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Brian K. Jorgensen

Closing the "Open Fields" Question: *Oliver v. United States*

Oliver v. United States[1] is one of several recent United States Supreme Court cases limiting application of rules excluding evidence seized in violation of the fourth amendment.[2] In *Oliver* the Court considered the validity of the open fields doctrine as articulated sixty years earlier in *Hester v. United States.*[3] Under *Hester* property outside the curtilage is not protected from warrantless searches. However, the Court's subsequent decision in *Katz v. United States*[4] shifted the focus of fourth amendment analysis from the type of location searched to the privacy expectation in the searched area. *Oliver* upheld the open fields doctrine after deciding that open fields are not protected by either the literal language of the fourth amendment or the *Katz* expectation of privacy test.

I. The *Oliver* Case

In *Oliver v. United States*[5] the Supreme Court consolidated two cases raising similar questions about the vitality and limits of the open fields doctrine, *United States v. Oliver*[6] and *State v. Thornton.*[7]

A. United States v. Oliver

In July 1980, Kentucky State Police received an anonymous tip that Oliver was growing marijuana on his farm. In response to the tip, two narcotics agents drove to the farm to investigate.

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

2. *E.g.*, United States v. Leon, 104 S. Ct. 3405 (1984) (exclusionary rule should not bar evidence obtained by officers acting in reasonable reliance on a search warrant that is ultimately found to be invalid); New York v. Quarles, 104 S. Ct. 2626 (1984) ("public safety" exception to requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence); Nix v. Williams, 104 S. Ct. 2501 (1984) (evidence seized in violation of the Constitution not excluded if it inevitably would have been discovered notwithstanding the violation).

3. 265 U.S. 57 (1924).

4. 389 U.S. 347 (1967).

5. 104 S. Ct. 1735 (1984).

6. 686 F.2d 356 (6th Cir. 1982).

7. 453 A.2d 489 (Me. 1982).

After reaching the farm, the officers drove along a private road posted with a number of "No Trespassing" signs until they came to a locked gate barring the road. The officers left their cars and walked around the gate. Eventually the officers came to a marijuana field located nearly one-and-a-half miles from Oliver's farmhouse.[8] The field was highly secluded and not visible from any point outside of Oliver's property.[9]

Oliver was arrested and charged with manufacturing a controlled substance. The district court supressed evidence relating to the marijuana discovery, concluding that Oliver's expectation of privacy demanded a search warrant.[10] The Sixth Circuit reversed, holding that the expectation of privacy test does not apply to open fields, and that even if it did apply, there is no privacy expectation in an open marijuana field.[11] A lengthy dissent argued that while open fields are generally not protected by the fourth amendment, landowners can create a protected privacy interest by taking steps to exclude the public.[12]

B. State v. Thornton

In *State v. Thornton*[13] an informant told the police he had spotted marijuana plants growing near Thornton's residence. Two officers visited the site and, after walking past a stone wall and several "No Trespassing" signs, found two fenced patches of marijuana.[14]

The trial court granted a motion to suppress discovery of the marijuana. Citing *Katz*, the court held that the open fields doctrine did not apply because Thornton had shown a reasonable expectation of privacy in the property.[15]

The Supreme Court of Maine affirmed the trial court's decision, reasoning that two factors were important in determining whether the open fields doctrine applied: the openness with

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8. United States v. Oliver, 686 F.2d 356, 362 (6th Cir. 1982) (Keith, J., dissenting).

9. *Id.* at 362-63 (Keith, J., dissenting).

10. *Id.* at 358.

11. *Id.* at 359-60. The Sixth Circuit expressed the opinion that the expectation of privacy test applies only to areas of law that could not have been contemplated by the drafters of the fourth amendment. The open fields doctrine was already well established when the Constitution was drafted. *Id.* (citing Hester v. United States, 265 U.S. 57 (1924)).

12. *Id.* at 371-72 (Keith, J., dissenting).

13. 453 A.2d 489 (Me. 1982).

14. *Id.* at 490-91.

15. *See id.* at 493.

which the activity was pursued and the lawfulness of the officer's presence on the property. The court found that the open fields doctrine did not apply because Thornton's efforts to conceal his activities established a reasonable expectation of privacy in the field. The court also noted that the officers were never legitimately on Thornton's property because they did not have a warrant.[16]

II. Analysis

The Supreme Court's decision to admit the evidence against Oliver and Thornton reaffirmed the doctrine that open fields are not protected under the fourth amendment.

A. Background

The open fields doctrine was first articulated in *Hester v. United States*.[17] In *Hester* two concealed officers watched as Hester left his father's house with a bottle of bootleg whiskey. When Hester saw the officers he dropped the bottle and the officers seized it as evidence.[18] Hester urged that the evidence be suppressed because the officers were unlawfully present on private property. The Supreme Court refused to suppress the evidence and held that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between [open fields] and the house is as old as the common law."[19]

Hester has been relied on as the exemplar of open fields cases.[20] However, the extent of its impact on fourth amendment doctrine is obscure because the opinion does not disclose whether the officers were within the curtilage of the house, whether the property was fenced, or whether the property was visible to the public. Thus, although *Hester* held that open fields

16. *Id.* at 495-96.
17. 265 U.S. 57 (1924).
18. *Id.* at 58-59.
19. *Id.* at 59.
20. *See* United States v. Knotts, 460 U.S. 276, 282 (1983); Donovan v. Dewey, 452 U.S. 594, 609 (1981) (Rehnquist, J., concurring); Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352 (1976); United States v. Santana, 427 U.S. 38, 42 (1975); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 393 (1971).

are not protected by the fourth amendment, it did not precisely define "open fields."

The definition of open fields was clarified in *Olmstead v. United States*[21] in which the Supreme Court considered whether tapping telephone lines violates the fourth amendment. The Court, citing *Hester*, held that fourth amendment rights are not violated "unless there has been . . . an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure."[22] Although *Olmstead* was subsequently overruled by *Katz v. United States*,[23] courts have consistently accepted *Olmstead*'s proposition that *Hester*'s open fields include all property outside the curtilage.[24]

The Supreme Court's decision in *Katz v. United States*[25] raised some question as to the continued vitality of the open fields doctrine. The issue in *Katz* was whether the fourth amendment prohibits installing a device on the outside of a telephone booth to record conversations within the booth. The Court concluded that "the Fourth Amendment protects people, not places"[26] and held that Katz had a protectable privacy interest in his telephone conversation.[27]

B. The Supreme Court's Two Step Analysis in Oliver

In *Oliver* the Supreme Court rejected the argument that *Katz* had affected the open fields doctrine. First, the Court adopted a literal reading of the fourth amendment and held that an open field is not included within the meaning of "persons, houses, papers, and effects."[28] The Court noted that a proposed draft of the fourth amendment included specific protection of "property" but the final draft replaced "property" with the less inclusive "effects."[29] This evidence led the Court to conclude

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21. 277 U.S. 438 (1928).

22. *Id.* at 466.

23. 389 U.S. 347, 353 (1967).

24. *E.g.*, United States v. Long, 674 F.2d 848, 852-53 (11th Cir. 1982); United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979); United States v. Brown, 487 F.2d 208, 210 (4th Cir. 1973), *cert. denied*, 416 U.S. 900 (1974); United States v. Molkenbur, 430 F.2d 563, 566 (8th Cir.), *cert. denied*, 400 U.S. 952 (1970); United States v. Whitmore, 345 F.2d 28, 29 (6th Cir. 1965) (per curiam), *cert. denied sub nom.* Anderson v. United States, 382 U.S. 991 (1966).

25. 389 U.S. 347 (1967).

26. *Id.* at 351.

27. *Id.* at 359.

28. Oliver v. United States, 104 S. Ct. 1735, 1740 (1984).

29. *Id.*

that open fields are not protected by the fourth amendment. Second, the Court found no reasonable expectation of privacy. Therefore, open fields were not protected under *Katz*.[30]

Initially, this second point seems to contradict the Court's literal reading of the fourth amendment. According to *Katz*, the focus of fourth amendment protection has shifted from "constitutionally protected" areas to individual privacy.[31] Therefore, the argument that open fields are not protected because they are not specifically enumerated in the fourth amendment seems outdated. However, the Court's logic is clear and persuasive if the two grounds for decision are considered as parts of a two-step analysis rather than separate rationale.[32]

If a searched area does not fall within the literal terms of the fourth amendment, then the circumstances of the search must be analyzed under *Katz* to determine whether the searched area otherwise qualifies for protection. *Katz* held that the fourth amendment was intended to protect people, not places. Thus, fourth amendment protection extends to searched areas not specifically enumerated in the Constitution only if people somehow create a reasonable expectation of privacy in those places. Locations such as business offices and phone booths are protected if there is a reasonable expectation of privacy in them.

The Court's literal reading of the fourth amendment is a logical preface to a *Katz* inquiry, rather than an alternate ground for decision. After having determined that open fields do not possess the intimate personal attributes of "houses, papers, and effects," the Court considered whether a reasonable privacy expectation nevertheless existed.

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30. *Id.* at 1741-42. Justice White concurred with the argument upholding the open fields doctrine under the literal interpretation of the fourth amendment, but he did not concur with the *Katz* argument, which he found unnecessary. He expressed the opinion that "[h]owever reasonable a landowner's expectations of privacy may be, those expectations cannot convert a field into a 'house' or an 'effect.'" *Id.* at 1744.

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

32. The Court made little effort to explicitly link its two arguments. Its only attempt is buried at the end of a rather lengthy footnote:

> *Katz*'s "reasonable expectation of privacy" standard did not sever Fourth Amendment doctrine from the Amendment's language. . . . *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 unreasoning literalism.

Oliver v. United States, 104 S. Ct. 1735, 1740 n.6 (1984) (citation omitted).

C. *Reasonable Expectation of Privacy*

In *Katz v. United States* Justice Harlan established a two-fold test for determining whether fourth amendment safeguards are required for any particular search. First, a person must have exhibited an actual (subjective) expectation of privacy. Second, society must recognize the expectation as being "reasonable."[33]

The first prong is easily satisfied by the *Oliver* property owners who exhibited their privacy expectation by building fences, posting "No Trespassing" signs, and planting their marijuana fields so as not to be visible from off the property. The second prong was the controlling question in *Oliver*. "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."[34]

Both the majority and dissent analyzed several factors in determining whether an expectation of privacy in open fields is reasonable. These factors included exclusion of the public, property law concepts, the use to which the fields are put, and the availability of alternative surveillance. After considering these factors the Court concluded that there is no reasonable expectation of privacy in open fields.[35]

1. *Exclusion of the public*

The *Oliver* dissent argued that a legitimate expectation of privacy in open fields arises when attempts have been made to exclude the public by building fences or posting "No Trespassing" signs.[36] This argument assumes that the private activity cannot be viewed from a point off the property where an officer might legitimately stand.[37] Under this view, evidence of marijuana would have been suppressed in *Oliver* and *Thornton*. In both cases the marijuana fields were in the interior of thickly wooded properties and were not visible from outside the prop-

33. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

34. *Oliver*, 104 S. Ct. at 1743 (citation omitted).

35. *Id.* at 1741, 1743-44. For the dissent's analysis of important factors, see *id.* at 1748-50 (Marshall, J., dissenting).

36. *Id.* at 1749-50 (Marshall, J., dissenting).

37. *Id.* at 1744 (Marshall, J., dissenting). Justice Marshall notes that in both cases officers entered posted property and discovered contraband "[a]t a spot that could not be seen from any vantage point accessible to the public." *Id.*

erty. Officers in both cases saw and ignored fences and "No Trespassing" signs.

The dissent's view is supported by language in *Katz* stating that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[38] However, the two cases *Katz* cited for this proposition did not involve open fields. In *Rios v. United States*[39] the Supreme Court held that a man who was concealing a package of narcotics on his person in a public place could not be arrested or searched without the required procedural safeguards. In *Ex Parte Jackson*[40] the Supreme Court reaffirmed the doctrine that letters and sealed packages in the postal system are constitutionally protected from illegal search or seizure.

These cases addressed the constitutionality of searches of persons, papers or effects that, though in a public place, had been sought to be preserved as private. *Katz* did not hold that something sought to be kept private in an area accessible to the public can consist of an entire area intermittently fenced and posted with "No Trespassing" signs. In fact, Justice Harlan stated that "an enclosed telephone booth is an area where, like a home . . . *and unlike a field*, . . . a person has a constitutionally protected reasonable expectation of privacy."[41]

A privacy interest in an open field from which the public has been excluded is also not reasonable from a law enforcement point of view. As the majority in *Oliver* argued, if the open fields

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38. *Katz*, 389 U.S. at 351. Two recent Supreme Court cases also suggested that a field may not be deprived of fourth amendment protection if the public has been excluded. In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the question was whether government OSHA agents could inspect a business for safety violations without a warrant. The Court determined that government agents are in no better position than members of the public and that "[w]hat is observable by the public is observable, without a warrant, by the Government inspector as well." *Id.* at 315. Although the *Marshall* search was of a factory and not a field, some courts have applied to open fields the basic premise that exclusion of the public helps raise a protectable privacy interest. In Air Pollution Variance Bd. v. Western Alfalfa, 416 U.S. 861 (1974), the Court dealt with exclusion of the public in an open fields setting. *Western Alfalfa* decided the constitutionality of a government inspection in the parking lot outside a factory. The Court held that the search did not violate the fourth amendment since the inspection had taken place in open fields from which the public had not been excluded. *Id.* at 865. The Court did suggest that if the inspector had made his inspection on property from which the public had been excluded the search might have been prohibited. However, neither of these cases directly addressed the open fields question.

39. 364 U.S. 253, 260-62 (1960).

40. 96 U.S. 727, 733 (1877).

41. *Katz*, 389 U.S. at 360 (Harlan, J., concurring) (citations omitted) (emphasis added).

doctrine were qualified in the manner suggested by the dissent, police officers would be left with an unclear standard on which to base their conduct. Before entering private open fields, officers would have to determine whether fences were high enough or "No Trespassing" signs plentiful enough to prohibit entry without violating the fourth amendment.[42] The majority provides the officer with the knowledge that his warrantless search is valid if the property is undeveloped and outside the area of the home.

Even without considering the *Katz* language and law enforcement standards, the dissent's proposed formulation of the open fields doctrine is intuitively unreasonable. The dissent would distinguish two identical pieces of property by the presence of a few "No Trespassing" signs. Society would find it unreasonable to grant the posted property greater protection merely because of the owner's minor efforts at excluding the public.

2. Property law

Recent cases have held that local property laws are not dispositive of whether a search or seizure violates the fourth amendment.[43] The rule differed at the time of *Olmstead* when the Court held that a police wiretapping did not violate the fourth amendment because there was no trespass.[44] However, the *Katz* Court found the trespass doctrine greatly eroded by subsequent decisions and concluded that "[t]he premise that property interests control the right of the Government to search and seize has been discredited."[45]

Although trespass law is not conclusive of fourth amendment protection, it is a factor in determining whether a reasonable privacy right exists. The dissent in *Oliver* argued that criminal trespass laws indicate society's willingness to recognize a reasonable expectation of privacy in real property.[46] The majority responded by arguing that trespass laws were not drafted for the protection of fourth amendment privacy interests. Rather,

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42. *Oliver*, 104 S. Ct. at 1742-43.

43. *See* Silverman v. United States, 365 U.S. 505, 511 (1961); Jones v. United States, 362 U.S. 257, 266 (1960).

44. Olmstead v. United States, 277 U.S. 438, 466 (1928).

45. *Katz*, 389 U.S. at 353 (quoting Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 304 (1967)).

46. *Oliver*, 104 S. Ct. at 1748 (Marshall, J., dissenting).

criminal trespass law was intended to protect against stealing or destruction of property by intruders and civil trespass law was drafted to allow an owner to defeat others' claims to his title.[47]

Both the majority and dissent cited the same footnote in *Rakas v. Illinois*[48] to support their positions. The dissent cited to language stating that " 'one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude [others].' "[49] The majority relied on language stating that " 'even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.' "[50]

The majority's reference is more persuasive because it applies to open fields. Whereas the language quoted by the dissent is a broad statement of the law, the language quoted by the majority presents a narrow exception to the law within which open fields fall, as evidenced by a reference in *Rakas* to *Hester*.

3. *Use to which fields are put*

The use to which real property is put may determine whether a legitimate expectation of privacy in the property exists. Property on which a home stands is protected as long as it is not exposed by its inhabitants to the public. On the other hand, open fields are devoid of permanent inhabitants. Therefore, the privacy interest in residential or commercial property will differ from the privacy interest in open fields.

Open fields may nevertheless be used by people in ways that justify legitimate privacy expectations. In *Oliver* the Court noted that "[t]he dissent conceives of open fields as bustling with private activity as diverse as lovers' trysts and worship services."[51] These types of activities rarely take place in open fields, but when they do, the privacy rights of the people involved are legitimate and protected by the fourth amendment.[52] However, neither the typical types of activities conducted in open fields, such as cultivation or grazing, nor the fields themselves, demand

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47. *Id.* at 1744 n.15.

48. 439 U.S. 128 (1978).

49. *Oliver*, 104 S. Ct. at 1747 (Marshall, J., dissenting) (quoting *Rakas*, 439 U.S. at 144 n.12.).

50. *Oliver*, 104 S. Ct. at 1744 (quoting *Rakas*, 439 U.S. at 144 n.12.).

51. *Oliver*, 104 S. Ct. at 1741 n.10.

52. *Id.* at 1742 n.10.

privacy protection.[53] Private documents and personal belongings are not scattered through open fields as they are through homes and office buildings.

4. Alternative forms of surveillance

Supporters of a privacy right in open fields have argued that police can search the field from the air and thus are not hampered by an inability to make warrantless ground searches.[54] This argument fails for two reasons. First, searches from the air are not always feasible, nor are they necessarily as effective as ground searches. Aerial searches are expensive and the necessary equipment is not always available. Also, some types of illegal activity in open fields may not be discoverable from the air.[55]

Second, and more importantly, the option of air surveillance suggests that no matter how high and impenetrable the wall surrounding the property, the public has not been excluded. This casts doubt on the existence of any reasonable expectation of privacy in open fields.[56]

III. Conclusion

The Supreme Court's decision in *Oliver v. United States* is in line with other recent cases limiting application of the exclusionary rule. It is firmly supported by case law and public policy arguments. Open fields are not specifically protected under the fourth amendment; neither are they protected under *Katz*'s reasonable expectation of privacy standard. Unlike homes and commercial structures, open fields are neither the normal setting for activities requiring privacy nor the repository for personal effects. Open fields are also generally accessible to the public eye, whether by ground or air. Thus, the *Oliver* decision does not substantially threaten the privacy of landowners, nor does it create an unreasonable standard for law enforcement.

Brian K. Jorgensen

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53. *Id.* at 1741.

54. *See, e.g.*, United States v. Oliver, 686 F.2d 356, 372 (6th Cir. 1982) (Keith, J., dissenting).

55. For example, marijuana or other illegal plants might be growing in a wooded area where the plants could not be seen through the foliage.

56. *See* United States v. Oliver, 686 F.2d 356, 360 n.4 (6th Cir. 1982).