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The Shrinking of the Fourth Amendment Umbrella: Oliver v. United States

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Abstract

Recently the United States Supreme Court was called upon to determine the size of the fourth amendment umbrella. In *Oliver v. United States,'* the Court was asked whether a search warrant was required, "for the search of a highly secluded field from which the public is excluded when a reasonable expectation of privacy can be shown to exist in that field.

KEYWORDS: amendment, umbrella, shrinking

The Shrinking of the Fourth Amendment Umbrella: *Oliver v. United States*

I. Introduction

Recently the United States Supreme Court was called upon to determine the size of the fourth amendment umbrella. In *Oliver v. United States*,[1] the Court was asked whether a search warrant was required, "for the search of a highly secluded field from which the public is excluded when a reasonable expectation of privacy can be shown to exist in that field."[2] By granting the writ of certiorari, the Court agreed to settle a question which has plagued lower courts for over fifteen years. In order to understand the Supreme Court's decision in *Oliver*, this comment will begin with a cursory glance at the origin of the fourth amendment.[3] The evolution of the "open fields" doctrine[4] as developed in five landmark decisions: *Hester v. United States*,[5] *Olmstead v. United States*,[6] *Katz v. United States*,[7] *Air Pollution Variance Board v. Western Alfalfa Corporation*,[8] and *Marshall v. Barlow's Inc.* will be

1. ___U.S.___, 104 S. Ct. 1735 (1984).

2. Brief for Petitioner Ray E. Oliver, Oliver v. United States, 104 S. Ct. 1735 (1984).

3.

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

U.S. CONST. amend. IV.

4. Hester v. United States, 265 U.S. 57 (1924), is generally recognized as the case responsible for the creation of the "open fields" doctrine. The Court held "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. Therefore, if a search is conducted in an open field, the courts will not apply fourth amendment protection from unreasonable search and seizure and any evidence obtained as a result of this warrantless search will be admissible at trial.

5. *Id.*

6. 277 U.S. 438 (1928).

7. 389 U.S. 347 (1967).

8. 416 U.S. 861 (1974).

reviewed.[9] This comment will focus on the analysis employed, as well as that not employed, by the Court in *Oliver*. In conclusion, this comment will examine the Court's decision in light of the constant tension which exists between effective law enforcement and an individual's right to be free from governmental intrusion.

II. Origin of the Fourth Amendment

Just as American attention is currently focused on volatile issues such as protecting the environment, preventing the occurrence of a nuclear disaster, and reducing the national debt, so were there issues in the latter half of the eighteenth century which were of equal importance to the people of this country.[10] One issue more compelling and immediate than any other in the eighteenth century was America's determination to be free from the dictates of the British Government.[11] One particularly loathsome practice of the British was the use of writs of assistance, a device considered to be a major cause of the American Revolution, and also credited with inspiring the Framers to include the fourth amendment in the Bill of Rights.[12] The British, by utilizing a procedure known as a writ of assistance, were able to subject the colonists to search and seizures without first showing probable cause.[13] The Framers, keenly aware of the abuses a government could subject its people to, constructed the fourth amendment with an aim to prevent the new American government from continuing the British practice of warrantless searches.[14] As Justice Field explained in his discussion of the fourth amendment, it is essential to the peace of mind of every American citizen that he have confidence in his government to protect his right to keep his private affairs beyond the scrutiny of others.[15] In

9. 436 U.S. 307 (1978).

10. *See generally*, N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 103 (1937).

11. *Id.* at 58-9.

12. Boyd v. United States, 116 U.S. 616, 625-26 (1886). For an analysis of this historic decision, see Note, *The Life and Times of Boyd v. United States (1866-1976)*, 76 MICH. L. REV. 184 (1977).

13. In *Boyd*, the Court explained that writs of assistance "authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid; and to enter into and search any suspected vaults, cellars, or warehouses for such goods." *Boyd*, 116 U.S. at 623.

14. *Id.* at 623-30.

15. In Re Pacific R.R. Comm', 32 F. 241, 250 (1887).

the decades which followed, the courts struggled to determine the bounds of fourth amendment protection from unreasonable search and seizures.[16] Although that struggle began over 200 years ago, courts continue to wrestle with issues that require them to balance the demands of effective law enforcement against the preservation of personal liberties.

III. The Evolution of the "Open Fields" Doctrine

The open fields doctrine evolved as a result of one of the Supreme Court's endeavors to determine the extent of fourth amendment protection. *Hester v. United States*[17] is the case generally recognized as the source of this doctrine. The open fields doctrine asserts that the fourth amendment does not protect activities which take place in the open fields, i.e. grasslands, ranges, cow pastures or woods.[18]

In *Hester*, revenue agents hiding on Hester's father's land, saw Hester hand a bottle to a man named Henderson.[19] When a warning was given Hester took a gallon jug from a nearby car and he and Henderson ran.[20] The officers followed and a pistol was fired.[21] The jug carried by Hester was dropped and the one by Henderson discarded.[22] The officers retrieved the discarded bottle and jug which had contained

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> Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, papers, from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.

16. The continuous development in this area of the law is evidenced by the long evolution of the "exclusionary rule." *E.g.*, Weeks v. United States, 232 U.S. 383 (1914) (origin of the exclusionary rule which held evidence seized in violation of a person's fourth amendment rights can not be used against that person in federal court); Mapp v. Ohio, 367 U.S. 643 (1961) (the Court determined the exclusionary rule applied to the states via the fourteenth amendment); United States v. Leon, ___U.S.___, 104 S. Ct. 3405 (1984) (the Court held that the exclusionary rule does not bar the use of evidence obtained in reasonable reliance on a defective search warrant).

17. *Hester*, 265 U.S. at 57.

18. An open field is defined as "any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech." *Oliver*, ___ U.S. at ___, 104 S. Ct. at 1742, n.11.

19. *Hester*, 265 U.S. at 58.

20. *Id.*

21. *Id.*

22. *Id.*

illicitly distilled moonshine whisky.[23] Since a warrant for search or arrest had not been obtained by the revenue officers, Hester claimed that the police violated his constitutional rights under the fourth amendment.[24] Justice Holmes, in delivering the opinion of the Court, stated 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."[25] The Court noted that even though the revenue officers had committed a technical trespass, the fourth amendment protection did not extend to the area referred to as the open field since Hester's own acts had disclosed the evidence.[26] In essence, *Hester* stands for the proposition that government agents can trespass on property from which the public was not excluded during a warrantless search, and without violating the fourth amendment, could view that which was exposed to the public.[27]

Three years later in *Olmstead v. United States*,[28] the Supreme Court addressed the issue of whether the tapping of telephone wires by federal officers constituted an illegal search and seizure.[29] The government submitted recorded conversations as evidence to prove the defendants had engaged in activities prohibited by the National Prohibition Act. A closely divided Court determined that there could not be a violation of a defendant's fourth amendment rights, "unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage'[30] for the purpose of making a seizure."[31] The significant point of the Court's analysis is that certain areas are to be considered "constitutionally protected" and unless a search and seizure

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23. *Id.*

24. *Id.* at 57-8.

25. *Id.* at 59.

26. *Id.* at 58.

27. United States v. Oliver, 686 F.2d 356, 363 (6th Cir. 1982) (Keith, J., dissenting).

28. *Olmstead*, 277 U.S. at 438.

29. The wire taps were not done on the property belonging to the defendants. *Id.* at 457.

30. Curtilage is a common-law term which describes buildings subject to burglary. *See* W. LaFave & A. Scott, Criminal Law 712-13 (1972). Curtilage is defined as "the inclosed space of ground and buildings immediately surrounding a dwellinghouse." Black's Law Dictionary 346 (5th ed. 1979).

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

took place within those specified areas, the fourth amendment could not be invoked.[32] This decision made actual physical intrusion into the defendant's house or within the curtilage a prerequisite to a fourth amendment defense.[33] For many decades, *Olmstead*'s per se rule allowed law enforcement personnel to conduct arbitrary warrantless searches of the area beyond the curtilage. This locational approach to defining the reach of the fourth amendment became the subject of criticism[34] and was eventually overruled in *Katz v. United States*.[35]

Katz is credited with dramatically altering fourth amendment analysis employed in determining whether an illegal search and seizure took place. In *Katz*, the defendant was convicted for transmitting illegal gambling information from a public phone booth.[36] The government introduced evidence of these conversations, overheard by F.B.I. agents who had placed electronic listening and recording devices on the outside of a telephone booth.[37] The Supreme Court held that Katz's fourth amendment rights had indeed been violated because the government had invaded an area in which Katz had a reasonable expectation of privacy.[38] The Court rejected the locational approach to fourth amendment protection employed in *Olmstead*.[39] Instead, the Court determined that the focus of the application of fourth amendment protection centers on one's right of privacy.[40] The Court held, that the "fourth amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office is not a subject of fourth amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[41]

The Court concluded that the common-law property concepts of

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32. *Id.* at 466.
33. *Id.*
34. *E.g.*, Silverman v. United States, 365 U.S. 505 (1961) (the Court held that conversations can be the subject of fourth amendment violations even without a technical trespass); Warden v. Hayden, 387 U.S. 294 (1967) (the Court refused to restrict the concept of unlawful search and seizures to the limitations of common-law property rights and held the spirit of the fourth amendment was to protect the privacy rights of individuals).
35. *Katz*, 389 U.S. at 350.
36. *Id.* at 348.
37. *Id.*
38. *Id.* at 353.
39. *Id.* at 352-53.
40. *Id.* at 353.
41. *Id.* at 351.

trespass and curtilage were to be considered only as factors in determining if a fourth amendment violation had taken place.[42] Writing for the majority, Justice Stewart stated that the activities of the F.B.I. had indeed "violated the privacy upon which . . . [Katz] had justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the fourth amendment."[43] The Court then had to determine whether the governmental activities met with constitutional standards.[44] Failure of the officers in *Katz* to obtain the approval of a neutral magistrate, prompted the Court to clarify its policy on the warrant requirement. The Court viewed the warrant requirement as a necessary safeguard to assure that independent judicial review determines whether there is probable cause to issue a search warrant.[45] Acknowledging that the officers believed that their activities would produce evidence of a particular crime and that they carried out their investigation by utilizing the least intrusive means, the Court, nevertheless, held the warrantless search to be unlawful.[46] The Court concluded, "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the fourth amendment—subject only to a few specifically established and well delineated exceptions."[47]

Another major contribution of *Katz* to fourth amendment analysis was the two-pronged test set forth in Justice Harlan's concurring opinion. Designed to further define the standard of review applicable in determining when the fourth amendment's protections should be extended, the test requires: "first that a person have exhibited an actual

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42. *Id.* at 353.

43. *Id.*

44. *Id.* at 354.

45. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 481-82 (1963); United States v. Jeffers, 342 U.S. 48, 51 (1951); United States v. Ortiz, 422 U.S. 891 (1975). *See* Johnson v. United States, 333 U.S. 10, 14 (1948) which contains Justice Jackson's classic explanation of the rationale behind the fourth amendment warrant requirement:

> Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right to privacy must reasonably yield to the right of search is, as a rule, to be decided by judicial officer, not by a policeman or government enforcement agent.

Johnson, 333 U.S. at 14.

46. Warrantless searches have been considered unlawful regardless of probable cause. *See, e.g.*, Agnello v. United States, 269 U.S. 20, 33 (1925).

47. *Katz*, 389 U.S. at 357.

(subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[48] That this test was readily adopted by courts throughout the country and, is in fact frequently quoted in other Supreme Court majority opinions, perhaps accounts for the particularly powerful impact of Justice Harlan's concurrence.

The next major case to amplify the Court's application and interpretation of the "open fields" doctrine was *Air Pollution Variance Board v. Western Alfalfa Corporations*.[49] A State Board of Health Inspector entered the outdoor premises of the defendant's business, from which the public was not excluded, and conducted visual pollution tests.[50] The evidence obtained from this daylight test proved that the emissions from the business' chimneys violated state statutes.[51] The business claimed that the inspector's failure to obtain either a search warrant or the consent of the owners violated its fourth amendment right to be free from unreasonable searches.[52] The Court observed that the inspector did not enter the plant or offices, and in fact had "sighted what anyone in the city who was near the plant would see in the sky—plumes of smoke."[53] Justice Douglas then noted the *Hester* decision and Justice Holmes' refusal to "extend the fourth amendment to sights seen 'in the open field.' "[54] In essence, the Court held that it did not constitute an illegal search and seizure, within the meaning of the fourth amendment, for a government agent to trespass upon land from which the public is not excluded and to submit as evidence anything exposed to the public view.[55]

Justice Douglas did not clarify whether the decision would have been different, had the inspector entered land in which the owners had exhibited a reasonable expectation of privacy. Yet the Court's emphasis on the fact that the inspector was on premises open to the public, arguably implies that this fact affected the Court's conclusion.[56] Also noteworthy is the language chosen by Justice Douglas in quoting the *Hester* decision. Douglas speaks of Holmes' refusal to extend constitu-

48. *Id.* at 361 (Harlan, J., concurring).
49. *Air Pollution Variance Board*, 416 U.S. at 861.
50. *Id.* at 862-63.
51. *Id.* at 863-64.
52. *Id.* at 864.
53. *Id.* at 865.
54. *Id.*
55. *Id.*
56. *Id.*

tional protection to "sights seen 'in the open field.' "[57] This language will be significant in the later examination of *Oliver* since in that case the police had to trespass on highly secluded, fenced and posted land before they were in a position to view the *sights seen* in that so called "open field."[58]

The Supreme Court refined the definition of a permissible warrantless search in *Marshall v. Barlow's, Inc.*[59] In *Marshall*, a businessman refused to allow a warrantless search by an Occupational Safety and Health Administration inspector who was looking for safety hazards and regulatory violations.[60] The Court upheld the district court's decision, which held that statutory authorization for warrantless searches were unconstitutional.[61]The Court determined that a government inspector "[w]ithout a warrant stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the government inspection as well."[62] At this phase of evolution the open fields doctrine appeared to relegate a government agent, minus a search warrant, to exactly the same position as any other member of the public.

In order to clarify the case law development of the open fields doctrine under the fourth amendment, the following is a brief summary of the previously discussed cases:

1. *Hester* (1924): Fourth amendment protection does not extend to the open fields.[63]
2. *Olmstead* (1928): Actual physical intrusion into the house or surrounding curtilage is required before one's fourth amendment rights could be violated.[64]
3. *Katz* (1967): a. This is a shift from the locational approach of *Olmstead*, to the reasonable expectation of privacy test: "Fourth Amendment protects people, not places."[65]

b. Harlan's test for determining whether the privacy expectation is reasonable "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that

57. *Id.*
58. *Oliver*, 686 F.2d at 358.
59. *Marshall*, 436 U.S. at 307.
60. *Id.* at 310.
61. *Id.* at 325.
62. *Id.* at 315.
63. *Hester*, 265 U.S. at 59.
64. *Olmstead*, 277 U.S. at 466.
65. *Katz*, 389 U.S. at 351.

society is prepared to recognize as 'reasonable.' "[66]

c. Warrantless searches are per se unreasonable under the fourth amendment (subject to a few exceptions).[67]

4. *Air Pollution* (1974): Warrantless searches are permitted in areas from which the public is not excluded.[68]

5. *Marshall* (1978): Without a warrant a government official is in no better position than any other member of the public and conversely anything exposed to the public is observable by the police.[69]

The years between 1924, when Justice Holmes first articulated the "open fields" doctrine in *Hester*, and 1978 when the Court issued its ruling in *Marshall*, produced many changes in the doctrine. A considerable amount of confusion resulted from this evolutionary process and courts were uncertain whether *Hester* remained viable in light of *Katz*. This is evidenced by the varied interpretations and applications of the open fields doctrine in courts throughout the country. Many courts allowed warrantless searches only of areas from which the public was not excluded and where a reasonable expectation of privacy, as measured by the two-prong test, was absent.[70] This method of application of the open fields doctrine, constituted a rejection of the per se approach of *Hester*, and an adoption of the reasonable expectation of privacy test developed in *Katz*. Other courts, however, continued to apply the locational analysis of the *Olmstead* decision to the holding in *Hester*. Under this latter view, the area labeled as the open field was beyond the zone of fourth amendment protection or outside of the constitution-

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

67. *Id.* at 357.

68. *Air Pollution Variance Board*, 416 U.S. at 865.

69. *Marshall*, 436 U.S. at 315.

70. *See, e.g.*, United States v. Lace, 669 F.2d 46, 50 (2d Cir. 1982), where the court referred to the "Hester-Katz rationale" as determinative in cases involving the "open fields" doctrine. This combined rationale considers activities observable by the general public to be observable by government agents without a warrant, and conversely, that which is excluded from public view can not be used as evidence by the police without a warrant; see also United States v. Varkonyi, 645 F.2d 453 (5th Cir. 1981) (government agents observed illegal aliens working in fenced scrap metal yard); United States v. Mullinex, 508 F. Supp. 512, 514 (E.D. Ky. 1980) (court rejected a *per se* approach to the "open fields" doctrine and held a reasonable expectation of privacy, Justice Harlan's two-pronged test, to be controlling); United States v. Swart, 679 F.2d 698, 702 (7th Cir. 1982) (The analysis used in *Katz*, prohibits a rule determining an activity which takes place a particular distance from the house or curtilage to be, as a matter of law, denied fourth amendment protection).

ally protected areas.[71] Due to the uncertainty concerning the scope of the open fields doctrine in the wake of *Katz*, the Supreme Court granted the writ of certioari in *Oliver*.[72]

IV. Statement of the Case

Without the aid of a clear ruling from the Supreme Court, lower courts have been required to determine on their own if and when the open fields doctrine applies as a viable exception to the fourth amendment warrant requirement. The divergent lower court holdings of *United States v. Oliver*[73] and *State v. Thornton*[74] are representative of the problem which has existed in courts across the country. The problem is dramatically underscored by the contrary decisions reached in these two cases which possess almost identical facts.[75] The question presented in each of these cases was whether the open fields doctrine allows government agents to trespass upon and search for marijuana fields without a warrant, where the fields are secluded, surrounded by no trespassing signs and clearly exhibit the landowner's subjective ex-

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71. *See, e.g.*, United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc) (the Court held that *Hester* applied to a field that was fenced and posted); United States v. Williams, 581 F.2d 451 (5th Cir. 1978) *cert. denied*, 440 U.S. 972 (1979) (*Hester* still considered viable in light of *Katz* analysis); Ford v. State, 264 Ark. 141, 569 S.W.2d 105 (1978), *cert. denied*, 441 U.S. 947 (1979) (applied "open fields" doctrine to posted land which was fenced and had a locked gate).

72. The inconsistency which resulted from different interpretations and applications of the "open fields" doctrine prompted the Supreme Court to first grant certioari in State v. Brady, 406 So. 2d 1093 (Fla. 1981), *cert. granted*, 456 U.S. 988 (1982), *cert. dismissed in part, vacated in part* ___ U.S. ___, 104 S. Ct. 2380 (1984). In *Brady*, the Florida Supreme Court determined that the fourth amendment prohibited application of the "open fields" doctrine when contraband was seized in a warrantless search of land posted, surrounded by barbed wire, and secured by locked gates. However, due to procedural difficulties, the viability of the case became questionable. This comment assumes the Court granted the writ of certiorari in *Oliver* as a result of these procedural developments in *Brady*.

73. *Oliver*, 686 F.2d at 356. For an analysis of this 5 to 4 decision see, Glickman, *Katz In Open Fields*, 20 AMER. CRIM. L. REV. 485, 497 (1983), and Gibson, *How Open Are Open Fields? United States v. Oliver*, 14 U. TOL. L. REV. 133, 157 (1982).

74. 453 A.2d 489 (Me. 1982).

75. In *Oliver*, tried before the United States Court of Appeals for the Sixth Circuit, the court found the warrantless search of Petitioner's fenced and posted property was not a violation of the fourth amendment rights. Yet in *Thornton*, heard before the Maine Supreme Judicial Court, the court held that entry by government agents onto defendant's fenced and posted land was a violation of his fourth amendment rights.

pectation of privacy.

In *United States v. Oliver*,[76] the defendant, Ray Oliver, was a retired farmer living with his wife and daughter in the Commonwealth of Kentucky on a two hundred acre farm which he owned.[77] Oliver used a portion of his farm to raise hogs, and the rest he leased to third parties.[78] In the summer of 1980, the Kentucky State Police received an anonymous tip that marijuana was being grown on Oliver's farm.[79] Without attempting to secure a search warrant or to obtain Oliver's consent, the police proceeded to the farm to investigate.[80] They drove down Oliver's private road past several "No Trespassing" signs, until a locked gate blocked their path.[81] At this point the agents abandoned their car and slipped through a gap in the gate on a path clearly marked with a "No Trespassing" sign.[82] The narcotics agents proceeded to walk three-quarters of a mile down the road and past a barn and truck camper. After the police had walked approximately one quarter of a mile beyond the barn and camper, a man appeared near the camper and requested the agents to turn around and come back. The officers stated that they were Kentucky State Police and did in fact begin to walk back toward the camper. However, the person who had requested they leave the property was no longer present.[83] The officers continued with the investigation proceeding through a wooded area until they came upon two fields of marijuana. The fields were located at the rear of the farm[84] in a secluded area surrounded by a natural barrier of trees, banks and fences.[85] The facts clearly indicate that one could not view these marijuana fields unless he were standing on Oliver's land and had gone to the same trouble to view the fields as the agents had.[86]

The government charged Oliver with manufacturing marijuana.[87]

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76. *Oliver*, 686 F.2d at 356.
77. *Id.* at 358.
78. *Id.* at 361 (Keith, J., dissenting).
79. *Id.* at 358.
80. *Id.* at 362 (Keith, J., dissenting).
81. *Id.* at 358.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 362 (Keith, J., dissenting).
86. *Id.*
87. *Id.* at 358. Oliver was charged under 21 U.S.C. § 841(a) (1981) and 18 U.S.C. § 2 (1969).

The Kentucky District Court found that the state police had violated Oliver's fourth amendment rights and granted the defendant's motion to suppress the marijuana evidence. The Sixth Circuit applied Justice Harlan's two-prong test to determine first, if Oliver exhibited an actual expectation of privacy, and second, if the expectation was one that society is prepared to recognize as reasonable. Under this standard the Sixth Circuit court found that Oliver possessed a reasonable expectation of privacy sufficient to require a search warrant.[88] However, on rehearing the Sixth Circuit, sitting *en banc*, reversed and found that any expectation of privacy in an open field is, as a matter of law, unreasonable.[89]

In *State v. Thornton*,[90] the companion case of *Oliver*, the Maine police received an anonymous tip that marijuana was being grown on property located off of the Davis Corner Road.[91] The officers proceeded to the Davis Corner Road and following the directions given by the informant entered the Thornton property by walking between a mobile home and an adjacent house until they came upon an "overgrown tote road."[92] The officers continued on this path and discovered two clearings fenced in with chicken wire which contained marijuana. Due to the density of the woods, it was not possible to see the patches of mari-

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Under title 21:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
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> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute, or dispense, a counterfeit substance.

21 U.S.C. § 841 (1981); Under title 18:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (1969).

88. United States v. Oliver, 657 F.2d 85, 88 (6th Cir. 1981). Circuit Judges Keith and Lively, and District Judge Rice, sitting in designation, made up the panel in the original decision.

89. *Oliver*, 686 F.2d at 360.

90. *Thornton*, 453 A.2d at 489.

91. *Id.* at 490.

92. *Id.*

juana from any significant distance whatsoever.[93] The Thornton property was surrounded by an old barbed wire fence, an old stone wall, and numerous "No Trespassing" signs. The officers left the area once they determined that the plants were marijuana.[94]

Three days later the state trooper involved in the initial search of the Thornton property, filed an affidavit and obtained a warrant to search the defendant's land.[95] The trooper relied on three factors to substantiate his claim of probable cause: 1) he had seen marijuana growing on the defendant's land in 1980; 2) his observations from the warrantless search three days earlier; and 3) the information given by the anonymous informant.[96] A warrant was granted based on the affidavit and the trooper returned to the Thornton property and confiscated the marijuana. Thornton was subsequently charged with unlawfully furnishing scheduled drugs in violation of state law.[97]

Thornton moved to suppress both the evidence seized and the observations of the government agents. The Superior Court of Somerset County granted the order to suppress upon finding: 1) that the District Attorney had abandoned any attempt to prove the informant's tip justified the issuance of the warrant; 2) that the information gathered in the state trooper's 1980 search was stale and possibly obtained during an unlawful search; and 3) that the sole remaining ground for substantiating the validity of the warrant rested entirely on the observations of the

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 491.

97. *Id.* at 490. Thornton was charged with unlawfully furnishing scheduled drugs which is a violation of 17-A M.R.S.A. § 1106. That section provides:

> 1. A person is guilty of unlawfully furnishing scheduled drugs if he intentionally or knowingly furnishes what he knows or believes to be a scheduled drug, and which is, in fact, a scheduled drug, unless the conduct which constitutes such furnishing is either:
>
> A. Expressly authorized by Title 22;
>
> B. Expressly made a civil violation by Title 22.
>
> 2. Violation of this section is:
>
> A. A Class C crime if the drug is scheduled W drug; or
>
> B. A Class D crime if the drug is scheduled X, Y, or Z drug.
>
> 3. A person shall be presumed to be unlawfully furnishing a scheduled drug if he intentionally or knowingly possesses more than 1 ½ ounces of marijuana.

17 A M.R.S. A. § 1106 (1983).

state trooper.[98] According to the trial judge, the central issue was whether the initial warrantless search of the police qualified as an exception to the warrant requirement. Taking into consideration the nature of the land searched, that it was secluded, had been fenced in and that signs were posted, the court concluded that Thornton had a reasonable expectation of privacy and that the initial search was unlawful.[99] The Maine Supreme Court affirmed, upholding the trial court's determination that the initial search violated Thornton's reasonable expectation of privacy and that the open fields doctrine did not apply.[100]

Consequently, the evidence obtained in *Thornton* constituted the fruit of an unlawful search and seizure and, therefore, was inadmissible. However, in *Oliver* a contrary decision was reached, allowing the evidence to be introduced at trial even though it was obtained under almost identical circumstances. As stated, both cases used different but presumptively valid Supreme Court cases to arrive at different results. It, therefore, became necessary for the Supreme Court to clarify the fourth amendment standard for search and seizures in the open fields.

V. Analysis of Case

Because the Court consolidated the cases of *Oliver v. United States*[101] and *State v. Thornton*[102] this comment will also focus on the issues raised by these cases as though they were one. The Court in *Oliver* concluded that fourth amendment protection does not extend to posted and fenced fields which clearly manifest the property owner's expectation of privacy.[103] In reaching this decision, the Court first declared that the Framers of the Constitution did not intend an intrusion by government agents onto land located beyond the curtilage to be proscribed by the laws against unreasonable search and seizure.[104] Second, the Court stated that in light of *Hester*, "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[105]

In determining whether the defendants had a justifiable expecta-

98. *Id.* at 491-92.
99. *Id.*
100. *Id.* at 495-96.
101. Docket No. 82-15.
102. Docket No. 82-1273.
103. *Oliver*, ___U.S. at___, 104 S. Ct. at 1743.
104. *Id.* at ___, 104 S. Ct. at 1740.
105. *Id.* at ___, 104 S. Ct. at 1741.

tion of fourth amendment protection, the Supreme Court specifically stated that no single factor was to be determinative.[106] Rather, a number of components were to be considered: 1) the intentions of the Framers of the Constitution; 2) the use made of the area by the defendants; and 3) the understanding of society that certain locations require fastidious protection from government intrusions.[107]

The Court reasoned that the Framers' substitution of the word "effects" in place of "property," which James Madison had in his proposed draft of the fourth amendment, is evidence of their intent to limit the protection of the fourth amendment to personal rather than real property.[108] Therefore, the Court concluded, "the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the fourth amendment."[109] This narrow interpretation of the fourth amendment is sharply divergent from the path taken in past Supreme Court decisions. For example, this new interpretation of the Framers' intent is inconsistent in light of the Court's holding in *Katz*[110] that a conversation in a public phone booth is worthy of fourth amendment protection; as well as with the Court's holding in *Marshall*[111] that an office or commercial establishment, that excluded the public, is protected from warrantless searches. It is also at odds with the Court's prior attitude toward constitutional interpretation as demonstrated in the cases of *Boyd v. United States*[112] and *Weems v. United States*.[113]

Cases such as *Boyd* represent the method of constitutional interpretation utilized to guard values traditionally deemed worthy of the Supreme Court's protection. In *Boyd*, Justice Bradley warned that a strict construction of the fourth amendment will result in a gradual loss of the personal rights the amendment was created to protect.[114] Clauses

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106. *Id.*
107. *Id.*
108. *Id.* at ___, at 1740.
109. *Id.*
110. 389 U.S. 347.
111. 436 U.S. at 310.
112. *Boyd*, 116 U.S. at 616.
113. 217 U.S. 349, 373 (1910).
114. *Boyd*, 116 U.S. at 635.

> 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 of them deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in

designed to protect the individual from governmental abuses of power, were also the focus of the Court's attention in *Weems v. United States.* Justice McKenna emphasized that it is better to read the Constitution liberally, for although a particular wrong might have inspired the creation of an amendment, in order for the underlying principle to remain vital it "must be capable of wider application than the mischief which gave it birth."[115] In the dissent in *Oliver*, Justice Marshall's style of Constitutional interpretation is in harmony with that employed by Justice Bradley in *Boyd* and Justice McKenna in *Weems*. In *Oliver* Justice Marshall stated that "[t]he fourth amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed, not to prescribe with 'precision' permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from governmental intrusion."[116] Only if the Constitution is liberally construed to allow the courts to effectuate the purposes of the Framers, will our individual liberties be protected.

Although the Supreme Court purported to use the reasonable expectation of privacy test, in effect the *Oliver* Court injected a threshold question into the second prong of Justice Harlan's test: "whether the government's intrusion infringes upon the personal and societal values protected by the fourth amendment?" By determining that the Framers never intended that fourth amendment protection should extend to the area beyond the curtilage, the Court did not need to proceed any further with an examination of Justice Harlan's test. For once the Court decided that the Framers would not accept the defendants' expectation of privacy in an open field as reasonable, it followed that society, too, was not prepared to recognize an expectation of privacy as reasonable, which was not based on a right protected by the Constitution. Although it appears that the *Oliver* Court is using a fresh ap-

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sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and guard against any stealthy encroachments thereon.

115. *Weems*, 217 U.S. at 373.

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.

116. *Oliver*, ___U.S.___, 104 S. Ct. at 1745 (Marshall, J., dissenting).

proach it was actually in *Olmstead* that the Supreme Court first declared that certain areas were to be considered "constitutionally protected." Both Courts based their decisions upon a literal construction of the fourth amendment and determined that unless a search and seizure took place within those specified areas, the fourth amendment did not apply.

Arguably, the decision by the Court in *Oliver*, is a retreat back to the period of constitutional interpretation which existed prior to *Katz*. Although *Katz* overruled the *Olmstead* "constitutionally protected areas" method for application of fourth amendment protection, the *Oliver* decision appears to draw once again upon that antiquated locational approach. By ruling that constitutional prohibitions forbidding warrantless searches and seizures do not apply to specific areas, i.e. open fields, no matter what the individuals subjective expectation of privacy might be, the Court appears to be utilizing pre-Katz analysis. Regardless of the approach taken, a direct result of the Court's decision in *Oliver* is that police officers will no longer be required to prove probable cause to an impartial magistrate before conducting a "search" of that portion of a citizen's property which lies beyond the curtilage. Far from carrying out the intentions of the Framers, the Court's narrow interpretation of the fourth amendment actually impedes protection of the fundamental values which it was designed to safeguard.

Additional factors examined by the Court include: the use made of the areas by Oliver and Thornton, and whether society requires fastidious protection from government intrusion of clearly marked privately owned property.[117] As an example of a use which has historically received fastidious fourth amendment protection, the Court discussed the "sanctity of the home."[118] Writing for the majority in *Oliver* Justice Powell contrasted activities which take place in the home with those that occur in open fields, and concluded that the level of intimacy for activities in open fields was insufficent to warrant "an expectation [of privacy] that 'society recognizes as reasonable.' "[119] Three reasons were given by the Court for reaching this conclusion: 1) "open fields are accessible to the public and the police in ways that a home, office, or commercial structure would not be,"[120] 2) posting and fencing "do not

117. *Oliver*, ___U.S.___, 104 S. Ct. at 1741.

118. *Id.*

119. *Id.* The cultivation of crops was an example, given by Justice Powell, of activities that take place in open fields.

120. *Id.*

effectively bar the public from viewing open fields,"[121] and 3) "the public and police lawfully may survey land from the air."[122]

Arguably, in making the determination that any expectation of privacy a landowner might have in an open field is per se unreasonable, the *Oliver* Court did not fully utilize the test as outlined in *Katz*. According to Justice Harlan's test as outlined in *Katz*, the inquiry should have been whether the defendants had a reasonable (subjective) expectation of privacy which society is prepared to recognize as reasonable.[123]

Although the premise that only property interests limit the power of the government to conduct warrantless searches has been rejected by the Court,[124] common-law property concepts are still relied on to help determine whether the expectation of privacy in the area in question is reasonable.[125] As Justice Powell observed in his concurrence in *Rakas v. Illinois*, "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable."[126] Accordingly, the common law has long recognized the right to exclude others as an incident of property ownership.[127] It is this right to exclude which creates a legitimate expectation of privacy.[128]

The steps taken by both Thornton and Oliver to exclude the public from their land clearly manifest a subjective expectation of privacy. It was not possible to see either field from any direction of public access. Nor was it the government's contention that the police had probable cause for the warrantless search, or that exigent circumstances existed which would have done away with the warrant requirement.[129] The

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121. *Id.*

122. *Id.*

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

124. *Id.* at 353.

125. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128 at 143, 144 n.12 (1978) (Powell, J., concurring): ("the Court has not altogether abandoned the use of property concepts in determining the presence or absence of the privacy interest protected by [the Fourth] Amendment"); and *Marshall*, 436 U.S. at 312 (1978) ("if the government intrudes [upon] a person's property, the privacy interest suffers. . . .").

126. *Rakas*, 439 U.S. at 153.

127. Loretto v. Teleprompter Manhattan CATC Corp., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in the owner's bundle of property rights").

128. *Rakas*, 439 U.S. at 153.

129. *Oliver*, 104 S. Ct. at 1738 n.1.

Court in *Katz* found the warrant requirement a necessary safeguard to assure that an impartial tribunal determines whether there is probable cause to issue a search warrant.[130] A warrantless search is justified only under the strict guidelines established as exceptions to the warrant requirement. The five basic exceptions[131] include: incident to a lawful arrest;[132] probable cause and exigent circumstances;[133] suspect consents to the search;[134] hot pursuit;[135] and stop and frisk.[136] These exceptions apply where the general welfare of society, balanced against the individual's privacy interest, warrant government action. It was clearly established in *Katz*, that searches which are conducted without the prior approval of a magistrate, are per se unreasonable under the fourth amendment.[137]

In the lower courts, resolution of the inquiry as to whether a warrantless search was justified according to the open fields doctrine involved an objective appraisal of surrounding circumstances, in particular the existence of gates, signs, fences, and locks.[138] The fact that both Oliver and Thornton owned the land lends additional credence to their assertion of a justifiable expectation of privacy. It is also important to note that in both Kentucky and Maine, violation of the property rights

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130. *Katz*, 389 U.S. at 357. The purpose of the fourth amendment's warrant requirement is to protect citizens from arbitrary intrusion by the government into their private domain.

131. The "plain view" doctrine allows the police to seize evidence, in plain view, and inadvertently seen in the course of a lawful search in regard to another crime. *See, e.g.*, Collidge v. New Hampshire, 403 U.S. 443 (1970); Texas v. Brown, 460 U.S. 730 (1982).

132. Michigan v. DeFillippo, 443 U.S. 31, 35 (1979).

133. Payton v. New York, 445 U.S. 573 (1979).

134. Schnickloth v. Bustomonte, 412 U.S. 218, 248 (1973).

135. Warden v. Hayden, 387 U.S. 294, 298 (1967).

136. Terry v. Ohio, 392 U.S. 1, 16 (1968).

137. *Katz*, 389 U.S. at 357.

138. *Compare, e.g.*, United States v. Lace, 669 F.2d 46 (2nd Cir. 1982) (held a warrantless search was justified because the property was not posted and the public could enter at will), United States v. Balsamo, 468 F. Supp. 1363, 1379 (D. Me. 1979) (search justified because the land was not posted or fenced), and United States v. Miller, 589 F.2d 1117, (1st Cir. 1978) (warrantless search allowed since outsiders could enter at will); *with* United States v. Dunn, 674 F.2d 1093 (5th Cir. 1982) (fenced property is protected), *vacated* ___U.S.___, 104 S. Ct. 2380 (1984) and State v. Brady, 406 So. 2d 1093 (Fla. 1981) (property protected where posted and fenced), *cert. granted*, 456 U.S. 988 (1982), *cert. dismissed in part, vacated in part* ___U.S.___, 104 S. Ct. 2380 (1984).

of others is considered a criminal offense.[139] In determining whether a defendant's asserted privacy expectations were justifiable, the Supreme Court, prior to the *Oliver* decision, inquired as to whether the defendant "took normal precautions to maintain his privacy."[140] If such precautions were taken by the defendant, the Court usually determined that without a warrant a government official was in no better position than any other member of the public.[141] In *Oliver*, had a private citizen entered the property concerned, he would clearly have been trespassing and therefore committing a criminal offense.

The Court in *Oliver* makes it clear that violations of a citizen's property interest by a government agent will not, in and of itself, create a fourth amendment problem. Although the majority does not specifically address the issue of criminal trespass, that the Court is unwilling to suppress the evidence means, in essence, that the only remaining remedy for the defendants is to sue the officers for trespass. Needless to say this remedy falls short of being of any real assistance to either Oliver or Thornton. Ultimately the only remedy that truly counts is application of the exclusionary rule.

Apparently the approach, developed in *Marshall*,[142] has now been rejected by the Court. In *Oliver*, the Court supported its decision that a trespass by a government agent upon an open field is not necessarily a violation of the fourth amendment, stating that *Katz* determined that property interests do not control the right of the government to search and seizure.[143] It is important to note, that the purpose behind *Katz* in discarding the *Olmstead* "constitutionally protected areas" approach, was to shift the focus away from the place being intruded upon by government officials and to place it on the person being subjected to the warrantless search. Presumably, the objective of the Court in *Katz*, was to increase the size of the fourth amendment umbrella and thereby broaden constitutional protection.

The third rationale offered by the *Oliver* Court to show that the defendants' expectation of privacy was unreasonable, was that aerial surveillance could have been used to gather sufficient evidence to obtain

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139. KY. REV. STAT. § 511.070(1), .080, (1975 & 1984); and ME. REV. STAT. ANN. TIT. 17A, § 402(1)(c) (1983).

140. Rawlings v. Kentucky, 448 U.S. 98, 105 (1980).

141. *Marshall*, 436 U.S. at 315.

142. *Id.*

143. *Oliver*, ___U.S.___, 104 S. Ct. at 1743.

a search warrant or to justify a warrantless search.[144] The utilization of sophisticated technology which makes this type of wide-ranging, arbitrary search for crime possible, threatens the basic constitutional right to be free from unreasonable search and seizures.[145] As one writer stated, "[j]udicial implementations of the fourth amendment need constant accomodation to the ever-intensifying technology of surveillance."[146] The cases of *Olmstead* and *Katz* demonstrate that there are times when fourth amendment interpretation has lagged behind rapidly developing technologies of surveillance, and thus newer techniques which invade privacy may go temporarily unrecognized as "searches" and "seizures."[147] In this era of ever-increasing surveillance capabilities, care must be taken to ensure that tomorrow's sophisticated surveillance devices, do not go so far as to deprive Americans of the right to privacy recognized by the Supreme Court as existing within the "sanctity of the home."[148]

VI. Justice Marshall's Dissent

Justice Marshall, joined by Justice Brennan and Justice Stevens dissented in *Oliver*. These Justices listed three factors traditionally used to determine whether a person's expectation of privacy in a physical space is reasonable: 1) whether the defendants' expectation of privacy was recognized by positive law; 2) the potential uses of the open fields on defendants' property; and 3) whether the defendants had clearly manifested to the public, in a manner likely to be understood, their intent that the land in question was private.[149]

To determine whether the defendants' privacy expectations were grounded in positive law, the dissent reflected upon the Court's statement in *Rakas*,[150] that one who lawfully possesses property, coupled

144. *Id.* at ___, 104 S. Ct. at 1741.

145. Granberg, *Is Warrantless Aerial Surveillance Constitutional*? 55 CAL. ST. B.J. 451, 454 (1980).

146. Brief for Amici Curiae American Civil Liberties Union of Northern California (ACLU-NC), Mexican American Legal Defense and Educational Fund (MALDEF), and California Rural Legal Assistance (CRLA) in Support of Petitioner, *Oliver*, ___ U.S. at ___, 104 S. Ct. at 1735. *But see*, Justice Rehnquist's statement in United States v. Knotts, 460 U.S. 276 (1982) for a contrary argument.

147. *Id.*

148. *Oliver*, ___U.S.___, 104 S. Ct. at 1741.

149. *Id.* at ___, 104 S. Ct. at 1747 (Marshall, J., dissenting).

150. *Rakas*, 439 U.S. at 153.

with the right to exclude, will probably have a justifiable expectation of privacy. The dissent noted that the defendants could subject an intruder to criminal liability, under local law, for violation of their property rights.[151] Taking into consideration that Oliver and Thornton both owned the property concerned, the dissenters concluded that the defendants' expectations of privacy were of the type that society has traditionally accepted as reasonable.[152]

The *Oliver* dissenters speculated upon the numerous ways the defendants could have enjoyed their secluded property which society would recognize as deserving of privacy. Solitary walks, lovers tryst, and religious services were but a few of the potential uses to which the defendants' could have put their property.[153] "Our respect for the freedom of the landowners to use their posted 'open fields' in ways such as these" accounts for the gravity with which the positive law considers intentional trespass.[154]

Finally, the dissent explained that it is essential to a strong claim of privacy to clearly manifest an intent to exclude. Justice Marshall stated that although a property owner need not execute his right to exclude the public, if and when he does exercise this entitlement, he bears the burden of clearly communicating his intention to passersby.[155] Both positive law and social convention consider undeveloped land to be open to the public unless the landowner has clearly indicated a contrary intent.[156] Justice Marshall concluded that if the property had been properly fenced and posted, and the intentional intrusion of a private citizen would expose him to criminal liability, then "[I] see no reason why a government official should not be obliged to respect such unequivocal and universally understood manifestations of a landowner's desire for privacy."[157]

The dissent expressed concern that not only will the *Oliver* ruling pave the way for a variety of distasteful investigative activities, but also that society will gradually become accustomed to law enforcement agencies routinely engaging in this type of invasive "search."[158] The dissent warns, that even the most repugnant of activities can become

151. *Oliver*, ___ U.S. at ___, 104 S. Ct. at 1748.
152. *Id.*
153. *Id.* at ___, 104 S. Ct. at 1748-49.
154. *Id.* at ___, 104 S. Ct. at 1749.
155. *Id.*
156. *Id.*
157. *Id.* at ___, 104 S. Ct. at 1750.
158. *Id.* at ___, 104 S. Ct. at 1751.

common place and thereby lose their power to offend.[159]

VII. Effect of the *Oliver* Decision

Arguably the *Oliver* decision demonstrates that the Court is shifting away from the protection of civil liberties. Perhaps the government's interest in combating crime is replacing its fundamental concern for personal liberty. Judicial attention appears to reflect society's concern with the rising crime rate. The Court, it appears, is prepared to sacrifice rights protected by the Constitution in an effort to aid law enforcement personnel in apprehending and prosecuting criminal suspects. No longer does the Court place a higher value on guarding personal rights than on detecting criminals. Justice Holmes, once faced with a decision similar to the Court in *Oliver*, said "[w]e have to choose, and for my part I think it is a less evil that some criminals should escape than that the government should play an ignoble part."[160]

If the pendulum continues to swing in this direction, and the courts grow increasingly preoccupied with "fighting" crime, there is yet another danger threatening the preservation of our fourth amendment rights. Professor Amsterdam warns that the danger of requiring an actual expectation of privacy is that the government could conceivably manipulate the public's expectations so that no legitimate subjective expectation could exist.[161] In effect the *Oliver* Court determined, using the objective standard as defined in the second prong of Justice Harlan's test, that society would not recognize the defendant's expectation of privacy in an open field as reasonable. Although the Court grounded the *Oliver* decision on the objective prong of Justice Harlan's test, Professor Amsterdam points out that the subjective prong can also be used as a device to limit fourth amendment protection.[162] In his examination of Justice Harlan's two-pronged test Professor Amsterdam focuses upon the potential for governmental abuse.[163] To reiterate, Justice Harlan required the Court to determine whether the defendant possessed an expectation of privacy and whether this expectation was

159. *Id.* at ___, 104 S. Ct. at 1751, n.21.
160. *Olmstead*, 277 U.S. at 470.
161. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).
162. United States v. Jacobstein, ___U.S.___, 104 S. Ct. 1652 (1984).
163. *Id.*

one that society is prepared to recognize as reasonable.[164] As noted by another commentator, "each element of Justice Harlan's test, if taken to its logical extreme, might eliminate the right to have expectations of freedom from governmental intrusions, thereby nullifying the safeguards of the fourth amendment."[165] In *Oliver*, for example, the Court determined that an individual can not possess a justifiable expectation that open fields will be free from warrantless intrusion by agents of the government.[166] If the government of the United States "can condition citizens to expect that certain intrusive searches and seizures will occur, then those searches and seizures, by definition, would not be unreasonable."[167] Therefore, regardless of the measures taken by an individual, i.e. electric fencing, posting, ten foot high brick walls etc., no action will be deemed sufficient to create a reasonable subjective expectation of privacy in property which lies outside the curtilage.

Arguably, by defining the open fields doctrine in this manner, the *Oliver* Court has reduced the protection of personal privacy traditionally guarded by the fourth amendment. Indeed, there is little doubt that by concluding that any expectation of privacy an individual might have in an open field is per se unreasonable, the Court has removed numerous barriers from the path of law enforcement personnel. By eliminating the necessity of obtaining a warrant, the police are no longer required to convince an impartial magistrate of sufficient probable cause before beginning a search of that portion of a citizen's property, considered by the police to be an open field. Therefore, the police are free to conduct arbitrary, persistent, and indiscriminate searches on private property in an effort to discover criminal activity. In essence, the *Oliver* decision marks a return to a pre-*Katz* approach to fourth amendment analysis. By determining that constitutional protection from warrantless searches and seizures does not apply, as a matter of law, to open fields, regardless of the individual's subjective expectation of privacy, the Court has apparently returned to the once disfavored locational approach of *Olmstead*.

The Court justified its decision in *Oliver* by claiming that an ad hoc case-by-case determination of whether or not a defendant possessed a reasonable expectation of privacy was not a workable solution to an-

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

165. Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 157-58 (1977).

166. *Oliver*, ___ U.S. at ___, 104 S. Ct. at 1742.

167. Note, *supra* note 168, at 157-58.

swer the needs of law enforcement.[168] Yet the dissent offered a solution which is not only workable and can easily be applied, but which continues to offer protection against unreasonable search and seizure. The dissent suggested that "[p]rivate 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."[169]

The Court in *Oliver* held that, "[t]he 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."[170] This is an excellent question posited by the Court but never satisfactorily answered. Constitutional interpretation is the method the Supreme Court uses to discover which values the Framers intended to protect by the creation of the fourth amendment. The *Oliver* Court chose a close and literal interpretation of the language in the fourth amendment. Judicial history, however, demonstrates what past Supreme Courts have considered values protected by the fourth amendment.[171] In *Boyd* Justice Bradley, in his discussion of the fundamental principles of constitutional liberty, stated, "[i]t is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefensible right of personal security, personal liberty and private property. . . ."[172] Justice Brandeis, in his well known dissent in *Olmstead*, stated that the Framers of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."[173]

Even in 1984, Orwellian projections of doom[174] can still be kept at bay. By remembering Justice Frankfurter's graceful phrase, "[t]he course of true law pertaining to searches and seizures . . . has not . . .

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168. *Oliver*, ___ U.S. at ___, 104 S. Ct. at 1743.

169. *Id.* at 1750 (Marshall, J., dissenting).

170. *Id.* at 1743.

171. *Id.*

172. *Boyd*, 116 U.S. at 630. Justice Brandeis called *Boyd*, "a case that will be remembered as long as civil liberty lives in the United States."

173. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

174. Amsterdam, *supra* note 165, at 384.

run smooth,"[175] one can hope that *Oliver* is but one more bump in the road.

Vickie Popkin Kligerman

175. Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).