

CRIMINAL PROCEDURE

CLOSING THE ISSUE OF THE OPEN FIELDS DOCTRINE IN NEBRASKA: *STATE v. HAVLAT*

INTRODUCTION

In *State v. Havlat*,¹ the Nebraska Supreme Court addressed the first impression issue of whether the search and seizure clause of the Nebraska constitution should be interpreted more broadly than the fourth amendment to the United States Constitution when applied to open field searches.² The United States Supreme Court has held,³ and reaffirmed in *Oliver v. United States*,⁴ that the fourth amendment affords no protection from searches and seizures occurring in open fields.⁵

The Nebraska Supreme Court followed the United States Supreme Court's lead and held in *Havlat* that "[c]oncerning the open fields doctrine, our state Constitution does not afford more protection than does the fourth amendment to the federal Constitution."⁶ The court concluded that "no constitutional protection attaches to . . . activities occurring in the open fields."⁷ Thus, in Nebraska, police may enter and search open fields without probable cause or a warrant.⁸

Because the Nebraska Supreme Court in *Havlat* patterned its interpretation of article I, section 7 of the Nebraska Constitution⁹ after the United States Supreme Court's construction of the fourth amendment,¹⁰ it is important to examine the "open fields doctrine" as it developed under this amendment. An understanding of the history of the fourth amendment and the "open fields doctrine" brings to light possible criticisms and alternatives to the *Havlat* decision.

1. 222 Neb. 554, 385 N.W.2d 436 (1986).

2. *Id.* at 557, 385 N.W.2d at 439. The Nebraska Supreme Court had decided other cases involving open field searches, but these cases were decided on fourth amendment grounds. See *infra* notes 83-92 and accompanying text.

3. *Hester v. United States*, 265 U.S. 57, 59 (1924).

4. 466 U.S. 170 (1984).

5. *Id.* at 177; *Hester*, 265 U.S. at 59.

6. *Havlat*, 222 Neb. at 561, 385 N.W.2d at 441.

7. *Id.*

8. *Id.*

9. NEB. CONST. art. I, § 7.

10. U.S. CONST. amend. IV.

BACKGROUND

THE DEVELOPMENT OF THE OPEN FIELDS DOCTRINE UNDER THE FOURTH AMENDMENT

The Early History of the Fourth Amendment

The fourth amendment to the United States Constitution was drafted in response to the frequent and unreasonable searches and seizures that colonists were subjected to prior to the formation of the United States.¹¹ The framers of the Constitution sought to protect the citizens of the newly formed United States from such governmental abuses.¹² The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹³

As the plain language of the amendment indicates, not all searches and seizures were regulated by the fourth amendment.¹⁴ Only those searches and seizures affecting persons, houses, papers, and effects were required to be reasonable.¹⁵ The Court used this limitation to exclude open fields from the amendment's scope.¹⁶

The Creation of the Open Fields Doctrine

The Supreme Court first announced the open fields exception to

11. *Boyd v. United States*, 116 U.S. 616, 624-29 (1886). The Court in *Boyd* examined the history of the fourth amendment in order to determine whether the compulsory production of a person's private papers, to be used against him at a forfeiture proceeding, was an "unreasonable search and seizure" within the meaning of that amendment. *Id.* at 622 (referring to U.S. CONST. amend. IV).

12. *Id.* at 624-29.

13. U.S. CONST. amend. IV.

14. See *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928). In *Olmstead*, the Court stated that "Justice Bradley in the *Boyd* case . . . said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution. . . . But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects. . . ." *Id.* at 465. See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356 (1974). Professor Amsterdam stated:

The words "searches and seizures" and the words "persons, houses, papers, and effects" are terms of limitation. Law enforcement practices are not required by the fourth amendment to be reasonable unless they are either "searches" or "seizures." Similarly, "searches" and "seizures" are not regulated by the fourth amendment except insofar as they bear the requisite relationship to "persons, houses, papers, and effects."

Id.

15. See *Olmstead*, 277 U.S. at 465.

16. See *infra* notes 17-22 and accompanying text.

fourth amendment protection in *Hester v. United States*.¹⁷ In *Hester*, revenue agents, with no warrant to search or arrest, concealed themselves approximately fifty to one hundred yards from the home of the plaintiff's father.¹⁸ The agents observed the plaintiff handing another party a bottle of what was later identified as moonshine whiskey.¹⁹ The plaintiff then apparently became aware of the agents' presence and began to run.²⁰ As he was pursued by the agents, the plaintiff dropped and broke the jug he was carrying, exposing its alcoholic contents.²¹ In a brief and unanimous opinion, Justice Holmes stated:

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. 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 house is as old as the common law.²²

In *Olmstead v. United States*,²³ the Court addressed whether using evidence of private telephone conversations obtained by wiretapping violated the fourth amendment.²⁴ The Court again held that fourth amendment protections apply only to "material things—the person, the house, his papers or his effects."²⁵ It stated that "[t]he language of the [a]mendment can not [sic] be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his

17. 265 U.S. 57, 59 (1924).

18. *Id.* at 58. Hester also lived there. *Id.*

19. *Id.* The Court defined "moonshine whiskey" as "whiskey illicitly distilled."
Id.

20. *Id.*

21. *Id.*

22. *Id.* at 59. At trial, Hester contended that testimony by the agents was inadmissible since the agents were on the Hester property without a warrant. *Id.* at 58. The court responded:

It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug . . . and there was no seizure in the sense of the law when the officers examined the contents . . . after it had been abandoned.

Id.

23. 277 U.S. 438 (1928).

24. *Id.* at 455. *Olmstead* and others were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting, importing, and selling liquor. *Id.* Information about the conspiracy was obtained by tapping the telephone wires of some of the conspirators. These taps were made without trespass onto any property of the defendants. *Id.* at 456-57.

25. *Id.* at 464.

house or office any more than are the highways along which they are stretched."²⁶ In this same case, the court indicated in dicta that the "curtilage" surrounding the house would fall within the amendment's scope.²⁷ Thus, for a time, the Supreme Court²⁸ and lower courts²⁹ focused on the idea of "constitutionally protected areas" in

26. *Id.* at 465. *Contra* *Katz v. United States*, 389 U.S. 347, 353 (1967) (concluding 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").

27. *Olmstead*, 277 U.S. at 466. The Court stated:

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

Id.

28. *Berger v. New York*, 388 U.S. 41, 43-44 (1967). In *Berger*, the Court held that a New York "eavesdrop statute" was "too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and was therefore, violative of the Fourth and Fourteenth Amendments." *Id.* See *Lanza v. New York* 370 U.S. 139, 139 (1961). In *Lanza*, the petitioner visited his brother in jail. *Id.* Their conversation was intercepted, and a transcript of the conversation was used by a committee of the New York Legislature to question Lanza concerning possible corruption of the state's parole system. *Id.* at 140-41. When Lanza refused to answer the committee's questions he was tried and convicted under a New York statutory provision. *Id.* at 140. He appealed his conviction to the United States Supreme Court, claiming that the interception of his conversation in the jail was a violation of the fourth and fourteenth amendments, and thus it was impermissible of the State to use the transcript of that conversation to question him. *Id.* at 141-42. He concluded that the New York court denied him due process of law by convicting him for refusing to answer the questions of the committee. *Id.* at 142. The Supreme Court addressed this argument, stating that it "necessarily begins with two assumptions: that the visitors' room of a public jail is a constitutionally protected area, and that surreptitious electronic eavesdropping under certain circumstances may amount to an unreasonable search or seizure." *Id.* The Court was able to decide the case without answering these issues since "at least two of the questions which the committee asked [Lanza] were not related in any way to the intercepted conversation." *Id.* at 145. The court concluded that "the ultimate constitutional claim asserted in this case, whatever its merits, is simply not tendered by this record." *Id.* at 147.

29. *Smayda v. United States*, 352 F.2d 251, 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966). In *Smayda*, the court held that police officers could observe and photograph people from a hole in the ceiling of public toilet stalls without violating the fourth amendment. *Id.* at 256. The court looked at the plain language of the amendment and concluded that *Smayda* was unlike other fourth amendment cases where there was "some physical and unconsented to invasion of a private place." *Id.* See *Jones v. United States*, 339 F.2d 419, 419 (5th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965). In *Jones*, the Fifth Circuit Court of Appeals held that there was no unreasonable search and seizure when narcotics agents overheard incriminating conversations of defendants from a hotel room next door to defendants' room. *Id.* at 420-21. The agents were able to hear into the defendants' room by removing a heating panel control from inside the agents' own room. *Id.* at 420. The court held that the fourth amendment was not violated since there was no "physical intrusion or encroachment within an area protected by the Constitution." *Id.*

determining the scope of the fourth amendment.³⁰ Open fields were an exception to fourth amendment protections, since they did not fall within the plain meaning of persons, houses, papers, and effects.³¹ However, the "curtilage" around the house was apparently protected.³² This left courts to grapple with a definition of "curtilage." Where did the curtilage end, and the open field begin?

Working with the Open Fields Doctrine

In order for courts to apply the open fields doctrine, it was necessary to distinguish between those areas considered "open fields" and those defined as "curtilage."³³ The word "curtilage" originally referred to "the land with the castle and outhouses, enclosed often with high stone walls, and where the old barons sometimes held their court in the open air, and which word we have corrupted into courtyard."³⁴ Modern courts have expanded the definition³⁵ and the United States Supreme Court recently stated that the curtilage is

30. *Silverman v. United States*, 365 U.S. 505, 512 (1961). In *Silverman*, the petitioners were tried and found guilty of gambling offenses under the law of the District of Columbia. *Id.* at 506. At trial, police officers were allowed to describe the petitioners' incriminating conversations which were overheard by officers using a listening device. *Id.* From an adjacent vacant row house, officers attached a microphone with a foot-long spike to the wall of the headquarters of the gambling operation. *Id.* The spike made contact with a heating duct in the gambling headquarters, "thus converting their entire heating system into a conductor of sound." *Id.* at 506-07. The Supreme Court held that this eavesdropping violated the fourth amendment. *Id.* at 512. The Court based its decision "upon the reality of an actual intrusion into a constitutionally protected area." *Id.*

31. *Hester v. United States*, 265 U.S. 57, 59 (1924). See *supra* notes 17-22 and accompanying text.

32. *Olmstead*, 277 U.S. at 466. See *supra* note 27 and accompanying text.

33. *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968). The *Wattenburg* court stated:

The protection afforded by the Fourth Amendment, insofar as houses are concerned has never been restricted to the interior of the house, but has extended to open areas immediately adjacent thereto. The differentiation between an immediately adjacent protected area and an unprotected open field has usually been analyzed as a problem of determining the extent of the "curtilage."

Id.

34. *Coddington v. Dry Dock Co.*, 31 N.J.L. 477, 485 (1863).

35. See *Care v. United States*, 231 F.2d 22, 25 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956). In *Care*, the court noted: "Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family." *Id.* See also *State v. Hanson*, 113 N.H. 689, —, 313 A.2d 730, 732 (1973). In *Hanson*, the court stated: "The curtilage includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment." *Id.* (citations omitted).

"the land immediately surrounding and associated with the home."³⁶

One definition used by the Nebraska Supreme Court provided that "[c]urtilage is usually defined as a small piece of land, not necessarily enclosed, around a dwelling house and generally includes buildings used for domestic purposes in the conduct of family affairs."³⁷ Using this definition, the court concluded that a calf shed located about 100 feet from the defendant's house and on the opposite side of a chain link fence surrounding the yard was within the curtilage of the home.³⁸ The definition of an "open field" is less difficult to determine, referring to almost any area outside of the curtilage.³⁹ The United States Supreme Court has stated that the words "open" and "field" need not be taken literally.⁴⁰ While courts were struggling to determine the distinction between open fields and curtilage, the Supreme Court decided a case⁴¹ which led one commentator to wonder if the open fields doctrine was not all but obsolete.⁴²

The Supreme Court Expands Fourth Amendment Protection

In *Katz v. United States*,⁴³ the Supreme Court extended fourth amendment protection beyond the traditional "constitutionally protected areas."⁴⁴ The petitioner, Katz, was convicted in federal court for transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of federal law.⁴⁵ At trial the government was allowed, over Katz's objections, to admit evidence of

36. *Oliver v. United States*, 466 U.S. 170, 180 (1984) (citation omitted).

37. *State v. Vicars*, 207 Neb. 325, 330, 299 N.W.2d 421, 425 (1980) (citing *State v. Kender*, 60 Haw. 301, 304, 558 P.2d 447, 449 (1978)).

38. *Id.* Although the court concluded that the shed was within the curtilage and protected by the fourth amendment, it also held that the requirements of that amendment were satisfied. *Id.* at 331, 299 N.W.2d at 425. Police had a warrant to search the defendant's home, and the court held that outbuildings within the curtilage of the home qualified for a search under this same warrant, though the buildings were not specifically described. *Id.*

39. *Oliver*, 466 U.S. at 180 n.11.

40. *Id.*

41. *Katz v. United States*, 389 U.S. 347, 347 (1967). See *infra* notes 43-57 and accompanying text.

42. See W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 2.4, at 333-36 (1978). In his treatise, Lafave stated: "[I]t is to be hoped that courts will come to accept the fact 'that *Hester* no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy.'" *Id.* § 2.4, at 336 (quoting *United States v. Freie*, 545 F.2d 1217 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977)).

43. 389 U.S. 347 (1967).

44. *Id.* at 350. The court stated: "[T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'" *Id.*

45. *Id.* at 348.

the petitioner's telephone conversations.⁴⁶ These conversations were overheard by F.B.I. agents who had attached a listening and recording device to the outside of a public phone booth from which Katz made the calls.⁴⁷ The Ninth Circuit Court of Appeals affirmed Katz's conviction and rejected the contention that the conversations were recorded in violation of the fourth amendment.⁴⁸ The court held that there was no violation because "[t]here was no physical entrance into the area occupied by [Katz]."⁴⁹ The United States Supreme Court granted certiorari and reversed the court of appeals decision.⁵⁰

The majority opinion delivered by Justice Stewart recognized that at one time the absence of physical intrusion into a constitutionally protected area foreclosed fourth amendment inquiry.⁵¹ Justice Stewart also stated:

[T]his effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own 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.⁵²

The Court concluded that "[t]he Government's activities . . . violated the privacy upon which [Katz] *justifiably relied* while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."⁵³

Justice Harlan's concurring opinion in *Katz* set forth a two-part

46. *Id.*

47. *Id.*

48. *Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

49. *Id.*

50. *Katz*, 389 U.S. at 349, 359.

51. *Id.* at 352. Justice Stewart wrote: "[A]lthough a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested." *Id.* at 353.

52. *Id.* at 351-52 (citations omitted).

53. *Id.* at 353 (emphasis added). After determining that the agents' actions constituted a search and seizure, the Court examined whether "the search and seizure conducted in this case complied with constitutional standards." *Id.* at 354. The government argued that even though agents did not obtain a search warrant before setting up their electronic surveillance, the facts of the case demonstrate that they could have obtained a warrant. *Id.* at 356. They urged the Court to "retroactively validate their conduct." *Id.* The Supreme Court held that it could not do that because "government agents here ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case." *Id.* at 359 (citing *Osborn v. United States*, 385 U.S. 323, 330 (1966)).

test to determine the existence of the justifiable reliance mentioned by the majority.⁵⁴ This test has often been used by courts attempting to interpret the decision in *Katz*.⁵⁵ Justice Harlan stated that his "understanding of the rule that has emerged from prior decisions [was] that [of] a twofold requirement, first that a person . . . [exhibit] an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁵⁶ He applied this test to the facts of the case and agreed with the majority that *Katz*'s reasonable expectation of privacy had been violated.⁵⁷

Lower Court Opinions Concerning the Effect of Katz on the Open Fields Doctrine

The Supreme Court's expansive reading of the fourth amendment in *Katz* led some courts to believe that *Katz* impliedly overruled the open fields doctrine.⁵⁸ In *State v. Wert*,⁵⁹ Knoxville police officers, acting on information supplied by two informants, made several warrantless searches of the Wert farm to look for cultivated marijuana.⁶⁰ The farm was bounded by woods and a creek, and it was

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

55. *E.g.*, *United States v. Freie*, 545 F.2d 1217, 1223 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (finding that "the determination of whether an intrusion is an unreasonable search has depended on one's actual subjective expectation of privacy and whether that expectation is objectively reasonable"); *State v. Cladwell*, 20 Ariz. App. 331, —, 512 P.2d 863, 867 (1973) (holding that a court "must determine whether a defendant has exhibited a subjective expectation of privacy and whether the expectation is one that society may recognize as reasonable"); *State v. Stanton*, 7 Or. App. 286, —, 490 P.2d 1274, 1278 (1971) (stating that "Mr. Justice Harlan's concurring opinion in *Katz* is helpful in defining how this inquiry [into reasonable expectation of privacy] should be made").

56. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

57. *Id.* at 360-61 (Harlan, J., concurring). Justice Harlan stated:

I join the opinion of the Court, which I read to hold only (a) 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; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

Id. (citations omitted).

58. *E.g.*, *Freie*, 545 F.2d at 1223 (stating that "[i]t now appears that *Hester* no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy"); *People v. McClaugherty*, 193 Colo. 360, —, 566 P.2d 361, 363 (1977) (stating that "the 'open fields' doctrine has been substantially undermined by *Katz*"); *Stanton*, 7 Or. App. at —, 490 P.2d at 1279 (holding that "just as 'constitutionally protected areas' is no longer a talismanic phrase, neither should 'open field' be a talismanic phrase") (citation omitted).

59. 550 S.W.2d 1 (Tenn. Crim. App. 1972).

60. *Id.* at 2.

enclosed by a fence with the exception of about 400 feet on its east side.⁶¹ The state, citing *Hester*, argued that the marijuana found by the officers was in the open fields of the farm, an area unprotected by the fourth amendment.⁶² The Tennessee Court of Criminal Appeals was not persuaded and overturned the conviction.⁶³

The *Wert* court relied on *United States ex rel. Gedko v. Heer*.⁶⁴ In that case officers made a warrantless entry onto Gedko's wooded 160 acre farm.⁶⁵ Officers there observed Gedko attempting to destroy a large amount of harvested marijuana.⁶⁶ In *Gedko*, the government argued that this warrantless search fell within the *Hester* open fields exception; however, the district court rejected that argument.⁶⁷ The *Gedko* court held:

[T]he effect of the [*Katz*] decision was to make the area in which the intrusion took place one of several factors to be considered in evaluating the reasonableness of an expectation of privacy as to activities carried on in that place; that *Hester* no longer has any independent meaning except insofar as it indicated that "open fields" were not areas in which one traditionally could have expected privacy.⁶⁸

Relying on this reasoning, the *Wert* court concluded that "Wert had a similar expectation of privacy here which was similarly violated by the police."⁶⁹

In *State v. Byers*,⁷⁰ the Louisiana Supreme Court held that there may be a legitimate expectation of privacy in an open field.⁷¹ In the *Byers* case, marijuana discovered by police was not visible from a public road.⁷² A private logging road posted against trespassers gave access to the property.⁷³ Although a chain barred access to this road, the chain was down at the time the officers entered upon the land to

61. *Id.* at 1.

62. *Id.* at 2. The marijuana patch discovered by the officers was not visible from the road and could only be seen after entering the Wert property. *Id.*

63. *Id.* at 3. The court noted that "*Katz* has modified *Hester* by injecting the privacy concept to the open-fields doctrine." *Id.* at 2.

64. 406 F. Supp. 609 (W.D. Wis. 1975). See *Wert*, 550 S.W.2d at 3.

65. *Gedko*, 406 F. Supp. at 610-11.

66. *Id.* at 611. The Gedkos spotted an airplane flown by a law enforcement officer over their property. They were apparently attempting to destroy evidence of their illegal activities. Other police officers hiding on the Gedko property saw and heard the Gedkos' attempting to burn large amounts of marijuana in their possession. *Id.*

67. *Id.* at 614-15.

68. *Id.* at 615.

69. *Wert*, 550 S.W.2d at 3.

70. 359 So. 2d 84 (La. 1978).

71. *Id.* at 86.

72. *Id.*

73. *Id.* at 85.

make their arrests and seizures.⁷⁴ The *Byers* court concluded that "under these circumstances, the defendants had a legitimate expectation of privacy."⁷⁵

The Florida Supreme Court stated in *State v. Brady*⁷⁶ that "[a]lthough the *Hester* opinion has not been overruled, subsequent opinions indicate that the open fields doctrine cannot be used as *carte blanche* for a warrantless search simply because the location searched is not part of a dwelling or its adjacent curtilage."⁷⁷ In *Brady*, law enforcement officers made a warrantless entry and seizure on the Brady ranch by crossing a dike, ramming through a gate, cutting the chain lock on another and cutting or crossing posted fences.⁷⁸ The court stated that "[o]bviously activity conducted in an open field does not, in most cases, warrant a significant expectation of privacy. Under the facts of this case, however . . . we find that an expectation of privacy was reasonable."⁷⁹

The *Wert*, *Byers*, and *Brady* cases represent just one approach concerning the status of the open fields doctrine after the *Katz* decision.⁸⁰ Other courts, including the Nebraska Supreme Court,⁸¹ took the position that application of *Hester* and the open fields doctrine was still proper.⁸²

74. *Id.* at 86.

75. *Id.* Two lower courts had held that the warrantless search and seizure was permitted under the open fields doctrine of *Hester*. *Id.* The Supreme Court of Louisiana disagreed, stating that "[t]he crucial question, then, in cases such as this, is whether or not there is a legitimate expectation of privacy." *Id.*

76. 406 So. 2d 1093 (Fla. 1981).

77. *Id.* at 1095.

78. *Id.* at 1094-95. Officers were acting on information that airplanes carrying contraband might land on the Brady ranch. *Id.* at 1094.

79. *Id.* at 1097.

80. See *supra* notes 58-79 and accompanying text.

81. See *supra* notes 83-92 and accompanying text.

82. *E.g.*, *Patler v. Slayton*, 503 F.2d 472, 478 (4th Cir. 1974) (holding that even if the defendant had an actual expectation of privacy in a pasture owned by his father-in-law, it was not one society was willing to recognize as reasonable); *United States v. Brown*, 473 F.2d 952, 954 (5th Cir. 1973) (holding that the open fields doctrine still prevailed); *United States v. Swann*, 377 F. Supp. 1305, 1307 (D. Md. 1974) (holding that as "[t]he open fields around the barn [were] . . . an area constitutionally protected against a warrantless search, there was no 'search' in this case within the meaning of the Fourth Amendment"); *Bedell v. State*, 257 Ark. 895, —, 521 S.W.2d 200, 201 (1975), *cert. denied*, 430 U.S. 931 (1977) (holding that "the Fourth Amendment to the Constitution only protect[ed] against *unreasonable* searches and seizures of persons, houses, papers and effects and [did] not extend to open fields and forested areas"); *Cornman v. State*, 156 Ind. App. 112, —, 294 N.E.2d 812, 816 (1973) (holding that "[t]he provisions of the Fourth Amendment . . . [were] not applicable to open fields."); *Commonwealth v. Janek*, 242 Pa. Super. 340, —, 363 A.2d 1299, 1300 (1976) (holding that "*Hester* has not been overruled."); *Conrad v. State*, 63 Wis. 2d 616, —, 218 N.W.2d 252, 258 (1974) (holding that "[a]n open field remains beyond the ambit of the Fourth Amendment protection").

Nebraska Cases Addressing the Open Fields Doctrine After Katz

The Nebraska Supreme Court seemed to make its position clear concerning the open fields doctrine controversy in *State v. Poulson*.⁸³ In *Poulson*, the court concluded that fourth amendment protections against unreasonable searches and seizures did not encompass a field seventy-five feet behind the defendant's partially constructed house.⁸⁴ Law enforcement officers discovered marijuana growing in this field while attempting to serve an arrest warrant on the defendant.⁸⁵ The court, referring to *Hester*, held that the fourth amendment protection guaranteed to people in their persons, houses, papers, and effects did not extend to the open fields.⁸⁶ The court concluded that "the trial court was correct in admitting evidence of the marijuana which was cut and collected from the open field by the officers."⁸⁷

The Nebraska Supreme Court had an opportunity to address the open fields issue again in *State v. Cemper*.⁸⁸ The court cited *Poulson* with apparent approval and stated that Nebraska took the position that application of the open fields doctrine was still correct after *Katz*.⁸⁹ However, the court also stated that the question before it was "whether the defendant had a legitimate expectation of privacy in the marijuana patch in the middle of a cornfield under the circumstances disclosed by this record."⁹⁰

The court relied heavily on the particular facts of *Cemper*, especially the following:

[the cornfield in question] was owned by one company, of which [the defendant] was an employee, and farmed by another company, with which he had no connection, in a rural area and on land on which no one resided. The field was enclosed by an ordinary barbed wire fence and the property was not posted against trespassers. At least one gate was al-

83. 194 Neb. 601, 234 N.W.2d 214 (1975).

84. *Id.* at 603, 234 N.W.2d at 216.

85. *Id.* at 602, 234 N.W.2d at 215. The marijuana "was in plain view from the outside of the house during the time that the officers were attempting to locate and contact the defendant owner in the customary manner." *Id.* at 603, 234 N.W.2d at 216.

86. *Id.* The court did not discuss *Katz* nor did it use the "reasonable expectation of privacy" analysis found in other search and seizure cases decided after *Katz*. See *supra* notes 60-79 and accompanying text.

87. *Poulson*, 194 Neb. at 604, 234 N.W.2d at 216.

88. 209 Neb. 376, 307 N.W.2d 820 (1981).

89. *Id.* at 380, 307 N.W.2d at 822.

90. *Id.* Unlike the *Poulson* decision, the *Cemper* opinion discussed both *Hester* and *Katz*. *Id.* The court attempted to use the *Katz* analysis, yet at the same time the court stated that a straightforward application of the open fields doctrine was still appropriate. *Id.* at 380-82, 307 N.W.2d at 822-23. This later led to confusion among the Nebraska Supreme Court chief justice and judges concerning the status of the open fields doctrine under *Cemper*. See *infra* notes 191-98 and accompanying text.

ways open.⁹¹

The court concluded that "under the circumstances here the defendant had no legitimate expectation of privacy in an open field in which he had no personal ownership or possessory rights and therefore cannot claim the protection of the fourth amendment as to unreasonable searches and seizures."⁹²

The *Cemper* decision sent mixed messages concerning the Nebraska Supreme Court's position regarding the open fields doctrine under the fourth amendment.⁹³ However, this confusion was soon eliminated by the United States Supreme Court's decision in *Oliver v. United States*.⁹⁴

The United States Supreme Court Settles the Open Fields Doctrine Controversy

The United States Supreme Court laid the controversy to rest in *Oliver v. United States*⁹⁵ and its companion case involving a criminal action brought by the state of Maine against defendant Thornton.⁹⁶ The Court sought to "clarify confusion that has arisen as to the continued vitality of the [open fields] doctrine."⁹⁷ In a 6-3 decision, the Court held that the *Hester* open fields doctrine fully survived *Katz*.⁹⁸

In *Oliver*, narcotics agents went to the defendant's farm to investigate a tip that marijuana was being cultivated.⁹⁹ The officers arrived at the farm and drove past the Oliver home to a locked gate posted with a no-trespassing sign.¹⁰⁰ The agents walked around the gate and found marijuana growing more than a mile away from the defendant's home.¹⁰¹

The companion case involved similar facts. Officers, investigating a tip, entered a wooded area behind the defendant's home by following a path between the residence and a neighbor's house.¹⁰² In the woods, officers found two marijuana patches, fenced and posted against trespassers.¹⁰³

91. *Cemper*, 209 Neb. at 381, 307 N.W.2d at 823.

92. *Id.* at 382, 307 N.W.2d at 823 (emphasis added).

93. See *infra* notes 184, 191-98 and accompanying text.

94. *Oliver v. United States*, 466 U.S. 170, 181 (1984).

95. 466 U.S. 170 (1984).

96. *Id.*

97. *Id.* at 173.

98. *Id.* at 177.

99. *Id.* at 173.

100. *Id.*

101. *Id.* It was "conceded that police did not have a warrant authorizing the search, that there was no probable cause for the search, and that no exception to the warrant requirement [was] applicable." *Id.* at 173 n.1.

102. *Id.* at 174.

103. *Id.*

In each case, evidence seized during the warrantless searches was used against the defendant.¹⁰⁴ The decisions were appealed to the United States Supreme Court, and certiorari was granted.¹⁰⁵ The Court held, citing *Hester*, that "the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment."¹⁰⁶

The *Oliver* opinion, written by Justice Powell, stated three reasons for affirming the open fields doctrine.¹⁰⁷ The Court first looked at the plain language of the fourth amendment and found that it indicated "with some precision the places and things encompassed by its protections."¹⁰⁸ The Court concluded that an open field was neither a person, house, paper, nor effect, and thus not "within the meaning of the Fourth Amendment."¹⁰⁹

The second reason stated by the majority was:

[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And . . . the public and police lawfully may survey lands from the air. For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."¹¹⁰

The final reason for the Court's complete exclusion of the open fields from fourth amendment protection was that a case-by-case approach would not "provide a workable accommodation between the

104. *Id.* at 173-75.

105. *Maine v. Thornton*, 460 U.S. 1068, 1068 (1983); *Oliver v. United States*, 459 U.S. 1168, 1168 (1983). In *Oliver*, the district court suppressed evidence of the discovered marijuana holding that Oliver had a reasonable expectation that his fields would remain private. *Oliver*, 466 U.S. at 173. The court of appeals reversed this holding, finding that *Katz* "had not impaired the vitality of the open fields doctrine of *Hester*." *Id.* at 174. It was from this decision that Oliver appealed. *Oliver*, 459 U.S. at 1168.

The trial court in *Thornton* also suppressed evidence because it found the police officers' warrantless search unreasonable. *Oliver*, 466 U.S. at 175. The Maine Supreme Judicial Court affirmed this decision. *Id.* The United States Supreme Court affirmed *Oliver* and reversed its companion case. *Id.* at 184.

106. *Id.* at 177.

107. *Id.* at 177-79.

108. *Id.* at 176.

109. *Id.* at 176-77. Justice Marshall's dissent suggested that the plain-language theory, because of its weakness, "will have little or no effect on our future decisions in this area." *Id.* at 188 n.7 (Marshall, J., dissenting).

110. *Id.* at 179 (footnotes omitted).

needs of law enforcement and the interests protected by the Fourth Amendment."¹¹¹ The majority expressed its concern that an "ad hoc approach" would make it "difficult for the policeman to discern the scope of his authority," and would create "a danger that constitutional rights will be arbitrarily and inequitably enforced."¹¹²

Justice Marshall's dissent, joined by Justices Brennan and Stewart, first took issue with the majority's literal interpretation of the fourth amendment.¹¹³ Justice Marshall wrote:

This line of argument has several flaws. Most obviously, it is inconsistent with the results of many of our previous decisions, none of which the Court purports to overrule. For example, neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; yet we have held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation.¹¹⁴

Furthermore, Justice Marshall pointed out the majority's own inconsistency in ruling that the curtilage surrounding a house is constitutionally protected.¹¹⁵ He stated: "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."¹¹⁶

Justice Marshall's second point of argument was that society is willing to recognize that an expectation of privacy in an open field may be reasonable.¹¹⁷ He examined three factors to determine "whether an expectation of privacy asserted in a physical space is

111. *Id.* at 181.

112. *Id.* at 181-82. The court stated that under a case-by-case approach, "police officers would have to guess before every search whether land owners 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." *Id.* at 181.

113. *Id.* at 185-88 (Marshall, J., dissenting)

114. *Id.* at 185 (Marshall, J., dissenting) (footnote omitted).

115. *Id.* at 186 (Marshall, J., dissenting). The majority stated that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Id.* at 178. Neither Oliver nor the co-petitioner Thornton claimed that the property searched was within the curtilage, so it was not "necessary . . . to consider the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself." *Id.* at 180 n.11.

116. *Id.* at 186 (Marshall, J., dissenting). The majority indicated that the curtilage fell under the category of "house." *Id.* at 180. The Court stated: "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of the home itself for Fourth Amendment purposes." *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

117. *Id.* at 188-89 (Marshall, J., dissenting).

'reasonable.'"¹¹⁸ Justice Marshall applied these factors to the *Oliver* and *Thornton* cases and found, first, that the "positive law" of their respective states recognized "the legitimacy of Oliver's and Thornton's insistence that strangers keep off their land."¹¹⁹ These laws subjected those who refused to respect these wishes to criminal liability.¹²⁰ He found, second, that privately owned woods and fields are often used for activities that society "acknowledges deserve privacy," such as solitary walks, meetings between lovers, or gatherings of fellow worshippers.¹²¹ Finally, Justice Marshall stated that where the owner of land has attempted to exclude the public, such as by posting no-trespassing signs, he saw no reason why the government "should not be obliged to respect such unequivocal and universally understood manifestations of a landowner's desire for privacy."¹²²

Justice Marshall thus proposed an alternative to the majority's complete exclusion of open fields from fourth amendment protection.¹²³ He believed that a workable rule would be that "[p]rivate land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the state in which the land lies" would be "protected by the [f]ourth [a]mendment's proscription of unreasonable searches and seizures."¹²⁴

Although Justice Marshall's dissent is persuasive, he has been unable to convince a majority of the Court. Open fields remain a *per se* exception to fourth amendment protection.¹²⁵ Thus, it appears

118. *Id.* at 189 (Marshall, J., dissenting). Justice Marshall proposed:

First, we consider whether the expectation at issue is rooted in entitlements defined by positive law. Second, we consider the nature of the uses to which spaces of the sort in question can be put. Third, we consider whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect. When the expectations of . . . Oliver and . . . Thornton are examined through these lenses, it becomes clear that those expectations are entitled to constitutional protection.

Id. (footnotes omitted).

119. *Id.* at 191 (Marshall, J., dissenting).

120. *Id.* Justice Marshall stated: "In Kentucky, a knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public, constitutes criminal trespass. The law in Maine is similar." *Id.* at 190 (Marshall, J., dissenting) (citation omitted).

121. *Id.* at 192 (Marshall, J., dissenting).

122. *Id.* at 194-95 (Marshall, J., dissenting) (footnote omitted).

123. *Id.* at 195-97 (Marshall, J., dissenting).

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

125. *See Dow Chem. Co. v. United States*, 106 S. Ct. 1819, 1825 (1986). In *Dow Chem. Co.*, decided after *Havlat*, the Supreme Court repeated its holding in *Oliver*: "an individual may not legitimately demand privacy for activities out of doors in fields, except in the area immediately surrounding the home." *Id.* (quoting *Oliver*, 466 U.S. at 178). The Court used this holding to conclude:

[T]he open areas of an industrial plant complex with numerous plant structures . . . are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open

that if there is to be any protection from unreasonable searches and seizures in an area defined as an "open field," it must come from a source other than the fourth amendment.¹²⁶

Facts and Holding

On July 26, 1983, two Nebraska State Patrol officers made an investigative air flight over several rural parts of Seward County, Nebraska.¹²⁷ The flight was initiated because of suspicions that marijuana was being cultivated in these areas.¹²⁸ One of the areas observed and photographed during the flight was a 250-acre farm owned by Lumir and Valerie Havlat, the parents of defendant Terry Havlat.¹²⁹ The farm had been used by Havlat, in partnership with his father, for a grain and livestock operation since about 1977.¹³⁰

The photographs taken over the Havlat farm were developed the next day, and officers believed that the depicted vegetation was marijuana.¹³¹ To determine whether the suspected marijuana plants were volunteer or cultivated, State Patrol officers made the first of several warrantless entries on the Havlat farm on July 28, 1983.¹³²

At the time of the officers' initial entry, the Havlat farm was completely surrounded by a fence, and all entrances had gates which were kept closed.¹³³ Although the investigators saw the conspicuously posted no-trespassing signs,¹³⁴ they crawled through a perimeter fence from a country road along the side of the Havlat property "at a point distant from the farm buildings."¹³⁵ Officers walked west to a haystack area located one-quarter mile away from the road,¹³⁶ and there they found four patches of cultivated marijuana growing near the creek.¹³⁷ The marijuana could not be seen from the road.¹³⁸

field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

Id. at 1827 (footnote omitted).

126. *See supra* notes 159-63 and accompanying text.

127. *State v. Havlat*, 222 Neb. 554, 555, 385 N.W.2d 436, 438 (1986).

128. Brief for Appellant at 6, *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986).

129. *Havlat*, 222 Neb. at 555-56, 385 N.W.2d at 438.

130. *Id.* at 569, 385 N.W.2d at 444 (Shanahan, J., dissenting).

131. *Id.* at 568, 385 N.W.2d at 445 (Shanahan, J., dissenting).

132. *Id.*

133. Brief for Appellant at 8, *Havlat*.

134. *Havlat*, 222 Neb. at 568, 385 N.W.2d at 445 (Shanahan, J., dissenting).

135. *Id.* at 556, 385 N.W.2d at 438.

136. *Id.* at 568, 385 N.W.2d at 445 (Shanahan, J., dissenting).

137. *Id.* at 556, 385 N.W.2d at 438. Officers knew that the marijuana was cultivated because "[t]he ground around the marijuana had been disturbed, and the weeds had been eradicated." *Id.* Plastic garden hoses and a pump transported water from the creek to the marijuana. *Id.*

138. *Id.*

The State Patrol continued surveillance of the area and made six further warrantless entries on the Havlat farm over a twelve-day period.¹³⁹ On the evening of August 8, 1983, Terry Havlat was arrested by officers when he appeared at the growing area.¹⁴⁰ The following day 600 pounds of marijuana plants were seized at the site.¹⁴¹ Based on information gathered during these warrantless intrusions onto the Havlat property, the county court issued a warrant to search Havlat's home, from which other items were seized.¹⁴²

Havlat was charged in the District Court of Seward County with the manufacture of a controlled substance, marijuana, and with conspiracy to manufacture marijuana.¹⁴³ Prior to trial, the defendant filed a motion to suppress evidence seized during the warrantless search of the Havlat farm.¹⁴⁴ The district judge granted this motion, holding that the search of the Havlat farm and the defendant's arrest violated the fourth amendment to the United States Constitution.¹⁴⁵ The district judge ordered the suppression of all evidence.¹⁴⁶ He stated that "[a]s operator of the real estate . . . Terry Havlat had a legitimate expectation of privacy in the land, recognized by society as reasonable, and had outwardly manifested the same."¹⁴⁷

A single member of the Nebraska Supreme Court reversed the suppression order after the state made an interlocutory appeal.¹⁴⁸ Judge White held that the United States Constitution did not require the suppression of evidence obtained during a warrantless search of an open field.¹⁴⁹ He stated that "neither probable cause nor a warrant was required to effect a search of open fields."¹⁵⁰

The district court, on its own motion, again suppressed the same evidence on the ground that the search of the Havlat farm and the arrest of Terry Havlat violated article I, section 7 of the Nebraska

139. *Id.* Officers entered the Havlat farm on July 29, 1983 and on August 2, 4, 5, 8, and 9, 1983. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 569-70, 385 N.W.2d at 445 (Shanahan, J., dissenting). Items seized, including seed starter trays, marijuana seeds, and other marijuana paraphernalia, were suppressed at the close of trial. *Id.* at 556, 385 N.W.2d at 438.

143. *Id.* at 555-57, 385 N.W.2d at 437-38. The conspiracy charge against Havlat was dismissed immediately prior to trial. *Id.* at 557, 385 N.W.2d at 438.

144. *Id.* at 556, 385 N.W.2d at 438. Near the marijuana, officers found a machete, a gas powered pump, plastic hose and pipe, and a footprint. Also, a palm print, identified as Havlat's, was subsequently lifted from the pump. *Id.*

145. Brief for Appellant at 8-9, *Havlat*.

146. *Id.* at 9.

147. *Id.* at 8 (quoting Trial Record, *Havlat*).

148. *Havlat*, 217 Neb. 791, 792, 351 N.W.2d 86, 87 (1984).

149. *Id.* at 791, 351 N.W.2d at 86-87.

150. *Id.* at 792, 351 N.W.2d at 87.

Constitution.¹⁵¹ Article I, section 7 provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.¹⁵²

This language is nearly identical to the language of the fourth amendment.¹⁵³

The state made a second interlocutory appeal, and again Judge White reversed the suppression order.¹⁵⁴ He based this decision on the fact that he was "not convinced that a majority of this court would adopt an exclusionary rule based on the Nebraska Constitution relating to open field searches."¹⁵⁵

The case proceeded to trial, and Havlat was found guilty of manufacturing marijuana.¹⁵⁶ He was sentenced to twenty to forty months in the Nebraska Penal and Correctional Complex.¹⁵⁷ Havlat appealed his convictions to the Nebraska Supreme Court.¹⁵⁸

On appeal, Havlat claimed that the warrantless-search evidence was seized in violation of state and federal search and seizure provisions.¹⁵⁹ He urged the court to give a broader interpretation to article I, section 7 of the Nebraska Constitution than to the fourth amendment to the U.S. Constitution when deciding cases involving fact situations falling under the open fields doctrine.¹⁶⁰ Havlat argued for a separate state standard, but the court was not persuaded¹⁶¹ and it affirmed Havlat's conviction.¹⁶² Chief Justice Krivosha and Judge Shanahan offered separate dissenting opinions.¹⁶³

The majority held that the Nebraska Constitution did not give

151. *Havlat*, 222 Neb. at 557, 385 N.W.2d at 438.

152. NEB. CONST. art. I, § 7.

153. Compare *id.* with U.S. CONST. amend. IV (both provisions describing the right against unreasonable searches and seizures).

154. *Havlat*, 218 Neb. 602, 603, 357 N.W.2d 464, 464 (1984).

155. *Id.*

156. *Havlat*, 222 Neb. at 557, 385 N.W.2d at 438.

157. *Id.* at 555, 385 N.W.2d at 438.

158. *Id.* at 555, 385 N.W.2d at 437.

159. *Id.* at 557, 385 N.W.2d at 439. Havlat also claimed that the trial court erred in deciding his guilt on the basis of testimonial evidence that was "wholly lacking in relevance and probative value due to the State's failure to lay adequate foundation." *Id.* at 561, 385 N.W.2d at 441. The majority held that even disregarding this testimony, there was ample evidence to support Havlat's conviction. *Id.* at 564, 385 N.W.2d at 442.

160. *Id.* at 557, 385 N.W.2d at 439.

161. *Id.* at 561, 385 N.W.2d at 441.

162. *Id.* at 564, 385 N.W.2d at 442.

163. *Id.* at 564, 567, 385 N.W.2d at 442 (Krivosha, C.J., dissenting); *Id.* at 567, 385 N.W.2d at 444 (Shanahan, J., dissenting).

greater protection than the fourth amendment to the U.S. Constitution in cases falling under the open fields doctrine.¹⁶⁴ Therefore, the court concluded that Havlat had no constitutional protection concerning activities occurring in an open field.¹⁶⁵ The court found that Havlat had no legitimate expectation of privacy, and that police could enter and search the open fields of the Havlat farm without probable cause or a search warrant.¹⁶⁶

Chief Justice Krivosha dissented, stating that he believed the defendant's right to be free from unreasonable searches and seizures, both under the fourth amendment and the Nebraska Constitution, had been violated.¹⁶⁷ Chief Justice Krivosha further stated:

I am simply not prepared to hold that under the provisions of [article I, section 7 of the Nebraska Constitution], no one in Nebraska may have an expectation of privacy in an open field which is tightly fenced, locked, and signed against trespassers. I cannot imagine what more a person could do to evidence an expectation of privacy.¹⁶⁸

Judge Shanahan, in a separate dissent, stated that the court "should not unquestioningly follow an analysis tendered by the U.S. Supreme Court regarding its construction of the fourth amendment to the U.S. Constitution."¹⁶⁹ Judge Shanahan believed that Havlat's reasonable expectation of privacy had been violated, and that the evidence gathered during the search of the Havlat farm should have been excluded.¹⁷⁰ Judge Shanahan also pointed out that the warrantless entries by Nebraska State Patrol officers constituted repeated trespasses in violation of the Nebraska criminal code.¹⁷¹ He argued that the exclusion of evidence gathered by criminal conduct would deter further illegal actions by law enforcement officers pursuing

164. *Id.* at 560-61, 385 N.W.2d at 440-41. The court held: "[W]e decline to judicially impose higher standards governing law enforcement officers under the provisions of the state Constitution." *Id.* at 561, 385 N.W.2d at 441.

165. *Id.*

166. *Id.* The court stated: "[W]e find persuasive the reasons advanced in *Oliver* for concluding that no constitutional protection attaches to Havlat's activities occurring in the open fields, that Havlat had no legitimate expectation of privacy under the facts here . . ." *Id.*

167. *Id.* at 564, 385 N.W.2d at 442 (Krivosha, C.J., dissenting).

168. *Id.* at 586, 385 N.W.2d at 444 (Krivosha, C.J., dissenting).

169. *Id.* at 573, 385 N.W.2d at 447 (Shanahan, J., dissenting). Judge Shanahan pointed out that "this court is not inextricably bound to federal decisions which provide less restriction on searches and seizures than may be appropriate for the citizens of Nebraska." *Id.*

170. *Id.* at 572, 385 N.W.2d at 447 (Shanahan, J., dissenting). Judge Shanahan stated: "Havlat demonstrated a subjective expectation of privacy protectable against unreasonable governmental intrusion. Acquisition of physical evidence in the present case is the result of an invasion upon and violation of Havlat's reasonable expectation of privacy, an unreasonable search, and should have been excluded." *Id.*

171. *Id.* at 572-73, 385 N.W.2d at 447 (Shanahan, J., dissenting).

investigations.¹⁷²

ANALYSIS

THE ARGUMENT FOR A SEPARATE STATE STANDARD

In *State v. Havlat*, the Nebraska Supreme Court faced the task of interpreting article I, section 7 of the Nebraska Constitution in the context of an open field search.¹⁷³ The defendant, Terry Havlat, sought the protection of the state constitution because the United States Supreme Court had indicated in *Oliver v. United States*¹⁷⁴ that the scope of the fourth amendment protection under the U.S. Constitution did not encompass an open field search.¹⁷⁵

The Nebraska Supreme Court did not have to follow the United States Supreme Court's lead in the area of the state constitution.¹⁷⁶ The court was urged by Havlat to adopt a broad and separate interpretation of article I, section 7.¹⁷⁷ However, apart from recognizing that the court had such a right, it gave little discussion to this argument.¹⁷⁸

The majority apparently paid little attention to Judge Shanahan's plea that "this court should not exhibit some pavlovian conditioned reflex in an uncritical adoption of federal decisions as the construction to be placed on provisions of the Nebraska Constitution analogous to the U.S. Constitution's."¹⁷⁹ Nor did the court remember Judge White's advice from his concurring opinion of *State v. Arnold*.¹⁸⁰ Judge White urged that "rather than blindly allowing the 'continuing evisceration of Fourth Amendment protection against unreasonable searches and seizures,' we adopt a standard based on the Nebraska Constitution and offer such protection as we may in

172. *Id.* at 573, 385 N.W.2d at 447 (Shanahan, J., dissenting). Judge Shanahan further stated: "When law enforcement has contempt for laws of the people, inevitably people will have contempt for enforcement of laws." *Id.* at 573, 385 N.W.2d at 448 (Shanahan, J., dissenting).

173. *Id.* at 557, 385 N.W.2d at 439.

174. 466 U.S. 170 (1984).

175. *Id.* at 177. See *supra* notes 95-112 and accompanying text.

176. See *Havlat*, 222 Neb. at 560, 385 N.W.2d at 440. The majority opinion recognized that "a state may impose higher standards governing police practices on the basis of state law." *Id.* (citations omitted).

177. *Id.* at 557, 385 N.W.2d at 439.

178. *Id.* at 559-60, 385 N.W.2d at 439-40. It was argued in the brief for Havlat that "[c]itizens of a state such as Nebraska, which is essentially rural in nature and has an agrarian based economy, have interests which substantially justify the establishment of search and seizure standards which afford more protection than does Federal Law." Brief for Appellant at 14, *Havlat*. See *infra* notes 179-80 and accompanying text.

179. *Havlat*, 222 Neb. at 573, 385 N.W.2d at 447 (Shanahan, J., dissenting).

180. 214 Neb. 769, 774-76, 336 N.W.2d 97, 100-01 (1983) (White, J., concurring).

the courts of Nebraska."¹⁸¹

In his brief, Havlat specifically urged a broader standard under the Nebraska Constitution, because "the present Fourth Amendment *Oliver* standard is inadequate to protect the rights to which an agrarian population like Nebraska is entitled."¹⁸² Although the court, with little discussion, concluded that "there [was] no merit in the argument,"¹⁸³ the argument does deserve scrutiny.

The majority opinion in *Oliver* stated that "the term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech."¹⁸⁴ Such a broad definition would apparently leave most of an agricultural state like Nebraska completely unprotected from unreasonable searches and seizures. The very purpose of a state constitution is to recognize and protect the unique needs of the state's citizenry. A state constitution that does no more than duplicate the protection of the federal constitution is redundant.

The majority opinion in *State v. Havlat*,¹⁸⁵ adding little of its own reasoning, based its interpretation of article I, section 7 of the Nebraska Constitution on two fourth amendment decisions,¹⁸⁶ *State v. Cemper*¹⁸⁷ and *Oliver v. United States*.¹⁸⁸ The first, *Cemper*, was a case decided by the Nebraska Supreme Court on fourth amendment grounds.¹⁸⁹ In *Cemper*, the court held that under the facts of that case the defendant had no legitimate expectation of privacy in an open field under the fourth amendment.¹⁹⁰ The *Havlat* majority's understanding that *Cemper* "merely anticipated *Oliver*"¹⁹¹ was strongly criticized by Chief Justice Krivosha and Judge Shanahan in their respective dissenting opinions.¹⁹² According to Chief Justice

181. *Id.* at 775-76, 336 N.W.2d at 101 (White, J., concurring) (citation omitted). In *Arnold*, Judge White concurred with the majority opinion that the affidavit in that case was adequate to support the issuance of a search warrant under the fourth amendment. *Id.* at 774, 336 N.W.2d at 100 (White, J., concurring). However, Judge White also wrote: "In my view, it is now past time to consider search and seizure cases in light of [article I, section 7 of the Nebraska Constitution]. . . ." *Id.* at 775, 336 N.W.2d at 100 (White, J., concurring).

182. Brief for Appellant at 15, *Havlat*.

183. *Havlat*, 222 Neb. at 561, 385 N.W.2d at 440.

184. *Oliver*, 466 U.S. at 180 n.11 (1984). The court stated: "For example . . . a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment." *Id.* (citations omitted).

185. 222 Neb. 554, 385 N.W.2d 436 (1986).

186. *Id.* at 558-61, 385 N.W.2d at 439-41.

187. 209 Neb. 376, 307 N.W.2d 820 (1981).

188. 466 U.S. 170 (1984).

189. See *supra* notes 88-92 and accompanying text.

190. *Cemper*, 209 Neb. at 382, 307 N.W.2d at 823 (1981).

191. *Havlat*, 222 Neb. at 560, 385 N.W.2d at 440.

192. See *supra* notes 167-72 and accompanying text.

Krivosha's dissent, *Cemper* did not remove all open fields from the protection of article I, section 7 of the Nebraska Constitution, or from the protection of the fourth amendment of the U.S. Constitution.¹⁹³ Instead, he believed that the case simply held that "the defendant could not have a legitimate expectation of privacy in *his particular* open field."¹⁹⁴

A reading of the *Cemper* case gives support to Chief Justice Krivosha's view. Although the court remarked that the Nebraska Supreme Court took the position that a straightforward application of *Hester v. United States*¹⁹⁵ was still proper after *Katz v. United States*,¹⁹⁶ the court later stated that "[t]he open fields doctrine is not *completely* dead. Its reincarnated substance is still a vital part of the broader constitutional concept of freedom from unreasonable searches and seizures."¹⁹⁷ This statement implies that the open fields doctrine did not survive *Katz* unmodified in the eyes of the Nebraska Supreme Court. In fact, the court's holding that "*under the circumstances here* the defendant had no legitimate expectation of privacy in an open field"¹⁹⁸ reinforces that impression.¹⁹⁹

Judge Shanahan added to the criticism of *Cemper*, writing that "[e]ven seeking strained similarities, one is compelled to conclude there is a drastic difference between the facts in *Cemper* and the present case."²⁰⁰ He explained that "[i]n *Cemper* the real estate involved was not posted, was accessible through at least one fence-gate which was never closed, and was land 'owned by one company, of which [*Cemper*] was an employee, and farmed by another company, with which [*Cemper*] had no connection.'"²⁰¹ On the other hand, "the *Havlat* land was entirely fenced private property, accessible only with consent or by trespass, was conspicuously posted with 'no trespassing' signs, and constituted an occupied and developed farm unit."²⁰²

The second opinion upon which the *Havlat* majority relied, *Oliver v. United States*,²⁰³ also had its critics. In *Oliver*, the United

193. *Havlat*, 222 Neb. at 566, 385 N.W.2d at 443 (Krivosha, C.J., dissenting).

194. *Id.*

195. 265 U.S. 57 (1924).

196. 389 U.S. 347 (1967).

197. *Cemper*, 209 Neb. 376, 382, 307 N.W.2d 820, 823 (emphasis added).

198. *Id.* (emphasis added).

199. *See id.*

200. *Havlat*, 222 Neb. at 571, 385 N.W.2d at 446 (Shanahan, J., dissenting).

201. *Id.* at 571-72, 385 N.W.2d at 446 (Shanahan, J., dissenting).

202. *Id.* at 572, 385 N.W.2d at 447 (Shanahan, J., dissenting). Judge Shanahan added: "Short of constructing some opaque and impenetrable structure around the farm, it is difficult to envision what other measures could have been reasonably utilized to assert and preserve the right of privacy on the *Havlat* land." *Id.*

203. 446 U.S. 170 (1984).

States Supreme Court held that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers."²⁰⁴ One of the most persuasive criticisms of the *Oliver* decision is Justice Marshall's dissent.²⁰⁵ Justice Marshall first addressed the *Oliver* majority's argument that open fields do not come within the plain meaning of the fourth amendment.²⁰⁶ He pointed out that this line of argument was inconsistent with previous Court holdings and with the *Oliver* decision itself.²⁰⁷ Justice Marshall wrote:

The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, 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.²⁰⁸

The *Havlat* court also made this plain-meaning argument stating: "Nowhere . . . do we find evidence that the framers intended the explicit language of article I, [section] 7, to encompass more than what it says."²⁰⁹ Chief Justice Krivosha agreed with Justice Marshall, and in the Chief Justice's *Havlat* dissent he stated: "it is difficult for me to perceive how we can, on the one hand, write out open fields surrounded by a locked fence and posted signs reading 'No Trespass,' and, on the other, read in public telephone booths and commercial places of business."²¹⁰

Justice Marshall also criticized the *Oliver* majority's "contention that any interest a landowner might have in the privacy of his woods and fields is not one that 'society is prepared to recognize as [reasonable].'"²¹¹ He believed that there are some uses of an open field for which society might acknowledge that a legitimate expectation of privacy exists, especially when the landowner takes steps to make his desire for privacy known.²¹² In Justice Marshall's opinion, society indicates through the creation of laws what it considers reasonable.²¹³

Judge Shanahan in his *Havlat* dissent pointed out that Nebraska

204. *Id.* at 181.

205. See *supra* notes 113-24 and accompanying text.

206. See *supra* notes 113-16 and accompanying text.

207. See *supra* notes 113-16 and accompanying text.

208. *Oliver*, 466 U.S. at 186.

209. *Havlat*, 222 Neb. at 561, 385 N.W.2d at 440.

210. *Id.* at 565, 385 N.W.2d at 443 (Krivosha, C.J., dissenting).

211. *Oliver*, 466 U.S. at 188 (citation omitted). See *supra* notes 117-22 and accompanying text.

212. See *supra* notes 117-22 and accompanying text.

213. See *supra* notes 117-22 and accompanying text.

has a criminal trespass statute,²¹⁴ which officers violated by entering the Havlat farm.²¹⁵ This fact, combined with the fact that Havlat took great care to preserve his privacy,²¹⁶ makes it difficult to understand why society would never recognize Havlat's expectation of privacy as reasonable. As Judge Shanahan stated: "[I]t is difficult to envision what other measures could have been reasonably utilized to assert and preserve the right of privacy on the *Havlat* land."²¹⁷

Critics of the *Oliver* decision have called the Court's per se exclusion of the open fields from fourth amendment protection too broad,²¹⁸ and an effective emasculation of the *Katz* decision.²¹⁹ Another writer criticized the opinion because it sacrificed "protection of truly reasonable privacy interests for the sake of attempting to state an easily applied rule."²²⁰ These criticisms appear to apply with equal force to the *Havlat* decision.

THE ALTERNATIVES AVAILABLE TO THE *HAVLAT* COURT

In *Oliver*, the Court held that a case-by-case approach to determining whether a reasonable expectation of privacy existed in an open field would not be a workable solution.²²¹ The Court stated that 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."²²² Instead, the

214. *Havlat*, 222 Neb. at 572, 385 N.W.2d at 447 (Shanahan, J., dissenting). See also NEB. REV. STAT. § 28-521(1) (Reissue 1985). Subsection 28-521(1) provides:

A person commits second degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:

- (a) Actual communication to the actor; or
- (b) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
- (c) Fencing or other enclosure manifestly designed to exclude intruders.

215. *Havlat*, 222 Neb. at 572, 385 N.W.2d at 447 (Shanahan, J., dissenting). The state insisted in its brief that the State Patrol officers' actions were not unlawful. The state claimed that under subsection 28-429(1)(d) of the Nebraska Revised Statutes, which established a division of drug control within the Nebraska State Patrol, the officers were permitted to enter onto the Havlat farm without a warrant or consent in order to locate and destroy illicit plants from which controlled substances may be extracted. Brief for Appellee at 8, *Havlat*.

216. See *supra* notes 133-34 and accompanying text.

217. *Havlat*, 222 Neb. at 572, 385 N.W.2d at 447 (1986) (Shanahan, J., dissenting).

218. Note, *The Return to Open Season For Police in the Open Field*, 50 MO. L. REV. 425, 434 (1985).

219. Comment, *Oliver v. United States: Powell Chases Katz Out of the Fields*, 62 DEN. U.L. REV. 899, 905 (1985).

220. Note *Confusing Views: Open View, Plain View, and Open Fields Doctrine in Tennessee*, 14 MEM. ST. U.L. REV. 337, 361 (1984).

221. See *supra* notes 111-12 and accompanying text.

222. *Oliver*, 466 U.S. at 181.

Court, purporting to apply Justice Harlan's two-part *Katz* test,²²³ concluded that an expectation of privacy in an open field always failed the second part of the test.²²⁴ Thus, open fields are never protected by the fourth amendment.²²⁵ One commentator stated that the disadvantages of a case-by-case rule should not be exaggerated.²²⁶ Even if the problems predicted by the Court exist, "[i]nfringement of an individual's constitutional rights should not be permitted simply because the Court finds it difficult to protect someone else in similar circumstances."²²⁷

After the *Katz* decision, but before *Oliver*, other courts determined the status of the open fields doctrine under the fourth amendment.²²⁸ For example, courts deciding *State v. Wert*,²²⁹ *State v. Brady*,²³⁰ *State v. Byers*,²³¹ used an analysis similar to that used by the *Oliver* Court, but concluded that in some cases an expectation of privacy in an open field may be reasonable.²³² In *Wert*, the court held that the defendant had a reasonable expectation of privacy in his fifty acre farm which was violated when police conducted a warrantless search of that property.²³³ The *Brady* court held that "[o]bviously, activity conducted in an open field does not, in most cases, warrant a significant expectation of privacy. Under the facts of this case, however . . . we find that an expectation of privacy was reasonable."²³⁴ Finally, the *Byers* court also held that "under these circumstances, the defendants had a legitimate expectation of privacy" in their tract of land.²³⁵ Those courts obviously did not find a case-by-case approach too difficult to apply. Although *Oliver* had the last word concerning the open fields doctrine under the fourth amendment, the *Wert*, *Brady*, and *Byers* decisions illustrate that there were well-reasoned, and perhaps better, alternatives that the Nebraska

223. See *supra* notes 54-57 and accompanying text.

224. See *supra* note 110 and accompanying text. The Court stated: "The Amendment does not protect the merely subjective expectation of privacy, but only those 'expectation[s] that society is prepared to recognize as "reasonable".'" *Oliver*, 466 U.S. at 177 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The Court concluded that the "asserted expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'" *Id.* at 179 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

225. See *supra* notes 107-12 and accompanying text.

226. Note, *supra* note 218, at 434.

227. *Id.*

228. See *supra* notes 58-82 and accompanying text.

229. 550 S.W.2d 1 (Tenn. Crim. App. 1977).

230. 406 So. 2d 1093 (Fla. 1981).

231. 359 So. 2d 84 (La. 1978).

232. See *supra* notes 59-80 and accompanying text.

233. *Wert*, 550 S.W.2d at 3.

234. *Brady*, 406 So. 2d at 1097.

235. *Byers*, 359 So. 2d at 86.

Supreme Court could have followed in interpreting the Nebraska Constitution.

Justice Marshall, in his *Oliver* dissent, also presented an alternative and "easily administrable rule."²³⁶ He proposed that "[p]rivate land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures."²³⁷ Justice Marshall claimed that the advantage of this rule was that the rule was familiar to both citizens and governmental officials:²³⁸ "The police know that body of law, because they are entrusted with responsibility for enforcing it."²³⁹ By contrast, under the majority's rule, police must still "make on-the-spot judgments as to how far the curtilage extends" and as to "how much improvement is necessary to remove private land from the category of 'unoccupied or undeveloped area' to which the 'open fields exception' is now deemed applicable."²⁴⁰ Justice Marshall's rule appears to resolve the problems of the case-by-case approach and is preferable to the wholesale exclusion of large amounts of land from fourth amendment protection. The *Havlat* majority discussed neither this rule nor other available alternatives. When the Nebraska Supreme Court decides something as important as the interpretation of a state constitutional provision, the citizens of Nebraska should know that their court weighed the alternatives and chose the best interpretation. The opinion of the *Havlat* majority indicates that the court chose the interpretation it did only because this was the interpretation of the fourth amendment announced by the United States Supreme Court.²⁴¹

CONCLUSION

The *Havlat* opinion, while claiming to interpret article I, section 7 of the Nebraska Constitution, does little more than blindly follow the United States Supreme Court's interpretation of the fourth amendment to the United States Constitution. The *Havlat* majority does not address valid criticisms that have been made concerning the United States Supreme Court's construction of that amendment, nor does the court take advantage of possible alternative interpretations and standards for the Nebraska Constitution. The citizens of Nebraska would probably be surprised to learn that they have no rea-

236. *Oliver*, 466 U.S. at 195 (Marshall, J., dissenting).

237. *Id.*

238. *Id.* at 195-96 (Marshall, J., dissenting).

239. *Id.* at 196 (Marshall, J., dissenting).

240. *Id.* (citation omitted).

241. See *supra* note 164-66 and accompanying text.

sonable expectation of privacy in many activities which they undertake on their land. Surely, they at least deserve a greater explanation than that provided by the court: "[W]e find persuasive the reasons advanced in *Oliver*" ²⁴² By unquestioningly following the United States Supreme Court's interpretation of the fourth amendment, the Nebraska Supreme Court has denied us "one less tree to shield us from the devil." ²⁴³

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242. *Havlat*, 222 Neb. at 561, 385 N.W.2d at 441.

243. *State v. Arnold*, 214 Neb. 769, 775, 336 N.W.2d 97, 100-01 (1983) (White, J., concurring).

