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Criminal Procedure - Fourth Amendment Protection Does Not Extend to Open Fields - *Oliver v. United States*

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CRIMINAL PROCEDURE — Fourth Amendment Protection
Does Not Extend to Open Fields — *Oliver v. United States*,
466 U.S. 170 (1984)

FACTS

In *Oliver v. United States*,¹ two narcotics agents of the Kentucky State Police went to Oliver's farm to investigate reports of marijuana cultivation. Without a warrant, they passed Oliver's home and several "No Trespassing" signs, and went around a locked gate. Over one mile from Oliver's home, the agents discovered a secluded field of marijuana. Oliver was arrested, but the district court suppressed the evidence of the discovered marijuana field. The court of appeals reversed.²

In *Maine v. Thornton*,³ acting on an anonymous tip, two police officers entered the woods behind Thornton's residence by way of a path from a neighboring house. There they found two concealed patches of marijuana, fenced with chicken wire and posted with "No Trespassing" signs. After ensuring that the marijuana was on Thornton's property, the officers obtained a search warrant, seized the marijuana, and arrested Thornton. The trial court suppressed the evidence of the marijuana. The Maine Supreme Judicial Court affirmed.⁴

The United States Supreme Court granted certiorari in both cases, affirming *Oliver v. United States* and reversing and remanding *Maine v. Thornton* in a consolidation of the two actions.⁵ The Court considered the validity of the fifty-year-old "open fields" doctrine⁶ in light of modern fourth amendment⁷ standards⁸ and held that the doctrine applied in both actions. By examining the language and history of the fourth amendment, the Court concluded that its protection against an unreasonable search and seizure does not extend to open fields. The Court further held this conclusion to be consistent with its "understanding of the right

1. 466 U.S. 170 (1984).

2. *United States v. Oliver*, 686 F.2d 356, 358 (6th Cir. 1982) (en banc), *aff'd*, 466 U.S. 170 (1984).

3. 466 U.S. 170 (1984).

4. *State v. Thornton*, 453 A.2d 489, 490-91 (Me. 1982), *rev'd and remanded*, 466 U.S. 170 (1984).

5. 466 U.S. at 184.

6. "[T]he 'open fields' doctrine, first enunciated by this Court in *Hester v. United States*, 265 U.S. 57 (1924), permits police officers to enter and search a field without warrant." *Oliver*, 466 U.S. at 173.

7. "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 of affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

8. See *Katz v. United States*, 389 U.S. 347 (1967) and subsequent cases relying on the standards *Katz* set forth. See *infra* notes 33-41 and accompanying text.

to privacy expressed in . . . Fourth Amendment jurisprudence,"⁹ since one cannot have a reasonable expectation of privacy in an open field.¹⁰

This note examines the history and background of the "open fields" doctrine in the United States Supreme Court's jurisprudence and discusses the unique status of the doctrine in Mississippi. Further, the rationale and implications of *Oliver v. United States*¹¹ are analyzed, with special attention to its effect on the law in Mississippi.

HISTORY AND BACKGROUND

Until the fourth amendment and the exclusionary rule were applied to the states, judicial interpretation of the amendment was rare. The only major case prior to this century was *Boyd v. United States*,¹² which first examined the historical need for the fourth amendment. The amendment was "a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of 'the sanctity of a man's home and the privacies of life,'¹³ . . . from searches under indiscriminate, general authority."¹⁴ However, the narrow holding was that the federal statute and the resulting federal action compelling production of one's private papers was invalid¹⁵ since actual entry onto private premises was not always necessary to constitute an unreasonable search and seizure.¹⁶

The determination of fourth amendment violations quickly assumed a greater importance with the adoption of the exclusionary rule.¹⁷ Protection against an unreasonable search and seizure was extended to those accused of a crime. Illegally obtained evidence could not be used in the trial of one who had been so aggrieved.¹⁸

In 1949, the Supreme Court again applied fourth amendment principles to the states,¹⁹ but the only remedies of the accused lay in an action for damages for trespass or a prosecution for oppression.²⁰ Thus, the holding was of little consequence until 1961,

9. 466 U.S. at 177.

10. *Id.* at 183-84.

11. 466 U.S. 170 (1984).

12. 116 U.S. 616 (1886).

13. *Id.* at 630 (breaking into one's house and opening boxes and drawers).

14. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967).

15. Failure to produce the given papers was considered a confession. *Boyd*, 116 U.S. at 620.

16. *Id.* at 617-20, 630, 638.

17. *Weeks v. United States*, 232 U.S. 383, 392 (1914).

18. *Id.* at 398.

19. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

20. *Id.* at 31 n.2.

when the exclusionary rule was applied to the states.²¹ Because all other remedies had failed,²² the Court believed that the exclusionary rule was necessary to enjoyment of fourth amendment rights.²³

Well before the fourth amendment was applied to the states, the Supreme Court, in *Hester v. United States*,²⁴ had read the amendment as excluding open fields from its protection. This holding came to be known as the “open fields” doctrine. In *Hester*, revenue officers hid near the home of Hester’s father and witnessed an exchange of illicit moonshine whiskey. They entered the land and examined a jug which had been broken. This evidence, obtained in the open field and disclosed by Hester himself, became the basis of his conviction. Although the search was without warrant,²⁵ the Court held that “the special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields. The distinction between the latter and the house is as old as the common law.”²⁶ This distinction between open fields and one’s house was not refined until *Olmstead v. United States*.²⁷ The Court in *Olmstead* indicated that either persons, papers, or effects must be searched or seized, or there must be an actual, physical invasion of the curtilage before the fourth amendment is violated.²⁸ Thus it appears the distinction set forth in *Hester* was the common law concept of curtilage, a concept most often important in prosecutions for burglary before *Olmstead*.

No complete definition of “curtilage” exists; it has been of primary importance in deciding whether a given outbuilding may be the subject of a burglary.²⁹ However, some definitions in the context of search and seizure law have been attempted: Traditionally, “[t]he curtilage includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto . . . and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment.”³⁰ More

21. *Mapp v. Ohio*, 367 U.S. 643 (1961).

22. *Id.* at 651-52.

23. *Id.* at 655-56.

24. 265 U.S. 57 (1924).

25. *Id.* at 58.

26. *Id.* at 59.

27. 277 U.S. 438 (1928). A large conspiracy to import, possess, and sell liquor illegally was discovered by intercepting phone calls of the conspirators from outside their property. The fourth amendment was not violated. *Id.* at 455-56.

28. *Id.* at 465-66.

29. Annot., 43 A.L.R.2d 833 (1955).

30. *State v. Hanson*, 113 N.H. 689, 691, 313 A.2d 730, 732 (1973).

important was the *Olmstead* requirement that the invasion of the curtilage be an actual, physical invasion; in short, a trespass.³¹

This "trespass doctrine" resulted in fine, artificial distinctions but was definitive of fourth amendment standards³² until the landmark decision of *Katz v. United States*³³ in 1967. Having previously recognized that the protection of privacy is the principal object of the fourth amendment,³⁴ the Court established a new standard to determine whether this objective had been met. In *Katz*, F.B.I. agents had attached an electronic device to the outside of the telephone booth, avoiding a technical trespass. The evidence obtained thereby was permitted in the trial for showing transmission of wagering information by telephone in violation of a federal statute.³⁵ The Court said that the traditional idea of "constitutionally protected area" does not help solve the problem in this particular case,³⁶ because the fourth amendment goes further and protects people, not simply areas. Once this concept is recognized, it "becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."³⁷ Therefore, the trespass doctrine is no longer controlling.³⁸ Instead, for a person to be protected by the fourth amendment, he must claim "a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy'" that has been invaded by the government.³⁹

The Court has adopted a two-pronged test for examining such a privacy expectation: normally, there must be both an actual, subjective expectation of privacy and an objective one, that is, one that society recognizes as reasonable or justifiable under the circumstances.⁴⁰ The reasonableness of the search is determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests."⁴¹

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

32. *Goldman v. United States*, 316 U.S. 129 (1942) (evidence obtained by use of a detectaphone placed against the wall of an office). Both *Olmstead* and *Goldman* were at least partially overruled. *Katz v. United States*, 389 U.S. 347, 353 (1967). Revision of this "trespass" doctrine had been signalled in *Silverman v. United States*, 365 U.S. 505 (1961), where the Court found an unreasonable search only by distinguishing the particular electronic equipment used and its required method of installation from that used in *Olmstead* and *Goldman*. *Id.* at 509-13 (Douglas, J., concurring).

33. 389 U.S. 347 (1967).

34. *Warden*, 387 U.S. at 304.

35. *Katz*, 389 U.S. at 348.

36. *Id.* at 351.

37. *Id.* at 353. The dissent claimed that the Court went beyond the language of the amendment by including eavesdropping, stating that eavesdropping, though not electronic, existed at the time the amendment was framed, and the authors of the amendment would have included eavesdropping in the language had they intended such protection. *Id.* at 366 (Black, J., dissenting).

38. *Id.* at 353.

39. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

40. *Id.* (all circumstances must be considered); *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

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

No one factor, such as a property interest in or a legitimate presence on the premises, is controlling.⁴² For example, the presence of normal precautions to maintain privacy and the use made of a particular location are also relevant factors.⁴³

Throughout these changes in fourth amendment doctrine, the distinction between the home and the open area has continued. A search within a home without a warrant has remained *per se* unreasonable.⁴⁴ However, the application of the *Katz* standard to *Hester* open fields cases has been rare in the Supreme Court and confusing in lower courts, making apparent the need for a definitive statement. The clearest statement is found in a concurring opinion in *Katz*. Relying on *Hester*, the second Justice Harlan stated that an open field is not an area like a home or a telephone booth where "a person has a constitutionally protected reasonable expectation of privacy."⁴⁵

Despite this language in *Katz*, the only Supreme Court case to rely on the *Hester* open fields doctrine was equivocal. The defendant-corporation was held not to be protected from the search for evidence by a government inspector on the open fields of its premises. But great emphasis was placed on the fact that the inspector was not in an area from which the public was excluded. The Court did not indicate whether the result would have been different had the public been excluded.⁴⁶ Nevertheless, in 1983, with a decision on the open fields doctrine in sight, the Court hinted that it would uphold the doctrine when there was no reasonable expectation of privacy in objects in open fields.⁴⁷

The need for an unequivocal decision by the Supreme Court is apparent from the multifarious decisions of the circuits and the states.⁴⁸ An especially interesting example is the Fifth Circuit. Although its decisions have been consistent with the open fields doctrine, its theory has changed from one of strictly applying

42. *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

43. *Id.* at 152-53 (Powell, J., concurring).

44. *Payton v. New York*, 445 U.S. 573, 586-87 (1980).

45. *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

46. *Air Pollution Var. Bd. of Colo. v. Western Alfalfa Corp.*, 416 U.S. 861, 863-65 (1974). A later case indicated that the officer must be where the public is not excluded, but the "open field" was not involved. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978). But lower courts did apply the distinction to open fields. *See, e.g., United States v. Lace*, 669 F.2d 46, 50-51 (2d Cir. 1982), *cert. denied*, 459 U.S. 854 (1984). The Supreme Court also applied *Hester* in two seizure cases in concluding that there had been no invasion of privacy. *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 352 (1977); *United States v. Santana*, 427 U.S. 38, 42 (1976) (*Hester* analogized).

47. *United States v. Knotts*, 460 U.S. 276, 282 (1983).

48. WAYNE R. LAFAYE, *SEARCH AND SEIZURE - A TREATISE ON THE FOURTH AMENDMENT* § 2.4(a) (1978 & Supp. 1984). Various circuit and state court decisions are cited. Fifth Circuit decisions are cited in this note to illustrate the change in theory within this circuit; the decisions of various southern states are cited to illustrate their representative diversity as well as the number of recent open fields decisions.

*Hester*⁴⁹ to something of a reconciliation of *Hester's* open fields doctrine with the *Katz* privacy standard. Thus the open fields determination is merely "helpful" in the requisite fourth amendment analysis and not conclusive in the Fifth Circuit.⁵⁰ The possibility that barriers, even natural barriers, could manifest a legitimate expectation of privacy in an open field has been expressly left open.⁵¹

The southern states confronted with the issue are typical in their uneven application of *Katz* and *Hester*. Some have relied on the *Hester* doctrine without qualification.⁵² Others have found the doctrine useful in determining whether reasonable privacy expectations exist.⁵³ Still others have held *Hester* to be of little consequence.⁵⁴

THE OPEN FIELDS DOCTRINE IN MISSISSIPPI

The state of Mississippi has not adhered to the open fields doctrine. This result is possible because the Supreme Court has ensured only that fourth amendment standards are applied to the states through the fourteenth amendment.⁵⁵ The relevant question for the Supreme Court is "not whether the search . . . was authorized by state law. The question is rather whether the search was reasonable under the fourth amendment."⁵⁶ Therefore, the Court has stated that its "holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."⁵⁷ If only state standards have been violated, the state alone may review.⁵⁸

Mississippi appears to be the only state which still construes its constitutional "search and seizure" provision to apply even to unenclosed fields, based on the use of the word "possessions."⁵⁹

49. *Atwell v. United States*, 414 F.2d 136, 138 (5th Cir. 1969) (a still found outside the curtilage); *United States v. Brown*, 473 F.2d 952, 954 (5th Cir. 1973) (stolen money found buried on abandoned property).

50. *United States v. Williams*, 581 F.2d 451, 453 (5th Cir. 1978) (curtilage not broken by crossing a dilapidated fence).

51. *United States v. Baldwin*, 691 F.2d 718, 723 (5th Cir. 1982).

52. *Ford v. State*, 264 Ark. 141, 142-43, 569 S.W.2d 105, 106 (1978), *cert. denied*, 441 U.S. 947 (1979); *Skipper v. State*, 387 So. 2d 261 (Ala. Crim. App. 1980), *writ denied*, 387 So. 2d 268 (Ala. 1980); *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923 (1981), *cert. denied*, 454 U.S. 823 (1981).

53. *State v. Brady*, 406 So. 2d 1093 (Fla. 1981) (respecting landowner's privacy expectation in relation to a particular open field as demonstrated by defendant's use of numerous protective measures), *cert. granted*, 459 U.S. 986 (1982), *vacated*, 104 S. Ct. 2380 (1984); *Goehring v. State*, 627 S.W.2d 159, 162-63 (Tex. Crim. App. 1982).

54. *State v. Wert*, 550 S.W.2d 1, 2 (Tenn. Crim. App. 1977); *State v. Byers*, 359 So. 2d 84 (La. 1978).

55. *Mapp v. Ohio*, 367 U.S. 643 (1961).

56. *Sibron v. New York*, 392 U.S. 40, 61 (1968) (quoting *Cooper v. California*, 386 U.S. 58, 61 (1967)).

57. *Cooper*, 386 U.S. at 62.

58. *Id.*

59. 79 C.J.S. *Searches and Seizures*, §10 n.78 (1952 & Supp. 1984).

This broad construction was adopted by the court in *Faulkner v. State*,⁶⁰ decided about three months before *Hester*. The *Faulkner* court found that the Mississippi provision protects the people in their "persons, houses, and possessions,"⁶¹ while the federal provision applies to "persons, houses, papers, and effects."⁶² Thus *Faulkner* holds that, unlike the words "papers" and "effects," the term "possessions" embraces "all of the property of the citizen."⁶³

The Alabama Constitution also has a provision similar to Mississippi's, but its courts have held that since use of the word "possessions" in the state constitution⁶⁴ is not an attempt to enlarge the meaning of the word "effects" in the Federal Constitution,⁶⁵ open fields are protected by neither the federal nor the state constitution.⁶⁶ Although the Alabama court noted the exceptions of Mississippi and Tennessee,⁶⁷ Tennessee courts no longer construe the Tennessee Constitution more favorably to the accused than the Federal Constitution, since the "Supreme Court has rejected the premise that distinctions based upon property interests control the right of the state or government to search and seize under the fourth amendment."⁶⁸

The term "open fields" has not been used by the Mississippi courts because the question of trespass has been dispositive in every type of case. In other words, the trespass doctrine has been applied to all the property of the accused and not just to determine that a search within the curtilage was unreasonable.⁶⁹ In 1930, the Mississippi Supreme Court held that an officer may observe⁷⁰ or listen⁷¹ as long as he does not trespass or violate one's right of privacy.⁷² Forty years later, the court adhered to its previous

60. 134 Miss. 253, 98 So. 691 (1924). The court held that a sheriff and his deputy violated the state constitution when they observed a still in operation in wooded land belonging to one of the defendants. *Id.* at 256-57, 98 So. 691-92.

61. MISS. CONST. art. III, § 23.

62. U.S. CONST. amend. IV.

63. 134 Miss. at 261, 98 So. at 693.

64. ALA. CONST. art. I, § 5.

65. U.S. CONST. amend. IV.

66. *Skipper v. State*, 387 So. 2d 261, 263 (Ala. Crim. App. 1980), *writ denied*, 387 So. 2d 268 (Ala. 1980).

67. *Id.* at 263.

68. *State v. Wert*, 550 S.W.2d 1, 2 (Tenn. Crim. App. 1977); *Sneed v. State*, 221 Tenn. 6, 423 S.W.2d 857 (1967).

69. See *supra* notes 31-37 and accompanying text.

70. *Goodman v. State*, 158 Miss. 269, 130 So. 285 (1930).

71. *Goode v. State*, 158 Miss. 616, 620, 131 So. 106, 108 (1930).

72. *Goodman*, 158 Miss. at 273, 130 So. at 286. Various non-dispositive factors are "the place searched, the thing seized, the purpose for, and the circumstances under which the search or seizure was made, and the presence or absence of probable cause therefor." *Moore v. State*, 138 Miss. 116, 155, 103 So. 483, 485 (1925).

decisions and held that a trespass on abandoned land made the search there illegal.⁷³

INSTANT CASE

The case of *Oliver v. United States*⁷⁴ upheld the open fields doctrine of *Hester* as an exception to the protection of the fourth amendment. The Court relied on the explicit language of the amendment, reasoning that fourth amendment doctrine had not been severed from its language by the "expectations" test. The *Katz* standard merely identified the extent to which people and their property, not simply areas, as listed in the amendment, are protected.⁷⁵ However, the Court went on to hold that applying the expectations test of *Katz* would yield a result consistent with fourth amendment language as the Court interprets it.⁷⁶

The Court found several factors which indicate that one simply cannot have a reasonable expectation of privacy in an open field and thereby preclude a warrantless search of that field. Normally, those intimate activities intended to be protected by the amendment do not occur in open fields,⁷⁷ nor conversely, does society protect the usual uses of open fields.⁷⁸ Further, open fields are accessible to the public and the police. In this connection, it was conceded that "the public and police lawfully may survey lands from the air."⁷⁹ The Court added these factors together, determining that there is not a legitimate expectation of privacy even under *Katz*. Furthermore, courts which have applied the expectations test to open fields continued to uphold the common law distinction between open fields and curtilage, which is itself defined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent

73. *Davidson v. State*, 240 So. 2d 463, 464 (Miss. 1970). When an officer observed marijuana plants from neighboring premises, *Davidson* did not apply because there was no trespass, *Sims v. State*, 257 So. 2d 210, 211-12 (Miss. 1972), but if the officer were to cross over for a moment any search on the premises would be illegal, evidence obtained would be excluded, and a search warrant based on that search would be invalid. *Isaacs v. State*, 350 So. 2d 1340, 1344 (Miss. 1977).

74. 466 U.S. 170 (1984) (Powell, J., delivered the opinion).

75. *Id.* at 176 n.6. The Court also said that the term "effects" is less inclusive than the term "property," which was stricken from Madison's proposed draft of the fourth amendment. Thus the term "effects" did not include open fields. *Id.* at 177.

76. *Id.* The dissent suggests that the Court proceeded to an "expectations" analysis because it was "[s]ensitive to the weakness of its argument that the 'persons and things' mentioned in the Fourth Amendment exhaust the coverage of the provision." *Id.* at 188 n.7 (Marshall, J., dissenting).

77. *Id.* at 179. Even in those rare cases where such activities do occur, the individual is still protected by the amendment against unreasonable arrest or seizure of effects on the person, for example. *Id.* at 179 n.10.

78. *Id.* at 179 (such as cultivation of crops).

79. *Id.* at 179. Thus, as a practical matter, even if a privacy expectation were legitimate as to trespassers, police would just be required to obtain needed information by aerial surveillance. *Id.* at 179 n.9.

to the home will remain private.”⁸⁰ Here, the Court disapproved the use of a case-by-case approach in open fields situations as not meeting the needs of law enforcement personnel to discern the scope of their authority or the need of citizens and courts to have the equitable enforcement of constitutional rights. The Court added that problems do arise in the necessary determination of whether an area is in the open field or the curtilage but that this is only occasionally difficult.⁸¹

The Court also noted that steps taken to protect privacy and the effect of trespass during the search are not relevant in the instant case. First, an individual cannot create a legitimate expectation of privacy merely by choosing to conceal certain activities. If the government’s intrusion does not infringe on those values protected by the fourth amendment to begin with, then an individual’s expectation of privacy, resulting from definite steps to protect that privacy, is not legitimate.⁸² With regard to the effect of trespass, trespass laws have only incidentally protected privacy interests, their primary purpose being the protection of property interests. As a result, in open fields cases, violation of a property interest has “little or no relevance in determining whether a privacy interest was violated.”⁸³

One Justice concurred only with the point that open fields are simply not within the explicit language of the fourth amendment.⁸⁴ He considered it unnecessary to determine whether a reasonable expectation of privacy existed in the open fields.⁸⁵ The dissent could not agree either that the fourth amendment does not protect open fields or that one has no legitimate expectation of privacy in his open field. The dissent considered the omission of open fields from the language of the fourth amendment unpersuasive since telephone booths, conversations, commercial buildings, and the curtilage are protected by the amendment, yet they are likewise not included in the amendment’s specific language. Therefore, the Court’s constitutional interpretation was rejected as too narrow to protect people sufficiently.⁸⁶ The dissent determined that both the petitioner Oliver and respondent Thornton had legiti-

80. *Id.* at 180. See, e.g., *supra* notes 26-30 and accompanying text. In the case at hand, there was no contention that property within the curtilage was searched. *Id.* at 180 n.11.

81. *Id.* at 182 n.12.

82. *Id.* at 182-83.

83. *Id.* at 183. (“[T]he premise that property interests control the right of the government to search and seize has been discredited.” *Katz*, 389 U.S. at 353) (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)).

84. See *supra* note 73 and accompanying text.

85. *Id.* at 184 (White, J., concurring).

86. *Id.* at 186-87 (Marshall, J., dissenting, joined by Brennan, J., and Stevens, J.).

mate expectations of privacy, which should be protected by the fourth amendment:

An owner's right to insist that others stay off his posted land is firmly grounded in positive law. Many of the uses to which such land may be put deserve privacy. And, by making the boundaries of the land with warnings that the public should not intrude, the owner has dispelled any ambiguity as to his desires.⁸⁷

ANALYSIS AND CONCLUSION

The holding in *Oliver* must have surprised lower courts and commentators,⁸⁸ though it appears consistent with the Supreme Court's proclivity toward easing restrictions on law enforcement officials.⁸⁹ Perhaps the foreseeability of this surprise explains the Court's conscientious answer to its prospective critics when it applied the expectations test to open fields. However, the Court is less conscientious in its short rationale for excepting open fields, *per se*, from coverage of the fourth amendment.⁹⁰ Nevertheless, the dissent's response that a liberal construction which includes open fields within the amendment's protection is necessary because the amendment's coverage has already been extended beyond its plain language is unconvincing, despite the dissent's point that the framers could not have been comprehensive and exact in a constitution.⁹¹ While a liberal construction may be one way to give a constitutional provision its full, intended effect, the language of the fourth amendment has not and should not be ignored.

The holding in *Katz* did not establish a standard independent of the language. Rather, *Katz* held that private telephone conversation must be protected from electronic eavesdropping because eavesdropping is encompassed by the fourth amendment's protection of persons, not because a telephone booth was listed in the amendment.⁹² To reach the result urged on the Court by the dissent, open fields must be among the places or things textually protected by the amendment or they must be included within a person's legitimate expectation of privacy. In other words, while the place of the search does determine whether a person's property is protected, it does not determine whether a person is protected due to his privacy expectations.

By definition, open fields are not within the curtilage of a home

87. *Id.* at 195 (Marshall, J., dissenting).

88. *See, e.g., supra* notes 45-53 and accompanying text. *See also* Note, *How Open Are Open Fields?* *United States v. Oliver*, 14 U. Tol. L. Rev. 133 (1982).

89. *See, e.g.,* in regard to the exclusionary rule: *Nix v. Williams*, 467 U.S. 431 (1984); *Segura v. United States*, 104 S. Ct. 3380 (1984); *United States v. Leon*, 104 S. Ct. 3405 (1984); *I.N.S. v. Lopez-Mendoza*, 104 S. Ct. 3479 (1984).

90. 466 U.S. at 176-77. *See supra* notes 73-74 and accompanying text.

91. *Id.* at 186-87. *See supra* note 84 and accompanying text.

92. *Id.* at 176 n.6.

and so cannot fall within the protection of persons in their “houses”;⁹³ likewise, open fields are not included in the “effects” contemplated by the fourth amendment.⁹⁴ Having decided that an open field is not an area protected within the amendment’s meaning, the Court proceeded with an expectations of privacy analysis, probably to avoid a later claim of a legitimate privacy expectation in an open field, based on the amendment’s protection of the person. By holding that open fields are *per se* unprotected by the fourth amendment’s privacy protection, the Court assured conformity with the *Hester* doctrine and simultaneously recognized the continuing vitality of the *Katz* expectations test. Unless these are the Court’s reasons, its consideration of privacy expectations is unnecessary.⁹⁵

Two of the reasons advanced in favor of the Court’s analysis are especially important for future consideration of the decision’s consequences. First, participants in activities must remain in protected areas in order to have a reasonable expectation of privacy. If they move into an open field and use it, for example, as a meeting place for lovers or for worship services, their privacy expectations are no longer legitimate ones, regardless of their personal desire to be left alone.⁹⁶ At that point, the fourth amendment no longer protects their activities from the officer who stumbles across them, and so the government may search that area although some protection from unreasonable search and seizure remains even then.⁹⁷ Thus steps taken to protect privacy, short of building a house or setting up a tent, thereby creating a curtilage, would not make the privacy expectation legitimate.⁹⁸ Such precautions, as in the instant case, only deter trespassers and protect property interests and are not of fourth amendment significance.⁹⁹ If these precautions were to constitute a legitimate privacy expectation, it would be virtually impossible for law enforcement officials to judge whether a privacy or a property interest was manifested.¹⁰⁰

The second important reason the Court gave for its result is the abandonment of trespass distinctions, which would have made searches more difficult by requiring aerial surveillance if there were no clear view from the ground.¹⁰¹ Indeed, to prohibit open

93. *Id.* at 183 n.14. See *supra* note 78 and accompanying text.

94. See *supra* note 73.

95. See *supra* note 82 and accompanying text.

96. *Id.* at 179 n.10. See *supra* notes 75-76 and accompanying text.

97. See *supra* note 75.

98. See *supra* note 80 and accompanying text.

99. See *supra* note 81 and accompanying text.

100. See *supra* note 79 and accompanying text.

101. See *supra* note 79 and accompanying text.

field searches only in cases like *Oliver*, where a trespass has occurred, is to return to a form of the trespass doctrine, which has been rejected by the Supreme Court,¹⁰² and to create a distinction between two types of searches with no apparent justification other than where the observation is made. The effect would be to enforce a drastic remedy for trespass over and above actual damages to property interests, regardless of whether the trespass was great or small. Evidence found during a harmless trespass would be excluded from any resulting criminal trial.

States other than Mississippi conform their search and seizure holdings to the Federal Constitution and will presumably conform to *Oliver*.¹⁰³ On the whole, such state decisions will change little as a result since, regardless of the particular analysis chosen, state courts have usually yielded results consistent with the open fields doctrine.¹⁰⁴ However, the rejection of the trespass doctrine in fourth amendment jurisprudence has far-reaching implications for Mississippi. Mississippi cases indicate that a trespass on an open field makes a search there unreasonable. These holdings vary little from the trespass doctrine abandoned in *Katz*. Pre-*Katz* cases applied the doctrine only to determine that searches of the curtilage were unreasonable¹⁰⁵ while Mississippi cases have applied it broadly to searches of all property, including the open field.¹⁰⁶

Now is the time for Mississippi to abandon the notion that property interests equate with privacy interests in open fields. Its constitutional search and seizure provision should not be given a broader interpretation than the fourth amendment. The Mississippi interpretation of the word "possessions" to include all real property makes fourth amendment privacy interests dependent on and coextensive with property interests. This is the same dependency rejected in *Katz*, under the name of the trespass doctrine.¹⁰⁷ Furthermore, this rejection has been the means by which other state courts have conformed the interpretation of the word "possessions" in state constitutions to the Supreme Court's interpretation of the fourth amendment.¹⁰⁸

In summary, the Supreme Court has continued to uphold the *Katz* expectations test and the liberal construction of the fourth

102. See *supra* note 81 and accompanying text. In reality, the dissent requires only that the land be posted and that a trespass occur to find a search unreasonable. See *supra* note 85 and accompanying text.

103. See *supra* notes 54-55 and accompanying text.

104. See *supra* notes 47 and 51-53 and accompanying text.

105. See *supra* notes 26-34 and accompanying text.

106. See *supra* notes 67-71 and accompanying text.

107. See *supra* notes 57-66 and accompanying text.

108. *State v. Wert*, 550 S.W.2d 1, 2 (1977). See *supra* note 66 and accompanying text.

amendment which gave rise to the test, while recognizing that it is still the plain language of the fourth amendment which the Court must construe. Thus, the Court has continued to construe the amendment to protect privacy but has rejected a construction of the amendment that requires the equation of privacy interests with property interests. Mississippi has retained the trespass distinction in its search and seizure law, but is now presented with a challenge to adopt the reasoned analysis of *Oliver* and thereby refrain from unduly restricting law enforcement officials in searches of open fields. Continued adherence to the position that open field searches constitute a trespass ignores the importance of such searches by law enforcement officials when balanced against the harmless nature of the intrusion.

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