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# Fourth Amendment Implications of Warrantless Aerial Surveillance

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# FOURTH AMENDMENT IMPLICATIONS OF WARRANTLESS AERIAL SURVEILLANCE

## INTRODUCTION

One aim of a free society is to protect its citizens from unwarranted governmental intrusion. The fourth amendment[1] protects the right of the individual to be free from unreasonable search and seizure. The scope of fourth amendment protection, however, is not defined easily. As the needs of society change and technology advances, the judiciary is faced with complicated fourth amendment issues.[2] One such difficult issue is the constitutionality of warrantless aerial surveillance.

The judicial system presently condones the use of warrantless aerial surveillance, although the United States Supreme Court has yet to address the issue of whether warrantless aerial surveillance constitutes a search under the fourth amendment.[3] The modern approach to fourth amendment protection began with the Supreme Court decision in *Katz v. United States*.[4] *Katz* changed the standard for fourth amendment protection from the constitutionally protected areas concept[5] to a test of what an individual reasonably expects to preserve as private.[6] This new standard has posed some interpretation problems for the courts, but, nevertheless, it is applied frequently to surveillance cases involving fourth amendment issues.

Courts have been reluctant to consider aerial surveillance as a search under the fourth amendment due to a misapplication of *Katz*.[7] Moreover, courts justify the denial of fourth amendment protection to aerial surveillance by invoking the plain view and open fields

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1. The fourth amendment to the United States Constitution provides:
> 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 persons or things to be seized.

U.S. CONST. amend. IV.

2. *See* Goldman v. United States, 316 U.S. 129 (1942).

3. *See* United States v. Allen, 633 F.2d 1282 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S. Ct. 133 (1981).

4. Katz v. United States, 389 U.S. 347 (1967). *See infra* notes 12-18 and accompanying text.

5. *See infra* notes 19-28 and accompanying text.

6. 389 U.S. 347 (1967).

7. *See infra* notes 29-36 and accompanying text.

doctrines.[8] An examination of the modern approach to fourth amendmend protection, however, demonstrates that aerial surveillance does indeed constitute a search and, therefore, requires fourth amendment restrictions. Once it is established that aerial surveillance is a search, under the modern approach, courts must strike a balance between effective law enforcement and one's privacy interests.

This note examines the constitutionality of warrantless aerial surveillance. Although *Katz* theoretically should protect the individual's reasonable privacy expectations,[9] its frequent misapplication serves to narrow fourth amendment protection. In addition, judicial reliance on the plain view and open fields doctrines is an inappropriate justification for warrantless aerial surveillance. Finally, a critical examination of the present approach by the courts to aerial surveillance reveals the difficult fourth amendment issues involved in the unregulated use of airplanes as surveillance tools.

## THE MODERN APPROACH TO FOURTH AMENDMENT PROTECTION: THE KATZ PRINCIPLE

In the landmark decision of *Katz v. United States*, the Supreme Court held for the first time that fourth amendment protection against unreasonable search and seizure depended upon the individual's reasonable reliance on privacy.[10] The Court states that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection; but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[11] *Katz* is commonly applied to surveillance cases because such cases involve what an individual reasonably expects to preserve as private.[12]

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8. *See infra* notes 96-136 and accompanying text.

9. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) [hereinafter cited as Amsterdam]. There is a distinct difference between the right of privacy and the right to expect privacy from the government. The latter expectation is often overridden by the need for effective law enforcement.

10. 389 U.S. 347 (1967).

11. *Id.* at 351-52. According to *Katz*, if a person justifiably relies on a place, seemingly any place, as private, and the government intrudes upon that place, a search has occurred. The search is held presumptively unreasonable in the absence of a search warrant. *Id.* at 361.

12. *Id.* at 360. Justice Harlan's concurrence established a more concrete basis for fourth amendment protection. The two-prong reasonable expectation of privacy test discussed in the text of this note (*see infra* notes 29-46 and accompanying text) clarified the majority's somewhat murky interpretation of what a person "justifiably relies" on as remaining private. The concurrence emphasized that preserving the right

In *Katz*, FBI agents attached a listening device to a public telephone booth in order to uncover illegal activity. The wiretap device enabled the federal agents to record Katz' telephone conversations. Katz was subsequently charged with violating a federal statute prohibiting the transmission of wagering information by telephone.[13] At the trial, the government introduced into evidence the taped conversations of the telephone calls.[14] The Supreme Court concluded that Katz' privacy interests were invaded by the government through the use of the wiretap. The Court determined that Katz had "justifiably relied"[15] on the privacy of a public telephone booth. The Court failed, however, to define what "justifiably relied on" meant or how this test was to be applied in subsequent fourth amendment cases. Generally, the *Katz* principle is defined in terms of an individual's reasonable privacy interests. However, this principle is not clearly defined by the courts and, therefore, must be applied with caution to all types of surveillance cases.

The Supreme Court in *Katz* did not intend to establish a specific formula for protection against the invasion of one's privacy. The Court noted that "the Fourth Amendment protected individual privacy against certain kinds of governmental intrusion but its protections went further, and often had nothing to do with privacy at all."[16] Although *Katz* is the modern approach to fourth amendment protection, it should not be given a rigid application as it lacks a definitive standard. Rather, the *Katz* principle suggests a case-by-case analysis which takes into account each individual and his reasonable expectation of privacy.

Before *Katz*, fourth amendment protection against unreasonable

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to be free from governmental intrusion means more than recognizing that the fourth amendment protects expectations of privacy; it ultimately should protect the *right to have* certain privacy expectations. Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 155-56 (1977).

13. 389 U.S. 347 (1967).

14. *Id.* at 348.

15. Justice Stewart, writing for the majority, used the ambiguous phrase "justifiably relied upon" to describe Katz' privacy interests. *See supra* note 12.

16. 389 U.S. 347, 350, *citing*, Griswold v. Connecticut, 381 U.S. 479, 509 (1965):

> The average man would very likely not have his feelings soothed any more by having property seized openly than by having it seized privately and by stealth. . . . And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

*Id.* at 509, n.4. In other words, an individual's privacy interests are not defined by a place, but rather a reasonable reliance on what type of privacy he is entitled to—no matter where he may be.

search and seizure was only afforded to certain constitutionally protected areas. Such areas included one's person, house, papers and effects.[17] Other areas, such as open fields,[18] were not protected under the fourth amendment. The concept of "constitutionally protected areas" was the traditional approach to fourth amendment protection. As a result of sophisticated surveillance devices, however, the concept became ineffective in providing fourth amendment protection. To fully understand the *Katz* principle and its relation to aerial surveillance, a brief review of the constitutionally protected areas standard is necessary.

*The Constitutionally Protected Areas Standard*

In establishing the constitutionally protected areas standard, the Supreme Court strictly construed the fourth amendment. The Court refused to extend constitutional protection beyond one's person, house, papers or effects. In an early surveillance case,[19] the Court held that wiretapping[20] did not constitute a search because no physical invasion or trespass of property occurred. Because the fourth amendment was construed originally to protect an individual from the physical invasion of constitutionally protected areas, courts applied fourth amendment protection only to specific areas without examining what the individual reasonably sought to preserve as private.[21]

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17. U.S. CONST. amend. IV. Originally, under a literal interpretation of the fourth amendment, constitutionally protected areas consisted only of one's person, home, documents and belongings. Over the years these areas have expanded to include automobiles, business offices and hotel rooms; generally, *see* Amsterdam, *supra*, note 9 at 357. After *Katz*, fourth amendment protection was extended to garbage in People v. Krivada, 5 Cal. 3d 357 (1971) (defendants' reasonable expectation of privacy in their trash did not end until it was co-mingled with everyone else's garbage) and to public restrooms with open stalls in People v. Triggs, 8 Cal. 3d 844 (1973).

18. Hester v. United States, 265 U.S. 57 (1924).

19. Olmstead v. United States, 277 U.S. 438 (1928). Federal agents in *Olmstead* obtained evidence of a conspiracy to violate the Prohibition Act. Government officers secretly tapped the telephone lines of the conspirators to gain conclusive evidence of illegal conduct. The wiretapping was not located in the building where the conspirators were gathered; it was conducted in the basement of a nearby office building. The Supreme Court found that no "trespass" was committed on the property, and, thus, no search. *Id.*

20. The majority opinion stated that the language of the fourth amendment could not be expanded to include telephone wires reaching from Olmstead's house outward to the whole world. The Supreme Court found that "the intervening telephone wires were not a part of Olmstead's house or office any more than were the highways along which they were hung." *Id.* at 465.

21. Note, *From Private Places to Personal Privacy: A Post-Katz Study of the Fourth Amendment*, 43 N.Y.U.L. REV. 968, 971 (1968). Judge Brandeis' dissent in *Olmstead*

The concept of "constitutionally protected areas" was founded on the physical trespass theory. For example, if a home was invaded by federal agents in search of illegal conduct, the action constituted a physical trespass of a constitutionally protected area—the home. Physical trespass was considered an unreasonable search under the fourth amendment. If federal agents, however, looked for evidence of criminal enterprise in an open field, their actions would not amount to a search[22] because an open field traditionally was not afforded fourth amendment protection.

The Supreme Court applied the constitutionally protected areas standard to various methods of surveillance. In one case,[23] the Court held that a detectaphone, a device used to monitor defendants' incriminating conversations, placed against a wall was not a search. The dissent maintained that the search of a home or office no longer required physical entry[24] because modern technology provided more effective devices for the invasion of one's privacy.[25] Accordingly, the dissent argued that the physical trespass theory no longer provided adequate fourth amendment protection. Since modern surveillance devices enabled law enforcement officials to enter protected areas without a physical trespass a reexamination of the constitutionally protected areas standard was warranted. Eventually, the physical trespass theory became an ineffective standard for resolving fourth amendment issues. In *Silverman v. United States*,[26] the Supreme Court held that the use of a "spike mike" constituted a search. Federal agents inserted the surveillance device through an adjoining wall to defendant's premises. The device acted as a microphone when it came in contact with the heating ducts.[27] The Court held that the government's unauthorized physical penetration and encroachment upon defendant's property violated the fourth amendment, although there

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reflected the attitude which prompted the *Katz* decision: "Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world." 277 U.S. at 438.

22. 265 U.S. 57 (1924). Government agents found remnants of a bottle of illicit whiskey on Hester's property. Since open fields were not considered to be protected by the fourth amendment, there was no physical invasion of a constitutionally protected area, and thus, no search. The most agents were committing was a "technical trespass" on the property, which was not protected by the fourth amendment. *Id.*

23. Goldman v. United States, 316 U.S. 129 (1942).

24. Justice Murphy's dissent in *Goldman* stated that conditions of modern life warranted an expansion of the fourth amendment if people were to enjoy the full benefit of privacy provided by the Constitution. *Id.* at 138.

25. 316 U.S. at 139.

26. Silverman v. United States, 365 U.S. 505 (1961).

27. *Id.*

was no actual physical trespass upon Silverman's home—a traditional constitutionally protected area.[28]

The erosion of the constitutionally protected areas standard continued after *Silverman*. In *Katz*, the Supreme Court shifted fourth amendment analysis away from the unwieldy "constitutionally protected areas" standard toward a review of reasonable privacy expectations. The Court in *Katz* fashioned a more manageable and contemporary principle based on the individual's reasonable expectation of privacy.

*A Reasonable Expectation of Privacy*

The *Katz* principle holds that what an individual reasonably expects to keep private, even in a public area, may be afforded fourth amendment protection. The reasonable expectation of privacy standard, however, is a threshold question which determines whether or not a search occurred. If a court finds that a search took place, it must then balance the competing interests between the police action and the specific privacy expectations involved. Courts must either justify the police action or find a violation of the fourth amendment.

Most aerial surveillance cases do not meet the threshold question of whether a search occurred. Courts are hesitant to regard aerial surveillance as a search due to misapplication of the *Katz* principle. For example, in *United States v. Allen*,[29] the defendant exhibited definite expectations of privacy by posting "no trespassing" signs and constructing gates across the main road leading into his ranch.[30] Yet

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28. 365 U.S. at 510. Justice Douglas concurred in the decision while noting:

> An electronic device on the outside wall of a house is a permissible invasion of privacy according to *Goldman*, while an electronic device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other. The concept of 'an unauthorized physical penetration into the premises' on which the present decision rests, seems to me to be beside the point.

*Id.* at 512. Douglas re-emphasized the majority opinion that fourth amendment protection should not be based on trespass law or focus on the type of electronic equipment used.

29. 633 F.2d 1282 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S. Ct. 133 (1981). The defendants in *Allen* were arrested for possession of marijuana; they were not growing marijuana. Their activities became suspect when fisherman and hunters complained that defendant has terminated their traditional right-of-way across the Allen property. Acting on that suspicion, law enforcement officials used a helicopter to survey the Allen ranch. It is fair to surmise that in surveying Allen's property by air, enforcement officials were "searching" for evidence of criminal activity.

30. *Id.*

the Court of Appeals for the Ninth Circuit refused to hold that aerial surveillance of the property constituted a search. The court applied the *Katz* principle and found that Allen's expectations of privacy were unreasonable.

While *Allen* purported to apply *Katz* by considering whether the government intruded upon reasonable privacy expectations, the court failed to include measures taken by the defendant to secure his privacy. The court agreed with the defendant insofar as "a person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy in regard to activities carried on there in all circumstances."[31] But, because the defendant was aware of routine Coast Guard flights[32] over the area, the court concluded that he could not have a reasonable expectation of privacy.

The rationale that "routine" airflight precludes any reasonable expectation of privacy illustrates the general judicial approach to aerial surveillance. Because airplanes are a fact of modern life, it is said, one cannot have reasonable privacy expectations in open property. There is a distinct difference, however, between "routine" flights and aerial surveillance.[33] Police officers rarely "stumble" across illegal conduct when they are in an airplane. Usually the police officers are searching for signs of criminal activity.[34] In *Allen*, the court noted that any justification for concentrating surveillance on a specific area, rather than random investigation to discover criminal enterprise, "is a contributing factor to the justification for the surveillance."[35] There is no apparent reason why a police officer cannot obtain a search warrant based on probable cause prior to the aerial surveillance, if in fact a justification for the surveillance exists. The *Katz* principle invokes such fourth amendment protection when unwarranted intrusions occur upon reasonable privacy expectations.

The *Katz* principle is undermined by the courts' reasoning that "routine" airflight negates a reasonable expectation of privacy in one's open property. In *Allen*, the defendant demonstrated a justifiable expectation of privacy. There was little else he could have done to secure his property, save constructing an "opaque bubble" over his land.

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31. 633 F.2d at 1289.

32. The court noted that the Coast Guard was well known for seacoast patrol and surveillance. The Coast Guard traversed the airspace over Allen's property for several reasons—one of which was law enforcement. *Id.* at 1290. *See infra* note 50.

33. *See infra* note 44 and accompanying text.

34. *See infra* note 101 and accompanying text.

35. 633 F.2d at 1290.

Fourth amendment protection should not be denied because one cannot prevent aerial surveillance of property he seeks to preserve as private.[36]

When aerial surveillance intrudes upon reasonable privacy expectations, it constitutes a search. The courts' consistent denial of fourth amendment protection to aerial surveillance results from the imprecise standard of review set forth in *Katz*. A reasonable expectation of of privacy is not a definitive standard and, thus, its application often results in incongruous fourth amendment resolutions.

A more precise method for determining fourth amendment protection was devised in Justice Harlan's concurrence to *Katz*. Harlan suggested a two-fold test that is frequently applied in surveillance cases.[37] First, an individual must exhibit an actual (subjective) expectation of privacy and, second, that expectation must be one society considers reasonable (objective).[38] Some courts have adopted this test when resolving fourth amendment issues even though substantial opposition to the two-prong analysis exists.

The subjective/objective approach toward specific privacy ex-

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36. *See infra* note 102.

37. As stated by Berner in *Search and Seizure: Status and Methodology*, 8 VAL. U.L. REV. 471, 480 (1974) [hereinafter cited as Berner], *Katz* suggests the following analysis in light of Justice Harlan's concurrence:

(1) the "place" or context into which the people intrude;
(2) the nature of the actual intrusion;
(3) the defendant's subjective expectation of privacy from such intrusion;
(4) the reasonableness of such expectation in accordance with the societal norms.

The reasonableness of the expectation is the major consideration in the majority of fourth amendment cases after *Katz*. In *Katz*, the place at issue was an enclosed public telephone booth. Katz' expectations that his telephone conversations would remain private were reasonable by society's standards. The booth was not considered to be accessible to the public at all times even though it was a public telephone booth. Justice Harlan noted that the telephone booth was a "temporarily private place whose momentary occupants' expectations of freedom from intrusion were recognized as reasonable." 389 U.S. at 361.

38. 389 U.S. at 361. Justice Harlan also observed that:

> A man's home is, for most purposes, a place where he expects privacy, but objects, activities or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open world would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

*Id.* Justice Harlan cited Hester v. United States, 265 U.S. 57 (1924), to support his theory that conversations in the open were not protected by the fourth amendment. *See infra* notes 120-142 and accompanying text. *See also infra* note 85.

pectations is criticized because it is said to yield unrealistic results.[39] The two-fold test is problematic with regard to aerial surveillance for several reasons. First, courts seemingly pay little attention to attempts made by the individual to maintain privacy.[40] Even though an individual makes reasonable efforts to secure his property, thereby meeting the subjective prong of the test, fourth amendment protection is consistently defeated by the objective requirement.[41] Society objectively regards any expectation of privacy in an open area unreasonable because airflight is a common occurrence. For example, if one plants a marijuana field, surrounds it by a forest and posts "no trespassing" signs on the property, such efforts to maintain privacy may be reasonable but are of little value if the area is surveyed by a government airplane.

A second major problem with the two-prong test is that it logically can be extended to defeat all fourth amendment claims.[42] The burden of proof is on the individual to show that he manifested actual expectations of privacy by posting warning signs and erecting fences. Courts must then determine whether the individual demonstrated expectations that society would find reasonable. If the individual had no subjective expectation of privacy, there could be no intrusion upon that privacy, and, hence, no illegal search.[43] Similarly, the objective viewpoint that airflight is "routine" also precludes fourth amendment protection. In either case, a strict application of the two-fold test narrows the scope of fourth amendment protection in regard to aerial surveillance.

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39. Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, a Man's Home is His Fort*, 23 CLEV. ST. L. REV. 63, 74 (1974). The author noted that the court's treatment of defendant's privacy expectations in State v. Clarke, 242 So. 2d 791 (Fla. App. 1970), was in fact an "objective approach overall" to what was supposedly also a subjective approach. The court found that police officer's action of mounting a fire escape to peer into defendant's window was not violative of the fourth amendment because other tenants could use the escape and thus defendant's expectation of privacy was not reasonable. *Id.* at 75.

40. *Id.* at 75.

41. *See* United States v. Allen, 633 F.2d 1282 (9th Cir. 1980).

42. Note, *supra* note 39, at 77.

43. Amsterdam, *supra* note 9, at 384. The author found that an actual expectation of privacy did not have a place in the *Katz* decision or in a theory of what the fourth amendment protects. He stated that:

> [It] can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection; if it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.

*Id.*

Third, the most disturbing effect of the two-fold test is that it allows the government to dictate to society what is reasonable. An individual's privacy expectations, whether subjectively or objectively reasonable, are negated by the unwarranted "routine" use of aerial surveillance. If the government announced in advance that airplanes will make regular flights over certain areas, reasonable expectations of privacy are effectively curtailed.[44]

An application of *Katz* to aerial surveillance cases requires careful scrutiny in order to preserve an individual's privacy interests.[45] Privacy is significantly reduced if a specific type of law enforcement activity goes unregulated. This is clearly inconsistent with the aims of a free society.[46] The more logical approach, when applying *Katz*, is to maintain a balance between the interest of society in effective law enforcement and the right of the individual to be left alone.[47] The primary focus of *Katz* is not privacy, but the right to be protected against arbitrary governmental intrusion.[48]

Although aerial surveillance involves the right to be free from unreasonable search and seizure, courts presently do not recognize aerial surveillance as a search requiring fourth amendment protection. A close examination of aerial surveillance, however, and its intricate relationship to *Katz*, reveals that it does fall within the scope of fourth amendment protection. Fourth amendment safeguards, such as a search warrant based on probable cause, should therefore accompany the use of airplanes as surveillance devices.

## WARRANTLESS AERIAL SURVEILLANCE AND THE FOURTH AMENDMENT

Aerial surveillance is the use of airplanes by law enforcement

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44. Note, *supra* note 39, at 77. In aerial surveillance cases, courts have repeatedly held that defendants' privacy expectations were unreasonable because flights over open fields were "routine." This notion contravenes both the *Katz* principle, that what one reasonably expects to preserve as private may be constitutionally protected, and the fourth amendment in general. It also contradicts Amsterdam's belief that the fourth amendment does not ask what we can expect from government, "rather *Katz* and the right against unreasonable search and seizure tells us what we should demand from government." Amsterdam, *supra* note 9, at 384. *See also supra* note 9 and accompanying text.

45. Amsterdam, *supra* note 9, at 403.

46. *Id.*

47. *Id.*

48. Boyd, *The Reasonable Expectation of Privacy—Katz v. United States, a Post-Scriptum*, 9 IND. L. REV. 468, 470 (1976).

officials to detect criminal activity.[49] It is distinguished from those cases where law enforcement officials inadvertently encounter illicit conduct while traversing legal airspace.[50] Before it can be determined whether or not aerial surveillance falls within the scope of fourth amendment protection, it must first be established that surveillance from an aerial vantage point constitutes a search.

*"Search" and Its Application to Surveillance Devices*

Unreasonable searches and seizures are prohibited by the fourth amendment. Although the Supreme Court has never given a comprehensive definition of the term "search,"[51] the words "searches and seizures" are seen as terms of limitation.[52] A search and a violation of the fourth amendment are not synonymous. A search can occur based on probable cause or fall within one of the exceptions to the warrant requirement without violating the fourth amendment.[53] A search absent those justifications, however, violates the right to be free from unwarranted governmental intrusion.

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49. Aerial surveillance is basically achieved by the use of airplanes and helicopters. Advanced surveillance devices are attached to these vehicles to afford even greater aerial observation. *See*, Comment, *Police Helicopter Surveillance and Other Aided Observations: The Shrinking Reasonable Expectation of Privacy*, 11 CAL. W.L. REV. 505 (1975). For example, hand-held binoculars, mounted on gyro-stabilizers, are used during daylight hours; hovering at 500 feet a license plate number or the color of one's tie is easily discerned. *Id.* at 509.

50. The scope of this note is confined to a discussion of aerial surveillance. Some courts have resolved aerial surveillance issues on the fact that a policeman in the air could view the area below just as any citizen could do by flying over one's property. *See infra* note 88-101 and accompanying text. This is an untenable justification for two reasons: (1) the conduct of private citizens is not the standard by which police conduct is to be measured. Note, *supra* note 39, at 81; and (2) in most aerial flights the law enforcement officials' conduct in viewing the property below was deliberate and not happenstance. While it is true that some types of surveillance by air are justified, for example, the Coast Guard, there is an important and obvious difference between routine observation and the deliberate aerial surveillance of a specific site. For public policy reasons, the latter situation should not remain unregulated as it serves to undermine fourth amendment protection.

51. W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 2.1 (lst ed. 1978) [hereinafter cited as W. LAFAVE]. The term usually implies a quest for something; under the fourth amendment, the "looking" is performed by a law enforcement official.

52. Amsterdam, *supra* note 9, at 356. The terms have a limited application because law enforcement activity is not required to be reasonable under the fourth amendment unless the activity is either a "search" or a "seizure." *Id.*, *citing* United States v. Dionisio, 410 U.S. 1, 15, (1973).

53. *See infra* note 118 and accompanying text.

An examination of one's person, home or property, with an intent to discover evidence of contraband or illegal activity, usually constitutes a "search."[54] While a search impliedly suggests looking for hidden objects, it is not a search to observe places or things open to public view.[55] The idea of "open view," however, is circumvented by the use of artificial means to gain visual access to otherwise inaccessible areas.[56] For this reason, the use of vision-enhancing surveillance devices may amount to a search under the fourth amendment.

Aerial surveillance is analogous to those cases where the use of vision-enhancing surveillance devices were found to constitute a search. If a police officer flies over an individual's property, with intent to discover criminal conduct, it is fair to assume he is in search of illegal activity. The use of airplanes, as vision-enhancing surveillance devices, should thus be deemed "searches" under the fourth amendment.

A recognition that vision-enhancing surveillance devices could amount to a search is based on the fourth amendment right to be secure from unwarranted governmental intrusion.[57] Presumably, as the technological capabilities of law enforcement increase, the scope of fourth amendment protection must likewise expand.[58] For instance,

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54. BLACK'S LAW DICTIONARY, 1211 (5th ed. 1979). A "search" to which the exclusionary rule may apply denotes a quest for or a seeking out of that which offends the law by law enforcement officials. *Id. See* State v. Woodall, 16 Ohio Misc. 226, 241 N.E.2d 755, 757 (1968); Vargas v. State, Tex. Crim. App., 542 S.W.2d 151, 153 (1976). For more on the exclusionary rule, *see infra* note 177.

55. People v. Montgomery, 84 Ill. App. 3d 695, 405 N.E.2d 1275 (1980).

56. "Artificial means" is a general term which describes any type of vision-enhancing device used to gain view that normally could not have been gained otherwise, that is, through the "naked eye." *See* United States v. Kim, 415 F. Supp. 1252 (D. Hawaii 1976). Various other types of highly sophisticated surveillance devices include high-powered binoculars, telescopic cameras, infra-red telescopes and even satellite surveillance. *See also* State v. Stachler, ___ Hawaii ___, 570 P.2d 1323 (1977) (aerial surveillance upheld because property was in "open view"). *But compare* State v. Knight, ___ Hawaii ___, 621 P.2d 370 (1980) (the use of high-powered binoculars was unconstitutional during warrantless visual surveillance).

57. *Id.* at 1257. *See also*, Lorenzana v. Superior Court of Los Angeles, 9 Cal. 3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973). In *Lorenzana*, the court held that a policeman conducted an unreasonable search by peeking into defendant's window. The police officer was standing on non-public ground peering through a two-inch gap between the drawn window shade and the sill. The court found the procedure was too akin to actions taken by a police state and stated that the actions dangerously intruded on defendant's reasonable expectation of privacy. *Id.*

58. United States v. Kim, 415 F. Supp. 1252, 1257 (D. Hawaii 1976).

one court recently held that telescopic surveillance of a home constituted a search[59] because the use of vision-enhancing devices intruded upon the owner's privacy.[60] A reasonable expectation of privacy in the home is expressly protected by the fourth amendment.[61] This protection is also extended to areas outside the home where reasonable privacy interests are intruded upon by law enforcement officials.[62]

The right to expect privacy in the home from intrusive surveillance devices is clearly within the ambit of fourth amendment protection. Yet the right to have reasonable privacy expectations is no longer restricted to one's person, papers, home or effects.[63] Fourth amendment protection was extended beyond the home to vehicular movement in *United States v. Holmes*.[64] Because government agents in *Holmes* found ordinary visual surveillance ineffective in tracking down the defendant's whereabouts, the agents attached an electronic tracking device[65] to defendant's van and tracked the vehicle by air.[66] The government, in defense, argued that a citizen could not reasonably expect his movements on public roads to remain private.[67]

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59. *Id.* at 1252.

60. In *Kim*, the government agents employed a telescope to gain visual access to the inside of defendant's home. The curtains were not drawn and thus the agents had an unobstructed view of defendant's living room. The court noted that it was "inconceivable that the government could intrude so far into one's home that agents could discover what newspaper one was reading and still not be considered to have engaged in a search." *Id.* at 1256. The court applied *Katz* and conclusively determined that a search had occurred. The court also noted that if the government agents had probable cause to support the use of telescopic surveillance, they could have applied for a search warrant. *Id.* In advocating a search warrant based on probable cause to authorize the telescopic surveillance, the court stated that "the days and hours when surveillance would be used must be supported by evidence of criminal activity that would be obtained by the proposed surveillance." *Id.* at 1257.

61. Hester v. United States, 265 U.S. 57 (1924).

62. United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978). *See infra* note 123 and accompanying text.

63. U.S. CONST. amend. IV. *See supra* note 17.

64. United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), *aff'd en banc* 537 F.2d 224 (5th Cir. 1976).

65. Electronic tracking devices are commonly called "bumper beepers" and are attached to vehicles in order to trace the vehicles' movements on the road. In *Holmes*, the tracking device was a beacon which allowed the van to be traced by air.

66. The pilot of the plane was not able to determine the exact location of the van for two reasons: (1) he feared that flying too low would alert defendant to the aerial surveillance; and (2) the area was heavily wooded. 521 F.2d at 861. Without the device, defendant's location would have been much more difficult to determine.

67. *Id.* at 865. The court noted that although an individual can anticipate visual surveillance on the road, he can reasonably expect to be "alone" in his car when he drives. *Id.* at 866. The court did not make a distinction between the attachment of

The court, finding that argument weak, held that an individual has a right to expect that police will not affix tracking devices to his car.[68] *Holmes*, in accordance with *Katz*, recognized the right of the individual to have reasonable privacy expectations. The decision in *Holmes* exemplifies a judicial belief that unregulated and unauthorized[69] police conduct should not outweigh the right to have reasonable privacy expectations.

On the contrary, other courts have gone to unusual lengths to find that an individual's specific privacy expectations were not infringed. For instance, one court held that the use of trained dogs to detect the odor of marijuana emanting from a parked vehicle did not constitute a search.[70] The court reasoned that the warrantless detection of marijuana did not violate the fourth amendment because the dogs only monitored the public air; they did not engage in a search.[71] Although *Katz* was cited, the court did not apply it.[72] The court believed that the adoption of any steadfast version of *Katz* would require the abandonment of a useful law enforcement tool.[73] Since the dogs had only "minimally invaded" defendant's property, the invasion was outweighed by the need to obtain evidence of illegal activity.[74] The

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a beacon without judicial authorization in the form of a warrant and the attachment of a telephone tap in *Katz*. *Id.* at 865.

68. *Id.* at 866.

69. The use of surveillance devices, especially aerial surveillance, should be authorized by a judicial magistrate. This insures that their use will not be abused by overzealous law enforcement officials. The premise of this note is not based on the abolishment of intrusive surveillance devices. Rather, this note contends that surveillance methods which constitute searches should be governed by fourth amendment safeguards.

70. United States v. Solis, 536 F.2d 880 (9th Cir. 1976). The Court of Appeals for the Ninth Circuit overturned the lower court's decision which had held a search under the circumstances did occur.

71. *Id.* at 881. In the hearing for a motion to suppress, evidence was admitted which revealed that the dogs' sense of smell was eight times as acute as that of a human being. *Id.* Other evidence showed that the vehicle, a semi-trailer, was completely enclosed and its walls were approximately six inches thick. The government conceded that previous to the use of dogs to detect odor, no probable cause existed for a warrant to search the vehicle. *Id.*

72. The court also recognized the viewpoint that the use of any aid which enhances or replaced an officer's natural senses is a search and should be equated with an unwarranted invasion of privacy. *Id.* at 882. Yet the court declined to apply this "hard and fast" rule and held the use of trained dogs to detect narcotics was not an unreasonable action. *Id.*

73. *Id.* Even though the court did not apply *Katz*, it found that the dogs' intrusion into airspace open to the public was reasonably tolerable in today's society. *Id.*

74. *Id. See also* United States v. McMillon, 350 F. Supp. 593 (D.D.C. 1972). In McMillon, the premises were enclosed by a six-foot-high stake fence overgrown with

balancing approach, implemented by the court, served to contravene the *Katz* principle by emphasizing the need for useful law enforcement tools rather than reasonable privacy interests.

Aerial surveillance is a decidely useful law enforcement tool. The government's interest in deterring criminal conduct by employing aerial surveillance is justifiable. Nevertheless, the unwarranted use of aerial surveillance intrudes upon reasonable expectations of privacy. It passes the *Katz* threshold question of what constitutes a search,[75] and consequently violates the fourth amendment.

The judiciary's reluctance to regard aerial surveillance as a search is understandable because it is a relatively new fourth amendment issue. Moreover, courts encounter difficulty when applying *Katz* to aerial surveillance. An examination of the *Katz* principle with regard to other types of surveillance devices helps to clarify what the term "search" means under the fourth amendment. This, in turn, leads to a better understanding of why warrantless aerial surveillance should be considered unconstitutional.

*"Bumper Beepers" and Pen Registers: Legitimate Government Surveillance Devices*

Electronic tracking devices, commonly referred to as "bumper beepers,"[76] and pen registers[77] are modern surveillance tools used to

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vines and bushes. Police officers, with the permission of the owner, climbed an adjacent porch to observe defendant's yard and consequently viewed marijuana plants growing on his property. The court held the action did not constitute a search despite the fact that the police officers had to stand on their toes to get a "plain view" of defendant's premises. The decision was justified by the judicial finding that the police officer observed what "would have been visible to any curious passerby." *Id.* at 594. Even though the physical condition of defendant's property demonstrated that the defendant has a constitutionally-protected reasonable expectation of privacy, in accordance with *Katz*, the police officers' observation was not unreasonable. *Id.* at 595. A common sense approach toward defining what constitutes a search is the most effective way to constitutionally protect that which an individual reasonably expects to preserve as private. As Amsterdam points out, in cases where "the policeman shines his flashlight in a parked car or listens at the tenement door, what else is he doing than searching? When he climbs up a telephone pole and peers beneath a second-story window shade, what on earth is he doing up that pole but searching?" Amsterdam, *supra* note 9, at 384. Similarly, when a police officer repeatedly flies in a plane over open property, using binoculars to get a closer view, what is he doing in that plane but searching?

75. *See supra* note 11 and accompanying text.

76. *See supra* note 65 and accompanying text.

77. As described in United States v. Caplan, 255 F. Supp. 805, 807 (E.D. Mich. 1966):

A pen register is a device attached to a telephone line usually at a cen-

trace criminal activity. Both devices enhance the discovery of criminal enterprise and are analogous to aerial surveillance. An individual has a right to expect that his privacy interests are not abolished by the use of airplanes. When courts determine the constitutionality of "bumper beepers" and pen registers, privacy interests also are taken into account.

"Bumper beepers" are electronic devices used to trace vehicular movement. Generally, these devices are not considered to violate the fourth amendment because their use has been held as not constituting a search.[78] Rather, "bumper beepers" are seen as sense-enhancing devices which do not intrude upon privacy interests. Nevertheless, in *Holmes*,[79] the court held that the electronic tracking device attached to defendant's van intruded upon his reasonable expectation of privacy. The electronic tracking device was thus held to constitute a search under the fourth amendment.

In *Holmes* the court implied that an individual does not give up all expectations of privacy when in public.[80] Similar to the *Holmes* approach, the District Court of Massachusetts[81] observed that even though a person who drives his car could anticipate being followed by someone, he does not expect that his whereabouts will be continuously monitored by a tracking device.[82] These decisions recognize

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tral office. When a number is dialed, a pulsation of the dial triggers the attached pen register, which in turn records on a paper tape dashes equal in number to the number dialed. The paper tape then becomes a permanent record of the outgoing numbers called on that respective line. With reference to incoming calls, the pen register records only a dash for each ring of the telephone, but does not identify the numbers from which the incoming call originated. The pen register ceases to function after the number is dialed on outgoing calls and after the ringing is concluded on incoming calls without determining whether the call is completed or the receiver is answered. There is neither recording nor monitoring of the conversation. The device is usually used in a legal manner to check for defective dials or overbilling; it may, however, also be used by criminal investigators.

Hodge v. Mountain States Tele. & Tele. Co., 555 F.2d 254, 255 (9th Cir. 1977).

78. Note, *Tracking Katz: Beepers, Privacy and the Fourth Amendment*, 86 YALE L.J. 1461 (1977).

79. 521 F.2d 859 (1975).

80. This notion re-echoes the holding in *Katz* that "what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351-52. *See infra* notes 1-3 and accompanying text.

81. United States v. Bobinsik, 415 F. Supp. 1334 (D. Mass. 1976), *vacated and remanded*, United States v. Moore, 562 F.2d 106 (1st Cir. 1977) (remanded on other grounds).

82. 415 F. Supp. at 1336. On appeal, the court stated, "while a driver has no

that privacy interests may also be protected in areas accessible to the public.

The unrestrained use of "bumper beepers" monitors public acts and intrudes upon reasonable privacy expectations. The employment of those devices by law enforcement officials, therefore, should be characterized as a search under *Katz*.[83] The same reasoning is applicable to aerial surveillance. Although airspace above the ground may be regarded as a public thoroughfare,[84] that does not mean all privacy interests in one's open property are abolished. Furthermore, if an individual manifests intentions to keep his property private, those expectations should not be summarily dismissed solely by the objective viewpoint that airplanes routinely fly over land. Rather, in accordance with the *Katz* principle, both the subjective and a reasonable objective approach must be taken with regard to aerial surveillance.[85] The judicial approach in *Holmes* should therefore be applied to aerial surveillance because both types of monitoring intrude upon reasonable privacy expectations.

Efforts have been made, however, to uphold the unregulated use of "bumper beepers" in some circumstances. One court found that the installation of a tracking device into lawfully-seized contraband, before

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claim to be free from observation while driving in public, he properly can expect not to be carrying around a device that continuously signals his presence." 562 F.2d at 112. Such an intrusion cannot be written off as non-existent. *Id.*

83. W. LAFAVE, *supra* note 51, at 423. *See also supra* note 50 and accompanying text. The danger of unrestrained use of "bumper beepers" without judicial authorization is self-evident. Boyd v. United States, 116 U.S. 616, 635 (1886), was an early admonishment of governmental intrusions without judicial supervision:

> It may be that it is the most obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal procedures.

*Id.*

84. *See infra* note 87 and accompanying text.

85. In United States v. White, 401 U.S. 745 (1971), Justice Harlan dissented to the majority opinion. He examined formulations based on the subjective/objective approach and stated:

> While these formulations represent an advance over the unsophisticated trespass analysis of the common law, they too have their limitations and can, ultimately, lead to the substitution of words for analysis. The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.
>
> Since it is the risk of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and

defendants purchased it, was not a search.[86] Since the monitoring device only augmented surveillance, which could have been accomplished through visual surveillance alone,[87] the court held that no intrusion upon defendant's reasonable expectation of privacy occurred. No distinction was made between ordinary visual surveillance and the use of the electronic tracking device, provided that no fourth amendment violation occurred when the beeper was initially attached.[88]

Although the rationale that certain monitoring devices only augment ordinary visual surveillance may arguably apply to "bumper beepers," it is an untenable justification with regard to warrantless aerial surveillance. A distinction must be made between ordinary visual surveillance and aerial surveillance. Law enforcement officials, absent the ability to fly on their own, could not accomplish through ordinary visual surveillance what they could achieve by aerial surveillance.[89] Therefore, aerial surveillance cannot be likened to those cases which hold that electronic tracking devices merely enhance or augment normal visual surveillance.[90]

The pen register is a second type of surveillance device employed

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> risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

A comparable query would ask whether the government may impose warrantless aerial surveillance on society, after finding that society deems any expectation of privacy objectively unreasonable because of routine airflight. Justice Harlan also noted that "the Fourth Amendment does, of course, leave room for the employment of modern technology in criminal law enforcement, but in the stream of current developments in Fourth Amendment law I think it must be held that third-party electronic monitoring, subject only to the self-restraint of law enforcement officials, has no place in our society." *Id.* at 790. A similar argument could be made with regard to aerial surveillance.

86. United States v. Hufford, 539 F.2d 32 (9th Cir. 1976); *see also* United States v. French, 414 F. Supp 800 (W.D. Okla. 1976).

87. 539 F.2d at 34. *See also* United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976). The court in *Pretzinger*, under similar facts to *Hufford*, ruled that under the law of the Ninth Circuit, attachment of an electronic location device to a vehicle moving about on public thoroughfares, or through public airspace, does not infringe upon any reasonable expectation of privacy and therefore does not constitute a search. 542 F.2d at 520.

88. 539 F.2d at 34.

89. It has been suggested that one should remember Superman is also a law enforcement official. *See generally supra* note 37.

90. *See supra* note 80 and accompanying text. Again, the distinction must be made between aerial surveillance and the use of airplanes for other purposes. For instance, where airplanes are used to cross long stretches of property, like a 2,000 acre ranch, surveillance from an aerial vantage point is not the purpose for the airflight.

by law enforcement officials.[91] The use of pen registers involves privacy interests similar to those found in aerial surveillance and electronic tracking device cases. The pen register differs from an electronic tracking device in that it traces lines of communication rather than vehicular movement. It can record telephone calls by tracing the number dialed and the location where the call was made.[92] Generally, the courts have not considered the use of pen registers to be violative of the fourth amendment. Rather, the fourth amendment protects only the content of a telephone call;[93] not that a particular call was made or that a particular number was dialed.[94] Telephone customers presumably have no reasonable expectation that records of their calls will not be made.[95]

A recent Supreme Court case supported the notion that telephone customers do not have reasonable privacy interests in records of their telephone calls.[96] The pen register in *Smith v. Maryland* was installed by the telephone company upon police request,[97] although no warrant was issued. The Court deemed that fourth amendment protection depended upon the defendant's reasonable expectation of privacy. It was determined, however, that privacy interests in dialed telephone numbers did not constitute an expectation that society would recognize as reasonable.[98]

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91. *See supra* note 67 and accompanying text.

92. United States v. Clegg, 509 F.2d 605 (5th Cir. 1975). In *Clegg*, the government's interest in tracing defendant's calls stemmed from the consistent use of illegal "blue boxes": an electronic device used to circumvent the telephone company's billing system. The telephone company, by reporting to the government the information gleaned from the pen registers, was protecting its own property interests while aiding the FBI in its nation-wide investigation.

93. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act, 18 U.S.C.A. § 2510 (5) (1968), which prohibited wiretapping and electronic surveillance, with some narrowly-defined exceptions. W. LAFAVE, *supra* note 51, at 277. Congress passed the Act one year after the *Katz* decision. The Act does not apply to electronic tracking devices or to aerial surveillance.

94. 509 F.2d at 610.

95. *Id.*

96. Smith v. Maryland, 442 U.S. 735 (1979).

97. *Id.* at 735.

98. *Id.* The Court reasoned that when petitioner used the phone he voluntarily conveyed numerical information to the telephone company and therby exposed himself to the risk that the company would reveal to the police the numbers he had dialed. *Id.* at 744. Justice Stewart, Brennan and Marshall disagreed with the majority opinion. The three concluded that the use of the pen register was an unreasonable intrusion under the fourth amendment. *Id.* at 747. The dissent echoed the recurring principle that fourth amendment protection should not be based on what an individual can reasonably expect from the government and law enforcement agencies; rather, it is what an individual has a *right* to expect. Justice Marshall concluded that privacy was

The underlying rationale for the use of pen registers is that telephone customers run the risk of having their numbers recorded whenever they use the telephone. Risk analysis, however, is a poor justification for intruding upon specific privacy interests. Even though "ordinary social intercourse"[99] poses everyday risks to the individual, that does not mean the government is constitutionally unrestrained in benefiting from those risks.[100] To permit the government to dictate what privacy interests are subject to risk and therefore unreasonable vitiates the individual's right to be free from governmental intrusion.

Freedom from unwarranted governmental intrusion is inherent in the issue of aerial surveillance. Various surveillance devices, including electronic tracking devices and pen registers, have been held constitutional despite their intrusion upon reasonable privacy expectations. As in *Holmes*, one has a right to expect that government agents would not affix electronic tracking devices to a car and, as the dissent in the pen register case stated, one has a right to expect that records of telephone calls and numbers would not be released to other persons. In the case of aerial surveillance, one has a right to expect some degree of privacy if his expectations are reasonably manifested, despite the common occurrence of airflight over open property. Under the courts' present treatment of warrantless aerial surveillance, however, one's manifested privacy expectations, while clearly displayed, are consistently defeated.

Aerial surveillance has a definite search quality despite judicial reluctance to define it as such. Although the *Katz* principle does not guarantee an absolute right to privacy, its objective is to provide ade-

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not a discreet commodity, possessed absolutely or not at all. *Id.* at 749. He stated: "Those who disclose certain facts to a bank or telephone company for a limited business purpose need not assume that the information will be released to other persons for other purposes." *Id.* Fourth amendment rights should not be determined by what risk the telephone customer undertook by using the telephone. Marshall opined that to make risk analysis dispositive in determining the reasonableness of privacy expectations would permit the government to define the boundaries of the fourth amendment. *Id.* at 750.

99. Amsterdam, *supra* note 9, at 406. Amsterdam also observed:

> Every person who parks his or her car on a side street in Greenwich Village voluntarily runs the risk that it will be burglarized—a risk, I should add as one who has lived in Greenwich Village, that is very much higher than the risk of betrayal by your friends even if you happen to choose a circle of machiavellian monsters. Does that mean that government agents can break into your parked car uncontrolled by the Fourth Amendment?

*Id.*

100. *Id.*

quate fourth amendment protection. The misapplication of *Katz*, through the invocation of the plain view and open fields doctrines, further emphasizes the need to regard aerial surveillance as a search requiring fourth amendment protection.

*The Plain View and Open Fields Doctrines: Improper Justifications for the Use of Warrantless Aerial Surveillance*

Many courts consistently deny fourth amendment protection to aerial surveillance by applying the plain view and open fields doctrines. The plain view rationale is that a law enforcement official, in legal airspace, is in a place where he has a right to be[101] and anything the officer sees from that vantage point is in "plain view"[102]—exposed to the public. In addition, it is argued that warrantless aerial surveillance of property is constitutional because open fields are not afforded fourth amendment protection. The plain view doctrine, when applied to aerial surveillance, abrogates the *Katz* principle which holds that what an individual reasonably expects to preserve as private, even though in a public place, may be constitutionally protected.[103] Moreover, although *Katz* did not expressly overrule *United States v. Hester*,[104] which held that open fields were not constitutionally protected areas, the concept of constitutionally protected areas was replaced impliedly by *Katz* and other subsequent decisions. The modern approach to fourth amendment protection thus remains largely dependent upon one's reasonable privacy expectations.

A recent aerial surveillance case appropriately raised the issues of whether the plain view doctrine justifies warrantless aerial surveillance and whether the open fields doctrine remains viable.[105] The court upheld the use of warrantless aerial surveillance by law enforcement officials who surveyed defendant's property by air. In support of its decision, the court observed that is was "no more unreasonable to expect an airplane to fly over a farm at a legal distance than to expect a passer-by, whether a policeman or not, to look past the strand of barbwire separating an open field from a

101. People v. Lashmett, 71 Ill. App. 3d 429, 389 N.E.2d 888, 890 (1979).

102. Comment, *Police Helicopter Surveillance*, 15 ARIZ. L. REV. 145 (1973). Plain view will always be controlling in aerial surveillance cases unless the precautions taken by the individual to preserve his expectations of privacy are observed. *Id.*

103. *See supra* notes 1-3 and accompanying text.

104. 265 U.S. 57 (1924).

105. Williams v. State, 157 Ga. App. 476, 277 S.E.2d 923 (1981), *cert. denied*, ___ U.S. ___, 102 S. Ct. 109 (1981). *See also* State v. Stachler, 570 P.2d 1323 (Hawaii 1977) (contraband growing on side of ridge was susceptible to warrantless aerial surveillance).

highway."[106] In what was presumably an effort to convict the defendants for growing marijuana, the court invoked both the plain view and open fields doctrines to justify the warrantless aerial surveillance. These doctrines, however, are inapposite when applied to the unregulated use of airplanes as surveillance devices.

The plain view doctrine cannot be applied to any fourth amendment issue until its stated requirements are met.[107] It is important to fulfill these requirements because the plain view doctrine validates the warrantless seizure of incriminating evidence. The requirements for plain view are as follows: (1) there must be a valid prior intrusion by a law enforcement official which is justified by either a search warrant or one of the exceptions to the warrant requirement; (2) the discovery of the seized items must be inadvertent; and (3) the law enforcement officials must have immediately recognized the evidence.[108] A typical example of plain view is where a police officer enters a suspect's home with a search warrant, looking for a murder weapon, and observes contraband lying in "plain view" on a table. The police officer is allowed to seize the contraband under the plain view doctrine. The rationale for the plain view doctrine is that the police officer has a right to be where he is and may seize the evidence as a result of that right.[109]

Application of the plain view doctrine to aerial surveillance is problematic because the standard for plain view is whether "a police officer, using only natural vision in a natural or normal position from a normally public place, can observe the objects or activities which the individual expects to keep private."[110] Although a police officer

106. 277 S.E.2d at 925. The court noted that the sky, like the road, is a highway over which those licensed to do so may pass, so long as they keep a proper vertical distance between their craft and the property of others. *Id.* at 925. Yet by keeping a proper distance, binoculars or other visual aids are needed to uncover criminal activity. Furthermore, the *Williams* decision equates what a curious passerby might do with that or what a law enforcement official could do.

107. Coolidge v. New Hampshire, 403 U.S. 443 (1971). In *Coolidge*, defendant was convicted for the murder of a young girl based on evidence seized without a warrant: the conviction was reversed and remanded.

108. *Id.* at 443. The court in *Coolidge* overturned defendant's conviction because the circumstances of the case did not meet the requirements for plain view. In *Coolidge*, the discovery was not inadvertent. Furthermore, the police had ample opportunity to obtain a search warrant to seize defendant's car. *Id.*

109. The Supreme Court's most recent statement on plain view permits police officers to search containers found in automobiles, even if the containers are not opaque, as long as the evidence searched for could fit within such a container. In other words, an officer "cannot look for an alien inside a suitcase." United States v. Ross, 50, U.S.L.W. 4580 (U.S. June 1, 1982).

110. Comment, *supra* note 49, at 534.

in an airplane arguably may be in a place where he has a right to be, he is using a vision-enhancing device to survey the property below.[111] The officer is elevated to a height from which he has a distinct vantage point; his observations therefore are not inadvertent. The plain view doctrine revolves around the inadvertent discovery of evidence based on a prior valid intrusion. Courts have applied the plain view doctrine to aerial surveillance cases even though the doctrine's stated requirements have not been fulfilled. Additionally, courts have frequently misapplied the plain view doctrine to justify a finding that no search was committed.

Another inherent problem with the plain view doctrine and aerial surveillance is the concept of a prior valid intrusion. The plain view doctrine is not an absolute statement of a law enforcement official's right to seize evidence after viewing something in open view; it is a specific and limited right following a valid intrusion.[112] The concept that there is no intrusion into open fields[113] is a valid one with regard to the plain view doctrine. The policeman's right to seize items in plain view, after making a prior valid intrusion, cannot be likened to a police officer flying over open property because, in the latter circumstance, no prior valid intrusion has occurred. The idea of a prior valid intrusion is inapplicable to aerial surveillance cases because one cannot intrude upon areas that are open.[114]

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111. Flying at a legal height, most police officers require the aid of binoculars to obtain a clear view of the area being surveyed.

112. Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1096 (1975). The court in *Coolidge* noted:

> What the "plain view" cases have in common is that the police officer in each of them has a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.

402 U.S. at 466.

> [I]t is important to keep in mind that, in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than being the normal concomitant of any search, legal or illegal.

403 U.S. at 465.

113. *Id.*

114. Berner, *supra* note 37, at 492-93. Berner examines the plain view doctrine and states:

> Casual observation by police in a public place has often been upheld under the "plain view" doctrine. There certainly is no need for a "doctrine" to explain the validity of such activity. "Plain view" traditionally has arisen when the officer has *already* entered a protected area. Such cases then turn on the validity of the officers' presence in such place. If an officer sees contraband in "plain view" on a bedroom nightstand, the validity

Aerial surveillance cannot be considered a plain view concern because the requirements of a prior valid intrusion and inadvertent discovery are missing. The notion that a police officer flying at a legal height is in a place where he has the right to be, is inconsistent with the concept of a prior valid intrusion because one cannot intrude upon a place where one has the right to be. Moreover, a police officer's use of an airplane to survey property is hardly an inadvertent observation. The plain view doctrine is, therefore, an improper justification for the use of warrantless aerial surveillance.

The plain view doctrine is also incompatible, in regard to aerial surveillance, with the *Katz* principle that what an individual reasonably expects to preserve as private, even in an area accessible to the public, may be constitutionally protected.[115] Law enforcement officials cannot justify aerial surveillance by claiming that what they observed was in plain view, without regard for what an individual did to preserve his privacy. An individual who makes an effort to shield his property from others should not be penalized because he is incapable of preventing aerial observation.[116] "Plane view," as one author noted, is not plain view.[117]

Despite the enumerated problems posed by the application of the plain view doctrine to aerial surveillance, courts continue to employ it as a justification for the unregulated use of airplanes as surveillance tools. Courts do not find that a search was committed because of the plain view character of the situation, and, therefore, hold that aerial observation is lawful without the requirements of pre-existing prob-

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> of such discovery depends primarily on the validity of his presence in the bedroom. If the entry were unlawful, the fruits of such entry are excluded. When a policeman opens a dresser drawer, the contents may be said to be in "plain view," and yet this is hardly of the same mold as observing the color or license number of an automobile on the street. Since the "plain view" doctrine does nothing more than affirm that the use of fruits of a search depend on its validity, it has no applicability in a setting where no search is being conducted. In short, if a policeman sees something in "plain view" in a public area, he has no need for the "plain view" doctrine.

*Id.*

115. In United States v. Wright, 449 F.2d 1355, 1365, n.1 (D.C. Cir. 1971), the dissent held that "if *Katz* is still the law, and everyone concedes it is, it is difficult to understand how the plain view doctrine [on which the majority in *Wright* relied] can be taken seriously, particularly as a justification for invading premises in non-exigent circumstances without a warrant."

116. Comment, *supra* note 102, at 167.

117. Granberg, *Is Warrantless Aerial Surveillance Constitutional?* 55 CAL. ST. B.J. 451 (1980) [hereinafter cited as Granberg].

able cause, a search warrant or one of the traditional exceptions to the warrant requirement.[118] The plain view doctrine, when applied by the courts to aerial surveillance, eliminates one's right against unwarranted governmental intrusion and nullifies fourth amendment protection.[119]

The open field doctrine is another justification employed by the courts to uphold warrantless aerial surveillance, In light of *Katz*, the application of the open fields doctrine is questionable. By emphasizing privacy interests instead of protected areas, *Katz* implicity replaced the outmoded concept that fourth amendment protection does not extend to open fields. It is therefore necessary to examine the open fields justification for warrantless aerial surveillance because such surveillance is commonly directed towards open property.

In 1924, the Supreme Court ruled that open fields were not protected by the fourth amendment.[120] The Court stated in *Hester v. United States*,[121] that the distinction between a house, which was a protected area under the fourth amendment, and open fields, which were unprotected, was as old as the common law.[122] Subsequent to the *Hester* decision, fourth amendment protection was extended to the curtilage,[123] the immediate area surrounding a home. To date, however, fourth amendment protection has not been interpreted consistently to include open fields.

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118. W. LAFAVE, *supra* note 51, at 263. Consent searches, a limited class of routine-type searches and certain searches conducted under exigent circumstances, are exceptions to the warrant requirement. Amsterdam, *supra* note 9, at 358. *See also* United States v. Frazier, 538 F.2d 1322 (8th Cir. 1976). In *Frazier*, obtaining a search warrant would have impeded immediate police action. The defendant was involved in an extortion plan which included attaching a belt of dynamite around the victim. Such exigent circumstances are rare, and hardly ever arise in the case of aerial surveillance. For a complete discussion of exigent circumstances, *see* Harris v. United States, 390 U.S. 234 (1968).

119. Note, *supra* note 12, at 157. There are no "adequate safeguards which protect the public from police who use visual aid techniques to transform America into a 'watched society' if courts apply the physical presence test of plain view." Comment, *supra* note 49, at 510.

120. 265 U.S. 57 (1924).

121. *Id.* at 59.

122. *Id.* The word "open" in the *Hester* rule has not been strictly used; the rule has applied when the land was fenced in, posted with "no trespassing" signs and when the evidence was not in plain view. The term "fields" enjoys similar expansion and has been applied to police intrusions into wooded areas, open beaches, desert, vacant lots in urban areas and open waters. W. LAFAVE, *supra* note 51, at 332.

123. The court in United States v. Williams, 581 F2.d 451, 453 (5th Cir. 1978), noted that the distinction between open fields and curtilage, after *Katz*, is only helpful in determining whether or not an individual's expectation of privacy is reasonable.

The viability of the open fields doctrine is debatable. As noted,[124] the constitutionally protected areas concept did not provide adequate fourth amendment protection. Technological advances in surveillance devices and law enforcement capabilities rendered the concept inoperative in protecting one from unreasonable search and seizure. Some courts have recognized that the *Katz* reasonable expectation of privacy standard[125] modified the open fields doctrine, but a substantial number of courts[126] have continued to employ a straight-forward application of *Hester*.[127]

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The court also suggested three possible ways of defining curtilage: (1) drawing the line an arbitrary distance from the most remote outbuilding in the curtilage; (2) holding that the curtilage includes a "reasonable zone" beyond the most remote outbuilding in the curtilage; (3) or holding that the outer walls of the extreme outbuildings of the curtilage define the outer limits of the curtilage. *Id.* at 454. The *Williams* court adopted the last definition, finding the first definition irrational and the second vague. *Id.*

124. *See supra* notes 10-19 and accompanying text.

125. *See supra* notes 1-3 and accompanying text.

126. Generally, *see* United States v. Ramapuram, 632 F.2d 1149 (3d Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S. Ct. 1710 (1981) (defendant had no legitimate expectation of privacy in a junked vehicle placed in an open field); Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974) (defendant had no reasonable expectation of privacy in respect to bullets and shell casings seized from pastureland); United States v. Noe, 494 F. Supp. 1032 (E.D. Ky. 1980) (defendant had no expectation of privacy when storing two bales of marijuana in an open field without any attempt to hide them from public view); United States v. Swann, 377 F. Supp. 1305 (D. Md. 1974) (game wardens' search for attempted taking of migratory waterfowl with aid of bait valid under the "open fields" doctrine). *See also* Morsman v. State, 360 So. 2d 137 (Fla. 1978), where the court found that the area adjacent to defendant's backyard was "clothed with a reasonable expectation of privacy from unreasonable governmental intrusion." *Also* Keely v. State, 146 Ga. App. 179, 245 S.E.2d 872 (1978), where defendants, as tent dwellers, had a reasonable expectation of privacy against unreasonable government intrusions under the fourth amendment.

127. W. LAFAVE, *supra* note 51, at 333. *Hester* dealt with defendant's prosecution for concealing moonshine whiskey. Revenue officers found the whiskey in a broken jug near defendant's house. Justice Holmes authored the brief opinion by stating the protection accorded to the people in their "persons, houses, papers and effects" does not extend to open fields. 265 U.S. 57, 59 (1924). A strict application of *Hester* could have disturbing results. For example, in Conrad v. State, 63 Wis. 2d 616, 218 N.W.2d 252 (1974), the sheriff, acting on suspicion of foul play, dug up defendant's property in search of the body of defendant's wife. The body of defendant's wife was found buried in the ground beneath a pile of rocks. The court held that *Hester* remained authoritative even though defendant arguably had a reasonable expectation of privacy in burying his wife underneath a rockpile. The court reasoned that if the field, pursuant to *Hester*, was not afforded constitutional protection, the sheriff 's act of digging into the ground to find the body was a trespass only and did not involve the Fourth Amendment protection. Although a majority of the court felt an "outrageous trespass" occurred when the sheriff dug up the body, it declined to consider the act a search within the meaning of the fourth amendment. Conceivably, the sheriff might dig up every farm yard in the county for his quest without constitutional restraint. W.

A strict application of *Hester* to all open fields undermines the *Katz* principle. The *Hester* approach arbitrarily declares that land beyond the curtilage is subject to police scrutiny and intrusion; no matter how careful the occupant is to keep the property private.[128] A reasonable expectation of privacy, expressed by attempts to keep land private, is impossible under a straight *Hester* approach. The more logical approach would be that "open fields" no longer has any independent meaning, but instead only indicates that open fields are not areas traditionally protected by the fourth amendment.[129]

This approach to open fields was recently applied by several courts. A portion of defendant's farm land in *United States v. Oliver*[130] was leased out to a third party. Investigating officers, who paid no attention to the locked gate and "no trespassing" signs, discovered marijuana growing on the leased land. The Court of Appeals for the Sixth Circuit held that the concept of constitutionally protected areas was replaced impliedly by *Katz*. The court ruled that *Katz*, in effect, modified *Hester* to the point where open fields could be afforded constitutional protection.[131]

*Katz* effectively shifted the test for the fourth amendment protection from an inquiry into common law property distinctions, namely constitutionally protected area, to an inquiry into an individual's reasonable expectations of privacy.[132] In *Oliver*, the court stated that

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LAFAVE, *supra* note 51, at 337. The dissent to *Conrad* found the search unreasonable in that the location of the rockpile on defendant's farm was not an open field within the meaning of the doctrine. *Id.* at 357. It is unacceptable to suppose that a sheriff on suspicion can dig up one's property with a backhoe or a bulldozer, looking for evidence of a crime. *Id. Compare*, United States *ex rel.* Saiken v. Bensinger, 489 F.2d 865 (2d Cir. 1973): *Bensinger*, similar to *Conrad*, dealt with a search for evidence in an open field. The case involved the murder of a teen-aged girl who was a "friend" to both father and son. The father confessed the murder to his son. The body was found on the father's farm in Indiana, after the son had told police the specific place where the father had admitted burying it. 489 F.2d at 869. The court cited *Hester* in support of the search conducted in an area outside of the curtilage.

128. W. LAFAVE, *supra* note 51, at 336.

129. United States v. Freie, 545 F.2d 1217 (9th Cir. 1976). The court in United States v. Basile, 569 F.2d 1053, 1057 (9th Cir. 1978), held that under both *Katz* and *Freie* fourth amendment inquiry does not relate to the geography of open fields, but relates to the state of mind of the person asserting the fourth amendment claim, and the reasonableness of that person's expectation of privacy in respect to the area of the thing searched. 569 F.2d at 1058.

130. United States v. Oliver, 657 F.2d 85 (6th Cir. 1981). The appellant was charged with manufacturing marijuana. The government argued that the evidence was admissible on the grounds that it was a warrantless search of an open field.

131. *Id.* at 87.

132. *Id.*

fourth amendment protection was no longer a question of whether the search was conducted in a "constitutionally protected area,"[133] but, rather, whether the individual's expectations of privacy in the area searched were reasonable. The defendant in *Oliver* had demonstrated both a subjective expectation of privacy in the posting of fences and "no trespassing" signs, and a reasonable objective expectation of privacy.[134] The court held that society's interest in effective law enforcement was not hampered by the requirement of a search warrant prior to a search of a private field, absent exigent circumstances.[135]

A second case favoring a reasonable expectation of privacy in an open field was *United States v. Berkshire Beagle Club*.[136] In *Berkshire*, a natural resource officer (NRO), suspecting the possible trapping of protected wildlife, entered the club's premises without a search warrant through an unlocked gate,[137] and seized leg traps. The court held that the officer exceeded his statutory authority by proceeding without judicial authorization. The *Berkshire* decision was based on *Katz* and the fact that "searches conducted outside the judicial process, without prior approval by the judge or magistrate, are *per se* unreasonable under the fourth amendment—subject only to a few well-delineated exceptions."[138] In *Berkshire*, the court found that *Hester* neither specifically nor the "open fields" doctrine generally, were cited among those few exceptions.[139] The defendants in *Berkshire* also fulfilled the

133. *Id.*, *citing* Katz v. United States, 389 U.S. at 351 (1967).

134. 657 F.2d 85. *See also* State v. Layne, 623 S.W.2d 629 (Tenn. Crim. App. 1981); State v. Lakin, 588 S.W.2d 544 (Tenn. 1979); Rakas v. Illinois, 439 U.S. 128 (1978).

135. 657 F.2d 85. The court cited several cases which supported its belief that the "open fields" exception to the fourth amendment can no longer be automatically invoked to validate a warrantless search. These cases included: United States v. Williams, 581 F.2d 451, 454 (5th Cir. 1978); United States v. Berkshire Beagle Club, No. ___ (D. Mass. Aug. 1981); United States v. Debacker, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980); Burkholder v. Superior Court. 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (1979); State v. Larkin, 588 S.W.2d 544, 549 (Tenn. 1979).

136. United States v. Berkshire Beagle Club, No. ___ (D. Mass. Aug. 1981).

137. The Club's premises were located on a two-hundred acre site, surrounded by a 1¼ inch wire mesh fence approximately five feet high. The fence was posted with "no trespassing" signs. *Id.*

138. 389 U.S. at 357 (1967). *See supra* note 118 and accompanying text. It is interesting to note that "a few well-delineated exceptions" amount to approximately 70% of fourth amendment cases. Berner, *supra* note 37.

139. No. ___ (D. Mass. Aug. 1981). The court also noted that the "open fields" doctrine has "reflected the underlying conceptual uncertainty regarding its relation to the Fourth Amendment in that truly open fields (no fence) surrounding a house are not protected by the fourth amendment but yet the curtilage of a dwelling, including open areas, is protected." *Id. See also* United States v. Williams, 581 F.2d 451 (5th Cir. 1978); Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968) (defendant's stockpile of illegally cut Christmas trees was within the protected curtilage zone).

two-pronged *Katz* reasonable expectation of privacy test by surrounding their property with a five-foot high fence and posting "no trespassing" signs. Short of hiring guards, it is hard to see how defendants could have evinced any clearer intent to exclude outsiders from the premises.[140] Furthermore, the defendants' privacy expectations in *Berkshire* were objectively reasonable in that the fenced-in areas shielded a view by the general public.[141]

The *Oliver* and *Berkshire* decisions indicate a present trend towards a reconciliation between the open fields doctrine and a reasonable expectation of privacy. Since *Katz* cannot be ignored, its guiding principle must be harmonized with the outdated notion that open fields are exempt from fourth amendment protection. In both *Oliver* and *Berkshire*, the defendants demonstrated, through their physical efforts, a desire to keep their property private. Under *Katz*, governmental intrusion upon those privacy interests constituted a search. Fourth amendment protection of the open fields was therefore required.

The extension of fourth amendment protection to open fields directly affects the use of warrantless aerial surveillance. Proponents of unregulated surveillance by air consequently face difficult obstacles in arguing that aerial surveillance does not constitute a search. If open fields are no longer considered strictly outside the ambit of fourth amendment protection,[142] as *Oliver* and *Berkshire* suggest, the proposition that aerial surveillance is a search, requiring fourth amendment protection, continues to gain strength. For example, if the natural

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140. No. ____ (D. Mass. Aug. 1981).

141. *Id.*

142. United States v. Mullinex, 508 F. Supp. 512, 514 (E.D. Ky 1980). The final analysis is that "open fields" are not *per se* outside the protective boundary of the fourth amendment, but a defendant's expectations of privacy in an open field must be an expectation that society would consider reasonable, namely, a reasonably objective expectation. However, in *Mullinex*, the court held that defendant could not have a reasonable expectation of privacy because airplane flights over his property were not unusual, despite defendant's efforts to conceal his marijuana patch from the public and the remoteness of his farm. *Id. See also* United States *ex rel.* Gedko v. Heer, 406 F. Supp. 609 (W.D. Wis. 1973). The court in *Gedko* found that defendant had a reasonable expectation of privacy in his conversations and activities conducted in his open fields. Even though defendant's property was fenced in and warning signs were posted, government officials intruded into the area and stationed themselves in the woods. From that vantage point, the officers were able to observe reactions made by the defendant to a low-flying government plane. The court, in holding that "open fields" no longer retained any independent meaning, found that the officials' observation of defendant's reactions (to a plane flying over his marijuana field) constituted a search. The court concluded that defendant had a "reasonable, exhibited and justifiable" expectation of privacy; therefore, he was entitled to fourth amendment protection. 406 F. Supp. 609.

resource officer in *Berkshire* had hired an airplane to survey the premises, an intrusion upon defendant's reasonable privacy interests would still have occurred. Although the officer would not have made an actual physical entry, as he did on the ground, he still would have invaded the defendant's privacy interests by an aerial intrusion. Thus, it can be concluded that intrusions, either from the ground or by air, into an area one reasonably expects to preserve as private, are unreasonable under *Katz*. Such intrusions are "searches" and, therefore, should follow the warrant requirement established by the fourth amendment.

*Aerial Surveillance Constitutes a Search Under the Fourth Amendment*

With the modification of the open fields doctrine, it is apparent that individuals can have reasonable expectations of privacy in their open property. As the courts continue to apply *Katz* to cases involving open fields, a comparison with aerial surveillance is appropriate. If an individual attempts to secure his open property from ground surveillance and his expectations of privacy are deemed reasonable, any intrusion upon that privacy is unreasonable absent a search warrant. The same rationale applies to airplanes and helicopters that intrude upon private property above the ground. The *Katz* principle states that what an individual reasonably expects to preserve as private, even in an area accessible to the public,[143] may be constitutionally protected.[144] An individual who seeks to shield his property from public view should not be denied fourth amendment protection because he is unable to protect his property from aerial observation.[145] Aerial surveillance of activity on private property may constitute an unreasonable search, if the individual has demonstrated reasonable privacy interests.[146] Therefore, it can be concluded that aerial

143. Some courts have interpreted public areas as a place where an officer has a legal right to be. *See supra* notes 101-106 and accompanying text. The Model Rules for Law Enforcement, published by the Police Foundation (1974) states:

> It is difficult to define precisely those places where an officer has a right to be. Generally they include: (i) areas of public or private property normally accessible to the public or its view; (ii) any place with the consent of a person empowered to give such consent; (iii) any place pursuant to a court order (such as an arrest or search warrant); (iv) any place where circumstances dictate immediate police presence to protect life, well-being or property; or (v) any place to effect a proper warrantless arrest.

144. 389 U.S. 347 (1967).

145. Comment, *supra* note 102, at 167.

146. *Id.*

surveillance, absent a search warrant based on probable cause, violates the fourth amendment.[147]

*Katz* expressed the basic constitutional rule defining unreasonable searches: "searches conducted outside the judicial process without prior approval by a magistrate are *per se* unreasonable."[148] Aerial surveillance does not fall into one of the few exceptions to the warrant requirement. Rather, it is a sense-enhancing method for surveying from the air what normally cannot be observed from the ground, and often intrudes upon an individual's reasonable expectation of privacy. Moreover, aerial surveillance is a search that cannot be justified by the plain view or open fields doctrine.[149] If aerial surveillance is conducted without proper judicial authorization, it constitutes an unreasonable search under the fourth amendment.

The framers of the Constitution included the warrant requirement in the fourth amendment to prevent unjustified search and seizure thereby protecting the individual's right to be free from arbitrary governmental intrusion.[150] Unless one of the exceptions to the warrant requirement is present, aerial surveillance should be governed by fourth amendment safeguards. Judicial authorization for the use of airplanes as surveillance tools effectively regulates the ability of a law enforcement official to investigate purported criminal activity.[151]

Various types of sense-enhancing surveillance tools, including aerial surveillance, are undoubtedly potent law enforcement aids. Their regulated use through warrant procedures is therefore justified.[152] In the case of aerial surveillance, judicial authorization also preserves the right to have reasonable privacy expectations. If fourth amendment protection is afforded to aerial surveillance, the legitimate government interest in detecting criminal activity will be more equally balanced with the right to be free from unwarranted governmental intrusion. *Katz* is more consistently applied to aerial surveillance cases when courts adhere to the modern approach for resolving fourth amendment issues. A critical examination of the courts' application

147. *Id.*

148. 389 U.S. at 357. *See supra* note 118 and accompanying text; *see also supra* note 138 and accompanying text. There are, of course, some "well-delineated exceptions" to the unreasonableness of warrantless searches.

149. *See supra* notes 101-142 and accompanying text.

150. Amsterdam, *supra* note 9, at 841. If aerial surveillance is a serach, it follows that fourth amendment protection in the form of a search warrant is required.

151. Comment, *supra* note 49, at 534.

152. *Id.* at 536. *See infra* notes 173-178 and accompanying text.

of *Katz* to aerial surveillance reveals the inherent difficulties posed by the use of airplanes as surveillance tools.

## AN APPLICATION OF THE KATZ PRINCIPLE TO WARRANTLESS AERIAL SURVEILLANCE

The *Katz* principle is based on what an individual seeks to maintain as private. If an individual demonstrates reasonable intentions to keep his property private, then, under *Katz*, he is afforded fourth amendment protection when those privacy expectations are intruded upon by law enforcement officials. Nevertheless, the courts' application of *Katz* to aerial surveillance frequently serves to narrow the scope of fourth amendment protection.[153]

Fourth amendment protection is limited when courts adopt a balancing approach toward aerial surveillance. For instance, in a case similar to *Allen*,[154] one court held that the minor expectations of privacy exhibited by defendant did not outweigh the value of society in permitting warrantless aerial surveillance.[155] A police officer, flying at an altitude of 50 feet, observed marijuana growing in defendant's open fields.[156] The property was located in an isolated area with fences and "no trespassing" signs posted. While the court advocated a more sensitive reading of *Katz*, which would uphold a reasonable expectation of privacy against warrantless aerial surveillance, the court nevertheless concluded that isolated instances of aerial surveillance[157] over "open fields" did not violate the fourth amendment.[158]

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153. *See supra* notes 30-36 and accompanying text.

154. *See supra* notes 30-36 and accompanying text.

155. United States v. DeBacker, 493 F. Supp. 1078 (D.C. Mich. 1980). The judge disagreed that "open fields" are outside the scope of the fourth amendment because no reasonable expectation of privacy exists. He stated that "such a reading of the Fourth Amendment would provide police with a 'carte blanche' to investigate areas outside of a homestead's curtilage." *Id.* at 1081.

156. *Id.* at 1078.

157. *See* People v. Lashmett, 389 N.E.2d 429 (1979). In *Lashmett*, the surveillance was not isolated. Acting on a tip, the sheriff chartered an airplane and flew over defendant's property searching for stolen farm machinery. He found the stolen goods only after viewing them from the air. The land on which the stolen farm machinery was located was enclosed by both an outer and an inner fence. The equipment could not be seen from adjacent public ways. Although this type of case was one of first impression for the court, it would not hold the aerial "observation" to be an illegal search. *Id.* The court in United States v. DeBacker, observed that when airplanes fly over farmland, frequently at low altitudes, the defendant could not reasonably expect his property to remain private. Any pilot could have observed the marijuana field and notified the police. 493 F. Supp. 1078, 1081 (D.C. Mich. 1980). Yet priavte citizens do not have police powers and undoubtedly would not be "searching" for criminal activity.

158. 493 F. Supp. at 1078.

Several recent California decisions involving aerial surveillance also give a narrow interpretation of the fourth amendment. The decisions are based on the "common agrarian habits of mankind" and represent a retreat from *Katz*[159] by refusing to properly focus on individual privacy interests.[160] In one case, the fourth amendment was found to guard reasonable privacy expectations from both "aerial and terrestrial intrusion."[161] Aerial surveillance, however, was not considered to be a search because other agriculturalists did not expect their crops to be immune from aerial view. Therefore, the defendant could not reasonably expect his marijuana crop, like a wheat crop, to remain private.[162] The open fields doctrine was impliedly invoked to justify the aerial surveillance. The court held that the defendant could not have a reasonable expectation of privacy, despite the defendant's cultivation of the marijuana crop in an isolated area which was surrounded by forest. Although the defendant may have had an expectation of privacy in his mind, the court found he did not objectively communicate those expectations to society.[163]

The concept that reasonable privacy expectations rest on the common habits of farmers was again expressed in another California aerial surveillance case.[164] The court employed an objective reasonable expectation of privacy test[165] to hold that attempts to hide contraband

159. Granberg, *supra* note 117, at 451. The author criticized the recent decisions as deviating from a proper application of the *Katz* principle: whether or not an individual has objectively manifested a reasonable expectation of privacy. *Id.* Furthermore, an application of the "plain view" to aerial surveillance is erroneous because "absent feathered policemen, such surveillance cannot occur without technological assistance." *Id.*

160. *Id.* at 454.

161. Dean v. Superior Court, 32 Cal. App. 3d 585, 108 Cal. Rptr. 116, 117 (1973).

162. *Id.* at 589. The court noted that "mankind's common habits in the use of domestic and business property supply a prime measure for the reasonableness of expectations of privacy." *Id.* The court also made the distinction between one who could reasonably expect privacy in his backyard swimming pool, but found one could not expect fourth amendment protection in his open fields. In effect, the *Dean* court resurrected the outmoded concept of "constitutionally protected areas." *See also*, Tuttle v. Superior Court, 120 Cal. App. 3d 320 (1981) (no reasonable expectation of privacy in open fields).

163. *Id.* at 859.

164. People v. St. Amour, 104 Cal. App. 3d 886, 163 Cal. Rptr. 187 (1980). *See also* People v. Joubert, 118 Cal. App. 3d 637 (1981) (binocular-aided aerial surveillance lawful); Burkholder v. Superior Court, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (1979). In *Burkholder*, aerial surveillance, with the aid of binoculars, was conducted at 1,500 at 2,000 feet. Police officials sited a large marijuana field located in a heavily wooded and mountainous region. The area was only observable from the air. 163 Cal. Rptr. at 891.

165. 104 Cal. App. 3d 886, at 890.

constituted insufficient privacy expectations.[166] Instead, an individual was required to show that "the land in question was expected to remain private according to the common habits of persons engaged in agriculture."[167] In addition, the police officers were deemed to have been in a place where they had a right to be and therefore had a "plain view" of the marijuana corp. Thus, the defendant was not entitled to fourth amendment protection because the surveyed land was not "expected to remain private."[168]

The California approach, based on agricultural habits, is inconsistent with the *Katz* principle. The approach does not focus on the individual's actions to reasonably manifest his privacy interests. Although *Katz* incorporates both the subjective and objective standards for reasonableness, the California approach strikes down fourth amendment protection for aerial surveillance solely on an objective level; that is, the "common agricultural habits of mankind." Taken to its logical extreme, the California approach would extend protection to an open field only if it was covered by an opaque bubble.

The two California decisions also invoke the inapplicable plain view doctrine to justify aerial surveillance. Aerial surveillance, nevertheless, is a sense-enhancing means for achieving a distinct visual vantage point. As one legal writer noted, "aerial surveillance is no more 'plain view' than a wiretap is 'plain hearing.' "[169] The California courts, like most courts, misapply the *Katz* principle and the plain view doctrine to justify the warrantless aerial surveillance of open property.

A proper application of the two-prong analysis in *Katz* was implemented in one case where the defendant had placed a stolen car behind a five-foot fence.[170] Because the fence could not shield the car from public view, the court held a view from a helicopter did not violate any manifested privacy interest.[171] The defendant's reliance on a five-foot barrier was held objectively unreasonable and, therefore, the second prong of the *Katz* test was not met.

These aerial surveillance cases demonstrate that the balance between the need for effective law enforcement and the protection of one's reasonable privacy expectations is not easily struck. The courts, aware of the need to deter criminal activity, hesitate to find warrant-

166. *Id.*
167. *Id.* at 891.
168. *Id.*
169. *See supra* note 159 and accompanying text.
170. People v. Superior Court, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1973).
171. *Id.*

less aerial surveillance unconstitutional. Instead, courts devise standards, such as the common habits of agriculturalists, or employ the plain view and open fields doctrines, to justify aerial surveillance.

Furthermore, courts encounter difficulty when applying the two-prong reasonable expectation of privacy test to aerial surveillance. A subjective expectation of privacy, manifested by posting fences and "no trespassing" signs, is generally overridden by society's objective belief that "routine" airflight precludes reasonable privacy expectations. The courts do not focus on what an individual did to reasonably expect privacy; rather, close attention is paid to the regularity and common-place occurrence of aerial flight. Aerial flight, however, cannot be equated with aerial surveillance. In effect, by stating that "routine" flights make expectations of privacy in open fields unreasonable, the government establishes what is and what is not private. As one author noted: "If the right of privacy is only as great as the expectation of privacy, then the government can vitiate the right simply by taking away all such expectations."[172] The *Katz* principle was established to afford greater fourth amendment protection against new intrusive surveillance techniques. *Katz* was not meant to narrow the scope of constitutional protection by allowing the government to dictate what privacy expectations are reasonable.[173]

A proper application of *Katz* to aerial surveillance circumvents the problem of permitting the government to vitiate privacy expectations. In *People v. Sneed*, the court applied *Katz* and determined that aerial surveillance of defendant's marijuana garden constituted a search.[174] In its determination that Sneed exhibited a reasonable expectation of privacy, the court considered whether the premises were located in an "urban or rural area, whether the area was surrounded

172. Note, *supra* note 12, at 157.

173. One might speculate whether the proper application of *Katz* was implemented in People v. Superior Court, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1973), because it justified a criminal conviction, and therefore benefited the side of law enforcement. A proper application of *Katz* in aerial surveillance cases benefits an individual engaged in criminal conduct; namely a conviction will not stand because an illegal search has occurred. Nevertheless, it is important to note that judicial decisions should not be based on providing effective law enforcement or letting a criminal go free on a "technicality." The proper focus of fourth amendment protection is at stake—not the difference between law enforcement and criminal enterprise. Unwarranted search and seizure violates the fourth amendment. It is not a technicality that is to be overlooked in an effort to convict criminals.

174. 32 Cal. App. 3d at 541 (1973). Defendant's marijuana plants could not be seen from any public vantage point on the ground. The police observed the garden from a helicopter hovering 20 to 25 feet above Sneed's property. Comment, *supra* note 49, at 453.

by artificial structures, how high and sight-proof any fencing was, how close public walkways were to the premises and in what way the police had gained their view."[175] That Sneed had taken reasonable measures to shield his property from public view was not the basis for the decision. The court instead focused its attention on the low altitude level of the helicopter and its intrusive surveillance of Sneed's marijuana garden.[176] Although the court emphasized altitude rather than manifested privacy expectations, it applied *Katz* in a more appropriate manner. The *Sneed* decision marks an important step toward the recognition of aerial surveillance as a search.

The *Katz* principle is intended to guard against unwarranted governmental intrusion. If an individual reasonably desires to preserve something as private, even though the public might have access to it, his privacy interests are protected by the fourth amendment. The frequent misapplication of *Katz* by the courts to aerial surveillance denies fourth amendment protection despite an individual's reasonable attempts to maintain privacy.[177] The objective standard employed by the courts precludes fourth amendment protection as it finds expectations of privacy from routine airflight unreasonable. Nonetheless, aerial surveillance intrudes upon reasonable expectations of privacy and, therefore, constitutes a search requiring fourth amendment protection. A search without a warrant based on probable cause is "*per se* unreasonable"[178] under the fourth amendment. Although aerial surveillance is a justifiable law enforcement tool, its unwarranted and arbitrary use violates the fourth amendment.[179]

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175. 32 Cal. App. 3d at 541 (1973).

176. *Id.* The court in People v. Dumas, 9 Cal. App. 3d 811, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973), stated people who build swimming pools and sunbathe in their own backyards expect privacy and immunity from aerial surveillance. *Id.* The court, observing that Sneed's garden was also part of his backyard, made the distinction between backyards and tracts of cultivated land surrounded by forests. The latter was not immune from overflight surveillance. *Id.* at 883. The question is where the line can be drawn when an airplane flies over backyards and tracts of cultivated land. Since, under *Katz*, "constitutionally protected areas" no longer exist, the answer is that no distinction between the areas exist.

177. In most aerial surveillance cases, the defendant files a motion to suppress, based on the exclusionary rule of evidence, gained from an alleged illegal search. The defendant is required to prove that his reasonable privacy interests were invaded by the warrantless aerial surveillance. Often the defendant's motion to suppress is denied because the courts are unwilling to define aerial surveillance as a search. If no illegal search occurred, there is no justification for suppressing the evidence. *See* Mapp v. Ohio, 367 U.S. 643 (1961). A full discussion of the exclusionary rule and its accompanying controversy is beyond the scope of this note.

178. See *supra* note 142 and accompanying text.

179. The following three hypotheticals suggest certain appropriate responses

## CONCLUSION

The fourth amendment proscribes unreasonable search and seizure. Under the *Katz* principle, fourth amendment protection is based on what an individual reasonably expects to preserve as private, even in an area accessible to the public. In the case of warrantless aerial surveillance, courts have circumvented the right to have reasonable privacy expectations protected by misapplying the *Katz* principle.

Courts also invoke the plain view and open fields doctrines to uphold the unregulated use of airplanes as surveillance tools. These two doctrines, however, are inappropriate justifications for aerial surveillance under a proper application of *Katz*. If an individual seeks

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to the difficult fourth amendment issues presented by warrantless aerial surveillance:

> (a) Officer *A* is on a routine aerial patrol. Using only his unaided powers of observation, he sees contraband growing in a large field. The property holder has made no serious efforts to shield his contraband from public view.
>
> *Result*: The open view doctrine should apply. Warrantless aerial surveillance was proper because the suspect did not show a subjective expectation of privacy.
>
> (b) Officer *A*, acting on an informant's tip, put *B*'s farm under aerial surveillance. *A* suspects *B* of growing contraband on the premises, but he does not obtain a search warrant. After a brief period of surveillance, *A* sees, with his unaided vision, the contraband growing between two rows of corn.
>
> *Result*: In this case the suspect showed a subjective privacy expectation by planting the contraband between rows of corn. Officer *A* may have had information enough to obtain a search warrant before the aerial surveillance took place. His observations of *B*'s field were more like a focused "search" than an inadvertent sighting of something in open view. In a jurisdiction with a modified probable cause standard, police could have obtained a search warrant on their reasonable suspicions. In that case the warrantless intrusion should be deemed unreasonable and the court should act to protect *B*'s privacy interest.
>
> (c) Officer *A*, acting on an informant's tip, puts *B*'s property under aerial surveillance on the suspicion that *B* is growing contraband. On the first overflight, *A* is unable to confirm the tip. But on a subsequent overflight, *A*, armed with a high-powered telescope, is able to see contraband growing under a canopy.
>
> *Result*: This warrantless aerial surveillance should be an unconstitutional search. All three elements—protection of property from public view, absence of police inadvertance, and the use of sophisticated viewing devices—militate against a warrantless search and the courts should act to preserve *B*'s privacy interest.

Schmalz, *Recent Developments, Warrantless Aerial Surveillance: A Constitutional Analysis*, 35 VAND. L. REV. 409, 433, n.145 (1982).

to maintain privacy in his open property, by erecting fences and posting warning signs, he has reasonably done all he can to protect his property—either from the ground or by air. While normal airflight is a fact of modern life, aerial surveillance is not. It is inequitable to deny fourth amendment protection against warrantless aerial surveillance because one cannot prevent airflight or surveillance from an aerial vantage point of open property.

Some courts adopt a strict objective approach toward aerial surveillance by finding "routine" airflight negates reasonable privacy expectations. This approach contravenes *Katz*. It also vitiates the right to have reasonable privacy expectations by permitting the government and law enforcement agencies to determine what privacy interests are to be protected.

The judicial system must balance legitimate law enforcement with the right to have reasonable privacy interests. Although aerial surveillance is clearly an effective law enforcement tool, its unregulated use intrudes upon reasonable privacy interests. Warrantless aerial surveillance therefore constitutes a search and must comply with fourth amendment requirements. To permit warrantless aerial surveillance serves to encourage rather than inhibit unwarranted governmental intrusion.

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