Bound By Oath | Season 3 | Episode 1: Mr. Thornton's Woods

John: Hello and welcome to Episode 1 of Season 3 of Bound By Oath, a legal history podcast from the Institute for Justice's Center for Judicial Engagement. If this is your first time listening, there's no need to go back through the archives. Starting here works just fine. For long-time listeners, this season we're going to bring you more of what you've enjoyed in Seasons 1 and 2. That is, we'll be taking a look at landmark Supreme Court cases that shaped the law and how we live. When possible, we'll talk to the real life people behind those cases – people who, whether they wanted to or not, put their lives, fortunes, and sacred honor on the line and who looked to the courts and the Constitution for protection against the abuse of government power. We'll also talk to scholars and to litigators who are bringing history to light and precedent to bear on today's civil rights battles. This season, we're going to focus on property rights, which, on paper at least, enjoy an exalted status in our constitutional tradition. Many of the rights in the Bill of Rights are explicit protections of property meant to stave off tyranny, anarchy, or unfair play. Nevertheless, today, the government has expansive – and for the most part, ahistorical – power to search property, to take property, to limit the peaceful and productive use of property, and even to blow up property. As we progress through the season, we'll ask: do these powers that the government has assumed and these restrictions that the government has imposed really stand up to constitutional scrutiny? And we'll suggest that society would be freer, fairer, and more prosperous if courts, at critical junctures, had chosen to secure individual rights. To start, we'll head out into the woods.

> **Maine's lawyer**: Thank you Mr. Chief Justice and may it please the Court. Fourth Amendment protection does not apply to Mr. Thornton's woods.

John: In 1981, the State of Maine prosecuted Richard Thornton after officers found marijuana

growing on his property, a heavily forested, 38-acre parcel in central Maine. The officers did not have a search warrant; they just walked onto his land. And when the case reached the U.S. Supreme Court, the question was: did that violate the Fourth Amendment and its prohibition on unreasonable searches? The state, of course, argued that it did not – that the Fourth Amendment simply does not apply out of doors on privately owned fields and woods – with the exception of a small amount of land immediately surrounding a home.

> **Maine's lawyer**: The Fourth Amendment does not protect property rights. The Fourth Amendment protects people from unreasonable governmental searches and seizures.

John: And in 1984, the Supreme Court sided with the state.

Josh Windham: What that means is that they can go on people's land regardless of how it's marked of how it's marked. So whether your land is fenced or not, doesn't matter. Whether it's got no trespassing signs or not, doesn't matter. They can treat your land like public property.

John: On this episode, we'll examine whether the Court got that right and what exactly the Founders had in mind when they recognized a right to be secure from unreasonable searches.

Laura Donohue: This is very much and very deeply a part of who we are as a country and what the colonists were trying to do at the Founding to ensure that that right was protected going forward.

John: And we'll talk about what happens when there is no limit on the government's authority to enter private land. I'm John Ross, thanks for tuning in to Season 3 of Bound By Oath.

BBO Montage - Justices saying the oath

John: On July 31st, 1981, a town constable in Hartland, Maine and a state trooper, acting on a tip from a “reliable, cooperating citizen,” took a stroll through Mr. Thornton’s woods. They did not have permission to be there. They did not have a warrant. Around the perimeter of the property were No Trespassing and No Hunting signs. They had to go around an old stone wall. Bypassing all of that, the officers tramped a few hundred yards through the woods until they found what they were looking for: marijuana. Which is legal today in Maine. But in 1981, growing it was a serious criminal offense. And if you read the Supreme Court’s opinion in Richard Thornton’s case, you might be forgiven for thinking that the officers had discovered the source of a large-scale trafficking operation. But that would be incorrect.

Richard Thornton: We’re both hippies. That’s pretty fair, yes.

John: That is Richard Thornton, who grew up in Norfolk, Virginia, went to college in Tennessee and taught English in the Peace Corps in Turkey. He moved to Maine in 1970.

Richard Thornton: I was just looking for a rural place, just a place that was away from the city. I was tired of city life. This piece of property I bought for $2,000.

John: In 1981, he lived with his wife and two kids on a wooded, secluded 38-acre piece of property in a cabin that he built by hand.

Richard Thornton: It was the first thing I built. I was all imbued with the spirit of the hippie community.

Linda Thornton: I'm pretty sure we had electricity then. Maybe not. Maybe we were still using kerosene lamps. I'm not sure. But you know it was just nice way to live.

John: And that's Linda Thornton. Linda grew up near Hartland and was a social worker. Richard worked for a construction company.

Richard Thornton: When I look back on it, it's amazing living that way – the kids going to the outhouse in, you know, sub-zero weather.

John: They had a vegetable garden. They made maple syrup. There were chickens. At one point, they raised a pig. And they grew a little pot.

Richard Thornton: And being a part of the hippie community, of course, we knew people who were growing their own marijuana. I said I can do that. And I tried it. It wasn't like wasn't even nearly enough to do anything but my own personal use. Give a little bit to a friend here and there. But it had nothing to do with like selling it or anything.

Linda Thornton: We just – growing a few pot plants out there. And the old guy who lived in the little trailer right beside the property, he always just used to walk up through there. We didn't care. But he told his buddy, the game warden and that started it right there.

John: They were on good terms with their neighbors. One set of neighbors gave the Thornton's permission to drive across their land to get to the cabin, which happened to be a more direct route from the road. Another set of neighbors used to buy eggs from the children. The wife occasionally made them baked goods. And the husband would always say hello.

Richard Thornton: We just see each other in passing. And we always spoke. We had a good rapport. We were all good.

John: So it's not entirely clear why that neighbor, the husband, told officers about the pot. But Richard speculates that he bought into drug-war propaganda that made pot out to be more of a threat than it is.

Richard Thornton: Like I said, he was an older fella – probably ideas about marijuana. He thought it was like serious drugs or something in his mind – scourge of the earth kind of thing. And it was his duty to report me or something.

Linda Thornton: This is just, you know, small town USA. Everybody knew him. We knew him but the old guy said you know, something must be up. Before I knew it one day Rich was at work and a whole bunch of police cruisers rolled in.

John: Only after the officers found the marijuana did they apply for a search warrant.

Richard Thornton: It was maybe like, maybe eight immature pot plants. They weren't even near ready for use. And they were small. And this is one thing I distinctly remember: One police officer came out of the woods with it in one hand and put it in the trunk of his car.

Linda Thornton: I was afraid I was going to jail. And we had a baby.

Richard Thornton: I didn't think about any laws or my rights or anything. It's just that oh, I'm busted. I also thought it's kind of ridiculous to make such a hubbub over such a little amount of weed.

John: Fortunately, Richard wasn't arrested; he just received a summons to come to court. At a hearing, Linda testified about the stone wall and the No Trespassing signs, all to the effect that there was no way the officers wouldn't have known that they were on private property.

Linda Thornton: Sitting on the stand in front of everybody was just terrifying for me. And then for people to imply that you're not telling the truth, or demonizing you in a way, that wasn't fun either.

John: In a state trial court, the judge ruled that searching first and then getting a warrant afterwards violated the Fourth Amendment, which would have meant that the state's evidence would be excluded and the case thrown out. But the state appealed. And, about a year and a half after the search, the Supreme Judicial Court, the highest court in Maine, unanimously affirmed the trial judge and dismissed the case. But prosecutors appealed again, and the U.S. Supreme Court took up the case.

Richard Thornton: One handful of immature marijuana. And we go to the United States Supreme Court about this?

John: Without realizing it, the Thorntons – living out in the woods and off the grid, hurting no one, and minding their own business – found themselves in the middle of a major constitutional controversy: the status of an old legal rule called the open fields doctrine.

Josh Windham: In 1924, the U.S. Supreme Court held, in a case called *Hester versus United States*, that private land is largely unprotected under the Fourth Amendment.

John: That's Josh Windham, who is a litigator at the Institute for Justice and the co-director of our project on the Fourth Amendment.

Josh Windham: The *Hester* case involved federal officers going to a private farm on an anonymous tip that somebody was dealing moonshine there, moonshine whiskey. And they go to the property, they park their car, they go to a grove, hop a fence. And at that point, they see Hester, who's on his dad's farm, hand somebody a jug of whiskey, and they give chase.

John: The farm was in rural South Carolina in the foothills of the Blue Ridge mountains. And in 1919, when the search the search took place, alcohol prohibition was in effect at the state level in South Carolina but not yet nationwide. So if we wanted to be pedantic about, and I do, technically the *Hester* case is not a Prohibition case. Because the agents were federal revenue agents and the prosecution was under federal, not state, law. From the point of view of the federal government, Charlie Hester's offense wasn't that he was trading in alcohol, it was that he was trading in untaxed alcohol.

Josh Windham: And Hester argues that, because the observations they made on the property of him handing that jug of whiskey to somebody, were the fruits of a warrantless search of the farm, it should be excluded. That in other words, the Fourth Amendment prohibited the search, and therefore he couldn't be prosecuted based on that evidence.

John: Hester was convicted and sentenced to four months in county jail and given a $200 fine. But when his case reached the Supreme Court in 1924 that was the question before the Court: Did the officers need a warrant? And in a unanimous decision written by Justice Oliver Wendell Holmes, the Court said no.

Josh Windham: And the Court says no. The Fourth Amendment protects persons, houses, papers and effects, from unreasonable searches and seizures. And the Court held that the Fourth Amendment does not protect open fields, a term it used to describe the vast majority of private land that people own in the United States.

John: The Court said that the text of the Fourth Amendment only mentions persons, houses, papers, and effects, and the Hester farm was not a person, house, paper, or effect. And that's all you need to know to decide the case. And thus the open fields doctrine was born, in an opinion that is less than two pages long, 100 years ago this coming spring.

Josh Windham: Really the key holding of the decision, the part that announces the open fields doctrine, is all of two sentences. So what we have is the U.S. Supreme Court announcing sort of an earth shattering constitutional rule – that says the vast majority of private land in this country is entirely unprotected from abusive searches – in the span of a sentence or two.

John: The opinion contains only a single citation – not to a prior case but instead to a legal treatise written before the Founding and that the Founders were deeply familiar with: Blackstone's Commentaries on the Laws of England.

Josh Windham: And the impression you get from reading that without actually looking at the Blackstone citation yourself would be that the common law supports the open fields doctrine, or that at common law, homes were protected from invasion, but open fields were not protected from invasion.

John: The common law is law developed by judges – as opposed to laws passed by Parliament or another legislature. In the United States, we don't much care about laws passed by

Parliament before the Founding, but our legal tradition is deeply tied to English, judge-made common law. If you want to know what the Founders thought about individual rights and the just powers of government, the common law helps fill in some of the blanks. And in *Hester*, Justice Holmes said that the distinction between the house and the field was deeply rooted in the common law.

Josh Windham: But when you go look at the citation to Blackstone yourself, that's not what it says. The Blackstone citation is to a part of the Commentaries that are about the tort of burglary, or the crime of burglary. And of course, burglary is a sort of thing that you can only do to a home. You can't burglarize a field. But what we don't get from that section of Blackstone's Commentaries is a rule that says open fields are open to invasion. You can, of course, commit other kinds of torts when it comes to land – the tort of trespass for example.

John: So it sort of seems like Holmes pulled a fast one there. And scholars have speculated that perhaps what was going on was that the Court didn't want to get in the way of Prohibition, which was in full swing by 1924. In any case, later in this episode, we'll go back prior to the Founding and take a look at what the common law really had to say about warrantless searches. But for now, we're going to stick with the evolution of the Fourth Amendment. Prior to the *Hester* case, the Supreme Court had not been nearly so stingy to people seeking the protections of the Fourth Amendment.

Josh Windham: Before *Hester*, the Supreme Court's first two big cases on the Fourth Amendment were in the late 1800s. And they were about opening private mail without a warrant and turning over private business records. And in each of those cases, the Court looked at the Fourth Amendment and construed it broadly to provide pretty robust protections for property and privacy rights. Now, *Hester* took the opposite approach. It construed the Fourth Amendment

narrowly.

John: And four years later, in 1928, in a case called *Olmstead v. United States*, the Court doubled down on that, interpreting the Fourth Amendment to protect persons, houses, papers, and effects, and nothing else. *Olmstead* involved a sophisticated, multi-million dollar bootlegging operation led by a Seattle police officer named Roy Olmstead that involved smuggling alcohol from Canada, down the Puget Sound, and into Seattle. Without warrants, federal agents put wiretaps on telephone lines going into several homes and into a large office building – without ever physically entering any of the properties. And for months they listened as members of the bootlegging operation did business, taking orders from customers and arranging shipments – and even bribing Seattle police officers to release smugglers who'd been arrested. Ultimately, 73 people were indicted.

Josh Windham: Olmstead, the ringleader, in that case was convicted. And when his case got to the Supreme Court, in a vote of five to four, the majority cited *Hester* and looked at the text and said, look, the Fourth Amendment doesn't say anything about wires. Wires aren't a person, a house, a paper or effect. It's not listed. End of story.

John: Four justices dissented. Perhaps surprisingly, one of the dissenters was none other than Justice Holmes, who wrote that wiretapping was a quote "dirty business" and that since wiretapping was illegal under state law, essentially the government had committed crime to investigate crime. Quote: [F]or my part, I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

Josh Windham: The most influential dissent, though, was written by Justice Brandeis. And in his view, there is a quote "principle underlying the Fourth Amendment," and that principle was

adopted to protect “the privacies of life.” That’s the phrase he uses. And so it’s not really whether the government physically comes onto your land or eavesdrops on you from outside that matters so much. It’s the fact that the government is intruding on something we properly regard as private.

John: Given the state of technology at the time, the Founders were naturally primarily concerned with, in Justice Brandeis’ words, “breaking and entering.” But the principle behind the Fourth Amendment went much further – to wiretapping and beyond. Because, quote: “The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping.”

Josh Windham: And ultimately, a few decades later in 1967, Justice Brandeis’ approach carries the day in what is one of the most famous (or infamous) Fourth Amendment cases of all time: *Katz v. United States*.

John: *Katz* involved FBI agents in Los Angeles who put a microphone on top of a phone booth that recorded Charles Katz’s end of the conversations he had in the booth. They listened for six days and only then obtained a warrant to search his apartment. Which led to Katz being convicted of illegal sports gambling.

Josh Windham: Under the hyper-literal approach from *Hester* and *Olmstead*, I think we would say that Katz loses the case because a conversation in a public phone booth isn’t a person, house, paper, or effect. A conversation is just sound waves, and sound waves aren’t listed in the Fourth Amendment.

John: At oral argument in front of the Supreme Court, Katz’s lawyer asked the Justices to try a

new approach.

> **Katz's lawyer**: We think that *Hester* was wrong. We think that if a confidential communication was intended and all the other aspects of confidentiality are present, then it makes no difference whether you're in an open field or in the privacy of your own home.

John: And so, Katz's lawyer urged a shift in emphasis.

> **Katz's lawyer**: We feel that the emphasis on whether or not you have a constitutionally protected area may be placing the emphasis on the wrong place. We feel that … the right to privacy is what's protected by the Fourth Amendment.

John: And in 1967, the Court agreed.

Josh Windham: The Court, echoed Justice Brandeis's *Olmstead* dissent, and says that the Fourth Amendment quote "protects people, not places." And what that really means is that wherever you go, you're still a person who has Fourth Amendment protection, and what's really protected and what follows you around is your right to privacy. So Justice Harlan, whose concurrence the Court later adopts, homes in on this. And he announces a new two-part test: He says the government conducts a Fourth Amendment search, when it invades a subjective expectation of privacy. You know, you really want the privacy. And it has to be an expectation that society thinks is reasonable. That we're willing to accept is legitimate. And *Katz* really marks a sea-change in Fourth Amendment law. And what's most remarkable to me about it is that *Katz* rejects *Olmstead* and it's hyper-literal approach and even overrules that case. But it never engages with *Hester*, which teed up *Olmstead* in the first place. And so ultimately that's a pretty

big dodge the Court's going to have to later grapple with in Richard Thornton's case.

John: As we'll hear more about a bit later, *Katz* has been the subject of vigorous scholarly debate.

Josh Windham: Justice Scalia in particular kicks off a trend of arguing that *Katz* is a modern judicial invention with really no foundation in the Fourth Amendment's original meaning. And that critique has inspired some scholars to pick up purported originalist defenses of *Katz*. So one version of that, for example, is that if you look at the Fourth Amendment's list of items, persons, houses, papers, and effects, these are some of the most private things we have. So if you read between the lines or see the forest and not just the trees, it's clear the Fourth Amendment is really all about privacy.

John: In any case, *Katz* raised serious questions about the validity of the open fields doctrine. If you have a reasonable expectation of privacy in a public phone booth, why not on land that you own?

Josh Windham: After *Katz*, lawyers across the country started arguing that *Hester*'s "categorical" open fields doctrine wasn't good law anymore. And courts started to agree with that. By the early 1980s, most federal circuit courts and lots of state supreme courts had rejected the categorical approach to the open fields doctrine and adopted a more fact-intensive approach that looked at how a person was actually using their land and whether they had taken reasonable steps to keep people out – like putting up No Trespassing signs, putting a fence around their property, and those sorts of things – to preserve their privacy.

John: Which brings us to Mr. Thornton's woods. The Supreme Judicial Court of Maine said

since there were No Trespassing signs and a stone wall, Richard Thornton had done enough to preserve his privacy. Quote: “The dispositive point is that by his actions the defendant indicated that he expected his land to be a private place.”

Josh Windham: After cases like these had percolated for about 15 years, the Supreme Court finally takes up the question of what to do with the open fields doctrine after *Katz*. And not only did they take up Richard Thornton’s case, but at the same time, they took up a case called *United States versus Oliver*, which involved the same issue. So if you're googling the case, you'll want to google *Oliver*. Because that's actually the lead case in the caption.

John: Richard Thornton’s case is known to history as the *Oliver* case. So named after Raymond Oliver, who, unlike Richard, had lost his case below. Oliver was a retired farmer, who rented parts of his 265-acre farm to unnamed third parties who were never identified. The renters lived on the property, and they grew marijuana – three rows of corn, three rows of marijuana – all of it 6 feet high when it was discovered – on about an acre and a half.[1] Possibly it was not just for personal use. In any event, here’s Raymond Oliver’s lawyer arguing before the Supreme Court.

> **Oliver’s lawyer**: Mr. Chief Justice, and may it please the Court: The state police without a warrant, probable cause or exigent circumstances searched the Petitioner Oliver's farm and found marijuana growing in a corn field. … 22 miles from the nearest town in a very, very remote area of Kentucky.

John: The officers did much more than take a little stroll.

[1] Fred Barbash, Drug search past farm’s No-Trespass sign leads to top court, Washington Post, Feb 21, 1984.

> **Oliver's lawyer**: To get to the field that they ultimately found the marijuana growing in, it was necessary for the police officers to enter Mr. Oliver's property, drive several 100 yards to his house, and then continue driving nearly another mile into the property.

John: They drove past a fence around the perimeter of the property onto a private road. They drove past several No Trespassing signs. And after going about a mile, they came to another fence with a locked gate. And they ducked through a hole in the fence.

> **Oliver's lawyer**: This locked gate also had on it a No Trespassing sign. The officers parked their car – not being able to go beyond that gate in the car … and proceeded about a quarter of a mile on when someone yelled to them: Come back, there's no hunting allowed on this property.

John: After the officers identified themselves as police, whoever yelled at them made themselves absent.

> **Oliver's lawyer**: They couldn't find the person that they had seen who had yelled at them. So they proceeded on for another approximate quarter of a mile. … a part of that way through very dense underbrush and very dense wooded area.

John: Finally, after traveling about a mile and half total from the road, they found the marijuana.

> **Oliver's lawyer**: Certainly society is ready to accept as reasonable a farmer's right to exclude other people from his property … that society would not favor warrantless government intrusions.

John: The lawyer for the federal government, on the other hand, argued that a farmer's expectation of privacy in his fields was not reasonable.

> **Feds' lawyer**: Now in the case of a field … there is very little privacy value in what goes on in a field. People just don't engage in the sort of private matters that the Fourth Amendment was intended to be directed at when they are out in their fields.

John: The implications of which at least some of the Justices found troubling. Here's Justice Thurgood Marshall.

> **Justice Marshall**: You say that a police officer can go on anybody's land at any time under any circumstances? You certainly can't mean that.
> **Feds' lawyers**: First of all, there's certainly a practical restriction. … There's I don't know how many trillions and trillions of acres of open fields in this country and police don't have time to go to tramping through them. … So there's a built in safeguard for that. But I don't think the Fourth Amendment itself extends any protection to these areas.

John: The lawyer for the state of Maine, arguing Richard Thornton's case, agreed, leaning on the Court's line from *Katz* that the Fourth Amendment protects "people not places."

> **Maine's lawyer**: Thank you Mr. Chief Justice and may it please the Court. Fourth Amendment protection does not apply to Mr. Thornton's woods. … The Fourth Amendment does not protect property rights. The Fourth Amendment protects people from unreasonable searches and seizures.
> **Justice Blackmun**: Do you really believe that?
> **Maine's lawyer**: Yes, I do.

> **Justice Blackmun**: Of course, the Court said it.

John: That is what *Katz* said: It's not your property that matters, it's your privacy. But where property ends and privacy begins or vice versa is pretty hard to tease out.

Josh Windham: I've always thought trying to separate people from their property in this way misses something really fundamental. We need our property to live, to build families, to earn a living, to pursue happiness. And controlling our property is a big part of how we carve out a degree of privacy for ourselves. Property and privacy rights are frequently bound up in a way that's pretty hard to untangle.

John: And I might add that it's awfully slippery for the government's lawyers to try to justify invading people's property anytime and for any reason by appealing to, of all things, privacy.

> **Maine's lawyer**: The State of Maine's core concern here is that if the Maine court's holding is allowed to stand that it permits people to buy up large tracts of land and fence them and post them and then invoke Fourth Amendment protections for those fields and woods and then conduct illicit activities behind that fencing and posting and invoke the protections of the Fourth Amendment and thereby remain free from government investigation.

Josh Windham: This is a strawman. Richard Thornton wasn't arguing that police could never enter his woods – he was arguing that police had to do what they do in every other context when they want to search your property: go get a warrant. As for this notion that protecting land will frustrate law enforcement, it's obviously true that forcing them to get a warrant will require a bit more work. But that's a good thing. Just as we want police to get a warrant before they

invade your home – where, of course, you can commit all sorts of crime behind closed doors – we should want police to get a warrant before they invade your land.

John: Richard Thornton's lawyer, who was actually a family friend who lived down the street and who litigated the case all the way from the initial suppression hearing to the Supreme Court, agreed. The officers should have gotten a warrant because Richard's woods were neither open nor a field.

> **Thornton's lawyer**: It was not a field for one thing, and it was not open in any sense of the word. … It was in fact closed woods, and secluded woods.

John: But, by a vote of 6 to 3, in an opinion written by Justice Lewis Powell, the Supreme Court agreed with the government, ruling that quote: "an open field need be neither 'open' nor a 'field' as those terms are used in common speech." Instead, all private land – except for the curtilage immediately around a home – is outside the Fourth Amendment. Because land is not on the list.

Josh Windham: The Court kicks off the opinion by saying that: what we said in *Hester*, that's still good law. *Hester* held that land isn't a house. And we're now going to say that land also isn't an effect because the Framers would have understood that term to refer only to personal property, to movable goods. And of course also isn't a paper or a person. So as far as we're concerned, there's nothing in the plain text of the Fourth Amendment that justifies protecting land.

John: But of course, a private conversation in a phone booth isn't a person, house, paper, or effect. Nor are office buildings or commercial properties, which the Court had said do get Fourth Amendment protection.

Josh Windham: Now next the Court turns to *Katz* and says, in effect, that fencing and No Trespassing signs – those are not enough to establish a reasonable expectation of privacy on land because, after all, some people are still going to walk through the land. Now we call that trespassing, right. And other people will be able to see what you're doing from neighboring properties or from the sky. Although we might call that spying.

John: And the Court said, there's just not really anything you could be doing out on your land that you could legitimately want and expect to keep private. Quote: "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."

Josh Windham: In dissent, Justice Thurgood Marshall completely disagrees with the majority's analysis. He thinks it's totally beyond the pale to pretend like people don't expect privacy on their land and that society, however you define that term, doesn't respect fences and No Trespassing signs.

John: Moreover, Justice Marshall pointed out that if a private citizen were to ignore No Trespassing signs, that would be a crime. Quote: "I see no reason why a government official should not be obliged to respect such unequivocal and universally understood manifestations of a landowner's desire for privacy."

Josh Windham: As for the majority's holding that land isn't on the Fourth Amendment's list of

protected items, he thinks that that's not the way we're supposed to be reading the Bill of Rights. We don't read it in this sort of hyper literal way. He points to the First Amendment and says when we construe speech in the First Amendment, we're not talking about literal talking, we're talking about expression as the principle behind the word speech. And so it's not mere speaking or mere talking that's protected. It's all sorts of expressive conduct. And the same is true of the Fourth Amendment, he argues.

John: As Justice Marshall points out it makes sense to construe constitutional provisions broadly and to look for an underlying purpose or principle because the Constitution is meant to withstand the test of time – as opposed to laws written by legislatures where it is reasonable to expect that they'll be drafted with more precision.

Josh Windham: When I brought this up to my wife, and I was complaining about how the majority read the Fourth Amendment's list in *Oliver*, my wife, who's a fourth-grade teacher was sort of astounded because that's not the way it works when you have a list, for example, of rules in a classroom. She gets her students together at the beginning of every year, and they come up with a list of what you can and can't do in the classroom. And one thing that shows up every year on that list is keep your hands to yourself. But if you read that literally Johnny could go up to Sue and kick her and say, I didn't violate any rule. And my wife's point is no, I would punish that kid. And you should, right, because it's not an exhaustive list of everything you can and can't do in the classroom. It's demonstrative. It demonstrates or illustrates what what is allowed and what isn't. And I think the Bill of Rights works the same way. It's not a exhaustive list of every right we have it's a demonstrative list. Now, when the British were conducting arbitrary searches of colonists' property to look for uncustomed goods. They were looking in homes and warehouses and chests for papers, for example, that would show that they hadn't paid their taxes. But you don't find those things out in fields, right? And so it's just sort of an accident of

history that land doesn't end up listed in the Fourth Amendment. But the fact that land isn't listed – the fact that at the top of the Framers' minds were intrusions into structures, for example, doesn't mean that the colonists or the Framers were unconcerned with arbitrary searches of all other kinds of property.

John: But perhaps you are wondering: What would the Founders have thought? That's coming up, but first a quick break.

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John: Welcome to the break. If this were for-profit podcast, this is where we would run a commercial. But this is a nonprofit podcast, and so instead we will ask you to ask yourself if you are enjoying this podcast. And if so, maybe the right thing to do with your life is to apply to work for the Institute for Justice. We are currently hiring litigation attorneys with 3 - 6 years of experience, give or take, for our Arlington, Virginia and Austin, Texas offices. We are hiring baby lawyers for fellowships and law students for clerkships. We are even looking for an extra special lawyer to join the Center for Judicial Engagement, which produces this podcast. And we are hiring nonlawyers to do things like empirical research and coalition building. All of these opportunities are enumerated, with some precision, at ij.org/careers. We might be right for you. And you might be right for us. And together, we'll be alright.

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John: Today there are two approaches to interpreting the Fourth Amendment, and they are incongruous. There is the *Hester* approach that says there is no protection outside of persons, papers, houses, and effects. And there is the *Katz* approach that says Fourth Amendment

protection follows you around anywhere and everywhere, but vanishes and reappears seemingly at the whim of the Supreme Court. You don't have it on your own land, but you might have it in a phone booth or an office. At some point, hopefully, the Supreme Court will figure out how to resolve this tension. And when they do, surely they'll go back to Founding principles. Which is what we'll do now.

Laura Donohue: The basic idea behind the Fourth Amendment was really a restriction on overarching government power.

John: That's Professor Laura Donohue, a Fourth Amendment scholar at the Georgetown Law Center.

Laura Donohue: So the right of the people to be secure against unreasonable searches and seizure shall not be violated. That's the text of the Fourth Amendment, what it means by unreasonable search and seizure, it means actions that go against the reason of the common law, which means actions that are reflecting a general warrant.

John: When the Founders talked about reasonable versus unreasonable searches and seizures, what they were referring to, according to Professor Donohue, was the reason of the common law, the judge-made rules that had been developed over centuries. And in the context of the Fourth Amendment, the specific thing that the reason of the common law prohibited was the general warrant.

Laura Donohue: For hundreds of years prior to the American Founding, English courts had said, well, common law, the reason of the common law, says that you cannot have a general warrant. That's going to be seen as a violation of the ancient rights that Englishmen have by

nature of them being Englishmen.

John: For centuries in England, various monarchs and high-government officials had used general warrants to punish political or religious dissent. And for centuries, dissenters, lawyers, and judges, had argued that general warrants violated the common law.

Laura Donohue: A general warrant requires the individual on whom it is served to provide certain information. It's not premised on an actual crime having been committed or in the process of being or about to be committed. Instead, it's used in order to allow the government, the Crown to just cast about. And there's no oath or affirmation, and there's no third-party check.

John: The key feature – and defect – of a general warrant was, not surprisingly, that it was not specific. It did not specify a person or place to be searched. It did not specify particular things to be seized. It did not name a crime that was supposedly committed. It gave officers discretion to go wherever they wanted.

Laura Donohue: One of the reasons general warrants were so odious was because they allowed individuals to harass people, to imprison them, to figure out ways to bring the full force of the law down on them. They became personal instruments of power, and of ways of wielding power against others – against whom you might have had no other reason to proceed other than kind of you didn't like them for some reason. They could be used for revenge.

John: Of course, not all warrants were general warrants. At common law, government officials could lawfully enter private property if they had a specific warrant. In fact, they typically needed one. The main exception was in cases involving active pursuit of a suspected felon.

Laura Donohue: The Crown couldn't enter your home outside of the hue and cry or fleeing felon. So the hue and cry was when you actually saw somebody, for instance, who was murdered, and you raise the hue and cry, meaning every able bodied person has to actually go and obtain that person, whether they run into a home or not. Other than that, the Crown had to get a warrant in order to go into anybody's home.

John: And if a government agent went into a home without a specific warrant and not during active pursuit of a felon …

Laura Donohue: It's a trespass and you could actually bring a claim of trespass against the government or the government agent who entered into your home. So underlying all of these concepts of what process is due is this idea that an Englishman's home is his castle, and whilst he is there, he is as well guarded as a prince in a castle – that you cannot allow the Crown just to run rampant over your private life.

John: In a series of cases decided in England in the 1760s that were closely followed in the American colonies and that became a part of our constitutional heritage, that principle was put to the test. Starting with a case called *Wilkes v. Wood*.

Laura Donohue: In *Wilkes v. Wood*, you have a publication in which the writer – actually there were a series of articles in them that were seen as being treasonous or seditious material because they were critiquing the British government for reaching peace with France in the Treaty of Paris. And they felt that it had sold out basically any advantage that the English had.

John: John Wilkes was a member of English Parliament, who anonymously wrote some pretty sharp criticisms of government officials and policies.

Laura Donohue: And they accuse the Crown of having been sunk even to prostitution. At which point the government issued a general warrant – the Crown issued a general warrant – and used it to go into Wilkes' home and to seize his papers.

John: Wilkes was arrested and questioned, and he sued the agent who led the search for trespass.

Laura Donohue: When that case comes forward, Pratt, who hears the case, says, no, you can't use general warrants to go into an individual's home, right, it has to be specific, and it has to have the charge, it has to have the individual, it has to have the place to be searched.

John: The judge, Charles Pratt, urged the jury to find not only did the warrant not shield the agent from suit but also to award extraordinary damages to deter future use of general warrants and to show quote "the detestation of the jury." And they did, awarding Wilkes the astounding sum of one thousand pounds. In a separate case, a different judge and jury reached a similar conclusion regarding the suspected publisher of Wilkes' publication, who had also been arrested and had his home searched. And not for nothing, but it turned out they had the wrong printing press; he was not actually the publisher.

Laura Donohue: So these particular holdings really double down on and reiterate the commitment within English law for individuals to have their rights protected through legal instruments that have been sufficiently probed and established and challenged.

John: And then in a third case, called *Entick versus Carrington* that also involved searches and arrests for the publication of essays that criticized the government, Chief Justice Pratt again

ruled against the Crown. And his ruling made clear that not only was the common law concerned with invasions of the house, but also invasions of land. Quote:

> **Chief Justice Pratt/Lord Camden**: By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, … where the defendant is called upon to answer for bruising the grass and even treading upon the soil.

John: In 1886, the Supreme Court said that quote "the principles laid down in this opinion" – *Entick v. Carrington* – "affect the very essence of constitutional liberty and security." So when Justice Holmes, in the *Hester* case, implied that land wasn't protected against physical invasions at common law, which the *Oliver* Court later cited approvingly and is still controlling today, it sure seems like a bit of the essence of the Fourth Amendment was lost.

Laura Donohue: I actually looked at this. I went back and I researched British law to find this. And in fact, what I found were things like if you shoot across a corner of somebody's property, it's a trespass.

John: If you shot at a deer, for instance, across the corner of someone else's land, that was a trespass. No bruising the grass required.

Laura Donohue: So there were all sorts of ways that common law is very protective of the privacy rights on that property itself. It's not as though like, oh, it's open fields, so anybody can enter it or see it or collect it or do whatever. No.

John: Anyway, back to *Entick v. Carrington*. In that very same opinion, Chief Justice Pratt also

wrote that quote:

> **Chief Justice Pratt/Lord Camden**: The great end, for which men entered into society, was to secure their property.

John: At the Institute for Justice, we heartily agree. Strong protections for property rights stave off tyranny or anarchy and make all good things possible. But then there's Chief Justice Pratt's next sentence. Quote:

> **Chief Justice Pratt/Lord Camden**: That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.

John: Property rights were sacred, but they could be set aside or abridged by Parliament. If Parliament were to say that general warrants would henceforth be valid, then that would control, and the common law, the background rules, would yield. And, in fact, Parliament did authorize general warrants in various circumstances, including forcing people into the military and investigating smuggling. But not for criticizing the government. Parliament had not authorized general warrants for that, and Parliament's silence meant that the common law controlled. In the United States, however, that's not how it works. Congress does not get to take a vote and override the Constitution. And you can see the seeds of that idea – that there are some things that can't be imposed on a free people – in another case from the 1760s, about a particular kind of general warrant, this time in Massachusetts.

Laura Donohue: So you started to see with the colonists the use of what was called a writ of assistance, which essentially functioned as a general warrant, in that it would say you who are

served with this document must provide X, Y, and Z.

John: A writ of assistance allowed customs officers to go into houses, warehouses, ships, or other any place, day or night, indefinitely. They did not expire unless the King did. They did not require suspicion. If you possessed a writ of assistance, you could go anywhere, anytime. And you could require people to drop what they were doing and assist you. Anyone who refused could face legal consequences.

Laura Donohue: And what was happening was that writ was being used as an excuse to go into people's homes. So a ship would pull into harbor and goods would be offloaded and taken into somebody's home, for instance. Or maybe not, maybe they just happen to live in a port area. And so the Crown issued a writ of assistance, which then would require anybody served with it to enter into somebody's home, to try to assist them to recover, undutied goods, goods that they hadn't paid taxes on.

John: In what became known as *Paxton's case*, a group of American merchants mounted a challenge to the use of writs of assistance. Arguing on their behalf was a Harvard-educated lawyer, James Otis, who had been a judge in a British admiralty court and who had been asked by the British to argue the case on their behalf. Instead, he resigned his position.

Laura Donohue: And when the case came forward, James Otis, who takes pro bono the case of the writ of assistance. He says that these are instruments of enslavement on the one hand, and tyranny on the other.

John: Otis cited a then-recent case where a customs agent had used the writ to harass a colonist the agent didn't like. Otis argued that writs quote: "place[] the liberty of every man in the

hands of every petty officer." And he said that even if Parliament approved them, they were quote "void." And he lost. But his oration, according to future president John Adams, quote "breathed into this nation the breath of life."

Laura Donohue: John Adams, who was present at the time, later wrote: then and there was a first act of rebellion against Britain – then and there was a first shot of the Revolution. So this is very much and very deeply a part of who we are as a country and what the colonists were trying to do at the Founding.

John: Decades later, when the Founders put a prohibition on unreasonable searches and seizures into the Constitution – and into early state constitutions and colonial charters before that – what they meant by unreasonable, according to Professor Donohue, was against the reason of the common the law.

Laura Donohue: When I started looking at all the colonial writings, that's how it was referred to it was the reason of the common law and against the reason of the common law. If something was against the reason of the common law, or unreasonable, it violated the common law. And particularly, the reason of the common law was you had to have a specific warrant in order to violate the sanctity of the home, that you couldn't just run rampant over it by issuing some sort of general warrant or acting under no warrant whatsoever.

John: Today, the Supreme Court says that the word unreasonable means something altogether different.

Laura Donohue: Coming with *Katz*, you get this concept that no, the Fourth Amendment protects people, not places. So where you have an objective expectation, reasonable

expectation of privacy, one that society recognizes, and you actually think that you have privacy, so a subjective reasonable expectation of privacy, then that meets the requirement in the Fourth Amendment of reasonableness. The problem, of course, is that reasonable in this interpretation is like more or less reasonable. Which puts the Court in the position of policymaking. They get to decide what's more or less reasonable. That's very different than the original concept of what was reasonable as against the reason of the common law. Which was a general warrant. It was a very clear common law rule – gets replaced by a subjective and objective analysis that the Court does based on its own predilections and kind of impressions and understandings.

John: In Richard Thornton's case, the Supreme Court said, listen, there may be this common law history of prohibiting general warrants or warrantless searches, and sure, the common law didn't allow you to trespass onto land – but none of that matters under the Fourth Amendment if you don't have a legitimate privacy interest in the first place.

Laura Donohue: So open fields doctrine becomes this analysis or understanding that well, what happens in public, anybody can see and it is outside the home therefore it is not protected. There's this naked-eye concept that whatever you can see is pretty much fair game. So if any member of the public can see it, then why do we disadvantage police officers? And the response to that is because normal people can't put me in prison, take my money, take my life.

John: And of course today we aren't just talking about physical intrusions anymore. Thanks to technology – planes and helicopters and drones and high-resolution cameras – government officials have far more options to spy on people than in the past. And soon after *Oliver*, the Supreme Court decided a case about aerial surveillance. And the idea that a member of the public would be able to fly over the property, so police should be able to do the same, controlled the outcome.

Laura Donohue: So in a case in the 1980s, called *Ciraolo*, which happens in Santa Clara, California. Somebody gets into a Cessna and flies over a house.

John: After getting an anonymous tip that someone was growing marijuana in the yard of their home, but behind two fences, Santa Clara police flew a plane overheard.

Laura Donohue: And the Court decides no, there's no reasonable expectation of privacy, even though there are two fences, right. And the Court decides well, because anybody could ride on the top of a truck or a double decker bus, it's not reasonable to assume that that part of the garden growing pot was actually protected.

John: Because it was in plain view, if you could see over the fences.

Laura Donohue: The idea that anybody could just hire a plane and fly over is a particular socioeconomic take that might be true of the Supreme Court, but certainly isn't true of everybody else who lives in Santa Clara. And it was illegal to ride on the top of a truck. I actually went through Santa Clara ordinances, there were two ordinances, city ordinances and one state ordinance that said you cannot sit on the top of a truck. So you have the Supreme Court decision handed down? And the Court says, Oh, yes, it is, it is totally reasonable that somebody might sit on top of a truck and be able to peer over an eight foot high fence, even though it's illegal to do that, or might be in a double decker bus, even though there are no double decker buses in Santa Clara, California. And so what ends up happening is they're just substituting their judgment.

John: A few years after, in 1988, in the case of *Greenwood v. California*, the Supreme Court

ruled that police can go through your trash without a warrant once it's placed out on the curb.

Laura Donohue: So in another case that comes forward there's somebody who's suspected of being a drug dealer, and they decide, well, we're gonna go through their garbage. And the Court has this kind of incredible analysis that says, well, since a raccoon could go through this garbage, right, since a feral cat could go through the garbage, certainly the government should be allowed to go through people's garbage because it's an open space. So this open fields doctrine ends up influencing how the Court evolves, especially in a post-*Katz* world, where the Court gets to pick and choose what is reasonable and what is unreasonable.

John: All told, *Katz* has proven to be a sort of double-edged sword that both expands and retracts Fourth Amendment protections. And while the Supreme Court does not currently appear too keen to revisit the open fields doctrine anytime soon that does not mean all hope is lost. Far from it. And that is because every state has its own constitution, and state supreme courts can and do go their own way when interpreting those constitutions.

Josh Windham: When it comes to state constitutions, state courts are really the masters of their own destinies. They aren't bound by what the U.S. Supreme Court thinks about the Fourth Amendment. They're bound by the text, the history, and the values of their own constitutions. And so far, seven states – Mississippi, Montana, New York, Oregon, Tennessee, Washington and Vermont – have rejected the federal open fields doctrine under their own state constitutions, and all for different reasons. State courts in Mississippi and Tennessee and Vermont, have looked at language in their constitutions that protect "possessions," which replaces the word "effects" in the Fourth Amendment from unreasonable searches and seizures. And they say, look, possessions includes land. You can possess your land. Now, Washington and Montana courts have relied on their private affairs clauses or provisions similar to that, to reject the open

fields doctrine. And courts in Oregon in New York have held their search and seizure provisions, which are texturally identical to the Fourth Amendment, they reject the doctrine anyway.

John: At the Institute for Justice, we're trying to pump those numbers up.

> **Josh Windham (in court)**: Good afternoon, your honors. My name is Josh Windham and I represent plaintiff-appellees Terry Rainwaters and Hunter Hollingsworth.

John: IJ is currently challenging the open fields doctrine in three states, with more to come. Our cases are little bit different than previous open fields cases where people like Charlie Hester, Richard Thornton, and Raymond Oliver, were being prosecuted and were trying to get evidence of their guilt excluded. Our clients, by contrast, are just asking courts to stop the government from invading their land. Here's a clip from oral argument earlier this year in Tennessee.

> **Josh Windham (in court)**: They wander around in secret on private land. They wear camouflage. They observe people from behind bushes while they're hunting. They don't keep records of their entries. We don't know how many times they've gone on these properties, and neither does the state.

John: As it happens, the Tennessee Supreme Court actually rejected the open fields doctrine in 1926. But state officials have been ignoring that precedent, not only invading private land at will, but even hiding surveillance cameras on our clients' – and other people's – property.

> **Josh Windham (in court)**: Terry and Hunter are afraid to go out on their property. They're afraid to, you know, sorry to be crass, but to use the restroom out in the open on the properties. They're afraid to hunt because they might shoot somebody who's hiding

> in the bushes. They're afraid to invite guests over because they might be spied on. I mean, this is not how people should think about their private property in Tennessee. And that's why we have a 100-year line of cases treating private property, treating private land as sacred and holding that if the government wants to get onto that property to enforce laws, and I agree, hunting laws are important. But if it wants to go on these properties, it has to follow a constitutional process.

John: Our cases in Pennsylvania and Virginia involve similar intrusions by state wildlife officials. In Pennsylvania, officers routinely accost people on our clients' land while they are hunting, and they also use hidden cameras surreptitiously placed on private property. The case is currently before the Pennsylvania Supreme Court. In Virginia, our client had a slightly different experience in that he had his own camera on his property, and officers who were there without his knowledge or permission took it. He only learned that officers were coming onto his property when his wife and and six-year-old son, who were playing basketball in the driveway, saw a figure in camouflage hiding in bushes spying on them. In terror, they ran into the house and alerted our client, but the officer had slipped away before he came outside. His son was afraid to go outside for weeks and still talks about the scary man in the woods. That case is ongoing. And, unfortunately, it's just the tip of the iceberg.

Josh Windham: We know that government officials all over the country – at the federal state and local level – rely on the open fields doctrine to enter people's private land without a warrant. Farm inspectors go on to people's properties to inspect their crops. Environmental inspectors go on to people's land without a warrant to test their soil or their air or their water quality. Immigration officials patrol property along the borders looking for illegal immigrants. Code enforcement officers go on to people's private land to find zoning violations or other code violations. And ultimately, what's happening here is that they're going in without any sort of

meaningful oversight, not from a judge, not from anybody else. They're sort of a law unto themselves. And I always say that it's not anti-law enforcement to resist that kind of power. It's pro-Constitution. Law enforcement means the enforcement of the law, and the Constitution is the supreme law of the land, right. And so there's no such thing as law enforcement that doesn't involve enforcing laws in a way that is consistent with the Fourth Amendment.

John: So that's the state of play. But before we go, I feel it's important for you to know that Richard and Linda Thornton are doing okay.

Linda Thornton: They're here. **John**: Hello. **Richard Thornton**: I thought they might be. **Linda Thornton**: Right here. **Richard Thornton**: How are you? **John**: John Ross. **Richard Thornton**: Nice to meet you. **Josh**: Hey, I'm Josh Windham. **Richard Thornton**: How are you?

John: The kids are grown up; they have great careers and spouses and children of their own. Even though Richard and Linda were marijuana users. This fall, Josh and I went up to Maine to get a look at the spot where constitutional history was made and a little bit of the essence of the Constitution was lost.

Linda Thornton: We think we found the spot, the exact spot. We mapped the route out to get up there because we hadn't been out there for 40 years. But I had a pretty good idea where it was, and I think we've got it down.

John: They now live one town over, but Richard still owns the property at the center of the case.

Linda Thornton: This is a game trail that comes through here on this old road. I marked our route here. This I believe is the spot right here. **John**: How big an area would you say that is?

Richard: Four by four. **Linda**: You know, nothing huge or scary. **Richard**: Nothing too big or scary. **Linda**: This is the spot. We're not bothering small children. Richard owns the property. **John**: Constitutional history right here. **Linda**: With the Thorntons. **Richard**: Richard Thornton memorial garden. [laughter]

John: After the Supreme Court ruled against Richard, the case went back to state court.

Richard Thornton: It was stressful. It was stressful for both of us not knowing how it was going to be resolved or what I would face in the end. I labored under that feeling for years.

John: Having lost the Fourth Amendment argument, Richard's attorney argued that the search was illegal under the state constitution. But the Supreme Judicial Court ruled that it was too late to make that argument. So, a little over three years after the initial search, the prosecution was cleared to continue. Fortunately, it did not.

Richard Thornton: No fines, no jail. It was dropped.

Linda Thornton: They lost the evidence, and that was the final gavel, I believe, was at the end of it, when it was revealed that the police couldn't locate the marijuana anymore. Because I was weeping and he said, you've put this woman through enough and I believe that's when they said that they had lost track of it. For the best of my recollection.

Josh Windham: Well, I'm really happy to hear that didn't end up in any sort of actual criminal time.

Linda Thornton: No, we just went through the wringer. But nobody ever went to jail over it.

Conclusion:

John: And that concludes this episode. Thanks for listening, and I hope you'll stick around for the rest of the season. If you're a Fourth Amendment aficionado, stay tuned for an announcement about a conference that we're holding this spring to mark the 100th anniversary of the *Hester* decision and the open fields doctrine. But here on the podcast, we will be moving on. On the next episode, we will return with yet another momentous constitutional ruling written by Justice Oliver Wendell Holmes. And once again, it would have been nice if he'd put just a little bit more thought into his citations. Next time on Bound By Oath, we'll head out of the woods and into Pennsylvania coal mines.

Credits:

John: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Charles Lipper and Kais Ali at Volubility Podcasting. This episode was produced by John Ross and Josh Windham. With voice work from Sam Gedge. We relied mightily on the scholarship of Laura Donohue and Stephen Saltzburg. Audio from oral argument in the Supreme Court comes from Oyez. The theme music is by Patrick Jaicomo.

Post-script:

John: Actually, there's just one more thing to say. There is postscript to the *Hester* case that was front page news in Greenville County, South Carolina for nearly a decade. It doesn't have anything to do with the open fields doctrine itself, but feel we would be doing an an injustice to

listeners if we did not mention it. Just before Christmas in 1924, Charlie Hester, the bootlegger whose case kicked off the open fields doctrine, returned home after serving his jail sentence. One day later, a juror who voted to convict him was murdered in cold blood. J. Ed Thackston was a prominent farmer and the owner of a general store, and he was lured out of his home at night by one of his employees on a pretext when he was confronted by, according to the authorities, Charlie Hester, his father Jerry Hester, and his brother Claude Hester. The employee believed, he said, that the Hesters were planning to give Thackston a whipping. Instead, they shot him in the head. A month later, the employee confessed his role. And he was ultimately sentenced to 20 years in prison but only served six before his sentence was commuted by the governor. At any rate, with the employee's confession in hand, a state detective and the county sheriff arrested the three Hesters and put them together in the same jail cell. Which was bugged. According to the detective and the sheriff, the Hesters then proceeded to implicate themselves in the murder. There was no tape recording; and at trial, it was the officers' word against the Hesters', plus the confession of the employee, plus the word of a neighbor who testified that Jerry Hester, the father, had said a few days before the murder to keep on an eye on the newspapers because something big was going to happen. All three Hesters were convicted and sentenced to death. But on appeal at South Carolina Supreme Court, their convictions were vacated because of several serious errors. For one, the employee who confessed had not taken the stand; rather, his sworn statement had been introduced into evidence, which violated the rights of the accused to confront their accuser. On retrial, Charlie and Claude, the brothers, were acquitted. Only Jerry, the father, was convicted, and he was sentenced to life in prison. So it does seem that the Hesters may very well have been a bad bunch. But, judging by the number of headlines, the murder of J. Edward Thackston was only the second most notorious murder in Greenville County in the 1920s. The most notorious murdered occurred in 1927, one month after Jerry was convicted the second time. And the victim was the sheriff of Greenville County. Not the sheriff who'd investigated the Hesters. That

sheriff had lost an election and been replaced by the new sheriff, who was murdered. And it turns out, the new sheriff was murdered by a hitman, who confessed and said he had been hired by … the old sheriff. Both the hitman and the old sheriff were convicted. The other lead investigator in the Hester case was charged with perjury for trying to cover up the former sheriff's involvement. What was the motive for the murder? I'm not sure. Did the charges and convictions of the lead officers in their case exculpate the Hesters, at least in the court of public opinion? I don't know. What I can say is Charlie and Claude lived out the rest of their lives in Greenville County. So did their father, Jerry Hester, whose life sentence was commuted after he had served almost six years. And I should note that the former sheriff also had his sentence commuted, and he even ran unsuccessfully for sheriff after he got out of prison. And with that, now we really conclude the episode. Thank you for listening and goodbye.