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Clifford S. Fishman

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## ARTICLES

### POLICE TRESPASS AND THE FOURTH AMENDMENT: A WALL IN NEED OF MENDING

CLIFFORD S. FISHMAN\*

In Robert Frost's poem "Mending Wall,"<sup>1</sup> the narrator and his neighbor are repairing the stone walls that separate their farms. The neighbor insists on mending the wall even where there is no need for one, explaining, "Good fences make good neighbors." The narrator muses, "Before I built a wall I'd ask to know/ What I was walling in or walling out. . . ." The neighbor simply repeats, "Good fences make good neighbors."<sup>2</sup>

When police officers suspect that a wall or fence has been erected primarily to wall them out, they sometimes decline to be "good neighbors." The question then arises whether an unlawful trespass by law enforcement officials also constitutes an unlawful search forbidden by the Fourth Amendment.<sup>3</sup> Four times since 1983, the Supreme Court has devoted substantial discussion to the related questions of what kind of property the Fourth Amendment protects from physical police intrusion, and what kind of fence or wall is needed to secure such protection. In *Oliver v. United States*,<sup>4</sup> police officials trespassed on fenced and posted rural farmland to discover marijuana being cultivated in an open field. In *United States v.*

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\* Professor of law, The Catholic University of America Law School. A.B., University of Rochester, 1966; J.D., Columbia University, 1969. Professor Fishman was formerly an Assistant District Attorney in the New York County District Attorney's Office, and Executive Assistant District Attorney in New York City's Special Narcotics Prosecutor's Office. In 1984-1986, he served as a consultant to the President's Commission on Organized Crime.

1. THE COMPLETE POEMS OF ROBERT FROST 47 (1949).

2. *Id.* at 48.

3. See *infra* text accompanying note 8 for the provisions of the Fourth Amendment. The author wishes readers to note that the "Fourth Amendment" is capitalized throughout this article in proud defiance of any published citation guidelines.

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

*Dunn*,<sup>5</sup> agents climbed over several fences and gates, peered into the screened-off entrance to a barn, and observed an illicit drug lab. In both cases, the Court concluded that no fourth amendment violation had taken place. In *Dow Chemical Co. v. United States*,<sup>6</sup> investigators conducted aerial surveillance of a 2,000 acre industrial complex. Likewise, in *California v. Ciraolo*,<sup>7</sup> investigators conducted aerial surveillance of a suburban backyard surrounded by a ten-foot-high fence. In upholding the constitutionality of the surveillance in each case, the Court commented extensively on what kind of fence might be required to erect a constitutional barrier to police intrusion. Thus, these cases have significant privacy implications in a wide variety of contexts: a clearing in a woods a mile from any structure (*Oliver*), the entrance to a barn a few dozen yards from a residence (*Dunn*), suburban homes (*Ciraolo*) and commercial property (*Dunn* and *Dow*).

Part I of this article provides an overview of basic Fourth Amendment principles. Part II analyzes the *Oliver* and *Ciraolo* cases which define and distinguish residential "curtilage," protected by the Fourth Amendment, and "open fields," which the Fourth Amendment does not protect. Part III reviews the *Dow* decision's discussion of whether an industrial facility, like a residence, might have constitutionally protected curtilage. Part IV focuses on the *Dunn* decision, which dramatizes the curtilage-open field dichotomy while at the same time blurring the line between the two. Finally, part V shows how these decisions may have invalidated the "commercial curtilage" concept without squarely discussing it, and may even permit police officers to conduct surreptitious surveillance of a home from its front lawn or back yard.

## I. The Fourth Amendment

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.<sup>8</sup>

Judicial interpretation and application of the amendment are broadly summarized as follows: "searches and seizures" are lawful only if authorized in advance by a judicially-issued warrant, based on facts that establish probable cause to believe that specific evi-

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5. 480 U.S. 294 (1987).

6. 476 U.S. 227 (1986).

7. 476 U.S. 207 (1986).

8. U.S. CONST., amend. IV.

dence of crime will be found in "the place to be searched."<sup>9</sup> If evidence is obtained in a manner which violates a defendant's Fourth Amendment rights, the prosecutor is not permitted to utilize that evidence at trial to establish the defendant's guilt.<sup>10</sup> This principle, known as the "Fourth Amendment exclusionary rule," is intended to deter law enforcement officials from conducting unlawful searches and seizures by depriving them of the incentive to do so.<sup>11</sup>

Because the Fourth Amendment only protects a person against "unreasonable searches and seizures," a defendant may attempt to challenge the method police or prosecution use to obtain evidence only if he can first show that the authorities obtained that evidence by conducting either a "search" or a "seizure."<sup>12</sup> Thus a defendant may win suppression of the fruits of a police trespass onto his property only if that trespass amounted to an "unreasonable search" as that term is defined in Fourth Amendment caselaw.

Until 1967, the Supreme Court had consistently held that police investigative conduct did not constitute a "search" *unless* that conduct physically invaded a defendant's premises, property or possessions.<sup>13</sup> In *Katz v. United States*,<sup>14</sup> however, the Supreme Court

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9. "Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." *United States v. Karo*, 468 U.S. 705, 716-17 (1984). In certain circumstances, however, searches and seizures are lawful even if no warrant has been obtained, so long as probable cause existed at the time the search or seizure was conducted. Such is the law governing searches of automobiles. *See United States v. Ross*, 456 U.S. 798 (1982) (under "automobile exception," warrantless search is not unreasonable if search is based on objective facts that would justify issuance of warrant). Similarly, police may lawfully search private premises without a warrant in exigent circumstances. *Warden v. Hayden*, 387 U.S. 294 (1967). In other circumstances, searches and seizures are lawful even in the absence of probable cause, so long as a "reasonable suspicion" of wrongdoing existed at the time of the search. For example, police may temporarily stop and detain ("seize") an individual for investigation without either a warrant or probable cause, so long as reasonable suspicion exists to believe that the individual may be involved in criminal activity. *Florida v. Royer*, 460 U.S. 491 (1983). If the officer also has a reasonable suspicion that the person he seeks to stop and question is armed, the officer may also conduct a superficial frisk ("search") of the individual. *Terry v. Ohio*, 392 U.S. 1 (1968).

10. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

11. *Nix v. Williams*, 467 U.S. 431, 442-47 (1984); *United States v. Ceccolini*, 435 U.S. 268, 275-76 (1978); *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Janis*, 428 U.S. 433, 458-59 n.35 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974); *Mapp*, 367 U.S. at 657-68. In *Mapp*, the Court emphasized other purposes for the rule as well, including "the imperative of judicial integrity." *Id.* at 659. More recently, however, the Court has stressed the deterrent rationale as the primary justification for the rule. *Duckworth v. Eagan*, 109 S. Ct. 2875 (1989).

12. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

13. Under this view, neither wiretapping nor bugging constituted a search, so long as investigators managed to avoid such a physical invasion. *See Olmstead v. United States*, 277 U.S. 438, 441 (1928) (wiretapping); *Goldman v. United States*, 316 U.S. 129, 134-35 (1942) (bugging).

14. 389 U.S. 347 (1967). Government agents placed a listening device on the

emphasized:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>15</sup>

But while "the Fourth Amendment protects people, not places," the real question, as Justice Harlan stressed in his concurring opinion, is "what protection [the Fourth Amendment] affords to those people."<sup>16</sup> Justice Harlan reasoned that Fourth Amendment protection exists only if two conditions exist: "first[,] that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"<sup>17</sup>

Justice Harlan's formula has since been endorsed by the Court as the basic definition of the rights which the fourth amendment protects.<sup>18</sup> Thus, if a defendant seeks to suppress evidence or information obtained by a law enforcement official, he must first establish that the official engaged in conduct which intruded upon his reasonable (or "legitimate," or "justifiable") expectation of privacy. If the defendant can establish that there was in fact such an intrusion, a fourth amendment search has occurred, and the defendant is entitled to challenge the legality of that search. If, however, the defendant is unable to establish that the investigators' conduct in-

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outside of a public telephone booth, used the device to overhear what Katz said during two telephone conversations, and then testified as to what they heard at Katz's trial. *Id.* at 348-49. The litigants had argued the case before the Supreme Court in terms of whether a telephone booth was a "constitutionally protected area" and whether actual physical penetration into such an area was a prerequisite to the application of the fourth amendment. *Id.* at 350-51. The Court "decline[d] to adopt this formulation of the issues." *Id.* at 350.

15. *Id.* at 351-52. Although the agents had probable cause to believe that Katz's conversations would be incriminating and that they acted with restraint by listening only when Katz was in the booth, the Court suppressed the agents' testimony as to what Katz said because the agents had failed to obtain a warrant authorizing the use of the listening device. *Id.* at 356-57.

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

17. *Id.*

18. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979) ("Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action" (quoting Justice Harlan's concurring opinion in *Katz*)). See also *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1978) (stating that while a person may have a justified subjective expectation of privacy, it may not be one that the law recognizes as legitimate); *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion) (stating that the difficulty with applying the principles announced in *Katz* arises when determining what expectations of privacy are constitutionally justifiable). See generally Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977).

truded upon his reasonable expectation of privacy, then no "search" has occurred, and the defendant is not entitled to have the manner in which the evidence or information was obtained measured against fourth amendment standards.<sup>19</sup>

How then, does one assess whether an expectation of privacy is "legitimate?" No definitive answer has yet emerged, but the Court discussed the question rather extensively in *Rakas v. Illinois*:<sup>20</sup>

[I]t would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.<sup>21</sup>

While expectations of privacy "need not be based on a common-law interest in real or personal property," the fact that a property interest does exist "may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon."<sup>22</sup> In particular, the Court has held that the related concepts of "knowing exposure" and "assumption of risk" significantly limit the scope of the term "search" and the application of the exclusionary rule.

#### A. "Knowing Exposure"

The Court in *Katz* observed that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."<sup>23</sup> If a person knowingly exposes information or conduct to the public, he is deprived of any reasonable expectation of privacy he may otherwise have had with regard to that information or conduct; hence, surveillance of that conduct or acquisition of that information by the police will not be considered to be a fourth amendment search.<sup>24</sup> "The Fourth Amendment protection of the home," for example, "has never been extended to require law enforcement officers to shield their eyes when passing by a

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19. See, e.g., *United States v. Place*, 462 U.S. 696, 706-07 (1983) (exposing suspected drug courier's suitcase to a trained narcotics dog does not constitute a "search," because it reveals only whether the suitcase contains contraband); *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) ("A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy" and therefore is not "characterize[d] . . . as a search").

20. 439 U.S. 128 (1979).

21. *Id.* at 143-44 n.12.

22. *Id.*

23. *Katz v. United States*, 389 U.S. 347, 351-52 (1967).

24. *California v. Ciraolo*, 476 U.S. 207, 212-23 (1986). See also *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978) ("What is observable by the public [may also be observed] without a warrant by [a] Government inspector.")

home on public thoroughfares."<sup>25</sup> Inevitably, issues arise as to the extent to which conduct or conditions need be exposed, and the degree of knowledge of that exposure necessary to bring about a loss of Fourth Amendment protection.

### B. "Assumption of risk"

Even if a person exposes information or conduct to only a chosen few, he has no Fourth Amendment complaint if one of his confidants is, unbeknownst to him a police informer or undercover agent who reports what he has seen and heard to the authorities.<sup>26</sup> "The risk of being . . . betrayed by an informer or deceived as to the identity of one with whom one deals is . . . the kind of risk we necessarily assume whenever we speak."<sup>27</sup> Therefore, the Fourth Amendment provides no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."<sup>28</sup>

The "assumption of risk" limitation on Fourth Amendment protection could seriously undermine individual privacy if the limitation is applied in a "value-neutral" fashion. For example, Justice Marshall has cautioned that "whether privacy expectations are legitimate within the meaning of *Katz* depend[s] . . . on the risks he should be forced to assume in a free and open society . . . [C]ourts must evaluate the 'intrinsic character' of investigative practices with reference to the basic values underlying the Fourth Amendment."<sup>29</sup> A majority of the Court has conceded that in some situations, a "normative inquiry" might be necessary.<sup>30</sup> It should surprise no one that the Court has on several occasions divided sharply when pondering such issues.

## II. THE CURTILAGE-OPEN FIELDS DICHOTOMY

The law recognizes several different categories of locations for purposes of applying the Fourth Amendment. At one extreme is the

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25. *Ciraolo*, 476 U.S. at 213.

26. *Hoffa v. United States*, 385 U.S. 293, 303 (1966).

27. *Id.* at 303. Thus, when a drug dealer invites a customer into his home to sell him drugs, he assumes the risk that the customer may really be an undercover police officer; if such is the case, the mere fact that the officer or agent accepted the invitation does not constitute a "search." *Lewis v. United States*, 385 U.S. 206 (1966). Hence, the dealer cannot invoke the Fourth Amendment to preclude the officer from testifying as to what the defendant said or did in his presence. *Id.* Similarly, it is not a search for one party to a conversation surreptitiously to record or transmit it without the knowledge of the other party. *United States v. Caceres*, 440 U.S. 741, 744 (1979); *United States v. White*, 401 U.S. 745, 749 (1971).

28. *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

29. *Smith v. Maryland*, 442 U.S. 735, 750-51 (1979) (Marshall, J., dissenting).

30. *Id.*, at 740-41 n.5 (majority opinion).

home, which enjoys the greatest degree of protection.<sup>31</sup> The "curtilage"<sup>32</sup> of a home also enjoys substantial protection.<sup>33</sup> At the other extreme, public locations, including streets, sidewalks, parks, etc., are not afforded Fourth Amendment protection.<sup>34</sup> Neither are "open fields,"<sup>35</sup> even if they are private property.<sup>36</sup> Business locations fall somewhere in between these extremes, enjoying some Fourth Amendment protection, but not as much as a home does.<sup>37</sup>

Thus, the outcome in Fourth Amendment suppression litigation often depends upon how a particular location is categorized (residence, curtilage, open field or business location). As the cases discussed herein will demonstrate, these issues have sharply divided the Supreme Court.

#### A. *Hester and Oliver*

The Fourth Amendment explicitly protects "[t]he right of the people to be secure, in their persons, houses, papers and effects, against unreasonable searches and seizures . . ."<sup>38</sup> In 1924, in *Hester v. United States*,<sup>39</sup> the Court held, in Justice Holmes' opinion, that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."<sup>40</sup> Thus, the fact that police officers trespassed onto private land to examine a bottle of bootleg whiskey where they had seen it thrown did not violate the Fourth Amendment.

Sixty years later, in *Oliver v. United States*,<sup>41</sup> the Court consid-

31. See, e.g., *Dow Chemical Co. v. United States*, 476 U.S. 227, 237 n.4 (1986) (privacy expectations most heightened in the area of the home); *United States v. Karo*, 468 U.S. 705, 714-15 (1984) (warrantless home search presumed unreasonable); *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (absent exigent circumstances warrantless entries into the home presumed unreasonable). Thus, if police unlawfully enter a defendant's home, any evidence they see once they are inside will be tainted by the unlawful entrance and therefore will be suppressed. *Segura v. United States*, 468 U.S. 796, 804 (1984); *Steagald v. United States*, 451 U.S. 204, 211-12 (1981); *Payton v. New York*, 445 U.S. 573, 586 (1980).

32. See *infra* text accompanying note 51.

33. See *infra* notes 51-83 and accompanying text.

34. See *supra* text accompanying note 23.

35. See *infra* text accompanying note 50.

36. See *infra* note 45 and accompanying text.

37. Recently, the Court has divided sharply on the degree to which Fourth Amendment protection of business premises differs from the protection afforded a home. See *infra* notes 73-81 and accompanying text.

38. Emphasis added. See *supra* text accompanying note 8 for full text of the fourth amendment.

39. 265 U.S. 57 (1924).

40. *Id.* at 59.

41. 466 U.S. 170 (1984).



ered whether the *Hester* "open fields" doctrine survived the *Katz* decision and its progeny. In *Oliver*, the Court decided two unrelated cases, one arising in Kentucky and one in Maine, in which police officers trespassed onto private, rural, undeveloped land to determine whether the owner was (as they suspected) cultivating marijuana. Justice Powell, writing for a six-member majority,<sup>42</sup> concluded that the "open fields" doctrine was still good law: "we reaffirm today . . . that an individual may not legitimately demand privacy for activities conducted in fields out of doors, except in the area immediately surrounding the home."<sup>43</sup>

This result, the majority emphasized, is mandated by the language and history of the Fourth Amendment: at the time the amendment was added to the Constitution, real property was understood to be quite distinct from a person, house, paper or effect (the latter term including only personal property).<sup>44</sup> Moreover, the Court insisted, such a result was entirely consistent with *Katz*:

[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields.<sup>45</sup>

The Court also pointed out that 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,"<sup>46</sup> because fences and "no trespassing" signs do not effectively bar the public from viewing open fields in rural areas.

Justice Powell's majority opinion conceded that the defendants had sought to secure the privacy of their unlawful horticulture by restricting it to areas remote from public roads, and by fencing and posting no trespassing signs. The Court refused, however, to utilize a case-by-case analysis to apply the Fourth Amendment to open fields. To do so, the majority insisted, would introduce vast new areas of confusion into the law.<sup>47</sup> Moreover, while the marijuana-grower's precautions probably prevented members of the public from stumbling upon the crops found by the police, this fact did not make defendants' privacy expectations "legitimate" in Fourth

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42. Justice Powell was joined by Chief Justice Burger and Justices Blackmun, Rehnquist, O'Connor and, in part, White. Justices Marshall, Brennan and Stevens dissented.

43. *Oliver*, 466 U.S. at 178.

44. *Id.* at 176-77.

45. *Id.* at 179. Justice White did not join this part of the opinion, reasoning that the language and history of the amendment disposed of the issue without need to discuss privacy expectations. *Id.* at 184.

46. *Id.* at 179.

47. *Id.* at 181-82.

Amendment terms, because "a police inspection of open fields" does not "infringe[] upon the personal and societal values protected by the Fourth Amendment."<sup>48</sup> And while the intrusion "is a trespass at common law," property interests, though relevant to Fourth Amendment analysis, no longer "control the right of the Government to search and seize."<sup>49</sup> Thus, the Court concluded that there had been no Fourth Amendment violation.

In the course of explaining its conclusions, the Court offered at least a partial definition of "open fields":

the term "open fields" may include any unoccupied or undeveloped area outside the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech. For example, . . . a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment.<sup>50</sup>

As Justice Homes did in *Hester*, Justice Powell in *Oliver* carefully distinguished between open fields, unprotected by the Fourth Amendment, and the "curtilage" of a house, which is protected. Concerning curtilage, the Court observed:

At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," and therefore has been considered part of the home itself for Fourth Amendment purposes. Thus, the courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private.<sup>51</sup>

The facts of the two cases before the Court in *Oliver* did not require the Court to distinguish any more precisely than that between curtilage and open fields.

### B. Back Yard as Curtilage: *Ciraolo*

In *California v. Ciraolo*,<sup>52</sup> decided two years after *Oliver*, marijuana again fertilized the law of open fields and curtilage. Once again, police officers received a tip concerning unlawful cultivation — not, as in *Oliver*, in a remote rural area, but in the back yard of a suburban home. Two fences, one of them ten feet high, prevented observation from the ground. Two officers trained in marijuana detection rented an airplane, flew over the yard, and saw marijuana growing within the fenced-in area. Ciraolo subsequently sought to

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48. *Id.* at 182-83.

49. *Oliver*, 466 U.S. at 183, quoting, *Katz*, 389 U.S. at 353, quoting, *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

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

51. *Id.* at 180, quoting, *Boyd v. United States*, 116 U.S. 616, 630 (1896).

52. 476 U.S. 207 (1986).

suppress the information obtained during this flight.

In describing *Ciraolo's* fenced-in garden, Chief Justice Burger cited to the *Oliver* discussion of curtilage, and continued:

The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. The . . . area here was immediately adjacent to a suburban home, surrounded by high double fences. This close nexus to the home would appear to encompass this small area within the curtilage . . . .

That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.<sup>53</sup>

The majority concluded that the officers' location in publicly navigable airspace was the constitutional equivalent of a public thoroughfare, and that the surveillance therefore did not constitute a search.<sup>54</sup>

A few aspects of this passage merit comment. First, the Court's observation, that a double-fenced suburban back yard "*would appear*" to be within the curtilage of the house, is somewhat begrudging. If this isn't curtilage, it is difficult to imagine anything without a roof that ever would be.

Perhaps more significant; if a suburban homeowner does *not* surround his back yard with an opaque ten-foot high fence, does this deprive the yard of "curtilage" status? *Ciraolo* provides no clear answer. The Court's most recent curtilage-open fields decision, *United States v. Dunn*,<sup>55</sup> does not address the question squarely, but provides clues which, if Delphic in nature, at least have the virtue of elevating our uncertainty to a higher plane. Before considering *Dunn*, it is necessary to examine a companion case to *Ciraolo*.

### III. THE "INDUSTRIAL CURTILAGE" CONCEPT: *DOW CHEMICAL V. UNITED STATES*

*Dow Chemical v. United States*<sup>56</sup> was argued and decided the same day as *Ciraolo*.<sup>57</sup> The Environmental Protection Administration ("EPA") sought permission to conduct an on-site inspection of a 2,000-acre chemical manufacturing facility operated by Dow in Midland, Michigan. When Dow refused to consent to the inspection,

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53. *Ciraolo*, 476 U.S. at 212-13.

54. *Id.* at 214.

55. 480 U.S. 294 (1987). See *infra* notes 88-145 and accompanying text for discussion of this recent case.

56. 476 U.S. 227 (1986).

57. The cases were argued on December 10, 1985 and decided on May 19, 1986.

the EPA employed a commercial aerial photographer to photograph the facility at altitudes ranging from 1,200 feet to 12,000 feet. Claiming that the photographs might reveal valuable trade secrets it had gone to considerable lengths to protect (particularly with regard to several open-air plants), Dow sought an injunction in federal district court.<sup>58</sup> Dow alleged that the EPA's action constituted a search that violated the Fourth Amendment. The district court agreed, and granted the injunction.<sup>59</sup> The Sixth Circuit Court of Appeals reversed,<sup>60</sup> and Dow appealed.

Thus *Dow*, like *Ciraolo*, poses questions concerning the applicability of the Fourth Amendment to aerial surveillance. The cases differ, however, in two significant respects. First, in *Ciraolo*, the surveillance was conducted with the naked eye, while in *Dow*, it was conducted with an aerial mapping camera that recorded on film far more than an observer in the plane could have seen with the naked eye. Thus, the surveillance in *Dow* was far more revealing than that in *Ciraolo*.<sup>61</sup> Second, while *Ciraolo* involved surveillance of the backyard of a private home, *Dow* involved surveillance of a huge multi-building industrial complex.

Dow's Fourth Amendment argument consisted, as all such claims must, of two basic points: that it had a reasonable expectation of privacy with regard to the target of the surveillance, and that the surveillance unlawfully violated that expectation. To support its claim that it had a right to privacy from aerial photography, Dow argued that the open spaces within the complex<sup>62</sup> constituted an "industrial curtilage" protected by the Fourth Amendment. The company pointed out that federal and state trade secret laws protect Dow from unauthorized disclosure of the information in question. By enacting such legislation, Dow reasoned, society had recognized as "reasonable" the company's expectation of privacy from surveillance that might disclose the information in question. Moreover, Dow insisted, it had "done everything commercially feasible to protect the confidential business information and property located

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58. Dow also argued that EPA lacked statutory authority to conduct the surveillance. The Supreme Court unanimously upheld that authority. Because this article focuses solely on Fourth Amendment issues, it does not analyze that aspect of the *Dow Chemical* decision.

59. 536 F. Supp. 1355 (E.D. Mich. 1982).

60. 749 F.2d 307 (6th Cir. 1984).

61. The Court's treatment of the photographic and technological aspects of *Dow* are summarized briefly in note 76, *infra*.

62. The 2,000-acre complex contains numerous chemical processing plants, several of which are "open-air" plants, with reactor equipment, loading and storage facilities, motors, etc., located in the open area between buildings. Dow claimed that the technology used in these plants are trade secrets protected by law, and that aerial photographs of the design and configuration of its open-air facilities could reveal details of its secret manufacturing processes. *Dow Chemical*, 476 U.S. at 232.

within the borders of the facility."<sup>63</sup> Entrance to the plant is strictly regulated. An eight-foot high chain link fence completely surrounds the facility. The fence is patrolled by security personnel, monitored by closed-circuit television, motion detectors and other alarm systems. The open-air plants are placed within the internal portion of the complex, to shield them from public view from outside the perimeter fence. Use of photographic equipment within the complex by anyone other than authorized Dow personnel is prohibited, and no photographs of the facility may be taken or released without prior management review and approval.<sup>64</sup> Dow alleged to the district court that all told, it had spent at least \$3.25 million on various security measures in each of the ten years preceding the litigation.<sup>65</sup> In addition, Dow asserted that it had also taken strenuous measures designed to protect it against aerial surveillance.<sup>66</sup>

The Court, dividing five to four, rejected Dow's claims. The majority opinion, written by Chief Justice Burger,<sup>67</sup> acknowledged that commercial property, like residential property, is protected by the fourth amendment from unreasonable searches and seizures.<sup>68</sup> Conceding that the outdoor portions of Dow's facilities were in some respects analogous to the "curtilage" of a private home, the majority pointed out that it was also analogous in many ways to an "open

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63. *Id.*, 476 U.S. at 241 (Powell, J., concurring in part and dissenting).

64. *Id.*

65. *Dow Chemical Co. v. United States*, 536 F. Supp. 1355, 1365 (E.D. Mich. 1982).

66. As a matter of standard company practice, employees are instructed to note the identification number of any "suspicious" overflights of the facility. When such flights occur, the company locates the pilot to determine if he had photographed the facility and (if so) requests the photographer to turn over the film. If the pilot complies, Dow develops the film and reviews the photographs. If they reveal private business information, Dow retains the photographs and negatives. If the pilot refuses to cooperate, Dow commences litigation to protect its trade secrets. *Dow*, 476 U.S. at 242 n.3. Thus, Dow argued, it does all it reasonably could be expected to do to protect its facility from aerial photography. The only other alternative would be to place a roof over its open-air facilities. This, the company insisted, would be unreasonable for two reasons. First, it would be prohibitively expensive: to roof just one such plant in 1978 would have cost approximately \$15 million. Second, it would greatly increase the danger to employees if explosive or toxic chemicals were accidentally released. *Id.* at 241 n.1. (Powell, J., concurring in part and dissenting). The majority concluded, however, that these measures were insufficient to give Dow a reasonable expectation of privacy against such photography. See *infra* note 79.

67. Justices White, Rehnquist, Stevens and O'Connor joined chief Justice Burger. Justice Powell, joined by Justices Brennan, Marshall and Blackmun, dissented from the majority's Fourth Amendment analysis. Because these Justices agreed with the majority's conclusion that (Fourth Amendment issues aside) the EPA has statutory authority to conduct aerial surveillance (see *supra* note 58), Powell's opinion is technically classified as "concurring in part and dissenting." Because this article focuses solely on Fourth Amendment issues, Powell's opinion is referred to hereafter simply as the dissent.

68. *Dow Chemical*, 476 U.S. at 235, citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) and *See v. City of Seattle*, 387 U.S. 541 (1967).

field."

The Chief Justice, quoting from Justice Powell's majority opinion in *Oliver*, pointed out that the open areas in the Dow complex "do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from governmental interference or surveillance."<sup>69</sup> Again quoting *Oliver*, Chief Justice Burger likewise observed in *Dow* that "[t]o fall within the open fields doctrine the area 'need be neither "open" nor a "field" as those terms are used in common speech.'"<sup>70</sup> Thus, "[t]he area at issue here can perhaps be seen as falling somewhere between 'open fields' and curtilage, but lacking some of the critical characteristics of both."<sup>71</sup> The Court emphasized, however, that "[w]e find it important that this is *not* an area immediately adjacent to a private home where privacy expectations are most heightened."<sup>72</sup> Rather, this was commercial property, which enjoys somewhat less Fourth Amendment protection than an individual's home, "because 'the expectations of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity afforded an individual's home.'"<sup>73</sup>

"Any actual physical entry by EPA into any enclosed areas," Chief Justice Burger acknowledged, "would raise significantly different questions, because 'the businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.'"<sup>74</sup> But this case, the Court stressed, "concerns aerial observation of a 2,000-acre outdoor manufacturing facility *without* physical entry."<sup>75</sup> Moreover, despite the sophisticated nature of the photog-

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69. *Dow Chemical*, 496 U.S. at 235, quoting *Oliver*, 466 U.S. at 179.

70. *Id.* at 236, quoting *Oliver*, 466 U.S. at 180 n.11. For the pertinent portion of note 11 of *Oliver*, see *supra* note 49 and accompanying text. As both the majority and dissent describe it, Dow's 2,000-acre site apparently bears little resemblance to an "unoccupied or undeveloped . . . or thickly wooded area."

71. *Dow Chemical*, 476 U.S. at 236.

72. *Id.* at 237, n.4 (emphasis in the original).

73. *Id.* at 237-38, quoting *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981). The majority also quoted the Court's comment in *Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978) that "[w]hat is observable by the public is observable without a warrant by the Government inspector as well." *Dow Chemical*, 476 U.S. at 238. It is a comment that has at least arguable applicability to aerial surveillance from public airspace.

Justice Powell, dissenting, accused the majority of grossly misrepresenting the Court's prior decisions applying the Fourth Amendment to commercial premises. See *infra* note 80 concerning Powell's dissent.

74. *Id.* at 237, quoting *See v. City of Seattle*, 387 U.S. 541, 543 (1967). The expression "enclosed area" is ambiguous: it could be taken to mean the entire Dow complex, which, after all, is enclosed by a rather formidable fence and other security measures (see *supra* text accompanying notes 63-64) or it might mean merely "within a building inside the Dow complex."

75. *Dow Chemical*, 476 U.S. at 237 (emphasis in original).

raphy involved, the majority did not consider the surveillance to be particularly intrusive.<sup>76</sup>

Finally, the Court brushed aside the argument that the enactment of trade secret laws constitutes a societal recognition of a reasonable expectation of privacy against aerial surveillance by government agents. Such laws "may protect against use of photography by competitors" who are trying to spy upon Dow's industrial secrets, but these statutes do not "proscribe the use of aerial photography of Dow's facilities for law enforcement purposes, let alone photography for private purposes unrelated to competition such as map-making or simple amateur snapshots."<sup>77</sup>

The Court therefore concluded that "the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres" is, for purposes of aerial surveillance and photography from publicly navigable airspace, more analogous to an open field than to a residential curtilage.<sup>78</sup> Thus, such surveillance and photography "is not a search prohibited by the Fourth Amendment."<sup>79</sup>

Justice Powell, writing for the four dissenters,<sup>80</sup> denounced every aspect of the majority's Fourth Amendment analysis.<sup>81</sup> Of par-

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76. The photographs were taken with a \$22,000 aerial mapping camera mounted onto the floor of an airplane; when enlarged, they revealed far more than the unaided eye could have seen from the same height. In finding this constitutionally insignificant, the Court stressed that the EPA had not used "highly sophisticated surveillance equipment not generally available to the public, such as satellite technology," nor "some unique sensory device" that could "penetrate the walls of buildings and record conversations" that took place indoors. The Court acknowledged that "serious privacy concerns" would be implicated if the photographs revealed "intimate details" such as "a class ring, . . . identifiable human faces or secret documents," but emphasized that they revealed only a more detailed "outline of the facility's buildings and equipment." *Id.* at 238-39. For a detailed discussion of this aspect of *Dow Chemical*, see Fishman, *Technologically Enhanced Visual Surveillance and the Fourth Amendment: Sophistication, Availability and the Expectation of Privacy*, 26 AM. CRIM. L. REV. 315, 340-351 (1988).

77. *Id.* at 239 n.6.

78. *Id.* at 239. The Court noted that its holding does not reach issues that might arise in the event of "actual physical entry" onto a so-called "business curtilage." *Id.* n.7.

79. *Id.* at 239. The Court also dismissed Dow's anti-aerial surveillance procedures (see *supra* note 65 and accompanying text) as being beneath serious discussion. "Dow did not take any precautions against aerial intrusions, . . ." *Id.* at 237 n.4 (Court's emphasis). "Simply keeping track of the identification numbers of any planes flying overhead, with a later followup to see if photographs were taken, does not constitute a procedure designed to protect the facility from aerial photography." *Id.* The majority did not respond directly to Dow's claim that no more protective countermeasures were feasible. The holding in *Dow* nonetheless contains an unequivocal rejection of this claim. The cost of privacy from aerial surveillance of this sort, the Court said silently but clearly, is a roof. If *Dow* was unwilling or unable to pay the price, it would simply have to forgo the privacy.

80. See *supra* note 67 for details of the Court's split.

81. Part II of the dissent accused the majority of ignoring a long-established

ticular interest here, Justice Powell ridiculed the majority's misuse of the curtilage — open fields concepts, insisting, quite correctly, that "the Dow facility resembles neither."<sup>82</sup> To compare the Dow complex to a residential curtilage is specious, since "Dow makes no argument that its privacy interests are equivalent to those in the home."<sup>83</sup> The open fields analogy is equally irrelevant, because "[o]pen fields, as we held in *Oliver*, are places in which people do not enjoy reasonable expectations of privacy and therefore are open to warrantless inspections from ground and air alike."<sup>84</sup> Asserting that the majority conceded that "Dow was constitutionally protected against warrantless intrusion by the Government on the ground" — an assertion that somewhat overstates what the majority in fact said<sup>85</sup> — Justice Powell concluded that "The [Dow] complex bears no resemblance to an open field either in fact or within the meaning of our cases."<sup>86</sup>

In essence, the dissent accuses the majority of using an inappropriate "either-or" approach to the situation — all unroofed property is either residential curtilage or "open field" — to rationalize a result that it could not justify any other way. There is considerable merit to this criticism. A location like the Dow complex was beyond the experience and probably even beyond the imagination of generations of the judges who formulated the open fields-curtilage dichotomy, and of the founding fathers who drafted and ratified the Fourth Amendment. Even the strictest of "strict constructionists"

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principle that the Fourth Amendment protects commercial as well as residential premises from warrantless searches. *Dow Chemical*, 476 U.S. at 245. (See *supra* note 73 and accompanying text for the majority's treatment of the subject.) Protesting the majority's assertion that the Court's prior decisions had in general given the government "greater latitude to conduct warrantless inspections of commercial property," Justice Powell insisted that those prior decisions had recognized an exception to the warrant requirement only with regard to "pervasively regulated businesses." *Id.* at 246 (cites omitted). A detailed analysis of this issue is beyond the scope of this article. Suffice it here to say that while the dissent perhaps gets the better of the skirmish, the majority's overstatement is not as egregious as the dissent claims. The majority simply appears to be making the point that since business premises have lesser expectations of privacy in some respects than do private homes, in doubtful or uncertain situations, analogies to residential curtilage simply may not merit constitutional recognition.

The dissenting Justices accepted as valid Dow's argument that the existence of trade secret laws supports the company's Fourth Amendment claims, *Dow Chemical*, 476 U.S. at 249, and rejected the majority's discussion of the technology issue. *Id.* at 251 (Powell, J., dissenting). These issues are beyond the scope of this article.

82. *Dow Chemical*, 476 U.S. at 250 (Powell, J., dissenting).

83. *Id.*

84. *Id.* at 250-51 (Powell, J., dissenting), citing, *Oliver*, 466 U.S. at 180-81 (1984).

85. The majority merely observed that "physical entry . . . into any enclosed area would raise significantly different questions. . . ." *Dow Chemical*, 476 U.S. at 237. See *supra* note 74 and accompanying text.

86. *Dow Chemical*, 476 U.S. at 250 (Powell, J., dissenting).



would be compelled to look beyond "original intent" to apply the Fourth Amendment to such a location.

It is unfortunate that the Court insisted on drawing inapt analogies and waffled on the question whether the Dow complex would be constitutionally protected from physical intrusion.<sup>87</sup> The facts did not involve a ground-level intrusion, however, so there was no absolute necessity that the Court rule on the implications of such an intrusion.

#### IV. THE DICHOTOMY DRAMATIZED: *United States v. Dunn*

Less than a year after deciding *Ciraolo* and *Dow*, the Court, in *United States v. Dunn*,<sup>88</sup> returned to the curtilage — open fields dichotomy. As in the *Oliver* cases and *Ciraolo*, the issue arose as a result of the seizure of illicit drugs. In September of 1980, agents of the Drug Enforcement Administration (DEA) learned that a man named Carpenter had ordered substantial quantities of chemicals and equipment used in the manufacture of methamphetamine and phenylacetone. The agents obtained a court order authorizing the placement of electronic tracking devices in the equipment and chemical containers before Carpenter took possession of them. By monitoring the beeper and conducting aerial surveillance,<sup>89</sup> the agents eventually traced the chemicals, equipment, and Carpenter's pickup truck, which had transported some of these items, to a barn behind the ranch house of defendant Dunn's 198-acre ranch.<sup>90</sup>

Acting without a warrant, on the evening of November 5, 1980, a DEA agent and a Houston police officer walked onto Dunn's ranch, crossed several fences, walked up to a barn, looked inside and saw what the DEA agent believed was a phenylacetone laboratory. At that time, the officers did not enter the barn. After two additional visits to the barn door the next day, they described what they had seen in affidavits. A warrant was issued based on the affidavits authorizing a search of the ranch. A few days later they executed the warrant, and seized chemicals and equipment from the barn, along with bags of methamphetamine from the ranch house.

Convicted of drug offenses, Dunn appealed the denial of his pre-trial motion to suppress. He argued that the officers had committed an unlawful search by peering into his barn. This not only tainted the search warrant, but also all of the evidence seized pursu-

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87. See *supra* note 74 and accompanying text.

88. 480 U.S. 294 (1987).

89. The defendants apparently did not challenge the constitutionality of the use of either beeper or aerial surveillance.

90. *Dunn*, 480 U.S. at 297.

ant to the warrant.<sup>91</sup> Dunn further maintained that by looking into the barn, the officers committed an unlawful search because it violated the privacy of his home and its curtilage, or violated his reasonable expectation of privacy in the barn itself. The case went on a rather peripatetic appellate journey before the Fifth Circuit Court of Appeals ultimately agreed with Dunn's first theory.<sup>92</sup> The Supreme Court reversed, ruling that the officers' actions prior to the execu-

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91. If an unlawful search sets in motion a chain of events leading to the ultimate discovery of evidence, that initial illegality may taint, i.e. require suppression of, the evidence, even if the intervening steps were themselves lawful. See *Steagald v. United States*, 451 U.S. 204 (1981) (unlawful entry into petitioner's home led to the suppression in court of all narcotics obtained through an otherwise lawful seizure); *Payton v. New York*, 445 U.S. 573 (1980) (unlawful entry into a suspect's home led to the suppression of shell casing evidence connecting defendant to a homicide). See generally 3 W. LAFAVE, *SEARCH AND SEIZURE* § 11.4 (2d ed. 1987); Pitler, "The Fruit of the Poisonous Tree Revisited and Shepardized," 56 CALIF. L. REV. 579 (1968).

92. The Fifth Circuit initially ruled that the barn was within the curtilage of the residence, and that the warrantless entry into the curtilage was an unlawful search. It therefore reversed Dunn's conviction. *United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982). (Carpenter's conviction, however, was left undisturbed, for reasons explained in the second paragraph of this footnote.) The government appealed, and the Supreme Court vacated the judgment, and remanded it for further consideration in light of *Oliver v. United States*, 466 U.S. 170 (1984). *United States v. Dunn*, 467 U.S. 1201 (1984). On remand, the Fifth Circuit reaffirmed its reversal of Dunn's conviction, albeit on a somewhat different basis: this time the circuit court concluded that although the large barn was not within the curtilage of the residence, peering into the barn violated Dunn's expectation of privacy into the barn itself. *United States v. Dunn*, 766 F.2d 880, 886 (5th Cir. 1985). The government again applied for certiorari, but before the Supreme Court acted on the petition, the Fifth Circuit recalled and vacated its judgment, stating that it would enter a new judgment in due course. *United States v. Dunn*, 781 F.2d 52 (5th Cir. 1985). Finally, the circuit court reinstated the original decision rendered in 1982, concluding that "[u]pon studied reflection, we now conclude and hold that the barn was inside the protected curtilage." *United States v. Dunn*, 782 F.2d 1226, 1227 (5th Cir. 1986).

Throughout the appellate process, the only significant issue was whether there had been a violation of Dunn's Fourth Amendment rights. Carpenter, the co-defendant, did not live at Dunn's ranch and had no other privacy interest there. Thus, even if the search violated Dunn's privacy, it did not violate any of Carpenter's rights. It is a well-established principle that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). If a search unlawfully intrudes upon the reasonable expectations of privacy of defendant "X" but does not intrude upon the reasonable expectations of privacy of defendant "Y," then evidence obtained as a result of that search is inadmissible against X but is admissible against Y, since Y lacks "standing" to challenge the legality of the search in the first place. *Id.* "Co-conspirators and co-defendants [are] accorded no special standing." *Id.* at 172. Nine years after *Alderman*, in *Rakas v. Illinois*, the Court explicitly endorsed the reasoning and result in *Alderman*, although eschewing the use of the term "standing" in favor of a more direct examination of whether, on a defendant-by-defendant basis, the investigative technique in question intruded into that defendant's fourth amendment-protected privacy. 439 U.S. 128, 136-38 (1978). For a concise discussion of "standing" and the related topics of "poisonous trees," "tainted fruit," and "taint aversion," see Fishman, *Electronic Tracking Devices and the Fourth Amendment: Knotts, Karo, and the Questions Still Unanswered*, 34 CATH. U. L. REV. 277, 347-54 (1985). For an exhaustive treatment of these topics, see 3 W. LAFAVE, *SEARCH AND SEIZURE* §§ 11.3 - 11.4 (2d ed. 1987).

tion of the search warrant did not constitute a search.

To fully appreciate the Supreme Court decision and its implications, detailed descriptions of the physical layout of Dunn's ranch, the area in the immediate vicinity of the barn, and how the officers got there are necessary.<sup>93</sup> Dunn's 198-acre ranch was completely encircled by a perimeter fence, and contained several interior fences, constructed mainly of posts and multiple strands of barbed wire.<sup>94</sup> Neither the farmhouse nor its outbuildings were visible from the public road or from the fence that encircled the entire property. They were located in a clearing surrounded by woods, one-half mile from a road, down a chained, locked driveway.<sup>95</sup> The residence and a nearby small greenhouse were encircled by yet another fence. Thus, access to Dunn's property was not easy.<sup>96</sup>

The agents entered the ranch by crossing over the perimeter fence, then over a second, interior fence.<sup>97</sup> From approximately midway between the residence and the barns, the DEA agents smelled an odor which they believed to be phenylacetic acid coming from the direction of the barns.<sup>98</sup> They then crossed over a barbed wire fence, looked into the smaller barn (which contained only empty boxes), and proceeded to the larger barn, crossing yet another barbed wire fence to do so.<sup>99</sup> Unable to see through the larger barn's solidly built back and sides,<sup>100</sup> they climbed over a wooden fence that enclosed the front portion of the barn and walked under the overhang.<sup>101</sup> Entrance to the barn itself was barred by locked, waist-high gates. Netting material was stretched from the ceiling of the barn to the top of wooden gates.<sup>102</sup> Shining a flashlight through the netting, the officers peered into the barn. It was this observation by flashlight which became the basis for the officers' search warrant.<sup>103</sup>

#### A. *Dunn's Barn as Non-Curtilage*

Justice White, joined by six other justices, concluded that no intrusion upon Dunn's Fourth Amendment rights had occurred prior

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93. The circuit court provided a sketch of the area as an appendix to one of its opinions. *Dunn*, 782 F.2d 1226, 1228 (5th Cir. 1986) (attached hereto as appendix A).

94. *Dunn*, 480 U.S. at 297.

95. *Id.* at 306 (Brennan, J., dissenting).

96. *Id.* at 297 (majority opinion by Justice White). See *infra* notes 101-02 and accompanying text for further description of the area.

97. *Id.* at 297. Apparently this second "interior" fence is the "substantial" fence referred to in the text corresponding to note 95, *supra*. It was at this point that the agents could smell the laboratory.

98. *Dunn*, 480 U.S. at 297.

99. *Id.*

100. *Id.* at 306-07 (Brennan, J., dissenting).

101. *Id.* at 298, 307.

102. *Id.* at 297.

103. *Id.* at 298.

to the execution of the search warrant.

The Court began its analysis by reciting the holdings in *Hester* and *Oliver*, and reiterated that in determining whether a particular area constitutes curtilage, the inquiry centers on whether the area harbors the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" <sup>104</sup> Such questions, the Court instructed:

should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.<sup>105</sup>

Applying these factors, the Court concluded that none of them supported including the barn within the curtilage of Dunn's ranch house. First, the barn was fifty yards from the fence surrounding the house, and sixty yards from the house itself.<sup>106</sup> Second, the barn did not lie within the perimeter of the fence around the house.<sup>107</sup> Third, the officers "possessed objective data indicating that the barn was not being used for intimate activities of the home"<sup>108</sup> — information from the beepers and aerial photographs, and the odor of phenylacetic acid and the sound of a motor that grew stronger the closer the officers came to the barn.<sup>109</sup> Finally, respondent failed to protect the barn area from open field observation; the various fences on Dunn's property were "typical ranch . . . fences . . . designed and constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed area."<sup>110</sup>

Justices Brennan and Marshall dissented, rejecting every aspect of the majority opinion. First of all the four-part analysis "overlooks the role a barn plays in rural life and ignores extensive authority

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104. *Id.* at 300, citing, *Oliver*, 466 U.S. at 180, quoting, *Boyd v. United States*, 116 U.S. 616, 630 (1886).

105. *Dunn*, 480 U.S. at 301. The Court conceded that combining these factors would not produce "a finely tuned formula" that could be applied mechanically to produce a "correct" answer to all "extent-of-curtilage questions." *Id.*

106. *Id.* at 302.

107. *Id.* The Court explicitly rejected the government's suggestion that the Court adopt a "bright line rule" that the curtilage extend no further than the nearest fence surrounding a fenced house. *Id.* at 301 n.4.

108. *Id.* at 302. Justice Scalia joined Justice White's majority opinion except for the latter's discussion of the use of the barn. *Id.* at 305 (Scalia, J., concurring). In determining whether the barn was within the curtilage of the residence, Justice Scalia argued that what is significant is whether the barn *in fact* was being used for domestic or non-domestic purposes. *Id.* "The officers' perceptions might be relevant to whether the intrusion upon curtilage was nonetheless reasonable," Justice Scalia concluded, "but they are no more relevant to whether the barn was curtilage than to whether the house was a house." *Id.*

109. *Id.* at 302-03.

110. *Id.*

holding that a barn, when clustered with other out-buildings near the residence, is part of the curtilage."<sup>111</sup> Moreover, even assuming the Court's four-part test was valid, the Court had misapplied it. First, Justice Brennan asserted, the sixty-yard distance between house and barn is insignificant: many lower court decisions had held barns farther than that from the ranch-or-farm house to be within the curtilage of the house.<sup>112</sup> Second, the configuration of fences around the house is irrelevant, particularly since the barn was "clustered with the farmhouse and other outbuildings in a clearing surrounded by woods," and was connected to the house by a "'well-walked' and a 'well-driven' path."<sup>113</sup>

The Court's third factor — "the nature of the uses to which the area is put" — is, according to Justice Brennan, inconsistent with the *Oliver* majority's approach to privacy expectations. The *Oliver* Court, eschewing a particularized examination of how the field at issue in any given case was in fact used, had simply enunciated a general rule that no legitimate expectations of privacy can exist in open fields.<sup>114</sup> Thus, Brennan reasoned, the Court should employ the same level of generality in deciding how a barn should be classified: since most barns are curtilage, all barns, including Dunn's, should be regarded as curtilage.<sup>115</sup>

Finally, Justice Brennan described as astounding the Court's assertion that Dunn "did little to protect the barn area from observation of those standing in the open fields."<sup>116</sup> On the contrary, he maintained Dunn had done all he reasonably could have to prevent uninvited visitors from even seeing the barn: fencing around the entire property, additional fencing within the ranch, and positioning

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111. *Id.* at 307 (Brennan, J., dissenting). Justice Brennan cited twelve state cases, from Georgia, Missouri, Nebraska, North Carolina, Oklahoma, Oregon and Texas, and six federal cases, from the First, Fifth and Eleventh Circuits and district courts in Maryland and Mississippi, in support of his assertion. *Id.* at 308-09.

112. *Id.* at 309. Several of the cases cited by Justice Brennan, *supra* n.111, so held.

113. *Id.* at 309-10.

114. *Oliver*, 466 U.S. at 179 n.10, 181. See *supra* notes 45-49 and accompanying text.

115. *Dunn*, 480 U.S. at 310 (Brennan, J., dissenting). Justice Brennan reasoned that even if a home were used as a drug laboratory, it would still be protected by the Fourth Amendment against unreasonable searches; the same should be true, therefore, of a barn near a rural residence. *Id.* at 311. Justice Brennan complained that "[t]he Court's willingness to generalize about the absence of a privacy interest in the open fields and unwillingness to generalize about the existence of a privacy interest in a barn near a residence are manifestly inconsistent and reflect a hostility to the purpose of the Fourth Amendment." *Id.* at 310. Moreover, he insisted, the officers learned about the laboratory (by detecting the aroma of phenylacetic acid) only after they were in the "area between the barns and the farmhouse," an area which, he insisted, "is itself part of the curtilage" of the home. *Id.* at 311.

116. *Id.* at 312 (Brennan, J., dissenting).

the barn out of sight from the ranch's perimeter.<sup>117</sup> Beyond that, Dunn had also taken elaborate measures to shield the inside of the barn from all unwelcome views: the solid construction of its back and sides, the wooden fence across its front, the inner waist-high fence with locked wooden gates, and the fish-net material that covered the opening from the gates to the roof.<sup>118</sup> Even a few feet away from the netting, Justice Brennan stressed, it was impossible to see inside.<sup>119</sup> "The Fourth Amendment," Justice Brennan observed sarcastically, "does not require the posting of a 24-hour guard to preserve an expectation of privacy."<sup>120</sup>

Perhaps Justice Brennan is correct. Perhaps the majority opinion "reflects a fundamental misunderstanding of the typical role of a barn in rural domestic life."<sup>121</sup> Never having lived on a farm, I am in no position to evaluate this point, although to maintain, as Brennan apparently does, that *all* barns located within sight of a ranch or farm house should be considered as within the residential curtilage, regardless of the distance between them and regardless of the use to which the barn is put, seems a substantial over-generalization.<sup>122</sup>

Assuming, therefore, that it is appropriate to examine the particular circumstances of a case to determine whether an out-building is within the curtilage of a home, the majority's four-factor test seems rational enough.<sup>123</sup> While there is validity to Justice Brennan's criticism of the majority's application of that test to the facts in Dunn, particularly with regard to its treatment of Dunn's efforts to protect the barn from surveillance,<sup>124</sup> the majority's opinion is stronger. Dunn's barn was sixty yards and a fence or two away from his home. Even before entering Dunn's ranch, the officers had reason to believe the barn was being used to store chemical equipment.<sup>125</sup> As they approached the barn itself, they could detect a strong chemical aroma emanating from it. Although Dunn did protect it from unwelcome viewing, the barn simply does not seem to be a place "intimately linked to the home, both physically and psycho-

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117. *Id.* at 306.

118. *Id.* at 312.

119. *Id.* at 312, *citing*, *United States v. Dunn*, 766 F.2d 880, 883 (5th Cir. 1985).

120. *Dunn*, 480 U.S. at 312.

121. *Id.* at 312.

122. It is not necessarily inconsistent to conclude that all "unoccupied or undeveloped areas" (*Oliver*, 466 U.S. at 180 n.11), should be treated the same for Fourth Amendment purposes, yet also conclude that barns should be classified on a case-by-case basis for the same purpose.

123. Applied in different factual settings, however, the test has significant shortcomings. See *infra* notes 158-73 and accompanying text.

124. See *supra* note 109 (majority opinion) and 116-18 and accompanying text (dissent).

125. This conclusion is certainly supported by the beeper and aerial surveillance. See *supra* notes 84-90 and accompanying text.

logically, where privacy expectations are most heightened";<sup>126</sup> and therefore is not a place "to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life."<sup>127</sup> Dunn's barn was not functionally a part of his home; thus it would have been illogical to treat it as such for Fourth Amendment purposes.<sup>128</sup>

### B. Barn Doorway as Open Field

Having disposed of Dunn's curtilage argument, the Court proceeded to examine Dunn's second theory. Dunn argued that he had a constitutionally protected expectation of privacy in the barn because it was an essential part of his business.<sup>129</sup> The Court assumed for the sake of argument that Dunn's barn enjoyed Fourth Amendment protection and could not be subjected to a search and seizure without a warrant.<sup>130</sup> Nevertheless, the Court concluded, the officers' conduct did not violate the fourth amendment. It purported to base this conclusion squarely on *Oliver v. United States*.<sup>131</sup>

Once again the Court began its analysis by repeating the *Hester-Oliver* holdings stating that since an open field is neither a house nor an effect, a police intrusion into an open field "is not one of those 'unreasonable searches' proscribed by the text of Fourth Amendment,"<sup>132</sup> and that "the erection of fences on an open field — at least of the variety involved in those cases and the present case" — does not create a "constitutionally protected privacy interest."<sup>133</sup> The Court then quoted the first two sentences of the *Oliver* semi-definition of "open field": "[T]he term 'open fields' may include any unoccupied or underdeveloped area outside the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech."<sup>134</sup>

126. *Ciraolo*, 476 U.S. at 213. See *supra* note 53 and accompanying text.

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

128. It is true that homeowners often use chemicals or machines in their houses, basements, garages or apartments, and that this does not strip the home of its Fourth Amendment protection as a home. *Dunn*, 480 U.S. at 311 (Brennan, J., dissenting). The issue in *Dunn*, 480 U.S. at 296, however, is whether a structure some fifty yards from the home was so intimately associated with a home and the privacies of domestic life that it should be considered a part of the home for Fourth Amendment purposes.

129. Concerning the protection afforded by the Fourth Amendment to business locations, see *supra* notes 73 and 80 and accompanying text.

130. *Dunn*, 480 U.S. 294, 303.

131. 466 U.S. 170 (1984).

132. *Dunn*, 480 U.S. at 303-04, quoting, *Oliver*, 466 U.S. at 177.

133. *Dunn*, 480 U.S. at 304.

134. *Id.*, quoting, *Oliver*, 466 U.S. 180 n.11). The sentence immediately following the quoted passage in *Oliver* reads: "For example, . . . a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment." *Oliver*, 466 U.S. 180 n.11. The *Dunn* majority did not quote this

Immediately after quoting *Oliver*, the *Dunn* opinion continues:

It follows that no constitutional violation occurred here when the officers crossed over respondent's ranch-style perimeter fence, and over several similarly constructed interior fences, prior to stopping at the locked front gate of the barn. . . . Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn. This conclusion flows naturally from our previous decisions.<sup>135</sup>

"It follows?" ". . . flows naturally?" *Oliver* says that any "unoccupied or undeveloped area outside the curtilage" can be an "open field" for Fourth Amendment purposes. The officers in *Dunn* were standing within a multiply-fenced area in a well-defined clearing in a wood which contained two well-maintained and apparently frequently used barns. The barns were located within sixty yards of a ranch house and other structures and connected to the house by a "well-walked" and "well-driven" path.<sup>136</sup> They had climbed over a wooden fence that enclosed the front end of the barn and were standing beneath the overhang of the barn at the locked, waist-high gate with their noses virtually pressed against the netting.<sup>137</sup>

It follows that the officers were standing in an open field, as that term was defined in *Oliver*, only if their location can be described as an "unoccupied or undeveloped area." This flows from *Oliver* about as naturally as water flows uphill. Or, to put it differently, the Court's conclusion<sup>138</sup> flows from *Oliver* only if *all* outdoors areas must be classified as *either* the curtilage of a residence or an open field, with no other categories being recognized as constitutionally significant.<sup>139</sup>

### C. Surveillance of Private Premises from "Open Fields"

The *Dunn* Court continued:

Under *Oliver* and *Hester*, there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields. Similarly, the fact that the objects observed by the officers lay within an area that we have assumed, but

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sentence.

135. *Dunn*, 480 U.S. at 304.

136. See *Dunn*, 480 U.S. at 306-09 for a full description of the premises.

137. *Id.* at 298, n.1.

138. Specifically, the lower court in *Dunn* concluded that the agents' actions "did not invade the premises." *Id.*

139. Such a challenge occurred in *Dow Chemical v. United States*, where the concept of industrial curtilage was discussed. 476 U.S. 227 (1986). See *supra* text accompanying notes 62-74.



not decided, was protected by the Fourth Amendment does not affect our decision . . . [T]he Fourth Amendment "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."<sup>140</sup>

In other words, so long as the police have secured an observation point that does not violate the Fourth Amendment (even if it does involve trespass onto private land), they may look anywhere they wish — not only into a barn or other commercial premises, but also, as the final sentence of this passage makes clear, into a home. Indeed, it appears that the officers could have permanently ensconced themselves just outside the fence that surrounded the ranch, and from that vantage point could have conducted round-the-clock surveillance of home and barns, without giving rise to any Fourth Amendment issues.<sup>141</sup>

As a result of *Dunn*, the "open fields" doctrine can be summarized in the following manner. First, it is not a search for police officers to trespass onto an open field to look for evidence, even if that field is fenced and posted.<sup>142</sup> Second, it is not a search for police officers to position themselves in an open field to peer inside a private business or residential building, so long as they don't physically enter the structure.<sup>143</sup> Third, an area qualifies as an "open field" even if it is neither "open" nor a "field," so long as it is an "unoccupied and undeveloped area."<sup>144</sup> Finally, an area may qualify as an "unoccupied and undeveloped area" even if it is both "occupied" and "developed."<sup>145</sup>

## V. IMPLICATIONS

The *Dunn* decision has implications far beyond its application to rural property and barns. It may diminish the privacy afforded to commercial, industrial, and residential property as well.

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140. *Dunn*, 480 U.S. at 304, *quoting*, *California v. Ciraolo*, 476 U.S. at 207, 213.

141. To do so probably would, however, constitute a "taking" of Dunn's property without due process of law, in violation of the Fifth Amendment.

142. *Oliver v. United States*, 466 U.S. 170, 181-82 n.13 (1984).

143. *Dunn*, 480 U.S. at 304.

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

145. *Dunn*, 480 U.S. at 304. See *supra* text accompanying notes 129-136.

It is also noteworthy that the agents did not merely look into the barn; they used a flashlight to enable them to see its contents. The Court commented that "the officers' use of the beam of a flashlight, directed through the essentially open front of respondent's barn, did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment." *Dunn*, 480 U.S. at 305, *citing*, *Texas v. Brown*, 460 U.S. 730, 741 (1983). The citation to *Brown* is not necessarily apt: that case involved use of a flashlight to illumine the passenger compartment of a car stopped on a public street, an area that does not enjoy Fourth Amendment protection, whereas the Court assumed that Dunn's barn did enjoy such protection.

### A. *Dow and Dunn: a Comparison*

The dissenters in *Dow Chemical* (Justices Powell, Blackmun, Brennan and Marshall) took it as given that "Dow was constitutionally protected against warrantless intrusion by the Government on the ground."<sup>146</sup> The *Dow Chemical* majority did not go quite so far, observing only that "[a]ny actual physical entry by EPA into any enclosed area would raise significantly different questions . . . ."<sup>147</sup> Courts inevitably will confront cases that present facts falling somewhere in between *Dow Chemical* and *Dunn*. Assuming *Dow Chemical's* entire 2,000-acre facility is in fact protected from ground-level intrusion, while *Dunn's* ranch, as the Court held, is not, it is worthwhile to briefly compare the two cases in an effort to predict which aspects of each case are likely to be most significant.

There are similarities. In each case, the entire perimeter of the property was fenced in a way that, at the very least, might be expected to discourage uninvited visitors. In each case, the actual entrance onto the property was barred except to carefully screened invitees. In each case, the buildings that were the object of official attention were not visible from the perimeter of the property.<sup>148</sup> Since such similarities were not sufficient to bring *Dunn* within the protection from ground-level intrusion that *Dow Chemical* presumably enjoys,<sup>149</sup> the question becomes; what are the factual differences between the two locations that explain the different results?

Dow's facility is ten times the size of *Dunn's* ranch, but it is hard to see how this would explain the different treatment. If size is a factor at all, logically one would expect it to be a negative factor, not a positive one. Dow's facility employed many more personnel than *Dunn's* ranch, but again, this fact would tend to diminish rather than enhance Dow's claim of protection against warrantless ground-level intrusion. Dow's facility is industrial, rather than rural/agricultural like *Dunn's*, but it is unclear why the Fourth Amendment should favor an outdoor industrial complex over an outdoor agricultural location.

Assuming none of these distinctions explain the presumably different results, what we are left with is the difference between the

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146. *Dow Chemical*, 476 U.S. at 251. See *supra* notes 85-86 and accompanying text.

147. *Dow Chemical*, 476 U.S. at 237. This aspect of *Dow* is discussed *supra* at notes 74 and 85 and accompanying text.

148. See *supra* notes 59 and 85 and accompanying text.

149. It's worth noting that Powell and Blackmun, two of the *Dow* dissenters who state unequivocally that Dow would enjoy Fourth Amendment protection against warrantless physical intrusion on the ground, were among the seven judges in *Dunn* who concluded that *Dunn's* ranch, indeed his barnyard, did not enjoy such protection.

security measures which Dow and Dunn took to prevent ground-level intrusion. Dow's eight-foot high chain link perimeter fence was much more imposing than Dunn's two-or-three strand barbed wire fence; EPA agents might have had to cut a hole in the Dow fence, rather than merely climb over it, as did the agents in *Dunn*. In addition, the Dow fence was patrolled by security personnel, and was monitored by a variety of electronic systems as well,<sup>150</sup> while Dunn's ranch was not (so far as we know) patrolled or monitored by so much as a watchdog. If indeed the Fourth Amendment protects the Dow facility from unauthorized physical entry, the only conclusion that can be stated with any certainty is that constitutional protection against nonconsensual and non-court authorized entry onto large tracts of land is rather expensive.<sup>151</sup>

### B. The End of "Commercial Curtilage?"

As we have just seen, *Dunn* holds that a fenced-in and well-used barnyard is for Fourth Amendment purposes an "unoccupied or undeveloped area outside the curtilage" of a home, and therefore, in constitutional terms, an "open field." But the decision goes further because the officers didn't merely stand in the barnyard. To observe what they came to see, they had to climb over a wooden fence that enclosed the front portion of the barn, walk under the barn's overhang, and stand "right at" the waist-high wooden gate to peer through the netting.<sup>152</sup>

As described in the various reported opinions, the area between the wooden fence and the wooden gate would seem to have the same relationship to the barn as, for example, a garage or shed has to a private residence which it is near, or to which it is attached. Since the latter structures presumably are within the curtilage of the house,<sup>153</sup> if the concept of industrial or commercial curtilage has any constitutional validity, the fenced-in, partially overhung area in front of the barn should likewise qualify as being within the curtilage of the barn — a cognizable curtilage that enjoys Fourth Amendment protection similar to that enjoyed by a residential curtilage.

The *Dunn* majority makes no explicit mention of the commercial or industrial curtilage concept.<sup>154</sup> It nonetheless appears that the concept has been *Dunn* away with.<sup>155</sup>

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150. See *supra* note 64 and accompanying text.

151. See *supra* note 65 and accompanying text.

152. *Dunn*, 480 U.S. 294, 311 n.1.

153. Even the *Dunn* majority's four-factor analysis would appear to so hold.

154. The dissent contains a passing reference. *Dunn*, 480 U.S. at 318, n.11 (Brennan, J., dissenting).

155. Or, if the reader prefers, such litigation may be no more than an attempt to lock the barn after the door's been stolen. In *Comm. v. Lutz*, 512 Pa. 192, 516 A.2d

C. On "Privacy" and "Intimacy": Back Yard as Curtilage,  
Revisited

In discussing curtilage, the Court has consistently used the terms "intimacy" and "privacy." In *Ciraolo*, for example, the Court commented that "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."<sup>156</sup> The front or back yard of a private residence is "intimately linked to the home," however, without necessarily being entirely "private." Is it curtilage, or not?

The back yard in *Ciraolo v. California* "was immediately adjacent to a suburban home [and] surrounded by high double fences. This close nexus to the home," the Court observed, "would appear to encompass this small area within the curtilage."<sup>157</sup> It is not entirely clear whether the yard's "close nexus to the home" suffices, or whether its "apparent" status as curtilage depends upon "nexus" plus "high double fences." If the latter, *Ciraolo* provides little comfort to the vast majority of homeowners who do *not* surround their yards with even one ten-foot-high fence.

In *United States v. Dunn*,<sup>158</sup> the Court listed four factors to be considered in determining curtilage status:

the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.<sup>159</sup>

These factors do not mechanically yield a

'correct' answer to all extent-of-curtilage questions. Rather, they are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration: whether the area in question is so intimately tied to the home itself that it should be

339 (1986), for example, the state supreme court, in a decision rendered prior to *Dunn*, relied on *Oliver* to rule that state inspectors had acted improperly when, proceeding without a warrant, they intruded upon respondent's outdoor commercial property to investigate whether he was complying with the state's waste management laws. The Supreme Court granted certiorari, vacated the judgment and remanded the case "for further consideration in light of *United States v. Dunn*." *Pennsylvania v. Lutz*, 480 U.S. 927 (1987).

156. *Ciraolo*, 476 U.S. 207, 213. Similarly, in *Oliver*, the Court spoke of curtilage as an area so "closely associated with the home" that it harbors "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver*, 466 U.S. at 180 (quoting *United States v. Boyd*, 116 U.S. 616, 630 (1886)). This passage from *Oliver* is in turn quoted in *Dunn*, 480 U.S. at 300 (1987).

157. *Ciraolo*, 476 U.S. at 213. As noted earlier, the Court's use of the phrase "would appear" is rather begrudging. See *supra* notes 53-55 and accompanying text.

158. 480 U.S. 294 (1987).

159. *Id.*

placed under the home's 'umbrella' of Fourth Amendment protection.<sup>160</sup>

It is possible to apply these factors to a typical suburban home. The front yard is not fenced in at all. The back yard is surrounded by a picket or cyclone fence only five feet high. A passer-by can see over or through it without difficulty. Its gate latches but does not lock. The gate may be imposing enough to keep children and pets in or out, but the homeowner does not put up such a fence to physically prevent adults from entering,<sup>161</sup> but instead, simply because "good fences make good neighbors."<sup>162</sup> People erect such fences for much the same reason that a wolf "marks" its territory with its scent, to give warning that crossing the line is socially offensive.

Clearly such a homeowner has no Fourth Amendment complaint if police officers position themselves on a nearby sidewalk or roadway and watch or photograph what he does inside the yard. The officers are not and should not be obliged "to shield their eyes when passing by a home on public thoroughfares."<sup>163</sup> But does this deprive the yard of curtilage status altogether? The question is important, because if the yard is not curtilage, it is apparently an "open field"<sup>164</sup> — in which case, *Dunn* holds, the police apparently can position themselves in the yard to watch or listen to conduct occurring in the home.<sup>165</sup>

Thus, applying the *Dunn* factors, one may conclude the following:

(1) *Proximity to the residence*. These are areas "intimately tied to"<sup>166</sup> and "immediately surrounding the home,"<sup>167</sup> both of which weigh strongly in favor of "curtilage" status.

(2) *Configuration of fences*. In *Dunn* the Court observed that "the fence surrounding the residence [on Dunn's ranch] serves to demarcate a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house."<sup>168</sup> Presumably, the area within this fence is indeed curtilage. Since this fence was not of *Ciraolo*-like proportions,<sup>169</sup> the clear implication is

160. *Id.*

161. Some adults may have an implicit license to enter, for example, meter readers and trash collectors (in communities that do not require the homeowner to carry the trash to the curb).

162. R. Frost, *supra* note 1, at 48.

163. *Ciraolo*, 476 U.S. at 213.

164. See *supra* notes 139-140 and accompanying text, and text immediately following note 86, *supra*.

165. See *supra* notes 140-141 and accompanying text.

166. See *supra* note 160 and accompanying text.

167. *Oliver*, 466 U.S. at 178. See *supra* note 43 and accompanying text.

168. *Dunn*, 480 U.S. at 302.

169. See *People v. Ciraolo*, 161 Cal. App. 3d 1081, 1086, 208 Cal. Rptr. 93, 94 (1984) (defendant had two fences, of six feet and ten feet in height).

that a front or back yard can gain a substantial number of "curtilage points" even if enclosed by a fence that imposes only a symbolic, not a physical, obstacle to a would-be trespasser. If the yard lacks such a fence, on the other hand, does this subtract from its "curtilage quotient"?

(3) *Use of the area.* The typical back and front yards are "used for intimate activities of the home."<sup>170</sup> Homeowners relax in the sun or shade, watch their young children run under the sprinkler, stoke up on carcinogens over the barbecue, and reenact our simpler, pastoral past as they water and weed, prune and hoe, rake and seed, mulch and mow. But these activities, while "intimately tied to the home,"<sup>171</sup> are not necessarily "private," at least in terms of the fourth factor:

(4) *Privacy-protective measures.* The typical home owner does little to protect what he or she does in his or her yard from being seen from the street, sidewalk, a neighbor's window, and so on. This brings us back to the original question: does the lack of an imposing fence entitle the police to trespass in the yard, free of Fourth Amendment restraints, to observe (or overhear) what is going on inside the house, as the agents in *Dunn* trespassed in the barnyard to see what was inside the barn? Even after applying the *Dunn* test, there is no clear answer.

There is nothing inherently wrong with the four-factor test enunciated in *Dunn*.<sup>172</sup> It is incomplete, however, because it is too value-neutral. An officer who walks across a front lawn or enters a back yard to peer into a window (with or without flashlight) has intruded upon the resident's legitimate expectation of privacy, and therefore has conducted a "search" subject to Fourth Amendment restraints, not simply because he has trespassed, but because using someone's back yard or lawn to spy on what he has, does, or says inside his house violates "understandings that are recognized and permitted by society."<sup>173</sup>

The *Dunn* test does not explicitly include such "understandings" as relevant considerations; and for this reason that test is incomplete and potentially dangerous.

## VI. CONCLUSION

Four times between 1983 and 1987, the Supreme Court has considered whether police entry onto private land constitutes a Fourth

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170. See *Dunn*, 480 U.S. at 302.

171. See *supra* note 161 and accompanying text.

172. See *supra* note 123 and accompanying text.

173. See *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12. See also *supra* notes 20-21 and accompanying text.

Amendment search. The locations in the four cases differed widely: a field far from any structure (*Oliver*), a 2,000-acre industrial complex (*Dow*), a suburban back yard (*Ciraolo*) and the entranceway to a barn (*Dunn*). In none of these cases did the Court state unequivocally that an unwelcome physical entry would be a search.<sup>174</sup>

*Oliver v. United States* reaffirms that under the "open fields" doctrine, it is not a violation of the Fourth Amendment for police to trespass on "unoccupied and undeveloped" private property, even if it is fenced and posted, to look for incriminating evidence.<sup>175</sup> In so holding, the Court appropriately applied established Fourth Amendment principles. *Dow* and *Ciraolo* involved aerial surveillance, rather than physical intrusion, but nevertheless raised unsettling questions about physical entry. *Dow* leaves uncertainty as to what kind of outdoor commercial property (if any) enjoys Fourth Amendment protection from police trespass, and what kind of fence is needed to afford it that protection. *Ciraolo* raises similar questions with regard to a suburban back yard.

In *Dunn*, the Court did more than raise questions concerning outdoor property and the Fourth Amendment; it provided at least partial answers. *Dunn* classified as "unoccupied and undeveloped" (and hence as "open field") an area which appears to be neither.<sup>176</sup> Moreover, *Dunn* explicitly states that it is not a Fourth Amendment search for an officer to peer inside a business location or residence while trespassing in the suspect's "open field."<sup>177</sup> Taken to its logical extreme, this would empower the police to use a person's own back yard as a surreptitious watching and listening post, free of any constitutional restraints. While it is doubtful the Court will ever go that far, the decision nonetheless has dangerous implications for commercial, industrial, and even residential privacy. The wall needs mending.

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174. The closest the Court came was its acknowledgement that *Ciraolo's* backyard, surrounded by opaque double fences (one of which was ten feet high), "would appear [to be] within the curtilage [of the residence]." *Ciraolo*, 476 U.S. at 213.

175. See *supra* note 43 and accompanying text.

176. See *supra* notes 132-39 and accompanying text.

177. See *supra* note 140 and accompanying text.