Denver Law Review

Volume 62 | Issue 3 Article 13

January 1985

Oliver v. United States: Powell Chases Katz out of the Fields

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OLIVER V. UNITED STATES: POWELL CHASES *KATZ* OUT OF THE FIELDS

INTRODUCTION

Two Kentucky state policemen, without a warrant and admittedly without probable cause, entered the farm of Ray Edward Oliver after receiving an anonymous tip claiming that marijuana was growing on his property.[1] After driving a short distance past Oliver's house on a road posted as private, they encountered a locked gate.[2] Undaunted, the detectives parked their car and continued past the gate on foot.[3] By this time, they had already passed four "no trespassing" signs.[4] After the agents had walked several hundred yards beyond the locked gate, past a barn and a parked camper, they were warned by a man on the property not to proceed farther. The police, however, continued their investigation and eventually found a field of marijuana over a mile from the Oliver home.[5] The district court suppressed the evidence obtained by the officers under the exclusionary rule,[6] but its decision was eventually reversed by the Sixth Circuit Court of Appeals, sitting *en banc*.[7]

A similar factual scenario had taken place in Maine.[8] Again, acting on an anonymous tip, without probable cause or warrant, two police officers proceeded onto private property, between a mobile home belonging to Richard Thornton and a neighboring residence, until they reached an overgrown footpath in a heavily wooded area.[9] An old stone wall, a barbed wire fence, and "no trespassing" signs were placed around the perimeter of Thornton's property, including a sign where the footpath entered the property. The officers ignored all this, however, and followed the path until they encountered two marijuana patches[10] which were fenced with chicken wire. Thornton was arrested

1. The Government admitted that it did not have probable cause to conduct the warrantless search. United States v. Oliver, 686 F.2d 356, 362 (6th Cir. 1982) (en banc) (Keith, J., dissenting), *aff'd*, 104 S. Ct. 1735 (1984).

2. *Id.* at 358.

3. The reported *Oliver* opinions differ somewhat on the facts of the case. For instance, the Sixth Circuit panel opinion stated that "the two men slipped through a hole in the gate," United States v. Oliver, 657 F.2d 85, 86 (6th Cir. 1981), *rev'd en banc*, 686 F.2d 356 (6th Cir. 1982). However, the *en banc* opinion reported that they walked around the gate and proceeded on a path adjacent to it, 686 F.2d at 358. *See* Note, Katz *in Open Fields*, 20 AM. CRIM. L. REV. 485, 487 n.13 (1983).

4. Petitioner's Opening Brief at 4, Oliver v. United States, 104 S. Ct. 1735 (1984).

5. Oliver v. United States, 104 S. Ct. 1735, 1738 (1984).

6. See United States v. Oliver, 657 F.2d 85 (6th Cir. 1981) for a synopsis of the unpublished district court order. The exclusionary rule provides that evidence seized in violation of the Constitution is inadmissible at the trial of the accused.

7. 686 F.2d 356 (6th Cir. 1982).

8. Maine v. Thornton, 453 A.2d 489 (Me. 1982), *rev'd*, 104 S. Ct. 1735 (1984).

9. *Id.* at 490-91.

10. The entire area was so heavily wooded that it was impossible to see the two marijuana patches from Thornton's home, from his driveway, from the public road, or from

and indicted on the basis of this evidence.[11] The trial court granted Thornton's motion to suppress; its decision was affirmed by the Maine Supreme Judicial Court.[12]

In each of these two cases, then, police officers had entered private property in search of evidence of a crime.[13] The property owners had excluded the public with no trespassing signs and fences. The contraband subsequently found by the police was located in areas which could not have been seen from any vantage point accessible to the public; this evidence was then used to incriminate the owner of the property. There was no warrant authorizing the activities of the police in either case.[14]

In their efforts to incriminate others, the police in both instances had committed criminal acts themselves, since statutes prohibiting criminal trespass in Kentucky[15] and in Maine[16] had been violated. Certiorari was granted in both cases,[17] which were then consolidated.

The United States Supreme Court, in *Oliver v. United States*,[18] held that the fourth amendment,[19] which was created to protect individual privacy rights against unreasonable governmental intrusion,[20] did not apply in these two situations. It is argued here that the *Oliver* decision conflicts with the "reasonable expectation of privacy" standard enunciated in *Katz v. United States*,[21] that it perpetuates the unworkable curtilage concept,[22] and that it inconsistently applies fourth amendment protections.[23]

I. Creation and Erosion of Fourth Amendment Protections

Since the adoption of the fourth amendment, judicial definition of the amendment's scope has propagated confusion and debate.[24] To facilitate an understanding of *Oliver*'s impact on fourth amendment analyses, it is necessary to trace the evolution of judicial interpretation of the

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neighboring land. "In fact, a person would have had to search just to find his way to the patches." *Id.* at 491.

11. *Oliver*, 104 S. Ct. at 1739.

12. 453 A.2d 489 (Me. 1982).

13. *Oliver*, 104 S. Ct. at 1744 (Marshall, J. dissenting).

14. *Id.*

15. Ky. Rev. Stat. §§ 511.070, 511.080, 511.090 (1985).

16. Me. Rev. Stat. Ann. tit. 17A, § 402(1)(c) (1983).

17. Certiorari was granted in Oliver v. United States, 459 U.S. 1168 (1983) and in Maine v. Thornton, 460 U.S. 1068 (1983).

18. 104 S. Ct. 1735 (1984).

19. The fourth amendment provides:

> 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.

20. *See infra* notes 25-28 and accompanying text.

21. 389 U.S. 347 (1967).

22. *See infra* notes 97-110 and accompanying text.

23. *See infra* note 125 and accompanying text.

24. *See generally* Coker, *Confusion Regarding Exclusion: The Evolution of the Fourth Amendment*, 23 Ariz. L. Rev. 801 (1981).

scope of fourth amendment protection against unreasonable searches and seizures, as well as the "open fields" exception to the fourth amendment.

A. *Early History*

Prior to the formation of the United States, colonists were frequently subjected to unreasonable searches and seizures under "writs of assistance."[25] These writs were issued by the British, without any requirement of a showing of probable cause, in order for their officers to search any place suspected of concealing smuggled goods.[26] The widespread abuse of this process by officers has been credited as one of the major catalysts behind the American movement towards independence.[27] In response to these governmental intrusions on privacy, the framers of the United States Constitution drafted the fourth amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.[28]

The language of the fourth amendment does not provide a remedy for its violation.[29] None of the events leading to its adoption involved pleas that illegally obtained evidence be excluded from trial. In fact, any pertinent evidence was admissible, regardless of the manner in which it was obtained; the only remedy available to the victim of illegally obtained evidence was to sue in tort.[30]

In an effort to put teeth into the fourth amendment protections against unreasonable searches and seizures, the Supreme Court, in 1886, excluded evidence from a criminal trial due to violation of the petitioner's constitutional rights in *Boyd v. United States.*[31] However, the

25. Boyd v. United States, 116 U.S. 616, 625 (1886). *See also* H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 104 (8th ed. 1968).

26. *Boyd*, 116 U.S. at 625.

27. James Otis pronounced the writ to be "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," since it placed "the liberty of every man in the hands of every petty officer." *Id.* (quoting *Cooley's Constitutional Limitations*, 301-303).

Referring to the famous debate in which the above statement was made, John Adams reflected that "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Id.*

28. United States v. Chadwick, 433 U.S. 1, 8 (1977). In *Chadwick*, Chief Justice Burger reasoned:

> [a]lthough the searches and seizures which deeply concerned the colonists, and which were foremost in the minds of the Framers, were those involving invasions of the home, it would be a mistake to conclude . . . that the Warrant Clause was therefore intended to guard only against intrusions into the home . . . . [T]here is no evidence at all that they intended to exclude from protection of the Clause all searches occurring outside the home.

Id. His discussion indicates that the vagueness in the fourth amendment was intended to be flexibly construed. *See generally* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

29. *See, e.g., supra* note 19.

30. Olmstead v. United States, 277 U.S. 438, 462-63 (1928). For a discussion of modern trends in this direction, see Berner, *Fourth Amendment Enforcement Models: Analysis and Proposal*, 17 VAL. U.L. REV. 215 (1982).

31. 116 U.S. 616 (1886).

official creation[32] of the exclusionary rule did not take place until 1914, in *Weeks v. United States*.[33]

In *Weeks*, the Supreme Court ruled that evidence illegally obtained must be excluded from criminal proceedings in the federal courts.[34] Thirty-five years later, in *Wolf v. Colorado*,[35] the Court stated that the exclusionary rule did not apply to state proceedings. However, in 1961, the Court changed course with its *Mapp v. Ohio* decision[36] and held that the exclusionary rule *was* binding on the states, under the due process clause of the fourth amendment, as an implicit part of fourth amendment guarantees.[37] *Mapp* was also one of the first cases to espouse deterrence as the principal purpose of the exclusionary rule.[38]

B. *The* Katz *Decision*

In 1967, the next major expansion of the fourth amendment's scope occurred in the landmark decision of *Katz v. United States*.[39] Federal agents in Los Angeles had attached electronic listening and recording

32. The *Boyd* case is not considered the original source of the exclusionary rule because the decision was not based solely on a violation of the fourth amendment. The Court reasoned that, as the petitioner was in essence forced to incriminate himself by the compulsory production of private papers, both the fourth and fifth amendments were violated; the combined violation necessitated exclusion of the evidence. Note, *The Erosion of the Exclusionary Rule Under the Burger Court*, 33 BAYLOR L. REV. 363, 363-64 (1981).

33. 232 U.S. 383 (1914). In *Weeks*, the defendant was convicted, in the trial court, of using the mails to transmit coupons or tickets in a lottery enterprise, based on evidence obtained by a U.S. Marshall who had searched his room and seized various papers and articles without a search warrant. The Supreme Court held that such taking of papers by an official of the United States, acting under color of office, violated the constitutional rights of the defendant, and that the lower court had erred by permitting introduction of the papers at trial.

34. Justice Day stated:

> [t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

Id. at 398.

> In Olmstead v. United States, 277 U.S. 438 (1928), the Court reiterated:
> [I]n the Weeks Case, and those which followed, this court decided with great emphasis and established as the law for the *federal courts* that the protection of the Fourth Amendment would be much impaired, unless it was held that not only was the official violator of the rights under the amendment subject to action at the suit of the injured defendant, but also that *the evidence thereby obtained could not be received.*

Id. at 463 (emphasis added).

35. 338 U.S. 25 (1949). The Court stated that the due process clause of the fourteenth amendment did not incorporate the Bill of Rights. *Id.* at 26.

36. 367 U.S. 643 (1961).

37. *Id.* at 655. *See also* Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

38. Coker, *supra* note 24. "The rationale is that potential exclusion of any evidence produced by an unreasonable search will eliminate the incentive to conduct such searches." *Id.* at 805. *See* United States v. Janis, 428 U.S. 433 (1976); Peltier v. United States, 422 U.S. 351 (1975); United States v. Calandra, 414 U.S. 338 (1974); Elkins v. United States, 364 U.S. 206 (1960). *See generally* Note, *Scope of the Exclusionary Rule—"Inevitable Discovery" Exception Adopted*, 4 U. ARK. LITTLE ROCK L.J. 551 (1981).

39. 389 U.S. 397 (1967).

devices to the outside of a public telephone booth[40] to gather evidence that Charles Katz was transmitting wagering information to Miami and Boston in violation of a federal statute.[41] The District Court for the Southern District of California admitted the evidence, and Katz was convicted under an eight-count indictment.[42] The Ninth Circuit affirmed the conviction, holding that no fourth amendment violation had occurred, as there was no *physical* invasion of the area occupied by Katz.[43]

The Supreme Court granted Katz's petition for certiorari in order to provide the lower courts with a much needed clarification of the fourth amendment's application. The majority opinion shifted emphasis away from the "constitutionally protected areas" standard[44] toward a review of reasonable privacy expectations. Most important, the Court held that the fourth amendment's protections against unreasonable governmental intrusions applied to "people, not places."[45]

Justice Harlan, in his concurrence, interpreted the majority opinion as holding that the rule to be applied was whether the individual had a "reasonable expectation of privacy."[46] He then defined this rule as involving a two-part test. First, the individual must have exhibited an expectation of privacy (subjective part).[47] Second, this expectation must

40. *Id.* at 348.

41. 18 U.S.C. § 1084 (1982). The statute provides:

> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

18 U.S.C. § 1084 (1982).

42. 389 U.S. at 349.

43. *Katz*, 369 F.2d 130, 134 (9th Cir. 1966).

44. The Court stated that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'" 389 U.S. at 350. Originally, under a literal interpretation of the fourth amendment, constitutionally protected areas consisted only of "persons, houses, papers and effects." U.S. CONST. amend. IV. A "physical trespass theory" was initially used to determine whether an invasion of a protected area had taken place. Over the years, these protected areas were expanded to include automobiles, business offices and hotel rooms. Note, *Fourth Amendment Implications of Warrantless Aerial Surveillance*, 17 VAL. U.L. REV. 309, 311 n.17, 312 (1983). The physical trespass theory was also expanded, beginning with Silverman v. United States, 365 U.S. 505 (1961), to protect individuals against modern surveillance devices. After *Katz*, fourth amendment protection was extended to cover public restrooms with open stalls, People v. Triggs, 8 Cal. 3d 844 (1973), and garbage, People v. Krivada, 5 Cal. 3d 357 (1971).

45. 389 U.S. at 353. Justice Harlan's concurrence noted: "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.'" *Id.* at 361.

46. *Id.*

47. *Id.*

be one that society deems reasonable (objective part).[48]

The expansive reading of the fourth amendment's protections given in *Katz* seemed to impliedly overrule the limitations imposed by the "open fields" doctrine[49] first espoused almost half a century earlier, in *Hester v. United States*.[50]

C. *The Open Fields Exception*

In *Hester*, decided in 1924, revenue agents had observed two men committing the crime of "concealing distilled spirits."[51] The agents had witnessed the incriminating activity while hiding on private property without a warrant. However, the case did not mention the presence of "no trespassing" signs, fences, or anything else which would have indicated that the land was not open to the public; in fact, the Court did not seem clear as to whether there had even been a trespass.[52] The two men bolted when they saw the officers. While in pursuit, the agents recovered two containers of moonshine whiskey[53] which the men had abandoned in their flight. The Court held simply that there was no fourth amendment violation, since the amendment's protections did not apply to "open fields."[54]

Olmstead v. United States,[55] decided three years after *Hester*, involved evidence obtained through telephone wire taps. The Court again held that the fourth amendment protections did not apply, since their scope was limited to "persons, houses, papers, or effects."[56] However, the Court did concede in dicta that an actual physical invasion of the "curtilage" surrounding a house would fall within the amendment's purview.[57]

Therefore, prior to *Katz*, the open fields doctrine was a recognized exception to the scope of the fourth amendment. Open fields were not within the plain meaning of the fourth amendment, and so were not entitled to any constitutional protection. However, the *Katz* mandate to

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48. *Id.*

49. *See* Comment, Katz *in Open Fields*, 20 AM. CRIM. L. REV. 485 (1983).

50. 265 U.S. 57 (1924).

51. *Id.*

52. *Id.* at 58. The language used by the Court states ambiguously, "even if there had been a trespass." *Id.*

53. The Court defined "moonshine whisky" as "whisky illicitly distilled." *Id.*

54. The Court matter-of-factly stated that "it is enough to say 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." *Id.* at 59.

55. 277 U.S. 438 (1928).

56. *Id.* at 465.

57. Specifically, the Court stated:

> Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant, unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house *"or curtilage"* for the purpose of making a seizure.

Id. at 466 (emphasis added).

protect "people, not places"[58] made rigid fourth amendment interpretations, such as those enunciated in *Hester* and *Olmstead*, appear obsolete.[59]

The open fields doctrine has been the subject of numerous decisions in the lower courts, although there has been a great deal of confusion among the circuits regarding its application,[60] especially after the *Katz* decision.[61] With its decision in *Oliver*, unfortunately, the Court has apparently decided to restrict the expansive reading *Katz* had previously given the fourth amendment. Ironically, the Court purportedly uses a *Katz* analysis to accomplish this end.[62]

II. *OLIVER*'S RESTRICTION OF THE FOURTH AMENDMENT'S SCOPE

The *Oliver* decision erodes the scope of the fourth amendment under the guise of defining protected subject matter.

A. *Analysis of the Majority's Reasoning*

The crux of the majority opinion is that fourth amendment protections do not extend to open fields.[63] The majority effectively emasculates the *Katz* decision, while purporting to apply Harlan's two-part *Katz* test in its analysis. As the basis for its revitalization of the "open fields doctrine," the majority stated that society will never recognize an expectation of privacy in open fields as reasonable.[64] Open fields, then, automatically fail the second, objective, part of Harlan's *Katz* test. The fact that a person asserts a subjective privacy interest in the property is irrelevant.[65]

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58. *Katz*, 389 U.S. at 353. "*Katz* made it clear that the Court would no longer rely solely on property right technicalities or physical intrusion to determine the scope of protection afforded by the fourth amendment." *See* Note, *How Open Are Open Fields?* United States v. Oliver, 14 TOLEDO L. REV. 133, 142 (1982).

59. *See generally* Note, Florida v. Brady: *Can* Katz *Survive in Open Fields?* 32 AM. U.L. REV. 921 (1983).

60. *See infra* notes 97-109 and accompanying text.

61. One recent Supreme Court case did, however, uphold the open fields doctrine, at least in an administrative context. Pollution Variance Board of Colorado v. Western Alfalfa Corporation, 417 U.S. 861 (1974), was decided seven years after *Katz*. It involved open fields surrounding a business, though, and not a home, as in *Oliver*. Here, a state health inspector entered the Western Alfalfa Corporation's outdoor premises, without a warrant, in order to determine if the plant's emissions violated air quality standards. *Id.* at 862-63. In holding that there was no violation of the fourth amendment, the Court, although specifically citing *Hester*, *id.* at 865, noted that "we are not advised that [the inspector] was on premises from which the public was excluded." *Id.* The Court was apparently applying the *Katz* test, finding that there was no subjective manifestation of the Corporation's privacy interest in the property. The Court implied that if the public had actually been excluded from the property, it may have ruled differently. *Id.* Since there was not even a subjective manifestation of an expectation of privacy in the premises, however, this case failed the *Katz* test from the outset, unlike the *Thornton* and *Oliver* situations. *See supra* notes 13-16 and accompanying text.

62. *See infra* notes 64-85 and accompanying text.

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

64. *Id.* at 1741.

65. Since both parts of Harlan's two-part test must be satisfied in order for a "reasonable expectation of privacy" to be found, the fact that the second part of the test fails

Justice Powell, writing for the majority, advanced three main reasons that open fields fail the "objective" evaluation under *Katz*:

(1) Open fields are not within the plain meaning of the fourth amendment;[66]

(2) Open fields do not provide the setting for those intimate activities that the fourth amendment is intended to shelter from government interference or surveillance;[67] and

(3) A blanket open fields exception to fourth amendment protections would avoid a case-by-case determination of whether a legitimate expectation of privacy does indeed exist, and would at the same time take the guesswork out of police operations.[68]

1. Plain Meaning Interpretation

The majority stated that open fields cannot be categorized as "persons, houses, papers [or] effects,"[69] and therefore are not "within the meaning of the Fourth Amendment."[70] Powell tried to reconcile this strict interpretation with *Katz* by implying that "persons, houses, papers, and effects" are examples of "those expectations that society is prepared to recognize as reasonable."[71]

In explaining its holding, the majority admitted that "no single factor determines whether an individual *legitimately* may claim under the fourth amendment that a place should be free of government intrusion not authorized by warrant."[72] The Court then listed factors it had considered in past determinations of whether society deemed a privacy expectation to be "legitimate."[73]

2. No Activities Deserving of Protection

The Court stated that an individual can never have a "legitimate" expectation of privacy in an open field, as such fields "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance . . . . There is no societal interest in protecting the privacy of those activities . . . that

precludes the expectation from being found to be a "reasonable" one. *See supra* notes 46-48 and accompanying text.

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

67. *Id.* at 1741. *Cf. id.* at n.10.

68. *Id.* at 1742-43.

69. This is the precise language used in the fourth amendment. U.S. CONST. amend. IV., *supra* note 19.

70. 104 S. Ct. at 1740.

71. *Id.* (quoting *Katz*, 389 U.S. at 361).

72. 104 S. Ct. at 1741 (emphasis added).

73. These factors include:

1. The intention of the framers of the fourth amendment, *e.g.*, United States v. Chadwick, 433 U.S. 1 (1977);

2. The uses to which the individual has put a location, *e.g.*, Jones v. United States, 362 U.S. 257 (1960); and

3. Our societal understanding that certain areas deserve the most scrupulous protection from government invasion, Payton v. New York, 445 U.S. 573 (1980). *Oliver*, 104 S. Ct. at 1741.

occur in open fields."[74]

As support for this proposition, the majority observed that open fields are usually accessible to the public and the police in ways that a home, an office, or a commercial building would not be. This is due to the fact that fences and signs do not generally bar the public from "viewing" open fields in rural areas.[75]

3. Ease of Application

Finally, to bolster its holding that open fields automatically fail the objective part of the *Katz* test, the majority stated that such a clear cut rule would facilitate police enforcement. The Court felt that a blanket "open fields" exception to fourth amendment protections would make it easier for a policeman to discern the scope of his authority.[76] It stated that, conversely, a case-by-case determination would create a danger that constitutional rights could be arbitrarily and inequitably enforced.[77]

B. *White's Concurrence*

Justice White briefly stated[78] that the majority's determination that open fields do not fall within the plain meaning of the fourth amendment provided enough support for its holding. No matter how reasonable an individual's expectations of privacy are, "those expectations cannot convert a field into a 'house' or an 'effect.' "[79]

C. *The Dissent*

Justice Marshall's dissent was joined by Justices Brennan and Stevens.[80] The dissent particularly took issue with the plain meaning interpretation of the fourth amendment taken in both the majority and concurring opinions,[81] and with the majority's finding that society does not recognize a legitimate privacy expectation in open fields.[82]

1. Non-Literal Interpretation of the Fourth Amendment

Marshall noted the majority's inconsistency with *Katz*, stating that "neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; yet we have

74. *Id.*
75. *Id.*
76. *Id.* at 1742-43.
77. *Id.* at 1743.
78. White's concurrence, in its entirety, was as follows:
> I concur in the judgment and join Parts I and II of the Court's opinion. These parts dispose of the issue before us; there is no need to go further and deal with the expectation of privacy matter. However reasonable a landowner's expectations of privacy may be, those expectations cannot convert a field into a "house" or an "effect."

Id. at 1744 (White, J., concurring).
79. *Id.*
80. *Id.* at 1744-51 (Marshall, J., dissenting).
81. *See infra* notes 83-86 and accompanying text.
82. *See infra* notes 87-92 and accompanying text.

held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation."[83] Further, Marshall pointed out the inconsistency in the majority's own holding:

> The Court rules that the curtilage, a zone of real property surrounding a dwelling, is entitled to constitutional protection. . . . We are not told, however, whether the curtilage is a "house" or an "effect"—or why, if the curtilage can be incorporated into the list of things and spaces shielded by the Amendment, a field cannot.[84]

The dissent reiterated that constitutional provisions should be interpreted to effectuate their purposes.[85] Marshall stated that the fourth amendment's guarantee of freedom from unreasonable governmental intrusions into legitimate expectations of privacy would be incompletely protected if the amendment were strictly construed.[86]

2. Privacy Expectation Can Be Legitimate

Contrary to the majority's holding, Marshall found that privacy expectations in open fields are sometimes viewed by society as reasonable.[87] One way in which society manifests its definition of reasonableness is in the laws it promulgates.[88] In both Kentucky and Maine, society protects property interests by invoking criminal sanctions against those who trespass.[89] A punishable trespass occurs, however, only when the property owner has manifested his privacy expectation in the area by posting conspicuous "no trespassing" signs, or by fencing or otherwise enclosing the area.[90]

To further emphasize his point, Marshall listed ways in which privately-owned fields not exposed to public view might be used such that society would acknowledge a legitimate privacy expectation.[91] These

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83. 104 S. Ct. at 1745 (Marshall, J., dissenting) (referring generally to *Katz*, 389 U.S. 347 (1967)).

84. *Id.*

85. *Id.* at 1746.

86. *Id.*

87. Justice Marshall's reasoning was as follows:

> [W]e have traditionally looked to a variety of factors in determining whether an expectation of privacy asserted in a physical space is "reasonable". . . . Though those factors do not lend themselves to precise taxonomy, they may be roughly grouped into three categories. First, we consider whether the expectation at issue is rooted in entitlements defined by positive law. Second, we consider the nature of the uses to which spaces of the sort in question can be put. Third, we consider whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect. When the expectations of privacy asserted by petitioner Oliver and respondent Thornton are examined through these lenses, it becomes clear that those expectations are entitled to constitutional protection.

Id. at 1747.

88. Justice Marshall stated that "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, [and] should be considered in determining whether an individual's expectations of privacy are reasonable." *Id.* at 1747 (quoting Rakas v. Illinois, 439 U.S. 128, 153 (1978)).

89. *See supra* notes 15-16.

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

91. *Id.* at 1748-49.

include solitary walks, agricultural business, wildlife refuges, lovers' meetings, worshippers' gatherings, or other creative endeavors.[92]

3. The Dissent's Solution

The dissent concluded by proposing its own rule: "Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the states in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures."[93] Marshall was obviously applying a version of the *Katz* test: a subjective privacy expectation, manifested in accordance with the trespass laws of the state, is objectively reasonable.[94]

III. Problems Perpetuated by the Majority's Holding

The *Oliver* majority, while declining to extend fourth amendment protections to open fields, acknowledged two places obstensibly absent from the "persons, houses, places, and effects" list as within the fourth amendment's coverage: curtilage[95] and offices.[96]

A. *Difficulty of Distinguishing Between Curtilage and Open Fields*

Courts have struggled with the concept of curtilage ever since *Olmstead*.[97] The distinction between curtilage and open fields is extremely important, as the former is protected under the fourth amendment, while the latter is not.[98]

Curtilage has been generally defined as "an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling."[99] *Oliver* defines curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' "[100] What has been termed a "fairly well-accepted set of guidelines for ascertaining curtilage"[101] is enunciated in *Care v. United States*:[102] "Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to

92. The majority acknowledged these "private uses" suggested by the dissent, but justified its failure to extend fourth amendment protections in these situations by stating that "in *most* instances police will disturb no one when they enter upon open fields." *Id.* at 1741-42, n.10 (emphasis added).

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

94. *See generally supra* notes 45-48 and accompanying text.

95. 104 S. Ct. at 1742.

96. *Id.* at 1741, n.8.

97. 277 U.S. 438 (1928).

98. *See generally supra* notes 51-62 and accompanying text.

99. United States v. LaBerge, 267 F. Supp. 686, 692 (D.Md. 1967).

100. *Oliver*, 104 S. Ct. at 1742 (quoting Boyd v. United States, 116 U.S. at 630).

101. United States *ex rel.* Saiken v. Bensinger, 546 F.2d 1292, 1296 (7th Cir. 1976), *cert. denied*, 431 U.S. 930 (1977).

102. 231 F.2d 22 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956).

the domestic economy of the family."[103]

Such a nebulous concept has led to inconsistent results in the appellate courts.[104] Outbuildings or areas as far as 240 feet away from a house have been held to be *within* the "curtilage,"[105] while others approximately one-third that distance away from a house have been held to be *outside* the "curtilage."[106] The Seventh Circuit in *United States ex rel. Saiken v. Bensinger*,[107] frustrated by these inconsistencies, stated its own *per se* rule: any outbuilding or area within 75 feet of the house is within the curtilage and any outbuilding or area further than 75 feet is outside the curtilage."[108] However, other circuits have declined to follow this rule.[109]

Oliver provided the Supreme Court with a perfect opportunity to resolve the curtilage mystery; instead, the Court perpetuated it. Therefore, as the law in this area stands after *Oliver*, curtilage is protected under the fourth amendment, while open fields definitely are not. However, a *Katz*-type analysis[110] may be needed to determine whether an area is actually curtilage or an open field, thus necessitating additional judgment calls by police officers.

B. *Protection of Offices*

Just as the fourth amendment has been held to include "curtilage," so it also has been held to cover "commercial premises."[111] The

103. *Id.* at 25.

104. *See* United States v. Van Dyke, 643 F.2d 992 (4th Cir. 1981) (150 feet is within the curtilage); United States v. Williams, 581 F.2d 451 (5th Cir. 1978) (150 feet is within the curtilage), *cert. denied*, 440 U.S. 972 (1979); United States *ex rel.* Saiken v. Bensinger, *supra* note 101 (400 feet is outside the curtilage); United States v. Minton, 488 F.2d 37 (4th Cir. 1973) (80-90 feet is outside the curtilage), *cert. denied*, 416 U.S. 936 (1974); United States v. Capps, 435 F.2d 637 (9th Cir. 1970) (40-45 feet is within the curtilage); Atwell v. United States, 414 F.2d 136 (5th Cir. 1969) (750 feet is outside the curtilage); Wattenburg v. United States, 388 F.2d 853 (9th cir. 1968) (20-35 feet is within the curtilage); Fullbright v. United States, 392 F.2d 432 (10th Cir.) (150-300 feet is outside the curtilage), *cert. denied*, 393 U.S. 830 (1968); United States v. Mullin, 329 F.2d 295 (4th Cir. 1964) (75 feet is within the curtilage); United States v. Hassel, 336 F.2d 684 (6th Cir. 1964) (750 feet is outside the curtilage), *cert. denied*, 380 U.S. 965 (1965); Brock v. United States, 256 F.2d 55 (5th Cir. 1958) (150-180 feet is outside the curtilage); Hodges v. United States, 243 F.2d 281 (5th Cir. 1957) (150 feet is outside the curtilage); Care v. United States, *supra* note 102 ("one long city block" is outside the curtilage); Walker v. United States, 225 F.2d 447 (5th Cir. 1955) (210-240 feet is within the curtilage); Janney v. United States, 206 F.2d 601 (4th Cir. 1953) (100 feet is outside the curtilage). Hester v. United States, 265 U.S. 57 (1924), the landmark Supreme Court decision in this area, held that an article found 150-300 feet from the house was outside the curtilage.

105. *Walker*, 225 F.2d 447 (5th Cir. 1955).

106. United States v. Minton, 488 F.2d 37 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

107. 546 F.2d 1242 (7th Cir. 1976), *cert. denied*, 431 U.S. 930 (1977).

108. *Id.* at 1297.

109. United States v. Van Dyke, 643 F.2d 992 (4th Cir. 1981).

110. *See supra* notes 44-48 and accompanying text.

111. Mancusi v. DeForte, 392 U.S. 364 (1968). "This Court has held that the word 'houses,' as it appears in the Amendment, is not to be taken literally, and that the protection of the Amendment may extend to commercial premises." *Id.* at 367. *See also* See v. City of Seattle, 387 U.S. 541 (1967); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Supreme Court has repeatedly indicated that offices can be constitutionally protected areas.[112]

Katz stated that "what a person knowingly exposes to the public, even in his own home *or office*, is not a subject of fourth amendment protection"[113] but "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[114] The *Katz* majority, then, specifically extended its "reasonable expectation of privacy" standard to offices and, in fact, appears to be applying Harlan's two-part test.

Straying from its own analytical framework, *Oliver* also evidenced its support for fourth amendment protection of offices,[115] even though "offices" are not within the plain meaning of the fourth amendment. The majority, in dicta, specifically stated that there may be legitimate expectations of privacy in commercial buildings, citing *Marshall v. Barlow's Inc.*[116] and *G.M. Leasing Corp. v. United States*.[117] Both of these post-*Katz* cases employed Harlan's subjective/objective analysis in determining that commercial buildings were protected under the ambit of the fourth amendment.[118]

C. *Cumbersome Test*

As the law stands after *Oliver*, certain areas, such as "curtilage" and "offices," which do not fall within the plain meaning of the fourth amendment may still be protected by it, depending upon the outcome of a *Katz* analysis.[119] Other areas, however, such as "open fields," are held not to be deserving of a *Katz* analysis and will never be protected by the fourth amendment, no matter what the surrounding circumstances.[120]

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112. The majority opinion in *Oliver* specifically mentions two recent rulings in which the Court held that offices fell within the ambit of the fourth amendment: Marshall v. Barlow's, 436 U.S. 307 (1978) and G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977). 104 S. Ct. at 1741, n.8. *See also* Lewis v. United States, 385 U.S. 206, 211 (1966).

113. 389 U.S. at 351 (emphasis added). In United States v. Biswell, 406 U.S. 311 (1972), the Court held that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context. Thus, a warrantless search of a locked storeroom during business hours, pursuant to the inspection procedure authorized by the Gun Control Act of 1968, 18 U.S.C. § 923(g), was upheld since "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Id.* at 316. In Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), the Court stated that Congress has broad authority to fashion standards of reasonableness for searches and seizures to regulate the liquor industry, although in that case a warrantless search was not authorized. *See also* Lewis v. United States, 385 U.S. 206 (1966); United States v. Lee, 274 U.S. 559 (1927).

114. 389 U.S. at 351. *See* Rios v. United States, 364 U.S. 253 (1960); *Ex parte* Jackson, 96 U.S. 727 (1877).

115. *Oliver*, 104 S. Ct. at 1741, n.8.

116. 436 U.S. 307 (1978).

117. 429 U.S. 338 (1977).

118. *Oliver*, 104 S. Ct. at 1741, n.8. Justice Powell refers to Marshall v. Barlow's and G. M. Leasing Corp. v. United States, *supra* note 112.

119. *See supra* notes 110-115 and accompanying text.

120. *See supra* note 63 and accompanying text.

Therefore, after *Oliver*, policemen actually have a more cumbersome test to apply.

First, officers must determine whether the area in question is an "open field," thus falling under a blanket exclusion from fourth amendment protections. In order to do this, however, the police must determine if the area can be classified as curtilage. Such a determination has not proven easy in the past.[121] Second, if the area does not fall under a blanket exclusion from fourth amendment protections, the officers must proceed to a *Katz* analysis to determine whether the individual had a reasonable expectation of privacy in the area.[122] If not, there are no fourth amendment protections. If so, fourth amendment protections apply.[123]

Oliver, in its attempt to streamline the analytical process for policemen, actually adds the extra, "first," step to that process.[124]

IV. PROPOSAL

The majority opinion in *Oliver* results in a selective and inconsistent application of the *Katz* analysis. Open fields, when involving private land where citizens have made their homes, should at least be accorded the same protections as businesses.[125] Furthermore, confusion as to what constitutes curtilage necessitates the case-by-case determination process which the *Oliver* majority wished to avoid.[126]

Hester does not need to be overruled, but it should only be used as modified by the *Katz* decision.[127] As in the office exception,[128] Harlan's subjective/objective clarification of the reasonable expectation of privacy standard should still be used. Specifically, the test to be applied to open fields should be that which was basically proposed by the *Oliver* dissent:[129]

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121. *See supra* notes 97-109 and accompanying text.

122. For example, such a determination would be necessary in the case of a telephone booth, *see Katz*, 389 U.S. 347 (1967), or an office, *see supra* notes 109-118 and accompanying text.

123. *See supra* notes 44-48 and accompanying text.

124. This "first" step, as previously stated, is that officers must now determine whether an area falls under a blanket exclusion from fourth amendment protections. This must be done before the officers apply the *Katz* analysis, since if the area is excluded under the first test, no additional analysis is necessary. However, a *Katz* analysis may be needed to determine whether the first test is satisfied, *see supra* note 110 and accompanying text.

125. *See supra* notes 111-118 and accompanying text.

126. *See supra* note 110 and accompanying text.

127. "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 v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976). *See also* United States v. Magana, 512 F.2d 1169, 1170 (9th Cir. 1974); Patler v. Slayton, 503 F.2d 472, 478 (4th Cir. 1974).

128. *See supra* notes 111-118 and accompanying text.

129. The test proposed by the dissent, *see supra* notes 93-94 and accompanying text, basically qualified the *Katz* test in both parts of Justice Harlan's subjective/objective analysis:

(1) An individual must manifest his individual expectation of privacy in an open field by complying with the "markings" required under his state's criminal trespass statute.

(2) Society will objectively view a governmental intrusion as a violation of the indi-

(1) The manifestation of a subjective expectation of privacy,

(2) Evaluated objectively by societal standards of reasonableness.

Considerations for the first part of the above test might include whether the area in question could be viewed from a place open to the public, and whether the individual asserting the privacy expectation had posted signs, erected fences, or otherwise indicated that the place was private.

Considerations for the second part of the above test might include whether the individual manifesting the privacy expectation had complied with the notice requirements under local trespass laws, whether in fact there were any trespass laws, and whether the open field was next to a residence.[130]

Application of the two-part *Katz* test to open fields questions would abolish the nebulous curtilage concept. In addition, it would provide a consistent standard for law enforcement officers to apply, instead of a rule fraught with exceptions.

CONCLUSION

The *Oliver* decision, under the guise of streamlining fourth amendment application, only serves to perpetuate old problems, as well as create new ones. Determination of whether an intrusion into an open field constitutes an unreasonable search should depend, per *Katz*,[131] on a reasonable expectation of privacy standard. This can be evaluated by viewing an individual's subjective expectation of privacy, as manifested, in light of objective societal standards.[132]

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vidual's fourth amendment rights only if said intrusion constituted a trespass under the laws of that state.

This author agrees with the dissent's proposal as far as it goes, but feels it is too limited; *Katz* would have allowed the consideration of other factors in addition to those listed above.

130. Even though a subjective privacy expectation is expressed, society would probably not deem the expectation to be objectively reasonable where there is no dwelling at all on the land. *See* United States v. Freie, 545 F.2d 1217 (9th Cir. 1976); United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972); United States v. Capps, 435 F.2d 637 (9th Cir. 1970).

131. In particular, as previously discussed, the analysis should focus on whether there is a reasonable expectation of privacy, as determined by the use of Justice Harlan's two-prong subjective/objective analysis. *Katz*, 389 U.S. 347, 361 (1967).

132. *See supra* notes 127-130 and accompanying text.