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Criminal Procedure--Oliver v. United States: The Open Fields Doctrine Survives Katz

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Criminal Procedure—*Oliver v. United States*: The Open Fields Doctrine Survives *Katz*

A police officer enters a privately owned field in search of evidence of criminal activity. The officer has acted on an anonymous tip—with no indication of reliability—and has failed to secure a search warrant. The area that he probes is fenced, remote from any dwelling, and posted with no-trespassing signs; the owner has done all she can to create an expectation of privacy. According to the recent Supreme Court pronouncement in *Oliver v. United States*,[1] the officer's search does not violate the fourth amendment's prohibition of unreasonable searches.[2] Any evidence discovered during the search is admissible at trial.[3]

Oliver offered the Court an opportunity to determine the viability of the open fields doctrine, which allows government agents to conduct warrantless open fields searches,[4] in light of a Warren-era ruling that required a warrant to search any place in which a defendant has a "reasonable expectation of privacy."[5] The Court decided that even under the reasonable-expectation-of-privacy rule—or perhaps in spite of the rule—the open fields doctrine remains the law.[6] This Note will examine the open fields doctrine, as reaffirmed by *Oliver*, from both a historical and a practical perspective.

The *Oliver* holding decided two cases: *Oliver v. United States* and *Maine v. Thornton*.[7] In the former, agents of the Kentucky State Police received an anonymous tip that marijuana was being grown on Oliver's farm and decided to investigate immediately without obtaining a search warrant or Oliver's consent.[8] They entered his land by automobile on a private road, passing several "no trespassing" signs and continuing three-quarters of a mile past Oliver's house. Although the road was blocked by a metal gate also marked with a "no trespassing" sign, the officers passed the gate on foot through a gap in the fence. They travelled down a dirt path past a barn and a truck camper; a man then appeared and shouted for them to go no farther. The officers identified themselves and turned back to speak to the man but could not find him. They resumed their search and followed the path through a wooded area to a field of marijuana. The field was surrounded by woods, fences, and an embankment; it could be

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1. 104 S. Ct. 1735 (1984).

2. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

3. *Oliver*, 104 S. Ct. at 1744.

4. *See* Hester v. United States, 265 U.S. 57 (1924).

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

6. *Oliver*, 104 S. Ct. at 1744.

7. *Id.* *Oliver* affirmed the United States Court of Appeals for the Sixth Circuit decision, United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc), and reversed the Maine Supreme Judicial Court decision, Maine v. Thornton, 453 A.2d 489 (Me. 1982).

8. United States v. Oliver, 686 F.2d 356, 358 (6th Cir. 1982) (en banc), *aff'd*, 104 S. Ct. 1735 (1984).

seen only from the air.[9]

Based on this discovery, Oliver was arrested and charged with growing marijuana.[10] At an evidentiary hearing, the United States District Court for the Western District of Kentucky suppressed the evidence relating to the discovery of the marijuana.[11] Relying on the reasonable-expectation-of-privacy rule enunciated in *Katz v. United States*,[12] the court determined that defendant had created a reasonable expectation of privacy in the field. The United States Court of Appeals for the Sixth Circuit, however, reversed the suppression order en banc.[13] The court ruled that the open fields doctrine had survived *Katz* intact, reasoning that "the human relations that create the need for privacy do not ordinarily take place in [open fields], and that the property owner's common law right to exclude trespassers is insufficiently linked to privacy to warrant the Fourth Amendment's protection."[14] Thus, any expectation of privacy that an owner had in an open field was unreasonable as a matter of law and therefore gave rise to no protection under *Katz*.[15]

In *Maine v. Thornton* [16] two police officers, acting on an anonymous tip that marijuana was being grown in the woods behind defendant's home, entered Thornton's land by a path between his home and a neighbor's house. In the woods they discoverd two marijuana patches surrounded by chicken wire. After verifying that the marijuana was on defendant's land, the officers obtained a search warrant, seized the marijuana, and arrested Thornton.[17] The trial court suppressed the evidence obtained in the second search, finding that the warrant was based on information produced by an unreasonable prior search. The court concluded that the no-trespassing signs and the secluded location of the mari-

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9. *Id.* at 358.

10. *Id.* Oliver was charged under 21 U.S.C. § 841(a) (1982) and 18 U.S.C. § 2 (1982). Section 841 provides:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Section 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

11. United States v. Oliver, No. CR-80-0005-BG, slip op. (W.D. Ky. Nov. 19, 1980) (order suppressing marijuana evidence), *aff'd*, 657 F.2d 85 (6th Cir. 1981), *rev'd en banc*, 686 F.2d 356 (1982), *aff'd*, 104 S. Ct. 1735 (1984).

12. 389 U.S. 347 (1967).

13. United States v. Oliver, 686 F.2d 356 (1982) (en banc), *aff'd*, 104 S. Ct. 1735 (1984). A panel of judges previously had affirmed the district court. United States v. Oliver, 657 F.2d 85, 88 (6th Cir. 1981).

14. United States v. Oliver, 686 F.2d 356, 360 (1982) (en banc), *aff'd*, 104 S. Ct. 1735 (1984).

15. *Id.*

16. 453 A.2d 489 (Me. 1982), *rev'd*, 104 S. Ct. 1735 (1984).

17. *Id.* at 491.

juana gave rise to a reasonable expectation of privacy.[18] The Supreme Judicial Court of Maine affirmed.[19] It agreed with the trial court's reasoning, but also went a step further to state that the open fields doctrine applied only when officers are lawfully present on the property and observe open and patent activity.[20]

To understand *Oliver*, it is necessary to review the history of the prohibitions provided by the fourth amendment against unreasonable searches and seizures. The Framers' intention to provide such protection was inspired largely by the abusive practices of the British colonial authorities. Before the American Revolution, colonists were subjected to searches and seizures pursuant to writs of assistance.[21] These documents were intended to assist British colonial authorities in preventing the colonists from trading with non-British industry in violation of the Mercantile Acts.[22] Although justifiable from the viewpoint of British mercantilism, the writs were inherently abusive. The writs issued without any showing of probable cause; they were general—they authorized the search of any place for any item—and they were permanent in that they remained valid until six months after the sovereign's death.[23] Under such a system, abuses were inevitable and indeed were widespread.[24]

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18. *Id.* at 492.

19. *Id.* at 493.

20. *Id.* at 495.

21. Writs of assistance are considered to have been one of the fundamental causes of the American Revolution. *See* Dickerson, *Writs of Assistance as a Cause of the American Revolution* in THE ERA OF THE AMERICAN REVOLUTION 40 (1939).

George II died in October 1760. By law, all writs of assistance would expire six months later in March 1761. A group of Boston merchants represented by James Otis, Jr., unsuccessfully opposed their reissuance in the Superior Court of the Massachusetts Bay Colony. *See* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 33-37 (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 57-66 (1937). A youthful John Adams was present as a spectator. Fifty years later he wrote: "[Otis] was a flame of fire . . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance . . . . Then and there the Child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free." 10 C. ADAMS, THE LIFE AND WORKS OF JOHN ADAMS 276 (1856), *quoted in* J. LANDYNSKI, *supra*, at 37. Adams, writing to his wife Abigail to inform her of the resolution of independence passed by the Second Continental Congress, remembered Otis' argument as the first link in the "Chain of Causes and Effects" leading to independence. 2 ADAMS FAMILY CORRESPONDENCE 28 (L. Butterfield ed. 1963).

Even after hostilities had begun, the Continental Congress petitioned George III for a redress of grievances. Among them, they complained that, "The officers of the customs are empowered to break open and enter houses, without the authority of any civil magistrate, founded on legal information." Petition from Continental Congress to King George III (Oct. 26, 1774), *quoted in* N. LASSON, *supra*, at 75.

22. *See generally* Boyd v. United States, 116 U.S. 616, 623, 625 (1886) (origin and purpose of the fourth amendment); J. LANDYNSKI, *supra* note 21, at 30-31 (origin of the fourth amendment); N. LASSON, *supra* note 21, at 51, 53 (writs of assistance in the colonies).

23. N. LASSON, *supra* note 21, at 53-54, 57.

24. *Id.* at 53-57; *see also* J. LANDYNSKI, *supra* note 21, at 31 (writs granted unlimited discretion to royal officers). A contemporary view of the abusiveness of the writs of assistance is found in the statement of a committee of Bostonians appointed in 1772 to state the rights of the colonists:

> Each of these petty officers . . . is entrusted with power more absolute and arbitrary than ought to be lodged in the hands of any Man or body of Men whatsoever . . . . Thus our Houses and even our Bed-Chambers are exposed to be ransacked . . . by Wretches, whom no prudent Man would venture to employ even as Menial Servants . . . .

The memory of writs of assistance lingered in the minds of the Constitution's Framers.[25] The fourth amendment was their response to the dangers of unjustified government interference with the people's privacy: unreasonable searches and seizures were forbidden[26] and search warrants, issued only on a showing of probable cause,[27] would be required. Moreover, search warrants were required to specify the area to be searched and the persons or items

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1761-1772 Mass. (Quincy) 395, 467 (appendix on writs of assistance).

25. *See generally* J. LANDYNSKI, *supra* note 21, at 39-48 (origin and purpose of the fourth amendment); N. LASSON, *supra* note 21, at 79-85 (precedents of fourth amendment).

The importance many postcolonial leaders attached to denying the federal government a general search power is reflected in the Ratification Debates that followed the 1787 Constitutional Convention. Virginia, after a sharp debate, ratified the Constitution, but also recommended a bill of rights with strong provisions against unreasonable searches. J. LANDYNSKI, *supra* note 21, at 40; N. LASSON, *supra* note 21, at 95-96. North Carolina made a similar recommendation. J. LANDYNSKI, *supra* note 21, at 40. New York's recommendations upon ratification included a reference to "freedom from unreasonable searches and seizures." 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 362 (J. Elliot ed. 1836). Seven states already had constitutional restrictions regarding searches and seizures prior to the Constitutional Convention. N. LASSON, *supra* note 21, at 82.

The vividness of certain statements made during the ratification debates typifies the hostility of many leaders to general search powers. Elbridge Gerry, a Massachusetts delegate who refused to sign the Constitution because it lacked a bill of rights, wrote:

> "There is no provision by a bill of rights to guard against the dangerous encroachments of power in too many instances to be named: but I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence—the daring experiment of granting *writs of assistance* in a former arbitrary administration is not yet forgotten in Massachusetts."

N. LASSON, *supra* note 21, at 89 n.40 (quoting 2 FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 723 (E. Scott ed. 1894)).

In Virginia, Patrick Henry argued that failure to include a bill of rights would produce a general search power:

> Excisemen may come in multitudes; for the limitation of their number no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and measure everything you eat, drink, or wear. They ought to be restrained within proper bounds.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 414 (J. Elliot ed. 1836).

The Framers also were influenced by the battle against general warrants in England. In England, general warrants had been used to restrict freedom of the press by conferring a virtually limitless power to seek out objectionable publications. In 1765 damages were awarded to a victim of a search conducted under a general warrant in Entick v. Carrington, 95 Eng. Rep. 807 (1765). The following year Parliament virtually banned general warrants. For a more detailed discussion, see Marcus v. Search Warrant of Property, 367 U.S. 717, 724-39 (1961); N. LASSON, *supra* note 21, 1-50.

26. The fourth amendment does not define an unreasonable search, nor is the relationship between the unreasonable search clause and the warrant clause clear from the text. As Landynski states, the fourth amendment has "both the virtue of brevity and the vice of ambiguity." J. LANDYNSKI, *supra* note 21, at 42. The Supreme Court generally has regarded warrantless searches as unreasonable. Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."). For a discussion of the rule and its exceptions, see 1 W. LAFAVE, SEARCH AND SEIZURE § 3.1(c)-(d) (1978).

27. Probable cause is defined as "a reasonable belief from the facts and circumstances that an offense occurred and that the suspect committed it or that evidence of that offense can be found in the place to be searched. It is more than a mere suspicion, but not a prima facie case of guilt." J. HALL, SEARCH AND SEIZURE § 5:7 (1978). For a detailed treatment of probable cause, see 1 W. LAFAVE, *supra* note 26, § 3.

sought.[28] The fourth amendment's general prohibition against unreasonable searches and seizures, and its probable cause and particularity requirements, reflect a philosophy that the individual's sense of security cannot be abridged at the government's whim; rather, intrusions on individual liberty are permissible only when subjected to prior, independent judicial approval according to strict standards.[29]

Although this philosophy inspired the fourth amendment, it is not clear how the Framers intended to implement the protections conferred by the fourth amendment. At common law, all relevant evidence was admissible—that it was obtained illegally did not matter.[30] The aggrieved party was limited to a suit for damages in tort.[31] This view prevailed in the United States until the 1914 Supreme Court decision in *Weeks v. United States*.[32] In *Weeks*, the Court ruled that evidence obtained in violation of the fourth amendment was inadmissible in the federal courts.[33] In 1961 this "exclusionary rule" was extended to the states as a matter of due process under the fourteenth amendment.[34] Thus, it now is well settled that the remedy for an illegal search or seizure is the exclusion of any resulting evidence at trial.[35]

A distinct issue is the scope of protection offered by the fourth amendment. Even though the history of the amendment is clear, and the remedy for its violation established, the scope of coverage of the amendment is not. Taken literally, the language of the amendment extends protection only against unreasonable searches and seizures to "persons, houses, papers and effects."[36] In many cases, however, the Supreme Court has not interpreted the language of the amendment literally.[37] It has accorded protection to stores,[38] offices,[39] and sealed packages.[40] The Court, however, has not construed the fourth amendment as a general right of privacy against all government activity;[41] it has held that the fourth amendment does not apply in certain instances—when items or activities are in plain view,[42] when the object of search is abandoned property,[43] when searches

28. 1 W. LAFAVE, *supra* note 26, § 3.1(b).

29. *Id.* § 3.1(a).

30. *See* Olmstead v. United States, 277 U.S. 438, 462-63 (1928).

31. *Id.* at 463.

32. 232 U.S. 383 (1914).

33. *Id.* at 398.

34. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

35. For a discussion of the current Supreme Court's dissatisfaction with the exclusionary rule, see *infra* notes 95-105 and accompanying text.

36. *See supra* note 2.

37. *See infra* notes 38-40.

38. Amos v. United States, 255 U.S. 313 (1921).

39. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

40. *Ex parte* Jackson, 96 U.S. 727 (1877).

41. For a discussion of the relationship between the constitutional right to privacy and the fourth amendment, see Note, *From Private Places to Personal Privacy: a Post-*Katz *Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 978-87 (1968).

42. *See, e.g.*, Trupiano v. United States, 334 U.S. 699, 705 (1948) (illict distilling committed in discernible presence of law enforcement officer), *overturned on other grounds*, United States v. Rabinowitz, 339 U.S. 56 (1950).

43. *See, e.g.*, Abel v. United States, 362 U.S. 217, 240-41 (1960) (items left in wastebasket of plaintiff's hotel room after he had paid his bill and vacated the room).

are conducted under exigent circumstances,[44] and, notably, when searches are conducted in open fields.[45]

In *Hester v. United States*[46] the Court ruled that the safeguards of the fourth amendment did not extend to an open field. In *Hester*, revenue officers had staked out a field near the home of defendant's father. When they saw Hester hand a bottle of moonshine to a suspected customer, the agents seized the bottle and arrested Hester. Hester moved to suppress the evidence on the ground that the search—the observation—violated the fourth amendment.[47] Justice Holmes, writing for a unanimous Court, stated that no illegal search had occurred. "The special protection accorded by the fourth amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[48]

Hester, however, did not attempt to define an open field. A definition was implied three years later in *Olmstead v. United States*,[49] when the Court examined the legality of warrantless wiretaps by federal prohibition officers. Defendant claimed that the wiretap constituted an illegal fourth amendment search. The Court disagreed, concluding that no fourth amendment violation could occur unless there has been an actual physical violation of defendant's house or its curtilage.[50] Since an open field could not by definition be considered part of the home or its curtilage[51] the practical effect of *Olmstead* was to place all areas outside the curtilage beyond the fourth amendment's protections.[52] A

44. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 162 (1925) (liquor seized from automobile incident to arrest of plaintiffs for illegal transportation).

45. *See* Hester v. United States, 265 U.S. 57 (1924).

46. 265 U.S. 57 (1924).

47. *Id.* at 57-58.

48. *Id.* at 59. The cited passage referred to the place requirements for the common-law crime of burglary. *See infra* note 51.

49. 277 U.S. 438 (1928).

50. *Id.* at 466 ("The Fourth Amendment [is not] violated . . . unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure."). The Court also ruled that fourth amendment protections extend only to material items and not to information. *Id.* at 464. This latter interpretation eventually was discredited in Silverman v. United States, 365 U.S. 505 (1961). In *Silverman* the Court reversed a decision that admitted evidence obtained by a listening device inserted into a party wall. Although the ruling was based on a finding of a technical trespass into defendant's home, the Court in dictum expressed its dissatisfaction with the *Olmstead* rule. *Olmstead* was overruled six years later in Katz v. United States, 389 U.S. 347, 351, 353 (1967). *See infra* notes 60-71 and accompanying text.

51. The concept of the "curtilage" originally was used to determine what buildings or areas could be the subject of a common-law burglary. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 96, at 712 (1972). "Curtilage" is defined as the "enclosed space of ground and buildings immediately surrounding a dwelling house." BLACK'S LAW DICTIONARY 346 (5th ed. 1979).

52. The use of common-law property concepts to delimit the fourth amendment has been criticized since its inception. Justice Brandeis argued in dissent that the majority's narrow interpretation of the fourth amendment's language contradicted the intent of the Framers. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting). In his opinion, a more liberal construction was necessary in light of technological advances:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions

precise definition of "open field" was unnecessary: the open fields doctrine of *Hester* applied to any area outside the curtilage. Courts subsequently have determined that wooded areas,[53] deserts,[54] vacant lots in urban areas,[55] beaches,[56] open waters,[57] reservoirs,[58] and fenced land[59] are open fields.

The physical-invasion-of-the-curtilage requirement eventually was abandoned in 1967 in *Katz v. United States*.[60] The FBI had placed a listening device on the outside of a telephone booth to monitor defendant's end of a conversation concerning illegal gambling.[61] Rather than determine whether the phone booth was a "constitutionally protected area," the Court explicitly overruled its own property-based rule of *Omstead*; determination whether a fourth amendment violation has occurred must depend on whether the government intruded on the privacy upon which the defendant has justifiably relied.[62] The crux of the Court's decision was that "the Fourth Amendment protects people, not places."[63]

Katz liberated fourth amendment protections from common-law property concepts. This result, however, was undermined by the Court's failure to formulate a rule for justifiable reliance on privacy.[64] In his concurrence Justice Harlan recognized this flaw and suggested a two-pronged test. "My understanding of the rule that has emerged . . . is that there is a twofold requirement: First, that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one which society is prepared to recognize as 'reasonable.' "[65] The Supreme Court subsequently has employed Harlan's two-pronged test in search and seizure cases.[66] The test, however, has proved troub-

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and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.

Id. at 472-73.

Justice Brandeis argued that the protection of the individual's privacy against unreasonable government intrusion was the goal of the fourth amendment, noting, "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping." *Id.* at 476.

53. Bedell v. State, 257 Ark. 895, 521 S.W.2d 200 (1975); Cornman v. State, 156 Ind. App. 112, 294 N.E.2d 812 (1973).

54. State v. Caldwell, 20 Ariz. App. 331, 512 P.2d 863 (1973).

55. State v. Stavricos, 506 S.W.2d 51 (Mo. App. 1974); State v. Aragon, 89 N.M. 91, 547 P.2d 574 (1976).

56. Anderson v. State, 133 Ga. App. 45, 46, 209 S.E.2d 665, 666 (1974).

57. Nathanson v. State, 554 P.2d 456, 459 (Alaska 1976).

58. State v. Borchard, 24 Ohio App. 2d 95, 99, 264 N.E.2d 646, 648-49 (1970).

59. *See* Janney v. United States, 206 F.2d 601, 604 (4th Cir. 1953); *see also* Stark v. United States, 44 F.2d 946, 948 (8th Cir. 1930) (open fields doctrine invoked to justify warrantless search of a fenced-in cave).

60. 389 U.S. 347, 351-53 (1967).

61. *Id.* at 348.

62. *Id.* at 351-53.

63. *Id.* at 351. Applying this new test, the Court held that evidence obtained by this type of electronic eavesdropping was inadmissible.

64. *Katz* merely stated that defendant had a privacy interest on which he had "justifiably relied." *Id.* at 353. The rule was not denoted as the "reasonable expectation of privacy" standard until Terry v. Ohio, 392 U.S. 1, 9 (1968).

65. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

66. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 143 & n.12 (1978) (fourth amendment protections

lesome, especially the second prong of the test. Even Justice Harlan, dissenting in *United States v. White*,[67] stated that an assessment of a socially reasonable expectation of privacy should be based on a variety of factors.[68] He asserted that the nature of the government intrusion and its probable impact on the individual's sense of security must be weighed against the usefulness of the intrusion for effective law enforcement.[69] Thus, there should be a balancing of the public's interest in effective law enforcement and the public's interest in freedom from government intrusion.[70] The Court adopted Harlan's balancing test in *Delaware v. Prouse*.[71]

Oliver ended great confusion among the state and federal courts over the post-*Katz* status of the open fields doctrine. *Katz*'s repudiation of a property basis for fourth amendment protection rendered the viability of the open fields doctrine at least questionable. Even though the Supreme Court had not overruled *Hester* explicitly—as it had overruled *Olmstead*—*Katz* cast considerable doubt on the existence of an independent open fields rule. The *Katz* Court stated bluntly that "the Fourth Amendment protects people, not places."[72] It also reasoned that, "[W]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[73] Since the open fields doctrine dealt by definition with places, the relevance of the doctrine was left unclear. The *Katz* opinion raised by implication the possibility of a reasonable expectation of privacy in an open field.

Prior to *Oliver*, the Court did little to resolve this ambiguity; it decided only one open fields case between 1924 and 1984. In *Air Pollution Variance Board v.*

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depend not on property rights but on a "legitimate expectation of privacy in the invaded place"); United States v. Chadwick, 433 U.S. 1, 7 (1977) (Individuals are protected against government intrusions into "legitimate expectations of privacy."); Terry v. Ohio, 392 U.S. 1, 9 (1968) (Individuals are entitled to a "reasonable expectation of privacy.").

The Court's initial explanation of the new fourth amendment standard was vague. The need to rely on a test developed in a concurring opinion, however, is not necessarily reprehensible. Professor Amsterdam offered this explanation:

> The Supreme Court ordinarily must decide the case before it. It must do so even though it is not prepared to announce the new principle in terms of comparable generality with the old, still less to say how much the old must be displaced and whether or how the old and new can be accommodated. If the Court declines to give birth to the new principle, it will never acquire the experience or the insight to answer these latter questions. If it attempts to answer them at the moment of the new principle's birth, it is not likely to answer them wisely. Clarity and consistency are desirable, certainly, to the extent that they can be achieved. But the temptation to achieve them by ignoring the complex and the unpredictable quality of real problems is fortunately less beguiling to Justices perennially faced with responsibility for solving those problems than to the Justice's academic critics.

Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 352 (1974).

67. 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

68. *See id.* at 786.

69. *Id.*

70. *See id.*

71. 440 U.S. 648, 654 (1979).

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

73. *Id.* at 351-52.

Western Alfalfa Corp.,[74] the Court dealt with a warrantless entry onto factory grounds by state inspectors to conduct an opacity test of smoke emissions.[75] The Court relied on *Hester* to find that no fourth amendment violation had occurred, reasoning that the inspectors only had observed what was observable by the general public on lands from which the public was not excluded.[76] The Court, however, did not comment on what the result would have been had the inspectors entered land from which the public had been excluded, nor did it refer to *Katz*. The case did little to clarify the open fields doctrine beyond implying that a trespass alone would be insufficient to make an intrusion an illegal search;[77] it did, however, leave open the possibility that *Katz* would require a warrant for searches when the public was excluded from a given area and when activity was not publicly visible.

Since the Supreme Court had given no concrete guidance on the application of the open fields doctrine, the state and lower federal courts were left to fashion their own interpretations. Three positions emerged.[78] One held that the open fields doctrine had no meaning separate from *Katz*—that open field searches must be judged under a reasonable-expectation-of-privacy standard.[79] A second view was that *Hester* remained valid because there was per se no reasonable expectation of privacy in an open field.[80] Last, a few courts held that *Hester* was unaffected by *Katz*.[81]

An apparent majority of courts adhered to the first position.[82] The courts

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74. 416 U.S. 861 (1974).

75. *Id.* at 862-63.

76. *Id.* at 865.

77. Note, *How Open are the Open Fields?* United States v. Oliver, 14 U. TOL. L. REV. 133, 146-47 (1982).

78. *See generally* Note, Florida v. Brady: *Can Katz Survive in Open Fields?*, 32 AM. U.L. REV. 921, 930-33 (1983) (articulating two positions: open fields doctrine seen as "independent from and unaffected by *Katz*" and open field searches' validity determined under *Katz*) [hereinafter referred to as Note, *Can* Katz *Survive?*]; Note, *supra* note 77, at 145-46 (presenting three views of the open fields doctrine: still "substantially intact," without "any meaning independent of a *Katz*-type analysis," and "no longer valid fourth amendment law").

79. Note, *Can* Katz *Survive?*, *supra* note 78, at 930.

80. *Id.*

81. *Id.* at 931-32.

82. *See, e.g.*, United States v. Lace, 669 F.2d 46 (2d Cir.) (no "legitimate expectation of privacy" in private land clearly visible from public road and easily observable by outsiders who could enter property at will), *cert. denied*, 103 S. Ct. 121 (1982); Patterson v. National Transp. Safety Bd., 638 F.2d 144 (10th Cir. 1980) (visual observation of aircraft parked in open area adjacent to runway within "open fields" exception to fourth amendment); United States v. Ramapuram, 632 F.2d 1149 (4th Cir. 1980) (no "reasonable expectation of privacy" in unlocked trunk of "junker" car in open area on farm leased by appellant's family to others), *cert. denied*, 450 U.S. 1030 (1981); United States v. Miller, 589 F.2d 1117 (1st Cir. 1978) (no "reasonable expectation of privacy" in tarpaulin-covered property plainly visible from private road inside unfenced, unposted area), *cert. denied*, 440 U.S. 958 (1979); United States v. Williams, 581 F.2d 451 (5th Cir. 1978) (no "reasonable expectation of privacy" in area outside and beyond curtilage, the outer limits of which are defined as walls of remote outbuildings), *cert. denied*, 440 U.S. 972 (1979); People v. Bradley, 1 Cal. 3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969) (en banc) (no "reasonable expectation of privacy" when marijuana plant in plain sight within 20 feet of defendant's home, to which access was not restricted); People v. McClaugherty, 193 Colo. 360, 566 P.2d 361 (1977) (no "reasonable expectation of privacy" in leased pasture land accessible to ranch employees or in flatbed truck parked on private property but in plain view of public); Norman v. State, 379 So. 2d 643 (Fla. 1980) ("legitimate expectation of privacy" in tobacco barn on farm to which access was restricted by fence and locked gate); State v.

reasoned that after *Katz*, fourth amendment analysis must focus on the privacy and security of the individual against arbitrary invasion by government officials. A per se open fields rule, as embodied in *Hester*, would be inconsistent with the scope of fourth amendment protection as defined by *Katz*.

Some courts adopted the second position, that *Hester* survived as a per se rule. They concluded that privacy in an open field is not an interest which society is prepared to recognize as reasonable.[83] Such claims of privacy, therefore, failed the second part of the two-pronged test established by *Katz* and its progeny.

One court—the United States Court of Appeals for the Sixth Circuit—held that *Hester* was unaffected by *Katz*.[84] It relied on three arguments. First, it noted that both the majority opinion[85] and Harlan's concurrence[86] in *Katz* re-

Bakker, 262 N.W.2d 538 (Iowa 1978) (no "reasonable expectation of privacy" when possessory interest in land was insufficient to deprive property owners of authority to grant consent to search); State v. Byers, 359 So. 2d 84 (La. 1978) ("legitimate expectation of privacy" in property not visible from public road where access road was posted as private); State v. Charvat, 175 Mont. 267, 573 P.2d 660 (1978) (no "reasonable expectation of privacy" in property clearly visible from defendant's abandoned home to which access was not restricted by locked gates or "no trespassing" signs); State v. Cemper, 209 Neb. 376, 307 N.W.2d 820 (1981) (no "legitimate expectation of privacy" in open field in which defendant had no personal ownership or possessory rights); State v. Hanson, 113 N.H. 689, 313 A.2d 730 (1973) (no "reasonable expectation of privacy" in garden and field not within curtilage and not in close proximity to dwelling); State v. Chort, 91 N.M. 584, 577 P.2d 892 (Ct. App. 1978) ("reasonable expectation of privacy" in garden shielded from public view by fence); State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977) (no "reasonable expectation of privacy" in tractor parked in open-air lean-to shed and clearly visible from adjacent public property); State v. Walle, 52 Or. App. 963, 630 P.2d 377 (1981) ("reasonable expectation of privacy" in rural property protected by fence and creek even though in plain view of adjacent private property); State v. Lakin, 588 S.W.2d 544 (Tenn. 1979) ("reasonable expectation of privacy" in occupied, fenced, private property over one-half mile from public road); State v. Weigand, 289 S.E.2d 508 (W. Va. 1982) (no "reasonable expectation of privacy" in open field visible from public road); *see also* Note, *Can* Katz *Survive?*, *supra* note 78, at 930-31 (noting that the majority of courts had treated open fields searches as *Katz* problems).

83. *See, e.g.*, United States v. Long, 674 F.2d 848 (11th Cir. 1982) (convictions for marijuana importation upheld when no legitimate expectation of privacy existed in open barn); United States v. Freie, 545 F.2d 1217 (9th Cir. 1976) (no objectively reasonable expectation of privacy prohibited seizure of marijuana hidden near airport parking lot), *cert. denied*, 430 U.S. 966 (1977); Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974) (seizure of bullets matching those from murder weapon did not violate defendant's unreasonable expectation of privacy); United States v. Brown, 487 F.2d 208 (4th Cir. 1973) ("reasonable expectation of privacy" does not extend to open fields surrounding barns), *cert. denied*, 416 U.S. 909 (1974); DeMontmorency v. State, 401 So. 2d 858 (Fla. App. 1981) (defendant had no "reasonable expectation of privacy" to protect marijuana grown in fenced yard outside the curtilage of defendant's home); Giddens v. State, 156 Ga. App. 258, 274 S.E.2d 595 (1980) (no "reasonable expectation of privacy" exists in storage building in field surrounded by barbed-wire fence), *cert. denied*, 450 U.S. 1026 (1981).

84. United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc), *aff'd*, 104 S. Ct. 1735 (1984); *see also* Ford v. State, 264 Ark. 141, 569 S.W.2d 105 (1978) (warrantless search of rural field in which marijuana was grown upheld as reasonable), *cert. denied*, 441 U.S. 947 (1979); Commonwealth v. Janek, 363 A.2d 1299, 1300 (Pa. Super. 1976) (seizure of evidence from field upheld despite seclusion of area and posted warnings against trespassing). The *Oliver* court of appeals, however, phrased its conclusion in terms of the reasonable expectation of privacy: "[W]e conclude that under *Hester* and *Katz* any expectation of privacy that an owner might have with respect to his open field is not, *as a matter of law*, an expectation that society is prepared to recognize as reasonable." *Oliver*, 686 F.2d at 360.

85. Katz v. United States, 389 U.S. 347, 351 n.8 (1967) ("It appears to be common ground that a private home is [a protected area] but that an open field is not. Hester v. United States, 265 U.S. 57.").

86. *Id.* at 360 (Harlan, J., concurring) ("[A]n enclosed telephone booth is an area where, like a

ferred to *Hester* and the proposition that an open field is beyond the purview of the fourth amendment.[87] Second, it noted that the Supreme Court had mentioned the open fields doctrine after *Katz*[88] and had not overruled it as a per se rule.[89] Last the court averred that *Katz* merely applied the fourth amendment to a situation that the Framers could not have foreseen—conversation by telephone—without affecting established doctrines.[90]

Oliver preserved the open fields doctrine as a per se exception to the fourth amendment. The Supreme Court adopted the second argument as one justification for reaffirming *Hester*. Applying the second prong of Harlan's test for reasonable expectation of privacy, the Court determined that privacy in an open field was not an interest that society was prepared to recognize as reasonable. It reasoned that the nature of an open field and the activities carried on there do not demand a high level of privacy;[91] likewise, the historical distinction between the house, including the curtilage, and outlying lands implied a low expectation of privacy.[92] Thus, the Court was able to reach a desired result—a per se open fields exception—while adhering to the rule of precedent.[93]

A quest for harmony within the rule of stare decisis, however, is not the essence of *Oliver*. The Court is less interested in rationalizing its rulings than in setting judicial policy in law enforcement.[94] *Oliver*'s bright-line rule excluding open fields from the fourth amendment's ambit reflects two fundamental viewpoints of the current Court: that the exclusionary rule should be restricted and that law enforcement is promoted by simple, easily applied rules.

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home . . . and unlike a field, Hester v. United States, . . . a person has a constitutionally protected reasonable expectation of privacy.").

87. United States v. Oliver, 686 F.2d 356, 359 (6th Cir. 1982) (en banc), *aff'd*, 104 S. Ct. 1735 (1984); Note, *supra* note 78, at 932.

88. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978) (property interest may not be sufficient to establish a legitimate expectation of privacy in activity on the premises); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352 (1977) (open fields doctrine supports constitutionality of seizing automobiles in public areas); United States v. Santana, 427 U.S. 38, 42 (1976) (exposing oneself to public view on doorstep of house analogized to lack of expectation of privacy when one is completely outside one's house); *Air Pollution Variance Board*, 416 U.S. at 865 (when smoke emission testing conducted completely outside defendant's plant, fourth amendment not violated).

89. United States v. Oliver, 686 F.2d 356, 360 (6th Cir. 1982) (en banc), *aff'd*, 104 S. Ct. 1735 (1984).

90. *Id.* at 359.

91. *Oliver*, 104 S. Ct. at 1741. The court noted:

> open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office or a commercial structure would not be. It is not generally true that fences or no trespassing signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air. For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."

Id.

92. *Id.* at 1742.

93. *But cf. id.* at 1744 (White, J., concurring) (contending that *Katz* analysis unnecessary in open fields cases).

94. *Id.* at 1744.

There is little question that the Supreme Court is disenchanted with the exclusionary rule and has attempted to limit its force.[95] Criticism of the exclusionary rule began in the early 1970s. Justice Harlan, concurring in *Coolidge v. New Hampshire*,[96] noted that the deterrent effect of the rule in illegal searches and seizures had not been proved.[97] In *Coolidge*, Justice Black also stated his view that the exclusionary rule is simply a judge-made rule and therefore is not mandated by the fourth amendment.[98] Perhaps the bluntest statement, however, was that of Chief Justice Burger: "[The *Coolidge*] case illustrates the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves."[99]

Since the early 1970s the Court has fashioned a number of exceptions to the exclusionary rule. Illegally obtained evidence may be used before a grand jury[100] or to impeach a witness' testimony at trial.[101] Evidence obtained in violation of a third party's rights also may be used.[102] Recently, the Court has ruled that certain evidence which otherwise would have been discovered by legal means is admissible,[103] and that the exclusionary rule should not apply when a police officer, acting in good faith, discovers evidence pursuant to a warrant later found to be invalid.[104] By upholding a per se open fields rule, however, the court did not create another exception to the exclusionary rule. Instead, the Court eliminated the possibility of exclusion altogether by removing open fields from the fourth amendment's scope. The Court did not denounce the exclusionary rule explicitly; its attitude, however, can be inferred from the analytically unnecessary phrase: "Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity . . . ."[105]

Equally evident—and explicit—in *Oliver* is an attempt to assist law enforcement officials by an easily understood and easily applied bright-line rule. Justice Powell stated:

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95. *See generally* S. SCHLESINGER, EXCLUSIONARY INJUSTICE (1977) (calling for nullification of the exclusionary rule and predicting that the Supreme Court would do so); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621 (noting that the Supreme Court has chipped away at the exclusionary rule, but has not abandoned it); Miles, *Decline of the Fourth Amendment: Time to Overrule* Mapp v. Ohio, 27 CATH. U.L. REV. 9 (1977) (listing recent limitations on fourth amendment protections); Wilson, *The Origin and Development of the Federal Rule of Exclusion*, 18 WAKE FOREST L. REV. 1073 (1982) (discussing the evolution of the exclusionary rule); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 4, 177-85 (1983) (discussing recent developments in the exclusionary rule).

96. 403 U.S. 443, 491 (1971).

97. *Coolidge*, 403 U.S. at 491 (Harlan, J., concurring) (citing Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970)). In *Coolidge* defendant was convicted of the murder of a 14 year-old girl. The conviction was reversed because evidence central to the case had been discovered pursuant to an invalid warrant. *Id.* at 490.

98. *Id.* at 498-99 (Black, J., concurring in judgment).

99. *Id.* at 493 (Burger, C.J., concurring in judgment).

100. United States v. Calandra, 414 U.S. 338 (1974).

101. United States v. Havens, 446 U.S. 620, 628 (1980).

102. *See* United States v. Salvucci, 448 U.S. 83 (1980); United States v. Payner, 447 U.S. 727, 731 (1980).

103. Nix v. Williams, 104 S. Ct. 2501, 2511 (1984) (evidence obtained in violation of sixth amendment right to counsel admissible if it would have been discovered by lawful means).

104. Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984).

105. *Oliver*, 104 S. Ct. at 1743 n.13.

> Nor would a case-by-case approach [to reasonable expectation of privacy] provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment . . . . This Court repeatedly has acknowledged the difficulties created for courts, police and citizens by an *ad hoc*, case-by-case definition of Fourth Amendment standards to be applied in differing circumstances.[106]

The per se approach to open field searches arguably would promote expediency in law enforcement by providing clear guidance to police officers and courts regarding what actions are constitutional. The rule in *Oliver* also may assist police " 'in the prompt and efficient completion of the task at hand' "[107] by avoiding the need to secure a warrant—and derivatively, the need to establish probable cause.

Justice Marshall argued in dissent that a per se open fields rule in turn would subject police officers to difficult spot judgments on how far the curtilage extends from the home.[108] Although there is some cogence to this observation, it is equally likely that the administrative advantages of the *Oliver* rule, which exempts millions of acres of open fields from the fourth amendment, will outweigh any problems created. Moreover, judgments about the extent of the curtilage will be easier than those concerning what is a "reasonable expectation of privacy." The presence of a nearby home or office is a physical reminder to law enforcement officials that a fourth amendment issue may arise and that a warrant should be obtained when the extent of the curtilage is uncertain. A reasonable expectation of privacy, however, is an abstract and difficult concept that may not be appreciated in the course of a search.

It is difficult to find fault with the result in *Oliver* in light of the post-*Katz* decisions. Permitting warrantless searches of fields inevitably entails the possibility of abuse by the police. The law, however, should not turn on the mere existence of a threat to privacy. Fourth amendment analysis now focuses on the reasonableness of a law enforcement practice "by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate government interests."[109] *Oliver* dealt with the enforcement of narcotics laws, an area in which the government's interests in searching out illegal marijuana plants in open fields is substantial, if not indisputable. The cultivation of marijuana naturally is dependent on the availability of remote and secluded tracts of land. To combat the growth of marijuana, government agents must be able to search these areas. Statistics on the cultivation of marijuana reinforce the government's interest in this area: Marijuana is the fourth largest cash crop in the United States behind corn, soybeans, and wheat.[110] In 1981 the marijuana crop

106. *Id.* at 1742-43.

107. Note, *Katz in the Open Fields*, 20 AM. CRIM. L. REV. 485, 502 (1983) (quoting United States v. Ross, 102 S. Ct. 2157, 2171 (1982)).

108. *Oliver*, 104 S. Ct. at 1750 (Marshall, J., dissenting).

109. Delaware v. Prouse, 440 U.S. 648, 654 (1979).

110. *Grass was Never Greener*, TIME, Aug. 9, 1982, at 15.

had a street value of eight and one-half billion dollars.[111] It would be a mistake, however, to believe that the government's interest in open field searches is limited to discovering marijuana cultivation. Instead, its interest is coextensive with a wide range of evidence of criminal activity that can be found in the open fields.[112]

The power to conduct open field searches facilitates the realization of an important government objective. In this narrow context, the Court's decision that no reasonable expectation of privacy can exist as a matter of law is justifiable. First, the privacy interest in a field, even one that is fenced and marked with "no trespassing" signs, is not even remotely comparable to that involved in the search of a home or office. Personal activites customarily are carried on in the home. The same cannot be said of a field. Second, the disruptive effects of an open field search are minimal. Even when no evidence is discovered, the effects on individual privacy generally are inconsequential.[113] A search of a house based on mistaken suspicions, however, would constitute a severe disruption of an area that normally is reserved for private affairs.[114] For this reason, the fourth amendment's requirement of a warrant based on probable cause is necessary to protect the inherent privacy interest in a home. When the reduced expectation of privacy in an open field is balanced against the government's need to enforce its laws, it is reasonable to conclude that the protections of the fourth amendment warrant clause are unnecessary. Last, it would be anomalous for the Court to require a warrant for open fields when it permits warrantless searches of automobiles on the basis of a reduced expectation of privacy.[115] The likelihood that a person will have personal effects which he desires to keep private in a car are much greater than the possibility of his keeping the same personal effects in an open field.

By balancing the government's need to enforce its laws against a tenuous privacy interest in open fields, the Supreme Court preserved the open fields doctrine of *Hester* within the analytical framework of *Katz*. Had the analysis stopped there, *Oliver* might have been viewed simply as a conservative, pro-law enforcement interpretation of the fourth amendment. The Court, however, offered a second and independent justification for its decision: The exclusion of

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111. *Id.*; *see also The Marijuana Wars*, NEWSWEEK, Aug. 29, 1983, at 22 (estimates of the size of the American marijuana crop).

112. The brief for the United States mentioned these possibilities:

> Suppose, for instance, that the police receive an anonymous tip that a kidnap victim is being held in the woods inside posted and fenced private property or that a cache of automatic weapons is hidden in a wheat field on a large, fenced farm. Or suppose that an EPA inspector receives information that hazardous chemicals are being illegally dumped near a stream running through such property.

Brief for the United States at 31, *Oliver*. Stolen property, dead bodies, and murder weapons can be added to this incomplete list.

113. The United States offered this analysis in its brief: "the police will observe nothing but a field and perhaps some cornstalks, or cows; an individual is highly unlikely to keep exposed in an open field effects that he wishes to keep private." *Id.* at 34-35. When unjustified intrusions occur, the victim retains a cause of action for damages. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971).

114. Brief for the United States at 30-35, *Oliver*.

115. *See* J. HALL, *supra* note 27, § 9:8; 2 W. LAFAVE, *supra* note 26, § 7.2(a).

open fields from the fourth amendment's protection is based on the express language of the amendment. The Court virtually reiterated Justice Holmes' reasoning in *Hester* that an open field is embraced neither by the term "houses" nor the term "effects" in the fourth amendment.[116]

To justify its apparent retreat from *Katz*'s reasonable-expectation-of-privacy rule, the Court noted:

> This Court frequently has relied on the explicit language of the Fourth Amendment as delineating the scope of its affirmative protections. See, e.g., *Robbins v. California* . . .; *Payton v. New York* . . .; *Alderman v. United States*.
>
> As these cases, decided after *Katz*, indicate, *Katz*'s "reasonable expectation of privacy" standard did not sever Fourth Amendment doctrine from the Amendment's language. *Katz* itself construed the Amendment's protection of the person against unreasonable searches to encompass electronic eavesdropping of telephone conversations sought to be kept private; and *Katz*'s fundamental recognition that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures," . . . is faithful to the Amendment's language. As *Katz* demonstrates, the Court fairly may respect the constraints of the Constitution's language without wedding itself to a [sic] unreasoning literalism . . . .[117]

The Court's reliance on the express language of the fourth amendment is perplexing. A plain-language reading of the amendment was unnecessary; the same result was possible, and indeed realized, by a reasonable-expectation-of-privacy analysis. Furthermore, an assertion that the fourth amendment's protections are limited by its express language contradicts *Katz* and subsequent cases. In *Smith v. Maryland*[118] the Court stated: "Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action . . . ."[119] Earlier, in *Chadwick v. United States*,[120] the Court had observed: "We do not agree that the Warrant Clause protects only dwellings and other specifically designated locales. As we have noted before, the Fourth Amendment 'protects people, not places,' . . .; more particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy."[121]

The cases cited by the majority also do not support a contention that the Court has relied on the express language of the fourth amendment to *limit* the scope of its protections. In *Robbins v. California*,[122] the Court had ruled that a

116. *Oliver*, 104 S. Ct. at 1740.
117. *Id.* at 1740 n.6.
118. 442 U.S. 735 (1979).
119. *Id.* at 740.
120. 433 U.S. 1 (1977).
121. *Id.* at 7.
122. 453 U.S. 420 (1981).

driver had an expectation of privacy in a wrapped package of marijuana found in a trunk.[123] In *Payton v. New York*,[124] the Court had overruled a New York statute that allowed police officers to enter private residences to make routine felony arrests. The Court referred to the amendment's language to demonstrate that the prohibition against warrantless searches and seizures applied to arrests in the home as well as searches.[125] The Court, therefore, used the language of the amendment to equate the protection against seizures with that against searches; it did not rely on the language to limit the scope of protection itself. Finally, *Alderman v. United States*,[126] had been decided only two years after *Katz* and long before the reasonable-expectation-of-privacy rule had been elaborated by the Court. None of the cases indicate that the *Katz* reasonable-expectation-of-privacy rule is inappropriate.

If a plain language reading of the fourth amendment is unnecessary and inappropriate to the result in *Oliver*, why did the Court offer it as an alternative justification for the open fields doctrine? Justice Marshall suggested that:

> Sensitive to the weakness of its argument that the "persons and things" mentioned in the Fourth Amendment exhaust the coverage of the provision, the Court goes on to analyze at length the privacy interests that might legitimately be asserted in "open fields." The inclusion of Parts III and IV in the opinion, [—the expectation of privacy analysis—] coupled with the Court's reaffirmation of *Katz* and progeny . . . strongly suggest that the plain-language theory sketched in Part II of the Court's opinion will have little or no effect on our future decisions in this area.[127]

Perhaps this will hold true. On the other hand, *Oliver*'s literal reading of the fourth amendment may suggest a fundamental dissatisfaction with the expanded fourth amendment protections required by *Katz*. This sentiment may be implicit in the Court's assertion that "the rule [of *Hester*] is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Founders that *certain enclaves* should be free from arbitrary government interference."[128] Indeed, if interpreted from this perspective, the Court's footnote can be read as an assertion that *Katz* simply defined electronic surveillance as an unreasonable intrusion against the "person"—an interpretation consistent with a literal reading of the fourth amendment—and thus was not intended to extend fourth amendment protections further than its language implied.

If this is the sentiment of the Court, it must realize that the *Katz* balancing test is too well entrenched to be simply overruled. Any retreat from *Katz* must

123. The Court referred to the language of the fourth amendment to hold that there was no distinction between a "personal" and an "impersonal" effect for the purpose of protection. The *Robbins* decision, however, turned on the reasonable expectation of privacy that defendant had in a closed container. *Id.* at 426-29.

124. 445 U.S. 573 (1980).

125. *Id.* at 585-90.

126. 394 U.S. 165 (1969).

127. *Oliver*, 104 S. Ct. at 1746 n.7 (Marshall, J., dissenting).

128. *Id.* at 1741 (emphasis added).

be slow and deliberate, much like the current trend against the exclusionary rule. The Court's immediate objective, however, has been attained: the powers of law enforcement have been strengthened by the exclusion of open fields from the protection of the fourth amendment.

Oliver resolved the open fields question. Fourth amendment protections do not apply to open fields. *Oliver*, however, has planted the seeds of controversy. Fourth amendment law is forged from the tension between each citizen's desire to be free of governmental intrusion upon his privacy and society's need to enforce its laws. The Court's rulings ideally will preserve at least those privacy interests necessary to maintain individual freedom. By finding that privacy in the open fields is not an interest that society recognizes as reasonable, the Court has decided that such privacy is not essential to the maintenance of a free society; that the benefits of privacy in the open fields are so marginal that they should yield to society's need for effective law enforcement. That much is settled. The Court also may have initiated a fundamental change in fourth amendment jurisprudence. By offering alternative justifications for its ruling, the Court may have signaled the eventual decline of the reasonable-expectation-of-privacy rule in favor of a plain-language theory of the fourth amendment.

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