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# California v. Ciraolo: The Demise of Private Property

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## *California v. Ciraolo*: The Demise of Private Property

After receiving an anonymous tip that marijuana was growing in the backyard of Dante Ciraolo, two police officers trained in marijuana identification went to investigate the area. A six-foot outer fence and a ten-foot inner fence prevented ground-level observation. In light of their plans to investigate some twelve additional tips involving nearby marijuana cultivation, the undaunted duo rented a private plane which flew at an altitude of 1,000 feet over the Ciraolo home. Using only the naked eye, the officers identified marijuana plants of eight to ten feet in height growing inside the enclosed backyard of the Ciraolo residence and photographed the plants with a 35mm camera before pursuing additional aerial investigations. The officers then went before a magistrate and executed an affidavit describing their observations and the tip which prompted the surveillance. An aerial photo of the house, yard, and neighboring homes was attached to the affidavit. A warrant was issued, and seventy-three marijuana plants were seized. In the trial court, Ciraolo unsuccessfully moved to suppress the seized marijuana and was convicted of the charged offense. The California Court of Appeal reversed the conviction on the ground that the warrant used to seize the plants was based upon a constitutionally invalid search of respondent's yard which rendered the evidence inadmissible.[1] The United States Supreme Court reversed, holding that the marijuana was obtained pursuant to a valid warrant based upon a constitutionally permissible warrantless aerial observation since the Fourth Amendment does not require police traveling in public airways at 1,000 feet to obtain a warrant in order to observe things visible to the naked eye. *California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809 (1986).

The police have increasingly used the airways in an effort to enforce laws against marijuana cultivation. Documents released to the National Organization for the Reform of Marijuana Laws (NORML) under the Freedom of Information Act reveal that thousands of aerial searches have been conducted in the United States since the late 1970's.[2] These practices have presented the courts with many constitutional challenges.[3]

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1. 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (Cal. App. 1st Cir. 1984) rev'd, California v. Ciraolo, 106 S. Ct. 1809 (1986).

2. Zeese, Aerial Searches For Marijuana, 9 Search and Seizure L. Rep. 33 (1982).

3. See Comment, The Fourth Amendment in the Age of Aerial Surveillance: Curtains for Curtilage?, 60 N.Y.L. Sch. L. Rev. 725 n.5 (1985) (for example, United States v. Alexander, 761 F.2d 1294 (9th Cir. 1985); United States v. Marbury, 732 F.2d 390 (5th Cir. 1984); Nat. Org. for Reform of Marijuana Laws (NORML) v. Mullen, 608 F. Supp. 945 (N.D.Cal. 1985)).

In aerial surveillance cases, the initial constitutional query is whether the aerial observations are sufficiently intrusive to amount to a search invoking the warrant clause of the Fourth Amendment. In the 5-4 *Ciraolo* decision, the Supreme Court considered the additional problems presented by aerial inspection of private residences.

This paper reviews the historical background of the Fourth Amendment and the extra protection traditionally afforded the home and those areas closely associated with it. The discussion then turns to the majority and dissenting opinions in *Ciraolo* and their suggested implications concerning the use of the property doctrine in Fourth Amendment search cases.

*Historical and Jurisprudential Look at the Fourth Amendment*

The original version of the Fourth Amendment to the United States Constitution indicated that the framers' primary concern was with overreaching warrants rather than with warrantless searches.[4] The Senate, however, adopted the present version of the Fourth Amendment which contains two clauses. The first clause prohibits unreasonable searches and seizures, and the second clause establishes requirements for the issuance of warrants.[5] Although the relationship between the two clauses has been the subject of much controversy,[6] the general consensus is that a warrantless search is presumed to be unreasonable[7] unless it is conducted within one of the judicially established and "well delineated

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4. For an interesting discussion of the history of the Fourth Amendment see generally T. Taylor, Two Studies in Constitutional Interpretation (1969), and Reynard, Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?, 25 Ind. L.J. 259 (1950).

5. The Fourth Amendment of the U.S. 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 the persons or things to be seized.

U.S. Const. amend. IV.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25, 33, 69 S. Ct. 1359, 1364 (1949), overruled on other grounds, Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961).

6. See Comment, Aerial Surveillance and the Fourth Amendment, 17 J. Marshall L. Rev. 455, 461 (1984); Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 48, 72-73 (1974).

7. "It is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so." New York v. Belton, 453 U.S. 454, 457, 101 S. Ct. 2860, 2682 (1981).

exceptions" to the warrant requirement.[8] Otherwise, evidence obtained is considered to be the product of an unreasonable search and is excluded both to deter overzealous police work and to maintain "judicial integrity."[9]

Although there exists an abundance of cases involving the Fourth Amendment, no clear cut rules govern when the amendment's protection will be invoked, for the language of the amendment possesses "both the virtue of brevity and the vice of ambiguity."[10] Many definitional words within the Fourth Amendment reflect suggested boundaries for its use. Of particular importance are the words "searches and seizures" which define the scope of the amendment, in that, unless there is a search or seizure, Fourth Amendment protection against unreasonable action is not activated. The meaning attached to these and other words is extremely important, for the determination of the scope of the Fourth Amendment reflects "our society's current balancing of the private citizen's right of privacy and security against the interest of the government in detecting and preventing crime."[11] Thus, the first step in examining

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8. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967). See also Chimel v. California, 395 U.S. 752, 768, 89 S. Ct. 2034, 2042-43 (1969). See generally Charles Whitebread's discussion of the two possible views regarding the interrelationship between the two clauses of the Fourth Amendment. C. Whitebread, Criminal Procedure 103 (1980).

9. "But it is not deference alone that warrants the exclusion of evidence illegally obtained—it is 'the imperative of judicial integrity.'" Harrison v. United States, 392 U.S. 219, 224, n.10, 88 S. Ct. 2008, 2011 n.10 (1968) (quoting Elkins v. United States, 364 U.S. 206, 222, 80 S. Ct. 1437, 1447 (1960)). See also Mapp v. Ohio, 367 U.S. 643, 659, 81 S. Ct. 1684, 1694 (1961); Walder v. United States, 347 U.S. 62, 64-65, 74 S. Ct. 354, 356 (1954). Note, however, that United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, emasculates the contention that judicial integrity mandates exclusion of illegally obtained evidece. The "good faith" exception established in *Leon* permits the use of evidence obtained pursuant to a subsequently validated warrant. The court stated that "[p]enalizing the officer for the magistrate's error, rather than his error, cannot logically contribute to the deterrence of Fourth Amendment violations." Id. at 3419. In a footnote, the court felt it necessary to state that their holding does not implicate the integrity of the courts. Id. at 3419-20, n.22. It seems apparent, however, that the *Leon* Court considers the deterrence factor the primary reason for excluding evidence. The opinion may also reflect "Justice White's unwillingness to suggest that the exclusionary sanction might well be an appropriate remedy for substandard *judicial*, as opposed to police, action." Lamonica, Developments in the Law, 1983-1984—Pre-Trial Criminal Procedure, 45 La. L. Rev. 500, 504 (1984).

10. J. Landynski, Search and Seizure and the Supreme Court (1966).

11. Comment, The Relationship between Trespass and Fourth Amendment Protection after *Katz v. United States*, 38 Ohio St. L. J. 709 (1977).

"The efforts of the courts and their officials to bring the guilty to punishment,

aerial surveillance in light of the Fourth Amendment is to determine what constitutes a search.

*Constitutionally Protected Areas*

The Supreme Court originally interpreted the Fourth Amendment in light of English property rights.[12] The amendment was applicable only when there was a physical trespass into "a constitutionally protected area."[13] Such areas were never clearly delineated, but the term "apparently referred to those places, paradigmatically the home, accepted by society as areas where a large measure of privacy and security from government intrusion should be enjoyed."[14] Also within the protection of the Fourth Amendment were those areas closely allied with the home where "the intimate activity associated with the 'sanctity of a man's home and the privacies of life'" took place.[15]

Certain property, however, received no Fourth Amendment protection even if a trespass occurred. In *Hester v. United States*,[16] revenue agents observed a sale of illegal liquor in front of the defendant's father's home. A field approximately 200 yards from the house was searched without a warrant, and two jugs of bootleg whiskey were seized. The Supreme Court rejected the defendant's Fourth Amendment claim, stating that "the special protection accorded . . . to the people in their 'persons, houses, papers and effects,' is not extended to the open fields."[17]

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praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." Weeks v. United States, 232 U.S. 383, 393, 34 S. Ct. 341, 344 (1914).

12. Comment, supra note 6, at 462 n.34. See particularly Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765), which involved a trespass action for breaking and entering Entick's home under a warrant issued by the Secretary of State (who lacked jurisdiction). "The defendants have no right to avail themselves of . . . these warrants . . . . [O]ur law holds the property of every man so sacred, that no man can set foot upon his neighbour's close without his leave." Id. at 817.

13. Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am. Crim. L. Rev. 257, 266 n.64 (1984). See generally Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564 (1928).

14. Wasserstrom, supra note 13, at 266 n.64 (1984).

15. Oliver v. United States, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630, 6 S. Ct. 524, 532 (1886)). See generally Comment, Curtilage or Open Fields?: *Oliver v. United States* Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis, 46 U. Pitt. L. Rev. 795 (1985).

16. 265 U.S. 57, 44 S. Ct. 445 (1924).

17. Id. at 59, 44 S. Ct. at 446.

Four years after *Hester*, the Supreme Court better articulated the scope of the Fourth Amendment in light of trespass doctrine. In *Olmstead v. United States*,[18] police tapped the defendant's phone through telephone lines located on the street. The Court found no Fourth Amendment violation because there was no seizure of "tangible material effects" nor was there an "actual physical invasion" of defendant's home or his surrounding yard.[19] The test of whether or not a search occurred apparently was based upon the finding of a physical trespass, whereas the question of the reasonableness of that search turned upon the type of property involved. A trespass of a home or an immediately surrounding area was unreasonable in the absence of a warrant, but a similar trespass of an open field was considered reasonable.[20]

The Supreme Court began to move away from a strict application of property concepts in *Silverman v. United States*,[21] where the warrantless use of an electronic listening device which had been pushed through a common wall was found to be an invasion of the defendant's Fourth Amendment rights. The Court did "not pause to consider whether or not there was a technical trespass under local property law relating to party walls" because "[i]nherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."[22] The decision rested instead upon a concept of privacy found "[a]t the very core" of the Fourth Amendment which grants a man

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18. 277 U.S. 438, 48 S. Ct. 564 (1928), overruled by Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967).

19. *Olmstead*, 277 U.S. at 466, 48 S. Ct. at 568. By negative implication, the Court considered the house and surrounding yard as constitutionally protected areas, viewing the Fourth Amendment as a protector of property from physical encroachment rather than as a comprehensive protector of "Americans in their beliefs, their thoughts, their emotions, and their sensations" from "unjustifiable intrusion by the government. . .whatever the means." Id. at 478, 48 S. Ct. at 572 (Brandeis, J., dissenting).

20. [T]he rule of *Hester v. United States*, supra, which we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. . . . This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the *sanctity* of the home that has been embedded in our traditions since the origins of the Republic.' *Payton v. New York*, supra, 445 U.S., at 601, 100 S. Ct., at 1387-88. . . . (other cites omitted)

Oliver v. United States, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741 (1984).

21. 365 U.S. 505, 81 S. Ct. 679 (1961).

22. Id. at 511, 81 S. Ct. at 682.

the right "to retreat into his own home and there be free from unreasonable governmental intrusion."[23] Thus, although initially only areas approximate to the boundaries of a person's property were covered, the stage was set for expansion of the Fourth Amendment's protection beyond physical trespass.

*Katz and the Reasonable Expectation of Privacy*

In *Katz v. United States*,[24] the Supreme Court went beyond its property-related interpretation of the Fourth Amendment. FBI agents had installed an electronic listening device onto the outside of a public telephone booth being used by the defendant to transmit wagering information. The government argued that the booth was not an area constitutionally protected under the Fourth Amendment. The core of the majority opinion was that the "Fourth Amendment protects people, not places."[25] From that starting point, the Court concluded that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . [b]ut what he seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected."[26] The Court further stated that "once it is recognized that the Fourth Amendment protects people . . . against unreasonable searches . . . it becomes clear that *the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion*."[27] Because the defendant had "justifiably relied" upon the privacy of the booth, an impermissible search had taken place even without any physical trespass of his property.[28] Furthermore, the "strong probability" that Katz was engaging in illegal activity did not render the search reasonable.[29]

Although the majority opinion in *Katz* considered whether the FBI had violated "the privacy upon which he [Katz] had justifiably relied,"[30] the "reasonable expectation of privacy" test, articulated in Justice Harlan's concurring opinion, became crucial in Fourth Amendment search cases. The test consists of a two part inquiry: (1) Did the person challenging the search exhibit an actual, subjective expectation of pri-

23. Id. at 511, 81 S. Ct. at 683.
24. 389 U.S. 347, 88 S. Ct. 507 (1967).
25. Id. at 351, 88 S. Ct. at 511.
26. Id. (emphasis added).
27. Id. at 353, 88 S. Ct. at 512 (emphasis added).
28. Id.
29. Id. at 356, 88 S. Ct. at 514.
30. Id. at 353, 88 S. Ct. at 512.

vacy? (2) Is that expectation one that society is prepared to accept as reasonable?[31]

The Warren Court failed to define what constituted a reasonable expectation of privacy, leaving the language, as one cynical commentator remarked, as "little more than readily manipulable cant."[32] Interpretation of the *Katz* decision was not aided by Justice Harlan's later expression of second thoughts about the usefulness of inquiring into a subjective expectation of privacy.[33] In *Katz*, however, the Court did indicate its future direction by stating that the Fourth Amendment's protections go further than mere protection of the privacy of persons "and often have nothing to do with privacy at all."[34] Thus, whatever the *Katz* privacy concept may be, "the Court unquestionably intended it to expand, not to replace, the Fourth Amendment's traditional coverage. . . ."[35]

In the cases following *Katz*, the Supreme Court has emphasized that no single dispositive factor determines when an individual has a reasonable expectation of privacy.[36] Justice Harlan noted that the determination of Fourth Amendment protection generally requires reference

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31. Id. at 361, 88 S. Ct. at 516 (Harlan, J., concurring).

Anthony Amsterdam strongly objects to the frequent use of the test developed in the concurrence:

> [T]he common formula for *Katz* fails to capture *Katz* at any point because the *Katz* decision was written to resist captivation in any formula. An opinion which sets aside prior formulas with the observation that they cannot 'serve as a talismanic solution to every Fourth Amendment problem' should hardly be read as intended to replace them with a new talisman.

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 385 (1974).

32. Wasserstrom, supra note 13, at 271.

33. "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." United States v. White, 401 U.S. 745, 786, 91 S. Ct. 1122, 1143 (1971) (Harlan, J., dissenting).

34. 389 U.S. at 350, 88 S. Ct. at 510.

35. Wasserstrom, supra note 13, at 268.

36. Some factors to be considered

> [i]n assessing the degree to which a search infringes upon individual privacy . . . [are] the intention of the Framers of the Fourth Amendment, e.g., United States v. Chadwick, 433 U.S. 1, 7-8, 97 S. Ct. 2476, 2481-2482, 53 L.Ed.2d 538 (1977), the uses to which the individual has put a location, e.g., Jones v. United States, 362 U.S. 257, 265, 80 S.Ct. 725, 733, 4 L.Ed.2d 697 (1960), and our societal understanding that certain areas deserve the most scrupulous protection from government invasion, e.g., Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.

Oliver v. United States, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741 (1984).

to places,[37] and, in fact, cases following *Katz* suggest that the pre-*Katz* analysis of constitutionally protected areas still maintains some vitality.

In *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*,[38] the Supreme Court based its decision upon the pre-*Katz* distinction between open fields and those lands not accessible to the public. A health inspector walked onto the defendant's property to test chimney emissions for violations of air quality standards. The defendant claimed that the warrantless entry was an unreasonable search under the Fourth Amendment. The majority stated that "[t]he field inspector was on respondent's property, but we are not advised that he was on premises from which the public was excluded."[39] In addition, "[h]e had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke."[40] Reference was then made to the Court's refusal in *Hester* to extend the Fourth Amendment to objects observable in "the open fields." The Court in *Air Pollution Variance Board* clearly relied upon property concepts to distinguish non-public areas from sights visible in the open fields.

The Supreme Court in *Rakas v. Illinois*[41] went beyond a mere reaffirmation of the pre-*Katz* property distinction and actually narrowed the scope of the Fourth Amendment to property interests and the "understandings" of society.[42] The defendants in *Rakas* had been passengers in a car that was stopped, searched, and found to contain incriminating evidence. Defendants were convicted after denial of their motion to suppress the evidence as violative of the Fourth and Fourteenth Amendments, and the Supreme Court, in a 5-4 decision, affirmed the conviction.

The majority opinion began by subsuming the traditional inquiry of standing within the issue of Fourth Amendment protection by reasoning that only those whose Fourth Amendment rights have been violated may move to suppress evidence from an unreasonable search and seizure.[43] The majority applied the *Katz* analysis to determine if any substantive protection existed, an analysis where "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control."[44] The Court concluded that the defendants in *Rakas* did not meet the "legitimate expectation of privacy" standard enunciated in *Katz* because "[t]hey asserted neither a property

37. *Katz*, 389 U.S. at 361, 88 S. Ct. at 516 (Harlan, J., concurring).
38. 416 U.S. 861, 94 S. Ct. 2114 (1974).
39. Id. at 865, 94 S. Ct. at 2116.
40. Id. at 865, 94 S. Ct. at 2115.
41. 439 U.S. 128, 99 S. Ct. 421 (1978).
42. Id. at 143-44 n.12, 99 S. Ct. at 430-31 n.12.
43. Id. at 138-40, 99 S. Ct. at 427-28. See generally Fiss, The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 172 (1979).
44. *Rakas*, 439 U.S. at 143, 99 S. Ct. at 430.

nor a possessory interest in the automobile, nor an interest in the property seized."[45] Justice White pointed out in his dissenting opinion that although the majority "assert[ed] that it [was] not limiting the Fourth Amendment bar against unreasonable searches to the protection of property rights," in essence they "[did] exactly that."[46] The only interests given a "clear stamp of legitimacy" by the *Rakas* court are those based upon property and related concepts of possession and control.[47] As one commentator has pointed out, "[i]n the name of developing the *Katz* 'privacy' test, the *Rakas* Court has instead revived the centrality of property and possession by explicitly investing only the owner/possessor with a clear 'legitimate expectation.'"[48] *Rakas*, embracing all that *Katz* rejected, marks the first clear undermining of the *Katz* rationale.

In *Oliver v. United States*,[49] the Supreme Court again interpreted the protection afforded by the Fourth Amendment in light of property distinctions. Police officers received an anonymous tip that marijuana was growing on defendant's farmland, entered the "posted and fenced" Oliver farm without obtaining a warrant, and, after spotting marijuana in a field, arrested Oliver. The Court held that protections of the Fourth Amendment do not extend to open fields, defining the test of a reasonable privacy interest to be "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment," rather than "whether the individual chooses to conceal asserted 'private' activity."[50] Justice Powell, writing for the majority, listed the relevant factors in a determination of a reasonable privacy interest to be "the intention of the Framers of the Fourth Amendment, . . . the uses to which the individual has put a location, . . . and our societal understanding that certain areas deserve the most scrupulous protection from governmental invasion."[51] Relying upon these factors, the Court decided that open fields are not areas that society is prepared to consider protected by the Fourth Amendment regardless of the privacy expectation which an individual manifests.[52]

Once more, while stating adherence to the *Katz* rationale, the Court in fact decided the case in a way arguably inconsistent with the *Katz* decision. As one commentator has pointed out, "[a]s a *per se* exception, the open fields rule is an irrebutable presumption that an individual can

45. Id. at 148, 99 S. Ct. at 433.
46. Id. at 164, 99 S. Ct. at 441 (White, J., dissenting).
47. Fiss, supra note 44, at 178.
48. Id.
49. 466 U.S. 170, 104 S. Ct. 1735 (1984).
50. Id. at 182-83, 104 S. Ct. at 1743.
51. Id. at 178, 104 S. Ct. at 1741.
52. Note that the *Oliver* Court, however, did consider the area "immediately surrounding and associated with the home" as protected. Id. at 180, 104 S. Ct. at 1742.

have no reasonable expectation of privacy in certain areas. The presumption turns *solely on the nature of the area itself*," rendering it "inconsistent with the basis of *Katz* [which was that] an individual is protected by the fourth amendment irrespective of the nature or the location of his or her activities, as long as he or she has a reasonable expectation of privacy there."[53] The inquiry into Fourth Amendment violations, therefore, relied upon the use of pre-*Katz* property analysis, but with a slight twist. Instead of considering the viewing location of the police to determine if a search had taken place by physical trespass upon property, the Court examined the type of property allegedly searched to determine the extent of privacy rights attached to it.

Just as the Supreme Court has declared that open fields warrant no protection under the Fourth Amendment, other property concepts have been used to conclude that the home and the land which closely surrounds it are entitled to a heightened privacy interest.[54] The protection afforded the home is not as important to a discussion of aerial observations as is the concept of "curtilage." Curtilage, defined as that "area which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'"[55] is afforded heightened protection by the courts.[56] The curtilage historically derived its protection from its use as an actual living area; "[t]his dwelling area—called the curtilage—was readily discernible when the kitchen, the laundry, the springhouse, the woodshed, and most particularly the 'outhouse' were not within the four walls of the mansion house."[57] Although the curtilage of a home rarely contains such physical necessities today, it remains a vital part of home life by providing a secluded area for hobbies and recreation. Only by protecting the curtilage can that core protection of the home and those activities associated with the home truly be safeguarded.[58]

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53. Comment, Affirmation of the Open Fields Doctrine: The *Oliver* Twist, 46 Ohio St. L. J. 729, 748 (1985) (emphasis added).

54. See Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980); Silverman v. United States, 365 U.S. 505, 81 S. Ct. 679 (1961). See generally Moylan, The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?" 1977 S. Ill. U. L. J. 75.

55. *Oliver*, 466 U.S. at 180, 104 S. Ct. at 1742 (quoting Boyd v. United States, 116 U.S. 616, 630, 6 S. Ct. 524, 532 (1886)).

56. See sources cited in supra note 54.

57. Moylan, supra note 54, at 87. For further commentary on the curtilage doctrine see generally Comment, Curtilage or Open Fields?: Oliver v. United States Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis, 46 U. Pitt. L. Rev. 795 (1985).

58. This paper is not concerned with the physical scope of the curtilage doctrine since the *Ciraolo* Court found that Ciraolo's backyard was within the curtilage of his home. It is interesting to note, however, that in United States v. Dunn, 107 S. Ct. 1134,

The curtilage doctrine was discussed in *Dow Chemical Co. v. United States*,[59] the companion case to *Ciraolo*. In *Dow*, the Environmental Protection Agency (EPA) hired a private commercial photographer to take photographs of the outside of Dow's Michigan plant. The photographer used a precision aerial mapping camera to photograph the complex from lawful navigable airspace. The Supreme Court held that this warrantless aerial photography of the industrial complex was not a search prohibited by the Fourth Amendment, emphasizing that the "narrow issue raised" was the lawfulness of observation "without physical entry" rather than a finding of "business curtilage."[60] The Court found the area at issue to be "somewhere between 'open fields' and curtilage, but lacking some of the critical characteristics of both."[61] Although finding that Dow possessed a "reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings," the Court concluded that "[t]he intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant."[62] Dow's contention that it had manifested an expectation of privacy by preventing ground level viewing of its complex, "although a potential factor in a *Katz* expectation of privacy analysis, was irrelevant to the Court's open fields analysis."[63] Just as in *Oliver*, the Court applied a *per se* rule based upon property concepts which ignored parts of the *Katz* analysis, while implying that a different rule would be applicable to a private residence and its curtilage.

In summary, interpretation of the Fourth Amendment in search cases has taken a decidedly winding path. A search, an intrusive "quest by an officer of the law,"[64] was originally defined by the use of property concepts which focused on the location of the policeman at the time

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1139-40 (1987), the Supreme Court seriously limited the definition of curtilage by finding that a barn was not included within the curtilage of a farmhouse. Such a finding is contrary to the "overwhelming majority of state courts" and those lower federal courts which "have consistently held that barns are included within the curtilage of a farmhouse." Id. at 1143 (Brennan, J., dissenting). *Dunn* considers the scope of property to be deemed curtilage, whereas *Ciraolo* considers the level of privacy interests that curtilage warrants under the Fourth Amendment.

59. 476 U.S. 207, 106 S. Ct. 1819 (1986).

60. Id. at 1826.

61. Id.

62. Id. at 1825.

63. Halpern, Dow Chemical Co. v. U.S.-Aerial Surveillance, 13 Search and Seizure L. Rep. 49, 53-54 (1986).

64. Hale v. Henkel, 201 U.S. 43, 76, 26 S. Ct. 370, 379 (1906) (disapproved of on other grounds, Murphy v. Waterfront Comm'n. of N. Y. Harbor, 378 U. S. 52, 69-70, 84 S. Ct. 1594, 1604 (1964)). See also Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341 (1914) (questioned by Elkins v. United States, 364 U.S. 206, 210-211, 80 S. Ct. 1437, 1140-1441 (1960)).

of the supposed "search." A physical trespass was required to invoke Fourth Amendment protection. *Katz* extended the Fourth Amendment protections beyond mere property interests; a physical trespass determination was not as important as a determination of the existing privacy expectations. A search is now considered an intrusive quest by an officer of the law "when an expectation of privacy that society is prepared to consider reasonable is infringed."[65] *Katz*, however, has not been consistently followed. *Dow* and *Rakas* demonstrate the Court's continued reliance upon property concepts to interpret and apply *Katz*.

*The Ciraolo Opinion*

The majority opinion in *Ciraolo* began its discussion by mapping out the *Katz* test, for "[t]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'"[66] The Court concluded that Ciraolo had manifested a subjective expectation of privacy "from at least street level views"[67] by virtue of his ten foot fence, but questioned whether this expectation of privacy extended to "all observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits."[68] However, because the state did not challenge the finding of the California Court of Appeal that Ciraolo had manifested such an expectation, the first part of the *Katz* test was not at issue.[69]

The second part of the *Katz* test was the main focus of the opinion: whether Ciraolo's expectation of privacy in his backyard activity was an expectation which society would consider reasonable. The Court, relying upon *Oliver*, stated that "'[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity,' but instead 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'"[70] The Court began its examination of the issue with the observation that the respondent's yard was within the curtilage, "an area intimately linked to

65. United States v. Jacobsen, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656 (1984). Note that searches by private citizens, plain view, open fields, abandonment, and consent searches are not searches proscribed by the Fourth Amendment. See Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1435 (1984); Walter v. United States, 447 U.S. 649, 100 S. Ct. 2395 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971); Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788 (1968); Abel v. United States, 362 U.S. 217, 80 S. Ct. 683 (1960); Burdeau v. McDowell, 256 U.S. 465, 41 S. Ct. 574 (1921).

66. 476 U.S. 207, 106 S. Ct. at 1811.

67. Id. at 1812.

68. Id.

69. Id. at 1811-12.

70. Id. at 1812.

the home, both physically and psychologically."[71] Implicitly, the Court acknowledged that Ciraolo's expectation of privacy within his yard was objectively reasonable with respect to ground-level surveillance. The Court stated that although an area is deemed curtilage, that fact "does not itself bar *all* police observation,"[72] for "'[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'"[73] According to the majority, Ciraolo knowingly exposed his backyard to observation from the airways. The officers involved did nothing more than observe what "[a]ny member of the public flying in this airspace who glanced down could have seen" and their observations took place in "a physically nonintrusive manner."[74] This author submits that the majority's distinction between a ground-level privacy interest and an aerial one is inconsistent with the Fourth Amendment's historical evolution and its jurisprudential development as intended under *Katz*.

The Court has associated the curtilage with those privacy interests specified by *Katz* as protected by the Fourth Amendment. As stated in *Oliver*, "[t]he distinction [between 'open fields' and 'curtilage'] implies that . . . the curtilage . . . warrants the Fourth Amendment protections that attach to the home."[75] The court of appeals decision in *Dow* stated that the curtilage should be considered an extension of the home not solely because of proximity, but because "people have both actual and reasonable expectations that many of the private experiences of home life often occur outside the house. Personal interactions, daily routines and intimate relationships revolve around the entire home place."[76] Before *Ciraolo*, the Court had made no distinctions between the curtilage and the home in the Fourth Amendment context.

The majority opinion in *Ciraolo*, while acknowledging that the area surveilled was within the curtilage of the Ciraolo home, limited to "ground level observation" the Fourth Amendment protection.[77] This analysis is flawed, for, in the Court's own words, "once it is recognized that the Fourth Amendment protects people-and not simply 'areas'-against unreasonable searches and seizures, it becomes clear that the

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71. Id. Also stated is the contention that the "heightened" protection traditionally afforded the curtilage "is essentially a protection of families and personal privacy." Id.

72. Id. at 1812 (emphasis added).

73. Id. (quoting Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 511 (1967)).

74. Id. at 1813.

75. Oliver v. United States, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742.

76. Dow Chemical Co. v. United States, 749 F.2d 307, 314 (6th Cir. 1984), aff'd, 106 S. Ct. 47 (1986).

77. 476 U.S. 207, 106 S. Ct. at 1812. Apparently, when Ciraolo erected two fences around his yard he established a "ground-level" expectation of privacy which society would consider reasonable. From the air, however, these fences did not have the same effect. Id.

reach of that amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[78] Distinguishing ground-level observation from aerial observation for purposes of interpreting the Fourth Amendment signals a return to the analysis adhered to in pre-*Katz* cases, namely a reliance upon the physical position of the observer rather than upon the privacy interests of the observed. A return to the pre-*Katz* reliance upon physical trespass before invocation of the Fourth Amendment ignores not only nineteen years of jurisprudence, but focuses attention upon the government's actions instead of upon the privacy rights of the citizen.

There are also problems with the majority's assertion that because the Ciraolo backyard was within aerial "plain view" there existed no privacy expectation from the air. Plain view observation must first be distinguished from plain view search and seizure. Plain view observation, or open view, refers to the reasonableness of the government's observation of something that has been knowingly made accessible to public view. In *Ker v. California*,[79] the Court stated that discovery of evidence "did not constitute a search, since the officer merely saw what was placed before him in full view."[80]

In *Ciraolo*, the Court uses language reminiscent of *Ker* when it states, "the mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."[81] The *Ciraolo* Court, however, fails to address the incompatibility of *Katz* and the plain view observation doctrine. As the majority opinion in *Ciraolo* properly points out, *Katz* states that "[w]hat a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection."[82] The *Katz* Court, however, continues with the statement that "what he [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[83] Prior to *Katz* there was no conflict between a privacy doctrine rooted in "constitutionally protected areas" and the plain view doctrine under *Ker*, since "the two concepts were mutually exclusive for there could be no

78. Katz v. United States, 389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967). As Professor Amsterdam stated, "'[s]earches' are not particular methods by which government invades constitutionally protected interests: they are a description of the conclusion that such interests have been invaded." Amsterdam, supra note 31, at 385.

79. 374 U.S. 23, 83 S. Ct. 1623 (1963).

80. Id. at 43, 83 S. Ct. at 1635. See also United States v. Lefkowitz, 285 U.S. 452, 465, 52 S. Ct. 420, 423 (1932); United States v. Lee, 274 U.S. 559, 47 S. Ct. 746 (1927).

81. 476 U.S. 207, 106 S. Ct. at 1812.

82. Id. (quoting *Katz*, 389 U.S. at 351, 88 S. Ct. at 511).

83. 389 U.S. at 351, 88 S. Ct. at 511.

freedom from plain view observation unless one was in a totally enclosed space, unobservable to the public through any method."[84] With *Katz*, however, the privacy concept was expanded beyond property law determinations to include a reasonable subjective privacy expectation, while the plain view doctrine continued to objectively equate privacy with enclosed space, unobservable to the public. As one commentator notes, it is quite conceivable under *Katz* "that one could have a reasonable expectation of privacy and still be legally observed within the meaning of the physical presence test of plain view."[85] The *Ciraolo* court's reliance upon "open view" to justify a finding of no Fourth Amendment intrusion emphasizes the deterioration of the *Katz* privacy conception in favor of a property doctrine analysis.

Additionally, the Court's conclusion that the aerial surveillance of the defendant's backyard was not a search has an interesting impact upon Fourth Amendment seizure provisions. To characterize aerial observation as plain view *observation* may cause an irreparable infringement upon Fourth Amendment protections, given the interrelationship between open view observation and plain view seizure.

The plain view seizure doctrine refers to the permissible seizure of evidence found when there is a "prior justification for an intrusion in the course of which [an officer comes] inadvertently across a piece of evidence incriminating the accused."[86] As an exception to the warrant requirement, the plain view seizure doctrine, outlined in *Coolidge v. New Hampshire*,[87] attempts to set the requirements of an admissible seizure in the context of a warrant authorized search or otherwise lawful intrusion by requiring an inadvertent discovery of the evidence and an immediate recognition of its incriminating nature.[88]

In *Arizona v. Hicks*,[89] the latest Supreme Court case to address the issue of plain view search and seizure, the majority ignored the inadvertency element which the plurality opinion in *Coolidge* first estab-

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84. 3 Search and Seizure L. Rep. 2 (Feb. 1976).

85. Id.

86. Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S. Ct. 2022, 2038 (1971) (plurality opinion). Note that *Coolidge* also discusses a plain view search, which is to be analyzed under the same criteria as a plain view seizure. Such a doctrine, however, is distinguishable from open view or plain view observation in that the former is a search excepted from the Fourth Amendment warrant requirement, whereas an open view under *Ker* is not considered a search. See also Texas v. Brown, 460 U.S. 730, 738-39, 103 S. Ct. 1535, 1541 (1983) (plurality opinion); New York v. Payton, 445 U.S. 573, 587, 100 S. Ct. 1371, 1380 (1980).

87. 403 U.S. 433, 91 S. Ct. 2022 (1971).

88. Id. at 466, 91 S. Ct. at 2038.

89. 107 S. Ct. 1149 (1987).

lished.[90] Justice Scalia, writing for the majority, discussed the plain view seizure doctrine as formulated under *Coolidge*, but stated that probable cause would be required in order to invoke the plain view doctrine in the context of searches as well as seizures.[91] The majority opinion distinguished a search from a cursory inspection of objects in open view, but failed to discuss the inadvertency prong of the doctrine.[92] In fact, the probable cause requirement to the plain view doctrine established by *Hicks* may be mutually exclusive of an inadvertence element.[93] The status of an inadvertency requirement in open view or plain view observation, however, is unclear.

In *Ciraolo*, the plain view seizure doctrine had no application since the officers who observed Ciraolo's home obtained a warrant before entering his property to seize the marijuana growing in his backyard. Likewise, a plain view search was not involved since the Court concluded that no search had taken place. The *Ciraolo* Court's reasoning, however, may become the foundation for a future finding that what is observed from the air may also be seized without a warrant. In *Coolidge v. New Hampshire*,[94] the Court gives the following example of a prior valid intrusion which permits a warrantless seizure: "[T]he plain view doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an in-

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90. In *Hicks*, the police validly entered a residential apartment without a search warrant under the exigent circumstances exception to the warrant requirement. While searching for a gunman, weapons, and victims involved in a recent shooting, the policemen observed two high quality sound systems in the home. Suspecting the stero equipment to be stolen, the officers moved some of the components in order to read and record serial numbers affixed to the base of the equipment; after confirming that the equipment was stolen, the officers seized the stereos. The Supreme Court found that the officers' conduct was a search that went beyond mere inspection of objects in open view. Id. at 1151-53. See Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408 (1978), for a discussion of the exigent circumstances exception to the warrant requirement.

91. *Hicks*, 107 S. Ct. at 1152-54.

92. Id. at 1154. See related discussion in text accompanying supra note 87. Note that Justice White's concurrence stated that the inadvertency "'requirement' of the plain view doctrine has never been accepted by a judgment supported by a majority of this court." Id. at 1155 (White, J., concurring).

93. Professor Whitebread's discussion of inadvertency which concludes that "it seems correct to say that a discovery will be inadvertent whenever there is the absence of probable cause to secure a warrant." C. Whitebread, Criminal Procedure 217-20 (1980). The inadvertenancy prong of the plain view doctrine as established by Coolidge v. New Hampshire and as defined by Whitebread is inconsistent with the *Hicks* mandate that only a finding of probable cause may invoke the plain view doctrine. See also Mapp v. Warden, 531 F.2d 1167 (2d Cir. 1976), cert. denied, 429 U.S. 982, 97 S. Ct. 498 (1976); United States v. Glassel, 488 F.2d 143 (9th Cir. 1973), cert. denied, 416 U.S. 941, 94 S. Ct. 1945 (1974).

94. 403 U.S. 443, 91 S. Ct. 2022 (1971).

criminating object."[95] Reference is then made to *Ker*. This passage suggests that an open view observation, or "cursory inspection" under *Hicks*, must be inadvertent and that such an observation may be the basis of a permissible seizure.[96]

By labeling an intentional observation as a plain view observation incapable of being classified as a search, the *Ciraolo* court conceivably establishes the right of a police officer not only to observe, but also to seize that which he observes in an aerial overflight, given the interrelationship between open view and plain view seizures. The *Hicks* requirement of probable cause before a warrantless seizure may validly occur can easily be met with information gathered in the aerial observation. An aerial overflight may authorize an actual, physical trespass for purposes of seizing that which is observed.

In addition, as the dissent in *Ciraolo* points out, the majority "fails to acknowledge the qualitative difference between police surveillance and other uses of the air space . . . . [T]he actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent" since such travelers normally obtain the most "nondiscriminating glimpse" of the land over which they travel.[97] The fact that a person is aware of possible commercial flight in navigable airways over his home does not mean that he should be deemed to have waived his privacy rights with respect to governmental observation. The Fourth Amendment was specifically designed to protect citizens from *governmental* intrusion. "The fact that Peeping Toms abound does not license the government to follow suit."[98]

The majority failed to differentiate between potential observation by private citizens and the calculated surveillance by police in *Ciraolo*.[99] As the dissent states, "the Court certainly would agree that he [the policeman in *Ciraolo*] would have conducted an unreasonable search had he climbed over the fence, or used a ladder to peer into the yard without first securing a warrant."[100] Since the police in *Ciraolo* rented a plane only after failing to see over Ciraolo's fence, they arguably did "jump" the fence. Screening a yard from aerial view, thereby depriving it of those qualities which render it a backyard, is nothing more than

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95. Id. at 466, 91 S. Ct. at 2038.

96. If open view requires inadvertent discovery, then "[t]he spirit of the warrant requirement might easily be subverted if a level of suspicion below probable cause will support a finding of inadvertence." Whitebread, supra note 93, at 218. The *Hicks* Court does not address the issue of inadvertence in the context of open view. Justice Scalia states that a cursory investigation, as a nonsearch, "does not even require reasonable suspicion." 107 S. Ct. at 1154.

97. 476 U.S. 207, 106 S. Ct. at 1818 (Powell, J., dissenting).

98. United States v. Kim, 415 F. Supp. 1252, 1256 (D. Haw. 1976).

99. See the majority's hypothetical examples, *Ciraolo*, 476 U.S. 207, 106 S. Ct. at 1812-13.

100. Id. at 1817 (Powell, J. dissenting).

a deliberate attempt to avoid the Warrant Clause of the Fourth Amendment. Without the review of a magistrate to determine if probable cause for a search exists, aerial surveillance becomes little more than the type of general warrant which the Fourth Amendment was adopted to prevent.[101]

Moreover, the possibility that someone may intrude upon another's privacy does not mean that one has "knowingly" exposed an object or activity. The defendant in *Katz* had a reasonable expectation of privacy despite the possible consideration that his conversation could be tapped by the FBI or interpreted by a lip-reader in the vicinity. He did not abandon his privacy right with respect to his telephone call by not taking precautions to guard against the *possibility* of such invasions. To hold that abandonment occurred would allow any surveillance technique to be nonintrusive simply by warning the public of the possibility of its use. If citizens then did not take precautions to guard against the technique, they would be deemed to have "knowingly" exposed themselves or their activities to a position beyond the reach of the Fourth Amendment protection. By differentiating between a ground-level privacy interest and an aerial one, the majority stands for the proposition that any outdoor activity is "knowingly exposed" to the public since all are aware of the existence of airplanes. The reasoning is at odds with the opinion in *Katz*, where the reasonableness of the expectation of privacy was the focal point of the inquiry, and not an examination of the precautions taken by Katz with respect to the observation techniques of law enforcement officials. Such reasoning forces a homeowner to take unreasonable precautions to guard against the possibility of aerial observation, and, it is submitted, forces him to compromise the dignity and usefulness of his property—a backyard with an opaque covering ceases to function properly as a backyard.

*Conclusion*

In accord with *Katz*, the inquiry in a Fourth Amendment case should be into the impact that the challenged governmental conduct will have upon a person's sense of security and liberty. The *Katz* privacy standard, however, has been greatly undermined. The Supreme Court has only nominally applied the *Katz* rationale, relying instead upon property concepts in formulating *per se* rules which deny protection to certain physical areas.[102]

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101. Id. at 1817, 1819 (Powell, J., dissenting).

102. A study of the line of cases involving car searches further reveals how the Supreme Court relies upon property distinctions in defining the scope of Fourth Amendment protection. See California v. Carney, 471 U.S. 386, 105 S. Ct. 2066 (1985); United States

Through its use of property concepts to determine a Fourth Amendment violation, the *Ciraolo* Court further upset the delicate balance which should exist between personal liberty and societal security. As Justice Powell states in his dissent in *Ciraolo*: "Some may believe that this case, involving no physical intrusion on private property, presents 'the obnoxious thing in its mildest form' . . . . [b]ut this court recognized long ago that the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefensible right of personal security, personal liberty and private property.'"[103]

The *Ciraolo* Court should not have allowed the Fourth Amendment inquiry to turn upon the presence or absence of a physical trespass, for there are many conceivable, unreasonable nontrespasses which may be constitutionally permissible under such reasoning. Technological advancement is proceeding at a rapid pace and with it comes a change in the very nature of human existence. The danger of losing the capacity to "shape our own destiny . . . is particularly ominous when the new technology is designed for surveillance purposes, for in this case, the tight relationship between technology and power is most obvious. Control over the technology of surveillance conveys effective control over our privacy, our freedom and our dignity—in short, control over most meaningful aspects of our lives as free human beings."[104] The *Ciraolo* reasoning opens the door for technological advancements to be used as general warrants, allowing circumvention of the Fourth Amendment merely because of unobtrusiveness. The Court's decision in *Ciraolo* steps beyond the mere affirmation of unobtrusive searches—the majority condones such practices exercised in an area as sacred to a person's right to privacy and individuality as his home.

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v. Ross, 456 U.S. 798, 102 S. Ct. 2157 (1982); Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975 (1970); Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302 (1949); Husty v. United States, 282 U.S. 694, 51 S. Ct. 240 (1931); Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925).

103. 476 U.S. 207, 106 S. Ct. at 1819 (Powell, J., dissenting).

As Professor Amsterdam has observed, "[T]he question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not." Amsterdam, supra note 32, at 403.

104. Surveillance Technology, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 3 (1975) (opening statements of Senator Tunney).