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California v. Ciraolo: Are the Protections of the Fourth Amendment Earthbound, 20 J. Marshall L. Rev. 343 (1986)

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CALIFORNIA V. CIRAOLO:* ARE THE PROTECTIONS OF THE FOURTH AMENDMENT EARTHBOUND?

Traditionally, the fourth amendment[1] has guaranteed citizens protection from warrantless[2] invasions of privacy[3] in their homes and the surrounding curtilage.[4] The United States Supreme Court

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* 106 S. Ct. 1809 (1986).

1. The fourth amendment provides that:

> 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 thing to be seized.

U.S. CONST. AMEND. IV. The fourth amendment is made applicable to the states through the due process clause of the fourteenth amendment. Wolf v. Colorado, 338 U.S. 25 (1949).

2. A warrant based on probable cause and issued by a detached judicial officer is required prior to a search, in the absence of exigent circumstances, or an exception to the warrant requirement. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). *See also* United States v. Van Dyke, 643 F.2d 992, 993 (4th Cir. 1981) (warrantless search of home or curtilage effected through trespass and absent exigency is *per se* unreasonable); *cf.* Johnson v. United States, 333 U.S. 10, 13-14 (1948). The *Johnson* Court stated:

> The point of the [f]ourth [a]mendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. . . . The right of officers to thrust themselves into a home is of grave concern, not only to the individual but in a society which chooses to dwell in reasonable security and freedom from surveillance. When the right to privacy must reasonably yield to the right of a search is, as a rule, to be decided by a judicial officer, not by a policeman or government agent.

Id. at 13-14.

3. The right to privacy in the sense of the fourth amendment is distinct from the four-branch tort action. *See* RESTATEMENT (SECOND) OF TORTS §§ 652A-652H (1976). Most states have adopted the four branches of tortious invasion of privacy which include actions for appropriation of name or likeness, public disclosure of private facts, publicity placing a person in a false light, and intrusion into seclusion. *See generally* W. KEETON, PROSSER AND KEETON ON TORTS, 117 (5th ed. 1985).

The fourth amendment "protects individual privacy against certain kinds of governmental intrusion, *but its protections go further*, and often have nothing to do with privacy at all." Katz v. United States, 389 U.S. 347, 350 (1967) (footnote omitted, emphasis added).

4. The traditional protection of one of the areas related to the home is the focus of much of this casenote. "Curtilage" has traditionally been extended the same protection under the fourth amendment as a person's house. Oliver v. United States, 466 U.S. 170, 180 (1984). Curtilage is defined as:

> A piece of ground commonly used with the dwelling house. A small piece of land, not necessarily enclosed around the dwelling house, and generally includes the buildings used for domestic purposes in the conduct of family affairs. A courtyard or the space of ground adjoining the dwelling house neces-

has set forth a two-prong test[5] to determine when surveillance constitutes an unreasonable search[6] under the fourth amendment.[7] The

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sary and convenient and habitually used for family purposes and the carrying on of domestic employments. A piece of ground within the common enclosure belonging to a dwelling house, and enjoyed with it, for its more convenient occupation.

For search and seizure purposes it includes those outbuildings that are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling that are necessary and convenient and habitually used for family purposes and carrying on domestic employment.

BLACK'S LAW DICTIONARY 346 (5th ed. 1979). For an excellent discussion of the common law origins of the curtilage concept and the protection accorded curtilage under the fourth amendment, see, *Comment, The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U.L. REV. 702, 728-35 (1985).

5. *See* Katz v. United States, 389 U.S. 347 (1967).

6. As used in fourth amendment law, the word "search" is a term of art. Search has been defined as:

[S]ome exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force. . . . A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view not a 'search.'

79 C.J.S. *Searches and Seizures* § 1 (1952). The concept of a search, given the construction and interpretation of the fourth amendment, acts as an "all or nothing" trigger. *See* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 2.1, 234 (1978) [hereinafter LAFAVE].

Professor Amsterdam has noted this phenomenon:

The fourth amendment, then, is ordinarily treated as a monolith: wherever it restricts police activities at all, it subjects them to the same extensive restrictions that it imposes upon physical entries into dwellings. To label any police activity a 'search' or a 'seizure' within the ambit of the amendment is to impose those restrictions upon it. On the other hand, if it is not labeled a 'search' or 'seizure,' it is subject to no significant restrictions of any kind. It is only 'searches' or 'seizures' that the fourth amendment requires to be reasonable; police activities of any other sort may be as unreasonable as the police please to make them.

Amsterdam, *Perspectives on the Fourth Amendment* 58 MINN. L.R. 349, 387 (1974) [hereinafter Amsterdam]. Given the fourth amendment's monolithic character, courts have recognized that the *Katz* test may be imperfect. *See infra* notes 7-9 and accompanying text. If a given government law enforcement technique becomes routine, it might be argued that an individual could not have had a subjective expectation that his privacy would be sacrosanct. The Supreme Court recognized this possibility in Smith v. Maryland, 442 U.S. 735 (1979), and promised an alternative:

Situations can be imagined, of course, in which *Katz'* two-pronged inquiry would provide an inadequate index of fourth amendment protection. . . . In such circumstances, where an individual's subjective expectations had been 'conditioned' by influences alien to well-recognized fourth amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of fourth amendment protection was. In determining whether a 'legitimate expectation of privacy' existed in such cases, a *normative* inquiry would be proper.

Id. at 740 n.5 (emphasis added). Arguably, the case which is the subject of this note occasioned the promised normative approach. *See supra* notes 121, 124-127 and accompanying text.

7. Prior to *Katz*, a physical trespass into a constitutionally protected area was

first query under this test is whether the person challenging the government's activity had subjective expectation of privacy in some area or activity.[8] If so, the second query is whether society is willing to recognize that expectation as reasonable.[9] The Supreme Court, however, in *California v. Ciraolo*, has considerably weakened this important interpretative devise.[10] In *Ciraolo*[11] the Court addressed the issue of whether the purposeful aerial surveillance of a fenced-in residential backyard constituted a search under the fourth amendment.[12] The Court held that aerial surveillance, even of enclosed curtilage,[13] is not unconstitutional.[14]

On September 2, 1982, a police narcotics officer received an anonymous tip that marijuana was being cultivated in a residential

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necessary before an illegal search could occur. *See* Olmstead v. United States, 277 U.S. 438 (1927). In *Katz*, F.B.I. agents wiretapped a public telephone booth without prior judicial approval, to gather evidence of illegal betting activity. *Katz*, 389 U.S. at 349. The trial court refused to suppress evidence of the defendant's covertly intercepted conversation because no physical trespass had occurred. *Id.* The *Katz* Court reversed the defendant's conviction and rejected the physical trespass doctrine. *Id.* at 351. The Court held that the fourth amendment protects people rather than areas, and that a search had occurred because government intruded into the privacy upon which the defendant had "justifiably relied." *Id.* at 353.

8. Although the majority in *Katz* did not propose a test to determine when a person could justifiably rely on privacy, Justice Harlan proposed a determinative test in his concurring opinion. *Id.* at 361. Justice Harlan's view is recognized as the rule of *Katz*. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 740 (1979). The first query under *Katz* is whether the person challenging the government's activity had an actual (subjective) expectation of privacy in some area or activity. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Although the inquiry is into the defendant's subjective state of mind, it is an objective test similar to the "reasonable man" standard applied in tort cases. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (defendant failed to exhibit an expectation of privacy where he failed to take "normal precautions to maintain his privacy").

9. *Katz*, 389 U.S. at 361, (Harlan, J., concurring). The inquiry in this second prong is whether the police activity in question impinges on personal and societal values essential to life in a free an open society. Rakas v. Illinois, 439 U.S. 128, 143 (1978). In discussing whether society views a privacy expectation as "reasonable," the words "reasonable," "legitimate," and "justifiable" are used interchangeably. Smith v. Maryland, 442 U.S. 735, 740 (1979).

The adoption of the two prong test of *Katz* has been broadly criticized as too formulaic, misguided because the *Katz* majority, in rejecting the "talismanic" trespass doctrine, did not intend to embrace a talismanic formula to gauge privacy. *See, e.g*, Amsterdam, *supra* note 6, at 385. *See also* LAFAVE, *supra* note 6, at 227-234.

10. 106 S. Ct. 1809 (1986). Also in danger in a social attitude; whether citizens may conduct outdoor activities without fear of constant government surveillance.

The fear that technological advances might allow a government so inclined to spy on the activities of its citizens, and thereby usurp their freedom, has been the subject of modern literature. *See, e.g.*, G. ORWELL, NINETEEN EIGHTY FOUR (1949).

11. 106 S. Ct. at 1810.

12. In its grant of certiorari, the Court expressly limited argument to this issue. California v. Ciraolo, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984), *cert. granted*, 105 S. Ct. 2672 (1985).

13. *See supra* note 4.

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

neighborhood.[15] Because Dante Ciraolo's yard was enclosed with a six foot outer-fence and a ten foot inner-fence, the investigating officer was unable to see into it.[16] Consequently, two officers chartered an airplane to view Ciraolo's yard from the air.[17] At an altitude of 1,000 feet, the officers were able to visually[18] identify and photograph[19] marijuana growing within Ciraolo's enclosed yard.[20] A search warrant was issued based on the informant's tip and the officers' aerial observations.[21] Subsequently, the police executed the warrant and seventy-three marijuana plants were seized.[22] Police arrested Ciraolo and charged him with cultivation of marijuana.[23]

At trial, Ciraolo moved to suppress the introduction into evidence of the marijuana plants, contending that the aerial surveillance of his yard constituted a warrantless search in violation of the fourth amendment[24] and that the plants were inadmissible "fruits"[25] of an illegal search.[26] The trial court denied Ciraolo's motion to sup-

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15. The tip read "Can see grass growing in yard. Stebbins by Clark, S/B on left." Respondents Brief at 2, California v. Ciraolo, 106 S. Ct. 1898 (1986) (No. 84-1513).

16. *Ciraolo*, 106 S. Ct. at 1810. The tip did not provide a specific address. *See supra* note 15. Apparently, the officer became suspicious of Ciraolo's yard for the very reason that fences made it private. In his affidavit in support of the warrant the officer stated that the inner fence was built up to its ten foot height with the addition of bamboo stakes. Joint Appendix at 11-12, California v. Ciraolo, 106 S. Ct. 1809 (1986) *reh'g, denied* 106 S. Ct. 3320 (1986). The officer related his experience of marijuana cultivators building up their fences to avoid their contraband being spotted. *Id.*

17. The two officers were experts in aerial identification of marijuana. *Ciraolo*, 106 S. Ct. at 1809.

18. The officers did not use any device to aid their vision. In other aerial surveillance cases airborne police have augmented their senses through the use of ordinary or gyrobinoculars. Gyrobinoculars compensate for the vibration of an aircraft to facilitate efficacious spying. *See, e.g.*, People v. St. Amour, 104 Cal. App. 3d 886, 163 Cal. Rptr. 187 (1980) (officer used regular and gyrobinoculars to enhance his vision from an altitude of 1000-1500 feet).

19. Photographs were taken with a standard 35 mm camera. A developed photograph was attached to the request for a warrant, but not relied upon in issuing the warrant. *Ciraolo*, 106 S. Ct. at 1812. The photo did not reveal the distinctive color of the plants, and thus the trial court considered the officers' visual observations rather than the photograph. *Id.* Because the parties did not raise the issue of the propriety of aerial photography coupled with aerial surveillance, the Supreme Court circumscribed its analysis accordingly. *Id.*

20. *Ciraolo*, 106 S. Ct. at 1810-11.

21. *Id.* at 1811.

22. *Id.*

23. *Id.*

24. *Id.*

25. The "fruit of the poisonous tree" doctrine was originated in Nardone v. United States, 308 U.S. 338 (1939). Under the doctrine, evidence obtained as the result of illegal conduct or an unlawful search is inadmissible unless the state can show that the evidence was gotten through means independent of the illegality. Wong Sung v. United States, 371 U.S. 271, 273 (1963). The doctrine is made applicable to the states through the due process clause of the fourteenth amendment. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

26. *Ciraolo*, 106 S. Ct. at 1811.

press, and Ciraolo pleaded guilty to cultivation of marijuana and was convicted.[27]

The California Court of Appeals reversed Ciraolo's conviction.[28] In so doing, the court applied the two prong test set forth in *Katz*,[29] but failed to distinguish between, and separately apply the two prongs of the test.[30] In addition to implicitly finding that Ciraolo had an actual expectation of privacy which society is prepared to honor,[31] the court relied heavily on the Supreme Court's recent reaffirmation of the curtilage doctrine.[32] Finally, the court of appeals found it significant that the officers' search for evidence was a deliberate attempt to circumvent the obstacle of the fence and the warrant requirement, rather than an inadvertant discovery made while on a routine patrol.[33]

The United States Supreme Court granted the state's petition for certiorari, but limited argument to the issue of whether police aerial surveillance of a fenced-in residential yard constitutes a search under the fourth amendment.[34] The Supreme Court, with four Justices dissenting,[35] held that the warrantless aerial surveillance of Ciraolo's curtilage did not constitute a search under the fourth amendment.[36] Writing for the Court, Chief Justice Burger ap-

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27. *Id.* Ciraolo was charged with and plead guilty to feloniously cultivating marijuana, a violation of CAL. HEALTH & SAF. CODE, §§ 11358, 11360(a).

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

29. The court cited *Katz* for the proposition that "the fourth amendment protects people, not places" and that "what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 1088, 208 Cal. Rptr. 93, 96 (1984) (quoting Katz v. United States, 389 U.S. 347, 351-52 (1967)).

30. Apparently the appellate court found the officers' aerial surveillance so heinous as not to require careful analysis under both prongs of the *Katz* test. "[The] defendant's backyard is within the curtilage; the height and existence of the two fences constitute objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard." *Id.* at 1089, 208 Cal. Rptr. 93, 97 (1984).

31. *Id.*

32. *Id.* at 1087, 208 Cal. Rptr. 93, 96 (1984). The appellate court relied on the Supreme Court's apparent reaffirmation of the curtilage doctrine in Oliver v. United States, 466 U.S. 170 (1984). *See infra* notes 77-81 and accompanying text. The court also read federal aerial surveillance decisions as distinguishing between curtilage and non-curtilage observations. People v. Ciraolo, 161 Cal. App. 3d 1081, 1088-89, 208 Cal. Rptr. 93, 97 (1984). For a discussion of these cases, see *infra* notes 103-105 and accompanying text.

33. People v. Ciraolo, 161 Cal. App. 3d 1081, 1089, 208 Cal. Rptr. 93, 97 (1984). The court characterized the officers' conduct as a "direct and unauthorized intrusion into the sanctity of the home" and stated that "[a] person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy regarding the activities occurring there in all circumstances." *Id.* at 1089-90, 208 Cal. Rptr. 93, 97-98 (1984) (citations omitted).

34. *See supra* note 12.

35. Justice Powell authored the dissent in which Justices Brennan, Marshall, and Blackmun joined. *Ciraolo*, 106 S. Ct. at 1814-19.

36. *Id.* at 1813.

plied the two-prong test of *Katz v. United States*.[37] Conceding that Ciraolo *may* have manifested a subjective expectation of privacy,[38] the Court held that his expectation was unreasonable and one which society does not recognize as legitimate.[39]

The Court began its analysis with an inquiry into whether a constitutionally protected expectation of privacy had been invaded.[40] In order to determine this, the Court applied the two-prong test of *Katz*.[41] The Supreme Court did not disturb the court of appeals' finding that Ciraolo manifested an expectation of privacy from *street level* views.[42] Although the Court conceded that Ciraolo's conduct satisfied the first prong of *Katz*, the Court did question whether Ciraolo indeed had a subjective expectation that his yard would not be viewed from some other vantage point.[43]

Having dispensed with the first prong of *Katz* the Court proceeded to impale Ciraolo and his claim with the second prong.[44] In judicial pursuit of what society recognizes as reasonable, the Court

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37. *Id.* at 1811-13. For a discussion of the *Katz* test see *supra* notes 7-9 and accompanying text.

38. For a discussion of the Court's analysis utilizing the first prong of the *Katz* test, see *infra* notes 69-71 and accompanying text.

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

40. *Id.* at 1811. *See also*, *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

41. *Ciraolo*, 106 S. Ct. at 1811. *See supra* notes 7-9 and accompanying text.

42. *Ciraolo*, 106 S. Ct. at 1811. Because the state did not contest the court of appeals' finding that Ciraolo had a subjective expectation of privacy, the Supreme Court did not feel compelled to disturb it.

43. The Court questioned whether Ciraolo actually expected (or merely hoped) that a citizen or policeman on top of a truck or two-level bus would not view his yard, or perhaps a repairman on a telephone pole. *Id.* at 1812-13. For an analysis of this reasoning see *infra* notes 69-71 and accompanying text.

44. In determining what expectations society recognizes as "reasonable" or "legitimate" the Court stated that the relevant inquiry is "[w]hether the government's intrusion infringes upon the personal and societal values protected by the fourth amendment." *Ciraolo*, 106 S. Ct. at 1812 (quoting Oliver v. U.S., 466 U.S. 170, 182-183 (1984)). *See also* Rakas v. Illinois, 439 U.S. 128 (1978), where the Court stated:

> Legitimation of expectations of privacy by law *must have a source outside the fourth amendment*, either by reference to concepts of real or personal property law or to *understandings that are recognized and permitted by society*. One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy protected by the fourth amendment, of course, need not be based on a common law interest in real or personal property, or on the invasion of such an interest. These ideas were rejected. . . [by] *Katz*. But by focusing on legitimate expectations of privacy in fourth amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that amendment.

Id. at 143 (emphasis added).

It is clear that in determining what society is willing to recognize as reasonable, the Court relies even in the post-*Katz* era on privacy expectations associated with possession of property. Further, the language in *Rakas* makes it clear that the Court recognizes that tapping society's pulse calls for the Court to make a value judgment.

turned to the curtilage doctrine[45] for instruction.[46] The Court agreed that Ciraolo's yard was within the curtilage of his home.[47] The Court reaffirmed that the curtilage is a place, like the home, where privacy expectations are heightened.[48] Nevertheless, the Court held that even though a person has taken reasonable steps to protect his curtilage from *some* views, that *all* observations of curtilage are not therefore foreclosed.[49] The Court held that if the curtilage observed is in "open view,"[50] the observation does not constitute an illegal search.[51]

The Court then applied this open view rationale to the challenged police conduct, and held that society does not recognize as reasonable an expectation that police will not surveil what is in open view from the air.[52] In so deciding, the Court relied on several factors which brought the challenged aerial surveillance within an open view analysis. First, the police conducted their surveillance from a public vantage point, the airspace, where they had a right to be.[53] Second, any member of the public could have seen what the officers saw.[54] Finally, the Court noted that the police observation was conducted from an altitude which rendered it physically nonintrusive.[55]

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45. *See supra* note 4.

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

47. *Id.*

48. The Court's reaffirmation of the curtilage doctrine seems unequivocal:

> [T]he curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' *The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.*

Id. (emphasis added, citations omitted).

49. *Id.*

50. An understanding of the open view doctrine is crucial to understanding the Court's reasoning in this case. In the open view situation the officer is able to see an object or activity from a public vantage point, which any reasonably curious member of the public could have seen. Under the open view doctrine, inadvertance is not required and no search is involved. State v. Stachler, 58 Haw. 412, 415-416, 570 P.2d 1323, 1326-27 (1977).

Courts often confuse the open view concept with the concept of "plain view." In the plain view situation there is (1) a prior valid intrusion (e.g., a search conducted pursuant to a warrant, or without a warrant under exigent circumstances); (2) the discovery of the items must be inadvertent; and (3) it must be obvious to the officer that evidence is in front of him. LAFAVE, *supra* note 6, at 242.

Where it is evident that a court has applied the open view analysis, but mistakenly referred to its reasoning as plain view, this casenote refers to that court's reasoning as if they utilized the appropriate term.

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

52. *Id.* The Court decided that despite Ciraolo's efforts to preserve his privacy, there is no precluding a police officer from viewing that which is plainly visible from a public vantage point where the officer had a right to be. *Id.* at 1812.

53. *Id.* at 1813. *See infra* notes 88-90 and accompanying text.

54. *Ciraolo*, 106 S. Ct. at 1813. *See infra* notes 91-93 and accompanying text.

55. *Ciraolo*, 106 S. Ct. at 1813. *See infra* notes 94-97 and accompanying text.

While applying the test of *Katz*, the Court distinguished *Katz* on its facts. The Court stated that *Katz* was concerned with developments in technology that allowed intrusions into communications, rather than with "simple" observations conducted from public places.[56] The Court concluded its opinion noting that expectations of privacy from aerial observation are unreasonable because air travel has become routine.[57]

The *Ciraolo* Court's reasoning is unpersuasive and its holding untenable for three reasons. First, the Court's holding repudiates the letter and spirit of *Katz* and its progeny, and is irreconcilable with the Court's own recent precedents.[58] Second, in extending the open view doctrine[59] to the airways, the Court relied on factors largely irrelevant to determining whether a reasonable privacy interest has been invaded.[60] Finally, the Court declined to analyze an emerging body of aerial surveillance case law, thereby ignoring the fact that most courts have distinguished aerial observations of "open fields"[61] from focused aerial surveillance of curtilage.[62]

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

57. The Court stated: *"In an age* where private and commercial flight is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1000 feet." *Id.* (emphasis added). This reasoning is dangerous because of the implication that as technology advances, and its presence becomes routine, that expectations of privacy must shrink in direct proportion to those advances. Before aircraft were used as a law enforcement tool, a citizen could be secure in the knowledge that he was not under covert surveillance in the confines of his own walled yard. *Ciraolo* allows police use of technology to force citizens indoors behind tightly shuttered windows if they wish to be out of the government's eye.

58. *See, e.g.*, Dow Chem. Co. v. United States, 106 S. Ct. 1819, 1826 (1986) (finding it "important" that petitioner's aerially surveyed property was not curtilage); *See also* Oliver v. United States, 466 U.S. 170, 179-180 (1984) (reaffirming that curtilage is a place where expectations of privacy are legitimate). *See infra* notes 77-86 and accompanying text.

59. *See supra* note 50 and accompanying text.

60. *Ciraolo*, 106 S. Ct. at 1811. The Court, in extending the open view doctrine to the airways, relied on (1) the officers' conducting their surveillance from a public vantage point, where police had a right to be; (2) the general public could have seen what the officers saw; and (3) the officers' conducted their surveillance from a sufficient attitude to be physically non-intrusive.

61. The "open fields" doctrine was first set forth in Hester v. United States, 265 U.S. 57 (1924). A unanimous Court held that the protections of the fourth amendment do not extend to open fields. *Id.* at 59. It appears to be a *per se* rule after *Oliver* that one cannot legitimately expect privacy in activities conducted out of doors in open fields. *Oliver*, 466 U.S. at 178 (1984). The *Oliver* Court stated: "[T]he rule of *Hester*. . . that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, *except in the area immediately surrounding the home." Id.* (emphasis added). The open fields rule is said to be compatible with the meaning of *Katz* because there is no societal interest in preserving privacy in the type of activities normally conducted in open fields, such as the cultivation of crops. *Id.* at 179.

According to the *Oliver* Court, anything outside of the curtilage has generally been held to be within open fields. The Court stated:

It is clear, however, that the term 'open fields' may include any unoccupied or

One hundred years ago, the Supreme Court in *Boyd v. United States*[63] recognized that the right to privacy and citizen's interest in security from government intrusion are the interests protected under the fourth amendment.[64] In the spirit of *Boyd*,[65] and faced

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undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech. For example. . . a thickly wooded area nonetheless may be an open field as that term is used in construing the fourth amendment.

Id. at 180. *See* U.S. v. Knotts, 460 U.S. 276 (1983) (holding that the warrantless monitoring of an electronic transponder in a can of chloroform was not a search, where the container was transported on *public roads* to a secluded cabin; the fact that the chloroform was transported through public demenses and monitored outside the cabin was held to be sufficiently analagous to open fields). *See generally* LAFAVE, *supra* note 6, at 331-338 (defining the open fields concept and questioning the wisdom of its application as *per se* rule in the post-*Katz* era).

62. *See infra* notes 103-120 and accompanying text.

63. Boyd v. United States, 116 U.S. 616 (1886).

64. The *Boyd* Court recognized that the constitution must be interpreted in light of contemporary norms and conditions to avoid "stealthy encroachments" upon citizens' constitutional rights, and that physical invasion of property may be just a symptom of aggravation. The *Boyd* Court stated:

The principles laid down in this opinion effect the very essence of constitutional liberty and security. [T]hey apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of a man's doors, and the rummaging of his drawers, that constitutes the essence of the offense; but *it is the invasion of his indefeasible right of personal security, personal liberty, and private property.* . . [b]reaking into a house and opening boxes and drawers are circumstances of aggravation. . .It may be that it [the search in Boyd] is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction, deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted ;more in sound that in substance.

Id., at 630-635 (emphasis added).

In Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, Holmes, Butter, and Stone, J.J., dissenting) *overruled* Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring), Justice Brandeis enunciated a stirring interpretation of the fourth amendment and a prediction that has proved to be prophetic:

[T]his Court has repeatedly sustained the exercise of power by Congress, under various clauses of [the constitution] over objects of which the fathers could not have dreamed. . . . [A] principal to be vital must be capable of wider application than the mischief that gave it birth. This is particularly true of constitutions. . . . Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in Court of what is whispered in the closet. . . . The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. . . . Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

Id. at 472-479 (footnotes omitted). *But cf.* United States v. Knotts, 460 U.S. 276, 282-284 (1983).

Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police effi-

with governmental use of technology that permitted invasions of privacy without the necessity of physical trespass, the *Katz* Court developed the flexible standard of *Katz*.[66] The focus of *Katz* is to concentrate not on the *manner* in which police gather evidence, but on whether government action jeopardizes personal and societal privacy interests.[67] In *Ciraolo* the Court misapplied the *Katz* test. Aerial surveillance of a place where privacy is reasonably expected constitutes use of physically non-intrusive investigatory methods to probe private matter, and consequently is a practice which *Katz* condemns.[68]

In applying the first prong of the *Katz* test the Court correctly found that Ciraolo had an actual expectation that his curtilage would not be subjected to a street level search.[69] The Court's questioning whether Ciraolo had an actual expectation that his yard would not be surveilled from some other vantage point, however is an example of sophistic and unjustified reasoning.[70] Considered with

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ciency with unconstitutionality, and we decline to do so now. . . *Nothing in the fourth amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.*

Id. (emphasis added).

65. Boyd v. United States, 116 U.S. 616 (1886).

66. *See supra* notes 5-9 and accompanying text.

67. "[O]nce it is recognized that the fourth amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of the amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz*, 389 U.S. at 354. *See also* Oliver v. United States, 466 U.S. 170, 182-183 (1984). In *Oliver* the Court stated that "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.* (footnote omitted, emphasis added).

According to Professor Amsterdam:

> The fourth amendment protects not against incrimination, but against invasions of privacy—or rather, as *Katz* holds, of the right to maintain privacy without giving up too much freedom as the cost of privacy. . . the ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That, in outright terms is the judgment lurking underneath the Supreme Court's decision in *Katz*.

Amsterdam, *supra* note 6, at 403.

68. *See supra* note 67.

69. *Ciraolo*, 106 S. Ct. at 1811-12.

70. In constructing a double privacy fence, Ciraolo did all that could reasonably be done to maintain the privacy of his curtilage. To build a dome over his yard or to cover it with camoflage netting would have destroyed its utility. Police did not conduct their surveillance, as the Court hypothesized they might have, from the top of a truck, a bus or a telephone pole. This is not a case where police spotted something a neighbor or repairman might reasonably have been expected to see. The police did not observe Ciraolo's yard from any position on *terra firma* consistent with the Court's hypotheticals. Had police been able to conduct their surveillance in such a

the Court's application of the second prong of *Katz*, the Court's questioning whether Ciraolo had an expectation that his yard would remain unseen from other than street level seems like a guileful foundation for the Court's open view denouement.[71] The Burger Court consummated its subtle repudiation of *Katz* in its application of *Katz's* second prong.[72] The Court adulterated a flexible Warren Court standard, designed to adapt to new means of government intrusion into privacy in using the *Katz* standard as a funnel for an apparent anti-criminal-defendant bias.[73]

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manner the use of technology, i.e., an aircraft, would not have been in issue.

Utilizing the Court's rationale and applying it to the facts of *Katz*, one might question whether the *Katz* defendant whose conversation was wiretapped had an expectation of privacy in a public phone booth. *See supra* note 7. Being in public view, someone might have walked past and overheard, or a lip reader may have viewed him (a deaf person or a police expert perhaps). But what actually happened is that police used technology to put themselves into a position to gather evidence of what was justifiably expected to be private. The Court's reasoning in *Ciraolo* provokes speculation whether *Katz* would be decided in the same way today, were it a case of first impression.

71. *See supra* note 70.

72. Professor Westin's observations are instructive in discussing the Court's application of a second prong of Katz: "The modern totalitarian state relies on secrecy for the regime, but high surveillance and disclosure for other groups. . . . The democratic society relies on publicity as a control over government, and on privacy as a shield for group and individual life." P. WESTIN, PRIVACY AND FREEDOM (1967) 23-24 (footnote omitted).

73. One commentator has observed and aptly described the Burger Court's misuse of Warren Court tests:

> The Warren Court explained neither what it meant by privacy, nor why, and in what contexts, privacy should be accorded fourth amendment protection at all. Yet without some explanation of how privacy relates to more ultimate individual and societal goals and values, and of how the fourth amendment furthers these interests by protecting privacy, there is no principled way to decide what makes a reliance on privacy 'justifiable,' or an expectation of privacy 'reasonable.'
>
> As a result, these formulas are now little more than readily manipulable cant; a 'legitimate' expectation of privacy is simply one which a majority of the Court wants to accord fourth amendment protection. As the Court now seeks to give the police a freer hand, it has not found it difficult to explain why for one reason or another the defendant could not 'reasonably,' 'justifiably,' or 'legitimately' have expected that his activities would remain undisclosed. Thus, far from proving an impediment to expanding the unregulated investigative powers of the police, *Katz* has supplied the Burger Court with a handy verbal formula for exempting a variety of intrusive law enforcement practices not only from the warrant and probable cause requirements, but from all fourth amendment restraints.
>
> So far, then, the Burger court has been able to alter substantially the course of substantive fourth amendment law charted for it by the Warren Court, just as it has been able to narrow the thrust of the exclusionary remedy, by boring from within.

Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 270-272 (1984) (footnotes omitted). *But see* Harris, *The Return to Common Sense: A Response to "The Incredible Shrinking Fourth Amendment,"* 22 AM. CRIM. L. REV. 26 (1984) (arguing primarily against the exclusionary rule, and that rather than working from an anti-criminal defendant bias, the Court is actually returning to common law principles known to the framers, and thus to "common sense").

In attempting to tap society's pulse to determine whether society views an expectation of privacy from aerial surveillance as reasonable, the Court correctly turned to the curtilage doctrine for instruction.[74] The fourth amendment has traditionally protected curtilage to the same extent as a residence,[75] while "open fields' "[76] have been held to be outside the amendment's protection. Examining the treatment of the curtilage doctrine in recent Supreme Court decisions facilitates understanding of the Court's holding in *Ciraolo.* In *Oliver v. United States,*[77] police purposefully trespassed on secluded and posted private property and discovered marijuana.[78] No aerial surveillance was conducted, but the Court noted that, short of physical trespass, aerial surveillance would have been officers' only means of viewing the property.[79] The *Oliver* Court reaffirmed the open fields doctrine.[80] Reasoning that the open fields doctrine survived *Katz,* the Court relied heavily on the curtilage doctrine.[81] In effect, the Court, in reaffirming the curtilage doctrine, used the doctrine as a spade to bury the open fields defendant of *Oliver.*

Similarly, in *Dow Chemical Company v. United States,*[82] the companion case to *Ciraolo,*[83] the Court purported to again reaffirm the curtilage doctrine, and did so in unequivocal terms.[84] The Court

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74. *Ciraolo,* 106 S. Ct. at 1812. *See supra* note 4.

75. *See, e.g.,* United States v. Van Dyke, 643 F.2d 992 (4th Cir. 1981) (surveillance of defendant's activities in the area surrounding his home from a position within the bounds of the curtilage held a search).

76. *See supra* note 61.

77. 446 U.S. 170 (1984).

78. *Id.* at 173-176.

79. The parties in *Oliver* conceded that the police may survey land from the air, and the Supreme Court agreed. *Id.* at 179. It is important to note the distinction between lands' (implying open fields) and curtilage. Furthermore, the implication that police could aerially survey *lands* does not translate into a justified blanket rule of constitutional law that all aerial surveillance is legitimate, given the *Oliver* Court's reaffirmation of the curtilage doctrine.

80. *Id. See supra* note 61.

81. The *Oliver* Court held that individuals can legitimately expect privacy in outdoor activities only in the area immediately surrounding the home, and pointedly distinguished curtilage from open field. *Oliver,* 466 U.S. at 178-180. The Court noted that the curtilage is an area traditionally associated with intimate and private family activities. *Id.* The Court also stated that curtilage is in effect an extension of the home, and noted that it was recognized as such at common law. *Id.*

In contrast, the Court noted that open fields are not the location for intimate family activities, and held that society does not recognize as reasonable an expectation of privacy in the activities that traditionally take place in open fields, *e.g.,* the cultivation of crops. *Id.*

82. 106 S. Ct. 1819 (1986).

83. *Dow* and *Ciraolo* are both aerial surveillance cases, the only such cases heard by the Supreme Court. Oral argument was heard in each case on December 10, 1985, and both decisions were handed down on May 19, 1986.

84. In *Dow,* the E.P.A. subjected the company's 2,000 acre plant to aerial surveillance from altitudes of 1,200, 3,000 and 12,000 feet. *Id.* at 1823. A state-of-the-art aerial mapping camera was used to photograph the plant, yielding high resolution photographs which exposed minute details of activity at the plant. *Id.* at 1829. Dow

defined curtilage as an area where intimate family activities take place, and where expectations of privacy are legitimate.[85] The Court then distinguished Dow's manufacturing complex from curtilage, and analogized it to open fields, because of the absence of intimate family activities.[86]

In both *Oliver* and *Dow*, the Court proclaimed that the curtilage attaches legitimate expectations of privacy. In both cases, the Court used the curtilage/non-curtilage distinction to deny the non-curtilage parties' claims. For the Court to proclaim that the curtilage carries with it a legitimate expectation of privacy, and then subsequently withdraw all meaningful protection in the next reported decision, is casuistry unworthy of the Supreme Court. Given the Court's holding in *Ciraolo*, any purported protection of the curtilage is destroyed as it is practically impossible to conduct any activity in the curtilage which is not observable from the air.

In addition to ignoring the rule of law set forth in *Oliver* and *Dow*, the Court decided Ciraolo's case based on factors which are largely irrelevant in determining whether a reasonable expectation of privacy in curtilage has been invaded.[87] The Court's reliance on the availability of the airspace to the general public for routine air travel is one such factor. Undoubtedly, police have the same right to use the airspace as the general public, but one must question a police right to utilize the airspace for activities inconsistent with the fourth amendment. In *Ciraolo*, the question is not what the officers *could* see, but whether they had a right, without a warrant, to see it.[88] In *Ciraolo*, the officers took to the airways for the express purpose of viewing that which was prohibited, absent a search warrant, from their viewing on the ground. Had officers physically climbed over Ciraolo's fence without a warrant, it almost certainly would have been held an unconstitutional search.[89] In effect, the officers

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brought suit to enjoin the overflights and gain possession of the photos. *Id.* at 1822. Dow prevailed at the trial level, but the Supreme Court held that the aerial surveillance and photography did not constitute a search. *Id.* at 1827.

85. The Court used the curtilage doctrine as a lever to pry apart Dow's claim, stating that: "The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants *have a reasonable and legitimate expectation of privacy that society is prepared to accept.*" *Id.* at 1825. (emphasis added).

86. *Id.* at 1824-27.

87. *See supra* note 60.

88. *See, e.g.*, People v. Cook, 41 Cal. 3d 373, 221 Cal. Rptr. 499, 710 P.2d 299 (1985) (purposeful aerial surveillance of area within curtilage held an unconstitutional search); People v. Agee, 153 Cal. App. 3d 1167, 200 Cal. Rptr. 827 (1984) (random aerial surveillance of curtilage and non-curtilage property held an unconstitutional search).

89. *See, e.g.*, U.S. v. Taborda, 635 F.2d 131 (2d Cir. 1980) (held a search where an officer used a telescope to view defendant's activities through his open apartment window); *accord* U.S. v. Kim, 415 F. Supp. 1252 (D. Haw. 1976) *See also* State v.

used the aircraft to jump the fence, and the Supreme Court has sanctioned this behavior. That police have discovered the utility of aircraft for surveillance, and that the airspace is in the public domain, is not a satisfactory explanation of why a privacy expectation worthy of protection from ground surveillance loses its sanctity when viewed from the air. Furthermore, if police randomly or systematically surveil curtilage from the airways, their conduct is akin to a general search.[90]

The second premise the Court relied on in implementing its open view analysis is that any member of the public utilizing the airways could have seen what the officers saw. This statement is facially attractive and perhaps true. However, merely because a citizen is forced to put up with the occasional glance of his fellow citizen at the general panorama below, he should not be held to assume the risk that airborne officers will purposefully and intensely surveil his yard.[91] The fourth amendment was designed to protect persons not from fellow citizens, but from government.[92] Because a necessary opening above the curtilage is left for light and air, a citizen should not be forced to give up what has traditionally been held a reasonable expectation of privacy.[93]

Kender, 558 P.2d 447 (Haw. 1976). In *Kender*, police investigating an anonymous tip that marijuana was being cultivated outdoors were unable to see into the suspect curtilage because it was effectively screened with dense vegetation. *Id.* at 448. With permission, officers entered the neighboring yard. *Id.* Still unable to see, one of the officers climbed three quarters of the way up a fence separating the yards, supporting himself on his fellow officer's shoulder. *Id.* at 449. From this vantage point, and with the aid of a telescope, the officer was able to observe marijuana growing in the suspect's yard. *Id.* Applying the two prong text of *Katz*, the Supreme Court of Hawaii found that the officer's surveillance constituted an illegal search. *Id.* at 451.

90. *See generally* People v. Agee, 153 Cal. App. 3d 1167, 200 Cal. Rptr. 827 (1984). One of the driving forces behind the fourth amendment at its inception was the abuse of "general warrants." 68 AM. JUR. 2d *Searches and Seizures* §§ 3-4 (1973). These warrants allowed general and indiscriminate searches. *Id.* Outrage at the lack of security from having one's property searched was one of the causes of the American Revolution, and spurred the fourth amendment's requirement that a warrant be based on probable cause and describe particularly the place to be searched. *Id.*

91. *Ciraolo*, 106 S. Ct. at 1818 (Powell, J., dissenting) (arguing that the Court should be more sensitive in imposing an assumption of the risk of surveillance on citizens in a free and open society). *See* Smith v. Maryland, 442 U.S. 735, 749-750 (1979) (Marshall, J., dissenting).

> Privacy is not a discrete commodity, possessed absolutely or not at all. . . . Implicit in the concept of assumption of risk is some notion of choice. . . . since it is the task of the law to form and project, as well as mirror and reflect, we should not. . . merely recite. . . . risks without examining the desirability of saddling them upon society.

Id.

92. *See, e.g.*, People v. Cook, 41 Cal. 3d 373, 221 Cal. Rptr. 499, 504 (1985).

93. While the open view doctrine is reasonable when applied to observations conducted from earthbound locations, it becomes patently unreasonable when extended to the airways. After *Ciraolo*, citizens assume the risk that they will be aerially surveilled even in private enclaves if they leave open an aperature through which they might be viewed. A patio enclosed in a Spanish style house or a skylight are now

Another facially appealing factor on which the *Ciraolo* Court relied was that the officers' surveillance was conducted from sufficient altitude to be physically non-intrusive.[94] Under *Katz*, whether police activity is physically intrusive or whether a physical trespass has occurred is largely irrelevant to the question of whether a protected privacy interest has been invaded.[95] *Katz* focuses on the privacy interest of the citizen, not on the *manner* in which police gleened information.[96] The conduct prohibited in *Katz*, a warrantless wiretap, may be analogized to the conduct permitted in *Ciraolo*. While being wiretapped, a subject probably does not know he is being spied on, and he does not own the wire telephone lines. Although a wiretap is physically non-intrusive and is accomplished without a trespass on the subject's property, a privacy interest is invaded.[97] Similarly, when aircraft pass at 1,000 feet over a subject's yard, he probably does not know he is being spied on, and he certainly does not own the airspace. However, the individual's privacy interest in a place or an activity should not depend on whether he is observed from ground level, two feet, or two miles. Viewed this way, low altitude, physically intrusive aerial surveillance is only an aggravating factor in the invasion of a privacy interest. Surveillance conducted from a greater and therefore physically non-intrusive altitude, is no less an invasion of a privacy interest. *Katz* repudiated the outdated physical trespass doctrine;[98] *Ciraolo* is an untimely step toward its resurrection.

It is noteworthy that in its two aerial surveillance cases, *Ciraolo* and *Dow*, the Supreme Court chose not to discuss or cite a single aerial surveillance case decided in any lower court.[99] Although police use of aircraft to conduct surveillance is a relatively novel phenomenon for the courts,[100] several federal and state courts have consid-

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licenses for police to look in. Brief for Respondent at 13, California v. Ciraolo, 106 S. Ct. 1809 (1986) (No. 84-1513) *reh'g denied*, 106 S. Ct. 3320 (1986).

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

95. "Whether or not a search has occurred cannot turn upon the presence or absence of physical intrusion." *Katz*, 389 U.S. at 353.

96. *Ciraolo*, 106 S. Ct. at 1817 (Powell, J., dissenting) "Reliance on the *manner* of surveillance is directly contrary to the standard of *Katz*, which identifies a constitutionally protected privacy right by focusing on the interests of the individual and of a free society." *Id.*

97. *Katz*, 389 U.S. 347 (1967).

98. *See supra* note 7.

99. The only aerial surveillance case cited in *Ciraolo* is *Dow*, and *vice versa*. *Ciraolo*, 106 S. Ct. at 1813-14; Dow Chem. Co. v. United States, 106 S. Ct. 1819, 1824 (1986).

100. The first reported a aerial surveillance case was People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146, *reh'g denied* (Aug. 16, 1973), *disapproved of* People v. Cook, 41 Cal. 3d 373, 221 Cal. Rptr. 499.

In 1985 the Drug Enforcement Administration hosted twenty-five marijuana eradication seminars. 931 officers from state and federal agencies attended these seminars, which generally included a block of instruction on aerial detection and photog-

ered the constitutionality of aerial surveillance.[101] In ignoring this emerging body of case law, the Supreme Court ignored the reasoning that led many other courts to distinguish between observations of open fields and of curtilage. Additionally, the Court ignored well reasoned opinions, decided on similar facts, which reached conclusions opposite that of *Ciraolo*.[102]

Only two federal courts previously upheld aerial surveillance of areas including curtilage.[103] Other federal courts have carefully distinguished observation of curtilage from open fields observation.[104] Still other federal courts have sustained aerial surveillance utilizing an open fields analysis, where the aerial surveillance did not include observation of curtilage areas.[105]

Much like the federal courts, state courts have considered the following factors in analyzing aerial surveillance cases: 1) the frequency of overflights in the area observed;[106] 2) the altitude of the

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raphy. The D.E.A. aviation unit alone flew 484 missions, totalling 1,318 flying hours. *See* U.S. DEPT. OF JUSTICE, 1985 DOMESTIC CANNABIS ERADICATION SUPRESSION PROGRAM FINAL REPORT, iii, 16-17 (1985).

101. *See infra* notes 102-119 and accompanying text.

102. *See, e.g.*, People v. Cook, 41 Cal. 3d 373, 221 Cal. Rtpr. 499 (1985) *reh'g denied* (Feb. 14, 1986).

103. U.S. v. Allen, 675 F.2d 1373 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981). In *Allen*, Coast Guard helicopters conducted aerial surveillance of a 200 acre ranch, and ultimately interdicted a large scale drug-smuggling operation. *Id.* Although the *Allen* court did not discuss the curtilage concept, several factors were held to militate against a finding that the *Allen* defendant had a reasonable expectation of privacy. The Allen ranch was "virtually on" the U.S. seacoast border, the federal government was Allen's neighbor (a narrow strip of federal land separated Allen's land from the coast) and the Coast Guard routinely conducted training and law enforcement overflights in the area. *Id.* at 1381. The case is distinguishable from *Ciraolo*, as it involved no aerial surveillance of a fenced in area adjacent to the house, but, rather of a 200 acre ranch. *See also* U.S. v. Bassford, 601 F. Supp. 1324 (D. Me., 1985) (aerial surveillance of area including curtilage upheld, relying on the short duration of the surveillance, lack of physical intrusiveness (altitude), the proximity of local airports and regular aerial traffic, and the ostentacious appearance of the marijuana patches to aerial observers).

104. *See, e.g.*, United States v. Mullinex, 508 F. Supp. 512 (E.D. Ky. 1980) (aerial surveillance of open fields portions of defendant's property upheld; marijuana found growing outside of barn (within the curtilage) and stored inside the barn suppressed).

105. *See* Bissonette v. Haig, 776 F. 2d 1384 (8th Cir. 1985), *aff'd on rehearing*, _ F.2d _ (Sept. 16, 1986, No. 84-2617) (aerial surveillance upheld where there was no allegation that surveillance of the curtilage had been conducted); United States v. Palumbo, 742 F.2d 656 (1st Cir. 1984) *cert. denied*, 105 S. Ct. 799 (1985) (auto surveilled on open road); United States v. Marbury, 732 F.2d 390 (5th Cir. 1984) (aerially surveyed property was a gravel pit); Clinksdale v. United States, 729 F.2d 940 (8th Cir. 1984) (officers were able to see marijuana grown outside the curtilage from a lawful place on the ground, as well aerially); United States v. DeBacker, 493 F. Supp. 1078 (W.D. Mich. 1980) (property surveyed was not within the curtilage; aerial surveillance was found a search, but not unreasonable); *But see* United States v. Broadhurst, 612 F. Supp. 777 (E.D. Cal. 1985) (aerial surveillance of greenhouse outside of the curtilage held an unconstitutional search).

106. *E.g.*, State v. Stachler, 58 Haw. 412, 416-417, 570 P.2d 1323, 1327-28

observing aircraft;[107] 3) the use or non-use of optical aids;[108] and 4) the traditional uses of the observed area.[109] Although defendants challenging the constitutionality of aerial surveillance have generally lost, in most cases their illegal activity was conducted in open fields.[110] At the very least, the state courts' distinction between observations of curtilage and of open fields reveals a reluctance to subordinate expectations of privacy in curtilage merely because technology has afforded police new means of intruding.

The reasoning of two state courts has been particularly convincing.[111] Each court reached a conclusion inconsistent with that in *Ciraolo*. For example, in *People v. Cook*,[112] a case which is factually analogous to *Ciraolo*,[113] the Supreme Court of California held that

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(1977).

107. *E.g.*, State v. Cord, 103 Wash. 2d 361, 363-364, 673 P.2d 81, 83-84 (1985).

108. *E.g.*, State v. Layne, 623 S.W. 2d 629, 635 (Tenn. Crim. App. 1981) *rev'd on other grounds*, 691 S.W. 2d 520 (Tenn. 1984).

109. *E.g.*, State v. Roode, 643 S.W. 2d 651, 653 (Tenn. 1982).

110. The following cases concerned marijuana patches grown *outside* of the curtilage, in which the defendant lost under an open fields analysis: Maughan v. State, 473 So. 2d 1140 (Ala. Crim. App. 1985); People v. Stanislowski, 180 Cal. App. 3d 748, 225 Cal. Rptr. 770 (1986); People v. Smith, 180 Cal. App. 3d 72, 225 Cal. Rptr. 10 (1985) People v. Egan 141 Cal. App. 3d 800, 190 Cal. Rptr. 546 (1983); People v. Joubert, 118 Cal. App. 3d 639, 173 Cal. Rptr. 428 (1981) *aff'd in relevant part* 140 Cal. App. 3d 946, 190 Cal. Rptr. 23 (1983); Tuttle v. Superior Ct. of San Luis Obispo, 120 Cal. App. 3d 234, 174 Cal. Rptr. 576 (1981) *cert. denied*, 454 U.S. 1033 (1981); People v. St. Amour, 104 Cal. App. 3d 886, 163 Cal. Rptr. 187 (1980); Burkholder v. Superior Ct. for Cty. of Santa Cruz, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (1979); Dean v. Superior Ct. for Nevada County, 35 Cal. App. 3d 112, 110 (Cal. Rptr. 585 1973); People v. Lashmett, 71 Ill. App. 3d 429, 27 Ill. Dec. 657, 389 N.E.2d 888 (1979) *cert. denied*, 444 U.S. 1081 (1980); Blalock v. State, 483 N.E.2d 439 (Ind. 1985); State v. Nolan, 356 N.W. 2d 670 (Minn. 1984); State v. Fierge, 673 S.W. 2d 855 (Mo. App. 1984); State v. Bigler, 100 N.M. 505, 672 P.2d 1136 (1983); State v. Bruno, 68 Or. App. 827, 683 P.2d 1383 (1984) *review denied*, 297 Or. 824, 687 P.2d 797 (1984); State v. Jennette, 706 S.W.2d 614 (Tenn. 1986); State v. Roode, 643 S.W.2d 651 (Tenn. 1982); State v. Layne, 623 S.W.2d 629 (Tenn. Crim. App. 1981) *rev'd on other grounds*, 691 S.W.2d 520 (Tenn. 1984); Goehring v. State, 627 S.W.2d 159 (Tex. Crim. App. 1982); Wellford v. Virginia, 227 Va. 297 315 S.E.2d 235 (Va. 1984); State v. Cord, 103 Wash. 2d 361, 693 P.2d 81 (1985); State v. Myrick, 102 Wash. 2d 506, 688 P.2d 151 (1984). *But see* People v. Superior Ct. for City of Los Angeles, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1974) *disapproved* People v. Cook, 41 Cal. 3d 373, 221 Cal. Rptr. 499 710 P.2d 299 (1985); Randall v. State, 458 So. 2d 822 (1984); State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977); State v. Rogers, 100 N.M. 517, 673 P.2d 142 (1983); State v. Grawien, 123 Wis. 2d 428, 367 N.W.2d 816 (1985); *compare* People v. Cook, 41 Cal. 3d 373, 221 Cal. Rptr. 499, 710 P.2d 299 (1985) (discussed *infra* notes 115-115 and accompanying text); People v. Agee, 153 Cal. App. 3d 1169, 200 Cal. Rptr. 827 (1984) (discussed *infra* notes 117-119 and accompanying text).

111. People v. Cook, 41 Cal. 3d 373, 221 Cal. Rptr. 499 (Cal. 1985); People v. Agee, 153 Cal. App. 3d 1167, 200 Cal. Rptr. 827 (1984).

112. 221 Cal. Rptr. 499 (Cal. 1985).

113. In *Cook*, an officer responding to an anonymous tip was unable to observe the defendant's yard because it was enclosed with a six foot outer-fence and an eight foot inner-fence. *Id.* at 502. Officers conducted aerial surveillance from an altitude of 1,600 feet, and were able to visually identify and photograph marijuana growing within the enclosure. *Id.* As in *Ciraolo*, the photo was apparently not relied upon by the magistrate in issuing the search warrant. *Id.* at 502. Also, as in *Ciraolo*, the yard

deliberate aerial surveillance of fenced-in curtilage constitutes an illegal search.[114] The *Cook* court held that the right to be free from warrantless search is not waived merely because one fails to foreclose all possible avenues of government observation, or because air travelers may occasionally glance downwards.[115] The *Cook* court recognized that an Orwellian notion had presented itself,[116] and the court refused to dissolve traditional privacy expectations.

In another well reasoned opinion, *People v. Agee*,[117] a California appellate court analogized *random* aerial surveillance to the program of a police state.[118] The *Agee* court held that citizens have a blanket right to be free from warrantless aerial searches of their backyards.[119] The *Ciraolo* Court, in contrast, held that Ciraolo's expectation of privacy was unreasonable *in an age where flight is routine*.[120] This implies that as technology becomes commonplace, regardless of its invasive use, that privacy expectations must shrink

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contained a swimming pool and sun deck. *Id.* at 506.

114. The *Cook* court was careful to make clear that it based its decision on the California constitution, but was also clear in stating that it did not consider aerial surveillance legal under the Federal constitution. *Id.* at 500. The Court applied the *Katz* test and cited many relevant United States Supreme Court precedents, along with its own. *Id.* at 501-508. Comparison of the relevant article of the California constitution and with the language of the fourth amendment reveals that the former is a more grammatical reiteration of the latter. The relevant passages provide:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.
>
> CAL. CONST. ART. I, 13.
>
> 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.

115. People v. Cook, 41 Cal. 3d 373, 221 Cal. Rptr. 499, 505 (1985).

116. *Id.* The analogy between police conduct in the aerial surveillance cases and the antagonists in Orwell's work is all too apparent: "In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a blue bottle and then darted away again with a curving flight. It was the police patrol, snooping into people's windows." G. ORWELL, NINETEEN EIGHTY-FOUR 6 (1949).

117. *Agee*, 153 Cal. App. 3d 1167, 200 Cal. Rptr. 827 (1984).

118. *Id.*

119. 200 Cal. Rptr. at 837. The *Agee* court stated:

> It is the claim of unlimited right to aerial surveillance by the state that this opinion addresses and rejects. In holding that aerial surveillance is limited by our constitution we say no more (and no less) that that there is a constitutional right of privacy from state surveillance in our backyards and property adjacent to our homes, which cannot be invaded, by ground or air, unless the particularized standards of the [f]ourth [a]mendment and the cognate provisions of the California Constitution are met.

Id. at 829.

120. 106 S. Ct. at 1813.

commensurately. However, what is worthy of protection at ground level should not mysteriously become unworthy merely because aircraft exist for travel, and police have discovered the utility of aircraft for spying.

Police aerial surveillance of curtilage areas should be permitted only pursuant to a warrant.[121] Police use of aircraft to view what they are constitutionally prohibited from viewing on the ground destroys the expectation of privacy that has traditionally been inherent in the concept of curtilage.[122] Because aerial surveillance lays bare most activity on the ground, and because the fourth amendment should provide citizens with a sense of security and freedom from pervasive government surveillance,[123] the Court should recognize and honor citizens' terrestrial expectations.[124] When a citizen has taken reasonable steps to preserve his privacy in the curtilage of his home, he should not be required to close off light and air or assume the risk that the government will surveil him from the air.[125]

The result of the *Ciraolo* decision for fourth amendment rights and for aerial surveillance defendants is a drastic curtailment of protection. This is true despite the narrow tone of the Court's specific holding.[126] No longer may citizens bask in the sunshine of their en-

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121. As officers conduct aerial surveillance of open fields it may happen that they will observe curtilage areas of homes. If that is the case, the evidence gained should not be admissible. Officers who can detect marijuana growing from altitudes of 1,000 feet or more should also be able to detect if there is a residence immediately adjacent. Presumably, police would not be unduly hampered in their duty to eradicate illicit marijuana growing if small producers in lots immediately adjacent to homes were removed from officers' *aerial* purview. Only by depriving officers of the use of evidence gained from aerial surveillance of curtilage can the necessary and salutory effect of personal security in the area of one's residence be effected.

122. *See supra* note 4.

123. Johnson v. United States, 333 U.S. 10, 14 (1948).

124. *See* Comment, *Aerial Surveillance and the Fourth Amendment*, 17 J. MARSHALL L. REV. 455, 491-492 (1984) (explaining the necessity of preserving terrestrial privacy expectations against aerial surveillance).

125. As Professor Amsterdam has noted, the essential question in cases involving police surveillance is:

> [H]ow tightly the fourth amendment permits people to be driven back into the recesses of their lives by the risk of surveillance. Mr. Katz could, of course, have protected himself against surveillance by forebearing to use the phone; and-so far as I am presently advised of the state of mechanical arts—anyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the [fourth] amendment because, if it were, the amendment's benefit would be too stingy to preserve the kind of open society to which we are committed and in which the amendment is supposed to function. What kind of society is that? Is it one in which a homeowner is put to the choice of shuttering up his windows or of having a policeman look in?

Amsterdam, *supra* note 6, at 97.

126. The Court appears to have limited its approval of aerial surveillance to that conducted with the naked-eye and from an altitude of at least 1,000 feet. *Ciraolo*, 106 S. Ct. at 1813.

closed yards and enjoy privacy and security. Because of *Ciraolo's* precedential weight, the fourth amendment protections of all citizens are diminished. In light of the Court's favorable disposition towards police use of technology,[127] and apparent unconcern for individual privacy expectations, it is painfully apparent that individual privacy expectations in outdoor activities are inappropriately vested with police.[128]

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127. *See supra* note 64 (quoting Justice Rehnquist in United States v. Knotts, 460 U.S. 276, 282-284 ((1983)).

128. One must be careful to distinguish between constraints on police conduct which limit effective police enforcement and those constraints that merely make effective police enforcement more burdensome. . . . Duties of law enforcement officials are extremely demanding in a free society. But that is as it should be. A policeman's job is easy only in a police state.

People v. Spinelli, 35 N.Y.2d 77, 80, 315 N.E.2d 792, 795 (1974).