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COMMENTS

NOTES

FOURTH AMENDMENT AERIAL PRIVACY: EXPECT THE UNEXPECTED

Florida v. Riley, 109 S. Ct. 693 (1989).

Michael Riley was growing marijuana in a greenhouse behind his home in rural Pasco County, Florida.[1] A fenced yard surrounded both the greenhouse and Riley's home.[2] The greenhouse was enclosed on two sides, and the view into one of the remaining sides was obscured by shrubbery within the fenced perimeter.[3] The other open side was shielded from view by the home.[4] The contents of the greenhouse were not visible from the ground.[5]

A Pasco County Sheriff's deputy had been anonymously informed of the nature of Riley's activities and chose to view Riley's property from the air.[6] The deputy carried a camera with a telephoto lens, and while circling over the property at an altitude of 400 feet,[7] observed marijuana growing within the greenhouse.[8] The deputy was able to see through the roof because two of the panels in the roof were missing.[9] The deputy was also able to see through at least one of the open sides.[10]

After the airborne sheriff's deputy had spotted Riley's crop, the deputy obtained a search warrant.[11] A subsequent search of the

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1. State v. Riley, 476 So. 2d 1354, 1354 (Fla. 2d DCA 1985).

2. Riley v. State, 511 So. 2d 282, 283 (Fla. 1987). Riley lived in a mobile home situated on five acres in a rural area. A "DO NOT ENTER" sign was also posted on the front of the mobile home. *Id.*

3. *Id.*

4. 476 So. 2d at 1354.

5. *Id.* The deputy had tried to view the contents of the greenhouse from the road but was unable to discern the building's contents. 511 So. 2d at 283.

6. *Id.*

7. 476 So. 2d at 1355. The evidence is unclear regarding whether the helicopter descended below 400 feet. *Id.*

8. *Id.* The deputy took photographs from the air, but the trial judge accepted the fact that the deputy's identification was based on his view from the air and not from the photographs. *Id.* The Supreme Court stated that the deputy's identification from the air was achieved with his "naked eye." Florida v. Riley, 109 S. Ct. 693, 695 (1989) (plurality opinion). See *infra* note 126 for a discussion of photographic magnification techniques.

9. 109 S. Ct. at 695. The roof was constructed of corrugated roofing material. Some panels were opaque, and others were translucent. The two missing panels constituted approximately 10% of the roof surface. *Id.*

10. *Id.*

11. *Id.*

premises revealed marijuana in the greenhouse.[12] Riley was charged with possession of marijuana.[13] At trial, Riley moved to suppress the evidence[14] which had been seized pursuant to the search warrant.[15] The trial court suppressed the evidence because the greenhouse enclosure was within the curtilage of the defendant's home.[16] Additionally, the court noted that the structure had been constructed in order to obscure the view of those who attempted to peer into the premises.[17] The trial court therefore reasoned that Riley had a reasonable expectation of privacy under the fourth amendment.[18] The Florida Second District Court of Appeal reversed,[19] but certified the question to the Florida Supreme Court as a question of great public importance.[20]

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12. *Id.* The activity was being conducted within 10 to 20 feet of Riley's home. *Id.*

13. 511 So. 2d at 284. FLA. STAT. § 893.13(1)(a) (1987) provides in part: "[I]t is unlawful for any person to sell, manufacture, or deliver . . . a controlled substance." *Id.* Under § 893.03(1)(c), marijuana (cannabis) is a controlled substance. *Id.* at § 893.03(1)(c).

14. 476 So. 2d at 1355. The evidence consisted of 44 marijuana plants that were found growing in the greenhouse. *Id.*

15. *Id.*

16. *Id.* Curtilage is defined as the "land immediately surrounding and associated with the home." Oliver v. United States, 466 U.S. 170, 180 (1984).

17. 476 So. 2d at 1355.

18. *Id.* 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.

FLA. CONST. art. I, § 12, is similar but additionally provides:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions construing the 4th Amendment to the United States Constitution.

19. 476 So. 2d at 1357. The court discounted Riley's efforts to cover his greenhouse with opaque roofing material and reversed the trial court citing inter alia Randall v. State, 458 So. 2d 822 (Fla. 2d DCA 1984) (aerial view of backyard from helicopter not a search). 476 So. 2d at 1356.

20. *Id.* The question certified was:

> WHETHER POLICE OFFICERS RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PREINTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELING AT 400 FEET ABOVE A BACK YARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

Id. at 1356-57.

The Florida Supreme Court quashed the appellate court's ruling.[21] The court reasoned that the deputy's aerial surveillance was an improper invasion of Riley's privacy.[22] Thus, the court held that the motion to suppress the evidence obtained had been properly granted by the trial court.[23] The United States Supreme Court reviewed the case on a writ of certiorari to the Florida Supreme Court.[24] HELD: The judgment of the Florida Supreme Court was reversed.[25]

The *Riley* case is significant because it is now questionable whether there are reasonable expectations to be free from the probing eye of the government above. Even those activities within the close confines of the home are now subject to aerial scrutiny. Therefore, activity which one wishes to remain private must now be confined to areas strictly within the walls of the home, with the curtains securely drawn. The Court's rejection of Riley's privacy claim signals the continued erosion of personal privacy rights under the fourth amendment.

This Note will briefly trace the modern development of the Court's approach to privacy claims. Particularly, this Note will examine the open field and curtilage doctrines and summarize their application to privacy claims under the fourth amendment. The Court's utilization of these doctrines will be discussed, and the reasoning used by the *Riley* court in declining to strictly apply either doctrine will be reviewed. Federal regulation of the public airspace, which has

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21. 511 So. 2d at 289.

22. *Id.* The court stated: "There is little that an individual can do to bar either the public or the police from aerial viewing of an open area, even if the area is within the curtilage and otherwise entitled to fourth amendment protection." *Id.* at 288.

23. *Id.* The Florida Supreme Court recognized that the question of Riley's expectation of privacy was "a close one." The court then quoted the seasoned language of Boyd v. United States, 116 U.S. 616 (1886): "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." 511 So. 2d at 289 (quoting 116 U.S. at 635).

24. The Florida Supreme Court restated the question which had been certified to it by the Florida Second District Court of Appeal. 511 So. 2d at 283. The restatement of the certified question was:

> WHETHER SURVEILLANCE OF THE INTERIOR OF A PARTIALLY COVERED GREENHOUSE IN A RESIDENTIAL BACKYARD FROM THE VANTAGE POINT OF A HELICOPTER LOCATED 400 FEET ABOVE THE GREENHOUSE CONSTITUTES A "SEARCH" FOR WHICH A WARRANT IS REQUIRED UNDER THE FOURTH AMENDMENT AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION?

Id. The Court reviewed the Florida Supreme Court's restated question. 109 S. Ct. at 695.

25. 109 S. Ct. at 697.

played a critical role in the development of the Court's approach to aerial privacy claims, will also be outlined. Finally, this Note explores the technological developments that will continue to redefine citizens' reasonable expectations of privacy and how technology has provided ever more intrusive surveillance techniques, which may force a retreat from the sanctuary of the yard, to seek privacy within the home.

FROM TRESPASS TO REASONABLE EXPECTATION

Early cases addressed fourth amendment privacy claims under a trespass standard. For example, *Olmstead v. United States* held that the telephonic surveillance of importers of illegal liquor was not prohibited under the fourth amendment.[26] Chief Justice Taft, writing for a closely divided Court, reasoned that since there had been no physical trespass of Olmstead's house, there was no search or seizure.[27] Also, the Court held that violation of a state law that prohibited wiretapping was not grounds for exclusion of the evidence that the government agents had obtained.[28]

Silverman v. United States ruled that government agents who inserted a microphone into Silverman's home had intruded into a constitutionally protected area, and accordingly the information they gathered was excluded.[29] The Court continued to apply a standard based largely upon the physical penetration of the premises until 1967, when it decided *Katz v. United States.*[30]

The government attached a listening device to the outside of a public phone booth that Katz was using.[31] Although the device had not physically intruded into the booth, the Court ruled that Katz was still protected under the fourth amendment's right to privacy.[32] The

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26. Olmstead v. United States, 277 U.S. 438 (1928) (5-4 decision).

27. *Id.* at 466.

28. *Id.* at 468-69. A state statute made it a misdemeanor to intercept messages which had been sent over telephone lines. *Id.* at 468. The statute did not contain any provision for the exclusion of evidence gathered in violation of the statute. *Id.* at 469.

29. 365 U.S. 505 (1961). The minimal trespass consisted of the insertion of a microphone into a common wall between two residences. The spike mike contacted the heating duct of the adjoining residence, "thus converting the entire heating system into a conductor of sound." *Id.* at 506-07.

30. 389 U.S. 347 (1967). Katz was convicted based upon evidence gathered by the government through a listening device attached to the outside of a telephone booth. The device allowed the police to listen in on Katz' end of the conversation. *Id.* at 348.

31. *Id.*

32. *Id.* at 353.

trespass analysis was abandoned in *Katz*, which established a two-prong "expectation of privacy"[33] standard upon which a citizen's right to privacy would be evaluated.[34] Under the *Katz* test, to receive protection of the fourth amendment, a "person must have exhibited an actual (subjective) expectation of privacy and . . . the expectation [must] be one that society is prepared to recognize as 'reasonable.' "[35]

OPEN FIELD AND CURTILAGE DOCTRINES

The fourth amendment affords little protection for outdoor activities. *Hester v. United States*[36] involved illegal alcohol or "moonshine."[37] The occupants of Hester's home told revenue agents that there was no whiskey on the premises.[38] Meanwhile, on the property surrounding the house, the agents discovered some abandoned containers that held whiskey residue.[39] The Court held that the fourth amendment did not extend its protection to the "open field" surrounding the home and ruled that the testimony of the agents who found the contraband was properly admitted.[40]

In 1984 the Court revisited the open field doctrine in *Oliver v. United States*.[41] Oliver was also charged with a controlled-substance violation.[42] State police officers, who had walked around a fence which partially surrounded Oliver's premises, found marijuana growing in a field approximately one mile from Oliver's home.[43] The court reaffirmed its prior holding in *Hester* and ruled that even though the

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33. *Id.* at 361 (Harlan, J., concurring). The language of Justice Harlan's concurrence has come to stand for the majority opinion. See *infra* notes 62-70 and accompanying text for a discussion of California v. Ciraolo, 476 U.S. 207, 211 (1986) (adopting the language of Justice Harlan's concurrence). *See generally* 1 W. LAFAVE, A TREATISE ON THE FOURTH AMENDMENT § 2.1 (2d ed. 1987) (discussion of the *Katz* expectation of privacy test). *Katz* expressly overruled *Olmstead*, citing the erosion of the trespass doctrine by subsequent decisions of the Court. 389 U.S. at 353.

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

35. *Id.*

36. 265 U.S. 57 (1924).

37. *Id.* at 58.

38. *Id.*

39. *Id.* The agents had surrounded the house and observed what appeared to them as activity associated with the delivery of illegal alcohol outside of the house. *Id.*

40. *Id.* at 59.

41. 466 U.S. 170 (1984).

42. *Id.* at 173. Oliver was charged with manufacturing a controlled substance, marijuana. *Id.*

43. *Id.* at 173. The Court recognized that the field was secluded and not visible from "any point of public access." *Id.* at 174.

officers were trespassing on the defendant's farm, the fourth amendment's applicability was not determined by the common law of trespass.[44] The Court held that the defendant had no "legitimate expectation of privacy"[45] for an activity carried on in an open field, even if he had taken precautions to conceal his agricultural pursuits.[46] Clearly, under the Court's current analysis, the fourth amendment will not provide much protection for outdoor activities.

More protection may be available for activities within the close confines of the home. The curtilage[47] doctrine was most recently addressed in *United States v. Dunn*.[48] Dunn and his accomplice had set up a laboratory in a barn for the manufacture of amphetamines.[49] The barn was approximately sixty yards from their ranch house.[50] The 198-acre ranch was completely surrounded by a fence.[51] The *Dunn* Court established a test for defining the extent of the curtilage.[52] The Court ruled that if the area is "intimately tied to the home,"[53] it is deserving of the fourth amendment's protection.[54]

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44. *Id.* at 183-84.

45. *Id.* at 182. The Court then defined a test to determine the legitimacy of a privacy expectation: "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.* at 182-83.

46. *Id.* at 182.

47. For a concise definition of "curtilage," see *supra* note 16.

48. 480 U.S. 294 (1987). "The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *Id.* at 300. "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Hester*, 265 U.S. at 59 (quoting 4 W. BLACKSTONE, COMMENTARIES *223, *225, *226).

49. 480 U.S. at 298. The defendant was convicted of conspiracy to manufacture controlled substances with intent to distribute. *Id.* at 296.

50. *Id.* at 302.

51. *Id.* at 297. In addition to the perimeter fences, the buildings on the property were also surrounded by separate fences. By the time the Drug Enforcement Administration (DEA) agents had a view into the barn on the property, they had crossed several fences. *Id.* at 297-98. The officers were able to see over the barn's gate without entering the property. *Id.* at 298. The Court refused to adopt a bright line rule that the curtilage should extend only to the first fence surrounding a fenced house. *Id.* at 301 n.4.

52. *Id.* at 301. The factors to be tested are: 1) the proximity of the area in question to the home, 2) whether the area is within an enclosed perimeter around the home, 3) the types of uses to which the area is put, and 4) the actions taken by the residents to protect from observation by passers by. *Id.*

53. *Id.*

54. *Id.* Applying the curtilage test the Court ruled that 1) the barn was too far away from the home, 2) the barn was not within the fence surrounding the home, 3) the DEA had objective data to support their contention that the barn was not being used for "intimate activities

Accepting for the purposes of argument that the barn was within the curtilage,[55] the *Dunn* Court applied the rule of *Oliver v. United States*.[56] Under the *Oliver* analysis, the Court reasoned that since the agents had not entered Dunn's barn, but merely observed the activities within the barn from an "open field,"[57] the manner in which they observed was not forbidden under the fourth amendment.[58]

TECHNOLOGY DRIVES A REVISION OF THE MODERN LAW OF PRIVACY

Emergent technologies may sculpt the fourth amendment's protections of privacy rights. *Katz* indirectly addressed the issue of technological advances and their impact upon fourth amendment privacy rights.[59] Justice Harlan stated that the "legitimate needs of law enforcement may demand specific exceptions" to the warrant requirement; however, the Justice deferred consideration of these circumstances to such time as they were presented to the Court.[60] Such circumstances arose in 1986 when the Court again visited both the curtilage and open field doctrines.[61]

The issue of aerial privacy arose in *California v. Ciraolo* when the Court reviewed the usage of aircraft by law enforcement personnel.[62] Ciraolo was convicted after officers observed and photographed the defendant's marijuana patch, using an ordinary thirty-five millimeter camera, from a fixed wing aircraft at an altitude of 1000 feet.[63] The plot was adjacent to Ciraolo's home and had been surrounded by

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of the home," and finally 4) the fences were not designed to keep persons from observing the activities on the property, but were solely for corralling livestock. *Id.* at 302-03. See *supra* note 52 for the Court's factors in analyzing the extent of the curtilage.

55. *Id.* at 303.

56. Oliver v. United States, 466 U.S. 170 (1984). *See supra* notes 41-46 and accompanying text.

57. 480 U.S. at 304. The barn's owner had attempted to block the view into the barn by using a fish-net material. *Id.* at 297-98 & n.1. A view into the barn was only possible if the observer was within "a few feet" of the barn entrance. *Id.* at 312 (Brennan, J., dissenting) (quoting United States v. Dunn, 766 F.2d 880, 883 (5th Cir. 1985)).

58. 480 U.S. at 305.

59. 389 U.S. at 362 (Harlan, J., concurring).

60. *Id.*

61. California v. Ciraolo, 476 U.S. 207 (1986); Dow Chem. Co. v. United States, 476 U.S. 227 (1986).

62. 476 U.S. 207 (1986).

63. *Id.* at 209. A warrant was obtained based upon an anonymous tip and photographs taken from the air. *Id.* The marijuana plants were discernible to the naked eye from the air. *Id.* at 215.

a ten-foot fence.[64] The Court ruled that under the first prong of the *Katz* test,[65] it was unclear whether the defendant had a subjective expectation of privacy. Even though Ciraolo attempted to shield the yard from view, he had concealed the crop from some but not all views.[66] The Court noted that a policeman or a citizen atop a double-deck bus could have seen over the ten-foot-high fence.[67] Even assuming that Ciraolo had a subjective expectation of privacy, the Court held that under the second prong of *Katz*,[68] Ciraolo could have no reasonable expectation of privacy since he had not taken measures to shield his activities from aerial observations made from a point where the public had a right to be.[69] Consequently, the fourth amendment afforded him no right to aerial privacy.[70]

In a companion case, *Dow Chemical Co. v. United States*,[71] the Court extended the reach of the government's gaze by permitting the use of high-power cameras to photograph activity from an altitude of 1200 feet.[72] The premises in *Dow* were an industrial complex, where Dow had taken numerous precautions to prevent both terrestrial and aerial observations.[73] The Court stated that photographic technology had indeed advanced law enforcement's techniques of gathering data.[74] However, the fact that state law could bar private parties from utilizing the same techniques to violate trade secret laws (through laws prohibiting espionage) was deemed irrelevant in the Court's analysis of the government's use of these photographs.[75] The Court held that Dow's 2000-acre manufacturing facility was subject

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64. *Id.* at 209.

65. 389 U.S. at 361 (Harlan, J., concurring) (subjective expectation of privacy). See *supra* notes 33-35 and accompanying text for a discussion of the test.

66. 476 U.S. at 213.

67. *Id.* at 211.

68. 389 U.S. at 361 (Harlan, J., concurring) (society recognizes the privacy interest as reasonable). See *supra* notes 30-35 and accompanying text for a discussion of *Katz*.

69. 476 U.S. at 215.

70. *Id.*

71. 476 U.S. 227 (1986).

72. *Id.* at 229.

73. *Id.* at 241-42 (Powell, J., concurring in part and dissenting in part). Dow took action any time aircraft overflew the plant. Dow traced the identification numbers of aircraft that flew over the premises, attempting to find the pilot and determine whether aerial photographs had been taken. *Id.*

74. *Id.* at 231.

75. *Id.* at 232. The photographs were capable of resolving objects as small as one-half inch. *Id.* at 243 (Powell, J., concurring in part and dissenting in part) (citing Dow Chem. Co. v. United States. 536 F. Supp. 1355, 1357 (E.D. Mich. 1982)). The camera was the finest aerial camera available and cost in excess of $22,000.00. *Id.* at 242 n.4 (citation omitted in original).

to regulatory inspections by the EPA. Consequently, the Court ruled that what was visible to the public or government inspectors was not subject to the strictures of the warrant requirement.[76]

Advancing technology, which has allowed the government to listen into phone conversations,[77] to fly over areas that had historically been inaccessible to law enforcement personnel without a search warrant,[78] and to photograph such areas with a high degree of resolution,[79] has forced the Court to redefine modern fourth amendment privacy rights.

FEDERAL AVIATION ADMINISTRATION REGULATIONS

The Constitution and the common law have not been the only source of guidance that courts have used in redefining the modern expectation of privacy doctrine. The Federal Aviation Administration promulgates the regulations applicable to various types of aircraft and the altitudes at which they may legally operate.[80] The regulations have special altitude provisions for the operation of helicopters.[81] The helicopter may operate at lower altitudes than fixed-wing aircraft, with the lower limit defined by the point at which the helicopter's operation becomes a hazard to those on the ground.[82]

Regulations applicable to helicopters also provide that, except for take-off and landing operations, the helicopter may not operate at an altitude of less than 300 feet.[83] This section applies only to opera-

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76. *Id.* at 238. The Court stated that it had previously held that "[w]hat is observable by the public is observable without a warrant, by the Government inspector as well." *Id.* (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 315 (1978) (fourth amendment protects commercial property; OSHA regulation authorizing warrantless search of work place is unconstitutional).

77. *See supra* notes 30-35 and accompanying text.

78. *See supra* notes 62-76 and accompanying text.

79. *See supra* note 75 and accompanying text.

80. 14 C.F.R. § 91.79 (1988) provides that aircraft generally must operate at an altitude no lower than that necessary to make a power-off emergency landing without endangering persons or property on the ground. *Id.* § 91.79(a). Over congested areas, aircraft are required to remain 1000 feet above the highest obstacle that is within 2000 feet horizontally of the aircraft. *Id.* § 91.79(b). In other than congested areas the minimum altitude is 500 feet. *Id.* § 91.79(c).

81. *Id.* § 135.203.

82. 14 C.F.R. § 91.79(d) (1988) provides in part: "Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface." *Id.* See *supra* note 80 for the text of 14 C.F.R. § 91.79(b)-(c) (1988). The *Riley* plurality interpreted the hazard referred to in the FAA regulation as "undue noise," wind, dust, or threat of injury. 109 S. Ct. at 697 (plurality opinion).

83. 14 C.F.R. § 135.203(b) (1988).

tions over congested areas.[84] As a result, helicopter operations in rural areas remain largely unchecked. Some types of aircraft are not even under the FAA's control. For example, radio-controlled aircraft are not subject to the altitude minimums of the FAA regulations.[85] If the right to aerial privacy is to be defined in light of aircraft legally operating within flight minimums, the regulations promulgated by the FAA will provide some important parameters. Against this background, the Supreme Court reviewed the *Riley* decision.

THE RILEY *COURT'S ANALYSIS*

Jurisdiction in the Supreme Court was based upon Riley's claim that the helicopter overflight constituted a search under the fourth amendment.[86] The plurality found that the Florida Supreme Court's decision did not rest upon adequate and independent state grounds, and consequently the United States Supreme Court was not precluded from reviewing the decision.[87]

The plurality agreed with Florida's claim that *California v. Ciraolo*[88] was the appropriate authority for the decision in this case.[89]

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84. *Id.*

85. Other sections specifically provide for different types of aircraft. For example, 14 C.F.R. § 101.33 (1988), provides operating rules for moored balloons, kites, unmanned rockets, and unmanned free balloons. The enabling statute that delegates the areas to be regulated by the FAA does not allow the Administrator to regulate the operation of radio-controlled aircraft. 49 U.S.C. §§ 1421-1423 (1982). The FAA has attempted to regulate the operation of remote-controlled aircraft through an advisory circular, which urged voluntary compliance with safety standards; however this document merely suggests an upper altitude limit of 400 feet. Fed. Aviation Admin., U.S. Dep't of Transp., Advisory Circular No. 91-57, Model Aircraft Operating Standards (June 9, 1981).

86. 109 S. Ct. at 695 n.1 (plurality opinion).

87. *Id.* at 695 & n.1 (citing Michigan v. Long, 463 U.S. 1032, 1041 (1983)). The Florida Supreme Court asserted that FLA. CONST. art. I, § 12, provided protection from surveillance of the type in Riley's case. 511 So. 2d at 289. The plurality reasoned that merely posing the question and then concluding that the search violated the state constitution provided "no indication that the decision 'clearly and expressly . . . [was] alternatively based on bona fide separate, adequate, and independent grounds.'" 109 S. Ct. at 695 n.1 (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983)). The Florida Constitution gives the Florida Supreme Court some discretion on search and seizure issues. If the court finds that: 1) there is no Supreme Court decision on point; or 2) the Supreme Court's opinion was a plurality; or 3) the language was dicta. Then the Florida court will be "free to interpret the constitution on its own." Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*, 18 STETSON L. REV. 241, 279 (1989) (footnote omitted). See *supra* note 18 for the text of the Florida Constitution's provision.

88. 476 U.S. 207 (1986). *See supra* notes 62-70 and accompanying text.

89. 109 S. Ct. at 695 (plurality opinion). Justice White delivered the plurality opinion in which Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy joined. Justice O'Connor

The plurality relied almost completely upon *Ciraolo*, stating that Riley could have reasonably expected that routine overflights would occur and that activities on his property would be observed.[90] Accepting that Riley's greenhouse was within the curtilage of the home, the plurality found that observations from the helicopter were nevertheless permissible under the fourth amendment because he had knowingly exposed the greenhouse's contents to view from above.[91]

The plurality detailed the widespread use of helicopters, and noted that helicopters were utilized by law enforcement agencies in every state.[92] A discussion of applicable federal regulations governing the operation of rotorcraft followed.[93] Under these regulations the helicopter was found to be in compliance with the altitude and operational minimums established by the FAA.[94]

Concurring in the judgment, Justice O'Connor discounted the plurality's reliance on federal regulations, since those regulations were established to promote public safety rather than to define the public's right to privacy.[95] She agreed with the plurality, which had also applied *Katz*,[96] that Riley's expectation of privacy was not recognized by society as reasonable.[97] In disagreeing with the plurality's reliance on *Ciraolo*,[98] Justice O'Connor stated that Ciraolo's expectation of privacy was unreasonable because of the frequency of such flights and not merely because of the public's right to travel in public airspace.[99] Similarly, Justice O'Connor reasoned that Riley's fourth amendment privacy claim should be denied based upon the fact that the public could have been expected to fly over his back yard at 400 feet and not solely upon the right of the public to be in the airspace over his home.[100] Justice O'Connor concluded her analysis by placing

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concurred in the judgment. The dissenters were Justice Brennan, joined by Justices Marshall and Stevens. Justice Blackmun wrote a separate dissent.

90. *Id.* at 696.

91. *Id.*

92. *Id.* at 696 n.2 (citing E. BROWN, THE HELICOPTER IN CIVIL OPERATIONS 79 (1981)).

93. *Id.* at 696-97 & n.3. 14 C.F.R. § 91.79 (1988) applies to the operation of helicopters and provides in part that they may be operated at lower altitudes than fixed wing aircraft so long as "the operation is conducted without hazard to persons or property on the surface." *See supra* notes 80-85 and accompanying text.

94. 109 S. Ct. at 697 (plurality opinion). *See supra* notes 80-85 and accompanying text.

95. *Id.* at 697 (O'Connor, J., concurring in the judgment).

96. *Id.* at 696 (plurality opinion).

97. *Id.* at 697 (O'Connor, J., concurring in the judgment).

98. *Id.* at 695 (plurality opinion).

99. *Id.* at 698 (O'Connor, J., concurring in the judgment).

100. *Id.* at 697. In an age where air travel has become a common part of everyday living,

the burden upon Riley to show that he had a reasonable expectation of privacy. Riley had not met that burden, but the Justice stated in dictum that there may be circumstances where helicopter usage below 400 feet would violate a citizen's reasonable expectation of privacy.[101]

The Dissent: A Vision of the Future

The dissent criticized the plurality's failure to apply the Court's prior holding in *Katz*.[102] It leveled criticism at the plurality's application of federal regulations to define a citizen's aerial privacy rights,[103] and opined that the reasonable expectation of privacy rule established in *Katz* should be controlling.[104] Noting that the FAA regulations provide for no minimum altitude requirement, the dissent hypothetically questioned the ramifications of a silent helicopter capable of hovering without disturbing the property below. Such a helicopter would not violate FAA regulations and would be capable of hovering at altitudes sufficiently low to peer into the windows of the home.[105] Under the plurality's analysis, citizen's privacy rights would not be infringed by such an aircraft.[106]

The dissent concluded with an ominous quotation from "George Orwell's dread vision of life in the 1980's."[107]

> The black-mustachio'd face gazed down from every commanding corner. There was one on the house immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . . In the

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Justice O'Connor stated that reasonable people should expect to be observed by those flying overhead. *Id.* at 697-98.

101. 109 S. Ct. at 699. The Justice stated that such a violation could occur even if the aircraft were fully in compliance with the FAA regulations. *Id.*

102. *Id.* (Brennan, J., dissenting). Justices Marshall and Stevens joined in Justice Brennan's dissent. Justice Blackmun filed a separate dissent. The dissenters stated that the plurality decision "reads almost as if *Katz* . . . had never been decided." *Id.* Justice Brennan wrote that a large portion of the plurality's opinion relied upon the fact that the officer made his observations from a position where he had a legal right to be. *Id.* Therefore, the plurality's opinion had discounted the Court's prior holding in *Katz*, that a citizen may have a reasonable expectation of privacy — even though the government legally has a right to be in such a position to observe the activity. *Id.*

103. *Id.* at 699-700.

104. *Id.* at 700-01.

105. *Id.* at 702-03. The dissenters posited a situation where the police were not only discovering what crops were under cultivation, but what books the residents were reading and who their houseguests were. *Id.*

106. *Id.* at 703.

107. *Id.* at 704-05.

> far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.[108]

Justice Blackmun wrote a separate dissent based upon the reasonableness of Riley's expectation that flights over his rural home would be infrequent.[109] The Justice would have placed the burden of proving the frequency of overflights upon the prosecution.[110] Justice Blackmun contended that the case should have been remanded for proceedings to allow the prosecution to meet its burden of proving that Riley's expectation of privacy had been unreasonable.[111]

A CRITICAL LOOK AT RILEY

The Supreme Court has nearly eliminated any right which a citizen has to aerial privacy. Such privacy, if it ever existed, is all but gone as we have reached a point where further erosion of citizens' fourth amendment rights to aerial privacy is not easy to envision. After the recent line of aerial privacy decisions in *Ciraolo, Dow,* and now *Riley*, the public can be reasonably certain that the government will be able to aerially observe ground activities, free from the restraint of the fourth amendment. Even with the curtains drawn, it is conceivable that from an aerial perch an officer could peer into the home through a crack in the curtains and be free to report his observations and use such information to the government's advantage.

The result in *Riley* was foreseeable after the Court's holding in *Katz*.[112] Application of the *Katz* reasonable expectation of privacy test and abandonment of the protected places analysis had resulted in expansion of the scope of the fourth amendment's protections.[113] It was inevitable that there would be cases where the right would be constricted. *Riley* is such a case. The *Riley* plurality's result became probable when the Court shifted its emphasis from protecting places to protecting people.

It may also be argued that with the advance of technology, *Katz*

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108. 109 S. Ct. at 705 (quoting G. ORWELL, NINETEEN EIGHTY-FOUR 4 (1949)).
109. *Id.* (Blackmun, J., dissenting).
110. *Id.*
111. *Id.*
112. 389 U.S. 347 (1967). *See supra* notes 30-35 and accompanying text.
113. *See* Walter v. U.S., 447 U.S. 649 (1980) (individual may expect that contents of a package in domestic mail will remain private).

itself is no longer a viable interpretation of the fourth amendment. The government could easily destroy any subjective expectation of privacy, simply by informing people that the capability to spy on them exists and will be used.[114] It is clear that the Court's position on the aerial privacy issue has empowered the government to literally watch over all of us.[115]

Federal Regulations Defining Constitutional Rights

The dangers inherent in defining the right to privacy using federal regulations as perimeters are particularly evident when certain aircraft are not subject to the FAA's altitude and operating minimums.[116] The future may find camera-equipped drones legally operating and doing the work of the present-day sheriff and helicopter duo. With such drones the government could fly lower than ever without disturbing the property below. Remote-controlled aircraft are currently available to the general public at hobby shops, and the military is developing even more sophisticated remote-piloted vehicles specifically for intelligence-gathering purposes.[117] The utilization of these tools by law enforcement agencies, if left unchecked, will greatly assist the government in law enforcement, but will be highly invasive to the privacy rights of the public.

Balloons are currently being used in drug interdiction efforts in the Florida Keys.[118] The balloon provides an exceptionally stable observation platform with tremendous lifting capabilities. The balloons are able to lift sophisticated monitoring equipment to positions best suited for legally monitoring both surface and air activities.[119] Around-the-clock surveillance is possible from these vantage points.

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114. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974). See *supra* text accompanying notes 33-35 for discussion of the "reasonable expectation of privacy" standard which also requires that an expectation of privacy be subjectively reasonable.

115. The *Riley* decision may not necessarily impact upon FLA. CONST. art. I, § 12. The Florida Supreme Court may still have some discretion on aerial search and seizure issues, because only a *plurality* has now specifically ruled on the issue of aerial surveillance from a low-altitude aircraft without fixed-wings. *See supra* note 87.

116. *See supra* note 85 and accompanying text.

117. Greeley, AVIATION WEEK & SPACE TECH., Mar. 9, 1987, at 58. These aircraft are neither helicopters nor fixed-wing aircraft. They utilize tilt-rotor technology, which makes these craft lightweight (504 pounds); they also have the high speed flight characteristics of a fixed-wing aircraft and the ability to hover as a helicopter. *Id.* See *supra* note 85 for discussion of remote-controlled aircraft, which are not within the purview of the FAA's regulations.

118. *Eye in the Sky*, TIME, May 13, 1985, at 27.

119. *Id.*

In the future, the balloon could easily be cast as a permanent fixture in neighborhoods, shifting its duties from drug interdiction to all-purpose general monitoring of the community's activities.

Advances in Technology: What's Next

The *Dow* Court stated that orbital satellite observations could require a search warrant.[120] Given the Court's current trend toward erosion of aerial privacy rights, the frightening possibility of the government monitoring activities on a global scale becomes reasonably expected. Under the Court's current analysis, a proliferation of orbital craft will decrease the individual's reasonable expectation of privacy. If logically consistent, the Court should find high-altitude observations to be reasonably expected and consequently not infringements of fourth amendment aerial privacy rights.[121] Just as the commercialization of air travel has resulted in the use of civil aircraft for law enforcement tasks, so too will the commercialization of space. Once this frontier is reached, any remaining right to be free from aerial surveillance would be virtually nonexistent.

The *Dow* court indicated that the mere fact that an aerial observer's vision had been "enhanced somewhat" did not present Constitutional problems.[122] Mapping cameras are capable of resolving objects as small as one-half inch from aircraft operating legally within federal regulations.[123] This has rendered it certain that activities conducted in the open can be very carefully monitored, if law enforcement deems it necessary.

The *Riley* plurality adopted the term "naked eye" which was repeatedly used in the State's brief.[124] However, the investigating deputy had a telephoto lens on his airborne camera.[125] The plurality failed to address the fact that a telephoto lens can magnify an image

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120. 476 U.S. at 238.

121. Note, *California v. Ciraolo and Dow Chemical v. U.S. — A View From Above: Is It Ever Private?*, 14 J. SPACE L. 172, 174 (1986). Private industry will launch commercial satellites such as the LANDSAT which will soon present issues of privacy from higher altitudes than ever before. *Id.* Commercial privacy issues may be raised which will require formulation of new guidelines, since these *private* craft may not be the subject of fourth amendment analysis because there will be no government intrusion. *Id.*

122. 476 U.S. at 238 (footnote omitted). *See supra* notes 71-76 and accompanying text.

123. *Id.*

124. Petitioner's Brief on the Merits, Riley v. State, 109 S. Ct. 693 (1989) (No. 87-764). The State used the term "naked eye" approximately sixteen times to characterize the identification. *Id. passim.*

125. 511 So. 2d at 283 n.2.

by a factor of forty.[126] Even though the Florida Supreme Court had accepted the trial court's finding that the officer made his identification from the air,[127] the Court failed to address the fact that enhancing vision can render such aerial observations substantially more intrusive.

Allowing enhancement of vision was predictable after the Court's approval of the high-powered mapping camera in *Dow*.[128] But in ignoring the magnification powers of such optical equipment, the Court has ignored the fact that now almost all law enforcement agencies can have the technology to discretely scrutinize activities from afar. After *Riley* relaxed the altitude constraint, police who commonly have helicopters,[129] and may also have telephoto camera equipment as well as high-powered binoculars, are now constitutionally equipped to make sure all citizens, not just the smugglers, growers, and other criminals, do not engage in objectionable outdoor activities as defined by the government.

Although *Dow* reflected the Court's intention to reevaluate the warrant requirement when applied to satellite surveillance,[130] some experts hold that suborbital aircraft, which are permissible under the Court's current scheme, are in many ways more intrusive than satellites.[131] Aircraft, unlike satellites whose orbits are fixed, can descend and circle over targets which the pilot wishes to observe more closely.[132] As a result, the pilot can gather much more information about a specific location with an aircraft than with a satellite.[133]

In light of this fact, the Court must realize that the real damage to citizens' right to privacy will not be in the future, when the police may have the power to monitor neighborhoods live via satellite. The harm was done when the Court allowed telephoto-equipped sheriffs to monitor activities on the ground from a helicopter, without a search warrant.

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126. C. SHIPMAN, NIKON SLR CAMERAS 49 (1980). Relative magnification is defined as the focal length of the lens being used (usually expressed in millimeters) divided by 50 (the focal length of a normal lens on a 35 millimeter camera). For example, a 2000 millimeter telephoto lens is capable of magnifying an image by 2000/50 or 40 times. *Id.*

127. 511 So. 2d at 283 & n.2.

128. 476 U.S. at 238 & n.5. *See supra* notes 71-76 and accompanying text.

129. *See supra* note 92 and accompanying text.

130. 476 U.S. at 238.

131. Bak, *The technology behind . . . Arms Verification*, DESIGN NEWS, Sept. 7, 1987, at 136.

132. W. BURROWS, DEEP BLACK: SPACE ESPIONAGE AND NATIONAL SECURITY 153-54 (1986).

133. *Id.*

Riley was rightly decided based upon the Court's prior holdings in *Katz*, *Ciraolo*, and *Dow*.[134] The *Riley* result was an inevitable corollary of the Court's earlier reasoning that the frequency of legal overflights and the use of technologically advanced photographic equipment for aerial surveillance had diminished an expectation of privacy from above. Thus, the *Riley* plurality's opinion was compelled by the collision of its preceding decisions with advancing aerospace technology.

A LONG-TERM ALTERNATIVE APPROACH TO AERIAL PRIVACY

A legitimate expectation of aerial privacy under the *Katz* standard has been reduced to the point where there is virtually no reasonable expectation of privacy from above. The government's interest in law enforcement may justify the application of the open field and open view doctrines to the curtilage. But the erosion of the curtilage doctrine, which the plurality has continued in *Riley*, is a most disturbing trend. Protection of the home from the intruding arm of the government must have been the very essence of what the Framers sought to protect when drafting the fourth amendment.[135]

A return of the fourth amendment's protections for aerial privacy of the home could be readily achieved. The Court could revise its application of the *Katz* standard as applied to the curtilage and develop a standard immune from technological advances. Views into the curtilage could be limited to those possible without the aid of devices that enhance the senses of the viewer or contrivances that allow the officer to position himself for a better view.[136]

This rule would eliminate the use of visual magnification techniques[137] and views from aircraft, remote-controlled[138] or otherwise.

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134. See *supra* notes 30-35 & 62-76 and accompanying text for a discussion of the reasoning used in this line of cases.

135. The very use of the word "houses" in the amendment and the Court's later interpretations of that language establish that " '[a]t the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " Payton v. New York, 445 U.S. 573, 589-90 (1980) (citation omitted). "In assessing the degree to which a search infringes upon individual privacy, the Court has given much weight to such factors as the intention of the Framers . . . . " *Oliver*, 466 U.S. at 178 (citing United States v. Chadwick, 433 U.S. 1, 7-8 (1977)).

136. Corrective lenses should not be considered such an enhancement. Views from natural structures such as trees, hills, and mountains likewise should not be excluded under the proposed solution.

137. *See supra* note 126 and accompanying text.

138. *See supra* note 117 and accompanying text.

Such an approach would leave intact both the open field and open view doctrines, as long as the officer's view was not enhanced. The elimination of these procedures would require that both *Riley* and *Ciraolo* be overruled; however, limiting surveillance capabilities to those that are innately human would prevent the Court's continuous redefinition of what a reasonable expectation of privacy is, in light of the day's technological developments.

CONCLUSION

The United States Supreme Court must apprise itself of the emergent and contemporary technologies that have rendered its prior holdings lethal weapons to the provisions of a Constitution originally drafted to prevent invasions into the private lives of citizens. The Court must reconsider its application of the *Katz* standard in approaching aerial privacy claims. Otherwise, we will all be expected to expect the unexpected.

W.F. "Casey" Ebsary, Jr.

ADDENDUM

The Florida Supreme Court vacated its decision and remanded *Riley* "to the district court with directions to return the matter to the trial court for further proceedings consistent with the opinion of the United States Supreme Court in this cause."[139] The majority cited four portions of the Supreme Court opinion in its remand of the case.

First, the court concluded that in Justice White's opinion, Riley had the obligation to support his aerial privacy claim by showing that his expectation of privacy was reasonable.[140] Justice Barkett arrived at this conclusion by virtue of Justice White's statement that there was "no indication that [helicopter] flights are unheard of in Pasco County" and that the record had not shown that such flights were "sufficiently rare."[141] Second, the court cited Justice O'Connor's

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139. Riley v. State, 549 So. 2d 673, 674 (Fla. 1989). Justice Barkett delivered the majority opinion in which Chief Justice Ehrlich, Justice Overton, Justice Shaw and Justice Kogan concurred. Justice McDonald wrote a separate concurring opinion. Justice Grimes did not participate in the decision.

140. *Id.*

141. *Id.* (quoting Florida v. Riley, 109 S. Ct. at 696-97 (1989) (plurality opinion)). See *supra* notes 88-94 and accompanying text for discussion of the plurality's opinion.

opinion for the proposition that Riley had not presented evidence regarding the frequency of helicopter overflights and that he had not met his burden that "his expectation of privacy was . . . reasonable."[142]

Third, the majority cited the *Riley* dissenters for the premise that the burden was upon the state to show "the extent of public use of the airspace at that altitude."[143] Fourth, the Florida Supreme Court asserted that Justice Blackmun would also have "impose[d] upon the prosecution the burden of proving contrary facts necessary to show that Riley lacked a reasonable expectation of privacy."[144] After reviewing these four positions, Justice Barkett reasoned that a majority of the Court had "agreed that the record below lacked evidentiary development concerning the reasonableness of Riley's expectation of privacy."[145]

The Florida Supreme Court's decision may allow Riley to reargue the privacy issue under article one, section twelve of the Florida Constitution.[146] Because a majority of the United States Supreme Court has not decided the issue of aerial privacy rights from a helicopter, the Florida court may now decide the issue under the Florida Constitution, which may provide greater protection for activities within the curtilage.[147] But a claim of protected privacy interests under section twelve may be res judicata due to its inclusion in the United States Supreme Court's decision. Accordingly, Justice McDonald's concurrence appears to limit the scope of the court's inquiry on remand.[148] Thus, Riley may be precluded from further argument under article one, section twelve.

A much stronger claim, in light of two recent Florida Supreme Court decisions, would contend that Riley has a right to be "let

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142. 549 So. 2d at 674 (quoting 109 S. Ct. at 699 (O'Connor, J., concurring in the judgment) (citations omitted)). See *supra* notes 95-101 and accompanying text for discussion of Justice O'Connor's opinion.

143. *Id.* (quoting 109 S. Ct. at 704 (Brennan, J., dissenting) (citation and footnote omitted). See *supra* notes 102-08 and accompanying text for discussion of Justice Brennan's opinion.

144. *Id.* (quoting 109 S. Ct. at 705 (Blackmun, J., dissenting)). See *supra* notes 109-11 and accompanying text for discussion of Justice Blackmun's opinion.

145. *Id.*

146. See *supra* note 18 for the text of the provision.

147. See *supra* note 87 for discussion of FLA. CONST. art. I, § 12. *See generally* Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653 (1987).

148. 549 So. 2d at 674-75. (McDonald, J., concurring).

alone" under article one, section twenty-three of the Florida Constitution.[149] The court recently held that the Florida Constitution afforded additional privacy protection not available under the United States Constitution.[150] The court ruled that the compelling state interest standard applies to gathering of telephone numbers using a pen register.[151] The court specifically rejected the application of traditional reasonable expectation of privacy analysis in its evaluation of claims under article one, section twenty-three.[152] In another recent case the court held that the right to be let alone under section twenty-three guaranteed the right of an unmarried pregnant fifteen-year-old to obtain an abortion free from parental consent.[153] The Florida Supreme Court held that a state statute requiring such consent was unconstitutional.[154] The court ruled that the right to privacy "demand[ed] the compelling state interest standard."[155] In so ruling, the burden of proof was placed upon the state to show that the invasion of privacy was justified.[156] The court specifically decided the case

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149. That section provides: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Fla. Const. art. I, § 23.

150. Shaktman v. State, 14 F.L.W. 522 (Fla. Oct. 12, 1989).

151. *Id.* at 523. The compelling state interest standard was described as "shift[ing] the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Id.* (citing Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985) (citation omitted)).

A pen register is "a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached." FLA. STAT. § 934.02(20) (Supp. 1988).

152. The court dispensed with the terminology familiar under fourth amendment analysis as follows:

> The words "unreasonable" or "unwarranted" harken back to the federal standard of "reasonable expectation of privacy," which protects an individual's expectation of privacy only when society recognizes that it is reasonable to do so. The deliberate omission of such words from article I, section 23, makes it clear that the Florida right of privacy was intended to protect an individual's expectation of privacy regardless of whether society recognizes that expectation as reasonable.

Id. at 524 (Ehrlich, C.J., concurring specially) (citation omitted in original).

153. *In re* T.W., 14 F.L.W. 497 (Fla. Oct. 5, 1989).

154. FLA. STAT. § 390.001(4)(A) (Supp. 1988). The statute provides, in part: "1. If the pregnant woman is under 18 years of age and unmarried, in addition to her written request [for an abortion], the physician *shall obtain the written informed consent* of a parent, custodian, or legal guardian of such unmarried minor . . . . " *Id.* (emphasis added).

155. 14 F.L.W. at 499 (quoting Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985)).

156. *Id.*

under the Florida Constitution and "state law grounds . . . cit[ing] federal precedent only to the extent" necessary to illuminate Florida law.[157]

In a courageous posture the court has opened the door for use of the Florida Constitution to protect privacy interests, despite the erosion of such protection under the United States Constitution. The ramification of these recent decisions is unclear as applied to Riley's case on remand. One issue is clear: The court has extended an invitation to argue some privacy claims under article one, section twenty-three.[158]

157. *Id.* at 501.

158. The court concluded its analysis in *Shaktman* by stating: " Personal and private information comes within the zone of privacy protected by article I, section 23 of the Florida Constitution." 14 F.L.W. at 524 (Ehrlich, C.J., concurring specially).