NOTES

WARRANTLESS AERIAL OBSERVATION
OF A BACKYARD

In California v. Ciraolo the United States Supreme Court held that warrantless aerial observation from an altitude of 1,000 feet of a fenced-in home backyard does not violate the fourth amendment. The Supreme Court's decision in Ciraolo misapplied the prevailing "reasonable expectation of privacy" test and thereby failed to determine whether the police conducted a proper fourth amendment search by considering the dweller's expectations. Moreover, by failing to consider the nature of the place surveyed, the Court left the curtilage, a traditionally protected area, unprotected from aerial police surveillance. The Court's holding allows police to fly over a home without a warrant, even when the yard is not observable at ground level, to search for contraband that police officials believe might be located in the yard.

This Note reviews the history of search cases and the application of the fourth amendment to warrantless aerial surveillance of the curtilage. The Note then critiques the Ciraolo majority's analysis, which not only mischaracterizes the search in question as "simple visual observations from a public place," but also departs from prior fourth amendment decisions. Finally, the Note considers the policy implications of the Court's decision.

I. BACKGROUND

A. Definition of a Fourth Amendment Search

The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects, against unrea-

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1 106 S. Ct. 1809 (1986).
2 Id. at 1811-13. The fourth amendment states:
   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.
3 Chief Justice Burger wrote the Court's opinion and was joined by Justices Rehnquist, O'Connor, White, and Stevens.
4 Ciraolo, 106 S. Ct. at 1813.
reasonable searches and seizures.”

Fourth amendment cases involve a two-step test: First, determination of whether a fourth amendment search occurred; and second, if so, was the search reasonable. If a fourth amendment search occurs, and if it is not reasonable, then the search violates the fourth amendment.

I. Katz v. United States

Prior to Katz v. United States, a search in violation of the fourth amendment was limited to a physical intrusion into a “constitutionally protected area.” The Court deemed certain areas, such as houses and their “curtilage,” “constitutionally protected areas.” Unreasonable searches of “constitutionally protected areas” consisted of “any physical entry by law enforcement officers [or] any physical intrusion of a surveillance device into the premises.”

In Katz v. United States the Court revised this traditional notion of fourth amendment searches. The Court stressed the defendant’s intent rather than “protected areas” in defining the relevant privacy interests and established that “the Fourth Amendment protects people, not places.” Justice Stewart’s majority opinion

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5 U.S. CONST. amend. IV. The basic purpose of the amendment “is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” Camara v. Municipal Court, 387 U.S. 523, 528 (1966).


7 1 W. LAFAVE, SEARCH AND SEIZURE: TREATISE ON THE FOURTH AMENDMENT § 2.1, at 223 (1979); see also Olmstead v. United States, 277 U.S. 438 (1928) (warrantless wiretap did not violate fourth amendment because no actual physical invasion of property occurred); Goldman v. United States, 316 U.S. 129 (1942) (warrantless use of detector by Government agents did not violate fourth amendment because no trespass took place).

8 Curtilage is defined as “[t]he inclosed space of ground and buildings immediately surrounding a dwellinghouse. . . . For search and seizure purposes [the definition] includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment.” BLACK’S LAW DICTIONARY 346 (5th ed. 1979).

9 1 W. LAFAVE, supra note 7, at 223.


12 Id. at 353. The defendant in Katz was convicted based on evidence obtained by the F.B.I. from warrantless eavesdropping. The F.B.I. attached microphones to a public telephone booth where Katz made his phone calls. Id.; see generally Note, Telescopes, Binoculars, and the Fourth Amendment, 67 CORNELL L. REV. 379, 382 (1982) (authored by Lawrence Marks).

13 Katz, 389 U.S. at 353.

14 Id. at 351.
never defined when the fourth amendment protects people;¹⁵ Justice Harlan's concurrence, however, posited a two-part test¹⁶ to ascertain whether a fourth amendment search has occurred.¹⁷ The test, later termed the "reasonable expectation of privacy test,"¹⁸ poses two questions: (1) whether the individual, by his conduct, has exhibited an actual, subjective expectation of privacy; and (2) whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.¹⁹

Justice Harlan's test defines the scope of fourth amendment protection by focusing on privacy rights rather than property rights. The fourth amendment protects those things that a person "seeks to preserve as private, even in an area accessible to the public,"²⁰ unless the person's expectation of privacy is unreasonable under the circumstances. Areas traditionally protected remain protected under the Harlan test only if an individual exhibits an intention to keep the area private. For example, "a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."²¹

2. The Continued Importance After Katz of the Curtilage as a "Constitutionally Protected Area"

Recent Supreme Court decisions, although purporting to apply the Katz test,²² have continued to stress the importance of the traditional "constitutionally protected areas."²³ In Oliver v. United States²⁴ the Court singled out the curtilage²⁵ as a place where an

¹⁷ The test has been termed a "standard to determine whether an individual has 'justifiably relied' on privacy." Note, supra note 15, at 982.
¹⁸ Id.
¹⁹ Katz, 389 U.S. at 361 (Harlan, J., concurring).
²⁰ Id. at 351.
²¹ Katz, 389 U.S. at 361 (Harlan, J., concurring).
²² See Oliver v. United States, 466 U.S. 170, 178 (1984) ("individual may not legitimately demand privacy for activities conducted out of doors in fields, except in area immediately surrounding the home"). The Katz decision, by its own language, is ambiguous regarding traditional constitutionally protected areas such as the home.
²³ I W. LAFAVE, supra note 7, at 223; see also Payton v. New York, 445 U.S. 573, 589 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms."); supra note 7 and accompanying text.
individual may "legitimately demand privacy for activities conducted out of doors." The Oliver Court noted that the curtilage has traditionally "been considered part of the home itself for Fourth Amendment purposes." Nevertheless, the Oliver Court did not define the limits of the fourth amendment protection afforded the curtilage; the Court left unclear the extent to which the Katz test and the earlier place-defined doctrines can coexist. Furthermore, the Court did not establish the weight to be accorded an individual’s privacy interests in his curtilage. This lack of clarity is illustrated in cases of warrantless aerial surveillance of the curtilage.

B. Warrantless Aerial Surveillance of the Curtilage

Aerial surveillance has become an increasingly important tool in law enforcement. In recent years, individuals subjected to warrantless aerial surveillance have repeatedly challenged such action as a fourth amendment search. Courts, employing the Katz and Oliver standards, have had difficulty determining whether a particular aerial surveillance is a fourth amendment search. Warrantless aerial surveillance of the curtilage is an exemplary problem for development of fourth amendment analysis because it requires that courts come to terms with the coexistence of place-defined and person-defined rights of privacy.

1. The Facts-of-Surveillance Approach

Some courts, applying Katz, have found that a dweller’s expectation of privacy in his curtilage is unreasonable where officials sur-

25 See supra note 8.
26 Oliver, 466 U.S. at 178 (in contrast to curtilage, individual may not legitimately demand privacy for activities conducted out of doors in fields). See also United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978), cert. denied, 640 U.S. 972 (1979) ("[T]he distinction between open fields and curtilage is still helpful in determining the existence or not of reasonable privacy expectations.").
27 Oliver, 466 U.S. at 180.
28 Id. at 180 n.11.
29 See Amsterdam, supra note 10, at 358, 443-44 & n.83.
32 Courts and commentators have noted that the allowance of warrantless over-flights "poses difficult questions of fourth amendment law." United States v. Alexander, 761 F.2d 1294, 1299 (9th Cir. 1985). See also Comment, supra note 31, at 259; Note, Curtains for the Curtilage?, supra note 30, at 726.
vey the area in a "reasonable and lawful manner." These courts hold that no search occurs if the surveillance results in an "observation that could be expected by a reasonably curious passerby on the 'highway' of the sky." For example, in United States v. Bassford, the court found that surveillance of an area where marijuana plants were growing did not amount to a search. According to the court, no fourth amendment search occurred because a reasonably curious member of the public who was flying over the area would have noticed the striking difference between the color of the marijuana plants and the other flora in the area.

In applying the "reasonably curious" standard, courts have considered the following factors: whether the surveillance was deliberate, sustained, or disruptive; whether the police conducted overflight at a lower altitude than usual flight patterns over the area; whether there were frequent flights over the area; and the nature of the place surveyed.

2. The Protected Curtilage Approach

Other courts, applying the analytical framework of Katz, have found a subjective expectation of privacy reasonable if a dweller ex-

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34 Note, Curtains for the Curtilage?, supra note 30, at 747; see also cases cited supra note 33. Courts have also used the "curious passerby" approach in terrestrial searches, see United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971), cert. denied, 405 U.S. 947 (1972) (police surveillance that uncovers what was protected by dweller from observations of curious passerby is unreasonable).


36 id. at 1331.

37 id.

38 See cases cited supra note 33.


40 Bassford, 601 F. Supp. at 1330 (small plane flights common in area).

hibits an intention to keep his curtilage private. Thus, even if the curtilage is open to the view of police overflights, these courts will not find a fourth amendment search because the dweller has exhibited an intention to keep his curtilage private. These courts emphasize the first prong of the Katz test—did the dweller exhibit a subjective expectation of privacy in his curtilage? If so, the aerial surveillance is not a search because courts consider a privacy expectation in the curtilage, a "constitutionally protected area," reasonable. These courts tend, therefore, to answer the second Katz question by equating society's view of reasonableness with traditional, place-oriented, protected attitudes about the curtilage. Thus, a dweller's subjective expectation of privacy in his curtilage is reasonable because the curtilage is a traditionally protected area.

For these courts, the likelihood of overflight has no bearing on the reasonableness of privacy expectations in the curtilage. These courts consider warrantless overflights analogous to telescopes and other devices that enhance police officers' views of the home and its curtilage. The fourth amendment prohibits warrantless use of these technologies to view a home or curtilage. Overflights, like telescopes, create a view for police officers that would not exist without the help of the technology. Therefore, any "open view" that

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43 See supra notes 22-27 and accompanying text.

44 See Cook, 41 Cal. 3d at 385, 710 P.2d at 307, 221 Cal. Rptr. at 507 (analogizing aerial surveillance to use of electronic beeper in house); Agee, 200 Cal. Rptr. at 835 (aerial observation "lift[s] states gaze" and reduces "the extent of one's privacy").

45 In fact, the Ciraolo majority recited the State's acknowledgment that "[a]erial observation of a curtilage may become invasive . . . through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." Ciraolo, 106 S. Ct. at 1814 n.3 (quoting Brief for Petitioner at 14-15, California v. Ciraolo, 106 S. Ct. 1809 (1986) (No. 84-1513)). See also, United States v. Karo, 468 U.S. 705, 714 (1984) (monitoring of electronic beeper in private residence unconstitutional); United States v. Taborda, 635 F.2d 131 (2d Cir. 1980) (warrantless use of telescope to view apartment unconstitutional). But see United States v. Knotts, 460 U.S. 276, 282 (1983) (warrantless use of electronic tracking devices on cars driving on public highways constitutional). See generally Note, Curtains for the Curtilage?, supra note 30, at 748. Telescopic viewing of the home is unconstitutional even if the homeowner fails to obstruct the view from the outside by not closing the curtains. See, e.g., Taborda, 635 F.2d at 138-39 (inference of intended privacy not rebutted by failure to obstruct telescopic view by not closing curtains).

46 See, e.g., Agee, 200 Cal. Rptr. at 835 ("If limitations of privacy can be technologically leaped, as by the use of aircraft to lift the state's gaze above a restrictive fence, the
the police obtain by overflights is not “open view” but merely an enhanced view obtained by the use of technology.

In sum, prior to Ciraolo, courts tended to fall into one of two groups. In the first group, if a dweller exhibited a subjective expectation of privacy, then the court decided whether the expectation was reasonable; that inquiry rested on whether the overflight was analogous to the passing flight of a “reasonably curious passerby.” In the second group, if a dweller exhibited a subjective expectation of privacy in his curtilage, then the court found his expectation reasonable because the curtilage is an area that society is willing to protect. These courts gave no weight to the view of the “reasonably curious” air passenger in determining the reasonableness of a dweller’s expectation of privacy. Instead, they analogized overflights to telescopes and other technological devices, and found that the dweller does not need to exhibit a subjective expectation of privacy from such “enhanced” views. Thus, a backyard, surrounded by fences and unobservable from ground level is an area that the second group of courts was willing to protect. The courts, therefore, had pursued a well-developed, although not altogether coherent, range of approaches to aerial surveillance cases when the police surveyed Ciraolo’s backyard from the air.

II

CALIFORNIA V. CIRAOLE: NO REASONABLE EXPECTATION OF PRIVACY IN ONE’S OWN BACKYARD

A. Facts

On September 2, 1982, the Santa Clara police received an anonymous telephone tip that Ciraolo was growing marijuana in his backyard. The police could not observe the backyard from ground level because the area was enclosed by a six-foot outer fence and a ten-foot inner fence. Later that day, the police chartered a plane to fly overhead, within public navigable airspace, to view Ciraolo’s backyard. From the plane, the officers observed marijuana plants growing in Ciraolo’s backyard. After obtaining a warrant, the officers seized the plants.
Ciraolo tried to suppress the evidence seized in the search.\textsuperscript{54} The trial court denied his motion to suppress and thereafter Ciraolo pleaded guilty to cultivation of marijuana.\textsuperscript{55} The California Court of Appeal\textsuperscript{56} reversed, holding that the warrantless aerial observation of Ciraolo's backyard was an unreasonable search in violation of the fourth amendment.\textsuperscript{57} The Court of Appeal applied the \textit{Katz} test, finding that (1) Ciraolo exhibited a subjective expectation of privacy by building the fences surrounding his yard\textsuperscript{58} and (2) such an expectation was "reasonable . . . by any standard."\textsuperscript{59} The United States Supreme Court granted certiorari to determine whether warrantless aerial observation from an altitude of 1,000 feet of a home's fenced-in backyard violated the fourth amendment.\textsuperscript{60}

B. The Majority Opinion

The Supreme Court, in a five to four decision,\textsuperscript{61} reversed the California Court of Appeal and found that Ciraolo's subjective expectation of privacy was not reasonable because the marijuana in his backyard was visible from a "public vantage point."\textsuperscript{62} The Court reasoned that because the police observations took place in public navigable airspace,\textsuperscript{63} "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed."\textsuperscript{64}

The Court's analysis in \textit{Ciraolo} appears to turn on the "open view doctrine." Under the "open view" doctrine it is reasonable for the government to view an area that a dweller knowingly leaves open to public view.\textsuperscript{65} Because private and commercial airplanes

\begin{itemize}
\item \textsuperscript{54} \textit{Id.} Admission of evidence against a defendant obtained in contravention of the fourth amendment is prohibited under the exclusionary rule, \textit{Elkins v. United States}, 364 U.S. 206 (1960), which applies to the states through the fourteenth amendment, \textit{Mapp v. Ohio}, 367 U.S. 643 (1961).
\item \textsuperscript{55} \textit{Ciraolo}, 106 S. Ct. at 1811.
\item \textsuperscript{56} \textit{People v. Ciraolo}, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984).
\item \textsuperscript{57} \textit{Id.} at 1090, 208 Cal. Rptr. at 98.
\item \textsuperscript{58} \textit{Id.} at 1089, 208 Cal. Rptr. at 97.
\item \textsuperscript{59} \textit{Id.} Factors the California Court of Appeal considered significant in determining that society would deem Ciraolo's expectation of privacy reasonable included the fact that the surveillance was over the curtilage and that the flyover was focused and deliberate. \textit{Id.} at 1089, 208 Cal. Rptr. at 97-98.
\item \textsuperscript{60} \textit{California v. Ciraolo}, 471 U.S. 1134 (1985).
\item \textsuperscript{61} \textit{See supra} note 3.
\item \textsuperscript{62} \textit{Ciraolo}, 106 S. Ct. at 1812.
\item \textsuperscript{64} \textit{Ciraolo}, 106 S. Ct. at 1815.
\item \textsuperscript{65} \textit{Katz v. United States}, 389 U.S. 347, 351 (1967). For an example of a case involving nonaerial surveillance, see \textit{State v. Pontier}, 95 Idaho 707, 711-13, 578 P.2d 969, 973-74 (1974) (no reasonable expectation of privacy where foreseeable that neighbor could see into backyard surrounded only by low picket fence and some vegetation). \textit{But see}, \textit{People v. Fly}, 34 Cal. App. 3d 665, 667, 110 Cal. Rptr. 158, 159-60 (1973) (reason-
routinely fly in the public airways, Ciraolo's backyard was in "open view" to those members of the public flying over his home. Ciraolo's activities in his backyard were exposed to outsiders and, therefore, his expectation of privacy was not reasonable. Thus, the police surveillance of his backyard was not an unreasonable search.

C. The Dissenting Opinion

Justice Powell's dissent in *Ciraolo* criticizes the majority for basing its decision solely on the fact that "the air space generally is open to all persons for travel in airplanes." Powell felt that even if Ciraolo's backyard was in the open view of the airplane-riding public, that fact alone should not have determined whether Ciraolo's expectation of privacy was reasonable.

Powell reasoned that courts should construe the fourth amendment prohibition against unreasonable searches "in light of contemporary norms and conditions." Thus, the determination of the second question in *Katz*—whether society deems reasonable an individual's subjective expectation of privacy—compels a court to ask "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." A court should give weight to factors such as "the uses to which an individual has put a location" and "our societal understanding that certain areas deserve the most scrupulous protection from government invasion." Society traditionally has considered the curtilage an area where privacy interests have been afforded the "most heightened" protection. Therefore, the Court should have given more...
weight to Ciraolo's interest in maintaining a private backyard.

In addition, Powell criticized the majority's reasoning that Ciraolo's expectation of privacy was unreasonable because the backyard was in open view. "[T]he actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent." Because most citizens do not assume that there is a risk to their privacy from above, the dissenting opinion concluded that Ciraolo did not "knowingly expos[e]" his yard to the public.

Finally, Justice Powell found a "qualitative difference between police surveillance and other uses made of the air space." Because police officers will fly over backyards solely for the purpose of observing activities within those yards, the Court's decision has implications for all citizens attempting to conduct private activities in their curtilage. Police officers, at their own discretion, may now observe private family life. Powell found it inconsistent to give the police the power to conduct "warrantless surveillance at will" when the police are constitutionally forbidden to intrude at ground level without a warrant.

III

ANALYSIS

A. The Critical Notion of "Open View"

The Court's decision in Ciraolo rested on the conclusion that Ciraolo's backyard was in "open view"; it was in "open view" because members of the public could observe it from navigable airspace. Apparently, Justice Burger, writing for the majority, agreed that the backyard was in the curtilage, a traditional constitutionally protected area. However, the Court concluded that even though the area was within the curtilage, that fact alone did not bar all police observation. Id. at 1812 (majority opinion).

Although the majority opinion does not explain why it finds "open view" so significant in determining Ciraolo's privacy expectations, the Court probably "believes that citizens bear the risk that air travelers will observe activities occurring within backyards." Id. at 1818 (Powell, J., dissenting).

This notewriter, after conducting an investigation of what a "reasonable curious passenger" on a commercial airline could see from 1,000 feet, agrees with the dissenting opinion. Even at 1,000 feet (during take-off and landing) the most a passenger can observe is a fleeting glimpse of a backyard. This notewriter finds it hard to believe that an untrained, curious member of the public could distinguish marijuana plants from any other greenery within the curtilage. See id. at 1818 n.8 (Powell, J., dissenting).

Thus, the dissenting opinion disagrees with the majority opinion's application of Katz in Ciraolo. See supra notes 65-66 and accompanying text.

See supra notes 65-67 and accompanying text.
believed that "open view" was so obvious a matter of common sense that it did not require analysis. Consequently, the Court failed to acknowledge the difference between deliberate police surveillance and the possibility of commercial aircraft flying over a backyard, and the difference between "open view" from ground level observation and "open view" created with the aid of technology. The Court's concept of "open view" has an ominous ease and flexibility: it can call into question a dweller's very ability to exhibit a subjective expectation of privacy, or, just as easily, it can nullify the very possibility of the reasonableness of such an exhibition. Thus, the majority's conception of "open view" as an unswerving, naturally rational doctrine allows the Court to sidestep the necessarily political determination of what society deems reasonable.

1. The Difference Between Ground-Level, Unenhanced "Open View" and Aerial, Enhanced "Open View"

The Court's conception of "open view" is actually an enhanced view created by technology. The Katz decision was the first case that rejected the physical trespass notion of fourth amendment search. Katz was followed by the "unreasonable technology" cases. Because the police chartered a plane to fly over Ciraolo's home, they created a view analogous to climbing stilts in order to look over a fence (i.e., an enhanced view).

Perhaps the view created by aerial surveillance is distinguishable from other unreasonably enhanced views. Such a distinction would rest on the flight patterns of the area and the view of reasonably curious air passengers. For example, if Ciraolo's backyard were in the direct flight pattern of many commercial planes, the enhanced aerial view might be commonplace and, thus, not unreasonable. Similarly, if all pedestrians in a certain neighborhood wore stilts, still-climbing police officers would only enhance their view to an ex-

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84 Ciraolo, 106 S. Ct. at 1818 (Powell, J., dissenting) ("Members of the public use the air space for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards."). More important, the fourth amendment protects the citizen from unreasonable searches by government and not from casual observations by a limited segment of the public. See People v. Agee, 200 Cal. Rptr. 827, 836 (1984), retransferred for reconsideration in light of California v. Ciraolo, 106 S. Ct. 1809 (1986), by 238 Cal. Rptr. 374, 738 P.2d 720 (1987).

85 See supra notes 11-21 and accompanying text.

86 See supra note 45; see also Granberg, Is Warrantless Aerial Surveillance Constitutional?, 55 Cal. St. B.J. 451, 451 (1980) ("aerial view is no more 'plain' than a wiretap is 'plain' hearing").

87 See Note, Curtains for the Curtilage?, supra note 30, at 747. See United States v. Kim, 415 F. Supp. 1252 (D. Haw. 1976) (court excluded evidence gathered by use of telescope to view illegal gambling in high rise building that police otherwise would have been unable to obtain). See also cases cited supra note 45.
expected level. Thus, if an enhanced view is commonplace and expected, the dweller has sufficient notice that his yard is in "open view" and his expectation of a private yard becomes unreasonable.

2. The Difference Between Deliberate Police Surveillance and the Possibility of Commercial Aircraft Flying Over a Backyard

The Court did not acknowledge the difference between deliberate police surveillance and the possibility of commercial aircraft flying over a backyard. The Court never distinguished possible public observation by a curious air passenger from a police officer's deliberate search. The police practice in Ciraolo was a deliberate departure from routine, ground-level surveillance. To analogize properly the deliberate police surveillance with the possible observations of passengers flying commercial aircraft, the Court needed to determine the actual flight patterns of commercial aircraft in the area. Instead, the Court assumed that airspace above a home is as accessible as the street in front of a home and, therefore, anyone may view the intimate life conducted in an unobstructed backyard.

The Court should have determined whether ordinary, curious passersby on the "highway of the sky" could clearly view Ciraolo's backyard; if not, the dweller's expectation of privacy from warrantless aerial surveillance was reasonable.

3. The Effect of the Ciraolo Court's Unexamined "Open View" Doctrine

The Ciraolo Court, in effect, endorsed a new definition of "open view." Now open view is not only what is apparent to the casual, curious passerby, but also what the public hypothetically might see if the public were particularly concerned with what is contained within a private citizen's yard and had the power to arrange

88 See Note, supra note 12, at 391 (because dwellers do not ordinarily anticipate that citizens carry telescopes and binoculars to observe dweller's private activities, dweller's expectation of privacy regarding surveillance by such instruments should be reasonable).
89 See supra note 77 and accompanying text.
90 Courts have not clearly indicated whether the intent of the police in warrantless aerial surveillance cases is relevant under the open view doctrine. See Note, Curtains for the Curtilage?, supra note 30, at 744 n.112.
91 See Wright v. United States, 449 F.2d 1355, 1363-64 (D.C. Cir. 1971), cert. denied, 405 U.S. 947 (1972) ("Fourth Amendment protects from invasion by the police the actions and conversations that the ordinary individual would reasonably expect to be strictly private and free from perception by others, regardless of their locale."); see also, Note, Curtains for the Curtilage?, supra note 30, at 747 (society finds reasonable the expectation of privacy from an unreasonably curious passerby).
92 Note, Curtains for the Curtilage?, supra note 30, at 744 n.112 ("open view doctrine... measures whether a person has exposed something to public view by determining whether a reasonably curious passerby may observe it").
and charter observational flyovers. By relying on a superficial application of the "open view" doctrine, the Court obscures rather than clarifies fourth amendment doctrine. Moreover, the Court's conception of "open view" calls into question a dweller's ability ever to exhibit a reasonable subjective expectation of privacy in his curtilage from aerial surveillance unless the dweller erects a view-obstructing structure over his entire yard. Thus, the Ciraolo Court leaves the Katz test devoid of meaning in the context of aerial surveillance.

B. Departure from Katz

In his concurrence in Katz, Justice Harlan found that objects exposed to the plain view of outsiders are not protected because the owner exhibited no intention to keep the objects private. In Ciraolo, in contrast, the majority found that the backyard exposed to "open view" was not protected even though Ciraolo exhibited an intention to keep it private. Because Ciraolo did not exhibit an intention to keep his backyard specifically excluded from aerial surveillance his subjective expectation of privacy was unreasonable.

The Ciraolo majority determined that Ciraolo "[c]learly—and understandably . . . met the test of manifesting his own subjective intent and desire to maintain privacy." In other words, he exhibited an actual subjective expectation to keep his backyard private. In fact, the State did not challenge that he had such an expectation. The Court, in dicta, however, created an extra dimension to the first question in Katz; the Court questioned Ciraolo's "subjective expectation of privacy from all observations of his backyard" and found that Ciraolo lacked a subjective expectation of privacy from aerial observation. Ciraolo did not exhibit a subjective expectation of privacy from aerial surveillance because his backyard was open to view from commercial planes. The Court determined that his overall subjective expectation of privacy was unreasonable. The "open view" doctrine is an important component of the first question in Katz—whether the dweller exhibited an actual, subjective expectation of privacy in his curtilage. The Court, in Ciraolo,

94 See supra notes 61-67 and accompanying text.
95 Ciraolo, 106 S. Ct. at 1811.
96 Id.
97 See supra notes 16-19 and accompanying text.
98 Ciraolo, 106 S. Ct. at 1812.
99 Ciraolo has no expectation of privacy from aerial observation because of the Court's conception of the "open view" doctrine. See supra notes 65-66 and accompanying text.
100 See Note, Curtains for the Curtilage?, supra note 30, at 742-43 nn.111-12.
appears to use this doctrine in determining whether the dweller’s expectation of privacy was reasonable. Thus, a dweller who does not knowingly expose his yard to open view but who, nevertheless, leaves his yard open to the view of a “reasonably curious passerby” does not have a reasonable expectation of privacy.

The Court’s dicta implies that Ciraolo had to take measures to block the view of all aircraft from his backyard to satisfy its newly-created test. Thus, no private citizen who maintains an open-air yard has exhibited a subjective expectation of privacy; further, because an expectation of privacy that is not exhibited is per se unreasonable, all subjective expectations of keeping a fenced-in yard secluded from aerial surveillance are unreasonable. A yard completely enclosed, however, is no longer a yard in the ordinary sense of the word; it ceases to function as an intimate outdoor enclave for the use and enjoyment of the homeowner.

The Ciraolo Court left Katz devoid of meaning. The first question in Katz was circumvented by the creation of a new prong to the test: the exhibition of an expectation of privacy from all observations of a yard. The second question in Katz became an afterthought; the Court avoided a full, reasoned analysis of what expectations of privacy “society is prepared to recognize as ‘reasonable.’” The second part of the Katz test, and the importance of the fourth amendment in protecting citizens from unreasonable searches, demands a more searching inquiry into the “personal and societal values protected by the Fourth Amendment.”

C. Avoiding the Importance of the Curtilage

The Court’s conception of “open view” freed it from the burden of exploring the “personal and societal values protected by the Fourth Amendment.” In Dow Chemical Co. v. United States, however, the Court noted that the curtilage surrounding a private home is a place where society recognizes an individual’s expectations of

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101 The Florida Supreme Court does not read Ciraolo as “sanctioning an unlimited right to any type of examination of residential property from the air.” Riley v. State, 511 So. 2d 282, 286 (1987), cert. granted, 56 U.S.L.W. 3555 (U.S. Feb. 22, 1988) (No. 87-784). In Riley, the Florida Supreme Court distinguished a flyover by a fixed-wing plane at 1,000 feet from a flyover by a helicopter at 400 feet. The Riley court found that “surveillance by helicopter is particularly likely to unreasonably intrude upon private activities.” Id. at 287. Thus, the court held that the defendant had a reasonable expectation of privacy in a greenhouse located within the curtilage from warrantless aerial observations by a police officer flying in a helicopter at 400 feet. The U.S. Supreme Court will presumably decide whether Riley is consistent with Ciraolo.

102 Katz, 389 U.S. at 361 (Harlan, J., concurring).


104 Id. at 182-83.

Thus, on the same day it decided Ciraolo, the Court held that protecting the privacy of curtilage is a relevant societal value. The Court was remiss in not fully determining why in Ciraolo the curtilage is not protected or at least given weight in a determination of the dweller’s reasonable expectation of privacy. The Court should have weighed the level of protection usually afforded a dweller in his curtilage against the unreasonableness of such protection when a “reasonably curious passerby on the ‘highway’ of the sky” might observe the curtilage.

D. Public Policy Implications

Under the Court’s view, the home and its curtilage are no longer safe from police tactics designed to circumvent both the warrant requirement and reasonable attempts to maintain privacy in one's yard. If the police cannot observe the curtilage from the ground, they can observe it from the air even though they would have needed a warrant to conduct a terrestrial or electronic search. The Court noted that the aerial surveillance in Ciraolo was a “simple visual observation[] from a public place” and not a search. By holding that the police did not “search” the curtilage, the Court avoided grappling with settled rights, such as the “right to be left alone in the privacy of [one’s] house.” Because the Court held that aerial surveillance is not a “search,” the police can observe the curtilage of any citizen’s home without violating the fourth amendment. Thus, the decision in Ciraolo grants new freedom and flexibility to the police conducting aerial surveillance of private homes; if police cannot observe a yard from the ground, they can observe the yard from the air and gather information that private citizens expect will remain private. The Constitution, and the cases interpreting the Constitution, should “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.” Unfortunately, the implications of Califor-

106 Id. at 1825-27 (EPA’s warrantless aerial surveillance of Dow’s plant reasonable because areas exposed to aerial observation analogous to open fields and not analogous to curtilage).
107 Note, Curtains for the Curtilage?, supra note 30, at 747. See also supra note 34 and accompanying text.
108 See supra note 45 and accompanying text.
109 Ciraolo, 106 S. Ct. at 1813.
110 Id. at 1819 (Powell, J., dissenting).
nia v. Ciraolo portend just such a totalitarian future. "Don't go out into the open. There might be someone watching." 114

CONCLUSION

The Court ruled in Ciraolo that warrantless aerial surveillance of the curtilage is not a fourth amendment search. The Court's decision elevates a doctrine of "open view" over the "reasonable expectation of privacy" theory used by prior Supreme Courts in other contexts and by the lower courts in warrantless aerial surveillance cases. The Ciraolo Court applied the language of the Katz test without searching into the reasonableness of Ciraolo's expectation based upon the facts of this particular search. The Court did not consider whether society was willing to protect an individual's privacy interests in his backyard. Thus, the Katz test became mere window dressing for a decision based on the majority's notion of common sense.

The fourth amendment requires a searching inquiry into the reasonableness of an individual's expectation of privacy. Courts should scrupulously address the evidence concerning a specific search and society's values about protecting a particular place before deciding whether the search was reasonable. In the context of aerial searches, however, the Ciraolo decision may make such detailed, precise considerations obsolete.

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