ARIZONA
LAW REVIEW

VOLUME 28 1986 NUMBER 2

Essay

THE FORGOTTEN MOTTO OF *OBSTA PRINCIPIIS* IN FOURTH AMENDMENT JURISPRUDENCE*

Wayne R. LaFave**

My appearance here today was prompted by an invitation I received from your "good-dean"[1] Paul Marcus some months ago. I immediately accepted, and then sought my marching orders. They were simple and straight-forward: 1) give a thought-provoking address; 2) on a topic appropriate for the bicentennial of the United States Constitution. The first requirement is, in a sense, quite manageable. During my quarter of a century in academe, I have attended an untold number of lectures, all of which—I dare say—I found to be thought-provoking. Trouble is, most of them provoked exactly the same thought: somewhere between the fifth and fifteenth minute, a profound wish for the mystical power of teleportation—for those of you not up on your science-fiction, a mind-over-matter capability by which intense mental concentration can cause one's body to vanish and then

* These remarks were delivered at the University of Arizona College of Law on November 20, 1986.

** David C. Baum Professor of Law and Professor in the Center for Advanced Study, University of Illinois.

1. The term "good-dean," it should be explained, is a commonly used expression in academe, reflecting no more (I suspect) than that professors know which side their paychecks are buttered on. By long usage, the words are conjoined much as is "damn-Yankee" in the South. I tried to come up with an illustration endemic to Arizona, but the best I could do is "but-no-humidity," typically uttered after a number like "106."

In any event, my use of "good-dean" on this occasion is simply a matter of habit. I do not draw my paycheck from Paul Marcus, though—come to think of it—he did mention something about a modest remuneration if I showed up for my lecture sober and alert. So the fact I have referred to Marcus as a "good-dean" does not mean that I know him to be one. I *am* aware, from the approximately ten years we were together at Illinois, that he is a good colleague, but what decanal transmogrification may have wrought is beyond my ken.

reappear at another place. Just how long it will be before you all experience a collective onrush of such an urge today I do not know. But remember, you have Marcus to blame, so while desiderating your respective telekineses, you may want also to aspire that his hopes for similar deliverance go unrealized.

As for my topic, about which your curiosity may be waxing at this point, let me say that I have for some years now perceived the fourth amendment, having to do with search and seizure, as my personal domain. Some of the other amendments were already taken, and, more importantly, it has seemed to me that the fourth amendment *is* rather special for, as once stated by Justice Frankfurter, it occupies "a place second to none in the Bill of Rights."[2] But whether you can stomach this Fourth-is-first anteriority or instead are a literalist who believes the Fourth is only fourth, I hope you will concede that the fourth amendment's protections are not at all trivial and that, as no less a personage than Erwin Griswold once put it, they largely determine "the kind of society in which we live."[3] So my plan, as formulated some months ago, was to speak to you today about the fourth amendment.

However, I made the serious mistake of revealing my intentions to one of my colleagues, who upbraided me no end. If Marcus wants a bicentennial talk, my associate protested, then I've got the wrong subject, as that youngster the fourth amendment has only been around since 1791. The irrefragability of his objection, I must confess, was such that I seriously contemplated shifting to some other topic having legitimate bicentennial credentials (such as: Is the "necessary and proper" clause more necessary than proper, or vice-versa?). But my infatuation with the fourth amendment proved to be too intense, so the fourth amendment it is!

I. THE *BOYD* DECISION

But that was only the beginning of my troubles. A bicentennial speech, it seems to me, ought to take the long view of things; it should look at some trend in our constitutional jurisprudence as it has developed over this span of 200 years. But when I looked back into the earlier Supreme Court decisions, what did I find concerning the fourth amendment? Nothing! Absolutely nothing—zip, cipher, zero, aught, nil, or however you want to put it. To ensure that this was not just an instance of my WESTLAW terminal being unable to penetrate the veil of antiquity, I checked with fourth amendment historian Jacob Landynski, who informs that the fourth amendment "remained for almost a century largely unexplored territory."[4] (This must be what Attorney General Meese means by the "good old days.") It was not until the 1886 case of *Boyd v. United States*[5] that the Supreme Court gave anything more than a passing glance at the fourth amendment. So already my hoped-for 200-year perspective has been cut into half.

Intending to make the best of a bad situation, I then began to refresh

2. Harris v. United States, 331 U.S. 145, 157 (1947) (dissenting).
3. E. GRISWOLD, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 39 (1975).
4. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 49 (1966).
5. 116 U.S. 616 (1886).

my recollection of *Boyd*. My plan now was to pull the wool over Marcus' eyes with some sort of *Boyd*-centennial presentation, wherein I would explain how the principles of that primordial case, later characterized by the Supreme Court as "the leading case on the subject of search and seizure,"[6] had come to influence fourth amendment jurisprudence over the next hundred years. But what principles? The Court in *Boyd* held, *inter alia* and *ad nauseam*, that the search there was unreasonable because it was only for evidence of crime. But a celebration of this "mere evidence" rule, as it came to be called, hardly seems appropriate, as it was unceremoniously dumped by the Supreme Court in *Warden v. Hayden*.[7] It was even too much for Justice Brennan, who fulminated that privacy "would be just as well served by a restriction on searches to the even-numbered days of the month," which "would have the extra advantage of avoiding hair-splitting questions."[8]

Looking further into *Boyd*, I found the ratiocination that exclusion of evidence because of an illegal search is a consequence mandated by a linking together of the fourth amendment with the privilege against self-incrimination of the fifth amendment. Aha! If this is, as one commentator deliriously exclaimed, "the most creative . . . feature"[9] of Justice Bradley's opinion, then here is what I have been looking for. But it was not creative enough, for in *Andresen v. Maryland*[10] the Supreme Court rejected what it referred to as the " 'convergence theory' of the fourth and fifth amendments," noting it simply could not be squared with the "historic function" of the fifth amendment. The basic point here is that, while some have ascribed to the fifth amendment the broad purpose of protecting privacy,[11] the truth of the matter is that "there is no coherent notion of privacy that explains the privilege."[12]

At this juncture, I was about ready to abandon *Boyd* and explore some of the later outcroppings on the fourth amendment landscape, such as the 1914 *Weeks* case,[13] the 1949 *Wolf* decision,[14] or perhaps even the *Mapp v. Ohio*[15] ruling of 1961. *Mapp* imposed the exclusionary rule on the states, and thus it would seem a good candidate here—but for one consideration. It is only 25 years old, and even the likes of Paul Marcus could be expected to grasp the difference between a bicentennial and a silver anniversary.

That prompted me to give the *Boyd* case one more look, which fortunately I did, for what I uncovered was an absolute gem, which shall serve as the text for the balance of my remarks here today. Why my faith in *Boyd*

---

6. *E.g.*, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965); Carroll v. United States, 267 U.S. 132, 147 (1925).

7. 387 U.S. 294 (1967).

8. *Id.* at 309, quoting Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 479 (1961).

9. J. LANDYNSKI, *supra* note 4, at 53.

10. 427 U.S. 463, 472 n.6 (1975).

11. *See* Couch v. United States, 409 U.S. 322, 338 (1973) (Douglas, J., dissenting); California v. Byers, 402 U.S. 424, 439 (1971) (Harlan, J., concurring).

12. Meltzer, *Privilege Against Self-Incrimination in the Hit-and-Run Opinions*, 1971 SUP. CT. REV. 1, 21.

13. Weeks v. United States, 232 U.S. 383 (1914).

14. Wolf v. Colorado, 338 U.S. 25 (1949).

15. 367 U.S. 643 (1961).

ever wavered I do not know, for the opinion in that landmark case was written by the inestimable Justice Joseph P. Bradley, an extraordinary jurist of that time or, indeed, any time. Bradley had an insatiable appetite for the written word, and over the years he accumulated a personal library of sixteen thousand volumes on which he eagerly nurtured his inquisitive mind; because of his acute bibliomania, he was well-read in all disciplines. But his special interests outside the law were mathematics and religion, and he melded his proficiency in those two fields when conducting his multifarious and creative researches. He took special pride, his biographers tell us, in his construction of an exact model of Noah's ark, and also in his meticulous calculation that the Crucifixion had occurred precisely on April 17, 30 A.D.[16]

This is the kind of man who, when confronted in *Boyd* with the government's contention that compelling the Boyd brothers to turn an invoice over to the government was unworthy of the Court's concern because it lacked "many of the aggravating incidents of actual search and seizure,"[17] was moved to this grandiloquent response:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*[18]

For those of you whose Latin is a bit rusty—and, in particular, for those of you who attribute your presence here today to nothing more substantial than idle curiosity about that phrase in the announced title of my speech—I now considerately supply a nonliteral translation: Resist the opening wedge![19] Now there is a battle cry if I ever heard one (if not a battle cry, at lease a cheer one might expect to rise from Wildcat Stadium on a fall Saturday afternoon). Resist the opening wedge! Hold that line!

But experience with the other branches of the *Boyd* case left me sufficiently apprehensive about this quotation that I dispatched my research assistant to the law library with instructions to see how it had fared in the Supreme Court's later cases. He returned several months later—he gets paid by the hour and thus eschews LEXIS, WESTLAW and, indeed, even Shepard's—with some reassuring news: that quotation, or at least significant portions thereof, has appeared in over thirty of the Court's subsequent cases. But upon closer inspection of his research, I concluded that the results were

16. 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 1199 (L. Friedman & F. Israel, eds. 1969).

17. 116 U.S. at 635.

18. *Id.*

19. K. GUINAGH, DICTIONARY OF FOREIGN PHRASES AND ABBREVIATIONS 179 (1965).

at best mixed. Focussing only on fourth amendment cases, I learned that the *Boyd* quote had made the majority or plurality opinion on just three occasions,[20] while it was invoked by dissenters more than twice as often.[21] Though that did not look too good, perhaps this was destined to be the case. After all, dissenting Justices are more in need of a battle cry than are those comfortably ensconced in the majority.

But I think there is more to it than that. The sad truth, as I see it, is that the motto of *obsta principiis* has too often been neglected in the Supreme Court's search and seizure decisions. With your indulgence, I should now like to illustrate that point by examining just a few of the Supreme Court's decisions dealing with the prominent question of what constitutes a "search" so as to be subject to fourth amendment limitations. The cases I have selected have to do with police surveillance by reliance upon modes of modern technology which I suspect did not occur even to one as knowledgeable and well-read as Justice Bradley back in 1886. In particular, I shall be looking at surveillance by overflight and surveillance by sophisticated photography, two practices the Court addressed last Term.

II. AERIAL SURVEILLANCE

The first case I wish to examine has the distinction of being the most recent instance in which the dissenters invoked Justice Bradley's *obsta principiis* motto. It is *California v. Ciraolo*,[22] involving these facts: Santa Clara police received an anonymous tip that marijuana was growing in respondent's backyard. An effort at ground-level surveillance went for naught, as respondent had decided to conceal his gardening and other curtilage-based deportment from passersby with a solid 6-foot outer fence and 10-foot inner fence. Undaunted, the officer assigned to this investigation then secured a private plane and flew over respondent's house at an altitude of 1,000 feet. He and the officer with him, both trained in marijuana identification, readily identified in a 15 by 25 foot plot in respondent's backyard marijuana plants growing 8 to 10 feet high. (Those sound like exceptionally healthy plants to me,[23] which explains why, when I first read this case, my

20. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Silverman v. United States, 365 U.S. 505 (1961).

21. California v. Ciraolo, 106 S. Ct. 1809, 1815 (1986) (Powell, J., dissenting); Dalia v. United States, 441 U.S. 238, 262 (1979) (Brennan, J., dissenting); Stone v. Powell, 428 U.S. 465, 524 n.17 (1976) (Brennan, J., dissenting); California Bankers Ass'n v. Shultz, 416 U.S. 21, 94 (1974) (Marshall, J., dissenting); United States v. Edwards, 415 U.S. 800, 812-13 (1974) (Stewart, J., dissenting); United States v. White, 401 U.S. 745, 789 (1971) (Harlan, J., dissenting).

22. 106 S. Ct. 1809 (1986).

23. "The plant may grow to a height of 16 feet, but the strains used for drug-producing effect are typically short stemmed and extremely branched." 5 ENCYCLOPEDIA BRITTANICA 1058 (15th ed. 1974). See, e.g., United States v. Smith, 783 F.2d 648, 650 (6th Cir. 1986) ("a marijuana plant about seven feet tall"); United States v. Bernard, 757 F.2d 1439, 1442 (4th Cir. 1985) ("Marijuana plants about five feet in height"); Carter v. United States, 729 F.2d 935, 937 (8th Cir. 1984) ("marijuana plants approximately 4 to 6 feet tall"); People v. Cook, 41 Cal. 3d 373, 710 P.2d 299, 309, 221 Cal. Rptr. 499, 508, (1986) ("marijuana plants approximately 6 to 7 feet fall"); People v. Bradley, 1 Cal. 3d 80, 84, 460 P.2d 129, 130, 81 Cal. Rptr. 457, 458 (1969) ("The largest one was about two and a half feet tall"); In the Matter of Moore, 453 N.E.2d 971, 974 (Ind. 1983) ("marijuana plants ranging from 'waist high' to five feet"); State v. Fearn, 345 So. 2d 468, 472 (La. 1977) ("They ranged from 8 to 30 inches in height"); State v. Silva, 509 A.2d 659, 660 (Me. 1986) ("marijuana plants,

mind's eye conjured up the grinning visage of actor James Whitmore, as in the ubiquitious TV commercials, extolling Stern's Plant Food and displaying the bounteous harvests of that fecundator.)

Based upon an affidavit describing the anonymous tip and those observations, a search warrant was issued and executed, resulting in the seizure of 73 marijuana plants. After respondent's suppression motion was denied, he pleaded guilty to unlawful gardening, but the conviction was reversed on appeal on the ground that the aerial observation was an illegal search.[24] The Supreme Court, however, in a 5-4 decision, held that no fourth amendment search had occurred. "In an age where private and commercial flight in the public airways is routine," wrote the Chief Justice for the majority, "it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The fourth amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."[25]

As every first-year law student knows (or, at least, ought to know if he or she aspires to be a second-year law student), in deciding such a was-there-a-search issue it is necessary to begin with the landmark decision of *Katz v. United States*,[26] where the Court declared that the question is not whether the police physically intruded into a "constitutionally protected area,"[27] but rather is whether the police action infringed upon a "constitutionally protected reasonable expectation of privacy."[28] Thus, as was accurately summarized in *Ciraolo*, "*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?"[29] Those are not easy questions, nor were they intended to be. *Katz* "was written to resist captivation in any formula,"[30] and rightly so. As Professor Amsterdam put it some years ago: "An opinion which sets aside prior formulas with the observation that they cannot 'serve as a talismanic solution to every fourth amendment problem' should hardly be read as intended to replace them with a new talisman."[31]

The new formulation in *Katz*, then, provided the Supreme Court with a wonderful opportunity, in the years that were to follow, to mark in a more

---

some in excess of five feet tall"); Garrison v. State, 272 Md. 123, 135, 321 A.2d 767, 774 (1974) ("marijuana plants, about two to three feet in height"); State v. Minor, 290 N.C. 68, 72, 224 S.E.2d 180, 183 (1976) ("marijuana plants, all approximately six feet in height"); Anderson v. State, 657 P.2d 659 (Okla. Crim. 1983) ("green leafy plants approximately three feet high"); State v. Harris, 671 P.2d 175, 177 (Utah 1983) ("marijuana plants, roughly 2 ½ to 3 feet high"); State v. Shreve, 667 P.2d 590, 591 (Utah 1983) ("marijuana plants, about four to five feet high"); State v. Chavez, 103 Wash. 2d 823, 825, 700 P.2d 319, 320 (1985) ("marijuana plants, approximately 2 feet tall"); State v. Curtin, 332 S.E.2d 619, 624 (W. Va. 1985) ("some plants as high as six feet tall").

24. People v. Ciraolo, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984).

25. 106 S. Ct. at 1813.

26. 389 U.S. 347 (1967).

27. *Id.* at 350.

28. *Id.* at 360 (Harlan, J., concurring). The Harlan terminology and approach has often been used by the Supreme Court and lower courts.

29. 106 S. Ct. at 1811.

30. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974).

31. *Id.*

meaningful fashion the boundaries of the fourth amendment's coverage. But while *Katz* was unquestionably "a new and more useful approach to the fourth amendment,"[32] the Court neglected to take full advantage of that opportunity. As Professor Francis Allen aptly stated, the Supreme Court "failed to pursue the implications of its insight"[33] in *Katz*. How else, I might ask, does one explain such intervening Supreme Court decisions as that one has no reasonable expectation of privacy in the numbers he dials on his phone[34] or the numbers in his bank account,[35] or in land he has left "open" by doing no more than fencing the property, locking the gate, posting it with multiple "No Trespassing" signs, and personally ordering interlopers to leave?[36] The *Ciraolo* case, then, at least in the eyes of this observer, is just the latest in a line of disappointments in the Court's application of the expectation-of-privacy formulation. (Were it not for the anticipated groans, I would be inclined to say that *Katz* has gone to the dogs.[37])

As to the first prong of the two-part *Katz* test, again, whether the defendant manifested a subjective expectation of privacy, it is fair to say that the cases generally have given little attention to its independent significance or to precisely how it is to be interpreted. Indeed, "the courts frequently do not distinguish between the two parts of the *Katz* test,"[38] and the *Ciraolo* case is not atypical in this respect. True, the Chief Justice states for the majority: "Clearly—and understandably—respondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits."[39] Though that seems an unequivocal acceptance of the fact that the first *Katz* requirement was met (as the dissenters concluded[40]), the majority in *Ciraolo* then backs off with the disclaimer that "we need not address that issue"[41] because the state had conceded the point. This in turn is followed by the gratuitous observation that because "a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a . . . 2-level bus," it "is not entirely clear" whether the defendant "therefore manifested a subjective expectation of privacy from all observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits."[42]

---

32. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 540.

33. *Id.*

34. Smith v. Maryland, 442 U.S. 735 (1979).

35. United States v. Miller, 425 U.S. 435 (1976).

36. Oliver v. United States, 466 U.S. 170 (1984).

37. But in one sense it has not, for the Court has also held that use of drug-sniffing dogs on luggage is also no search. United States v. Place, 462 U.S. 696 (1983). In any event, my comment is somewhat lacking from the standpoint of both cleverness and originality. *Compare* Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on* Katz *and Dogs*, 11 GA. L. REV. 75 (1976).

38. Note, 60 N.Y.U. L. REV. 725, 744-45 (1985).

39. 106 S. Ct. at 1811.

40. "The Court begins its analysis of the Fourth Amendment issue posed here by deciding that respondent had an expectation of privacy in his backyard. I agree with that conclusion." *Id.* at 1817 (Powell, J., dissenting).

41. *Id.* at 1811.

42. *Id.* at 1812. Also, in response to the respondent's reliance upon Justice Harlan's concurring opinion in *Katz*, the majority later states: "Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not

The unfortunate implication of this comment is that a defendant cannot even get by the first *Katz* hurdle unless he has taken steps to ensure against all conceivable efforts at scrutiny; it is not enough (as the dissenters in *Ciraolo* put it) that "he had taken steps to shield those activities from the view of passersby."[43] Actually, it is worse than that; what the majority seems to be saying is that one cannot have an expectation of privacy unless safeguards have been put in place that ensure against even purely *hypothetical* means of intrusion upon privacy. The Chief Justice's reference to double-decker buses suggests that his travels to London have had a profound effect upon his outlook,[44] but it does not reflect knowledge of the state of affairs in Santa Clara. The truth of the matter is that there are no double-decker buses in that community.[45]

If, as the *Ciraolo* dicta intimates, it is appropriate under the first *Katz* requirement to ponder such occurrences as hypothetical police perched atop non-existent double-decker buses, then it is surely just as easy to say there was no subjective expectation of privacy in light of the surveillance technique *actually* used which, after all, was successful. That is, if one starts with the supposition that Mr. Ciraolo had not sufficiently protected himself from snoopers precariously balancing themselves on the roof of an invented double-decker bus, then of course he did not protect himself from surveillance from an imaginary skyhook either, at which point it becomes obvious he had no expectation of privacy vis-a-vis surveillance from an airplane. This sleight-of-hand, of course, can be worked in either direction—either ground-to-air or air-to-ground. Should you have any doubts on that score, I direct your attention to *Oliver v. United States*,[46] holding there was no expectation of privacy in a not-so-open "open field." The Court concluded that on-the-ground surveillance, accomplished by physical intrusion past a locked gate into a fenced area posted against trespassing, was no search. Why? In part because the Court wrung from the defendant the concession "that the public and police lawfully may survey lands from the air."[47]

But surely all of this is a perversion of *Katz*. As one perceptive commentator has put it:

> The essential focus of the *Katz* analysis is on the *reasonableness* of expectations of privacy; it is thus disingenuous for a court to evade consideration of that issue, under the second part of the *Katz* analysis, by failing to recognize that a dweller exhibited an expectation of privacy because he did not take extraordinary precautions against the specific way in which the state conducted the surveillance.

---

being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is 'entitled to assume' his unlawful conduct will not be observed by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard." *Id.* at 1813. (Whether the "pole overlooking the yard" is also only hypothetical is unknown.)

43. *Id.* at 1817.

44. For a discussion of the Chief Justice's recent activities in London, see 71 A.B.A. J. 124, 125, 126, 127 (September 1985). There is, however, no specific reference to his actually riding in (say nothing of on the top of) a double-decker bus.

45. Letter to author from Santa Clara University School of Law Professor Russell W. Galloway, August 12, 1986, stating "there are no 2-level buses in Santa Clara."

46. 466 U.S. 170 (1984).

47. *Id.* at 179.

> In *Katz* itself, there was no suggestion that the defendant in that phone booth took any precautions against the wiretapping at issue in that case; he simply closed the door to the phone booth to prevent being overheard by those within earshot. . . . The first part of the *Katz* test requires only that the dweller have exhibited an expectation of privacy—in other words, that his conduct have demonstrated an intention to keep activities and things within the curtilage private, and that he did not knowingly expose them to the open view of the public.[48]

Most assuredly, then, the respondent in *Ciraolo*, despite his understandable failure to contemplate the passage of double-decker buses by his estate, had an expectation of privacy in his back yard.

In determining whether a person has an expectation of privacy which society is prepared to recognize as reasonable, I believe there are two relevant inquiries to be made. This is because, it seems to me, courts should not bestow the nonsearch appellation upon police surveillance 1) which does not occur at a somewhat public "vantage point"[49]; or 2) which is offensive in its intrusiveness in the sense that it uncovers that which has been protected from scrutiny by the "curious passerby."[50] The first point is illustrated by those cases holding it is a search for an officer to look into an apartment from a fire escape landing otherwise used exclusively for egress during an emergency evacuation[51] or into a motel room by climbing onto a second-story trellis.[52] The second point is illustrated by those cases holding it is a search for an officer to peek through a keyhole[53] or transom[54] to see what is occurring inside the room of a rooming house. This approach, producing these results, seems eminently sensible to me. Recall my quotation of Erwin Griswold's comment that the protections of the fourth amendment largely determine "the kind of society in which we live."[55] That point has special relevance in this context. If we do not want to live in a society where we are open to unrestrained government-conducted snooping from fire escapes and second-story trellises and through keyholes and transoms, then such investigative activities *must* be viewed as within the fourth amendment's "search" category. That is, Professor Amsterdam is absolutely correct when he asserts that the "ultimate question" put under the *Katz* formulation "is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."[56]

---

48. Note, *supra* note 38, at 753-54.

49. Pate v. Municipal Court, 11 Cal. App. 3d 721, 724, 89 Cal. Rptr. 893, 894 (1970).

50. Wright v. United States, 449 F.2d 1355, 1358 (D.C. Cir. 1971), quoting James v. United States, 418 F.2d 1150, 1151 n.1 (D.C. Cir. 1969).

51. Cohen v. Superior Court, 5 Cal. App. 3d 429, 85 Cal. Rptr. 354 (1970).

52. Pate v. Municipal Court, 11 Cal. App. 3d 721, 89 Cal. Rptr. 893 (1970).

53. State v. Person, 34 Ohio Misc. 97, 298 N.E.2d 922 (1973).

54. *Cf.* State v. Adams, 378 So. 2d 72 (Fla. App. 1979) (where police looked in defendant's room in a rooming house by going onto the porch and then standing on a chair to peer through a window above eye level, this was a search because defendant had a reasonable expectation of privacy against such surveillance).

55. E. GRISWOLD, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 39 (1975).

56. Amsterdam, supra note 30, at 403.

Viewed from that perspective, the first observation which might be made about *Ciraolo* is that the Court has embraced the public vantage point requirement I have proposed. This is because the Court makes much of the fact that the "observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace"[57] as defined in 49 U.S.C. App. § 1304. But this limitation upon the *Ciraolo* holding seems to me about as shaky as Don Knotts. An earlier lower court decision[58] held that it was no search for police to make observations from an aircraft being operated in violation of government regulations on minimum altitudes, for the simple reason that those regulations "were designed to promote air safety" and thus were "not formulated for the purpose of defining the reasonableness of citizens' expectation of privacy."[59] Had I been required to take a blindfold test as to that language, I would have thought it was the Supreme Court itself speaking. This is because it sounds remarkably similar to the Court's rejection just a few years ago, in *Oliver v. United States*,[60] of the contention that the police conduct there was a fourth amendment "search" because it was quite obviously a kind of intrusion proscribed by the common law doctrine of trespass. The Court there explained that argument away by noting "the common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers."[61] (Were it, once again, not for the anticipated groans, I would be inclined to suggest that because of *Oliver* it may not suffice, in future challenges to police surveillance by overflight, to object that the police had a bad altitude.)

But however the Court ultimately comes out on that point, the central defect in *Ciraolo*, as I see it, is that it does not meet the "curious passerby" test. As to this, the Chief Justice says for the majority: "Any member of the public flying over this airspace who glanced down could have seen everything that these officers observed."[62] That brings to mind my most recent experience with air travel, my flight to Tucson just a few days ago. As we started our descent to the Tucson Airport, I glanced out the window to the terrain below and then exclaimed to my wife, "I'll be damned, Loretta, look what Paul Marcus has growing in his backyard!" *Of course* that didn't happen and couldn't happen. This is because, as the four *Ciraolo* dissenters correctly observed,

> the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial to protect against. . . .

57. 106 S. Ct. at 1813.
58. State v. Davis, 51 Or. App. 827, 627 P.2d 492 (1981).
59. *Id.* at 831, 627 P.2d at 494.
60. 466 U.S. 170 (1984).
61. *Id.* at 183 n.15.
62. 106 S. Ct. at 1813.

> . . . The only possible basis for this holding is a judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance. But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the air space. Members of the public use the air space for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards.[63]

Please do not misunderstand me. The point here is *not* that I really didn't see what was in Marcus' backyard because I cannot tell a cannabis plant from a tomato plant. I am not urging some sort of expectation-of-privacy theory under which any and all special police expertise must be treated as if it were nonexistent.[64] Rather, the point here is that at that height I am not really in a position to identify much of anything, except for large and distinctive objects,[65] and also that as a general proposition what I do see is not associated with any particular and identifiable person or place. By thus failing to appreciate the qualitative difference between the very "focused"[66] surveillance of officers Shutz and Rodriguez and the more casual and generalized observations that others might make from the sky, the Supreme Court once again seriously erred in not giving fourth amendment significance to the anonymity which attends certain limited disclosures citizens must inevitably make of their activities. In that respect, *Ciraolo* is of a kind with *United States v. Miller*,[67] *Smith v. Maryland*[68] and *United States v. Knotts*.[69]

In *Miller*, the Court held a person has no justified expectation of pri-

63. 106 S. Ct. at 1818 (Powell, J., dissenting).

64. The matter of police expertise is most often considered in the context of the question whether what the police saw added up to probable cause. See 1 W. LAFAVE, SEARCH AND SEIZURE § 3.2(c) (1978). There, as the Supreme Court has rightly concluded, the police expertise is to be taken into account. *See, e.g.*, United States v. Ortiz, 422 U.S. 891 (1975). This is as it should be, for there "would be little merit in securing able, trained men to guard the public peace," State v. Harris, 256 Wis. 93, 101, 39 N.W.2d 912, 916 (1949), if their actions were to be "measured by what might be probable cause to an untrained civilian." *In re* Jones, 264 S.C. 286, 290, 214 S.E.2d 816, 817 (1975).

It by no means follows from this, of course, that a justified expectation of privacy under *Katz* should likewise be affected by the expertise which turns out to have been brought to bear on the information in the particular case. But if the matter is viewed, as seemingly it should be, as it was by Justice Harlan in *Katz*, i.e., whether "the expectation be one that society is prepared to recognize as 'reasonable,' " 389 U.S. at 361, then a defendant's claim that he had a justified expectation of privacy concerning that which he revealed to the general public because he knew the public generally would not grasp the incriminating nature of the revealed facts is hardly compelling. This is because the matter of reasonableness in this context is not a question of statistical probability. *See* Note, 43 N.Y.U. L. REV. 968, 983 (1968) (explaining why, therefore, there would be no intrusion upon a justified expectation of privacy if "two narcotics peddlers were to rely on the privacy of a desolate corner of Central Park in the middle of the night to carry out an illegal transaction," but "by extraordinary good luck a patrolman were to illuminate the desolate spot with his flashlight").

65. *See, e.g.*, United States v. Allen, 633 F.2d 1282 (9th Cir. 1980) (helicopter surveillance not a search where "the objects observed were large scale modifications of the Allen Ranch landscape and barn"); People v. Lashmett, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979) (no search to see large farm machinery from plane at 2400 feet).

66. The Court expressly rejected the California Court of Appeals' reliance upon the fact that the police observation was "focused" upon the defendant's premises. 106 S. Ct. at 1813 n.2.

67. 425 U.S. 435 (1976).

68. 442 U.S. 735 (1979).

69. 460 U.S. 276 (1983).

vacy in the records of his banking transactions kept at those financial institutions with which he has done business, and thus cannot object if those records are handed over by (or stolen from[70]) the bank. Why? Because "the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."[71] But that makes not one whit of sense. For one thing, "the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account."[72] For another, "[c]ommercial banks have rigorously maintained the confidentiality of checking account transactions,"[73] and thus disclosure to bank personnel can hardly be equated with more general disclosure to others (including police). That is, that situation is quite different from, say, *Hoffa v. United States*,[74] where the Court understandably concluded that the fourth amendment will not come to the rescue of one who "voluntarily confides his wrongdoing" to another. But the central point here is that one discloses his private affairs to a bank "for a limited purpose," and thus in fact "has a reasonable expectation that his check will be examined for bank purposes only—to credit, debit or balance his account."[75] This expectation accords with reality, as "the banker has virtually no occasion to gain access to or make use of the underlying transactional information."[76] Bank employees see a particular customer's checks only briefly and not all at one time, and thus they are not in a position "to construct accurate conclusions about the customer's lifestyle."[77] But when the police are permitted to give all of that customer's banking records a thorough and exhaustive examination, they will have learned a great deal more about the customer; "the totality of bank records provides a virtual current biography."[78] Thus the Court in *Miller* (in a fashion similar to its more recent oversight in *Ciraolo*) missed the significance of the fact that there was a substantial degree of anonymity and disjunction in the many individual disclosures to the bank which did not carry over to the more focused scrutiny by the police.

Essentially the same objection may be made concerning *Smith v. Maryland*,[79] which in a sense may have set back the science of celestial navigation a couple of centuries. The majority in that case, though asserting that "our lodestar is *Katz*,"[80] rejected petitioner's claim that he had a "legitimate expectation of privacy" regarding the numbers he dialed on his phone. This

70. *See* United States v. Payner, 447 U.S. 727 (1980).
71. 425 U.S. at 442.
72. Burrows v. Superior Court, 13 Cal. 3d 238, 247, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974).
73. Note, 83 YALE L.J. 1439, 1463 (1974).
74. 385 U.S. 293, 302 (1966).
75. California Bankers Ass'n v. Shultz, 416 U.S. 21, 95-96 (1974) (Marshall, J., dissenting).
76. Note, supra note 73, at 1463.
77. Comment, 14 SAN DIEGO L. REV. 414, 425 n.81 (1977).
78. Burrows v. Superior Court, 13 Cal. 3d 238, 247, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974).
79. 442 U.S. 735 (1979).
80. *Id.* at 739.

could not be the case, the Court asserted, as "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed," and they realize also "that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills."[81] Thus the defendant in that case could not object to police use of a pen register to obtain a complete record of his outgoing calls, though there again the focused police examination of the information revealed much more than the limited and episodic scrutiny which the phone company gave to that same information. *Smith* truly can be viewed as the harbinger of the two cases of last Term I have chosen to discuss with you today, for the Court there asserted that the information defendant conveyed to the telephone company's switching equipment was that formerly given to "the operator who, in an earlier day, personally completed calls for the subscriber."[82] Thus was announced the ominous proposition that modern technology cannot add to one's justified expectation of privacy, but can only detract from it!

This brings me to *United States v. Knotts*.[83] (This is not the tremulous Mr. Knotts of whom I spoke earlier, though the defendant in this case may have been similarly afflicted when he found out what the government had done.) By placing a "beeper" inside a container of chloroform before it was sold, federal agents kept track of that container from the time of its purchase in Minneapolis until its delivery to a cabin 100 miles away in rural Wisconsin. For a time police relied upon both visual surveillance of the vehicle carrying the container and monitoring of the beeper, but during the latter part of the journey the visual surveillance was ended because of the driver's evasive maneuvers, and though even the beeper signal was lost for a time it was later picked up. The beeper monitoring of that journey was no search, the Court explained, because when that driver "traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property."[84] Thus, "scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise."[85] But this reasoning will not wash. The "anyone who wanted to look"—just as hypothetical in rural northern Wisconsin as are the Chief Justice's double-decker buses in Santa Clara—would not have known what the beeper revealed: that the container purchased at a Minneapolis chemical company was now at a secluded cabin in rural northern Wisconsin. Only an army of bystanders, conveniently strung out on the route and who not only "wanted to look" but also wanted to pass on what they observed to the next in line, would—to use the language in *Knotts*—"have sufficed to

81. *Id.* at 742.
82. *Id.* at 744.
83. 460 U.S. 276 (1983).
84. *Id.* at 281, 282.
85. *Id.* at 285.

reveal all of these facts to the police."[86] Just why the disclosure of these fragments to an imaginary line of bystanders must be treated as a total surrender of one's expectation of privacy concerning his travels is never explained.[87]

I conclude, therefore, that *Ciraolo* is wrong for precisely the same reason that *Miller*, *Smith* and *Knotts* are wrong. In each instance, a majority of the Court failed to appreciate that "[p]rivacy is not a discrete commodity, possessed absolutely or not at all,"[88] and that there is a dramatic difference, in privacy terms, between revealing bits and pieces of information sporadically to a small and often select group for a limited purpose and a focused police examination of the totality of that information regarding a particular individual. We are thus left with the choice of foregoing the use of banking service, telephone service, the highways and, now, even our back yards, or of running the risk of unrestrained police surveillance.

III. PHOTOGRAPHIC SURVEILLANCE

I turn now to the subject of photographic surveillance and, in particular, to *Ciraolo*'s companion case, *Dow Chemical Co. v. United States*.[89] Dow operates a 2,000-acre facility in Michigan, consisting of numerous covered buildings with manufacturing equipment and piping conduits located between them. Because that technology constitutes confidential business information, Dow has gone to some lengths to keep its manufacturing processes secret; the plant is surrounded by an 8-foot chain link fence, and closed-circuit TV monitors, alarm systems and motion detectors are also in use. Anything short of anti-aircraft fire is used to protect the premises from aerial photography. The Environmental Protection Agency made an on-site inspection of a part of this facility, but when their request for a second inspection was denied they proceeded, in lieu of going to all the trouble of getting an administrative search warrant, to hire an aerial photographer to fly over the plant and take pictures. As soon as Dow learned the EPA had construed the Clean Air Act[90] as if it were the Seen-from-the-Air Act, they sought and

86. *Id.* at 282.

87. Except for the Court's statement that it is following Smith v. Maryland, significantly the prior decision most relied upon is *Knotts*.

Knotts does not mean that monitoring of a beeper which is in a container then being transported by a vehicle is never a search. In United States v. Karo, 468 U.S. 705 (1984), the Court held that "the monitoring of a beeper in a private residence, a location not open to visual surveillance," *id.* at 714, constitutes a search intruding upon those having a privacy interest in the premises. However, three Justices noted that the Court also recognized generally "that concealment of personal property from public view gives rise to fourth amendment protections." *Id.* at 733. It would thus seem to follow that when a beeper is used to establish the fact that a certain container is concealed inside a vehicle, then this also constitutes a search. As three Justices properly put it: "When a person drives down a public thoroughfare in a car with a can of ether concealed in the trunk, he is not exposing to public view the fact that he is in possession of a can of ether; the can is still 'withdrawn from public view' and hence its location is entitled to constitutional protection." *Id.* at 734 (Stevens, J., concurring in part and dissenting in part). *Knotts* is not inconsistent with that conclusion, as there the agents had by visual surveillance seen the codefendant take possession of the container, and thus the monitoring of the beeper never revealed a previously unknown fact as to the vehicle the container was in, but only revealed the location of the vehicle the container was known to be in.

88. Smith v. Maryland, 442 U.S. 735, 749 (Marshall, J., dissenting).

89. 106 S. Ct. 1819 (1986).

90. 42 U.S.C. §§ 7401-7626 (1982).

obtained injunctive relief.[91] The court of appeals reversed,[92] however, and that decision was affirmed by the Supreme Court. Once again the decision was 5-4, once again the majority opinion was written by the Chief Justice, and once again the Court was of the view that no fourth amendment activity had occurred. The Court concluded "that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the 'curtilage' of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras."[93] But my interest in *Dow* here today concerns not the matter of overflight, a problem we have already considered, but rather the use of photographic equipment.

At one point in *Dow*, the Chief Justice asserts: "The mere fact that human vision is enhanced somewhat . . . does not give rise to constitutional problems."[94] There is no denying the truth of that observation. While artificial aids to the sense of hearing, such as the electronic listening and recording device used in *Katz v. United States*,[95] are deemed to constitute a "search" in the fourth amendment sense even absent a physical intrusion, the Court has never taken the same position as to artificial aids to sight. Over sixty years ago, in *United States v. Lee*,[96] the Court ruled that the nocturnal use of a searchlight on a Coast Guard patrol boat to see what was on the deck of an adjacent schooner was no search. Because the Supreme Court in that case emphasized that "[s]uch use of a searchlight is comparable to the use of a marine glass or a field glass," the *Lee* decision was understandably accepted as supporting the conclusion that ordinary use of such common implements as flashlights[97] and binoculars[98] did not convert an otherwise no-search observation into activity governed by the fourth amendment. The *Katz* case, of course, changed dramatically the approach to be used in determining whether police activity qualifies as a "search." But the Court in *Katz* did say that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection,"[99] and lower courts took this to mean that it was still true that use of artificial aids to sight did not alone convert the viewing into a search.[100]

Lower courts similarly concluded that certain uses of photographic equipment were not a search. Use of photography merely to memorialize what was lawfully seen with the naked eye is clearly no search.[101] But

91. 536 F. Supp. 1355 (E.D. Mich. 1982).
92. 749 F.2d 307 (6th Cir. 1984).
93. 106 S. Ct. at 1827.
94. *Id.*
95. 389 U.S. 347 (1967).
96. 274 U.S. 559 (1927).
97. *E.g.*, United States v. Lara, 517 F.2d 209 (5th Cir. 1975); People v. Bombacino, 51 Ill. 2d 17, 280 N.E.2d 697 (1972).
98. *E.g.*, Fullbright v. United States, 392 F.2d 432 (10th Cir. 1968); Hodges v. United States, 243 F.2d 281 (5th Cir. 1957).
99. 389 U.S. at 351.
100. *E.g.*, United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971).
101. *E.g.*, United States v. McMillon, 350 F. Supp. 593 (D.D.C. 1972) (pictures and videotape of

courts went beyond this to hold that it was at least sometimes no search even if the photographs enhanced the naked-eye perception to some degree. Illustrative is the use of a telescopic lens of a type widely available commercially[102] or the enlarging of photos taken with standard photographic equipment.[103] However, the technology utilized in *Dow* was more sophisticated, and thus the case naturally raises the issue of at what point, if any, this scientifically augmented viewing crosses into fourth amendment territory.

Dow involved use of an aerial mapping camera from altitudes of 12,000, 3,000 and 1,200 feet. The majority passed off this equipment as "conventional" and "commonly used,"[104] but the dissenters felt compelled to elaborate upon the nature of the camera and its capabilities. They noted that the camera "cost in excess of $22,000 and is described by the company as the 'finest precision aerial camera available,' " that it "was capable of taking several photographs in precise and rapid succession," and that such a "technique facilitates stereoscopic examination, a type of examination that permits depth perception."[105] Also, they observed that the district court had found that "some of the photographs taken from directly above the plant at 1,200 feet are capable of enlargement to a scale of 1 inch equals 20 feet *or greater*, without significant loss of detail or resolution. When enlarged in this manner, and viewed under magnification, it is possible to discern equipment, pipes, and power lines as small as ½ inch in diameter."[106] Yet the majority in *Dow* concluded the use of that equipment was no search; it could not see "that any reasonable expectations of privacy have been infringed."[107]

I am not about to pretend that *Dow* is an easy case, for it is not. But the majority's analysis in the case makes me sufficiently uneasy to wish that those five Justices had taken greater heed of Justice Bradley's admonitions in the *Boyd* case. About as close as the text of the *Dow* majority opinion comes to recognizing that technological advances could require some fourth amendment line-drawing is with the observation that "[i]t may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."[108] I find that passing bow to a nonbinding concession less than reassuring, and I say this despite the fact that I do not know whether EPA's failure to use a spy satellite against Dow (again, instead of suffering the terrible inconvenience of going to a magistrate for an administrative war-

marijuana growing in defendant's back yard, taken without a warrant, admissible because plants were in plain view). *See* Annotation, 27 A.L.R. 4th 532 (1984); Note, *Electronic Visual Surveillance and the Right of Privacy: When is Electronic Observation Reasonable?*, 35 WASH. & LEE L. REV. 1043 (1978).

102. United States v. Allen, 675 F.2d 1373 (9th Cir. 1981).

103. State v. Dickerson, 313 N.W.2d 526 (Iowa 1981).

104. 106 S. Ct. at 1826.

105. *Id.* at 1829 n.4.

106. *Id.* at 1829.

107. *Id.* at 1827 n.5.

108. *Id.* at 1826.

rant for ground-level inspection) was attributable to exemplary self-restraint or to launching difficulties.

The *Dow* majority's no-search conclusion is suspect for several reasons. For one thing, it hardly makes sense to read *Katz* as meaning that we assume the risk of whatever technology the government can bring to bear upon its investigative efforts. Nor is it particularly consoling to be told—as the dissenters aptly describe the majority's approach—"that the photography was not a fourth amendment 'search' because it was not accompanied by a physical trespass and because the equipment used was not the most highly sophisticated form of technology available to the Government."[109] The Supreme Court at one time, until it later recognized the error of its ways,[110] used a hindsight "least intrusive means" test to judge the constitutionality of certain investigative practices.[111] I find equally unappealing *Dow*'s "most intrusive means" test, whereunder government snooping is characterized as no search because government agents beneficently stopped short of using some other (even only theoretically available) technology which would be more intrusive.

Be that as it may, the bottom line is that the *Dow* majority's distinction between the equipment used in that case and "satellite technology" which is "not generally available to the public" is hardly a compelling one. A spy satellite might have been more effective in the sense of escaping detection by Dow's sky-watch, but since (as the dissenters noted) "the camera used in this case was highly sophisticated in terms of its capability to reveal minute details of Dow's confidential technology and equipment," "[s]atellite photography hardly could have been more informative about Dow's technology."[112] Moreover, if, as I suggested earlier, *Katz* should be read as protecting that which is safe from scrutiny by the "curious passerby," then it is essential to consider sense-enhancement devices in terms of their general availability and use. On this score, surely the *Dow* dissenters are correct in concluding: "Nor are 'members of the public' likely to purchase $22,000 cameras."[113]

I do not wish to make out the *Dow* decision as being worse than it is. The Court asserted it was deciding nothing more than the "narrow issue"[114] presented by the unique facts before it, and suggested the result might be otherwise if *either* the camera had been pointed at "an area immediately adjacent to a private home, where privacy expectations are most heightened,"[115] *or* there were "any identifiable human faces or secret documents captured in such a fashion as to implicate more serious privacy concerns."[116] (If only such decision-narrowing caveats were not shunted off to footnotes but were, instead, displayed as prominently as the potentially decision-broadening dictum in *Ciraolo*.) Hopefully, however, those limits will be taken seriously by the Supreme Court and lower courts, for only then can we

109. *Id.* at 1827 (Powell, J., dissenting).
110. United States v. Sharpe, 105 S. Ct. 1568 (1985).
111. Florida v. Royer, 460 U.S. 491 (1983).
112. 106 S. Ct. 1833-34 n.13 (Powell, J., dissenting).
113. *Id.*
114. 106 S. Ct. at 1826.
115. *Id.* at 1826 n.4.
116. *Id.* at 1827 n.5.

expect that the emerging limitations upon sense-enhancing devices can take hold. I refer to such laudatory lower court decisions as that it *is* a search to use a highpower telescope to ascertain from the closest vantage-point a quarter of a mile away what a person is reading inside his high-rise apartment;[117] that it *is* a search to utilize a flashlight in the daytime to ascertain through a minute crack what is inside a darkened interior;[118] and that it *is* a search to use a "startron" or nightscope to facilitate voyeurism of what couples are doing in their darkened bedrooms.[119]

IV. CONCLUSION

Because the time has come—if it has not already passed—for me to provide the denouement to all of this, I now direct your attention to the New York Mets. I do *not* mean that Juggernaut of the baseball season recently concluded; rather, I am referring to the 1962 Mets, that hapless and maladroit band of agonizing agonists who won a total of 40 games for their manager, the loquacious but confabulatory Casey Stengel. We have thus journeyed from the sublime of Justice Bradley's eloquent language in *Boyd* to the ridiculous. Though the Mets' misfortunes of that season approached infinity, I have selected one incident, related as follows by Roger Angell:

> During the early stages of their terrible first summer, in 1962, their center fielder, Richie Ashburn, suffered a series of frightful surprises while going after short fly balls, because he was repeatedly run over by the shortstop, the enthusiastic but modestly talented Elio Chacon. After several of these encounters, Ashburn took Chacon aside and carefully explained that, by ancient custom, center fielders were allowed full freedom to catch all flies they could get to and signal for. The collisions and near-collisions and dropped fly balls continued exactly as before, and Ashburn eventually concluded that Chacon, who spoke very little English, simply didn't understand what it meant when he saw his center fielder waving his arms and yelling "Mine! Mine! I got it!" Richie thought this over and then went to Jo Christopher, a bilingual teammate on the Mets, and asked for help.
>
> "All you have to do is say it in Spanish," Christopher said. "Yell out '*Yo la tengo!*' and Elio will pull up. . . . You won't have any more trouble out there."
>
> . . .
>
> In the second or third inning that night, an enemy batter lifted a short fly to center. Ashburn sprinted in for the ball. Chacon thundered out after it. "*Yo la tengo! Yo la tengo!*" Richie shouted.
>
> Chacon jammed on the brakes and stopped, happily gesturing for Ashburn to help himself. Richie reached up to make the easy catch—and was knocked flat by Frank Thomas, the Mets' left fielder.[120]

117. United States v. Kim, 415 F. Supp. 1252 (D. Haw. 1976).

118. Berryhill v. State, 372 So. 2d 355 (Ala. Civ. App. 1979); Raettig v. State, 406 So. 2d 1273 (Fla. App. 1981).

119. Commonwealth v. Williams, 494 Pa. 496, 431 A.2d 964 (1981).

120. R. ANGELL, FIVE SEASONS 72-73 (1977).

My further research on this subject reveals that Richie Ashburn's one line of Spanish recently became the name of a rock group. As reported in The Sporting News, July 21, 1986, at 9, cols. 2-3,

The moral of that story, I guess, is that even if you take extraordinary precautions in an effort to maximize your self-protection, harm can still befall you from an unexpected direction. But Richie Ashburn is not the only person who has learned that lesson. Dante Ciraolo learned it about his fenced backyard; and the officials at Dow Chemical also learned it, for they seem not to have anticipated the EPA's extraordinary efforts at uncovering violations of the Clean Air Act. But please do not misunderstand me. I am not asserting a right of Ciraolo to pursue his cannabis agronomy with impunity. And I am not here to speak in favor of air pollution, by Dow Chemical or anyone else. Rather, my concern is with surveillance pollution, for I believe that the rest of us—you and I—should be able to relax in our respective habitats and engage in various other activities without fear of official scrutiny totally unconstrained by the fourth amendment.

Of course, the police are *not* going to watch all of us all the time, some might say, because it is simply too damn inefficient to do so. All of *us* (well, most of us, anyway) are law-abiding, and thus it would hardly avail the police to waste their time by placing us under intense or protracted surveillance. There is something to this, of course. Principles of efficiency, and not just the fourth amendment exclusionary rule, doubtless have had something to do with the degree to which the police have seen fit to encroach upon the privacy of citizens. But before we take great solace in the liberating effect of this cost-benefit principle, it is necessary to consider the impact of what the *Ciraolo* dissenters referred to as the "rapidly advancing technology"[121] available to law enforcement.

The inevitable consequence of such technology, it seems to me, is that it will skew the cost-benefit principle significantly. That is, it simply makes it too easy, without the loss of a lot of shoe leather and the other costs police traditionally have had to take into account in determining the realistic limits upon their enforcement activities, to engage in random and wholesale snooping. Posnerian cost-benefit balancing[122] is thus no longer a sufficient deterrent to such enlarged investigative strategies, and this is *precisely* why this activity needs to be brought within the purview of the fourth amendment. Absent constitutional limitations, all of us run the risk of being "blindsided," if you will, to the same or a greater degree than the star-crossed Richie Ashburn.

Here again, I want not to be misunderstood. I am not suggesting the advantages of modern technology should be denied our police; they certainly need and are entitled to the assistance of all available technological whizbang in their increasingly difficult war on crime. My point is only that many

---

"Ira Kaplan chose the name Yo La Tengo for his rock band, which has turned out the album, 'Ride the Tiger' on Coyote Records . . .

"Kaplan grew up as a Mets fan and wanted a baseball-related name for his band. 'First, I thought of "Bad Hop," ' Kaplan said. 'Then, we almost agreed on "A Worrying Thing," which is a line from "The Glory of their Times," by Lawrence Ritter.'

"Finally, Kaplan read Ashburn's anecdote in Roger Angell's 'Five Seasons,' and the band had its name."

121. 106 S. Ct. at 1819.

122. A law enforcement agency "can be expected to try to use its resources as effectively as possible in achieving its goals." R. POSNER, ECONOMIC ANALYSIS OF LAW 474 (2d ed. 1977).

uses of this equipment, such as the activities I have discussed here today, need to be subjected to fourth amendment restraints. And I hasten to add that those restraints need not be unrealistically harsh. The Supreme Court, by a "process of 'factualization' in search and seizure cases,"[123] has moved away from the old "monolith"[124] version of the fourth amendment. What this means is that if the kinds of investigative activities I have been discussing are truly, to use Justice Bradley's language, fourth amendment activity "in its mildest and least repulsive form,"[125] then they ought not and need not be subjected to precisely the same constitutional constraints that are applicable, say, to a full-scale search of the interior of a residence.

It is high time, therefore, that the Supreme Court reaffirm the stirring words of Justice Bradley in the *Boyd* case, and recall just why it is that the motto *obsta principiis* makes such eminently good sense.

123. This phrase was first used in Allen, *The* Wolf *Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 4-5 (1950), where it is explained why such a process is to be desired. For a look at how this process has turned out, see LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases," 85* MICH. L. REV. __ (1986) (forthcoming).

124. Amsterdam, supra note 30, at 388.

125. 116 U.S. at 635.