existed in a cellular phone. Therefore, with the Dissemination Doctrine, the mission of applying the Fourth Amendment to cellular phones is not only possible, it is also just.

Following the Dissemination Doctrine, the Fourth Amendment once again becomes a guardian of privacy. It recognizes that cellular phones are advanced and must be afforded the amount of privacy that people expect and deserve. Overall, the emphasis on the *Katz* test should be lowered and the file cabinet approach must be correctly utilized. Cellular phones are comparable to file cabinets because they contain as much information as file cabinets in an organized manner, and the methods of searching cellular phones should mirror those followed when searching a file cabinet. The Dissemination Doctrine provides law enforcement officials latitude so they can gather evidence because it

²³⁷ Recognizing that *Katz* is a pillar in Fourth Amendment analysis, this test does not suggest that *Katz* be completely disregarded in any Fourth Amendment claim, but suggests that this approach only be utilized with cellular phones and other technological devices.

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incorporates established telephone precedent, which provides for a diminished expectation of privacy. The determinative factor in Fourth Amendment and cellular phone analysis should be whether the information that the person seeks to protect was voluntarily offered to others.

Now, back in the courtroom. Ron is awaiting the ruling on his motion to suppress the picture of marijuana found within his cellular phone. He is nervous because he is aware of the importance of this decision. Ron knows that if the evidence is suppressed, he will likely not be convicted. He also knows that if the evidence is not suppressed, he will likely go to jail and miss his daughter's seventh birthday and her first school play. Ron begins to panic and the public defender explains to Ron that there is a new precedent on how to decide cases involving searches and seizures of cellular phones. The attorney asks Ron: "Did you send the image of marijuana in your phone to any other person?" The answer to this question is crucial. If he answers yes, the court will likely determine Ron had no expectation of privacy in the image and the evidence will be allowed into the trial. If Ron answers no, the court will likely conclude that Ron had an expectation of privacy in the image.

Ron thought back to the day he downloaded the picture. He had suspicions that his neighbor was growing marijuana so Ron performed a "private investigation" by comparing the picture he found through the Internet on his cellular phone to the plants growing in his neighbor's apartment. After comparing the picture to the plants, Ron inadvertently forgot to delete the picture from his cellular phone. Ron begins to grin as he whispers a definite "no" to his attorney's question. The public defender cannot conceal his delight as he smiles, reassuring Ron that it is unlikely he will be convicted. The public defender rises and begins to speak: "Your honor, . . ." but Ron did not hear a word. He drowned out the legal jargon and events in the courtroom because he had a more pressing issue to contemplate: He had to decide if he should buy his daughter a bike or a new doll for her birthday.

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