

2011

## Big Brother is Watching: The Reality Show You Didn't Audition For

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### Recommended Citation

Amy Dillard, *Big Brother is Watching: The Reality Show You Didn't Audition For*, 63 OKLA. L. REV. 461 (), <http://digitalcommons.law.ou.edu/olr/vol63/iss3/2>

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# BIG BROTHER *IS* WATCHING: THE REALITY SHOW YOU DIDN'T AUDITION FOR

J. AMY DILLARD\*

*Even if one cannot expect total privacy while alone in [an open field] . . . this diminished privacy interest does not eliminate society's expectation to be protected from the severe intrusion of having the government monitor private activities through hidden video cameras.<sup>1</sup>*

## *Introduction*

In the winter of 2006, a woman set out on a hike across her neighbor's working farm.<sup>2</sup> The farm stretched for hundreds of acres, with major portions completely hidden by trees from adjacent public or other private property.

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1. United States v. Nerber, 222 F.3d 597, 604 (9th Cir. 2000).

2. The facts in the first two paragraphs of this Article arose in the pre-trial hearing and trial of Steven Vankesteren before the United States District Court for the Eastern District of Virginia, Norfolk Division, in Criminal Action No. 2:07cr153. At that hearing and trial, Mr. Vankesteren was not represented by counsel. The totality of the facts is best captured in Mr. Vankesteren's Petition for Writ of Certiorari to the Supreme Court of the United States, which includes the transcript from the entirety of his hearing and trial. See Petition for Writ of Certiorari, Vankesteren v. United States, 129 S. Ct. 2743 (2009) (No. 08-1253), 2009 WL 979654 [hereinafter, Petition for Certiorari]. The Fourth Circuit also offers a detailed recitation of facts in its opinion. See United States v. Vankesteren, 553 F.3d 286 (4th Cir. 2009), cert. denied, 129 S. Ct. 2743 (2009). The Author, along with Matthew Haynie and Karen Woody, then associates at Bracewell and Giuliani, LLP, represented Mr. Vankesteren in his Petition for Certiorari. The Author's personal notes, taken between January 9, 2009, and April, 8, 2009, during extensive interviews with Mr. Vankesteren, add some of the additional detail presented in this Article; for the purpose of a full examination of the case, the facts as recited in this Article are intended to be more complete and detailed than what the Court considered. See Author's Personal Notes (2009) (on file with author).

During her hour-long, trespassory hike through the posted, private property,<sup>3</sup> she stumbled upon several large metal traps with dead birds inside. When she returned home, she called the local game warden<sup>4</sup> and reported that she believed that the trapped birds were red-tailed hawks.<sup>5</sup>

The game warden investigated the tip<sup>6</sup> by driving onto the posted, private property, into an area well out of sight of any adjacent private or public property. Over the course of the next month, he entered the property nine times, and each time he drove to the area of the reported traps;<sup>7</sup> each time that he entered the property, he left quickly to avoid being seen by the farm's owner.<sup>8</sup> The first several times that he entered the property, the game warden observed the traps but never saw a protected bird in any trap. After his unsuccessful attempts to catch the farmer with a protected bird in his traps, the game warden installed a sophisticated, stop-action, motion-sensing video camera, and he trained the camera on the area where the traps sat.<sup>9</sup> For thirteen days, the camera recorded any movement within its view, including, among other things, video images of the farmer walking hand-in-hand with a companion, of the farmer urinating, of a flock of turkeys strutting by, and, on two occasions, of the farmer removing a red-tailed hawk from a trap and

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3. The phrase "posted, private property," has a special significance in criminal law. Prosecution for trespassing requires proof of the defendant's mental state, i.e., "that the actor be aware of the fact that he is making an unwarranted intrusion." WAYNE LAFAVE, CRIMINAL LAW §21.2(C) (West 5th ed. 2010). Proof that a defendant entered property that was clearly posted as private and with a trespassing prohibition can satisfy proof of intent. Most states have incorporated this method of proof into their trespassing statutes. *See, e.g.*, VA. CODE ANN. § 18.2-119 (1998).

4. *Vankesteren*, 553 F.3d at 287.

5. Red-tailed hawks are migratory birds protected under the Migratory Bird Treaty Act, which makes it unlawful to trap or kill red-tailed hawks without a permit. 16 U.S.C. § 703 (2004); 50 C.F.R. § 21.11 (2008). Gamekeepers engaged in a small game hunting enterprise might trap and kill red-tailed hawks and other birds of prey to protect the natural game, such as rabbits, quail, and pheasants. Red-tailed hawks often fly into gun fire during a shoot with pen-raised pheasant because a red-tailed hawk can catch and kill a full-grown pheasant mid-flight. Like planting and harvesting to attract game birds or creating and maintaining natural cover for rabbit warrens, trapping birds of prey is a conservation effort by small game hunters. *See* Author's personal notes, May 9, 2011, from an interview with Joseph S. Michael, proprietor, Whistling Hill Regulated Shooting Area, Boonsboro, Maryland.

6. Though the tip received by the game warden was anonymous, after speaking with a neighbor, Mr. Vankesteren learned that she had reported the traps to the game warden. *See* Author's Personal Notes, *supra* note 2.

7. Petition for Certiorari, *supra* note 2, at 37a-40a.

8. *Id.* at 36a.

9. *Id.* at 38a.

wringing its neck.<sup>10</sup> The game warden arrested the farmer, and he was convicted in federal district court of violating the Migratory Bird Treaty Act.<sup>11</sup>

In 1984, at the height of the Reagan-era war on drugs, the Supreme Court created a bright-line exception<sup>12</sup> to Fourth Amendment protection by declaring that no person had a reasonable expectation of privacy in an area defined as an open field.<sup>13</sup> When it created the exception, the Court ignored positive law and its own jurisprudence that the Fourth Amendment protects people, not places.<sup>14</sup> The open fields doctrine allows law enforcement officers to enter posted, private areas that are not part of a house or its curtilage<sup>15</sup> for brief surveillance.<sup>16</sup> The Supreme Court has never “extended the open fields doctrine to anything beyond observation searches,”<sup>17</sup> nor has the Court ever authorized hidden video surveillance on private property without prior authorization by warrant or consent.<sup>18</sup> The Fourth Circuit, however, recently extended the open fields doctrine to authorize sustained video surveillance.<sup>19</sup> This new extension of a constitutionally authorized intrusion has resulted in a significant diminution in the rights of property owners to exclude government agents from their property and to be free from the probing eye and constant videotaping of the government on private property.

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10. Author’s Personal Notes, *supra* note 2, which were taken while watching the videotape that was admitted into evidence by the United States District Court for the Eastern District of Virginia, Norfolk Division.

11. *See* *United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2743 (2009).

12. The Court is generally critical of bright-line rules in its Fourth Amendment jurisprudence. *See e.g.*, *Georgia v. Randolph*, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) (“But the Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single sets of legal rules can capture the ever-changing complexity of human life. It consequently uses the general terms ‘unreasonable searches and seizures.’ And the Court has continuously emphasized that ‘[r]easonableness...is measured...by examining the totality of the circumstances.’” [citations omitted]).

13. *Oliver v. United States*, 466 U.S. 170 (1984).

14. *See Katz v. United States*, 389 U.S. 347, 351 (1967).

15. The general test used by the Court to determine whether a space is curtilage or an open field employs four factors: 1) proximity of the area to the home; 2) whether the area is enclosed along with the home; 3) how the area is used by the resident; and 4) steps taken by the resident to protect the area from observation. *See United States v. Dunn*, 480 U.S. 292 (1987).

16. *See Oliver*, 466 U.S. at 178-79.

17. *Husband v. Bryan*, 946 F.2d 27, 29 (5th Cir. 1991).

18. *See generally Katz*, 389 U.S. at 353.

19. *See United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2743 (2009) (holding that warrantless, long-term, trespassory videotaping on posted, private property does not violate the Fourth Amendment protection of citizens to be free from unreasonable searches).

Upper-level law students struggle mightily to resolve the Court's open fields doctrine with other rules of law. In Torts, students learn that the bending of a single blade of grass is a sufficient damage to justify liability against a trespasser.<sup>20</sup> In Property, they learn that owners must move to eject squatters from their property in order to avoid an adverse possession claim.<sup>21</sup> In Criminal Law, they learn that trespass is a lesser-included offense to common law burglary.<sup>22</sup> Typically in Constitutional Criminal Procedure,<sup>23</sup> just before students study the open fields doctrine, they read *Katz v. United States*,<sup>24</sup> which offers the contemporary, expansive understanding that the Fourth Amendment protects people, not places. But in *Oliver v. United States*,<sup>25</sup> the leading case endorsing the open fields doctrine, the Court rejected the bulk of these various bodies of common and constitutional law to establish a bright-line exception<sup>26</sup> to Fourth Amendment protection. In *United States v. Vankesteren*,<sup>27</sup> the Fourth Circuit extended the bright-line exception created by the open fields doctrine to authorize governmental video surveillance of a citizen's actions on his posted, private property.<sup>28</sup>

This Article first maintains that the Supreme Court based its decision in *Oliver* on an open fields doctrine that had been established in a formalist opinion, which lacked any substantive analysis by the Court.<sup>29</sup> Next, the

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20. See *Dougherty v. North Carolina*, 18 N.C. (3 & 4 Dev. & Bat.) 371 (N.C. 1835) (holding that "it is an elementary principle, that every unauthorized, and therefore unlawful entry, into the close of another is trespass").

21. See *Humbert v. Trinity Church*, 24 Wend. 587 (N.Y. Sup. Ct. 1840) (offering a broad overview of the rights of owners against claims of adverse possession).

22. See LAFAVE, *supra* note 3.

23. See, e.g., JOSHUA DRESSLER & GEORGE THOMAS, *CRIMINAL PROCEDURE: INVESTIGATING CRIME* (4th ed. 2010); STEPHEN SALTZBURG & DANIEL CAPRA, *AMERICAN CRIMINAL PROCEDURE INVESTIGATIVE: CASES AND COMMENTARY* (9th ed. 2010).

24. 389 U.S. 347 (1967).

25. 466 U.S. 170 (1984).

26. Again, the Court generally steers clear of bright-line rules in Fourth Amendment analysis, preferring instead to rely on "the officials' ability to evaluate the intangible indicia of criminality effectively and accurately, or to make tactical decisions based upon bringing pragmatic skills or expertise to bear." See Eric J. Miller, *Putting Practice Into Theory*, 7 OHIO ST. J. CRIM. L. 31, 52 (2009). The *Oliver* majority, to the contrary, rejects the idea that law enforcement officials benefit from training and experience in their ability to employ sophisticated rules. "Under this [case-by-case] approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy." *Oliver*, 466 U.S. at 181.

27. *United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2743 (2009).

28. *Id.*

29. *Hester v. United States*, 265 U.S. 57 (1924).

Article argues that, in *Oliver*, the Court should have engaged in an honest review of the open fields doctrine, unhindered by the formalist commands from an early generation, in light of the newer *Katz* rule that required an assessment of whether a defendant can maintain a justifiable expectation of privacy on vast acreage that is well-marked against trespassers with signs and fencing.<sup>30</sup> Because the premise of the majority opinion in *Oliver* is that open fields deserve *no* protection from the probing governmental eye, the reasoning offered therein remains unreconciled with the Court's dominant Fourth Amendment doctrine articulated in *Katz*. Finally, the Article maintains that the doctrine in *Oliver* lacks any vision of a future replete with invasive technology,<sup>31</sup> and while the Fourth Circuit correctly applied the flawed open fields doctrine, it dangerously extended the authorization of government agents to use hidden video surveillance on posted, private property.<sup>32</sup> In a world full of modern technology, the least intrusive of which may be constant, hidden video surveillance, this Article criticizes an unfettered open fields doctrine and the government excesses and incursions that may infringe upon a citizen's justifiable expectation of privacy.

The Article proceeds in five parts beginning with an overview of the majority opinion in *Oliver* and of the detailed dissent authored by Justice Thurgood Marshall; this part offers a critique that the majority opinion lacks a coherent, consistent legal theory to support the open fields doctrine. In Part Two, the Article reexamines the historical basis for the open fields doctrine and demonstrates that the issue is more complex than the *Oliver* majority acknowledges. In Part Three, the Article views *Oliver* through the pragmatic lens of its time and assesses whether the pragmatic justifications for the outcome are still as pressing today. In Part Four, the Article assesses the danger to individual expectations of privacy by critiquing the open fields doctrine in light of the prevailing "technology doctrines." In Conclusion, the Article theorizes the dangers of per se rules within Fourth Amendment jurisprudence and argues for a flexible open fields doctrine that allows for a case-by-case assessment which can weigh privacy rights against governmental interests.

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30. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

31. Surveillance, whether physical or transactional, has come to the forefront in recent Fourth Amendment scholarship, though the *Oliver* Court does not anticipate constant video surveillance. See, e.g., Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004); Orin Kerr, *The National Surveillance State: A Response to Balkin*, 93 MINN. L. REV. 2179 (2009); Peter Swire, *Proportionality for High Tech Searches*, 6 OHIO ST. J. CRIM. L. 751 (2009).

32. *Vankesteren*, 553 F.3d at 286.

*I. The Lack of a Coherent, Consistent Legal Theory to Support the Open Fields Doctrine*

The Court's Fourth Amendment jurisprudence falls into two main categories: discerning what constitutes a search, and reflecting on the reasonableness of searches. In both areas, the law is confusing at its best and "illogical, inconsistent, unprincipled, ad hoc, and theoretically incoherent"<sup>33</sup> at its worst. This Article focuses on the former category – discerning what constitutes a search. When the Court concludes that government action does not constitute a search—as in the open fields doctrine—it does not reach the issue of reasonableness. A review of the case law supports the common assertion that in the past fifty years, the Court has largely applied the theory of legal pragmatism<sup>34</sup> to its Fourth Amendment jurisprudence. But as it shifted from its previous approach, legal formalism,<sup>35</sup> to its current approach, legal pragmatism,<sup>36</sup> the Court had to reject its prior constrained interpretations of the

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33. Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 204 (1998). Professor Cloud establishes that the community of legal scholars and dissenting Justices routinely criticize the Court's majority opinions for inconsistent application of its own rules. *Id.* at 204 n.10.

34. This Article does not survey the nuances of legal pragmatism. As a theory, legal pragmatism espouses that the law is not foundational but that it is a living instrument that can be used to solve social problems; its application is necessarily contextual. *See generally* RICHARD POSNER, *HOW JUDGES THINK* (2010); RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1993). The most succinct summary of legal pragmatism belongs to Professor Morgan Cloud: "[The law] is something that judges, lawyers, and legislators make." Cloud, *supra* note 33, at 210-11.

35. I am accepting the conventional views of legal formalism, and I make no effort to offer any analysis of its tenets. At its most basic level, legal formalism adheres to the meaningful nature of legal rules and seeks to apply the rules to factual situations. Formalism is the standard approach in first-year legal writing courses, where students learn to find rules, synthesize rules, and apply rules. For an excellent example of formalism in practice, see Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008). For further study, see Frederick Schauer, *Formalism*, 97 YALE L. J. 509, 514 (1988) (tracing formalism to the theories of H.L.A. Hart); Thomas Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 817 (1989) (tracing formalism to Christopher Langdell's view that law is a science filled with principles and doctrine).

36. Cloud, *supra* note 33 at 205. I accept Professor Cloud's assertion that the Court shifted from legal formalism to legal pragmatism between the early- and mid-twentieth century. Perhaps the best evidence is the Court's own sheepishness when it engages in retro-formalism. *See Georgia v. Randolph*, 547 U.S. 103, 121 (2006) (holding that one co-tenant can bar the police from entering a dwelling when another co-tenant consents, the Court wrote, "[t]his is the line we draw, and we think the formalism is justified"). Though I accept the general shift to pragmatism, I remain interested in ways to catalogue the Court's pragmatism into some reliable, predictable form that demonstrates intellectual consistency. *See* Orin Kerr, *Four Models of*

Fourth Amendment. Chief among those was a shift from a view that the Fourth Amendment should be interpreted in light of conventional property law<sup>37</sup> to a more expansive notion that the Amendment “protects people, not places.”<sup>38</sup> The concept that falls most squarely into the breach between formalism and pragmatism is the open fields doctrine. In *Oliver*, the Court fails to comport with either legal theory, in that it bows to formalism by accepting precedent that was incomplete in its historical review, then it offers a limited, constrained reconciliation with the newer *Katz* model.<sup>39</sup>

#### A. *The Tired Formalism of Oliver v. United States*

The open fields doctrine was first established in *Hester v. United States*,<sup>40</sup> in which the Court held that a government agent’s seizure of abandoned personal property on an open field did not violate the Fourth Amendment.<sup>41</sup> In two ways the *Hester* Court rejected the defendant’s claim: first, it declared that abandoned property was not protected by the Fourth Amendment, and second, it found that a government agent’s entry onto an open field did not invoke Fourth Amendment analysis at all because the intrusion did not constitute a search.<sup>42</sup> Perhaps ironically, it was Oliver Wendell Holmes, regarded as the father of legal realism,<sup>43</sup> who issued the formalist proclamation in *Hester*: “the special protection accorded by the Fourth Amendment to the

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*Fourth Amendment Protection*, 60 STAN. L. REV. 503, 516-19 (2007).

37. See *Olmstead v. United States*, 227 U.S. 438 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

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

39. Professor Cloud finds the Court’s reasoning in *Oliver*, “plausible, but far from irrefutable.” Cloud, *supra* note 33, at 255. I find the Court’s rote, formalist adoption of the open fields doctrine unpersuasive, and its attempt to reconcile the doctrine, through legal pragmatism, with more contemporary law, specious at best. That it employs rigid formalism then tries to reconcile its pragmatic precedent reveals a troubling lack of analytical rigor.

40. See 265 U.S. 57 (1924).

41. See *id.* at 58.

42. See *id.* at 57-58.

43. For a contemporary summation of the Legal Realists’ theories of law, see Michael Steven Green, *Legal Realism as a Theory of Law*, 46 WM. & MARY L. REV. 1915, 1921-39 (2005); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997). The most famous demonstration of Holmes’ legal realism philosophy springs from the first page of his *The Common Law*: “The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed.” Oliver Wendell Holmes, *Common Law* 1 (Barnes & Noble 2004) (1909).

people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields. The distinction between the latter and the house is as old as the common law.”<sup>44</sup> The Court continued to clarify the doctrine in subsequent cases throughout the early twentieth century,<sup>45</sup> culminating with its decision in *Oliver v. United States* in 1984.<sup>46</sup>

In *Oliver* and its companion case, *Maine v. Thornton*,<sup>47</sup> the Court defined “government intrusion” by the facts of the two cases. In each case, an officer received information that the defendant might be growing marijuana in the fields near his home;<sup>48</sup> further, officers disregarded “No Trespassing” signs, walked into and through areas bordered by private fencing, and traveled some distance by foot through the private property to discover a marijuana field.<sup>49</sup> The Court concluded in the first order that open fields are not protected by the Fourth Amendment based on the rule from *Hester*.<sup>50</sup>

Although the Court primarily relied on a textual analysis of the Fourth Amendment,<sup>51</sup> the majority attempted to reconcile other constitutional doctrines that should have prevented a purely textual analysis.<sup>52</sup> Further, in its formalist adoption of the open fields precedent, the Court elided centuries of trespass analysis<sup>53</sup> in its rejection of a common-sense and common-law approach to the open fields doctrine. In so doing, the Court offered a cursory nod to the Framers’ intent in drafting the Fourth Amendment, but disregarded

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44. *Hester v. United States*, 265 U.S. 57, 59 (1924) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*223, \*225-26).

45. The Court modified or overruled the holding in each of those cases when it decided *Katz v. United States*, 389 U.S. 347 (1967). See *Silverman v. United States*, 365 U.S. 505 (1961); *On Lee v. United States*, 343 U.S. 747 (1952); *Goldman v. United States*, 316 U.S. 129 (1942), overruled by *Katz*, 389 U.S. 347; *Olmstead v. United States*, 277 U.S. 438 (1928), overruled by *Katz*, 389 U.S. 347, and *Berger v. New York*, 388 U.S. 41 (1967).

46. 466 U.S. 170 (1984) (holding that the open fields doctrine remained unmodified by the Court’s justifiable expectation of privacy doctrine established in *Katz*).

47. 466 U.S. 170 (1984).

48. *Id.* at 173-75.

49. *Id.*

50. *Id.* at 176.

51. Much as Justice Holmes had in *Hester*. See *supra* note 44 and accompanying text.

52. The majority opinion simply fails to address Justice Marshall’s criticism, in dissent, that “we do not construe constitutional provisions of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change the provisions when they become obsolete.” See *Oliver* at 186-87 (Marshall, J., dissenting) (comparing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

53. I trust Justice Scalia that trespass analysis should be at the cornerstone of Fourth Amendment analysis. “From the date of its ratification until well into the 20th century, violation of the Amendment was tied to common-law trespass.” *Georgia v. Randolph*, 547 U.S. 103, 143 (2006) (Scalia, J., dissenting).

the complexity and vigor of the debates over the meaning and importance of property in Fourth Amendment analysis. Moreover, even in its textual analysis, the Court drifted toward the dominant Fourth Amendment doctrines of the time. The Court tied its determination of what the Framers intended to protect in the Fourth Amendment to the fact that each defendant sought to conceal his criminal activities by planting marijuana upon secluded land and behind fences and “No Trespassing” signs.<sup>54</sup>

Before 1967, the Court focused its Fourth Amendment analysis on whether a government agent had trespassed into an area protected by the plain text of the Amendment.<sup>55</sup> The Court often examined whether government actors had crossed physical thresholds into areas protected by the plain language of the Fourth Amendment<sup>56</sup> to determine whether a violation had occurred.<sup>57</sup> This narrow construction of the Fourth Amendment satisfied most situations until telephone wiretapping became more and more prevalent.<sup>58</sup>

When the *Oliver* majority addressed whether the Fourth Amendment protected an open field it relied on an “old” locational theory<sup>59</sup> case in the first order, *Hester v. United States*,<sup>60</sup> where the Court found a ready answer to the question by relying on the plain text of the Amendment.<sup>61</sup> The *Hester* Court

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54. *Id.* at 182.

55. See *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). Of interest, *Olmstead* is a Prohibition-era case that offered the Court its first opportunity to determine whether the Fourth Amendment protects private telephone conversations from government eavesdropping without a warrant. In a 5-4 decision, the Court declared that, when the government does not actually trespass onto private property, it does not violate the Fourth Amendment by eavesdropping on telephone conversations. See *id.* Thus, the warrantless wiretap was not prohibited by the Fourth Amendment so long as the eavesdropping occurred somewhere along the telephone wires outside of the home.

56. The Fourth Amendment protects “persons, houses, papers, and effects.” U.S. CONST. amend. IV.

57. In the most memorable of these cases, the Court decided that a “spike mic,” which had been pushed through the wall from an adjoining row house to monitor the defendant’s conversations, had “trespassed,” ever so slightly, into the defendant’s home and was, thus, a violation of the Fourth Amendment. See *Silverman v. United States*, 365 U.S. 505 (1961) (“[T]he eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners.”).

58. See *Katz*, 389 U.S. 347.

59. Locational theory is the term employed by Justice Marshall to describe the pre-*Katz* method of analyzing Fourth Amendment claims. See *Oliver*, 466 U.S. at 187.

60. See 265 U.S. 57 (1924).

61. *Id.* at 59. “As to that, it is enough to say that, apart from the justification, 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

found that only when government agents crossed the threshold of a protected area might the Court have found a violation.

*Hester* is factually distinct from *Oliver*, though the *Oliver* majority did not heed the distinction. Justice Powell's wholesale reliance on *Hester*, without acknowledging the difference, resulted in an incomplete analysis.<sup>62</sup> In *Hester*, federal revenue officers seized abandoned jugs and bottles that contained illegal liquor.<sup>63</sup> That the officers may have seized the abandoned contraband on private property was not the central issue in the case; the abandonment drove the analysis.<sup>64</sup> Justice Holmes shared his views on the distinction between the houses and fields in dicta, though it seems clear that he was unconvinced that the examination of the contraband took place on private property.<sup>65</sup> Justice Powell, however, turned Holmes' dicta into a rule by simply declaring it to be one.<sup>66</sup> Holmes decided the case by disposing of Petitioner's arguments in turn.<sup>67</sup> He found that the testimony from the defendant was not obtained by an illegal search and seizure, that the

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former is as old as the common law." *Id.* This quotation represents the entirety of the Court's analysis of the open fields issue in *Hester*. Justice Holmes cites Blackstone's Commentaries in support of his bold assertion, though the citations he offers, 4 WILLIAM BLACKSTONE, COMMENTARIES \*223, \*225-26, deal with burglary of the home, and seem, at best, to offer oblique support for the declaration.

62. *See Oliver*, 466 U.S. at 194 (Marshall, J., dissenting); *cf. id.* at 176 n.6 (majority opinion) (arguing that the rule in *Hester* is not limited to the facts in *Hester*).

63. 265 U.S. 57, 58 (1924).

64. *Id.* While the evidence is unclear, the Court assumed, "on the strength of the pursuing officer's" testimony, that the agents in *Hester* concealed themselves on private property to observe the exterior of a house where a moonshining sales operation was run out of a South Carolina farm. The Court disposes of the trespass issue by concluding that "even if there had been a trespass," the observations of the agents had not been obtained by illegal search or seizure. *Id.* There is no other indication that the officers' vantage point was from private property or that, if private, it was posted to exclude trespassers. *See also Oliver*, 466 U.S. at 194 (Marshall, J., dissenting).

65. *Hester*, 265 U.S. at 59 ("The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land.").

66. *Oliver*, 466 U.S. at 176 ("The rule announced in *Hester v. United States* was founded upon the explicit language of the Fourth Amendment."). The declarations of law by Justice Holmes often have extraordinary meaning, and a review of Justice Powell's case file from *Oliver* reveals that the dicta of Justice Holmes in *Hester* had significant meaning simply because it was the dicta of Justice Holmes. Justice Powell took handwritten notes at the *Oliver* Conference, and under the heading "Justice Blackmun" he wrote, "Clerks want to reverse *Hester* until they remember who wrote it." 82-15 *Oliver v. United States*, Supreme Court Case Files, Lewis F. Powell, Jr. Papers, Lewis F. Powell Jr. Archives, Washington & Lee University School of Law (copy on file with author).

67. *Hester*, 265 U.S. at 58.

defendant's own acts revealed the location of the abandoned contraband, that no evidence was obtained by entry into the house, and that examination of abandoned evidence did not constitute a seizure.<sup>68</sup> When he finally turned to the open fields question, he suggested that there was insufficient evidence to even consider the claim, noting "the hypothesis that the examination of the vessels took place upon Hester's father's land."<sup>69</sup>

Because the Court later rejected the narrowness of locational analysis, any reliance on *Hester* should have been limited. If the *Oliver* Court wished to remain true to its pre-*Katz* formalistic approach, however, it could have concluded that *Oliver* and *Thornton*'s open fields were not part of the "persons, houses, papers, and effects" protected by the Fourth Amendment, and, like the *Hester* Court, ended its inquiry there. Entry into an unprotected area by a government agent does not demand any Fourth Amendment analysis under this rationale, and if the majority had been willing to assert this rule completely, it would not have needed to engage in any further analysis.

#### *B. A New Understanding: The Fourth Amendment Protects People, Not Places*

The Court largely rejected the narrowness of locational theory in 1967 when it began to view the Fourth Amendment more broadly; since then, the Court has consistently declared, "[t]he Fourth Amendment protects people, not places."<sup>70</sup> The Court shifted its focus in Fourth Amendment doctrine when it rejected the strict confines of trespass<sup>71</sup> analysis in favor of a more flexible doctrine in *Katz v. United States*.<sup>72</sup> While there is vigorous debate among

68. *Id.*

69. *Id.* at 59. That Holmes finds insufficient evidence of trespassing in *Hester* is radically important, given his opinion in *Olmstead v. United States*. In *Olmstead*, Holmes joined the dissent in finding that the evidence obtained by a wiretap should not have been admitted into evidence. See *Olmstead v. United States*, 277 U.S. 438, 469 (Holmes, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). Rather than engage in head-on constitutional analysis, Holmes employs an evidentiary policy rationale. See *id.* He maintains that the government should not be allowed to use evidence that is obtainable only by a criminal act. He famously wrote, "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part." *Id.* Given this philosophy from Holmes, that the government should not be allowed to rely on evidence obtained by an illegal act, such as trespassing, had Holmes been on the bench when *Oliver* was decided, he may well have been overwhelmed by the blatant trespassory conduct of the officers and joined Justice Marshall in dissent.

70. See, e.g., *Katz*, 389 U.S. at 351 n.9.

71. Trespass here refers to the entry into or interference with "persons, houses, effects, and papers" as set out in *Olmstead*, 277 U.S. at 456.

72. 389 U.S. 347 (1967). If *Hester* relies on a locational theory for its interpretation of the

scholars<sup>73</sup> as to the impact that *Katz* has had on Fourth Amendment jurisprudence, *Katz* is offered in textbooks as a starting point for the “expectation of privacy” doctrine that has permeated constitutional criminal procedure in the last forty years.<sup>74</sup> Read at its most narrow, *Katz* is merely another wiretapping case—albeit one that cements an understanding that warrantless wiretaps violate the Fourth Amendment.<sup>75</sup> The *Oliver* Court, however, read *Katz* as more and as a result, it struggled to acknowledge, yet subsequently reject, the importance of *Katz* in any Fourth Amendment question that involves a determination of which places are protected from government interference.<sup>76</sup>

In *Katz*, the Court declared that the Fourth Amendment “protects people, not places,” and concluded that a telephone conversation within a public phone booth was the kind of activity that a person “seeks to preserve as private, even in an area accessible to the public,” and, thus, that it deserved constitutional protection.<sup>77</sup> Justice Harlan’s concurring opinion has produced the subsequently paradigmatic rule from the case, that a person must exhibit “an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable’.”<sup>78</sup> Justice Harlan’s rule, though, is limited to the facts of *Katz*, as demonstrated by his own application. He opined that “conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.”<sup>79</sup> Most scholars agree that tying the

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Fourth Amendment, some would argue that *Katz* overrules it, though in the form of a critique. See Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5 (2002). Others argue that *Katz* offered very little change in the property-based reasoning in *Olmstead*. See Kerr, *The Fourth Amendment*, *supra* note 31, at 808-15.

73. For a clear, concise overview of the debates among scholars see David Alan Sklansky, “One Train May Hide Another”: *Katz*, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 883 (2008).

74. Constitutional Criminal procedure textbooks typically offer *Katz* as the first case in the chapter that addresses what constitutes a search. See, e.g., JOSHUA DRESSLER & GEORGE C. THOMAS, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES* 84-89 (4th ed. 2010); MYRON MOSKOVITZ, *CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE POLICE* 135-39 (5th ed. 2010).

75. *Katz*, 389 U.S. at 353. For an overview of whether Congress or the *Katz* Court is ultimately responsible for prohibiting warrantless wiretaps, see Kerr, *The Fourth Amendment*, *supra* note 31, at 839-56. For an excellent overview of the competing theories regarding *Katz*, see Sklansky, *supra* note 72, at 882-86.

76. *Oliver v. United States*, 466 U.S. 170, 177 (1984).

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

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

79. *Id.* Justice Harlan seems to limit his predictions about future cases and his assertions

*Katz* holding too closely to places—whether public phone booths, homes, or open fields—eviscerates the case of any meaning.<sup>80</sup>

After *Katz*, the Court continued to employ trespass<sup>81</sup> analysis in Fourth Amendment considerations,<sup>82</sup> particularly in cases that involved houses and did not involve wiretaps.<sup>83</sup> The *Oliver* Court does the same, though with an effort toward incorporating the *language*, if not the spirit, of the Harlan test. The Court swept over the first prong<sup>84</sup> of the Harlan test, only offering a recitation of the holding from the lower court, which found that the defendant “had done all that could be expected of him to assert his privacy in the area of the farm that was searched.”<sup>85</sup> By devaluing the overwhelming demonstration

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about private places to situations where the defendant would be in conversation. He asserts at the start of his concurring opinion “that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy.” *Id.* But to read this assertion without the limitation *when in conversation* would mean that a person’s activities, which are readily visible in a public phone booth, would also be protected.

80. See, e.g., David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 158 (2002). *Katz* is a case about conversation, not about location. If the *Katz* phone booth had been in an open field, surely the Court would have reached the same conclusion because conversations by telephone, at the time, demonstrated a subjective expectation of privacy between the speaker and the listener and society was prepared to endorse that expectation of privacy.

81. I use the term trespass with two meanings, as does the Court. Trespass analysis in the traditional Fourth Amendment context of *Olmstead* required courts to determine whether the police had crossed over a protected threshold. Criminal trespass, the other meaning, was often the driving doctrine in Fourth Amendment trespass analysis, as it was in *Silverman*. The Court in *Oliver* found it unnecessary to engage in any complete pre-*Katz* model of analysis, and it rejects the positive law of criminal trespass.

82. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001).

83. See Sklansky, *supra* note 72, at 885 (“The result has been that, outside the area of electronic surveillance, the scope of the Fourth Amendment under *Katz* has looked a lot like the scope of the Fourth Amendment under the old, ‘trespass’ test of *Olmstead v. United States*.”).

84. *Oliver v. United States*, 466 U.S. 170, 179 (1984). There are many critics of the Court’s two-part test for assessing whether a defendant had a justifiable expectation of privacy, and most focus on the inherent irrelevance of the first prong’s assessment of the defendant’s subjective expectation of privacy. The second prong, what society is prepared to tolerate, is the brainchild of legal pragmatism, calling on judges to “define fundamental constitutional values by referring to contemporary social values, goals, and attitudes.” Cloud, *supra* note 33, at 250; see also Melvin Gutterman, *A Formulation of the Value and Means Model of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 681 (1988); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 43-44 (1991) (proposing ways to honor an individual’s subjective expectation of privacy).

85. *Oliver*, 466 U.S. at 173. The Court does not engage with the overwhelming evidence of the defendant’s subjective expectation of privacy – including posted “No Trespassing” signs

of a subjective expectation of privacy,<sup>86</sup> the Court was left to engage in a history lesson to declare that this kind of expectation of privacy is one that society is never prepared to recognize.<sup>87</sup> The Court returned to the open fields doctrine as an expression that society is not willing to tolerate individual demonstrations of a subjective expectation of privacy. In its refusal to honor the demonstrated, subjective expectations of the landowners, the Court rejected a case-by-case approach, and established a per se rule that warrantless government intrusion into any open field does not violate the Fourth Amendment.<sup>88</sup> Specifically, the *Oliver* majority rejected the following rule from *Katz*: “[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>89</sup>

The Court’s post-*Oliver* Fourth Amendment jurisprudence, however, *does not* reject this rule. It is the expansiveness of the Court’s ruling in *Oliver* that

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at regular intervals, a locked gate, and the establishment of a field in a highly secluded area “bounded on all sides by woods, fences, and embankments.” *Id.* at 174. Instead, the Court addresses only whether society is prepared to acknowledge the subjective demonstration of privacy. To see the two parts as unhinged from one another is to employ circular logic. *See Sklansky, supra* note 72, at 886.

86. Of interest is Justice Powell’s dissenting opinion in another open fields case decided just after *Oliver*. In *California v. Ciraolo*, 476 U.S. 207 (1986), the Court held that warrantless aerial observations by the police of curtilage spaces directly adjacent to the dwelling house did not violate the Fourth Amendment. In *Ciraolo*, Justice Powell criticizes the majority for significant departure from the *Katz* standard and argues that society has a per se expectation of privacy in the curtilage. *See id.* at 221. Powell’s philosophy focuses, foremost, on the nature of the space being searched rather than on the conduct of the government. In *Ciraolo*, the police were not committing an act of criminal trespass in their aerial observation, whereas in *Oliver*, they were.

87. Or put another way, a reasonable expectation of privacy is what the Court says it is. *See Cloud, supra* note 33, at 200-01 (explaining that as the Court employs pragmatist theories to search and seizure law, the end result may seem chaotic); Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L.REV. 1, 60 (2001) (“When judicial decisions affect people’s reasonable expectations of privacy and the reasonableness of a search depends on such expectations, the judicial decisions are indirectly affecting the Constitution’s meaning.”).

88. By crafting a bright-line rule, the *Oliver* Court creates the opportunity for an absurd result in the future. If Charlie Katz stepped into a phone booth that sat in an open field on posted, private property and placed a call, the police could lawfully wiretap the phone, but if he stepped into a phone booth on a crowded city street, they could not. Beyond absurd results, Professor Raymond Ku crafts an interesting argument that in creating bright-line exceptions to the Fourth Amendment, the Court neglects its constitutional duty as a check on an unrestrained executive. *See Raymond Ku, The Founder’s Privacy: The Fourth Amendment and the Power of Technological Surveillance after Kyllo*, 86 MINN. L. REV. 1325, 1328 (2002).

89. *Katz*, 389 U.S. at 351 (internal citations omitted).

remains most troubling, particularly in light of the Court's subsequent decisions regarding government intrusions into private spaces accessible from public places.<sup>90</sup> As plainly applied, Oliver and Thornton sought to preserve as private an area that *was not* accessible to the public, short of criminal trespass. The *Oliver* majority declared that some posted, private property deserves no more protection from government intrusion than public property, and that an open field deserves no protection, regardless of a person's subjective expectation of privacy. Consequently, the Court's position in this case could easily reach the result that a private conversation in a telephone booth on a busy street corner deserves Fourth Amendment protection while a cell phone conversation in one's own posted, private field does not, merely because in the former instance the speaker can demonstrate a justifiable expectation of privacy by standing in a phone booth while in the latter, the speaker in the field cannot.

The culmination of the two disjointed theories is the assertion of a *per se* rule that no court in the future need ever "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion"<sup>91</sup> when the police have conducted a search from or in an open field. Underpinning the open fields doctrine is the Court's most fundamental jurisprudence, that the Fourth Amendment shields people "from unreasonable government intrusions into . . . legitimate expectations of privacy."<sup>92</sup> But, the *Oliver* Court declared that a citizen cannot have a legitimate expectation of privacy in open fields or other areas that "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."<sup>93</sup>

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90. It is as if the Court has a blind spot for reconciling its open fields doctrine with the rest of its Fourth Amendment jurisprudence. *See, e.g., California v. Ciraolo*, 476 U.S. 207 (1986) (holding that a warrantless aerial inspection of private property does not violate the Fourth Amendment because any member of the public *could* conduct this inspection from a commercial airplane flying overhead).

91. *Scott v. Harris*, 550 U.S. 372, 383 (2007) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). I submit that a trial court should reach the balancing analysis recently reiterated in *Scott* when it encounters a warrantless entry into any posted, private property; under the open fields doctrine, a wholly unreasonable seizure in an open field is admissible. *See Oliver*, 466 U.S. at 181.

92. *United States v. Chadwick*, 433 U.S. 1, 7 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991).

93. *See Oliver*, 466 U.S. at 179. The facts in *Oliver* and *Thornton* did not require the Court to contemplate whether a person in an open field would be entitled to any Fourth Amendment protection, since the officers observed a static agricultural activity rather than dynamic human

Justice Marshall's dissent in *Oliver* seems acutely prescient of how government agents might abuse an open fields doctrine, and he suggests the slippery slope of jurisprudence that would result in the wake of the majority's opinion.<sup>94</sup> He wrote, "By exempting from the coverage of the [Fourth] Amendment large areas of private land, the Court opens the way to investigative activities we would all find repugnant."<sup>95</sup> The absolute exemption of huge tracts of personal property from the reach of the Fourth Amendment ignores the prevailing inquiry into intrusiveness that the Court makes with most other Fourth Amendment claims.<sup>96</sup>

## *II. Criminal Trespass, Historical Debates, Source Material, and the Fourth Amendment*

When the majority in *Oliver* cited to *Katz*—"[t]he premise that property interests control the right of the Government to search and seize has been discarded"<sup>97</sup>—it did so for the inverse of the purpose of the *Katz* rule. *Katz* offered *more* protection to people from government intrusion by discarding the limitations of the "old" trespass rule.<sup>98</sup> The *Oliver* court seems to view *Katz* as a wholesale rejection of all trespass analysis in favor of the justifiable expectation of privacy doctrine.<sup>99</sup> The *Oliver* Court reasoned that the law of

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activities. But Justice Marshall's dissent provokes the majority into opining on the issue in a footnote. The Court writes that "the Fourth Amendment provides ample protection to activities in the open fields that might implicate an individual's privacy." *Id.* at 179 n.10. It goes on to reference that citizens maintain some rights to privacy even in public places, leading one to conclude that the Court views posted, private open fields in the same way that it views public property. *See id.*

94. *See Oliver*, 466 U.S. at 184.

95. *See id.* at 196 (Marshall, J., dissenting). In his warning to the majority, Justice Marshall suggests the danger of eroding Fourth Amendment protections through the open fields doctrine by referencing *United States v. Lacey*, 669 F.2d 46, 54 (2d Cir. 1982) (Newman, J., concurring) ("[W]hen police officers execute military maneuvers on residential property for three weeks of round-the-clock surveillance, can that be called reasonable?").

96. Here, I am relying on a study conducted by Christopher Slobogin of U.S. Supreme Court Fourth Amendment cases which concluded that over 200 of the Court's cases examine intrusiveness or invasiveness. *See* Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1595 n.37 (2010).

97. *Oliver*, 466 U.S. at 183.

98. Put another way, after *Katz*, the spike mic would still be an unlawful government intrusion under the Fourth Amendment. *See Silverman v. United States*, 365 U.S. 505 (1961).

99. That the Court adopts the constrained view that property doctrine and the privacy doctrine are mutually exclusive remains a mystery. Frankly, it does not require a complex, post-modernist's view to comprehend that the boundary between the property doctrine and the privacy doctrine is "permeable and overlapping," a reflection of the Court responding to new, unanticipated situations involving invasive technology. *See* Kathryn Urbonya, *A Fourth*

criminal trespass had no place in the open fields analysis for three reasons. First, the Court found that, factually, fences and signs are not effective barriers to bar the public from viewing open fields.<sup>100</sup> Second, the Court found that the purpose of trespass laws is fundamentally different from the purpose of the Fourth Amendment.<sup>101</sup> Finally, the Court found, without offering any support, that the Framers did not intend for the Fourth Amendment to shelter criminal activity.<sup>102</sup>

#### A. The Positive Law of Criminal Trespass

The *Oliver* Court's bright-line rule<sup>103</sup> that open fields are not protected by the Fourth Amendment is hugely sweeping since the conduct of the spying agents constituted criminal trespass.<sup>104</sup> Also, considering the Court's definition of an open field as every place other than the home and the curtilage,<sup>105</sup> the Court effectively created a privilege for government agents to

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*Amendment "Search" in the Age of Technology: Postmodern Perspectives*, 72 MISS. L.J. 447, 478 (2002).

100. *Oliver*, 466 U.S. at 179.

101. *Id.* at 183 n.15.

102. *Id.* at 182 n.13.

103. With its bright-line open fields doctrine, the Court refuses to examine the police certainty in the investigation – the police had none in *Oliver* – by exempting all open fields from traditional Fourth Amendment analysis. The Court generally views intrusions into private spaces with an examination of the police certainty in their investigation. The Court allows more intrusion when the police have probable cause to believe that a crime is being committed or that a place contains evidence of a crime. The scale is sliding since *Terry v. Ohio*, 392 U.S. 1 (1968), established an intermediate police-citizen interaction, one that necessitates that the police have only a reasonable suspicion that criminal activity is afoot. For a thorough explanation of this “police certainty doctrine,” see CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 37-39 (2007).

104. Contrary to Justice Powell's assertion, the Court did not *reject* trespass analysis after *Katz*. See *Ciraolo*, 476 U.S. 207, 223 (1986) (Powell, J., dissenting) (“Since *Katz* we have consistently held that the presence or absence of physical trespass by police is constitutionally irrelevant to the question whether society is prepared to recognize an asserted interest as reasonable” (internal citation omitted)). In fact, Powell's assertion is incorrect, as he acknowledged as the author of the majority opinion in *United States v. U.S. District Court*, 407 U.S. 297, 313 (1972) (The Court's “decision in *Katz* refused to *lock* the Fourth Amendment to instances of actual trespass”) (emphasis added). The Court did not abandon trespass analysis in *Katz*; instead, it developed a more nuanced approach to the concept of trespass and moved beyond the notion of actual, physical trespass. See *Katz*, 389 U.S. at 512.

105. The general test used by the Court to determine whether a space is curtilage or an open field employs four factors: 1) proximity of the area to the home, 2) whether the area is enclosed along with the home, 3) how the area is used by the resident, and 4) steps taken by the resident to protect the area from observation. See *United States v. Dunn*, 480 U.S. 294, 301 (1987).

trespass on vast swaths of land.<sup>106</sup> The Court went to some lengths to justify the privacy interest in, and Fourth Amendment protection of, the curtilage adjacent to private homes, referring back to the *Hester* Court's similar assertion.<sup>107</sup> In part, this was analytically necessary given the Court's reliance on the plain text of the Fourth Amendment; insofar as "curtilage" is not listed there, the Court needed to establish that the curtilage was considered part of the "house" at common law.<sup>108</sup> Of course, the laws of criminal trespass apply to houses, curtilage, and open fields without distinction.

Positive law,<sup>109</sup> such as a criminal trespassing statute, is not the sole means by which the Court can assess society's expectations of privacy. The Court consistently looks outside of the confines of the Fourth Amendment to determine what society is willing to recognize as reasonable.<sup>110</sup> The Court describes these as "sources outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."<sup>111</sup> Perhaps the best example of the Court's reliance on trespass law comes from the seminal Fourth Amendment case, *Boyd v. United States*.<sup>112</sup> In *Boyd*, the Court addressed whether the compulsory production of private papers prompted Fourth Amendment review,

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106. It is hard to imagine a prosecutor offering evidence of marijuana farming from the agents in *Oliver*, then turning around and prosecuting those agents for criminal trespass.

107. From *Hester* and *Oliver*, the Court adopts an approach that all private property that is neither the house nor the curtilage is an open field. See *id.* at 300. "[T]he central component of this inquiry is whether the area harbors the 'intimate activity associated with the 'sanctity of a man's home and privacies of life.'" *Oliver*, 466 U.S. at 180 (quoting *Boyd v. United States*, 116 U.S. 6161 (1886)).

108. See *Oliver*, 466 U.S. at 186 (Marshall, J., dissenting) ("We are not told, however, whether the curtilage is a 'house' or an 'effect' – or why, if the curtilage can be incorporated into the list of things and spaces shielded by the Amendment, a field cannot.").

109. See Orin Kerr, *Four Models*, *supra* note 36, at 516-19 (theorizing that an examination of positive law offers a model for courts when determining the reach of Fourth Amendment protection); see also *Oliver*, 466 U.S. at 191 (Marshall, J., dissenting) ("Thus, positive law not only recognizes the legitimacy of *Oliver*'s and Thornton's insistence that strangers keep off their land, but subjects those who refuse to respect their wishes to the most severe penalties—criminal liability.").

110. See *Rakas v. Illinois*, 439 U.S. 128 (1978). As it did when citing *Katz*, the *Oliver* majority cites *Rakas v. Illinois* for the limitation on the *Rakas* rule rather than for the rule itself. See *Oliver*, 466 U.S. at 183 ("[E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon").

111. *Rakas*, 439 U.S. at 143 n.12.

112. 116 U.S. 616 (1886). The Court specifically linked the Fourth Amendment to trespass law in *Boyd*; quoting Lord Camden, the author of legal opinions celebrated by the English and the American colonists, the Court reiterated that the "great end for which men entered into society was to secure their property." *Id.* at 627.

and in deciding that the Fourth Amendment *did* protect personal papers, the Court relied on property law.<sup>113</sup> In basic, common law terms, a citizen could expect privacy behind the castle gates, and trespass law helped enforce that privacy interest against invaders; the Fourth Amendment offered the same protection against government intruders, notwithstanding contemporary interpretations that extend the castle gates to intangible privacy interests in the spoken word captured by technology.<sup>114</sup> As the Court expanded its interpretation of the Fourth Amendment to include privacy and personal security, it did not reject the trespass doctrine;<sup>115</sup> it merely found the trespass interpretation too narrow for the intrusions of modern technology. But the *Oliver* Court chose to interpret the evolution from the narrow trespass doctrine, to the *Katz* notion that the Fourth Amendment protects people, not places, as a near rejection of trespass principles by applying the limitation on the rule: “even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items or activity conducted thereon.”<sup>116</sup>

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113. *Id.* at 623-624. Fourth Amendment scholars criticize the Court’s early, slavish use of property law as the cornerstone of its Fourth Amendment analysis. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 23 (1997) (employing the term “property worship”); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 579-80 (1996) (arguing that the *Boyd* Court established a near absolute adherence to theory that property rights trumped police powers, thus sanctifying property rights much as the Court had done in *Lochner*).

114. See Kathryn Urbonya, *supra* note 98, at 477-83 (explaining that the *Boyd* Court’s understanding that the citizen’s “sacred right” in his real and personal property also encompassed his “personal security and personal liberty” (citations omitted)). It took the Court two generations to move from its constrained view that the Fourth Amendment could not protect words obtained without trespassing to its expansive view that citizens have a privacy interest in all words in which they maintain a justifiable expectation of privacy. See *Olmstead v. United States*, 277 U.S. 438, 466 (1928). Cf. *Katz*, 389 U.S. at 353 (“We conclude that the underpinnings of *Olmstead* [...] have been so eroded by our subsequent decisions that the “trespass” doctrine there enunciated can no longer be regarded as controlling”).

115. To the contrary, courts continue to embrace trespass doctrine to interpret the Fourth Amendment. See Luke Milligan, *The Fourth Amendment Rights of Trespassers: Searching For the Legitimacy of the Government-Notification Doctrine*, 50 EMORY L.J. 1357, 1360 (explaining the conflict in the Amezquita-Ruckman theory, which holds that trespassers have no legitimate privacy interest even in tents or campers, and the Government-Notification Doctrine, which requires the government to prove that the defendant was a trespasser and had been notified of such before admitting evidence gathered during a warrantless search of a tent). That trespassers may have more of an expectation of privacy than landowners against government intrusion seems an absurd result.

116. *Oliver*, 466 U.S. at 183.

Orin Kerr has written that “[t]he positive law approach is descriptive, not normative: it asks whether the government’s access to the suspect’s information was achieved legally based on preexisting legal doctrine.”<sup>117</sup> The simple inquiry is whether the government broke an existing law in order to obtain the information, and if it did, then the government has violated a reasonable expectation of privacy.<sup>118</sup> The Court has never made this approach, of considering and applying positive law, mandatory in its Fourth Amendment analysis, and the majority in *Oliver* considered and rejected the positive law approach.<sup>119</sup>

The Court in *Oliver* was evidently satisfied that it was not required to follow the law of trespass, to the extent which that law forbids intrusions onto posted, private lands, in defining whether open fields deserved Fourth Amendment protection.<sup>120</sup> The Court concluded “that the government’s intrusion upon the open fields is not one of those ‘unreasonable searches’ proscribed by the text of the Fourth Amendment.”<sup>121</sup> Because the Fourth Amendment extends only to “persons, houses, papers, and effects,” and not, as James Madison wished, to “other property,”<sup>122</sup> the Court reasoned that the distinction between the protected house and the unprotected “other property” evolves properly as pure textual construction.<sup>123</sup> Though the common law plainly recognized trespass

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117. Kerr, *Four Models*, *supra* note 36, at 516.

118. *Id.*

119. Had the majority accepted the positive law approach, it would have found that the officers in *Oliver* were trespassing, and as they broke the law in obtaining the information about the marijuana fields, they violated a reasonable expectation of privacy. *See generally*, KY. REV. STAT. ANN. § 511.070 (West 1964); ME. REV. STAT. tit. 17A, § 402 (1964). Under the first prong of the *Katz* test, the defendants in *Oliver* did everything within reason to demonstrate their subjective expectation of privacy, like erecting fences and posting signs. Under the second prong of the *Katz* test, society would certainly be prepared to recognize an expectation of privacy as justifiable if the government agents committed criminal trespass, resulting in a Fourth Amendment violation in *this* open field search.

120. Specifically, at the time of the government intrusions onto Oliver’s and Thornton’s posted, private property, the law in Kentucky criminalized “knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public,” and the law in Maine criminalized intrusion into “any place . . . which is posted in a manner prescribed by law or in a manner reasonably likely to come to the attention of intruders which is fenced or otherwise enclosed.” KY. REV. STAT. §§ 511.070(1), 511.080, 511.090(4); ME. REV. STAT. ANN. TIT. 17A, § 402(1)(c).

121. *Oliver*, 466 U.S. at 177.

122. A reading consistent with Madison’s original draft is wholly proper, and is, in fact, consistent with the Ninth Amendment’s directive that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

123. *See* U.S. CONST. amend. IV; *Oliver*, 466 U.S. at 176-77 (quoting NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES

as an improper incursion onto land, the Court ignored the profound conflict created by its expanded open fields doctrine and common law trespass principles.<sup>124</sup>

It is the majority's wholesale rejection of the positive law of trespass that makes the overall reasoning in *Oliver* most suspect.<sup>125</sup> "One of the purposes of the law of real property (and specifically the law of criminal trespass) is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities."<sup>126</sup> Read in the extreme, after *Oliver*, government agents are allowed to break down fences to enter private property and ignore demands to leave private property without fear of prosecution.<sup>127</sup> One is left to think that the Court created a privilege for government agents who trespassed onto posted, private property.<sup>128</sup>

According to the *Oliver* majority's reasoning, trespass laws reflect only the normative attitude of society toward intrusions by *private* citizens.<sup>129</sup> If trespass laws have *no* meaning in the Court's determination of whether a citizen can have a reasonable expectation of privacy against government

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CONSTITUTION 100 n.77 (1937)). Four states have disagreed with the expansive open fields doctrine set out in *Oliver*. Vermont's constitution offers more protection than the U.S. Constitution. See VT. CONST. ch. I, art. 11 ("[T]he people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure."); *State v. Kirchoff*, 587 A.2d 988 (Vt. 1991) ("[A] lawful possessor may claim privacy in 'open fields' . . . where indicia would lead a reasonable person to conclude that the area is private."). Mississippi, New York, and Oregon have interpreted their constitutions, which have essentially the same language as the U.S. Constitution, as offering more protection to their citizens than the Court authorized in *Oliver*. See, e.g., *Falkner v. State*, 98 So. 691 (Miss. 1924); *People v. Scott*, 593 N.E.2d 1328, 486 (N.Y. 1992) ("A constitutional rule which permits State agents to invade private lands for no reason at all—without permission and in outright disregard of the owner's efforts to maintain privacy by fencing or posting signs—is one we cannot accept as adequately preserving fundamental rights of New York citizens."); *State v. Dixon*, 766 P.2d 1015 (Or. 1988).

124. *Oliver*, 466 U.S. at 180.

125. Or, put another way, "[t]he *Oliver* Court justified this curious doctrine by rejecting the positive law model." Kerr, *Four Models*, *supra* note 36 at 518.

126. *Oliver*, 466 U.S. at 190 n.10 (Marshall, J., dissenting).

127. See Stephen Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 19 (1986).

128. The Court often excuses the authorized criminality of police officers, especially those working in drug enforcement. For a full treatment of the harms to the criminal justice system from criminal conduct by police, see Elizabeth Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155 (2009).

129. See *Oliver*, 466 U.S. at 183-84 ("Thus, 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.").

intrusion in an open field, then a property owner's only option to protect himself from the spying eye of the government would be self-help.<sup>130</sup> A private person cannot hike across posted, private property without fear of criminal recourse; likewise, a hunter who follows a target onto private property cannot do so without fear of criminal recourse. Nevertheless, according to the Fourth Circuit, a government agent can enter posted, private property with a camera and set up a constant spying operation of the owner's activities without even a nod in the direction of constitutional consideration.<sup>131</sup> The property owner has no recourse against the trespassing and has, thus, a severely diminished interest in his real property.

### *B. Original Meaning of the Fourth Amendment*

The *Oliver* majority purported to look to the Framers as it grappled to justify that a landowner has *no* expectation of privacy, under any circumstances, in a posted, private open field, and it declared that the Framers had a very firm understanding of those areas—like the home—that should be “free from arbitrary government interference.”<sup>132</sup> But the majority leapt quickly to an account of the “sanctity of the home” doctrine that supported its conclusion that *only* the home – and not an open field – deserves protection under the Fourth Amendment. That the Court looked to the use of open fields<sup>133</sup> rather than to the history of the sanctity of all property, both enclosed and open, reveals a disingenuousness in its original intent analysis.<sup>134</sup>

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130. See *id.* at 195 n.19 (Marshall, J., dissenting). While deadly force is justified only in response to deadly force, land owners do have the right to use the force necessary to eject a trespasser. A court might examine the force used by the trespasser to accomplish illegal entry onto the land to determine the justifiable force that the landowner could use to eject.

131. *United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2743 (2009) (holding that warrantless, long-term, trespassory videotaping on posted, private property does not violate the Fourth Amendment protection of citizens to be free from unreasonable searches).

132. *Id.* at 178.

133. *Id.* at 179.

134. I am not attempting to resolve whether the Framers intended that open fields deserved the protection of the Fourth Amendment, and I am not entering the debate about the true meaning and intent of the Fourth Amendment that can be gleaned from the plain text and historical review. Professor Thomas K. Clancy is the leading Fourth Amendment historian, and his work reflects a depth and nuance of the issues that the *Oliver* majority largely ignores. See Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEMPHIS L. REV. 483, 490-517 (1995) (discussing the long history of the role of property rights and liberty in the development of the Fourth Amendment); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 309-27 (1998) (offering an extensive overview of the Court's property-based Fourth Amendment jurisprudence and evidence of the historical roots of the

The question of the Framers' intent is both complex and highly contested, something the *Oliver* majority failed to acknowledge. That the Court selected a tiny snippet of the complex record of the Framers' understanding of property protection through the Fourth Amendment suggests an indifference to any substantive analysis of how the Framers might have viewed the meaning of the Fourth Amendment *in light of* the Court's expansion in *Katz*. What follows here is not a complete rendering of the history of the Fourth Amendment or the history of the underlying property laws of England and the American colonies. The Fourth Amendment, among other parts of the Constitution, was meant to reflect the tension between state power and individual rights. The *Oliver* majority's failure to acknowledge that the Framers were intensely protective of property rights should prompt skepticism.<sup>135</sup>

Originalist analysis of the Fourth Amendment begins with William Blackstone, as he captured the laws of England in his *Commentaries on the Laws of England*, which on many accounts formed the most significant basis for the Framers' understanding of the law.<sup>136</sup> In presenting his *Commentaries*, William Blackstone described the absolute right of property obtained from Magna Carta, and applied it to a man's *lands*, not just his home:

[Pursuant to Chapter 29] and by a variety of ancient statutes it is enacted that no man's lands or goods shall be seised into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none.<sup>137</sup>

Blackstone viewed property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total

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notion that property rights are sacred).

135. I am making no effort to be comprehensive or exhaustive in this historical review; however, I am being more complete than the *Oliver* majority.

136. This Article does not concern itself with constitutional hermeneutics, and acknowledges the interpretive theory of the Constitution is highly contested. The scant Framing history offered here serves only as a suggestion that the *Oliver* majority failed to give even the smallest attention to the fact that the Framers may well have had a reasonable expectation of privacy for activities in open fields. For a detailed look at the original meaning debates, see, for example, Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 459 (2009); Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).

137. 1 WILLIAM BLACKSTONE, COMMENTARIES \*135.

exclusion of the right of any other individual in the universe.”<sup>138</sup> For Blackstone, the right to exclude others from real property was enforceable by the trespass laws and did not even require the presence of a tangible enclosure delineating the private nature of the space:

[E]very man’s land is in the eye of the law enclosed and set apart from his neighbor’s: and that either by a visible and material fence; . . . or by an ideal inviolable boundary, existing only in the contemplation of law . . . and every such entry or breach of a man’s close carries necessarily along with it some damage or other.

. . .<sup>139</sup>

In addition, Blackstone noted that, while the law did provide for exceptions which would not result in a trespass action, a trespass *ab initio* would result where an individual invaded property without proper authority, such as “[i]n cases where a man misdemeanors himself, or makes an ill use of the authority with which the law entrusts him,” as “this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass.”<sup>140</sup> Despite Blackstone’s thesis that a boundary need not be visibly marked, so long as it was legally understood—“an ideal inviolable boundary, existing only in the contemplation of the law”<sup>141</sup>—a 1769 case involving property rights provided that, since “the principal end for which the first institution of property was established” was “to preserve the peace of mankind,” then some mark should be placed on property in order to distinguish it so that “every body knew that it was not open to another” and “none should intrude upon the possession of another.”<sup>142</sup>

The Framers relied heavily on the British example in outlining the right to property.<sup>143</sup> For example, John Locke’s *Two Treatises of Government*, like the work of Coke and Blackstone, would have been widely read by the Framers and is often said to have been incorporated into their views of property.<sup>144</sup>

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138. 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

139. 3 WILLIAM BLACKSTONE, COMMENTARIES \*209-10.

140. *Id.* at \*212-13.

141. *Id.* at \*209-10.

142. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.) 217-19, 235.

143. See Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 121 (emphasizing that Americans of the founding generation would have viewed security, liberty, and property as absolute rights because Blackstone had indicated such). In fact, it is security that has garnered the most attention from scholars, not property, as the meaning of the former is harder to decipher than the latter. See *id.* at 123; see also, Thomas Y. Davies, *Recovering the Fourth Amendment*, 98 MICH. L. REV. 547, 668 (1999).

144. BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 30 (2001).

Locke famously believed that “[t]he great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property.”<sup>145</sup> For Locke, then, property rights were strongly tied to an individual’s fundamental right to liberty, and government should be limited to preserving those rights, as government “has no other end but the preservation of property.”<sup>146</sup> His proposition was that society is formed by people who “unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.”<sup>147</sup>

This broad and inviolate view of property as a natural right, intimately intertwined with liberty and freedom from government intrusion, was influential on the men who wrote and ratified the Constitution, and can be traced in their writings, the various state constitutions adopted during the revolutionary period, and the earliest drafts of the Fourth Amendment itself. In 1776, John Adams declared:

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; and to give his personal service, or an equivalent, when necessary. But no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent.<sup>148</sup>

Although seven different states had constitutional provisions which governed search and seizure by the time the Constitutional Convention met in 1787,<sup>149</sup> it was most likely Article 14 of the Massachusetts Declaration of Rights and Constitution, drafted by John Adams and adopted in 1780, that later served as the model for the Fourth Amendment: “Every subject has a

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145. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 350-51 (Peter Laslett ed., Cambridge Univ. Press 1991).

146. *Id.* at 329.

147. *Id.* at 250.

148. John Adams, *Thoughts on Government* (1776), in THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS, BY HIS GRANDSON CHARLES FRANCIS ADAMS 225-26 (Charles Francis Adams ed., 1856).

149. Lasson, *supra* note 123, at 82.

right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions.”<sup>150</sup>

The absence of a Bill of Rights in the U.S. Constitution led to considerable objections from opponents, including Richard Henry Lee and other writers concerned that the new government would strip away fundamental rights. Lee was so concerned that he drafted his own version of a Bill of Rights, where he included a search and seizure clause that provided “the Citizens shall not be exposed to unreasonable searches, seizures of their papers, houses, persons, or property.”<sup>151</sup> Writing in his “Letters from a Federal Farmer,” Lee claimed:

There are other essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men’s papers, property, and persons.<sup>152</sup>

Lee was hardly alone in moving for a Bill of Rights. The New York Convention that ratified the Constitution proposed an amendment that would have given every freeman “a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property.”<sup>153</sup> The North Carolina Convention proposed a similar provision protecting against “unreasonable searches and seizures of his person, his papers and property,”<sup>154</sup> and Virginia’s 1788 ratifying convention proposed a federal amendment to affirm that “every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and his property.”<sup>155</sup>

James Madison’s first draft of the Fourth Amendment secured *all* of an individual’s property from government intrusion: “The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.”<sup>156</sup> The Federalist papers contain several instances in which Madison

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150. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 238-39 (1988).

151. *Id.* at 241.

152. PAUL LEICESTER FORD, PAMPHLETS ON THE CONSTITUTION 315 (1888).

153. B. SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 913 (1980) (reproducing New York proposed amendments, 1778) (cited in *Minnesota v. Carter*, 525 U.S. 83, 93 (1998) (Scalia, J., concurring)).

154. *Id.* at 968 (reproducing North Carolina proposed Declaration of Rights, 1778).

155. EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 184 (1957).

156. NELSON B. LASSON, *supra* n.123, at 100 n.77 (citing *Annals of Cong.*, 1st Cong., 1st sess., p. 452).

explained his belief that government exists to support and defend property rights: “The protection of these faculties [the rights of property] is the first object of government,”<sup>157</sup> and “[g]overnment is instituted no less for protection of the property, than of the persons, of individuals.”<sup>158</sup> Madison’s consistent interpretation of property as encompassing everything that a man acquires (“whatever is his own”) can also be seen by this excerpt published after the Bill of Rights was finally ratified by the states:

[A] man’s land, or merchandize, or money is called his property . . . Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his own.<sup>159</sup>

The proposed amendments of Lee, Madison, and the New York, Virginia, and North Carolina ratifying conventions were consistent with this generally-held view, and Madison’s writings before and after passage of the Bill of Rights confirm his understanding of property rights. Although the final version of the Fourth Amendment that was approved and ratified was different from Madison’s original draft, in that it replaced the phrase “and their other property” with “and their effects,”<sup>160</sup> there is no historical documentation explaining the purpose, if any, for such change. In defending the Constitution against claims that it failed to protect property rights, John Adams asserted that “[t]he moment the idea is admitted into society that property is not as sacred as the law of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”<sup>161</sup> Madison similarly linked personal security to property rights in his defense of the Constitution; “[h]ence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”<sup>162</sup> Moreover, in 1790, while the Bill of Rights

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157. THE FEDERALIST NO. 10 (James Madison).

158. THE FEDERALIST NO. 54 (James Madison).

159. James Madison, On Property, (March 29, 1792), in THE FOUNDERS’ CONSTITUTION 598-99 (Philip Kurland and Ralph Lerner, eds., 1987).

160. U.S. CONST. amend. IV.

161. JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES (1787), reprinted in THE POLITICAL WRITINGS OF JOHN ADAMS 148 (George A. Peek, Jr. ed. 2003).

162. *Id.*

was being ratified, John Adams claimed, “[p]roperty must be secured or liberty cannot exist.”<sup>163</sup>

Since the Fourth Amendment was drafted and ratified by men who saw the invasive general warrants and writs of assistance as the ultimate intrusion on their privacy and security, it is reasonable to assume that by buttressing the security of their property rights, the Framers hoped that the Fourth Amendment would fully protect those rights and shield the people from all unreasonable searches and seizures by the federal government.<sup>164</sup> In interpreting the Fourth Amendment, the Court has time and again also focused its attention on a closer examination of arguably the most critical of the specific rights afforded property owners, namely, the right to exclude others, and, in particular, the government.<sup>165</sup>

Though the *Oliver* majority declared that the plain text of the Fourth Amendment limits the reach of Fourth Amendment protection, it could have arrived at a more nuanced and complex conclusion,<sup>166</sup> particularly in light of the Court’s contemporary understanding that the Amendment protects people, not places. The expansion of the plain text of the Fourth Amendment, to include curtilage, offices, commercial buildings, and telephone booths, provokes an acute conflict with the Court’s assertion that “the government’s intrusion upon the open fields is not one of those ‘unreasonable searches’ proscribed by the text of the Fourth Amendment.”<sup>167</sup>

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163. JOHN ADAMS, DISCOURSES ON DAVILA (1790), in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

164. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT, ORIGINS AND ORIGINAL MEANING 767 (2009). See generally Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, supra note 134 (concluding that the property- and privacy-based analyses of the Fourth Amendment are flawed and that the Amendment instead should be read as a protection of security interests).

165. See, e.g., *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984) (“‘Property’ is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. The right to use the physical thing to the exclusion of others is the most essential and beneficial. Without this right all other elements would be of little value.”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (“The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”); *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (“[A]n essential element of individual property is the legal right to exclude others from enjoying it.”); *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring) (“The notion of property... consists in the right to exclude others from interference with the more or less free doing with it as one wills.”).

166. In fact, the Ninth Amendment could be read to demand as much. See U.S. CONST. amend. IX.

167. *Oliver v. United States*, 466 U.S. 170, 177 (1984).

The wholesale rejection of *any* legitimate expectation of privacy in an open field is simply unsupported by even a quick history lesson, and the *Oliver* majority's assertion to the contrary relies on mere pronouncements about the Framers' intent. The Court relies on Justice Holmes' formalist shorthand from *Hester* in its troublesome, limited review of the legal history.<sup>168</sup>

### *III. The Dude Abides: How Temperance and Anti-Drug Movements Justified the Creation and Expansion of the Open Fields Doctrine*

By declaring that posted, private open fields deserved no constitutional protection, the *Oliver* majority employed a policy model,<sup>169</sup> importing its own normative values into the decision, and situated its analysis outside of the framework of most Fourth Amendment jurisprudence. Yet the Court curiously rejected the need to establish any mechanism to determine the balance between government justification and the invasiveness of the intrusion.<sup>170</sup> In this section, the Article will theorize how Prohibition-era policies and policing necessities may have prompted the Court to establish the open fields doctrine in *Hester* and how the war on drugs may have prodded the Court to reinforce and extend the doctrine in *Oliver*. In *Oliver*, the majority adopted the tone of Prohibition-era Fourth Amendment jurisprudence<sup>171</sup> rather than that of the Framing era or the contemporary era marked by the *Katz* test. In so doing, the Court trapped its open fields doctrine in the 1980's pragmatism of dominant drug enforcement policy; the blanket assertion of a per se open fields exclusion from Fourth Amendment protection forecloses any future pragmatic approach to other open fields issues.<sup>172</sup>

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168. See *Hester v. United States*, 265 U.S. 57, 59 (1924) (“The distinction between the [open field] and the house is as old as the common law.”).

169. See Kerr, *Four Models*, *supra* note 36, at 519-22.

170. For a full explanation of the proportionality model for Fourth Amendment analysis, see SLOBOGIN, *supra* note 103. “The principle component of this framework is the idea that the justification for a government search or seizure ought to be roughly proportionate to the invasiveness of the search or seizure.” Slobogin, *supra* note 96, at 1588.

171. The majority asserts that, “[c]ertainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post ‘No Trespassing’ signs.” *Oliver*, 466 U.S. at 182 n.13.

172. If the justification for the open fields doctrine in the 20th century relies on Prohibition-era policy and drug enforcement policy, then the doctrine should be applied in similar situations. “What is noteworthy for this discussion is that the opinion ultimately rests upon a pragmatist instrumentalism and concern for social and physical context that license judges to base their decisions upon unsupported suppositions about the nature of social reality.” Cloud, *supra* note 33, at 256-57. It is hard to see how the justification of protecting a migratory bird, such as the red-tailed hawk, which can be trapped lawfully with a proper permit, can sustain the

Current scholars tend to situate contemporary analysis of police infringement on individual liberty in the police abuses of the Prohibition era and in the restorative responses of the Modern era.<sup>173</sup> The expansion of the open fields doctrine was an exception to the pattern of restoring individual rights in the Modern era after the police and courts trampled them during the Prohibition era.<sup>174</sup> However, when the Court decided *Oliver* in 1984, a new age of prohibition was underway that did not encourage a restoration of property rights that could be framed as encouraging, or at least masking, illicit behavior.

The U.S. war on drugs began in earnest during the Reagan era, and politicians touted the drug scourge as something to fear, something that was destroying the fabric of American culture.<sup>175</sup> When faced with a marijuana grower who tried to use private property laws to shield the very criminal activity being warned of and being fought on foreign and domestic fronts, the Court may have responded to the political pressure of the time and extended the open fields doctrine decided in *Hester*—an alcohol prohibition case—to *Oliver*—a marijuana prohibition case. A tacit effort to aid the raging war on drugs may have motivated the Court to extend its open fields doctrine without due regard for its evolving, flexible Fourth Amendment jurisprudence.<sup>176</sup>

However, as time has passed, the political climate that may have driven the Court in deciding *Oliver* no longer exists. With more and more states permitting the medical use of marijuana<sup>177</sup> and with an Obama Justice Department specifically instructed to avoid investigation and zealous

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extension of the open fields doctrine to allow for constant video surveillance. See *United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009).

173. See, e.g., Wesley Oliver, *The Neglected History of Criminal Procedure*, 62 RUTGERS L. REV. 447 (2010).

174. See Richard Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1100 n. 119 (1987) (detailing the many cases where courts concluded that *Katz* simply overruled the open fields doctrine as set out in *Hester*).

175. See e.g., Lamar Jacob, *Rolling Out the Big Guns*, TIME, Sept. 22, 1986, <http://www.time.com/time/magazine/article/0,9171,962371,00.html>.

176. See Stephen Saltzburg, *supra* note 127, at 1.

177. The best resource for the current status of medical marijuana laws in the United States is [www.procon.org](http://www.procon.org), which provides links to individual state statutes. Fifteen states – Alaska, Arizona, California, Colorado, Hawaii, New Jersey, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington—and the District of Columbia currently have provisions for the legal use of medical marijuana. See <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881#summary>. Ten states—Alabama, Connecticut, Delaware, Idaho, Illinois, Maryland, Massachusetts, New Hampshire, New York, and North Carolina—have pending legislation to legalize medical marijuana. See <http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481>.

prosecution of marijuana-related crimes,<sup>178</sup> it now appears that the open fields doctrine lacks the justification of its political origin, just as many Prohibition-era doctrines did following a return to societal and governmental alcohol tolerance. Moreover, by declaring that posted, private property was open to government inspection without Fourth Amendment protection, the Court drove marijuana cultivation indoors, where it has become significantly harder to police.<sup>179</sup> Finally, the rationale of effectively policing marijuana cultivation fails to justify the expansion of the open fields doctrine to constant video surveillance to police the largely regulatory crime of trapping a protected migratory bird without a license.

#### *A. How the Prohibition Era Established a New Standard for Police Investigation*

From 1920 to 1933, the Eighteenth Amendment<sup>180</sup> prohibited the sale, manufacture, and transportation of alcohol for consumption.<sup>181</sup> While numerous states had adopted state-wide bans on alcohol, the Eighteenth Amendment broadened the scope of the prohibition to a federal one, without any consideration for its enforcement.<sup>182</sup> As is often the case with sumptuary laws, the citizenry was not in step with Prohibition; alcohol was a piece of the national fabric, and intense law enforcement efforts failed to curb alcohol manufacturing and consumption.<sup>183</sup>

Because enforcement of Prohibition laws was difficult, and circumvention was rampant due to a public perception that the laws were inane, police

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178. See Memorandum from David W. Ogden, Deputy Attorney General to All United States Attorneys (Oct. 19, 2009) (“As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”) (on file with author).

179. The Court has been more likely to protect the illegal marijuana farming when it is indoors. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001).

180. U.S. CONST. Amend. XVIII

181. The Eighteenth Amendment became effective on January 16, 1920, after 36 states approved the Amendment.

182. The states had various methods for proscribing the use of alcohol. For a comprehensive look at how the states handled prohibition of alcohol prior to the enactment of the Eighteenth Amendment, see DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 83-95 (2010). Rhode Island and Connecticut rejected the Eighteenth Amendment and continued to have state laws that regulated alcohol distribution throughout the Prohibition period. *Id.*

183. Insurance companies reported that alcoholism rates soared by more than 300 percent during the 1920s, and by the close of the 1920's, New York City had over 30,000 speakeasies. See Deborah Blum, *The Chemist's War*, SLATE, Feb. 19, 2010, <http://www.slate.com/id/2245>; and see generally *Boardwalk Empire* (HBO 2010).

resorted to invasive and deadly tactics to try to ferret out violators.<sup>184</sup> There were only 200 federal Prohibition officers in place in New York when the Volstead Act took effect in January 1920.<sup>185</sup> Most of those officers were incompetent and corrupt, and during investigations, they destroyed private property, accepted bribes, and opened their own illegal speakeasies.<sup>186</sup> The urban citizenry became intolerant of the unbridled incursion into privacy and private spaces, and criminal defendants caught in the dragnet of Prohibition began to challenge the admissibility of evidence seized in liquor raids under the relatively newly-created exclusionary rule.<sup>187</sup>

The courts in urban centers like New York had little patience or tolerance for the zealous enforcement of prohibition laws.<sup>188</sup> The courtrooms were flooded with new criminal defendants, each with a Fourth Amendment challenge to the method of police search and seizure in their case.<sup>189</sup> Yet enforcement in urban centers was likely easier than enforcement in rural areas, where landowners held vast acreage and could conceal the illegal manufacturing and consumption of alcohol. Rural moonshiners developed systems for customers to ring a bell hanging on a tree in the woods, take a stroll, then return to find an alcoholic beverage waiting. Grateful customers would then leave a fee at the tree.<sup>190</sup> This entire enterprise would take place on posted, private property, often highly guarded by people and dogs.<sup>191</sup>

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184. Among the most egregious government effort to curb the consumption of alcohol was the “chemist’s war of Prohibition,” a program run by federal agents to poison industrial alcohol that was manufactured in the United States. *See generally* DEBORAH BLUM, *THE POISONER’S HANDBOOK: MURDER AND THE BIRTH OF FORENSIC MEDICINE IN JAZZ AGE NEW YORK* (2010). Bootleggers routinely stole industrial alcohol then re-natured and re-purposed it as drinkable liquor. *See* Blum, *supra* note 183. During the Christmas season of 1926, 23 people died from alcohol poisoning, compliments of the “chemist’s war,” and another 60 were made gravely ill. *Id.* In 1927, deaths in New York City from alcohol poisoning reached 700. *Id.*

185. National Prohibition Act. ch.85, 41 Stat. 305 (Comp. Stat. Ann. 1923); *see also* MICHAEL A. LERNER, *DRY MANHATTAN: PROHIBITION IN NEW YORK CITY* 71 (2007).

186. *See* WILBUR R. MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON* 78 (1973) (explaining expansive police corruption in the Prohibition era); LERNER, *supra* note 185 at 70-71.

187. *See Weeks v. United States*, 232 U.S. 383 (1914) (establishing the federal exclusionary rule); Victor House, *Search and Seizure Limits Under the Prohibition Act*, N.Y. TIMES, Feb. 11, 1923 at 14.

188. LERNER, *supra* note 185 at 80.

189. *Id.*

190. *See* David Stacks, *Bluffton-Cherokee County’s Boomtown Gives Up Ghost*, ANNISTON STAR, Nov. 11, 1982, *available at* <http://users.ap.net/~chenae/chertext.html> (detailing a rural history of the late nineteenth and early twentieth century along the Alabama-Georgia border).

191. Some of the best descriptions of the rural moonshine industry during Prohibition (and after, as moonshiners continued to manufacture and sell the alcohol free from government taxation) can be found in folk music from the era. *See* AL HOPKINS AND HIS BUCKLEBUSTERS,

Government agents simply could not patrol the area and enforce Prohibition without entering posted, private property.

The Court offered support to police enforcement of Prohibition in its interpretation of the reach of the Fourth Amendment. In *Hester v. United States*,<sup>192</sup> and *Carroll v. United States*,<sup>193</sup> the Court concluded the warrantless police searches of open fields and automobiles did not violate the Fourth Amendment; in both cases, the Court grappled with how to interpret the Fourth Amendment so that the police could tackle the difficult task of enforcement of Prohibition. Of interest here is *Hester*, where Justice Holmes, writing for the majority, put an end to any constitutional obstacle between law enforcement officers and the application of Prohibition in rural communities. In facts straight from *Tobacco Road*,<sup>194</sup> Hester and his father operated a moonshine business out of the family home. Customers drove to the house, and Hester would exit the house to deliver quart bottles of moonshine whiskey.<sup>195</sup> To investigate this private moonshining operation, officers had to hide about 100 yards away from Hester's house, on the Hester family property, to observe the illegal transactions. When the officer gave a signal for the raid, one customer threw his quart bottle, which the police recovered.<sup>196</sup> Hester, who also had a jug in his possession at the time the police emerged for the raid, threw the jug, which broke, but "kept about a quart of its contents."<sup>197</sup> Hester challenged the testimony of the officers at trial, claiming that they obtained the information about the contents of the jug unlawfully, as they were trespassers on his private property and had no warrant to enter it.<sup>198</sup> The Court upheld the information collection and the testimony. With very little fanfare, Justice Holmes

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CAROLINA MOONSHINER (Brunswick, 1928); MEMPHIS MINNIE, MOONSHINE (Vocalion, 1936); CHARLIE BOWMAN, MOONSHINER AND HIS MONEY (Columbia, 1929).

192. 265 U.S. 57 (1924).

193. 267 U.S. 132 (1925). In *Carroll*, the Court held that automobiles carrying contraband, like boats and wagons, were different from houses and stores in that "in it not practicable to secure a warrant, because the vehicle can be quickly moved." *Id.* at 153.

194. ERSKINE CALDWELL, TOBACCO ROAD (1932).

195. *Hester*, 265 U.S. at 58 (recounting that during the raid, several other cars approached the Hester house, but Hester's father shooed them away). For whiskey purists, I have used the conventional spelling of "whiskey," to denote that its country of origin was the United States. Justice Holmes used "whisky," though I think he would likely agree that the moonshine had been distilled in the United States.

196. To Justice Holmes, this was abandoned property, which is not protected by the Fourth Amendment. *Id.* See generally *United States v. Greenwood*, 486 U.S. 35 (1988).

197. *Hester*, 265 U.S. at 58 ("The jug and the bottle both contained what the officers, being experts, recognized as moonshine whisky, that is, whisky illicitly distilled; said to be easily recognizable.").

198. *Id.*

authorized government spying on private property in the interest of investigating the crime of illegal liquor distribution,<sup>199</sup> an act that was no longer criminal within a decade of the Court handing down its decision in *Hester*.<sup>200</sup>

*B. Illegal Activities in Open Fields: From Moonshining to Pot Farming*

Just as government agents embraced the anti-alcohol fanaticism during the Prohibition era, so too did government agents become vigilantes trying to eradicate marijuana farming in the United States during the 1970s and 1980s.<sup>201</sup> While marijuana now grows wild in the United States and was farmed as hemp during the eighteenth century,<sup>202</sup> marijuana first came to the United States as an intoxicant commodity from farms in Mexico during the early twentieth century.<sup>203</sup> As Mexicans emigrated to the United States in large numbers between 1915 and 1930, marijuana cultivation emigrated with them, and where large Mexican communities grew, so too did marijuana crops and use.<sup>204</sup> States responded by passing legislation to outlaw the cultivation and sale of marijuana, and in 1930, the federal government, by way of the new Federal Bureau of Narcotics, began work on the Uniform State Narcotic Drug Act.<sup>205</sup> From a very early point in the effort to curb marijuana use, it was recognized that prohibition of the cultivation of marijuana was necessary.<sup>206</sup>

Quashing marijuana cultivation and consumption was fairly easy for government agents while the country held a national consensus about the evils

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199. *Id.*

200. *See* U.S. CONST. amend. XXI (“The Eighteenth Amendment to the Constitution is hereby repealed”); OKRENT, *supra* note 182, at 353-54 (“On December 5, [1933], at 3:31 p.m. local time, Utah became the thirty-sixth state to ratify the Repeal Amendment. At the age of thirteen years, ten months, and nineteen days, national Prohibition was dead.”).

201. *See* RUDOLPH J. GERBER, *LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS 20-60* (2004) (detailing the history of the war on drugs beginning with the Nixon presidency).

202. Hemp was an agricultural crop at Mount Vernon, the home of George Washington, and on the farms of Thomas Jefferson and Benjamin Franklin. *See id.* at 2.

203. *See* RICHARD BONNIE & CHARLES WHITEBREAD, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 38 (1999).

204. *See id.* at 38-39 (asserting that Colorado, in particular, reported widespread marijuana cultivation and consumption, and the state became one of the first to pass legislation prohibiting cultivation and sale in 1917).

205. *See id.* at 67. Harry Anslinger was the notorious first commissioner of the new bureau, a post he held for 32 years. He undertook a massive media campaign to warn (white, natural-born) citizens of the United States against the evils of narcotics and the usual group of narcotics users (blacks and immigrants).

206. *Id.*

of marijuana. But by the mid-1960s, the consensus began to disappear.<sup>207</sup> The shift from poor immigrant and black users to middle and upper-class white college students offered a broader social awareness of the drug and enticed researchers to look anew at the medical literature, much of which had been concocted by prohibitionists.<sup>208</sup> Yet the increased awareness of the drug and the prolific use among college students did not quickly overwhelm the status quo. In fact, the dominant anti-marijuana culture girded itself and increased criminal penalties and investigation for marijuana use and cultivation.<sup>209</sup> By 1970, college campuses reported marijuana use by well over 50 percent of their student bodies, and substantial numbers of the young professional class in urban centers reported marijuana use.<sup>210</sup> Meanwhile, the law enforcement community and prosecutors began to turn a blind eye toward casual use and possession of an insignificant quantity of marijuana.<sup>211</sup> Rather than punishing the (sometimes young and affluent) users, state and federal law enforcement began to focus their energy on the growers and the distributors of the drug.<sup>212</sup> Unlike cocaine and heroin, marijuana was a home-grown commodity.

The consensus toward an acceptance of marijuana use that flourished in the 1960s did not persist through the 1980s, and the Drug Enforcement Administration (DEA) declared marijuana use to be the United States' most serious drug problem.<sup>213</sup> To combat the perceived problem, the DEA developed a marijuana eradication program that consisted of search teams looking for marijuana fields and burning them.<sup>214</sup> The program was focused

207. *Id.* at 223.

208. *Id.*

209. In a speech at the University of Virginia, in 1970, Jerry Rubin, one of the Chicago Seven, said, "Smoking pot makes you a criminal and a revolutionary—as soon as you take your first puff, you are an enemy of society." See JERRY RUBIN, *DO IT!* (1970).

210. BONNIE & WHITEBREAD, *supra* note 203, at 237; see *Behavior: Pop Drugs: The High Way of Life*, TIME, Sept. 26, 1969, <http://www.time.com/time/magazine/article/0,9171,844942,00.html>; A.L. Mallabre Jr., *Drugs on the Job*, WALL STREET JOURNAL, May 4, 1970.

211. BONNIE & WHITEBREAD, *supra* note 203, at 239.

212. *Id.* at 241.

213. MITCH EARLYWINE, UNDERSTANDING MARIJUANA 225 (2002).

214. *Id.* Burning marijuana fields may seem like a drastic measure, but law enforcement's darkest hour came during a program aimed at eradicating Mexican marijuana fields. Much like the poisoning of industrial alcohol during the Prohibition era, in the 1970s government agents began spraying Mexican marijuana crops with paraquat, a toxic herbicide. See Deborah Blum, *supra* note 183. Government officials believed that, if the public became aware that marijuana crops were being sprayed with toxic herbicide, people would be deterred from using marijuana since the toxic herbicide would sicken or kill the user. *Id.* In fact, marijuana users started having their marijuana tested in labs for the presence of paraquat. See *Nation: Panic Over*

primarily in Hawaii and California, but it reached into forty states.<sup>215</sup> People such as Oliver and Thornton were the targets of this search and destroy program.

In the Northern Hemisphere, marijuana grows best in direct sunlight during the summer months.<sup>216</sup> To avoid the observation of the public, marijuana fields are often located in a clearing in an otherwise wooded area far from public roads, and guerilla marijuana farmers often tend their plants in the sunny clearings of wooded state or federal parks. The surreptitious growing areas found in *Oliver* and *Thornton* were typical marijuana fields, far from the public road, surrounded by woods, with numerous fences and *No Trespassing* signs. Detection of these types of fields is very difficult for law enforcement without entering the property to investigate.<sup>217</sup> By employing an open fields doctrine, police could wander freely (and constitutionally) on posted, private property in the hopes of stumbling across illegal activity.<sup>218</sup> Without an open fields doctrine or a warrant, law enforcement would be stymied from detecting most marijuana fields. Given the fervor in the 1980s to eradicate marijuana growth and "win" the war on drugs, the Court may have viewed the open fields doctrine as an essential tool for the DEA to make progress in its assaults on growers.

### *C. Resolving (or Not) the Open Fields Doctrine with the Current Interpretation of the Fourth Amendment's Reach*

The *Oliver* majority's normative values come across most plainly in an unsupported footnote: "Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal

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*Paraquat*, TIME, May 1, 1978, <http://www.time.com/time/magazine/article/0,9171,919548-1,00.html>.

215. EARLYWINE, *supra* note 213, at 225.

216. For an overview of contemporary marijuana farming operations in the California, see David Samuels, *Dr. Kush*, THE NEW YORKER, July 28, 2008, [http://www.newyorker.com/reporting/2008/07/28/080728fa\\_fact\\_samuels](http://www.newyorker.com/reporting/2008/07/28/080728fa_fact_samuels).

217. Police do use helicopters with infrared cameras to detect the higher reflective nature of marijuana plants. *See id.*

218. Ironically, the open fields doctrine served to make the investigation on marijuana farming much harder because it drove farmers indoors. Indoor cultivation led to much more stable and potent forms of marijuana as indoor farming became a true craft. *See generally* MICHAEL POLLAN, THE BOTANY OF DESIRE 133 (2002) (offering a long history of marijuana cultivation from a gardener's perspective). Of course, indoor grow-ops can be guarded against invasion by police and are much more difficult to detect and take down. Much like meth labs, indoor marijuana farming has become a huge enterprise, highly profitable, and highly specialized. *See generally* NICK REDDING, METHLAND: THE DEATH AND LIFE OF AN AMERICAN SMALL TOWN (2009).

intent choose to erect barriers and post 'No Trespassing' signs."<sup>219</sup> The Court strived to determine whether Oliver and Thornton's expectation of privacy was legitimate, rather than reasonable.<sup>220</sup> This test for legitimacy belies the majority's own normative values and forms the overall model for the majority opinion.

While scholars debate whether empirical evidence of society's toleration for government intrusion is useful, all seem to agree that *some* examination of the facts of each case is necessary.<sup>221</sup> The net result of the majority opinion in *Oliver* is that subsequent courts are not obliged to engage in the analysis of the substantive facts—like how the defendant expressed his subjective expectation of privacy and whether society is prepared to tolerate that subjective expectation—once they determine that the property at issue is an open field, and not curtilage. The Court engaged in a pure policy choice to leave all government intrusion into posted, private open fields wholly unregulated, resulting in an open fields doctrine untethered from precedent and tied only to the socio-political context of 1984.

#### *IV. Big Brother Is Watching: The Application of Oliver in the Wake of Increasing Technological Advances*

The federal circuits consistently apply the open fields doctrine, and the factual circumstances are, likewise, regularly similar to *Oliver*. The two factual features that most often compel application of the open fields doctrine are 1) a one-time, brief intrusion for investigation of 2) a somewhat static, agricultural condition.<sup>222</sup> The Fifth Circuit has specifically held that open fields analysis cannot ignore justifiable expectations of privacy analysis in all cases.<sup>223</sup>

Justice Marshall's warning in his *Oliver* dissent has seemingly come to life in law enforcement's contemporary interpretation of the open fields

219. *Oliver v. United States*, 466 U.S. 170, 182 n.13 (1984).

220. *Id.* at 182.

221. See Slobogin, *supra* note 96, at 1599-1607; Kerr, *Do We Need a New Fourth Amendment*, 107 MICH. L. REV. 951, 961, n. 14 (2009).

222. See, e.g., *United States v. Hayes*, 551 F.3d 138 (2d Cir. 2008) (cocaine cultivation); *Allinder v. Ohio*, 808 F.2d 1180 (6th Cir. 1987) (beehives); *United States v. Broadhurst*, 805 F.2d 849 (9th Cir. 1986) (marijuana cultivation).

223. *Husband v. Bryan*, 946 F.2d 27, 29 (5th Cir. 1991). In *Husband v. Bryan*, the Fifth Circuit recognized a reasonable expectation of privacy in the land under an open field and declared government agents must comply with the warrant requirement before removing dirt in an open field. *Id.* at 29.

doctrine.<sup>224</sup> The first frightening extension came in *Dunn v. United States*,<sup>225</sup> where the Court held that officers standing in an open field could lawfully peer into a closed, private barn. The *Dunn* Court conflated its public space jurisprudence<sup>226</sup> with its open fields jurisprudence, without regard to the fact that the officers who peered into Dunn's barn were committing criminal trespass.<sup>227</sup> The strongest recent evidence of the diminution of a property owner's right to privacy is evidenced in the Fourth Circuit's decision in *United States v. Vankesteren*.<sup>228</sup>

#### A. The Fourth Circuit's Recent Extension of *Oliver*

In *Vankesteren*, a game warden installed a hidden surveillance camera on a farmer's posted, private property to determine whether, based on an anonymous tip, the farmer was trapping protected hawks.<sup>229</sup> The game warden, however, first trespassed on the land to search for evidence of traps. Finding only lawfully trapped pigeons, he installed a hidden camera. The game warden's intrusion, therefore, did not stop at one instance of trespassing.<sup>230</sup> Yet in reaching to uphold the game warden's continuous intrusion into the farmer's privacy, the Fourth Circuit employed significant extensions to the Court's open fields doctrine.<sup>231</sup> Unlike the agent in *Oliver*,

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224. See *Oliver*, 466 U.S. at 197 (Marshall, J., dissenting) ("By exempting from coverage of the Amendment large areas of private land, the Court opens the way to investigate activities we would all find repugnant.").

225. 480 U.S. 294, 305 (1987)

226. The Court has defined public spaces in light of the *Katz* model. See *Santana v. United States*, 427 U.S. 38, 42 ("While it may be true that under the common law of property the threshold of one's dwelling is 'private,' as is the yard surrounding the house, it is nonetheless clear under the cases interpreting the Fourth Amendment *Santana* was in a 'public' place. She was not in an area where she had any expectation of privacy.").

227. See *Dunn*, 480 U.S. at 304. ("Under *Oliver* and *Hester*, there is no constitutional difference between police observations conducted while in a public place and while standing in an open field.")

228. 553 F.3d 286 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2743 (2009).

229. See *supra* note 2.

230. In addition to the continuing trespass of the camera, the game warden counted nine instances of actual trespassing onto *Vankesteren*'s property during the investigation. See Petition for Certiorari, *supra* note 2 at 37a-40a.

231. The common argument justifying the use of invasive technology that increases the feeling of intrusiveness of searches is that it allows the police to accomplish investigation more efficiently than traditional, in-person surveillance. See Ric Simmons, *Why 2007 Is Not like 1984: A Broader Perspective on Technology's Effect on Privacy and Fourth Amendment Jurisprudence*, 97 J. CRIM. L. & CRIMINOLOGY 531, 542 (2007) (arguing that merely turning a formerly labor intensive act of surveillance, like following a vehicle, into a more feasible task with the use of technology is not unduly invasive). What Simmons and the *Vankesteren* Court overlook, however, is that a suspect could see a person following him for 24 hours or could see

the game warden found no evidence of any crime when he first investigated the farmer's open field.<sup>232</sup> To the contrary, his warrantless inspection produced only evidence of lawful trapping. Thus, the warden turned to video technology to perpetually monitor the farmer's field in the hopes of substantiating an anonymous tip and capturing images of the farmer engaged in illegal conduct.<sup>233</sup>

Despite significant factual differences between the *Vankesteren* case and *Oliver*, the Fourth Circuit applied *Oliver* and the open fields doctrine in an absolute manner. This extension of the doctrine contravenes the scant protections that the *Oliver* Court might have envisioned in future cases: "The correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police *inspection* of open fields accomplishes such an infringement."<sup>234</sup> The Court's language suggests that any infringement beyond a police inspection, like the brief inspections in *Oliver* and *Thornton*, requires extended Fourth Amendment consideration.<sup>235</sup> However, the Fourth Circuit's *Vankesteren* decision, like Justice Powell's majority in *Oliver*, failed to reflect either the wealth of Fourth Amendment jurisprudence or its historical underpinnings in theories of property rights and the subsequent jurisprudence honoring an individual's efforts to prevent intrusion upon his land.<sup>236</sup>

Superficially consistent with the holding in *Oliver*, the Court in *Vankesteren* stated that a farmer does not have a reasonable expectation of privacy from a game warden's warrantless wandering onto his posted, private property on an anonymous tip that the farmer was trapping protected birds.<sup>237</sup> The Fourth Circuit drastically extended *Oliver*, however, by allowing the continuous surveillance of dynamic activity.<sup>238</sup> The minor, fleeting, criminal trespass of

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a game warden sitting on his property near his bird traps for *weeks on end*, and could alter his conduct accordingly. Technologically enhanced surveillance does not merely substitute for in-person surveillance; rather, it enhances the likelihood of the police to capture relevant conduct by making their presence invisible.

232. *See id.*

233. *See* Petition for Certiorari, *supra* note 2, at 38a.

234. *Oliver v. United States*, 466 U.S. 170, 182-83 (1984) (emphasis added).

235. *Id.* at 174 (noting that, in *Thornton*, the officer obtained a warrant before he returned to the field to investigate further).

236. *See id.* at 187-88 (Marshall, J., dissenting).

237. *United States v. Vankesteren*, 553 F.3d 286, 287 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2743 (2009).

238. *See id.* The Court gave little attention to the use of technology by the game warden and ignored the general tests employed in technology cases in favor of expanding the open fields

the officers in *Oliver* and *Thornton*, as well as instances of trespass found in other circuits' subsequent cases, involved static conditions and short intrusions. *Vankesteren* allows for repetitive, long-term, and enduring trespassing by a hidden video camera.<sup>239</sup>

The Fourth Circuit also devoted some effort to determine whether Vankesteren's field might be considered curtilage under the four-factor test established in *United States v. Dunn*.<sup>240</sup> The general test used by the Court to determine whether a space is curtilage or an open field employs four factors: 1) proximity of the area to the home, 2) whether the area is enclosed along with the home, 3) how the area is used by the resident, and 4) steps taken by the resident to protect the area from observation.<sup>241</sup> The Court reasoned that Vankesteren's field was outside of the allowable curtilage area because it was located a mile or more from his home and was used primarily for farming activities.<sup>242</sup> The game warden installed the video camera on a posted, private open field, and the Fourth Circuit equated the open field to public lands to conclude that the installation of the video camera and subsequent video recordings did not violate the Fourth Amendment.<sup>243</sup>

Had the game warden instead pointed his camera toward Vankesteren's house, the Fourth Circuit's rationale would hold that the recording did not violate the Fourth Amendment so long as the court could have determined that Vankesteren's home was readily visible from his open field.<sup>244</sup> Because the Fourth Circuit treated the installation of the camera in an open field as identical to installation of a camera in public, it follows that the court would have viewed any observation of unprotected curtilage by the hidden video

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doctrine. Christopher Slobogin has developed a list of seven factors that courts often examine when reviewing Fourth Amendment cases involving the use of technology. They are: 1) the nature of the place being observed; 2) availability of the technology to the average consumer; 3) steps taken by the defendant to enhance his privacy; 4) degree of trespass on the private property; 5) nature of the activity observed; 6) the extent to which the technology enhances natural senses; and 7) whether the police took any steps to minimize the intrusion. See Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The America Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 389-98 (1997).

239. For an excellent overview of how sustained surveillance should prompt a different approach to the Fourth Amendment, see Afsheen John Radsan, *The Case for Stewart over Harlan on 24/7 Physical Surveillance*, 88 TEX. L. REV. 1475, 1498-99 (2010) (asserting that the invasion of a citizen's privacy comes from the fact of the constant, invasive monitoring rather than from its form).

240. 480 U.S. at 301.

241. See *id.*

242. *Vankesteren*, 553 F.3d at 290.

243. *Id.* at 290-91.

244. The recording also would not have violated the Fourth Amendment provided his home was visible from space. See *California v. Ciraolo*, 476 U.S. 207 (1986).

camera as permissible. This presents a profound and troubling extension of lawful, constitutional intrusion into private property by government agents.<sup>245</sup>

Law enforcement officers may fly overhead and lawfully photograph subjectively private activities and conditions without raising Fourth Amendment concerns because a one-time overhead flight, like a glance over a backyard fence, is an intrusion that society is willing to tolerate.<sup>246</sup> But in *Cuevas-Sanchez*, the Fifth Circuit stated that installing a video camera on a public utility pole pointed to monitor a person's backyard activities "provokes an immediate negative visceral reaction."<sup>247</sup> The lawful glance over the fence, like the trespassing game warden's glance as he ambles through a posted, private open field, does not violate the Fourth Amendment's guarantee of protection from unreasonable searches. Had *Cuevas-Sanchez* not demonstrated a subjective expectation of privacy by enclosing his curtilage with a fence, the court would have engaged in significantly less analysis regarding the probing eye of the video camera since the camera was installed on a public utility pole.<sup>248</sup> Because he did enclose his backyard, he had an expectation of privacy that society would recognize as reasonable.

Following the Fourth Circuit's reasoning, however, any video camera posted in an open field is the same as a video camera posted on a public utility pole. This is true even though the homeowner on a busy street might, reasonably, fence his curtilage for privacy, while a farmer who owns thousands of acres of open field might not fence his yard from the probing eye of the unexpected, criminal trespasser. According to the *Oliver* majority, society has been willing to tolerate fleeting intrusions for the purpose of effective law enforcement, but the *Vankesteren* standard goes beyond what is tolerable by society and by the historical standards of property rights that grounded the Fourth Amendment.<sup>249</sup>

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245. The Fourth Circuit declines to engage in any depth with the wealth of "doctrinal difficulties for courts in applying the Fourth Amendment" in surveillance cases. See Russell Weaver, *The Fourth Amendment, Privacy and Advancing Technology*, 80 MISS. L.J. 1131, 1134 (2011) (detailing the struggles of the Court to address ever-evolving technological advances in the Fourth Amendment context).

246. *United States v. Cuevas-Sanchez*, 821 F.2d at 251 (citing *California v. Ciraolo*, 476 U.S. 207 (1986)).

247. *Id.*

248. *Id.*

249. See, e.g., Editorial, *Ruling on Camera Badly Out of Focus*, VIRGINIA-PILOT, Feb. 21, 2009, available at <http://hamptonroads.com/2009/02/ruling-camera-badly-out-focus>.

*B. The Role of Technology in Fourth Amendment Jurisprudence*

Unaided visual observation of the outside of a home does not constitute a Fourth Amendment search.<sup>250</sup> The use of technology, however, should change the analysis by which the Fourth Amendment applies to otherwise constitutional surveillance. The Fourth Amendment arguably requires that constant video surveillance be held to a higher level of scrutiny under the open fields doctrine. This is suggested by a number of federal and state courts which have recognized that video cameras are more invasive than the unaided eye.<sup>251</sup>

In *Vankesteren*, the Fourth Circuit asserted that "the placement of a video camera in an open field does not portend the arrival of the Orwellian state" that it might if the game warden had taken thermal images of the farmer's home.<sup>252</sup> To the contrary, the Supreme Court's decision in *Kyllo v. United States* suggests that the use of technology in general, and not just specific types of technology like the thermal imaging scans at issue in *Kyllo*, to enhance surveillance can affect the Fourth Amendment analysis of a potential search.<sup>253</sup> In *Kyllo*, the Court considered whether the Fourth Amendment applied to the government's use of a thermal-imaging device during a search. It held that the government had performed a search within the meaning of the Fourth Amendment when an agent of the United States Department of the Interior used a thermal-imaging device to detect relative amounts of heat within a private home.<sup>254</sup> The thermal imaging device did not literally allow the agent to see inside the house, but it allowed the agent to obtain information about the

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250. See *Dow Chem. Co. v. United States*, 476 U.S. 227, 234-35 (1986).

251. See, e.g., *United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994) (noting that "silent video surveillance . . . results in a very serious, some say Orwellian, invasion of privacy"); *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991) (noting that "[p]ersons may create temporary zones of privacy within which they may not reasonably be videotaped . . . even when that zone is a place they do not own or normally control"); *United States v. Cuevas-Sanchez*, 821 F.3d 248, 252 (5th Cir. 1987) (video "surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state"); *United States v. Torres*, 751 F.2d 875, 882 (7th Cir. 1984) (noting that video cameras "could be grossly abused—to eliminate personal privacy as understood in modern Western nations"); *State v. Thomas*, 642 N.E.2d 240, 246-47 (Ind. Ct. App. 1994) (noting that "[v]ideo surveillance is highly intrusive and amenable to abuse, and a warrantless video search poses a serious threat to privacy"); *State v. Bonnell*, 856 P.2d 1265, 1277 (Haw. 1993) (stating that "[w]e agree with the . . . Fifth Circuit that [video] 'surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state'").

252. *United States v. Vankesteren*, 553 F.3d 286, 291 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2743 (2009) (citing *Kyllo v. United States*, 533 U.S. 27 (2001)).

253. *Kyllo*, 533 U.S. at 29.

254. *Id.* at 29.

inside of the home by measuring the radiation of heat emitted from the outside of the house which was otherwise unavailable to him through personal observation—"naked-eye surveillance of a home."<sup>255</sup>

The use of the thermal imaging technology, like the use of a hidden video camera, will turn a commonplace observation of a home into a search because it allows the government to obtain information surreptitiously.<sup>256</sup> Although *Kyllo* narrowly addresses the search of a home, the intense scrutiny given to the government's use of technology suggests that the Court is wary of whittling away constitutional protections in the face of increased technological capabilities.<sup>257</sup> Unlike the minority in *Kyllo*, which would have found no search as the surveillance only involved observations of the exterior of the home,<sup>258</sup> the majority found that the use of technology changed the character of the surveillance in a way that was constitutionally significant. In a technical sense, the government agents only searched heat emanating from the outside of a house; such openly-perceivable heat receives no constitutional protection. The use of technology to observe that heat, however, changed the nature of the surveillance into a constitutionally impermissible search.<sup>259</sup>

The use of a permanent, hidden video camera should constitute a constitutionally significant change to the character of what would otherwise be a constitutional foray onto a private citizen's open field. For example, a video camera allows the government to continuously collect information about an individual without the need for a law enforcement officer to actually remain on the property. The Fourth Circuit found this point to be insignificant in *Vankesteren*, noting that the government could have stationed agents on the property "twenty-four hours a day" and that the use of a "more resource-efficient surveillance method" was of no importance.<sup>260</sup> This reasoning ignores, however, the fact that the government would have been unlikely, or even unable, to station an agent on the property twenty-four hours a day. Limitations on resources—and the risk of detection—provide a check on the

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255. *Id.* at 33-35 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

256. *Id.* at 34.

257. In *Kyllo*, however, the Court refined its holding from *Dow Chemical* because the government in *Kyllo* had used technologically-enhanced surveillance. See *Kyllo*, 533 U.S. at 27. Similarly, the Supreme Court has not determined whether the use of a technological enhancement should affect the Fourth Amendment analysis regarding the reasonableness of a government intrusion into an open field.

258. *Id.* at 41 (Stevens, J., dissenting).

259. *Id.*

260. *United States v. Vankesteren*, 553 F.3d 286, 291 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2743 (2009).

ability of the government to engage in this type of constant surveillance.<sup>261</sup> As in *Kyllo*, the government in the Fourth Circuit case used a technological enhancement to do something that it would not have been able to do otherwise, and, as in *Kyllo*, this technological enhancement allowed the government to collect constitutionally protected information and to infringe upon the privacy of an individual. Accordingly, the technological enhancement should have affected the Fourth Circuit's Fourth Amendment analysis.<sup>262</sup>

The Ninth Circuit has observed that "[e]very court considering the issue has noted [that] video surveillance can result in extraordinarily serious intrusions into personal privacy. . . . If such intrusions are ever permissible, they must be justified by an extraordinary showing of need."<sup>263</sup> "Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, *regardless of where we are*, dictates that its use be approved only in limited circumstances."<sup>264</sup> According to *Oliver*, a citizen is bound to expect that he may be observed on his posted, private open fields, but he should still be able to maintain a reasonable expectation that he would not be subjected to such a severe intrusion into his privacy as the probing, constant eye of the hidden video camera.<sup>265</sup>

Yet in *Vankesteren*, the Fourth Circuit relied on dicta in *United States v. Taketa*<sup>266</sup> to establish that "[v]ideo surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in *public* places, such as banks, does not violate the Fourth Amendment; the police may record what they normally may view with the naked eye."<sup>267</sup> However, *Taketa* concluded that the suspect's reasonable expectation of privacy in his office had been violated by the hidden video camera *even though* the suspect was a DEA agent and his office was one that could have been entered and observed by

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261. See, e.g., *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007) (noting that "[t]echnological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive").

262. The Supreme Court has elsewhere noted that the use of invasive surveillance techniques may change the Fourth Amendment character of otherwise constitutionally permissible actions. See *United States v. Knotts*, 460 U.S. 276 (1983) (noting that "dragnet-law enforcement practices" could require "different constitutional principles").

263. *United States v. Koyomejian*, 970 F.2d 536, 551 (9th Cir. 1992) (Kozinski, J., concurring).

264. *United States v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000) (emphasis added).

265. See *Bond v. United States*, 529 U.S. 334 (2000) (noting that some invasive inspections are simply more invasive than others).

266. 923 F.2d 665, (9th Cir. 1991).

267. *United States v. Vankesteren*, 553 F.3d 286, 290 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2743 (2009).

snooping law enforcement agents.<sup>268</sup> Thus, the Fourth Circuit's reliance on *Taketa* appears to be misplaced.

Similarly, the Ninth Circuit has held that images captured by a government agent's installation of a hidden video camera placed on public, national forest lands, which are open to the public, do not violate the Fourth Amendment.<sup>269</sup> In *McIver*, a camera was installed and hidden on public lands, and the *McIver* court praised the government agent's "prudent and efficient use of modern technology" by installing the video camera on public land and video recording public activities.<sup>270</sup> The *McIver* court, however, noted that its holding was "quite narrow," with the decision hinging on the fact the government agent installed the hidden video camera on public lands.<sup>271</sup> Similarly, video cameras mounted in public places, recording activities open to public observation, are lawful and do not violate the Fourth Amendment, even if the video camera records continuously.<sup>272</sup>

Moreover, the Ninth Circuit has stated that once the police officer leaves an area and can no longer observe the activities from a public space, he may not video record the private activities.<sup>273</sup> Although the Fourth Circuit acknowledged in *Vankesteren* that the camera was doing more, albeit "little more than the agents themselves could have physically done," it wholly disregarded the need to engage in additional analysis when the camera *does more* than the agents themselves could have done.<sup>274</sup>

*Vankesteren* marks what could be a potentially grave incursion against individual rights. As law enforcement and espionage technology increases at warp speed, the open fields doctrine will logically apply to increasingly more areas. Satellites can view individuals sitting on their front porches, every mobile device contains GPS capabilities, and remote searches of personal computers is possible through a mere web connection. According to the current open fields jurisprudence, Big Brother could be watching, and would be doing so legally.

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268. *Taketa*, 923 F.2d at 665.

269. *United States v. McIver*, 186 F.3d 1119, 1125-26 (9th Cir. 1999).

270. *Id.* at 1125.

271. *Id.* at 1125-26.

272. *See, e.g., State v. Holden*, 964 P.2d 318 (Utah App. 1998).

273. *See, e.g., United States v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000).

274. *Vankesteren*, 553 F.3d at 291; *see also Hoffa v. United States*, 385 U.S. 293 (1966); *Nerber*, 222 F.3d at 604 ("the defendants had no reasonable expectation of privacy that they would be free from hidden video surveillance *while the informants were in the room*" (emphasis added)).

V. *Conclusion: A Balancing Act Between Necessary Police Intrusion and Citizens' Reasonable Expectations of Privacy in Open Fields*

The Fourth Amendment “was designed, not to prescribe with ‘precision’ permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion.”<sup>275</sup> The inflexible open fields rule in *Oliver* is largely a product of stare decisis, resting on a one-line proclamation with little examination of the basis for the original “rule.”<sup>276</sup> The *Oliver* majority does review the issues under the *Katz* model, but its reconsideration must be disingenuous since it proclaims a per se rule. The *Katz* test simply does not allow for a per se result given the nature of the two-part assessment.<sup>277</sup> Justice Harlan’s two-part inquiry cannot have a ready-made answer if applied properly, and if the *Oliver* majority truly believed that the open fields doctrine was an ancient, per se rule, it would not have needed to address the *Katz* model at all.<sup>278</sup> Instead, the Court would have declared the open fields doctrine as establishing areas beyond the protective reach of the Fourth Amendment. That the Court did not make such a clear declaration demonstrates that the open fields doctrine is not a permanent, ancient rule.

The *Oliver* Court’s engagement with the *Katz* model is flawed in three ways. First, the Court ignores the subjective expectation of privacy portion of the test by disregarding the substantial steps that the defendants took to demonstrate their subjective expectation of privacy.<sup>279</sup> Next, the Court categorically declares that society is not willing to tolerate an expectation of privacy for criminal activity,<sup>280</sup> which, followed to its logical conclusion,

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275. *Oliver v. United States*, 466 U.S. 170, 186 (1984) (Marshall, J., dissenting).

276. *See id.* at 176; *Hester v. United States*, 265 U.S. 57, 59 (1924).

277. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring) (“My understanding of the rule that has emerged from prior decisions is that there is a two-fold requirement, first that the person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

278. For example, in consent cases the Court need only evaluate whether the defendant’s consent was a product of free will not overborne by the police. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (viewing consent as an exception to the warrant requirement). Because consent is an exception to the warrant requirement, the Court does not examine the *Katz* justifiable expectation of privacy issues when it finds that the defendant consented to the search.

279. One is left to conclude that no matter how high the fence, how guarded the boundary, and how explicit the prohibition against trespassing, the *Oliver* court would have found the subjective expectation of privacy unreasonable. *See Oliver*, 466 U.S. at 179. That members of the public may view the property from the air is a flawed analogy, since those viewing from the air are acting lawfully and those wandering through a posted, private field are engaged in criminal trespass. *See id.* at n.9.

280. *See id.* at 182-83 (holding that trespassing police officers inspecting marijuana fields do not infringe upon societal values). Recall the Court’s formalist declaration in footnote 13:

eviscerates the Fourth Amendment.<sup>281</sup> Finally, the Court views the intrusion by the police within the narrow socio-political context of the time without much thought toward the ways the government might abuse an expansive open fields doctrine in the future.<sup>282</sup>

Policy will and should play some role in the Court's interpretation of the Fourth Amendment, but a doctrine relying only on policy cannot withstand the test of time.<sup>283</sup> The open fields doctrine clearly sits well outside of the Court's Fourth Amendment jurisprudence since *Katz*, yet it claims the formalist imprimatur of providing a clear "rule."<sup>284</sup> The combination establishes a dangerous precedent; the inflexible approach in *Oliver* becomes impossible to apply in any useful way to assess the reasonableness of police activity involving the use of highly intrusive technology. Stare decisis allows lower courts to apply the open fields doctrine like a blanket to all situations.<sup>285</sup>

What this Article offers is a doctrine, consistent with precedent, for use in open fields cases. Since the possibility of a property owner having an expectation of privacy can exist in an open field, courts should engage the facts to determine whether that expectation is reasonable and legitimate. The Court in *Oliver* looked only to its own normative values in employing the policy model, and open fields, like telephone booths and commercial businesses, deserve more (or at least some) scrutiny about what society is willing to tolerate. The factual examination of what the government agent did and how the citizen acted cannot be disregarded in construing the meaning of an Amendment that purports to balance the interests of the state against those

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"Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post 'No Trespassing' signs." *Id.* at n.13 (emphasis added).

281. Of course, the police did not know of the criminal activity in *Oliver* until after they had trespassed and, arguably, violated the Fourth Amendment. The implications of the *Oliver* majority's logic are more troublesome in other contexts. For example, the police can also presume that black people running in high-crime neighborhoods are criminals. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000); see also, Paul Butler, *The White Fourth Amendment*, TEX. TECH L. REV. 245, 254 (2010). Butler maintains that the Fourth Amendment has been a "project" by the Court in the past 40 years "to expand the power of the police against people of color." *Id.* at 246.

282. See *Oliver*, 466 U.S. at 197 (Marshall, J., dissenting).

283. See Kerr, *Four Models*, *supra* note 36, at 519 ("[T]he policy model, presumably, plays a guiding hand in many cases even when an opinion itself is framed in terms the probabilistic model, private facts model, and/or positive law model.").

284. See *Oliver*, 466 U.S. at 176; *Hester v. United States*, 265 U.S. 57, 58 (1924).

285. See *United States v. Vankesteren*, 553 F.3d 286, 288 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2743 (2009).

of the individual.<sup>286</sup> *Katz* clarified that how individuals act toward potential government intrusion matters, and how society views intrusion more generally is a necessary component to any Fourth Amendment analysis.<sup>287</sup> No court should disregard the holding in *Katz* in favor of its own policy model, especially when the motivating force behind the policy, like drug or alcohol prohibition, is subject to the dynamic opinions of an evolving society.

Society's view on intrusiveness can change, a fact acknowledged by the Court in *Katz*.<sup>288</sup> Empirical studies could provide a reliable model for the Court to measure society's views, and they might be especially reliable in cases involving an intrusion into posted, private property since the situation is fairly static.<sup>289</sup> For investigations of minor crimes, society may be less tolerant of intrusion—especially when those investigations are based on unsubstantiated tips. In an era when marijuana use is more tolerated and prosecution is less vigorous than when the open fields doctrine hardened into its contemporary form, society may view marijuana crimes as less serious, and thus be less tolerant of government intrusion into posted, private property for the purpose of general searches for marijuana.<sup>290</sup> Or, even if society has an abiding interest in the investigation and eradication of marijuana farming, it may not have the same interest in prosecution of a regulatory environmental crime, like trapping a red-tailed hawk without a permit.<sup>291</sup>

As was the case during Prohibition, and again during the intense days of the war on drugs, law enforcement will always have a pressing reason to seek to operate outside of the confines of the Fourth Amendment.<sup>292</sup> But if Justice Powell's assessment is correct, that people engaged in criminal activity—like growing marijuana—cannot expect to be protected by the Fourth Amendment, then the Amendment has no meaning. The Court has struggled mightily with

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286. Or, put in Professor Kerr's terms, if a court employed the positive law and probabilistic methods of analysis in *Oliver*, the result would be a likely finding that the defendants had taken significant steps to maintain their privacy and did not expect their privacy to be invaded in light of the criminal law remedies against trespassers. See Kerr, *Four Models*, *supra* note 36, at 508-12, 516-19.

287. *See id.*

288. *See Katz v. United States*, 389 U.S. 347, 352 (1967) ("To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.").

289. *See generally*, SLOBOGIN, *supra* note 103.

290. *Id.* at 1598. I would suggest that society, especially a rural society, would find the killing of red-tailed hawks without a permit by a conservation gamekeeper to be a less-than-serious crime that would not justify a high degree of intrusion. Another comparable, and perhaps more readily accessible example, would be the investigation of catch-and-release trout fishing without a license on posted, private property.

291. *See* 16 U.S.C. § 703 (2004); 50 C.F.R. § 21.11 (2008).

292. The war on terrorism is the obvious new frontier.

defining the Fourth Amendment since the wide adoption of the exclusionary rule in 1963.<sup>293</sup> Had the court truly employed the *Katz* test in *Oliver*, the evidence would have overwhelmingly demonstrated the defendant's reasonable expectation of privacy, and under *Mapp*, the only remedy would have been exclusion.<sup>294</sup> While the Court has maintained the posture that it concerns itself with *how* evidence is obtained rather than examining *whether* the evidence would be helpful to the prosecution's case,<sup>295</sup> it has begun to relax its stance on wholesale exclusion for illegally obtained evidence.<sup>296</sup>

In *Hudson v. Michigan*<sup>297</sup> and *Herring v. United States*,<sup>298</sup> the Court began its march toward dismantling the exclusionary rule in favor of a balancing test, which weighs the substantial deterrent effect of exclusion against the overall harm to the justice system of admitting the tainted evidence.<sup>299</sup> While I am no advocate for abolishing the exclusionary rule, I can see how the open fields doctrine might be a part of the constitutionalized common law, just as the knock and announce rule was in *Hudson*.<sup>300</sup> And a modified exclusionary rule could still be simply applied in open fields cases while preserving the integrity of *Katz*. The Court would first examine the facts to see whether the defendant had demonstrated a subjective expectation of privacy in how he maintains and guards against intruders into his open field. Evidence of "No Trespassing" signs and fencing, in addition to the remoteness of the field in question and what obstacles the police encountered while getting to the field, would inform the Court of the defendant's reasonable expectation of privacy and whether

293. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (expanding the federal exclusionary rule established in *Weeks v. United States*, 232 U.S. 383 (1914)).

294. The *Mapp* majority plainly held that exclusion was the proper remedy for evidence obtained in violation of the Fourth Amendment, even if "the criminal goes free." *Id.* at 659.

295. For more on deontological ethics, see Arthur LeFrancios, *On Exorcising the Exclusionary Demons: An Essay on Rhetoric, Principle, and the Exclusionary Rule*, 53 UNIV. CIN. L. REV. 49 (1984).

296. Justice White served as the Court's leading proponent to abandon the exclusionary rule. He joined the Court one year after *Mapp* was decided, and he spent the next thirty years filing dissenting opinions in Fourth Amendment cases where he argued for the abolition of the exclusionary rule. See, e.g., *Illinois v. Gates*, 462 U.S. 213 (1983). White succeeded only once in restricting the reach of the exclusionary rule, in *United States v. Leon*, 468 U.S. 897 (1984). For more, see generally DENNIS J. HUTCHINSON, *THE MAN WHO WAS ONCE WHIZZER WHITE* 401-02 (1998) (detailing Justice White's "good faith" exception to the exclusionary rule).

297. 547 U.S. 586 (2006) (allowing for the admission of evidence after officers violated a court-created knock and announce rule).

298. 555 U.S. 135 (2009) (holding that the exclusionary rule does not apply in a police recordkeeping error).

299. *Id.*

300. 547 U.S. at 604.

society would tolerate that expectation.<sup>301</sup> But with a refined analysis of the evidentiary question of exclusion, the Court need not exclude the evidence even if it was obtained in violation of the Fourth Amendment pursuant to *Katz*. If the police obtained evidence of marijuana cultivation in violation of the Fourth Amendment, but the Court concluded that suppressing the evidence would be detrimental to the overall justice system, then the court could admit the evidence even if the police might be deterred in the future from such unconstitutional incursions. The crime of trapping a red-tailed hawk without a permit, in the current political, economic, and social climate is likely not the kind of crime that would warrant a court tipping the balance in favor of admission to preserve the fabric of the justice system. The same may not be true for crimes of terrorism.<sup>302</sup>

Finding a solution that preserves constitutional integrity while providing avenues for necessary police investigation, especially of covert crimes that occur in very private, inaccessible places, should be the overall solution. That the Court in *Oliver* took a politically expedient route is not altogether surprising given its lack of options (i.e., a majority not willing to overturn the exclusionary rule). But the present day abuses of the open fields doctrine and the spectre of future abuses as technology advances should prompt a reassessment of the doctrine. An open fields doctrine consistent with the requirements of *Katz*, combined with the relaxed application of the exclusionary rule, would leave the Court with a stronger Fourth Amendment jurisprudence that would not open the jailhouse door.

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301. The defendants in *Oliver* and *Vankesteren* gave substantial indications of their subjective expectation of privacy and society traditionally has honored the kind of privacy that they sought to preserve.

302. In fact, there is an argument that the Court might actually *encourage* constitutional violations to preserve overall public safety; that is, deterrence is *not* the goal, and the Court should specifically *encourage* police to violate the Fourth Amendment. See *New York v. Quarles*, 467 U.S. 649 (1984).