California v. Ciraolo: Has Backyard Privacy Gone to Pot?

Carol Elizabeth Kelley

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr

Part of the Law Commons

Recommended Citation
Available at: https://scholarlycommons.pacific.edu/mlr/vol18/iss3/7
Selected Developments in California Law

California v. Ciraolo: Has Backyard Privacy Gone to Pot?

The fourth amendment of the United States Constitution protects the person and property of an individual from unnecessary governmental intrusions.¹ In California v. Ciraolo,² the United States Supreme Court considered the application of the fourth amendment to an aerial search of the curtilage of a home.³ The Court examined whether warrantless aerial surveillance of the curtilage constitutes an unreasonable search.⁴

In Ciraolo, as a result of aerial surveillance, marijuana plants were discovered growing on Ciraolo's property.⁵ The plants were seized by the police, and Ciraolo was arrested and charged with the cultivation of marijuana.⁶ At trial, the defendant, Ciraolo, moved to suppress the evidence on the theory that the aerial search was unreasonable under the fourth amendment.⁷ When the motion was denied, the defendant pleaded guilty to the charge.⁸

¹ The fourth amendment provides:
The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

² 106 S. Ct. 1809 (1986).

³ Id. Curtilage is defined as “a small court, yard, garth, or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling-house and its out-buildings.” Id. at 1817 n.6 (Powell, J., dissenting) (quoting 2 Oxford English Dictionary 1278 (1933)). Generally the curtilage is construed to include at least the yard around the dwelling house and the areas that are occupied by out-buildings. Care v. United States, 231 F.2d 22, 25 (10th Cir. 1956).

⁴ Ciraolo, 106 S. Ct. at 1811-13. See infra text accompanying notes 83-91 (discussion of curtilage and the fourth amendment).

⁵ Ciraolo, 106 S. Ct. at 1811.


⁷ Ciraolo, 106 S. Ct. at 1811.

⁸ Id.
The California Court of Appeal reversed, concluding that the warrantless aerial observation of the defendant’s backyard violated the fourth amendment because the area observed was within the curtilage of the defendant’s home. The court concluded that Ciraolo had demonstrated a reasonable expectation of privacy by maintaining two fences surrounding his backyard. After the state’s petition for review was denied by the California Supreme Court, the United States Supreme Court granted a petition for certiorari. In reversing the decision of the California Court of Appeal, the United States Supreme Court stated that although the defendant may have manifested a reasonable expectation of privacy from some observation, the expectation that there would be privacy from all observation was unreasonable. The Court reasoned that the legitimacy of an expectation of privacy depends not on whether the activity has been concealed, but on whether the governmental intrusion infringes on the values protected by the fourth amendment.

Part I of this Note summarizes the facts of Ciraolo and reviews the opinion of the Supreme Court. Part I also discusses the companion case to Ciraolo, Dow Chemical v. United States, which considered the fourth amendment implications of aerial surveillance of an industrial plant. Part II examines the legal background of the Ciraolo decision concentrating on previous Supreme Court decisions regarding search and seizure, and California decisions regarding aerial surveillance. Finally, the effects and ramifications of the case are discussed in part III.

I. THE CASE

A. The Facts

On September 2, 1982, the Santa Clara police department received an anonymous tip that marijuana was growing in the defendant’s

10. Id. at 1087-90, 208 Cal. Rptr. at 96-98.
13. Id. at 1812.
14. Id.
15. See infra notes 19-78 and accompanying text.
16. See infra notes 57-78 and accompanying text.
17. See infra text accompanying notes 89-109.
backyard.\textsuperscript{19} The police attempted to view the property from the ground, but were unsuccessful because two fences completely surrounded the defendant’s yard.\textsuperscript{20} Later that day, two police officers engaged a private plane and flew directly over the defendant’s home at an altitude of approximately 1000 feet, within navigable airspace.\textsuperscript{21} During the overflight, the officers, who were trained in marijuana identification, observed and photographed marijuana plants growing in the yard.\textsuperscript{22} Six days later, a search warrant was issued, based on an affidavit describing the anonymous tip and the aerial observations.\textsuperscript{23} Having obtained the search warrant, the police seized seventy-three marijuana plants from the defendant’s backyard.\textsuperscript{24} At trial, Ciraolo contested the use of the evidence discovered through the aerial surveillance arguing that the surveillance was an illegal search under the fourth amendment.\textsuperscript{25}

\textbf{B. The Majority Opinion}

After the California Court of Appeal reversed Ciraolo’s conviction, the state petitioned the California Supreme Court to review the case. When the petition was denied, the state then petitioned the United States Supreme Court for a writ of certiorari, which was granted.\textsuperscript{26} In a five to four opinion, Chief Justice Burger, writing for the majority, analyzed the case according to the two-pronged inquiry first articulated by Justice Harlan in his concurrence in \textit{Katz v. United States}.\textsuperscript{27} The first question asked under the \textit{Katz} analysis is whether the

\textsuperscript{19} \textit{Ciraolo}, 106 S. Ct. at 1810.

\textsuperscript{20} Id. The outer fence was six feet in height and the inner fence was ten feet in height. Id.

\textsuperscript{21} Id. The ownership of airspace above the ground only extends to airspace that can be occupied and used in connection with the enjoyment and use of the land. \textit{United States v. Causby}, 328 U.S. 256, 264 (1945). The airspace above this level belongs to the public. \textit{Hinman v. Pacific Air Transp.}, 84 F.2d 755, 758 (1936), \textit{cert. denied}, 300 U.S. 654 (1936). "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C.A. § 1304 (West 1976).

\textsuperscript{22} \textit{Ciraolo}, 106 S. Ct. at 1810-11. The camera used to photograph the plants was not used for visual assistance, but only for evidentiary purposes. The identification of the marijuana plants was made by observation with the naked eye. \textit{Id.} at 1809.

\textsuperscript{23} Id. at 1811. A photograph was attached to the affidavit as an exhibit. \textit{Id.}

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.} at 1811-13; \textit{see} \textit{Katz v. United States}, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The two-pronged \textit{Katz} inquiry developed primarily from the concurrence written by Justice Harlan. For a more detailed explanation of the \textit{Katz} decision, see \textit{infra} text accompanying notes 100-11.
individual has manifested a subjective expectation of privacy in the object of the challenged search. The Court agreed that by erecting fences, Ciraolo clearly had manifested an expectation of privacy, at least as to ground level views. Once the court finds that the defendant manifested a subjective expectation of privacy, the second inquiry is whether society will recognize that expectation as reasonable. This question proved to be a more controversial issue for the court in Ciraolo.

Justice Burger observed that the legitimacy of an expectation of privacy is not based on whether the individual subject to the search has concealed an activity but on whether the governmental intrusion "infringes upon the personal and societal values protected by the fourth amendment." Applying this reasoning, the Court held that the defendant had no reasonable expectation of privacy from aerial surveillance, even though the area searched was within the defendant's curtilage. The Court stated that all police observation is not barred simply because the area observed is within the curtilage of the home. Even though an individual may have attempted to restrict public view of a particular area, the police are not restricted from viewing the area from a public vantage point. Relying on the Katz decision, the Court stated that something which is knowingly exposed to the public is not a subject of fourth amendment protection. The Court emphasized that the police observations in this case were made nonintrusively, with the naked eye, and within public airspace.

In concluding that aerial observation of the defendant's property did not violate the fourth amendment, Justice Burger distinguished

29. Ciraolo, 106 S. Ct. at 1811. The appellate court found that the defendant had manifested an expectation of privacy. The state did not challenge this finding, and therefore the United States Supreme Court did not address the issue. Id. at 1811-12.
31. See infra text accompanying notes 42-56 (the Katz tests as viewed by the Ciraolo dissent).
33. Ciraolo, 106 S. Ct. at 1812.
34. Id. Stated otherwise, the Court held that the fourth amendment does not require police or other government officials to cover their eyes when passing by a private home. Id.
35. Id.
36. Id. at 1812. Ciraolo asserted that he did everything that he could reasonably be expected to do to manifest his desire for privacy. Ciraolo argued that being required to cover his backyard would defeat the purpose of the yard as an outdoor living area. He did not believe that by failing to cover his yard he knowingly exposed himself to aerial surveillance by the police. Id. at 1813.
37. Id. at 1813.
the electronic developments Justice Harlan warned of in his *Katz* concurrence from the increasingly common use of aircraft. Justice Burger noted that in an era when private airplanes are used routinely, an assumption that observation from an aircraft would be protected by the fourth amendment would be unreasonable. The Court held that the defendant’s expectation that his privacy was protected from aerial observation in his backyard was not an expectation society would honor, and therefore was unreasonable.

C. The Dissent

The four dissenting justices expressed concern over what they perceived as the majority’s departure from the *Katz* analysis. In the dissenting opinion, Justice Powell asserted that the majority had ignored Justice Harlan’s warning in *Katz*. Instead, Powell contended, the majority returned to a fourth amendment analysis based only on physical intrusions, failing to consider technological advancements.

The dissenters stated that the fourth amendment should not be an unchanging rule, but should be interpreted according to contem-

---

38. *Katz*, 389 U.S. at 360-62 (Harlan, J., concurring). Justice Harlan warned that a decision which suggested that the fourth amendment did not restrict electronic invasion unless coupled with 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.* at 363.
40. *Id.*
41. *Id.* The appellate court decision made a sharp distinction between aerial surveillance by the police focusing on a particular home, and those made on routine patrols. Because the observations in this case were deliberate, not random, the California Court of Appeal held that the defendant’s reasonable expectation of privacy was violated. People v. Ciraolo, 161 Cal. App. 3d 1081, 1089, 208 Cal. Rptr. 93, 97 (1984), rev’d, 106 S. Ct. 1809 (1986). The United States Supreme Court disagreed, finding instead that the purposes for which a plane flies overhead would not affect the defendant’s expectation of privacy. *Ciraolo*, 106 S. Ct. at 1813 n.2.
42. The dissenting opinion was written by Justice Powell. Justices Blackmun, Brennan, and Marshall joined the opinion. *Ciraolo*, 106 S. Ct. at 1814 (Powell, J., dissenting).
43. *Id.* at 1814-16 (Powell, J., dissenting).
44. *Id.* at 1814. The majority asserted that Justice Harlan’s warning was not ignored, but that the warning was not applicable to the situation in *Ciraolo*. Justice Burger stated that Justice Harlan’s warning was not intended for “simple visual observations from public places.” The majority opinion expressed doubt that in 1967 Justice Harlan considered an aircraft to be within a category of “future electronic developments” that could infringe on an individual’s privacy. *Id.* at 1813.
45. *Id.* at 1817.
46. *Id.* at 1815. See *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981) (both crime and law enforcement have changed, and actions taken by law enforcement agents three centuries ago should not govern what we now regard as proper); *Payton v. New York*, 445 U.S. 573,
The dissenting opinion suggests that a contemporary interpretation of the fourth amendment should include the consideration of technological developments, including the utilization of the airplane as a means of surveillance. Justice Powell wrote that when a search is defined only in terms of physical intrusion, no fourth amendment protection exists against those types of surveillance made available through advances in technology. The dissenters believed that although the majority purported to reaffirm Katz, their summary rejection of the expectation of privacy argument indicated a rejection of the principles underlying the Katz decision.

In addition to disapproving of the majority's Katz analysis, the dissent found fault with the majority's interpretation of the curtilage doctrine. Justice Powell asserted that while the majority implicitly acknowledged that a reasonable expectation of privacy exists within the curtilage from ground level observation, according to the majority a privacy expectation does not exist when the same area is viewed from the air. Justice Powell stated that the reasonable expectation of privacy within the curtilage should not be nullified by purposeful police surveillance from the air.

Finally, the dissent disagreed with the majority's failure to adequately enforce the privacy rights in the home and surrounding areas. According to the dissent, the majority did not consider the traditional presumption that any warrantless intrusion into the home is unreasonable. Justice Powell remarked that although an individual does not have a right to engage in illegal conduct within the home,

---

591 n.33 (1980) (Supreme Court has not fixed into law the enforcement practices that existed at the time the fourth amendment originated); United States v. United States District Court, 407 U.S. 297, 313 (1972) (interpreting Katz as a refusal to confine the fourth amendment to situations which involve actual trespasses).
47. Ciraolo, 106 S. Ct. at 1815 (Powell, J., dissenting); Steagald, 451 U.S. at 217 n.10.
49. Id.
50. Id. at 1816.
51. Id. at 1816-17.
52. Id. at 1817-18. Justice Powell asserted that the majority's holding was based only on the fact that airspace is available to anyone who chooses to travel in an airplane. Justice Powell stated that the majority did not explain why the availability of the airways for transportation should remove privacy rights in enclosed curtilage. Id. at 1818.
53. Id. at 1818.
54. Id. at 1816.
55. Id. See United States v. Karo, 468 U.S. 705, 714 (1984) (private residences are places where privacy from warrantless governmental intrusion is expected); Payton v. New York, 445 U.S. 573, 589 (1980) (the zone of privacy in a home is clearly defined, and the threshold may not be crossed without a warrant, unless exigent circumstances are present); Silverman v. United States, 365 U.S. 505, 511 (1961) (fourth amendment gives individuals the right to retreat into the home and be free from governmental intrusion).
police are required by the fourth amendment to obtain a warrant before intruding into an individual's privacy.\(^{56}\)

D. Dow Chemical Co. v. United States

_Dow Chemical Co. v. United States_,\(^ {57}\) a companion case to _Ciraolo_, also involved aerial surveillance of private property. In _Dow_, the Environmental Protection Agency (EPA) made an on-site inspection of the Dow Chemical plant in Michigan, with Dow's consent.\(^ {58}\) Subsequently, the EPA requested a second inspection. When Dow refused to allow the inspection, the EPA hired a private aerial photographer to survey and photograph the chemical plant.\(^ {59}\) After learning of this activity, Dow brought an action against the EPA, seeking declaratory and injunctive relief.\(^ {60}\) In the district court action, Dow alleged that the EPA's actions exceeded its statutory investigative authority under the Clean Air Act\(^ {61}\) and also constituted a search violative of the fourth amendment.\(^ {62}\) Dow asserted that the outdoor areas which the EPA photographed were "industrial curtilage," and therefore should be given the same constitutional protection as the curtilage of a home.\(^ {63}\) Because the area assertedly had constitutional protection, Dow contended that an expectation of privacy from aerial surveillance was reasonable.\(^ {64}\) The district court agreed with Dow's contentions and issued an order permanently enjoining the EPA from taking aerial photographs of Dow's property.
and from releasing, distributing, or copying the photographs which had already been taken.\(^6\) On the EPA's appeal, however, the appellate court reversed,\(^6\) holding that although Dow had a reasonable expectation of privacy from ground level observation, the expectation of privacy from aerial surveillance was not reasonable.\(^6\) When the case was appealed to the United States Supreme Court, the Court rejected both Dow's assertion that the EPA had exceeded its statutory authority under the Clean Air Act and the contention that the surveillance constituted an unreasonable search.\(^6\) Regarding the investigative authority under the Clean Air Act, the Court held that although that Act does not specifically authorize aerial inspections, neither does it expressly forbid this type of investigation.\(^6\) As a result, the EPA was held to be within the authority granted by the Clean Air Act.\(^7\)

The Supreme Court also disagreed with Dow's arguments that taking photographs of an industrial plant was a search prohibited by the fourth amendment.\(^7\) Responding to Dow's assertion that the plant deserved the protection traditionally given to curtilage, the Court concluded that an open-air plant\(^7\) was not analogous to the curtilage of a home.\(^7\) For the purposes of aerial surveillance, the Court held that an industrial complex more closely resembled an open field,\(^7\) a location where there can be no legitimate expectation of privacy.\(^7\)


\(^6\) Id. at 313.

\(^6\) Dow, 106 S. Ct. at 1824, 1827.

\(^6\) Id. at 1823. The Court in Dow stated that the Clean Air Act expands, rather than restricts, the EPA's investigatory authority. The powers listed in the statute are not exclusive. Id.

\(^7\) Id. at 1824.

\(^7\) Id. at 1827. In their discussion of whether taking aerial photographs was a search violative of the fourth amendment, the Court only considered a situation such as that in Dow, where the type of property is analogous to an open field. The Court did not discuss aerial photography of curtilage. Presumably, the propriety of aerial photography of curtilage is still in question. Id.

\(^7\) The Dow Chemical plant in Michigan is a 2000 acre facility for chemical manufacturing. The plant consists of numerous covered buildings. Located between the buildings are manufacturing equipment and piping conduits which can be viewed from the air. Id. at 1822.

\(^7\) Id. at 1827.

\(^7\) Id. See infra text accompanying notes 85-91 (discussion of "open fields" concept).

\(^7\) Dow, 106 S. Ct. at 1826. It should be noted that Dow did attempt to protect privacy
As in *Ciraolo*, the Court in *Dow* purported to reaffirm the curtilage doctrine. At the same time, however, the Court refused to allow fourth amendment protection of private outdoor property from aerial surveillance. In *Dow*, this denial of fourth amendment protection is justifiable on the grounds that the chemical plant is not analogous to curtilage. The same result is more difficult to understand in *Ciraolo*, where the protection afforded the curtilage is contradictory to the conclusion that no fourth amendment protection exists from aerial surveillance.

II. LEGAL BACKGROUND

The right of an individual to be secure from governmental intrusion is a fundamental constitutional right. Originally, the courts interpreted this right in terms of property law, requiring a physical intrusion in order to find a search. Over time, fourth amendment law evolved into an analysis of whether the government violated an individual's expectation of privacy. *Ciraolo* indicates that the court is returning to a property-based analysis.

A. Supreme Court Decisions

Early interpretations of the fourth amendment were based on property and trespass law. A search under fourth amendment prin-
ciples required a physical intrusion into a "constitutionally protected area." Under this property-based analysis, land was placed into one of three categories to determine the amount of constitutional protection allowed. The three categories consisted of the dwelling, the curtilage, and the outlying property or open fields. According to traditional analysis, the dwelling areas received the greatest protection. The curtilage areas also received substantial protection because the curtilage was viewed as an extension of the home. Under common law doctrines, open fields were given minimal protection.

Early technological developments, and the intrusions which accompanied them, did not change property-based fourth amendment analysis. In Olmstead v. United States, the United States Supreme Court held that wiretapping did not constitute an unlawful search or seizure. Listening without any physical intrusion was not a trespass.
according to the Court in \textit{Olmstead}. Therefore, wiretapping did not constitute a fourth amendment violation under the property-based analysis.\footnote{94} In subsequent cases, the requirement of a physical intrusion was interpreted very strictly; the slightest physical penetration could trigger a fourth amendment violation.\footnote{95} For example, in \textit{Silverman v. United States}, a spike mike\footnote{97} was placed into a party wall, where the microphone made contact with the defendants' heating duct.\footnote{98} The Supreme Court held that this physical penetration was violative of the fourth amendment.\footnote{99}

Though fourth amendment analysis did not change because of early technological advancements, the increased use of electronic surveillance necessitated a more flexible approach to determining claims based on the fourth amendment.\footnote{96} In \textit{Katz v. United States},\footnote{91} the Supreme Court recognized for the first time that the traditional property analysis was inadequate for evaluating searches under the fourth amendment.\footnote{92} The majority opinion in \textit{Katz} stressed that the fourth amendment "protects people, not places."\footnote{93} Following \textit{Katz}, search and seizure analysis no longer focused exclusively on the area subject to search, but included consideration of the privacy expectations of the person observed.\footnote{94} According to the \textit{Katz} rationale,

\begin{itemize}
  \item \textit{Id.} at 464-65. Cases which followed the \textit{Olmstead} decision also required physical intrusion in order to find a fourth amendment violation. \textit{See, e.g.,} Goldman v. United States, 316 U.S. 129, 134 (1942), wherein a listening device which recorded conversations was placed on a party wall. No fourth amendment violation was found because no physical intrusion occurred. \textit{Id.} \textit{See also} Lopez v. United States, 373 U.S. 427, 439 (1963). In Lopez, an undercover agent with a hidden microphone recorded conversations between himself and the defendant in the defendant's office. No fourth amendment violation was found because the agent entered the defendant's office with consent. \textit{Id.}
  \item Clinton v. Virginia, 377 U.S. 158, 158 (1964) (per curiam) (spiked microphone sufficient penetration of premises to be considered a fourth amendment violation); Silverman v. United States, 365 U.S. 505, 511-12 (1961).
  \item 365 U.S. 505 (1961).
  \item A spike mike is an electronic listening device. The device consists of a foot long spike attached to a microphone, with an amplifier, power pack, and earphones. By placing the spike mike in a heating duct, as was done in \textit{Silverman}, the heating system became a sound conductor. \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} at 511-12.
  \item \textit{See Comment, supra note 81, at 412.}
  \item 389 U.S. 347 (1969). In \textit{Katz}, a wiretapping device planted on the outside of a public telephone booth recorded incriminating telephone calls made by the defendant. \textit{Id.} at 348.
  \item \textit{See Comment, supra note 81, at 412.}
  \item \textit{Katz}, 389 U.S. at 351.
  \item \textit{Id.} at 350-53. All property considerations did not disappear after \textit{Katz}. For example, there may be a higher expectation of privacy inside a home than outside in a yard. \textit{See, e.g.,} United States v. Allen, 633 F.2d 1282, 1289 (9th Cir. 1980), \textit{cert. denied}, 454 U.S. 833 (1981) (privacy expectation is associated with the interior of residences); People v. Sneed, 32 Cal.
what a person knowingly exposes to the public is not a subject of fourth amendment protection.105

In his concurring opinion in *Katz*, Justice Harlan clarified the majority's analysis.106 Justice Harlan stated that the correct inquiries in analyzing a search under the fourth amendment were, "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"107 Justice Harlan's language was thereafter adopted as the standard analysis for addressing all fourth amendment inquiries,108 replacing the "constitutionally protected areas" test of *Olmstead* and its successors.

Despite the development of the two-pronged inquiry in *Katz v. United States*, some remnants of the traditional property analysis persisted.109 Courts continued to distinguish between curtilage and open fields. Activities within the curtilage were still protected,110 while those conducted in open fields were not.111

---

105. *Katz*, 389 U.S. at 351. The knowing exposure rule applies even if the area exposed is of a private nature, such as a home or office. *Id.*

106. *Id.* at 360 (Harlan, J., concurring).

107. *Id.* at 361.

108. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (using Harlan's concurrence as the crux of the holding in *Katz*). Harlan's reasonable expectation of privacy test has been criticized as being too easily manipulated. For example, if the government announced that a new surveillance technique would now be routinely used to observe the interior of private homes, a subjective expectation of privacy in the home would no longer be reasonable. See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 384 (1974). See also *Smith v. Maryland*, 442 U.S. 735, 740-42 n.5 (1975) (Justice Harlan's test inadequate in certain situations). Another criticism is that the requirement of a physical manifestation of privacy is problematic in any aerial search situation because of the near impossibility of manifesting privacy skyward. See Comment, supra note 79, at 470 n.68.

109. In the year following the *Katz* decision, the ninth circuit decided *Wattenberg v. United States*, 388 F.2d 853 (9th Cir. 1968). In *Wattenburg*, the court held that contraband which was 20 to 35 feet from the defendant's home was entitled to fourth amendment protection because the contraband was within the curtilage. *Id.* at 857. The court went on to say, however, that a better inquiry after *Katz* was whether there was an intrusion into an area the defendant attempted to maintain as private. *Id.* at 857.

110. *Oliver v. United States*, 466 U.S. 170, 178 (1984) (privacy may be legitimately expected in areas immediately surrounding the home); *Wilson v. Health & Hosp. Corp.*, 620 F.2d 1201, 1209 (7th Cir. 1980) (open fields and plain view exceptions to warrant requirements do not justify warrantless search of, or entry into curtilage); *United States v. Stroble*, 431 F.2d 1273, 1276 (6th Cir. 1973) (item within curtilage of home protected by fourth amendment); *Wattenburg*, 388 F.2d at 857. See infra notes 112-19 (detailed discussion of *Oliver*).

111. Air Pollution Variance Bd. v. Western Alfalfa Corp., 415 U.S. 861, 865 (1974) (the public is not excluded from areas such as open fields); *Oliver*, 466 U.S. at 178 (open fields not within protection of fourth amendment). Under the plain view doctrine, an activity or item loses fourth amendment protection if it can be observed by someone who is in a location
Seventeen years after the *Katz* decision, the United States Supreme Court narrowed the two-pronged *Katz* test in *Oliver v. United States.*\(^{112}\) In *Oliver*, the Court also reinforced earlier property law interpretations of the fourth amendment.\(^{113}\) The Court gave renewed constitutional significance to the curtilage doctrine, holding that privacy may not legitimately be expected in the outdoors, except in those areas immediately surrounding the home.\(^{114}\) In contrast to the *Katz* decision, the *Oliver* Court emphasized the area or type of property involved, rather than the expectation of privacy manifested by the person subjected to the search.\(^{115}\) The Court further stated that the steps taken by an individual to ensure privacy are irrelevant in determining whether a search was reasonable.\(^{116}\) The test for a reasonable expectation of privacy is not that the individual chose to hide the activity, but whether the governmental intrusion "infringes upon the personal and societal values protected by the Fourth Amendment."\(^{117}\) Although *Katz* was not specifically overruled, the Court in effect rejected the first prong of the *Katz* test.\(^{118}\) After the *Oliver* decision, courts were only required to consider the second part of the *Katz* test.\(^{119}\)

Thus, prior to the *Katz* decision, the Supreme Court followed historical property doctrines in the analysis of search and seizure cases under the fourth amendment. *Katz*, however, signaled a change where the person has a right to be. See, e.g., *Texas v. Brown*, 460 U.S. 730, 737-38 (1983) (police officer must lawfully be in position from which contraband can be viewed); *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971) (object in plain view if police officer had prior justification for an intrusion and while in the private area inadvertently sees incriminating evidence).


\(^{113}\) Id. at 178-80.

\(^{114}\) Id. at 180.

\(^{115}\) Id. at 178-82. The Court reaffirmed *Hester v. United States*, 265 U.S. 57 (1924). See *supra* note 91 (discussion of *Hester*).

\(^{116}\) "[W]e reject the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate." *Oliver*, 466 U.S. at 182. See Comment, *supra* note 90 at 808 n.87 (*Oliver* holding implies that steps taken by an individual to insure privacy in a particular locale are irrelevant).

\(^{117}\) *Oliver*, 466 U.S. at 178-82. The Court, however, did not articulate exactly what these protected values are.

\(^{118}\) See Comment, *supra* note 90, at 808-09 n.87. The first prong of the *Katz* test asks whether the individual has manifested a reasonable subjective expectation of privacy. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). *Oliver* seems to reject the first prong because the inquiry is irrelevant to the personal and societal values protected by the fourth amendment. *Oliver*, 466 U.S. at 182.

\(^{119}\) See Comment, *supra* note 90, at 808 n.87. The second prong of *Katz* asks whether society will accept the individual’s privacy interest as reasonable and legitimate. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
in the Court's approach. Following *Katz*, the Court began to look not at the particular property searched, but at the subjective intent of individuals, as manifested by the actions taken to protect their privacy.\(^{120}\) In *Oliver*, however, emphasis on the intent of individuals began to erode, in favor of greater concern in law enforcement for the interests of society as a whole.\(^{121}\)

**B. California Decisions**

In 1969 the California Supreme Court adopted an approach similar to *Katz* for analyzing search and seizure cases. *People v. Edwards*\(^{122}\) marked the first time the California Supreme Court refrained from using the traditional definitions of curtilage and open fields in a fourth amendment case.\(^{123}\) The court stated that the more appropriate question in determining whether a search violates the fourth amendment is whether the individual has manifested a reasonable expectation of privacy.\(^{124}\) If so, the next inquiry is whether that privacy has been intruded upon by government officials.\(^{125}\)

After the *Edwards* decision, the reasonable expectation of privacy test became the standard analysis in fourth amendment cases.\(^{126}\) In *Lorenzana v. Superior Court*,\(^{127}\) police officers acting on an informant's tip trespassed onto the defendant's property and peered into his window through a gap in the drawn window shade.\(^{128}\) The officers

---

120. *See supra* text accompanying notes 79-118.
121. *Oliver*, 466 U.S. at 182.
123. *Id.* at 1100, 1103-04, 458 P.2d at 715, 717-18, 80 Cal. Rptr. at 635, 637 (formal rejection of property based distinctions and adoption of *Katz* analysis). *See Comment, supra* note 84, at 788.
124. *Id.*
125. *Id.* at 1100, 458 P.2d at 715, 80 Cal. Rptr. at 635.
126. *See, e.g.*, People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973). *Triggs* involved police surveillance of illegal sex acts in a public restroom. *Id.* at 888, 506 P.2d at 234-35, 106 Cal. Rptr. at 410-11. Although the individual stalls had no doors, and the acts were conducted in plain view, the defendants still had a reasonable expectation of privacy because they had no reason to suspect that clandestine surveillance was taking place. *Id.* at 891-92, 506 P.2d at 236-37, 106 Cal. Rptr. at 412-13. An exception to the use of the reasonable expectation of privacy test was *People v. Dumas*, 9 Cal. 3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973). In *Dumas*, the California Supreme Court employed a "hierarchy of protection" analysis. This hierarchy applied protection in varying degrees, depending upon the nature of the area searched. In this sliding scale analysis, houses were given a high degree of protection, while public areas were not. The court suggested that one standard of reasonableness be used for all locations, but the standard should include the realization that not all locations are deserving of equal protection. *Id.* at 881-82, 512 P.2d at 1208, 109 Cal. Rptr. at 304 (1973).
128. *Id.* at 630, 511 P.2d at 36, 108 Cal. Rptr. at 588.
observed defendant Lorenzana apparently handling narcotics and proceeded to forcibly enter the house and arrest the defendant. The court held that a governmental intrusion into an area in which an individual has manifested a reasonable expectation of privacy is an unreasonable search under the fourth amendment. In addition, the court reasoned that the type of intrusion was irrelevant in determining whether a reasonable expectation of privacy existed. Thus, governmental intrusion into an individual's reasonable expectation of privacy was considered an unreasonable search, whether accomplished by physical, auditory, or visual means.

Until 1985, when the California Supreme Court decided *People v. Cook*, aerial search cases had been decided only at the intermediate appellate level in California. The appellate courts had consistently analyzed aerial surveillance cases differently than those cases involving ground level surveillance. Generally, the California courts did not hold that aerial surveillance of backyards or other fenced areas was unconstitutional. The aerial search cases in California tended to contradict the *Katz* approach by focusing on the lack of physical intrusion and on the nature of the activity discovered, rather than on the privacy expectation of the person subjected to the search.

The first California case involving aerial surveillance was *People v. Sneed*. In *Sneed*, a helicopter flew at a very low altitude over

---

129. Id. at 631, 511 P.2d at 36-7, 108 Cal. Rptr. at 588-89.
130. Id. at 639, 511 P.2d at 42, 108 Cal. Rptr. at 594.
131. Id.
132. Id.
134. See infra text accompanying notes 135-56 (discussion of appellate level aerial search cases).
135. See *People v. Joubert*, 118 Cal. App. 3d 637, 647, 173 Cal. Rptr. 428, 434 (1981) (no right to privacy from aerial search); *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836, 839, 112 Cal. Rptr. 764, 765 (1974) (no reasonable expectation of privacy in backyard used for storage of stolen auto body parts); *Dean v. Superior Court*, 35 Cal. App. 3d 112, 118-19, 110 Cal. Rptr. 585, 589-90 (1973) (no reasonable expectation of privacy unless activity within "mankind's common habits"). See also *Burkholder v. Superior Court*, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (1979). According to the *Burkholder* court, the possessor of land used for cultivation of illegal crops can have no reasonable expectation of privacy from overflight. *Id.* at 425, 158 Cal. Rptr. at 88. In *Burkholder*, however, a fourth amendment violation was found because of an illegal ground search rather than because of the overflight. *Id.* at 429, 158 Cal. Rptr. at 91.
136. See Comment, supra note 84, at 790-94.
137. *Burkholder*, 96 Cal. App. 3d at 425, 158 Cal. Rptr. at 88 (possessor of land devoted to cultivation of contraband can exhibit no reasonable expectation of privacy consistent with common habits of those engaged in agriculture); *Stroud*, 37 Cal. App. 3d at 839, 112 Cal. Rptr. at 765 (no reasonable expectation of privacy for storage of stolen automobile parts in backyard).
the defendant’s yard in search of marijuana. The surveillance was held to constitute an unreasonable search, due to the unusually low elevation of the helicopter. The court stated that if the helicopter had flown at a reasonable altitude, no intrusion would have occurred.

Although the Sneed analysis was based on traditional property concepts, other courts recognized the need to consider technological advancements when evaluating fourth amendment claims. In Dean v. Superior Court, an aerial search was conducted after police received a tip that marijuana was growing on the defendant’s property. During the flight, marijuana plants were discovered growing on a tract of land surrounded by a forest. While acknowledging that a reasonable expectation of privacy may extend into airspace, the appellate court found no fourth amendment violation. Because the defendant had not exhibited an expectation of privacy consistent with what the court referred to as the “common habits” of persons engaged in agriculture, he had not manifested a reasonable expectation of privacy from overflights. According to the Dean court, the common habits of society in the use of property supplies the measure of reasonableness for a privacy expectation. The defendant’s subjective expectations are immaterial if the use of the property is not consistent with what society deems normal for that property.

The concept that there is no reasonable expectation of privacy when property is viewed from the air was expanded in People v.
In this case, the court held that an individual has no right to privacy from aerial examination conducted at a lawful altitude. Thus, anyone who grows marijuana outdoors does so at the risk of being seen by police officers in aircraft. The *Joubert* court stated that the only way to demonstrate a reasonable expectation of privacy would be to shield the plants completely.

These aerial search decisions demonstrate the prevailing position taken by the California appellate courts. First, although the possibility of a reasonable expectation of privacy within airspace was acknowledged, that privacy right for all practical purposes was nonexistent. Second, the California courts failed to incorporate the *Katz* principles into analysis of aerial surveillance. According to the decisions, the fourth amendment was not violated by aerial observation that did not involve any physical intrusion. The courts failed to consider the policy expressed in *Katz* that reasonable privacy expectations should not change simply because advancements are made in technology.

The first aerial search case decided by the California Supreme Court, *People v. Cook*, involved facts remarkably similar to those in *California v. Ciraolo*. In *Cook*, an informant reported to the police that marijuana was being cultivated in the defendant’s backyard. Police attempted a ground search, but were unsuccessful, because the yard was surrounded by a high fence. The police later flew over the property and observed and photographed marijuana.

---

151. Id. at 647, 173 Cal. Rptr. at 434.
152. Id. at 646, 173 Cal. Rptr. at 434.
153. Id. The court suggested that only by growing the marijuana in a hothouse or by otherwise shielding the plants completely from aerial surveillance would they be protected. See also *People v. St. Amour*, 104 Cal. App. 3d 866, 892, 163 Cal. Rptr. 187, 190-91 (1980). The court in *St. Amour* expanded this idea, stating that physical manifestations of privacy, such as fences and signs, protected property from “earthly encroachments” only. Id.
155. See *supra* text accompanying notes 135-51 (discussion of appellate level aerial search cases).
156. See *supra* text accompanying notes 138-53 (discussion of appellate level aerial search cases).
158. 41 Cal. 3d 373, 710 P.2d 299, 221 Cal. Rptr. 499 (1985).
159. 106 S. Ct. 1809. See *supra* notes 19-25 and accompanying text (discussion of *Ciraolo* facts).
160. *Cook*, 41 Cal. 3d at 377, 710 P.2d at 302, 221 Cal. Rptr. at 501-02.
161. Id.
Based on this evidence, a search warrant was issued. In reference to aerial surveillance, the California Supreme Court held that there is a reasonable expectation of privacy in an enclosed backyard. Because private life within the home can be expected to extend to outdoor areas, a high privacy interest must exist in the curtilage.

The court strongly asserted that no state interest can justify "unfettered intrusions on the sanctity of private residences" that occur through purposeful aerial surveillance. The court differentiated between occasional, inadvertant observation, as that which might occur when a private or commercial airplane flies over a home, and the intensive government spying that occurred in this instance. According to the California Supreme Court, the airplanes are not public highways, and routine aerial surveillance is not analogous to a routine street patrol. The California Supreme Court disapproved of earlier appellate court opinions, and stated that measures such as covering a backyard are not necessary to ensure privacy.

Two important aspects of Cook should be noted. First, the case was decided under the California Constitution, rather than on fourth amendment grounds. Second, although Cook was decided after Proposition Eight was enacted, the facts occurred before the new law went into effect. Thus, Proposition Eight did not affect the holding of Cook.

Proposition Eight, also known as the Victim's Bill of Rights, was voted into law on June 8, 1982 and became part of the California Constitution. The provision known as the Right to Truth in Evi-

162. Id. at 377-78, 710 P.2d at 302, 221 Cal. Rptr. at 502.
163. Id.
164. Id. at 375-77, 710 P.2d at 300-02, 221 Cal. Rptr. at 500-01.
165. Id. at 379, 710 P.2d at 303, 221 Cal. Rptr. at 503.
166. Id. at 382, 710 P.2d at 305, 221 Cal. Rptr. at 505.
167. Id. at 380-81, 710 P.2d at 304, 221 Cal. Rptr. at 504.
168. Id. at 381-82, 710 P.2d at 304-05, 221 Cal. Rptr. at 504-05.
170. Cook, 41 Cal. 3d at 376, 710 P.2d at 300, 221 Cal. Rptr. at 500. The pertinent section of the California Constitution is article XIII, § 1, which states: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated. . . ." CAL. CONSTR. art. XIII, § 1.
171. The facts of Cook which gave rise to the decision occurred on September 2, 1981. Proposition Eight became effective on June 8, 1982. Cook, 41 Cal. 3d at 386 n.1, 710 P.2d at 308 n.1, 221 Cal. Rptr. at 508 n.1 (Lucas, J., dissenting).
172. Section three of the Proposition Eight initiative became article I § 28 of the California Constitution.


dence states that relevant evidence may not be excluded in any
criminal proceeding.\textsuperscript{174} The effect of this provision is that all evidence
admissible under federal constitutional law will be admissible in the
California courts.\textsuperscript{175} The use of California's exclusionary rule is
therefore precluded whenever that rule entitles a suspect to have
greater rights than federal law would allow.\textsuperscript{176}

The California exclusionary rule is codified in Penal Code section
1538.5(d), which states that evidence may be suppressed on the
motion of the defendant if (1) the search or seizure was without a
warrant and was unreasonable, or (2) the search and seizure was
with a warrant, but was unreasonable.\textsuperscript{177} The rule has not been
repealed.\textsuperscript{178} Instead, the California Supreme Court must now interpret
search and seizure cases consistently with United States Supreme
Court interpretations.\textsuperscript{179} Cases such as \textit{Cook}, which are decided under
the California Constitution, as well as cases decided on fourth
amendment grounds are affected by Proposition Eight.\textsuperscript{180}

The impact of Proposition Eight was recently illustrated in \textit{In re
Lance W.}.\textsuperscript{181} In this case, the California Supreme Court held that
Proposition Eight precludes the use of article 1, section 13 of the
California Constitution.\textsuperscript{182} This section essentially is California's par-
allel to the fourth amendment.\textsuperscript{183} The court in \textit{Lance W.} held that
Proposition Eight eliminated California's exclusionary rule as a ju-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{174} The California Constitution article I, § 28(d) provides: "(d) Right to Truth in
Evidence . . . relevant evidence shall not be excluded in any criminal proceeding, including
pretrial and post conviction motions and hearings or in any trial or hearing of a juvenile for
\item \textsuperscript{175} \textit{See In re Lance W.}, 37 Cal. 3d 873, 879, 649 P.2d 744, 750, 210 Cal. Rptr. 631, 634
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} \textit{CAL. PENAL CODE} § 1538.5 (West 1982).
\item \textsuperscript{178} \textit{See Comment, supra note 173, at 1064 n.26.}
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} Id. at 1065. The effect of Proposition Eight on \textit{Cook} was demonstrated by \textit{People v.
that \textit{Cook} could not be relied upon as precedent in an aerial search case if the facts giving
rise to the action occurred after Proposition Eight became effective. The court cited \textit{In re
Lance W.}, 37 Cal. 3d 873, 649 P.2d 744, 210 Cal. Rptr. 631 (1985), as authority for the
abolition of independent state grounds for the exclusion of evidence. \textit{Smith}, 180 Cal. App. at
85, 225 Cal Rptr. at 355.
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} \textit{Id. at 879, 694 P.2d at 747, 210 Cal. Rptr. at 634.}
\item \textsuperscript{183} \textit{Compare} U.S. \textit{CONST.} amend. IV with \textit{CAL. CONST.} art. I, § 13. \textit{See supra note 1}
(text of U.S. \textit{CONST.} amend. IV); \textit{supra} note 171 (text of \textit{CAL. CONST.} art. I, § 13).
\end{itemize}
\end{footnotesize}
dicially created remedy for unlawful searches and seizures. The result is that although a search violating the California Constitution would remain unlawful, the remedy for the violation no longer exists in the form of excluding evidence. In effect, Lance W. abolishes California state law as grounds for the exclusion of evidence in the area of search and seizure law. In aerial surveillance cases, therefore, Ciraolo is now the controlling precedent.

III. RAMIFICATIONS

California v. Ciraolo marks an important change in the United States Supreme Court’s analysis of fourth amendment search and seizure cases. In both Dow and Ciraolo, the Supreme Court claimed to reaffirm the curtilage doctrine. Nevertheless, the status of the doctrine remains uncertain. In Dow, the Court specifically stated that society does accept as reasonable an expectation of privacy in the curtilage. In Ciraolo, however, although the property searched was considered curtilage, this protection was denied the defendant.

Both Ciraolo and Dow indicate that the Supreme Court will treat precautions directed towards aerial surveillance quite differently from those directed towards ground surveillance. Apparently, manifestation of an expectation of privacy from ground surveillance will not be sufficient to satisfy the first prong of the Katz test and therefore protect against aerial surveillance. Precautions against both types of surveillance would appear to be necessary to avoid the result reached in Ciraolo. Presumably this new rule applies to both open fields and curtilage.

---

184. Lance W., 37 Cal. 3d at 886-87, 694 P.2d at 752, 210 Cal. Rptr. at 639.
185. Id.
186. See Comment, supra note 173 at 1100; Christiansen, supra note 173, at 13.
188. Id.
189. See Ciraolo, 106 S. Ct. 1809, 1813.
190. See supra text accompanying notes 29-41 and 71-72.
191. See supra text accompanying notes 29-41 & 72.
192. At first glance, requiring precautions against both aerial and ground surveillance seems reasonable. The Court failed to consider, however, the economic feasibility of imposing such a requirement. The chances that homeowners who desire privacy are financially capable of covering their backyards seems quite unlikely. The Court was not concerned with this economic aspect in Dow. The record shows that the cost of enclosing one of the sections of the Dow Chemical plant would have been approximately $15,000,000 in 1978, plus increased maintenance costs. The Court apparently would still require the installation of a roof to protect against aerial surveillance, even though this cost would probably render such roofing impossible. Dow, 106 S. Ct. at 1828 n.1 (Powell, J., dissenting).
As the dissent points out, the *Ciraolo* analysis departs from the principles expressed in *Katz*. The majority in *Ciraolo* did not consider the concerns of individual privacy as seriously as the Court in *Katz*. Instead, the Court focused on the manner of surveillance. Under the Court’s reasoning, since the intrusion was not physical, and since no one entered the curtilage, the defendant’s rights of privacy were not constitutionally protected. An unfortunate result of this new requirement, especially if extended by future cases, may be a chilling effect on outdoor activity whether legal or illegal. As the dissent warns, *Ciraolo* creates a probability that individuals do not have an expectation of privacy unless they withdraw behind the walls of their homes. A roof would be required to protect outdoor space.

Though the individual’s privacy in and around the home traditionally has been given much fourth amendment protection, the decision in *Ciraolo* may open the door to a restriction of these protections. With the growing use of high-tech law enforcement practices such as aerial surveillance, privacy may well diminish even further. Although society may benefit by a diminished crime rate with this increase in allowable surveillance techniques, the loss of security “damages the fabric of a free society and weakens its democratic institutions.” Although *Ciraolo* may not appear to sanction the strongest, most offensive kind of search, the decision may be a significant indication of the possibility of future expansions in surveillance techniques.

Following the *Ciraolo* decision, warrantless aerial surveillance may become an accepted police practice in the United States. Allowing aerial surveillance of the curtilage without a warrant, however, ef-

---

194. *Id.* at 1814-16 (Powell, J., dissenting).
195. *Id.* at 1817 (Powell, J., dissenting).
196. *Id.* at 1813.
197. People v. Cook, 41 Cal. 3d 373, 377, 710 P.2d 299, 301, 221 Cal. Rptr. 499, 502 (1985). The chilling effect would cause individuals to refrain not only from illegal activities such as growing marijuana, but also private legal activities associated with the outdoors, such as nude sunbathing, family activities, and the like. *Id.* at 382, 710 P.2d at 305, 221 Cal Rptr. at 505.
199. *Cook*, 41 Cal. 3d at 382, 710 P.2d at 305, 221 Cal. Rptr. at 505.
201. See Comment, supra note 79 at 491.
fectively permits technology to outmaneuver the fourth amendment.\textsuperscript{203} As the majority in \textit{Ciraolo} reasoned, since the use of airways is common,\textsuperscript{204} the public cannot reasonably expect privacy outdoors.\textsuperscript{205} By consistently using technological aids for surveillance, therefore, the government can dictate whether an expectation of privacy is reasonable. The government’s ability to use any means of technology available, as long as within common knowledge, will make it increasingly difficult for anyone to maintain complete privacy.\textsuperscript{206} By allowing this result, curtilage has lost valued protections.\textsuperscript{207} The routine use of technological advances has provided the government with the ability to do exactly what the fourth amendment was designed to prevent.\textsuperscript{208}

\textit{Ciraolo} will not only cause changes in federal interpretation of fourth amendment search and seizure provisions, but will also have considerable effect on California law. Proposition Eight and the holding of \textit{In re Lance W.} cause the federal standard to be the governing standard for the exclusion of evidence in California, despite the provisions of the California Constitution and the state’s penal code. Any decision of the United States Supreme Court is thus rendered the effective law in California. \textit{Ciraolo} therefore changes the interpretation of the California Constitution regarding searches and seizures.\textsuperscript{209} Barring other grounds of exclusion, evidence discovered through aerial surveillance conducted under circumstances similar to those in \textit{Ciraolo} and \textit{Cook} will be admissible. Thus, although \textit{People v. Cook} was not directly overruled by the \textit{Ciraolo} decision, the holdings of \textit{Cook} will no longer be controlling.\textsuperscript{210} The California

\begin{itemize}
\item \textsuperscript{203} See Comment, \textit{supra} note 79, at 479.
\item \textsuperscript{204} \textit{Ciraolo}, 106 S. Ct. at 1813.
\item \textsuperscript{205} \textit{Id.} The majority stated that simply because an individual has succeeded in restricting some views of activities, all views are not precluded from official observation. \textit{Id.} at 1812. Because the airways are routinely used, activities exposed to aerial surveillance are \textit{knowingly} exposed. Any activities observed are therefore not protected. \textit{Id.}
\item \textsuperscript{206} See \textit{Amsterdam}, \textit{supra} note 108, at 384-85. “Big Brother is watching you . . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a blue-bottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people’s windows.” G. \textsc{Orwell}, 1984, at 6 (1949).
\item \textsuperscript{207} See \textit{supra} notes 83-91.
\item \textsuperscript{208} See \textit{Amsterdam}, \textit{supra} note 108, at 384-85.
\item \textsuperscript{209} See \textit{supra} text accompanying notes 173-86.
\item \textsuperscript{210} \textit{People v. Mayoff}, 42 Cal. 3d 1302, 1321, 729 P.2d 166, 178, 233 Cal. Rptr. 2, 14 (1986) (Lucas, J., concurring) (in cases governed by Proposition Eight, the courts are compelled to use federal law when application of the state exclusionary rule is concerned). \textit{Cook} was relied on, however, in one recent case. As with \textit{Cook}, the facts in \textit{Mayoff} occurred before the enactment of Proposition Eight. Therefore, California’s exclusionary rule did apply. In \textit{Mayoff}, a random aerial search of the defendant’s property was conducted by local and federal
\end{itemize}
appellate courts that have been analyzing aerial surveillance cases in much the same manner as *Ciraolo* since 1973, now have the stamp of approval from the United States Supreme Court.

At this time, two aerial search cases have been decided at the appellate level in California since *Ciraolo*. Although both cases relied on *Ciraolo*, the two courts came to opposing conclusions. In *People v. Venghiattis*, members of the Marin County Sheriffs department observed marijuana growing in a garden on the defendant’s property. Evidence based on this observation was held to be admissible. Relying on *Ciraolo*, the court stated first that the garden was not within the curtilage of the defendant’s home, and second, that the defendant had not established a reasonable expectation of privacy. Even though the garden was fenced and surrounded by six officers. The search was part of a program conducted in several Northern California counties where commercial marijuana farming is prevalent. As part of the program, there is a random pattern of warrantless flights over Humbolt county, where the defendant, Mayoff, lived. The operation is run jointly by local, state, and federal law enforcement authorities.  

...
foot high brush, the court stated that the defendant’s efforts to hide
the garden from passers-by did not afford protection from aerial
observation.\textsuperscript{216} The court stated that the decision was not controlled
by the holdings in \textit{Cook}, since Proposition Eight and \textit{In re Lance W.}
abrogated independent state grounds for the exclusion of evi-
dence.\textsuperscript{217}

Unlike \textit{Venghiattis}, the court in \textit{People v. Sabo}\textsuperscript{218} held that the
defendant in that case did have a reasonable expectation of privacy
which was violated by aerial surveillance.\textsuperscript{219} The \textit{Sabo} court distin-
guished the case factually from \textit{Ciraolo}, and therefore did not apply
\textit{Ciraolo}’s holdings.\textsuperscript{220} In \textit{Sabo}, the observation of the defendants’
property and their marijuana plants were made by police officers in
a helicopter, from an altitude of 400 feet.\textsuperscript{221} The court held that the
defendants’ had manifested a reasonable expectation of privacy, as
the plants were enclosed within a greenhouse in the backyard.\textsuperscript{222} The
defendants’ right to privacy was violated because the helicopter flew
over the property at an altitude that was below navigable airspace.\textsuperscript{223}
According to the \textit{Sabo} court, the holdings of \textit{Ciraolo} and \textit{Dow} are
limited to situations in which the observation occurs within navigable
airspace.\textsuperscript{224} The court also made a point of distinguishing between
the use of helicopters and airplanes, stating that helicopters permit
a much more intrusive form of surveillance, due to their capabilities
to “gambol in the sky—turning, curtsying, tipping, hummingbird-
like suspended in space.”\textsuperscript{225}

\textit{Ciraolo} has thus begun to affect decisions of the California courts.
At least one California court, however, has attempted to limit \textit{Ciraolo}
to the specific factual circumstances of the case. Although how much
\textit{Ciraolo} will change law enforcement and aerial surveillance in Cali-

\begin{footnotes}
\item[216] \textit{Id.} at 331, 229 Cal. Rptr. at 638-39.  
\item[217] \textit{Id.} at 332, 229 Cal. Rptr. at 639.  
\item[219] \textit{Id.} at 849, 230 Cal. Rptr. at 172-75.  
\item[220] \textit{Id.} at 850-53, 230 Cal. Rptr. at 172-75.  
\item[221] \textit{Id.} at 850, 230 Cal. Rptr. at 172.  
\item[222] \textit{Id.} at 849, 230 Cal. Rptr. at 172. The plants were viewed through gaps in the roof
of the greenhouse. According to the court, observation through the gaps would not have been
possible had the officers been in a plane, as they would not have been able to circle the area
as did the helicopter. \textit{Id.} at 850, 230 Cal. Rptr. at 172.  
\item[223] \textit{Id.} at 852-53, 230 Cal. Rptr. at 174-75.  
\item[224] \textit{Id.} at 853-54, 230 Cal. Rptr. at 174-75.  
\item[225] \textit{Id.} at 853, 230 Cal. Rptr. at 175. 
\end{footnotes}
CONCLUSION

Deciding whether a particular law enforcement practice is appropriate requires a balancing of competing social interests. In a fourth amendment case, the individual's interest in security, must be balanced against the government's interest in effective law enforcement. The Constitution does not provide that individuals are vulnerable to any means of government inspection they have failed to prevent. On the other hand, nothing in the fourth amendment prohibits police from increasing human capabilities through the use of technology. Efficient police practices do not necessarily equal unconstitutional police practices.

In California v. Ciraolo, the Supreme Court seems to be continuing its trend of withdrawal from the first prong of the Katz test. An individual's subjective expectation of privacy no longer warrants the same consideration as in the past. The type of location searched, although always considered, has once again become a prevalent factor in deciding whether a search is constitutional. In California, where aerial searches are common, citizens must seek new ways of protecting their property from observation by airborne policemen.

Carol Elizabeth Kelley

228. Cook, 41 Cal. 3d at 382, 710 P.2d at 305, 221 Cal. App. at 505.
230. Id. at 284.
231. See supra text accompanying notes 112-21 (discussion of Supreme Court's retreat from Katz as indicated in Oliver), & 193-96 (discussion of Supreme Court's retreat from Katz as indicated by Ciraolo).