NEW MEXICO LAW REVIEW

Volume 51
Issue 1 *Winter*

Winter 2021

Why Get a Warrant When You Can Fly Over the Wall? The Constitutionality of Aerial Surveillance without a Warrant

Royce A. Deller
University of New Mexico - School of Law

WHY GET A WARRANT WHEN YOU CAN FLY OVER THE WALL? THE CONSTITUTIONALITY OF AERIAL SURVEILLANCE WITHOUT A WARRANT

Royce A. Deller

ABSTRACT

Individuals in and around their home have a reasonable expectation of privacy from warrantless, ground-level surveillance because the curtilage of the home, like the home itself, is protected from searches and seizures. This is settled Fourth Amendment law. The curtilage of a home is "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'"[1] Less clear, however, is whether there is a reasonable expectation of privacy from aerial surveillance. One would be forgiven for assuming one enjoys an expectation of privacy from surveillance in the curtilage of one's own home. But counter-intuitively, individuals do not have a reasonable expectation of privacy from aerial surveillance unless the surveillance creates a hazard on the ground, or it is conducted in an un-disciplined manner, according to State v. Davis and the precedent it relies on.[2] The intrusion analysis that the Supreme Court of New Mexico relied on in Davis is consistent with federal precedent, but it fails to adequately incorporate Katz and conflicts with the additional privacy protections under the New Mexico Constitution

The issue of aerial surveillance is timely considering the surveillance that currently takes place by helicopter as well as the availability and increased use of drones, but the court failed to address this issue and, instead, adhered to flawed federal precedent. An individual's expectation of privacy should not be based on compliance with Federal Aviation Administration (FAA)

1. Oliver v. United States, 466 U.S. 170, 180 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

2. *See* State v. Davis, 2015-NMSC-034, ¶ 35, 360 P.3d 1161, 1169.

> *regulations because FAA regulations focus on public safety concerns, not privacy concerns. Similarly, whether a helicopter kicks up too much dust should not be a determining factor in deciding whether aerial surveillance without a warrant is constitutional. Neither of these safety considerations are applied when conducting ground-level surveillance and they should not apply to aerial surveillance either.*
>
> *Currently, individuals only have a reasonable expectation of privacy from ground-level surveillance, but not from aerial surveillance. This Note argues that the reasonable expectation of privacy from ground-level surveillance should be coextensive with the reasonable expectation of privacy from aerial surveillance when it is conducted with the purpose of detecting criminal activity.[3] New Mexico has a "strong preference for warrants"[4] and it would be consistent with precedent to assert that a warrant for aerial surveillance is required when an "individual has taken steps to ward off inspection from the ground, [because that] individual has also manifested an expectation to ward off inspection from the air."[5]*

INTRODUCTION

Imagine you own or rent a home in the United States. One day, you wake up to loud, disruptive noises coming from your backyard. The panels on your house are creaking. You look into your backyard, and you see a police helicopter hovering as low as 50 feet over your property. The helicopter is surveilling your property and the curtilage of your home. Out in front of your house, there are seven police officers armed with assault rifles asking for consent to search your backyard.[6]

Surely this violates the Fourth Amendment. Police officers cannot arrive at your door with assault rifles, fly 50 feet over your property, kick up dust, and cause panic with the strong winds created by the helicopter without first obtaining a warrant. In *State v. Davis*, the Supreme Court of New Mexico correctly held that such police behavior was a violation of the Fourth Amendment.[7] However, this case highlights how extreme the police activity must be to violate the Fourth Amendment.

---

3. *See*, *e.g.*, People v. Cook, 41 Cal. 3d 373, 385, 710 P.2d 299, 307 (1985).

4. State v. Crane, 2014-NMSC-026, ¶ 16, 329 P.3d 689 (quoting State v. Gomez, 1997-NMSC-006, ¶ 36, 932 P.2d 1) ("The foremost distinct state characteristic upon which this Court has elaborated New Mexico's search and seizure jurisprudence under Article II, Section 10 is 'a strong preference for warrants.").

5. *Davis*, 2015-NMSC-034, ¶ 63, 360 P.3d at 1174 (Chávez, J., concurring); *see generally* State v. Gomez, 1997-NMSC-006, ¶ 20, 122 N.M. 777, 932 P.2d 1, 7) (This case adopted the interstitial approach in New Mexico. In adopting the approach, the court specifically mentions situations where application of federal analysis might not be appropriate, and many of those situations involve warrants, searches and seizures, and, although not directly on point, the "open fields" doctrine, which does draw some similarity with the present issue.).

6. This hypothetical is based on the facts from State v. Davis, 2015-NMSC-034, 360 P.3d 1161.

7. *See Davis*, 2015-NMSC-034, ¶ 52, 360 P.3d at 1172.

Indeed, nearly every other aerial surveillance case has held that the aerial surveillance was constitutional.[8]

But what if the helicopter had not made any noise? What if the helicopter[9] was hovering over your house, silently or with little disturbance, surveilling and observing your backyard and the curtilage of your home? Would that make you feel better, or would you feel like your privacy rights were *more* invaded? Perhaps you might not even know that the government was surveilling you.[10] How would you feel if the only barrier to aerial surveillance of your home was that the aircraft flew in publicly navigable airspace and complied with Federal Aviation Administration regulations? And what if you knew that FAA's regulations are not, and never have been, written to protect individual privacy rights? On the contrary, the FAA's mission is to "provide the safest, most efficient aerospace in the world" and its regulations are written to accomplish just that—safety.[11]

The second hypothetical situation, according to the precedent set in *Davis*, would be entirely legal. In this case, the Supreme Court of New Mexico adhered to federal precedent and held that there was no reasonable expectation of privacy from aerial surveillance when the surveillance "took place within public navigable airspace, in a physically nonintrusive manner."[12] The court went on to state that, if surveillance of the Davis property was carried out without intrusion on the ground, then it "would likely not constitute an unreasonable search under the Fourth

8. *See Davis*, 2015-NMSC-034, ¶¶ 37–39, 360 P.3d at 1169–1170 (citing *State v. Rogers,* 1983–NMCA–115, ¶¶ 3, 5, 100 N.M. 517, 673 P.2d 142.) "Although decided three years before the first of the U.S. Supreme Court opinions on aerial surveillance, the Court of Appeals' opinion in *Rogers* presaged the analysis eventually undertaken by that Court. As in *Rogers,* in most cases courts find that the aerial observation was not sufficiently intrusive as to invade a reasonable expectation of privacy, and sustain the warrantless aerial surveillance. *See, e.g., People v. McKim,* 214 Cal.App.3d 766, 263 Cal.Rptr. 21, 25 (1989) (upholding a helicopter surveillance where there was no evidence the helicopter interfered with the defendant's use of his property or 'created any undue noise, wind, dust, or threat of injury'); *Henderson v. People,* 879 P.2d 383, 389–90 (Colo.1994) (en banc) (upholding helicopter surveillance where there was little evidence of wind, dust, threat of injury, or interference and there was no indication the neighbors felt compelled to go outside and observe the commotion); *State v. Rodal,* 161 Or.App. 232, 985 P.2d 863, 867 (1999) (upholding surveillance where the helicopter was operated in a lawful and unintrusive manner).

9. This policy concern is equally applicable, if not more so, to drones. The court of appeals in *Davis* recognized this, but the supreme court purposefully tailored a narrow holding to exclude drones. *See Davis*, 2015-NMSC-034, ¶ 54 ("[W]e note that the Court of Appeals, when reviewing the district court's order in this case, suggested that when considering privacy interests under our State Constitution we move away from an intrusion analysis in anticipation of future surveillance conducted by "ultra-quiet drones" and other high-tech devices. Because this case only involves surveillance by helicopters, technology that has been with us for nearly 80 years, we find it unnecessary to speculate about problems—and futuristic technology—that may or may not arise in the future.").

10. This hypothetical is based on the dissent in Florida v. Riley, 488 U.S. 445 (1989).

11. Federal Aviation Administration, *About FAA,* https://www.faa.gov/about/ [https://perma.cc/GPF2-EJ4G]; *see also Davis*, 2015-NMSC-034, ¶ 33 (citing *Riley* 488 U.S. at 451) (describing reliance on FAA standards in analysis); *see Davis*, 2015-NMSC-034, ¶ 64 (Chávez, J., specially concurring) (criticizing use of FAA regulations in analysis); *see also Riley* 488 U.S. at 456, 458–59 (1989) (Brennan, J., dissenting) (criticizing the conflagration of FAA safety standards with the 4th Amendment expectation of privacy standard).

12. *Davis*, 2015-NMSC-034, ¶ 30, 360 P.3d at 1168 (quoting California v. Ciraolo*,* 476 U.S. 207, 213 (1986)).

Amendment."[13] Thus, the critical factor with aerial surveillance is safety from physical intrusion by the aircraft. In this, the standard for aerial surveillance diverges from that for ground-level surveillance and resembles the outdated intrusion standard.

This case highlights a concerning distinction that is novel to New Mexicans who are concerned about their privacy rights. Individuals only have a reasonable expectation of privacy from ground-level surveillance, but that reasonable expectation does not extend to aerial surveillance. The Supreme Court of New Mexico in *Davis* failed to address the issue raised by the second hypothetical by pushing its responsibilities to a later date. What the court failed to see, however, is that technology is not just making drones quieter. Technology is making all forms of traditional aircraft quieter and less obtrusive, including the form used in this case. The type of aircraft that conducts the surveillance surely cannot be the deciding factor that determines whether or not an individual's right to privacy has been violated. This Note argues that the court in *Davis* reached the right decision, but the means chosen to arrive at that conclusion are flawed and create concerning public policy. This Note proceeds in four Parts. Part I discusses the background and history of aerial surveillance precedent. Part II examines the implications of the precedent set by *Davis*. Part III analyzes *Davis* and explores the broader protections that Article II, Section 10, of the New Mexico Constitution provides. Finally, Part IV offers potential solutions, such as departing from an intrusion analysis, that are more in alignment with the United States and New Mexico constitution. Moving away from an intrusion analysis is more applicable in a modern era where privacy rights must compete with advanced technology and new methods of aerial surveillance.

BACKGROUND

The Fourth Amendment protects individuals from unreasonable searches and seizures when there is a "constitutionally protected reasonable expectation of privacy."[14] In determining whether an individual's expectation of privacy is reasonable, there are two elements that must be satisfied: "first that a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that the expectation is one that society is prepared to recognize as 'reasonable.'"[15]

A. Federal Aerial Surveillance Landscape.

Fourth amendment jurisprudence has consistently upheld the primacy of private homes. Indeed, a "man's [sic] house is his castle" is one of the oldest principles in Fourth Amendment jurisprudence.[16] Even the areas around the outside of a home—the curtilage—are protected. When there is a potential search of a home or area near the home, courts assess whether the search took place within the curtilage of the home, or "the area to which extends the intimate activity associated

13. *Davis*, 2015-NMSC-034, ¶ 45, 360 P.3d at 1171.
14. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).
15. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
16. *E.g.*, Weeks v. United States, 232 U.S. 383, 390 (1914).

with the 'sanctity of a man's home and the privacies of life.'"[17] When a search takes place within the curtilage of the home, "privacy expectations are most heightened."[18] However, just because a search takes place within the curtilage of a home, it does not "automatically warrant protection from all observation under the Fourth Amendment."[19] The most common exception to this protection is when an individual knowingly exposes some portion of his or her home, or the curtilage of his or her home, to public view.[20]

Protection under the Fourth Amendment still exists, however, as long as individuals "take affirmative steps to exhibit an expectation of privacy."[21] It is also fairly clear what steps must be taken in order to protect individuals from ground-level surveillance. For example, fencing around an individual's house generally constitutes an affirmative step towards an expectation of privacy.[22] When the potential surveillance or intrusion is at ground-level, a physical intrusion analysis is applied.

Generally, the Fourth Amendment provides protection from ground-level surveillance when there is a reasonable expectation of privacy. Aerial surveillance, however, is treated differently. "[E]xhibiting a reasonable expectation of privacy from ground level surveillance may not always be enough to protect from public or official observation from the air under the Fourth Amendment."[23] When the surveillance takes place from the air, courts are less consistent and, at times, have attempted to apply a physical-intrusion analysis to surveillance that takes place from the air by helicopter or other means. There are logical issues with this type of application because there generally is no physical intrusion in aerial surveillance cases, which highlights the potential concern that this test may be outdated for technological advancements in surveillance technology. The days where physical intrusion is the only way, or is even necessary, to surveil a home are long gone.

Three leading cases are fundamental to understanding the constitutionality of aerial surveillance under the Fourth Amendment: *Katz*, *Ciraolo*, and *Riley*. *Katz* was a landmark Fourth Amendment case that drastically changed the search and seizure landscape. The United States Supreme Court effectively left behind the notion that, in order to receive constitutional protection under the Fourth Amendment, there must be some type of actual trespass or physical intrusion by law enforcement.[24] In *Katz*, there was no physical trespass, as it involved electronic surveillance by placing a wiretap on a telephone booth.[25] Even though there was no physical intrusion, the court held that there had been a violation of the Fourth Amendment. Justice Harlan is frequently cited for the creation of the "reasonable

17. Oliver v. United States 466 U.S. 170, 180 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

18. California v. Ciraolo, 476 U.S. 207, 213 (1986).

19. State v. Davis, 2015-NMSC-034, ¶ 27, 360 P.3d 1161, 1167.

20. *See Davis*, 2015-NMSC-034, ¶ 27, 360 P.3d at 1167.

21. *Id.*

22. *See Davis*, 2015-NMSC-034, ¶ 28, 360 P.3d at 1167.

23. *Id.* (citing *Florida v. Riley,* 488 U.S. 445, 450–51 (1989)).

24. Katz v. United States, 389 U.S. 347, 353 (1967).

25. *Id.*

expectation of privacy" test. The test involves two parts. First, whether there is a "(subjective) expectation of privacy and, second, [whether] the expectation is one that society is prepared to recognize as 'reasonable.'"[26]

In *Ciraolo and Riley*, the court applied the reasonable expectation test to aerial surveillance, distinguishing it as a separate category with far less protection than what individuals are afforded from ground-level surveillance. This had the practical effect of retreating back to the old physical intrusion-type analysis. In *Ciraolo*, police, flying an airplane, inspected the curtilage of a house.[27] The aircraft was operating at an altitude of 1,000 feet, and the officers observed marijuana growing in the yard.[28] The officers observed the marijuana from the plane with their naked eye.[29] The court applied the *Katz* test and determined that the first element was satisfied.[30] The individual had a subjective expectation of privacy, in part, because "the 10-foot fence was placed to conceal the marijuana crop from at least street-level views."[31] However, the second element of the *Katz* test was not satisfied in this case because the court determined that the expectation was not reasonable and was not accepted by societal norms.[32] The court reasoned that "the home and its curtilage are not necessarily protected from inspection that involves *no physical invasion*."[33]

Florida v. Riley largely mirrors the factual pattern in *Ciraolo*, with one notable distinction: the aerial surveillance was conducted by helicopter.[34] As in *Ciraolo*, the defendant in *Riley* took adequate precautions to protect his property from ground-level surveillance and the court observed that the "property surveyed was within the curtilage of respondent's home."[35] However, the court in *Riley* found that, because the greenhouse where the marijuana was located was "left partially open, . . . what was growing in the greenhouse was subject to viewing from the air."[36] The court determined that there was no violation of the Fourth Amendment because there was no reasonable expectation of privacy while the marijuana was subject to viewing from the air.[37] It reasoned that the surveillance was not unreasonable because the helicopter was flying in accordance with the law and applicable FAA regulations.[38] It further reasoned that it would have a different "case if flying at [400 feet] had been contrary to law or regulation."[39] However, the court stated that the lower limit an airplane can fly at is 500 feet, which implies that an individual's

26. *Id.* at 361 (Harlan, J., concurring).

27. California v. Ciraolo, 476 U.S. 207, 209 (1986).

28. *Id.*

29. California v. Ciraolo, 476 U.S. 207, 215 (1986).

30. *Id.* at 211.

31. *Id.*

32. *Id.* ("[I]t is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.").

33. Florida v. Riley, 488 U.S. 445, 449 (1989) (emphasis added) (citing California v. Ciraolo, 476 U.S. 207, 213 (1986)).

34. 488 U.S. 445, 448 (1989).

35. Florida v. Riley, 488 U.S. 445, 450 (1989).

36. *Id.*

37. *Id.*

38. *Id.* at 451.

39. *Id.*

reasonably expectation of privacy may depend on the type of aircraft that is conducting the surveillance.[40] Concerned with this precedent, Justice Brennan in his dissent stated: "whether Riley's expectation of privacy is reasonable turns on whether the police officer at 400 feet above his curtilage is seated in an airplane or a helicopter. *This cannot be the law*."[41]

B. Historical Reliance on FAA Regulations.

In each of these cases, the court relied heavily on FAA regulations. Specifically, the court applied these FAA regulations to determine whether, at the time of surveillance, the government aircraft was in lawful airspace. FAA regulations limit fixed-wing aircraft, such as airplanes, to an altitude of "1,000 feet while flying over congested areas and at an altitude of 500 feet above the surface in other than congested areas."[42] However, helicopters are not subject to such restrictions. Helicopters can be operated at *any* altitude, as long as the helicopter is "conducted without hazard to persons or property on the surface."[43]

From the beginning, using FAA safety regulations as a yardstick to measure the constitutionality of surveillance was controversial. Justice Blackmun, in his dissent in *Riley*, emphasized his concern with the plurality opinion's reliance on FAA regulations:

> I believe that answering this question depends upon whether Riley has a "reasonable expectation of privacy" that no such surveillance would occur, and does not depend upon the fact that the helicopter was flying at a lawful altitude under FAA regulations. A majority of this Court thus agrees to at least this much.[44]

Justice O'Connor, concurring, also voiced concern in using FAA regulations because the purpose of FAA regulations is to "promote air safety, not to protect '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'"[45]

She did not believe that expectations of privacy should "simply mirror the FAA's safety concerns" because FAA guidance allows for helicopters to operate at "virtually any altitude" as long as they do not pose a safety hazard.[46] Justice Brennan, dissenting, highlighted one of the key issues with relying on FAA regulations: that it improperly conflates aerial surveillance with ground-level surveillance analysis.[47] When surveillance by police takes place on the ground, there is no reasonable expectation of privacy when there is an open window or a gap in a fence that allows

---

40. *Id.*

41. *Id.* at 459, n.2 (Brennan, J., dissenting) (emphasis added).

42. *Id.* at 451, n.3.

43. 14 CFR § 91.79 (1988); *see also* Florida v. Riley, 488 U.S. 445, 453 (1989) (O'Connor, J., concurring).

44. *Riley*, 488 U.S. at 467 (1989) (Blackmun, J., dissenting).

45. *Id.* at 452 (O'Connor, J., concurring) (quoting U.S. CONST. amend. IV).

46. *Id.* at 453 (O'Connor, J., concurring).

47. *Id.* at 459 (Brennan, J., dissenting).

for an officer to observe evidence of a crime.[48] When surveillance takes place by air, however, there is a fundamental shift that the plurality in this case failed to address. The location of the police officer is not determinative in assessing whether there was a reasonable expectation of privacy. In cases involving aerial surveillance, "it makes no more sense to rely on the legality of the officer's position in the skies than it would to judge the constitutionality of the wiretap in *Katz* by the legality of the officer's position outside the telephone booth."[49] The United States Supreme Court in *Riley*, although arguably the most important, is not the only court that has expressed concern about using FAA regulations to assess whether there is a reasonable expectation of privacy.[50]

C. Modern Applicability of the Physical Intrusion Analysis.

Federal aerial surveillance precedent seemingly disregards the fact that the Supreme Court of the United States has departed from a property-based intrusion analysis.[51] At least as far back as *Katz v. United States* in 1967, the Supreme Court of the United States has explicitly stated that "[t]he premise that property interests control the right of the Government to search and seize has been discredited."[52] Although the Fourth Amendment was originally based on physical trespass, the court has expanded upon search and seizure analysis under the Fourth Amendment to include instances where there is no "technical trespass under local property law."[53] The court further reasoned that:

> [I]t is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling.[54]

Other courts and commentators have also noted that property-based "trespass law cannot be the lodestar of Fourth Amendment protection because it 'furthers a range of interests that have nothing to do with privacy.'"[55] Trespass law focuses on excluding others, usually the public, based on the interest and control of

48. *See, e.g., id.*

49. *Id.* at 460 (Brennan, J., dissenting).

50. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 460 n.3 (1989) (quoting State v. Davis, 51 Or. App. 827, 831, 627 P.2d 492, 494 (1981) ("We . . . find little attraction in the idea of using FAA regulations because they were not formulated for the purpose of defining the reasonableness of citizens' expectations of privacy. They were designed to promote air safety.")).

51. *See* Katz v. United States, 389 U.S. 347 (1967).

52. *Id.* at 353 (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)).

53. *Id*. (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

54. *Id.* at 353.

55. William Baude, & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1827 (2016) (quoting Oliver v. United States, 466 U.S. 170, 183 n.15 (1984)).

one's own property, whereas privacy law focuses on a right to be free from unreasonable searches and seizures. The former is much, much broader than the latter. As the court in *Oliver v. United States* articulated:

> [I]t does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. To the contrary, the common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers.[56]

This precedent makes clear that property-based intrusion analysis is no longer controlling when considering most searches and seizures under the Fourth Amendment, but the court has failed to carry the more nuanced approach into aerial surveillance jurisprudence—where a physical intrusion analysis is least applicable. It raises the question, then, why the Supreme Court of New Mexico in *Davis* relied so heavily on this same intrusion analysis in 2015.[57] Reliance on a physical-intrusion analysis will be discussed in further detail in Part II, Section A, of this Note.

D. State v. Davis Background.

State v. Davis is an outlier in aerial surveillance precedent. It is one of the few cases in which the New Mexico Supreme Court has found a Fourth Amendment violation. In *Davis*, Sergeant Travis Skinner, flying in a helicopter, observed a "potential marijuana plantation" in the curtilage of Davis' property.[58] Based on this information, Sergeant Skinner directed a team of "at least six armed law enforcement officers—to the Davis residence."[59] Despite the fact that Davis had enclosed his property from ground-level surveillance, Sergeant Skinner said that he was able to see a "greenhouse as well as what appeared to be marijuana plants located at the back of Davis' property near the house."[60] At the time of this surveillance, Davis was in bed ill.[61] He got out of bed because he "heard a helicopter hovering very low, right on top of [his] house," which was making a considerable amount of noise.[62] When the noise did not go away, Davis went outside to see what was happening, and it was at that time that he "observed the helicopter hovering approximately 50 feet above his head 'kicking up dust and debris that was swirling all around.'"[63]

This entire operation and the eventual search of Davis' property was conducted without a search warrant.[64] Residents that lived near Davis described the

56. 466 U.S. at 183 n. 15.
57. *See* State v. Davis, 2015-NMSC-034, ¶ 45–46, 360 P.3d 1161, 1171.
58. *Id.* at ¶ 6, 360 P.3d at 1164.
59. *Id.*
60. *Id.*
61. *Id.* at ¶ 7, 360 P.3d at 1164.
62. *Id.*
63. *Id.*
64. *Id.* at ¶ 9, 360 P.3d at 1164.

activity as "terrifying and highly disruptive."[65] One resident, Kelly Rayburn, noted that the helicopter flew around his house "about a half a dozen times."[66] Rayburn went on to state that the helicopter flew so close "to his roof that the downdraft lifted off a solar panel and scattered trash all over his property."[67] Another resident, Merilee Lighty, observed a helicopter flying over her house for approximately 15 minutes.[68] Yet another resident, William Hecox, stated that he "did not notice any real dust flying at the time of the flyover, but after the helicopter left he noticed that one of his four-by-four beams was broken at the ground and another one was broken three feet up from the ground."[69] Hecox stated that these beams were not broken prior to the incident, although it is not clear how he knew this and the record does not reveal any additional information.[70]

Based on these facts, the New Mexico Supreme Court held that "the aerial surveillance over Davis' property was an unwarranted search in violation of the Fourth Amendment."[71] It acknowledged that Davis took "affirmative steps to exhibit an expectation of privacy from ground level surveillance. He fully enclosed his property with ground level "fencing," using a combination of vegetation and artificial devices." It also reasoned that the aerial surveillance did interfere with Davis' expectation of privacy. It did not, however, determine that Davis' reasonable expectation of privacy from ground-level surveillance was sufficient on its own to protect from observation from the air.[72] Instead, the court determined that Davis' expectation of privacy was violated because the helicopter physically intruded upon Davis' property by hovering too close to the ground.[73]

I. IMPLICATIONS

A. The Current Test: Deprivation of Constitutionally Protected Freedom.

The precedent set by *State v. Davis* has significant implications. First, the holding effectively requires individuals to cover the curtilage of their home or retreat into their home if they wish to have any expectation of privacy from aerial surveillance. This type of solution deprives individuals of their right to enjoy their property in ways that are fundamental to the Fourth Amendment. For example, even an individual who has a fully enclosed patio is probably not free from aerial-surveillance.[74] There is a reason that the home and surrounding curtilage have been

65. *Id.* at ¶ 10, 360 P.3d at 1164.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at ¶ 11, 360 P.3d at 1164.
70. *Id.*
71. *Id.* at ¶ 52, 360 P.3d at 1172.
72. *Id.* at ¶ 28, 360 P.3d at 1167.
73. *Id.* at ¶ 52, 360 P.3d at 1172.
74. Florida v. Riley, 488 U.S. 445, 464 (1989) (Brennan, J., dissenting) ("If the Constitution does not protect Riley's marijuana garden against such surveillance, it is hard to see how it will prohibit the government from aerial spying on the activities of a law-abiding citizen on her fully enclosed outdoor patio.").

so fiercely protected for centuries. The home and curtilage require us to protect certain characteristics, which are usually taken for granted, in order to retain their precious character.[75] Freedoms such as privacy, sunlight, and fresh air are at risk when *Davis* is taken to its logical end. What is a home and backyard without the feeling of privacy that comes along with it? What about the feeling of fresh air in your backyard and the ability to walk out and feel sunlight on your face? Allowing aerial surveillance without a warrant would surely generate a number of "intangible costs," only a few of which have been mentioned here.[76] The precedent set in *Davis* creates a concerning future for people who wish to retain privacy in and around their homes.[77] Today, the police surveilled marijuana plants in Davis' backyard. However, other jurisdictions have realized that the same principle applies to surveillance of everything from family members relaxing in lawn chairs to nude sunbathers.[78] It is hard to see how, if the law is applied equally, there is any protection for law-abiding citizens from surveillance if "the Constitution does not protect [the defendant's] marijuana garden against such surveillance."[79] As Justice Brennan wrote in dissent to the court's *Riley* opinion, "[t]he question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not."[80] If *Davis* and its analogous precedent are dismissed as merely "drug case[s]," it will be at "the peril of our own liberties."[81]

---

75. *See, e.g.* State v. Davis, 2015-NMSC-034, ¶¶ 89–91, 360 P.3d 1161, 1180–81 (Chávez, J., specially concurring) (citing People v. Cook, 41 Cal. 3d 373, 382, 710 P.2d 299, 305 (1985)).

76. *Id.* at ¶ 91 ("[M]easures to block off curtilages from aerial view would generate 'intangible cost[s] of shutting out the sunlight and fresh air which gives such . . . space[s their] precious character.'") (citing People v. Cook, 41 Cal. 3d 373, 382, 710 P.2d 299, 305 (1985)).

77. *See id*. at ¶¶ 90–91 (Chávez, J., specially concurring) ("It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards. Instead, aerial surveillance is usually conducted with 'expensive' equipment by police officers. Thus, in most situations, an individual who desires complete privacy on his or her property can usually establish such privacy by *merely* taking steps to ward off *ground-level surveillance* because aerial surveillance usually is conducted only by law enforcement personnel, and not by the general public . . . . '[E]ven individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards *without entirely giving up their enjoyment of those areas*.'") (internal citations omitted)).

78. *See Cook* 710 P.2d at 305 ("Purposeful surveillance from the air simply lays open everything and everyone below—whether marijuana plants, nude sunbathers, or family members relaxing in their lawn chairs—to minute inspection. The usual steps one might take to protect his privacy are useless. To obtain relief from the airborne intrusion, one would have to roof his yard.").

79. Florida v. Riley, 488 U.S. 445, 464 (1989) (Brennan, J., dissenting).

80. *Id*. (Brennan, J., dissenting) ("If the Constitution does not protect Riley's marijuana garden against such surveillance, it is hard to see how it will prohibit the government from aerial spying on the activities of a law-abiding citizen on her fully enclosed outdoor patio. As Professor Amsterdam has eloquently written: 'The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.'").

81. *Id.* at 463 (Brennan, J., dissenting).

B. The Constitutionality of an Aerial Search is Currently Determined by the Type of Aircraft.

Finally, in addition to infringing upon privacy rights and an individual's right to enjoy his or her property without interference, this application of the law is simply unworkable. The right to be free from unreasonable searches should not turn on the type of aircraft that is conducting the search.[82] The law would never support such a distinction during the course of ground-level surveillance. For example, a police officer who arrives at a house in a truck versus a car does not somehow receive additional power to violate an individual's rights under the Fourth Amendment. This simple example, in conjunction with the rest of the analysis discussed below in Part III, highlights the potential issues with current state of the law. Therefore, the judiciary should either address these issues, or adopt one of the solutions proposed below.

ANALYSIS

II. STATE V. DAVIS

A. Revisiting the Approach Provided by the Court of Appeals in *Davis*.

The New Mexico Supreme Court, as discussed infra, held that the aerial surveillance of Davis' property violated the Fourth Amendment.[83] It did not, however, determine that Davis' reasonable expectation of privacy from ground-level surveillance was sufficient on its own to protect from observation from the air.[84] Instead, the court determined that Davis' expectation of privacy was violated because the helicopter physically intruded upon Davis' property by hovering too close to the ground.[85]

The New Mexico Court of Appeals provides an alternative path forward. In contrast to the New Mexico Supreme Court, it relied on the broader protections provided by the New Mexico constitution because it determined that there was no violation under the Fourth Amendment.[86] Assessment of a case under the New Mexico Constitution, discussed in further detail *infra*, is appropriate when the "New Mexico Constitution provides greater protection" than the Fourth Amendment.[87] Under the New Mexico Constitution, the Court of Appeals did not find the intrusion analysis persuasive and departed from the test. It did not find the intrusion analysis useful for two primary reasons. First, the privacy interest enumerated in the New Mexico Constitution "is not limited to one's interest in a quiet and dust-free

82. *See id*. at 459 n. 2 (Brennan, J., dissenting) ("whether Riley's expectation of privacy is reasonable turns on whether the police officer at 400 feet above his curtilage is seated in an airplane or a helicopter. This cannot be the law.").

83. *State v. Davis*, 2015-NMSC-034, ¶ 52, 360 P.3d 1161, 1172.

84. *Id.* at ¶ 28, 360 P.3d at 1167.

85. *Id.* at ¶ 52, 360 P.3d at 1172.

86. State v. Davis, 2014-NMCA-042, ¶¶ 11–12, 321 P.3d 955, 959–960, *aff'd in part*, *rev'd in part*, 2015-NMSC-034, 360 P.3d 1161.

87. *Id.* at ¶ 12, 321 P.3d at 959–60.

environment."[88] Instead, it determined that this privacy interest also includes "an interest in freedom from visual intrusion from targeted, warrantless police aerial surveillance, no matter how quietly or cleanly the intrusion is performed."[89] Second, the Court of Appeals did not find the intrusion analysis persuasive in determining what constitutes a search because the relevance of an intrusion analysis has been significantly diminished by the advent of significant technological advances. Specifically, the Court of Appeals noted that "[i]ndeed, it is likely that ultra-quiet drones will soon be used commercially and, possibly, for domestic surveillance."[90] Instead of relying on an intrusion analysis, the Court of Appeals adopted

> the view that if law enforcement personnel, via targeted aerial surveillance, have the purpose to intrude and attempt to obtain information from a protected area, such as the home or its curtilage, that could not otherwise be obtained without physical intrusion into that area, that aerial surveillance constitutes a search for purposes of Article II, Section 10 [of the New Mexico Constitution].[91]

In doing so, the court carried out its duty to protect the privacy of the people of this state, as guaranteed by the Fourth Amendment of the United States Constitution, as well as the additional guarantees provided under Section II, Article 10, of the New Mexico Constitution.

The Supreme Court of New Mexico, however, reverted back to federal precedent, finding that this case was so extreme that it violated the Fourth Amendment via a property intrusion analysis. In doing so, the Supreme Court of New Mexico never considered Davis' state constitutional claim[92] and effectively erased the giant step forward that the Court of Appeals had taken to protect New Mexicans from aerial surveillance in an age where technology is increasing at an exponential rate. While it is true that this same argument could be raised again in the next aerial surveillance case, it is unclear whether New Mexicans currently have any of the privacy rights that would not be protected under a traditional intrusion analysis, but were bolstered under the new test outlined by the Court of Appeals, which did not require any physical intrusion.[93]

---

88. *Id*. at ¶ 19, 321 P.3d at 961.

89. *Id.*

90. *Id*. (citing Michael J. Schoen, Michael A. Tooshi, *Confronting the New Frontier in Privacy Rights: Warrantless Unmanned Aerial Surveillance*, 25 No. 3 Air & Space Law 1 (2012) and Intelligence Advanced Research Projects Activity, *Great Horned Owl (GHO) Program*, https://www.iarpa.gov/index.php/research-programs/gho [https://perma.cc/F4XN-LPST].).

91. *Id*. at ¶ 20, 321 P.3d at 961

92. State v. Davis, 2015-NMSC-034, ¶ 24, 360 P.3d 1161, 1166 (citing State v. Gomez, 1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1) ("[B]efore reaching the state constitutional claim, we must first determine whether the right being asserted is protected under the Federal Constitution . . . . If the right is protected under the Federal Constitution, our courts do not reach the state constitutional claim.").

93. *Id*. at ¶ 53, 360 P.3d at 1172 ("[W]e reverse the Court of Appeals' holding with respect to the Fourth Amendment because we find an unreasonable, unconstitutional search under the U.S. Constitution. Second, it is now unnecessary to reach the same question posed under the New Mexico Constitution, which renders the Court of Appeals' discussion of that subject moot though informative. In the end,

B. Judicial Reliance on FAA Regulations in New Mexico.

Consistent with federal precedent set in previous aerial surveillance cases, the Supreme Court of New Mexico tied FAA safety regulations to an individual's privacy rights in determining whether the officers in *Davis* violated the Fourth Amendment. Specifically, the court relied on FAA regulations in determining whether the surveillance in this case took place within legally navigable airspace.[94] Fundamentally, The FAA provides regulations focused specifically on safety. Abiding by safety restrictions should not be sufficient to satisfy constitutional requirements. Instead, abiding by safety restrictions should be a prerequisite for any state or federal law enforcement agencies because

> Individuals "likely expect that law enforcement personnel as well as other air travelers will abide by safety rules and other applicable laws and regulations when flying over their homes," but simply abiding by these regulations is not "an adequate test of whether government surveillance from that same spot is constitutional."[95]

The New Mexico Supreme Court in *State v. Crane* is one example where the court correctly declined to measure the constitutionality of a search using public ordinances as a measuring stick. *Crane* reasoned that it "refus[ed] to guide its constitutional analysis by conflicting public ordinances that regulate the manner in which household trash is collected and disposed of in New Mexico."[96] The same court in *Davis, however,* declined to heed the warning highlighted in *Crane*, which was decided just one year before *Davis*. *Justice* Chávez in his concurrence in *Davis* noted that relying on FAA regulations is particularly concerning because "the *dangerousness* of police surveillance may become the yardstick by which constitutional privacy protection is measured."[97] If the Supreme Court of New Mexico in *Crane* was able to see the potential issues in measuring the constitutionality of a search based on public ordinances as it relates to household trash, then it stands to reason that it should also see the same concern in measuring the constitutionality of aerial surveillance using safety regulations. Justice Chávez poignantly highlighted this issue in his concurrence, but the majority failed to address why it was willing to adhere to precedent with such apparently faulty reasoning.

C. Reliance on Physical Intrusion Analysis.

It is clear from the discussion above that the United States Supreme Court has departed from relying strictly upon a physical intrusion analysis in other

---

however, we uphold the result achieved by the Court of Appeals, which is to suppress all evidence obtained from the search of Davis' property and to reverse his conviction.").

94. *See id*. at ¶¶ 33–35, 360 P.3d at 1168–69.

95. *Id.* at ¶ 95, 360 P.3d at 1182 (Chávez, J., concurring) (quoting State v. Bryant, 2008 VT 39, ¶ 28, 950 A.2d 467).

96. *See* State v. Crane, 2014-NMSC-026, ¶¶ 26–27, 329 P.3d 689, 696–97.

97. *Davis* at ¶ 95, 360 P.3d at 1182 (Chávez, J., concurring) (quoting State v. Bryant, 2008 VT 39, ¶ 23, 950 A.2d 467).

surveillance contexts like wire-tapping a phone booth, but it has failed to carry this more nuanced approach into aerial surveillance jurisprudence—where a physical intrusion analysis is least applicable.[98] However, in *Davis*, the Supreme Court of New Mexico relied on this type of analysis. Discussing the facts specific to this case, the court noted that, in flying over the house with a helicopter, "the police increased the risk of actual physical intrusion as occurred in this case."[99] Furthermore, the court relied on previous aerial-surveillance precedent, which held that "the home and its curtilage are not necessarily protected from inspection that involves no physical invasion."[100] In a particularly insightful section, the court stated that:

> [W]arrantless surveillance can go beyond benign observation in a number of different ways, one of those being when surveillance creates a "hazard"—a physical disturbance on the ground or unreasonable interference with a resident's use of his property. In that case, surveillance more closely resembles a physical invasion of privacy which has always been a violation of the Fourth Amendment.[101]

While it is true that a physical invasion does violate the Fourth Amendment, the court is incorrect in applying it in aerial surveillance cases where no physical surveillance takes place. This court almost seems to decide this opinion without regard for the fact that *Katz* had ever been decided. Paradoxically, the court in *Davis* attempts to apply the *Katz* test, while also ignoring the fact that the court in *Katz* explicitly moved away from reliance on a property-based, physical intrusion analysis.[102]

The court in *Davis* effectively decided to pick and choose which portions of *Katz* it would rely on. The court should not have the ability to elect which precedent it adheres to and which it does not without specifically providing reasoning for deviation. To pick and choose what precedent is followed would undermine stare decisis, which is the very foundation of the modern judicial system.[103] The contradictory and confusing precedent the United States Supreme Court has created

98. *Compare* Katz v. United States, 389 U.S. 347, 353 (1967) *with* Florida v. Riley, 488 U.S. 445, 449–50 (1989).

99. *Davis*, 2015-NMSC-034, ¶ 48, 360 P.3d at 1171.

100. *Id*. at ¶ 33, 360 P.3d at 1168 (quoting *Riley* 488 U.S. at 449–50).

101. *Id.* at ¶ 35, 360 P.3d at 1169.

102. *See* Katz v. United States, 389 U.S. 347, 353 (1967) ("[W]e have since departed from the narrow view on which [the *Olmstead*] decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under local property law.' Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." (citations omitted)).

103. *See* Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, ¶ 7, 68 P.3d 901, 904 ("The principle of stare decisis dictates adherence to precedent. This doctrine 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

is apparent in the New Mexico Supreme Court's convoluted opinion in *Davis,* which essentially refutes the ruling in *Katz* that no physical intrusion is required:

> [T]he Fourth Amendment affords citizens no reasonable expectation of privacy from aerial surveillance conducted in a disciplined manner—mere observation from navigable airspace of an area left open to public view with minimal impact on the ground.[104]

Taken as a whole, it becomes clear that the court in *Davis* relied very heavily on physical-intrusion analysis and, if there is "minimal impact on the ground," then there is no constitutional protection. This statement falls in stark contrast with the opinion in *Katz*, but it is also extremely concerning for practical purposes. Taken to its logical foundation, the court is saying that, as long as the government surveils an individual without physical disturbance, it is permissible. This is exactly what *Katz* refuted when finding that no physical intrusion is necessary in order to violate the Fourth Amendment, because the "Fourth Amendment protects people, not places."[105] Beyond conflicting with *Katz*, the rationale is skewed towards less restrictive requirements for law enforcement, while impeding on the Fourth Amendment rights of the individual. Just because there is "minimal impact on the ground" does not mean that it is a "minimal" invasion of privacy—especially in light of technological advancements and the increased use of drones by law enforcement agencies.[106] Unlike helicopters and planes that traditionally fly at altitudes above 1,000 feet at the very least, under new FAA regulations, drones cannot fly *above* 400 feet.[107] Unless state law enforcement agencies are exempted from this requirement, aerial surveillance by drone would likely take place at a very low altitude. Even though the surveillance would take place at a much lower altitude, under the current test, there would probably be no constitutional violation because drones simply do not cause the type of physical disturbance that a helicopter or plane would.

D. The Interstitial Approach.

In *Davis*, the court applied an interstitial approach in holding that there was a Fourth Amendment violation under the United States Constitution.[108] In States like

---

104.*Davis*, 2015-NMSC-034, ¶ 35, 360 P.3d at 1169.

105. *Katz*, 389 U.S. at 351.

106. Dan Gettinger, *Public Safety Drones: An Update*, CENTER FOR THE STUDY OF THE DRONE BARD COLLEGE (May 28, 2018) https://dronecenter.bard.edu/files/2018/05/CSD-Public-Safety-Drones-Update-1.pdf [https://perma.cc/RQG7-WSFV] ("The number of public safety agencies with drones has increased by approximately 82 percent in the last year alone. All told, there are now more than twice as many agencies that own drones as there are agencies that own manned aircraft in the U.S." Furthermore, "[a]t least 910 state and local police, sheriff, fire and EMS, and public safety agencies have acquired drones in recent years [and] [l]aw enforcement agencies make up two-thirds (599) of the public safety agencies with drones . . . [t]here are more than twice as many public safety agencies with drones as there are agencies with manned aircraft.").

107. FAA News, *Summary of Small Unmanned Aircraft Rule (Part 107)* (June 21, 2016) https://www.faa. gov/uas/media/Part_107_Summary.pdf [https://perma.cc/38EQ-274F].

108. *Davis*, 2015-NMSC-034, ¶ 24, 360 P.3d at 1166 ("When interpreting independent provisions of our New Mexico Constitution for which there are analogous provisions in the U.S. Constitution, New Mexico utilizes the interstitial approach.").

New Mexico, where an interstitial approach has been adopted, a state constitutional issue cannot be considered if there is analogous protection under the United States Constitution.[109]

Davis highlights the extreme police behavior required to trigger constitutional protection from aerial surveillance under a federal Fourth Amendment analysis. Even in this case, it is questionable whether, applying the test outlined in *Katz*, there was a violation of the Fourth Amendment because disruption by air does not necessarily mean that the defendant had an expectation of privacy that society is ready to recognize as reasonable, as outlined in the opinion by the Court of Appeals in *Davis*. Regardless, the federal precedent relied on by the Supreme Court of New Mexico in *Davis* highlights the extreme factual scenario that is necessary to find a violation of the federal constitution. Nearly every other federal aerial surveillance case has been found to be constitutional because the defendant did not have a reasonable expectation of privacy.[110]

Federal aerial surveillance precedent, however, does not align with the New Mexico Constitution and the unique protections that it provides. Broadly speaking, "New Mexico courts have long held that Article II, Section 10 provides greater protection of individual privacy than the Fourth Amendment."[111] More specifically, New Mexico courts have found that there are distinct state characteristics that differ from federal precedent. For example, in 2014, the Supreme Court of New Mexico in *State v. Crane* determined that "[t]he foremost distinct state characteristic upon which this Court has elaborated New Mexico's search and seizure jurisprudence under Article II, Section 10, is 'a strong preference for warrants.'"[112] Based on this strong preference for warrants, the court "depart[ed] from federal jurisprudence, and [held] that Article II, Section 10 provides greater protection than the Fourth Amendment of the right to privacy in garbage which is sealed from plain view and placed out for collection."[113] The underlying reasoning in reaching this holding is the importance of the role that a warrant plays in the judicial system.[114] The court understood that law enforcement officers are constantly engaged "in the often competitive enterprise of ferreting out crime" and the judicial warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches."[115] When it comes to applying the Fourth Amendment in New Mexico, departing from federal precedent and expanding state constitutional rights is routine practice.[116]

---

109. *Id*. ("[B]efore reaching the state constitutional claim, we must first determine whether the right being asserted is protected under the Federal Constitution . . . . If the right is protected under the Federal Constitution, our courts do not reach the state constitutional claim.").

110. *See*, *e.g.*, Florida v. Riley, 488 U.S. 445 (1989); California v. Ciraolo, 476 U.S. 207 (1986).

111. State v. Crane, 2014-NMSC-026, ¶ 16, 329 P.3d 689, 694.

112. *Id.* (quoting State v. Gomez, 1997-NMSC-006, ¶ 36, 122 N.M. 777, 932 P.2d 1, 11).

113. *Id.*

114. *Id.* ("The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." (quoting *Gomez*, 1997-NMSC-006, ¶ 36, 932 P.2d at 11).

115. *Id.*

116. Linda M. Vanzi, Andrew G Schultz & Melanie B. Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48 N.M. L. REV. 302 (2018) ("New Mexico courts have [] routinely

In fact, in *Davis*, the court recognized that "[it] 'has emphasized New Mexico's strong preference for warrants in order to preserve the values of privacy and sanctity of the home that are embodied by' Article II, Section 10."[117] Therefore, there is some indication that, when an aerial surveillance case does not fall under federal jurisdiction, New Mexicans may receive the additional protections they deserve. One example of the potential result of an aerial surveillance case under the New Mexico constitution is evident in the analysis carried out by the New Mexico Court of Appeals in *Davis*, which was discussed in detail above.

III. THE PATH FORWARD

A. Departure from intrusion analysis.

One potential solution lies in the reasoning of the lower court in *Davis*: depart from a property-based intrusion analysis in cases involving aerial surveillance. The Supreme Court of New Mexico noted that, while the lower court's reasoning was persuasive, it did not need to consider this matter because this case does not deal with advanced technology, like drones.[118] Therefore, there was no need to depart from an intrusion analysis.[119]

In doing so, the court in *Davis* failed to see the primary reason for departing from an intrusion analysis. The reason to depart is that an intrusion analysis was never the correct test for aerial surveillance cases. Technological advancements did not create this issue. Instead, advances in technology merely highlight the issue that has been present all along. The fact that aerial surveillance almost never involves any actual intrusion onto the property and the court must substitute fear from strong winds to find any physical intrusion is significant evidence that this might not be the correct test even in current aerial surveillance cases.[120] It is concerning that *Davis* implemented the intrusion analysis, but failed to adequately address the fundamental difference between ground-level and aerial surveillance.

B. An Equal Application of the Law: Ground-Level and Aerial Surveillance.

Holding that aerial surveillance is coextensive with the expectation of privacy from ground-level surveillance when it is conducted with the purpose of detecting criminal activity would set a precedent that is more in line with both the Fourth Amendment and the additional protections provided under the New Mexico

---

applied the *Gomez* analysis to expand the constitutional rights of criminal defendants under the New Mexico Constitution beyond those afforded by the United States Constitution, especially in numerous cases determining that article II section 10 of the New Mexico Constitution affords greater protections than the United States Supreme Court has held to be available under the Fourth Amendment.").

117. State v. Davis, 2015-NMSC-034, ¶ 88, 360 P.3d 1161, 1180 (Chávez, J., concurring) (quoting State v. Granville, 2006-NMCA-098, ¶ 24, 140 N.M. 345, 352,142 P.3d 933, 940.).

118. *See id.* at ¶ 54, 360 P.3d at 1172.

119. *See id.*

120. *See id.* at ¶ 46, 360 P.3d at 1171 ("When low-flying aerial activity leads to more than just observation and actually causes an unreasonable intrusion on the ground—most commonly from an unreasonable amount of wind, dust, broken objects, noise, and sheer panic—then at some point courts are compelled to step in and require a warrant before law enforcement engages in such activity.").

Constitution. For example, New Mexico has a "strong preference for warrants"[121] and it would allow for a more equal application of the law to assert that a warrant for aerial surveillance is required when an "individual has taken steps to ward off inspection from the ground, [because that] individual has also manifested an expectation to ward off inspection from the air."[122]

In fact, two other States have already applied the holding discussed above. In *State v. Quiday*, the primary issue was whether police observation of marijuana grown in "the curtilage of [the defendant's] house with the naked eye, was a 'search.'"[123] Relying on the concurrence in *Davis*, the Supreme Court of Hawaii held that "an individual has a reasonable expectation of privacy from governmental aerial surveillance of his or her curtilage and residence, when such aerial surveillance is conducted with the purpose of detecting criminal activity therein."[124]

Similarly, in *People v. Cook*, the defendant had taken reasonable steps to ward off inspection from ground-level surveillance.[125] Narcotics officers received information that there was, potentially, marijuana in the backyard of the defendant's home.[126] However, the officers were "unable to verify the tip, because a high wooden fence surrounded [defendant's] land."[127] Without any additional information, the officers returned a couple days later in an airplane.[128] The officers flew over the house at an "altitude of roughly 1,600 feet."[129] Based on these facts, the Supreme Court of California held that "the warrantless aerial scrutiny of defendant's yard, for the purpose of detecting criminal activity by the occupants of the property, was forbidden . . . . Any inconsistent language in [other] cases is disapproved."[130]

C. Legislative intervention.

The legislature can provide additional protection from aerial surveillance without a warrant if it is not satisfied with the current federal landscape in this area. Although it does not necessarily address aerial surveillance by helicopter, at least eighteen States have passed legislation that forbids law enforcement agencies from conducting aerial surveillance by drone without a warrant.[131] However, New Mexico

121. State v. Crane, 2014-NMSC-026, ¶ 16, 329 P.3d 689, 694 (quoting State v. Gomez, 1997-NMSC-006, ¶ 36, 932 P.2d 1) ("The foremost distinct state characteristic upon which this Court has elaborated New Mexico's search and seizure jurisprudence under Article II, Section 10 is 'a strong preference for warrants.'").

122. *Davis*, 2015-NMSC-034, ¶ 63, 360 P.3d at 1174 (Chávez, J., concurring).

123. State v. Quiday, 141 Haw. 116, 117, 405 P.3d 552, 553 (2017).

124. *Id.* at 126, 405 P.3d at 562.

125. 41 Cal. 3d 373, 375–376, 710 P.2d 299, 300–301 (1985).

126. *Id.* at 377, 710 P.2d at 302.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 385, 710 P.2d at 307–308.

131. *See* 2016 Unmanned Aircraft Systems (UAS) State Legislation Update, NATIONAL CONFERENCE OF STATE LEGISLATURES (March 20, 2017) https://www.ncsl.org/research/ transportation/2016-unmanned-aircraft-systems-uas-state-legislation-update.aspx [https://perma.cc/H9AD-BMEP] ("18 states—Alaska, Florida, Idaho, Illinois, Indiana, Iowa, Maine, Montana, Nevada, North Carolina, North Dakota, Oregon, Tennessee, Texas, Utah, Vermont, Virginia and Wisconsin— have passed legislation requiring law enforcement agencies to obtain a search warrant to use UAS for surveillance or to conduct

is not one of those eighteen States. Legislation introduced in New Mexico in 2017, titled the "Freedom From Unwanted Surveillance Act," highlights how the legislature can provide additional protection in the realm of aerial surveillance.[132] Although this bill was unsuccessful, it could be used as a guideline or framework to limit aerial surveillance without a warrant. This particular bill focuses on aerial surveillance from drones, and provides that:

> A person, state agency, law enforcement agency or political subdivision of the state shall not use a drone or unmanned aircraft with the intent to gather evidence or other information pertaining to criminal conduct or conduct in violation of a statute or regulation on private property in which the property owners have a reasonable expectation of privacy, except to the extent authorized in a warrant.[133]

Opposition to such bills often cite that it would impact the ability of law enforcement to crack down on the illegal drug industry.[134] However, this type of legislation does not, and would not upset the open fields doctrine. The open fields doctrine allows for aerial surveillance of an open field that is *not* within the curtilage of a home.[135] This type of legislation strikes the right balance between privacy rights of the individual and the government's need to police an illegal industry that has grown in recent years.

CONCLUSION

We must proceed with serious caution and consideration when we continue to apply a test that was meant for physical intrusion to factual scenarios where there is no physical intrusion and no illegal trespass. The property-based physical intrusion

---

a search. One state enacted such requirements in 2016."); *See also*, Aaron Mendelson, *Cal. Senate Approves Measure Banning Warrantless Drone Surveillance*, REUTERS (August 26, 2014, 11:44 PM), https://www.reuters.com/article/us-usa-california-drones/california-senate-approves-measure-banning-warrantless-drone-surveillance-idUSKBN0GR0E020140827 [https://perma.cc/VB4W-W6NX].

132. S.B. 167, 52nd Leg., 1st Reg. Sess. (N.M. 2017), available at https://nmlegis.gov/Sessions/17%20Regular/bills/senate/SB0167.pdf [https://perma.cc/K2E2-8U4V].

133. *Id.* at § 3.

134. *See, e.g.*, People v. Cook, 41 Cal. 3d 373, 387, 710 P.2d 299, 308–09 (1985) (Lucas, J., dissenting) ("Statistics contained in the Attorney General's appellate brief suggest that growing and selling marijuana have become a $1 billion business *annually* in this state. Defendant appears to be an entrepreneur in this budding 'growth industry'—execution of the search warrant issued as a result of the aerial surveillance uncovered 26 growing marijuana plants approximately 6 to 7 feet tall, along with 5,000 grams of loose marijuana. Overflights such as conducted here apparently represent the only effective means of policing the growing of marijuana. In my view, today's decision promotes such unlawful activity without protecting any cognizable or legitimate privacy interest. Like most other citizens, I certainly would oppose routine, exploratory backyard aerial searches conducted at a height low enough to disturb tranquility or violate privacy.").

135. *E.g.*, State v. Sutton, 1991-NMCA-073, ¶ 7, 112 N.M. 449, 451–452, 816 P.2d 518, 520–21 ("[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. Thus, the 'open fields'
doctrine permits police officers to enter and search a field without a warrant [] and the term 'open fields' includes any unoccupied, undeveloped area outside the curtilage of a residence.").

test has been stretched to its breaking point and it is time to consider whether it is time to depart from the test entirely and adhere to a test that more closely aligns with the Fourth Amendment under the United States Constitution and Section II, Article 10, of the New Mexico Constitution. It is important to note that the Fourth Amendment does not make any mention of physical intrusions. It should protect individuals from unreasonable searches and seizures, whether there is a physical intrusion or not, because the "Fourth Amendment protects people, not places."[136]

If a reasonable expectation of privacy from ground-level surveillance were held to be coextensive with aerial surveillance, then individuals would have additional protection without having to give up the privacy in the curtilage of their home. This solution would be cheaper and more realistic for individuals who are concerned about the privacy of their backyards. Additionally, it would result in a more equal application of the law to ground-level and aerial surveillance. Finally, abandoning a property-based intrusion test would address issues that society is *currently* facing. Helicopters right now can surveil individual homes without causing a physical disturbance. Furthermore, drones, as long as they are flown safely, will almost never cross the boundary into a physical trespass. Therefore, we must adopt a test that protects individual privacy in a technological age that no longer requires peering over someone's wall to see what he or she is doing; no longer requires physical intrusion to invade privacy; and no longer requires loud, obvious, and intrusive means to power helicopters and drones meant for surveillance.

136. Katz v. United States, 389 U.S. 347, 351 (1967).