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## Criminal Procedure - Oliver and the Open Fields Doctrine - Oliver v. United States

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**CRIMINAL PROCEDURE—OLIVER AND THE OPEN FIELDS DOCTRINE—*Oliver v. United States*, — U.S. —, 104 S. Ct. 1735 (1984).**

**INTRODUCTION**

In recent years, uncertainty has arisen concerning the vitality of the open fields doctrine developed in *Hester v. United States*.<sup>1</sup> In *Hester*, the United States Supreme Court adopted a *per se* rule that the protections of the fourth amendment do not apply to open fields.<sup>2</sup> The open fields doctrine of *Hester* seemed to conflict with a later decision, *Katz v. United States*.<sup>3</sup> In *Katz*, the Supreme Court held that the “Fourth Amendment protects people, not places.”<sup>4</sup> The Court in *Katz* held the proper test of fourth amendment protections to be whether an individual has a reasonable expectation of privacy which he justifiably relied upon.<sup>5</sup> In order to end the uncertainty in this area, the Supreme Court has announced its decision in *Oliver v. United States*.<sup>6</sup>

In examining the vitality of the open fields doctrine, this note will consider the development of the doctrine, the controversy caused by the *Katz* opinion, and the *Oliver* decision itself. Weaknesses in the majority’s analysis will be discussed and alternative approaches will be given. According to the Supreme Court in *Oliver*, open fields are not entitled to fourth amendment protections, nor are expectations of privacy within those fields deemed reasonable.<sup>7</sup>

**THE CASE**

In *Oliver v. United States*, narcotics agents of the Kentucky State Police received reports that marijuana was being raised on Oliver’s farm.<sup>8</sup> Officers went to the farm and upon arrival drove

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1. 265 U.S. 57 (1924).

2. *Id.* at 59.

3. 389 U.S. 347 (1967).

4. *Id.* at 351.

5. *Id.* at 353.

6. — U.S. —, 104 S. Ct. 1735 (1984).

7. 104 S. Ct. at 1741.

8. *Id.* at 1738. (note that *Maine v. Thornton*, 453 A.2d 489 (Me. 1982), *cert. granted*, — U.S. —, 103 S. Ct. 1520 (1983) is consolidated with *Oliver v. United States*.)

past Oliver's house to a locked gate with a "No Trespassing" sign.<sup>9</sup> The officers followed a footpath around one side of the gate and continued down the road on foot.<sup>10</sup> The officers walked several hundred yards passing a barn and a parked camper.<sup>11</sup> At that point, someone near the camper shouted, "No hunting is allowed, come back here." The officers shouted that they were with the Kentucky State Police but found no one when they returned to the camper.<sup>12</sup> The officers resumed their investigation and located two fields of marijuana over a mile from Oliver's home.<sup>13</sup> The marijuana fields, surrounded by other land owned by Oliver, were not accessible to the public and could only be seen by someone standing on Oliver's farm.<sup>14</sup>

Oliver was arrested and indicted for manufacturing a controlled substance.<sup>15</sup> The District Court for the Western District of Kentucky suppressed evidence of the discovery of the marijuana fields and found that Oliver had a reasonable expectation that the fields would remain private in light of the "No Trespassing" signs and the locked gate.<sup>16</sup> In examining the highly secluded nature of the marijuana fields, the court noted that these were not "open fields" that invited casual intrusion.<sup>17</sup>

The Court of Appeals for the Sixth Circuit reversed the district court.<sup>18</sup> The court of appeals concluded that the open fields doctrine enunciated in *Hester* was not impaired by *Katz*.<sup>19</sup> The court reasoned that the *Katz* application of the fourth amendment considered circumstances that could not have been contemplated at the time the amendment was adopted, specifically the role of the telephone in private communication.<sup>20</sup> The court of appeals stated that the open fields doctrine was compatible with *Katz* because people do not generally have a need for privacy in open fields and that the property owner's common law right to exclude

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States).

9. *Oliver*, 104 S. Ct. at 1738.

10. *Id.*

11. *Id.*

12. *Id.*

13. *United States v. Oliver*, 686 F.2d 356, 358 (6th Cir. 1982).

14. *Id.*

15. 104 S. Ct. at 1738.

16. *Id.*

17. *Id.*

18. 686 F.2d at 373.

19. *Id.* at 359.

20. *Id.*

trespassers is insufficiently linked to privacy to warrant fourth amendment protection.<sup>21</sup>

The United States Supreme Court affirmed the decision of the court of appeals.<sup>22</sup> The Supreme Court concluded that the open fields doctrine in *Hester* is consistent with the language of the fourth amendment.<sup>23</sup> The Court also stated that there can be no reasonable expectation of privacy in open fields under the analysis developed in *Katz*.<sup>24</sup> Like the court of appeals, the Supreme Court noted that in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the fourth amendment.<sup>25</sup>

### BACKGROUND

The first clause of the fourth amendment providing, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated," was held not to extend to open fields in *Hester v. United States*.<sup>26</sup> In *Hester*, the defendant was convicted of concealing distilled spirits.<sup>27</sup> Revenue officers concealed themselves fifty to one hundred yards away from the defendant's residence and observed Hester give another man a quart bottle. Pursuant to their observations and previously reported information, the officers approached and arrested the defendant.<sup>28</sup> At trial, the defendant objected to the revenue officers' testimony concerning their observations of the defendant but the lower court allowed the testimony.<sup>29</sup> The defendant appealed, contending that his fourth amendment rights were violated,<sup>30</sup> but the Supreme Court held that the officers' testimony was admissible even though the officers had no search warrant and the observations were made from Hester's land.<sup>31</sup> The Court noted that a trespass on the defendant's land was of little consequence to

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

22. *Id.* at 1735.

23. *Id.* at 1744.

24. *Id.*

25. *Id.*

26. 265 U.S. 57, 59 (1924).

27. *Id.* at 57.

28. *Id.* at 58.

29. *Id.*

30. *Id.*

31. *Id.*

a finding of illegal search and seizure.<sup>32</sup> The Court held that while special protection is given to persons, houses, papers, and effects, that protection is not extended to open fields.<sup>33</sup> The Court mentioned the existence of a distinction between an open field and a house by noting that the difference is as old as the common law, however, no explanation of the actual difference was given.<sup>34</sup>

The brief opinion of *Hester* was followed by *Olmstead v. United States*.<sup>35</sup> The *Olmstead* decision developed what came to be known as the "constitutionally protected places" interpretation of the fourth amendment.<sup>36</sup> In *Olmstead*, government officers secretly tapped telephone company lines and intercepted messages concerning a conspiracy to distribute alcohol unlawfully.<sup>37</sup> The taps were made in the basement of a large office building and in streets near the houses of the conspirators. No trespass was committed upon any property of the defendants.<sup>38</sup> The Court held that there was no search and seizure in this case.<sup>39</sup> The Court found that the language of the fourth amendment covers material things such as the person, the house, papers and effects and may not be extended to cover such things as telephone wires reaching into the defendant's house.<sup>40</sup> The Court held that the fourth amendment is not violated unless there is an official search and seizure of a person, his papers, or tangible material effects, "or an actual physical invasion of his house or curtilage<sup>41</sup> for the purpose of making a seizure."<sup>42</sup>

Out of *Olmstead* and *Hester* came a tremendous focus on fourth amendment protection of property, yet the action of trespass was not deemed a deciding factor in determining the legality of a search.<sup>43</sup> The Court in *Olmstead* also indicated that any area past the curtilage would receive no fourth amendment protection.<sup>44</sup>

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32. *Id.*

33. *Id.*

34. *Id.* at 59.

35. 277 U.S. 438 (1928).

36. *Id.*

37. *Id.* at 455-456.

38. *Id.* at 457.

39. *Id.* at 464.

40. *Id.* at 465.

41. *Oliver*, 104 S. Ct. at 1742 defines curtilage as, "the land immediately surrounding and associated with the home."

42. 277 U.S. at 466.

43. *Id.* at 465; 265 U.S. at 58.

44. 277 U.S. at 466.

In following cases, the curtilage test was used to determine fourth amendment questions despite the lack of a formal definition of curtilage in *Olmstead*.<sup>45</sup>

In *United States v. Potts*, curtilage was defined as "all buildings in close proximity to a dwelling, which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling, and is habitually used for family purposes."<sup>46</sup> Such a definition is little help in distinguishing an open field from curtilage. The Court in *Hester* noted that the distinction was as old as the common law yet failed to give example.<sup>47</sup> In search of a workable definition of curtilage, the court in *United States v. Bensigner*<sup>48</sup> cited numerous standards which dealt primarily with distance from the main dwelling.<sup>49</sup> The *Bensigner* court concluded that the cases have resulted in a clear rule: "any outbuilding or area within seventy-five feet of the house is within the curtilage and any outbuilding or area further than seventy-five feet is outside the curtilage."<sup>50</sup> With some guidance as to the definition of curtilage, the open fields doctrine of *Hester* and the protected places approach of *Olmstead* were interpreted broadly "in a *per se* manner to any area outside the curtilage."<sup>51</sup>

This interpretation of the fourth amendment was drastically changed by the ruling in *Katz v. United States*.<sup>52</sup> *Katz* specifically overruled the "constitutionally protected places" approach of *Olmstead*.<sup>53</sup> The Court held, "the fourth amendment protects people not places."<sup>54</sup> In *Katz*, the government conducted electronic surveillance of the defendant's telephone conversations in a public telephone booth.<sup>55</sup> The listening device was attached to the outside of the phone booth.<sup>56</sup> The district court allowed the evidence of

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45. *Id.* at 466; See *United States v. Potts*, 297 F.2d 68 (6th Cir. 1961); *United States v. Whitmore*, 345 F.2d 28 (6th Cir. 1965) and *United States v. Van Dyke*, 643 F.2d 992 (4th Cir. 1981).

46. 297 F.2d 68 (6th Cir. 1961).

47. *Hester*, 265 U.S. at 59.

48. 546 F.2d 1292 (7th Cir. 1976), *cert. denied*, 431 U.S. 930 (1977).

49. *Id.* at 1296. See *infra* Appendix A.

50. 546 F.2d at 1297.

51. Note, *Katz In Open Fields*, 20 AM. CRIM. L. REV. 485, 491 (1983).

52. 389 U.S. 347 (1967).

53. *Id.* at 350.

54. *Id.* at 351.

55. *Id.* at 348.

56. *Id.*

Katz's phone conversations and the court of appeals affirmed.<sup>57</sup> The defendant appealed to the Supreme Court alleging violation of his fourth amendment rights.<sup>58</sup> After a rejection of the "constitutionally protected places" approach, the Court held that fourth amendment protections turn on whether an individual has a reasonable expectation of privacy which he justifiably relied upon.<sup>59</sup> The Court noted that since the fourth amendment protects persons and not merely places, the amendment does not turn upon the presence or absence of a physical intrusion into any given enclosure.<sup>60</sup>

While the majority in *Katz* adopted an objective standard, Justice Harlan, in his concurring opinion adopted a subjective approach to the fourth amendment.<sup>61</sup> Justice Harlan noted that there is a two-fold requirement, "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"<sup>62</sup> Justice Harlan, like the majority, recognized the plain view exception to the protection of the fourth amendment.<sup>63</sup>

The *Katz* opinion drastically redefined fourth amendment rights. Areas previously not protected now received protection provided the *Katz* test was met.<sup>64</sup> Under *Katz*, what an individual "reasonably seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>65</sup>

With the ruling in *Katz*, considerable doubt was cast upon the continued vitality of the open fields doctrine of *Hester*. In *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*,<sup>66</sup> the Supreme Court supported the open field doctrine after *Katz*.<sup>67</sup> In that case, a health inspector entered upon the outdoor premises of Western Alfalfa Corporation to do some testing of plumes of smoke from the defendant's chimneys. The inspector entered no

57. *Id.*

58. *Id.*

59. *Id.* at 353.

60. *Id.*

61. *Id.* at 360-61.

62. *Id.* at 361.

63. *Id.* See *Harris v. United States*, 390 U.S. 234 (1968). The Supreme Court in *Harris* held that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to search and seizure.

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

65. *Id.* at 351-52.

66. 416 U.S. 861 (1974).

67. *Id.* at 865.

part of the defendant's plan to make the inspection.<sup>68</sup> The evidence did not show whether the inspector was on premises from which the public was excluded.<sup>69</sup> The Court found that the inspector was well within the open field exception to the fourth amendment approved in *Hester*.<sup>70</sup>

In *United States v. Allen*,<sup>71</sup> the Ninth Circuit Court of Appeals held warrantless aerial surveillance of the defendant's farm to be lawful.<sup>72</sup> The court agreed that "a person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy regarding the activities occurring there in all circumstances,"<sup>73</sup> yet the court concluded that the defendant had no reasonable expectation that his barn, vehicles and the tracks leading from the barn would not be noticed by aerial surveillance.<sup>74</sup> This ruling came despite the fact that the defendant had warned trespassers and placed "No Trespassing" signs around his ranch.<sup>75</sup>

Despite *Allen* and *Western Alfalfa's* support of the *Hester* concept, some courts have held searches of open fields to be unreasonable.<sup>76</sup> In *State v. Brady*,<sup>77</sup> the Supreme Court of Florida applied Justice Harlan's two-prong test and found that the defendant had an actual expectation of privacy in his open field and that his expectation was one that society would accept as reasonable.<sup>78</sup> In *Brady*, law enforcement officers responding to a tip, undertook surveillance of Brady's property.<sup>79</sup> In order to observe Brady's ranch, officers crossed a dike, rammed through a gate, cut a chain lock on

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68. *Id.* at 864.

69. *Id.* at 865.

70. *Id.*

71. 675 F.2d 1373 (9th Cir. 1981).

72. *Id.* at 1381.

73. *Id.* at 1380.

74. *Id.* at 1381.

75. *Id.* at 1377.

76. See *State v. Brady*, 406 So. 2d 1093 (Fla. 1981).

77. 406 So. 2d 1093 (Fla. 1981), *cert. granted*, 456 U.S. 988 (1982), *cert. dismissed in pt., judgment vacated in pt.*, — U.S. —, 104 S. Ct. 2380 (1984). The writ of certiorari as to defendant Brady was dismissed by the Court because the Circuit Court of Florida, Martin County, accepted the the State's *nolle prosequi*. The judgment as to the remaining respondents was vacated and remanded for further consideration in light of *Oliver*. 104 S. Ct. at 2380.

78. 406 So. 2d at 1098.

79. *Id.* at 1094.

another gate and cut or crossed posted fences.<sup>80</sup> The *Brady* court noted that the open fields doctrine cannot be used as carte blanche for a warrantless search simply because the location searched is not part of a dwelling or its adjacent curtilage.<sup>81</sup> In view of the ranch's secluded location, Brady's efforts to keep others away, and society's interest in protecting its citizens' privacy when in their homes and on their property, the court held that the protections of the fourth amendment should be applied to Brady.<sup>82</sup>

In light of the continuing controversy concerning the vitality of the open fields doctrine after *Katz*, the Supreme Court granted certiorari in *Oliver*.<sup>83</sup> In the *Oliver* case, the Court analyzed the open fields doctrine in light of the *Katz* opinion.

#### ANALYSIS

In *Oliver*, the Supreme Court explicitly reaffirmed the open fields doctrine of *Hester*.<sup>84</sup> The *Oliver* Court examined the special protections of the fourth amendment.<sup>85</sup> The Court held that the curtilage or land immediately surrounding and associated with the home is accorded the same protections that attach to houses.<sup>86</sup> The Supreme Court did not extend fourth amendment protections to open fields.<sup>87</sup> In applying the fourth amendment to the facts in *Oliver*, the Court utilized the objective test found in the *Katz* majority opinion.<sup>88</sup> The Court held that the fourth amendment does not protect merely subjective expectations of privacy but only "those expectations that society is prepared to recognize as 'reasonable.'"<sup>89</sup> The Court held that there can be no reasonable expectations of privacy in open fields.<sup>90</sup> The Court chose this *per se* rule of reasonableness over a *case by case* determination of reasonableness.<sup>91</sup> The *Oliver* decision also reaffirmed *Hester* by holding that in the case of open fields, the common law property rights pro-

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80. *Id.* at 1095.

81. *Id.*

82. *Id.* at 1098.

83. *Oliver*, 103 S. Ct. 812.

84. 104 S. Ct. at 1740.

85. *Id.*

86. *Id.* at 1742.

87. *Id.*

88. *Id.* at 1743.

89. *Id.* at 1740 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)).

90. *Id.* at 1744.

91. *Id.* at 1742-43.

tected by the law of trespass have little or no relevance to the applicability of the fourth amendment.<sup>92</sup>

Despite its firm holding in *Oliver*,<sup>93</sup> the Supreme Court made several errors in the rationale behind its decision. The most prominent errors include the following: the failure to define key terms, the inconsistent application of the *Katz* test and the use of a *per se* rule in determining reasonable expectations of privacy in open fields. Many of these errors are pointed out in the dissenting opinion by Justice Marshall.<sup>94</sup>

In forming its decision in *Oliver*, the Supreme Court emphasized certain terms from the fourth amendment and common law. The terms effects, houses, curtilage and open fields were found to be of particular importance.<sup>95</sup> The Court examined the history of the fourth amendment and concluded that the term "effects" is less inclusive than "property" and cannot be said to encompass open fields.<sup>96</sup> The Court noted that the distinction between houses and open fields is as old as the common law.<sup>97</sup> The Supreme Court also noted that the common law considered curtilage<sup>98</sup> to be part of the home itself for fourth amendment purposes.<sup>99</sup> The Court referred to curtilage as the land immediately surrounding and associated with the home.<sup>100</sup> The Supreme Court held that the common law, by implying that only the curtilage warrants the fourth amendment protections that attach to the home, conversely implies that no expectation of privacy legitimately attaches to open fields.<sup>101</sup>

Apparently, the Court in *Oliver* attempted to define open fields by showing that they are not houses, effects or curtilage and thus do not come under the protections of the fourth amendment. This attempt failed because houses, effects and curtilage were

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92. *Id.* at 1744.

93. *Id.* at 1737. The Supreme Court held there can be no reasonable expectations of privacy in open fields.

94. 104 S. Ct. at 1744 (Marshall, J., dissenting).

95. *Id.* at 1740, 1742.

96. *Id.*

97. *Id.*

98. *Id.* at 1742. The Supreme Court gave a common law definition of curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Id.* at 1742 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

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

100. *Id.*

101. *Id.*

never properly defined. The Court mentioned that there were several distinctions between these three terms and open fields but never set out the distinctions. Curtilage was defined as the land immediately surrounding and associated with the home.<sup>102</sup> This definition fails to give a practical standard such as the seventy-five foot rule found in *Bensigner*.<sup>103</sup> The Supreme Court also failed to supply a definition of open fields in *Oliver*. This failure is critical because a specific definition of open fields is necessary to give law enforcement officials guidelines as to what areas may be searched without a search warrant.

The Supreme Court purported to apply the reasonable expectation of privacy test found in *Katz* to the facts in *Oliver*.<sup>104</sup> Inconsistencies appear however in the Court's use of the test. This is most apparent in the Supreme Court's emphasis of the distinction between open fields and curtilage. Here the Court held that fourth amendment protections do not attach to land outside of the curtilage.<sup>105</sup> This holding seems to be very similar to the protected places approach of *Olmstead*. The *Olmstead* Court noted that any area beyond the curtilage was not a constitutionally protected area.<sup>106</sup> *Olmstead* was specifically overruled by *Katz* which focused on privacy interest as the basis of fourth amendment questions.<sup>107</sup>

The Supreme Court also ignored part of the *Katz* decision when it disregarded the importance of the steps taken by *Oliver* in preserving his privacy. The Court in *Oliver* reasoned that because open fields are accessible to the public and police in ways that a home, office or commercial structure would not be, and because fences and no trespassing signs do not effectively bar the public from viewing open fields, the asserted expectation of privacy is not one that society recognized as reasonable.<sup>108</sup> The Court also noted that the public and police may lawfully survey lands from the air.<sup>109</sup> This line of reasoning is contrary to the Supreme Court's holding in *Katz* that "what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally

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102. *Id.*

103. *Bensigner*, 546 F.2d at 1297.

104. *Oliver*, 104 S. Ct. at 1740-41.

105. *Id.* at 1742.

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

107. *Katz*, 389 U.S. at 351.

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

109. *Id.* See *United States v. Allen*, 675 F.2d at 1381 (9th Cir. 1981).

protected."<sup>110</sup> It is important to note that *Katz* required only a reasonable expectation of privacy and not complete privacy.<sup>111</sup> The Supreme Court should have considered *Oliver*'s efforts to secure his privacy in determining whether his expectations of privacy were reasonable.<sup>112</sup>

The Supreme Court erred in the adoption of the *per se* rule that there can be no reasonable expectation of privacy in open fields. The Court concluded that under a *case by case* approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, or had posted a sufficient number of warning signs to establish a reasonable expectation of privacy.<sup>113</sup> The Court failed to consider how much time would be lost by officers following the Court's *per se* rule in guessing how far curtilage extended and where the open field began.<sup>114</sup> Application of the *Oliver* Court's *per se* rule appears impossible due to the Supreme Court's failure to define the terms curtilage and open fields.

By adopting a *per se* standard, the Supreme Court emphasized the needs of law enforcement. Apparently the Court forgot its decision in *Mincey v. Arizona*.<sup>115</sup> *Mincey* held that, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the fourth amendment."<sup>116</sup> A *per se* standard also comes dangerously close to the protected places approach of *Olmstead*.<sup>117</sup> The *per se* rule that open fields are not subject to constitutional protection applies fourth amendment protections on the basis of places and not on people's expectation of privacy.<sup>118</sup>

Overall, the majority opinion of *Oliver* has limited *Katz* which held that the fourth amendment protects people not places.<sup>119</sup> This is most evident in the *Oliver* Court's emphasis of the curtilage as

110. *Katz*, 389 U.S. at 351 (1967); Note, *Katz In Open Fields*, 20 AM. CRIM. L. REV. at 494 (1983).

111. *Id.*

112. See *Oliver*, 104 S. Ct. at 1743. *Oliver* erected "No Trespassing" signs and fences on his property.

113. *Id.* at 1742-43.

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

115. 437 U.S. 385 (1977).

116. *Id.* at 393.

117. *Olmstead*, 277 U.S. at 466 (1927).

118. See *Katz*, 389 U.S. at 353. The *Katz* decision holds that the fourth amendment protects people not places. The *per se* rule of *Oliver* is contrary to *Katz*.

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

the cut off point of fourth amendment protections. The *Oliver* Court's refusal to consider a landowner's steps in preserving his privacy is contrary to *Katz* which examined what a person sought to preserve as private.<sup>120</sup> Also, the adoption of a *per se* rule that there can be no reasonable expectations of privacy in open fields creates a standard impossible to follow and favors law enforcement procedures over a property owners' fourth amendment rights.<sup>121</sup>

Justice Marshall presented a well reasoned dissenting opinion in *Oliver*.<sup>122</sup> The dissent emphasized a landowner's right to exclude others from his posted land, the uses to which land is put and the importance of boundary markers on a person's land.<sup>123</sup> Justice Marshall noted the importance of common law property rights, the violation of which can result in a prosecution for trespass.<sup>124</sup> The dissent did not conclude that property rights are determinative of fourth amendment protections, but simply used property rights as a factor in determining whether an individual's expectations of privacy are reasonable.<sup>125</sup> Justice Marshall noted that one who lawfully possesses property will have more of a reasonable expectation of privacy by virtue of his right to exclude others from his property.<sup>126</sup> The dissent also examined the uses to which property is put in examining a landowner's privacy interest.<sup>127</sup> While the majority mentioned that there are few privacy interests in the growing of crops, the dissent also considered privacy interests in agricultural research and business, private wildlife refuges and even walks taken by landowners in their posted open fields.<sup>128</sup> The dissent emphasized the term "posted" in determining whether a person's privacy interests in open fields are legitimate. Justice Marshall noted, "[a] claim to privacy is therefore strengthened by the fact that the claimant somehow manifested to other people his desire that they keep their distance."<sup>129</sup> This distinction between posted open fields

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120. Note, *Katz In Open Fields*, 20 AM. CRIM. L. REV. at 494 (1983).

121. See *Mincey*, 437 U.S. at 393. The Supreme Court held that, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the fourth amendment."

122. *Oliver*, 104 S. Ct. at 1745, (Marshall, J., dissenting).

123. *Id.* at 1750.

124. *Id.* at 1748.

125. *Id.* at 1747.

126. *Id.*

127. *Id.* at 1748.

128. *Id.* at 1748-49. The phrase "posted open fields" refers to open fields marked with no trespassing signs.

129. *Id.* at 1749 (Marshall, J., dissenting).

and non-posted open fields is most helpful in posing a solution to the problems created by the majority's opinion in *Oliver*.

The open fields doctrine may be viewed from the broad approach taken by the majority in *Oliver* or from the more narrow approach suggested in the dissenting opinion.<sup>130</sup> The majority adopted a *per se* rule as to reasonableness of expectations in open fields regardless of whether those fields are open to the public view or secluded.<sup>131</sup> As discussed above, this approach creates a number of problems with the defense of common law trespass and one's fourth amendment rights. The *Katz* opinion recognized the plain view doctrine as enunciated in *Harris v. United States*.<sup>132</sup> In *Harris*, objects within plain view of an officer who has a right to be in the position of viewing them are subject to search and seizure without a warrant.<sup>133</sup> Through the use of this exception the more narrow doctrine of open fields may be developed. In this narrow approach the landowner's precautions in guarding his privacy are extremely important.<sup>134</sup> Undeveloped land is generally deemed to be open to the public if the landowner has not posted his boundaries.<sup>135</sup> The court in *Western Alfalfa* held that an official may, without a warrant, enter private land from which the public is not excluded and make observation from that vantage point.<sup>136</sup> A more narrow approach to the open fields doctrine would be that an individual has no reasonable expectation of privacy in a field which is open and accessible to the public.<sup>137</sup> This approach would require a case by case determination by police as to whether the precautions taken by an owner would entitle him to a reasonable expectation of privacy. As noted before, this would impede police officers no more than a determination of where curtilage ends, the test now used in the broad approach adopted by the majority.<sup>138</sup> By using the narrow approach to open fields, a pure *Katz* test could be applied be-

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130. *Id.* at 1750-51. Note, *Katz In Open Fields*, 20 AM. CRIM. L. REV. at 492 (1983).

131. 104 S. Ct. at 1737.

132. *Katz*, 389 U.S. at 357; 390 U.S. 234 (1968).

133. *Harris*, 390 U.S. at 236.

134. 104 S. Ct. at 1749 (Marshall, J., dissenting); *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980).

135. 416 U.S. 861 (1974); *Oliver*, 104 S. Ct. at 1749 (Marshall, J., dissenting).

136. 416 U.S. at 865 (1974).

137. *Oliver*, 104 S. Ct. at 1749-50 (Marshall, J., dissenting). Note, *Katz In Open Fields*, 20 AM. CRIM. L. REV. at 496 (1983).

138. 104 S. Ct. at 1750-51 (Marshall, J., dissenting).

cause the plain view exception is accepted by *Katz* and the curtilage determination would be avoided. A *Katz* analysis using the "accessible or visible to the public standard" as a factor in assessing reasonableness would not require a precise definition of an open field.<sup>139</sup>

### CONCLUSION

The Supreme Court in *Oliver* held that an individual has no reasonable expectation of privacy in open fields and is therefore not entitled to the protections of the fourth amendment.<sup>140</sup> This ruling came after *Katz* which greatly expanded fourth amendment protections. The Supreme Court in *Katz* rejected the approach that the fourth amendment protections only applied to certain areas such as houses or curtilage<sup>141</sup> and held that the fourth amendment protects people not places.<sup>142</sup> As long as a person has a reasonable expectation of privacy, the Court in *Katz* held that the person is protected by the fourth amendment even if the person is in an area accessible to the public.<sup>143</sup> The Court in *Oliver* limited the holding of *Katz* and revitalized the protected places approach in *Olmstead v. United States*. In order to avoid a step backward in fourth amendment protections, the Supreme Court should adopt a narrow approach to the open fields doctrine. The narrow approach to the open fields doctrine would recognize property owners' rights of privacy on their land yet it would avoid many of the pitfalls of the *Oliver* decision. The adoption of a narrow approach to the open fields doctrine is more consistent with *Katz v. United States* and the protection of fourth amendment rights.

T. Michael Godley

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139. Note, *Katz In Open Fields*, 20 AM. CRIM. L. REV. at 505 (1983).

140. 104 S. Ct. at 1737.

141. *Katz*, 389 U.S. at 351 (1967).

142. *Id.* at 353.

143. *Id.* at 352.

## APPENDIX -A

Case	Outside Curtilage	Within Curtilage
<i>Care v. United States</i> , 231 F.2d 22 (10th Cir. 1956).	one long city block	
<i>Hassell</i> , 336 F.2d 684 (6th Cir. 1964).	750 ft.	
<i>Atwell v. United States</i> , 414 F.2d 137 (5th Cir. 1969)	750 ft.	
<i>United States v. Bensinger</i> , 546 F.2d 1292 (7th Cir. 1976)	400 ft.	
<i>Fullbright v. United States</i> , 392 F.2d 432 (10th Cir. 1968)	150-300 ft.	
<i>Hester v. United States</i> , 265 U.S. 57 (1924)	150-300 ft.	
<i>Brock v. United States</i> , 256 F.2d 55 (5th Cir. 1958)	150-180 ft.	
<i>Hodges v. United States</i> , 243 F.2d 281 (5th Cir. 1957)	150 ft.	
<i>Janney v. United States</i> , 206 F.2d 601 (4th Cir. 1953)	100 ft.	
<i>United States v. Minton</i> , 488 F.2d 601 (4th Cir. 1973)	80-90 ft.	
<i>Walker v. United States</i> , 225 F.2d 447 (5th Cir. 1955)		210-240 ft.
<i>United States v. Mullin</i> , 329 F.2d 295 (4th Cir. 1964)		75 ft.

*United States v. Capps*,  
435 F.2d 637  
(9th Cir. 1970)

40-45 ft.

*Wattenburg v. United States*,  
388 F.2d 853  
(9th Cir. 1968)

20-35 ft.