Florida State University Law Review

Volume 17 | Issue 1

Winter 1989


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MODERN police patrols in search of criminal activity are turning increasingly to the skies. Aerial surveillance is an attractive investigative tool because it enables law enforcement officials to make observations they could not constitutionally obtain from ground-level without a warrant. This unique ability of aerial surveillance makes it both a boon to police investigation and an unprecedented threat to individual privacy. Consequently, an increasing number of courts have faced the issue of when a warrantless aerial surveillance constitutes an illegal search. In *Florida v. Riley*, the United States Supreme Court addressed this issue and held that warrantless aerial surveillance of a person’s property and home does not constitute a search when the aerial surveillance is performed unintrusively and the area observed is in open view.

This Note examines the use of aerial surveillance within the context of fourth amendment jurisprudence. Part I presents the facts of the case and its prior judicial history. Part II reviews the historical development of fourth amendment jurisprudence and its subsequent refinement in *Katz v. United States*. Part III examines the different approaches courts have employed in analyzing aerial surve-

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5. *Id.* at 696-97.
6. 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 person or things to be seized.
U.S. Const. amend. IV.
veillance cases. Finally, Part IV criticizes the Court's decision in *Riley* and offers an alternative analysis.

I. THE FACTS OF *RILEY*

Michael Riley lived on approximately five acres of rural property in Pasco County, Florida.8 Surrounding his property were many trees and shrubs and a "DO NOT ENTER" sign which Riley had posted in front of his mobile home.9 Riley had also constructed a wire fence which encompassed his property and a greenhouse located ten to twenty feet behind the home.10 Two sides of the greenhouse were enclosed; the third side was obscured by trees and shrubbery, and the fourth side was screened by the mobile home and additional shrubbery.11 The roof of the greenhouse was composed of a combination of opaque and translucent panels. Two of these panels, which accounted for approximately ten percent of the roof, were missing.12

Acting solely on the basis of an anonymous tip, police made a ground-level inspection of Riley's property from the road and the adjacent property in search of marijuana.13 Frustrated in their attempt to view the contents of Riley's greenhouse from this vantage point, the police decided to investigate from the air.14 Armed with a helicopter and a camera with a telephoto lens, the police maneuvered themselves 400 feet over Riley's greenhouse and home15 and photographed the premises.16 After circling back over the area a second time, one officer believed he could identify marijuana in the greenhouse through the missing roof panels and open sides.17 Based on this information, police obtained a search warrant and discovered forty-four marijuana plants growing inside the greenhouse.18

The trial court found the warrantless helicopter surveillance constituted an illegal search and granted Riley's motion to suppress the

9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. It was unclear whether the helicopter descended below 400 feet. Brief for Respondent at 8, Florida v. Riley, 109 S. Ct. 693 (1989) (No. 87-764).
16. Riley v. State, 511 So. 2d 282 (Fla. 1987). The police also photographed the greenhouse from the air, but the trial judge appeared to accept that the marijuana was identified with the officer's naked eye and not from the photographs. Id. at 283-84 n.2.
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The District Court of Appeal reversed and certified the case to the Supreme Court of Florida, which quashed the District Court's decision and reinstated the suppression order. The United States Supreme Court granted certiorari and, in a bitterly divided plurality opinion, reversed the Supreme Court of Florida.

II. HISTORICAL DEFINITIONS OF A FOURTH AMENDMENT SEARCH

Traditionally, the fourth amendment has not been interpreted as a proscription against all searches. Instead, the amendment prohibits only those searches that are unreasonable. Warrantless searches are considered presumptively unreasonable, with a few well-defined exceptions. Thus, the key issue in Riley was whether the warrantless helicopter surveillance constituted an unreasonable search.

A. The Trespass Doctrine and the Open Fields Exception

Prior to the Court's decision in Katz, police surveillance was not considered a search unless an actual physical invasion of a "constitutionally protected area" occurred. The home and its curtilage were generally considered to be constitutionally protected areas. This definition of a search had its roots in English common law. English courts used a trespass standard to determine whether a person's privacy rights had been violated. This analysis was eventually

19. Id.
20. Id. at 1356-57.
23. See supra note 6.
26. See, e.g., Goldman v. United States, 316 U.S. 129, 134 (1942) (physical trespass necessary for a search to be unreasonable); United States v. Lee, 274 U.S. 559, 563 (1927) (searchlight observation not a search because it does not physically trespass on the area observed).
27. Curtilage has been defined as "a small piece of land, not necessarily inclosed, around the dwelling house, and generally includes the buildings necessary for domestic purposes. . . . [F]or search and seizure purposes [curtilage] includes those outbuildings which are directly and intimately connected with the habitation . . . ." BLACK'S LAW DICTIONARY 346 (5th ed. 1979). The concept of curtilage was originally used in common law burglary cases to define the boundaries of the home. Since the punishment for burglary was hanging, this was an extremely important distinction to make. 4 W. BLACKSTONE, COMMENTARIES *223, *225, *226.
applied to fourth amendment jurisprudence in the United States. Courts construed this trespass requirement literally, and nearly all physically non-intrusive surveillance by police was permitted. For example, in *Olmstead v. United States* the Supreme Court confronted the difficulty of applying the trespass doctrine to a fourth amendment search problem created by the advent of new technology. The Court upheld the trespass analysis and found that telephone wiretapping did not constitute a search because listening to a phone conversation involved no actual physical invasion of a constitutionally protected area.

Four years prior to *Olmstead*, the Supreme Court recognized an "open fields" exception to the trespass requirement which limited the scope of fourth amendment protection. In *Hester v. United States*, the Court held that a warrantless physical intrusion onto a person's property would not be considered a search when it took place in an open field. In *Hester*, revenue agents believed that the defendant was part of an illegal bootlegging operation and put his father's farm under surveillance. During the stakeout, one agent made a warrantless entry onto the property and saw Hester hand a bottle to another person. When Hester realized the agent's presence, he grabbed another bottle and ran into an open field behind the house, dropping the bottle during his escape. The pursuing agents examined the broken bottle and discovered about a quart of moonshine whiskey inside. Writing for the majority, Justice Holmes invoked a literal interpretation of the fourth amendment and held that an open field merited no protection because it was not a "person, house, paper, or effect."

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29. See cases cited *supra* note 26.
30. 277 U.S. 438 (1928).
31. The government believed Olmstead was distributing illegal liquor in violation of the National Prohibition Act. *Id.* In order to confirm their suspicions, and without committing any trespass on the curtilage, the government officers inserted small wires into the telephone line running to Olmstead's office and proceeded to monitor his calls. *Id.* at 456-57.
32. *Id.* at 464-66. In defining what is a constitutionally protected area, Chief Justice Taft stated that any intrusion into the curtilage was equivalent to an intrusion into the home. *Id.*
33. 265 U.S. 57 (1924).
34. *Id.* at 59.
35. *Id.* at 58. The revenue agents were acting on a tip that the defendant was part of a bootlegging operation. *Id.*
36. *Id.* The agent walked onto the property and positioned himself about 75 yards from the house. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 59. Holmes based his definition of an open field on the common law concept of curtilage, but failed to give any specific guidelines for determining where the curtilage began or what the scope of this warrant exception would be. See *id.*
circumvented the trespass doctrine and allowed police to make a warrantless search of any area considered to be an open field.\textsuperscript{40}

\textbf{B. Katz: The Reasonable Expectation of Privacy Test}

As technology advanced, the use of electronic surveillance by law enforcement became increasingly more widespread and intrusive. Accordingly, a need arose for a new fourth amendment search analysis that could keep pace with this rapid increase in technology.\textsuperscript{41} Responding to this need, the Supreme Court significantly extended fourth amendment protection in \textit{Katz v. United States}.\textsuperscript{42}

The Federal Bureau of Investigation suspected Katz was using a public telephone booth to place illegal bets.\textsuperscript{43} To confirm this suspicion, an agent placed a sensitive listening and recording device outside the booth and monitored Katz's phone calls.\textsuperscript{44} The government argued to the United States Supreme Court that the agent's use of the listening device did not constitute a search because the position of the microphone was physically non-intrusive, and that the phone booth could not be considered a "constitutionally protected area."\textsuperscript{45} The Court rejected this argument and held the government's warrantless intrusion to be a search which violated Katz's expectation of privacy.\textsuperscript{46} In reaching this conclusion, the Court explicitly rejected the trespass doctrine as controlling and stated that "the reach of the [Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."\textsuperscript{47} The Court also found the public location of the phone booth unimportant and

\textsuperscript{40} One commentator has suggested that the Court postulated the open fields exception solely as a response to the defendant's claim that the examination of his abandoned bottle, and not the entry into the field itself, was improper, "Thus, it is possible that all the Court intended to say was that abandoned property found in an open field may be seized." Saltzburg, \textit{Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)}, 48 U. Pitt. L. Rev. 1, 8 (1986).

\textsuperscript{41} The difficulty of logically applying the trespass doctrine to fourth amendment search analysis became absurdly apparent in Clinton v. Virginia, 377 U.S. 158 (1964) (per curiam), where the Court held that the physical intrusion requirement for a search was fulfilled because the police had attached their microphone to a wall with a thumbtack. \textit{See also} Silverman v. United States, 365 U.S. 505 (1961) (use of a spike mike driven into the wall constituted a physical intrusion of a constitutionally protected area, but result might have been different had the police merely leaned the mike against the wall).

\textsuperscript{42} 389 U.S. 347 (1967).

\textsuperscript{43} Transmitting bets across state lines by telephone violated 18 U.S.C. § 1084 (1967).

\textsuperscript{44} \textit{Katz}, 389 U.S. at 348.

\textsuperscript{45} \textit{Id.} at 351-52.

\textsuperscript{46} \textit{Id.} at 353.

\textsuperscript{47} \textit{Id.}
rejected the constitutionally protected area doctrine, stating that "the Fourth Amendment protects people, not places."  

While this decision overturned nearly 100 years of fourth amendment precedent, Justice Harlan’s concurring opinion produced the test for determining whether a search had occurred. Harlan proposed what is now referred to as the "reasonable expectation of privacy test," which asks, first, whether a person has exhibited a subjective expectation of privacy, and second, whether that expectation is one society is prepared to recognize as reasonable. When both prongs of the Katz test are met, and no exigent circumstances exist, then warrantless surveillance by the police is deemed unconstitutional.

III. The Fourth Amendment and Aerial Surveillance

While Katz was intended to ensure the vitality of fourth amendment protection in the face of advancing technology, many courts had difficulty applying the reasonable expectation of privacy test to aerial surveillance cases. Airplanes and helicopters were certainly not "new technology," but the ways in which the government began using these aircraft raised a novel question about whether it was possible to have an expectation of privacy from aerial surveillance.

One of the more troubling aspects of aerial surveillance is that virtually everything on the ground is exposed to some kind of view from the air. This may be true even when objects or areas are well-hidden from all ground-level vantage points. Thus, many courts faced situations where a person clearly had a reasonable expectation of privacy from warrantless ground-level searches. As a result, it

48. Id. at 351.
49. The term "reasonable expectation of privacy" was first employed by the Court in Terry v. Ohio, 392 U.S. 1, 9 (1968).
50. Katz, 389 U.S. at 361 (Harlan, J., concurring). One commentator expressed disapproval with the subjective prong of the test noting that government could alter subjective expectations of privacy by announcing a nation-wide surveillance program. See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 384 (1974). But see Comment, Aerial Surveillance and the Fourth Amendment, 17 J. Marshall L. Rev. 455, 469 (1984) (subjective prong reasonable because it is unlikely that a person who does not exhibit an actual expectation of privacy could reasonably have one).
51. See supra note 24 and accompanying text.
was necessary to determine if the required expectation of privacy extended to aerial surveillance as well.\textsuperscript{54} In making this determination, courts divided as to whether the open fields doctrine had survived \textit{Katz}, and, if so, whether the curtilage enjoyed any heightened protection from aerial surveillance.\textsuperscript{55}

Courts dealt with this problem in one of three ways. Some reasoned \textit{Katz} had rejected the plain language analysis of the fourth amendment and that it was now possible for a person to entertain a reasonable expectation of privacy in a place not explicitly mentioned by the fourth amendment.\textsuperscript{56} Other courts maintained that the "plain language analysis" had survived \textit{Katz}, and that it was necessary to determine whether the area surveilled was in the curtilage or in an open field before the \textit{Katz} test could be applied.\textsuperscript{57} The third analysis went a step further and held that anything in open view, whether in the curtilage or an open field, would receive no fourth amendment protection.\textsuperscript{58}

\textbf{A. The Pure \textit{Katz} Analysis}

Many courts believed that \textit{Katz} greatly expanded the potential of fourth amendment protection.\textsuperscript{59} These courts often held that it was

\textsuperscript{54} See, \textit{e.g.}, California \textit{v.} Ciraolo, 476 U.S. 207 (1986).

\textsuperscript{55} See, \textit{e.g.}, United States \textit{v.} Mullinex, 508 F. Supp. 512, 514 (E.D. Ky. 1980) (a person may have an expectation of privacy in an open field if society would consider it reasonable); United States \textit{v.} DeBacker, 493 F. Supp. 1078, 1080-81 (W.D. Mich. 1980) (upholding \textit{Katz} test over open fields doctrine because police should not be given \textit{carte blanche} to search areas outside the curtilage); Dean \textit{v.} Superior Court, 35 Cal. App. 3d 112, 116, 110 Cal. Rptr. 585, 589 (1973) (\textit{Katz} reasonable expectation of privacy test more appropriate because open fields doctrine reminiscent of constitutionally protected areas approach); State \textit{v.} Brady, 406 So. 2d 1093, 1096 (Fla. 1981) (open fields doctrine may receive fourth amendment protection if it passes both prongs of \textit{Katz} test).

\textsuperscript{56} See cases cited \textit{supra} note 55.

\textsuperscript{57} See, \textit{e.g.}, United States \textit{v.} Long, 674 F.2d 848, 852 (11th Cir. 1982) (no legitimate expectation of privacy in an open field); United States \textit{v.} Williams, 581 F.2d 451, 453 (5th Cir. 1978) (distinguishing between open fields and curtilage useful in determining the existence of a reasonable expectation of privacy), \textit{cert. denied}, 440 U.S. 972 (1979); Izzard \textit{v.} State, 10 Ark. App. 265, 269, 663 S.W.2d 192, 194 (1984) (helicopter surveillance 100 feet over marijuana patch not a search because people do not reasonably expect privacy in open fields). Courts will often reject an expectation of privacy under the open fields exception and then conclude there was also no reasonable expectation of privacy under \textit{Katz}. See, \textit{e.g.}, Izzard \textit{v.} State, 10 Ark. App. 265, 268-69, 663 S.W.2d 192, 195-96 (1984). This is largely a moot exercise because once the court accepts the open fields doctrine as controlling, there is no need to analyze privacy expectations further.

\textsuperscript{58} See, \textit{e.g.}, People \textit{v.} Superior Court, 37 Cal. App. 3d 836, 839, 112 Cal: Rptr. 764, 765 (1974) (inspection of auto body parts from the air not a search because parts were in open view from neighbor's property); Randall \textit{v.} State, 458 So. 2d 822, 825 (Fla. 2d DCA 1984) (aerial observation not a search because police saw what was in open view at a legally permissible vantage point); State \textit{v.} Knight, 63 Haw. 90, 93, 621 P.2d 370, 373 (1980) (helicopter surveillance of greenhouse not a search because the structure was in open view).

\textsuperscript{59} See cases cited \textit{supra} note 55.
possible for a person to have a reasonable expectation of privacy in an open field or other publicly accessible area if both prongs of the Katz test were satisfied. These courts either explicitly rejected the open fields doctrine or held that it would apply only if the Katz test was not met.\(^{60}\)

For example, in \textit{People v. Sneed},\(^{61}\) the first aerial surveillance case, a California appellate court held that a warrantless helicopter observation twenty to twenty-five feet above an open field constituted an illegal search. Police had received a telephone tip that Sneed was growing marijuana on his land. They subsequently flew over a corral located 125 feet from Sneed's home.\(^{62}\) While the corral was arguably outside the curtilage, the court rejected the open fields doctrine as a mechanical test that was no longer necessary in light of Katz.\(^{63}\) Instead, the court held that it is possible to have a reasonable expectation of privacy in an open field, or other area in open view, depending on the circumstances of the surveillance.\(^{64}\)

\textbf{B. Oliver: The Open Fields Analysis}

Many courts insisted \textit{Hester}\(^{65}\) had survived Katz and that the distinction between the curtilage and open fields had an important bearing on the reasonableness of a person's expectation of privacy.\(^{66}\) For example in \textit{Brennan v. State},\(^{67}\) police flew a helicopter at treetop level over a heavily wooded section of appellant's rural property and observed a marijuana patch approximately 150 yards from a mobile home.\(^{68}\) The court held that the appellant did not have a reasonable expectation of privacy from the helicopter surveillance because the area surveilled was an open field.\(^{69}\)

The Supreme Court resolved the open fields question in \textit{Oliver v. United States}.\(^{70}\) The Court reached back sixty years and invoked

\(^{60}\) Courts that did not reject the open fields doctrine often applied the Katz test inconsistently. \textit{See}, \textit{e.g.}, United States v. Mullinex, 508 F. Supp. 512 (E.D. Ky. 1980) (defendant failed prong one because it is not possible to exhibit an intention to keep open field activities to oneself); United States v. DeBacker, 493 F. Supp. 1078 (W.D. Mich. 1980) (court failed to address prong one and held that prong two was not met because society is unwilling to recognize an expectation of privacy in an open field).

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) Id.

\(^{65}\) Id.

\(^{66}\) Id.


\(^{68}\) Id.

\(^{69}\) Id.

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Hester's "plain language analysis" as support for its holding that the fourth amendment was not designed to protect activities that take place in open fields. 71 Oliver involved the consolidation of two factually similar cases. 72 In both cases police made warrantless entries onto the defendants' land, ignoring fences and "no trespassing" signs in an attempt to verify tips that marijuana was being grown on the property. 73 Applying the Katz test, the Court held that society is not prepared to recognize as reasonable any expectation of privacy in an open field. 74 This bright-line rule has received much criticism and has been compared to the constitutionally protected areas doctrine that the Court rejected in Katz. 75

While Oliver made it clear that open fields would receive no fourth amendment protection from ground-level searches, it did not specifically address the issue of aerial surveillance. 76 Many courts, however, interpreted Oliver's approval of ground-level intrusions into open fields as implicit approval of aerial intrusions, without considering whether the Court's failure to specifically address aerial surveillance suggested otherwise. 77 These courts applied the open fields doctrine to determine the extent of fourth amendment protection for ground-level searches as well as for aerial searches. 78 This analysis first asks whether the area or object surveilled was within the curtilage. Anything outside the curtilage is per se unprotected, according to Hester, and observations of these areas will not constitute a search. 79

71. Id. at 181.
73. Oliver, 466 U.S. at 173-75.
74. Id. at 179.
75. See, e.g., Comment, A Privacy-Based Analysis for Warrantless Aerial Surveillance Cases, 75 CALIF. L. REV. 1767, 1783 (1987); Comment, Supreme Court's Treatment of Open Fields: A Comment on Oliver and Thornton, 12 FLA. ST. U.L. REV. 637, 667 (1984). The Oliver Court offered no guidelines beyond the common law to determine where the curtilage ends and where open fields begin. Prior to Oliver, many courts had a difficult time making this distinction. See, e.g., DeMontmorency v. State, 401 So. 2d 858, 862-63 (Fla. 1st DCA 1981) (court struggled with whether an area is an open field when a fence surrounds both it and the dwelling), aff'd, 464 So. 2d 1201 (Fla. 1985).
76. The Court simply noted that the petitioner had conceded that the police could lawfully survey his land from the air. Oliver, 466 U.S. at 179.
78. See Note, supra note 1, at 751.
79. Id.
Many courts that follow this per se approach do not apply the *Katz* test. In *Masters v. State*, police used a helicopter to hover thirty feet over a backyard to observe a marijuana patch located forty feet from the house. Despite the proximity of the marijuana to the house, the court considered it to be in an open field and, therefore, held it was unprotected. In reaching this conclusion, the court found it unnecessary to discuss *Katz*.

However, the use of warrantless aerial surveillance remains a potentially abusive investigative tool whether the area surveilled is an open field or the curtilage. The most graphic example of this occurred in *National Organization for Reform of Marijuana Laws v. Mullen*, where the United States District Court for the Northern District of California held that persons living near sites of rural marijuana "gardens" were entitled to a preliminary injunction preventing law enforcement personnel from conducting warrantless searches and seizures and indiscriminate helicopter surveillance of their homes and curtilages. Prior to this injunction, in a state-wide program designed to locate marijuana farms, the police had used helicopters to watch a woman using an outdoor shower, to chase two twelve-year-old girls, and even to blow the toilet paper out of a man's hand in his outhouse. The court held that these warrantless aerial surveillances were illegal searches when helicopter surveillance took place over homes and curtilage, but not when conducted over an open field.

While *Oliver's* open fields analysis implies that the curtilage receives heightened protection, it says very little about the relationship between this heightened protection and warrantless aerial surveillance. Some courts have found that distinguishing between curti-
lage and non-curtilage areas in aerial surveillance cases is a pointless task because both areas are equally visible from the air. Such exposed curtilage areas could not be denied fourth amendment protection under the open fields doctrine, so an increasing number of courts began to use the open view doctrine to severely limit fourth amendment protection.

**C. The Open View Analysis**

Use of the open view doctrine in aerial surveillance cases poses a unique problem for the *Katz* test: when can a person have a reasonable expectation of privacy from aerial observations? The answer to this question ultimately turns on how a court defines "open view." This is an important determination to make because open view observations are not considered searches for fourth amendment purposes. Ironically, the open view doctrine had its origin in *Katz*, where Justice Harlan noted that a person could not have an expectation of privacy in something that the person knowingly exposed to public view. Thus many courts consider an object or area to be in open view when the police are able to see the area or object equally as well as the public.

The open view doctrine has proved to be a powerful restraint on *Katz*. Courts invoking this doctrine often consider a *Katz* analysis unnecessary or find that the defendant fails the expectation of privacy on one or both prongs of the test. The first prong of *Katz*

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88. *See cases cited supra* note 58.
89. *For an excellent discussion of the open view doctrine, see generally Comment, Reving Trespass-Based Search Analysis Under the Open View Doctrine: Dow Chemical Co. v. United States, 63 N.Y.U. L. Rev. 191 (1988).*
90. The open view doctrine is distinct from the plain view doctrine. The latter is an exception to the fourth amendment requirement that search warrants list with specificity the items to be seized. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971). The plain view doctrine arises when an officer executing a search warrant discovers incriminating evidence in plain view. *Id.* at 465. The officer must be executing a search warrant, the discovery of the evidence must be inadvertent, and its incriminating nature must be in plain view. *Id.* at 469-71. Under the open view doctrine officers may view an area that a dweller knowingly leaves open to public view. *See, e.g.*, Hester v. United States, 265 U.S. 57 (1924); Fullbright v. United States, 392 F.2d 432 (10th Cir. 1968).
92. *See cases cited supra* note 58.
93. *See, e.g.*, People v. Romo, 198 Cal. App. 3d 581, 243 Cal. Rptr. 801 (1988) (defendant's subjective expectation of privacy not reasonable because the observation was made from legal vantage point).
requires a person to physically exhibit a subjective expectation of privacy. This usually involves erecting fences, posting signs and locking gates. Whether a person has exhibited a subjective expectation of privacy from aerial surveillance has been answered in one of two ways. Several courts have held that when a person has adequately blocked all ground-level observation, this will be sufficient evidence of a subjective expectation of privacy from aerial observation as well. Other courts have held that merely blocking all ground level observation is not enough and that, instead, a person must actually shield the area from aerial view.

The second prong of the Katz test asks whether society would consider the person's subjective expectation of privacy to be reasonable. This standard simply evaluates the person's actions and asks whether it is reasonable to assume others will honor the expectation of privacy. Courts have employed two methods of analysis to make this determination in aerial surveillance cases: the reasonably curious passerby approach and the legal vantage point approach.

1. Reasonably Curious Passerby

Many courts have used a "reasonably curious passerby" standard to determine whether an object or an area is in open view. This test asks whether the conduct of the police was sufficiently like that of a reasonably curious private citizen. Any subjective expectation of privacy a person had under prong one of the Katz test is considered unreasonable if the area could be viewed by a reasonably curious passerby in the air. Courts consider a variety of factors in}

96. See, e.g., State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977) (inability to view areas from the ground not significant); State v. Roode, 643 S.W.2d 651, 653 (Tenn. 1982) (protecting against earthly intrusions is not enough).
99. See, e.g., People v. Romo, 198 Cal. App. 3d 581, 588, 243 Cal. Rptr. 801, 805 (1988) (reasonableness of expectation based on whether aerial surveillance occurred at legal altitude and was performed non-intrusively); Diehl v. State, 461 So. 2d 157, 158 (Fla. 1st DCA 1984) (aerial observation of marijuana patch in open field constitutional because it was from a lawful vantage point).
100. See cases cited supra note 98.
101. See id.
determining whether the observation of the passerby was reasonable. For example, in United States v. Bassford\textsuperscript{102} the court held that a warrantless aerial surveillance conducted 1000 feet over a defendant's property was permissible because the plane had flown at a legal altitude and made only two passes over the property, and because the duration of each pass was minimal.\textsuperscript{103} The court concluded that it was unreasonable for the defendant to expect that people would not fly over his property in this manner and inspect the contents of his fields.\textsuperscript{104}

2. Legal Vantage Point

The second method of open view analysis asks whether the vantage point of the police surveillance was legal and non-intrusive. Under this test, the open view status of an object or area turns almost entirely on whether the police were where they had a legal right to be.\textsuperscript{105} This analysis gives an extremely broad interpretation to the reasonably curious passerby standard. Exposure of any part of the curtilage, no matter how small, is considered equivalent to unlimited exposure to all types of aerial observations so long as the aerial observations are made from a legal altitude.\textsuperscript{106} Courts using this legal vantage point standard often cite duration, frequency and dangerousness of the flight as the important factors;\textsuperscript{107} however, few courts have found a warrantless aerial surveillance actually constituted an illegal search because of these factors.\textsuperscript{108} Instead, most courts use these factors to illustrate why the surveillance did not constitute a search.\textsuperscript{109}

\begin{itemize}
\item[102] 601 F. Supp. 1324 (D. Me. 1985), aff'd, 812 F.2d 16 (1st Cir. 1987).
\item[103] Id. at 1331.
\item[104] Id. at 1331-32.
\item[105] See, e.g., cases cited supra note 99.
\item[107] See, e.g., Giacola v. West Virginia Dep't of Pub. Safety, 830 F.2d 547 (4th Cir. 1987).
\item[108] But see People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973) (defendant had a reasonable expectation of privacy from noisy, dangerous helicopter intrusions even though he had not fully met both prongs of the Katz test), rev'd, 41 Cal. 3d 373, 221 Cal. Rptr. 499, 710 P.2d 299 (1988).
\item[109] But see, e.g., United States v. Allen, 675 F.2d 1373, 1380-81 (9th Cir. 1980) (constant surveillance of ranch over three-week period not violative of defendant's expectation of privacy), cert. denied, 454 U.S. 833 (1981). But see, Note, Aerial Surveillance: Overlooking the Fourth Amendment, 50 Fordham L. Rev. 271, 279 (1981) (if aerial surveillance considered routine, a person could never fulfill prong one of the Katz test because increasing the number of flights would decrease the reasonableness of a person's expectation of privacy).
\end{itemize}
When the Supreme Court finally addressed the issue of aerial surveillance in *California v. Ciraolo*, it placed great emphasis on the legal vantage point of the observation. The Court invoked the open view doctrine and held that the warrantless aerial surveillance of a fenced backyard was not an illegal search because the police were in publicly navigable airspace. The Court found that because this is an age where commercial planes may routinely fly over the backyard, Ciraolo could not reasonably have expected the area to be protected from aerial inspection by the police. The Court equated partial exposure to some types of aerial surveillance with full exposure to police investigation at a legal altitude. Despite the Court’s reasoning in *Ciraolo*, it is not clear why the mere legality of an aircraft’s position and activity is relevant to determining the reasonableness of a person’s expectation of privacy.

**IV. A Critical Analysis of Riley**

In denying Riley’s motion to suppress, the Supreme Court did little to answer the question of why the legality of a plane’s position should determine the reasonableness of a person’s expectation of privacy. Indeed, the Court’s two-and-one-half page plurality opinion did little more than echo the reasoning of *Ciraolo*. The Court held that the warrantless aerial surveillance of Riley’s greenhouse did not constitute an illegal search because its contents were in open view. In reaching this conclusion, the Court conceded that the greenhouse was within the curtilage but reiterated its reasoning from

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111. *Id.* at 213. Police had received an anonymous telephone tip that Ciraolo was growing marijuana in his backyard. Unable to view the contents of the yard from the ground due to a ten-foot high inner fence and a six-foot high outer fence, the police procured an airplane and flew over Ciraolo’s property at an altitude of 1000 feet. During this flight, police made photographs of Ciraolo’s backyard and the yards of Ciraolo’s neighbors. *Id.* at 209.
112. *Id.* at 213. See also *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). *Dow*, decided on the same day as *Ciraolo*, held that the Environmental Protection Agency’s (EPA) warrantless aerial surveillance of Dow’s chemical plant did not constitute an illegal search. After being denied a second on-site inspection, the EPA hired a pilot to fly over and photograph Dow’s plant with a $22,000 aerial mapping camera. *Id.* at 229. The Court rejected Dow’s claim that the area observed and photographed was “industrial curtilage” which had been invaded. *Id.* at 235. The Court held the surveillance did not constitute a search because the photographs were taken at a legal altitude, and “[a]ny person with an airplane and an aerial camera could readily duplicate them.” *Id.* at 231.
114. *Id.* at 213.
116. *Id.* at 696.
Ciraolo that "the home and its curtilage are not necessarily protected from inspection that involves no physical invasion." 117

The plurality invoked the open view doctrine and used the legal vantage point approach to find that Riley had no reasonable expectation of privacy from aerial surveillance. 118 In adopting the broad definition of open view used in legal vantage point analysis, the Court almost completely destroyed any meaningful application of the Katz test. The Court's meager Katz analysis first noted that Riley had exhibited a subjective expectation of privacy from ground-level intrusions, but concluded that Riley had failed to exhibit a subjective expectation of privacy from aerial observations because of the hole in the greenhouse roof. 119 The Court concluded that this opening placed the contents of the greenhouse in open view of the public, and therefore that Riley could not have reasonably expected his greenhouse to be free from aerial surveillance by the police. 120

The Court's legal vantage point analysis contains three major flaws. First, the analysis places too much emphasis on the legal altitude of the flight. 121 The Court reasons that the warrantless inspection of Riley's property was permissible because it took place in publicly navigable airspace. 122 The plurality thus defines open view as anything that can be seen from a legal altitude according to Federal Aviation Administration (FAA) regulations. 123

Use of FAA regulations as a bright-line rule for determining what is in open view presents several problems. First, FAA altitude regulations are not designed to determine reasonable expectations of pri-

117. Id.
118. Id.
119. Id.
120. The trial court found that Riley did not knowingly expose the contents of the greenhouse to public view because the opening in the roof was meant not for public inspection but to let in sunlight and rain. State v. Riley, 476 So. 2d 1354, 1355 (Fla. 2d DCA 1985) (quoting the trial court).
121. Federal Aviation Administration (FAA) regulations provide that airplanes may be flown no lower than 1000 feet from the highest object in congested areas and no lower than 500 feet in non-congested areas. Helicopters may operate at lower altitudes provided they do so without endangering people or property below. 14 C.F.R. § 91.79 (1988).
122. The Court noted that if the helicopter had been flying at an illegal altitude, then a different result would have been mandated. Florida v. Riley, 109 S. Ct. 693, 696 (1989).
123. This line of reasoning has received much criticism. See, e.g., Dean v. Superior Court, 35 Cal. App. 3d 112, 116, 110 Cal. Rptr. 585, 588 (1973) (observer's altitude is a minor consideration because sophisticated technology allows intrusions from almost any height); LaFave, The Forgotten Motto of Obsta Principis in Fourth Amendment Jurisprudence, 28 ARIZ. L. REV. 291, 300 (1986) ("[T]his limitation upon the Ciraolo holding seems to me about as shaky as Don Knotts.").
vacy, but rather to promote air safety.124 Second, because FAA regulations distinguish between different types of aircraft, an altitude test would dictate the amount of protection based on the aircraft being used.125 As Justice Brennan pointed out, the result of the Court's holding is that Riley may have a reasonable expectation of privacy from airplanes flying at 400 feet but not from helicopters flying at the same height.126 This result is ironic because a helicopter's unique ability to hover over an area for long periods of time makes it a potentially far more intrusive device than an airplane.

Furthermore, the legal right to fly a helicopter 400 feet over someone's property does not address the issue of how many people actually do this, and ultimately, whether such activity by the police is reasonable. The mere prevalence of commercial air travel should not translate into a rule that someone who maneuvers a helicopter 400 feet over another's property with the sole intention of looking through the roof of that person's greenhouse is behaving in a reasonable manner. According to the Court's "Peeping Tom" standard, we are all angling and maneuvering our helicopters over the property of total strangers in an attempt to inspect the contents of their outbuildings or the activity on their patios. Surely it is questionable whether this is a standard of behavior that society would consider reasonable.

The second flaw in the Court's open view analysis is the assumption that any member of the public flying in legal airspace over Riley's greenhouse could have seen what the police saw.127 The Court cites Ciraolo for the proposition that commercial flight is routine and notes "there is no indication that such flights are unheard of in Pasco County, Florida."128 The Court does not acknowledge the qualitative difference that exists between an observation made by a passenger on a commercial airliner and a focused police inspection over an individual's property.129 The mere fact that a private citizen

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125. Id.
127. Id. at 696.
128. Id.; see also United States v. DeBacker, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980) (no search because a private pilot could have seen the marijuana field and notified the police); State v. Stachler, 58 Haw. 412, 417, 570 P.2d 1323, 1328-29 (1977) (observation of defendant's curtilage from a helicopter that dropped down to 300 feet not a search because cropdusters occasionally flew over the property); Blalock v. State, 483 N.E.2d 439, 443 (Ind. 1985) (observations from an airplane circling defendant's greenhouse and taking pictures at 800 feet not a search because any casual observer flying over the property could have seen what the police saw).
129. See, e.g., People v. Cook, 41 Cal. 3d 373, 710 P.2d 299, 221 Cal. Rptr. 499 (1985)
is at a legal altitude says nothing about what that person could actually see from that height. The view from a commercial airliner that the public has of an area on the ground is usually fleeting and anonymous. The police, however, knew that the home and yard they were inspecting was Riley's, and they knew they were looking for marijuana.

The Court's reasoning is based on the assumption that the limited exposure of one's property to some kinds of aerial view is equivalent to full exposure to all types of aerial surveillance. The obvious fault of such logic is that there exists no reason to believe that private citizens flying overhead scrutinize the land below in search of criminal activity. As one commentator has aptly noted, "[a] property owner would not expect a cropduster to be searching, only that he would be cropdusting." The more focused nature of the police surveillance and the special maneuvers necessary to observe an area both are indications that the area is not really in open view because such viewing behavior is contrary to typical public activity. Simply asking if the police were where they had a legal right to be is not enough. Instead, courts must ask whether the vantage point of the police is truly a public one.

See California v. Ciraolo, 476 U.S. 207, 223-24 (1985) (Powell, J., dissenting) ("the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent" and "too trivial to protect against").

See Note, supra note 106, at 510.

See Note, supra note 109, at 284.

Id.

This is not to say that simply because the public may not know what they see is marijuana that the substance is not in open view. The point is this: first, the public is not in a position to recognize anything at such a height; and second, in order to view the interior of the greenhouse, the public would have to engage in behavior that is contrary to normal public activity. For example, in United States v. DeBacker, 493 F. Supp. 1078 (W.D. Mich. 1980), police trained in spotting marijuana from the air could not do so at a height of 200 feet and felt compelled to drop down to 50 feet. Id. at 1079. If ordinary citizens, lacking the police's special expertise, were flying over the same property, these citizens would have to fly at least this low, if not lower, in order to view the interior of the greenhouse. The necessity of such special maneuvering indicates that the marijuana was not really in open view at all. See also State v. Brady, 406 So. 2d 1093, 1097-98 (Fla. 1982) (the property was not in public view because the police had to go to great lengths to obtain their view).

See Katz v. United States, 389 U.S. 347 (1967). "[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. at 351. See also People v. Cook, 41 Cal. 3d 373, 710 P.2d 299, 221 Cal. Rptr. 499 (1985) (it is entirely possible to have an expectation of privacy from directed police surveillance as op-
Perhaps the most disturbing aspect of the Court's holding is that the home and its curtilage will receive no protection from non-intrusive aerial invasions. The Court's ruling that a warrantless aerial surveillance does not constitute a search when it is performed in a non-intrusive manner ignores the basic principle of *Katz*. The *Riley* Court placed too much emphasis on the fact that the surveillance occurred from a legally permissible altitude, did not blow up wind or dust, and did not endanger people or buildings below. The Court concluded that Riley would have had a reasonable expectation of privacy from illegally low, noisy or intrusive aerial surveillance, but not from any aerial surveillance performed at a legal altitude. This distinction reveals a disingenuous application of the trespass doctrine cloaked in the language of *Katz*. *Katz* rejected the trespass doctrine as a mechanical test which allowed the existence of fourth amendment protection to turn solely on the degree of governmental intrusion. Similarly, the fact that the helicopter might not blow up wind or dust, or physically endanger people should have no bearing on whether the surveillance that was achieved with its use constituted a search.

*Katz* recognized that it is entirely possible to perform a search that violates the fourth amendment without someone ever being aware that a search is taking place. Accordingly, the reasonableness of a person's expectation of privacy should not be determined by asking whether the person anticipated the use of some novel surveillance technique which does not physically disturb that person's property. The fourth amendment does not maintain that we are subject to inspection by all surveillance tactics we have failed to block. If it did, our expectations of privacy would be defined by

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137. *Katz* explicitly rejected consideration of the intrusiveness of the police activity: "[T]hat the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Katz*, 389 U.S. at 353.
139. Id.
140. *Katz*, 389 U.S. at 353. See also Recent Developments, supra note 28, at 426 (use of altitude as reasonable expectation of privacy determinant similar to use of the degree of the physical intrusion in common law trespass doctrine.)
141. These factors may be appropriate considerations for determining whether an already warranted search is conducted reasonably, but they are of extremely limited value in determining whether a search has taken place.
the capabilities of the latest technology. The *Katz* decision recognized that the fourth amendment goes deeper than this and is meant to protect against warrantless searches that are repugnant to the privacy values of the people.

*Riley* is a continuation of the Rehnquist Court's enlargement of the scope of the open view doctrine. With one deft stroke, the Court has dictated that the curtilage will receive no more protection than an open field whenever it is possible to view the contents of the curtilage from the air. As a result, law enforcement officials may now observe with impunity all activity in our backyards, on our patios, and in any other area we have failed to completely seal off from aerial view.

The Court's decision simultaneously broadens the scope of the open view doctrine and emasculates *Katz*. If the *Katz* test is to have the power and flexibility the Court originally intended it to have, then our expectations of privacy cannot be slaves to technology and clever surveillance tactics. When a person has satisfied prong one of the *Katz* test, that is, has shown an expectation of privacy from ground-level surveillance, this manifestation of a privacy expectation should suffice as to aerial inspection as well. Furthermore, prong two should be satisfied if law enforcement's view really was from a public vantage point and not by a mechanical application of FAA regulations. As Professor Amsterdam pointed out, these questions are value judgments. We must ask if we want to live in a society where this type of police activity is acceptable.

V. Conclusion

*Florida v. Riley* is virtually a rubber stamp of approval for any warrantless aerial surveillance which meets FAA regulations. While the Court's ruling was undoubtedly influenced by the war on drugs, the implications of the decision extend much further than to the illegal marijuana farmer. Police may now inspect and photograph not only the property of a criminal suspect but also the property of in-

146. There also appears to be no limit to what the police may view. For example, it now appears that police may legally observe a woman through a bathroom skylight located in an outbuilding, even if the building is within the curtilage. Under *Riley* she would have no reasonable expectation of privacy for any activity in the bathroom because the skylight would afford an "open view" to all aircraft passing over her property.
147. See Amsterdam, supra note 50, at 386.
nocent neighbors as well. Furthermore, the Court's non-intrusive
ness standard seriously undermines the *Katz* doctrine and is a step
back to the more mechanical trespass analysis.

The Court's "what you don't know won't hurt you" approach to
aerial surveillance violates the spirit of *Katz* and the fourth amend-
ment. Something is fundamentally unsettling about stealthy, non-
intrusive surveillance performed without the awareness of the party
being watched. Furthermore, the Court's open view interpretation
will force those who do not wish to be subject to the indiscriminate
eye of the police to take drastic measures to ensure their privacy. As
one court has noted "[t]he Fourth Amendment does not set up a
contest between government and private citizen to test which party
can outmaneuver the other in a game of hide and seek."149 The Su-
preme Court has made it clear, however, that those who do not
want to play that game will receive no fourth amendment protection
from aerial surveillance.

F.2d 849 (9th Cir. 1986).