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THE SUPREME COURT AND THE FALL OF THE FOURTH AMENDMENT

BRUCE G. BERNER*

INTRODUCTION

The fourth amendment to the United States Constitution¹ poses two substantive questions about governmental searching. The first, what is a search?, might be called the amendment's "reach" and could be restated: what general type of governmental activity is this amendment interested in scrutinizing and regulating? The second and logically subsequent question--which searches are unreasonable?--might be termed the amendment's "grasp" and could be restated: from this universe of searches, which are permitted and which prohibited? It is, after all, only "unreasonable" searches that the constitution prohibits.

To demonstrate this "reach-grasp" dichotomy--consider the eighth-amendment prohibition against cruel and unusual punishment.² The word "punishment" marks the amendment's "reach" or outer boundary; it is "punishment" that the provision means to scrutinize. It is not concerned with cruel and unusual dogs. A court must first interpret what is meant by punishment and then scrutinize all punishment, so defined, to decide if it is "cruel and unusual". For example, assume that D argues that a \$5.00 fine for the crime of overparking is cruel and unusual punishment. The court must first determine whether or not a monetary fine is within the meaning of punishment for eighth-amendment purposes. Let us assume it so finds and that it then determines that there is nothing cruel or unusual about this punishment. In my terminology the eighth amendment has "reached" this case, meaning that it is

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1. The fourth amendment provides:

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.

2. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

an appropriate case for eighth-amendment scrutiny, but has not "grasped" it because the sentence is not invalidated.

The fourth-amendment "reach" cases are today in wild disarray and the subject of widespread attack.³ Supreme Court commentators are, of course, always "troubled by," or "baffled by," or "view with great alarm" almost any line of Supreme Court cases. Fourth-amendment commentators are in an apoplectic frenzy over the "reach" decisions. Professor Wayne LaFave (recently canonized by a Texas court as the "patron saint of the search and seizure law")⁴ has written several insightful articles on the question.⁵ One piece is a full-text, justice-by-Supreme Court justice opinion in a hypothetical case which is (a) absolutely consistent with past opinions, and (b) delightfully incoherent.⁶

The thesis of today's lecture is that the disarray, while it is particularly notorious because of recent decisions, springs from the fact that the Supreme Court has never formulated a coherent test for "reach." It has, instead, historically confused the "reach" and "grasp" problems. While this confusion has generated decisions which are profoundly odd,⁷ it has done far worse; it has assured that many potential governmental abuses *cannot*, without starting from scratch on the "reach" formulation, be correctly decided absent legislative intervention. While commentators for the most part agree (and I do too) that the Supreme Court is answering the question wrong, I argue that the problem is deeper. The Court is answering the wrong question.

This article's outline is as follows: Section A describes the Court's approach to the "reach" issue, tests its operation against 10 cases (some real and some hypothetical), and evaluates its performance. Section B sets forth a

3. See, e.g., Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 CRIM. L. & CRIMINOLOGY 1105 (1989); Reich, *Administrative Searches for Evidence of Crime: The Impact of New York v. Burger*, 5 TOURO L. REV. 31 (1988); Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583 (1989); Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563 (1990); Stewart, *Florida v. Riley: The Emerging Standard for Aerial Surveillance of the Curtilage*, 43 VAND. L. REV. 275 (1990).

4. Juarez v. State, 758 S.W. 2d 772, 784 (Tex. Crim. App. 1988).

5. See, e.g., LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990); LaFave, *The Fourth Amendment Today: A Bicentennial Appraisal*, 32 VILL. L. REV. 1061 (1987); LaFave, *The Fourth Amendment: "Second to None in the Bill of Rights"*, 75 ILL. B.J. 424 (1987); LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases"*, 85 MICH. L. REV. (1986).

6. LaFave, *A Fourth Amendment Fantasy: The Last (Heretofore Unpublished) Search and Seizure Decision of the Burger Court*, 669 U. ILL. L. REV. (1986).

7. See, e.g., Florida v. Riley, 488 U.S. 445 (1989); Dow Chem. Co., v. United States, 476 U.S. 227 (1986).

proposed new “reach” formulation, tests it by the same cases, and evaluates its performance.

You will not be surprised to hear me predict now that the new formulation works better. It does not, of course make all the difficult issues go away: many remain problematic and controversial; some of the questions are unalterably hard and politically charged. But it does make many of the difficult issues disappear because those issues were themselves generated by the confusion about “reach” and “grasp.” Beyond that, the proposal has two decisive advantages over current doctrine: (1) the hard questions remain for the courts, where constitutional questions belong, and not for the legislature; and (2) a wrong answer in one case does not doom us to Orwellian consequences in the next.

Section C recognizes that a proposal as radical as the one made is not, regardless of its coherence, likely to be instituted. However, some of the principles inherent in it could be grafted upon current “reach” doctrine to improve it. Those possibilities are briefly identified.

One final word of introduction. My proposed formulation will denominate considerably more police activity a “search” than is currently the case. But before you brand me an unabashed (dare I use the word in this kinder, gentler age?) liberal, bear in mind that to hold any given police activity a “search” merely opens fourth-amendment debate. We can then argue about which police searches are reasonable and which are not. To hold that same activity *not* a “search”, however, is to close debate.

A. *The Current Reach Formulation*

1. Description

The fourth amendment provides, in pertinent part: “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated....”⁸

Prior to 1967, this cited language prompted the Court to apply two tests for reach. One focused on “place” and one on governmental activity. The Court required that both hurdles be jumped before it would address the reasonableness question. The first hurdle, does the case involve a *place* that the fourth

8. U.S. CONST. amend. IV. There is a second clause about warrants and probable cause, *see supra* note 1, but it has nothing to do with “reach” and at the “grasp” level is wholly subservient to the cited clause.

amendment is concerned with?, is typified by *Hester v. United States*,⁹ a case which held that any amount of governmental seeking in an "open field," property of the defendant outside the house's protection, could not be a search. The second hurdle, did the police engage in the type of activity that the amendment means to scrutinize?, is typified by *Olmstead v. United States*,¹⁰ which held that police eavesdropping from one hotel room to the next with a detectaphone (a device that does not physically penetrate the wall) was not a search because it entailed no physical trespass. Thus, until 1967, there was no fourth-amendment debate until the police trespassed into a relatively short list of "protected places."¹¹

In 1967 the Supreme Court decided *Katz v. United States*,¹² the polestar "reach" case. In *Katz*, a defendant was making a phone call from a glass-enclosed public pay telephone. Federal police attached an electronic device to the top of the booth and recorded the conversation which became evidence in *Katz's* trial under federal gambling laws. The Court rejected both halves of its old "reach" doctrine. First, as to *place*, it rejected "persons, houses, papers and effects" as being an exclusive list of protected places and treated those words as merely evocative of places where the privacy interest is most keenly felt. It broadened the "place" part of reach to all places where a person has an actual and reasonable expectation of privacy.¹³ The *Katz* expansion of constitutional protection fits nicely with other decisions of the liberal Warren Court, in full sail by 1967.¹⁴ Having formulated this "reasonable expectation of privacy" test, the Court then held it reasonable to expect that private phone conversations, even when made in a public phone booth, are not being surreptitiously recorded. As to the "police activity" side, the Court stated that, given the state of technology, one need not identify a trespass to find a search.¹⁵ What did the Court replace trespass with? Nothing. The idea of measuring "reach" by looking at the police and their activities dropped out of

9. 265 U.S. 57 (1924).

10. 277 U.S. 438 (1928).

11. Over the years the Supreme Court developed a list of places that triggered fourth amendment scrutiny. See *v. City of Seattle*, 387 U.S. 541 (1967) (warehouses); *Schmer v. California*, 384 U.S. 757 (1966) (a person's body); *Beck v. Ohio*, 379 U.S. 89 (1966) (a person's clothing); *Clinton v. Virginia*, 377 U.S. 158 (1964) (apartments); *Stoner v. California*, 376 U.S. 483 (1964) (hotel rooms); *Preston v. United States*, 376 U.S. 364 (1964) (automobiles); *Taylor v. United States*, 286 U.S. 1 (1932) (garages); *United States v. Lefkowitz*, 285 U.S. 452 (1932) (business offices).

12. 389 U.S. 347 (1967).

13. *Id.* at 353.

14. Several Warren Court decisions expanded the protections afforded criminal suspects. See *e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring police to give specific warnings to suspects in custody); *Mapp v. Ohio*, 367 U.S. 643 (1961) (expanding fourth amendment protection against unreasonable searches and seizures to state cases).

15. *Katz*, 389 U.S. at 353.

the analysis for all practical purposes. The whole question regarding “reach” now focuses on “place.”¹⁶ Which places? All places in which a person entertains a “reasonable expectation of privacy.” This focus is on the citizen; it’s not on the government. As I hope to demonstrate, however, taking one’s eyes off of the government when doing fourth-amendment jurisprudence is a dangerous game.

The opportunity that the Court missed in *Katz* occurred immediately after it held that “persons, houses, papers and effects” was not an exhaustive list of protected places but rather that privacy interests may exist in countless places and contexts. Once it said that, the Court could have noticed that it was now analyzing the Constitutional text as if it read:

The right of the people to be secure against unreasonable searches and seizures shall not be violated;

All that would have remained, therefore, would be to define what “search” meant in terms of “governmental activity.” Instead, the Court, loathe to remove all place limitation, reworked the *place* side with a vaguer but self-consciously broader formulation--all places where there is a “reasonable expectation of privacy.” But why limit fourth-amendment protection to any place, however broadly defined? Why not say that such protection goes with all people to all places at all times?

I must concede that a public street affords less privacy than a home. But privacy in general is not the fourth amendment’s concern. Its concern is freedom from unreasonable searches and seizures, a freedom which is not sensibly circumscribed by time or place. A policeman can, to be sure, properly observe a great deal about us when we are in a public place. This is not, however, because the fourth amendment should not apply in a public place, but because his observations in public places are much less likely to be unreasonable.

16. In a concurring opinion, Justice Harlan wrote:

As the Court’s opinion states, “The Fourth Amendment protects people, not places.” The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a “place.” My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, 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.

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

2. Testing

At this point, I must introduce several hypothetical cases involving police activity that may or may not constitute a “search.”

Ransacker thinks *x* has contraband in his house. He breaks into *x*'s house to look.

Trueheart notices a house afire. He sees a child at a second-story window screaming, “Help!” He runs in and rescues her.

Glancer, walking along a public sidewalk, turns his head to the right and sees through a window into *x*'s house which is a few feet from the sidewalk.

Hunter and *Digger* receive an anonymous tip that *x*, who owns a 198-acre ranch, is operating an illegal drug-making operation in a barn about sixty yards from his house and that he has killed a cohort who threatened to expose the operation and buried him in the field near the barn. *Hunter* enters *x*'s property, scales three or four fences, passes several “No Trespassing” signs, walks up to the barn, and shines a flashlight through a mesh covering the doorway. *Digger*'s crew, using heavy equipment, digs a series of holes near where the tipster indicated the body had been buried.

Troller and *Excavator* engage in the same activities as *Hunter* and *Digger* but they have received no tip. They simply think that *x* looks like a “hippy commie freak with a lot to hide”.

Neighborly acting on a tip that *x* deals drugs from his house, obtains permission from *x*'s next-door neighbor to look into *x*'s house from the neighbor's strategically located second-floor window.

The Flying Eagle-Eyes, officers Smith and Jones, receive an anonymous tip that *x* is growing marijuana in (a) his backyard garden and (b) his backyard greenhouse. Unable to see either from ground level without trespassing, Smith hires a plane and Jones a helicopter to look. Smith sees the marijuana in the garden from 1,000 feet and Jones the marijuana in the greenhouse from 400 feet, each with the naked eye!

Vengeful hates *x* and would love to see him prosecuted from anything but has no indication of criminal activity. He recruits several colleagues and they all hover in helicopters over *x*'s property for several hours.

Resourceful believes that *x* is dealing drugs from his third-floor apartment. He rents a third-floor apartment across the street and, with the aid of binoculars

and a Startron (a device which illuminates darkened areas), conducts a continuous, nine-day surveillance of the apartment.

Peeker hears that x, a divorced man, is being visited by his thirteen-year old daughter. Knowing that x is a long-haired, bearded author of fiction, *Peeker* concludes that incest is certain to occur. Remembering that x's house has a skylight over the bed in the master bedroom, he rents a helicopter and observes the bedroom for several nights.

As we go through these cases, testing the court's formulation of which of these policemen are "searching," I shall indicate which are decided cases and which are hypotheticals. These cases all involve the residence and surrounding lands and buildings. I have chosen this line of cases because it is representative of others, is the most fully developed line, and has been the subject of much recent Supreme Court activity.

Ransacker's case is a prototype of many cases. The conduct involved is not only a "search" but the paradigmatic search--bodily physical trespass into the house, the most protected of places.¹⁷

Trueheart's case is also a search and for the same reasons as *Ransacker's*. You might argue that *Trueheart* is not searching in the ordinary meaning of the term. You would be right. But, as discussed above, the Court's formulation is much more interested in "where?" than "why?" The policeman is searching within the constitutional meaning of the term in that he has physically entered a house.¹⁸ Nobody would have any difficulty, however, holding that this "search" was not only reasonable, but heroic.

Glancer's case, modeled on many reported cases,¹⁹ is not a "search." The homeowner cannot reasonably expect that any "curious passerby" would not, from a public sidewalk, look into his house. As a matter of fact, it does not matter under these facts whether *Glancer* inadvertently sees the evidence or is purposefully looking for it--a passerby is "curious," and "need not avert his glance."

The case of *Hunter and Digger* is not the bizarre creation of a crazed law professor but a combination of decisions holding that policemen are not

17. See, e.g., *Lewis v. United States*, 385 U.S. 206 (1966) ("Without question, the home is accorded the full range of Fourth Amendment protections.").

18. See, e.g., *Amos v. United States*, 255 U.S. 313 (1921) (holding that government offices conducted a search of a suspect's house despite being allowed to enter by the suspect's wife).

19. See e.g., *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973).

searching when they are in a person's "open field."²⁰ Many commentators thought that the *Hester* open-field doctrine was doomed after *Katz*, which seemed to broaden the range of places reached by the fourth amendment. The Supreme Court has maintained the doctrine, asserting that people entertain no "reasonable expectation of privacy" in "open fields". Why not? Not much explanation has been given for this other than precedent and the vague idea that the place is "open". At any rate, there are no references in the "open fields" cases to "curious passersby" because they would perforce be trespassers, violating both tort and criminal law.

Troller and Excavator are hypothetical policemen who differ from Hunter and Digger only in that they have no reason whatsoever to think they will find anything. We can imagine their motivation any way we like--racism, xenophobia, political or merely personal dislike for the owner. You see, of course, that it doesn't matter. As the Court has already held that police in an open field are by definition not searching, it does not matter how unreasonable their actions become. Whatever they do and for whatever reason, so long as they remain in this unprotected place, they remain invisible to the fourth amendment.

Neighbory's case has been consistently defined by lower courts as "no search." A Pennsylvania court concluded that because the activity was in plain sight of the neighbor, the homeowner had "exposed his transaction to the public" and, therefore, could not reasonably expect it to remain private.²¹ But private from whom? It is one thing to group police with the general public, the "curious passersby," and quite another to select the one uninvited eye in the world that can physically observe a house, make him a surrogate for the public, and permit the police to stand in his shoes.

The Flying Eagle-Eyes is an amalgam of two recent Supreme Court decisions, *California v. Ciraolo*²² and *Florida v. Riley*,²³ that have set off storms of criticism. The Court held in each case that the police were not searching. In each case the police were acting on a suspicion born of an anonymous tip that the homeowner was growing marijuana, in *Ciraolo* in a backyard garden, in *Riley* in a backyard greenhouse. In neither case, due to fences, terrain, etc. was the suspected evidence visible from any public groundspace, neighbor's yard, or the suspects' "open fields". Thus, the police took to the air, in *Ciraolo* in a fixed-wing airplane at 1,000 feet and in *Riley* in

20. See *United States v. Dunn*, 480 U.S. 294 (1987); *United States ex rel. Saiken v. Bensinger*, 546 F.2d 1292 (7th Cir. 1976), cert. denied, 431 U.S. 930 (1977).

21. *Commonwealth v. Busfield*, 242 P. Super. 194, 198, 363 A.2d 1227, 1229 (1976).

22. 476 U.S. 207 (1986).

23. 488 U.S. 445 (1989).

a helicopter at 400 feet. New heights of visual acuity were reached since each policeman made a naked-eye identification of marijuana.²⁴

Even though the illegal crop was not in the house, it was within the house's "curtilage" (from "courtyard").²⁵ The curtilage, with long historical roots mostly associated with common-law burglary,²⁶ is roughly defined as that area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.²⁷ Its boundary is formed by distance, by physical enclosure (as by a fence), and by function. For those of you who disdain long-winded lawyer's explanations for straight talk, the "curtilage" is the "yard". Most of us who own houses in a suburban area own a house together with curtilage--no open fields. For those of you who own a larger spread, your "open field" begins where your curtilage ends.

Curtilage has consistently been accorded protected status, both pre- and post-*Katz*.²⁸ At least that has been the rhetoric. Research, however, discloses not a single Supreme Court case that has protected the curtilage as such. In *Ciraolo* and *Riley*, after stating that the curtilage was indeed protected, the Court held that neither homeowner could reasonably expect that their illegal crops would not be seen from the air. In neither case, of course, was there a physical trespass onto the curtilage, but, remember, after *Katz*, a trespass is not necessary to a finding of a "search." Again, the Court did not refer to police motivation, which was quite clear from the record. Again the Court addressed the question from the citizen focus: Did these homeowners have a reasonable expectation of privacy? In answering this question in the negative, the court arrayed a series of arguments:

(1) The various aircraft were in public, navigable airspace, in compliance with all applicable FAA altitude regulations; therefore, the police were merely where any member of the public might lawfully be;²⁹

(2) Any member of this flying public who "glanced down" could have seen everything that the officers observed;³⁰

24. The Supreme Court has also validated aerial searches involving mechanical surveillance equipment. See *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (aerial search using a floor-mounted, precision aerial mapping camera).

25. For an excellent discussion of "curtilage," see *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968).

26. See, e.g., *Hutchins v. State*, 3 Ga. App. 300, 59 S.E. 848 (1907).

27. 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 410 (2d ed. 1987) [hereinafter W. LAFAVE].

28. *Id.* at 410-11.

29. *Florida v. Riley*, 488 U.S. 445, 451 n.3 (1989).

30. *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986).

(3) Ciraolo's backyard, fenced as it was, though not visible to the common passerby, might have been visible from the upper half of a double-decker bus (Prof. LaFave notes that there are no double-decker buses in Santa Clara).³¹

(4) No "intimate details connected with the use of the home or curtilage were observed."³²

In broader terms, the Court said that overflights by the public were not so rare that the homeowners could claim they "reasonably expected" no one to survey from the air. In the next section, some of these arguments will be analyzed.

Just what do *Ciraolo* and *Riley* leave of the principle that the curtilage is a protected place? Note the places from which the curtilage may be viewed: public ground space;³³ public airspace;³⁴ the property of any adjacent neighbor;³⁵ the homeowner's "open field."³⁶ Apparently the curtilage is protected only against physical *trespass* by the police. Of course, this is at odds with *Katz* which stated that trespass was not necessary. Thus, those items a homeowner wishes to remain private in the curtilage must be placed under cover or underground. (If we take Digger, for example, and put him in the curtilage, he would probably be searching.)

There is an argument, not explored by the Court, by which one can justify the *Ciraolo* and *Riley* outcomes. It begins by noting that the protection extended to the curtilage is not extended for the curtilage's own sake, that is, to protect the curtilage itself from view, but as a means to protect the house. Indeed, the burglary history of curtilage sees that space in just this way. If one can keep people from physically entering the curtilage, one increases the privacy and security of the house. The policeman who walks across a lawn to the house's window gains a better view inside the house. Because there is typically little evidence in the curtilage that cannot be seen from outside it, protecting it from trespass only does not protect its privacy, but does create a kind of buffer zone in service of the house's privacy. This would not protect the house, of course, in those situations (like *Neighborly's*) in which the policeman can view the house's interior from outside the curtilage.

Vengeful's case is a hypothetical indicating how stating the holding of

31. *Id.* at 211.

32. *Riley*, 488 U.S. at 452.

33. *See supra* text accompanying note 19.

34. *See supra* notes 22-32 and accompanying text.

35. *See supra* text accompanying note 21.

36. *See supra* text accompanying note 20.

Ciraolo and *Riley* in terms of “reach” rather than “grasp” renders the fourth amendment powerless to reach governmental activity that we all may agree is outrageous. The Court could not distinguish *Vengeful* from *The Flying Eagle-Eyes* since that case did not turn on the reasonableness of the police activity but on inquiries into the “expectations” of the homeowner from real and hypothetical air travellers.³⁷

Staker is based upon a Pennsylvania case.³⁸ The spying itself, both naked-eye and binocular-aided, was held not a search. As the court noted, the apartment owners “did not place covers over the windows.”³⁹ The startron, however, was viewed as presenting a “difficult issue.”⁴⁰ The court did not bring itself to say that such use of a startron would always be a search, but held that, because the nine-day surveillance observed two acts of sexual intercourse wholly unrelated to the suspected criminal activity (engaged in by persons not the subject of any suspicion), it was a search.⁴¹

Peeker's case is the hypothetical which most scares me. I would like to think that the Court would find this a search, but it has left itself precious little doctrinal room to do so. If the curtilage is protected, as the Court insists in *Ciraolo* and *Riley*, yet there is no reasonable expectation that aerial surveillance will not view it, on what basis can the Court distinguish the case of aerial surveillance into a house? Note the factors that can be arrayed in support of finding *Peeker's* skylight viewing not a search:

- (1) Seeing into a house is not necessarily a search;⁴²
- (2) *Peeker*, in public airspace, is in a place he has a right to be;⁴³
- (3) Any member of the flying public could have obtained this observation;⁴⁴
- (4) No trespass is involved;⁴⁵
- (5) The homeowner did not cover the skylight.⁴⁶

37. See *California v. Ciraolo*, 476 U.S. 207, 211-12 (1986).

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

39. *Id.* at 500, 431 A.2d at 966.

40. *Id.* at 500, 431 A.2d at 966.

41. *Id.* at 500, 431 A.2d at 966.

42. See 1 W. LAFAYE, *supra* note 27, at 390.

43. See *e.g.*, *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

44. *Id.* at 213-14.

45. Even if a trespass was involved, that fact alone would not make *Peeker's* conduct violative of the fourth amendment, See generally, *Dow Chem. Co. v. United States*, 476 U.S. 227, 232 (1986).

46. See *Commonwealth v. Busfield*, 242 Pa. Super 194, 363 A.2d 1227 (1976) (narcotics suspect, by only using sheer curtains on his windows, exposed his criminal conduct to a police officer on surveillance).

When these factors are examined in service of the question "Should the homeowner have reasonably expected that his activities would remain private?" the issue seems in grave doubt.

3. Evaluation

The "reasonable expectation of privacy" formulation is, I believe, the wrong question to be asking wholly apart from the matter of whether or not the Court is doing a good job of answering it. (It isn't.) The Court is forced by this formulation into one of two unpleasant postures, and cases demonstrate it has adopted both: either it must simply conclude by *tour de force* that given expectations are unreasonable or it must offer logical support. Let us examine some of the justifications the Court has offered.

a. The Analogy to Private Citizens

As discussed above, courts often invoke images of the general public,⁴⁷ the curious passersby,⁴⁸ the flying public,⁴⁹ or a surrogate for the public (neighbors, for example)⁵⁰ to find expectations of privacy unreasonable. It is interesting to note how this analogy comes and goes in the cases. Sometimes we hear about these folks and sometimes we do not; often the reason we do not is that these folks, should they do what the police have done, would be committing torts or crimes. Of course the curious passerby may glance, even purposefully look, into a house from the sidewalk. But if he begins walking through open fields, looking in buildings or digging up the earth, he will need a good lawyer. He could fly over your property, but if he stakes you out with binoculars and startrons, he might be liable in tort for "invasion of privacy"⁵¹ or "outrage"⁵² and prosecutable criminally under Peeping-Tom Statutes.⁵³

Imagine this scene. The Mayor of that City in Florida in which the *Riley* helicopter case occurred holds a moonlight-swim party in his fenced-in backyard. Suddenly a helicopter appears and remains over the pool. The

47. See *Florida v. Riley*, 488 U.S. 445, 449 (1989).

48. See, e.g., *State v. Kelly*, 106 Idaho 268, 678 P.2d 60 (1984); see also 1 W. LAFAVE, *supra* note 27, at 399.

49. See *Riley*, 484 U.S. at 450.

50. See *Commonwealth v. Busfield*, 242 Pa. Super. 194, 198, 363 A.2d 1227, 1229 (1976).

51. For a discussion of causes of action based upon an invasion of privacy see W. KEETON, PROSSER AND KEETON ON TORTS § 117 (5th ed. 1984).

52. Some states recognize a separate tort of outrage, which is synonymous with intentional infliction of emotion distress. See, e.g., *Voorhees v. Preferred Mut. Ins. Co.*, 246 N.J. Super. 564, 588 A.2d 417 (1991).

53. See, e.g., IND. CODE § 35-45-4-5 (1988) (In Indiana, a person who "peeps" or enters the land of another with the intent to peep commits voyeurism, a Class B misdemeanor.).

furious Mayor calls the Chief of Police for quick action. Here is the conversation: (I like to picture Paul Ford as the Mayor and Rod Steiger as the Chief):

MAYOR: (After explaining the situation). Get this jerk out of here.

CHIEF: Hold on, is he within the 400-foot FAA altitude regulation?

MAYOR: What? Get him out of here.

CHIEF: It's not quite that simple. The Supreme Court says he's in a place he has a right to be. You can't reasonably expect that people in helicopters won't see your pool. Why don't you put a tent over it? That would protect it from curious passersby.

MAYOR: Listen, Chief. Number 1, your position is an appointed position. Number 2 this guy is *watching* us. He is sure as hell curious but he is not passing by. He is hovering! That's not what public airspace, as you put it, is for!

CHIEF: How about you turn the lights off? That would help unless he's got a startron. I mean you can't reasonably expect he does not. And, mayor, lighten up and lower your voice. He might be listening with a parabolic mike, which, along with the helicopter and binoculars, is pretty standard equipment for passersby these days.

MAYOR: Well, I'll be damned!

When doing constitutional jurisprudence, references to the legality or illegality of actions of private citizens are usually beside the point. Tort law and criminal law, among others, restrain private action. The Constitution restrains state action. This latter restraint is sometimes more than the former, sometimes less. If a policeman breaks into a house and seizes drugs, this is a search and seizure testable under the fourth amendment. If a private citizen were to do the same thing, he would commit burglary and theft. The fact that a private citizen may or may not lawfully engage in a given action is neither necessary nor sufficient to conclude that a policeman may or may not do that same act for a governmental purpose.⁵⁴

54. See *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986). In rejecting the contention that the EPA's aerial surveillance was subject to state laws applicable to private citizens, the court stated:

Dow nevertheless relies heavily on its claim that trade secret laws protect it from any aerial photography of this industrial complex by its competitors, and that this

b. The "Intimate Activities" Argument

In its decision in *Riley* (police in helicopter looking into greenhouse), the Court noted: "As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed...."⁵⁵ The Pennsylvania startron case indeed seems to turn not on what the policeman did, but on what he saw.⁵⁶ But with all due respect, how can one sensibly judge whether or not activity is a search by reference to what is observed? If police break into your house and find nothing, have they not been searching? Have you not suffered the intrusion? This kind of retrospective reasoning is like saying that all events which happen were perforce "foreseeable", or even "inevitable". I cannot imagine how a person's right to privacy can, without compromising the very idea of privacy, be rationally made to turn on what he does with it. The fourth amendment prohibits unreasonable searches and seizures not because they may yield results but because, regardless of their yield, they are improper intrusions.

c. The Policeman's Location

Because the *Katz* question is framed in terms of the expectations of the homeowner to be free from outside intrusion, the focus of the recent cases is, as we have seen, on where the policeman is located rather than into what he looks (or hears, etc.) into.⁵⁷ Note the irony: the "reasonable expectation" rubric, an approach by which the Warren Court self-consciously selected the "protected-place" rather than the "police-activity" perspective, ends up under the Burger-Rehnquist courts concentrating on where the policeman is physically located rather than on what place he intrudes upon! To the extent the Court now focuses on where a policeman "has a right to be" and not on what he has a "right to view," something akin to the old trespass requirement is back with a vengeance--the policeman needs only to justify his *location*, which is often outside any protected area. And today, of course, there are considerably more

protection is relevant to our analysis of such photography under the Fourth Amendment. That such photography might be barred by state law with regard to competitors, however, is irrelevant to the questions presented here.

Id. at 232.

55. *Florida v. Riley*, 488 U.S. 445, 452 (1989).

56. *Commonwealth v. Williams*, 494 Pa. 496, 431 A.2d 964 (1981). The court stated:

It is not necessary at this time and in this case to hold that every time a startron or other device that "sees" through darkness is used by authorities to obtain evidence without a search warrant the evidence must be suppressed. However, when such a device is used for nine days to observe a private apartment frequented by other than those sought by the police, including two acts of sexual intercourse not involving the person, ... for whom the surveillance was established, then the warrantless observation ... has truly impermissibly invaded privacy.

Id. at 500, 431 A.2d at 966.

57. See notes 33-36 and accompanying text.

tools to intrude on people's privacy without physically trespassing into "protected areas."⁵⁸

B. A Proposed Reach Formulation

1. Description

The pre-*Katz* notion that "reach" was a function of two perspectives, place and kind of activity, was attacked head on by Professor Anthony Amsterdam. Referring to *Katz*, he stated:

If the word "intrusion" is used, as "violated" plainly was, to mean only that interests protected by the fourth amendment have been defeated by the "Government's activities," I have no quarrel with it. The problem with the word lies in its subtle suggestion that a particular kind or sort of government activity, labeled an "intrusion," is necessary to trigger the fourth amendment. But this, in my view, was precisely the approach to fourth amendment coverage that *Katz* decisively rejected.⁵⁹

My argument is that this is precisely the approach that *Katz* decisively missed. Professor Amsterdam continued:

The entire thrust of the opinion is that it is needless to ask successively whether an individual has the kind of interest that the fourth amendment protects and whether that interest is invaded by a kind of governmental activity characterizable by its attributes as a "search." Rather, a "search" is anything that invades interests protected by the amendment.⁶⁰

I agree with Professor Amsterdam that there should be one test for "reach", not two, but I suggest that the Court in *Katz* chose the wrong one. If we follow Professor Amsterdam's suggestion that a search is "anything that invades interests protected by the [fourth] amendment,"⁶¹ we must next identify those interests. If we attempt to define them broadly as "privacy, security, liberty," the definition includes many interests protected by other constitutional guarantees, by statutes, by common law, and some interests not protected at all.

58. See, e.g., *Ex parte Maddox*, 502 So.2d 786 (Ala. 1986) (use of binoculars to help police see marijuana plants growing in a nearby field).

59. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 383 (1974) [hereinafter Amsterdam].

60. *Id.*

61. *Id.*

"Privacy"--what Justice Brandeis called "the most comprehensive ... and the most valued by civilized men," the "right to be let alone"⁶²--is a constellation of interests protected, in its various forms, by the first amendment provisions dealing with association⁶³ and religion,⁶⁴ the third amendment on troop quartering,⁶⁵ the fifth-amendment privilege against self-incrimination,⁶⁶ and the ninth amendment retained-rights clause,⁶⁷ not to mention those privacy-centered interests, like birth-control information,⁶⁸ which have been found "emanating" and/or "penumbrating"⁶⁹ from the Constitution's text. By the time we cull out these other aspects of privacy, the interest underlying the fourth amendment is to be free from uninvited governmental intrusions. The fourth amendment interest is, in short, to be free from unreasonable searches and seizures. If we then turn around and define a "search" as "anything which defeats this interest," we could be indicted on suspicion of felonious question-begging.

Rather than define the activity in terms of the interest (a search is anything that intrudes on a reasonable expectation of privacy) or the interest in terms of activity (the fourth amendment protects those places we want free from intrusion), I propose that we define the governmental activity in its own terms--that we take the word "search" to mean what it means. Pretty radical. My test for "reach" is as follows: *to search is physically to seek, through any of the senses, for a governmental purpose, including, of course, crime detection.*

This approach appears to be more consonant with the purpose of the Bill of Rights. There are two ways of understanding what the people have said to the government in these amendments. One is: we have these interests which we list here and your job is to be careful not to defeat them. Under this definition, the amendments truly form a Bill of Rights. In fourth amendment terms, we have expectations of privacy from official surveillance. The courts' monitoring function under this view entails keeping its eyes on us. What exactly is our anti-search interest? What are our expectations? Are they reasonable?

62. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

63. *See e.g.*, *Brown v. Socialist Workers Party*, 459 U.S. 87 (1982) (holding that a statute that required the Socialists Workers Party to disclose campaign contributors and recipients of campaign funds was unconstitutional as applied to that political party).

64. *See e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977) (individual cannot be compelled to display the state's motto, "Live Free or Die," on his automobile license plate).

65. *See Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) ("The Third Amendment's prohibition against unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion.").

66. *See e.g.*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

67. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 963 n.59 (1988).

68. *See Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977).

69. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Did we draw the drapes or fail to cover our pools? Did we use all of our technology to frustrate all of the government's technology? Sadly, we might not have enough.

The second understanding of the Bill of Rights is: because we have interests (which are sometimes identified herein clearly, sometimes not so clearly, and sometimes not at all), here is a list of things you may not do. Under this definition, the amendments create a Bill of Prohibitions. In fourth-amendment terms, don't search unless it is reasonable to do so. Under this conception, the courts' job must be conducted much differently; it must keep its eye on the government. What is it doing? And why? Under this proposal, the fourth amendment's command of "reasonableness" is brought to bear on all police/governmental activities which involve uninvited seeking. This second conception is more in keeping with the Founder's purpose--not the announcement of Rights (which they stated in the Declaration of Independence were "self-evident"), but the restriction of a new, feared government.

There is not much help from the text of the first eight amendments in selecting the "rights" or "prohibition" conception. The first amendment adopts a prohibitive tone: "Congress shall make no law ... abridging..."⁷⁰ So do several of the other amendments. The sixth amendment, on the other hand, adopts the entitling, or "rights" perspective: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ..." ⁷¹ And, of course, the fourth amendment adopts *both*: "The right of the people to be secure ..." is the "rights" perspective and "against unreasonable searches and seizures" the "prohibition" perspective. The ninth amendment, however, lends support to the prohibition perspective. It states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁷² The word "retained" is inconsistent with the idea that the first eight amendments had created rights. Those rights, along with those not mentioned, must have pre-existed if one can sensibly speak of "retaining" them.

I anticipate the following general objection to my proposal that "search" be defined as "any physical seeking for a governmental purpose": this definition is entirely too broad. Everything a policeman does is searching under this definition. Well, not everything. But, truth is, police do a lot of searching. It is a large part of the job. However, it cannot be persuasively argued that because activity happens routinely, the Constitution ought take no note of it--indeed, it ought to be especially interested in it. Of course, most of these searches are reasonable. The fourth amendment will "reach" them, but it will

70. U.S. CONST. amend. I.

71. U.S. CONST. amend. VI.

72. U.S. CONST. amend. IX.

not “grasp” them. When they become unreasonable, however, the fourth amendment will be there to strike them down.

I want to return to the eighth amendment analogy I referred to earlier to show that the Court’s fourth-amendment reach analysis is inconsistent with how it does constitutional jurisprudence generally. Remember our friend who contended that \$5.00 for overparking was cruel and unusual? The most obvious response is “No, it is not.” That is essentially what the Supreme Court has said. But that is not what the Court would say if it dealt with the eighth amendment’s reach the way it deals with that of the fourth. If it did, I imagine the operative language of the opinion would read something like this:

Of course a \$5.00-fine is not cruel and unusual, and we could decide today’s case on that ground. But logically anterior to the cruel and unusual question lies the question of whether or not a monetary fine is “punishment” within the meaning of the eighth amendment. If there is no punishment, we need not address the “cruel and unusual” issue. The clear history of this clause is about physical torture, disproportionate incarceration, and, maybe, death. Surely when the founders used the word “punishment” this is what they envisioned. It certainly would not have occurred to James Madison *et al.* that a clause animated by spectres of rack and screw, The Star Chamber and The Spanish Inquisition, should be applied to the payment of money. Thus, we hold today that a monetary fine is not “punishment” as that term is used in the eighth amendment.

The following day, the legislature increases the penalty for overparking to \$500,000! You see, of course, that, short of overruling yesterday’s decision, the Court is stuck. It cannot get to the “cruel and unusual” question because it held that monetary fine is not “punishment.” I think that what has happened in connection with the fourth amendment is not much different from this hypothetical.

And, at bottom, what has happened, I think, is this. (I trust you will grant me a short, political digression.) Using the *Riley* helicopter case as an example, the Court, from a reading of the entire record, concluded that, under the circumstances (including the anonymous tip), the police acted properly to detect a suspected crime. The Court was, therefore, comfortable affirming *Riley*’s conviction. In reality, the Court took this comfort born of a judgment about the conduct’s “reasonableness” and translated it, because the “reach” doctrine is so tractable to this, into a finding that the police were “not searching”. This result was similar to the result in my hypothetical eighth-amendment opinion where a perfectly rational intuition that a \$5.00 fine is not cruel and unusual is translated into a holding that monetary fine is not “punishment”.

But what of those cases looming out there when the Court *does not* think the police have acted properly or *does* think that \$500,000 *is* cruel and unusual? The Court will want the Constitution to “grasp” these cases but its “reach” will be too short.

2. Testing

The proposed formulation--a search is any physical seeking for a governmental purpose--is now tested against the same ten cases.

Ransacker's case is clearly a search, not because of where he is, but because of what he is doing and why--he is physically seeking evidence of crime. We need not ask what the homeowner “expected.” The issue of reasonableness, which entails the “probable cause” and “warrant” requirements, remains to be decided.

Trueheart is not searching. The critical motivation is missing. He is not seeking for a governmental purpose.

Glancer is not searching if he glanced inadvertently in that direction, but is searching if he purposefully looked. I shall deal with this special problem of motivation in the next section. In any event, we will not, absent features which aggravate his conduct, have any difficulty finding his actions reasonable. Here the “curious passerby” becomes sensibly a part of the “reasonableness” discussion.

The case of *Hunter and Digger* is clearly a search--they are physically seeking evidence of crime. Is it reasonable? This we can argue about and might decide to require that, to be reasonable, the police have some particular level of suspicion (maybe probable cause but maybe a less stringent standard like “reasonable suspicion”), or that they should have obtained prior judicial approval, etc. Or we might not.

However we decide the “reasonableness” question in *Hunter and Digger's* case, it will not prevent us from finding that *Troller and Excavator* are searching and doing so unreasonably. Notice how conceding that *Hunter and Digger* are searching and supplying some limitations on that searching leaves room for a finding that *Troller and Excavator* are violating the fourth amendment's command.

Neighborly's Case is also a search given his conduct and purpose. The fourth amendment is in play. Again, the search's reasonableness involves some balancing, but the Court could require more justification here when dealing with a neighbor than when on the sidewalk with the general public.

The Flying Eagle-Eyes are, of course, also searching. Having said that, we can ignore odd questions about what the homeowner can expect or who else could be flying there and concentrate on whether this sort of surveillance is reasonable. Again, level of suspicion, the presence or absence of prior judicial approval, and the exact techniques utilized to gain the observation all become relevant inquiries.

Again, because *The Flying Eagle-Eyes'* case focused on appropriate inquiries, we should have no trouble finding *Vengeful's* conduct to be an unreasonable search. We are not blocked by a holding that his activity is not a search in the first place.

Staker is clearly searching. I would certainly want to argue that this kind of aggressive, long-term intrusion should require probable cause and a warrant to be reasonable. Others may differ but at least we will not waste too much time deciding whether or not *Staker* is doing something that the fourth amendment is concerned about.

Peeker's case is clearly a search. The Court is fully free to examine the reasonableness of the conduct, contrasting it with that of the *Flying Eagle-Eyes* who saw into the backyard, not into the house itself. It is not necessarily an easy question at a time when the fact and fear of crime is high. We may get it wrong. But we are not bound to get it wrong as the Court faced with the *Ciraolo* and *Riley* holdings may be.

3. Evaluation

The proposed "reach" formulation produces, I think, demonstrably better and more sensible results in the tested cases. Its focus is on the police, not the vague "expectations" of the average citizen. It frees the Court to scrutinize all uninvited intrusions under the fourth amendment.

Yet, two categories of objections to the proposed formulation can be anticipated. At the "reach" level, a test turning on governmental motivation rather than location is more difficult to administer. A person's location is often provable through direct evidence; his motivation must usually be proved circumstantially. Once a policeman learns that certain motivations place his activity outside the fourth amendment, what prevents him from always claiming the innocent motivation? Aside from the obvious fact that police can attempt to manipulate any rule (they can lie now as to where they were), most of the police activity involved in these cases permit very unambiguous inferences about motivation. What could *Hunter* and *Digger* or *The Flying Eagle-Eyes* claim to have been their real purpose? The law, including Constitutional law, is rife with instances in which a court must judge motivation, intent, premeditation, knowledge, purpose, belief, etc. and it accomplishes this task, for the most part,

without grave difficulty. In troublesome areas, courts can use well-proven legal techniques to prevent abuse; the burden of proof, for example, can be imposed on the government to *disprove* search motivation under all or specified circumstances. One can, for example, easily imagine a rule which presumes a search, absent strong rebutting evidence, whenever a policeman enters a house.

The second category of objection is that the proposed formulation, because it recognizes so many more "searches", places undue stress on the "grasp" issue--"reasonableness". It must be conceded that reasonableness doctrine will have to be more finely tuned. Consider these observations of Professor Amsterdam:

A sliding scale approach would considerably ease the strains that the present monolithic model of the fourth amendment almost everywhere imposes on the process of defining the amendment's outer boundaries ["reach"]. It would obviously be easier and more likely for a court to say that a patrolman's shining of a flashlight into the interior of a parked car was a "search" if that conclusion did not encumber the flashlight with a warrant requirement but simply required, for example, that the patrolman "be able to point to specific and articulable facts" supporting a reasonable inference that something in the car required his attention.⁷³

Having painted this picture (which I find eminently congenial), he lowers the boom:

The problem with the graduated model, of course, is ... [that] it converts the fourth amendment into one immense Rorschach blot. The complaint is being voiced now that fourth amendment law is too complicated and confused for policemen to understand or to obey. Yet present law is a positive paragon of simplicity compared to what a graduated fourth amendment would produce. The varieties of police behavior and of the occasions that call it forth are so innumerable that their reflection in a general sliding scale approach could only produce more slide than scale.⁷⁴

It is often preferable, however, to adopt a rule which generates doctrinal complexity rather than one which simplifies a problem by ignoring it. This is especially true when ignoring it begs abuse, and, most especially, when that abuse will come from the government.

73. Amsterdam, *supra* note 59, at 393.

74. Amsterdam, *supra* note 59, at 393-94.

Moreover, the Supreme Court has in fact, since Professor Amsterdam's cited writing, already gone a very long way toward instituting the graduated model of reasonableness. Current doctrine recognizes all of the following concepts: physical restraint less than a typical arrest (called a "stop")⁷⁵ justified by less than the probable cause required for arrest; physical restraint more intrusive than a common arrest (like killing the arrestee, at the extreme)⁷⁶ justifiable only under compelling circumstances;⁷⁷ and "searches" less intrusive than typical ("frisks",⁷⁸ magnetometer scans at airports,⁷⁹ administrative searches,⁸⁰ etc.) as well as those searches uncommonly intrusive (strip searches,⁸¹ body-cavity searches,⁸² surgery to remove evidence,⁸³ etc.), all of which require respectively less or more justification than usual. The Court seems quite comfortable administering this "sliding-scale" approach to "reasonableness."

I do not believe that the task of fitting all the new "searches" into this existing graduated model would be difficult. For example, the Court could quickly establish that all naked-eye searches from public streets or sidewalks are *per se* reasonable absent bizarre aggravating circumstances; that views into a house from a consenting neighbor's property are justifiable upon a showing of "reasonable suspicion"; that views into houses utilizing advanced technology and/or strategic location require "probable cause" and, perhaps, prior judicial approval. The varieties of police behavior may be innumerable, as Professor Amsterdam suggests,⁸⁴ but they do tend to fit into broad, predictable categories. Despite the difficulty of such a task, however, it is preferable to burying the whole problem under the headstone, "No Search."

C. Possible Accommodations

Even a system based fundamentally on the current *Katz* formulation could, it is suggested, be enhanced by paying more attention to the officer's conduct and motivation. The Court may remain indifferent to that motivation when the officer physically enters a house (always calling this a search) and in an "open field" (always calling this not a search). But in curtilage and other intermediate-place cases (cases in which the officer is located in an unprotected place but

75. See *Terry v. Ohio*, 392 U.S. 1 (1968).

76. See *Tennessee v. Garner*, 471 U.S. 1 (1985).

77. See *Winston v. Lee*, 470 U.S. 753 (1985).

78. See *e.g.*, *Terry v. Ohio* 392 U.S. 1 (1968); *Adams v. Williams*, 407 U.S. 143 (1972).

79. See *e.g.*, *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972).

80. See *e.g.*, *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

81. See *e.g.*, *United States v. Palmer*, 575 F.2d 721 (9th Cir. 1978).

82. See *e.g.*, *United States v. Ogberaha*, 771 F.2d 655 (2d Cir. 1985).

83. See *e.g.*, *Winston v. Lee*, 470 U.S. 753 (1985).

84. See *Amsterdam*, *supra* note 59, at 381.

looking or listening into a protected place) closer scrutiny of the techniques and motivations of the policeman could be considered in answering the central *Katz* question. *Katz* himself, as the Court noted, could not in that glass phonebooth have reasonably expected that he would not be seen or even overheard with the naked ear.⁸⁵ It was particularly aggressive conduct involving special equipment which he could reasonably expect to be free from. The first and best answer to the question "What is our reasonable expectation of privacy?" is, "From whom or what?" We may reasonably expect that police will see into our houses from the sidewalk, but when they employ flashlights and binoculars, startrons and helicopters, we may reasonably demand that they do so only under careful constitutional scrutiny. Under the post-*Katz* cases, however, once the Supreme Court finds we cannot reasonably expect privacy from every imaginable intrusion, it affords protection from none!

CONCLUSION

To conclude, fourth-amendment analysis should begin by scrutinizing governmental activity to determine if it is the kind of activity that the provision is concerned about. The amendment, insofar as it extends to searches, should be understood to "reach" any physical seeking for a governmental purpose. Such an understanding would insure that the Court's function as guardian of constitutional liberties will not be jeopardized by decisions which put the "reach" too short. Once "reach" is too short, other branches of government must act to remedy injustices; it is crucial to note that many victims of governmental abuses have historically not had much access to those other institutions.

Under my proposal, which governmental searches are reasonable remains, as before, to be debated in an ongoing judicial discourse. The fourth amendment should not "grasp" everything it can "reach". Indeed, the Constitution's "reach" must exceed its "grasp", or what's a Supreme Court for?

85. *Katz v. United States*, 389 U.S. 347, 352 (1967).

