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Criminal Procedure - Search and Seizure - Expectations of Privacy in the Open Fields and an Evolving Fourth Amendment Standard of Legitimacy: Oliver v. United States

Clinton Wayne Marrs

CRIMINAL PROCEDURE—Search and Seizure—Expectations of Privacy in the Open Fields and an Evolving Fourth Amendment Standard of Legitimacy: *Oliver v. United States*

I. INTRODUCTION

In *Oliver v. United States*,[1] the United States Supreme Court reaffirmed the fourth amendment "open fields" doctrine by holding that an expectation of privacy in "open fields" is unreasonable *per se*. Accordingly, the Court concluded that the fourth amendment does not protect "open fields"—land outside the curtilage of a dwelling—against unreasonable government searches.[2]

In the 1924 decision of *Hester v. United States*,[3] the Supreme Court ruled that the "special protection" of the fourth amendment did not extend to "the open fields."[4] *Hester*, however, provided no guidance as to what kind of land constituted an "open field" for purposes of the fourth amendment's prohibition against unreasonable searches. Four years later, in *Olmstead v. United States*,[5] the Court held that a fourth amendment search of a house did not occur unless there was "an actual physical invasion of [the] house 'or curtilage.'"[6] After *Olmstead*, many courts construed the term "open fields" to mean any land situated beyond the curtilage of a house.[7]

The Supreme Court's decision in *Katz v. United States*,[8] however, cast

1. 104 S. Ct. 1735 (1984) [cited as *Oliver I*]. This opinion also reports Maine v. Thornton, 104 S. Ct. 1735 (1984) [cited as *Thornton I*].

2. *Id.* at 1742. The "open fields" doctrine treats an "open field" as a public place for fourth amendment purposes. Government officials, therefore, are permitted to search "open fields" without obtaining a search warrant and without probable cause. *Id.* at 1738, 1740.

The term "open fields" denotes the area of land outside the curtilage of a home. *Id.* at 1741, 1742 n.11. The term may describe an area which is neither open, nor a field, nor even land. It may describe a beach, a desert, or a body of water. *See* W. LAFAVE, SEARCH AND SEIZURE § 2.4(a), at 332 nn.5-13 (1978). "Curtilage" is a general term used to denote the zone of real property surrounding a home "to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver I*, 104 S. Ct. at 1742 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

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

4. *Id.* at 59. In *Hester*, Justice Holmes stated that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as common law." *Id.* (citing 4 W. BLACKSTONE, COMMENTARIES *223, *225, *226). *See infra* note 86 for an analysis of the common law distinction.

5. 277 U.S. 438 (1928).

6. *Id.* at 466.

7. *See infra* text accompanying notes 55-61.

8. 389 U.S. 347 (1967).

doubt on the precedential value of these two cases. In *Katz*, the Court transformed the method of fourth amendment analysis by announcing a two-pronged privacy test for ascertaining the amendment's reach.[9] Under the first prong, a court determines whether the individual complaining of a search possessed a subjective expectation of privacy in the area searched. Under the second prong, the court determines whether this expectation is one that society deems legitimate. After *Katz*, the lower courts split on the question whether an individual's subjective expectation of privacy in "open fields" had to be tested for legitimacy or whether the *Hester-Olmstead* "open fields" doctrine persisted as a blanket exclusion of land outside the curtilage from the fourth amendment.[10]

The decision in *Oliver* resolved the conflict by reconciling the doctrine's blanket exclusion of "open fields" from the fourth amendment with the two-pronged *Katz* test.[11] *Oliver*'s significance, however, lies in its clarification of *Katz*'s second prong. *Oliver* states that the correct legal standard for applying the test's second prong is whether the subjective expectation of privacy is in a place which is ordinarily the setting for "intimate activity."[12] This Note analyzes the *Oliver* Court's application of the *Katz* test to "open fields" and examines *Oliver*'s implication for fourth amendment privacy jurisprudence.

II. STATEMENT OF THE CASE

The Supreme Court consolidated two cases, *United States v. Oliver*[13] and *State v. Thornton*,[14] for review of the continued vitality of the "open fields" doctrine.[15] In *United States v. Oliver*, the Kentucky State Police investigated an anonymous tip that marijuana was cultivated on Ray Oliver's farm.[16] The police officers made no attempt to obtain a search warrant or Oliver's consent to their entry.[17] After turning off a public

9. *Id.* at 351-53. The *Katz* privacy test determines whether a government agent's conduct invaded a constitutionally protected privacy interest. The test was first articulated as a two-pronged test in Justice Harlan's concurring opinion in *Katz*. *Id.* at 361. The Supreme Court quickly adopted Justice Harlan's formulation as the dispositive fourth amendment analysis. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968). *See infra* text accompanying notes 72-76.

10. *See infra* text accompanying notes 77-81.

11. *Oliver I*, 104 S. Ct. at 1742, 1744.

12. *Id.* at 1741.

13. 686 F.2d 356 (6th Cir. 1982) (*en banc*) [cited as *Oliver II*].

14. 453 A.2d 489 (Me. 1982) [cited as *Thornton II*].

15. *Oliver I*, 104 S. Ct. at 1738.

16. *Oliver II*, 686 F.2d at 358. The investigating officers were narcotics detectives and previously had heard rumors that marijuana was cultivated on Oliver's farm. *Id.* The 200-acre farm was located 20 miles outside the nearest town. *Id.* at 361 (Keith, J., dissenting). The farm was fenced and posted against trespassing. *Id.* at 363.

17. *Id.* at 362 (Keith, J., dissenting). The United States conceded that the officers did not have probable cause for a search warrant and that the warrantless entry was not excused by an exception to the fourth amendment's warrant requirement. *Oliver I*, 104 S. Ct. at 1738 n.1.

highway onto Oliver's private gravel road, the officers parked their car at a locked gate which blocked the road a "short distance" past his home.[18] They continued on foot[19] for over a mile to a secluded field planted with marijuana.[20] Oliver was indicted for "manufactur[ing]" marijuana in violation of federal statute.[21]

The district court suppressed the evidence procured in the warrantless investigation.[22] A panel of the Sixth Circuit Court of Appeals affirmed the district court's suppression order.[23] The panel held that after *Katz*, the "open fields" were no longer "automatically exempted" from the fourth amendment warrant requirement.[24] The panel applied the *Katz* privacy test[25] in holding that the Kentucky State Police officers' warrantless investigation violated Oliver's constitutionally protected expectation of privacy in his farm.[26] The court of appeals, sitting *en banc*,

18. *Oliver II*, 686 F.2d at 358. The "short distance" beyond Oliver's home apparently was about 3/4 of a mile. *Id.* at 362 (Keith, J., dissenting). The private road was posted in at least four locations with "No Trespassing" signs. *Id.* The police officers disregarded the signs' warning. *Id.* The locked, metal gate was posted with a "No Trespassing" sign which the police officers also disregarded. *Id.*

19. *Id.* at 358 (Brown, J.). The officers apparently avoided the locked gate by following a path through a "gap in the fence". *Id.* at 362 (Keith, J., dissenting). *See* United States v. Oliver, 657 F.2d 85, 86 (6th Cir. 1981) (Keith, J.) (the officers "slipped through a hole in the gate") [cited as *Oliver III*], *rev'd en banc*, *Oliver II*, 686 F.2d 356 (6th Cir. 1982).

The gravel road dwindled as it receded from the highway. *Oliver II*, 686 F.2d at 362 (Keith, J., dissenting). The road became "markedly narrower" after it passed Oliver's home. *Id.* The police officers proceeded down the road for "several hundred yards" past a barn and a parked camper. *Id.* Beyond the barn the road had dwindled into an "earthen path". *Id.* The police officers proceeded 1/4 of a mile through "fields and wooded areas". *Id.* At this point the officers were accosted by shouts originating from the camper. *Id.* They were informed that hunting was not allowed and were ordered to "Come Back Here." *Id.* The officers returned to the camper but found no one. *Id.* The officers then resumed their investigation.

20. The marijuana was planted in a cornfield. Tr. of Oral Arg. at 6, *Oliver I*, 104 S. Ct. 1735 (1984). The field was located "over a mile" from Oliver's home. *Oliver I*, 104 S. Ct. at 1738. The field was "highly secluded," *Oliver II*, 686 F.2d at 362 (Keith, J., dissenting), and the marijuana "could not be seen by anyone standing on land other than Oliver's." *Id.* at 358 (Brown, J.). The dissent in the Sixth Circuit Court of Appeals sitting *en banc* stated, moreover, that the fields could not be seen from the locked gate, Oliver's home, or the barn. *Id.* at 362-63. The United States, however, asserted that the field was visible from the gate but that "it was not possible to determine from that distance that it was marijuana growing in the field." Brief for the United States at 3 n.1, *Oliver I*, 104 S. Ct. 1735 (1984).

21. *Oliver I*, 104 S. Ct. at 1738.

22. *Oliver III*, 657 F.2d at 88.

23. *Id.*

24. *Id.* The panel's characterization of *Hester*'s "open fields" rule as a warrant requirement exception derives from its overruling of United States v. Hassell, 336 F.2d 684 (6th Cir. 1964) (per curiam), *cert. denied*, 380 U.S. 965 (1965), which held that a warrantless search of an "open field" is not an unreasonable search. *See infra* note 28.

25. *See supra* note 9.

26. *Oliver III*, 657 F.2d at 87. First, the panel found that Oliver's expectation of privacy was manifested by the locked gate, the "No Trespassing" signs and the private use of the road leading to his home. *Id.* Second, the panel found that Oliver's expectation was constitutionally reasonable. *Id.* The panel noted that in the absence of exigent circumstances "[s]ociety's interest in law enforcement is not unduly hampered by requiring a warrant prior to searching a private field which

overruled the panel and reversed the district court.[27] The court of appeals held that *Hester*'s blanket exclusion of the "open fields" from the protection of the fourth amendment had not been overruled by *Katz*.[28] The court reasoned that *Hester* was "still good Fourth Amendment law" because any expectation of privacy in the "open fields" is unreasonable as a matter of law.[29] The court, sitting *en banc*, concluded, therefore, that "under *Hester* and *Katz*," the "open fields" are excluded *per se* from the fourth amendment.[30]

In *State v. Thornton*, Maine State Trooper Crandall and another police officer walked onto Thornton's land without a search warrant or consent to corroborate an informant's tip that marijuana was cultivated in a wooded area behind Thornton's house.[31] They discovered marijuana growing in two small clearings adjacent to a footpath running through a heavily wooded portion of Thornton's land.[32] After obtaining a search warrant,[33]

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has been reached through a private road exhibiting several 'No Trespassing' signs and blocked by a locked gate." *Id.*

27. *Oliver II*, 686 F.2d at 358.

28. *Id.* at 360. The court, in overruling the panel's decision, purported to expressly reaffirm *Hassell*. *Oliver II*, 686 F.2d at 358. *Hassell*, however, held that an investigation of an "open field" was exempted from the warrant requirement of the fourth amendment. 336 F.2d at 684. In contrast, the effect of the *Oliver II* court's holding that a privacy expectation in land outside the curtilage is unreasonable *per se* is to exclude the investigation from both the warrant *and* reasonableness requirements of the fourth amendment. *See infra* note 46.

29. *Oliver II*, 686 F.2d at 360. The court expressed two views of an individual's privacy interest in land outside the curtilage. The first is that "no privacy rights inhere [in] . . . an open field of marijuana." *Id.* The second view is that no *fourth amendment* privacy rights inhere in land outside the curtilage. *Id.* While the court neglected to distinguish these two conceptions of privacy, the latter view is the correct expression of the premise of the court's holding that a privacy expectation in land outside the curtilage is unreasonable for purposes of the fourth amendment.

The property right of exclusive occupation represents society's recognition of a privacy interest in land. *See infra* note 106. The question, however, is whether the privacy interest denoted by property law coincides with the privacy interest protected by the fourth amendment. Judge Brown answered this question in the negative. First, Judge Brown stated that the fourth amendment shelters the privacy necessary to "create the conditions and the context for many relationships based on intimacy, friendship and trust." *Oliver II*, 686 F.2d at 360. Second, "[t]he human relations that create the need for privacy do not ordinarily take place in . . . settings [such as the open fields]." *Id.* Protection of "open fields" against unreasonable government searches, therefore, is not warranted. As Judge Brown concluded, "[t]he only significant interest at stake here—a property owner's interest in excluding others from his possessions—is not sufficient alone to bring into play legal principles protecting privacy." *Id.* (footnote omitted).

30. *Id.*

31. *Thornton II*, 453 A.2d 489, 491 (Me. 1982) ("without license"). At the time of their first entry onto the property, the police officers did not know who owned it but assumed that it belonged to Thornton. *Id.*

32. *Id.* The property consisted of approximately 30 acres of secluded, heavily wooded rural land. Brief for Respondent at 4, *Thornton I*, 104 S. Ct. 1735 (1984). The land was enclosed by an old stone wall and a barbed wire fence and was posted with "No Trespassing" signs. *Thornton II*, 453 A.2d at 491. The marijuana patches were not visible from any point off Thornton's land. *Id.* The patches also were not visible from Thornton's home or his driveway. *Id.* In oral argument before the United States Supreme Court, the respondent suggested that aerial surveillance with the unaided eye also might not disclose the marijuana patches because they were small and the land was thickly wooded. Tr. of Oral Arg. at 17, 18, *Thornton I*, 104 S. Ct. 1735 (1984).

33. Probable cause in support of the warrant in part was furnished by Trooper Crandall's obser-

Trooper Crandall and other police officers returned to Thornton's land and seized a quantity of marijuana.[34] Thornton was indicted for unlawfully furnishing scheduled drugs.[35]

The trial court suppressed the evidence procured in the two entries onto Thornton's land.[36] The Maine Supreme Judicial Court affirmed the trial court and held that the entries onto Thornton's land constituted unlawful searches.[37] The court held that the *Hester* "open fields" doctrine[38] was inapplicable because Thornton's property was secluded from public view and because Thornton had taken steps to exclude the public.[39] Hence, Thornton's property was not "open" for purposes of the doctrine. Invoking *Katz*, the court unanimously held that the police officers' intrusion onto Thornton's land defeated Thornton's reasonable expectation of privacy.[40]

The United States Supreme Court granted certiorari and consolidated the two cases for review.[41] The Supreme Court held that *Hester*'s "open fields" rule retains its vitality and that an expectation of privacy in the "open fields" is unreasonable *per se*.[42] Accordingly, the Court, with three

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vations during the warrantless entry. *Thornton II*, 453 A.2d at 491. Trooper Crandall did not obtain a search warrant prior to his initial entry onto Thornton's land because he "didn't feel without checking it that [he] had enough information." *Id.*

34. *Id.*

35. *Id.* at 490.

36. *Id.* at 492. The trial court invalidated the search warrant after holding that the initial warrantless entry constituted an unlawful search. *Id.* at 491-92. Accordingly, the trial court granted Thornton's motion to suppress.

37. *Id.* at 496.

38. Under the "open fields" doctrine, warrantless searches of land outside the curtilage of a home are not unconstitutional. *See infra* text accompanying notes 51-61.

39. *Thornton II*, 453 A.2d at 495. The court rejected the state's argument that *Hester* announced a *per se* rule excluding "open fields" from the fourth amendment. *See id.* at 494-95. The court accepted the defendant's view that the *Hester* "open fields" doctrine had been modified by the *Katz* privacy rationale. *See id.* at 496. The court stated that application of the "open fields" doctrine required two predicates: (1) that the activity be visible to the public (2) from a location in which the public is lawfully present. *Id.* at 495.

Thornton's expectation of privacy for activity on his land would be subject to the "open fields" doctrine if he cultivated the marijuana openly and the marijuana was visible to the police officers from a location in which they had a right to be. *Id.* Thornton had "made every effort to conceal his activity"; and the officers were required to trespass onto Thornton's land to observe it. *Id.* at 495. The Maine Supreme Judicial Court held, therefore, that the "open fields" doctrine did not apply. *Id.* at 495-96.

40. *Id.* at 495. The court held that Thornton had manifested an expectation of privacy in his land and that under the circumstances the expectation was reasonable. *Id.* at 494-95. "He chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land." *Id.* at 494.

41. Oliver v. United States, 459 U.S. 1168 (Jan. 24, 1983), *granting cert. to* United States v. Oliver, 686 F.2d 356 (6th Cir. 1982); Maine v. Thornton, 460 U.S. 1068 (Apr. 4, 1983), *granting cert. to* State v. Thornton, 453 A.2d 489 (Me. 1982).

42. *Oliver I*, 104 S. Ct. at 1740, 1742.

Justices dissenting and one Justice concurring in part, affirmed the Sixth Circuit sitting *en banc* in *Oliver* and reversed *Thornton*.[43]

III. DISCUSSION AND ANALYSIS

The *Oliver* Court rested its exclusion of "the open fields" from the fourth amendment's prohibition against unreasonable searches on two grounds. First, the Court affirmed *Hester*'s construction of the plain language of the fourth amendment, holding that *Hester* drew a bright line excluding land outside the curtilage from the amendment's protection.[44] Second, the Court reconciled *Hester*'s bright line rule with the legitimate expectation of privacy test articulated in *Katz*.[45] Following a brief review of the development of the "open fields" doctrine, this Note analyzes the Supreme Court's affirmation of the doctrine in *Oliver*.[46]

A. *The Open Fields Doctrine*

1. The Open Fields Doctrine Prior to *Katz: Hester v. United States* and *Olmstead v. United States*

The fourth amendment expressly prohibits unreasonable government searches of "persons, houses, papers, and effects."[47] The amendment's

43. *Id.* at 1744. Justices Marshall, Brennan and Stevens dissented on the ground that *Hester*'s blanket exclusion of the "open fields" from the fourth amendment did not survive the privacy test announced in *Katz*. *Id.* at 1745. The dissent argued that depending upon the facts of a case, a person could possess a constitutionally reasonable expectation of privacy in "open fields." *Id.* at 1750. Justice White concurred in the judgment and stated that the reasonableness of an expectation of privacy in the "open fields" is irrelevant inasmuch as the "open fields" are nowhere mentioned in the text of the fourth amendment. *Id.* at 1744. Accordingly, Justice White refused to join the majority's holding that an expectation of privacy in the "open fields" is unreasonable as a matter of law. *Id.*

44. *Id.* at 1740.

45. *Id.* at 1740-41.

46. *Id.* at 1741. *Oliver*'s rule excluding "open fields" from the fourth amendment is not an additional exception to the fourth amendment's warrant requirement. The warrant requirement, *see infra* note 47, embodies the principle that generally a judicial officer should decide "[w]hen the right of privacy must reasonably yield to the right of search." Johnson v. United States, 333 U.S. 10, 14 (1948).

The United States Supreme Court has held on many occasions that a warrantless search is unreasonable *per se* unless the search is excused by a prescribed exception to the warrant requirement. *See, e.g., Katz,* 389 U.S. at 357; Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). However, if an individual's expectation of privacy in the searched premises is not protected by the fourth amendment then government intrusion into or surveillance of the premises does not constitute a "search" for purposes of the fourth amendment. United States v. Jacobsen, 104 S. Ct. 1652, 1660 (1984). In the absence of a constitutionally recognized "search," the fourth amendment's prohibition of "unreasonable searches" is not implicated by the intrusion or surveillance. Moylan, *The Fourth Amendment Inapplicable Vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?,"* 1 S. ILL. U.L.J. 75 (1977). The intrusion or surveillance, therefore, need not be reasonable for purposes of the amendment.

47. U.S. CONST. amend. IV. The fourth amendment provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ." *Id.* A warrantless search is invalid *per se*, unless excused by a recognized exception to the amendment's warrant requirement. *See supra* note 46.

scope, however, is not limited to protection of its express enumerations. Early in the history of fourth amendment adjudication the Supreme Court recognized that the amendment's guarantee must not be "gradual[ly] depreciat[ed]" by "close and literal" interpretation of its terms.[48] In line with this recognition, the Court has, for instance, extended fourth amendment protection to commercial buildings[49] and to public telephone booths.[50]

In 1924, in *Hester v. United States*,[51] the Supreme Court first confronted the question whether the fourth amendment protects "open fields." It turned to common law for guidance in determining whether the protection against unreasonable government searches accorded to "persons, houses, papers, and effects" extended to an "open field."[52] The common law extended greater protection against trespass to a dwelling than to the "open fields" which lay beyond it.[53] The *Hester* Court incorporated this differential protection into the fourth amendment, holding that the amendment's "special protection" of "houses" does not extend to "the open fields."[54]

Justice Holmes, writing for the Court in *Hester*, did not specify what kind of land constituted "open fields" for purposes of the fourth amendment's prohibition against unreasonable searches. The scope of "open fields" became more apparent four years later with the Supreme Court's decision in *Olmstead v. United States*.[55] In *Olmstead*, the Court held that a trespass, "or an actual physical intrusion of [a] house 'or curtilage'", was a necessary predicate to a fourth amendment search of a house.[56] Citing to *Hester*, the Court indicated, however, that the fact of a government trespass on private property did not necessarily constitute a search for fourth amendment purposes.[57] *Olmstead*'s trespass predicate appeared to equate a house with its curtilage, the zone of land immediately surrounding the house.[58] After *Olmstead*, many courts invoked this equation of house and curtilage to construe the term "open fields" to include any land situated beyond the curtilage.[59]

Under the *Hester-Olmstead* "open fields" doctrine, the constitutionality

48. Boyd v. United States, 116 U.S. 616, 635 (1886).

49. *E.g.*, G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977).

50. Katz v. United States, 389 U.S. 347 (1967).

51. 265 U.S. 57 (1924).

52. *Id.* at 59.

53. *See* 4 W. BLACKSTONE, COMMENTARIES *225-26. *See infra* note 86 for an analysis of the common law's protection of a dwelling against trespass.

54. 265 U.S. at 59. *See supra* note 4.

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

56. *Id.* at 466. *See infra* note 87 and accompanying text.

57. *See id.* at 465.

58. *See id.* at 466. The equation also is implied by *Hester's* distinction between a house and "the open fields." *See infra* notes 86-87.

59. *See* Comment, *Katz In Open Fields*, 20 AM. CRIM. L. REV. 485, 490-91 (1983). *See also* Note, *How Open Are Open Fields? United States v. Oliver*, 14 U. TOL. L. REV. 133, 138 (1982).

of a search of land turned on whether the land was within the curtilage of a house and, if so, whether a government agent trespassed onto the land.[60] Inasmuch as the "open fields" lay beyond the curtilage, the fourth amendment did not shelter an "open field" from unreasonable government searches. Accordingly, the amendment did not prohibit a warrantless government search of land outside of the curtilage.[61]

2. The Open Fields Doctrine in the Aftermath of *Katz v. United States*

In a dissent that foreshadowed the future direction of fourth amendment jurisprudence, Justice Brandeis rejected *Olmstead*'s trespass predicate, stating that "every unjustifiable intrusion by the Government upon the privacy of the individual" violated the fourth amendment.[62] In 1967, in *Katz v. United States*,[63] the Supreme Court vindicated Justice Brandeis' conception of the fourth amendment as harboring a right of privacy.[64] In *Katz*, FBI agents, who declined to obtain a search warrant, eavesdropped on Katz's telephone conversations, using an electronic listening device attached to the exterior of the public telephone booth.[65] Katz was convicted of telephoning wagering information across state lines.

Invoking *Olmstead*'s trespass predicate, the lower courts ruled that no fourth amendment search had occurred because "'[t]here was no physical entrance into the area'" occupied by Katz.[66] The Supreme Court in *Katz* reversed the lower courts and overruled *Olmstead*'s requirement of a trespass onto a constitutionally protected area.[67] Noting that the fourth amendment "protects people, not places,"[68] the Court reasoned that the absence of a trespass was without constitutional significance.[69] Since the warrantless electronic eavesdropping violated "the privacy upon which

60. *See Katz*, 389 U.S. at 352-53. *See also supra* note 59.
61. *See Olmstead*, 277 U.S. at 466; *Hester*, 265 U.S. at 59.
62. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).
63. 389 U.S. 347 (1967).
64. *Katz* inaugurated the modern fourth amendment privacy jurisprudence. *See infra* text accompanying notes 62-76. The Court, however, had recognized as early as 1886 that the fourth amendment was meant to protect the "privacies of life." *Boyd*, 116 U.S. at 630. *See* United States v. Chadwick, 433 U.S. 1, 11 n.6 (1977) (purpose of fourth amendment to safeguard "legitimate" privacy interest "has been settled law in this Court for over 90 years."). And again, well before *Katz*, the Court stated in Wolf v. Colorado, 338 U.S. 25 (1948), that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is at the core of the Fourth Amendment." *Id.* at 27.
65. 389 U.S. at 348.
66. 369 F.2d 130, 134 (9th Cir. 1966).
67. 389 U.S. at 353.
68. *Id.* at 351.
69. *Id.* at 353.

[Katz] justifiably relied while using the telephone booth,"[70] the Court concluded that the eavesdropping constituted an unreasonable search.

Katz directed courts to determine whether government conduct defeated legitimate privacy interests. Courts make the determination by applying a two-pronged expectation of privacy test.[71] First, courts inquire into whether the individual possessed a subjective expectation that his activity would remain private.[72] Second, the courts determine whether the expectation is objectively reasonable; that is, whether it is one that society deems legitimate.[73] To succeed under *Katz*, an allegation that a warrantless search violated the person's expectation of privacy must satisfy both prongs of the test.[74] The first prong requires that the person actually have exhibited a subjective expectation of privacy.[75] As a result of the second prong, however, only those expectations which "society is prepared to recognize as 'reasonable'" are entitled to fourth amendment protection.[76] Thus, *Katz* shifts the focus of the inquiry from whether a government agent physically intruded into an area constitutionally protected *per se* to whether the agent invaded an area in which the individual complaining of the invasion had an objectively reasonable expectation of privacy.

This shift in focus raised a question as to the continued vitality of the *Hester-Olmstead* "open fields" doctrine.[77] State and lower federal courts after *Katz* developed two conflicting constructions of the scope of *Hester*'s "open fields" holding. In applying the *Katz* test to land outside of the curtilage, some courts concluded that an expectation of privacy in the land was unreasonable if it was open to the public. These courts construed *Hester* narrowly, holding that an "open field" which may be warrantlessly searched is an area from which the public has not been lawfully excluded and which is open to public view.[78] Other courts applied the *Katz* test to

70. *Id.*

71. *E.g., Katz*, 389 U.S. at 361 (Harlan, J., concurring); Terry v. Ohio, 392 U.S. 1, 9 (1968).

72. *E.g., Katz*, 389 U.S. at 361 (Harlan, J., concurring); *Terry*, 392 U.S. at 9.

73. *E.g., Katz*, 389 U.S. at 361 (Harlan, J., concurring); Smith v. Maryland, 442 U.S. 735, 740 (1979).

74. *See, e.g., Smith*, 442 U.S. at 740 & n.5.

75. In practice, however, the first prong is relatively minor. A showing that the accused exhibited a subjective expectation of privacy is usually easily made. Moreover, the Supreme Court will waive the criterion of the first prong altogether in instances where the defendant in fact did not have an expectation of privacy because he had been "'conditioned' by influences alien to well-recognized Fourth Amendment freedoms." *Smith*, 442 U.S. at 741 n.5. In these instances, the relevant test is whether an "unconditioned" person would have manifested a subjective expectation of privacy. *Id.*

76. *E.g., Katz*, 389 U.S. at 361 (Harlan, J., concurring); Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).

77. *See Oliver I*, 104 S. Ct. at 1739 n.5.

78. *See* Comment, *supra* note 59, at 490, 495-96. For a review of the cases narrowly interpreting *Hester*, see *Oliver II*, 686 F.2d at 368-69 (Keith, J., dissenting) (warrantless searches upheld where public not excluded) and *id.* at 369-70 (warrantless searches condemned where public was excluded).

Courts narrowly construing *Hester* hold that under the two prongs of the *Katz* test a person who

conclude that an expectation of privacy in land outside the curtilage is unreasonable *per se*. These courts construed *Hester* broadly, holding that an "open field" is any land outside the curtilage without regard to the area's accessibility or visibility to the public.[79] The Supreme Court in *Oliver* expressly reaffirmed *Hester*'s broad holding.[80] Moreover, the Court expressed *Hester*'s broad holding in *Katz* terms by stating that an expectation of privacy in "open fields" is unreasonable *per se*.[81]

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lawfully exercises dominion over land outside the curtilage may manifest a legitimate subjective expectation of privacy in the land. The first prong is satisfied easily. A person manifests a subjective expectation by fencing and posting the land against trespassers. *E.g.*, State v. Brady, 406 So. 2d 1093, 1097 (Fla. 1982); *Oliver II*, 686 F.2d at 371 (Keith, J., dissenting) ("[T]he presence or absence of fences, gates to impede access, and signs which convey [no trespassing] warnings . . . have consistently been a determinate of whether the warrantless search was within the Open Fields Doctrine."). The second prong—whether the expectation is "legitimate"—typically is satisfied when the land is secluded from public view, is relatively inaccessible to the public and when the person is entitled to exclude the public from the land. *See, e.g.*, *Brady*, 406 So. 2d at 1098 ("There can be no reasonable expectation of privacy in a field open, visible, and easily accessible to others.").

The New Mexico courts adopted the narrow construction of *Hester's* "open fields" rule. The decision in State v. Chort, 91 N.M. 584, 577 P.2d 892 (Ct. App. 1978) "illustrates the departure which *Katz* requires from the *per se* rationale of *Hester*." State v. Bigler, 100 N.M. 515, 516, 673 P.2d 140, 141 (Ct. App. 1983). Chort cultivated marijuana plants in a garden located on his unfenced, ten acre tract of land. The garden was enclosed by "an almost solid five foot fence." *Chort*, 91 N.M. at 585, 577 P.2d at 893. The court in *Chort* noted that the marijuana plants were not visible "[f]rom any point off the property." *Id.* at 584-85, 577 P.2d at 892-93. A government agent entered onto Chort's tract of land and observed the marijuana plants in the garden. In *Chort*, the New Mexico Court of Appeals held that the agent's warrantless entry onto Chort's land violated the fourth amendment. *Id.* at 585, 577 P.2d at 893.

In so holding, the court noted that *Hester* did not provide a "talismanic solution" to the question of the legality of the warrantless entry. It reasoned that the legality of a warrantless search of the "open fields" "must be viewed in light of the facts of each case subject to the requirements of *Katz*." *Id.* (citation omitted). The court found that Chort manifested a subjective expectation of privacy by his "placement of the garden" on his land and by fencing the garden. It applied *Katz*'s second prong without analysis, asserting that "this expectation of privacy was such that society would recognize as reasonable." *Id.* The warrantless search of Chort's "open field," therefore, was unreasonable.

The court of appeals reached the opposite result in State v. Bigler, 100 N.M. 515, 673 P.2d 140 (Ct. App. 1983), *cert. quashed*, Bigler v. State, 100 N.M. 505, 672 P.2d 1136 (1983). Like *Chort*, *Bigler* involved the out-door cultivation of marijuana. Unlike in *Chort*, however, the police officer in *Bigler* did not trespass upon the defendant's land. Instead, the officer conducted his warrantless searches by flying over the defendant's land in an airplane and by observing the marijuana from a county road. *Id.* at 515, 673 P.2d at 140.

The *Bigler* court applied the *Katz* test to the searches of the defendant's land. *Id.* at 516, 673 P.2d at 141. The court noted that the defendant's land was near a municipal airport and that crop dusters flew "in the area at will." *Id.* It reasoned, therefore, that the defendant "had no reasonable expectation of privacy in his field to the extent of visibility from the air." *Id.* Hence, the *Bigler* court concluded that the aerial surveillance of the defendant's "open field" did not violate the fourth amendment. *Id. Compare* State v. Rogers, 100 N.M. 517, 673 P.2d 142 (Ct. App. 1983) (helicopter surveillance of marijuana plants protruding from defendant's greenhouse located "near his house within the fenced portion of his property."), *cert. denied*, Rogers v. State, 100 N.M. 439, 671 P.2d 1150 (1983).

79. *See* Comment, *supra* note 59, at 490-91.

80. *Oliver I*, 104 S. Ct. at 1740, 1744.

81. *Id.* at 1742, 1744.

B. *Oliver's Affirmation of Hester's Plain Language Construction of the Fourth Amendment*

The expressly enumerated subjects of the fourth amendment's ban against unreasonable government searches are "persons, houses, papers, and effects."[82] Inasmuch as the "open fields" are not enumerated in the fourth amendment text, the *Oliver* Court concluded that the amendment does not shelter the "open fields" from warrantless government intrusion.[83] *Oliver*'s plain language construction affirmed the Supreme Court's construction of "houses" in *Hester v. United States*[84] and *Olmstead v. United States*.[85] In *Hester*, the Court held that "the open fields" did not enjoy the status of the fourth amendment "house" and, therefore, were not constitutionally protected.[86] As a corollary to this proposition, *Olmstead* held that the constitutional status of the fourth amendment "house" extended to the curtilage, the private land immediately surrounding the house.[87]

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82. *See supra* note 47.

83. *Oliver I*, 104 S. Ct. at 1740.

84. 265 U.S. at 57. *See infra* note 85.

85. 277 U.S. at 438. *See infra* notes 86-87 for an analysis of *Hester* and *Olmstead's* construction of "houses."

86. In distinguishing a house from "the open fields," the Court in *Hester* did not explicitly define an "open field." *See Hester*, 265 U.S. at 59. Justice Holmes' rationale for the distinctiveness of "the open fields" draws upon a distinction Blackstone made for purposes of the common law of burglary of a private house. Blackstone distinguished non-residential buildings associated with a house "and within the same common fence" from out-lying buildings "distant" from the house. 4 W. BLACKSTONE, COMMENTARIES *225.

According to Blackstone, if the former non-residential buildings are "within the curtilage" of a house then the common law of burglary of a private house extends to these non-residential buildings. *Id.* Conversely, since a nocturnal breaking into a "distant" non-residential building is not "attended with the same circumstances of midnight terror," such a building, presumably outside the curtilage, is not protected by the common law of burglary of a private house. *Id.* Hence, the common law distinction drawn by Blackstone is between a non-residential building inside the curtilage and a non-residential building outside it. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 96, at 712 (1972).

The distinction in *Hester* between "the open fields" and a fourth amendment "house" implies an identity of the curtilage and a fourth amendment "house." This implication comports with Blackstone's distinction of buildings inside and outside of the curtilage. Blackstone states that "the capital house protects and privileges all its branches and appurtenance, if within the curtilage." 4 W. BLACKSTONE, COMMENTARIES *225. Consequently, the implication raised by *Hester* can be understood as a suggestion that the curtilage is an "appurtenant" or extension of the house and, therefore, enjoys the house's fourth amendment privileges. *Cf. Oliver I*, 104 S. Ct. at 1742 ("At 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,' and therefore has been considered part of home itself for Fourth Amendment purposes.").

87. *Olmstead*, 277 U.S. at 466. *Olmstead* held that a fourth amendment search of a house required "an actual physical invasion of [the] house 'or curtilage.'" *Id.* With this holding, the *Olmstead* Court made explicit *Hester*'s implied rule that the curtilage acquires the constitutional status of a "house" for fourth amendment purposes. With *Olmstead*, the "open fields" rule of *Hester* matured into the doctrine that land outside the curtilage of a dwelling is beyond the protection of the fourth amendment. *See Oliver II*, 686 F.2d at 364 (Keith, J., dissenting).

The dissent in *Oliver* criticized the majority's "parsimonious" construction of "persons, houses, papers, and effects."[88] The majority in *Oliver,* however, avoided the error of "sticking too closely to the words" of the fourth amendment by justifying its construction of the amendment's words in terms of the "policy that goes beyond them."[89] Other than "houses," the only other word in the fourth amendment that could arguably describe land is "effects." The *Oliver* Court stated that "[t]he Framers would have understood the term 'effects' to be limited to personal, rather than real, property."[90] The Court noted that the initial draft of the fourth amendment contained the more inclusive "property," which was subsequently replaced by the less inclusive "effects."[91] The *Oliver* majority concluded from this legislative history that the framers did not intend the fourth amendment to shelter "open fields" from warrantless government intrusion.[92] Moreover, the Court rationalized the framers' intent in terms consistent with the fourth amendment guarantee of privacy. The *Oliver* Court interpreted the framers' intent as reflecting a societal understanding that expectations of privacy in land outside the curtilage were unreasonable.[93] Whether the majority's textual construction was parsimonious or not, its rationalization of the framers' intent in terms of reasonable expectations of privacy demonstrated fidelity to the amendment's language without distorting *Katz.*

While the Court in *Oliver* narrowly construed the fourth amendment, it did not depreciate the amendment's guarantee of individual privacy. *Oliver*'s reliance on textual construction on one hand serves as a reminder that the fourth amendment's plain language erects a barrier beyond which claims of privacy in certain areas cannot reach.[94] This reminder is especially applicable to those areas like "open fields" which existed con-

88. *Oliver I,* 104 S. Ct. at 1745.

89. *Olmstead,* 277 U.S. at 469 (Holmes, J., dissenting) (citation omitted).

90. *Oliver I,* 104 S. Ct. at 1740 n. 7 (citations omitted).

91. *Id.* at 1740.

92. *Id.*

93. *See Oliver I,* 104 S. Ct. at 1741-42.

94. *Id.* at 1740 n.6 (*Katz* did not "sever Fourth Amendment doctrine from the Amendment's language."). The dissent in *Oliver* suggested that the plain language construction ground is a mere adjunct to the Court's analysis of privacy interests in the "open fields." *Id.* at 1746 n.7. The dissent argued that the Court intended its *Katz* analysis to buttress "the weakness of its [plain language construction] argument." *Id.* Moreover, the dissent expresses the view that the Court's *Katz* analysis, and not its plain language construction, is controlling. Hence, the plain language construction ground "will have little or no effect on our future decisions in this area." *Id.* The dissent's argument, however, misinterpreted *Oliver*'s attempt to link the scope of *Katz* functional privacy analysis to the textual boundary of the fourth amendment. The *Katz* privacy analysis is directed towards the inquiry into whether the challenged government intrusion thwarts the function of the fourth amendment. *Oliver* refines the scope of the analysis by distilling this function from the history and text of the fourth amendment.

temporaneously with the framers of the fourth amendment. The Court's construction of "houses" suggests that the framers recognized the necessity of protecting the curtilage against government interference if the house was to be protected. Its construction of "effects" suggests that if the framers had intended to protect "open fields" they would not have substituted a word describing only personal property for a word that described personal and real property. In both instances, *Oliver* justifies the framers' intent by attributing it to their contemporaneous understanding that a landowner or tenant could not legitimately expect his "open fields" to be free of warrantless government intrusion.[95]

Yet, on the other hand, this justification is not available where the framers' intent cannot be inferred from the fourth amendment's plain language. The *Oliver* Court's method of textual construction does not carry over to novel areas, such as phone booths or automobiles, that did not exist when the amendment was drafted. *Oliver*'s plain language construction, therefore, does not impair the framework for resolving search and seizure issues and fact patterns that could not have been envisioned by the fourth amendment framers and are not accommodated by that amendment's text.[96] Hence, the Court's plain language construction in *Oliver* does not appear to limit future opportunities to extend fourth amendment protection to novel areas.[97]

C. *Oliver's Reconciliation of Hester's Blanket Exclusion with Katz's Expectation of Privacy Test*

As the second ground for its decision, the *Oliver* Court reconciled *Hester*'s broad holding[98] with the two-pronged expectation of privacy test articulated in *Katz v. United States* and its progeny.[99] *Oliver*'s significance lies in this reconciliation of *Hester* with *Katz*.

The defendants in the courts below argued that their expectations of

95. *Id.* at 1740, 1742. *See infra* text accompanying notes 125-32.

96. *See Oliver II*, 686 F.2d at 359 (suggesting that the *Katz* test is designed to govern the "application of the Fourth Amendment under circumstances that could not have been contemplated at the time the Amendment was formulated and adopted"). *See also* Comment, *supra* note 59, at 497-98.

97. *See Oliver I*, 104 S. Ct. at 1740 n.6 ("As *Katz* demonstrates, the Court fairly may respect the constraints of the Constitution's language without wedding itself to a [sic] unreasoning literalism."). The *Oliver* Court's acknowledgement that relying exclusively on the explicit text of the fourth amendment is not an adequate methodology for construing the fourth amendment is directed towards Justice White. Justice White joined the majority's plain language construction ground but refused to join the majority's privacy analysis. "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 in part and in the judgment).

98. *See supra* text accompanying note 79.

99. *Oliver I*, 104 S. Ct. at 1740, 1742.

privacy were legitimate because their land was secluded and the expectations were created by their common law property right to exclude the public from the land.[100] The *Oliver* Court rejected the defendants' arguments, holding (1) that the right to exclude did not legitimate the defendants' expectations of privacy in their "open fields" and (2) that the appropriate legal standard for evaluating the legitimacy of the defendants' privacy expectations was the utility of the "open fields" as a setting for activity which merits fourth amendment protection.[101] These two holdings indicate that the trespass law source of a privacy expectation does not automatically confer constitutional status on the expectation. Thus, under *Katz*'s second prong the constitutional status of a privacy expectation is determined by reference to the purpose of the fourth amendment, not by reference to an independent source such as the law of private property. Examination of each of these two holdings suggests that *Oliver*'s application of *Katz*'s second prong is correct.

1. The Right To Exclude Does Not Evidence a Legitimate Expectation of Privacy

The Supreme Court in *Oliver v. United States* applied the two prongs of the *Katz* test to determine whether a subjective expectation of privacy in the "open fields" is one that "society is prepared to recognize as 'reasonable.'"[102] The Court accepted the findings below that the defendants had each satisfied the first prong of the *Katz* test by manifesting a subjective expectation of privacy in their land.[103] The courts in *State v. Thornton* and *United States v. Oliver,* however, formulated conflicting legal standards of legitimacy governing the analysis under *Katz*'s second prong.[104] Accordingly, the lower courts in *Thornton* and *Oliver* squarely presented the United States Supreme Court with the question of the "appropriate legal standard"[105] for evaluating the objective reasonableness, or legitimacy, of an expectation of privacy in the "open fields."

The Maine Supreme Judicial Court in *Thornton* held that the legitimacy of Thornton's expectation was evidenced by his authority to rely on the common law of trespass and his concomitant common law right to exclude the public from his secluded land.[106] Conversely, the Sixth Circuit Court

100. *See id.* at 1742-43.
101. *Id.* at 1741, 1743-44.
102. *Id.* at 1740 (quoting *Katz,* 389 U.S. at 361).
103. *See id.* at 1742-43.
104. *See infra* text accompanying notes 106-14.
105. *Oliver I,* 104 S. Ct. at 1739 n.5.
106. *Thornton II,* 453 A.2d at 495. For courts narrowly construing *Hester,* the legitimacy of an expectation of privacy in land outside the curtilage is reflected in the land owner or tenant's right to exclude the public from the private land. The land owner or tenant's right to exclude the public

of Appeals in *Oliver* held that the common law of trespass and the right to exclude did not evidence a societal understanding that land outside the curtilage should be free of warrantless government intrusion.[107] Accordingly, the court ruled that Oliver's authority to rely on the common law of trespass failed to validate his subjective expectation of privacy.[108]

The supreme judicial court in *Thornton* understood that lawful public access to "open" land precluded a legitimate expectation of privacy.[109] The unanimous court reasoned, however, that a person could manifest a constitutionally protected expectation of privacy by taking steps to exclude the public.[110] The court based its reasoning on *Katz*, in which the Supreme Court had stated that that which a person "seeks to preserve as private,

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from private property is a "fundamental element" of modern property rights. Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979). This right embodies an expectation of freedom from unlicensed intrusions onto private land. *See, e.g., Thornton II*, 453 A.2d at 494. *See also* Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).

As the Supreme Court recognized in United States v. White, 401 U.S. 745, 786 (1971), legal prescriptions translate "into rules the customs and values of the past and present." The law of trespass represents society's mandate that a person may enjoy a right of exclusive occupation of real property. RESTATEMENT (SECOND) OF TORTS § 165 (1965). This right of exclusive occupation confers a correlative right enforceable by trespass law, the right to exclude others. *See* MODEL PENAL CODE § 221.2 comment, at 85, 87 (1980) (Criminal trespass involves "defiance of the owner's request or notice to desist from trespass."). Accordingly, the expectation of privacy implicit in the right is sanctioned by society inasmuch as the right to exclude is enforced by the common and statutory law of trespass.

Members of the Supreme Court have suggested that the right to exclude the public from private property may indicate society's legitimation of an expectation of privacy in property. Justice Blackmun has stated that "[i]n my view, that 'right to exclude' often may be a principal determinant in the establishment of a legitimate fourth amendment interest." Rawlings v. Kentucky, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring). *See* G.M. Leasing Corp. v. United States, 429 U.S. 338, 354 (1977) (Blackmun, J.) ("It is one thing to seize without a warrant property resting in an open area . . . and it is quite another thing to effect a warrantless seizure of property . . . situated on private premises to which access is not otherwise available for the seizing officer.").

Justice Rehnquist, writing for the majority in Rakas v. Illinois, 439 U.S. 128 (1978), suggested that "[o]ne of the main rights attaching to property is the right to exclude others and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Id.* at 144 n.12 (citation omitted). In *Rakas*, petitioners asserted that a warrantless search of the glove compartment and the area below the seat of the car in which they were riding was unconstitutional. The Court rejected this claim in part because the petitioners failed to show that they "had complete dominion and control over [the areas searched], and could exclude others from [them]." *Id.* at 149. Significantly, the *Rakas* Court distinguished the result in *Katz*, in which the warrantless surveillance of a public telephone booth was held unconstitutional, on the ground that the accused in *Katz* had exercised his right to exclude the public. *Id. See Katz*, 389 U.S. at 352 (where the Court disposed of the government's argument that this right to exclude could not indicate a legitimate expectation of privacy because the telephone booth was partly transparent: "But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear.").

107. *Oliver II*, 686 F.2d at 360 ("[A] property owner's interest in excluding others . . . is not sufficient alone to bring into play legal principles protecting privacy.").

108. *See id.*

109. *Thornton II*, 453 A.2d at 495.

110. *See id.* at 495-96.

even in an area accessible to the public, may be constitutionally protected."[111] The law of trespass provides the means with which a person vindicates his right to be free of intruders onto his private land.[112] The state court in *Thornton,* therefore, reasoned that the societal legitimation required by *Katz*'s second prong is reflected in a person's authority to rely on trespass law to preserve the privacy of his land.[113] In light of Thornton's attempts to exclude the public by posting his land against trespassers, the state court concluded that Thornton's expectation of privacy was legitimate.[114] Thus, the lower court's analysis under the second prong of the *Katz* test was guided by the proposition that the law of trespass may legitimate an expectation of privacy for fourth amendment purposes.

The United States Supreme Court in *Oliver* squarely rejected the *Thornton* court's reasoning.[115] *Oliver*'s rejection of trespass law as evidence of the legitimacy mandated by the second prong of the *Katz* test rested on two grounds. First, the *Oliver* Court reasoned that the law of trespass does not evidence a legitimate expectation of privacy because it only incidentally promotes a person's interest in the privacy of land outside the curtilage.[116] Second, and more significantly, *Oliver* held that the privacy interest incidentally promoted by trespass law is itself not the kind of privacy interest the fourth amendment is designed to protect.[117]

Oliver's first ground for rejecting the trespass law standard of legitimacy distinguished the common law right to exclude from the constitutional right to be free of unreasonable government searches. The Supreme Court in *Oliver* noted that the law of trespass confers the property right of a person to exclude others from his land.[118] It also noted, however,

111. 389 U.S. at 351-52. *See also id.* at 359 ("Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.").

112. *See supra* note 106.

113. *See Thornton II,* 453 A.2d at 495.

114. *Id.*

115. *Oliver I,* 104 S. Ct. at 1743-44.

116. *Id.* at 1744. The Court expressly reasoned that the law of trespass does not evidence a societal legitimation of privacy in the "open fields" because it principally promotes "a range of interests that have nothing to do with privacy." *Id.* at 1744 n.15. The Court did not dispute that "the right to exclude conferred by trespass law embodies a privacy interest." *Id.* Nevertheless, Justice Marshall, dissenting in *Oliver,* argued that the majority "surely must concede that *one* of the purposes of the law of real property . . . is to define and enforce privacy interests." *Id.* at 1747 n.10 (emphasis in original). This statement implies, incorrectly, that the majority rejected the view that the common law of trespass promotes a privacy interest in real property. The Court did not dispute the notion that the law of trespass may define and enforce a privacy interest. *See id.* at 1744 n.15. Rather, the Court held in *Oliver* that the privacy interest promoted by the law of trespass is too attenuated to warrant the use of trespass law as evidence of a societal legitimation of a privacy interest. *Id.* at 1744.

117. *See id.* at 1741-42.

118. *Id.* at 1744 n.15.

that trespass law principally promotes "a range of interests that have nothing to do with privacy."[119] Hence, the Court reasoned that vindication of the right to exclude by the law of trespass only incidentally promotes an interest in privacy in the "open fields."[120] The *Oliver* Court concluded, therefore, that trespass law and the right to exclude are "insufficiently linked"[121] to the promotion of privacy in the "open fields" to justify their use as presumptive evidence of a legitimate expectation of privacy.[122]

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119. *Id.*

120. *Id.* at 1744 & n.15. *See supra* note 116.

121. *Oliver I*, 104 S. Ct. at 1739. While the law of private property may *create* an interest in privacy, in *Oliver*, the constitutional *status* of the interest is governed by the function of the fourth amendment. This mode of reasoning is analogous to a method by which the Court has decided whether "'entitlement' interests created by statutory law" constitute "property" for purposes of the fourteenth amendment due process clause. Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 407 (1977). A person's interest in a thing which the government has taken away may rise to the level of a property interest if the person has a "legitimate claim of entitlement" to it. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972). As the Court noted in *Roth*, the fourteenth amendment does not create the property interest. 408 U.S. at 577. Rather, it is created and defined by an "independent source such as state law." *Id.* The legitimacy, or the constitutional *significance* of the interest, however, is a function of fourteenth amendment standards. Monaghan, *supra*, at 437.

While *Oliver* distinguishes the origin of a privacy interest (the right to exclude) from its constitutional significance, it goes further by articulating the standard for measuring the legitimacy of the interest. *See infra* text accompanying notes 133-46. Moreover, unlike the fourteenth amendment property interest, the fourth amendment privacy interest does *not* have an independent source outside of the fourth amendment. *Id.*

122. *Oliver I*, 104 S. Ct. at 1743-44. In *Olmstead*, the Supreme Court held that a physical trespass on a house or its curtilage is a necessary predicate to a fourth amendment search of a house. 277 U.S. at 466. *See supra* note 87 and accompanying text. The predominance of property law in fourth amendment jurisprudence began to diminish as early as 1960, in Jones v. United States, 362 U.S. 257 (1960). *Cf.* Lopez v. United States, 373 U.S. 427, 460 (1963) (Brennan, J., dissenting) (noting that the "grudging, narrow conception of 'search and seizures'" expressed in *Olmstead* has not been followed by the Court as indicated by the cases in which "the Court has refused to crowd the fourth amendment into the mold of local property law.") (citations omitted).

In 1967, *Katz* overruled *Olmstead*'s trespass predicate. 389 U.S. at 353. *See supra* text accompanying note 67-70. *Katz*, however, did not altogether forbid reliance on property law to define a protected area. *Katz* did not identify the sources of the societal understanding that an expectation of privacy in an area is or is not reasonable. After *Katz*, many lower courts viewed property law as a source of guidance for deciding which expectations of privacy society is prepared to sanction. *See supra* notes 78, 106 and accompanying text. Hence, after *Katz*, many courts continued relying on property law to define a protected area. These courts construed the common law of trespass and the right to exclude the public from private land as indicative of the reasonableness of an expectation of privacy in the "open fields." *Id.* Thus, these lower courts often decided the constitutional status of an expectation of privacy in the "open fields" by reference to the law of trespass. *Id.*

The *Oliver* Court did not contest the general rule that property rights and the common law *may* be material to an analysis of legitimate expectations of privacy. Indeed, the Court recognized that "[t]he common law may guide consideration of what areas are protected by the fourth amendment search by defining areas whose invasion by others is wrongful." 104 S. Ct. at 1744 (citation omitted). The Court noted that *Hester*'s use of the common law concept of "curtilage" illustrates this function. *Id.* at 1744 n.14. The Court's analysis, however, makes clear that conduct deemed wrong at common law is not synonymous with conduct deemed wrong by the fourth amendment. *See id.* at 1743-44.

2. *Oliver*'s Intimate Activities Standard For Evaluating the Legitimacy of an Expectation of Privacy

The *Oliver* Court was not content to rest its rejection of the trespass law standard of legitimacy on the conclusion that the linkage of trespass law and the right to exclude to privacy in the "open fields" is too attenuated to evidence society's legitimation of an expectation of privacy in land outside the curtilage. It stated that even if the right to exclude embodies a privacy interest, "it does not follow that . . . [the privacy interest] is also protected by the fourth amendment."[123] Hence, as a second ground for rejecting the trespass law standard, the Court distinguished the privacy interest embodied in a person's right to exclude others from his land from the interest in privacy that the fourth amendment is designed to protect. The *Oliver* Court concluded that even if a warrantless government intrusion into the defendants' "open fields" violated a privacy interest embodied in the defendants' right to exclude, the intrusion did not violate an interest in privacy protected by the fourth amendment.[124]

The Court's distinction between a privacy interest embodied in the right to exclude others from private land and a fourth amendment privacy interest rests on its analysis of the utility of an "open field" as a setting for personal and social activity. Rather than the existence of entitlements created by trespass law, the *Oliver* Court stated that the test of legitimacy under *Katz*'s second prong is whether the government's intrusion into an "open field" "infringes upon the personal and societal values protected by the Fourth Amendment."[125] The Court identified three traditional factors relevant to determining whether a government intrusion infringes upon the "personal and societal values" of the fourth amendment. It identified these factors as (1) the framers' intent, (2) "the uses to which the individual has put a location," and (3) the "societal understanding that certain areas deserve the most scrupulous protection."[126] The Court in *Oliver* considered these three factors in its analysis of the "open fields," concluding the "open fields" did not merit fourth amendment protection.

The *Oliver* Court explained that the framers intended the fourth amendment to immunize "certain enclaves" against "arbitrary government interference."[127] In holding that an "open field" is not such an enclave, the Court reasoned that "open fields do not provide the setting for those intimate activities" that the framers intended the fourth amendment to

123. *Oliver I*, 104 S. Ct. at 1744 n.15.

124. *See id.* at 1743.

125. *Id.*

126. *Id.* at 1741. *See* Rakas v. Illinois, 439 U.S. 128, 152-53 (1978) (Powell, J., concurring) (reviewing the use of these three factors in fourth amendment analysis).

127. *Oliver I*, 104 S. Ct. at 1741.

protect.[128] Instead, the Court found that "open fields" ordinarily are the setting for activities, like crop cultivation, which the framers did not intend, and society does not expect, to be free from warrantless government searches.[129] The *Oliver* Court reconciled *Hester*'s blanket exclusion with the *Katz* test by concluding that neither the framers' intent, the uses to which "open fields" are ordinarily put, nor societal expectations legitimate an expectation of privacy in "open fields."[130]

In contrast to the "open fields," *Oliver* includes the curtilage within the protection of the fourth amendment. By definition the curtilage is a discrete area in which "the intimate activity associated with the 'sanctity of a man's home and the privacies of life'" occurs.[131] Based on the personal and social uses to which the curtilage is ordinarily put, the Court in *Oliver* concluded that an expectation of privacy in the curtilage is one that "society is prepared to recognize as 'reasonable.'"[132]

IV. IMPLICATIONS

A close examination of the *Oliver* Court's method of evaluating the legitimacy of an expectation of privacy in the curtilage and "open fields" suggests an evolution in privacy analysis under *Katz*'s second prong. *Katz* inaugurated modern fourth amendment jurisprudence when it created the two-pronged expectation of privacy test. *Katz*'s emphasis on a person's expectation of privacy, however, did not render obsolete an inquiry into the nature of the area to which the expectation attaches. Justice Harlan, who first articulated the *Katz* privacy analysis as a two-pronged test, observed that while the fourth amendment protects "people, not places," the question of "what protection it affords to those people . . . [g]enerally . . . requires reference to a 'place.'"[133] Inasmuch as personal and social activity must occur within some "place," the place must be protected from government intrusion if the privacy of the activity is to be preserved.[134] Under the second prong of the *Katz* test, the recognition that

128. *Id.*
129. *Id.*
130. *Id.* at 1742.
131. *Id.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
132. *Id.*
133. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
134. Indeed, this result inevitably follows from the finding that a warrantless search of the place violated constitutionally protected expectations of privacy. The privileged status of an area creates a "zone of privacy" into which the government may not unreasonably intrude. J. HALL, SEARCH AND SEIZURE § 2:7, at 43 (1982). As early as 1928, members of the Court recognized that the fourth amendment cast a penumbra within which a person is protected against arbitrary government interference. Olmstead v. United States, 277 U.S. 438, 469 (Holmes, J., dissenting). *See also* Griswold

an expectation of privacy in activity occurring within a place is "reasonable" reflects a societal understanding that the place should be free of arbitrary government interference.

The *Katz* Court cautioned, however, that the fourth amendment's restraints on government conduct shield only certain privacy expectations from arbitrary government interference.[135] This limitation is incorporated by *Katz*'s second prong, which provides that only objectively reasonable, or legitimate, expectations are protected. Echoing Justice Harlan's observation, *Oliver* reasserts that recognition of legitimate expectations often requires reference to a "place."[136] *Oliver,* however, builds on the analysis by articulating a standard of legitimacy under the second prong. In *Oliver,* the discrete area to which the fourth amendment right of privacy inheres is viewed as an "enclave" to which people retreat, and in which people reasonably expect, to be free of "arbitrary government interference."[137] An "enclave" acquires its constitutional dimensions because it is ordinarily the setting for "intimate activities" whose protection realizes the "personal and societal values" embedded in the fourth amendment.[138]

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v. Connecticut, 381 U.S. 479 (1965) (listing the fourth amendment as one of several creating penumbras, or zones of privacy).

The Court's recognition of a zone of privacy protecting that which occurs within it against arbitrary government interference has not been limited to the fourth amendment prohibition against unreasonable searches. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 n.13 (1973), a case involving the fourteenth amendment right of privacy, the Court stated that the place in which personal intimacies occur is protected "as otherwise required to safeguard the right to intimacy involved." But perhaps the most dramatic application of the concept of a zone of privacy protecting the activity occurring within "places" has occurred in the fourth amendment context. For instance, as Justice Harlan once stated, "if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within." Poe v. Ullman, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting).

The Court in *Oliver* explicitly recognized the necessity of protecting an area in which the "privacies of life" occur. 104 S. Ct. at 1741 ("The [Fourth] Amendment reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference."). Moreover, the utility of an area as a setting for "the privacies of life" is pivotal in *Oliver*'s analysis of the "open fields." *See supra* text accompanying notes 125-32.

135. In framing the applicability of the fourth amendment in terms of individual privacy, the Court in *Katz* emphasized that the amendment did not create a "general constitutional 'right to privacy.'" 389 U.S. at 350. A person's "*general* right to privacy—his right to be let alone by other people" is governed "largely" by state law. *Id.* at 350-51 (emphasis in original). The fourth amendment, on the other hand, creates a limited right of privacy. *Id.* at 350. The amendment protects a person's privacy against "certain kinds of government intrusion." *Id.* This right of privacy has been characterized as a right to control the disclosure of information "by which the world defines one's identity." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-17, at 966 (1978). The fourth amendment, however, "confers protection [of such a right] only within a fairly restricted sphere of places and situations." *Id.* at 967. In dictum, Justice Stevens has stated that the fourth amendment "directly" protects a person's right "to be free in his private affairs from governmental surveillance." Whalen v. Roe, 429 U.S. 589, 599 n.24 (1977).

136. *See Oliver I,* 104 S. Ct. at 1741-42.

137. *Id.* at 1741.

138. *Id.* The *Oliver* opinion does not use the adverb "ordinarily" to qualify its conclusion that the "open fields" do not provide a setting for "intimate activities." The qualification may be inferred, however, from the Court's statement that "in most instances" a government intrusion into the "open fields" will not disturb such activity. *See id.* at 1741 n.10.

The *Oliver* Court's conception of an "enclave" as a discrete area to which an individual retreats to escape government surveillance is consonant with the traditional view that the fourth amendment creates a zone of personal privacy.[139] The Court's further characterization of an "enclave" as the situs of "intimate activities," however, particularizes the fourth amendment's limited right of privacy. Under *Oliver,* whether an area is enveloped within the zone of personal privacy created by the fourth amendment depends upon the uses to which the area is put.[140] *Oliver* emphasizes that the fourth amendment zone of privacy does not envelope any area that a person may desire to be private.[141] Instead, *Oliver*'s distinction between curtilage and the "open fields" suggests that the *kinds* of uses to which an area is normally put will be determinative in deciding whether the area warrants fourth amendment protection.[142] In this regard, the Court in *Oliver* appears to limit the fourth amendment zone of privacy to areas in which activity associated with the domestic intimacy of the home, or to areas where analogous intimacy, ordinarily occurs.[143] Thus, *Oliver*'s definition of "enclave" suggests that an expectation of privacy in an area and, hence, the protectability of the area turns on the utility of the area as a setting for "intimate activities."

The activity which *Oliver* labels as "intimate" is activity whose protection from arbitrary government interference realizes the "personal and societal values" embedded in the fourth amendment.[144] The *Oliver* Court did not elaborate on the kinds of activity which are sufficiently "intimate," nor did the Court allude to the meaning of "intimacy" for purposes of the fourth amendment right of privacy. Moreover, *Oliver* does not provide a road map of the values implicit in the fourth amendment. The Sixth Circuit, sitting *en banc* in *United States v. Oliver,* stated only that the fourth amendment "establish[es] an environment in which individual emotional and mental processes can develop freely."[145] While *Oliver* does not resolve these perplexing issues, it nevertheless clarifies the proper analysis of the legitimacy of an expectation of privacy by asking whether the searched area ordinarily is used in such a manner as to create a zone of privacy in which, perhaps, "individual emotional and mental processes" are entitled to develop freely.

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139. *See supra* note 134.

140. *See supra* text accompanying notes 128-32.

141. *See Oliver I,* 104 S. Ct. at 1743 ("The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.").

142. *See id.* at 1741 ("There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."). *See also id.* at 1742 n.10 (Open fields "are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment.").

143. *See id.* at 1741-42.

144. *Id.* at 1743.

145. *Oliver II,* 686 F.2d at 360. *See supra* note 29.

Oliver's "intimate activities" standard is not limited to "open fields" fact patterns. The Court's category of "intimate activities" provides the basis for making normative value judgments as to what kinds of places *should* be protected by the fourth amendment. By expanding or restricting the definition of "intimate activities," the Court can expand or shrink the range of places protected by the fourth amendment.[146] Although *Oliver*'s "intimate activity" standard of legitimacy is not without ambiguity, it nevertheless expresses accurately the fundamental inquiry required by *Katz*. The object of the inquiry propounded by *Katz* is to discern whether an expectation of privacy is one that society deems legitimate for purposes of the fourth amendment. *Oliver* recognizes that the fourth amendment's zone of privacy demarcates an enclave within which individuals are entitled to be free of arbitrary government interference. Moreover, the decision recognizes that the enclave status of an area is a function of its normative utility as a setting for "intimate activities." The search for the indicia of "intimate activities," which *Oliver* invites, is, thus, a more coherent approach to solving fourth amendment privacy issues than primary reliance on property rights and the common law.

V. CONCLUSION

By reaffirming *Hester, Oliver* resolved the long-standing uncertainty as to the continued vitality of the "open fields" doctrine as a bright line rule. By rejecting trespass law as a basis for a fourth amendment right of privacy in the "open fields," *Oliver* subjects owners or tenants of land outside the curtilage to an increased risk of government trespasses and warrantless searches.[147] In "open fields" cases, the question presented will be whether the area searched without a warrant was within or without the curtilage.[148]

Oliver's focus on the status of a place as a setting for "intimate activities" refines the analytical approach to *Katz*'s second prong. After *Katz*,

146. For instance, the Court could limit "intimate activities" to the personal intimacies of home, family, marriage, and child-rearing. Conversely, the Court could define "intimate activities" as expansively as the scope of fourth amendment protections suggested by Justice Brandeis in his *Olmstead* dissent. Justice Brandeis argued that the "right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men." *Olmstead*, 277 U.S. at 478. He concluded that "[t]o protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual . . . must be deemed a violation of the Fourth Amendment." *Id.*

147. *See Oliver I*, 104 S. Ct. at 1741. An aggrieved defendant, however, may bring a trespass action against the intruder. *See id.* at 1748 (Marshall, J., dissenting) (criminal trespass liability).

148. Thus, in Wellford v. Comm., 315 S.E.2d 235 (Va. 1984), decided ten days after the Supreme Court's decision in *Oliver*, the court stated that "the sole question is whether the contraband was located within the curtilage of a dwelling or within an open field when subjected to a warrantless search and seizure." *Id.* at 235.

many courts viewed an expectation of privacy in the "open fields" as presumptively legitimate if the expectation rested on an entitlement such as a property owner's right to be free of trespassers. In an *Oliver*-type analysis, however, the legitimacy of an expectation of privacy in a place is a function of the utility of the place as a setting for those activities whose protection realizes the "personal and social values" of the fourth amendment. *Oliver*'s standard of legitimacy under the second prong of the *Katz* test provides a mode of reasoning for assessing the legitimacy of an expectation of privacy in terms specific to the constitutional right of privacy contained in the fourth amendment. *Oliver* thus refines the *Katz* analysis by uncoupling the fourth amendment right of privacy from the right of privacy deriving from property law.

CLINTON WAYNE MARRS