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SUPREME COURT'S TREATMENT OF OPEN FIELDS: A COMMENT ON *OLIVER* AND *THORNTON*

BARBARA ROCKHILL EDWARDS

I. INTRODUCTION

In the past term the United States Supreme Court announced its decision in *Oliver v. United States*¹ and declared that open fields² are not embraced by the fourth amendment's prohibition against unreasonable searches and seizures of a citizen's "effects." In so doing the Court reaffirmed its earlier conclusion, first expressed in 1924 in *Hester v. United States*,³ that fourth amendment protection does not extend to open fields.

The return full cycle to *Hester* is not without its irony. In the sixty years separating these two landmark decisions both federal and state courts had receded from *Hester* and granted fourth amendment protection to open fields; the courts had placed reliance upon the Supreme Court's increasingly liberal interpretations of the reach of the fourth amendment. The *Oliver* decision represents a rejection of that liberal interpretative philosophy and a return to a literal, more conservative view of a narrowly defined prohibition against unreasonable searches and seizures.

The purpose of this comment is to explore the birth of the open fields doctrine and to analyze the interpretative philosophies which caused the initial expansion and subsequent regression of the doctrine. The open fields doctrine will be followed from its birth in *Hester*, through adolescence, the vital middle years, and into the senility assigned to the doctrine by today's Court.

II. THE BIRTH AND NURTURE OF THE FOURTH AMENDMENT

Britain's use of writs of assistance and general warrants during the colonial period was perceived by the colonists as an infringement of the rights of citizens and thus as an abuse of governmental power.⁴ To ensure that analogous actions by their own government

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

2. Essentially, open fields are exactly what one would expect them to be—outdoor areas. The controversy underlying the decisions discussed in this comment is whether the fourth amendment's protection against unreasonable searches and seizures extends to persons and effects situated in these outdoor areas.

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

4. Writs of assistance were documents used in the colonies by British officers to authorize the examination of ships, vaults, cellars, and warehouses where contraband was suspected to be located. General warrants were used in Great Britain to allow the search of private homes for papers and books. See *Olmstead v. United States*, 277 U.S. 438, 463

would be foreclosed, the fourth amendment was written and adopted by the founding fathers.⁵ The first draft of the amendment, which was presented by James Madison at the first congressional session, read:

The right of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.⁶

The committee which was to determine the language of the congressional proposal to the states changed the wording of the original text. Mr. Gerry, a committee member, presumed that there was an error in the wording and moved to substitute the words "and effects" for "other property."⁷ What emerged from the committee is the fourth amendment in its present form:

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.⁸

Unfortunately, we have no method for determining what was in the minds of the committee members at the time that the amendment was drafted. Whatever distinction they perceived between the words "other property" and "effects" will probably remain a mystery.⁹ This mystery becomes problematical when courts attempt to construe the amendment's content and implications in current legal disputes.

In 1886, Justice Bradley followed the "spirit" of the Constitution rather than the "letter" when he delivered the opinion of the Court

(1928); *Boyd v. United States*, 116 U.S. 616, 624-30 (1886); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 969 n.6 (1968).

5. See *Olmstead*, 277 U.S. at 449; *Boyd*, 116 U.S. at 624-30; Note, *supra* note 4, at 969-70.

6. *Olmstead*, 277 U.S. at 450.

7. *Id.*

8. U.S. CONST. amend. IV.

9. See *Olmstead*, 277 U.S. at 450.

in *Boyd v. United States*.¹⁰ Although the facts of the case¹¹ were contrary to the usually understood meaning of the terms "search and seizure," the Court nevertheless applied those terms, stating:

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, . . . it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. *A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.* It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.¹²

Bradley was echoing the sentiments of Chief Justice Marshall when he cautioned that a constitution, by its nature, cannot be a legal code. If a constitution attempted to be exacting, it would become unintelligible.¹³ By 1925, however, the Court was ignoring the urgings of Marshall and Bradley and promoting more literal constitutional interpretations in *Carroll v. United States*.¹⁴ Holding

10. 116 U.S. 616 (1886). Justice Bradley stated:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court. . . . It is not the breaking of [the defendant's] doors, and the rummaging of his drawers . . . but it is the invasion of his infeasible right of personal security, personal liberty and private property [which is objectionable].

Id. at 630.

11. In *Boyd* the concern was the constitutionality of courts compelling the production of private papers for use as evidence in noncriminal cases. The courts were authorized to order defendants to produce papers which the government alleged would prove elements of the offenses charged. Failure to comply resulted in admission of the facts which the government alleged that the papers would substantiate. *Id.* at 619-20.

12. *Id.* at 635 (emphasis added).

13. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). "Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *Id.* at 407.

14. 267 U.S. 132 (1925). Federal prohibition agents, in an earlier encounter, arranged to buy liquor from the defendants. Although the arranged sale was never consummated, the agents became familiar with the car which the defendants drove. In subsequent routine highway patrols, this auto was seen traveling between Grand Rapids and Detroit and was ultimately stopped and searched. Sixty-eight bottles of liquor were found secreted behind

that both the search and the seizure were justified under the facts of the case, the Court implied that the fourth amendment was to be construed narrowly, stating that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."¹⁵

This battle of interpretative philosophy would have been of only academic interest were it not for the decisions in *Weeks v. United States*¹⁶ and its progeny, which gave teeth to the fourth amendment. The exclusionary rule announced in *Weeks* required that all materials seized under federal authority in violation of the fourth amendment were to be returned to the owner upon his motion and could not thereafter be used as evidence in federal court.¹⁷ Suddenly, the determination of what did or did not constitute an unreasonable search and seizure became of paramount importance in winning federal convictions.

For a time, however, federal authorities attempted to circumvent

the upholstering of the seats. *Id.* at 135.

15. *Id.* at 149. The kind of construction advocated by the *Carroll* Court and others to follow crystalizes the problems created by the courts' inability to understand the exact implications of the use of the word "effects" in the fourth amendment. Because there were no automobiles at the time the amendment was written, it certainly cannot be claimed that the Framers intended the specific inclusion of cars within the scope of the term; however, it is equally impossible to determine if articles analogous to automobiles were intended to be included in the word "effects," due to the lack of any record of discussion as to the meaning of the term.

16. 232 U.S. 383 (1914). The defendant was arrested at work while police officers gained entry to his home, searched it without a warrant, and seized certain papers and articles. Later the local police returned with a United States marshal, conducted an additional search, and seized additional materials. *Id.* at 386.

17. *Id.* at 398. The Court did not disallow the use of the material seized by the police in the instant case because it was not done under federal authority. *Id.*

[T]he Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

Id. at 391-92. In explaining the importance of the rule, the Court stated:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

the spirit of *Weeks*. In *Silverthorne Lumber v. United States*,¹⁸ the Court held that when subpoenas were based on earlier unconstitutional searches and seizures, evidentiary use of the subpoenaed materials in criminal proceedings against the party required to produce them was prohibited. The Court stated that "knowledge gained by the government's own wrong cannot be used by it in the way proposed."¹⁹ Shortly thereafter, the Court held that a motion for the return of illegally seized evidence was not necessary. Its admission into evidence was error even when return of the material was not requested.²⁰

Although *Weeks* had done much to restrain the unlawful activities of federal officers, local and state police had no equivalent incentive to similarly restrict their behavior. In 1949 the Court had an opportunity to extend the exclusionary rule to nonfederal prosecutions in *Wolf v. Colorado*.²¹ It was an opportunity missed, because the Court failed to make the extension. This failure seems puzzling upon examination of the rationale which the Court employed. The Court was quick to state that the "security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."²² The Court further opined that such behavior by the police, based solely upon their own authority, was to be condemned as inconsistent

18. 251 U.S. 385 (1920). Two corporate officers were arrested at home and detained for several hours while federal authorities searched their business offices and seized numerous documents. The originals were returned to the defendants pursuant to *Weeks*, but the government retained photographs and copies of all seized materials. Thereafter a grand jury served subpoenas on the defendants ordering them to produce the originals.

The Court held that the government was not entitled to do in two steps that which it was prohibited from doing in one and reversed contempt convictions entered against defendants for failure to comply with the subpoenas. The importance of this decision is that the Court expanded *Weeks* to embrace more than the actual tangible evidence illegally obtained; in so holding, the *Silverthorne* Court rejected the government's position that the fourth amendment protected physical possession without precluding any advantages which the government could otherwise gain through committing an act otherwise prohibited by the guarantee against unreasonable searches and seizures. *Id.* at 390-92.

19. *Id.* at 392. Justice Holmes stated that to prevent the fourth amendment from being reduced to a "form of words" illegally seized evidence "shall not be used at all." *Id.*

20. *Gouled v. United States*, 255 U.S. 298 (1921). The defendant's pretrial motion for the return of illegally seized documents was denied. On appeal he contended that the trial court erred in not inquiring into the origin of the papers at the time at which they were proffered against him. The Supreme Court held that the trial court was under a duty to entertain an objection to admission or a motion for exclusion, and in the process to determine whether the evidence had been unconstitutionally seized, notwithstanding a pretrial denial of a motion to return the evidence. *Id.* at 312-13.

21. 338 U.S. 25 (1949).

22. *Id.* at 27.

with individual rights and violative of the Constitution. Accordingly, any state which actively approved such behavior by state authorities would be in violation of the fourteenth amendment.²³ Then, paradoxically, the Court refused to apply the exclusionary rule to help assure the right which it had explicitly recognized. The Court's justification that there were other methods to insure compliance with the amendment left much to be desired.²⁴

More to the point, however, was the Court's recognition of the fact that many states had considered implementing the *Weeks* rule on their own initiative, but few had done so.²⁵ Apparently, the Court was unwilling to force a rule upon the states, regardless of the validity of that rule, where the states had previously declined to adopt it themselves.

Ever diligent, federal authorities continued to circumvent the *Weeks* rule through offering into evidence in federal criminal prosecutions material seized in violation of the fourth amendment by nonfederal authorities. The federal courts' use of unconstitutionally seized evidence which had been gathered by state authorities, a practice commonly referred to as the "silver platter doctrine," was put to an end by the 1960 Supreme Court decision of *Elkins v. United States*.²⁶

In explaining *Weeks*, the Court in *Elkins* noted that, while evidence obtained in violation of the fourth amendment was prohib-

23. The *Wolf* Court stated that freedom from arbitrary police intrusion is implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, [does] not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.

Id. at 27-28.

24. In the subsequent decision of *Mapp v. Ohio*, 367 U.S. 643, 650-56 (1961), the Court acknowledged the absurdity of the result which it had reached in *Wolf*.

For a discussion of the inadequacy of alternative methods of enforcing compliance with the fourth amendment, see Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 Nw. U.L. Rev. 1 (1950).

25. Forty-seven of the 49 states had considered the *Weeks* doctrine. Of those, 31 had rejected it and only 16 had chosen to follow it. Allen, *supra* note 24, at 29.

26. 364 U.S. 206 (1960) (state officers seized evidence during an unlawful search and seizure; the evidence was subsequently used against defendant in a federal prosecution). The Court stated that the purpose of this new ruling was "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 217.

ited from use in federal criminal prosecutions, *Weeks* had announced a companion rule which allowed evidence seized unlawfully by local police to be used in federal prosecutions.²⁷ Finally, in 1961 the Court held in *Mapp v. Ohio*²⁸ that a violation of the fourth amendment would invoke the exclusionary rule in state as well as federal courts, for state as well as federal actions, thereby effectively overruling *Wolf*. Thus the exclusionary rule removed the benefit derived from disregarding the fourth amendment, making it more than a mere "form of words."²⁹

In *Mapp* the Court was evidently unwilling to overrule itself without thoughtful consideration and well-reasoned justification. The Court first noted that the fourth and fifth amendments guaranteed personal privacy and that the courts were commissioned to watch over these constitutionally guaranteed rights.³⁰ Additionally, the Court noted a change in the attitude among the states toward the exclusionary rule since 1949 when *Wolf* was decided. "[I]n 1949 . . . almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite [*Wolf*], more than half of those since passing upon it, by their own legislative or judicial decision have wholly or partly adopted or adhered to the [exclusionary] rule."³¹ Further, the Court observed that other rights guaranteed by the Constitution were not afforded a double standard in application, but that they were enforced equally in both state and federal courtrooms.³² The Court commented on the paradox that

27. *Id.* at 210. The Court noted that the problem "arose from the entirely commendable practice of state and federal agents [cooperating] with each other in the investigation and detection of criminal activity." *Id.* at 211.

28. 367 U.S. 643 (1961). Searching for a suspect and "policy paraphernalia" in an unrelated case and acting on an informant's tip, police went to the Mapp home and demanded admittance. Mapp, on advice of counsel, refused to admit them without a warrant. Three hours later, after continuous surveillance, the police forcibly gained entrance. A struggle ensued, Mapp was handcuffed, and police officers commenced a search of the entire premises. *Id.* at 644-45.

29. See *supra* note 19.

30. The Court stated that "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Mapp*, 367 U.S. at 647.

31. *Id.* at 651. Recognizing the inconsistency of *Wolf* in not imposing the exclusionary rule upon the states, the Court quoted that decision: "[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." *Id.* at 650 (quoting *Wolf*, 338 U.S. at 28). The Court further noted that *Wolf* granted the right to protection against unlawful searches and seizures but in reality withheld its privilege and enjoyment. *Mapp*, 367 U.S. at 656.

32. *Mapp*, 367 U.S. at 656. The Court listed the rights of free speech, free press, and

“[p]resently, a federal prosecutor may make no use of evidence illegally seized, but a State’s attorney across the street may”³³

The *Mapp* Court took note of the criticism of the exclusionary rule that “ ‘the criminal is to go free because the constable has blundered.’ ”³⁴ Nevertheless, the Court was swayed by countervailing considerations of judicial integrity and held that the exclusionary rule should apply in state criminal proceedings: “The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”³⁵

III. OPEN FIELDS: OUTSIDE OF THE FOURTH AMENDMENT WOMB

A. *The Birth of the Doctrine*

The United States Supreme Court has long recognized various exceptions to the ancillary warrant requirement of the fourth amendment’s prohibition against unreasonable searches and seizures.³⁶ There was one situation, however, in which the Court held there was no fourth amendment protection at all—open fields.³⁷

In *Hester*, revenue agents had entered the land of the defendant’s father, secreted themselves, and watched while the defendant transferred a jug from the house to a car. An alarm was given, and the defendant attempted to flee, dropping the jug in the process. The jug was seized and found to contain whiskey. The Court found that the acts of the defendant had disclosed the evidence, that once something is abandoned it cannot be “seized” in a legal sense, and that the warrantless trespass into open fields was immaterial, because open fields are different from a house.³⁸

The Court’s terse opinion merely stated that “it is enough to say

“the rights to notice and to a fair, public trial, including . . . the right not to be convicted by use of a coerced confession,” as examples. *Id.*

33. *Id.* at 657. The Court also noted that “[i]n nonexclusionary States, federal officers, being human, were . . . invited to and did . . . step across the street to the State’s attorney with their unconstitutionally seized evidence.” *Id.* at 658.

34. *Id.* at 659 (quoting Justice (then Judge) Cardozo in *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926)).

35. *Mapp*, 367 U.S. at 659.

36. See generally Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

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

38. *Id.* at 58.

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 the latter and the house is as old as the common law."³⁹ The brevity of the decision allows for little analysis.

B. *The Trespass Requirement*

The distinction between houses and open fields reached a level of critical importance in 1928 when the Court announced its decision in *Olmstead v. United States*.⁴⁰ *Olmstead* was convicted of violating the National Prohibition Act based upon evidence gathered by tapping his phones. The Court noted that the tapping was accomplished by the insertion of small wires along ordinary telephone lines in the basement of an office building, without a trespass upon *Olmstead's* property. *Certiorari* was granted to consider the evidentiary use of private telephone conversations intercepted by a wiretap.⁴¹ Writing for the Court, Chief Justice Taft stated that a more liberal construction, even when used in an attempt to effectuate the purpose of the Framers in the interest of liberty, "cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."⁴² The Court held that the clandestine tapping of a telephone to record private conversations was not a violation of the fourth amendment, absent a trespass upon the defendant's property.⁴³ In fact, the Court stated that a physical invasion was a prerequisite for ever finding a violation of the fourth amendment, although it alone was not determinative of a violation.⁴⁴ In so

39. *Id.* at 59.

40. 277 U.S. 438 (1928).

41. *Id.* at 455-57. The Court quoted *Carroll* in advocating a narrow, literal construction of the Constitution. "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Id.* at 465 (quoting *Carroll*, 267 U.S. at 149).

42. *Olmstead*, 277 U.S. at 465.

43. *Id.* at 464-66.

44. *Id.* Justice Taft, writing for the Court, cited numerous Supreme Court decisions in his opinion to support the holding that the tapping of telephone wires was not a violation of the fourth amendment because there had been neither a trespass nor a seizure. *Id.* at 460-65.

Hester, the Court noted, also involved a trespass, but there was no constitutional infringement because "there was no search of person, house, papers, or effects." *Id.* at 465. *Weeks* and *Silverthorne*, on the other hand, were used to evince the proposition that only the

holding, the Court dismissed the spirit of *Boyd* by concentrating on the narrow issue of compelled production. Noting that conversation is not a material thing which can be particularly described or seized, the Court implied that it could not possibly be subject to the fourth amendment, which requires such particular description.⁴⁵

The majority saw danger in excluding otherwise admissible evidence gathered by unethical conduct on the part of the government, and decided that questionable behavior by the government was more desirable than allowing criminals to escape justice.⁴⁶

Justice Holmes, dissenting, noted that "[c]ourts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."⁴⁷ He believed "it . . . less evil that some criminals should escape than that the Government . . . play an ignoble part."⁴⁸ Justice Brandeis, in dissent, noted that although the tapping of a telephone was an evil which could not have taken place in earlier times, the nature of a constitution was one of immortality, and it contained general principles which needed to be applied to new situations.⁴⁹ The fact that these two liberal interpretists were now in the minority indicated that a new era was firmly entrenched.

In *Hester* the Court had said that a trespass was immaterial in open fields,⁵⁰ and in *Olmstead* the Court held that there could be no violation of the fourth amendment without a trespass.⁵¹ In addition, the *Olmstead* majority stated that an invasion of the curti-

seizure of tangibles such as documents and books would constitute an unlawful seizure. *Id.* at 460-61.

45. *Id.* at 462-64.

46. *Id.* at 468.

47. *Id.* at 469 (Holmes, J., dissenting). Justice Holmes foreshadowed the Court's holding in *Katz v. United States*, 389 U.S. 347 (1967), and the more liberally disposed Court of the 1960's.

48. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting). Justice Holmes' comment was an echo of the views previously expressed by Justice Cardozo. Justice Holmes, however, was unwilling to totally commit to either the majority or dissenting opinion. He stated that "[w]hile I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant . . ." *Id.* at 469.

49. *Id.* at 472-73 (Brandeis, J., dissenting). Justice Brandeis stated that the scientific progress which made this unforeseen invasion possible was unlikely to be halted. He envisioned various kinds of intrusions, such as psychic invasions, which would defeat the spirit of the fourth amendment but still circumvent the ruling of the Court. *Id.* at 474. He found the tangible/intangible distinction between a letter and phone call to be meaningless. *Id.* at 475.

50. *Hester*, 265 U.S. at 58-59.

51. *Olmstead*, 277 U.S. at 466.

lage is equivalent to an invasion of the house.⁵² Thus, while talking of literal interpretation in one instance, the Court expanded the constitutional protection in another. The fourth amendment, as interpreted after these decisions, would turn on a notion of "place," for a trespass requires an invasion of some space. The question remained as to what places would be construed as being protected by the amendment.

The next fourth amendment landmark was to be *Katz v. United States*,⁵³ but there were nearly forty years of legal decisions in the interim which deserve inspection. The decisions which followed *Olmstead* and predated *Katz* demonstrate how the courts, confined by precedent to a literal interpretation of the fourth amendment, determined which places were to be afforded fourth amendment protection from trespass and which were not.

IV. OPEN FIELDS UNDER LITERAL FOURTH AMENDMENT CONSTRUCTION

A disproportionate number of the cases between *Olmstead* and *Katz* involved the illegal production of intoxicants and the efforts of the Treasury Department to curb this activity.⁵⁴ The fact patterns usually included agents entering private land and finding a still housed in a farm building of some sort. The question for the courts then became whether the agents had violated the fourth amendment with their intrusion onto the property, or, if they had entered the building where the still was operating, whether they

52. *Id.* "[T]he Fourth Amendment [has not] been violated . . . unless there has been an official search and seizure of . . . tangible material effects, or an actual physical invasion of . . . house 'or curtilage' for the purpose of making a seizure." *Id.* It is probably the reference in *Hester* to the common law which led to the inclusion of "curtilage" within the fourth amendment's protection.

It is difficult to see how the facts of *Hester* could have occurred without a trespass upon the curtilage. Yet the Court insisted that the curtilage is included within the fourth amendment language of "persons, houses, papers and effects" and that a trespass within the house would have been a violation.

53. 389 U.S. 347 (1967).

54. *But see* *United States v. Mullin*, 329 F.2d 295 (4th Cir. 1964) (possession rather than production of untaxed whisky); *United States v. Minker*, 312 F.2d 632 (3d Cir.), *cert. denied*, 372 U.S. 953 (1963); *United States v. Sorce*, 325 F.2d 84 (7th Cir. 1963) (possession of stolen goods). These cases predate the burgeoning drug culture which took hold in the early 1970's. The most current open fields cases relate primarily to drugs. *See* *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966); *United States v. Romano*, 330 F.2d 566 (2d Cir. 1964); *United States v. Hassell*, 336 F.2d 684 (6th Cir. 1964); *Monnette v. United States*, 299 F.2d 847 (5th Cir. 1962); *Brock v. United States*, 256 F.2d 55 (5th Cir. 1958); *Hodges v. United States*, 243 F.2d 281 (5th Cir. 1957); *Care v. United States*, 231 F.2d 22 (10th Cir. 1956).

had made a prohibited entry. Only a few of the circuit courts of appeals indicated explicit acceptance of the expansion of the word "houses" to include the concept of "curtilage."⁵⁵ Interestingly, although the courts which explicitly embraced the concept differed somewhat in their definition of curtilage,⁵⁶ the criteria which they applied for determining which buildings were included or excluded from the concept were strikingly similar.

Generally, the court would look to the physical distance between the dwelling and the outer building,⁵⁷ whether or not the outer building was located within any enclosure which surrounded the dwelling,⁵⁸ the building's use as an adjunct to domestic activity,⁵⁹

55. *Rosencranz*, 356 F.2d at 313 (" 'houses' of persons, which word has been enlarged by the courts to include the 'curtilage' or ground and buildings immediately surrounding a dwelling, formerly usually enclosed"); *Minker*, 312 F.2d at 634 (trash can of apartment building not within the protected curtilage); *Hodges*, 243 F.2d at 283 (no invasion of home's immediate appurtenances forming curtilage); *Care*, 231 F.2d at 25 (fourth amendment applies to buildings within the curtilage); cf. *Hassell*, 336 F.2d at 686 (still located 250 yards from defendants house; court considered the possibility that the barn which housed the still was within the curtilage but justified the search on other grounds). *But see Romano*, 330 F.2d at 569 ("protection accorded by the fourth amendment to the people in their 'persons, houses, papers, and effects,' does not extend to open fields, or to unoccupied buildings"); *Sorce*, 325 F.2d at 86 ("protection . . . does not extend to 'open fields,' . . . nor to 'enclosed or unenclosed grounds around houses'" (citations omitted)); *Monnette*, 299 F.2d at 850 (going inside a fence, onto the front porch, and around to the back of the house to peer into a window found permissible because a "trespass upon the grounds surrounding a building does not constitute an illegal search"). The *Monnette* court did suggest that peering into the window at the back of the house might have been a violation of the defendant's right to privacy but for the fact that the house was not his dwelling place and that there no evidence was gathered from the activity.

Romano, *Sorce*, and *Monnette*, dealing with an industrial complex, an open air nursery, and a nonresidence, respectively, and their rejection of the curtilage concept, indicate that the courts were not disposed towards applying the concept to such places.

56. See *Rosencranz*, 356 F.2d at 313 (curtilage consists of "ground and buildings immediately surrounding a dwelling, formerly usually enclosed"); *Mullin*, 329 F.2d at 298; *Hodges*, 243 F.2d at 283 ("included are the buildings comprising the immediate domestic establishment and which are thus the buildings 'constituting an integral part of that group of structures making up the farm home'") (quoting *Walker v. United States*, 225 F.2d 447, 449 (5th Cir. 1955)).

57. See *Mullin*, 329 F.2d at 298 (smokehouse approximately 75 feet from residence); *Minker*, 312 F.2d at 634 (proximity to the dwelling); *Brock*, 256 F.2d at 57 (located some distance from residence); *Hodges*, 243 F.2d at 283 (too removed in distance from home—150-180 feet); *Care*, 231 F.2d at 25 (more than a long city block from the home).

58. See *Minker*, 312 F.2d at 634 (within enclosure surrounding home); *Brock*, 256 F.2d at 57 (separated from residence by fence and gate); *Care*, 231 F.2d at 25 (within general enclosure surrounding residence).

59. See *Rosencranz*, 356 F.2d at 313 (driveway suggests propinquity); *Minker*, 312 F.2d at 634 (use as adjunct to domestic economy); *Hodges*, 243 F.2d at 283 (buildings comprising domestic establishment making up farm home); *Care*, 231 F.2d at 25 (adjunct to domestic economy).

and whether there existed any barrier between the dwelling and the outer building.⁶⁰ Several courts also made a distinction between a "house" and a "dwelling" and declined to extend protection to houses which were not used as dwelling places.⁶¹

In determining whether a trespass was determinative of a fourth amendment violation, the courts generally looked at the facts of the cases to determine if the areas entered were included in their understanding of the curtilage concept. If they were, a trespass without a valid warrant was a violation of the security promised by the Framers.⁶² If the areas entered were adjudged to be outside the protected area, the trespass was deemed irrelevant as to the constitutionality of the search or seizure.⁶³

The application of this process and the criteria involved were quite uniform throughout these cases. Only a comparison of *United States v. Mullin*⁶⁴ and *Rosencranz v. United States*⁶⁵ reveals a contradiction in the application of the factors determining curtilage. In *Rosencranz* the First Circuit found the existence of a driveway between the house and outer building indicative of a domestic connection between the buildings,⁶⁶ while in *Mullin* the Fourth Circuit suggested that a driveway between the buildings would be a barrier.⁶⁷ All in all, however, the open fields decisions

60. See *Rosencranz*, 356 F.2d at 313 (absence of barriers); *Mullin*, 329 F.2d at 298 (intervening barrier); *Brock*, 256 F.2d at 57 (separated by fence and gate); *Hodges*, 243 F.2d at 283 (set apart by fixed fences); cf. *Care*, 231 F.2d at 25 (in a field across the road from house).

61. E.g., *Monnette*, 299 F.2d at 850 (if the house were a dwelling, protection would vest); *Brock*, 256 F.2d at 57 (nearest residence not used as a dwelling).

62. See *Rosencranz*, 356 F.2d at 313:

The Treasury agent who led the search said, "it was a small farm with dwelling house and barn to the left as you faced the premises." He also testified that tracks of vehicles and footprints were visible on the snow, leading to both house and barn; he decided to enter the barn first because the signs of traffic were somewhat heavier. Other witnesses said there was a driveway between the barn and the dwelling house. This suggests propinquity and absence of separating barriers.

See also *Mullin*, 329 F.2d at 298:

The residence was located in a rural community and was partially surrounded in semicircular fashion by a number of outbuildings, a pattern traditionally found in the area. Perry rented the premises and was living in the residence, along with his family, at the time of his arrest. The smokehouse, from outside appearances, was typical of any normal farm smokehouse.

63. See *Mullin*, 329 F.2d at 298 (smokehouse within curtilage, hence unwarranted entry prohibited and evidence seized must be suppressed); *Monnette*, 299 F.2d at 850 (fourth amendment does not extend to the grounds).

64. 329 F.2d 295 (4th Cir. 1964).

65. 356 F.2d 310 (1st Cir. 1966).

66. *Id.* at 313.

67. "[T]here was no intervening barrier of a fence or a driveway between the two build-

exhibited a cogent consistency prior to *Katz*.

In *United States v. Minker*,⁶⁸ the court stated that the important factors in fourth amendment cases are "the nature of the individual's interest in and the extent of the claimed privacy of the premises searched."⁶⁹ These considerations foreshadowed the coming change in the Supreme Court's interpretative philosophy which was crystallized in *Katz*.

V. A RETURN TO THE DAYS OF LIBERALLY INTERPRETING THE FOURTH AMENDMENT

In 1967 the Court was presented with a situation clearly unanticipated by the Framers of the Constitution when the Court decided *Katz v. United States*.⁷⁰ In *Katz*, officers had attached a recording device to the outside of a phone booth and recorded the defendant's conversation. Until the *Katz* decision it was assumed that an individual had automatic fourth amendment protection within his home and its curtilage, but that a physical invasion of those places was a prerequisite for invoking the fourth amendment's protection. Justice Stewart, delivering the opinion of the Court, stated that a trespass was once believed a prerequisite to any fourth amendment inquiry because the courts believed that the amendment forbade only searches and seizures of tangible property; he noted, however, that this idea had been discredited.⁷¹ In *Katz*, the defendant was not within his home or its curtilage, and there was no physical invasion of the phone booth. Nevertheless, the Court was unwilling to find that the government's acts constituted a reasonable search and seizure, as the *Olmstead* court had. Instead, the Court found that the acts of a person would evidence the type of privacy which he expected, and that this particular expectation was to be respected.⁷²

ings." *Mullin*, 329 F.2d at 298.

68. 312 F.2d 632 (3d Cir.), cert. denied, 372 U.S. 953 (1963).

69. *Id.* at 634 (citing *Jones v. United States*, 362 U.S. 257 (1960)).

70. 389 U.S. 347 (1967). Justice Stewart, writing for the majority, noted that a narrow construction of the Constitution ignores the role of the public telephone in private communication. *Id.* at 352.

Justice Harlan commented on the vital role of the telephone in today's society. He stated that the Court's prior limitations on fourth amendment protection "is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.* at 362 (Harlan, J., concurring).

71. *Id.* at 352-53 (citing *Olmstead v. United States*, 277 U.S. 438 (1928)).

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

[O]nce it is recognized that the Fourth Amendment protects people—and not sim-

The majority rejected the use of such phrases as "constitutionally protected area" and "right to privacy" as an accurate description of that which the fourth amendment was designed to protect.⁷³ Justice Stewart submitted that framing the issue in terms of a constitutionally protected area diverted attention from the real problem:

For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.⁷⁴

The fact that Katz's activity in the phone booth was visible because the door was constructed of transparent glass was irrelevant, the Court said, because the issue was not what the officers saw through glass walls, but what they heard with an electronic listening device. The Court stated that even a person in a telephone booth is entitled to rely upon the protection of the fourth amendment. By shutting the door, one should be "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."⁷⁵

Further, the Court totally negated the requirement of a physical invasion, stating that people, not simply "areas," were protected, and that a determination of a violation of fourth amendment rights would turn neither on an intrusion nor on a trespass.⁷⁶

The Court concluded by addressing the lack of a warrant, stating

ply "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. . . . [T]he "trespass" doctrine . . . can no longer be regarded as controlling.

Id. at 353.

The Court noted that what one "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351. The Court added, "[b]ut what [Katz] sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id.* at 352.

73. *Id.* at 351-52. The Court saw the amendment as protecting "individual privacy against certain kinds of governmental intrusion," but, the Court noted, "its protections go further, and often have nothing to do with privacy at all." *Id.* at 350 (footnote omitted).

74. *Id.* at 351-52.

75. *Id.* at 352.

76. The reach of the amendment, the majority stated, "cannot turn upon the presence or absence of a physical intrusion . . ." *Id.* at 353. The majority further opined that the trespass doctrine was no longer controlling. "The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.*

that although the officers showed restraint in their behavior, they needed prior judicial approval for their conduct. The safeguard of judicial review was compulsory; the Court noted that the officers probably had sufficient probable cause to justify judicial issuance of a warrant, but that nonetheless their failure to do so was fatal.⁷⁷

Mr. Justice Harlan concurred. It is necessary to look closely at Harlan's assessment of the case, because it soon became the standard by which fourth amendment questions were resolved.⁷⁸ In replacing the notion of a "constitutionally protected area" with the concept of a constitutionally protected "expectation of privacy," Justice Harlan stated that what was protected was not a place but rather that which a person subjectively expected to remain private. Places traditionally considered private, Harlan argued, were not necessarily private.⁷⁹ Justice Harlan believed that the test to apply in determining whether a fourth amendment violation had occurred consisted of two requirements: first, a determination must be made as to whether the person had "exhibited an actual subjective expectation of privacy," and second, the court must decide if that expectation was one which society would accept as reasonable under the circumstances. Justice Harlan wrote that anything a party subjected to the "plain view" of the public was not private, because there could be no reasonable expectation of privacy under those circumstances.⁸⁰

Harlan submitted that prior cases had established the test which he advocated. Using *Hester* as an example, Harlan explained:

[A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.⁸¹

77. *Id.* at 354-59.

78. *Id.* at 360 (Harlan, J., concurring). Justice Harlan's concurring opinion is often cited by the courts as setting out the test for fourth amendment violations. See generally *United States v. Berrong*, 712 F.2d 1370, 1373 (11th Cir. 1983); Comment, *How Open Are Open Fields?* *United States v. Oliver*, 14 U. Tol. L. Rev. 133, 143 (1982).

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

80. Justice Harlan interpreted the majority opinion as indicating a need for a person to have exhibited an actual subjective expectation of privacy. He concluded under the facts of the instant case that if *Katz* had not closed the phone booth door he could not have expected fourth amendment protection of his conversation. *Id.*

81. *Id.* (citing *Hester v. United States*, 265 U.S. 57 (1924)).

This should have proved to have been an easily administered two pronged test. The virtue of the test was the fact that it allowed for changes in societal standards—an adaptability which should have afforded it a long and useful life. Harlan is to be commended for taking the principles advocated by the majority and formulating a standard which the courts could easily apply to fourth amendment considerations. The majority had ruled that a trespass would no longer control fourth amendment inquiries, and that what one sought to preserve as private, if unexposed to the public, might be afforded fourth amendment protection against unreasonable searches and seizures. A more thoughtful summary than Harlan's is hard to envision.

This decision announced the beginning of another swing of the interpretative pendulum. For over forty years, the courts had been confined to a literal interpretation of the Constitution. But once again an age of philosophical jurisprudence which had been urged by earlier jurists—liberal interpretational philosophy—had returned.⁸² Additionally, this decision signaled the coming of age of the fourth amendment, for the announced standards exhibited a heretofore unknown maturity.

The Court had accomplished a general expansion of the fourth amendment, and it appeared that even open fields could be brought under the amendment's protection if the circumstances were right. If a man stood in the middle of an empty cow pasture beside the freeway, he could not claim any protection from visual intrusion, but in a secluded field, surrounded by thick, tall growth, he might have a reasonable expectation of privacy from visual observation. Add sturdy fencing and "No Trespassing" signs around the perimeter of the property, and it would seem that he also had an expectation which society would not only accept as reasonable, but would almost never reject. It seems obvious, then, that even in an open field, if one manifested the requisite expectation under the proper conditions, he could count on the fourth amendment's protection. Many courts agreed with this analysis; however, this was not the understanding of all the courts. A brief study of some decisions that are representative of the open fields decisions which followed *Katz* evidences this inconsistency among the courts.

82. *Katz*, 389 U.S. at 352.

VI. OPEN FIELDS AND THE FOURTH AMENDMENT AFTER *Katz*

After the *Katz* decision many courts assumed that the open fields doctrine had been modified to fall within the purview of fourth amendment protection. These courts tried to determine what was necessary to evidence a reasonable expectation of privacy in outdoor areas which society would accept as reasonable. Some courts found that certain kinds of fencing or the posting of "No Trespassing" signs met the test requirements. The following examples are a representative overview of this approach.

In *Norman v. State*⁸³ the Florida Supreme Court noted that taking "overt steps" to secure one's property against the public is evidence of a reasonable expectation of privacy.⁸⁴ Norman had been convicted of possession of cannabis with the intent to sell. The sheriff, acting on an informant's tip, and without benefit of warrant, went to the farm leased by Norman and, knowing it to be unoccupied, climbed a locked fence and walked to a barn on the premises. Peering through the windows, he confirmed that the building contained marijuana. Several days later Norman was stopped by a deputy and informed that the sheriff had seen the marijuana. The deputy asked to be taken to the marijuana barn. Norman complied and was later arrested; subsequently, officers returned to the farm and confiscated the marijuana.⁸⁵ The Florida Supreme Court held that climbing a fence to enter an unoccupied farm was a violation of the fourth amendment, because Norman, by placing the marijuana in a building and by fencing and locking his property, had evidenced a reasonable expectation of privacy.⁸⁶

83. 379 So. 2d 643 (Fla. 1980).

84. The court stated that

the capacity to claim the protection of the fourth amendment depends upon whether a person has a "legitimate" expectation of privacy in the invaded area. That expectation will be recognized as legitimate if a person has exhibited an actual (subjective) expectation of privacy, and the expectation is one that society is prepared to recognize as reasonable. . . . It seems incontestable that Mr. Norman exhibited a subjective expectation of privacy in the tobacco barn and its contents. He took overt steps to designate his farm and barn as a place not open to the public. The contraband, covered and wrapped in tobacco sheets, was in a closed structure.

Id. at 647 (citation omitted).

85. *Id.* at 645.

86. *Id.* at 647. *Accord* *United States v. Resnick*, 455 F.2d 1127 (5th Cir. 1972) (three warrantless intrusions were made onto defendant's land which was in a sparsely populated area, fenced with a six-foot chain link fence topped with one foot of barbed wire, and all gates were locked; at one place the property was bounded by a lake; the officers gained access by crawling through barbed wire and wading through a marshy area; court held the last two intrusions invalid, without determining the status of the first entry), *cert. denied*,

In *Katz*, both the majority and Justice Harlan made reference to excluding that which was exposed to public view from fourth amendment protection, as being either evidence of a lack of intended privacy, or evidence of an unreasonable expectation of privacy. Further clarification of just what the Court had in mind regarding what would exhibit an actual expectation of privacy was given by the Court's 1974 decision in *Air Pollution Variance Board v. Western Alfalfa Corp.*⁸⁷ In that case, the Court implied that excluding the public from one's land would evidence such a subjective expectation. In contrast, the Court noted that plumes of smoke which a government health inspector had seen while taking a visual pollution test were visible to "anyone in the city who was near the plant" and thus were outside the protection of the fourth amendment.⁸⁸

The Second Circuit followed the lead of *Katz* and *Air Pollution* in *United States v. Lace*,⁸⁹ observing that those things which any member of the public can see are outside the warrant requirement as applied to visual observation by the police. *Lace* and his coconspirators were convicted of trafficking in narcotics. They appealed their conviction on the grounds that their fourth amendment rights had been violated. Although the officers who investigated the case had a warrant when they seized the evidence used at trial, they had augmented the information provided by informants by entering the seventy-acre farm and observing the backyard area

409 U.S. 875 (1973); *State v. Kender*, 588 P.2d 447 (Hawaii 1979) (lush growth of California grass provided a natural barrier within which defendant could have a reasonable expectation of privacy). *But see United States v. Berrong*, 712 F.2d 1370, 1373 n.5 (11th Cir. 1983) (court held that warrantless entry upon defendant's land and seizure of marijuana plants, after flying over to confirm a tip, was not a fourth amendment violation: "It is arguable whether appellant Berrong exhibited a subjective expectation of privacy. The record indicates the total absence of any fence, wall, 'no trespassing' signs, or other artificial obstructions to entry on the property."); *Ford v. State*, 569 S.W.2d 105 (Ark. 1978) (fenced and posted rural property under cultivation and without buildings is an open field), *cert. denied*, 441 U.S. 947 (1979); *Luman v. State*, 629 P.2d 1275 (Okla. Crim. App. 1981) (going through barbed wire fence and two gates to collect plant sample was not a violation of the fourth amendment for it was an open field outside the curtilage); *Ochs v. State*, 543 S.W.2d 355 (Tex. Crim. App. 1976) (dense growth around property does not necessarily make it something other than an open field), *cert. denied*, 429 U.S. 1062 (1977).

87. 416 U.S. 861 (1974) (health inspector, with neither warrant nor permission, entered a business's outdoor premises and made visual pollution tests of emitted smoke).

88. *Id.* at 865.

89. 669 F.2d 46 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982). In *Lace* the court held that a rented home and the surrounding grounds which were visible from a public road and from which the public was not excluded were open fields for fourth amendment considerations. *Id.* at 49.

using binoculars and a spotting scope before securing the warrant.⁹⁰ The question, as the court saw it, was whether the warrant was issued upon sufficient legally obtained evidence. The court held that if some of the evidence was obtained illegally, that would not taint the warrant if, absent the illegally obtained evidence, there were still sufficient grounds for its issue.⁹¹

The court said that because the area was visible from the road, the defendants' lease arrangement contained an understanding that the owners of the property could enter and use it for recreation, and the land was not posted and was used by hunters, the observations made by the police did not require a warrant.⁹² The defendants had not excluded the public, so the police had observed only that which was exposed to public view and thus the defendants did not have a reasonable expectation of privacy. The court did not have to determine whether the independent information was sufficient to justify the warrant.

In *State v. Manly*,⁹³ the Washington Supreme Court stated that even using a ladder and binoculars to look into a building through an uncurtained window was not an invasion of fourth amendment rights. Occupants of a second floor apartment were growing marijuana near a window. A university police officer reported that he had seen what he believed to be a marijuana plant through the window. As a result of that report, a detective in the drug control unit drove by the apartment twice, observing nothing. Subsequently, he made an additional observation from across the street, at which time he saw what he believed to be marijuana. To confirm this observation, he used binoculars to enhance his view. Confident that the plants were indeed marijuana, he crossed the street to stand on the sidewalk beneath the window and look once again with the binoculars, and reconfirmed his previous observations.⁹⁴

90. *Id.* at 47-50.

91. "The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause." *Id.* at 49 (quoting *United States v. Giordano*, 416 U.S. 505, 555 (1974) (Powell, J., concurring and dissenting)).

92. *Lace*, 669 F.2d at 47-50; *see also* *United States v. Freeman*, 426 F.2d 1351 (9th Cir. 1970) (marijuana plants visible from common walkway in apartment building, even if within the curtilage, cannot be reasonably expected to remain private); *State v. Daugherty*, 591 P.2d 801 (Wash. Ct. App. 1979) (a driveway is not a constitutionally protected area; it is semi-private inasmuch as anything seen from such a vantage point does not constitute a search), *cert. denied*, 450 U.S. 958 (1981).

93. 530 P.2d 306 (Wash.), *cert. denied*, 423 U.S. 855 (1975).

94. *Id.* at 307-08.

In securing a warrant based on these observations, the detective failed to mention his use of binoculars. The trial court, in holding that the use of binoculars invaded the defendant's reasonable expectation of privacy and in approving the *Katz* decision, found that "without the use of binoculars [the officer] lacked sufficient reason to justify issuance of the search warrant," and that the defendants "did not knowingly expose the marijuana plants to public view and had a reasonable expectation of privacy regarding them."⁹⁵

The Washington Supreme Court, however, found the lack of curtains significant; it was evidence that the defendant had not manifested an intent to keep private that which could be seen through the open window. The court concluded that the plants were visible without binoculars, that there was no physical trespass, and that "[t]he use of binoculars under these circumstances did not constitute an illegal search of the premises."⁹⁶

This line of decisions demonstrates that at least some courts accepted the premise that *Katz* set the standard for all fourth amendment decisions. The exceptions to the warrant requirement remained only for the physical protection of the authorities or in those instances where either escape or destruction of evidence was imminent. The open fields doctrine, for these courts, was subject to the same requirements as any other search and/or seizure. If there were a demonstration of an expectation of privacy which society was willing to accept as reasonable, a search warrant would be necessary to avoid the exclusionary rule.

There were, however, other courts which questioned how, if at all, the *Katz* decision modified *Hester*. In *State v. White*⁹⁷ the court observed that all courts could not agree as to what effect, if any, *Katz* had on *Hester*.⁹⁸ The opinion is devoid of facts, presenting only the defendant's contention that *Katz* would dictate that

95. *Id.*

96. *Id.* at 309; *cf. United States v. Allen*, 633 F.2d 1282 (9th Cir. 1980) (use of binoculars from adjacent hilltop not illegal), *cert. denied*, 454 U.S. 833 (1981); *People v. St. Amour*, 163 Cal. Rptr. 187 (Ct. App. 1980) (use of binoculars in aerial search not unreasonable). *But see State v. Barnes*, 390 So. 2d 1243 (Fla. 1st DCA 1980) (marijuana in backyard, identifiable only through telescope, not within "plain view" exception); *State v. Kender*, 588 P.2d 447 (Hawaii 1979) (climbing fence and using telescope impermissible).

97. 332 N.W.2d 910 (Minn. 1983).

98. The *White* court noted that "[c]ommentators and courts have disagreed over whether the [open fields] doctrine lost some of its vitality as a result of the United States Supreme Court's decision in *Katz* . . ." *Id.* at 911.

he had a reasonable expectation of privacy on his land.⁹⁹ Unsure whether to apply *Katz* or *Hester*, the court looked to both cases in deciding that the defendant's land was an open field and as such his rights had not been violated.¹⁰⁰

The rationale applied by the federal court in *Fixel v. Wainwright*¹⁰¹ was that the yard of a four-apartment complex was private enough to warrant a reasonable expectation of privacy.¹⁰² While officers were in possession of a warrant to search Fixel's apartment, one of them concealed himself at the back of the building and, while thus hidden, observed Fixel leave the four-unit building several times, go to a pile of rubbish each time, and remove a shaving kit from the rubbish. The other officer remained in the front of the building observing activity there. After observing for some time, one officer executed the warrant, while the other retrieved the shaving kit. Although no narcotics were discovered in the apartment, the kit was found to contain heroin.¹⁰³

The Fifth Circuit based its decision on the curtilage concept, stating that the entry into the yard was an unlawful encroachment on a protected area, even while they noted that *Katz* had discarded this distinction as a determinant of fourth amendment rights. The court believed that one had a reasonable expectation of privacy in his curtilage.¹⁰⁴

In *United States v. Cobler*¹⁰⁵ the district court stated that a trespass by a law enforcement officer is not by itself a prima facie violation of the fourth amendment but suggested that trespass into one's home or curtilage would be relevant as evidence of a violation of one's reasonable expectation of privacy.¹⁰⁶ Acting on the suspi-

99. *Id.*

100. In applying both *Katz* and *Hester*, the *White* court held that "[n]ot only was the land in question an 'open field' within the cases that rely on *Hester*, but defendant had not taken sufficient steps to demonstrate that he had a reasonable expectation of privacy in the land under the cases that rely on *Katz*." *Id.*

101. 492 F.2d 480 (5th Cir. 1974).

102. The court concluded that the public exposure of the backyard of the complex, which was surrounded by a fence, was too limited for the yard to be designated an open field. *Id.* at 484.

103. *Id.* at 481.

104. *Id.* at 483. In referring to the idea of curtilage as possibly being a protected area, the *Fixel* court said that "[t]he area immediately surrounding and closely related to the dwelling is also entitled to the Fourth Amendment's protection. In defining the surrounding area . . . the courts historically have found helpful the common law concept of curtilage . . ." *Id.* Yet, when holding that the backyard was not an open field, the court once again used the *Katz* notion of a reasonable expectation of privacy. *Id.* at 484.

105. 533 F. Supp. 407 (W.D. Va. 1982).

106. *Id.* at 411.

cion that the defendant was involved in the distribution of moonshine, agents placed the defendant under surveillance. When defendant's truck entered a dead end road, the agents set up a barricade. Approximately one-half mile from the point of entry the road became a private country farm road leading to an abandoned house and a farm leased by the defendant's father. Agents stopped a car leaving the farm and discovered a gallon of moonshine. An agent later discovered defendant's truck parked on a dirt farm path which surrounded the edge of an open field. The truck was unlocked, but a camper shell on the back was not. The shell had curtained windows. The agent, smelling the strong odor of moonshine and noticing a crack between the curtains, used his flashlight and saw some stacked jugs which he concluded contained moonshine. The agent forced entry into the camper shell and seized the whiskey.¹⁰⁷

In deciding that the defendant's fourth amendment rights had not been breached, the court first noted that although the defendant had an expectation of privacy in the camper, it was neither legitimate, reasonable, nor justified. The court used the plain view exception to the warrant requirement to justify the seizure, stating that the position of the agent upon the farm land did not include an unjustifiable intrusion, because protection did not extend to open fields. The court implied that had the search occurred within the curtilage, rather than an open field, it might have been unlawful, despite the fact that expectations of privacy in an automobile are diminished.¹⁰⁸

But in *United States v. Freie*,¹⁰⁹ the Ninth Circuit noted that common law property concepts were not determinative of an expectation of privacy; however, the court applied the common law curtilage concept when noting that the area searched was not adjacent to someone's home.¹¹⁰

107. *Id.* at 408-09.

108. *Id.* at 410-12.

109. 545 F.2d 1217 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977).

110. The court said that a small rural airstrip and an adjacent private field which was surrounded by a cattle fence was an open field, and thus defendants could not have a reasonable expectation of privacy in closed cardboard boxes placed on the field. *Id.* at 1223.

Supporting the *Katz* decision, the court noted:

[T]he determination of whether an intrusion is an unreasonable search has depended on one's actual subjective expectation of privacy and whether that expectation is objectively reasonable. . . . Thus, the proper focus is no longer on common law property concepts. . . . It now appears that *Hester* no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy.

United States Forest Service rangers had observed a small airplane land at a rural airstrip. Several hours later, when the plane was apparently abandoned, the rangers approached it and observed boxes inside. The rangers called customs officials, but by the time the officials arrived the plane had left and the boxes were stacked in the field. A customs officer opened a box, discovered marijuana, and notified DEA agents who began surveillance. After a gun battle, one defendant was arrested and subsequently others were also placed in custody.¹¹¹ The court found that the defendants lacked a reasonable expectation of privacy in the open field, and that use of the drugs as evidence was permissible.¹¹²

Although these cases exhibit some confusion over the application of *Katz* property concepts, each court gave credence to the language of *Katz* by determining the existence or nonexistence of a reasonable expectation of privacy in resolving the fourth amendment questions presented to them. These courts had apparently not read *Katz* closely enough to ascertain that areas such as the curtilage were no longer automatically considered private. The courts' reasoning in these cases is unmistakably similar and certainly predicated upon the *Katz* holding. The major problem revealed by these cases, however, is the lack of consistency in the application of the criteria and in the results. There was no consensus among the courts as to what did or did not demonstrate an acceptable and reasonable expectation of privacy.

Conspicuous by their absence in the preceding discussion are *State v. Thornton*¹¹³ and *United States v. Oliver*.¹¹⁴ A more striking example of the divergence of result is not to be found. The United States Supreme Court has recently passed judgment on these cases, and those decisions will define, at least for a time, the viability of *Hester* after *Katz*.

VII. THE STATUS OF *Thornton* AND *Oliver* BEFORE THEIR TRIP TO WASHINGTON

In *Oliver*, Kentucky State Police, acting on an anonymous tip and rumor that marijuana was being grown, commenced an investigation. They entered Oliver's land via a posted road.¹¹⁵ Upon en-

Id. (citations omitted).

111. *Id.* at 1219-21.

112. *Id.* at 1223.

113. 453 A.2d 489 (Me. 1982), *rev'd*, 104 S. Ct. 1735 (1984).

114. 686 F.2d 356 (6th Cir. 1982) (en banc), *aff'd*, 104 S. Ct. 1735 (1984).

115. *Oliver*, 686 F.2d at 358.

countering a locked gate blocking the road a short distance beyond Oliver's house, they parked and proceeded on foot along a path which led to the barn. Near the barn, the officers had a brief encounter with an unidentified person who told them that they could not hunt there.¹¹⁶ Beyond the barn, the officers discovered two marijuana fields. The fields were located about one mile from Oliver's home on land which he leased to others and were not visible from adjacent property.¹¹⁷

The trial court allowed suppression of the marijuana, believing that the gates and posting of the area created a reasonable expectation of privacy.¹¹⁸ The Sixth Circuit had affirmed the suppression but, upon sitting en banc, reversed, reasoning that: (1) *Katz* dealt with a circumstance unpredicted at the time the fourth amendment was framed, whereas open fields were not unknown to either the Framers or to the Court when it announced *Hester*;¹¹⁹ (2) the unobservability of a field from adjacent property did not preclude it from being an open field, but rather a distinction was to be made between the curtilage and land outside the curtilage;¹²⁰ and finally, (3) the court noted that persons in the field or houses built upon it would be protected, but not the field itself.¹²¹ The court dismissed the "No Trespassing" signs and the gates as irrelevant.¹²²

Factually, *State v. Thornton*¹²³ was remarkably similar. Acting upon an unsubstantiated tip that marijuana was growing in a wooded area behind a mobile home, and without the benefit of a warrant, officers entered the property of Thornton to verify the existence of the contraband.¹²⁴ The property was posted against trespassing and hunting and surrounded by an old stone wall and barbed wire fence. The officers crossed the yard and entered an

116. *Id.*

117. *Id.*

118. *Id.*

119. The court noted that open fields have long been recognized as different from houses. *Id.* at 359.

120. The court stated:

Finally, it was suggested at argument that, since these marijuana fields were not observable while standing on land other than Oliver's, these fields were not 'open fields' within the meaning of *Hester*. . . . It is clear, however, that the rule in these cases is meant to distinguish between curtilage and land outside the curtilage.

Id. at 360.

121. *Id.*

122. *Id.*

123. 453 A.2d 489 (Me. 1982), *rev'd*, 104 S. Ct. 1735 (1984).

124. *Thornton*, 453 A.2d at 490-91.

overgrown and unpaved road, which they followed into a dense woods, ultimately discovering marijuana patches.¹²⁵

The trial court found that a subsequent warrant was tainted by the illegal search and suppressed both the plants and the testimony as to the observations of the officers.¹²⁶ The state appealed and the Maine Supreme Court affirmed, reasoning that: (1) the open fields doctrine required first, that the activity be openly pursued, and second, that the presence of the officers during their observations be lawful;¹²⁷ (2) the acts of fencing and posting of property clearly indicated that the public was excluded and that privacy was expected;¹²⁸ (3) the court believed that *Katz* had modified the wooden application of the open fields doctrine which was based upon common law property concepts;¹²⁹ and (4) the officers were not lawfully present on defendant's property when they made their observations, and because none of the exceptions to the warrant requirement were operating, the fourth amendment forbade their warrantless intrusion.¹³⁰

These two cases, with their factual similarity and dissimilarity of result, are striking examples of the dichotomy which existed in fourth amendment open fields decisions. They reflected the need for clarification by the Supreme Court in order to obtain uniformity of constitutional interpretation.

VIII. OPEN FIELDS GO TO WASHINGTON

In *Oliver*¹³¹ the Supreme Court announced that its purpose was to clear the confusion over the vitality of the open fields doctrine.¹³² The Court stated that the change in language from Madison's proposed draft¹³³ broadened the scope of the fourth

125. *Id.*

126. *Id.* at 492.

127. *Id.* at 495.

128. *Id.* at 494. "In the present case, the defendant's conduct evidenced a clear expectation of privacy. He chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land." *Id.*

129. *Id.* at 495. "[T]he issue of whether government action does or does not constitute a search is now understood to depend less upon the designation of an area than upon a determination of whether the examination is a violation of privacy on which the individual justifiably relied as secure from invasion." *Id.* at 493 (quoting *State v. Gallant*, 308 A.2d 274, 278 (Me. 1973)).

130. *Thornton*, 453 A.2d at 495-96.

131. *Oliver v. United States*, 104 S. Ct. 1735 (1984).

132. *Id.* at 1738.

133. See *supra* notes 7-9 and accompanying text.

amendment, but that "the term 'effects' is less inclusive than 'property' and cannot be said to encompass open fields."¹³⁴ The Court asserted that this judgment was not contrary to the *Katz* analysis of fourth amendment protection, which was predicated upon a reasonable expectation of privacy.¹³⁵

Announcing that three factors will determine whether a governmental intrusion onto open fields without a warrant and absent exigent circumstances will be adjudged reasonable or unreasonable and promising that each would be equally weighted, the Court listed: (1) the intention of the Framers; (2) the uses to which the individual has put the location; and (3) the understanding of society that certain areas are to be more protected than others.¹³⁶ The Court summarily concluded that these factors precluded any legitimate demand for privacy out of doors beyond the curtilage, without any discussion of how the aforementioned factors applied to the case at bar.

The Court stated that the types of activities which the amendment was designed to protect from governmental intrusion do not take place outside the curtilage and declared that society has no interest in protecting the privacy of those in open fields.¹³⁷ Further, the Court contended, fences and signs are ineffective in excluding the public from rural open fields.¹³⁸ Interestingly, the Court found support for this statement in the fact that the government could have surveyed the property from the air but in so doing ignored the obvious fact that *Katz*, too, was ineffective in excluding the uninvited ear from his phone booth.¹³⁹

134. *Oliver*, 104 S. Ct. at 1740 (footnote omitted).

135. *Id.* Stating unequivocally that Justice Harlan's concurrence has become the standard for fourth amendment considerations, the Court opined that "the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

136. *Oliver*, 104 S. Ct. at 1741 (citing *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977); *Jones v. United States*, 362 U.S. 257, 265 (1960)). "In this light, the rule of *Hester*, . . . that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Oliver*, 104 S. Ct. at 1741.

137. *Oliver*, 104 S. Ct. at 1741.

138. *Id.*

139. The accused in both *Oliver* and *Thornton* conceded that overflight of their lands would not have been a violation. *Id.* at 1741 n.9 (citing *United States v. Allen*, 675 F.2d 1373, 1380-81 (9th Cir. 1980); *United States v. DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980)).

The Court stated that despite its decision here, an individual retains some degree of

Continuing, the Court reaffirmed *Hester's* concept of curtilage as an area which is included within the amendment's explicit protection of the home, distinct from any other outdoor area. The Court concluded, however, that society is not prepared to accept as reasonable any expectation of privacy in open fields.¹⁴⁰

The Court foreclosed any possibility that different circumstances might make the search of an open field unreasonable. The majority noted that the case by case analysis which had been taking place put the authorities at a disadvantage by turning the determination of a lawful entry by police into guesswork and then subjecting the judgment of the police to subsequent judicial review. This, the Court contended, led to the undermining of law enforcement. Additionally, the Court said that such ad hoc determinations encouraged arbitrary and inequitable decisions regarding constitutional rights.¹⁴¹

Then, surprisingly, the Court admitted that fences, warning signs, and secluded locations could evidence a reasonable expectation of privacy. However, the Court unequivocally stated that open fields would not be afforded protection regardless of the steps taken by a citizen to conceal his activities upon them, because police officers would be required to make a value judgment as to the adequacy of the steps taken.¹⁴² The Court reasoned that the "Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post no trespassing signs."¹⁴³

The Court went on to note that a trespass would not determine the constitutionality of a search because "[t]he existence of a prop-

fourth amendment protection in open fields, reasoning that "protections against unreasonable arrest or unreasonable seizure of effects upon the person remain fully applicable." *Oliver*, 104 S. Ct. at 1741 n.10.

140. Once again the Court urged the view that this return to the idea that certain areas were not to be afforded fourth amendment protection was not contrary to the holding in *Katz*. "[C]ommon law distinguished 'open fields' from the 'curtilage'. . . . The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home." *Oliver*, 104 S. Ct. at 1742 (citation omitted). It was because of the close association between the home and its curtilage that protection was extended to the curtilage in the first place. This extension of protection was accomplished by "reference to the factors that determine[d] whether an individual reasonably [might] expect that an area immediately adjacent to the home [would] remain private." *Id.*

141. *Id.* at 1742-43.

142. *Id.* at 1743. Apparently the Court felt that adequate guidelines could not be set to allow officers to make a value judgment. The Court ignored the fact that officers make value judgments in every instance where an exception to the warrant requirement exists. The majority was obviously unpersuaded by the cogent solution suggested by the dissenters.

143. *Id.* at 1743 n.13.

erty right is but one element in determining whether expectations of privacy are legitimate."¹⁴⁴

In an attempt to harmonize its use of the common law property concept of curtilage with its rejection of common law trespass as definitive of wrongful invasion, the Court simply stated that "[t]he law of trespass . . . forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest."¹⁴⁵ Trespass law is unconnected with the idea of privacy, the Court contended; the concept of trespass developed in criminal law to protect against theft and vandalism and in civil law to protect ownership and use of land.¹⁴⁶

Ultimately, the Court affirmed the decision of the Sixth Circuit in *Oliver* and reversed the decision of the Maine Supreme Court in *Thornton*.¹⁴⁷

IX. THE DISSSENT NOTES SOME DIFFICULTIES WITH THE DECISION

The dissenting Justices in *Oliver* recognized the contradiction which the majority ignored in advocating a literal interpretation of the fourth amendment while purporting to approve the decision in *Katz*.¹⁴⁸ Clearly, there is great difficulty in jumping from a liberal interpretation of the fourth amendment to a literal approach without overruling previous cases. In trying to harmonize such divergent philosophies the Court left us with discordance.

In addition, the dissenters contended, society does respect the fencing and posting of property as reasonable exhibitions of an expectation to be free from intrusion.¹⁴⁹ They noted that such demonstrations of privacy are not invariably connected with a desire to conduct criminal activity in secrecy but often are connected to per-

144. *Id.* at 1743.

145. *Id.* at 1744.

146. *Id.* at 1744 n.15.

147. *Id.* at 1744.

148. *Id.* at 1744-51 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

149. The dissent noted that

because "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual's expectations of privacy are reasonable." . . . Indeed, the Court has suggested that, insofar as "[o]ne of the main rights attaching to property is the right to exclude others, . . . one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."

Id. at 1747 (citations omitted) (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12, 153 (1978)). Positive law, asserted the dissent, supports the reasonableness of the expectation.

factly legitimate reasons.¹⁵⁰ Further, they stated that open areas are presumptively public places unless owners take the initiative to notify the public of the owner's contrary intentions.¹⁵¹

Justice Marshall argued that if a member of the public ignored such notice, he would be liable for criminal sanctions and questioned why a government official should be allowed to ignore that which the general public is commanded to obey.¹⁵²

The ad hoc difficulties envisioned by the majority were not inevitable, the dissent believed.¹⁵³ The dissenters submitted that a workable test could be formulated such that when a landowner's exclusionary precautions are sufficient to impose criminal sanctions against trespassers, the fourth amendment's protections should attach. Police officers, being sufficiently conversant with the criminal law of trespass, are capable of making well-reasoned judgments about the lawfulness of a search rather than the haphazard guesses which the majority envisioned.¹⁵⁴

X. AGED, THE FOURTH AMENDMENT REMAINS, A SHADOW OF ITS PREVIOUS SELF

The recent history of open fields decisions has shown that the Court was somewhat justified in its concern with the conflicting decisions characteristic of recent open field cases. *Thornton* and *Oliver* represent only the tip of that iceberg. However, the dissent-

150. *Oliver*, 104 S. Ct. at 1748 (Marshall, J., dissenting) (meeting lovers, solitary walks, gathering with fellow worshippers).

151. Some spaces are presumed to be accessible by "positive law and social convention" absent a manifestation of an intention to exclude. *Id.* at 1749. The taking of normal precautions to assure privacy in an area would affect the determination of whether fourth amendment protection will attach to that space, the dissent asserted. Additionally, because a landowner is not required to exercise his right to exclude, privacy claims are "strengthened by the fact that the claimant somehow manifested to other people his desire that they keep their distance." *Id.*

152. *Id.* at 1750.

153. *Id.*

154. Justice Marshall suggested an easily applied rule: "Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the state in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.* He stated that the advantages of the rule included: (1) the doctrinal basis is familiar to officials and citizens alike; (2) substantial case law and statutes would outline the required precautions; and (3) value judgments by police would be simplified because they would be based on well-known laws which they are already entrusted to uphold. *Id.*

As noted earlier, one standard which remains desirable is uniformity of constitutional rights throughout the land. The dissent fails to address the fact that their alternative solution, resting upon police familiarity with local trespass law, will result in differing application of constitutional protections from one locality to another.

ing Justices presented a solution, using local trespass law, which would have left intact the fourth amendment's protection of reasonable expectations of privacy, while providing a rational solution to this dilemma.¹⁵⁶ If the Court felt it necessary, however, it could have simply stated that fourth amendment protection does not extend to open fields, regardless of any act by a citizen to assure privacy there, and merely returned open fields to their pre-*Katz* status.¹⁵⁶ Unsatisfied with this, however, the Court went further, and in attempting to justify its decision advocated two totally incongruous approaches to solving fourth amendment questions.

The Court's acknowledgement that fences and posting can demonstrate a reasonable expectation of privacy and its implicit recognition that the police are well aware of this clashes with its rejection of the reasonable expectation of privacy analysis in open fields cases, leaving one to question whether *Katz* is still viable, despite the Court's protestations to the contrary.¹⁵⁷ One can only speculate as to when the Court will again acknowledge the existence of a reasonable expectation of privacy which is universally recognized and accepted, then only to summarily dismiss it as being of no import to fourth amendment analysis.

More disturbing, however, is the rationale used to justify this warrantless intrusion—the contention that the authorities could have lawfully used aerial surveillance to search the property.¹⁵⁸ Such reasoning is contrary to everything that the *Katz* Court accomplished. One cannot help but recall the concern of Justice Brandeis in his *Olmstead* dissent.¹⁵⁹

Is the Court prepared to justify an illegal search and seizure within one's home as soon as a device capable of visually penetrat-

155. *Id.*

156. The comment of Justice Holmes in *Olmstead* comes immediately to mind:

Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained.

Olmstead, 277 U.S. at 470 (Holmes, J., dissenting).

The *Oliver* Court decided, much as the *Olmstead* Court had, that it was better to successfully prosecute those involved in drug trafficking and sacrifice individual rights, than live with the alternative.

157. *Oliver*, 104 S. Ct. at 1740.

158. *Id.* at 1741.

159. Brandeis envisioned all kinds of invasions defeating the trespass doctrine which might be accomplished with the advent of technology as yet unknown in 1928. See *supra* note 49 and accompanying text.

ing walls is invented? Is the Court going to use such convoluted reasoning to advocate any heretofore unlawful warrantless intrusion merely because a warrant could have been procured which would have made the intrusion lawful? If the police have at their disposal a legal method, the use of which would allow a search and seizure, will they no longer be required to use that legally prescribed method, but because of its very existence are they now to be permitted to use any method they desire without regard to its legality? Are we no longer to be afforded the unbiased reasoning of the courts before zealous police are allowed to enter wherever and whenever they please? In 1927 Justice Brandeis noted similar concerns.¹⁶⁰ And although his fears have not yet been realized, they remain concerns which the Court must not ignore.

The *Oliver* Court held that requiring the police to use the legal methods at their disposal would not "advance legitimate privacy interests."¹⁶¹ One can only conclude that Justices White, Marshall, Brennan, and Stevens may have shown remarkable wisdom in refusing to have their names and reputations connected to such a broad rejection of fourth amendment application to open fields searches and seizures.

The Court has concluded that the fourth amendment may no longer be applied to open fields. In so doing, the Court returns to a literal interpretation of the Constitution. The Court's journey into liberal interpretation was short lived—a mere seventeen years. This change in philosophy is understandable, for it has occurred before and will no doubt occur again. But the difficulties in the Court's rationale present a distinctive concern. Did the Court intend to restrict the fourth amendment's application only in the area of open fields or does the decision foreshadow further intrusions into what have come to be expected fourth amendment protections? Only time will provide the answers to these questions.

160. *Olmstead v. United States*, 277 U.S. 432, 474 (1927) (Brandeis, J., dissenting).

161. *Oliver*, 104 S. Ct. at 1741 n.9.