Aerial Surveillance: Overlooking the Fourth Amendment

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INTRODUCTION

Aerial surveillance has evolved as an important and effective tool of law enforcement. Such technologically aided sight permits law enforcement agents to police an area that would otherwise be unobservable absent a ground search pursuant to a warrant. Although high altitude surveillance has given the government a valuable weapon for enforcing the law, it has also increased the potential for the invasion of an individual's privacy in violation of the Constitution.

The fourth amendment requires that a balance be achieved between the individual's freedom to conduct certain affairs in private and the general public's interest in law enforcement. The line between a person's right to be free from unreasonable searches and society's need to effectively prevent crime must be narrowly and continually drawn. In aerial surveillance, a proper balance has yet to be struck, and the measures of allowable freedom delineated.


4. The fourth amendment provides that "[t]he 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, 27-28 (1949), overruled on other grounds, Mapp v. Ohio, 367 U.S. 643, 655-56 (1961).


Recent state and federal court decisions have validated aerial searches after finding that the individual whose property was searched had no privacy interest to be invaded.\(^7\) Part I of this Note criticizes these holdings. An examination of Supreme Court decisions discussing protectable fourth amendment privacy interests reveals that courts in aerial cases have ignored many factors relevant in determining whether an expectation of privacy exists. Such faulty analysis has resulted in an undermining of the very rights the fourth amendment seeks to protect. Part II suggests a more appropriate analysis to be utilized in determining whether an aerial search violates a person's fourth amendment interests. Observation by plane and helicopter has made it nearly impossible to protect privacy interests in those portions of the land that are unobscured from aerial view. Courts must, therefore, inquire into the very nature of this new means of law enforcement and, as has been done in the area of electronic surveillance,\(^8\) circumscribe its use. It is only when the fourth amendment grows in response to the increasing capabilities of surveillance techniques that its vitality can be retained.\(^9\)


\(^9\) United States v. Kim, 415 F. Supp. 1252, 1257 (D. Hawaii 1976). “[A]s the technological capability of law enforcement agencies increases, the Fourth Amend-
AERIAL SURVEILLANCE

1. THE FOURTH AMENDMENT AND ITS TREATMENT IN AERIAL SURVEILLANCE CASES

A. The "Reasonable Expectation" Test

The fourth amendment protects the privacy and security of individuals, and proscribes official harassment. The amendment establishes an absolute prohibition against unreasonable governmental searches or seizures and, for most searches, requires police to obtain a warrant from an impartial judicial officer. The detached scrutiny of a neutral magistrate is the most reliable safeguard against improper searches and protects an individual from the potentially misguided judgment of a law enforcement officer. It is a "cardinal principle

ment must likewise grow in response. To permit governmental intrusions . . . to remain uncontrolled would violate the basic foundations of privacy, security and decency which distinguish free societies from controlled societies." Id. in Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court stated that "[a] close and literal construction deprives [constitutional provisions] of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Id. at 454 (footnote omitted) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).


12. The fourth amendment proscription against illegal searches and seizures does not apply to private persons, but solely to public officers. Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971): Burdeau v. McDowell, 256 U.S. 465, 475 (1921). In Burdeau, the Supreme Court stated that the fourth amendment's "origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies." Id. at 475.

13. Arkansas v. Sanders, 442 U.S. 753, 758 (1979); Mincey v. Arizona, 437 U.S. 385, 393-94 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971); See v. City of Seattle, 387 U.S. 541, 546 (1967). In Coolidge, the Supreme Court stated that the requirement for a search warrant "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly over-zealous executive officers' who are a part of any system of law enforcement." 403 U.S. at 481 (quoting Coolidge v. United States, 255 U.S. 298, 304 (1921)).

that 'searches 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.'”

Evidence obtained from an unreasonable and therefore illegal search is excluded at trial. 16

The threshold question in any fourth amendment analysis is whether the individual claiming the protection has a “reasonable expectation of privacy” 18 in the area or item that was searched or seized. First formulated in Katz v. United States, 19 the “reasonable


expectation" test requires that an individual must establish that he has both a subjective expectation of privacy that is outwardly manifested, and a privacy interest that society is willing to recognize as reasonable.

In *Katz*, FBI agents, without first securing a warrant, placed sophisticated listening and recording devices on the outside of a telephone booth.\(^{21}\) Evidence was accumulated revealing defendant's involvement in an illegal gambling operation.\(^{22}\) The defendant had, however, closed the door to the booth and paid the toll for the call, thereby manifesting a desire for privacy.\(^{23}\) Despite the public location and lack of physical penetration of the booth,\(^{24}\) the Court held that the agents' conduct was an unreasonable intrusion into that privacy.\(^{25}\) The Court emphasized that it is the person and not the place that is to be safeguarded.\(^{26}\) What a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."\(^{27}\)

*Katz* signalled an end to the use of property concepts as the sole determinants of an expectation of privacy.\(^{28}\) Indeed, subsequent to *Katz*, the Court has stated that no single factor is to be dispositive in deciding whether an individual has a reasonable privacy expecta-
In refining the *Katz* test, the Court has suggested that the relevant facts to be examined in a privacy determination may be grouped into three general categories: (1) the property rights of the individual; (2) the precautions taken by the individual to maintain privacy; and (3) the characteristics of the property, including its degree of accessibility to view. For the "reasonable expectation" test to be properly applied, all of these factors must be addressed.

### B. The Improper Analysis

Although the Supreme Court has not addressed the fourth amendment in the context of aerial surveillance cases, lower courts have confronted the issue. An overwhelming majority of these courts

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31. Rakas v. Illinois, 439 U.S. 128, 152 (1978) (Powell, J., concurring) ("the Court has examined whether a person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy—that is, precautions customarily taken by those seeking privacy"); United States v. Chadwick, 433 U.S. 1, 11 (1977) ("[b]y placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination"); see Rawlings v. Kentucky, 448 U.S. 98, 105 (1980).


validated warrantless aerial searches after concluding that the individuals claiming protection lacked the necessary privacy expectation. These courts, however, improperly utilized the "reasonable expectation" test. Instead of examining all the factors deemed relevant by the Supreme Court in a fourth amendment analysis, the courts relied almost exclusively on a single factor—the characteristics of the land.

In Dean v. Superior Court, for example, the California Court of Appeal indicated that the accessibility of land to view is the principal factor in determining privacy expectations. In validating a warrantless aerial search that revealed a marijuana field, the court held that a landowner "who establishes a three-quarter-acre tract of cultivation surrounded by forests" does not have a protectable privacy interest because such property is an open area. The Hawaii Supreme Court followed Dean in State v. Stachler, similarly concluding


35. There was only one decision that invalidated an aerial search. In People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973), the court determined that the search was unreasonable and, therefore, in violation of the fourth amendment. This court's holding was greatly influenced by the extreme nature of the search; the police helicopter flew back and forth over the 20-acre ranch and then hovered as low as 20 to 25 feet above the individual's corral. The court, however, stated that although this search "an obtrusive invasion of privacy [and] probably illegal . . . . appellant certainly had no reasonable expectation of privacy from . . . . airplanes and helicopters flying at legal and reasonable heights." Id. at 542-43, 108 Cal. Rptr. at 151 (footnote omitted).

36. See infra notes 37-56 and accompanying text.


38. 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973). In this case, the county sheriff searched an isolated area of the Sierra foothills and observed what appeared to be a marijuana cultivation on private property. Id. at 114, 110 Cal. Rptr. at 587. The contraband found during a subsequent ground search was admitted at trial. Id. at 114-15, 110 Cal. Rptr. at 587-88.

39. Id. at 117-18, 110 Cal. Rptr. at 589-90.

40. Id. at 117, 110 Cal. Rptr. at 589.

41. 58 Hawaii 412, 570 P.2d 1323 (1977). In this case, the police conducted a general aerial search of a sparsely populated, remote area of Hawaii looking for any criminal activity. The police observed a patch of marijuana on defendant's land which could not be seen after they landed. Id. at 414, 570 P.2d at 1325. Based solely upon the information from this search, the police obtained a warrant and seized the marijuana. Id.
ing that an individual growing crops in an open field could not expect privacy from aerial observation. 42

By placing so much emphasis on the nature of the land, courts are turning away from the concept that the fourth amendment protects persons and not property interests. 43 As stated by the Supreme Court in Katz, the physical characteristics of the land are relevant but should not be controlling in determining a fourth amendment expectation of privacy. 44 "[W]herever an individual may harbor a reasonable 'expectation of privacy' . . . , he is entitled to be free from unreasonable governmental intrusion." 45

Because an open area of land is visible to view from the air, it is amenable to overflight by law enforcement planes. Some courts, therefore, turn to the regularity of these overflights to aid them in determining whether a reasonable expectation of privacy exists. 46 In United States v. Allen, 47 the Ninth Circuit stated that the property owner's expectation of privacy was diminished by the fact that Coast Guard aircraft "routinely traversed the nearby air space." 48 The court reasoned that the residents would, no doubt, have been aware of the routine flights and thus "could not reasonably bear a subjective expectation of privacy." 49 State courts have also used this ap-

42. Id. at 419-20, 570 P.2d at 1328.
43. See supra note 26 and accompanying text.
47. 633 F.2d 1282 (9th Cir. 1980), cert. denied, 50 U.S.L.W. 3227 (U.S. Oct. 5, 1981). In this case, the Coast Guard routinely flew over the defendant's ranch, which was located in a secluded area of Oregon. Using a telephoto lens, they took photographs of private property that revealed objects which normal cameras could not have disclosed. Id. at 1286, 1289. The property the Coast Guard observed could not be seen from any vantage point on land or sea, id. at 1289, yet the court held the residents did not bear an expectation of privacy from "airborne telephotographic scrutiny." Id. at 1290.
48. Id.
49. Id.
proach, and in People v. Superior Court, the California Court of Appeal indicated that, as long as the observations made from the air could be regarded as routine, they were constitutionally valid.

With this approach, the courts are effectively allowing the police to control whether an individual’s expectation of privacy will be deemed reasonable. Simply by increasing the number of flights, law enforcement officers would be able to derogate the reasonableness of an individual’s expectation. Such a result clearly circumvents the fourth amendment requirement that an impartial judge be placed between the government and the individual, and permits governments to control an amendment that was created to control them.

50. E.g., People v. Superior Court, 37 Cal. App. 3d 836, 839, 112 Cal. Rptr. 764, 765 (1974); State v. Stachler, 58 Hawaii 412, 419, 570 P.2d 1323, 1327-28 (1977); see Burkholder v. Superior Court, 96 Cal. App. 3d 421, 423-26, 158 Cal. Rptr. 86, 87-89 (1979). In Stachler, the court went so far as to expressly state this by holding that “if it had been shown that helicopter flights were rare occurrences in the area, the objective reasonableness of defendant’s expectation of privacy would be more credible.” 58 Hawaii at 419, 570 P.2d at 1328.

51. 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1974). In this case, a police helicopter flew over private homes in search of stolen property. With the aid of gyrostabilized binoculars, they observed missing auto parts in the fenced backyard of a home. Id. at 838, 112 Cal. Rptr. at 764-65. The court emphasized that this was the normal patrol area and the observations were routine, concluding that the residents could not reasonably have expected privacy. Id. at 839, 112 Cal. Rptr. at 765.

52. Id. at 839, 112 Cal. Rptr. at 765.

53. See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974), in which Professor Amsterdam criticizes the idea that there can be no expectation of privacy if the government announces often and in advance that surveillance will occur. In a society where such notices are flashed on television screens, no one would be free from governmental observation. Id. at 384. See United States v. Davis, 482 F.2d 893, 905 (9th Cir. 1973), where the court stated in dictum that fourth amendment guarantees could not be bypassed by announcing that all homes would be searched. Central to the individual’s right of personal liberty and privacy is the knowledge that he is not being watched. The realization that one is being observed has a restrictive influence on even the most innocent person because it is the observation that inhibits and makes one uneasy. Fried, Privacy, 77 Yale L.J. 475, 483-84, 490 (1968); Gavison, Privacy and the Limits of Law, 89 Yale L.J. 421, 447-55 (1980); Rachels, Why Privacy is Important, 4 Phil. & Pub. Aff. 323, 325-26 (1975). For a study of the effects on an individual being in the public eye, see E. Goffman, Behavior in Public Places (1963).


The right of privacy is "too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. . . . [H]istory shows that the police acting on their own cannot be trusted." Such lack of "policing the police" potentially would make the fourth amendment inapplicable to aerial searches, a result hardly commensurate with logic or justice.

The analysis consistent with Katz and its progeny is that even though activities are conducted in an open area and are accessible to view from above, they are entitled to fourth amendment protections if the individual affirmatively manifests a subjective expectation of privacy that is reasonable. To permit a contrary conclusion would require that a property owner erect an impenetrable enclosure—a conclusion that is neither required by, nor compatible with, established fourth amendment principles.

II. The Proper Approach For Determining Privacy Expectations in Aerial Surveillance

Courts confronted with warrantless searches are bound to follow fourth amendment principles in analyzing whether an individual has a reasonable expectation of privacy. To preserve the integrity of the amendment, the judiciary must address those factors deemed relevant by the Supreme Court: property rights, precautions taken, and characteristics of the land. Moreover, in aerial surveillance cases, there is a fourth factor that is crucial to the determination. Because use of aircraft creates a capability to observe and search heretofore unavailable, courts must evaluate the effect that this new surveillance method has on the rights that the fourth amendment serves to protect.

A. Property Rights

Property ownership reflects society’s recognition that a person may act as he desires in certain private areas. The Supreme Court has

56. McDonald v. United States, 335 U.S. 451, 455-56 (1948). The Court also stated that "[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law." Id. at 455.

57. Amsterdam, supra note 53, at 370-71.

58. See supra notes 17-20, 29-32 and accompanying text.

59. See United States v. Curtis, 562 F.2d 1153, 1156 (9th Cir. 1977) ("The three judges here concerned wish to make it clear that in this age of ever-advancing sophistication in the development of electronic eavesdropping devices, they are not insensitive to unjustifiable intrusions on the right of privacy, a right that is deemed to be most precious to the American people."). cert. denied, 439 U.S. 910 (1978).

stated that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude." The right to exclude is a fundamental right attaching to property and belonging only to one in rightful possession. An individual's interest in property is, therefore, of great significance in determining whether an expectation of privacy exists.

In aerial surveillance cases, however, a landowner may claim exclusive possession only of as much overlying airspace as he can reasonably use or enjoy. This limitation on the landowner's right to airspace over his property has resulted in courts limiting his expectation of privacy in the land below. In Burkholder v. Superior Court, for example, the California Court of Appeal indicated that observation of defendant's land from an aircraft flying at a lawful altitude in navigable airspace could not constitute a violation of his expectation of privacy. Because no trespass occurred, the aerial search was held to be valid.

To trigger fourth amendment protections, however, the Supreme Court has stated that a physical trespass is no longer necessary. The landowner's lack of a proprietary interest in the airspace is therefore irrelevant. It is the property right in the article or area actually searched that is significant. In aerial surveillance cases, the individual, as owner or occupier of the land, did indeed have a right to

61. Id. at 143 n.12 (1978).
62. Id.
66. Id. at 426, 158 Cal. Rptr. at 89. Congress has enacted numerous provisions dealing with the airspace overlying the United States. 49 U.S.C. §§ 1301-1542 (1976). Navigable airspace is defined as "airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter." 49 U.S.C. § 1301(26) (1976).
exclude others from the property searched. Whether the property owner has manifested an intent to exercise this right is also instrumental in ascertaining whether an expectation of privacy exists.

B. Precautions Taken

The Supreme Court has placed great emphasis on the precautions that an individual takes to preserve his privacy. The precautions taken need not be extreme to invoke constitutional protections; a person does not have to "construct an opaque bubble" over his property to maintain an expectation of privacy. In *Katz*, all the defendant needed to do was close the door of the telephone booth. In other cases, by closing a toilet stall door, locking a footlocker,


71. Rakas v. Illinois, 439 U.S. 128, 152-53 (1978) (Powell, J., concurring) (the precautions necessary to maintain privacy categorized as merely "normal . . . that is, precautions customarily taken by those seeking privacy"); see United States v. McMillan, 350 F. Supp. 593, 596 (D.D.C. 1972) (physical condition of property indicated that it was an area where she had a reasonable expectation of privacy).


73. Katz v. United States, 389 U.S. 347, 352 (1967). The Court held that an individual may justifiably rely on privacy while using a telephone, stating that "[o]ne who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.*


75. United States v. Chadwick, 433 U.S. 1, 11 (1977) ("By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination.").
growing grass very high, or building a tall fence, the individual sufficiently manifested an expectation of privacy that merited protection from warrantless searches.

In People v. St. Amour, branches, leaves and shrubbery were used as camouflage, and outsiders were forbidden entry by signs and a fence. In validating the aerial search, the court stated that the owner of land cannot invoke fourth amendment protections against intrusion from the air by taking precautions to defend property from earthly encroachments. Other courts have reached similar results despite defendants implementing measures to preclude visual detection and to restrict access to the public. Such analysis is clearly a departure from the Supreme Court guidelines.

To avoid the atmosphere of a police state, an individual’s efforts to protect himself or his property from surveillance must be given great deference in a court’s determination of whether a privacy interest exists. A person may always “protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet.” Such withdrawal, however, is clearly not necessary. Indeed, an individual must be free to use open land which he lawfully possesses without Orwellian scrutiny.


79. Id. at 890, 163 Cal. Rptr. at 190.

80. Id. at 892, 163 Cal. Rptr. at 190-91.


82. Amsterdam, supra note 53, at 402.

83. G. Orwell, 1984 (1949); accord Lorenzana v. Superior Court, 9 Cal. 3d 626, 637, 511 P.2d 33, 41, 108 Cal. Rptr. 585, 593 (1973). The court warns against a time “in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, air-proof box. The shadow of 1984 has fortunately
C. Characteristics of the Land

The proper way to utilize the characteristics of the land is as one of many factors necessary to determine a reasonable expectation of privacy. The property most commonly involved in aerial cases is isolated, rural land. As shown above, courts often seize upon this characteristic, but incorrectly emphasize that this type of land is accessible to aerial view and that pleasure crafts and cropdusting planes actually fly overhead. Overflights in rural areas are considered “consistent with the common habits of persons engaged in agrarian pursuits.” Because a rural dweller is accustomed to civilian overflights, courts assume that the individual cannot have a reasonable expectation of privacy from police flights.

The major flaw with this analysis is that even if there are non-police flights, there is no reason for the property owner to perceive that the passengers or pilots of such planes will scrutinize the land below in search of contraband. For example, a property owner would not expect a cropduster to be searching, only that he would be cropdusting.

A person should be able to “demand privacy unless a policeman can see or hear [him] from a place accessible to those members of the public not preternaturally inquisitive.” The measure to be ap-

84. See supra note 29 and accompanying text.
plied, therefore, is natural curiosity. Police lacking a warrant are permitted to intrude only to the same extent as a "reasonably respectful" individual. Furthermore, different expectations of privacy exist with respect to different people. The fact that a private citizen has intruded or may intrude does not entitle the police to do the same. There may be no reasonable expectation of privacy against a child wandering into a backyard, yet there may be one against a policeman making a search of the same area.

The proper question is whether the characteristics and location of the property make a view of the area accessible to the naturally curious observer. The characteristics of the land in most aerial cases should have led to a finding of a reasonable expectation of


94. See supra notes 88-89 and accompanying text.

privacy. In *Dean*, for example, the court conceded that the property searched was an "isolated area of the Sierra foothills . . . hidden from view by the surrounding hills and woods."96 The Supreme Court of Hawaii in *Stachler* also noted that the aerial surveillance took place over a sparsely populated and relatively remote area adjacent to a forest and surrounded by abandoned coffee farms, wild growth and numerous trees.97 Yet in both of these cases, the courts incorrectly applied the characteristics factor and held that no reasonable expectation of privacy existed.98 If an individual inhabits an area which is sparsely populated or difficult to reach, an expectation that his activities or property remain unobserved is more probable than that of an urban dweller whose every move is likely to be viewed by a casual passerby.99

D. The Method of Surveillance as a Fourth Factor

Few "unenclosed locations . . . [can] not be observed from some airborne location."100 Aircraft used in police searches, therefore, can greatly affect an individual's ability to protect his privacy interest. To ensure that the fourth amendment keeps pace with this advance in surveillance, courts must consider the method employed by the police as a fourth factor in determining a reasonable expectation of privacy.

The aerial cases fail to properly account for the significance of the method of surveillance. Some courts justify warrantless aerial surveillance by stating that the object or area was in "open view" and, therefore, no invasion into a privacy expectation could have occurred.101 The origin of this approach is the "open fields" exception

96. 35 Cal. App. 3d at 114, 110 Cal. Rptr. at 587.
97. 58 Hawaii at 413, 570 P.2d at 1325.
101. E.g., People v. St. Amour, 104 Cal. App. 3d 886, 894, 163 Cal. Rptr. 187, 192 (1980) ("marijuana cultivation was in plain view"); Burkholder v. Superior Court, 96 Cal. App. 3d 421, 425, 158 Cal. Rptr. 86, 88 (1979) ("contraband is plainly visible"); State v. Stachler, 58 Hawaii 412, 421, 570 P.2d 1323, 1329 (1977) ("marijuana patch was open to . . . view"); People v. Lashmett, 71 Ill. App. 3d 429, 431, 389 N.E.2d 888, 890 (1979) ("machinery was in clear view"), cert. denied, 444 U.S. 1081 (1980). In *Stachler*, the court explained that a search implies the seeking out of something that is concealed and that there is no search to observe that which is fully disclosed. 58 Hawaii at 416, 570 P.2d at 1326-27.
to the fourth amendment. That exception has historically been used as an independent justification for validating warrantless searches. The analysis underlying the "open fields" doctrine emphasized the nature of the land, reasoning that there simply is no search if the area observed is land fully visible to the public. An object in "open view," therefore, falls outside the protections of the fourth amendment.

By not considering the method of surveillance that was employed by the police, however, courts in aerial cases distort the "open view" analysis. Although it is axiomatic that something is not in open view if police must resort to unusual means to penetrate or extraordinary steps to obtain a glimpse, courts improperly ignore the methods employed and conclude that the property searched was out in the open. The protections of the fourth amendment are emasculated by finding that a field or yard, purposely concealed and unobservable except by aircraft, is in "open view." The correct analysis must be that the vantage point of the officer, as well as the method of surveillance


103. This exception was first enunciated in Hester v. United States, 265 U.S. 57 (1924), where the Supreme Court stated that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." Id. at 59. It has been recognized in subsequent cases. Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974); United States v. Lee, 274 U.S. 559, 563 (1927); United States v. Jackson, 588 F.2d 1046, 1053-54 (5th Cir.), cert. denied, 442 U.S. 941 (1979); Janney v. United States, 206 F.2d 601, 604 (4th Cir. 1953); Martin v. United States, 155 F.2d 503, 505 (5th Cir. 1946).


105. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan explained that something exposed to the open view of a member of the public is not protected under the fourth amendment because no intention to keep it private has been exhibited. Id.


107. See supra note 101 and accompanying text.
he employs, should play an important role in determining whether what was observed is in "open view." 108

The method utilized by law enforcement agents should play an integral part not only in determining whether an object or area is in "open view," but also whether the individual has a reasonable expectation of privacy. In fourth amendment aerial cases, the surveillance means has never been been used to bolster a finding of protectable privacy. Courts in the analogous area of trade secrets, however, have indicated that the methods employed may be critical in the determination of whether an individual has an interest to protect. 109

Just as a reasonable expectation of privacy must exist before an individual may claim a violation of his fourth amendment rights, 110 a valid protectable trade secret must exist before an individual may claim a violation of his business rights. 111 In determining whether particular information is a trade secret, courts consider the precautions taken to preserve the interest 112 as well as "the ease or difficulty with which the information might be properly acquired." 113


110. See supra notes 17-20 and accompanying text.


112. E.I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012, 1016-17 (5th Cir. 1970), cert. denied, 400 U.S. 1024 (1971). The court stated that society's "tolerance of the espionage game must cease when the protections required to prevent another's spying cost so much that the spirit of inventiveness is dampened." Id. at 1016; accord Mycalex Corp. of Am. v. Pemco Corp., 64 F. Supp. 420, 423 (D. Md. 1946), aff'd, 159 F.2d 907 (4th Cir 1947); G. Alexander, Commercial Torts § 3.1, at 207 (1973); R. Ellis, Trade Secrets § 239, at 324-25 (1953).

In *E.I. duPont deNemours & Co. v. Christopher*, the Fifth Circuit was confronted with the question of whether defendant's aerial observation of a plant construction site constituted an improper means of obtaining a trade secret. After examining both the precautions taken and the means utilized, the court concluded that plaintiff had a protectable trade secret and that the defendant's method of discovering it was wrongful. The fact that extraordinary means were necessary to obtain the view suggested that the protective measures taken were sufficient to establish the existence of a secret.

Similarly, in a fourth amendment analysis, the means employed by law enforcement agents should be assessed in determining whether an individual has a reasonable expectation of privacy. If a view may not be had unless a helicopter or plane is used, the presumption must be that a protectable expectation exists. The lengths to which the police must go serve to define and confirm the reasonableness of the expectation.

The proper approach to take in evaluating a fourth amendment claim is first to consider the means utilized when determining whether something is in "open view" to the casual passerby. If an overflight is necessary to observe activity and precautions have been taken to prevent ground observation, there is no "open view." It is not reasonable to assume that those members of the public not preternaturally inquisitive will seek access by the air. If there is no such "open view," then there is a search and a fourth amendment analysis is triggered. In

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115. *Id.* at 1015. See Restatement of Torts § 757(a) (1939), which states that an individual is liable to another if "he discovered the [trade] secret by improper means. . . ." *Id.*
116. 431 F.2d at 1013, 1016-17. The court noted that "[p]erhaps ordinary fences and roofs must be built to shut out incursive eyes, but we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available." *Id.* at 1016.
117. *Id.* at 1013, 1016-17.
118. *Id.* at 1016.
119. *Id.* at 1015, 1017. Aerial reconnaissance was held to be an improper means regardless of altitude or whether the flights violated any federal aviation regulations. *Id.*; see *Patent Preemption, supra* note 111, at 810 & n.20. For a discussion of the *E.I. duPont case, see Theft of Trade Secrets, supra* note 109, at 385-89.
120. 431 F.2d at 1015; see Restatement of Torts § 757 comment a, (1939) ("The significant difference of fact between trade secrets and processes or devices which are not secret is that knowledge of the latter is available to the copier without the use of improper means to procure it . . . .").
determining whether an individual has a reasonable expectation of privacy, the means must once again be considered. When evidence may only be discovered by such means as overflight surveillance, the difficulty of that acquisition suggests that the expectation of privacy was reasonable.

CONCLUSION

Personal liberty and freedom from arbitrary and unreasonable police invasion are endangered whenever an individual's reasonable expectation of privacy can easily be derogated by technology. The increased use of warrantless aerial surveillance as an investigative technique jeopardizes personal liberty. The absence of a warrant requirement in aerial cases is inconsistent with prior judicial and statutory responses to the use of electronic surveillance. Demanding a warrant and judicial supervision prior to aerial intrusion will inevitably entail extra effort on the part of government. Fourth amendment protections, however, may not be disregarded for mere efficiency's sake. "Duties of law enforcement officials are extremely demanding in a free society. But that is as it should be. A policeman's job is easy only in a police state."

Susan A. Higgins

122. See supra note 8 and accompanying text.