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Law Enforcement Use of High Technology: Does Closing the Door Matter Anymore?

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COMMENTS

Law Enforcement Use of High Technology: Does Closing the Door Matter Anymore?*

INTRODUCTION

Mr. Katz leaves his apartment and heads down the street to the glass-enclosed telephone booth on the corner. He steps inside, closes the door behind him, deposits a coin and places his call.

Mr. Jones arrives to use the phone and patiently waits his turn. Trying to determine how long he will have to wait, Mr. Jones tries to listen to the conversation, but cannot hear a thing.

Mr. Katz and Mr. Jones, however, are not the only people interested in this conversation. The police, suspicious of Katz's involvement in illegal gambling, are maintaining vigilant surveillance over him. Figuring Katz would eventually use the pay phone, they came prepared. They brought with them their newly acquired laser listening device. This device transmits a laser beam directly at the glass booth and interprets the signal reflected back to the device. The result is an augmentation[1] of the policeman's hearing (i.e., aural capabilities) to such a degree that the officer is essentially standing in the telephone booth with Katz.

The policeman's suspicions are correct. Katz has just discussed the details of his illegal gambling operation. As he exits the booth he is immediately arrested based solely upon the conversation intercepted by the officer.

Is Katz's telephone conversation protected by the fourth amend-

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1. "Augment" means "[t]o make greater, as in size, extent or quantity; enlarge; increase" AMERICAN HERITAGE DICTIONARY 87 (1981). *See, e.g.*, United States v. Knotts, 460 U.S. 276, 283 (1983), where now Chief Justice Rehnquist used the term in the following passage: "Nothing in the fourth amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." (At issue in Knotts was the use of beepers planted in a suspect's property to emit electronic signals in order to facilitate tracking by the police.)

For purposes of this Comment, "sensory augmentation" will be limited to those devices that increase the capabilities of the human senses such as hearing, seeing, and smelling. The use of aircraft generally shall not be considered within this category, because, although an advancement in technology, they enhance the vantage point, not augment the senses. *See, e.g.*, United States v. Broadhurst, 805 F.2d 849 (9th Cir. 1986) and Blalock v. State, 483 N.E.2d 439 (Ind. 1985) (no reasonable expectation of privacy from aerial surveillance when conducted from public navigable airspace on a greenhouse).

ment? Does the policeman's eavesdropping constitute a search or seizure? Under what circumstances, if any, would such eavesdropping be justified? Is the degree of sophistication associated with this technology relevant? This Comment explores these and other issues related to the ever increasing use of high technology by law enforcement officials to combat crime.

Law enforcement has long utilized available technology to augment their senses in order to effectively detect criminal activity. Starting with searchlights[2] flashlights[3] and binoculars;[4] and progressing to telescopes,[5] bugs,[6] and beepers;[7] those responsible for protecting and maintaining the public's safety have used these devices for a twofold purpose. First, they have been used to enhance the ability to perceive what was previously imperceptible. Second, they have made possible observations from vantage points that allow the police to avoid detection by those being observed.

Technological advances have significantly furthered these purposes. As a result, we now live in an age where technology can be used to observe individuals regardless of most precautions they take to preserve their privacy. Satellites located far away in the earth's orbit can observe the earthly movements of individuals with precision.[8] Infrared technology can furnish images of activities occurring well beyond the protection that darkness provides.[9] Telescopes,[10] high precision cameras[11] and other optical aids enable those occupying secluded vantage points to augment their visibility to a degree which places them within a range of vision previously unobtainable. Aural senses are heightened by advances in laser and acoustical technologies.[12] Moreover, canine training techniques provide enhancement of olfactory capabilities that in effect equate to the development of a high technology nose.[13]

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2. United States v. Lee, 274 U.S. 559 (1927).

3. Texas v. Brown, 460 U.S. 730 (1983); United States v. Coplen, 541 F.2d 211 (9th Cir. 1976); State v. Loyd, 92 Idaho 20, 435 P.2d 797 (1967).

4. State v. Ward, 617 P.2d 568 (Haw. 1980); People v. Ciochon, 23 Ill. App. 3d 363, 319 N.E.2d 332 (1974).

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

6. Katz v. United States, 389 U.S. 347 (1967).

7. United States v. Knotts, 460 U.S. 276 (1983).

8. S. HOCHMAN, SATELLITE SPIES (1970).

9. Forward looking infrared radar (F.L.I.R.). United States v. Porter, 701 F.2d 1158 (6th Cir. 1983); Unites States v. Kilgus, 571 F.2d 508 (9th Cir. 1978); *reh'g denied. See* Los Angeles Times, June 11, 1987, at 3, Los Angeles Times, July 26, 1987, (magazine), at 27.

10. United States v. Taborda, 635 F.2d 131 (2nd Cir. 1980).

11. Dow Chem. Co. v. United States, 106 S. Ct. 1819 (1986).

12. *New 'Bugs' Make Spying Easier*, Bus. Wk., July 12, 1982, at 76.

13. United States v. Place, 462 U.S. 696 (1983). This Comment will not address canine sniffing because it only reveals the absence or presence of contraband and is therefore distinguishable from the more general sensory augmenting devices addressed. *Id.* For

Balanced against the needs of law enforcement, however, is the individual's right to privacy as protected by the fourth amendment of the Constitution of the United States guarantee against unreasonable searches and seizures.[14] Under the fourth amendment, intrusions into an individual's privacy are protected by the requirement of a warrant based on probable cause.[15] However, this requirement can be avoided if no search or seizure occurs.[16]

Accordingly, courts have recently avoided finding an exception to the warrant requirement by holding that the obtaining of information by law enforcement through the use of sensory augmenting devices constitutes neither a search nor a seizure.[17] This approach has been taken more frequently and appears to be the trend in fourth amendment jurisprudence. [18]

This Comment explores the limitations of that view currently taken by courts in the face of modern technological advances. First, this Comment reviews the prevailing fourth amendment analysis in this area including most recent United States Supreme Court decisions, *California v. Ciraolo*[19] and *Dow Chemical Co. v. United States*.[20] Second, it critiques the Court's approach to addressing the threat technological advances pose to individual privacy by centering on the inherent limitations and resulting impli-

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an example of fourth amendment considerations regarding the intrusiveness of canine sniffing *see* United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985); United States v. West, 731 F.2d 90 (1st Cir. 1984). Horton v. Goose Creek Ind. School Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983). For examples of cases dealing with police observations using human sense of smell, *see* United States v. Sohns, 469 U.S. 478 (1985); United States v. Haley, 669 F.2d 201 (4th Cir. 1982); United States v. Dien, 609 F.2d 1038 (2d Cir. 1979); United States v. Martin, 509 F.2d 1211 (9th Cir. 1975).

14. The full text of the fourth amendment reads as follows:

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

U.S. CONST. amend. IV.

15. *Id.* The Supreme Court has suggested that to have probable cause for a search the available information must show "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213 (1983). *See also infra* note 111.

16. *See, e.g.*, Dow Chem. Co. v. United States, 106 S.Ct. 1819 (1986). Moreover, other inroads into the fourth amendment requirements for a warrant based on probable cause already exist. United States v. Leon, 468 U.S. 897 (1984) ("good faith" reliance on search warrants lacking probable cause); New York v. Belton, 453 U.S. 454 (1981) (search incident to arrest); United States v. Watson, 423 U.S. 411 (1976) (warrantless arrest of a felon in a public place); Terry v. Ohio, 392 U.S. 1 (1968) ("stop and frisk" on the basis of "reasonable suspicion").

17. Dow Chem. Co. v. United States, 106 S. Ct. 1819 (1986).

18. *See* Comment, *Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment*, 1977 U. ILL. L.F. 1167 (1977).

19. 106 S. Ct. 1809 (1986).

20. 106 S. Ct. 1819 (1986).

cations of the analysis set forth in *Dow* and *Ciraolo*. Third, this Comment recommends a limiting principle and discusses its implications in striking a balance between protecting individual privacy rights and enabling law enforcement officials to effectively detect and control crime. Finally, it makes an application of this limiting principle to hypothetical scenarios, similar to the one with Mr. Katz, as a means of testing this principle's feasibility in likely situations.

I. THE PREVAILING ANALYSIS

A. Explicit Coverage

The fourth amendment explicitly protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[21] Traditionally, this explicit fourth amendment coverage has included the home and the area immediately surrounding the home, known as the curtilage.[22] However, areas beyond the curtilage are considered "open fields" and are beyond the explicit coverage of the fourth amendment.[23] This is not to say that an individual is completely without privacy when participating in activities beyond the curtilage. However, one must have a "reasonable expectation of privacy" to be protected by the fourth amendment.[24]

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21. U.S. CONST. amend IV.

22. Oliver v. United States, 466 U.S. 170, 180 (1984).

Recently in United States v. Dunn, 107 S. Ct. 1134, 1139 (1987), the Supreme Court clarified the definition of curtilage as follows:

> We identified [in *Oliver*] the central component of this inquiry as whether the area harbors the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.' " (citation omitted). Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

Additionally, the Court went on to reject the government's suggestion to adopt a "first fence rule" which would limit the extension of curtilage to the "nearest fence surrounding a fenced house." *Dunn*, 107 S. Ct. at 1139 n.4. Thus, fourth amendment protection is still available to "a structure lying outside a home's enclosing fence" provided it satisfies the above guidelines." *Id.*

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

24. Katz v. United States, 389 U.S. 347 (1967).

B. *Reasonable Expectation of Privacy*

In the landmark decision *Katz v. United States*,[25] the Supreme Court held that an individual's telephone conversation in a public telephone booth enjoyed protection from police surveillance with an electronic listening device placed on the outside of the booth. Justice Stewart, in rejecting the notion that a search required a physical invasion, stated that such governmental activity violated the privacy upon which the individual justifiably relied while using the telephone booth and thus constituted a search and seizure within the meaning of the fourth amendment.[26] The majority found the fact that the conversation took place in a glass booth in a public location not dispositive of whether the individual had a right to privacy.[27] The Court reasoned that it was the uninvited ear not the intruding eye that the individual sought to exclude when he shut the door behind him.[28]

Restating the majority opinion, Justice Harlan in his concurrence reasoned that Katz had a constitutionally protected "reasonable expectation of privacy" in his telephone conversation.[29] This reasonable expectation of privacy embodied a two-prong test: "first that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[30] Justice Harlan's two-prong test has since become the prevailing rule for determining whether an individual has a reasonable expectation of privacy and is thus entitled to protection from unreasonable searches and seizures under the fourth amendment.[31] Accordingly, a "search" occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed."[32]

The Supreme Court has recently applied the *Katz* standard in the companion cases of *California v. Ciraolo*[33] and *Dow Chemical Co. v. United States*.[34] The Court held that the actions of the government authority in both cases did not constitute a search.[35]

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25. *Id.* at 358.
26. *Id.* at 353.
27. *Id.*
28. *Id.* at 352.
29. *Id.* at 360 (Harlan, J., concurring).
30. *Id.* at 361.
31. Smith v. Maryland, 442 U.S. 735, 740 (1979); Rakas v. Illinois, 439 U.S. 128 (1978).
32. United States v. Karo, 468 U.S. 705, 712 (1984) (quoting United States v. Jacobsen, 446 U.S. 109, 113 (1984)).
33. 106 S. Ct. 1809 (1986).
34. 106 S. Ct. 1819 (1986).
35. California v. Ciraolo, 106 S. Ct. 1809 (1986); Dow Chem. Co. v. United States, 106 S. Ct. 1819 (1986). In *Ciraolo* the police did not employ sensory augmenting technol-

In *California v. Ciraolo*,[36] the Court held that the naked-eye observation from an altitude of 1,000 feet of a backyard within the curtilage of a home did not constitute a search. Chief Justice Burger, writing for the majority, reasoned that although the defendant clearly manifested a reasonable expectation of privacy from the ground level by erecting a 10-foot fence around the curtilage of his backyard, the same was not true for observations made by police while lawfully occupying a vantage point in public navigable airspace.[37] The *Ciraolo* Majority stated that what a person "knowingly exposes" to the public, even in his own home, is not subject to fourth amendment protection.[38] Significant to the Court was Ciraolo's failure to employ adequate means to protect his backyard from the particular type of observation made by the police.[39] Unlike *Katz*, *Ciraolo* failed to shut the door behind him.[40] Somewhat ironically then, while the *Katz* standard might afford an individual a reasonable expectation of privacy beyond the curtilage of his home when adequate protective measures are employed, failure to do the same while within the confines of one's own backyard will leave them unprotected by the fourth amendment.[41]

In *Dow Chemical Co. v. United States*,[42] the Court once again applied the *Katz* standard to an aerial observation. In *Dow*, however, the Environmental Protection Agency (EPA) used a high precision aerial mapping camera mounted on-board an aircraft to facilitate their surveilling activities.[43] The Court concluded that despite Dow's extensive efforts to protect the open areas of their industrial complex from ground-level intrusions, they did not have a reasonable expectation of privacy from the aerial observations

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ogy and in *Dow* the EPA arguably did.

36. 106 S. Ct. 1809, 1813 (1986).

37. *Id.* at 1812. Public navigable airspace is generally considered to be above 1,000 feet over congested areas and above 500 feet over rural areas. *See* 49 U.S.C. §§ 1301 (29), 1304 (1986), and 14 C.F.R. § 91.79 (b-d) (1986). Also, for a recent case interpreting *Ciraolo*, as implying that the 1,000 feet minimum flight altitude over congested areas is the lower limit on unaided aerial observance not considered a search, *see* People v. Sabo, 185 Cal. App. 3d 845, 230 Cal. Rptr. 170 (1986), cert. denied, 107 S. Ct. 2200 (1987). *But see* State v. Layne, 623 S.W.2d 629, 632-636 (Tenn. Cr. App. 1981).

38. California v. Ciraolo, 106 S. Ct. 1809, 1812 (1986) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

39. *Ciraolo*, 106 S. Ct. at 1812.

40. Actually Ciraolo failed to obstruct the aerial vantage point from visual surveillance. The Court apparently adopts the State's contention that Ciraolo left a "knothole" through which the police could look. *Id.* at 1811. For an example of the potentially prohibitive costs of taking such precautions, *see* Dow Chem. Co. v. United States, 106 S. Ct. 1819, 1827 n.1 (1986) (Powell, J., dissenting).

41. *Ciraolo*, 106 S. Ct. at 1813.

42. 106 S. Ct. 1819 (1986).

43. *Id.* at 1822.

made by the EPA.[44]

The Court discussed at length the ramifications of the EPA's use of the aerial mapping camera.[45] The camera was distinguished from other types of technology on the basis of its common availability in the marketplace.[46] Moreover, the degree to which the camera enhanced visual observation in this case decidedly did not give rise to constitutional implications.[47] The Court, relying on *United States v. Karo*,[48] found that merely taking the photographs without enlarging them only constituted a "potential" invasion of privacy. However, since the photos were not exploited via enlargement no fourth amendment considerations were raised in this context. [49]

However, the Court continued its discussion of technology, in what can only be considered dictum,[50] by intimating that surveillance of private property by using highly sophisticated surveillance equipment, not generally available to the public, such as "satellite technology," might constitute a search.[51] Thus, the Court again used the availability of the technology as a critical factor in determining the need for fourth amendment protection.[52]

Despite the fact that the Court found that no "search" occurred

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44. *Id.* at 1827. In so concluding the Court rejected Dow's contention that the area observed was "industrial curtilage" and thereby entitled to full fourth amendment protection, holding that, although neither, it was closer to "open fields" than to curtilage. *Id.* at 1825-26.

45. *Id.* at 1826-27.

46. *E.g*, off-the-shelf, commonly available technology. *Id.* at 1826.

47. *Id.* at 1826-27.

48. 468 U.S. 705 (1984).

49. *Dow*, 106 S. Ct. at 1827 n.5. In United States v. Karo, 468 U.S. 705, 712 (1984), the Court held that the attaching of a beeper to a can of chloroform that one of the defendants had purchased did not constitute a search or a seizure. Since there was no "meaningful interference with the defendants' possessory interests, there was not a seizure. Id. at 712 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)). Similarly, as "an expectation of privacy that society was prepared to consider reasonable" was not "infringed," there was not a search. *Karo*, 468 U.S. at 712.

The Court acknowledged that the attaching of a beeper did create the "potential" for an invasion of privacy but "[i]t is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." *Id.* Thus, it was not until the beeper was tracked within Karo's home that a search had occurred. *Id.* at 712.

Similarly, in *Dow*, the existence of a photographic negative merely created the potential for an invasion of privacy. *Dow*, 106 S. Ct. at 1827 n.5. However, since the negative was not significantly enlarged, the EPA had not yet exploited the technological advances provided by the high precision aerial mapping camera, and therefore there was not a search. *Id.*

50. Although this Comment considers the capabilities of the aerial mapping camera used in Dow to be equivalent to those of a satellite, the EPA in Dow did not use a satellite, and therefore, any discussion of its legal implications is done by the Court without any factual basis.

51. *Dow*, 106 S. Ct. at 1826.

52. Presumably, the Court views the use of satellite technology as currently beyond the reach of most people.

in either case, there are two major distinctions between *Ciraolo* and *Dow*. First, the area observed in *Ciraolo* was within the curtilage and therefore explicitly covered by the fourth amendment.[53] On the contrary, the area observed in *Dow* was not considered curtilage but Dow nonetheless had a reasonable expectation of privacy from ground level intrusions.[54] Thus *Dow*, like *Katz*, was a case where the reasonable expectation of privacy concept was used to extend fourth amendment protection, albeit limited to ground-level intrusions, to an area not previously acknowledged as deserving such protection.[55]

Second, *Dow*, unlike *Ciraolo*, utilized technology to augment the senses.[56] Specifically, in *Dow*, the E.P.A.'s vision was enhanced by an aerial mapping camera.[57] This distinction, however, was blurred by the majority analysis in *Dow*. On one hand, the Court discussed the distinctions between commonly available and not commonly available technology.[58] On the other hand, the EPA's failure to enlarge the photographs taken of Dow's complex to any "significant degree" was found to be critical.[59] Thus, the Court left unclear whether its holding, that there was not a search, rested on the type of technology used or the degree to which it augmented the observer's senses.[60]

In summary, it would appear that the protective measures taken by *Dow* relative to the degree of sensory augmentation employed by the EPA was the pivotal analytical round upon which the

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53. *See supra* note 22 and accompanying text.

54. *See supra* note 44.

55. The limitation of Dow's reasonable expectation of privacy to protect their facility only from ground level intrusions naturally leads one to suspect that had a lip reader visually observed the conversation of Katz, the Court would have held that neither a search nor a seizure had occurred.

56. *See supra* note 43 and accompanying text.

57. *Id.*

58. *Dow*, 106 S. Ct. at 1826. The Court considers the aerial mapping camera used here to be generally available to the public despite its cost of $22,000.00 (*see id.* at 1833 n.12 (Powell, J., dissenting)).

59. *See supra* note 49 and accompanying text.

60. This is significant because the Court has left open two questions to be answered at a later date by the Court itself or lower courts. First, does the classification of the type of technology used by police as "commonly available" place the police activities beyond fourth amendment protection and judicial scrutiny regardless of the extent of the intrusion occurring in a particular case? Second, will trial courts be required to make factual determinations of the extent of sensory augmentation enjoyed by the police in a particular case before deciding whether to admit or exclude the evidence on fourth amendment grounds? Additionally, if the former is answered in the affirmative, what then will be the standard for classifying the type of technology? Similarly, if the answer to the latter question is yes, what standard will the courts apply? The limiting principle suggested by this Comment addresses the second inquiry (*see infra* notes 98-99 and accompanying text) and rejects the first as illogical (*see infra* notes 68-71 and accompanying text).

Court determined that a search had not occurred.[61]

From the Court's premise, one is led to speculate that had the EPA employed less available or more sophisticated technology in *Dow*, or had the police in *Ciraolo* used an aerial mapping camera to observe activity occurring within the curtilage, that there would have been different results in both cases.[62]

II. A CRITICISM OF THE PREVAILING ANALYSIS

The Supreme Court, and most lower courts since *Katz*, have limited an individual's reasonable expectation of privacy to what is not "knowingly exposed" to the public.[63] However, absent some limit on what constitutes a knowing exposure, such a test is unmanageable when confronted with the regular use by police of technology.[64] For instance, when a person opens their curtains to allow in light they presumably trade off a portion of their right to privacy. However, to whom do they knowingly expose the activities taking place within their home? To the nosey neighbor perhaps, or even the annoying door-to-door solicitor. However, does the mere act of opening your curtains signal to those perched far away with a sophisticated vision augmentating device that the activities going on in your living room are theirs for the viewing?

Limiting an individual's reasonable expectation of privacy by what they knowingly expose to the public carries alarming implications for an ever-eroding fourth amendment. As pointed out by

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61. "The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems" (footnote omitted). *Dow*, 106 S. Ct. at 1827.

62. Additionally, a "significant" enlargement of the area observed would be required. *See supra* note 49 and accompanying text.

63. *See, e.g.*, California v. Ciraolo, 106 S. Ct. 1809 (1986); Dow Chem. Co. v. United States, 106 S. Ct. 1819 (1986); State v. Barnes, 390 So. 2d 1243 (Fla. App. 1980); State v. Ward, 617 P.2d 568 (Haw. 1980); State v. Littleton, 407 So. 2d 1208 (La. 1981); Commonwealth v. Hernley, 216 Pa. Super. 177, 263 A.2d 904 (1970).

64. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 406-407 (1974) [hereinafter Amsterdam], where Professor Amsterdam stated:

> Now, it seems to me that the analysis of these cases in terms of voluntary assumption of risk is wildly beside the point. The fact that our ordinary social intercourse, uncontrolled by the government, imposes certain risks upon us hardly means that government is constitutionally unconstrained in adding to those risks. Every person who parks his or her car on a side street in Greenwich Village voluntarily runs the risk that it will be burglarized—a risk, I should add as one who has lived in Greenwich Village, that is very much higher than the risk of betrayal by your friends even if you happen to choose your friends exclusively from a circle of Machiavellian monsters. Does that mean that government agents can break into your parked car uncontrolled by the fourth amendment?

See also United States v. Kim, 415 F. Supp. 1252, 1256 (D.Haw. 1976), where Chief Judge Samuel King stated: "The fact that Peeping Toms abound does not license the government to follow suit."

Professor Amsterdam:[65]

> Such a narrow approach raises the question of how tightly the fourth amendment permits people to be driven back into the recesses of their lives by the risk of surveillance . . . —so far as I am presently advised on the state of the mechanical arts—anyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the amendment because, if it were, the amendment's benefit would be too stingy to preserve the kind of open society to which we are committed and in which the amendment is supposed to function.[66]

The alternative to the withdrawal described by Amsterdam is for individuals to protect their reasonable expectation of privacy by staying technologically one step ahead of those employing sophisticated means of observation. However, such an alternative is neither feasible nor justifiable. After all, who other than the professional criminal, or perhaps the wealthy individual, will find it economically feasible to pursue such an alternative? Moreover, it is not merely the rights of the criminal or the wealthy, but those of the ordinary law-abiding citizen that the fourth amendment and its exclusionary rule are intended to protect.[67]

Furthermore, the Supreme Court's distinction between equipment which is and which is not generally available to the public does not make sense. First, from the perspective of intrusiveness there is no difference. Whether it is a telescope being used from a nearby building, or a satellite in a distant orbit, the information

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65. Professor Amsterdam is a Professor of Law at Stanford Law School. His article, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974), is the text of the Oliver Wendell Holmes lectures, delivered by Professor Amsterdam at the University of Minnesota Law School on January 22, 23, and 24, 1974. The article is considered to be one of the most insightful scholarly works on the fourth amendment as evinced by the reliance placed on it by other scholars and courts. *See, e.g.*, 1 LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 342-43 (2d ed. 1987); United States v. Taborda, 635 F.2d 131, 136 (2d Cir. 1980).

66. Amsterdam, *supra* note 64, at 402.

67. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. 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 that in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 635 (1886).

observed by the observer is equally revealing.[68]

Second, the imposition placed on the observed is not lessened when the observer uses equipment that is available to ordinary citizens. The imposition takes the form of the cost to protect oneself from such observations, and the time and effort that taking such precautionary measures detracts from one's life.[69] Regardless of whether the observer is using a satellite or an aerial mapping camera mounted on a airplane, the individual is still burdened with taking extreme precautionary measures in order to protect those intimate activities associated with the home and traditionally afforded fourth amendment protection from uninvited intrusions. Thus, although defenses are available to individuals to protect their privacy, they should not be forced to resort to those defenses in order to maintain a constitutional right once previously afforded. As Justice Powell argued in his dissenting opinion in *Dow*, "Privacy rights would be seriously at risk as technological advances become generally disseminated and available in our society" if such a distinction was accepted by the Court.[70]

Finally, the distinction in technology is unnecessarily arbitrary from a law enforcement perspective. To hold that a given police observation was a search merely because the type of technology used was not "commonly available" would deprive the police of the use of an effective technological advancement when other less effective but equally intrusive means could be readily employed.[71]

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68. *See, e.g.*, United States v. Taborda, 635 F.2d 131, 138 n.7 (2nd Cir. 1980), where Circuit Court Judge Kearse discussing this contention stated: "We reject the government's notion that because elementary telescopes have been used since 1608 their use is significantly less intrusive than the use of more modern auditory devices." Therefore, although it is probably true that a correlation may exist between the relative unavailability of technological devices and their augmentation capabilities, the critical question is the degree of intrusion.

69. For example, in *Dow*, 106, S. Ct. at 1828 n.1 (Powell, J., dissenting), Justice Powell noted the prohibitive nature of the expense Dow would have had to incur in order to protect itself against aerial surveillance with a high precision aerial mapping camera.

> The record establishes that Dow used the open-air design primarily for reasons of safety. Dow determined that, if an accident were to occur and hazardous chemicals inadvertently released, the concentration of toxic and explosive fumes within enclosed plants would constitute an intolerable risk to employee health and safety. Moreover, as the Court correctly observes, Dow found that the cost of enclosing the facility would be prohibitive. *Ante*, at 1822, 1825. The record reflects that the cost of roofing just one of the open-air plants would have been approximately $15,000,000 in 1978. The record further shows that enclosing the plants would greatly increase the cost of routine maintenance. App. 74-75."

Also, such companies as CCS Communication Control, Inc., 633 Third Ave., New York, NY 10017, provide sophisticated countermeasures for those who can afford to take high technology precautionary measures.

70. *Dow*, 106 S. Ct. at 1833 (Powell, J., dissenting).

71. The term "readily employed" is intended to indicate that a search warrant would not be required. *See supra* note 51.

The police should be allowed to use all reliable means of detection available to them, subject only to legitimate constitutional limitations.

III. A Limiting Principle Under the Fourth Amendment for the Use of Technology

A. The Solution: The Definition of a Search by the Use of Sensory Augmenting Technology

The solution to the increasing challenge technology poses to individual privacy rights lies in placing a workable limitation on its use by police. A careful definition of when the use of technology by police constitutes a search will provide that solution. The following definition of such a search is suggested: A search is the use of technology to augment the senses in order to obtain information that could not have otherwise been obtained from a lawful vantage point without such an augmentation. In other words, it is not a "search" to use technology to augment the senses in order to obtain information that would be otherwise obtainable from a lawful vantage point without the aid of sensory augmentating devices. Under this definition, an individual would have a reasonable expectation of privacy from those intrusions that could not be made lawfully without the use of sensory augmenting technology. This proposition has already been acknowledged implicitly by lower courts[72] and suggested by Professor LaFave[73] in the context of po-

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72. *Accord* United States v. Taborda, 635 F.2d 131 (2d Cir. 1980); United States v. Lace, 502 F. Supp. 1021 (D. Vt. 1980); United States v. Kim, 415 F. Supp. 1252 (D. Haw. 1976); State v. Barnes, 390 So.2d 1243 (Fla. App. 1980;); State v. Ward, 617 P.2d 568 (Haw. 1980); State v. Kender, 588 P.2d 447 (Haw. 1979); People v. Ciochon, 23 Ill. App. 3d 363, 319 N.E.2d 332 (1974); State v. Louis, 196 Or. 57, 672 P.2d 708 (1983). *But see* Fullbright v. United States, 392 F.2d 432 (10th Cir. 1968), *cert. denied*, 393 U.S. 830; Cooper v. Superior Court of Contra Costa County, 118 Cal. App. 3d 499, 173 Cal. Rptr. 520 (1981); People v. Hicks, 49 Ill. App. 3d 421, 7 Ill. Dec. 279, 364 N.E. 2d 440 (Ill. App. Ct. 1977); Johnson v. State, 2 Md. App. 300, 234 A.2d 464 (1967); Commonwealth v. Hernley, 216 Pa. Super. 177, 263 A.2d 904, (Pa. Super. Ct. 1970), *cert. denied*, 401 U.S. 914.

73. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 339-42 (2d ed. 1987):

> Under this particular balancing of privacy and law enforcement interests, it is submitted, fourth amendment restrictions should not be imposed when the police have done no more than: (1) use binoculars to observe more clearly or carefully that which was in the open and thus subject to some scrutiny by the naked eye from the same location; or (2) use binoculars to view at a distance that which they could have lawfully observed from closer proximity but for their desire not to reveal the ongoing surveillance. When this is the nature of the police conduct vis-a-vis evidence or conduct located in the open, the assistance provided by the binoculars should not be characterized as a search.

Professor LaFave went on to address the more difficult problem of law enforcement use of binoculars or similar equipment to look inside of premises stating that the two primary

lice use of binoculars. Moreover, the Supreme Court has recognized this limiting principle in its decision of *United States v. Knotts*.[74]

In *Knotts*, the Court held that it was not a search for the police to monitor signals transmitted from a beeper placed in a drum of chloroform that the defendant transported on public streets.[75] The Court reasoned that individuals do not maintain a reasonable expectation of privacy in their public movements.[76]

In discussing the use of a beeper to track individuals the Court acknowledged that the use of such a device enabled the police to ascertain the ultimate resting place of the drum when they would have been unable to do so had they relied solely on their naked eyes.[77] Ultimately, however, the Court held that a search did not take place.[78] The Court found several facts critical: "[T]here [was] no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin."[79] Thus, the Court left open the question of whether the police could use a sensory augmenting device to obtain information not otherwise obtainable from a lawful vantage point without such augmentation.[80]

This question was soon answered in the negative by the Supreme Court in *United States v. Karo*.[81] In *Karo*, the Court held

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considerations would be: "(1) the level of sophistication of the equipment utilized by the police; and (2) the extent to which the incriminating objects or actions were out of line of normal sight from contiguous areas where passersby or others might be." (footnotes omitted) LaFave also criticized the Hernley case cited *supra* note 72 as a "less than adequate analysis of these factors" in light of Katz.

74. 460 U.S. 276 (1983). The majority opinion was written by now Chief Justice Rehnquist.

The reliance on *Knotts* by the majority in California v. Ciraolo, 106 S. Ct. 1809, 1918 (1986), was considered misplaced by the dissent. *Id.* at 1818 (Powell, J., dissenting). The dissent limits the holding in *Knotts* to police observations of public activity not the type of activity taking place within the curtilage. *Id.* However, the majority considers *Knotts* to stand for the proposition that unaided police observations from a lawful vantage point do not constitute a search. *Id.* at 1812. Inasmuch as the latter accurately depicts the majority view, this Comment is in accord.

75. *Knotts*, 460 U.S. at 236.

76. *Id.* at 281-282.

77. *Id.* at 286. The DEA agents could have kept track of the suspect with only the use of naked eye surveillance. However, they chose to end their visual surveillance, presumably to avoid being detected, when the suspect began making evasive maneuvers. *Id.* at 278.

78. *Id.* at 286. Since the DEA did not obtain any information that could not have been obtained unaided from a lawful vantage point (but for the need to avoid being detected), the holding in *Knotts* embodies the limiting principle suggested in this Comment.

79. *Id.*

80. *See* United States v. Karo, 468 U.S. 705, 714 (1984).

81. 468 U.S. 705 (1984).

that monitoring a beeper placed in a drum while it was located inside the home of one of the defendants constituted a search.[82] The Court reasoned that such monitoring revealed a critical fact about the interior of the defendants' premises that the government was extremely interested in knowing but that it could not have otherwise obtained without a warrant.[83]

Similarly, lower courts have held that police surveillance, although performed from a lawful vantage point, is a search, because it reveals critical information that they could not have otherwise obtained without the use of sensory augmentation.[84] In *United States v. Kim*,[85] the federal district court suppressed evidence obtained by FBI agents who observed the defendant in his apartment a quarter mile away through the use of an 800 millimeter telescope with a 60 millimeter opening.[86] The court stated that such an observation did not constitute a "plain view" since it was not obtained unaided but through the use of "powerful technology."[87] *Kim* is particularly significant because the court employed the reasonable expectation of privacy test suggested by Justice Harlan in *Katz*.[88] Accordingly, the defendant did not fail to manifest a subjective expectation of privacy merely by leaving the curtains in his apartment open,[89] for it was not a naked eye observation that was afforded the FBI, but an augmented one.[90] Moreover, the telescope was used not as a means of avoiding detection, but as a means of perceiving what was imperceptible to the general public from a lawful vantage point.[91] Thus, *Kim* aptly

82. *Id.* It should be noted that although there were three separate opinions written, the Court was unanimous in affirming the defendants' convictions. Justice O'Connor, with whom Justice Rehnquist joined, expressed concern over the extent of the privacy interests of a homeowner relative to the interests of the owner of this container in which the beeper was planted. *Id.* at 721 (O'Connor, J., concurring). Also, Justice Stevens, joined by Justices Brennan and Marshall, concurred in the above holding, but dissented from the Court's holding that the attachment of the beeper did not constitute a seizure. *Id.* at 728 (Stevens, J., concurring in part and dissenting in part).

83. *Id.* at 715. *See also supra* note 49.

84. *See supra* note 72.

85. 415 F. Supp. 1252 (D. Haw. 1976).

86. The degree of augmentation that the telescope afforded the FBI should be considered substantial since it enabled the FBI to read the title of the paper the defendant was reading inside his hotel room while they were located approximately a quarter of a mile away. *Id.* at 1254.

87. *Id.* at 1256. The Court went on to indicate that "[t]his case does not present a situation where private parties have a plain (unaided) view of the defendant's premises but government agents are forced to use visual aids because they were not able to get as close to the defendant's premises as the private parties." *Id.* at 1256 n.4.

88. *Id.* at 1256-57.

89. *Id.*

90. *Id.* at 1254.

91. *See supra* note 87. More recently the California Supreme Court has adopted the same view in light of the decisions in *Ciraolo*, and *Dow*. People v. Mayoff, 42 Cal.3d

illustrates the limiting principle suggested here.

B. *Implications of the Limiting Principle*

1. The Individual's Perspective—The proposed limiting principle would provide individuals with a bright line rule with which they could determine the extent of their privacy rights and gauge their conduct accordingly. Application of the rule would not require knowledge of the capabilities of technology or specifically what law enforcement currently has in its arsenal. When a person conducts activities in their backyard or within their home without drawing the curtains, they "knowingly expose" themselves only to the observation of those who can see, hear, or smell what they are doing without sensory augmentation from a lawfully occupied position. Thus if their activities are visible from the street with the naked eye, they are on notice that they may be observed from a distant location with a telescope.[92] However, if they are not visible from the street with the naked eye, then they have no need to take protective measures in order to keep their intimate activities private from those operating with sophisticated technology from distant or hidden locations.[93]

2. The Law Enforcement Perspective—The essential use of technology is to avoid detection by those being observed.[94] This purpose will be preserved for law enforcement if the limiting principle is adopted. Police need not be limited to "commonly available" technology. Whatever device that could be of use, may be

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1302, 233 Cal. Rptr. 2 (1986). In *Mayoff*, the court stated that "[o]ptical enhancers may not be used to shorten that visual distance." *Id.* at 1316 n.6, 233 Cal. Rptr. at 10. However, the court noted that "[o]n the other hand, the safest, most practical, and least intrusive method of surveillance may sometimes be to fly well above the minimum permissable altitude for naked-eye observation then to utilize magnifying devices to compensate for the increased distance." *Id.* Thus, the *Mayoff* court has adopted the limiting principle expressed in this Comment. Ultimately in *Mayoff*, the use of an 80-200 millimeter telephoto camera lens from an airplane flying at altitudes between 1000 and 2000 feet to observe marijuana growing on the defendant's property was not a violation of the fourth amendment because the photographs revealed nothing more than what could be observed with the naked eye from that altitude and the area observed was primarily outside the curtilage. *Id.*

92. What could be seen from the street includes the degree of detail corresponding to such an observation. For instance, being able to see a coffee table through an individual's living room window would mean being able to discern with some certainty the identity of the objects lying on the table. However, this would not necessarily mean that the observer could read a newspaper lying on the table. Thus, if only the presence of papers could be discerned from a lawful vantage point, the police could not use a telescope to read the words on the papers. *See, e.g.*, People v. Wright, 242 N.E.2d 180 (Ill. 1968).

93. This does not include the use of airplanes unless equipped with sensory augmenting technology. *See supra* note 1; and "Plane" view hypothetical *infra* IV-C.

94. *See supra* notes 73, 77, 78 and 87.

used.[95] Thus, police may take advantage of state-of-the-art technology without having to wait for the rest of society, including criminals, to catch up.[96] However, there will be some constraints. If an officer uses technology to put his eyes, ears, or nose where they could not otherwise constitutionally intrude, it will be considered a search and the officer will need to justify his actions in accordance with fourth amendment requirements.[97]

Moreover, the mere existence of a lawful vantage point from which unaided observations could be made will not give police carte blanche to make the best possible observation that technology will allow. Police will still bear the burden of proving, if challenged, that the technology used did not provide them with any information that could not have been obtained unaided from a lawful vantage point[98] (i.e., that they did not "excessively" augment their senses). If they cannot make such a showing, their actions will constitute a search and therefore require some justification before the evidence will be admitted in a trial.[99]

In summary, the implications of this limiting principle provide bright line rules with which both individuals and police can judge the protection and constitutionality of their conduct respectively. Individuals will not enjoy unfettered privacy nor will police be uncontrolled in their use of technology. For individuals, the desire to be protected must be purchased at some cost to privacy.[100] For

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95. Of course, this does not preclude legislative attempts to enact statutory controls on the use of technology in an effort to either protect privacy rights to a greater degree than afforded under this limiting principle and existing case law *or* control the potentially exorbitant costs associated with buying time on a satellite or renting aircraft equipped with sophisticated sensory augmenting technology.

96. This is not to say that they could not use state-of-the-art technology under current Supreme Court rulings. However, as suggested by the Court in *Dow*, the use of such technology might require a search warrant. *See supra* note 46. Furthermore, the limiting principle suggested in this Comment is not intended to preclude challenges to the use of technology by police on other grounds such as inadmissibility of scientific evidence because the principle upon which it is based has not been sufficiently established to have gained general acceptance among the scientific community. *See, e.g.*, United States v. Kilgus, 571 F.2d 508 (9th Cir. 1978); *see generally* Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923); People v. Kelly, 17 Cal. 3d 24, 130 Cal. Rptr. 144, 549 P.2d 1340 (1976).

97. *I.e.*, a warrant based on probable cause obtained from a neutral detached officer of the court. U.S. CONST. amend. IV. *But see supra* note 16, and more recent Supreme Court decisions such as New York v. Class, 106 S. Ct. 960 (1986) (although a search to open car door and look at Vehicle Identification Number (VIN), it was "sufficiently unintrusive" and therefore did not require any justification), and New Jersey v. T.L.O., 469 U.S. 325 (1985) (search of student's private belongings by public school official may be justified on only "reasonable suspicion").

98. *See, e.g.*, United States v. Karo, 104 S. Ct. 3296 (1984).

99. *See supra* note 98.

100. Recognition of the need to balance. *See, e.g.*, LA FAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 339 (2d ed. 1987). *See also* New Jersey v. T.L.O., 469 U.S. 325, 327 (1985).

police, some challenges will be posed.[101] However, "[l]aw enforcement in a free society is always faced with difficult challenges. As one court has so eloquently noted, 'A policeman's job is easy only in a police state.' "[102]

IV. HYPOTHETICAL SCENARIOS

The feasibility of this limiting principle is tested by applying it to hypothetical fact patterns which have or could likely occur, and then examining the results. The fact patterns used cover the use of technology to augment the different senses of vision and hearing, and illustrate the distinctions between which police actions would or would not constitute a search under the principle suggested in this Comment.

A. The Open Curtains I

1. Facts — Under this scenario, Mr. Homeowner leaves the curtains on his front window open. The window is located approximately thirty feet from the street. Thus, a passerby could easily take a view of the inside of the home by standing in the street. Officer Right has received an anonymous tip that Mr. Homeowner is growing marijuana in his home. Officer Right now must corroborate this tip.[103] He drives by the home of Mr. Homeowner in an unmarked car. The curtains are wide open. Right wants to be accurate, and in order to avoid tipping-off Homeowner by a prolonged view from the street, he decides to take a step back and observe from the open field across the street. Right obtains a telescope and proceeds to observe from across the street in the field. The tip is corroborated, the affidavit sworn, and the warrant issued. Homeowner is arrested and moves to suppress the evidence claiming his fourth amendment rights against unreasonable search and seizure have been violated.

2. Result—Homeowner's motion should be denied. Officer Right, like the tipster, could have seen the marijuana lawfully from the street.[104] However, in order to avoid detection, he took a step back and used a telescope to augment his vision. Homeowner

101. For example, avoiding "excessive" augmentation.

102. People v. Spinelli, 35 N.Y.2d 77, 82, 358 N.Y.S.2d 743, 748, 315 N.E.2d 792, 795 (1974).

103. *See generally* Illinois v. Gates, 462 U.S. 213 (1983). *See also* Draper v. United States, 358 U.S. 307 (1959).

104. Assuming Right has faculties and training equivalent to the officer who was able to recognize 8-10 feet high marijuana plants from 1,000 feet away in an airplane in California v. Ciraolo, 106 S. Ct. 1809, 1810 (1986).

knew or certainly should have known his living room was exposed to those on the street.

B. *The Open Curtains II*

1. Facts—Bif, a Southern California botany aficionado, rents an apartment with a large window with a southern exposure. He purchases many bright green exotic plants and brings them home to adorn his apartment. His building manager, nosey and impatient with youth, notices all of Bif's plants while surreptitiously entering the apartment. The manager figures he is just another pot-head growing his own marijuana and proceeds to anonymously inform the police in order to rid himself of Bif.

Officer Wrong is put on the case. Wrong tries to corroborate this tip with some independent evidence.[105] Unfortunately for Wrong, Bif's apartment is on the second floor and more than 200 feet from the nearest building. Wrong is allowed to temporarily use an apartment on the second floor of the building across the street. Much to Wrong's chagrin, he cannot see into Bif's apartment with his naked eye although the curtains are open. Wrong borrows Right's telescope and takes a view. Although trained in narcotics detection, Wrong is deceived by the striking familiarity with which Bif's plants resemble marijuana. Wrong obtains a search warrant and proceeds to search Bif's apartment.

2. Result—Officer Wrong's actions are wrong. The plants are not marijuana. Bif, a night-shift worker, is awaken, dresses, and submits to Wrong's search of his apartment. Bif's right to privacy has been intruded upon by this unlawful search.

3. Compare: Right and Wrong—Bif should not have been intruded upon. Bif, like Homeowner, left his curtains open. Unlike Homeowner, however, the interior of Bif's apartment could not be viewed lawfully from a vantage point that would yield a naked eye observation of its interior. Thus, Wrong did not utilize the telescope to avoid detection like Right, but to gain information about the inside of a home that would not have been otherwise obtainable without the use of such a device. Therefore, Wrong is required to use a search warrant in order to obtain such information.[106]

Under the Court's view of technology in *Dow*, Wrong could be right. This is because telescopes are commonly available technol-

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105. *See supra* note 103.

106. Bif may bring a Civil Rights action under 42 U.S.C. 1983 (1986). However, this Comment is concerned with protecting privacy rights from intrusions, not the remedies available to those individuals whose privacy rights have already been intruded upon.

ogy and Bif's curtains were left open. Arguably, the result could differ if the view was made from an observatory miles away.[107] However, this distinction is illogical since the intrusiveness of the act does not lessen with the advancement in technology. The same level of detail is revealed in both situations.

As for Homeowner, he is caught in the balance between privacy rights and law enforcement needs. He had an opportunity to make an informed decision. He gambled on leaving his curtains open and lost. However, the decision to leave his apartment open to a view by others did not require him to judge what view the latest technology could provide law enforcement. His decision was based on what a naked eye observation could provide. This is the subtle but critical distinction underlying the limiting principle suggested here.

C. A "Plane" View

1. Facts—Drug Enforcement Administration (DEA) Agent Hawk has been conducting an on-going investigation into the narcotics trafficking within the more affluent communities of Los Angeles County. Through his investigation Hawk has learned that large quantities of marijuana, earmarked for Beverly Hills, have left Mexico regularly on Wednesday mornings by van.

Unable to pinpoint the precise destination of the marijuana, Hawk obtained an airplane to fly over the Beverly Hills area on Wednesday afternoon to see what he could uncover. In order to avoid detection by both the traffickers and the territorial Beverly Hills Police Department, Hawk decided to maintain a flight altitude much in excess of the minimum 1,000 feet required by law.[108] However, Hawk equipped the plane with a high precision aerial mapping camera enabling him to make detailed observations from this far away vantage point.[109]

Much to Hawk's delight, his aerial observations and subsequent review of the enlarged photographs uncovered not one, but two potential felonies. First, Hawk was able to determine, on the basis

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107. Since observatories provide visual augmentation not "commonly available" to ordinary citizens, it could be inferred that according to the dicta in *Dow* their use would constitute a search and therefore require a search warrant. *See supra* note 51.

108. *See supra* note 37.

109. *See, e.g.,* Dow Chem. Co. v. United States, 106 S. Ct. 1819 (1986), where the Environmental Protection Agency (EPA) used a twin engine Beechcraft equipped with a sophisticated Wild RC-10 aerial mapping camera. The trial court described the capabilities of the camera as follows: "[S]ome of the photographs taken from directly above the planet 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." Dow Chem. Co. v. United States, 536 F. Supp. 1355, 1357 (E.D. Mich. 1982).

of his experience and training, that several bales of what appeared to be marijuana had been unloaded from a van into the backyard of socialite Candy. Second, Candy's neighbor, Soviet emigre Svetlana, was seen in her backyard reviewing documents marked "Top Secret—U.S. Government." Hawk quickly relayed this information to the FBI. On the basis of the information obtained through Hawk's surveillance, search warrants were executed at both homes, the contraband was seized and Candy and Svetlana were arrested. Attorneys for both defendants made pretrial motions to suppress the evidence of the basis of violations of their clients' fourth amendment rights.

2. Results—Candy's motion should be denied. Svetlana's motion should be granted. At both hearings, the government would be required to show that probable cause existed on the basis of photographs that represented a naked eye view from a flight altitude of at least 1,000 feet.[110] In Candy's case, such an observation could have led a well trained narcotics officer to believe it more likely than not marijuana bales were being unloaded in her backyard.[111] However, in Svetlana's case, all that could be seen from such an observation would be a woman reading papers.[112] Since this could not be the basis of probable cause, or even reasonable suspicion, that a crime was being committed, the evidence should

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110. In accordance with the limiting principle suggested by this Comment.

111. Applying the stricter standard for the degree of probability required to attain probable cause. *See, e.g.*, Draper v. United States, 358 U.S. 307 (1959). *But see*, Illinois v. Gates, 462 U.S. 213 (1983) ("fair probability"). *See also supra* note 15. For a discussion of the degree of probability required to establish probable cause see Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465 (1984). *See generally*, LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 586-606 (2d ed. 1987).

112. However, the government might argue that the information obtained from the accidental surveillance of Svetlana's backyard was done so "inadvertently" and is therefore not a search as falling within the "plain view" exception to the search warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443 (1971). The plain view doctrine enables the police to *seize* an item based on an inadvertent discovery made during a lawful initial intrusion (i.e., search or seizure) where they have probable cause to believe that the item seized is contraband or evidence of a crime. Arizona v. Hicks, 107 S. Ct. 1149 (1987); Texas v. Brown, 460 U.S. 730 (1983).

In this hypothetical, the police may have occupied their position in public navigable airspace lawfully. However, with regard to their view of Svetlana's backyard, the augmentation obtained through the use of the camera, in effect, placed them in Svetlana's backyard. Without a warrant, such an intrusion would be unlawful. Therefore, the plain view exception would not apply even though the inadvertence requirement was met.

Additionally, in light of California v. Ciraolo, 106 S. Ct. 1809 (1986), the inadvertence requirement of the plain view doctrine may no longer be valid. This is because the majority rejected the dissent's contention that a "focused" observation was different than a "routine patrol" finding that no relevant or legal distinctions could be made. *Id.* at 1813 n.2. Thus, although *Ciraolo* is not technically a "plain view seizure" case, such language casts doubt on the future of the inadvertence requirement.

be suppressed.[113]

D. The Voices From Beyond

1. Facts—Mr. Goodfellow, while barbecuing in his backyard, overheard his neighbor Bill Press discussing with his guests what seemed to be the logistical details of a conspiracy to print and distribute counterfeit U.S. currency. Realizing his civic duty, Goodfellow immediately notified the U.S. Treasury Department.

Agent Harken was put on the case. Since Goodfellow's backyard was not conducive to being a vantage point for surveillance, Harken obtained permission to conduct surveillance of Press from the residence across the street. Harken and his team of Secret Service agents used a camera with a telephoto lens to photograph the vehicles and people visiting Press, while a parabolic microphone[114] was used to listen to and record Press' poolside conversations.

On the basis of the conversations overheard, Harken determined that Press had acquired contraband paper, ink, and printing plates. A search warrant was issued, the Press home searched, and Press and his co-conspirators arrested for conspiracy to counterfeit U.S. currency.[115] The defense attorney moved to suppress the evi-

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113. *Compare* Dow Chem. Co. v. United States, 106 S. Ct. 1819 (1986). In *Dow*, the majority understood the facts found by the trial court to indicate that the photographs taken were not enlarged and thus there was no actual invasion of Dow's privacy rights. *See supra* note 49. However, the trial court did find that:

> [O]n the contrary, when flying at 1,200 or 5,000 feet, the eye can discern only the basic sizes, shapes, outlines, and colors of the objects below. In this case, the finest precision aerial camera available was used to take the EPA photographs. The camera successfully captured vivid images of Dow's plant which EPA could later analyze under enlarged and magnified conditions. In doing so, the camera saw a great deal more than the human eye could ever see. The Court therefore would agree with Dow that the use of a sophisticated aerial camera is, at a minimum, on a par with other methods of visually enhanced surveillance in terms of its intrusiveness.

Dow Chem. Co. v. United States, 536 F.Supp. 1355, 1367 (E.D. Mich. 1982).

This finding can be interpreted as meaning that the advantage of the camera was that it provided the EPA with a snapshot that could only have been obtained had the plane stood still long enough to allow a person to make an accurate naked eye observation. Thus, arguably it was not an enlargement (magnification) by the camera that was at issue, but the helicopter-like hovering advantage that the camera provided. *See, e.g.*, People v. Mayoff, 42 Cal. 3d 1302, 1316 n.6, 233 Cal. Rptr. 2, 10 (1986).

Unfortunately in *Dow*, neither the trial court nor the Supreme Court disclosed the extent of any magnification that the camera might have provided. Therefore, the limiting principle suggested in this Comment may have been violated, and as a result, a search would be found (if a magnification results), or not even called into play (absent a magnification).

114. A parabolic microphone is capable of picking up sounds several feet away by pointing the microphone in the direction of the person to be heard.

115. The probable cause necessary to support the search warrant is assumed to be based only on the conversations overheard by Agent Harken. Thus, the tip from Mr. Goodfellow is not used to support the search warrant except inasmuch as it is relied upon to

dence obtained as a result of the search warrant claiming the warrant was based on information obtained in violation of the fourth amendment.

2. Result—The motion should be denied. The government need only prove that the poolside conversations overheard with the parabolic microphone could have been overheard without it if Harken had chosen to risk detection by listening from Goodfellow's backyard or the street.[116] The testimony of Goodfellow as to the conversations he overheard prior to the commencement of surveillance would help the government establish this fact.[117]

CONCLUSION

The limiting principle suggested by this Comment is intended to strike a balance between the interests of individuals in preserving

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corroborate Harken's ability to overhear the conversations from Goodfellow's backyard. *See infra* note 117 and accompanying text. Moreover, the photos are not used to establish probable cause. However, even if the photographs taken were used to support an affidavit or introduced into evidence at trial, they would be admissible because there is no fourth amendment protection from police observing the people and cars visiting an individual's home. United States v. Knotts, 460 U.S. 276 (1983). Moreover, in this hypothetical the photographs only revealed information that could have been obtained unaided from the street or the consenting neighbor's backyard but for the need to avoid detection. Therefore, the use of photographs would be consistent with the limiting principle suggested here.

116. For cases dealing with police eavesdropping on conversations *see* United States v. Jackson, 588 F.2d 1046 (5th Cir. 1979); United States v. Muckenthaler, 584 F.2d 240 (8th Cir. 1978); United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973) (holding no search for police to listen unaided to defendant's conversation through keyhole in door); State v. Moses, 367 So. 2d 800 (La. 1979); State v. Day, 50 Ohio App. 2d 315, 362 N.E.2d 1253 (1976).

Moreover, the prohibition on the use of evidence of intercepted "oral communication" existing under 18 U.S.C. § 2515 (1982) should not apply to these circumstances. The prohibitions under that section apply only to those oral communications unlawfully intercepted under 18 U.S.C. § 2511 (1982). The conversation listened to by Harken would not be unlawful because they would not qualify as an "oral communication" as defined by 18 U.S.C. § 2510(2) (1982).

18 U.S.C. § 2510(2) (1982) states: " 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;" Courts have consistently held that the legislative history behind § 2510(2) reflects Congress's intent that Katz v. United States, 389 U.S. 347 (1967), serve as a guide to define communications that are uttered under circumstances justifying an expectation of privacy. United States v. Harrelson, 754 F.2d 1153, 1169-1171 (5th Cir. 1985); United States v. Padilla, 520 F.2d 5265, 527-528 (1st Cir. 1975); United States v. McIntyre, 582 F.2d 1221, 1223 (9th Cir. 1978). Thus, since the application of the limiting principle suggested in this Comment would not afford Bill Press with a reasonable expectation of privacy in his poolside conversations (i.e., no search), 18 U.S.C. §§ 2510-2521 would not apply. This is not, however, a situation where one of the parties to the conversation consented. Therefore, 18 U.S.C. § 2511 (2)(c) is not applicable. Also, for an example of more stringent state statutory requirements making it unlawful to intercept certain oral communications *see* CAL. PENAL CODE §§ 630-637.5.

117. *See supra* note 98 and the accompanying text.

their privacy rights from erosion in the face of technological advances and the needs of law enforcement to take advantage of those advances in their efforts to effectively detect and control crime. The contrast between these two interests is heightened by the tension between technological advances and criminal sophistication. As technology advances, the abilities of the police to gather information from sources never before accessible are greatly increased. Moreover, as criminal organizations become more sophisticated and continue to infiltrate legitimate business operations, their impact on society, and consequently the need to control them, is also increased.

Since the landmark decision of *Katz v. United States*,[118] the Supreme Court has struggled to maintain this balance. However, the Court has yet to clearly define what effect technological advances will have on an individual's expectation of privacy. The recent decisions in *Dow Chemical Co. v. United States*,[119] and *California v. Ciraolo*[120] illustrate this point. In *Dow* the Court struggled with distinguishing types of technology on the basis of their availability[121] and the significance of the marginal results the technology produced.[122] However, no clear guidance was provided for individuals to gauge the extent of their privacy rights or for courts to judge the constitutionality of police actions. In *Ciraolo*, the Court indicated a possible adoption of a "knothole"[123] approach for defining what is a "reasonable expectation of privacy." Unfortunately, this decision did nothing to indicate any limitation upon the extent to which an individual will be required to bear the burden of "plugging" the "knothole" poked in his privacy by an advance in technology.

It is inevitable that the Supreme Court will be presented with a case that squarely presents the technology issue. When that day comes, the Court should adopt the limiting principle suggested here as a means of maintaining the delicate balance between law enforcement needs and individual privacy rights while remaining consistent with its holdings in *United States v. Knotts*,[124] and

118. 389 U.S. 347 (1967).
119. 106 S. Ct. 1819 (1986).
120. 106 S. Ct. 1809 (1986).
121. *See supra* note 46 and accompanying text.
122. *See supra* note 47 and accompanying text.
123. *See supra* note 40 and accompanying text.
124. 460 U.S. 276 (1983).

United States v. Karo[125] and most importantly, with the spirit of the Fourth Amendment to the United States Constitution.[126]

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125. 468 U.S. 705 (1984).

126. Let us return to the hypothetical posed in the introduction and answer the questions presented in light of the limiting principle suggested in this Comment and the hypotheticals illustrating its application.

Mr. Katz will succeed in suppressing the content of his conversation. Since Mr. Jones could not hear the conversation without opening the door, the police could not use sensory augmenting technology to listen beyond the closed door. Like the Mr. Katz in Katz. v. United States, 389 U.S. 347 (1967), the expectation of privacy implicated by closing the door to the phone booth is a reasonable one.

Therefore, when the police infringed on this reasonable expectation of privacy, their actions constituted a search. Since this search cannot be justified by probable cause and a warrant or an exception, the conversation overheard is inadmissible at trial.

Most importantly, an individual's right to privacy is maintained in the face of ever-advancing technology. Accordingly, the need to gauge our expectations of privacy by the latest advancements in technology is eliminated.

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