Open Air Searches and Enhanced Surveillance in California

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I. INTRODUCTION

The fourth amendment of the United States Constitution guarantees the right of the people to be secure in their persons, houses, papers, and effects from unreasonable searches and seizures. Judicial interpretation of this amendment has evolved from property related doctrines into a concept of personal security. The shift in emphasis from a "constitutionally protected area" to a right of privacy has paralleled the rapid growth of surveillance technology available to police.

This comment explores the scope of fourth amendment protection of privacy that an individual is entitled to outside of closed private areas. The comment focuses on California law dealing with technologically enhanced police observations in the forms of electronic beepers, airplane overflights, and binoculars. It will be shown that in technologically enhanced scrutiny cases the California courts while attempting to apply the reasonable expectation of privacy formulation of Katz v. United States, nonetheless return to a trespass-intrusion analysis.

The main decisional conflict appears in the treatment of surveillance of open air activity. The reasonable expectation of privacy test has no set parameters outside the ready limitations of four walls. It is unclear whether privacy rights are waived because potential passers-by might make observations or whether police need to establish their own independent ability to observe. The plain view doctrine is inconsistently invoked as it confronts the possibility of enhanced scrutiny. The reasonableness of privacy expectations appears subject to constriction as various forms of technology gain wider usage and acceptance.

This comment advances a test derived from the holdings

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of two decisions, *People v. Triggs* and *People v. Arno*. This formulation should provide a standard for the measure of privacy in the open and a workable rule for the use of enhanced visual surveillance in California.

II. **FOURTH AMENDMENT LAW AND THE GROWTH OF TECHNOLOGY**

A. **Property Based Notions of Fourth Amendment Protection**

Early interpretations of the fourth amendment were rooted in property law concepts. Analysis of fourth amendment violations was made in terms of "constitutionally protected areas." Without some sort of physical invasion or intrusion into such an area, there could be no search. The concept of a protected area was expanded over the years to include more and more locations, but there remained a requirement of physical intrusion into such a space for police observations to come within the proscriptions of the amendment. Under this analysis early uses of technology were not considered searches. In *Olmstead v. United States* the defendant's telephone was tapped, but this was achieved without a physical entry onto his property. The lines were tapped on the street without disturbing the house or curtilage. The fourth amendment could not be extended to include protection of telephone wires "reaching to the whole world" from a house or office.

In *Goldman v. United States* a receiver was placed on a party wall that was capable of recording conversations within the defendant's home. Under the property based theory of the fourth amendment this was not a search because no trespass or intrusion had occurred. The Court could find no "practical

6. See note 1 supra.
10. 277 U.S. 438 (1928).
11. Id. at 465.
distinction” from Olmstead. In Silverman v. United States,\textsuperscript{13} however, a spike mike had been inserted into a party wall such that it made contact with defendant’s heating duct and was capable of recording conversations throughout the house. This was considered an unauthorized penetration into the defendant’s premises and violative of fourth amendment rights.

Perhaps the most strained application of the trespass doctrine came in Clinton v. Virginia.\textsuperscript{14} In that case an amplifier the size of a thumbtack had been placed on a wall. Justice Clark in his concurring opinion considered this to have “penetrated petitioner’s premises sufficiently to be an actual trespass thereof.”\textsuperscript{15}

In Lopez v. United States\textsuperscript{16} the issue of electronic surveillance and the surreptitious recording of conversations arose again. An undercover agent equipped with a hidden electronic device had recorded conversations between himself and the defendant in the latter’s office. Since the agent had entered the premises with the defendant’s consent there was no fourth amendment violation. In a lengthy and vigorous dissent Justice Brennan called for the Court to overrule Olmstead and fashion rules for electronic searches arguing that “[T]he Constitution would be an utterly impractical instrument of contemporary government if it were deemed to reach only problems familiar to the technology of the eighteenth century.”\textsuperscript{17}

B. The Move Away from Property Concepts: Katz v. United States and its Impact

Recognition that technology had limited the utility of the trespass doctrine finally came in 1967. In Katz v. United States\textsuperscript{18} the Supreme Court formally rejected the traditional analysis. The case dealt with the electronic surveillance of a public telephone booth; a device had been planted so that the defendant’s conversations regarding his gambling operations could be recorded. The Court declined to analyze the situation in terms of whether a telephone booth was a constitutionally protected area, and if so, what constituted an intrusion.

\textsuperscript{13} 365 U.S. 505 (1961).
\textsuperscript{14} 377 U.S. 158 (1964), \textit{per curiam}.
\textsuperscript{15} \textit{Id}.
\textsuperscript{16} 373 U.S. 427 (1963).
\textsuperscript{17} Id. at 459.
\textsuperscript{18} 389 U.S. 347 (1967).
into the area. In a now famous passage the Court noted that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." A fourth amendment search did not depend on the presence or absence of a physical intrusion into any given enclosure. Rather the focus of the inquiry was turned upon the conduct and expectations of the person observed.

Subsequent interpretations of the Katz opinion have utilized the language of Justice Harlan's concurring opinion. He stated that in order to trigger fourth amendment protection, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Justice Harlan did not reject the concept of a constitutionally protected area, but he refined what could constitute an intrusion. The trespass doctrine was "bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." Later interpretations of Katz by the Court reveal that the intrusion analysis is still viable in many situations.

Former Professor Anthony Amsterdam in his seminal article on the fourth amendment laments the reasonable expectation of privacy formulation. The test as it is articulated by the Supreme Court in later decisions, and as it is applied in California, has become: wherever an individual may harbor a reasonable expectation of privacy, he is entitled to be free from unreasonable government intrusion. The first problem

19. Id. at 350.
20. Id. at 351-52.
21. Id. at 353.
22. Id. at 350-53.
25. Id. at 360-61.
26. Id. at 362.
28. Amsterdam, supra note 9, at 385.
with this test, according to Amsterdam, is that it reintroduces the concept of an intrusion which is precisely what the majority in *Katz* had attempted to lay to rest.\(^{31}\) Secondly, the expectation of privacy formula has dangerous potential. It sets out an uncertain and easily manipulated standard.\(^{32}\) How can a citizen's expectation of privacy continue to be reasonable when he knows the technological reach of current surveillance methods? Both of these troublesome aspects of the reasonable expectation of privacy test, pinpointed by Amsterdam, emerge in the California case law.

III. California: Searches In The Open

A. People v. Triggs: Clandestine Vantage Point and Plain View

Current California law is struggling with the ramifications of *Katz* when applied to police observations that are made in the open.\(^{33}\) Part of the difficulty lies in determining where the officer's legitimate plain view ends and where a person's legitimate privacy expectation begins. Various factors have to be considered in measuring the reasonableness of the privacy expectation. Is the person observed in the open or in a traditionally protected area? Were members of the public in the vicinity? Was the police scrutiny clandestine; that is, was it enhanced by technology or a covert vantage point?

In the aftermath of *Katz*, the plain view doctrine has come into conflict with the protection afforded by the fourth amendment.\(^{34}\) An observation of what is in plain view, by an officer who has a right to be in position to have that view, has traditionally been considered to be outside the scope of the fourth amendment because it does not involve a search.\(^{35}\) This was logically consistent with requiring a trespass or an intrusion as the basis of a fourth amendment violation. Absent a prior entry, there could be no plain view into an enclosed

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32. *Id.* at 384.
33. Electronic surveillance of conversations by wiretapping or eavesdropping is now regulated by statute. *See Cal. Penal Code §§ 630-37 (West 1970).* This comment is concerned only with other forms of technological surveillance where there are no legislative enactments.
space. But since the concept of privacy in a public place was ushered in by *Katz*, it is now possible that a person may exhibit a reasonable expectation meeting the *Katz* test, yet be legally spied upon under the plain view doctrine. This conflict is particularly acute when both the person observed and the police making the observation are in the open.

In *People v. Triggs* the California Supreme Court was presented with a situation that required an accommodation between plain view observations and legitimate privacy expectations. The defendants were arrested for illegal sexual acts in a public toilet. Police hiding in the vents above the toilet stall observed the acts. The stalls had no doors, and thus the defendants had taken the risk of being discovered by members of the toilet-using public. The court found that the possibility of plain view observations by the public did not defeat the defendants' reasonable expectation that police would not be hiding in the vents. "Most persons using public restrooms have no reason to suspect that a hidden agent of the state will observe them." Thus, the clandestine government surveillance constituted an illegal search. It does not appear that the officers had committed any trespass in positioning themselves in the plumbing access area of the park's restroom building. Thus, a court applying the plain view doctrine could have found that the police had a right to be in a position to have the view. The California court, however, found that the method of observation which resulted in the clandestine observation of the innocent and guilty alike violated the fourth amendment. Only if the officer had probable cause to search, would his observations from the vents be sanctioned by plain view.

The court differentiated between a person's expectation of privacy from members of the public and from representatives of the state. Simply because an individual risks observation by the public, he has not waived his privacy expectation with respect to the state. Whenever privacy is analyzed outside traditionally protected areas, it is important to con-

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37. *Id.* at 891, 506 P.2d at 236, 106 Cal. Rptr. at 412.
38. *Id.* at 892, 506 P.2d at 237, 106 Cal. Rptr. at 413.
39. *Id.* at 894 n.7, 506 P.2d at 238 n.7, 106 Cal. Rptr. at 414 n.7.
40. This is not the first expression of such a principle. *See People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971) (trash); *People v. McGrew*, 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969) (airline footlocker).
sider the issue of how the potential passer-by affects the expectation of privacy.

It can be argued that the holding in *Triggs* was limited to restroom surveillance and the particularly acute privacy interests involved in such locations.\(^{41}\) The lower courts, however, have derived more generalized principles from the opinion.\(^{42}\) The reasonableness of the privacy expectation may depend on who is doing the viewing; consent to observation from some sources does not invite observation from all sources.

Thus, in *Triggs* the court refused to allow plain view, a corollary of the trespass doctrine, to rescue clandestine surveillance from the fourth amendment proscriptions. In order to protect the innocent public from the risk of observation, the court demanded a showing of probable cause before police could initiate surveillance. Although commentaries had hoped that the *Triggs* analysis would be extended to all forms of enhanced surveillance,\(^{43}\) the results have been uneven. In California the courts of appeal have persisted in looking for an intrusion as the basis of their analysis rather than focusing on the privacy expectation of the individual and the method of surveillance involved.

B. Technologically Enhanced Surveillance: Electronic Beepers

In People v. Smith\(^{44}\) the issue was the legality of the warrantless installation of a transponder, or electronic beeper, in the cockpit of a rented airplane. With the assistance of this device police had been able to track the airplane’s journey to and from Mexico on a smuggling expedition. The Attorney General argued that no search was involved because defendant Smith had no expectation of privacy for his airplane in the open sky; ordinary radar and F.A.A. ground equipment could have monitored the airplane in any event.\(^{45}\)

\(^{41}\) *Privacy*, supra note 34, at 599.


\(^{45}\) *Id.* at 651-52, 136 Cal. Rptr. at 771. This was factually incorrect. The court points out that the plane would eventually have been lost to normal ground equipment. *Id.* at 655, 136 Cal. Rptr. at 773.
The court of appeal considered the situation to be structurally similar to *Triggs*. The defendant's criminal activity had occurred in a place potentially exposed to public observation, but police had in fact employed a form of clandestine surveillance. The court read *Triggs* as standing for the proposition that:

[Olne's reasonable expectation of privacy is violated if the governmental observation of criminal behavior is from a hidden vantage point which most persons would have no reason to suspect was being so used, and that this is true even though the same criminal behavior could have been observed by the police and others from vantage points at which they had the right to be.]

Thus interpreted, *Triggs* should require a warrant prior to the use of an electronic tracking device.

The *Smith* court did not, however, rest with *Triggs*, but proceeded to discuss Ninth Circuit cases dealing with beeper installations. In the Ninth Circuit's view, fourth amendment rights must be analyzed at the time the device is planted; if the device can be installed without a trespass or other violation of the suspect's possessory interests, no warrant is needed. This view has been criticized as a reflection of the trespass doctrine, which, since *Katz*, should no longer be the starting point for an analysis of a form of electronic surveillance.

The Fifth Circuit, on the other hand, takes a different approach. In *United States v. Holmes* the warrantless installation of a beeper on the fender of a truck was held to be a search in violation of the fourth amendment. The court reasoned that although the defendant had parked his car on the public street, he nonetheless had a fourth amendment right to be secure. Since there was no way to protect oneself from this kind of surveillance, it required judicial authorization. The court noted:

46. *Id.* at 653, 136 Cal. Rptr. at 772.
47. *Id.* at 648, 136 Cal. Rptr. at 769. The court took pains to point out that the police had ample time to obtain a search warrant.
We are unwilling to hold that Holmes, and every other citizen, runs the risk that the government will plant a bug in his car in order to track his movements, merely because he drives his car in areas accessible to the public. The presence or absence of a physical intrusion into the interior of the car does not affect this conclusion.\textsuperscript{61}

In \textit{Smith} the court did not refer to \textit{Holmes} even though its result was closely in line with the holding in \textit{Triggs} as the court stated it. Instead, the California court cited Ninth Circuit cases with approval and incorporated an intrusion analysis into their holding. The \textit{Smith} court concluded that the fourth amendment is violated when police,

impermissibly enter private property to install electronic surveillance equipment in a location which most persons would have no reason to suspect is being used for such a purpose even though other unobjectionable methods are available for discovering and gathering the same evidence. If the Fourth Amendment protects a person who commits a sex offense in an open toilet stall in a public restroom from police intrusion from a vantage point he has no reason to suspect, a fortiori, the Fourth Amendment shields the owner or renter of an airplane from police intrusion into the aircraft itself for the purpose of installing a tracking device. . . \textsuperscript{62}

One wonders how the \textit{Smith} court would rule if the transponder had been planted on the outside surface of the airplane. There are two separate forms of analysis being employed here, and the court does not seem to recognize that the \textit{Katz-Triggs} view was developed in response to the limitations of the trespass theory. The court could, in effect, follow the example of the Fifth Circuit while applying the \textit{Katz-Triggs} rationale it cites. Or it might simply rule, like the Ninth Circuit cases it also cites, on the basis of the absence of a trespass.

\section*{C. Enhanced Surveillance; Police Overflights: Privacy in the Open Fields}

The California courts of appeal have also had occasion to consider the legality of police overflights.\textsuperscript{63} Aerial surveillance

\begin{itemize}
\item[51.] \textit{Id.} at 865.
\item[52.] 67 Cal. App. 3d at 654, 136 Cal. Rptr. at 773.
\item[53.] People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973); Dean v.
of private property poses many of the same problems found in Triggs and Smith. There is a conflict between the plain view of the police and the privacy expectations which can attach to open air activity. Like the Smith case the decisions reflect the same tendency to cite Triggs and Katz, but in the end to return to the presence or absence of an intrusion as the controlling question.

Traditionally, fourth amendment protection did not extend to searches in the open fields. Protection was, however, extended to areas immediately adjacent to the house, thus leading to the distinction between the protected "curtilage" and the unprotected open field. In People v. Edwards California formally rejected the open fields versus curtilage distinction and adopted the Katz analysis for outdoor searches. Now the question, indoors or out, is whether a person has exhibited a reasonable expectation of privacy to be free from unreasonable government intrusion. The reasonableness of privacy expectations and the unreasonableness of government intrusion will depend on the physical setting. In People v. Dumas, which dealt with the warrantless search of a car, the California Supreme Court suggested a sliding scale approach to privacy, where privacy rights increase as the individual retreats from the world. The court found a hierarchy of fourth amendment protection, ranging from the nearly absolute sanctuary of homes to sites that are entirely "public in nature."


54. See text accompanying notes 61-64 infra.
57. 71 Cal. 2d 1096, 458 P.2d at 713, 80 Cal. Rptr. at 633 (1969).
58. Id. at 1100, 458 P.2d at 715, 80 Cal. Rptr. at 635.
60. Id. at 882, 512 P.2d at 1216, 109 Cal. Rptr. at 312. The sliding scale approach appears recently to have turned into all slide and no scale. See Amsterdam, supra note 9, at 394. In People v. Schieb, 98 Cal. App. 3d. 820, 159 Cal. Rptr. 665 (1979), the court of appeal interpreted Dumas as an affirmation of the open fields doctrine. In Soli v. Superior Court, 103 Cal. App. 3d 72, 162 Cal. Rptr. 840 (1980), the court of appeal again sought to minimize protected privacy in the open and categorized Edwards as articulating no more than a "rare exception." 103 Cal. App. 3d at 80, 162 Cal. Rptr. at 846. Ironically, while recent California Supreme Court cases have extended more privacy protection to cars and their contents, the courts of appeal have used the car based precedent of Dumas to diminish privacy rights in rural areas. See People v. Minjares, 24 Cal. 3d 410, 420-21, 591 P.2d 514, 619, 153 Cal. Rptr. 224, 229 (1979); People v. Dalton, 24 Cal. 3d 850, 859, 598 P.2d 467, 472, 157 Cal. Rptr.
A series of guidelines have been developed to assess the privacy expectation. Visibility to other members of the public appears to be a major factor in ascertaining reasonableness. A backyard has privacy protection if it is fully enclosed. But if there is an easy viewpoint from a neighbor's property, a public pathway, or an area open to common use, the expectation of privacy is non-existent, or at least unreasonable. The presence of fencing, gates, and posted signs also emerges as a major factor in gauging the privacy expectation that may or may not attach to the property.

*Phelan v. Superior Court* is a recent pronouncement of these principles. Police, investigating a tip that defendants were growing marijuana in a rural mountain area, spotted the garden after extensive hiking on neighboring property. In an apparent good faith mistake, the police had in fact wandered onto defendant's property when they made their sighting. Two sides of the garden were enclosed by chicken wire covered with shrubbery; rocks and trees secluded the other sides of the garden. Using binoculars, police were able to identify marijuana leaves through the gaps in the trees. There were no footpaths or roads in the area.

The court found defendants entertained a subjective expectation of privacy that, under all the circumstances, was objectively reasonable. The isolated location, the lack of trails, and the attempts to conceal the garden were important factors. The court then sought to determine whether the police had violated that reasonable privacy expectation with an unreasonable intrusion. The court concluded that the presence or absence of a technical trespass was immaterial. "[T]he in-
quiry is not whether the officers have violated a particular boundary line in their searching but whether they have invaded the reasonable expectation of privacy exhibited by defendants. The expectation of privacy defines the parameters of the right to search." Thus, any police intrusion into a citizen's established sphere of privacy is an unreasonable search.

Curiously, these principles are altered when the police observations are made from the air. When police surveil these same backyards or rural properties from the air, the courts of appeal have not found a fourth amendment violation. Although a citizen's privacy expectations may appear reasonable on the ground, they may not be protected from overflights.

The first consideration of aerial surveillance occurred in People v. Sneed. Police received an anonymous tip that marijuana was being grown somewhere on a twenty acre ranch. Officers first drove around the premises finding nothing and then decided to obtain a helicopter and survey the ranch from the air. After extensive overflights, they spotted two marijuana plants growing in a corral. The helicopter flew as low as twenty feet off the ground to permit these observations.

The court rejected the argument that defendants had entertained no reasonable expectation of privacy because the plants were visible to mosquito abatement helicopters and crop dusting airplanes. Citing Triggs, the court stated:

"[T]hough a person may have consented to observations from some sources and by some persons and therefore cannot have a reasonable expectation of privacy as to those sources or persons, he does not thereby forego his Fourth Amendment protection as to intrusions from all sources and by all persons, and particularly has not waived his right to privacy as to government agents." But the court failed to pursue this analysis and based its holding on a trespass analysis. By that logic there would be no violation if the helicopter had flown at a legal and reasonable height, but flying 20 feet off the ground in violation of state statutes and federal regulations was an "unreasonable govern-

66. Id. at 1016, 153 Cal. Rptr. at 745.
67. Id. at 1015, 153 Cal. Rptr. at 744. The court cited Lorenzana v. Superior Court, discussed in text accompanying notes 89-90 infra.
69. Id. at 541, 108 Cal. Rptr. at 150.
mental intrusion into the serenity and privacy of . . . [the defendant's] backyard."  

Under Katz and Triggs the privacy interest should be analyzed in terms of the conduct of the individual observed. Using the rationale of Katz the question should be whether Sneed knowingly exposed his corral to the public or whether he had sought to preserve it as private. The height of the government plane involved in the surveillance should not be controlling. This is akin to differentiating between an eavesdropping device that is placed outside a party wall and one that is inserted into it.  

In Dean v. Superior Court a remote mountainside marijuana crop was again spotted by police airplanes pursuing an anonymous tip. The court of appeal stated that, "[J]udicial implementations of the Fourth Amendment need constant accommodation to the ever-intensifying technology of surveillance." The court concluded that the reasonable expectation of privacy may ascend into the airspace and claim fourth amendment protection. But then the court determined that the defendant's subjective expectation of privacy for his contraband was not objectively reasonable. Had his crop been oats or wheat he would have no need for privacy from police overflight. His choice of crop was not within "the common habits of mankind," and hence his rights were not violated.  

This illustrates the manipulations possible under a subjective interpretation of constitutional protections that Professor Amsterdam warned against. To begin with, as has often been noted, when the fourth amendment was drafted, the framers were specifically concerned with abusive government searches for contraband. It is a basic principle that the Constitution protects the innocent and the guilty alike. Furthermore, Triggs and Katz refute the idea that only legal activities have an objective claim to privacy. It is certainly not within "the common habits of mankind" to perform oral cop-

70. Id. at 543, 108 Cal. Rptr. at 151.
71. See text accompanying notes 12-13 supra.
73. Id. at 116, 110 Cal. Rptr. at 588.
74. Id. at 116, 110 Cal. Rptr. at 588-89.
75. Id. at 117, 110 Cal. Rptr. at 589.
76. See text accompanying notes 28-32 supra.
ulation in public restrooms nor to conduct gambling operations over the phone. Essentially, the Dean court has justified a search by what it turned up. The reasonableness variable in the test has been utilized to yield a highly unprincipled result.

The latest overflight cases repeat rather than reject this reasoning.\textsuperscript{78} In \textit{People v. St. Amour}\textsuperscript{79} police were cruising Humboldt County by air in a general, exploratory search for marijuana gardens. The court again reasoned that marijuana cultivation is not within the "common habits" of persons engaged in agriculture. Since the plant grows outside, no reasonable expectation of privacy could be displayed with regard to overflights.\textsuperscript{80}

\textit{People v. Superior Court}\textsuperscript{81} reveals another problem with the subjective versus objective aspect of the privacy test. There a police helicopter on patrol spotted stolen auto parts in the defendant's backyard. The court found there was no violation of fourth amendment rights because the helicopter was flying over its normal patrol area. Thus, it appears that once a method of surveillance slips into routine practice, it is no longer objectively reasonable to contest it. Helicopters over the backyards and decks of Californians could become as accepted and routine as the flashlights of the California Highway Patrol.\textsuperscript{82} What further technological developments promise to become routine?

The reasonableness of a privacy expectation should not hinge on the state of the technical arts nor on a citizen's knowledge of what methods are employed as a matter of course. As Anthony Amsterdam pointed out: "[A]nyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet."\textsuperscript{83} Personal expectations of privacy must not be allowed to be categorized as reasonable or unreasonable depending upon what surveillance methods are currently in vogue. Rather, the lower courts should focus on the Triggs principle, derived from \textit{Katz}, that the method of surveillance itself may be an unreasonable gov-

\begin{itemize}
  \item \textsuperscript{79} 104 Cal. App. 3d 886, 892, 163 Cal. Rptr. 187, 191 (1980).
  \item \textsuperscript{80} Id. at 894, 163 Cal. Rptr. at 192.
  \item \textsuperscript{81} 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1974).
  \item \textsuperscript{82} People v. Boone, 2 Cal. App. 3d 66, 82 Cal. Rptr. 398 (1969).
  \item \textsuperscript{83} Amsterdam, \textit{supra} note 9, at 402.
\end{itemize}
ernment search violating the fourth amendment.

In Burkholder v. Superior Court\textsuperscript{84} the court of appeal recently reaffirmed the validity of overflights, repeating the reasoning of Dean that it is not objectively reasonable for a cultivator of contraband to expect privacy from the overflights, regardless of the remote location. The Burkholder court found there was no intrusion because the police plane was flying at a lawful altitude and the marijuana was in plain view.\textsuperscript{85} But the subsequent warrantless police raid along the ground was held to be an illegal search because police traveled down private mountain roads, past closed gates and no trespassing signs to reach the marijuana patch. The defendant did have a right of privacy along the ground which was "impermissibly transgressed by the police incursion."\textsuperscript{86} Similarly in St. Amour the court stated that the no trespassing signs, fences, shrubs, etc., protected the land from "earthly encroachments" only.\textsuperscript{87}

In these cases a finding of physical intrusion was necessary to trigger fourth amendment protections. Under Katz a trespass should no longer be needed. If the defendant had a reasonable expectation of privacy against intrusion into his marijuana patch by police on foot, he should have a similar expectation against intrusion by police overhead. If there is a legally cognizable privacy expectation, then the fourth amendment precludes police observation; niceties about the differing forms of surveillance, some constituting trespasses and some not, should not control.\textsuperscript{88}

This was recognized in 1973 by the California Supreme Court in the case of Lorenzana v. Superior Court.\textsuperscript{89} There the prosecution argued that because the contested surveillance was "simple" eavesdropping from a clandestine vantage point, as opposed to electronically enhanced eavesdropping, no fourth amendment violation had occurred. The court rejected that distinction.

We now recognize the constitutional encasement which

\textsuperscript{84} 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (1979).
\textsuperscript{85} The "plain view" was enhanced by binoculars; see discussion at note 95 infra.
\textsuperscript{86} 96 Cal. App. 3d at 427, 158 Cal. Rptr. at 89.
\textsuperscript{87} People v. St. Amour, 104 Cal. App. 3d 886, 892, 163 Cal. Rptr. 187, 190-91 (1980).
\textsuperscript{88} For another example of the no-intrusion-no-search analysis, this time in the context of a marijuana sniffing dog, see People v. Matthews, 112 Cal. App. 3d 11, 169 Cal. Rptr. 263 (1980).
\textsuperscript{89} 9 Cal. 3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973).
renders inviolable the individual's reasonable expectation of privacy; any governmental intrusion into that privacy is an "unreasonable search" within the meaning of the Fourth Amendment, whether that intrusion be the traditional physical search [citations] or a surreptitious auditory invasion [citations] or indeed visual intrusion [citations].

The later lower court decisions in *Burkholder* and *St. Armour* fail to make the equation. Those decisions recognize fourth amendment protections from traditional physical searches along the ground but not from visual invasion from overhead. This inability to see beyond the traditional trespass analysis leaves the current law in a lamentable contradiction. If police make observations of outdoor property they must be careful to remain on public pathways; if they drive their jeeps off the beaten track, scale fences, or use binoculars they may have pierced a privacy expectation and performed an illegal search. But if police take to their airplanes and helicopters, there is no violation. Privacy expectations previously recognized as reasonable should not be defeated and become unreasonable because of advancing technical capacities of the police. *Triggs* and *Katz* recognize this principle, but California appellate courts have failed to apply it in plain view-overflight situations.

D. Enhanced Surveillance: Binoculars

In *People v. Arno* the court of appeal considered observations enhanced by high-powered binoculars. Police had stationed themselves on a hilltop across from the Playboy building in Los Angeles. Over a six hour period they monitored activities in the building; through the eighth floor windows they were able to see personnel handling pornographic film. These observations formed the basis for a search warrant of the suite.

The court, centering its inquiry on the conduct and expectations of the persons observed, and noting that *Katz* demanded such a focus, held that the surveillance was an illegal search. The court stated:

90. *Id.* at 639, 511 P.2d at 42, 108 Cal. Rptr. at 594.
91. See text accompanying notes 92-94 infra.
93. *Id.* at 510-11, 153 Cal. Rptr. at 626-27.
We thus view the test of validity of the surveillance as turning upon whether that which is perceived or heard is that which is conducted with a reasonable expectation of privacy and not upon the means used to view it or hear it. So long as that which is viewed or heard is perceptible to the naked eye or unaided ear, the person seen or heard has no reasonable expectation of privacy in what occurs. Because he has no reasonable expectation of privacy, governmental authority may use technological aids to visual or aural enhancement of whatever type available. However, the reasonable expectation of privacy extends to that which cannot be seen by the naked eye or heard by the unaided ear. While governmental authority may use a technological device to avoid detection of its own law enforcement activity, it may not use the same device to invade the protected right.

In essence, this establishes a "but for" test for enhanced observation. If the observation is one that can only be accomplished with the use of technological aids, then it violates a protected privacy right. But for the use of binoculars, would police in Arno have seen the handling of pornographic film on the eighth floor of the building? If the answer is no, there is an illegal search. As such, the test has the virtue of being easy to understand and apply.

Had the Burkholder court followed this reasoning it would not have found two differing privacy expectations: a reasonable expectation for the ground search and an unreasonable expectation for aerial surveillance. The Burkholder court should have concluded that if the defendant's cultivation was secluded from the unaided eye, then he had a constitutionally protected right of privacy. Thus, an airplane should not have been used to invade that right. Or putting it more simply, but for the use of a technological aid, here an airplane, could police have observed the marijuana patch?95

Nonetheless, the Arno formulation does not lay to rest all the problems generated by open air searches. Against whom is this privacy right measured? Whose naked eye or unassisted

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94. Id. at 511-12, 153 Cal. Rptr. at 627.
95. Both the Burkholder and the St. Amour courts cited Arno as support for the use of binoculars from the airplane. The courts stated that the officer in the plane merely used binoculars to provide greater detail of what was already visible to the naked eye, and therefore the use was sanctioned by Arno. There is, however, no discussion of how the officer's naked eye got where it was. This is indeed myopic use of legal principles.
ear is involved? We have seen that privacy expectations with regard to police may differ from those with regard to passers-by. If anyone at all might have seen the place or overheard the person in question, does that mean all privacy expectation vanishes and police may employ some form of technologically enhanced surveillance? For example, two persons are sitting and talking on a park bench thinking they are unobserved and unheard when a passer-by briefly intrudes on their solitude. Arno might permit police to activate hidden cameras or turn on high-powered telescopes; however Triggs would differentiate between the expectation of privacy from potential members of the public and the expectation of privacy from the police. In the latter case, Triggs would require probable cause to initiate clandestine surveillance.

The Arno formulation would probably not have protected Triggs and his co-defendant. They had taken the risk of being observed by others entering the restroom, and thus it is arguable that their activities were perceptible to the naked eye. Under Arno police would be free to retreat to the vents to avoid detection of their own law enforcement activities. Under Triggs, however, all privacy expectations are not waived because a person risks casual observation by members of the public. This issue is not recognized in Arno.

In Arno police used technological aids to penetrate the traditionally protected area of a building interior. The underlying problem was a covert intrusion; the police used technology to avoid a physical trespass into a protected area. If, however, the person observed is in the open and out of his curtilage, then the result is uncertain. In such a situation the proper analytical framework is better found in Triggs where the problem before the court involved a defendant observed outside the traditionally protected curtilage area. The Triggs court suggested a probable cause requirement for initiating enhanced surveillance of persons outside traditionally protected areas. Any probable cause requirement is absent from the Arno formulation.

96. See text accompanying notes 40-41 supra.
97. The Arno court referred to the Watergate break-in and questioned whether it would "have been any less intrusive had the sought after results been achieved by modern technology located outside the building." 90 Cal. App. 3d at 511, 153 Cal. Rptr. at 627.
IV. A PROPOSED TEST

As the cases discussed have revealed, the lower courts have been reluctant to implement fully the Triggs rationale. Undoubtedly there is some uncertainty as to the extent its principles should be extended beyond the restroom situation to enhanced surveillance in general. There is judicial uncertainty as to whether principles enunciated with regard to police vantage point should apply to police use of technology. Absent any clear direction in the language of the Triggs opinion about the scope of its application, the lower courts tend to return to a trespass analysis. However, if the courts set out to find such an intrusion, they may beg the question of what privacy rights persons in the open are entitled to.

The Arno court's suggestion, patterned as a "but for" test, has the advantage of being easy to understand and to apply. As with the old trespass doctrine, the parameters of the privacy expectation can be drawn with relative simplicity. The Arno court's test is not, however, sufficiently comprehensive. It fails to specify whose "unassisted ear" or "unaided eye" is the starting point of analysis and what vantage point that eye or ear may enjoy. Thus, the Arno test leaves open the possibility of wholesale electronic surveillance of public places.98

Triggs suggests at least two important concepts applicable to open air searches. First, a distinction should be recognized between the reasonable expectation of privacy that can be asserted against police and that which can be asserted against passers-by. Second, the method of surveillance may be sufficiently clandestine or inescapable as to require probable cause before initiating its use. If these two concepts are written into the Arno formulation, we can derive a workable rule to regulate open air searches. Such a rule would be bottomed on the fourth amendment and on the California constitutional right of privacy. As the Arno court stated:

The federal constitutional right against intrusion into the reasonable expectation of privacy is amplified by the specific right of privacy guaranteed by article 1, section 1, of the California Constitution. The California constitutional guarantee is motivated by concern against contemporary society's accelerating encroachment upon personal free-

98. Currently, in Santa Cruz County, police station themselves in the hills with "Spyscopes." These enable detailed observations over a several mile radius including the parking lots, shopping centers, and streets of the area.
dom and security caused by increased surveillance and data collection. [citations] It seems virtually tailored to meet the situation here involved.  

The rule could be stated as follows: the test for the validity of covert or technologically enhanced surveillance should turn upon whether that which is perceived or heard is conducted with a reasonable expectation of privacy and that expectation should not depend on the surveillance means used. So long as that which is viewed or heard is in fact perceptible to the naked eye or unaided ear of the government agent whose vantage point is neither unreasonably clandestine nor assisted by mechanical devices, the person seen or heard has no reasonable expectation of privacy in what occurs. Where there is no reasonable expectation of privacy as against the government agent, law enforcement may then use covert means of scrutiny including whatever technological aids are available to avoid detection of the surveillance activity. The reasonable expectation of privacy extends to that which cannot be heard by the unaided ear nor seen by the naked eye of the state, and any surveillance of that protected sphere must be sanctioned by a search warrant on a showing of probable cause, or bottomed on one of the traditional warrant exceptions.

Such a test would maintain the Katz focus on the conduct and manifested privacy expectations of the individual observed, thus eliminating any intrusion analysis. The test would also preserve the "but for" aspect of the Arno test. Without the use of the electronic beeper, airplane, telescope or whatever, could the police have made this observation? If not, then the observation has interfered with a privacy expectation protected by the fourth amendment.

The "but for" factor would also provide a brake against deterioration of privacy standards. The objective versus subjective dichotomy can be manipulated to provide a loophole for increased levels of surveillance. The proposed test would make it clear that an expectation of freedom from technologi-

99. 90 Cal. App. 3d at 511, 153 Cal. Rptr. at 627. Currently pending before the California Supreme Court is De Lancie v. Superior Court, 97 Cal. App. 3d 519, 159 Cal. Rptr. 20 (1979), hearing granted, Nov. 1979. It poses the issue of electronic surveillance in jails, an area that traditionally is not protected by the fourth amendment. The court of appeal held that art. 1, § 1 of the California Constitution protects the public and the inmates from indiscriminate observation by means of electronic surveillance in jail visiting rooms.
cally enhanced scrutiny is objectively reasonable. Furthermore, by making it explicit that the reasonableness of the privacy expectation is being measured against the state, and by requiring that all observation be made by unassisted police in the open, generalized surveillance of public places will be forestalled. Thus, the police would need to show probable cause prior to most forms of enhanced scrutiny of open places.

If, for example, an individual carelessly exposes his contraband on a crowded street, he has no reasonable expectation of privacy from officers spotting such activity. Police would be free to retreat to a safe distance and observe him at greater leisure with binoculars or any other device. But police would not be free to monitor potential narcotics transactions by setting up a hidden, remote control camera system in a suspected high drug area. The indiscriminate observations such a camera records would normally not be visible to the naked eye of the police. Hence, they would invade the observed persons' reasonable expectations of privacy and require a search warrant upon a showing of probable cause.

The need for a search warrant will not be unduly burdensome to legitimate police work. Most forms of enhanced surveillance (beepers, airplanes, stationed observations with high powered telescopes) require advance planning and consume time in installation and preparation.\(^\text{100}\) Hence, requiring supervision of a neutral magistrate should not stymie police efforts. Just as police must maintain and equip their technological aids, so too they should check on the overall legality of the enterprise. Ordinary eavesdropping and police tailing would not be proscribed. The "unreasonably clandestine vantage point" limitation should reach only Triggs or Lorenzana type concealment. Neither should police be unduly handicapped in a situation where time is of the essence. The established warrant exceptions of exigent circumstances, hot pursuit,\(^\text{101}\) and fleeting opportunity,\(^\text{102}\) which are tailored for police acting under time pressures, should remain available. Furthermore, it should be noted that telephonic search warrants are availa-
ble in California.103

V. CONCLUSION

We have seen that fourth amendment protection has been extended to persons and activities in the open. Under current decisions that privacy right must yield if certain forms of police surveillance are employed. What police may not scrutinize from a distance with binoculars they may, nevertheless, be allowed to fly over and observe. Although the California Supreme Court has said that the reasonable expectation of privacy is inviolable, the appellate courts have developed two lines of cases that illogically distinguish between ground observations and aerial observation. Despite apparent rejection of the trespass doctrine, it remains the underlying form of analysis in the lower courts.

At present there is no certain standard for analysis of clandestine or enhanced police surveillance. The courts may apply Triggs or may resort to a plain view analysis. The reasonable expectation of privacy test presents insufficient guidelines and is subject to manipulation. The merger of the Triggs and Arno tests proposed here should help to rationalize results. Stripping police scrutiny of technological aids provides a workable method for measuring the heretofore uncertain reach of protected privacy. The proposed test should not hamper legitimate police investigation, and would protect the privacy interests of the innocent public from indiscriminate surveillance.

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