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## Keeping Up with the Joneses: Making Sure Your History is Just as Wrong as Everyone Else's

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## KEEPING UP WITH THE *JONESES*: MAKING SURE YOUR HISTORY IS JUST AS WRONG AS EVERYONE ELSE'S

Brian Sawers\*†

Before *Katz v. United States*,<sup>1</sup> a search under the Fourth Amendment required a trespass. If there was no trespass on one's property, then there was no search. In *Katz*, a 1967 decision, the U.S. Supreme Court abandoned that approach, instead finding a search without a trespass based on the government's invasion of a "reasonable expectation of privacy."<sup>2</sup> In *Oliver v. United States*,<sup>3</sup> the Court found that trespass was not sufficient to create a search. It found no reasonable expectation of privacy in open fields, and thus no search, even though the defendant had erected "No Trespassing" signs around his property to exclude the public, consistent with state law. After *Oliver*, it seemed clear that trespass no longer equaled a search.

In *United States v. Jones*,<sup>4</sup> the latest case on Fourth Amendment searches, the Court returned to trespass as a bar on warrantless searches. It held that attaching an electronic tracking device to an individual's car constituted a search. Because attaching the device constituted a trespass, it was a search and the government was required to obtain a warrant.<sup>5</sup> The majority opinion and concurrences duel on whether reviving trespass in Fourth Amendment jurisprudence is wise, but all agree on the historical point that landowners always had the right to sue for trespasses on their property, including on open fields.

Quoting the Prosser and Keaton treatise, Justice Alito's concurrence asserts that "[a]t common law, any unauthorized intrusion on private

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1. 389 U.S. 347 (1967).
2. *Katz*, 389 U.S. at 360 (Harlan, J., concurring).
3. 466 U.S. 170 (1984). *See also* *Dow Chemical Corp. v. United States*, 476 U.S. 227 (1986) (holding that industrial plants are analogous to open fields, not a home's curtilage, and finding no search).
4. 132 S. Ct. 945 (2012).
5. *Jones*, 132 S. Ct. at 949–50.

property was actionable.”<sup>6</sup> Writing for the majority, Justice Scalia agrees that unauthorized entry in private land constituted a trespass at common law.<sup>7</sup>

The justices and the treatise writers are indisputably right about the common law of England. The English law of trespass grants the landowner a right to exclude from all private land, including empty fields and standing timber. But the justices are wrong about American law. Landowners in early America could only exclude others from their homes (and curtilage) and sometimes from fenced land. Landowners could not exclude from open land; thus, unwanted visitors to open lands committed no trespass.

A review of eighteenth-century American trespass cases shows that unwanted intrusions on open land unaccompanied by theft were not a trespass. Additional evidence comes from contemporary hunting law. Hunting, especially on horseback with dogs, is more disruptive than fishing or foraging and so generated more lawmaking. Constitutional and statutory protections for hunting on open land reinforce the proposition that landowners could not exclude unwanted visitors from unfenced land. Hunting was not an exception to the rule but rather the activity most in need of protection under the rule since the hunters were armed, killed game the landowners might want for themselves, and could harass livestock when hunting with dogs.

If courts are going to decide cases today based on the law in 1791, then courts have an obligation to get the history right.

#### CASE LAW

“Trespass” appears in 409 reported cases during the eighteenth century in what is now the United States. In the majority of cases, one party pleaded trespass to resolve competing claims of ownership. In a few cases, someone entered land without claiming ownership and removed timber, clams, or honey.<sup>8</sup> In those cases, the owner pleaded trespass when the real offense was theft. In no reported case did a landowner sue an unauthorized intruder merely for intruding.

The colonists who settled America came from a crowded island with clearly demarcated boundaries and intense land use. In contrast to England’s plentiful labor and scarce land, America was uncultivated and underpopulated. Within a few years of settlement, every colony rejected the

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6. *Id.* at 958.

7. *Id.* at 953.

8. *E.g.*, *Phelps v. Sanford*, 1 Kirby 343 (1787) (logging without permission); *Proprietors of Common Land and Undivided Land in Ipswich v. Herrick*, 75 Mass. (9 Gray) 529 (1772) (clamming without permission); *Merrills v. Goodwin*, 1 Root 209 (1790) (removing honey without permission).

English law of trespass and enacted new laws for a new continent.<sup>9</sup> Under the American rule, the public could travel, hunt, fish, and forage on private land without permission, until landowners fenced their land. In addition, stock owners could let their cattle or hogs graze on private land without having to seek permission.<sup>10</sup>

Early nineteenth-century cases can shed light on what rights the landowner had over open land. We can thank John Singleton, a particularly litigious landowner from South Carolina for two high court opinions that show the limited rights that landowners had to exclude from open land.

In 1818, South Carolina's highest court noted that "the right to hunt on unenclosed and uncultivated lands has never been disputed."<sup>11</sup> The opinion continued, "[I]t is well known that it has been universally exercised from the first settlement of the country up to the present time."<sup>12</sup> Even though the landowner was present and refused the hunter permission, there was no trespass. Landowner permission was irrelevant because, as the court held, "it is the right of the inhabitants to hunt on unenclosed lands," and that right could not be defeated by "mere will and caprice of an individual."<sup>13</sup>

Two years later, Singleton returned to the South Carolina courts when a group of hunters entered a fallow field enclosed by a dilapidated fence. Again, Singleton lost because landowners were required to maintain their fences to preserve their right to exclude.<sup>14</sup> As in the earlier case, landowner permission was irrelevant because the hunters had a right to be there. More explicitly than in 1818, the South Carolina court noted that England was thickly settled, which was not true of South Carolina.<sup>15</sup> The English rule was "wholly impracticable" and "destructive of the interests and peace of the community."<sup>16</sup>

Similarly, the Georgia Supreme Court explicitly rejected the English rule that owners could exclude from open land, noting that rule would "require a revolution in our people's habits of thought and action."<sup>17</sup> The English rule would mean that a "man could not walk across his neighbor's unenclosed land . . . without subjecting himself to damages for trespass. Our

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9. *E.g.*, Act 52, 1 Hening's Stat. at Large 199 (1632) (replacing the English law of trespass in Virginia).

10. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 677-79 (2011).

11. *M'Conico v. Singleton*, 9 S.C.L. (2 Mill) 244, 244 (1818).

12. *Id.*

13. *Id.*

14. *Broughton v. Singleton*, 11 S.C.L. (2 Nott & McC.) 338 (1820).

15. *Id.* at 340 ("There, almost every foot of soil is appropriated to some specific purpose—here, much the greater part consists in uninclosed and uncultivated forest.").

16. *Id.*

17. *Macon & Western R.R. Co. v. Lester*, 30 Ga. 911, 914 (1860).

whole people, with their present habits, would be converted into a set of trespassers. We do not think that such is the Law.”<sup>18</sup>

The landowner’s right to exclude from open land was so limited that some courts analogized open, but privately-owned, land to a common. In South Carolina, “uninclosed land, for many purposes, such as hunting and pasture, is regarded as common.”<sup>19</sup> The court was quick to note the limits of the analogy, since a landowner could “appropriate it for his exclusive use” by fencing it.<sup>20</sup>

#### CONSTITUTIONAL PROVISIONS

When the Fourth Amendment was drafted, two state constitutions explicitly guaranteed a public right to hunt on open land. Necessarily, landowners had no right to exclude from unfenced land and thus unwanted intrusions were not actionable.

In 1776, Pennsylvania adopted a new constitution, which guaranteed “[t]he inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed.”<sup>21</sup> The following year, Vermont adopted its first constitution which guaranteed its citizens the “liberty to hunt and fowl, in seasonable times, on the lands they hold, and on other lands (not enclosed).”<sup>22</sup>

Interpreting a 1797 statute, the Supreme Court of Vermont held that the “word enclosure therefore imports, land enclosed with something more than the imaginary boundary line, that there should be some visible or tangible obstruction, such as a fence, hedge, ditch or something equivalent.”<sup>23</sup>

Members of Pennsylvania’s delegation to the constitutional convention proposed a parallel provision along with the Bill of Rights.<sup>24</sup> In the other states, unfettered public access to open land was the norm, even if it did not receive constitutional protection.<sup>25</sup> More than a century later, the U.S. Supreme Court held that it was “customary to wander, shoot, and fish” over “large expanses of unenclosed and uncultivated land.”<sup>26</sup>

18. *Id.*

19. *Law v. Nettles*, 18 S.C.L. (2 Bail.) 447, 447 (S.C. Ct. App. 1831) (emphasis added).

20. *Id.*

21. PA. CONST. OF 1776, § 43. The provision first appeared in 1683 in the second Frame of Government. PA. FRAME OF GOV’T. OF 1683, § 22.

22. VT. CONST. OF 1777, ch. 2, § 39.

23. *Porter v. Aldrich*, 39 Vt. 326, 331 (1866) (interpreting 1797 fence law that allowed for the impounding of cattle damage feasant in the landowner’s enclosure) (emphasis in original).

24. Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, Dec. 12, 1787.

25. *Sawers*, *supra* note 10.

26. *McKee v. Gratz*, 260 U.S. 127, 135 (1922).

## RELATED STATUTES

In the eighteenth century, legislatures shaped the boundaries of private property law by enacting statutes that defined trespasses and acknowledged the right to hunt on private land.

Contemporary statutes serve as evidence of what trespass meant in 1791. Dissatisfied that trespassers were rarely punished, Connecticut enacted a statute for the “more Effectual Detecting and Punishing Trepass.”<sup>27</sup> Under the statute, trespass included logging another’s land without permission and damaging fences.<sup>28</sup> In 1791, New Hampshire passed a similar statute which, in addition, penalized mining without landowner permission.<sup>29</sup>

Similarly, game laws that defined where hunters needed landowner permission are evidence of where landowners had a right to exclude. At ratification, only one state granted landowners any right to exclude hunters from open land, while six other states authorized hunting on open land, regardless of landowner permission. In 1784, North Carolina imposed a fine on hunting with guns or dogs without landowner permission east of the Appalachian Mountains. Landowners, however, were required to post their desire to exclude in at least two public places.<sup>30</sup> Fishers, foragers, and travelers remained free to use open land, regardless of landowner permission.

In 1760, the colonial legislature of Pennsylvania responded to hunting on “other people’s land.”<sup>31</sup> The statute penalized hunting on “inclosed or improved lands” without permission.<sup>32</sup> Hunting on open land was not proscribed, regardless of landowner permission. In 1763, New York banned hunting in orchards, gardens, and “other inclosed Land whatsoever” within New York City without landowner permission.<sup>33</sup> An earlier law in Maryland banned hunting with dogs or guns on “Inclosed Grounds” without landowner permission.<sup>34</sup> Connecticut banned deer hunting without permission in any “Park or Inclosure.”<sup>35</sup>

In New Jersey, the colonial statute did not distinguish between fenced and unfenced land, but instead between taxed and untaxed land. In 1771, New Jersey proscribed carrying firearms on “Lands not his own, and for which the Owner pays Taxes.”<sup>36</sup> At the time, New Jersey taxed only

27. 1726 Conn. Acts 329.

28. *Id.* at 329–30.

29. Act of Feb. 15, 1791, 1792 N.H. Laws 259, 259–60.

30. 1784 N.C. Sess. Laws 364, 365.

31. Act of Apr. 9, 1760, § 6, 1760 Pa. Laws 227, 229.

32. *Id.* Fowling in the streets and gardens of Philadelphia was also proscribed. *Id.* § 7.

33. Act of Dec. 20, 1763, § 1, 1763 N.Y. Laws 441, 442.

34. In addition to fenced land, hunters needed landowner permission on islands or fenced-off peninsulas. 1728 Md. Laws 11, 13.

35. 1738–44 Conn. Acts 538, 539.

36. Act of Dec. 21, 1771, § 1, 1771 N.J. Laws 343, 344. Driving deer with dogs on taxed land without permission was also banned. *Id.* § 2.

improved land.<sup>37</sup> Another provision of the same statute set property qualifications for hunting on “waste and unimproved Lands,”<sup>38</sup> indicating the drafters did not think that § 1 proscribed hunting on unimproved land.

Responding to commercial hunters who took the hides but left the meat to rot, South Carolina enacted a slightly different rule. In 1769, the colonial legislature of South Carolina proscribed hunting without landowner permission more than seven miles from home.<sup>39</sup> Therefore, no landowner permission was necessary for hunting within seven miles of home.<sup>40</sup>

#### CONCLUSION

In the United States, landowners did not have a right of action against people who entered open land without permission. No eighteenth-century case shows a remedy for mere entry. Vermont and Pennsylvania constitutionally guaranteed a right to hunt on open land. In several other states, statutes regulating hunting implied a public right to hunt on (and, by implication, enter) unfenced land.

Both the majority and concurring opinions in *Jones* are wrong about the state of the law in 1791. Landowners in America had no right to exclude others from unfenced land. Whether a Fourth Amendment search requires a trespass or the violation of a reasonable expectation of privacy, government can explore open land without a search warrant.

While the error in *Jones* does not affect the case’s outcome, it is nonetheless distressing because the Supreme Court does not recognize the limits of its historical knowledge. All but one of the justices joined opinions that relied, at least on part, on historical errors found in a modern treatise.

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37. Act of Dec. 6, 1769, § 3, 1769 N.J. Laws 317, 320 (setting rates for “All profitable Tracts of Land held by Deed, Patent or Survey whereon any Improvements is made”).

38. Act of Dec. 6, 1763, § 6, 1763 N.J. Laws 343, 345.

39. Act of Aug. 23, 1769, 1769 S.C. Acts 275, 276.

40. *M’Conico v. Singelton*, 9 S.C.L. (2 Mill.) 244, 244 (1818).