Warrantless Aerial Surveillance of the Curtilage from Public Airspace Does Not Violate the Fourth Amendment: *California v. Ciraolo*, ____ U.S. ____, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).

Police received an anonymous tip that marijuana was growing in the backyard of defendant Ciraolo's home.[1] Officers responding to the tip were unable to view the defendant's backyard from ground level because of a six-foot outer fence and a ten-foot inner fence completely enclosing the yard.[2] The officers therefore procured an airplane and conducted an overflight specifically to observe the contents of the enclosed area.[3] By naked-eye observation from an altitude of 1,000 feet, officers readily identified marijuana growing in the enclosed area.[4] A search warrant was subsequently issued, the marijuana plants were seized, and Ciraolo was arrested.[5]

The California trial court refused to suppress the evidence acquired during the search, and Ciraolo was convicted.[6] The state court of appeals reversed,[7] holding that the fenced area was within the curtilage of the home; hence, the warrantless aerial observation of that area violated the fourth amendment prohibition of unreasonable searches.[8] The State's petition for review was denied by the California Supreme Court.[9] The United States Supreme Court granted certiorari and reversed the judgment of the appeals court.[10] The Supreme Court determined that warrantless, naked-eye aerial observation of areas within the curtilage does not constitute an unreasonable search under the fourth amendment.[11]

---

1. California v. Ciraolo, ____U.S. ____, ____, 106 S. Ct. 1809, 1810, 90 L. Ed. 2d 210, 214 (1986).
2. *Id.*
3. *Id.*
4. *Id.*
5. *See id.* at ____, 106 S. Ct. at 1811, 90 L. Ed. 2d at 214.
6. *Id.*
7. 161 Cal. App. 3d 1081, ____, 208 Cal. Rptr. 93, 98 (1984), *rev'd*, ____ U.S. ____, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).
8. *Id.* at ____, 208 Cal. Rptr. at 98.
9. ____ U.S. at ____, 106 S. Ct. at 1811, 90 L. Ed. 2d at 215.
10. *Id.*
11. *Id.* at ____, 106 S. Ct. at 1813, 90 L. Ed. 2d at 218.

I. THE DEVELOPMENT OF FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCHES

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated. . . .[12]

The drafting of the fourth amendment was originally motivated by indiscriminate searches and seizures by British officers pursuant to "general warrants."[13] These warrants, known as writs of assistance, gave officers unbridled freedom to search for goods imported in violation of British tax laws.[14] Predictably, such absolute British authority did not sit well with the colonists. In the words of one protester challenging the issuance of such writs in 1761, writs of assistance constituted "the worst instrument[s] of arbitrary power, [and] the most destructive of English liberty, and the fundamental principles of law, [since they place] the liberty of every man in the hands of every petty officer."[15] It was this strong and lingering feeling of injustice which later led Constitutional Convention delegates to forge the guarantees which are now the fourth amendment to the United States Constitution.[16] While it is clear that the fourth amendment's scope today extends far beyond the mere abolition of writs of assistance, it is equally apparent that courts have continually struggled to define precisely what constitutes an "unreasonable search."

A. Fourth Amendment Interpretation Prior to 1967

Early Supreme Court opinions interpreting the fourth amendment strongly emphasized the property law concept of trespass.[17] Absent actual physical encroachment upon a constitutionally pro-

---

12. U.S. CONST. amend. IV.

13. *See* Payton v. New York, 445 U.S. 573, 583 & n.21, 100 S. Ct. 1371, 1378 & n.21, 63 L. Ed. 2d 639, 649 & n.21 (1980).

14. *Id.*

15. *Id.* at 583 n.21, 100 S. Ct. at 1378-79 n.21, 63 L. Ed. 2d at 649 n.21 (quoting Boyd v. United States, 116 U.S. 616, 625, 6 S. Ct. 524, 529, 29 L. Ed. 746, 749 (1886)).

16. *See* Note, *Aerial Surveillance: A Plane View of the Fourth Amendment*, 18 GONZ. L. REV. 307, 310-11 (1983).

17. "Trespass" is defined as "[a]n unlawful interference with one's . . . property. . . ." BLACK'S LAW DICTIONARY 780 (abridged 5th ed. 1983).

tected area, no unreasonable search could exist.[18] This trespass-based theory emanated from the English case *Entick v. Carrington*,[19] in which the court concluded that the eye or ear alone could not commit a trespass; hence, spying and eavesdropping were not unlawful because no physical trespass occurred.[20]

The United States Supreme Court adopted this reasoning[21] and followed a trespass-based interpretation of the fourth amendment well into the twentieth century.[22] In *Olmstead v. United States*,[23] government agents secretly tapped telephone lines[24] to obtain evidence of a conspiracy to violate the Prohibition Act.[25] Over a period of many months, the tapes produced information directly incriminating Olmstead and others.[26] At trial, Olmstead asserted that the government eavesdropping constituted an illegal search and seizure.[27] The Court held, however, that the wiretapping was conducted without trespass upon any property of the defendants, and thus, no unreasonable search had taken place.[28]

The Supreme Court continued this line of reasoning in *Goldman v. United States*.[29] In *Goldman*, officers placed a "detectaphone" against the outside wall of the defendants' room to monitor their

---

18. Prior to Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the fourth amendment prohibition of unreasonable searches and seizures was generally understood in terms of "constitutionally protected areas." *See, e.g.*, Lanza v. New York, 370 U.S. 139, 82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962) (visitor's room of public jail not a constitutionally protected area); State v. Kender, 60 Haw. 301, 303, 588 P.2d 447, 449 (1978) ("[t]raditionally, the courts have spoken in terms of constitutionally protected places because of the trespass formerly necessary for the fourth amendment to apply").

19. 19 How. St. Tr. 1029 (1765); *see also* Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (nontrespassory searches held not within purview of fourth amendment).

20. Note, *Warrantless Aerial Surveillance: A Constitutional Analysis*, 35 VAND. L. REV. 409, 412 (1983) [hereinafter Note, *Warrantless Aerial Surveillance*].

21. *See* Boyd v. United States, 116 U.S. 616, 626-30, 6 S. Ct. 524, 530-32, 29 L. Ed. 746, 749-51 (1886) (the Court quoted and discussed *Entick v. Carrington* at length).

22. *See* Note, *Warrantless Aerial Surveillance*, *supra* note 20, at 412.

23. 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928).

24. *Id.* at 456-57, 48 S. Ct. at 565, 72 L. Ed. at 947.

25. *Id.* at 455, 48 S. Ct. at 565, 72 L. Ed. at 947.

26. *Id.* at 457, 48 S. Ct. at 565, 72 L. Ed. at 947.

27. *See id.* at 455, 48 S. Ct. at 565, 72 L. Ed. at 947.

28. *See id.* at 464-65, 48 S. Ct. at 568, 72 L. Ed. at 950-51; *see also* Hester v. United States, 265 U.S. 57, 58-59, 44 S. Ct. 445, 446, 68 L. Ed. 898, 899-900 (1924) (protection of fourth amendment does not extend to open fields).

29. 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1940).

conversation.[30] The Court allowed this action, holding that the use of an electronic listening device was legal so long as it was not accompanied by a physical intrusion.[31]

The preceding cases clearly demonstrate the Court's literal interpretation of the fourth amendment's plain language. Unless police physically trespassed upon the home, papers or effects of an individual, the fourth amendment provided no protection.

B. Katz v. United States *and the "Reasonable Expectation of Privacy"*

The Supreme Court significantly altered its trespass-based line of reasoning in 1967 with *Katz v. United States*.[32] In *Katz*, government agents placed electronic eavesdropping equipment on the outside of a telephone booth to record Katz's conversations.[33] The Court held that such action constituted an unlawful search and seizure because it violated Katz's reasonable expectation of privacy.[34] The Court stated that, "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home, . . . is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[35] Additionally, Justice Harlan emphasized in his well-known concurring opinion that the amendment does not protect every subjective expectation of privacy, but only those that society is prepared to recognize as reasonable.[36] Clearly, *Katz* represented a rejection of physical trespass as the sole determinative factor in fourth amendment analysis and the embracement of a far more nebulous concept—the "reasonable expectation of privacy."[37]

While a "reasonable expectation of privacy" is inherently difficult to define, three doctrines conditioning the legality of warrantless observation provide insight into the interpretation of this critical

30. *See id.* at 131-32, 62 S. Ct. at 994, 86 L. Ed. at 1326.
31. *See id.* at 134-35, 62 S. Ct. at 995-96, 86 L. Ed. at 1327-28.
32. 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).
33. *Id.* at 348, 88 S. Ct. at 509, 19 L. Ed. 2d at 580.
34. *See id.* at 353, 88 S. Ct. at 511-12, 19 L. Ed. 2d at 582.
35. *Id.* at 351, 88 S. Ct. at 511, 19 L. Ed. 2d at 582.
36. *Id.* at 361, 88 S. Ct. at 516-17, 19 L. Ed. 2d at 587-88 (Harlan, J., concurring).
37. *Id.* at 360, 88 S. Ct. at 516, 19 L. Ed. 2d at 587.

concept. The curtilage doctrine dictates that the same freedom from searches and seizures exists in the area immediately surrounding the home as within the home itself.[38] The "plain view" doctrine and the "open view" doctrine, though possessing important differences, both allow an officer to seize and introduce into evidence objects which are placed or left in plain sight by the defendant.[39]

1. The Curtilage Doctrine

The Supreme Court has defined "curtilage" as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' "[40] This definition clearly encompasses the area immediately surrounding the dwelling place[41] and extends to other areas adjacent to the home where an individual may reasonably expect privacy.[42] Though the Supreme Court has offered no mechanical test to determine the outer boundaries of the curtilage, physical barriers such as fences and walls may be found to separate the curtilage from constitutionally unprotected "open fields."[43]

Since the enactment of the fourth amendment, the Supreme Court has stressed its "overriding respect for the sanctity of the home."[44] The curtilage doctrine provides that the curtilage is part of

---

38. *See* Oliver v. United States, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, 225 (1984); *see also* Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968) (the fourth amendment's protection of the home has always included the curtilage); CARE v. United States, 231 F.2d 22, 25 (10th Cir. 1956) (it is well established that the home includes the house's curtilage), *cert. denied*, 351 U.S. 932 (1956).

39. *See generally* Note, *Aerial Surveillance: A Plane View of the Fourth Amendment*, 18 GONZ. L. REV. 307, 322-24 (1983) (discussion and comparison of "plain view" and "open view" doctrines); Note, *Fourth Amendment Implications of Warrantless Aerial Surveillance*, 17 VAL. U.L. REV. 309, 329-33 (1983) (same).

40. Oliver v. United States, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, 225 (1984) (citation omitted).

41. The curtilage doctrine, by definition, extends fourth amendment protection to the areas immediately surrounding the home.

42. "[F]or most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience." *Oliver*, 466 U.S. at 182 n.12, 104 S. Ct. at 1743 n.12, 80 L. Ed. 2d at 226 n.12.

43. *See* Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U.L. REV. 725, 733 ("[t]he area and buildings in reasonable proximity to the dwelling-house . . . were part of the curtilage, as was especially clear where they were enclosed by a fence or wall").

44. Payton v. New York, 445 U.S. 573, 601, 100 S. Ct. 1371, 1388, 63 L. Ed. 2d 639, 660 (1980).

the home for purposes of constitutional interpretation and so is entitled to equal respect and protection. Two recent Supreme Court opinions have further explained the curtilage doctrine and reaffirmed its validity.

In *Oliver v. United States*,[45] police officers received reports that marijuana was being grown on Oliver's farm.[46] Acting without a warrant, officers walked past Oliver's house to a locked gate with a "No Trespassing" sign, then proceeded around the gate and down a footpath.[47] The officers eventually located a field of marijuana over one mile from Oliver's home and arrested Oliver.[48] At trial, Oliver moved to suppress introduction of the marijuana, arguing that he had a reasonable expectation that the field would remain private.[49] The Supreme Court held that the search was permissible because it took place in "open fields," to which the fourth amendment supplies no protection.[50] The majority opinion, in a clear reference to the curtilage doctrine, stated that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, *except in the area immediately surrounding the home.*"[51] The Court then carefully distinguished between the home and its curtilage, which deserve the "most scrupulous protection from government invasion,"[52] and "open fields," which "do not provide the setting for those intimate activities that the Amendment is intended to shelter. . . ."[53]

More recently, the Supreme Court directly addressed the curtilage doctrine in *Dow Chemical Co. v. United States*.[54] In *Dow*, Environmental Protection Agency (EPA) officials, without seeking an administrative search warrant,[55] took extremely detailed aerial photographs of Dow's chemical plant from various altitudes, all of

45. 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984).
46. *See id.* at 173, 104 S. Ct. at 1738, 80 L. Ed. 2d at 220.
47. *Id.*, 104 S. Ct. at 1738, 80 L. Ed. 2d at 220-21.
48. *Id.*
49. *See id.*
50. *See id.* at 183-84, 104 S. Ct. at 1741, 80 L. Ed. 2d at 227-28.
51. *Id.* at 178, 104 S. Ct. at 1741, 80 L. Ed. 2d at 224 (citing Hester v. United States, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924)) (emphasis added).
52. *Id.* (citing Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)).
53. *Id.* at 179, 104 S. Ct. at 1741, 80 L. Ed. 2d at 224.
54. ___ U.S. ___, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986).
55. *Id.* at ___, 106 S. Ct. at 1822, 90 L. Ed. 2d at 232.

which were within legal airspace.[56] Dow sued the EPA, contending that the chemical plant was comparable to the curtilage of a home, and therefore warrantless aerial photography of the plant violated the fourth amendment.[57] Although the Court rejected Dow's argument,[58] it strongly reaffirmed the curtilage doctrine, stating: "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."[59]

2. The "Plain View" and "Open View" Doctrines

While the curtilage doctrine helps delineate citizens' right to be free from police observation in certain circumstances, the "plain view" doctrine aids in defining the right of police officers to perform such observation. Generally, the "plain view" doctrine may be described as follows: Objects within the plain view of an officer who has legally obtained that view may be seized and introduced into evidence, provided that the discovery of such objects is inadvertent.[60]

The Supreme Court directly addressed the "plain view" doctrine in both *Harris v. United States*[61] and *Coolidge v. New Hampshire*.[62] In *Harris*, police arrested the defendant and towed his car to an impound area.[63] Pursuant to police regulations, the arresting officer proceeded to secure the car by rolling up the windows and locking the doors.[64] Upon opening the passenger side door, the officer noticed a registration card lying face up on the metal stripping of the door sill.[65] The Supreme Court ruled that the officer's actions did not constitute a search and upheld the admissibility of the registration card, stating: "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to

---

56. *Id.*
57. *Id.* at ____, 106 S. Ct. at 1825, 90 L. Ed. 2d at 235.
58. *Id.* at ____, 106 S. Ct. at 1827, 90 L. Ed. 2d at 238.
59. *Id.* at ____, 106 S. Ct. at 1825, 90 L. Ed. 2d at 235.
60. Annotation, *Search and Seizure: Observation of Objects in "Plain View"—Supreme Court Cases*, 29 L. Ed. 2d 1067, 1068 (1971).
61. 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d at 1067 (1968).
62. 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).
63. 390 U.S. at 235, 88 S. Ct. at 993, 19 L. Ed. 2d at 1069.
64. *Id.*
65. *Id.* at 235-36, 88 S. Ct. at 993, 19 L. Ed. 2d at 1069.

have that view are subject to seizure and may be introduced in evidence."[66]

The defendant in *Coolidge v. New Hampshire*[67] was more fortunate. In *Coolidge*, officers acting on invalid warrants[68] arrested Coolidge and seized his automobile.[69] Police subsequently searched the automobile and obtained evidence which was admitted against Coolidge at trial.[70] Coolidge moved to suppress this evidence, contending that the search and seizure of his automobile, absent a valid warrant, was unconstitutional.[71] The State asserted that Coolidge's automobile was an "instrumentality of the crime" in "plain view," and so was legally seized despite the absence of a valid warrant.[72] The Court rejected the State's argument, holding that the "plain view" doctrine could not justify the seizure of Coolidge's automobile in the present case because the discovery of the automobile was not inadvertent.[73] In explaining its analysis, the Supreme Court noted a common thread running through all "plain view" cases. The Court determined that in each case, "the police officer . . . had a prior justification for an intrusion" and inadvertently discovered incriminating evidence during the intrusion.[74] Specifically, the Court set forth three requirements that must be fulfilled before the "plain view" doctrine will validate the warrantless seizure of evidence: (1) there must be a valid prior intrusion by a law enforcement official which was justified by either a search warrant or an exception to the warrant requirement;[75] (2) the discovery of the seized items must be inadvertent;[76] and (3) the law enforcement officials must immediately recognize the evidence.[77]

In contrast to the somewhat structured requirements of the "plain view" doctrine, the "open view" doctrine recognizes the

---

66. *Id.* at 236, 88 S. Ct. at 993, 19 L. Ed. 2d at 1069 (citing Ker v. California, 374 U.S. 23, 42-43, 83 S. Ct. 1623, 1634-35, 10 L. Ed. 2d 726, 743-44 (1963)).
67. 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).
68. *Id.* at 449, 91 S. Ct. at 2029, 29 L. Ed. 2d at 572.
69. *Id.* at 447, 91 S. Ct. at 2028, 29 L. Ed. 2d at 571-72.
70. *Id.* at 448, 91 S. Ct. at 2028, 29 L. Ed. 2d at 572.
71. *See id.* at 449, 91 S. Ct. at 2029, 29 L. Ed. 2d at 572-73.
72. *Id.* at 464, 91 S. Ct. at 2037, 29 L. Ed. 2d at 581-82.
73. *See id.* at 472, 91 S. Ct. at 2041, 29 L. Ed. 2d at 586.
74. *Id.* at 466, 91 S. Ct. at 2038, 29 L. Ed. 2d at 583.
75. *See id.* at 468, 91 S. Ct. at 2039, 29 L. Ed. 2d at 584.
76. *Id.* at 469, 91 S. Ct. at 2040, 29 L. Ed. 2d at 585.
77. *See id.* at 466, 91 S. Ct. at 2038, 29 L. Ed. 2d at 583.

simple principle that the government may lawfully observe, whether intentionally or inadvertently, what an individual knowingly leaves open to public view.[78] In this sense, the "open view" doctrine is merely a restatement of the Supreme Court's reasoning in *Katz v. United States*[79]—"What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[80] By placing or leaving an object in open view, one fails to exhibit the subjective expectation of privacy required by the first prong of the *Katz* test.[81] As one author explained,

> [I]f a dweller has drawn the curtains over the windows of his house, he has exhibited an expectation of privacy from passersby, and because society recognizes that this expectation is reasonable . . . the dweller's privacy is protected. . . . On the other hand, if the dweller has not drawn the curtain, he has left whatever is visible through the window in open view and can have no reasonable expectation of privacy regarding it. . . .[82]

The District of Columbia Circuit Court of Appeals aptly summarized the "open view" doctrine in *James v. United States*.[83] In *James*, a police officer observed, through a garage door which was ajar, a brand new automobile which had been completely stripped and had no license plate.[84] Subsequent investigation disclosed that the car had been stolen, and officers arrested James.[85] The court upheld the officer's right to peer under the partially opened garage door, stating, "The police are free to observe . . . evidence that [is] in 'plain view' to the public. . . . That the policeman may have to crane his neck, or bend over . . . does not render the doctrine inapplicable, so long as what he saw would have been visible to any curious passerby."[86]

---

78. Note, *supra* note 16, at 322-23.

79. 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

80. *Id.* at 351, 88 S. Ct. at 511, 19 L. Ed. 2d at 582.

81. *Id.* at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 588 (Harlan, J., concurring). The second part of the *Katz* test requires that an individual's subjective expectation of privacy be recognized as reasonable by society. *Id.*

82. Note, *supra* note 43, at 743 n.112.

83. 418 F.2d 1150 (D.C. Cir. 1969).

84. *Id.* at 1151.

85. *See id.*

86. *Id.* at 1151 n.1 (citations omitted). Hence, if view of the curtilage is obscured by fencing or vegetation, the "open view" doctrine is not applicable. *See* People v. Fly, 34 Cal. App. 3d 665, 667, 110 Cal. Rptr. 158, 159-60 (1973) (defendant's expectation of privacy was reasonable where vegetation made observation of backyard difficult). However, where an object is open to public view, the "open view" doctrine parallels common sense in allowing a police

II. CALIFORNIA V. CIRAOLO

Police were unable to inspect the defendant's backyard for marijuana plants because of two fences which enclosed the entire yard.[87] Officers therefore flew over the defendant's yard in an airplane at an altitude of 1,000 feet and observed marijuana plants, which were later seized pursuant to a warrant and used as evidence.[88] The defendant contended that police could not legally conduct such aerial surveillance of his yard without a warrant.[89] The United States Supreme Court held that a warrantless, naked-eye, aerial observation of areas within the curtilage is not an unreasonable search under the fourth amendment.[90]

The Court began its analysis by identifying *Katz v. United States*[91] as controlling in the instant case.[92] Specifically, the Court addressed whether the defendant possessed the constitutionally protected reasonable expectation of privacy demanded by *Katz*.[93] The Court agreed that Ciraolo had satisfied the initial requirement of the *Katz* test—he had demonstrated a subjective expectation of privacy.[94] The more complicated question posed by *Katz* was whether society would recognize Ciraolo's expectations as reasonable.[95]

In answering the latter question, the Court first turned to the curtilage doctrine.[96] While acknowledging that the curtilage had his-

---

officer to observe what any other individual may readily see. *See* State v. Pontier, 95 Idaho 707, 711-13, 518 P.2d 969, 973-74 (1974) (defendant's expectation of privacy not reasonable where marijuana in curtilage was surrounded only by a low picket fence and vegetation, and was within sight of neighbor).

87. California v. Ciraolo, ___U.S. ___, ___, 106 S. Ct. 1809, 1810, 90 L. Ed. 2d 210, 214 (1986) (opinion by Burger, C.J.; dissenting opinion by Powell, J., joined by Brennan, Marshall, and Blackmon, J.J.).

88. *Id.* at ___, 106 S. Ct. at 1811, 90 L. Ed. 2d at 214.

89. *Id.* at ___, 106 S. Ct. at 1812, 90 L. Ed. 2d at 216.

90. *Id.* at ___, 106 S. Ct. at 1813, 90 L. Ed. 2d at 218.

91. 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

92. *See* ___ U.S. at ___, 106 S. Ct. at 1811, 90 L. Ed. 2d at 215.

93. *Id.* As noted previously, the *Katz* test posits two questions: (1) did the individual exhibit an actual (subjective) expectation of privacy? and (2) if so, is society prepared to recognize that subjective expectation as "reasonable?" 389 U.S. at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 588 (Harlan, J., concurring). The Supreme Court subsequently adopted Justice Harlan's understanding of the test. *See* Rakas v. Illinois, 439 U.S. 128, 143 & n.12, 99 S. Ct. 421, 430 & n.12, 58 L. Ed. 2d 387, 401 & n.12 (1978).

94. ___ U.S. at ___, 106 S. Ct. at 1811, 90 L. Ed. 2d at 215. The Court found that by erecting a 10-foot fence around his yard, Ciraolo had manifested a subjective expectation of privacy as to his "unlawful agricultural pursuits." *Id.*

95. *Id.* at ___, 106 S. Ct. at 1812, 90 L. Ed. 2d at 216.

96. *Id.*

torically been given heightened protection and that Ciraolo's illegal crop was within the curtilage, the Court expressly rejected Ciraolo's contention that the fourth amendment did not permit warrantless aerial observation of the curtilage.[97] "Fourth Amendment protection," the Court said, ". . . has never been extended to require . . . officers to shield their eyes when passing by a home on public thoroughfares."[98] The Court further justified surveillance of the curtilage by emphasizing that the officers were in "public navigable airspace" and performed their observation in a "physically nonintrusive manner."[99]

Finally, the Court in several instances made implicit references to the "plain view" doctrine in attempting to justify its holding.[100] These intimations clearly indicated that, although the doctrine was never mentioned by name, it figured significantly in the Court's analysis.

The dissenting opinion focused primarily on three major points. First, it argued that the Court, while purporting to follow *Katz*, actually departed significantly from the standards developed in that case.[101] *Katz*, the dissent noted, held that the legality of a search turned not on the physical position from which observation was conducted, but rather on whether the observation invaded a "reasonable expectation" of privacy.[102] The dissent therefore questioned why the Court found it significant that the observation of Ciraolo's yard was conducted in "public navigable airspace" in a physically nonintrusive manner.[103] Further, the dissent claimed that the majority disregarded Justice Harlan's long-standing warning against the danger

---

97. *Id.* Ciraolo argued that because his backyard was within the curtilage of his home, no aerial observation of that area by police was permissible without a warrant. *Id.*

98. *Id.*

99. *Id.* at ____, 106 S. Ct. at 1813, 90 L. Ed. 2d at 217. This language is reminiscent of the Supreme Court's interpretation of the fourth amendment prior to *Katz*. At that time, an actual physical intrusion or trespass was required to trigger fourth amendment protection. *See, e.g.*, Goldman v. United States, 316 U.S. at 134, 62 S. Ct. at 996, 86 L. Ed. at 1327 (1942); Olmstead v. United States, 277 U.S. at 464, 48 S. Ct. at 568, 72 L. Ed. at 950 (1928).

100. "Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. . . . [O]bjects [that one] exposes to the 'plain view' of outsiders are not 'protected'. . . ." ____ U.S. at ____, 106 S. Ct. at 1813, 90 L. Ed. at 217-18 (citations omitted).

101. *Id.* at ____, 106 S. Ct. at 1814, 1816, 90 L. Ed. 2d at 218, 221 (Powell, J., dissenting).

102. *Id.* at ____, 106 S. Ct. at 1815, 90 L. Ed. 2d at 220.

103. *Id.* at ____, 106 S. Ct. at 1817, 90 L. Ed. 2d at 223 (quoting the majority opinion, ____ U.S. at ____, 106 S. Ct. at 1813, 90 L. Ed. 2d at 217).

of construing the fourth amendment to prohibit only physical intrusions.[104]

Secondly, the dissenting opinion alleged that the Court actually rejected the curtilage doctrine while ostensibly reaffirming it both in the instant case and in another aerial surveillance case decided the same day, *Dow Chemical Co. v. United States*.[105] The dissent noted that the curtilage had been considered part of the home for fourth amendment analysis purposes and that an expectation of privacy in one's home "virtually always [would] be legitimate."[106]

Finally, the dissent challenged the "plain view" reasoning to which the Court several times alluded.[107] Specifically, the dissent disputed the Court's contention that, because the airspace over Ciraolo's home was open to public travel, Ciraolo therefore could have no reasonable expectation of privacy from aerial observation.[108] "Members of the public use the airspace for travel, business, or pleasure," the dissent argued, "not for the purpose of observing activities taking place within residential yards."[109]

III. Conflicts Regarding the Reasonable Expectation of Privacy

While the Court's opinion correctly set forth the holding of *Katz*, it failed to thoroughly analyze the critical question posed by the second part of the *Katz* test. Did Ciraolo, in fact, have an expectation of privacy from aerial observation that society was prepared to recognize?[110] The Court examined this question from only

---

104. *Katz*, 389 U.S. at 362, 88 S. Ct. at 517, 19 L. Ed. 2d at 588 (Harlan, J., concurring). Justice Harlan warned that construing the fourth amendment to prohibit only physical intrusions "is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.* The majority in the present case responded that aerial observation is not the type of electronic intrusion of which Harlan warned. ___ U.S. at ___, 106 S. Ct. at 1813, 90 L. Ed. 2d at 217-18.

105. Dow Chem. Co. v. United States, ___U.S. ___, ___, 106 S. Ct. 1819, 1825, 90 L. Ed. 2d 226, 235 (1986).

106. ___ U.S. at ___, 106 S. Ct. at 1816, 90 L. Ed. 2d at 221 (Powell, J., dissenting) (citing Payton v. New York, 445 U.S. at 589, 100 S. Ct. at 1381-82, 63 L. Ed. 2d at 652-53 (1980)).

107. *See id.* at ___, 106 S. Ct. at 1818, 90 L. Ed. 2d at 223-24.

108. *Id.* at ___, 106 S. Ct. at 1818, 90 L. Ed. 2d at 223.

109. *Id.* at ___, 106 S. Ct. at 1818, 90 L. Ed. 2d at 224.

110. In the Court's words, does "the government's intrusion infringe upon the personal and societal values protected by the Fourth Amendment?" *Id.* at ___, 106 S. Ct. at 1812, 90 L. Ed. 2d at 216 (quoting Oliver v. United States, 466 U.S. 170, 182-83, 104 S. Ct. 1735, 1744, 80 L. Ed. 2d 214, 227 (1984)).

one perspective. One whose backyard was not covered, they suggested, could not reasonably expect privacy from aerial observation performed in public airspace.[111] This simple analysis overlooks an equally important reciprocal question of reasonableness: are citizens prepared to accept a society where airborne police officers, acting solely on anonymously supplied information and without a warrant, may focus on private homes and yards with such visual acuity that persons and their activities may be readily scrutinized? Though the Court failed to consider this important question, the question was amply addressed by at least one commentator, who replied: "The fourth amendment should not require canopies or domes as the only effective subjective manifestation of privacy. . . . [S]ociety should recognize some reasonable expectation of privacy outside of the house."[112]

The preceding question naturally leads to, and overlaps, consideration of the curtilage doctrine. Here, too, the strength of the Court's analysis is questionable. It is uncontested that protection of the home and curtilage from warrantless searches is deeply rooted in precedent.[113] The Court responded to this precedent by contending that fourth amendment protection has never required police officers "to shield their eyes when passing by a home on public thoroughfares."[114] This argument is completely inapplicable to the instant case. The police officers in the case at bar were not simply "passing by" Ciraolo's home. They proceeded to a specific location in search of a specific illegal substance.[115] Moreover, the airspace 1,000 feet above Ciraolo's home may hardly be likened to a "public thoroughfare." Police observation of Ciraolo's yard took place from the

111. *See id.* at ____, 106 S. Ct. at 1813, 90 L. Ed. 2d at 218.

112. Note, *Aerial Surveillance and the Fourth Amendment*, 17 J. MARHSALL L. REV. 455, 473 (1984); *see also* Note, *Warrantless Aerial Surveillance: A Constitutional Analysis*, 35 VAND. L. REV. 409, 432 (1982) ("[a]n area, object, or activity obscured from all reasonable observation except an aerial view should not be denied constitutional protection on the ground that it is in open view").

113. *See, e.g.*, Dow Chem. Co. v. United States, ____U.S. ____, ____, 106 S. Ct. 1819, 1825, 90 L. Ed. 2d 226, 235 (1986); Oliver v. United States, 466 U.S. 170, 178, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, 224 (1984).

114. ____ U.S. at ____, 106 S. Ct. at 1812, 90 L. Ed. 2d at 216.

115. *See id.* at ____, 106 S. Ct. at 1813, 90 L. Ed. 2d at 217. The aerial observation was directed at identifying the plants in Ciraolo's backyard, and the officers were trained to recognize marijuana.

absolute minimum legal altitude.[116] Barring emergency, common air traffic would seldom pass over Ciraolo's home at such a height.

Finally, the majority's implicit reliance on the "plain view" doctrine was clearly misplaced. Though logic might suggest that this rule would apply because the officers obtained a clear naked-eye view of Ciraolo's marijuana crop, the "plain view" doctrine covers a substantially different type of situation. As noted previously, the common thread running through all "plain view" cases is that, in each instance, "the police officer . . . had a prior justification for an intrusion" and *inadvertently* discovered incriminating evidence.[117] By contrast, officers in *Ciraolo* deliberately sought out the defendant's backyard crop with no more prior justification than an anonymous tip.[118]

Even assuming that the majority intended to apply the "open view" doctrine rather than the "plain view" doctrine,[119] their reasoning is equally tenuous. Using an airplane to perform observation is no more "plain" view or "open" view than a wiretap is "plain" hearing—both require the aid of modern technology.[120] Moreover, the language of *Katz* discourages such a broad interpretation of the "open view" doctrine in this case. Though the Court accurately quoted the words of *Katz* in support of its proposition ("what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection . . ."),[121] its quotation was both incomplete

---

116. *See* 14 C.F.R. § 91.79(b) (1986) (minimum legal altitude over populated areas is 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet). The altitude from which aerial observation is conducted is often a significant factor in determining whether such surveillance is reasonable. *See, e.g.*, United States v. DeBacker, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980). *But cf.* Dean v. Superior Court, 35 Cal. App. 3d 112, 116, 110 Cal. Rptr. 585, 588 (1973) (court reasoned that observer's altitude was only a minor factor in determining reasonableness of observation since interpretation of the fourth amendment must accommodate the ever-intensifying technology of surveillance).

117. Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S. Ct. 2022, 2027, 29 L. Ed. 2d 564, 583 (1971).

118. *Ciraolo*, ___ U.S. at ___, 106 S. Ct. at 1810, 90 L. Ed. 2d at 214.

119. The terms "open view," "plain view," "full view," and "plain sight" have apparently been used interchangeably by some members of the Supreme Court. Annotation, *Search and Seizure: Observation of Objects in Plain View—Supreme Court Cases*, 29 L. Ed. 2d 1067, 1068 n.1 (1971).

120. Granberg, *Is Warrantless Aerial Surveillance Constitutional?*, 55 CAL. ST. B.J. at 451 (1980).

121. ___ U.S. at ___, 106 S. Ct. at 1812, 90 L. Ed. 2d at 217 (citing *Katz*, 389 U.S. at 351, 88 S. Ct. at 511, 19 L. Ed. 2d at 582).

and misleading. Immediately following that sentence, the *Katz* court concluded, "[b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[122] Thus, considered in its entirety, *Katz* provides little support for the majority's contention that Ciraolo was not entitled to fourth amendment protection in the instant case.

IV. THE EFFECTS OF *CIRAOLO* UPON FOURTH AMENDMENT INTERPRETATION

The Supreme Court, while finding that observation of Ciraolo's yard was reasonable under the instant circumstances, offered no specific guidelines to determine what society would "recognize as reasonable" under different factual conditions. This suggests the vague and open-ended nature of the *Katz* test. Theoretically, the Court could find virtually any government action to be in compliance with *Katz* simply by declaring that society recognized such action as reasonable. Therefore, the instant case has little effect on the landmark *Katz* holding.

The effect of *Ciraolo* on the curtilage doctrine, however, is more pronounced. Despite a reaffirmation of the doctrine,[123] the majority's holding substantially erodes one's right of privacy in the area immediately surrounding the home. Ciraolo did everything possible to tell the world that he desired privacy in his backyard;[124] the Supreme Court has long stressed "the overriding respect for the sanctity of the home [and therefore the curtilage] that has been embedded in our traditions since the origins of the Republic."[125] Nonetheless, Ciraolo could not escape warrantless aerial observation by police. Clearly, the peril of which many authorities on the fourth amendment have warned[126] has now become reality. Unless an entire backyard is

---

122. *Katz*, 389 U.S. at 351-52, 88 S. Ct. at 511, 19 L. Ed. 2d at 582.

123. *See* ____U.S. at ____, 106 S. Ct. at 1812, 90 L. Ed. 2d at 216 (the Court implicitly reaffirmed the curtilage doctrine while discussing its limitations).

124. *See* People v. Ciraolo, 161 Cal. App. 3d 1081, 1089, 208 Cal. Rptr. 93, 97 (1984) ("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"), *rev'd*, ____ U.S. ____, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).

125. Payton v. New York, 445 U.S. 573, 601, 100 S. Ct. 1371, 1388, 63 L. Ed. 2d 639, 660 (1980).

126. Granberg, *supra* note 120, at 454 ("a person should not be required to roof over his property to protect it from police overflights"); Note, *Fourth Amendment Implications of*

roofed over, one may apparently expect privacy from observation only within the confines of his home.

Ciraolo may also represent a new and dangerously broad interpretation of the "open view" doctrine. By permitting the warrantless aerial surveillance of a residential yard which was protected from ground-level observation, the Court has opened the door to police use of other observational technologies—further disregarding citizens' valid expectations of privacy within their homes and yards. Such a strained interpretation of the "open view" doctrine disregards not only the plain language of *Katz*,[127] but the long-established curtilage doctrine as well.

V. QUESTIONS UNANSWERED BY *CIRAOLO*

The majority opinion in *Ciraolo* raises two critical questions and a host of related concerns. First, what are the limits of "reasonable" aerial surveillance? The instant holding was expressly limited to naked-eye observation from public airspace,[128] but many different factual situations are possible. May police officers use binoculars, or even high-powered telescopic lenses, to aid their observation of the curtilage?[129] Must observational flights adhere to FAA minimum altitude requirements at all times? Further, what specific knowledge or evidence, if any, is required before focused aerial observation of a private yard may be conducted?

Second, what must one do to be free from aerial observation of his home and its curtilage? In *Ciraolo*, two high fences surrounding a backyard pool and sunbathing area did not establish a reasonable

---

Warrantless Aerial Surveillance, 17 VAL. U.L. REV. 309, 345-46 (1983) ("[i]f an individual seeks to maintain privacy in his open property, by erecting fences and posting warning signs, he has reasonably done all he can do to protect his property—either from the ground or by air").

127. *See supra* notes 121-22 and accompanying text.

128. *See* ____U.S. at ____, 106 S. Ct. at 1813, 90 L. Ed. 2d at 218.

129. Annotation, *Observation Through Binoculars as Constituting Unreasonable Search*, 48 A.L.R. 3d 1178 (1973) (binoculars generally allowed). Potential means of surveillance range from naked-eye observation to satellite photography and microwave analysis. Where is the line of "reasonable" observation drawn? Courts have not laid down specific guidelines. *But cf.* United States v. Knotts, 460 U.S. 276, 282, 103 S. Ct. 1081, 1086, 75 L. Ed. 2d 55, 63 (1983) (regarding the use of electronic "beepers" to trail automobiles, the Court stated: "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.").

expectation of privacy. Must one literally roof over his backyard, shutting out the natural elements which make it enjoyable, in order to be assured of privacy?[130] The California Supreme Court has eloquently addressed this question. "Surely," the court reasoned in *Lorenzana v. Superior Court*,[131] "our state and federal [c]onstitutions . . . foreclose a regression into an Orwellian society in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, air-proof box."[132]

While one might suggest that a flexible, case-by-case analysis is the only way to deal with the preceding questions, the Supreme Court has expressly rejected that idea.[133] An "ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority, [but] it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced."[134] Clearly, then, the Court must decide upon and make public its fourth amendment analysis criteria, or the very danger of which it has warned will become reality.

In addition to the potential arbitrary enforcement of fourth amendment rights, *Ciraolo* has other disturbing implications. In this day of crowded cities and suburbs, the home and its curtilage stand as the last refuge from the ubiquitous eyes of modern society. *Ciraolo* deprives the individual of a significant portion of his remaining privacy at a time when that privacy is most precious.

Perhaps worse, *Ciraolo* may represent a trend toward more stringent enforcement of statutory law at the expense of constitutional guarantees. Certainly, the present drug problem in the United States is significant, and the police possess limited tools with which to fight it. It must be remembered, however, that the ultimate harm done by depriving citizens of their constitutional rights far outweighs the

---

130. The dissent answered this question in the negative. Justice Powell maintained that "[i]t is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards." ____U.S. at ____, 106 S. Ct. at 1818, 90 L. Ed. 2d at 223 (Powell, J., dissenting).

131. 9 Cal. 3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973). In *Lorenzana*, a police officer stood by the defendant's window and peered through a two-inch gap between the drawn window shade and the window sill. The court found that such action, absent a warrant, constituted an unreasonable search under the fourth amendment.

132. *Id.* at 636-37, 511 P.2d at 41, 108 Cal. Rptr. at 593.

133. *See* Oliver v. United States, 466 U.S. 170, 181-82, 104 S. Ct. 1735, 1743, 80 L. Ed. 2d 214, 226 (1984).

134. *Id.*

benefits gained by arresting and convicting persons who cultivate marijuana.[135]

At first glance, *California v. Ciraolo* does not appear overly threatening. The thought of police officers making naked-eye observations from legal altitudes may not worry most law-abiding citizens. However, a hundred year-old quotation to which the dissent alluded[136] bears repeating when considering the implications of *Ciraolo*: "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."[137] A century later, this warning still rings true.

CONCLUSION

In *California v. Ciraolo*,[138] the United States Supreme Court held that the fourth amendment did not prohibit police from conducting warrantless naked-eye observation of the curtilage from public airspace.[139] The Court's analysis relied primarily on *Katz v. United States*,[140] which required that persons claiming fourth amendment protection must have a "reasonable" expectation of privacy that society is prepared to recognize.[141] Ciraolo could not have reasonably expected privacy, the Court found, because he "knowingly exposed" his yard to aerial observation.[142]

Standing alone, *Ciraolo* represents an undesirable and unwarranted constriction of the long-respected curtilage doctrine. A roof is now required in order to obtain privacy where fourth amendment protection previously sufficed. The greatest danger of *Ciraolo*, however, lies in its potential as a stepping stone to further government

---

135. *See* Comment, *Aerial Surveillance and the Fourth Amendment*, 17 J. MARSHALL L. REV. 455, 491 (1984) ("Regardless of the benefits that may accrue to law enforcement authorities, the general lowering of each person's individual security irreparably damages the fabric of a free society and weakens its democratic institutions.").

136. *See* ___ U.S. at ___, 106 S. Ct. at 1819, 90 L. Ed. 2d at 225 (Powell, J., dissenting) (quoting Boyd v. United States, 116 U.S. 616, 635, 6 S. Ct. 524, 535, 29 L. Ed. 746, 752 (1886)).

137. *Boyd*, 116 U.S. at 635, 6 S. Ct. at 535, 29 L. Ed. at 752.

138. ___ U.S. ___, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).

139. *Id.* at ___, 106 S. Ct. at 1813, 90 L. Ed. 2d at 218.

140. *Id.* at ___, 106 S. Ct. at 1811, 90 L. Ed. 2d at 215.

141. *Id.*

142. *Id.* at ___, 106 S. Ct. at 1812-13, 90 L. Ed. 2d at 216-17.

intrusion of the home and curtilage. The Court defined neither the boundaries of permissible aerial observation nor the requirements for a "reasonable" expectation of privacy. Such neglect can only result in future confusion and frequent deprivations of citizens' fourth amendment rights.

by Brian Jobe