

# REASONABLE EXPECTATIONS OF PRIVACY AND HIGH TECHNOLOGY SURVEILLANCE: THE IMPACT OF *CALIFORNIA v. CIRAULO* AND *DOW CHEMICAL v. U.S.* ON TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

The fourth amendment of the United States Constitution protects all persons and their communications from unreasonable government searches.<sup>1</sup> In order to establish a fourth amendment violation, a subject needs to show that government actors conducted a search which violated both society's and the subject's expectations of privacy.<sup>2</sup> Courts can exclude evidence collected in violation of the fourth amendment.<sup>3</sup> However, even when a subject has an apparent fourth amendment right, government officials can still conduct a search if they act within the scope of a valid search warrant<sup>4</sup> or if one of the exceptions to the search warrant requirement applies.<sup>5</sup> Neutral magistrates issue such warrants only after the government meets certain procedural protections.<sup>6</sup>

In addition to the traditional fourth amendment protections, Title III

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1. *Katz v. U.S.*, 389 U.S. 347 (1967); see C.H. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE 111-112 (2d. ed. 1986) [hereinafter WHITEBREAD & SLOBOGIN]; see *infra* notes 54-74 and accompanying text.

2. *Id.* This two-part analysis comes from Harlan's concurring opinion in *Katz*. 389 U.S. at 361. See *Hudson v. Palmer*, 468 U.S. 517 (1984); *Smith v. Maryland*, 442 U.S. 735 (1979). See *infra* notes 59-61 and accompanying text.

3. *Weeks v. U.S.*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Ker v. California*, 374 U.S. 23 (1963); see WHITEBREAD & SLOBOGIN, *supra* note 1, at 16-68.

4. WHITEBREAD & SLOBOGIN, *supra* note 1, at 136-140.

5. The plain view rule and the open fields doctrine are the main exceptions that this Note considers. See *infra* notes 46-53 and accompanying text. See WHITEBREAD & SLOBOGIN, *supra* note 1, at 140 (comprehensive list of exceptions to warrant requirement).

6. A neutral and detached magistrate must issue a search warrant. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (warrant invalid because state attorney general, acting pursuant to state law, issued the warrant). The warrant must be based on a probable cause belief that the items sought are in the place described in the warrant. See *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (neutral and detached magistrate determines whether probable cause exists, but here warrant invalid because magistrate participated in the search). The warrant must describe with particularity the place to be searched and the items to be seized. Compare *Marron v. U.S.*, 275 U.S. 192 (1927) (government actors may not seize things not described in the warrant) with *U.S. v. Bridges*, 419 F.2d 963 (8th Cir. 1969) (fruits of criminal activity found in "plain view" during a search may be seized even though not described in the warrant). The warrant must be executed within a reasonable time so that the conditions justifying the probable cause finding do not change. The federal rule requires

of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III)<sup>7</sup> specifically protects "oral communications" from surreptitious interception.<sup>8</sup> The requirements for obtaining a search warrant to intercept oral communications under Title III<sup>9</sup> and the level of judicial supervision<sup>10</sup> are far more stringent than the requirements for and supervision over the traditional search warrant.<sup>11</sup> In order to invoke Title III protections of oral communications, however, a subject must meet the *same* generic standards applicable in traditional fourth amendment analysis: the person must show a government search,<sup>12</sup> a subjective expectation of privacy, and a reasonable objective expectation of privacy.<sup>13</sup> A person who fails to satisfy any of these conditions loses both fourth amendment and Title III protections of oral communications.

This Note focuses on the reasonable objective expectation standard found in both the traditional fourth amendment analysis and in the Title III definition of protected oral communications. The standard arose in

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that the warrant be executed within ten days. FED. R. CRIM. P. 41(c). See generally WHITEBREAD & SLOBOGIN, *supra* note 1, at 104-63.

7. Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1982)).

8. 18 U.S.C. § 2510(2), § 2512-2520 (1982 & Supp. 1987). See *infra* notes 126-29 and accompanying text.

9. The application for permission to electronically intercept oral communications must detail the particular offense in question; describe the nature and location of the facilities where the interception will occur; describe the type of communication to be intercepted; identify the person (if known) whose communications are being intercepted; explain why other investigative methods will not succeed; state all previous applications made to intercept communications from the same persons, facilities, or places; state the duration of the interception; and include such other evidence as the judge may require. 18 U.S.C. § 2518(1-2) (1982 & Supp. 1987).

At the federal level, only the Attorney General or an Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge of competent jurisdiction. See *U.S. v. Giordano*, 416 U.S. 505 (1974) (Attorney General or his specific designee must sign each wiretap application). At the state level, state officials of a similar level must authorize the applications to intercept communications under Title III. See, e.g., *State v. Farla*, 218 Kan. 394, 544 P.2d 341 (1975), *cert. denied*, 426 U.S. 949 (1976). See generally WHITEBREAD & SLOBOGIN, *supra* note 1, at 308-09.

10. The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application. 18 U.S.C. § 2518(2) (1982). Once the judge issues the order allowing the interception, he may require updated reports showing what progress has been made toward achieving the authorized objective and showing the need for continued interception. *Id.* § 2518(6).

11. Compare *supra* notes 4-6 and accompanying text with notes 9-10 and accompanying text.

12. Although Title III also proscribes private activity, this Note focuses primarily on a criminal defendant's position with respect to government activity. See 18 U.S.C. § 2510(6) (1982) ("person" defined to include government employees and private individuals).

13. The definition of protected "oral communications" is composed of a subjective and an objective component. See 18 U.S.C. § 2510(2) (1982). See *infra* notes 123-25 and accompanying text.

*Katz v. U.S.*,<sup>14</sup> a traditional fourth amendment case, which Congress incorporated into Title III.<sup>15</sup> Recently, the Supreme Court considerably limited the breadth of an individual's objective expectation of privacy in *California v. Ciraolo*<sup>16</sup> and *Dow Chemical Co. v. U.S.*,<sup>17</sup> both traditional fourth amendment cases. Arguably, this higher standard for traditional fourth amendment analysis will cause a like change in the objective expectation standard for oral communications under Title III. Should this occur, then, as technology advances future defendants may find it impossible to enjoy the significant Title III procedural protections.<sup>18</sup> Accordingly, this Note proposes a solution which will help prevent the complete erosion of the objective expectations standard in Title III.

Specifically, Part I discusses the history of the fourth amendment and the development of the reasonable objective expectation standard under *Katz*. Part II analyzes the impact of *Ciraolo* and *Dow* on the reasonable objective expectation standard set out in *Katz*. Part III provides the legislative history and pertinent textual provisions of Title III. Part IV analyzes the impact of *Ciraolo* and *Dow* on Title III. Part V proposes a solution which will maintain fourth amendment and Title III protections in the face of advancing technology.

## I. HISTORY OF FOURTH AMENDMENT RIGHTS

### A. Pre-Katz

Prior to *Katz v. United States*,<sup>19</sup> the Supreme Court analyzed fourth amendment search and seizure cases by asking whether the government

14. 389 U.S. 347 (1967). See *infra* notes 59-61 and accompanying text.

15. 18 U.S.C. § 2510(2) (Supp. 1987). See Note, *The Admissibility of Evidence Obtained by Eavesdropping on Cordless Telephone Conversations*, 86 COL. L. REV. 323, 340-41 n. 129 & 131 (1986); Note, *Electronic Monitoring in the Workplace: The Need for Standards*, 52 GEO. WASH. L. REV. 438, 444-48 (1984).

16. 476 U.S. 207 (1986).

17. 476 U.S. 227 (1986).

18. If a person cannot demonstrate a reasonable objective expectation of privacy from a given form of surveillance, then no "oral communication" exists within § 2510(2) of Title III and thus Title III procedural protections do not apply. See *infra* text accompanying note 114. The technology based standards for objective expectations in *Ciraolo* and *Dow* suggests that this possibility is real. See *infra* notes 129-36 and accompanying text.

19. In *Katz v. United States*, 389 U.S. 347 (1967), the Court moved away from its approach of examining physical boundaries to determine which areas the fourth amendment protected. The Court turned to an "expectation of privacy" standard which encompassed less tangible boundaries. See Note, *Constitutional Law-Search and Seizure-Warrantless Aerial Surveillance*, 54 TENN. L. REV. 131 (1986).

had physically intruded into a person's home or business or had seized his personal papers or effects.<sup>20</sup> One's "home" included the immediate area around the dwelling, the "curtilage".<sup>21</sup> A home did not include, however, "open fields."<sup>22</sup> This open fields exception authorized officials to observe all activities outside a dwelling or its curtilage<sup>23</sup> and to enter and search the field without probable cause and without a warrant.<sup>24</sup> By distinguishing between the curtilage and open fields, the Court attempted to create a bright-line test for determining the legality of an official's warrantless search.<sup>25</sup>

The Court based its curtilage rules on the common law understanding that laws protecting a house also reached nearby structures.<sup>26</sup> The court's rulings extended the curtilage to the area associated with the intimate activities connected with the "sanctity of a man's home and the privacies of life."<sup>27</sup> Additionally, lower courts defined the extent of the curtilage by determining whether a person reasonably would have expected that a given area would remain private.<sup>28</sup>

In *Olmstead v. U.S.*<sup>29</sup> the Supreme Court demonstrated its insistence

20. The fourth amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . ." U.S. CONST. amend. IV. In *Olmstead v. U.S.*, 277 U.S. 438 (1927) the Court added the following language to the fourth amendment in its holding: "[U]nless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house or 'curtilage' . . ." *Id.* at 466 (emphasis added to show additional language). Thus, the Court effectively read a physical intrusion requirement into the fourth amendment.

21. *United States v. Dunn*, 1075 S. Ct. 1134 (1987). See *infra* notes 26-45 & 66-70 and accompanying text.

22. *Oliver v. United States*, 466 U.S. 170 (1984). See *infra* notes 50-53 & 71-74 and accompanying text.

23. *Hester v. U.S.*, 265 U.S. 57 (1924).

24. *Oliver v. U.S.*, 466 U.S. 170 (1984) (officers traversed one mile path on defendant's land without a warrant to discover marijuana patch).

25. *Hester v. U.S.*, 265 U.S. 57 (1924) (all that is not in the curtilage is in the open field).

26. Thus, in the case of burglary Blackstone extended the protective curtilage:

"[i]f the barn, stable, or warehouse be parcel of the mainfionhouse, though not under the fame roof or contiguous . . . for the capital house protects and privileges all it's [sic] branches and appurtenants. . . [however,] no distant barn, warehouse, or the like, are under the fame privileges, nor looked upon as a man's cattie of defence. . . ."

4 W. BLACKSTONE, COMMENTARIES \*225.

27. *Oliver v. U.S.*, 466 U.S. 170, 180 (1984) (quoting *Byrd v. U.S.*, 116 U.S. 616, 630 (1886)).

28. See, e.g., *United States v. Van Dyke*, 643 F.2d 992, 993-94 (4th Cir. 1981) ("expectations of privacy are inherent in the common law concept of 'curtilage'"); *United States v. Williams*, 581 F.2d 451, 453 (5th Cir. 1978) (presence of curtilage helpful in determining the existence of reasonable privacy expectations).

29. 277 U.S. 438 (1927).

on a physical intrusion into the curtilage. The Court ruled that federal prohibition officers did not violate a defendant's fourth amendment rights when they wired into the phone lines of the office building where the defendant rented space.<sup>30</sup> The Court emphasized that the officers had not physically trespassed on the defendant's property nor entered his house or offices because the actual tap occurred on the street adjacent to the office building.<sup>31</sup> The Court stated that the agents could not violate the fourth amendment "unless there had been an official search and seizure of [his person, papers, or effects] or an actual physical invasion of his house or 'curtilage' for the purpose of making a seizure."<sup>32</sup> Finally, the Court concluded that a person who installs a telephone intends "to project his voice to those quite outside" his curtilage and that wire outside the defendant's home and the messages on the wires did not fall under the fourth amendment's protection.<sup>33</sup> At the same time, though, the Court recognized that Congress could prohibit the admissibility of intercepted phone messages in federal criminal trials.<sup>34</sup>

Following *Olmstead*, the Court reaffirmed its application of the physical invasion requirement.<sup>35</sup> For instance, in *Goldman v. U.S.*,<sup>36</sup> federal agents attached a "detectaphone" to the outside wall of the defendant's office to hear conversations therein. The agents legally occupied the office adjacent to the defendants'. When the defendant spoke in his office, the sound waves from his voice caused the common wall between the offices to vibrate. The detectaphone amplified these vibrations, enabling the agents to hear the defendant's conversation.<sup>37</sup> The defendant argued that because he intended to keep his conversation private and did not intend to project his voice "beyond the four walls of the room," he consequently did not assume the risk of anyone hearing his voice.<sup>38</sup> The court

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30. *Id.* at 469.

31. *Id.* at 464.

32. *Id.* at 466.

33. In explaining this holding, the Court declared that the phone-tapping did not constitute a seizure because the officers had not "physically" removed any evidence. "The evidence was secured by the use of the sense of hearing and that only." *Id.* at 464 & 466.

34. *Id.* at 465.

35. On *Lee v. U.S.*, 343 U.S. 747, 751 (1952) (no fourth amendment violation when undercover agent entered defendant's business with a hidden microphone because no trespass); *Clinton v. Virginia*, 377 U.S. 158 (1964) (penetration the depth of a thumbtack into a physical structure is a physical intrusion sufficient to violate the fourth amendment).

36. 316 U.S. 129 (1942). The agents had not physically invaded the premises. *Id.* at 130-32.

37. *Id.* at 130-32.

38. *Id.* at 135.

rejected this argument, however, and held that the use of the dictaphone did not violate the fourth amendment because the agents had not physically entered the defendant's office.<sup>39</sup>

By contrast, in *Silverman v. U.S.*<sup>40</sup> the Court held that police officers had violated the fourth amendment when they surreptitiously overheard the defendant's conversations without a search warrant.<sup>41</sup> The officers legally occupied the house adjacent to the defendant's in a series of row houses. The officers then placed a microphone through a crevice in the party wall between the buildings thereby contacting the heating duct in the defendant's house.<sup>42</sup> The heating duct transmitted conversations from all over the house to the officers' microphone.<sup>43</sup> Justice Stewart's opinion held that the use of the heating ducts inside the house created an unconstitutional physical invasion,<sup>44</sup> but he nonetheless recognized that electronic paraphernalia would soon require the Court to reexamine the *Olmstead* rule.<sup>45</sup>

While requiring a physical invasion, the Supreme Court also used the "plain view" rule to limit curtilage protection. In its broadest sense the rule allows governmental officials to observe without a search warrant all

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39. *Id.* Justice Murphy dissented and argued that the Court should have overruled *Olmstead*. *Id.* at 136-42. He found no sound basis to distinguish the stringent protections offered for mailed messages and the less restrictive rules governing oral communications. *Id.* at 141.

40. 365 U.S. 505 (1961).

41. *Id.* at 511.

42. *Id.* at 506.

43. Sound waves travel very well through hollow tubes. Therefore, the vents in each room of the defendant's house transmitted the conversation in the particular room into the duct work. The officers could thereby hear any conversation in the house which occurred near a heating vent. *Id.* at 507.

44. *Id.* at 511. A comparison of *Olmstead* and *Silverman* shows the difficulty (indeed absurdity) of applying a test based on physical invasion. The police officers "seized" spoken words in both cases. In *Olmstead*, the defendant spoke thus transmitting sound waves through the air. These sound waves collided with the inside surface of the wall causing the wall to vibrate. The agents, using a dictaphone, simply monitored the vibrations which were measurable at the outside surface. See *supra* notes 29-34 and accompanying text.

Likewise, in *Silverman*, the spoken word created a sound wave, a portion of which transmitted through the air inside the heating duct. Because of the rigidity of the walls of the heating duct, the sound wave did not disperse as quickly as it otherwise would have in free space. This sound wave collided with the inside surface of the duct causing the outside surface of the duct to vibrate. The officers then monitored these vibrations from a legally occupied position. See *supra* notes 40-43 and accompanying text. In both cases the vibrations, which the soundwaves created, transmitted information outside the physical boundaries of the structure. In both cases, mechanisms internal to the structure transmitted the information. From the standpoint of physics, the intrusions were identical. See P. TIPLER, PHYSICS 396-471 (2d ed. 1982).

45. *Id.* at 508-09.

things which a curious passerby might observe.<sup>46</sup> The rule has allowed officers to illuminate the inside of a barn with a flashlight while standing outside,<sup>47</sup> to peer through a gap in garage doors,<sup>48</sup> and to observe with binoculars from a helicopter.<sup>49</sup>

Additionally, a corollary of the plain view rule, the "open fields" doctrine, authorizes officials to observe activities occurring outside a dwelling or its curtilage and to enter and search such an area without probable cause or a search warrant.<sup>50</sup> The Court announced the doctrine in *Hester v. U.S.*<sup>51</sup> In *Hester*, federal agents observed the defendant's dwelling and physically invaded and seized whiskey from the land immediately adjacent to the defendant's dwelling.<sup>52</sup> The court held that the officials had seized the whiskey in an "open field" which the fourth amendment did not protect.<sup>53</sup>

#### B. *Enlargement of the Fourth Amendment Protections: The Katz Doctrine*

As electronic surveillance technology advanced, the Supreme Court voiced concern whether its decisions requiring physical intrusions for fourth amendment violations were affording sufficient protection to individuals from governmental searches.<sup>54</sup> In *Katz v. U.S.*,<sup>55</sup> the Court, de-

46. *James v. U.S.*, 418 F.2d 1150, 1151 n.1 (D.C. Cir. 1969).

47. *United States v. Dunn*, 107 S. Ct. 1134 (1987).

48. *U.S. v. Wright*, 449 F.2d 1355 (D.C. Cir.), *cert. denied*, *Wright v. U.S.*, 405 U.S. 947 (1971).

49. *State v. Stachler*, 58 Haw. 412, 570 P.2d 1323 (1977) (police observation with helicopter and binoculars is not a search since target in plain view). *See also* *People v. Hicks*, 49 Ill. App. 3d 421, 364 N.E.2d 440 (1977) (police observation through undrawn curtains upheld, even though defendant had twice closed them while officers were watching with binoculars); *Jessee v. State*, 640 P.2d 56, *reh'g denied*, 643 P.2d 681 (Wyo. 1982) (officers can look through windows and walk through a door that was flapping in the wind); *U.S. v. Arredondo-Hernandez*, 574 F.2d 1312 (5th Cir. 1978) (plain view rule applies to parked truck).

50. *Oliver v. U. S.*, 466 U.S. 170 (1984) *See infra* notes 71-74 and accompanying text.

51. 265 U.S. 57 (1924).

52. Revenue officers were watching the defendant's house from a remote location. When the defendant came out of his house and picked up a jug of whiskey, the officers revealed themselves, pursued the defendant, and seized the jug when he dropped it. The officers also seized a bottle of whiskey which one of the defendant's customers had thrown away during the pursuit. *Id.* at 58.

53. Justice Holmes based his opinion on the lack of protection given to the areas surrounding a dwelling at common law. *Id.* at 59. *See also supra* notes 19-27 and accompanying text. *But see* *Allinder v. State*, 808 F.2d 1180, 1185 (6th Cir. 1987) (open fields doctrine limited to sights, seizure without warrant violates fourth amendment).

54. *See* *Berger v. New York*, 388 U.S. 41, 47 (1967) ("sophisticated electronic devices have now been developed . . . which are capable of eavesdropping on anyone in almost any given situation").

claring that "the Fourth Amendment protects people, not places,"<sup>56</sup> rearticulated its standard for protecting persons from illegal electronic surveillance. In *Katz*, FBI agents had attached a listening and recording device to the top of a phone booth in which the defendant placed illegal wagers.<sup>57</sup> Although the device did not penetrate the structure, the court found a fourth amendment violation. The Court stated that "[o]ne who occupies [a phone 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."<sup>58</sup>

Justice Harlan's concurring opinion in *Katz* set forth a two part test which has become the standard for fourth amendment search and seizure analysis.<sup>59</sup> The first part asks whether "a person [has] exhibited an actual expectation of privacy."<sup>60</sup> The second part questions whether "the expectation [is] one that society is prepared to recognize as 'reasonable'"<sup>61</sup> Before an individual can claim any violation of his fourth

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See Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970s*, 66 COLUM. L. REV. 1003, 1005-10 (1966);

55. 389 U.S. 347 (1967).

56. *Id.* at 351 & 353.

57. *Id.* at 348.

58. *Id.* at 352.

59. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Michigan v. Clifford*, 464 U.S. 287 (1984); *Smith v. Maryland*, 442 U.S. 735 (1979).

60. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). This subjective inquiry determines whether the defendant took precautions against the form of surveillance used or otherwise believed that the type of surveillance used would not successfully occur. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (ten foot fence gives subjective expectation of privacy from street level surveillance).

61. This objective inquiry, based on societal norms, determines the reasonableness of a defendant's expectation of privacy. See, e.g., *Oliver v. U.S.*, 466 U.S. 170 (1984) (no objectively reasonable privacy interest over plot of ground located one mile from dwelling).

The plain view doctrine still applies under *Katz* because one could not reasonably maintain an objective expectation of privacy toward an action or event occurring in the plain view of the public. See, e.g., *California v. Ciraolo*, 476 U.S. 207 (1986). In *U.S. v. Knotts*, 460 U.S. 276 (1983), narcotics officers placed a "beeper" inside a container of chloroform which the defendant purchased. (A "beeper" is a radio transmitter which intermittently sends signals detectable by a receiver located at a distance from the beeper.) When the defendant drove away, officers followed him but eventually lost visual contact. Using the beeper, however, the officers located the defendant's destination. Upon getting a search warrant based on probable cause from the observations of the defendant's dwelling, the officers searched it. *Id.* at 278. The Court reasoned that the defendant possessed no objective expectation of privacy as to where he drove his car because someone potentially could have viewed him. *Id.* at 281-82. The Court held that the use of the beeper did not violate the fourth amendment. *Id.*

On the other hand, in *United States v. Karo*, 468 U.S. 705 (1984), the use of a beeper violated the fourth amendment. In *Karo*, agents installed a beeper in a container of chloroform which the de-



amendment rights, he must show both expectations.<sup>62</sup>

*Katz* represented a major policy change in that the Court expressly repudiated any physical entry prerequisite for fourth amendment violations.<sup>63</sup> Thus the *Katz* test maintained the protections the Court had recognized in prior cases under the curtilage doctrine<sup>64</sup> while shielding situations which would not have received protection under the "physical intrusion" standard.<sup>65</sup>

While *Katz* appeared to focus on the expectations of searched parties and society in general, the Supreme Court has continued to use the curti-

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defendant ultimately transported to a cabin. *Id.* at 708. As in *Knotts*, the Court found no fourth amendment violation in the use of the beeper for identifying the defendant's cabin. *Id.* at 713-14. The agents, though, had supported the affidavit for the search warrant on their knowledge that the can of chloroform sat inside the cabin. *Id.* at 710 & 714. Because they could not see the chloroform from outside the cabin and because the agents never saw anyone carry the chloroform into the cabin, the agents could not rely on the plain view doctrine for their knowledge of the chloroform's location. *Id.* at 715-16. The beeper, therefore, allowed them to identify an item inside the cabin. *Id.* This identification constituted an illegal search. The affidavit supporting the warrant rested on an illegal search, thus making the search pursuant to the warrant illegal. *Id.* at 721. See also *Smith v. Maryland*, 442 U.S. 735. (1979) (use of a pen register is not an illegal search because the defendant dialed the phone numbers in the plain view of the phone company).

62. *Rawlings v. Kentucky*, 448 U.S. 98, 112 (1980).

63. The Court held that the absence of physical penetration into the defendant's phone booth possessed "no constitutional significance." *Katz*, 389 U.S. at 353. The Court also declared that "the reach of [the fourth] amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.*

64. In theory, the curtilage doctrine would dictate the same result which the Court reached in *Katz*. Still, some courts have ignored the curtilage/open fields elements in their *Katz* analysis focusing only on Harlan's expectations analysis. See, e.g., *State v. Douglas*, 365 N.W. 2d 580 (Wis. 1985) (no fourth amendment protection from nonconsensual warrantless search of defendant's house and bedroom); *United States v. Brock*, 667 F.2d 1311 (9th Cir. 1982) (no fourth amendment protection from warrantless monitoring of a beeper in a cabin); *State v. Wood*, 617 P.2d 568 (1980) (no fourth amendment protection from search of seventh floor apartment with binoculars); *People v. Sirhan*, 7 Cal. 3d. 710, 744, 497 P.2d 1121, 1143, 102 Cal. Rptr. 385, 408 (1972) (no fourth amendment protection from removal of a letter from a box of trash in defendant's backyard).

As a practical matter, a defendant who proves that the observed activity occurred within his curtilage has satisfied the subjective leg of *Katz* and, absent the plain view exception, has satisfied the objective probe. E.g., *California v. Ciraolo*, 476 U.S. 207 (1986) (surveillance within curtilage violated subjective expectation of privacy, but plain view rule defeated reasonable objective expectation).

65. Certainly the FBI agents in *Katz* would not have violated the defendant's fourth amendment rights under the *Olmstead* or *Goldman* holdings. As in *Olmstead*, the agents in *Katz* had not physically removed any evidence. They had used their sense of hearing only. See *supra* note 33 and accompanying text. Additionally, because the device in *Katz* did not penetrate the booth it was quite similar to the detectaphone in *Silverman*. See *supra* notes 37-39 and accompanying text. In essence, *Katz* represented a movement away from an analysis of "constitutionally protected areas" towards a general examination of the reasonable expectations of a person to remain free from undetected surveillance. *Katz*, 389 U.S. at 351 n.9 & 359.

lage and open field doctrines as a framework for analysis. Thus, in *United States v. Dunn*,<sup>66</sup> the Court outlined four factors for determining the existence of a curtilage. The four factors included: 1) the proximity of the area to the home, 2) whether an enclosure surrounding the home also enclosed the area, 3) the nature of the claimant's use of the area, and 4) whether the resident had taken steps to protect the area from observation.<sup>67</sup> Applying these factors in *Dunn*, the Court ruled that a barn located sixty yards from a farmhouse and in which the defendant manufactured illegal drugs stood outside the curtilage.<sup>68</sup> This ruling subjected the barn to the open fields rule.<sup>69</sup> Therefore, when officers observed the contents of the barn without a warrant and without entering it, they did not violate the fourth amendment.<sup>70</sup>

Furthermore, in *Oliver v. U.S.*,<sup>71</sup> the Court expressly affirmed the open fields doctrine.<sup>72</sup> The Court ruled that police did not violate the fourth amendment when, acting on a tip, they walked a distance over one mile on the defendant's property past several obstructions and discovered a well-hidden marijuana patch.<sup>73</sup> Having used the visual evidence collected from the trip to show probable cause, the police obtained a valid search warrant and prosecuted the defendant.<sup>74</sup>

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66. 107 S. Ct. 1134 (1987).

67. *Id.* at 1139. These factors offer useful analytical tools only to the extent that they bear upon the "centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

68. *Id.* at 1140. Specifically, the Court found: 1) the barn stood 60 yards from the farmhouse and 50 yards from the fence around the farmhouse; 2) the barn was outside the fence around the house; 3) the defendant manufactured illegal drugs in the barn, not an intimate activity of the home; and 4) the defendant did little to protect the barn from observation by people standing in the open fields around the barn.

69. Under *Oliver v. U.S.*, 466 U.S. 170 (1984) and *Hester v. U.S.*, 265 U.S. 57 (1924), the Court found no constitutional difference between police observations conducted while in a public place and while standing in open fields. 107 S. Ct. at 1141. See *supra* notes 50-53 and *infra* notes 71-74 and accompanying text.

70. 107 S. Ct. at 1141.

71. 466 U.S. 170 (1984).

72. *Id.* at 176, 178. Quoting Holmes' opinion in *Hester*, the Court stated, "[T]he 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 178, (quoting *Hester*, 265 U.S. at 59). The Court held that an expectation of privacy in one's open fields was not reasonable. It also explicitly rejected use of a case-by-case approach for determining when the fourth amendment might protect some open fields. *Id.* at 183.

73. To get to the marijuana patch, officers walked one mile and en route passed a locked gate, several fences, and several "No Trespassing" signs. Woods, fences, and embankments bounded the patch on all sides so that no one could see it from any point of public access. *Id.* at 173-74.

74. *Id.* at 174.

## II. CALIFORNIA V. CIRAOLLO And DOW CHEMICAL V. U.S.: A NEW STANDARD FOR DETERMINING OBJECTIVE EXPECTATIONS OF PRIVACY?

In two separate cases in 1986 the Supreme Court appeared to create a more stringent analysis for determining under *Katz*<sup>75</sup> whether society would objectively recognize a party's subjective expectation of privacy. In *California v. Ciraolo*,<sup>76</sup> police officers observed, with the naked eye, the defendant's fenced-in backyard from an airplane. They had received an anonymous tip that the defendant was growing marijuana in his backyard. The flyover confirmed the tip.<sup>77</sup> They used their visual evidence to show probable cause for a search warrant.<sup>78</sup> A divided Court held that the police had not violated the defendant's fourth amendment rights during the flyover because they had gathered evidence in "plain view."<sup>79</sup>

Applying the *Katz* test, the court conceded that the fenced-in backyard fell within the curtilage wherein the defendant had a subjective expectation of privacy.<sup>80</sup> The Court held, however, that the defendant did not enjoy an objective expectation of privacy,<sup>81</sup> because airplane flights were "routine" and "[a]ny member of the public . . . who glanced down could have seen everything that [the] officers observed."<sup>82</sup> Further, the officials gathered the evidence in a "physically nonintrusive manner."<sup>83</sup> Thus, under the plain view rule, the police had not violated the fourth amendment.<sup>84</sup>

75. *Katz v. U.S.*, 389 U.S. 347 (1967).

76. 476 U.S. 207 (1986).

77. *Id.* at 209.

78. Based on his observations from the plane, the officer got a search warrant for the defendant's backyard. *Id.* at 209-10.

79. *Id.* at 215.

80. The defendant possessed a subjective expectation of privacy because he built a ten foot fence around his backyard. *Id.* at 213.

81. *Id.* at 214.

82. *Id.* at 213-14.

83. *Id.* at 213.

84. *Id.* at 215. The Court cited *Katz v. United States*, 389 U.S. 347 (1967), for the proposition 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." *Id.* at 351. See *supra* notes 57-58 for a detailed discussion of the facts in *Katz*.

Justice Powell, joined by Justices Brennan, Marshall and Blackmun, dissented in *Ciraolo*. The dissent argued that *Katz* had made the presence or absence of an official's physical trespass constitutionally irrelevant. 476 U.S. at 223. The opinion noted that people who fence in their residential lawns do not "knowingly expose" their activity by failing to build barriers that prevent aerial surveillance. *Id.* at 224. Furthermore, Justice Powell thought that passengers on a commercial flight or in

In the second case, *Dow Chemical Co. v. U.S.*,<sup>85</sup> Dow owned a 2000-acre facility which an extensive ground level and aerial security program protected.<sup>86</sup> The Environmental Protection Agency (EPA) requested that Dow allow it to enter the site for certain inspections. Dow refused.<sup>87</sup> The EPA then hired a mapmaker who took aerial photographs of Dow's facility with a mapping camera.<sup>88</sup> The Court held that the EPA's activities had not violated Dow's fourth amendment rights.<sup>89</sup>

An indication in *Dow* that the Court was drifting away from *Katz* was that although both lower courts had applied the *Katz* test,<sup>90</sup> the Supreme Court failed to mention *Katz* in its analysis.<sup>91</sup> However, the Court de

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private planes were not likely to observe the defendant's private activity. Accordingly, the defendant held a privacy interest in his backyard which society would consider reasonable. *Id.* at 223-25.

85. 476 U.S. 227 (1986).

86. *Id.* at 229. The district court found that Dow had implemented an extensive ground level security program composed of the following measures: A chain link fence around the facility, closed circuit television surveillance of entrance and exit gates, alarm systems, roving patrols, employee identification badges, restrictions on visitors, and 24-hour security personnel. *Dow Chemical Co. v. U.S.* By and Through Gorsuch, 536 F. Supp. 1355, 1364-65 (E.D. Mich. 1982). This program prevented ground level searches. *Id.* at 1366. Dow's aerial security program monitored overflights and, by checking airplane numbers at local airports, prevented dissemination of any photographs taken of the plant during the overflight. Overall, Dow spent at least \$3.25 million in each of the ten previous years on security. *Id.* at 1365. Two issues in *Dow* which this Note does not consider are: 1) whether the surveillance of Dow's facility infringed on Dow's protected trade secrets, and 2) whether the Environmental Protection Agency had the administrative power to conduct the warrantless surveillance.

87. 476 U.S. at 229. The EPA made one on-site inspection in September 1977. 536 F. Supp. at 1357. When the EPA requested a second visit in December, 1977 to inspect the power houses and take some photographs, Dow refused the request. The EPA then hired the mapmaker to take the photographs from the air. *Id.*

88. 476 U.S. at 229. The camera used, a Wild RC-10, cost \$22,000. Its manufacturer described the camera as the "finest precision aerial camera available." 536 F. Supp. at 1357 n.2. The mapmaker mounted the camera in a twin engine Beachcraft airplane to achieve the necessary photographic stability. *Id.* After enlargement, one could discern pipes as small as one-half inch in diameter. *Id.* The mapmaker photographed areas surrounded by buildings and other structures, which at ground level an inspector probably would not see. *Id.* The district court determined that ". . . the camera saw a great deal more than the human eye could ever see." *Id.* at 1367.

89. 476 U.S. at 239.

90. *Dow Chemical Co. v. U.S.*, 749 F.2d 307, 312 (6th Cir. 1984) ("*Katz* must be discussed for *Katz* defines in terms of privacy interests what a search is for fourth amendment purposes"); *Dow Chemical Co. v. U.S.*, 536 F. Supp. 1355, 1363 (E.D. Mich. 1982) (the *Katz* test is the prevailing formulation for evaluating the legality of a search).

91. The majority only mentioned *Katz* one time in its explanation of the district court's holding. 476 U.S. at 230. Chief Justice Burger, who wrote both *Dow* and *Ciraolo*, mentioned *Katz* seven times in *Ciraolo* while applying the *Katz* test. *California v. Ciraolo*, 476 U.S. 207, 211-15 (1986). On the other hand, the dissent in *Dow* directly applied the *Katz* test and found a fourth amendment violation. 476 U.S. at 252. *See infra* note 97.

facto applied the *Katz* test and found no fourth amendment violation.<sup>92</sup> The Court reasoned that Dow could not hold an objective expectation of privacy because mapmakers commonly used the camera and airplane. Thus, anyone with the equipment could have duplicated the photographs.<sup>93</sup> The Court noted that just as technological developments in photography had improved industrial processes, so had they "enhanced law enforcement techniques."<sup>94</sup> The Court, therefore, viewed the narrow issue as whether "aerial observation of a 2000-acre outdoor manufacturing facility *without* physical entry" was an unconstitutional search and seizure.<sup>95</sup> In ruling that the EPA had acted legally, the court emphasized that the EPA had never physically intruded onto Dow's property<sup>96</sup> and intimated that it would have reached a different result if the EPA had physically invaded the facility.<sup>97</sup>

Read in conjunction, *Ciraolo* and *Dow* apparently have established a two-part test for determining whether a person possesses an objectively reasonable expectation of privacy. First, the Court will examine whether the surveillance type in question is so common that members of the public generally have access to it or know of it.<sup>98</sup> Second, the Court will determine whether officials physically intruded into a complainant's pri-

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92. Under the guise of a curtilage/open fields analysis, the Court repeatedly examined the reasonableness of Dow's subjective/objective expectation of privacy. This is the *Katz* test. 476 U.S. at 235-37.

93. *Id.* at 231.

94. *Id.*

95. *Id.* at 237.

96. The Court mentioned five times that lack of physical entry was an important factor. *Id.* at 237-38, 239 n.7.

97. *Id.* at 237. As in *Ciraolo*, Justice Powell, joined by Justices Brennan, Marshall and Blackmun, dissented. He argued that the majority's reliance in *Dow* on an absence of a physical entry and on the method of surveillance repudiated *Katz*. *Id.* at 247. He also distinguished *Ciraolo* on the theory that a passenger on an airplane could not have seen the details which the photographs captured. *Id.* at 249-50. The dissent considered the majority's determination of whether Dow's plant was a curtilage or an open field inapposite and irrelevant. Justice Powell noted that Dow never argued that its interest in the plant equalled that of a homeowner in his curtilage. However, he argued that Dow's security program clearly showed it held a privacy interest in its plant which removed it from the open fields. *Id.* at 250-51. Applying *Katz*, then, the dissent would have held that Dow held a subjective and a reasonable objective expectation of privacy. *Id.* at 249-52.

98. In *Ciraolo* the Court remarked that "[a]ny member of the public . . . who glanced down could have seen everything that [the] officers observed." *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986). In *Dow* the Court ruled that the company did not hold a reasonably objective expectation of privacy in part because "[a]ny person with an airplane on aerial camera could readily duplicate [the photographs]." 476 U.S. at 231. The public's access to the surveillance technique, therefore, allowed governmental officials to use the techniques without warrants.

vate area.<sup>99</sup> To determine the extent of the private area the Court will use the curtilage and open fields doctrines. Later cases interpreting *Ciraolo* and *Dow* have generally followed this trend.<sup>100</sup> However, these interpretations seem inconsistent with *Katz* in which the Court moved its fourth amendment analysis from a consideration of constitutionally protected areas to a fundamental consideration of privacy interests independent of technology.<sup>101</sup>

### III. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

A rise in organized crime and the development of surreptitious surveillance technologies caught the attention of the President, Congress, and the Supreme Court during the 1960s. In response, the President ordered a commission to study the problem,<sup>102</sup> Congress feverishly drafted new legislation,<sup>103</sup> and the Supreme Court decided a landmark case.<sup>104</sup> These efforts culminated in Title III of the Omnibus Crime Control and Safe Streets Act of 1968<sup>105</sup> which Congress designed to protect private per-

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99. In *Ciraolo* the Court observed that the officers had gathered the evidence in a "physically nonintrusive manner." 476 U.S. at 213. In *Dow* the Court repeatedly stated Dow's claim concerned observation without physical entry. 476 U.S. at 237-38, 239 n.7. Further, *Ciraolo* found an invasion of a curtilage but found no fourth amendment violation, in part because no physical entry occurred. The *Dow* Court's repeated reference to physical entry further suggests the renewed importance of a physical entry requirement in fourth amendment analysis. See *supra* notes 95-97 and accompanying text.

100. See, e.g., *United States v. Bassford*, 812 F.2d 16, 19 (1st Cir. 1987) (upholding aerial search because any member of the public flying at 1000 feet *could* have seen what the officers observed); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987) (requiring search warrant for government's use of video camera to examine defendants yard even though a casual observer could have seen the yard; refusing to extend *Ciraolo*); *United States v. Echegosen*, 799 F.2d 1271, 1275 n.2 (9th Cir. 1986) (*Ciraolo* upheld validity of aerial searches); *United States v. Broadhurst*, 805 F.2d 849, 856 (9th Cir. 1986) (*Ciraolo* holds that a person has no reasonable expectation of privacy from aerial observation made in navigable public airspace). See also *Bissonette v. Haig*, 800 F.2d 812, 815 (8th Cir. 1986) (if the airplane in *Dow* had not been in lawful airspace, a fourth amendment violation would have occurred); (requiring search warrant for government's use of video camera to examine defendant's yard even though a casual observer could have seen the yard; refusing to extend *Ciraolo*); *People v. Sabo*, 185 Cal. App.3d 845, 854, 230 Cal. Rptr. 170, 176 (4th Dist. 1986), *cert. denied*, 197 S. Ct. 2200 (1987) (aerial surveillance from a helicopter in nonnavigable airspace violates fourth amendment).

101. *Katz*, 389 U.S. at 351-53.

102. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967). See Note, *The Admissibility of Evidence Obtained by Eavesdropping on Cordless Telephone Conversations*, 86 COL. L. REV. 323, 333-34 (1986).

103. See *infra* notes 107-10 and accompanying text.

104. *Katz v. U.S.*, 389 U.S. 347 (1967). See *Berger v. New York*, 388 U.S. 41 (1967).

105. Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified at 18 U.S.C. §§ 2510-20 (1982)).

sons from oral and wire interceptions by both government and private actors.<sup>106</sup>

### A. *Legislative History of Title III*

Senator Hruska introduced The Electronic Surveillance Control Act of 1967 (E.S.C.A.)<sup>107</sup> to prohibit private individuals from stealing trade secrets and other vital information via interception of oral and wire communications. At the same time, Senator McClellan introduced the Federal Wire Interception Act (F.W.I.A.)<sup>108</sup> to safeguard individuals from unauthorized governmental interceptions of wire conversations and other oral communication. While the Congress was developing E.S.C.A. and F.W.I.A., the Supreme Court decided *Katz*.<sup>109</sup> The Senate incorporated the *Katz* framework into a piece of legislation which combined E.S.C.A. and F.W.I.A.: Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III).<sup>110</sup>

### B. *Text*

While Title III specifically protects wire,<sup>111</sup> oral,<sup>112</sup> and electronic communications,<sup>113</sup> this Note focuses solely on oral communications. Section 2510(2)<sup>114</sup> defines "oral communication" as: "any oral communication uttered by a person exhibiting an expectation that such commu-

106. 18 U.S.C. §§ 2511, 2520 (1982 & Supp. 1987). The provisions regulating private activity arose out of a fear of organized crime. In reporting to the President on Title III, Senator McClellan stated, "[T]he greatest danger to America today is not from without; the greatest danger to America at this hour is the lawlessness, the violence, and the organized crime that prevails within." 114 CONG. REC. 14469 (1968).

107. S. 2050, 98th Cong., 1st Sess., 113 CONG. REC. 18007 (1967). See also Note, *The Admissibility of Evidence Obtained by Eavesdropping on Cordless Telephone Conversations*, 86 COL. L. REV. 323, 340-41 nn.124 & 131 (1986) (oral communication protected if the objective and subjective components of the *Katz* test met); Note, *Electronic Monitoring in the Workplace: The Need for Standards*, 52 GEO. WASH. L. REV. 438, 444-48 (1984) (definition of oral communication incorporates the "Justifiable expectation of privacy" concept found in *Katz*).

108. S. 675, 90th Cong., 1st Sess., 113 CONG. REC. 1491 (1967).

109. 389 U.S. 347 (1967).

110. Publ. L. No. 90-351, 82 Stat. 212 (1968) (codified at 18 U.S.C. § 2510-20 (1982)).

111. 18 U.S.C. § 2510(1) (Supp. 1987) (wire communications defined as any oral transfer via facilities for the transmission of communications by wire or cable but specifically excludes cordless telephones).

112. *Id.* § 2510(2).

113. *Id.* § 2510(2) (electronic communications defined as any transfer of data or other information but excludes cordless telephones, wire or oral communications, tone-only paging devices, and tracking devices).

114. 18 U.S.C. § 2510(2).

nication is not subject to interception under circumstances justifying such expectation. . .” The legislative history<sup>115</sup> and the plain text of Title III<sup>116</sup> demonstrate that Congress intended that its definition of “oral communication” would incorporate the *Katz* standard set out by Justice Harlan. Lower courts interpreting Title III have always applied the two prong subjective/objective inquiry.<sup>117</sup>

Sections 2511(a) and (b) prohibit any person from intercepting or endeavoring to intercept any oral communications by the use of any electronic, mechanical, or other devices.<sup>118</sup> Sections 2511(c) and (d) prohibit any person from intentionally disclosing or using or endeavoring to disclose or to use the intercepted contents of an oral communication.<sup>119</sup> The “any person” in section 2511 is defined to restrict both governmental and private activity.<sup>120</sup> Violators of section 2511 are subject to varying fines and up to five years in prison.<sup>121</sup>

115. In explaining the amendments by which it developed Title III, the Senate reported that “[t]he proposed legislation [Title III] conforms to the constitutional standards set out in . . . *Katz v. U.S.*” S.R. 1097 90th Cong., 2nd Sess., reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2113 (citations omitted). The report also stated that the § 2510(2) definition of “oral communications” “is intended to reflect existing law. See *Katz v. U.S.*” *Id.* at 2178. In his report to the President on Title III, Senator McClellan stated that “Title III was drafted to . . . conform with *Katz v. U.S.*” 114 CONG. REC. 14469, (1968). In response to a question from Senator Lausche regarding the powers within Title III to stop private searches or to grant governmental search warrants, McClellan responded: “I may say that every safeguard, in keeping with what the Supreme Court has said in the most recent cases, would be required. Every constitutional safeguard has been placed in [Title III].” 114 CONG. REC. 14469 (1968).

116. The definition of “oral communication” is no more than the subjective/objective inquiry found in the *Katz* test. See *supra* notes 54-65 and accompanying text.

117. One court stated:

The [Title III] standards are to be construed strictly, because Congress knew that it was creating an investigative mechanism which potentially threatened the constitutional right to privacy, and it carefully wrote into the law the protective procedures for the issuance of warrants which the Supreme Court had declared in *Katz v. U.S.* and *Berger v. New York*.

*U.S. v. Capra*, 501 F.2d 267 (2d Cir. 1974) (citations omitted). See *U.S. v. Donovan*, 429 U.S. 413, 426 (1977) (“S.917 [Title III] was then redrafted to conform to *Katz* as well as *Berger* . . .”); *U.S. v. Figueroa*, 757 F.2d 466, 471 (2d Cir. 1985) (Title III enacted to meet restrictions of *Berger* and *Katz*); *U.S. v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978) (the legislative history behind § 2510(2) of Title III reflects Congress’ intent that *Katz* serve as a guide to define communications that are uttered under circumstances justifying an expectation of privacy); *U.S. v. Scafidi*, 564 F.2d 633, 643 (2d Cir. 1977) (statutory requirements carefully tailored to meet constitutional requirements set out in *Berger* and *Katz*).

118. 18 U.S.C. § 2511(a) & (b) (1982 & Supp. 1987).

119. 18 U.S.C. § 2511(c) & (d).

120. 18 U.S.C. § 2510(b) (Title III regulates any “person” who is defined to be “an employee, or agent of the United States or any state or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation.”).

121. 18 U.S.C. § 2511(4) & (5).



Section 2512 is directed against the shipping, distribution, manufacture and advertisement of wire and oral communication interception devices.<sup>122</sup> Section 2512(1)(a) prohibits any person from sending any electronic, mechanical, or other device through the mail or in interstate commerce if the person knows or has reason to know that the design of the device renders it primarily useful for the surreptitious interception of oral communications.<sup>123</sup> Section 2512(1)(b) further proscribes the manufacture and sale of such devices.<sup>124</sup> Section 2512(1)(c) prohibits all newspaper and magazine advertisement of such devices.<sup>125</sup> Finally, violators of section 2512 are subject to a maximum penalty of a \$10,000 fine and five years in prison.<sup>126</sup>

Perhaps the most important aspect of Title III is the stringent procedures government officials must follow before they can have authority to intercept, disclose, and use the contents of an oral communication.<sup>127</sup> Section 2515 effectively enforces these procedural protections by requiring the suppression of all evidence collected in violation of Title III.<sup>128</sup> For these procedural protections to take effect, however, there must first be an "oral communication" within section 2510(2) of Title III. That is, a person must possess subjective and an objective expectation that his communication is not subject to interception.<sup>129</sup> Persons who fail to show such an oral communication have no Title III protections from surreptitious interception and most likely have no fourth amendment

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122. 18 U.S.C. § 2512.

123. 18 U.S.C. § 2512(1)(a).

124. 18 U.S.C. § 2512(1)(b).

125. 18 U.S.C. § 2512(1)(c).

126. 18 U.S.C. § 2512(1). Interestingly, all of the prosecutions under Title III to date have been for the mailing, selling or advertising of tiny microphone combinations or wire tapping devices. *See* U.S. v. Pritchard, 745 F.2d 1112, 1114-16 (7th Cir. 1984) (hidden microphones, transmitters, and receivers; larger phonetapping equipment); U.S. v. Schweihs, 569 F.2d 965, 967 (5th Cir. 1978) (phone tapping equipment); U.S. v. Bast, 495 F.2d 138, 139-41 (D.C. Cir. 1974) (tiny microphone and recorder combination); U.S. v. Wynn, 633 F. Supp. 595, 598 (C.D. Ill. 1986) (drop-in telephone microphone with transmitter and recorder). Although larger parabolic microphones fall within the clear proscription of § 2512 and although their advertisement, sale and use is undisputed, parabolic microphones have not prompted any prosecutions to date. This is rather anomalous when one considers the degree of intrusion of which parabolic microphones are capable. *See infra* note 143 (explaining how one writer regularly eavesdrops on the public with a "Big Ear" he purchased through a catalogue).

127. *See* 18 U.S.C. § 2517 (Supp. 1987). *See supra* notes 9-11 and accompanying text.

128. 18 U.S.C. § 2515 (Supp. 1987). *See Note, The Suppression Sanction in the Federal Electronic Surveillance Statute*, 62 WASH. U.L.Q. 707 (1985) *See also* WHITEBREAD & SLOBOGIN, *supra* note 1, at 312-314.

129. *See supra* note 115-17 and accompanying text.

protection either.<sup>130</sup>

#### IV. THE IMPACT OF *CIRAOLLO* AND *DOW* ON TITLE III

Although Title III on its face protects oral communications from any "electronic, mechanical, or other device," Congress incorporated the *Katz* standard for determining when an oral communicator could possess a legitimate, reasonable expectation of privacy.<sup>131</sup> Thus, the oral communicator must first establish an objective expectation under the statute that no one will intercept the communication.<sup>132</sup> If the Supreme Court applies the reasonable objective expectation analysis it delineated in *Ciraolo* and *Dow* to oral communications under Title III, then the procedural protections of the Act could become irrelevant.<sup>133</sup> This is because the public availability/physical entry standard would allow persons using well-known nonintrusive devices to intercept oral communications freely.<sup>134</sup>

At the time the Supreme Court decided *Katz* and Congress incorporated *Katz* into Title III, Congress felt that it had provided a framework that would protect privacy interests from new technology.<sup>135</sup> *Ciraolo* and *Dow* reverted back to an analysis which allows the unwarranted uses of known technology.<sup>136</sup>

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130. Title III protections are not triggered until the subject can show that the intercepted communication was an "oral communication" within § 2510(2). If the subject cannot prove an objective expectation of privacy, then no "oral communication" will exist and, therefore, no Title III protection will exist either. Likewise, an objective expectation of privacy is necessary to prove that traditional fourth amendment rights exist. See *supra* notes 115-17 and accompanying text.

131. See *supra* notes 115-17 and accompanying text.

132. See *supra* notes 54-62 and accompanying text.

133. See *supra* notes 9-11 & 75-97 and accompanying text.

134. See *supra* notes 98-101 and accompanying text.

135. See *supra* note 115.

136. See *supra* notes 98-101 and accompanying text. See Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 PITT. L. REV. 1 (1986) (suggesting that the move from *Katz* began with *Oliver*). But see Comment, *Dow Chemical and Ciraolo: For Government Investigators the Sky's No Limit*, 36 CATH. U.L. REV. 667 (1987).

One commentator has found that *Ciraolo* and *Dow* "signal an important narrowing of the protection of privacy," but determined that the narrowing occurred consistent with the philosophy of *Katz*. *Id.* at 669. Accordingly, the two decisions merely clarify what a defendant must show to satisfy the *Katz* test. *Id.* at 691.

Under the subjective leg, this commentator determined that now one must take effective action against the type of surveillance used. *Id.* at 692. The author suggested that the defendants in *Ciraolo* and *Dow* should have planted trees. *Id.* at 694. This is consistent with *Katz* because the defendant in *Katz* only had a subjective interest with respect to his conversation. The defendant did not have a subjective interest as to his *identity*, which was observable through the glass phone booth

## V. A PROPOSAL FOR LIMITING THE IMPACT OF *CIRAOLLO/DOW*

In order to give effect to the Congressional intent behind Title III,<sup>137</sup> the federal courts should limit the *Ciraolo/Dow* public availability/physical intrusion standard. The courts may do so by distinguishing between visual surveillance and oral communication interceptions or by limiting the case holdings strictly to their facts.

Future courts may distinguish visual surveillance from the interception of oral communication in their fourth amendment analysis and allow more intrusive visual searches.<sup>138</sup> In *Dow* the Court suggested this distinction.<sup>139</sup> The relaxed *Ciraolo/Dow* standard would allow the continued use of developing technologies for visual surveillance in law enforcement. The heightened *Katz* test would continue to protect oral communications from technological developments pursuant to Title III. This dual standard of fourth amendment analysis, however, would fail to address satisfactorily the issue of when an individual has a reasonable expectation of privacy. This is because analysis of fourth amendment rights would proceed according to the *manner* of intrusion rather than an individual's or society's expectations of privacy.<sup>140</sup>

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doors. *Id.* at 692. The commentator found that the objective leg has become a balancing test of several factors: the protection given to the situation historically, the government's interest in stopping crime, the type of search, the amount of concealment, and the public access to the area. *Id.* at 696-98. Applying those factors, the commentator decided that the Court reached the correct conclusion.

The problem with the comment is that it severely weakens *Katz*. Under the subjective leg, one must foresee the type of surveillance and then take *effective* precautions against it, no matter the cost. This could become unrealistic as technology progresses. See *infra* notes 142-48 and accompanying text. Further, the commentator incorrectly stated that *Ciraolo* had no subjective expectation of privacy. *Id.* at 687-88. In fact, the Court did find *Ciraolo* had a subjective expectation of privacy. *California v. Ciraolo*, 476 U.S. 207, 213 (1986). Therefore, contrary to the comment's requirement, future suspects need not take effective action against the surveillance for there to be a subjective expectation of privacy. Under the objective leg, the government's interest in stopping crime should not be a factor. The purpose of the fourth amendment is to restrict zealous officers. The desire to catch one guilty person should not trample the rights of innocent people.

137. See *supra* notes 115-117 and accompanying text.

138. This distinction is inherently suspect because one can invade another's privacy interests with either visual or oral techniques.

139. After holding that aerial surveillance with the mapping camera did not constitute a search, the Court distinguished oral interceptions by stating that "[a]n electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions." *Dow Chemical Co. v. United States*, 476 U.S. 227, 239 (1986). The Court did not persuasively draw this distinction, as it acknowledged in analyzing the aerial surveillance that plant layouts were trade secrets susceptible to photographic "recording." *Id.* at 232.

140. As the dissent in *Ciraolo* and *Dow* explained, analysis of fourth amendment rights by the

Furthermore, as a practical matter, courts which base the existence of a fourth amendment violation upon whether the officers used a publicly available level of technology or whether the manner of intrusion involved physical entry would be drawing an absurd distinction.<sup>141</sup> This distinction is absurd because, first, the level of technology is irrelevant because technology continues to advance. The common airplanes and cameras of today would have been high technology one hundred years ago. Indeed, a brief consideration of presently developing technologies suggests the types of devices that will be "publicly available" in the near future. For instance, television sports broadcasts routinely use parabolic microphones to detect sounds from the playing field. Mathematicians have understood the theory of this device for several hundred years<sup>142</sup> and the microphones are currently available to the public.<sup>143</sup> This same technology can intercept private conversations from great distances.<sup>144</sup> Applying the public availability/physical entry standard, no one could hold a reasonable expectation of privacy from the use of a parabolic microphone because of their availability and because they do not physically intrude. Thus, none of the stringent procedural protections of Title III would ever be triggered. This result would contradict Congress' declared purpose to protect persons and not places.<sup>145</sup>

Technology has advanced in other areas as well. The past twenty years have seen the development and use of laser equipment which enables the operator to hear conversations occurring behind closed windows ("lasersnooper").<sup>146</sup> With the rapid developments in computer

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"manner" of the intrusion will erode fourth amendment protection as technology advances. 476 U.S. at 240.

141. See *supra* notes 36-45 and accompanying text.

142. E. SWOKOWSKI, *CALCULUS WITH ANALYTIC GEOMETRY* 707 (2d ed. 1979).

143. Bumiller, *Eavesdropping*, Washington Post, Sept. 3, 1980, at B9, col. 5-6 ("Jerzy Kosinski, the author of *Being There* and a close observer of the Washington scene, eavesdrops regularly for material for his novels. He says he has purchased a 'Big Ear' listening device that he found in a children's toy catalogue, listed as a parabolic microphone. It picks up and amplifies sound from 200 feet away. He says he's attached it to his New York balcony.").

144. *Berger v. New York*, 388 U.S. 41, 48 (1967); McFadden, *The Mafia of the 1980's: Divided and Under Seige*, N.Y. Times, March 11, 1987, at B2, col. 3 (parabolic microphones used to listen in on the Mafia); Bumiller, *Eavesdropping*, Washington Post., Sept. 3, 1980, at B9, col. 5-6 (parabolic microphone picks up and amplifies sound from 200 feet away); Graham, *Loose Lips Sink Blue Chips*, Washington Post, Dec. 17, 1978, at G3, col. 3 (parabolic microphones can pick up a conversation in ordinary tones 100 yards away).

145. See *supra* note 115 and accompanying text.

146. *Island in Alien Seas*, N.Y. Times, April 13, 1987, § A, at 18, col. 1 (Russian laser beams probe the windows of the U.S. embassy in Moscow for "echoes of conversations"); *These Walls Have*

hardware and efficient portable lasers, this equipment could become affordable to the public in the near future.<sup>147</sup> A public availability technology test would ultimately allow the unfettered use of these devices by law enforcement officials, particularly when one considers that the cost of protection against them might be significantly cheaper than the expensive aerial protections required by *Ciraolo* and *Dow*.<sup>148</sup> Thus, a public availability test would emasculate the fourth amendment privacy guarantees.

The *Ciraolo/Dow* standards are incomprehensible for a second reason. Every type of surveillance, regardless of the *manner* and whether performed from a legally occupied position or not, requires a "physical intrusion." In cases where the government officer's body does not physically enter the suspect's property (the cases this Note considers), there are two broad classes of surveillance which have both passed fourth amendment muster in some form. The first class uses strictly receptive devices (e.g., a camera, eyeball, detectaphone) to analyze information available to anyone in the public domain. Whether the information travels as a sound wave, or an electromagnetic wave (light), however, the information always originates from a physical object and propagates through a physical medium within the suspect's property en route to the receptor in the public domain. Therefore, whether in plain view or behind an opened door, whether a detectaphone or a spike mike on a heating duct, this type of "receptor only" surveillance always requires the use

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*Ears*, THE ECONOMIST, April 11, 1987, at 49 ("Lasers provide a new means of eavesdropping. Directed at windows, they can monitor the vibrations created by people talking inside."); Church, *The Art of High-Tech Snooping*, TIME, April 20, 1987, at 22 & 23 ("The most exotic technique of all is to play laser beams against a window or any surface that vibrates slightly with sound waves. The laser beam senses the minute reverberations and transmits them to a computer that converts them back into sound"); Spector, *Eavesdropping Becomes Undetectable*, Washington Post, April 11, 1987, at A9, col. 2 ("Lasers . . . are harder to detect. A laser can bounce a light beam against a window, picking up the slightest vibrations on the glass of a room where people are talking. The beam, packed with sound, then heads back to a computer which can analyze the contents and recompose what was said.").

147. This laser equipment has already become portable on trucks. Morganthau, *The Battle of the Bugs*, NEWSWEEK, April 20, 1987, at 18 & 19 ("Laser beams may be aimed from trucks at the embassy windows to detect conversation in the room.").

148. Unlike the expensive dome or orchard of trees required to protect against aerial surveillance, fairly effective protection may be economically achieved against lasersnoopers. Begley, *High-Tech Conversation Stoppers*, NEWSWEEK, April 20, 1987, at 20 & 21 (the White House uses heavy drapes and noisemakers on windows for protection); *These Walls Have Ears*, THE ECONOMIST, April 11, 1987, at 49 (recommends mirror windows for protection); Church, *The Art of High-Tech Snooping*, TIME, April 20, 1987, at 22 & 23 (some have tried placing "white noise" sound generators in rooms for protection).

of elements internal to the subject's property.<sup>149</sup>

The second class of surveillance cases requires the use of a wave generator (e.g., a flashlight or lasersnooper) and a receptor (e.g., eyeball, laser monitor), often located external to the suspect's property. After bouncing the wave off a desired target, the officer discovers the content of the target on the defendant's property by interpreting or recording the reflection of the wave. Again, as in the first class of surveillance techniques, there is no way for this technique to work without using the objects and medium which exist within the suspect's property. Thus, these types of surveillance all require some physical intrusion.

In determining which types of surveillance fall within the fourth amendment, therefore, the court should abandon the indeterminate guidelines of the public availability of the device used and the manner of surveillance. The court should return to the basic policy in *Katz* of protecting reasonable expectations of privacy. There should be a presumption that a person has a reasonable expectation of privacy unless the evidence clearly shows otherwise. This will not unduly burden law enforcement officers, who will still be able to conduct searches under a court authorized warrant.<sup>150</sup>

Accordingly, future courts should limit the *Ciraolo* and *Dow* decisions to the facts of those cases: courts should restrict *Ciraolo* to overflights above 1000 feet and restrict *Dow* to administrative aerial photography of commercial premises.<sup>151</sup> Indeed, courts interpreting the cases seem to have developed the rule that the fourth amendment allows aerial surveillance without a warrant only if it occurs in non-restricted airspace.<sup>152</sup>

## VI. CONCLUSION

High technology research continues to produce very useful devices for law enforcement. *Katz v. U.S.* and Title III of the Omnibus Crime Con-

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149. The daylight observation of a defendant in his backyard (commonly found within the plain view rule) is a simple case for this first class. The sunlight reflects light off of the defendant and onto the officer's eyeball (receptor) in the public domain.

150. Giving a subject the presumption of a reasonable expectation of privacy will simply mean that law enforcement officials will have to conduct more searches under a court authorized warrant. If probable cause truly exists, this presumption will not prevent any investigation but it will ensure that everyone enjoys the full fourth amendment guarantees. *See supra* notes 6 & 9 (warrant requirements).

151. The dissents suggested this reading. *California v. Ciraolo*, 476 U.S. 207, 216 (1986); *Dow Chemical Co. v. United States*, 476 U.S. 227, 240 (1986).

152. *See supra* note 100 and accompanying text.

trol and Safe Streets Act responded to threatened abuses in the application of this technology on unwitting individuals.<sup>153</sup> Broadly read, however, the *Ciraolo* and *Dow* decisions condone surveillance techniques of which *Katz* and Title III disapproved.<sup>154</sup> Therefore, fourth amendment analysis may return to the outdated inquiry concerning physical intrusions coupled with a new examination of public knowledge of the surveillance tools.<sup>155</sup> Such analysis would eviscerate the amendment's protection against unreasonable search and seizure.

The narrow reading of *Ciraolo* and *Dow* which this Note proposes refocuses fourth amendment analysis on the individual's reasonable expectation of privacy. This narrow reading maintains the traditional *Katz* test and enables fourth amendment protection to grow with the development of new technology.

*Robert M. Evans, Jr.*

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153. See *supra* notes 54-62 and accompanying text.

154. See *supra* notes 98-101 and accompanying text.

155. See *supra* notes 131-36 and accompanying text.

