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Gregory K. Laughlin

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THE RETURN TO OPEN SEASON FOR POLICE IN THE OPEN FIELD

*Oliver v. United States*¹

Despite laws prohibiting its use and possession, an estimated 20 million Americans regularly use marijuana.² In recent years, the amount of this marijuana grown in the United States has increased to such an extent that it may be the nation's leading cash crop³ and federal officials admit that "the United States is becoming a major source for the drug."⁴ Marijuana growers have gone to great lengths to conceal their activities⁵ while law enforcement officials have taken a number of steps to discover and eradicate the plant's cultivation.⁶

One technique used has been warrantless intrusions into undeveloped areas where marijuana is believed to be growing.⁷ In many cases, those prosecuted for cultivation of the marijuana assert that evidence seized during these warrantless intrusions should be suppressed on fourth amendment grounds.⁸

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

2. St. Louis Post-Dispatch, November 25, 1984, at 12A, col. 3.

3. Washington Post, April 4, 1984, at A2, col. 1.

4. SELECT COMM. ON NARCOTICS ABUSE AND CONTROL, 98TH CONG., 1ST SESS., CULTIVATION AND ERADICATION OF ILLICIT DOMESTIC MARIHUANA 5 (Comm. Print 1984). In 1982, the Drug Enforcement Agency (DEA) reported that "38 percent more domestic marihuana was eradicated than was previously believed to exist." *Id.* Missouri is listed as having "a significant problem with marihuana cultivation." *Id.* at 29.

5. *Id.* at 21-22. Growers have used weapons, guard dogs, armed guards, and booby traps, including trip wires connected to "fragmentation grenades, dynamite or firearms, 'punji stakes,' fish hooks suspended at eye level, and others," to protect their crops. *Id.* In Butte County, California, rattlesnakes with their rattles removed have been placed in marijuana patches. *Id.* at 51. In Missouri, armed guards, guard dogs, and booby traps have been used. *Id.* at 34.

6. *Id.* at 11-19. The DEA considers aerial surveillance the most efficient and cost effective method to detect marijuana cultivation. *Id.* at 14. It conducts training programs to teach local law enforcement officers how to use aerial surveillance for this purpose. *Id.* at 13.

7. See, e.g., 104 S. Ct. 1735 (1984); *infra* cases cited in notes 44-47.

8. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, . . ." U.S. CONST. amend. IV. The fourth amendment was adopted in response to the abuse of the general warrant in England and the writs of assistance in the Colonies. Warden v. Hayden, 387 U.S. 294, 301 (1967). It was designed to prevent intrusion into "the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). For a more thorough discussion of the history of the enforcement of the fourth amendment, see Note, *How Open are Open Fields?* *United States v. Oliver*, 14 U. TOL. L. REV. 133, 134-36 (1982) (discussing the Sixth Circuit Court of Appeals decision on the *Oliver* case).

Some courts rejected this defense under the "open fields" doctrine.⁹ However, several courts refused to apply the open fields doctrine where the defendant exhibited expectations of privacy.¹⁰ These courts relied on *Katz v. United States*,¹¹ in which the Supreme Court held that the fourth amendment protects people, not places and shifted the analysis of fourth amendment issues to whether the defendant justifiably relied on his privacy being protected.¹² In *Oliver v. United States*,¹³ the Supreme Court thwarted this trend, reaffirming the per se rule that fourth amendment protections do not extend to an open field.¹⁴

In the *Oliver* case, Kentucky State Police received and investigated a tip that marijuana was being grown on the defendant's farm. They drove down a road on the defendant's land until they reached a locked gate beyond his house. "No Trespassing" signs were posted along the road and on the gate.¹⁵ The officers walked around the gate and continued down the road. After they passed a barn and a camper, someone shouted, "No hunting is allowed, come back here." The officers identified themselves and returned to the camper, but found no one there. They then continued down the road and discovered a marijuana patch over a mile from Oliver's house. The field was "highly secluded" and "bounded on all sides by woods, fences and embankments."¹⁶

The district court,¹⁷ in a pretrial hearing, suppressed evidence of the discovery of the marijuana patch, finding that Oliver had manifested a reasonable expectation of privacy.¹⁸ The Court of Appeals reversed, asserting the continued validity of the open fields doctrine.¹⁹

In *State v. Thornton*,²⁰ law enforcement officers entered the defendant's land, which was posted with "No Trespassing" signs and not "routinely" open to the public, after receiving a tip that marijuana was being grown there. The

9. See *infra* notes 46-47 and accompanying text. The open fields doctrine simply provides that fourth amendment protections do not extend to open fields. See *infra* note 33 and accompanying text.

10. See *infra* notes 44-45 and accompanying text.

11. 389 U.S. 347 (1967).

12. *Id.* at 353.

13. 104 S. Ct. 1735 (1984). The *Oliver* opinion addressed two cases decided below, *United States v. Oliver*, 657 F.2d 85 (6th Cir. 1981), and *State v. Thornton*, 453 A.2d 489 (Me. 1982). To avoid confusion, reference to "the *Oliver* case" will be used when discussing that separate case below and "*Oliver*" will refer to the Supreme Court opinion.

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

15. *Id.* at 1738.

16. *Id.*

17. While the intruders were Kentucky State Police, the case was tried in federal court because Oliver was charged with manufacturing marijuana in violation of federal law. See *United States v. Oliver*, 657 F.2d 85, 86 (6th Cir. 1981), *aff'd*, 104 S. Ct. 1735 (1984).

18. 104 S. Ct. at 1738.

19. *Id.* at 1739.

20. 453 A.2d 489 (Me. 1982), *rev'd*, 104 S. Ct. 1735 (1984).

officers crossed an old barbed wire fence and an old stone wall, which surrounded the defendant's land. They walked between a mobile home and an adjacent house, then proceeded up an "overgrown woods road," discovering two marijuana patches which were surrounded by chicken wire.²¹

The trial court suppressed evidence of the officers' observations and the marijuana seized during the investigation of the defendant's land.²² The Supreme Judicial Court of Maine affirmed,²³ noting that "[t]he defendant made every effort to conceal his activity; nothing about his enterprise was open, patent, or knowingly exposed to the public."²⁴ The court sought to reconcile its decision with *Katz* and similar cases by asserting that whether the open fields doctrine applied depended "on whether the field is truly open" or whether an effort is made to exclude the public.²⁵

The United States Supreme Court affirmed the *Oliver* decision and reversed *Thornton*.²⁶ It declared, "There is no societal interest in protecting the privacy of those activities . . . that occur in open fields."²⁷

The open fields doctrine arose from a strict interpretation of the fourth amendment. The Supreme Court first held that fourth amendment protections do not extend to open fields in *Hester v. United States*.²⁸ In *Hester*, the defen-

21. *Id.* at 491.

22. *Id.* at 492. The marijuana was seized three days after the warrantless intrusion described in the text. Affidavits based on information obtained during the earlier intrusion were relied on in issuing a warrant for this seizure. *Id.* at 491.

23. *Id.* at 496.

24. *Id.* at 495.

25. *Id.* at 496.

26. *Oliver v. United States*, 104 S. Ct. 1735, 1744 (1984). The Court voted 6 to 3 in reaching its decision in *Oliver*. Justice Powell wrote the majority opinion, in which Chief Justice Burger and Justices Blackmun, O'Connor and Rehnquist joined. Justice White wrote a separate concurring opinion. One commentator has observed that Chief Justice Burger, Justice O'Connor, and Justice Rehnquist consistently vote to limit the scope of the fourth amendment. Justices Blackmun, Powell, and White are described as "swing votes." They tend to balance the interest of law enforcement against those of privacy. When the case before the Court involves drug trafficking, as in *Oliver* and many other open fields cases, these justices vote consistently to uphold the search. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 276-78 (1984).

27. *Id.* at 1741.

28. 265 U.S. 57 (1924). Justice Holmes, speaking for the majority, cited the language of the fourth amendment and noted the common law distinction between the house and the open field as authority for the holding in *Hester*. One wonders why the open fields doctrine had not been announced much earlier. In 1922, the Court of Appeals of Kentucky, in *Brent v. Commonwealth*, 194 Ky. 504, 511-12, 240 S.W. 45, 49 (1922), held that a provision in its constitution similar to the fourth amendment (the pertinent difference being the substitution of the word "possessions" for the word "effects") was not violated by a search of "a woodland remote from the residence of the owner." *Id.* Perhaps the explanation for this delay is that until the exclusionary rule was announced in *Weeks v. United States*, 232 U.S. 383 (1914), just eight years prior to *Brent* and ten years prior to *Hester*, a defendant lacked a viable legal theory to challenge a search that occurred in his open fields.

dant appealed his conviction for concealing distilled spirits on the ground that the testimony of two government revenue officers should have been excluded because it was based on a warrantless search of his father's land.²⁹

The Court, speaking through Justice Holmes, held that the defendant's fourth amendment rights had not been violated³⁰ because "even if there had been a trespass, the . . . testimony was not obtained by an illegal search and seizure"³¹ and therefore need not be excluded. Noting that the evidence had not been obtained by entering the house,³² the Court declared, "[T]he 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."³³

The Court further defined the limits of the fourth amendment protections in *Olmstead v. United States*.³⁴ In *Olmstead*, the Court refused to find a violation of the fourth amendment³⁵ where law enforcement officers wiretapped the defendants' phones without entering their property.³⁶ It noted that a defendant's rights are not violated "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."³⁷

Doubts about the continued validity of the open fields doctrine arose from a series of 1960's cases³⁸ culminating with *Katz v. United States*.³⁹ In *Katz*,

29. 265 U.S. at 57-58. The officers entered the defendant's father's land without a warrant and concealed themselves about fifty to one hundred yards from the father's house, where they observed the defendant hand a third person a quart bottle. The officers moved in and the defendant fled, dropping a gallon jug, which spilled contents the officers recognized as whiskey.

30. *Id.* at 58-59.

31. *Id.* at 58.

32. *Id.*

33. *Id.* at 59. As authority for his assertion of the common law distinction between the house and the open field, Justice Holmes cited 4 W. BLACKSTONE, COMMENTARIES *223, 225, 226. That section notes that burglary can be committed in a house or outbuilding within the curtilage, but not in a building outside the curtilage (with certain exceptions). While that section does not directly deal with search and seizure, Blackstone said, "[N]o outward doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." *Id.* at 223.

34. 277 U.S. 438 (1928).

35. *Id.* at 456-57.

36. *Id.* at 464.

37. *Id.* at 466.

38. See, e.g., *Warden v. Hayden*, 387 U.S. 294 (1967). In *Warden*, the Court upheld the admissibility of evidence obtained from a search of the defendant's house conducted by police who had entered in pursuit of a fleeing robbery suspect (the defendant). The Court said, "The premise that property interests control the right of the Government to search and seize has been discredited . . . [T]he principal object of the Fourth Amendment is the protection of privacy rather than property, and [the Court has] increasingly discarded fictional and procedural barriers rested in property

the Court noted that a physical intrusion into a constitutionally protected area was at one time required before the fourth amendment was applicable.⁴⁰ However, the Court stated that the trespass requirement of *Olmstead* was no longer controlling⁴¹ because the fourth amendment applies when the government intrudes on "the privacy upon which [the subject of the search] justifiably relied."⁴²

Justice Harlan, in his concurring opinion in *Katz*, set forth a two-part test that is often used to determine the existence of justifiable reliance. First, the subject of the search must "have exhibited an actual (subjective) expectation of privacy and second, [this] expectation [must] be one that society is prepared to recognize as 'reasonable'."⁴³

Several courts, relying on *Katz*, have held that fourth amendment protections extend to an open field when the subject of the search manifests a reasonable expectation of privacy.⁴⁴ However, these courts retained the open fields doctrine to the extent that "[t]here can be no reasonable expectations of

concepts." *Id.* at 304. In *Silverman v. United States*, 365 U.S. 505 (1961), the Court held that the insertion of an electronic listening device into a party wall until it made contact with a heating duct which ran to the defendant's apartment violated the fourth amendment. The Court distinguished the facts in *Silverman* from those in *Olmstead*, noting that in the latter case there had been no "physical invasion of the petitioner's premises." *Id.* at 510-11. The Court also added that it "need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law." *Id.* at 511. The abandonment of property concepts undercut the open fields doctrine, which is based on the notion that some kinds of property are not protected by the fourth amendment. See *supra* note 28 and accompanying text; *infra* note 51 and accompanying text.

39. 389 U.S. 347 (1967). In *Katz*, the defendant appealed his conviction for transmitting wagering information by telephone across state lines. This conviction was based, in part, on evidence of the defendant's use of a telephone conversation obtained by FBI agents through an electronic listening device they had attached to a public telephone booth.

40. *Id.* at 352.

41. *Id.* at 353. The Court stated,

[T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected areas.' . . . [T]his effort to decide whether or not a given 'area', viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places.

Id. at 350-51.

42. *Id.* at 353.

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

44. *E.g.*, *State v. Brady*, 406 So. 2d 1093, 1095 (Fla. 1981) ("open fields doctrine cannot be used as carte blanche for a warrantless search"), *appeal denied*, 455 U.S. 1011, *cert. granted*, 456 U.S. 988, *modified*, 104 S. Ct. 2380 (1984); *Burkholder v. Superior Court*, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (1979) (fourth amendment protected open field where police ignored "No Trespassing" signs and went around or unlocked gates); *State v. Byers*, 359 So. 2d 84 (La. 1978) (police entered land without a warrant where land was posted and chain barred entry onto the premises).

privacy in a field open, visible, and easily accessible to others.”⁴⁵ Other courts have held that the doctrine remained in full force and that no fourth amendment protections attach to an open field.⁴⁶ Many of these cases also relied on *Katz*, reasoning that there can be no reasonable expectation of privacy in an open field.⁴⁷

The Supreme Court first indicated that the open fields doctrine survived *Katz*, at least where a search is conducted on premises open to the public, in *Air Pollution Variance Board v. Western Alfalfa Corp.*⁴⁸ Additionally, the Court continued to rely on property concepts in deciding whether a protected privacy interest exists.⁴⁹

Oliver v. United States presented the Court with an opportunity to clarify the confusion surrounding the applicability of the *Katz* standard to open fields. The Court in *Oliver* relied on three factors in deciding that a protected privacy interest does not exist in an open field: the intentions of the drafters of the fourth amendment; the uses to which an area has been put; and, societal understanding that certain areas deserve protection.⁵⁰ The Court stated, “The [fourth] Amendment reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference.”⁵¹ It found the

45. *Brady*, 406 So. 2d at 1098.

46. *E.g.*, *United States v. Lace*, 669 F.2d 46 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982); *United States v. Capps*, 435 F.2d 637 (9th Cir. 1970); *Atwell v. United States*, 414 F.2d 136 (5th Cir. 1969).

47. *E.g.*, *Lace*, 669 F.2d at 50.

48. 416 U.S. 861 (1974). In *Air Pollution Variance Bd.*, an inspector of the Colorado Department of Health entered the defendant's premises without its consent and without a warrant. There he conducted tests, which were used as evidence against the defendant for violations of the state's air pollution standards. The inspector did not enter the defendant's plant or offices. The Court ruled that since the inspector was between two stack heights and a quarter of a mile away from the defendant's smoke stacks and in an area from which the public was not excluded, his activities fell “well within the ‘open fields’ exception to the Fourth Amendment.” *Id.*

49. *Rakas v. Illinois*, 439 U.S. 128 (1978) (overruled on other grounds in *Rawlings v. Kentucky*, 448 U.S. 98 (1980)). In *Rakas*, the defendants had been convicted of armed robbery. They objected to the admission of a sawed-off rifle and rifle shells discovered in a search of a car in which they were riding. The defendants did not own the car searched and denied ownership of the rifle and shells. *Id.* at 129. The Court said that a “legitimate expectation of privacy” (i.e., one sufficient to invoke the protections of the fourth amendment) could exist even though a person's interest in the premises searched “might not have been a recognized property interest at common law.” *Id.* at 143 (citing *Jones v. United States*, 362 U.S. 257, 261 (1960)). In a note, the Court stated that more than a subjective expectation of privacy was necessary to establish a legitimate expectation of privacy, adding that the source of such an expectation must be found “outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Id.* at 143-44.

50. 104 S. Ct. at 1741.

51. *Id.* The Court noted that James Madison's proposed draft of the amendment provided, “[T]he rights of the people to be secured in their persons, their houses, their papers, and their other property, . . .” The term “other property” was changed to

home to be such an area, contrasting it with open fields, which “do not provide the setting for those intimate activities that the Amendment was intended to shelter from government interference or surveillance.”⁵² The Court concluded that “an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”⁵³

The Court next discussed the difference between the curtilage, the area immediately surrounding a house which the fourth amendment protects, and an open field.⁵⁴ It described the latter as “any unoccupied or undeveloped area outside the curtilage. An open field need be neither ‘open’ nor a ‘field’ as those terms are used in common speech.”⁵⁵

The Court rejected the contention that courts should utilize a case-by-case approach to determine whether a warrantless intrusion into an open field violated the fourth amendment.⁵⁶ Instead, it found that a rule that extends no protection to the open fields is better than requiring police officers to decide whether a landowner has taken sufficient measures to manifest his expectations of privacy or whether an area is so secluded that fourth amendment protections should attach.⁵⁷ In addition to these difficulties, the Court noted that a case-by-case approach would create a danger of arbitrary and inequitable enforcement of the fourth amendment.⁵⁸

The Court also rejected the notion that “steps taken to protect privacy” give rise to fourth amendment protection of an open field.⁵⁹ Instead, the proper test is “whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment.”⁶⁰ The Court refused to

“effects.” The opinion argued that the latter term is “less inclusive than ‘property’ and cannot be said to encompass open fields.” *Id.* at 1740.

52. *Id.* at 1741.

53. *Id.* The Court reasoned that open fields are more accessible to the public and police than a home or office. It asserted that fences and “No Trespassing” signs do not “effectively bar” this accessibility. The Court noted that both Oliver and Thornton concede that aerial surveillance of their lands could be lawfully conducted. *Id.*

54. *Id.* at 1742.

55. *Id.* The Court noted that “[a]t common law, the curtilage is the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” *Id.* It also stated that a “thickly wooded area” may be an open field for fourth amendment purposes. *Id.*; see also *Sproates v. State*, 58 Md. App. 547, 556, 473 A.2d 1289, 1293 (1984) (citing cases where the term “fields” had been applied to “wooded areas, vacant lots in urban areas, beaches, reservoirs, and open waters”).

56. 104 S. Ct. at 1742-43.

57. *Id.* at 1743. The Court declared that the adoption of a case-by-case approach would mean that “[t]he lawfulness of a search would turn on [a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions” *Id.*

58. *Id.* at 1743; see *infra* notes 87-89 and accompanying text.

59. See *infra* notes 89-91 and accompanying text.

60. 104 S. Ct. at 1743.

find an infringement from police inspections of open fields,⁶¹ because such a governmental intrusion is not a search "in the constitutional sense"⁶² even though the intrusion is a trespass, noting that the law of trespass protects interests unrelated to privacy.⁶³

Justice Marshall dissented, declaring that fourth amendment protections extend to an open field when there exists a reasonable expectation of privacy.⁶⁴ He rejected the notion that the fourth amendment proscribes only those activities listed in the amendment.⁶⁵ He reasoned instead that it was designed to prevent "unreasonable government intrusions into . . . legitimate expectations of privacy"⁶⁶ and stated that the Court should interpret the amendment so as to effectuate this purpose.⁶⁷

Justice Marshall listed three factors that should be considered in determining whether an expectation of privacy is reasonable: whether the expectation is "rooted in entitlements defined by positive law;" the uses to which an area can be put; and, whether the expectation was manifested in a way that others would understand and respect.⁶⁸ Marshall noted that property rights should be considered to the extent they give the owner the right to exclude others, which creates a legitimate expectation of privacy.⁶⁹ He found this right to exclude particularly persuasive in the cases before the Court because in both Kentucky and Maine the intrusions constituted criminal trespass.⁷⁰ Thus,

61. *Id.*

62. The term "search" has a different meaning when used in relation to the fourth amendment than it does in ordinary speech. A "search" in the "constitutional sense" means a governmental intrusion that infringes upon someone's reasonable expectation of privacy. *Kitch, Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 134.

63. *Id.* at 1743-44. The Court noted, "[T]he premise that property interests control the right of the Government to search and seize has been discredited." *Id.* at 1743 (quoting *Katz v. United States*, 389 U.S. at 353). This language, however, could just as easily be used to reject the continued validity of the open fields doctrine.

64. *Oliver v. United States*, 104 S. Ct. 1735, 1750 (1984) (Marshall, J., dissenting). Justice Marshall was joined in his dissent by Justices Brennan and Stevens. Wasserstrom describes Justices Marshall and Brennan as favoring preservation of "the conventional interpretation of the Fourth Amendment." See Wasserstrom, *supra* note 26, at 275. Justice Stevens often votes with Justices Marshall and Brennan on fourth amendment cases, but on procedural grounds; he believes that the Court should not review state court decisions upholding fourth amendment claims. *Id.* at 276.

65. *Id.* at 1745-46. Justice Marshall declared, "The Fourth Amendment . . . was designed, not to prescribe with 'precision' permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion." *Id.* at 1745.

66. *Id.* at 1746.

67. *Id.*

68. *Id.* at 1747.

69. *Id.* Apparently, this right to exclude would only create a legitimate expectation of privacy if it were exercised so that the public was denied access to the area the owner wished to keep private.

70. *Id.* at 1748.

Justice Marshall reasoned that the criminal liability which attaches to such intrusions indicates an expectation of privacy which society values, and therefore satisfies the first factor listed.⁷¹

As to the second factor, the uses to which the land can be put, Justice Marshall asserted that open fields can be put to a variety of uses which deserve protection from governmental intrusions.⁷² These uses include solitary walks, agricultural activities, meeting with lovers or fellow worshippers, engaging in sustained creative endeavor, and a refuge to protect wildlife from human interference.⁷³

Finally, while he acknowledged that the presumption of privacy that attaches to one's home does not extend to open fields, Justice Marshall stated that when a landowner manifests his desire for privacy by such steps as posting "No Trespassing" signs so as to expose a private citizen who violates that warning to criminal liability, government officials should be obliged to respect those expectations.⁷⁴

Based on these factors, Justice Marshall would have extended the protection of the fourth amendment to defendants in the cases before the Court.⁷⁵ He stated that these factors would be easier for police to apply than a test which requires them to determine where the curtilage ends and the open fields begin⁷⁶ and expressed fear that the majority's decision "opens the way to investigative activities that we would all find repugnant."⁷⁷

Both the majority and dissenting opinions are persuasive. In most cases, fourth amendment protections would not extend to an open field under either opinion, either because the owner manifests no expectation of privacy or because the manifested expectations are unreasonable. The majority opinion went further, however, declaring that the fourth amendment never protects an open field.⁷⁸

71. *Id.*; see *infra* note 68 and accompanying text. The majority asserted that the law of criminal trespass is not designed to protect privacy, but rather property. The law of criminal trespass "protect[s] against intruders who poach, steal livestock and crops or vandalize property." *Id.* at 1744 n.15.

72. *Id.* at 1748.

73. *Id.* at 1748-49. In a note, Justice Marshall asserted that business activities in an open field from which the public is excluded are no less deserving of protection than activities within office buildings. *Id.* at 1748 n.14. While he admitted some of the activities listed may seem odd, he said that "does not . . . render it less deserving of constitutional protection." *Id.* at 1749 n.15.

74. *Id.* at 1749-50.

75. *Id.*

76. *Id.*

77. *Id.* at 1751 (citing *States v. Lace*, 669 F.2d 46, 54 (2d Cir. 1982)) (police conducted around-the-clock surveillance of residential property using telescopic equipment); (citing *State v. Brady*, 406 So. 2d 1093, 1094-95 (Fla. 1981) (police rammed "through one gate, cut the chain lock on another, cut across posted fences, and proceeded several hundred yards to their hiding places."), *modified*, 104 S. Ct. 2380 (1984)).

78. *Id.* at 1740.

The Court's assertion that "[t]here is no societal interest in protecting the privacy of those activities . . . that occur in open fields"⁷⁹ is too broad. A landowner who manifests expectations of privacy by erecting barriers and posting his land so as to expose trespassers to criminal liability should be protected by the fourth amendment. He should not be required to take "unduly burdensome" precautions,⁸⁰ nor should government officials be exempt from obeying those restraints placed on private citizens without first having demonstrated to an impartial magistrate that there is probable cause to believe that an intrusion into the posted area will reveal contraband or some illegal activity.⁸¹ The inconvenience caused by such a limitation is not onerous and is no greater in open fields cases than in other situations where warrants are required.⁸² If a risk exists that contraband might be removed before a warrant can be obtained, the police may enter under the exigent circumstances exception to the fourth amendment.⁸³

The Court's declaration that providing some fourth amendment protection to open fields creates a danger of arbitrary and inequitable enforcement of that amendment is not persuasive.⁸⁴ While that danger may exist, it should not be exaggerated. This amounts to an assertion that since it may be difficult to guarantee equal protection, no protection should be provided. Infringement of an individual's constitutional rights should not be permitted simply because the Court finds it difficult to protect someone else in similar circumstances. Nor is it clear that such a danger exists. If the land is fenced and posted so as to expose one to criminal liability for trespassing, the police, who are responsible for enforcing those laws, should be aware of the owner's expectation of privacy.⁸⁵ If the police enter the land in an area not posted or fenced, then any

79. *Id.* at 1741.

80. As one commentator has stated, fourth amendment protections should arise whenever an individual has taken precautions a reasonable person would take to preserve his privacy. His failure to take "unduly burdensome", and therefore unreasonable precautions should not result in his having "no reasonable expectation of privacy." Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 168-69 (1977).

81. The public develops contempt for both the government and the law if government officials violate the law in performing their duties. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

82. The fourth amendment is not designed to prevent the government from drawing reasonable inferences from the evidence, but rather to require that those inferences be drawn by an impartial magistrate rather than "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

83. *E.g.*, *United States v. McLaughlin*, 525 F.2d 517 (9th Cir. 1975) (warrantless entry and seizure of marijuana justified where risk of destruction or concealment existed), *cert. denied* 427 U.S. 904 (1976); *United States v. Rubin*, 474 F.2d 262 (3d Cir.) (warrantless search and seizure justified where government agents reasonably believed evidence would be destroyed or removed before a warrant could be obtained), *cert. denied*, 414 U.S. 833 (1973).

84. *See supra* note 58 and accompanying text.

85. *Id.* at 1750.

expectations of privacy which the owner might have would be manifested insufficiently to give rise to fourth amendment protection. One commentator has suggested that such an approach provides "an easier and more predictable standard" than the open fields doctrine.⁸⁶

Nor should the fact that the fourth amendment provides specifically for the protection of the home be construed as an implicit denial of such protections for an open field. The scope of the protections provided has not been limited by a narrow adherence to the language of the fourth amendment. Rather, those protections have been extended beyond the amendment's language both by liberal definitions of the terms used in the amendment⁸⁷ and by shifting the interpretation of the object protected from property to privacy.⁸⁸

Finally, the Court's assertion "that steps taken to protect privacy" do not give rise to fourth amendment protections⁸⁹ misses the mark. The test for the existence of such protections is whether the subject of the search manifested reasonable expectations of privacy and whether society is prepared to recognize such expectations as reasonable.⁹⁰ The "steps taken to protect privacy" satisfy the first of these requirements. The societal recognition factor is satisfied by laws recognizing a landowner's right to exclude others from his or her property.⁹¹ The Court rejected such arguments,⁹² holding that the fourth amendment does not protect outdoor activities unless they are conducted within the curtilage.⁹³

Yet questions as to the scope of this decision remain. For instance, *Oliver's* effect on aerial surveillance cases is unclear. Obviously, aerial surveillance of open fields will not violate the fourth amendment, at least when the

86. Dutille, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U.L. REV. 1, 5 (1971). This author argues that any trespass, whether civil or criminal and whether the owner manifested any expectation of privacy in the land or not, should give rise to fourth amendment protections. *Id.* Such a rule goes too far. If a landowner manifests no expectation of privacy, there is no reason why he should be protected by the fourth amendment. Even the dissent in *Oliver* does not support such a rule. Justice Marshall stated, "If a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not welcome, he cannot object if members of the public enter onto the property." 104 S. Ct. 1735, 1749 (1984) (Marshall, J., dissenting).

87. *E.g.*, *Henry v. United States*, 361 U.S. 98 (1959) (automobile warrants fourth amendment protections); *United States v. Jeffers*, 342 U.S. 48 (1951) (a hotel room may be defined as a "house" for fourth amendment purposes) (overruled on other grounds in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), and *Rakas v. Illinois*, 439 U.S. 128 (1978)); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (fourth amendment protections extend to business offices) (overruled on other grounds in *United States v. Havens*, 446 U.S. 620 (1980)).

88. *Katz*, 389 U.S. at 353.

89. *See supra* note 59 and accompanying text.

90. *See supra* notes 39-40 and accompanying text.

91. Although trespass laws may not apply unless the owner takes certain precautions, once those precautions are taken, the law recognizes the owner's expectations.

92. *See supra* notes 47-60 and accompanying text.

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

overflight is at lawful altitudes.⁹⁴ Even if overflights are below legal limits, they do not violate the fourth amendment because regulations of altitude are designed to protect safety, not privacy.⁹⁵ The fact that the land may be fenced and posted would be immaterial in light of *Oliver*.⁹⁶ Likewise, attempts to conceal the illegal activity do not give rise to fourth amendment protections.⁹⁷ However, *Oliver* leaves room to protect the curtilage from aerial surveillance in at least some circumstances.⁹⁸

On the other hand, enclosed structures, such as barns or garages, located in open fields should be protected by the fourth amendment. An owner manifests expectations of privacy in such buildings by enclosing them. One would think that "society is prepared to recognize [such expectations] as 'reasonable'."⁹⁹ The Court's reasoning in holding that outdoor areas in open fields are not protected by the fourth amendment is not applicable to enclosed buildings. There is no problem in determining whether the fourth amendment applies because all enclosed buildings are protected.¹⁰⁰ Further, such buildings are put to a variety of uses, including storage and work, which deserve fourth amendment protections.¹⁰¹

However the Court resolves these issues, it has clearly held that the

94. See, e.g., *People v. Lashmett*, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979) (no reasonable expectation of privacy from aircraft flying at legal altitude), *cert. denied*, 444 U.S. 1081 (1980); *State v. Stachler*, 58 Hawaii 412, 570 P.2d 1323 (1977) (no reasonable expectation of privacy from helicopter flying at reasonable height); see also *State v. Myrick*, 102 Wash. 2d 506, 688 P.2d 151 (1984) (aerial surveillance from overflight at 1500 feet does not violate state constitution).

95. See *United States v. DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980) (no reasonable expectation of privacy from overflight of open fields even though airplane flew at altitude of 50 feet). That the purpose of altitude regulation is to protect safety is obvious from the language of those regulations. See, e.g., 14 C.F.R. § 91.79 (1984) (providing various "minimum safe altitudes" depending upon whether an area is congested and the type of aircraft being flown).

96. See *supra* note 59 and accompanying text; see also *United States v. DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980) (no violation of fourth amendment from overflight of open field which was fenced and posted).

97. See *supra* note 59 and accompanying text; see also *United States v. DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980) (no violation of fourth amendment despite defendant's attempt to hide marijuana patch by surrounding it with other crops).

98. See *supra* note 50 and accompanying text; cf. *People v. Sneed*, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973) (helicopter hovering 20 to 25 feet above the defendant's back yard violated fourth amendment).

99. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

100. See *supra* notes 53-55 and accompanying text.

101. Such uses seem to deserve as much protection as offices or hotel rooms, which the fourth amendment protects. E.g., *United States v. Jeffers*, 342 U.S. 48 (1951) (hotel room protected under the fourth amendment) (overruled on other grounds in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), and *Rakas v. Illinois*, 439 U.S. 128 (1978)); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (fourth amendment protects business office) (overruled on other grounds in *United States v. Havens*, 446 U.S. 620 (1980)).

fourth amendment does not protect outdoor areas in an open field.¹⁰² This decision overrules the result reached in at least five states.¹⁰³ In the remaining states, courts had already adopted the per se open fields doctrine¹⁰⁴ or have not given a clear statement of their position.¹⁰⁵ There is no reason a state court could not provide greater protection for open fields under its own constitution or statutes.¹⁰⁶ But in doing so, it must clearly indicate that it has not relied on the fourth amendment.¹⁰⁷

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

103. *See, e.g.*, *Burkholder v. Superior Court*, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (1979) (fourth amendment protected open field where police ignored "No Trespassing" signs and went around or unlocked gates); *People v. McClaugherty*, 193 Colo. 360, 566 P.2d 361 (1977) (en banc) ("As a per se exception to the fourth amendment, the open fields doctrine retains little vitality," but holding search of farm land without warrant did not violate fourth amendment where there was no reasonable expectation of privacy); *State v. Brady*, 406 So. 2d 1093 (Fla. 1981) (open fields doctrine cannot be used as carte blanche for a warrantless search), *modified*, 104 S. Ct. 2380 (1984); *State v. Byers* 359 So. 2d 84 (La. 1978) (fourth amendment protections apply where marijuana was not visible from public road, log road was posted as private and prohibited entry and chain barred access to road, though down at time of arrest and seizure); *State v. Thornton*, 453 A.2d 489 (Me. 1982), *rev'd Oliver v. United States*, 104 S. Ct. 1735 (1984).

104. *E.g.*, *State v. Simpson*, 639 S.W.2d 230 (Mo. App., S.D. 1982) (open fields doctrine applies where marijuana found 100 yards to one-quarter mile from farm buildings even if police were trespassing); *Casey v. State*, 87 Nev. 413, 488 P.2d 546 (1971) (land 500 to 700 feet from dwelling not protected by fourth amendment; "nothing in *Katz* signal[ed] [the] demise of the principal that an individual ordinarily has no constitutionally protected right to expect privacy in open fields").

105. *E.g.*, *State v. Caldwell*, 20 Ariz. App. 331, —, 512 P.2d 863, 867 (1973) (open fields doctrine applies where marijuana discovered 100 yards from house, but "[e]ach case must rest on its own facts . . .").

106. *See, e.g.*, *State v. Lakin*, 588 S.W.2d 544 (Tenn. 1979) (marijuana found during a warrantless search of an area 50 to 100 feet from barn and garden, which was one-quarter mile from farmhouse suppressed under state constitution); *see also State v. Myrick*, 102 Wash. 2d 506, 688 P.2d 151 (1984) (protections under state constitution vary significantly from fourth amendment, but aerial surveillance at 1500 feet is not a violation of state constitution or fourth amendment). However, if the remedy desired is exclusion of the evidence, this alternative is no longer available in California. CAL. CONST. art. I, § 28(d), passed by the voters of that state in 1982 as Proposition 8, abolished the exclusionary rule as a remedy for violation of the state constitution's search and seizure provisions. *In re Lance W.*, 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985). A similar amendment has been proposed for the Missouri Constitution. Evidence obtained in violation of that state's constitution would not be excluded if seized by law enforcement officers acting in good faith pursuant to a search warrant or if the prosecutor can prove that the evidence would eventually have been discovered by lawful means. S.J. Res. 12, 83rd Gen. Assembly, 1st Sess. (1984).

107. If it fails to do so, the Supreme Court will be free to infer that the state court based its decision on federal law thereby giving the Supreme Court jurisdiction to review that decision. *E.g.*, *Michigan v. Long*, 463 U.S. 1032 (1983). On the other hand, if the state court clearly articulates "adequate and independent [state law] grounds" for its decision, the Supreme Court will not review that decision. *Id.*