

New York Court of Appeals Declares an Open Field Posted with "No Trespassing" Signs Protected from Warrentless Searches and Seizures under the New York State Constitution

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DEVELOPMENTS IN THE LAW

New York Court of Appeals declares an open field posted with "No Trespassing" signs protected from warrantless searches and seizures under the New York State Constitution

The Fourth Amendment of the United States Constitution,¹ mirrored in Article I, Section 12 of the New York State Constitution, protects citizens against unreasonable searches and seizures of their persons and property.² The nature and scope of protection afforded property has, over the years, been defined by the courts.³

¹ U.S. CONST. amend. IV. 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.

Id.

² See N.Y. CONST. art. I, § 12. As the language contained in the New York State Constitution is identical to the Fourth Amendment, the rights conferred are similar. See *People v. Harris*, 77 N.Y.2d 434, 437, 570 N.E.2d 1051, 1053, 568 N.Y.S.2d 702, 704 (1991). Although there is no question that New York courts are bound by the decisions of the United States Supreme Court when reviewing federal statutes or applying the United States Constitution, see, e.g., *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 303, 501 N.E.2d 556, 559, 508 N.Y.S.2d 907, 911 (1986), *cert. denied*, 479 U.S. 1091 (1987), the state courts may exercise their sovereign powers when interpreting state statutes or the state constitution, provided no rights guaranteed citizens under the United States Constitution are curtailed. *Id.* States may supplement or expand the provisions of the Constitution so long as no conflict arises. *Id.*; see also *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding that states may recognize individual liberties broader than those conferred by Constitution); *Cooper v. California*, 386 U.S. 58 (1967) (recognizing state's right to impose more restrictive standards regarding searches and seizures than required under Constitution). The trend in New York has been to expand the scope of the rights afforded its citizens by interpreting art. I, § 12 more liberally than the Fourth Amendment. See *People v. Class*, 67 N.Y.2d 431, 433, 494 N.E.2d 444, 445, 503 N.Y.S.2d 313, 314 (1986) (declining to follow United States Supreme Court's position regarding nonconsensual entry into automobile to search for vehicle identification number); *P.J. Video*, 68 N.Y.2d at 304-05, 501 N.E.2d at 561-62, 508 N.Y.S.2d at 913-14 (adopting more stringent standards than Fourth Amendment for issuing of search warrant); *People v. Johnson*, 66 N.Y.2d 398, 406, 488 N.E.2d 439, 445, 497 N.Y.S.2d 618, 624 (1985) (declining to apply Supreme Court's "totality of circumstances" test for determining probable cause); *People v. Bigelow*, 66 N.Y.2d 417, 426-27, 488 N.E.2d 451, 457, 497 N.Y.S.2d 630, 636-37 (1985) (declining to follow "good-faith exception").

³ See, e.g., *Hester v. United States*, 265 U.S. 57, 59 (1924) (holding Fourth Amendment protection did not extend to open fields). The rationale of the Court was that the express language of the Fourth Amendment—"persons, houses, papers, and effects"—did not in-

In recent years, for example, government drug agents have been permitted to conduct warrantless searches of privately owned land outside the curtilage⁴ of the home to uncover illegally grown substances.⁵ The United States Supreme Court has held that despite posting "No Trespassing" signs on land in a secluded area, an owner of open fields may not legitimately expect privacy for activities conducted in areas not close to the home.⁶ The Court has reasoned that since the literal protections afforded by the Fourth Amendment do not extend beyond protecting people in their "persons, houses, papers, and effects,"⁷ any additional Fourth Amendment protection must be based on expectations that are societally reasonable; accordingly, an accessible open field would not be protected.⁸ Recently, however, in *People v. Scott*,⁹ the New York

clude open fields. *Id.* This case focused on the property concept of trespass to determine whether a search had occurred. *Id.* However, in *Katz v. United States*, 389 U.S. 347 (1967), finding that electronic surveillance of a public telephone booth constituted a search, the majority rejected the traditional property concepts, which after *Hester* had become the basis for Fourth Amendment inquiry, and instead recognized that the Fourth Amendment was designed to protect persons and not places. *Id.* at 351. Courts have since relied on the more extensive inquiry set forth by Justice Harlan's concurrence: "[f]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

⁴ See BLACK'S LAW DICTIONARY 384 (6th ed. 1990). Curtilage, for search and seizure purposes, is defined as that area which is directly and intimately connected with the habitation. *Id.*

⁵ See *Oliver v. United States*, 466 U.S. 170 (1984). In *Oliver*, the Court held that the owner of an open field outside of the private residence and curtilage is not among those protected under the Fourth Amendment. *Id.* at 178-79; see also *People v. Joubert*, 118 Cal. App. 3d 637, 642-48, 173 Cal. Rptr. 428, 431-35 (1981) (applying open fields doctrine to determine whether binocular-aided aerial search of cultivated area of marijuana on defendant's open field was constitutionally permissible).

⁶ *Oliver*, 466 U.S. at 178. The Court, after reviewing the concept of curtilage from common law, used it to define the extent of the open fields doctrine. *Id.* at 176-81. In *Oliver*, despite prominent "No Trespassing" signs and a locked gate at the entrance, two narcotics agents of the Kentucky State Police conducted a warrantless search of a farm where marijuana was reportedly being grown. *Id.* at 172. Walking along a foot path which led around the locked gate, the agents observed a field of marijuana over a mile from the defendant's home. *Id.* at 173. The majority upheld the search as constitutional because the Fourth Amendment only protects one's home and its curtilage, which does not include open fields. *Id.* at 176-81. A legitimate expectation is determined by whether the government's intrusion infringes upon the personal and societal values which the Fourth Amendment was designed to safeguard. *Id.* at 182-84.

⁷ *Id.* at 176-77 (quoting *Hester*, 265 U.S. at 59).

⁸ *Id.* at 177-81. Because open fields are accessible to the public and police in ways that a home, office, or commercial structure would not be, and because fences or "No Trespassing" signs do not effectively bar the public from viewing open fields, the asserted expectation of privacy in open fields is not one society recognizes as reasonable. *Id.* The *Oliver* Court also stated that the determination of reasonable expectations on a case-by-case basis

Court of Appeals held that a warrantless search of an open field, conducted by police when "No Trespassing" signs were clearly visible, violated the New York State Constitution.¹⁰

In *Scott*, after obtaining information from a witness that marijuana plants were being grown¹¹ on a portion of the one hundred

was not workable, therefore, the bright-line rule established by removing open fields from the protection of the Fourth Amendment was superior. *Id.* at 182. See generally Eric D. Bender, Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 738-39 (1985) (stating that *Oliver* reaffirmed open fields doctrine of *Hester*, which has held open fields per se unprotected in reliance on explicit Fourth Amendment language).

⁹ 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

¹⁰ *Id.* at 489, 593 N.E.2d at 1337, 583 N.Y.S.2d at 930. The general principle is that a state court may find that its state constitution extends greater protection to its citizens from state action than does the United States Constitution. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117 (1945). "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that arrest on adequate and independent state grounds." *Id.* at 125; see also A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 876 (1976) (examining areas where state constitutions have been construed differently from U.S. Constitution).

That these judgments are not subject to Supreme Court review based on the independent grounds has been seen as a great advantage to adjudicating in state courts. See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 n.1 (1981). While the authority of a state court to construe a provision in its constitution differently than the Supreme Court is not disputed, views on the subject differ. See Howard, *supra*, at 898. Some courts feel strongly that they must look to prior decisions of the Supreme Court which have interpreted the Fourth Amendment, for example, notwithstanding any prior decisions by that state's courts. *Id.*; see also *Hughes v. State*, 522 P.2d 1331, 1333-34 (Okla. Crim. App. 1974) ("elementary" to look to Supreme Court decisions). Other courts would consider adopting the Supreme Court's interpretation of the Constitution if similar state constitutional provisions are at issue. See Howard, *supra*, at 898. "A third approach is to give independent consideration to the state constitutional claim on its own merits," which could result in the state requiring more or less exacting standards than the Supreme Court. *Id.* at 899. In fact, more state courts are now construing their identically phrased Bill of Rights counterparts as affording their citizens greater protections. See William J. Brennan, Jr., *State Constitution and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977). "This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism." *Id.* This expansion has occurred in many circumstances, and this pattern "puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights." *Id.* at 501. Advocates believe the Supreme Court decisions are not dispositive of all questions arising under comparable state provisions. *Id.* at 502. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 32-42 (2d ed. 1988) (discussing legitimacy of differing interpretations of Constitution).

¹¹ *People v. Scott*, 169 A.D.2d 1023, 1024, 565 N.Y.S.2d 576, 576 (3d Dep't 1991), *rev'd*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992). A private citizen, Collar, was hunting and followed a wounded deer that he had shot onto the defendant's property. *Id.* Collar observed a pond structure on the hillside, two plastic fifty-gallon drums, and camouflage with brown spots underneath overhanging branches. *Id.* From this information, Collar "surmised" that the defendant was growing marijuana. *Id.* Upon a second entry to the land,

sixty-five acres of uncultivated fields and woodlands owned by the defendant,¹² the police requested that the witness return to the property and obtain a leaf from one of the plants.¹³ The property was conspicuously marked with "No Trespassing" signs every twenty to thirty feet around its perimeter.¹⁴ After determining that marihuana was being grown, the police were able to procure a search warrant¹⁵ and entered the defendant's property.¹⁶ Facing conviction for illegally growing marihuana, the defendant moved to suppress the evidence that had been seized during the searches.¹⁷ He asserted that the fact that he had posted "No Trespassing" signs demonstrated that he had a reasonable expectation of privacy with respect to his property, and that he should be entitled to protection under both the United States and New York State Constitutions.¹⁸ The defendant's motion to suppress was denied by the county court of Chenago County¹⁹ and the defendant subsequently

Collar observed marihuana plants, as well as a man with a gun strapped to his shoulder. *Id.* at 1025, 565 N.Y.S.2d at 577.

¹² *Scott*, 79 N.Y.2d at 478-79, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922. The property was described by the court as consisting of "165 acres of rural, hilly, undeveloped, uncultivated fields and woodlands," with the only exception being the crop of marihuana cultivated by the defendant. *Id.*

¹³ *Id.* After the police witness's second entry onto the defendant's land, he informed the New York State Police that he had witnessed the cultivation of approximately fifty marihuana plants. *Id.* After the witness had retrieved a leaf from the property, an investigator from the state police entered the defendant's property along with the witness to personally observe the plants. *Id.* The three entries onto the property were all without the defendant's awareness or permission. *Id.*

¹⁴ *Id.* at 478, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922. The defendant lived in a mobile home on a portion of the land; the marijuana plants were grown about 300-400 yards away. *Id.* at 479, 593 N.E.2d at 1331, 583 N.Y.S.2d at 923.

¹⁵ *Id.* at 479, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922. The application for the warrant included the "in camera" testimony of the witness, Collar; investigator Hyman's personal knowledge of the marihuana being grown; an anonymous phone call made to the Sheriff's Department reporting the cultivation of marihuana on the defendant's land; and research of the Chenago County tax maps to establish that the defendant owned the property. *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 478-79, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922.

¹⁸ *Id.* The defendant argued that the extent of the owner's legitimate expectation of privacy can be discerned in part by looking to the effort made by the defendant to keep members of the public off the property. *Id.*; see also N.Y. CONST. art. I, § 12 (explaining that under New York State Constitution, protection is based on individual's expectation of privacy, not type of place for which privacy is asserted).

¹⁹ *Scott*, 79 N.Y.2d at 479, 593 N.E.2d at 1331, 583 N.Y.S.2d at 923. The hearing court relied on the rationale in *Oliver* and concluded that the intrusion by the police did not go against the values that society deemed protected by the Fourth Amendment, nor did it violate art. I, § 12 of the New York State Constitution. *Id.*

pleaded guilty to first degree possession of marihuana.²⁰ On appeal, the Appellate Division, Third Department, affirmed the conviction.²¹

The New York Court of Appeals seized upon its authority to conduct an independent review of the case in an effort to determine whether the protections afforded citizens under the Fourth Amendment were adequate under the New York State Constitution.²² Judge Hancock, writing for the majority in the *Scott* case, explained that although the defendant's Fourth Amendment rights had not been violated under the rationale set forth by the Supreme

²⁰ *Scott*, 169 A.D.2d at 1024, 565 N.Y.S.2d at 576. The court held that the posting of a sign on rural property like the defendant's was not enough to create a protectable privacy interest. *Id.*

²¹ *Id.* at 1026, 565 N.Y.S.2d at 577.

²² A consolidated action combined the *Scott* case with *People v. Keta*, 165 A.D.2d 172, 567 N.Y.S.2d 738 (2d Dep't 1991), *rev'd*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992), which considered whether a vehicle dismantling shop could be searched without a warrant. *Scott*, 79 N.Y.2d at 492, 593 N.E.2d at 1339, 583 N.Y.S.2d at 931. In *Keta*, pursuant to VTL § 415-a(5)(a), the shop was inspected by members of the Auto Crime Division of the New York City Police Department. *Id.* VTL § 415-a(5)(a) provides, in pertinent part:

Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicle which are subject to the record keeping requirements of this section and which are on the premises.

VTL § 415-a(5)(a) (McKinney 1986). The statute permits the inspection without a search warrant. During the inspection, the defendant was asked to produce his "police book," a log in which the statute requires a dismantler to keep records of all purchases and sales of vehicle parts after a random selection of vehicle identification numbers revealed stolen parts. *Keta*, 165 A.D.2d at 175, 567 N.Y.S.2d at 739. The defendant was placed under arrest after a more detailed search of the premises revealed a greater number of stolen parts. *Id.* As in the *Scott* case, the defendant made a motion to suppress the evidence, after having been charged with criminal possession of stolen property in the third degree, grand larceny, and falsifying business records. *Id.*, 567 N.Y.S.2d at 740. The defendant's motion was granted; however, a divided Appellate Division reversed. *Id.* at 177, 567 N.Y.S.2d at 741. The basis for the reversal was that the United States Supreme Court had already upheld the validity of VTL § 415-a(5)(a) against a Fourth Amendment challenge. *See id.*; *New York v. Burger*, 482 U.S. 691 (1987). The facts of *Burger* are almost identical to *Keta*. In *Burger*, members of the Auto Crime Division, pursuant to VTL § 415-a(5)(a) randomly inspected several auto shops. *Id.* at 693-94. After it was determined that the parts had been stolen, the defendant attempted to suppress the evidence on the ground that VTL § 415-a(5)(a) was unconstitutional. *Id.* at 696. The New York Court of Appeals determined that this violated the Fourth Amendment. *Id.* The United States Supreme Court later upheld the constitutionality of VTL § 415-a(5)(a), reversing the Court of Appeals. *Id.* at 708-12. The Court determined that an owner of a business within a closely regulated industry has a reduced expectation of privacy. *Id.* at 707. With "[s]ufficient reasons appearing, a state court may adopt a different construction of a similar State provision unconstrained by a contrary Supreme Court interpretation of the Federal counterpart." *Id.*; *People v. Harris*, 77 N.Y.2d 434, 437, 570 N.E.2d 1051, 1053, 568 N.Y.S.2d 702, 704 (1991).

Court in *Oliver v. United States*,²³ it was necessary to ascertain whether the New York State Constitution provided broader protection.²⁴ Judge Hancock concluded that *Oliver* seemed directly at odds with the basic concept developed in an earlier Supreme Court decision, *Katz v. United States*,²⁵ that the Fourth Amendment protects a person's privacy interests rather than particular places, and "more particularly, it protects people from unreasonable government intrusions into areas where they have expectations of privacy."²⁶ Based on this conclusion, the *Scott* court expressly rejected the *Oliver* rationale,²⁷ and held that citizens are entitled to

²³ 466 U.S. 170 (1984).

²⁴ *Scott*, 79 N.Y.2d at 480-81, 593 N.E.2d at 1331-32, 583 N.Y.S.2d at 923-24. The Court of Appeals has, in the past, adopted more protective rules under the state constitution. *Id.*; see *supra* note 2 (discussing circumstances where court perceived need for more stringent search and seizure standard than provided by Supreme Court); see also *People v. Reynolds*, 71 N.Y.2d 552, 556, 523 N.E.2d 291, 293, 528 N.Y.S.2d 15, 17 (1988) (principles of federalism secure state's right to afford its citizens greater insulation from government intrusion than guaranteed under Fourth Amendment); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986) (declining to read Fourth Amendment and art. 1, § 12 as coextensive and requiring more exacting standard for issuance of search warrants), *cert. denied*, 479 U.S. 1091 (1987). However, the *Reynolds* court cautioned that a state's right to provide greater protection should not be exercised excessively because the "identity of language [in the two clauses] supports a policy of uniformity between State and Federal courts." *Id.* at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 912.

²⁵ 389 U.S. 347 (1967). In *Katz*, the petitioner was tried and convicted of using a telephone to communicate information regarding betting, in violation of 18 U.S.C. § 1084. *Id.* at 348. The Federal Bureau of Investigation had placed an electronic recording device on a public telephone booth from which the petitioner had made phone calls. *Id.* This evidence was deemed admissible, and the petitioner claimed a violation of his Fourth Amendment rights. *Id.* at 349. The petitioner asserted that the phone booth was a "constitutionally protected area," and therefore the FBI was not permitted to invade the booth. *Id.* Although the Court reversed the conviction, it stated that the petitioner had formulated the issue in a misleading fashion. *Id.* at 351. The Court stressed that "the Fourth Amendment protects people, not places," and thus the issue was not how the phone booth was characterized. *Id.* at 351-53. "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353. The next question to be addressed was whether the search and seizure "complied with constitutional standards." *Id.* at 354. Because the surveillance failed to meet the necessary prerequisite of probable cause, the petitioner's Fourth Amendment rights were violated. *Id.* at 357-59. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Id.* at 359; see also *supra* note 3 (discussing *Katz* decision).

²⁶ *Scott*, 79 N.Y.2d at 485, 593 N.E.2d at 1334, 583 N.Y.S.2d at 926 (quoting *United States v. Chadwick*, 433 U.S. 1, 7 (1977)). The majority in *Scott* grounded its decision on the second prong of the *Katz* test, that a legitimate expectation of privacy which society would recognize as reasonable was present in the case at bar. *Id.* at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

²⁷ *Id.* at 489, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929 ("[W]e do not find the *Oliver*

greater protection under the New York State Constitution.²⁸ The court determined that society would view the defendant's privacy expectations as reasonable.²⁹ Thus, the court found that under the rule of *Katz* and the laws of New York, the defendant possessed a protectable privacy interest.³⁰ Accordingly, it held that the search of defendant's property under the circumstances violated the New York State Constitution.³¹

In a vigorous dissent, Judge Bellacosa, joined by Chief Judge

Court's reasoning acceptable as a justification under article I, § 12 for a nonconsensual governmental search of properly posted or fenced land outside the curtilage.”)

²⁸ *Id.* at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

²⁹ *Id.* The idea that the ownership of property was an acknowledgement by society that a person would be able to act as he wished on his land was central to the holding of the *Scott* court. *Id.*

³⁰ *Id.* at 488, 593 N.E.2d at 1336, 583 N.Y.S.2d at 929. (“Our Court, in applying both federal and state law, has consistently adhered to the concept introduced in *Katz*: that the Fourth Amendment and article I, § 12 protect the privacy rights of persons, not places.”). According to the *Scott* court, a return to the “*Oliver* majority’s pre-*Katz*, property-oriented approach” would effectively undermine “New York’s acceptance of article I, § 12 and the Fourth Amendment as affording protection not to places, but to an individual’s legitimate expectation of privacy.” *Id.* The court also found support from Justice Brandeis’s “right to be left alone” theory put forth in his dissenting opinion in *Olmstead v. United States*, 277 U.S. 438 (1928). *Scott*, 79 N.Y.2d at 486-87, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927. The majority observed that this right is “the most comprehensive of rights and the right most valued by civilized men.” *Id.* (quoting *Olmstead*, 277 U.S. at 478). It pointed out that this right had been “reflected” in prior cases outside of the scope of search and seizure. *Id.* The majority went on to “hold that where landowners fence or post ‘No Trespassing’ signs on their private property or, by some other means, indicate unmistakably that entry is not permitted, the expectation that their privacy rights will be respected and that they will be free from unwanted intrusions is reasonable.” *Id.* at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930. Rejecting the *Oliver* court’s assumption that law-abiding citizens would have no legitimate reason to hide anything on open property and consequently a property owner would have no reasonable objection to an unauthorized search of posted land, the court instead relied on New York’s tradition of tolerance. *Id.* at 488, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929. Accordingly, the court reasoned, because society is not a conforming one, even law-abiding citizens may have good reasons for wishing privacy for their activities. *Id.* at 488-89, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929; see also *Oliver*, 466 U.S. at 192 (Marshall, J., dissenting) (discussing various ways in which privately owned woods and fields are used that society would recognize as reasonably deserving privacy, including walks, agricultural business, and worshipping).

³¹ *Scott*, 79 N.Y.2d at 488-89, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929. A few years earlier, in *People v. Reynolds*, 71 N.Y.2d 552, 556, 523 N.E.2d 291, 292-93, 528 N.Y.S.2d 15, 16-17 (1988), the court had expressly declined to address whether article I, § 12 protection was established by “No Trespassing” signs or other indications of an intent to exclude the public from privately owned, open land. The *Reynolds* case involved ground and aerial searches of the defendant’s property after receiving an anonymous tip that marijuana was being cultivated. *Id.* at 555, 523 N.E.2d at 292, 528 N.Y.S.2d at 16. The court upheld a later warrantless search against an article I, § 12 challenge. *Id.* (“We hold . . . that governmental intrusion upon or above such land without a warrant is not constitutionally prohibited.”).

Wachtler and Judge Simons, attacked the majority for creating a "pervasive, all-encompassing privacy essence," which broke from "the traditional expectation of privacy attribute" employed in the past.³² Judge Bellacosa argued that because the court failed to apply a noninterpretative analysis, a sweeping precedential change had occurred which effectively provided no guidance for future search and seizure cases posing state constitutional questions.³³

In pursuit of the preservation of fundamental rights of New York citizens, it is submitted that the *Scott* court correctly declined to adopt the Supreme Court's position in *Oliver*. By utilizing the "reasonable expectation of privacy" test articulated in *Katz*,³⁴ the court has eliminated the open fields doctrine and prescribed broad privacy rights for New Yorkers.³⁵ However, in doing so, the court failed to establish guidelines or standards for law enforcement officials searching open land. As a result, law enforcement agencies will not know whether they are acting within the bounds of the New York State Constitution.

It is submitted that a superior approach would have been to

³² *Scott*, 79 N.Y.2d at 513, 593 N.E.2d at 1353, 583 N.Y.S.2d at 945 (Bellacosa, J., dissenting). The main focus of this scathing dissent was criticism of the majority's failure to articulate "sufficient reasons" for its departure from the Supreme Court. *Id.* at 510, 593 N.E.2d at 1350, 583 N.Y.S.2d at 943. In light of the fact that the language of the two clauses is identical, and a like decision would not unsettle prior New York law, the dissent argued that the rules set forth by the Supreme Court should be given greater respect. *Id.* at 511-12, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944. For an example of the weight previously given to Supreme Court decisions, see *People v. Gustafson*, 101 A.D.2d 920, 475 N.Y.S.2d 913 (3d Dep't 1984) (reaffirming open field doctrine in light of *Oliver* decision). The dissent also stressed the importance of federal and state uniformity. *Scott*, 79 N.Y.2d at 515, 593 N.E.2d at 1354, 583 N.Y.S.2d at 946.

³³ *Scott*, 79 N.Y.2d at 512-13, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944 (Bellacosa, J., dissenting). "This approach wholly swallows up the non-interpretative analytical principle and substitutes a vacuum of guidance to the lower courts in place of the useful and proper guidance that was available." *Id.* In a non-interpretative analysis, the court focuses not on the text of the clause, but on matters peculiar to the state, and should consider factors such as:

any pre-existing State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the state citizenry toward the definition, scope or protection of the individual right.

People v. P.J. Video, 68 N.Y.2d 296, 303, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986), *cert. denied*, 479 U.S. 1091 (1987).

³⁴ See *supra* note 3 and accompanying text (discussing various aspects of *Katz* case); see also *supra* note 30 and accompanying text (discussing court's application of *Katz* test).

³⁵ See *Scott*, 79 N.Y.2d at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927 ("We believe that under the law of this State the citizens are entitled to more protection.").

balance the societal interest in prevention of illegal activities against the minimal level of intrusiveness suffered in a search of open fields as compared with the curtilage of one's home. Courts have attempted to achieve an adequate balance between the protection of individual rights and the prevention of such activities.³⁶ Ideally, law enforcement officials should know the extent of their authority to search property in order to effectively deter criminals without violating the protections afforded by both the federal and state constitutions. When the level of intrusiveness is minimal, law enforcements need only reasonable suspicion for a search to be legal, rather than the more stringent requirement of probable cause.³⁷ It is submitted that the Court of Appeals neglected to consider the minimal level of intrusiveness related to open fields, and therefore went beyond that which one could consider reasonable.

³⁶ Cf. *United States v. Place*, 462 U.S. 696 (1983). In *Place*, the police detained personal luggage in order to have a trained narcotic dog inspect it. *Id.* at 698. In determining whether reasonable suspicion was sufficient to detain the defendant's luggage, the Court held, "We must 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." *Id.* at 703; see also *People v. Lanahan*, 89 A.D.2d 629, 452 N.Y.S.2d 918 (3d Dep't 1982) (stating that determination of whether particular search is to be considered reasonable requires weighing governmental interest in apprehending criminals against individual's right to privacy); *People v. Doerbecker*, 48 A.D.2d 120, 125, 367 N.Y.S.2d 976, 980 (2d Dep't 1975) ("Thus to ascertain what constitutes an unreasonable search the court must evaluate a person's efforts to insure the privacy of an area or activity in view of both contemporary norms of social conduct and the imperatives of a viable democratic society." (quoting *United States v. Vilholti*, 452 F.2d 1186 (2d Cir. 1972), *cert. denied*, 406 U.S. 947 (1972))); *People v. Rivera*, 14 N.Y.2d 441, 447, 201 N.E.2d 32, 35-36, 252 N.Y.S.2d 458, 463-64 (1964) (stating only searches constitutionally restricted are unreasonable ones and determination of reasonableness always involves balancing of interests), *cert. denied*, 379 U.S. 978 (1965). *But see Scott*, 79 N.Y.2d at 488, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928 ("[W]e find troublesome . . . the *Oliver* Court's suggestion that the very conduct discovered by the government's illegal trespass[] could be considered as a relevant factor in determining whether the police had violated defendant's rights.").

The majority in *Scott* felt compelled to stress that an "after-the-fact" justification could not be reconciled with New York's practice of recognizing fairness as a fundamental concern in criminal law jurisprudence. *Id.*

³⁷ See, e.g., *People v. Dunn*, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), *cert. denied*, 111 S. Ct. 2830 (1991). *Dunn* involved a canine sniff in a corridor outside of the defendant's door in a search for narcotics. *Id.* at 20, 564 N.E.2d at 1055, 563 N.Y.S.2d at 389. Although deemed a search under art. I, § 12, the court upheld its validity, subjecting the police to a standard of reasonable suspicion. *Id.* at 26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392. "Given the uniquely discriminate and nonintrusive nature of such an investigative device, as well as its significant utility to law enforcement authorities, we conclude that it may be used without a warrant or probable cause, provided that the police have a reasonable suspicion that a residence contains illicit contraband." *Id.*; see also *Place*, 462 U.S. at 703 (explaining that where nature and extent of detention is minimally intrusive seizure may be based on less than probable cause).

One effect is that otherwise valid searches of property which result in little or no individual intrusiveness, such as aerial searches, will be avoided.³⁸ Accordingly, it is submitted that law enforcement's efforts to fulfill its mandate of preventing and detecting crime will be unduly hampered.

Under the *Scott* approach, it is difficult to contemplate any open field conduct that would not be protected by the mere posting of a sign. The court's decision to protect an individual's legitimate expectation of privacy was undoubtedly correct. However, standards for determining that legitimacy must also account for the effectuation of the equally important goals of law enforcement and protection of society.

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³⁸ See *People v. Reynolds*, 71 N.Y.2d 552, 553, 523 N.E.2d 291, 292, 528 N.Y.S.2d 15, 16 (1988). The court determined that where ground-level police intrusion of open fields is unreasonable under the state constitution, police overflight in navigable air space would be similarly permissible. *Id.* at 558, 523 N.E.2d at 294, 528 N.Y.S.2d at 18. However, it seems that the apparent undercutting of *Reynolds* by the *Scott* court will have great implications for the police. See, e.g., *Florida v. Riley*, 488 U.S. 445 (1989). The *Riley* case raised the issue of whether a greenhouse on private property that bore a "Do Not Enter" sign was protected from an aerial helicopter search which revealed marihuana growth through a partial covering. *Id.* at 447-48. Although the Court recognized that Riley had not intended his greenhouse to be open for public inspection, it found that the existence of a partial opening, which allowed the greenhouse to be viewed from the air, dispelled any reasonable expectation which the defendant had regarding its contents. *Id.* at 450. While the Court acknowledged that restrictions should be placed on otherwise valid aerial searches, different standards should guide the evaluation of these searches due to their lesser level of intrusiveness. See Eric D. Bender, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. Rev. 725, 758 (1985) (providing model approach to guard against warrantless aerial surveillance, while recognizing effectiveness of method as law enforcement tool); David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563, 568 (1989) (advocating three-part balancing approach to determine whether police must obtain a warrant prior to conducting sense-enhanced and aerial surveillance).