NOTES

A FOURTH AMENDMENT METAMORPHOSIS: HOW FOURTH AMENDMENT REMEDIES AND REGULATIONS FACILITATED THE EXPANSION OF THE THRESHOLD INQUIRY

Elizabeth Canter[*]

INTRODUCTION

DEFENDANT Steven Bond was arrested on a Texas bus for possessing drugs discovered when a border patrol agent squeezed passengers' luggage in a random search for contraband. Not a single judge who reviewed the agent's conduct concluded that it amounted to an illegal Fourth Amendment search—that is, until the U.S. Supreme Court handed down *Bond v. United States*.[1] The Supreme Court surprised lower courts and commentators alike by holding that the "tactile" observation of Bond's luggage constituted a Fourth Amendment search and was thus unconstitutional. The following year, the Court further unsettled Fourth Amendment jurisprudence by handing down *Kyllo v. United States*.[2] In that case, the Court considered whether thermal imaging, a heat-measuring technique, constituted a Fourth Amendment search. Rejecting the conclusions of every federal circuit court that considered the question, the Court answered in the affirmative.[3]

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[1] 529 U.S. 334 (2000); George M. Dery III, Lost Luggage: Searching for a Rule Regarding Privacy Expectations in *Bond v. United States*, 69 U. Cin. L. Rev. 535, 547, 550 (2001).

[2] 533 U.S. 27 (2001).

[3] Id. at 40; James J. Tomkovicz, Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures, 72 Miss. L.J. 317, 357 n.202, 394 n.293 (2002)

The Court held that thermal imaging, like the physical manipulation of luggage, was a Fourth Amendment event.[4] *Bond* and *Kyllo* sweep additional law enforcement conduct into the category of conduct that the Court understands as Fourth Amendment searches. In so doing, these cases signal a changed view of law enforcement conduct that is subject to Fourth Amendment regulation—one that is more expansive.

This Note offers a partial explanation for the shift: there is a dynamic relationship between the Fourth Amendment right and the Fourth Amendment remedy that facilitated the metamorphosis evidenced in *Bond* and *Kyllo*. As the chief remedy for Fourth Amendment violations—the exclusionary rule—has become a shadow of its former self, the Fourth Amendment right has been able to evolve in a more expansive direction. Phrased differently, the anemia of Fourth Amendment remedies enabled and may have provided some hydraulic pressure toward an expanded Fourth Amendment right.

Moreover, a second dynamic is also in play. The Fourth Amendment right contains two distinct components: (1) the threshold question of whether law enforcement conduct constitutes a Fourth Amendment search and (2) the protections that attach once conduct amounts to a Fourth Amendment search. When the Court defines law enforcement conduct as a "search," the conduct is not proscribed, but merely subject to certain protections—namely, a guarantee that the search will be conducted "reasonably." Fourth Amendment reasonableness is generally defined as the conjunction of probable cause to search plus either a warrant or an exigency that waives the warrant requirement.[5] By defining the manipulation of luggage as a search, the Court merely indicates that law enforcement personnel do not have the unfettered discretion to manipulate luggage. They may still engage in that conduct, so long as they do so reasonably. A law enforcement officer might also secure the consent of the person whose Fourth Amendment rights will be implicated. Consent serves as a waiver of one's Fourth Amendment rights, which takes the interaction completely

(noting that the Fifth, Seventh, Eighth, Ninth and Eleventh Circuits had held that thermal imaging was not a search).

[4] *Kyllo*, 533 U.S. at 40.

[5] See discussion infra Part III.

outside Fourth Amendment regulation. But a waiver is the functional equivalent of satisfying Fourth Amendment reasonableness insofar as it enables law enforcement to permissibly engage in conduct otherwise regulated as a Fourth Amendment search.

I argue that the two components of the Fourth Amendment right are themselves part of a dynamic relationship. The more difficult it is for law enforcement officers to comply with Fourth Amendment reasonableness, the more meaningful the threshold inquiry becomes in practice. This puts pressure on the threshold inquiry, which one might expect to shrink in terms of the scope of conduct captured. But weak protections with which it is inexpensive[6] for law enforcement officers to comply ought to facilitate the expansion of the threshold question. I argue that the corrosion of Fourth Amendment reasonableness over the past three decades is thus consistent with *Bond* and *Kyllo*'s augmentation of the scope of the Fourth Amendment threshold question.

This Note proceeds as follows. Part I establishes that *Bond* and *Kyllo* substantially enlarged the scope of conduct considered a Fourth Amendment search and elaborates on the contours of this expansion. Drawing on the scholarship of Professors John Jeffries and Daryl Levinson, Part II then considers the relationship between the Fourth Amendment right and Fourth Amendment remedies.[7] Professors Jeffries' and Levinson's scholarship recognizes that there is an interaction between constitutional rights and remedies that affects the contours of substantive constitutional rights. For example, the availability of a robust remedy may deter expansion of the corresponding right—a phenomenon that Professor Levinson terms "remedial deterrence."[8] Parallel to "remedial deterrence," the curtailment of remedies may facilitate the expan-

[6] There are several "costs" associated with the Fourth Amendment, including the costs to law enforcement of complying with Fourth Amendment reasonableness (securing a warrant, conducting additional investigations to secure probable cause, etc.) and the societal costs of "forgone arrests and convictions." See William J. Stuntz, The Political Constitution of Criminal Justice, 119 Harv. L. Rev. 780, 793 (2006) ("The government pays for criminal procedure rules in the coin of forgone arrests and convictions."). The costs of the Fourth Amendment in any given context ought to be the lesser of the two costs in that context.

[7] See John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 89–91 (1999); Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 858 (1999).

[8] Levinson, supra note 7, at 884–85.

sion of the corresponding right—a phenomenon I call "remedial facilitation." I argue that the expansion of the Fourth Amendment threshold inquiry evidenced in *Bond* and *Kyllo* is a manifestation of the remedial facilitation phenomenon. As Fourth Amendment jurisprudence has shifted in the direction of deferential standards of review and exceptions to the exclusionary rule's applicability, the exclusionary remedy has become increasingly anemic. Part II concludes that this curtailment of the exclusionary rule facilitated the expansion of the Fourth Amendment right.

Part III identifies and explains the second dynamic: the relationship between the Fourth Amendment's threshold question and the protections that attach when the threshold question is met. The Fourth Amendment context is not quite as simple as the binary right-remedy relationship that Professors Jeffries and Levinson discuss in other contexts. The Fourth Amendment right is comprised of two mutually dependent components: the threshold inquiry of whether law enforcement conduct is a "search" and the protections that attach when law enforcement conduct amounts to a "search." Part III identifies and explains the interaction between the two components of the Fourth Amendment right and suggests that a dynamic interdependence similar to that discussed in Part II characterizes the relationship between the two. Pointing to jurisprudential changes that have corroded Fourth Amendment reasonableness, Part III then argues that *Bond* and *Kyllo* might not have been able to expand the scope of the threshold inquiry absent these jurisprudential changes.

I. *BOND* AND *KYLLO*: AN EXPANDED UNIVERSE OF FOURTH AMENDMENT SEARCHES

At a minimum, *Bond* and *Kyllo* expanded the universe of Fourth Amendment searches to afford Fourth Amendment protection to the specific conduct at issue in those cases. Thermal imaging and the squeezing or manipulation of luggage are now subject to Fourth Amendment regulation. The Court's methodology in *Bond* and *Kyllo*, however, suggests an even larger expansion of the scope of police conduct regulated under the Fourth Amendment. Fourth Amendment jurisprudence has long held that defendants lack

Fourth Amendment rights with respect to information exposed to the public.[9] For many years the Supreme Court's jurisprudence seemed to foreclose consideration of the likelihood of public observation or the poor quality of publicly exposed information. Any possibility of public exposure, no matter how nominal, was sufficient. Yet *Bond* and *Kyllo* embrace a more realistic approach. They indicate that courts ought to consider the likelihood of public observation and the quality of that information. This modified Fourth Amendment methodology enlarged the threshold inquiry in such a way as to potentially subject far more law enforcement conduct to Fourth Amendment regulation.

A. The Katz *Test: Origins and Doctrine*

Since *Katz v. United States* inaugurated the modern era of search jurisprudence, the Court has defined a Fourth Amendment search as law enforcement conduct that infringes upon a reasonable expectation of privacy.[10] This test derives from language in Justice John Harlan's concurrence in *Katz*, in which he articulated the majority's test as looking first to whether there was "an actual (subjective) expectation of privacy and, second, [at whether] the expectation be one that society is prepared to recognize as 'reasonable.'"[11] The Court's jurisprudence has since focused on the second prong of Harlan's formulation, making the question of whether a suspect has a reasonable expectation of privacy the threshold question of the Court's Fourth Amendment analysis.[12]

In *Katz* itself, the Court held that the suspect had a constitutionally protected interest in a telephone conversation held in a public telephone booth against the "uninvited ear" of government agents.[13] The Court emphasized that the suspect sought to preserve the conversation as private: "One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he ut-

[9] See, e.g., United States v. White, 401 U.S. 745, 752 (1971).
[10] 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
[11] Id. (Harlan, J., concurring).
[12] Ric Simmons, From *Katz* to *Kyllo*: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies, 53 Hastings L.J. 1303, 1312–13 (2002).
[13] *Katz*, 389 U.S. at 352–53.

ters into the mouthpiece will not be broadcast to the world."[14] The Court also acknowledged the flip side of that principle: the information that a person exposes to the public is not subject to Fourth Amendment protection.[15]

*B. Post-*Katz *Jurisprudence*

Following *Katz*, the Court continued to write in terms of reasonable expectations of privacy, but it recognized such expectations infrequently.[16] The Court's primary justification for denying reasonable expectations of privacy in a variety of different contexts was an "assumption of risk" rationale. It derived this rationale from the common sense understanding that "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."[17] In *United States v. White*, for example, the Court rejected the defendant's argument that contemporaneous monitoring of his conversations with an informant constituted a Fourth Amendment search.[18] The Court held that "[i]nescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police . . . . [I]f he has no doubts, or allays them, or risks what doubt he has, the risk is his."[19] In subsequent cases, the Court continued to invoke an assumption of risk rationale to hold that suspects have no reasonable expectations of privacy in phone numbers dialed on a telephone,[20] in plastic

[14] Id. at 351–52.
[15] Id. at 351.
[16] See, e.g., Florida v. Riley, 488 U.S. 445, 450 (1989) (finding no reasonable expectation of privacy in "viewing from the air"); California v. Greenwood, 486 U.S. 35, 40–41 (1988) (finding no reasonable expectation of privacy in trash left on the curb of the street); United States v. Knotts, 460 U.S. 276, 280–82 (1983) (holding that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements"); Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (finding no reasonable expectation of privacy in phone numbers one dials); United States v. Miller, 425 U.S. 435, 442–43 (1976) (finding no reasonable expectation of privacy in checks conveyed to a bank).
[17] California v. Ciraolo, 476 U.S. 207, 213 (1986).
[18] 401 U.S. 745, 752–53 (1971).
[19] Id. at 752.
[20] *Smith*, 442 U.S. at 742.

garbage bags left near a public street,[21] or in their own whereabouts on public roadways.[22]

The post-*Katz* Court applied the assumption of risk rationale even when there was minimal likelihood that any member of the public would actually observe the information or when the information available to the public was of low quality. *California v. Ciraolo*[23] and *Florida v. Riley*[24] illustrate the degree to which the Court's inquiry into whether information was exposed to the public ignored the likelihood of observation by a member of the public. In both cases, the Court held that suspects do not have reasonable expectations of privacy in property exposed to aircraft within legal airspace. In *Ciraolo*, the defendant's yard was shielded by a six-foot high outer fence and a ten-foot high inner fence. One might think, as the Court of Appeals did, that these measures demonstrated that the defendant sought "to preserve as private" his backyard as much, if not more so, than the defendant in *Katz*, who was held to have sufficiently preserved his reasonable expectations of privacy after merely occupying a telephone booth, shutting the door behind him, and paying the toll.[25] The Supreme Court, however, disagreed. It reasoned that the defendant assumed the risk that some member of the public might look over his ten-foot fence, pointing to the fact that "a citizen or a policeman perched on the top of a truck or a two-level bus" or someone in an aircraft might have been able to "glance[] down [and see] everything that these officers observed."[26] The defendant in *Riley* protected the privacy of his greenhouse by roofing panels, a wire fence, and a "DO NOT ENTER" sign.[27] But the Court held that "[a]ny member of the public could legally have been flying over Riley's property in a helicop-

[21] *Greenwood*, 486 U.S. at 40 ("[P]lastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.").

[22] United States v. Knotts, 460 U.S. 276, 281–82 (1983) ("[A suspect] voluntarily convey[s] to anyone who want[s] to look the fact that he [is] traveling over particular roads in a particular direction."); see also United States v. Karo, 468 U.S. 705, 713–14 (1984) (holding that installation and monitoring of a beeper, by itself, does not infringe a reasonable expectation of privacy).

[23] 476 U.S. 207 (1986).

[24] 488 U.S. 445 (1989).

[25] Katz v. United States, 389 U.S. 347, 351–52 (1967).

[26] *Ciraolo*, 476 U.S. at 211–14.

[27] *Riley*, 488 U.S. at 448.

ter at the altitude of 400 feet and could have observed Riley's greenhouse."[28]

The Court declined to adopt Justice O'Connor's preferred inquiry, which would have examined "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not 'one that society is prepared to recognize as reasonable.'"[29] Instead, the Court looked at whether it was hypothetically possible, albeit unlikely, for the public to observe the information. It ignored the reality that members of the public do not regularly—or even occasionally—stand on buses to peer over ten-foot fences or fly in planes at the minimum navigable altitude.[30]

The post-*Katz* Supreme Court also ignored the quality of information accessible to members of the public. Because law enforcement personnel observe information in a more focused way and often use sense-enhancing technology, the quality of information accessed by members of the public is often inferior to that available to law enforcement officers.[31] The Court's post-*Katz* jurisprudence declined to require any comparability with regards to the quality of the information perceived by law enforcement versus bystanders. In *United States v. Knotts*, for example, the Court held that "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afford[.]"[32] The Court applied the assumption of risk rationale, even though, as scholars have noted, it would have taken "a legion of agents lined [on] all possible roads that the car might take" to track the movement of a vehicle with an unaided eye rather than an electronic beeper.[33] The

[28] Id. at 451.

[29] Id. at 454 (O'Connor, J., concurring) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)) (internal quotation omitted).

[30] See Melissa Arbus, Note, A Legal U-Turn: The Rehnquist Court Changes Direction and Steers Back to the Privacy Norms of the Warren Era, 89 Va. L. Rev. 1729, 1747 (2003).

[31] See id. at 1748–49.

[32] 460 U.S. 276, 282 (1982).

[33] Peter Arenella, Foreword: Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 Geo. L.J. 185, 233 n.257 (1983); see also Oregon v. Campbell, 759 P.2d 1040, 1045 (Or. 1988) (interpreting state constitution to reject *Knotts*' rationale because "the police, notwithstanding diligent ef-

Court has declined "to distinguish between the roaming view of the public eye and the watchful gaze of the government."[34]

The Court's doctrinal preference for an inquiry that ignored the likelihood of public observation and disregarded the quality of information accessible to the public kept the universe of Fourth Amendment searches smaller and narrower than it might otherwise have been. The Court's jurisprudence limited the Fourth Amendment inquiry to the question of whether, in a given case, it was hypothetically possible for information to become publicly available. Lower courts were to ignore whether the observable information was of sufficient quality to be meaningful.

C. Bond *and* Kyllo*: Creating a Broader Universe of Searches*

Bond[35] and *Kyllo*[36] depart from the Court's prior Fourth Amendment search inquiry in important respects.[37] Police officers still need not "shield their eyes when passing by a home on public thoroughfares,"[38] but the Court signaled that the probability of public observation and the quality of information available to the public now matter. By limiting the applicability of the "assumption of risk" rationale, the Court understands individuals to have rea-

forts, found it impossible to follow defendant's automobile through visual surveillance").

[34] Arbus, supra note 30, at 1745; see also United States v. White, 401 U.S. 745, 787–88 (1971) (Harlan, J., dissenting) ("Much off-hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record.").

[35] 529 U.S. 334 (2000).

[36] 533 U.S. 27 (2001).

[37] A number of commentators have noted that *Bond* and *Kyllo* depart from prior "search" jurisprudence. For representative articulations of why the *Bond* decision was surprising, see Stephen E. Henderson, Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search, 56 Mercer L. Rev. 507, 549 (2005); April A. Otterberg, Note, GPS Tracking Technology: The Case for Revisiting *Knotts* and Shifting the Supreme Court's Theory of Public Space Under the Fourth Amendment, 46 B.C. L. Rev. 661, 688–89 (2005). See generally Dery, supra note 1, at 536; Stacy E. Roberts, Note, *Bond* and Beyond: A Shift in the Understanding of What Constitutes a Fourth Amendment Search, 33 U. Tol. L. Rev. 457 (2002). For articulations of why *Kyllo* was surprising, see Tomkovicz, supra note 3, at 357 ("Kyllo is a remarkable decision because the Court reached a conclusion out of step with the predominant view of the lower courts."); Arbus, supra note 30, at 1763–66.

[38] California v. Ciraolo, 476 U.S. 207, 213 (1986).

sonable expectations of privacy against a broader universe of law enforcement conduct.

1. Bond v. United States

In *Bond*, a law enforcement officer squeezed luggage stored in overhead storage space as he walked from the back of a bus to the front.[39] After squeezing the defendant's bag, he felt a "brick-like" object that aroused his suspicion.[40] The legal question at issue was whether the law enforcement officer's having squeezed the luggage constituted a Fourth Amendment search.[41] Drawing on the Court's prior jurisprudence, the government argued that "by exposing his bag to the public, [the defendant] lost a reasonable expectation that his bag would not be physically manipulated."[42] On the facts of *Bond*, there was little question that it was hypothetically possible for members of the public to observe the information Bond sought to preserve as private. Justice Breyer's dissent cites to two federal circuit court opinions and three newspaper articles suggesting significant opportunities for members of the public to feel the outside of passengers' luggage.[43] Moreover, the defendant conceded that the other passengers on the bus had access to his bag.[44] As the lower court held, "[b]y placing his bag in the overhead bin, Bond knowingly exposed it to the public and, therefore, did not have a reasonable expectation that his bag would not be handled or manipulated by others."[45] Every court reviewing the case agreed, presumably because the Supreme Court's precedent heavily favored

[39] 529 U.S. at 335.
[40] Id. at 336.
[41] Id. at 335.
[42] Id. at 337.
[43] Id. at 340 (Breyer, J., dissenting) ("How does the 'squeezing' just described differ from the treatment that overhead luggage is likely to receive from strangers in a world of travel that is somewhat less gentle than it used to be? I think not at all. . . . '[A]ny person who has traveled on a common carrier knows that luggage placed in an overhead compartment is always at the mercy of all people who want to rearrange or move previously placed luggage.'" (quoting United States v. McDonald, 100 F.3d 1320, 1327 (7th Cir. 1996))). Justice Breyer also cites to newspaper articles published in the *Boston Herald*, *Kansas City Star*, and *San Francisco Examiner* to establish the regularity with which passengers feel other passenger's luggage.
[44] Id. at 336.
[45] United States v. Bond, 167 F.3d 225, 227 (5th Cir. 1999), rev'd, 529 U.S. 334 (2000).

the government's argument. Irrespective of the likelihood of public observation or the quality of information available to the public, the hypothetical possibility of public observation ought to have triggered the assumption of risk rationale.[46]

Contrary to commentators' expectations and lower courts' applications of the Court's precedent, however, the Supreme Court held that the squeezing of Bond's luggage constituted a Fourth Amendment search. The Court purported to differentiate the law enforcement conduct in *Bond* from that at issue in *Ciraolo* and *Riley* by pointing to the fact that the law enforcement conduct in *Bond* entailed tactile observation, rather than visual observation.[47] Under the Court's prior jurisprudence, however, it is not clear why this distinction matters. The government was not arguing that by virtue of the public's ability to observe the defendant's bag *visually*, the defendant had no expectation of privacy from *touch*. Rather, the government was arguing that members of the public were able to touch the defendant's luggage and that that possibility was dispositive under the Court's prior jurisprudence. In rejecting this straightforward application of its prior jurisprudence, the Court departed from its previous inquiry toward a more expansive understanding of what constitutes a Fourth Amendment search.[48]

Importantly, the Court emphasized that there was no realistic likelihood of public observation of the information sought to be preserved as private. The Court assessed the likelihood of public exposure to the "brick-like object" in the defendant's bag by identifying social norms bearing on the *actual* probability of public observation. The Court noted that "a bus passenger . . . does not expect that passengers or bus employees will, as a matter of course,

[46] Until the Supreme Court reviewed Bond's Fourth Amendment claim, every court reviewing the case was in accord that there had not been a search within the meaning of the Fourth Amendment. "Further, such rulings were hardly based on novel theories. Instead, they were anchored in explicit language from the Supreme Court's own precedent." Dery, supra note 1, at 547.

[47] *Bond*, 529 U.S. at 337.

[48] Madhavi M. McCall & Michael A. McCall, Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice, 39 Akron L. Rev. 323, 350–51 (2006) (referring to *Bond* as "perhaps the most surprising Rehnquist decision dealing with the Fourth Amendment" and "a surprisingly liberal ruling"); Andrew E. Taslitz, The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions, 65 Law & Contemp. Probs. 125, 149 (2002) ("[I]t appears that Justice Breyer was correct to say that *Bond* departed from earlier precedent.").

feel [his] bag in an exploratory manner" as the law enforcement officer did to Bond's luggage.[49] Drawing upon social norms and the pragmatic realities ignored in earlier cases, *Bond* suggests that whether a member of the public might actually feel the defendant's bag in a rigorous enough way to gain knowledge of a suspicious-feeling object is part of the threshold inquiry.[50] This approach stands in stark contrast to the Court's earlier holdings. Compare *Ciraolo*, for example, where the possibility that members of the public might stand on two-level buses and peer over the defendant's ten-foot fence was sufficient to trigger the assumption of risk rationale.[51] In requiring some likelihood of public observation, *Bond* moves in the direction of the distinction that Justice O'Connor urged in her *Riley* concurrence.[52] Even when a member of the public might conceivably observe the information sought to be preserved as private, courts should look at whether members of the public observe the information with "sufficient regularity."[53] It is also possible to see *Bond* as bearing upon whether the quality of information available to the public matters to the Court. Under the Court's prior jurisprudence, law enforcement officers were permitted to "augment[] the sensory faculties bestowed upon them at birth."[54] This rule seemingly suggests that police ought to be able to augment "causal contact"[55] with luggage, such as by "feel[ing a] bag in an exploratory manner."[56] By rejecting this logic, the *Bond* Court

[49] *Bond*, 529 U.S. at 338–39.

[50] Id. at 337–39.

[51] California v. Ciraolo, 476 U.S. 207, 211–14 (1986).

[52] Daniel Yeager, Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis, 74 Miss. L.J. 553, 583 (2004) ("The distinction that the four dissenters and concurring Justice O'Connor had acknowledged in *Riley*—that even when police are in a lawful vantage point, still they conduct a 'search' when they act in a way that few people would—must have somehow succeeded in introducing through *Bond* a new, or, I should say, renewed, version of *Katz*."); see also Dery, supra note 1, at 549–50 ("[N]o longer is the question simply the likelihood of exposure, but of the *most likely routes* to exposure. Here, Chief Justice Rehnquist began to build a sliding scale, where, although Bond could reasonably foresee 'casual contact' with his bag, he could not reasonably envision the 'physical manipulation' performed by Agent Cantu.").

[53] Florida v. Riley, 488 U.S. 445, 454 (1989) (O'Connor, J., concurring).

[54] United States v. Knotts, 460 U.S. 276, 282 (1983).

[55] *Bond*, 529 U.S. at 338.

[56] Id. at 339.

indicates that the quality of information actually accessible by the public matters to the assumption of risk rationale.

2. Kyllo v. United States

In *Kyllo*, law enforcement officers were investigating the defendant based on suspicion that he was growing marijuana in his house. Knowing that this practice typically requires high-intensity lamps, the officers sought to confirm their suspicions by using a thermal imager to detect whether unusual levels of heat were emanating from the home.[57] The legal issue in *Kyllo* was whether the use of an "Agema Thermovision 210" thermal imager to detect infrared radiation (heat) emitting from Kyllo's home constituted a Fourth Amendment search.[58] In an opinion authored by Justice Scalia, the Court held that use of the thermal imager *was* a search: "Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[59]

The unanimity of federal circuit court authority finding that thermal imaging of the home was not a search under the Court's prior precedent suggests the extent to which *Kyllo* expanded the threshold inquiry.[60] Specifically, the Court indicated it was requiring some actual likelihood of public observation to trigger the assumption of risk rationale; the mere hypothetical possibility of public observation is no longer sufficient. As the dissent in *Kyllo* notes, it was hypothetically possible that members of the public might observe the unusual level of heat emanating from Kyllo's home, and that ought to be enough under the inquiries in *White* and *Riley*:

> Indeed, the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer

[57] Kyllo v. United States, 533 U.S. 27, 29 (2001).
[58] Id.
[59] Id. at 40.
[60] Tomkovicz, supra note 3, at 357 & n.202.

> than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer.[61]

Yet *Kyllo* held that the law enforcement conduct at issue constitutes a Fourth Amendment search, at least where the "home" is implicated.[62] While the home has long been special under the Fourth Amendment,[63] the Court's disregard of the hypothetical possibility of observation reinforces an understanding of *Kyllo* as an expansion of the threshold inquiry. Additional language in the opinion confirms this reading. The Court indicates, for example, that the constitutional status of thermal imaging might be different if it were routine for members of the public to observe heat emanations through thermal imaging.[64] The Court intimated that the constitutional determination might change if it becomes commonplace to own a thermal imager.[65] Thus, the assumption of risk rationale might apply, but only when a greater likelihood of public observation exists.

Moreover, *Kyllo* suggests that the quality of information available to the public also now matters to the threshold inquiry. The Court treats as "quite irrelevant" the dissent's invocation of "circumstances in which outside observers might be able to perceive, without technology, the heat of the home—for example, by observing snowmelt on the roof."[66] As the majority notes,

> The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means

[61] *Kyllo*, 533 U.S. at 43 (Stevens, J., dissenting); see also United States v. Ford, 34 F.3d 992, 997 (1994), abrogated by *Kyllo*, 533 U.S. at 40 (reaching the same result through a different theory).

[62] *Kyllo*, 533 U.S. at 37 ("In the home, our cases show, *all* details are intimate details . . . .").

[63] See, e.g., Arizona v. Hicks, 480 U.S. 321, 326–27 (1987).

[64] *Kyllo*, 533 U.S. at 39 n.6.

[65] Id. at 34, 40.

[66] Id. at 35 n.2; see also Arbus, supra note 30, at 1765–66 (noting the Court's determination that it was irrelevant that observers might perceive a home's heat by observing snow melting on the roof "is significant because the test adopted by the majority, viewed independently of this statement, might have implied otherwise").

> that violate the Fourth Amendment. The police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful. In any event, on the night of January 16, 1992, no outside observer could have discerned the relative heat of Kyllo's home without thermal imaging.[67]

This language stands in stark contrast to the holding in *Knotts*, in which the Court held that the ability of the public to observe a suspect's movements on public highways was sufficient to suggest the suspect had assumed the risk of observation. As one scholar noted, the *Knotts*-era Court ignored the reality that it would have taken "a legion of agents lined [on] all possible roads that the car might take" to track the movement of a vehicle with an unaided eye rather than an electronic beeper.[68] But the *Kyllo* Court is attentive to the means of observation. *Kyllo*'s insistence on some similarity between the manner in which law enforcement seeks to obtain the information and the manner in which the public could observe the information reflects a substantial shift in the Court's jurisprudence. The Court suggests that there must be some practical ability for the general public to observe the information that law enforcement observes with the aid of sense-enhancing technology.[69]

3. Scope of the Expansion of the Fourth Amendment Right

Bond and *Kyllo* expand the contours of the Fourth Amendment search in the direction of regulating additional police conduct. That neither holding flowed from the Court's prior jurisprudence suggests that, at the very least, the Fourth Amendment search definition previously excluded, but now includes, the precise police conduct at issue in the two cases.[70] More importantly, *Bond* and *Kyllo* also enlarged the Fourth Amendment search inquiry on a more systemic level by adding to the framework two factors that the

[67] *Kyllo*, 533 U.S. at 35 n.2.

[68] Arenella, supra note 33, at 233 n.257.

[69] See *Kyllo*, 533 U.S. at 40 (holding that where a method of investigation explores details of the home that would previously have been unknowable without physical intrusion, there is a Fourth Amendment search).

[70] See supra note 37 and accompanying text.

post-*Katz* Court had previously ignored. The inquiry at the threshold of the Fourth Amendment now takes note of: (1) whether the defendant has assumed the risk of public exposure given some actual opportunity for the public to observe the information, and (2) whether the information available to the public is of some minimal quality so as to make public exposure meaningful.

Fourth Amendment jurisprudence is heavily fact-dependent and largely comprised of concrete, fact-specific rules articulated by lower courts. The Fourth Amendment threshold inquiry "takes on firm shape in the thousands of decisions implementing it in very specific factual contexts."[71] In evaluating new factual contexts, lower courts have looked and will continue to look to *Bond* and *Kyllo*'s more realistic assessment of whether information has been exposed to the public, capturing more police conduct in the Fourth Amendment threshold inquiry than they would have without *Bond* and *Kyllo*. Citing *Bond*, for example, the California Supreme Court held that a defendant had not exposed to the public information that the police were able to view through a window in the defendant's side yard. Even though "the meter reader or the child chasing a ball or pet" might hypothetically have observed the same information, the court determined that public observation was not sufficiently likely so as to destroy the defendant's expectations of privacy in the information.[72] Also citing *Bond*, a Virginia Court of Appeals looked to the quality of information available to the public as part of its determination of whether individuals have reasonable expectations of privacy in their shoes. The court held that a police detective who "manipulate[d] the [defendant's] shoe and expose[d] areas of the shoe not readily seen" engaged in conduct that amounted to a Fourth Amendment search. The court found it relevant that "the small piece of glass in the sole of [the defendant's] shoe could [not] have been seen by the public," except by "close inspection."[73] Consistent with *Bond* and *Kyllo*, the court found it significant that the quality of information available to the public was of a lesser quality than what the police were able to observe.

[71] Orin S. Kerr, Four Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 530 (2007).

[72] People v. Camacho, 3 P.3d 878, 885–86 (Cal. 2000).

[73] Sheler v. Commonwealth, 566 S.E.2d 203, 208–09 (Va. Ct. App. 2002).

Bond and *Kyllo* may be jurisprudentially significant for additional reasons, including *Kyllo*'s reaffirmation of a strong preference for protection of the "home" over other Fourth Amendment areas[74] and *Bond*'s distinction between tactile and visual searches.[75] In penetrating the methodologies applied by lower courts, however, *Bond* and *Kyllo* have expanded the definition of a search subject to Fourth Amendment regulation. With that expansion established, the following Parts provide a partial explanation for this jurisprudential shift: complimentary jurisprudential changes enabled the Court to move the threshold question in a more expansive direction.

II. REMEDIAL FACILITATION IN THE CONTEXT OF *BOND* AND *KYLLO*

The literature on rights and remedies recognizes a phenomenon that Professor Daryl Levinson terms "remedial equilibration"—that is, that the cost of remedies may shape the growth and development of rights.[76] This understanding of the relationship between rights and remedies rejects a conception of constitutional rights as "the pure, Platonic ideal of . . . constitutional right[s]" that "emerge fully formed from abstract interpretation of constitutional text, structure, and history, or from philosophizing about constitutional values."[77] Somewhat indeterminate, rights "are inevitably shaped by, and incorporate, remedial concerns."[78] Under Professor Levinson's conception of remedial equilibration, consequences that attach to violations of the right drive and shape courts' recognition of rights.[79] I argue this dynamic exists in the Fourth Amendment context: the Fourth Amendment right and remedy are interdependent, such that the current anemia of Fourth Amendment remedies enabled the expansion of the Fourth Amendment right evidenced in *Bond* and *Kyllo*.

[74] *Kyllo*, 533 U.S. at 37.
[75] *Bond*, 529 U.S. at 337.
[76] Levinson, supra note 7, at 858.
[77] Id. at 873.
[78] Id.
[79] Id. at 874.

A. The Relationship Between Rights and Remedies

Scholars have identified the process by which robust remedies inhibit the expansion of constitutional rights—a phenomenon called "remedial deterrence."[80] Professor Levinson explains this phenomenon in economic terms: "Remedial deterrence reflects simple economics. We should expect that raising the 'price' of a constitutional violation by enhancing the remedy will, all things being equal, result in fewer violations."[81] It seems an uncontroversial extension of tort law to suggest that the availability of damages might force liable actors to internalize those costs and change their behavior accordingly. Importantly, however, Professor Levinson suggests that the shape of a constitutional right need not remain static to reduce the number of violations. Economic pressure might push courts to change the contours of the constitutional right so that fewer violations result from the same level and type of conduct. Consider, for example, the right against the use of racial discrimination in jury selection that was recognized in *Batson v. Kentucky*.[82] The relatively severe remedy—automatic reversal of the defendant's conviction—is consistent with the limited nature of the right, as applied by courts. Exhibiting "an eagerness to accept many 'neutral' explanations for juror strikes," courts infrequently recognize violations of the right recognized in *Batson*.[83] The severe remedy imposes a cost that deters recognition of the *Batson* right.

There is a flip side to Professor Levinson's "remedial deterrence," which I will call "remedial facilitation."[84] Just as severe remedies may handicap recognition and evolution of rights, limited remedies facilitate the expansion of rights. Professor Jeffries has

[80] Id. at 889–99.

[81] Id. at 889.

[82] 476 U.S. 79 (1986) (holding unconstitutional the race-based preemptory challenges of jurors).

[83] Levinson, supra note 7, at 891–92.

[84] Levinson discusses the phenomenon by which robust remedies influence how rights are defined by deterring the expansion of the right and terms this negative effect "remedial deterrence." While Levinson also discusses the general phenomenon by which remedies affect the definition of rights—what he terms "remedial incorporation" or "remedial equilibration" in its various forms, he does not directly define the inverse of the remedial—what I term "remedial facilitation." Remedial facilitation is the phenomenon by which anemic remedies influence how rights are defined by facilitating the expansion of the right.

identified examples of this phenomenon in the context of constitutional torts and the equal protection rights recognized in *Brown v. Board of Education*.[85] With respect to constitutional torts, the doctrine of qualified immunity limits the liability of government officials to violations of clearly established constitutional rights.[86] Professor Jeffries argues this remedial limitation facilitates constitutional innovation by reducing the "potentially paralyzing cost of full remediation for past practice."[87] The argument does not suggest that Courts consciously contemplate the degree to which constitutional innovation is affordable. Rather, the absence of "paralyzing" societal costs makes constitutional innovation possible. With respect to the right recognized in *Brown v. Board of Education*, Professor Jeffries notes that money damages were not available to potential plaintiffs who were attending de jure segregated schools at the time. He argues this remedial limitation may have enabled the Court to recognize the right as soon as it did and in the terms it used.[88] "[T]he prospect of crippling judgments and school district bankruptcies" might have "altered the terms of the debate [or] delayed the decision even further."[89] Similarly, the absence of a remedial scheme in which schools were strictly liable enabled the Court, in *Green v. County School Board*,[90] to expand the right first recognized in *Brown*. *Green* imposed on school districts an "'affirmative duty' to undo the effects of prior practice and achieve a 'unitary' school system without racially identifiable schools."[91] While now viewed as necessary in order to give effect to the right recognized in *Brown*, *Green* "was not logically compelled."[92] Had money judgments been available to potential plaintiffs, it is conceivable that the Court might have recognized a right to only the technical elimination of de jure segregation without

[85] 347 U.S. 483 (1954).
[86] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[87] Jeffries, supra note 7, at 99–100.
[88] Id. at 102. Money damages were not available due to the naissance of modern class actions and the unavailability of 42 U.S.C. § 1983 damages actions. Id. at 101.
[89] Id. at 101.
[90] 391 U.S. 430 (1968).
[91] Jeffries, supra note 7, at 102.
[92] Id. at 102.

ever forcing states to also practically eliminate the effects of past de jure segregation.[93] It might have simply been too costly.

One final example: Professors Jeffries and Levinson also identify the constitutional right recognized in *Miranda v. Arizona*[94] as an example of the dynamic interdependence of rights and remedies.[95] Absent the now-defunct principle of nonretroactivity that enabled the Court to give effect to new constitutional rights in future cases only, the Court might not have been able to impose *Miranda* warnings on law enforcement officers. The societal costs of releasing from custody every criminal who had been convicted on the basis of a confession would have been too steep.[96] The doctrine of nonretroactivity reduced the otherwise massive societal costs, thereby enabling legal actors to conceive the change in constitutional doctrine that was ushered in by *Miranda*. The remainder of this Part, in adopting this dynamic conception of rights and remedies, discusses the Fourth Amendment remedy and how the Fourth Amendment right has expanded due to the remedy's erosion.

B. The Fourth Amendment Remedy

Any characterization of the dynamic between the Fourth Amendment right and the Fourth Amendment remedy depends, of course, on the current state of the Fourth Amendment remedy. While this Section touches on other possible remedies, Fourth Amendment violations are remedied chiefly by the exclusionary rule—a mechanism by which defendants are able to suppress illegally obtained evidence during their criminal cases-in-chief. The Court originally conceived of the exclusionary rule as "part and parcel of the Fourth Amendment's limitations upon federal encroachment of individual privacy."[97] Over time, the Court moved away from that conception and now clearly understands the exclusionary rule as a judicially created remedy.[98] "The fact that a Fourth Amendment violation oc-

[93] Id. at 102–03.
[94] 384 U.S. 436 (1966).
[95] Jeffries, supra note 7, at 98; Levinson, supra note 7, at 889–90.
[96] Jeffries, supra note 7, at 98.
[97] Mapp v. Ohio, 367 U.S. 643, 651 (1961).
[98] Herring v. United States, 129 S. Ct. 695, 699–700 (2009) ("We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.").

curred—that is, that a search or arrest was unreasonable—does not mean that the exclusionary rule applies."[99] The paragraphs that follow describe a handful of significant doctrinal limitations that have constrained and limited the applicability of the exclusionary remedy.

1. Standing Doctrine as an Exception to the Exclusionary Rule

Fourth Amendment standing doctrine holds that certain defendants cannot avail themselves of the exclusionary rule. Since *Rakas v. Illinois*, courts fold standing doctrine into the threshold substantive question of whether the claimant has a reasonable expectation of privacy in the area searched.[100] Given the current formulation of Fourth Amendment standing doctrine, it is not obvious that it is an exception to the exclusionary rule's applicability. Rather, its formulation, folded into the question of whether the defendant had a legitimate expectation of privacy, suggests the absence of a Fourth Amendment violation: there is arguably no constitutional violation to remedy. Yet many commentators view standing doctrine as providing an "end run" around the exclusionary rule.[101] Because of the nature of the exclusionary remedy, which is only available to those victims who are later prosecuted, a restrictive standing doctrine shrinks the number of Fourth Amendment violations for which the exclusionary remedy is available. Where the police unreasonably invade the legitimate expectation of privacy of Person A, and thus act in violation of Person A's Fourth Amendment rights, any fruits discovered in the course of the unconstitutional search will not be excluded during a prosecution of Confederates B and C. Where the police do not arrest and charge Person A, the violation of Person A's Fourth Amendment rights will likely go unremedied.

Standing doctrine's limitations on exclusion as a remedy are most pronounced in the contexts of potential defendants who have engaged in criminal conduct alongside one or more confederates. Trial courts might determine that all the evidence in a trial is the fruit of several unconstitutional searches, but, where none of the

[99] Id.

[100] 439 U.S. 128, 138–39 (1978) ("[W]e think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.").

[101] Paul R. Joseph & J. Michael Hunter, Circumventing the Exclusionary Rule Through the Issue of Standing, 10 J. Contemp. L. 57, 63, 66, 75 (1984).

confederates has standing to challenge all the searches, the Court will decline to suppress all the evidence as to any one confederate.[102] This ability to introduce evidence against most confederates creates the potential for police officers to exploit standing doctrine and may create perverse incentives for law enforcement.[103] The Court has lent its imprimatur to these incentives by declining to allow defendants to challenge the admission of evidence obtained when law enforcement officers purposefully take advantage of standing doctrine.[104] The flexibility this affords law enforcement further erodes the availability of the exclusionary rule, and thus erodes its efficacy as a remedy.

Moreover, *Rakas*'s formulation of standing doctrine is not inevitable; four justices would have held that the defendants in that case had standing to challenge the search of the automobile in which they were passengers. Justice White's dissent expressly contemplated that the majority's formulation of standing doctrine was designed to circumvent the exclusionary rule: "If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases."[105] As compared to a Fourth Amendment jurisprudence in which the dissent's conception of standing had won out, the *Rakas* limitation on standing to invoke exclusion as a remedy is less costly to society.

2. Inevitable Discovery Doctrine as an Exception to the Exclusionary Rule

The inevitable discovery doctrine is an additional exception to the exclusionary rule's ability to remedy violations of the Fourth

[102] See, e.g., United States v. Leon, 468 U.S. 897, 903 (1984).

[103] Joseph & Hunter, supra note 101, at 81–82 ("Now . . . it is quite likely that illegally seized evidence will often be admitted because the defendant will lack standing to object. This fact will not long be lost on police officers. . . . Observance of the constitutional requirements may well become mere tactical consideration.").

[104] See United States v. Payner, 447 U.S. 727, 735–37 (1980); Julie M. Giddings, The Interaction of the Standing and Inevitable Discovery Doctrines of the Exclusionary Rule: Use of Evidence Illegally Obtained from the Defendant and a Third Party, 91 Iowa L. Rev. 1063, 1071 (2006).

[105] Rakas v. Illinois, 439 U.S. 128, 157 (1978) (White, J., dissenting); see also Joseph & Hunter, supra note 101, at 79–80.

Amendment. Beginning with *Nix v. Williams*, the Court has held that the exclusionary rule does not apply where "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means."[106] Courts have held, for example, that the inevitable discovery exception is applicable where police are prepared to call for, or ready to use, a drug-detecting canine.[107] The availability of a drug-detecting canine sufficiently establishes that "the information ultimately or inevitably would have been discovered by lawful means."[108] Especially in the context of narcotics prosecutions, the inevitable discovery exception has the potential to significantly limit the exclusionary rule's applicability. Where an alternate means of discovery—even a drug-detecting canine back at the station house—is available, courts may decline to exclude evidence discovered during the course of an unconstitutional search.

Some lower courts have held that an alternate line of an investigation, such as the parallel investigation that was proceeding in *Williams*, is a prerequisite to the applicability of the inevitable discovery doctrine.[109] In other jurisdictions, however, courts have held that "the inevitable discovery exception may be invoked in the absence of an ongoing, independent investigation."[110] In those circuits

[106] 467 U.S. 431, 444 (1984); see also Troy E. Golden, The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, *Nix*, and *Murray*, and the Disagreement Among the Federal Circuits, 13 BYU J. Pub. L. 97, 100 (1998).

[107] United States v. Toledo, No. 97-3065, 1998 WL 58117, at *4 (10th Cir. Feb. 12, 1998) ("[T]he drug-sniffing dog was an independent means of investigation that inevitably would have led to the lawful discovery of the marijuana in this case. There is no doubt that the dog would have arrived on the scene. As the district court pointed out, the troopers intended to call the drug-sniffing dog and were ready to do so."). Courts have also held that when law enforcement officers have reasonable suspicion, they may temporarily seize luggage while awaiting the arrival of a canine. See, e.g., United States v. Griffin 7 F.3d 1512, 1517 (10th Cir. 1993).

[108] *Nix*, 467 U.S. at 444. The Supreme Court has held that the use of drug-detecting canines to smell luggage is not a search. Illinois v. Caballes, 543 U.S. 405, 409–10 (2005); United States v. Place, 462 U.S. 696, 707 (1983).

[109] United States v. Kirk, 111 F.3d 390, 392 (5th Cir. 1997) ("In order for the inevitable discovery exception to apply, the Government must demonstrate, by a preponderance of the evidence, both (1) a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of police misconduct and (2) that the Government was actively pursuing a 'substantial alternate line of investigation at the time of the constitutional violation.'").

[110] Stephen E. Hessler, Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule, 99

that have declined to require an alternate line of investigation, the inevitable discovery exception has the potential to overtake the rule itself. It can be used to justify an exception to the exclusionary rule wherever there is a conceivable manner in which law enforcement officers could lawfully observe the information.

Moreover, some courts have liberally interpreted the Court's requirement that only "lawful" alternative means of discovering evidence provide a basis from which the prosecution can invoke the inevitable discovery exception.[111] The First Circuit has gone the furthest in this direction.[112] In *United States v. Scott*, a search of the defendant's vehicle lacked probable cause, and was thus held unconstitutional.[113] On the basis of the inevitable discovery doctrine, however, the First Circuit declined to exclude fruits discovered during the unconstitutional search. The court held that the police would have had probable cause to search had they been aware of statements that the defendant's confederate made simultaneously to fellow police officers. The confederate's statements were not admissible against the confederate himself since the police had failed to give the confederate required *Miranda* warnings, but the First Circuit held that the statements provided a sufficient basis to establish that the police would have inevitably discovered the contraband in the defendant's vehicle. The First Circuit reasoned that the defendant lacked standing to contest the constitutionality of his confederate's statements,[114] interpreting the requirement of inevitable discovery by *legal means* to exclude only those discoveries "unlawful as to a defendant."[115] The court held that "inevitable discovery may rely on an illegal action that did not violate the relevant defendant's personal rights."[116] While there is no consensus on the First Circuit's approach, this extension of the inevitable discovery doctrine has the potential to further erode the general applica-

Mich. L. Rev. 238, 245 (2000) (citing examples of lower courts who fail to require active pursuit); see also United States v. Kennedy, 61 F.3d 494, 499–500 (6th Cir. 1995); United States v. Ford, 22 F.3d 374, 377 (1st Cir. 1994); United States v. Thomas, 955 F.2d 207, 210 (4th Cir. 1992).

[111] Giddings, supra note 104, at 1075.

[112] Id. at 1076–77.

[113] 270 F.3d 30 (1st Cir. 2001).

[114] Id. at 45.

[115] Id.

[116] Id. at 44.

bility of the exclusionary rule and create avenues for police exploitation that substantially reduce Fourth Amendment barriers to prosecution.

3. The Exclusionary Remedy in the Context of Searches Conducted Pursuant to Warrants

The exclusionary rule is rarely available to remedy unconstitutional searches conducted pursuant to warrants. Under the Fourth Amendment, law enforcement officials must establish probable cause and procure a warrant before engaging in most searches.[117] Yet few violations of the probable cause requirement will result in the exclusion of any evidence. In examining ex post whether sufficient probable cause underlies a warrant, the Court applies a deferential standard of review to the issuing magistrate's determination. Searches that would be unconstitutional under a de novo standard of review are upheld under the Court's deferential standard of review.[118] The cases applying deferential review ostensibly uphold a magistrate's probable cause determination, and few such cases are phrased in terms of a constitutional violation. Such standards of review, as Part III considers, can be understood as depressing the level of probable cause substantively required by courts. But standards of review can also be understood in remedial terms. Courts decline to exclude the fruit of unconstitutional searches because of the deferential review prescribed in *Illinois v. Gates*.[119] Deferential standards of review thus limit the ability of the exclusionary rule to remedy those constitutional violations that are closest to the constitutional line.

Under *Gates*, "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'"[120] The various interpretations of what "great deference" requires uniformly make it difficult to exclude evidence, but the majority of circuits apply "substantial basis" review to comply with *Gates*'s command of def-

[117] See infra Part III. The Fourth Amendment commands that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV.

[118] See, e.g., United States v. Zsido, No. 91-1070, 1991 WL 234197, at *5 (6th Cir. Nov. 12, 1991).

[119] 462 U.S. 213, 236 (1983).

[120] Id. (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).

erential review.[121] Under substantial basis review, a court will not overturn a magistrate's determination of probable cause so long as there was a substantial basis for finding probable cause, irrespective of whether there was actually probable cause. Under this standard, circuit courts afford magistrate determinations great deference, upholding them even where the reviewing courts would not independently find a quantum of evidence sufficient to constitute probable cause.[122] Indeed, courts applying substantial basis review have expressly upheld probable cause where they did not believe probable cause actually existed.[123] The clear error standard applied by the minority of circuits provides even greater deference to magistrate determinations of probable cause. These circuits will not apply the exclusionary remedy unless it would be clear error to find there is a substantial basis for probable cause.[124]

The Court further contracted the exclusionary rule in *United States v. Leon* by holding that the exclusionary rule is not the appropriate remedy for searches conducted in good faith reliance on a warrant—even a defective warrant—issued by a "detached and neutral" magistrate.[125] The deferential standard of review articulated in *Gates* does much of the work that *Leon* might otherwise do in limiting the exclusionary remedy's applicability. Yet *Leon* has independent utility with respect to defective warrants that are not defective for lack of probable cause, but instead, for example, for

[121] Drey Cooley, Clearly Erroneous Review is Clearly Erroneous: Reinterpreting *Illinois v. Gates* and Advocating De Novo Review for a Magistrate's Determination of Probable Cause in Applications for Search Warrants, 55 Drake L. Rev. 85, 97–99 (2006) (stating that the Seventh, Eighth, and Ninth Circuits review magistrates' probable cause determinations for clear error, whereas all other circuits apply substantial basis review).

[122] *Zsido*, 1991 WL 234197, at *5.

[123] One concurring judge in the Sixth Circuit acknowledged that he voted to affirm the probable cause determination even though, were he "reviewing the issue *de novo*, [he] might have reached a different result." Id. (Wellford, J., concurring); see also United States v. Allen, 211 F.3d 970, 979–88 (6th Cir. 2000) (Clay, J., dissenting) (suggesting that deference pushed the court to hold that the quantum of evidence amounted to probable cause despite insufficient evidence to meet a de novo determination of probable cause).

[124] Cooley, supra note 121, at 97.

[125] 468 U.S. 897, 926 (1984) ("In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.").

mistakenly failing to "particularly describe" the place to be searched.[126] Even where a magistrate's probable cause determination lacks a substantial basis under *Gates*, *Leon* essentially creates a safe harbor for law enforcement acting in good faith reliance on a warrant issued by a "neutral and detached" magistrate. As state and lower federal courts apply *Leon*, so long as "the application for the warrant was not so pitifully bereft of substance as to be laughed out of court . . . , the mere exercise of having obtained it will salvage all but the rarest and most outrageous of warranted searches."[127] By limiting the applicability of the exclusionary rule to "rare" and "outrageous" cases where a warrant does not even pass the "laugh" test, *Leon* significantly curtails the availability of the exclusionary remedy.

4. The Exclusionary Remedy in the Context of Warrantless Searches

Even where warrants do not insulate law enforcement conduct, the exclusionary rule is not particularly robust. Where an exception to the warrant requirement applies, investigating police officers fulfill the Fourth Amendment's reasonableness requirement upon a showing of probable cause. As in the warrant context, however, the absence of theoretical probable cause from the perspective of a reviewing court making a de novo determination does not necessarily result in the exclusion of evidence. The standard of review announced by the Court limits the applicability of the exclusionary rule.

In *Ornelas v. United States*, the Court articulated the standard appellate courts ought to use to review police officer probable cause determinations in the context of warrantless searches.[128] The

[126] U.S. Const. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched . . . .").

[127] Ashford v. State, 807 A.2d 732, 745 (Md. Ct. Spec. App. 2002) (quoting Herbert v. State, 766 A.2d 190, 206 (Md. Ct. Spec. App. 2001)); see also Marc W. McDonald, The Good Faith Exception to the Exclusionary Rule: *United States v. Leon* and *Massachusetts v. Sheppard*, 27 B.C. L. Rev. 609, 637 (1986) ("In the wake of *Leon*, warrants will not even require a 'substantial basis' . . . that evidence can be found in the place to be searched. Rather, the determinative factor will become whether a police officer could reasonably have believed that a judge had a 'substantial basis' for finding probable cause.").

[128] 517 U.S. 690 (1996).

standard announced by *Ornelas* contemplates de novo review of the sufficiency of police officer determinations, but the Court also held that "reviewing court[s] should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[129] While the Court conceives of this standard of review as more rigorous than the standard of review used to review magistrate determinations of probable cause,[130] the Court's specification that local law enforcement ought to be given "due weight" considerably weakens the standard of review. As Justice Scalia wrote in dissent,

> [T]he Court suggests than an appellate court should give "due weight" to a trial court's finding that an officer's inference of wrongdoing . . . was reasonable. . . . The Court cannot have it both ways. This finding of "reasonableness" is precisely what it has told us the appellate court must review *de novo*; and in *de novo* review, the "weight due" to a trial court's finding is zero. In the last analysis, therefore, the Court's opinion seems to me not only wrong but contradictory.[131]

Ornelas thus "ensur[es] that appellate courts grant broad discretion to . . . police officers' factual inferences."[132] A judge so inclined can use *Ornelas*'*s* "due weight" instruction to avoid excluding probative evidence.

Moreover, even where a trial judge holds that a warrantless search lacked probable cause, an appellate court, even one inclined to agree that the search lacked probable cause, might not affirm the exclusion of evidence. The appellate court may still afford "due weight" to the inferences made by police officers.[133] Typically, an appellate court only owes deference to a lower court, but, where

[129] Id. at 699.

[130] Id. ("The Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant,' . . . and the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches. Were we to eliminate this distinction, we would eliminate the incentive.").

[131] Id. at 705 (Scalia, J., dissenting).

[132] Frank Rudy Cooper, The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and *Arvizu*, 47 Vill. L. Rev. 851, 891 (2002).

[133] Id. at 891.

trial courts are more protective of Fourth Amendment privacy, *Ornelas*'s "due weight" framework enables courts to afford deference to police officers rather than a trial court. This framework suggests that the least common denominator of constitutional protection among the determinations made by law enforcement, the trial court, and the appellate court will govern probable cause determinations in the warrantless search context. Thus, *Ornelas*'s deferential review of warrantless searches further contracts the exclusionary rule's power to remedy unconstitutional searches.

Most recently, the Court has indicated that the exclusionary rule may not be appropriate where police officers act in good faith.[134] In *Herring v. United States*, the Court created an exception to the exclusionary rule's applicability for a small category of illegal searches incident to arrest. A police officer arrested Bennie Dean Herring on the basis of a reasonable but mistaken belief that there was an outstanding warrant for his arrest. That mistake arose because another law enforcement officer had failed to update the county records— a "negligent failure to act."[135] The Court acknowledged that such a search may violate the Fourth Amendment, but it nevertheless concluded that suppression was not an appropriate remedy.[136] It reasoned that any additional deterrence achieved by excluding the fruits of the search was outweighed by the substantial costs of the exclusionary rule.[137]

Herring is a relatively narrow holding, but its rhetoric is sweeping and has broader implications for the applicability of the exclusionary rule. Under current law courts typically exclude the fruits of illegal searches unless the Supreme Court has recognized an exception to the exclusionary rule's applicability. But *Herring* describes exclusion as the exception rather than a rule.[138] Its approach might be read to go so far as to suggest that courts should evaluate the applicability of the exclusion-

[134] Herring v. United States, 129 S. Ct. 695, 702–03 (2009). Bond and Kyllo were decided well before Herring, which seems to further weaken the exclusionary rule in more significant ways than its relatively narrow holding. While Herring could not have facilitated Bond and Kyllo, it may be important to the current Fourth Amendment landscape and facilitate further innovation of the Fourth Amendment right. Herring is also important to the discussion because it explicitly recognizes the right-remedy gap in Fourth Amendment jurisprudence.

[135] Id. at *3 (quoting United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007)).

[136] Id. at *4, *9.

[137] Id. at *5–7 & n.4.

[138] Id. at *5 (suggesting that the exclusionary rule only applies when "the benefits of deterrence . . . outweigh the costs").

ary rule on a case-by-case basis.[139] Moreover, *Herring* holds that the exclusionary rule is not necessarily applicable even where police officers act negligently and without a valid warrant.[140]

5. The Isolation of the Exclusionary Rule to Trials

The Court has further held the exclusionary rule inapplicable outside the prosecution's case-in-chief. In *Stone v. Powell*, for example, the Court held the exclusionary rule unavailable as a remedy in federal habeas corpus actions brought by state prisoners raising Fourth Amendment claims if the state has already provided for litigation of the claim.[141] The exclusionary rule also does not operate when law enforcement seeks to admit evidence obtained in violation of the Fourth Amendment to impeach witnesses, during grand jury proceedings, or during probation board hearings.[142] Because of the exclusionary rule's limited applicability, Fourth Amendment violations that never result in a criminal prosecution typically go unremedied.

6. Civil Rights Damages as an Alternative Remedy

While this Note focuses on the exclusionary remedy, the Fourth Amendment remedial scheme, at least in theory, includes damages actions under 42 U.S.C. § 1983 and implied causes of actions recognized under *Bivens v. Six Unknown Named Agents.*[143] For both doctrinal and functional reasons, however, damages actions are rarely available to remedy unconstitutional Fourth Amendment searches.

> [A] host of problems suggests that a damage action . . . is not by itself sufficient [to remedy Fourth Amendment violations]. First, . . . the immunity from liability for actions reasonably taken in good faith[] makes it very difficult to obtain a judgment

[139] Id. at *2 ("Our cases establish that suppression is not an automatic consequence of a Fourth Amendment violation.").

[140] Id. at *9.

[141] 428 U.S. 465, 481–82 (1976).

[142] Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 359 (1998) (probation board proceedings); United States v. Calandra, 414 U.S. 338, 351–52 (1974) (grand jury proceedings); Walder v. United States, 347 U.S. 62, 65 (1954) (impeaching credibility of witness); Joseph & Hunter, supra note 101, at 62–63.

[143] 403 U.S. 388, 389 (1971).

> against a police officer. Second, despite the availability of attorney's fees for prevailing litigants, it is often difficult to obtain competent counsel to prosecute such an action. Finally, if a money judgment *is* won, many officers do not have the resources to satisfy a judgment necessary to compensate the victim of a heinous fourth amendment violation.[144]

Damages actions have not picked up the remedial slack as the exclusionary rule has weakened.

C. Remedial Facilitation in Action

The previous Section makes clear that the exclusionary rule and damages actions fail to remedy many Fourth Amendment violations. This depresses the costs that the exclusionary rule imposes on society in the form of "forgone arrests and convictions."[145] Law enforcement may obtain more, or forgo fewer, convictions in a legal regime in which illegally obtained evidence is rarely excluded. In this Section, I argue that we should expect the Fourth Amendment right to expand when the societal costs of the Fourth Amendment remedial scheme are low, and the jurisprudential shift evidenced in *Bond* and *Kyllo* is a manifestation of this dynamic.

Neither Professors Levinson nor Jeffries discusses the relationship between Fourth Amendment search jurisprudence and the availability of remedies in the Fourth Amendment context,[146] but a previous generation of scholarship did contemplate some dynamic between the Fourth Amendment right and the exclusionary rule. A

[144] Potter Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1387–88 (1983) ("[D]amage actions are . . . expensive, time-consuming, not readily available, and rarely successful."); see also Hudson v. Michigan, 547 U.S. 586, 610 (2006) (Breyer, J., dissenting) (reaffirming Justice Stewart's view of Fourth Amendment damage actions as practically inadequate in the contemporary legal landscape).

[145] Stuntz, supra note 6, at 793 (describing costs as "foregone arrests and convictions").

[146] Levinson does allude to some other possible Fourth Amendment applications. Levinson, supra note 7, at 894–96 (arguing that the warrant requirement, as part of the Fourth Amendment "right," may be shaped by the operational remedy, which is review in an ex post proceeding); id. at 915 (contending that if there were no qualified immunity to protect police officers, "reasonableness" would become clearer and more rule-like).

number of courts and commentators feared that the then-vitality of the exclusionary rule was likely to contract the Fourth Amendment right, at least as applied by courts. As one commentator wrote, "[i]f one were diabolically to attempt to invent a device designed slowly to undermine the substantive reach of the Fourth Amendment, it would be hard to do better than the exclusionary rule."[147] Certainly, Professors Jeffries's and Levinson's models would predict that a robust exclusionary rule that produced high societal costs in terms of forgone convictions would deter expansion of the Fourth Amendment right. As the Court has corroded the exclusionary rule over the past three decades, however, the opposite phenomenon is now underway. The exclusionary rule became less robust, and the Fourth Amendment right subsequently expanded.

This relationship between the Fourth Amendment right and remedy depends, in part, on assumptions about police behavior. It is possible to imagine a world in which police officers endeavor to keep their conduct compliant with Fourth Amendment jurisprudence, irrespective of whether illegally obtained evidence will be excluded. If this is an accurate characterization of police behavior, then the argument outlined in this Part is vulnerable on the following ground: the societal costs associated with the exclusionary rule—foregone convictions—will be imposed on society irrespective of the vigor of the exclusionary rule. By avoiding conduct that violates the Fourth Amendment, convictions are lost at the outset of a police investigation rather than in a suppression hearing. An expansion of the Fourth Amendment right would translate into increased societal costs, irrespective of the anemia of the exclusionary rule.

But this assumption about police behavior, at least as a generalization, seems wrong. As an initial matter, empirical studies of police officers suggest that "a substantial percentage of officers are prepared to act in violation of what they think the Constitution requires."[148] Moreover, the Supreme Court's primary justification for

[147] Malcolm Richard Wilkey, Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule 19 (Nat'l L. Center for the Public Interest 1982); see also Edward L. Barrett, Jr., Personal Rights, Property Rights, and the Fourth Amendment, 1960 Sup. Ct. Rev. 46, 53–57 (1960).

[148] William C. Heffernan & Richard W. Lovely, Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law, 24 U. Mich. J.L.

the exclusionary rule's continued existence rests on the notion that the exclusion of illegally obtained evidence does—and is necessary to—deter violations of the Fourth Amendment that would occur absent the existence of this remedy.[149] When police officers do violate or are willing to violate the Fourth Amendment so long as the evidence is unlikely to be excluded, then societal costs imposed by the exclusionary rule are consistent with a dynamic interdependence between Fourth Amendment rights and remedies. A robust exclusionary rule will increase societal costs by causing forgone convictions. For those officers deterred by the possible exclusion of evidence, the costs will be incurred at the outset of the investigation, rather than at a suppression hearing. But those costs are still tied to jurisprudence governing the exclusionary rule because only the realistic possibility of the exclusion of evidence will actually deter police conduct. Where societal costs are tied to the vigor of the exclusionary rule, the dynamic relationship between rights and remedies articulated by Professors Jeffries and Levinson in other contexts seems to describe the dynamic between Fourth Amendment rights and remedies.

As Professor Levinson acknowledges, "claiming that a right would be different if a different remedy followed entails a counterfactual claim that is ordinarily highly speculative."[150] It is still possible to recognize, however, that a dynamic relationship exists between the Fourth Amendment right and remedy. That is, in conjunction with other legal and policy considerations, the Fourth Amendment remedy helped shape the current scope of the Fourth Amendment right.

By analogy, the impetus for *Brown v. Board of Education*'s recognition of a right to attend desegregated schools was the moral concern of the majority of the Court. The impetus was not the lack of any available monetary remedy.[151] Yet, only absent "the prospect

Reform 311, 350, 359 (1991). See generally L. Timothy Perrin et al., If It's Broken, Fix It: Moving Beyond the Exclusionary Rule, 83 Iowa L. Rev. 669, 734 (1998) (providing extensive empirical study).

[149] See, e.g., United States v. Calandra, 414 U.S. 338, 347 (1974) ("[T]he [exclusionary] rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . .").

[150] Levinson, supra note 7, at 890.

[151] See Jeffries, supra note 7, at 101.

of crippling judgments and school district bankruptcies,"[152] was the Court able to pursue the jurisprudential course it took.[153] I argue that Fourth Amendment search doctrine has followed a similar jurisprudential course. A number of different legal or policy concerns may influence the direction of Fourth Amendment doctrine. Absent the corrosion of the Fourth Amendment exclusionary remedy, however, the legal system might not have been able to innovate and experiment to address whatever legal and policy concerns were animating the Court when it decided *Bond* and *Kyllo*.

This dynamic between rights and remedies exists on a "macro" level. These doctrinal changes are not the result of the Court's conscious appreciation of remedial facilitation. Rather, constitutional remedies produce a sort of hydraulic pressure on legal doctrine. Where the system can absorb the consequences of a particular remedy with relative ease, that remedial scheme will facilitate the expansion of corresponding constitutional rights. The causation contemplated is limited to the following: desired doctrinal change might be impossible if the remedial scheme is too draconian, but might occur more quickly or more liberally when the change is relatively inexpensive for the system. The Court's ability to define the conduct at issue in *Bond* and *Kyllo* as Fourth Amendment searches was not dependent on the likelihood that the evidence in *those* cases would not be excluded. The posture of the cases dictates otherwise. But many future defendants whose luggage is searched, whose homes are subject to thermal imaging, or who are otherwise searched will not be able to suppress the fruits of those searches. Courts will deferentially review probable cause determinations by magistrates and police. Law enforcement might exploit standing doctrine or otherwise convince a trial court that the exclusionary rule is inapplicable. All the doctrines that have made the exclusionary rule the exception rather than the rule reduce the number of foregone convictions, thereby reducing the costs of the Fourth Amendment. In light of those cost savings, the system can afford Fourth Amendment search jurisprudence invigorated by the *Bond* and *Kyllo* methodologies.

[152] Id.
[153] See id. at 101–02.

III. INTRA-RIGHT FACILITATION IN *BOND* AND *KYLLO*

The dynamic identified by Professors Jeffries and Levinson concerns the "interdependent and inextricably intertwined"[154] relationship between rights and remedies, but the Fourth Amendment right is comprised of two operationally distinct components. The threshold question of whether police conduct amounts to a search—the question at issue in *Bond* and *Kyllo*—partly demarcates the content of the Fourth Amendment right. This threshold inquiry determines whether an investigatory technique will even be regulated under the Fourth Amendment.

> The significance of the threshold issue is hard to understate. If the employment of a new investigatory tool *is not a search* at all, it is outside the sphere of Fourth Amendment regulation, and government authorities are at liberty to use it whenever they wish, without need for prior justification. The "people" are wholly unprotected from any impacts the device may have on their lives.[155]

Once the Fourth Amendment threshold inquiry captures law enforcement conduct, the significance of the Fourth Amendment right is determined by a separate strand of jurisprudence that governs the ability of law enforcement officers to engage in such conduct. Police may engage in Fourth Amendment searches so long as they do so "reasonably."[156] It is this jurisprudence of Fourth Amendment reasonableness that supplies the remainder of the content of the Fourth Amendment right. Fourth Amendment reasonableness generally requires that law enforcement officials have probable cause to believe that fruits of a crime will be found in the place to be searched plus a valid warrant authorizing the search.[157]

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[154] Levinson, supra note 7, at 857.

[155] Tomkovicz, supra note 3, at 325–26.

[156] Id. ("[Where law enforcement use] of a novel device *is a search*, the government is not free to use it randomly, but is instead constrained by the command of reasonableness that governs entries of homes and other private domains. The infringements occasioned by the use of that device will be kept in check.").

[157] Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."); Nathanson v. United States, 290 U.S. 41, 47 (1933) ("Under the Fourth Amendment, an officer may not properly issue a warrant to

While *Bond* and *Kyllo* evidence an expansion of the Fourth Amendment threshold inquiry, an expansion of Fourth Amendment privacy could alternatively have targeted Fourth Amendment reasonableness.

This Part endeavors to demonstrate that there is an ongoing dynamic between the two components of the Fourth Amendment right. Analogous to the relationship between rights and remedies, the two components of the Fourth Amendment right are themselves "interdependent and inextricably intertwined."[158] This Part III describes this dynamic and then recounts the current state of Fourth Amendment reasonableness, which is not particularly protective of Fourth Amendment privacy. I argue that the corrosion of Fourth Amendment "reasonableness" may have further facilitated the expansion of the threshold inquiry evidenced in *Bond* and *Kyllo*.

A. The Relationship Between the Components of the Fourth Amendment "Right"

The two components of the Fourth Amendment right are in a dynamic relationship analogous to the relationship between rights and remedies. First, the doctrinal interactions between the components of the Fourth Amendment right echo the functional interdependence of rights and remedies. Just as a robust right is meaningless absent a remedial scheme that vindicates the right, a broad threshold inquiry is meaningless absent privacy protections that attach once conduct is captured in the threshold inquiry. If being "reasonable" only required law enforcement to have a modicum of particularized suspicion, the threshold inquiry would be less meaningful. There is not much daylight between the unfettered ability of law enforcement to use an investigative technique absent any restrictions and the ability of law enforcement to engage in the same conduct once they comply with de minimis restrictions. It is only because protections do attach—namely, searches must be conducted "reasonably"—that the threshold inquiry is meaningful.

search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation.").

[158] Levinson, supra note 7, at 857.

The economic explanation Professor Levinson offers in the context of rights and remedies similarly applies to the two components of the Fourth Amendment right. "[R]aising the 'price' of a constitutional violation" creates economic pressure for there to be fewer violations.[159] By the same logic, raising the price of engaging in regulated conduct creates economic pressure for there to be less regulated conduct. Decreasing law enforcement activity lessens the amount of regulated conduct, but a change in the scope of conduct that is subject to regulation also achieves this end. Where law enforcement needs remain static but the price of engaging in regulated conduct is high, we would expect the Court to reduce the amount of regulated conduct by contracting the scope of the threshold inquiry to capture less law enforcement activity.

More than a decade ago, Professor Akhil Amar speculated that the Court may have adjusted its definition of a Fourth Amendment search in order to bypass unwieldy warrant and probable cause requirements for conduct otherwise subject to those burdens.[160] The contraction of the Fourth Amendment search definition identified by Amar in 1994 is one manifestation of the dynamic between the threshold inquiry and Fourth Amendment reasonableness. *Bond* and *Kyllo* demonstrate that the dynamic continues to operate and is currently pushing the threshold inquiry in the opposite direction. As it becomes less costly for law enforcement officers to engage in regulated conduct, an invisible hand is expanding the scope of conduct regulated under the Fourth Amendment.

B. Reasonableness in Current Jurisprudence

There are several reasons why law enforcement officials are able to pursue investigatory conduct at relatively low cost. The quantum of evidence needed to establish probable cause is minimal, and there are an increasing number of exceptions to the warrant requirement. Additionally, there are few constraints governing the ability of law enforcement officials to secure the consent of indi-

[159] Id. at 889.

[160] See Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 783 (1994) ("To avoid some of the absurdities created by the so-called warrant and probable cause requirements, the Justices have watered down the plain meaning of 'search' and 'seizure.'").

viduals and thereby remove investigatory conduct from Fourth Amendment regulation altogether.[161]

1. Probable Cause

The quantum of suspicion magistrates and law enforcement officials must secure in order to establish probable cause is relatively minimal, such that the probable cause requirement is not particularly costly for law enforcement. The theoretical probable cause standard by which evidence and suspicion are measured is not a significant barrier, and, moreover, the probable cause standard actually applied by law enforcement officials, magistrates, and reviewing courts is further discounted by various institutional biases detailed below.

The Court has expressly declined to articulate a precise definition for the probable cause standard. Instead, the Court characterizes the inquiry as "commonsense" and a "nontechnical conception[] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[162] The most clear the Court has been in focusing the inquiry is to suggest that "probable cause to search [exists] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[163] As one commentator noted, the Court has "articulate[ed] a relatively standardless definition of

[161] The availability of consent searches is not typically considered within the framework of Fourth Amendment reasonableness. Instead, consent searches can be understood as outside the definition of a Fourth Amendment search. But consent searches most naturally fall into this part of the discussion. A certain law enforcement technique either is or is not a Fourth Amendment search as a general rule. Comparatively, consent and waiver operate in individual applications, just as probable cause, warrants, and the contexts in which exceptions to the warrant requirement operate. Said differently, law enforcement officials may seek consent as an alternative to obtaining the requisites of conventional Fourth Amendment reasonableness. Insofar as the costs of complying with the Fourth Amendment are predictive of the breadth of the Fourth Amendment threshold inquiry, less costly alternatives to complying directly with Fourth Amendment reasonableness are an important part of the analysis.

[162] Ornelas v. United States, 517 U.S. 690, 695 (1996) (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983)); see also Pennsylvania v. Dunlap, 129 S. Ct. 448, 449 (2008) (Roberts, J., dissenting from denial of certiorari) (discussing probable cause as common sense standard).

[163] *Ornelas*, 517 U.S. at 696.

probable cause."[164] The Court's conception of probable cause as a fact-specific inquiry helps explain why the Court has defined it so abstractly, but it also suggests its malleability as applied by police officers and legal actors.

Whatever the amount of evidence or suspicion *theoretically* required to establish probable cause, the probable cause standard applied *in practice*—whether applied by law enforcement officers, magistrates or reviewing courts at suppression hearings—requires a lesser quantum of evidence or suspicion. As described in Part II, the standards of review governing probable cause determinations can be characterized as a remedial limitation, but they also affect the substance of the Fourth Amendment right. Rights and remedies are not functionally distinct. "[T]he cash value of a right is often nothing more than what the courts . . . will do if the right is violated."[165] The Fourth Amendment might theoretically require a certain level of suspicion to amount to probable cause, but the probable cause used and applied by everyone in the law enforcement community will be discounted by deferential standards of review. So long as the law enforcement community is familiar with the applicable standards of review, the cash value of probable cause is reduced.

Studies confirm that the law enforcement community is familiar with the governing legal framework. Most officers undergo comprehensive training,[166] and, as repeat players in the system, have incentives to familiarize themselves with the rules.[167] Police officers are thus familiar with the "due weight" that reviewing courts afford

[164] Arenella, supra note 33, at 238.

[165] Levinson, supra note 7, at 887.

[166] Jillian Grossman, The Fourth Amendment: Relaxing the Rule in Child Abuse Investigations, 27 Fordham Urb. L.J. 1303, 1340 (2000) ("Training protocol for police officers ensures that the officers are fluent in the subtleties of the Fourth Amendment.").

[167] See William J. Stuntz, Warrants and Fourth Amendment Remedies, 77 Va. L. Rev. 881, 896 (1991) ("A police officer . . . will see hundreds of probable cause judgments over the course of his career. . . . [O]fficers are often subject to *both* detailed training in fourth amendment requirements at the time they join the force *and* supplemental training thereafter. It would be surprising, given so much exposure to the probable cause standard, if officers did not develop a strong ability to predict judicial applications of that standard."); see also Bruce A. Green & Daniel Richman, Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure, 26 Ariz. St. L.J. 369, 387–88 (1994).

their inferences under the standard of review articulated in *Ornelas v. United States*.[168] Cognizant of the additional latitude this standard grants them, officers may be deterred when a search is clearly illegal, but in "a borderline case, the officer might proceed with the search on the ground that there is a good chance that the evidence will be admitted."[169]

Warrant-issuing magistrates may similarly operate in the shadow of the deferential standard of review laid out in *Illinois v. Gates* and the good faith safe harbor articulated in *United States v. Leon*. Like police officers, magistrates are repeat players in the criminal justice system and likely incorporate their experiences in being overturned into their probable cause determinations. Moreover, warrant applications are made ex parte, such that prosecutors' presentations to magistrates are not tested by any adversarial process,[170] and magistrates may be passing on an enormous volume of warrant applications.[171] These institutional realities are consistent with judicial records suggesting that magistrate determinations overwhelmingly favor the government and approve warrant requests to such a degree that commentators have questioned the accuracy of these outcomes.[172] "[J]udicial officer[s'] participation is 'largely perfunctory'—it is 'notoriously easy' to obtain search warrants . . . ."[173]

Regardless of whether such distortions in judicial outcomes are due to judicial cognizance of the applicable standard of review or unconscious structural realities, a significant minority of magis-

[168] 517 U.S. 690, 699 (1996); see also supra Subsection II.B.2 (describing standard of review under *Ornelas*);

[169] Jerold H. Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich. L. Rev. 1319, 1414 (1977).

[170] Yale Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L. Rev. 565, 571 (1983).

[171] See id. at 570.

[172] Donald Dripps, Living with *Leon*, 95 Yale L.J. 906, 916–17 (1986) ("[I]mpugning the vigilance of magistrates . . . [also ignores] the record of judicial compliance with government requests for court-ordered electronic surveillance."); see also David B. Kopel & Paul H. Blackman, The Unwarranted Warrant: The Waco Search Warrant and the Decline of the Fourth Amendment, 18 Hamline J. Pub. L. & Pol'y 1, 42 (1996).

[173] Kamisar, supra note 170, at 569–70 (pointing to judges' reticence to engage in ministerial tasks and overwhelming case loads as reasons why magistrates are rarely more than "rubber stamps").

trates may rubber stamp affidavits alleging probable cause.[174] Even a minority of magistrates acting like rubber stamps for the police may have systematic effects that push the probable cause standard downward for a disproportionate number of warrants.[175] "Magistrate shopping" enables police to strategically seek warrant approvals for questionable cases from more lenient magistrates. Because some magistrates may be applying a probable cause standard less exacting than the theoretically applicable standard, the availability of magistrate shopping magnifies the effects of this phenomenon. This reduces the costs to law enforcement of complying with Fourth Amendment reasonableness.

In addition, even reviewing courts may apply a probable cause standard less exacting than the theoretical standard. Professor William Stuntz has identified several structural biases that inhere in suppression hearings and depress the quantum of suspicion that courts require to make a finding of probable cause.[176] In a suppression hearing, judges review "the risk of harm [to a suspect's privacy] . . . after the risk has materialized," and evaluate the legal rights and obligations of "inherently unsympathetic" parties.[177] "It must be much harder for a judge to decide that an officer had something less than probable cause to believe cocaine was in the trunk of a defendant's car when the cocaine was in fact there."[178] This hindsight bias is coupled with the unavoidable distortions resulting from police perjury, however slight, that may occur in suppression hearings. The "partisan desire[s] to win" and "to avoid seeing [their] work come to naught" give police officers incentives to distort their testimony.[179] "An officer might, for example, concoct a fictitious 'tip' that provides a series of incriminating details . . . ."[180] As Stuntz notes, the credibility gap between officer and defendant allows any such police perjury to distort the out-

[174] Kopel & Blackman, supra note 172, at 42.

[175] Phyllis T. Bookspan, Reworking the Warrant Requirement: Resuscitating the Fourth Amendment, 44 Vand. L. Rev. 473, 529 n.317 (1991) ("Where there clearly is great variance among magistrates, [that variance] inevitably leads to magistrate shopping.").

[176] Stuntz, supra note 167, at 916.

[177] Id. at 911–12.

[178] Id. at 912.

[179] Id. at 914.

[180] Id.

come of probable cause determinations. These structural biases make it less costly for police to satisfy the probable cause standard.[181]

2. The Warrant Requirement Is Riddled with Exceptions

The Supreme Court frequently has said that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[182] But, as Justice Scalia has noted, "the 'warrant requirement' ha[s] become so riddled with exceptions that it [is] basically unrecognizable."[183] The number of exceptions to the rule is significant because, without them, the rule would be more expensive for law enforcement. Warrants require a "day's worth of paperwork" and potentially require police officers to spend long stretches of time in the courthouse waiting for a meeting with the magistrate.[184]

> [The warrant requirement] requires "untoward" expenditures of official time and effort. It compels officers to spend valuable hours and energy on the formalities of preparing affidavits and submitting them for judicial approval. Officers are not able to detect crime and apprehend criminals as speedily as they could if they could act without warrants. As a result, evidence, contraband, stolen goods, and criminals themselves may never be found.[185]

Probable cause is less costly to establish, even in the warrant context, than it theoretically ought to be, but probable cause may be more expensive in the warrant context than the warrantless context.[186] The structural biases identified above may inflate evidence and suspicion that was ex ante inadequate to amount to probable

[181] Id. at 915–16.
[182] Katz v. United States, 389 U.S. 347, 357 (1967).
[183] California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).
[184] Stuntz, supra note 167, at 908.
[185] James J. Tomkovicz, California v. Acevedo: The Walls Close In On the Warrant Requirement, 29 Am. Crim. L. Rev. 1103, 1153–54 (1992).
[186] Stuntz, supra note 167, at 916 (suggesting that after-the-fact bias may result in two probable cause standards: "probable cause as it is applied by unbiased [magistrates]" and "probable cause with a thumb on the government's side of the scale").

cause so that it amounts to probable cause in an ex post hearing to suppress the fruit of a warrantless search.[187] This may result in "magistrates . . . actually apply[ing] a *higher* standard of probable cause than do judges in suppression hearings."[188] The costs of satisfying this probable cause standard are among the significant costs that the warrant requirement imposes on law enforcement.

Given the numerous exceptions to the warrant requirement, however, law enforcement may rarely be forced to shoulder the burden of these costs. Searches conducted pursuant to exigent circumstances, observation of contraband in plain view, searches of automobiles, and searches incident to arrest are all among the recognized exceptions to the warrant requirement.[189] Where these exceptions apply, law enforcement conduct that amounts to a Fourth Amendment search is constitutional, so long as the law enforcement official has probable cause.[190]

California v. Acevedo's expansion of the automobile exception to exclude from the warrant requirement searches of closed containers in automobiles[191] provides an example of how the growth of these exceptions has reduced the costs of reasonableness. Prior to *Acevedo*, the ability of police officers to search containers inside vehicles without first securing a warrant depended on whether they had probable cause to search the whole vehicle or to search only the specific container within the vehicle. A briefcase or piece of luggage in a vehicle was only protected by a warrant requirement if

[187] The argument that the probable cause required at a suppression hearing is less than that required by magistrates is somewhat at odds with the above description of magistrate determinations of probable cause being reduced because magistrates anticipate the unlikelihood of reversal. Both arguments are consistent with the general arguments, however, that the practical level of probable cause required by judicial actors is less than the theoretical level and that the warrant requirement is expensive for law enforcement.

[188] Stuntz, supra note 167, at 916.

[189] Mincey v. Arizona, 437 U.S. 385, 392 (1978) (affirming that exigent circumstances provide an exception to the warrant requirement); Arizona v. Hicks, 480 U.S. 321, 326 (1987) (allowing plain view exception to warrant requirement); Carroll v. United States, 267 U.S. 132, 153 (1925) (creating an automobile exception to the warrant requirement since "it is not practicable to secure a warrant because . . . vehicle[s] can be quickly moved out of the locality or jurisdiction in which [a] warrant must be sought"); Chimel v. California, 395 U.S. 752, 755 (1969) (permitting exception to warrant requirement for searches incident to arrest).

[190] New Jersey v. T.L.O., 469 U.S. 325, 354–55 (1985).

[191] 500 U.S. 565, 573 (1991).

the police only had probable cause to search the specific briefcase or piece of luggage.[192] Where police had probable cause to search the entire vehicle, however, they could search containers or packages found inside vehicles without first seeking a warrant.[193] Addressing this anomaly, *Acevedo* overruled the prior cases by moving toward the least common denominator of constitutional protection. The Court announced that in all searches of containers found in automobiles, "the police may search without a warrant if their search is supported by probable cause."[194]

This legal change reduced the costs of Fourth Amendment reasonableness by eliminating the need for police to secure a warrant where probable cause only existed as to a specific container or piece of luggage.[195] In the context of private vehicles, police officers could generally circumvent the pre-*Acevedo* warrant requirement for specific containers by asserting there was probable cause to search the entire vehicle rather than probable cause to search a specific container. This was not particularly difficult in the private vehicle setting, where police officers could reasonably attribute suspicion that existed as to one person in the vehicle to every person and all luggage in the vehicle. The same proprietary relationship does not exist in the public transportation context, where *Acevedo*'s effects may be particularly acute. In such public settings, *Acevedo* significantly reduced the costs to law enforcement for complying with Fourth Amendment reasonableness.

Moreover, *Wyoming v. Houghton* confirmed that passenger containers, even extremely personal and private containers, like purses, are subject to the *Acevedo* rule and may be searched so long as there is probable cause to search for contraband in the car.[196] "A passenger's personal belongings, just like the driver's be-

[192] Id. at 571–72 (characterizing rule of *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979)).

[193] Id. at 568–70 (characterizing rule of *Carroll v. United States*, 267 U.S. 132 (1925), and *United States v. Ross*, 456 U.S. 798 (1982)).

[194] Id. at 579. But *Acevedo* did not relieve automobile exception jurisprudence from all confusion. Locked compartments in automobiles are still treated differently than unlocked compartments. Id. at 581 (Scalia, J., concurring).

[195] The automobile exception applies to searches of buses, no less than traditional vehicles. See California v. Carney, 471 U.S. 386, 393–94 (1985) (holding that the automobile exception applies to warrantless searches of mobile homes).

[196] 526 U.S. 295, 302 (1999).

longings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband *in* the car."[197] *Houghton* and *Acevedo* substantially reduced the costs to law enforcement of searching automobile and bus passenger luggage in compliance with Fourth Amendment reasonableness.

3. Consent

In addition to the low costs associated with Fourth Amendment reasonableness as traditionally understood, the ease with which law enforcement officers secure consent to search further depresses the costs of lawfully participating in Fourth Amendment events. Where consent is voluntary and freely given, police may proceed with searches without complying with the requirements that "reasonableness" traditionally entails. Insofar as "police find that getting consent is far easier than [establishing probable cause and] obtaining a search warrant,"[198] the constraints governing the ability of police to solicit consent may be the only practical costs to law enforcement of complying with the Fourth Amendment.

Since *Schneckloth v. Bustamonte*, the Court has upheld consent or waiver of Fourth Amendment rights given by persons without "knowledge of the right to refuse consent."[199] While *Schneckloth* suggests that "knowledge of the right to refuse consent" might be "one factor to be taken into account" in determining whether consent is involuntary,[200] lower courts tend to disregard this factor.[201] Moreover, lower courts tolerate pressure on suspects from police officers, allowing police to mislead and even deceive suspects in order to secure consent to search. For example, lower courts have upheld the validity of consent that follows statements to the effect that the police can do this "the easy way"—and be discreet—or

[197] Id.

[198] Marc L. Waite, Reining in "Knock and Talk" Investigations: Using *Missouri v. Seibert* to Curtail an End-Run Around the Fourth Amendment, 41 Val. U. L. Rev. 1335, 1337 (2007).

[199] 412 U.S. 218, 227 (1973).

[200] Id.

[201] Note, The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine, 119 Harv. L. Rev. 2187, 2193 (2006).

"the hard way"—and go obtain a warrant first.[202] The Fourth Circuit has upheld the validity of consent given after an exchange in which the police officer, asked by the suspect whether the officer would search the car regardless of whether consent was given, answered, "[i]f you don't [consent], I feel you're hiding something. Therefore, I'll call a drug dog right up the road to come down here and let him search the car."[203] The universe of consent searches also includes police innovations like "knock and talks," where officers knock on a resident's door, identify themselves, and request entry.[204] Even if the suspect declines to consent to allow the police to enter the home, the investigation strategy itself may effectively excite an exigency that enables the police to lawfully search the premises.[205]

Moreover, consent is often forthcoming. As the California Supreme Court has noted:

> [T]here may be a number of "rational reasons" for a suspect to consent to a search even though he knows the premises contain evidence that can be used against him: for example, he may wish to appear cooperative in order to throw the police off the scent

[202] Rebecca Strauss, We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches, 100 Mich. L. Rev. 868, 868 (2002).

[203] Id. at 869. "Lying meant to effectuate a search or a seizure is routine practice for many police officers. . . . [P]olice may state that they do not need a warrant when they know the law requires they have one, assert they have a warrant when they do not, or state they can get a warrant when in fact they know they can not. This last ruse, designed to encourage acquiescence from an otherwise unwilling person, is one among many deceitful ways of obtaining consent . . . ." Christopher Slobogin, Deceit, Pretext, and Trickery: Investigative Lies by the Police, 76 Or. L. Rev. 775, 781 (1997).

[204] Waite, supra note 198, at 1338. The "knock and talk" practice in law enforcement has been upheld by numerous lower courts. Some courts have evaluated the technique under the same considerations used to evaluate whether consent is "coerced." Other courts regulate the technique under the same analysis used to determine whether police conduct amounts to a Fourth Amendment seizure. Id. at 1339–40 & n.29, n.31 (citing State v. Land, 806 P.2d 1156 (Or. App. 1991) and State v. Smith, 488 S.E.2d 210, 214 (N.C. 1997)); see also Ewolski v. City of Brunswick, 287 F.3d 492, 504–05 (6th Cir. 2002); United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001); United States v. Roberts, 747 F.2d 537, 543 (9th Cir. 1984). But see United States v. Jerez, 108 F.3d 684, 690–93 (7th Cir. 1997). Regardless of the theory, approval of "'consent searches' expands the range of police investigatory practices that will escape fourth amendment regulation." Arenella, supra note 33, at 234 n.257.

[205] Some lower courts do not recognize an exigency exception where police themselves create the exigency. See United States v. McCraw, 920 F.2d 224, 230 (4th Cir. 1990).

> or at least to lull them into conducting a superficial search; he may believe the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the courts; or he may simply be convinced that the game is up and further dissembling is futile.[206]

Because suspects nearly always consent to searches, even when they are hiding contraband,[207] the capacity to seek consent greatly reduces the costs to law enforcement of complying with the Fourth Amendment. Moreover, requests to use thermal imaging equipment or other less invasive investigative techniques may increase the pressure suspects feel to consent; suspects may believe non-consent to these particularly non-invasive types of law enforcement would amplify any existing suspicion. If the resident of a home does consent, police officers' observations do not constitute Fourth Amendment searches, and police are free to seize any contraband under the plain view doctrine.[208] Consequently, where the means by which consent can be obtained are largely unregulated, law enforcement officials will be able to engage in Fourth Amendment searches without incurring large costs.

C. Intra-right Facilitation

Fourth Amendment reasonableness and the Fourth Amendment threshold inquiry enjoy a dynamic relationship parallel to the dynamic between rights and remedies. Fourth Amendment doctrine coupled with law enforcement innovation has reduced the costs of Fourth Amendment reasonableness. These low costs have enabled the Court to expand the scope of conduct regulated under the Fourth Amendment's threshold inquiry. As it became less expensive for law enforcement officers to comply with Fourth Amendment reasonableness, it became affordable for the court to subject a greater amount of conduct to these requirements. The Fourth

[206] People v. James, 561 P.2d 1135, 1143 (Cal. 1977).

[207] William J. Stuntz, Waiving Rights in Criminal Procedure, 75 Va. L. Rev. 761, 763 (1989).

[208] Waite, supra note 198, at 1337–39.

Amendment now regulates additional law enforcement conduct but only under diluted Fourth Amendment reasonableness protections. The contraction of Fourth Amendment reasonableness facilitated the expansion of the Fourth Amendment threshold inquiry.

CONCLUSION

The above Parts explain how the contraction of the exclusionary rule facilitated an expansion of the Fourth Amendment right and how the corrosion of Fourth Amendment reasonableness facilitated the expansion of this right in the form of a broader threshold inquiry. Even if the regulations that give the threshold inquiry bite are relatively toothless and even if the exclusionary rule is rarely available, more conduct is regulated under the revised inquiry.

This metamorphosis has doctrinal implications, especially as courts struggle to evaluate new investigative techniques.[209] For example, while the Court has held that use of narcotics-detecting canines is not a Fourth Amendment event in the context of searches of automobiles and pedestrians' luggage, circuit courts of appeal are divided on whether the Fourth Amendment *is* implicated when such a canine is brought into the curtilage of a home.[210] This Note suggests that the Court—and certainly lower courts—may answer this question using a more expansive threshold inquiry than it did before *Bond* and *Kyllo*. It is difficult to predict at this time whether the Court's recent decision in *Herring v. United States* will erode the exclusionary rule as substantially as its rhetoric suggests. But if it does, we ought to expect further remedial facilitation at a time when technology has raised many new questions about the scope of the Fourth Amendment right.[211]

Even for critics who reject the indeterminacy of the Court's Fourth Amendment jurisprudence, this Note has descriptive value

[209] Taslitz, supra note 48, at 127 ("[There is a] growing potential use of surveillance technologies, including 'ray-gun distance frisks,' mandatory, nationwide DNA databases covering all United States residents, long-distance, hard-to-detect cybersearches, retinal scanning, and radioactive 'tag' alerts.").

[210] Compare United States v. Brock, 417 F.3d 692, 696 (7th Cir. 2005) with United States v. Thomas, 757 F.2d 1359, 1366–67 (2d Cir. 1985).

[211] See, e.g., United States v. Arnold, 523 F.3d 941, 942 (9th Cir. 2008) (evaluating whether examination of contents of laptop computer without reasonable suspicion violates the Fourth Amendment).

because it explains why the threshold inquiry has expanded. While a certain jurisprudential bent might incline some readers to reject the constitutional indeterminacy that Parts II and III embrace,[212] Part I confirms that a discussion about the propriety of constitutional evolution in the Fourth Amendment context is too late. We have already seen the Fourth Amendment right evolve in a more expansive direction.[213] For those inclined toward interpreting the content of a Fourth Amendment search by some original understanding, however, the discussions in Parts II and III confirm that, even if improper, the Fourth Amendment remedial scheme facilitated the expansion of the Fourth Amendment right.

Moreover, this argument has some normative implications. Any normative legal agenda as to either component of the Fourth Amendment right cannot focus exclusively on the jurisprudence governing just one aspect of the right. Critics of the exclusionary rule and those individuals with normative preferences as to the scope of conduct properly regulated or the privacy protections properly afforded by the Fourth Amendment must pay attention to the dynamic consequences that any doctrinal changes may propel. Similarly, as the Supreme Court and lower courts develop exclusionary rule jurisprudence following *Herring*, they ought to remain mindful of both aspects of the right, as well as the Fourth Amendment remedial scheme.

[212] Jeffries, supra note 7, at 98 & n.42 (citing Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990) and Antonin Scalia, A Matter of Interpretation: Federal Courts and The Law (1997)).

[213] See also id. at 98–99 (detailing additional examples of the inevitability of constitutional change).