

# A MAN'S BARN IS NOT HIS CASTLE: WARRANTLESS SEARCHES OF STRUCTURES UNDER THE "OPEN FIELDS DOCTRINE"

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## I. INTRODUCTION

For over two hundred years, the United States Constitution has protected Americans against "unreasonable searches and seizures."<sup>1</sup> The Fourth Amendment, by its explicit language, extends protection against unreasonable searches and seizures to "persons, houses, papers, and effects."<sup>2</sup> It is relatively common knowledge that police officers generally need a search warrant to enter a person's residence.<sup>3</sup> Many people, however, are probably unaware of some of the "searches" that courts have found reasonable and thus permissible. It might come as somewhat of a shock to many rural landowners, for example, that government officials can enter their fields without a warrant, even though an ordinary citizen could be arrested for doing the exact same thing.<sup>4</sup>

The ability of police and other officials to legally enter upon "open fields" without a warrant has forced courts to define exactly what constitutes an "open field."<sup>5</sup> If a person of average intelligence was asked whether a barn or other outbuilding could ever be defined as an "open field," most would quickly and sensibly answer "No it could not." Notwithstanding this, courts have handed down some rather interesting decisions when applying the "open fields" exception to the warrant requirement, commonly called the "open fields doctrine." The evolution of this area of the law demonstrates that many locations which are neither "open" nor "fields" within the traditional usage of

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1. U.S. CONST. amend. IV.

2. *Id.*

3. There are exceptions, such as when police face "exigent circumstances." *See, e.g.,* Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) ("[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment" (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978))).

4. *Hester v. United States*, 265 U.S. 57, 58 (1924) (the Supreme Court ruled that a warrantless entry upon an "open field" was not an unreasonable, and thus illegal, search even though the entry was a technical trespass).

5. The Supreme Court did not define what it meant by an "open field" in *Hester*.

the terms nonetheless fall within the ambit of the open fields doctrine.<sup>6</sup> Whether the Fourth Amendment protects a structure (such as a barn) located within an “open field” may be a closer question than one might intuitively think.

There are two reasons why the applicability of the open fields doctrine to structures is an important topic. First, law enforcement officials need to know when, if ever, they can legally enter a structure located within an “open field” without a search warrant. People use structures such as barns for many important and legitimate activities (e.g., farming) but also use them for a variety of illicit activities such as the cultivation of marijuana and the manufacture of methamphetamine. Police need to know when they may enter such a structure without a warrant, since evidence obtained through an illegal search may be inadmissible in court as “fruit of the poisonous tree.”<sup>7</sup> Second, citizens should know the extent to which the Fourth Amendment’s prohibition against unreasonable searches and seizures protects them. There are many legitimate private activities that can be carried out in barns and other outbuildings, and individuals should know how much privacy they can expect when engaging in such activities.

Courts should employ a two-part inquiry when determining whether a person has a reasonable expectation of privacy in a structure located outside the curtilage of a home. First, the inquiry should focus on the steps the individual took to protect privacy. Next, courts should look at how the structure was used. This approach is most consistent with the decisions of the Supreme Court. Also, this method provides individuals with notice of how far their Fourth Amendment protections reach while accommodating the legitimate needs of law enforcement.

This Comment explores how courts have applied the open fields doctrine to structures such as barns, and suggests the proper way for courts to do so in the future. Section II charts the development of the open fields doctrine. This section begins in part A with an analysis of the evolution of the open fields doctrine in the U.S. Supreme Court. Part B examines how the Illinois Supreme Court applied the open fields doctrine to a structure located within an open field. Part C follows with a survey of how other jurisdictions have dealt with structures within open fields. Section III focuses on which

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6. *See, e.g.*, *United States v. Rapanos*, 115 F.3d 367, 372–373 (6th Cir. 1997) (fenced property that was only accessible through a locked gate was an “open field”); *State v. Stavricos*, 506 S.W.2d 51, 57–58 (Mo. Ct. App. 1974) (vacant urban lot was an “open field”); *State v. Borchard*, 264 N.E.2d 646, 648 (1970) (reservoir was an “open field”).

7. *See, e.g.*, *Segura v. United States*, 468 U.S. 796, 804 (1984) (“the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or ‘fruit of the poisonous tree’”).

approach is most consistent with the prior decisions of the U.S. Supreme Court in this area of the law. Section IV suggests the approach that best protects individuals' legitimate expectations of privacy while not hindering law enforcement unreasonably.

## II. BACKGROUND

The Fourth Amendment to the United States Constitution guarantees “[t]he right of all people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>8</sup> The Fourth Amendment explicitly includes an individual’s residence in its protections. The text of the Fourth Amendment does not, however, explicitly mention structures other than “houses,” and courts have had to decide which types of structures are protected against warrantless entry. The Supreme Court decided long ago that the Fourth Amendment does not protect “open fields.”<sup>9</sup> The exclusion of “open fields” from the protections of the Fourth Amendment is commonly referred to as the “open fields doctrine.”

The development of the law in this area has taken considerable time, yet has left some questions unresolved. One unanswered question is whether the Fourth Amendment protects *structures* that are located within open fields. This section charts the development of the open fields doctrine in the U.S. Supreme Court. Additionally, this section examines how the Illinois Supreme Court and courts in other jurisdictions have applied the doctrine to structures in open fields.

### A. Evolution of the Open Fields Doctrine in the U.S. Supreme Court

What became known as the “open fields doctrine” had its genesis in *Hester v. United States*, where the Supreme Court decided that a warrantless search of a field located on Mr. Hester’s property did not violate the Fourth Amendment and thus did not require the exclusion of evidence found in the field.<sup>10</sup> In a very brief opinion, Justice Holmes simply stated 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.”<sup>11</sup> Commentators have observed that since the creation of the open fields

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

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

10. *Id.* at 58 (the case occurred during prohibition, and Hester was convicted of distilling whiskey based on partially full broken whiskey jugs found in the field during the warrantless search).

11. *Id.* at 59.

doctrine, courts have extended the doctrine to include most land that is not within the “curtilage” of a home.<sup>12</sup> The “curtilage” of a home refers to the area immediately surrounding the home.<sup>13</sup> The Fourth Amendment protects this area in the same manner as the home itself.<sup>14</sup>

The concept of “curtilage” seems to suggest that the Fourth Amendment protects certain *places*. In *Katz v. United States*, however, the Supreme Court made it clear that “the Fourth Amendment protects people, not places.”<sup>15</sup> The Court acknowledged that it had “occasionally described its conclusions in terms of ‘constitutionally protected areas.’”<sup>16</sup> However, the Court stated that it had “never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.”<sup>17</sup> Rather than focusing on the *place* at issue in *Katz*, the Court focused on whether a *person* had a justified expectation of privacy in a given place.<sup>18</sup> *Katz* established a two-part test for when the Fourth Amendment protects a person in a given place.<sup>19</sup> The two requirements for protection under the Fourth Amendment are that a person has “exhibited an actual (subjective) expectation of privacy” and the expectation of privacy was “one that society is prepared to recognize as ‘reasonable.’”<sup>20</sup>

After the *Katz* decision, it was not immediately clear that the open fields doctrine remained valid, since the decision in *Hester* was really just a conclusory statement that the Fourth Amendment did not protect open fields, based on the language of the Amendment.<sup>21</sup> The question was whether an open field would be protected under the two-part analysis established in *Katz*. The Supreme Court removed any doubt concerning the continued validity of the open fields doctrine when it decided *Oliver v. United States*.<sup>22</sup> The Court held that a person has no legitimate expectation of privacy regarding activities carried out in open fields.<sup>23</sup> The Court reasoned that society has no interest in protecting the privacy of activities carried out in open fields, that open fields are more accessible to the public and police than are offices, commercial buildings, or residences, that open fields do not “provide the

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12. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 617 (Thompson West 4th ed. 2004).

13. *United States v. Dunn*, 480 U.S. 294, 300 (1987).

14. *Id.*

15. *Katz v. United States*, 389 U.S. 347, 351 (1967)

16. *Id.* at 352 n.9.

17. *Id.*

18. *Id.* at 353.

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

20. *Id.*

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

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

23. *Id.* at 178.

setting for those intimate activities that the Amendment is intended to shelter from government interference and surveillance,” and that the police and the public may lawfully observe such lands from the air.<sup>24</sup>

In *Oliver*, the Court rejected an argument that the question of whether a warrantless search of an open field violates the Fourth Amendment should be decided on a case-by-case basis since an individual may sometimes have a reasonable expectation of privacy in such a field.<sup>25</sup> The Court found this suggestion unpersuasive because it would require police officers to “guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy.”<sup>26</sup> The extent of an individual’s efforts to conceal activity was not, in the Court’s view, the test of whether they had a reasonable expectation of privacy.<sup>27</sup>

The dissent in *Oliver* disagreed that a case-by-case analysis of whether the Fourth Amendment protects an “open field” would pose significant problems for law enforcement.<sup>28</sup> The dissent argued that:

“[a] clear, administrable rule emerges from [a case-by-case analysis like that employed in *Katz*]: Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendment’s proscription against unreasonable searches and seizures.”<sup>29</sup>

In the dissent’s view, individual landowners are familiar with criminal trespass laws and thus have notice of what kinds of precautions they would need to take to ensure their lands were protected.<sup>30</sup> Also, police are very familiar with the trespass laws and would only have to abide by the laws in order to avoid running afoul of the Fourth Amendment.<sup>31</sup> Some state courts have adopted a case-by-case analysis that focused on the steps a landowner

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24. *Id.* at 179.

25. *Id.* at 181.

26. *Id.*

27. *Id.* at 182.

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

29. *Id.*

30. *Id.* at 196.

31. *Id.*

took to protect privacy.<sup>32</sup> Commentators have agreed that the problems the majority envisioned with a case-by-case analysis were exaggerated.<sup>33</sup>

While *Oliver* clearly established that an individual does not have a reasonable expectation of privacy in an open field outside the “curtilage” of the home, it said nothing relating to *structures* within open fields.<sup>34</sup> The Supreme Court confronted such a problem in *United States v. Dunn*.<sup>35</sup> The Court ruled that the barn belonging to Dunn was outside the “curtilage” of his home.<sup>36</sup> Nevertheless, the Court assumed, for the sake of argument, that Dunn had a reasonable expectation of privacy in the barn, such that police officers could not *enter* the barn without a warrant.<sup>37</sup> The officers had not, however, ever entered Dunn’s barn, but had observed its interior from a vantage point within an open field.<sup>38</sup>

The Court held that the officers did not violate Dunn’s Fourth Amendment right against unreasonable search and seizure by looking into the interior of the barn.<sup>39</sup> The Court based its decision on the language of *Oliver* that suggested “open fields” included any undeveloped or unoccupied land outside the curtilage of the home.<sup>40</sup> However, the land upon which the officers stood was both occupied and developed!<sup>41</sup> Commentators have argued that the *Dunn* decision was counterintuitive and inconsistent with *Oliver*, the case that supposedly provided the basis for the Court’s holding.<sup>42</sup>

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32. See, e.g., *State v. Dixon*, 766 P.2d 1015, 1023–24 (Or. 1988) (“A person who wishes to preserve a constitutionally protected privacy interest in land outside the curtilage must manifest an intention to exclude the public by erecting barriers to entry, such as fences, or by posting signs. This rule will not unduly hamper law enforcement officers in their attempts to curtail the manufacture of and trafficking in illegal drugs, because it does not require investigating officers to draw any deduction other than that required of the general public”).

33. LAFAVE, *supra* note 12 at 622.

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

35. *United States v. Dunn*, 480 U.S. 294, 300 (1987).

36. *Id.* at 303.

37. *Id.*

38. *Id.* at 304.

39. *Id.* at 305.

40. *Id.* at 304.

41. *Id.* at 309–10 (the area surrounding the barn was “clustered with the farmhouse and other outbuildings in a clearing surrounded by woods” and the barn itself was connected to the house by a “well-walked” and “well-driven” path).

42. Clifford S. Fishman, *Police Trespass and the Fourth Amendment: A Wall in Need of Mending*, 22 J. MARSHALL L. REV. 795, 817–18 (1989) (“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 or posted. Second, it is not a search for 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. 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.’ Finally, an area may qualify as an ‘unoccupied and undeveloped area’ even if it is both ‘occupied’

Basically, *Dunn* stands for the proposition that police can enter upon an open field and observe the interior of a structure, but *might* not be able to enter the structure itself.<sup>43</sup> Although the Court assumed, *arguendo*, that a person has a reasonable expectation of privacy in a barn located within an open field, that was not a holding that binds lower courts.<sup>44</sup> Consequently, courts have had to decide whether a warrant is necessary for police to enter a structure located outside of a home's curtilage within an open field. Although *Dunn* seems to suggest that the Supreme Court believes that a person has a reasonable expectation of privacy in such a structure, lower courts have approached the issue in different ways. This is understandable, given that *Dunn* did not clarify whether a person *always* has a reasonable expectation of privacy in a structure located within an open field, or whether the question depends on a *Katz*-like analysis.

Commentators have noted that the Supreme Court continues to apply the two-part *Katz* test for when an individual has a legitimate expectation of privacy in a given place.<sup>45</sup> Professor Shelby Colb criticized the open fields doctrine as inconsistent with the *Katz* reasoning.<sup>46</sup> Specifically, Professor Colb found the reasoning used by the Court in *Oliver* to justify the continuing validity of the open fields doctrine problematic.<sup>47</sup> According to Colb, *Oliver* allows police to "engage in what is criminal misconduct on the theory that they could have made the same observations by a legal, alternative means."<sup>48</sup>

Despite reservations about the wisdom of the open fields doctrine, *Oliver* is still good law. Consequently, lower courts still face cases in which police have attempted to justify warrantless searches by invoking the doctrine. One issue that has arisen in this context is how the open fields doctrine applies to structures outside the curtilage of the home. Courts have resolved this issue in a number of different ways, each method having advantages and drawbacks.

#### B. How the Illinois Supreme Court Applied the Open Fields Doctrine to a Structure Outside the Curtilage of the Home

In 2004, the Illinois Supreme Court confronted the question of whether police officers' warrantless entry into a barn violated the Fourth Amendment

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and 'developed.'").

43. *Dunn*, 480 U.S. at 304–05.

44. *Id.* at 303.

45. Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 120 (2002).

46. *Id.* at 131.

47. *Id.*

48. *Id.* at 132 (referring to the lawful ability of police and the public to view the field from the air).

and thus justified a suppression of evidence obtained during the search.<sup>49</sup> Police became aware that Shane Pittman might be growing marijuana on the family farm on which he lived, after receiving a tip from Pittman's sister, Sherry.<sup>50</sup> Officers went to the property to question the sister, who lived in a house located on the same farm (Pittmann's mother owned the farm).<sup>51</sup> Unable to interview Sherry, the officers approached and entered a barn that was approximately fifty yards behind the house.<sup>52</sup> The officers did not have a warrant and testified that they could not see the marijuana plants until they entered the barn.<sup>53</sup> The barn had its doors open and did not have a wall on its south side, but it had a canopy that covered a feedlot.<sup>54</sup> The officers left, but returned and set up surveillance around the barn, arresting Mr. Pittmann and seizing the marijuana plants when he entered the barn.<sup>55</sup> After a motion to suppress the seized evidence was granted, one of the state's arguments on appeal was that if the barn was outside the curtilage of the home, then it was in an open field and thus not protected by the Fourth Amendment.<sup>56</sup>

As a threshold matter, the court held that the barn was not within the curtilage of any nearby house.<sup>57</sup> The court then had to decide whether Pittman nevertheless had a reasonable expectation of privacy in the barn and concluded that he did.<sup>58</sup> The court noted that the U.S. Supreme Court in *Dunn* did not hold that a person has a reasonable expectation of privacy in such a structure.<sup>59</sup> In deciding that Pittmann had a reasonable expectation of privacy in the barn, the court purported to apply several factors.<sup>60</sup> However, the court rested its decision entirely based upon Pittman's possessory interest in the barn.<sup>61</sup>

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49. *People v. Pittman*, 211 Ill.2d 502, 505 (2004).

50. *Id.* at 506.

51. *Id.* at 508.

52. *Id.* at 509–10.

53. *Id.* at 510.

54. *Id.*

55. *Id.*

56. *Id.* at 518.

57. *Id.* at 517.

58. *Id.* at 520.

59. *Id.* at 518.

60. *Id.* at 520–21 (the court stated that “[s]everal factors should be examined to determine whether a defendant possesses a reasonable expectation of privacy: (1) ownership of the property searched; (2) whether the defendant was legitimately present in the area searched; (3) whether defendant has a possessory interest in the area or property seized; (4) prior use of the area searched or property seized; (5) the ability to control or exclude others from the use of the property; and (6) whether the defendant himself had a subjective expectation of privacy in the property”).

61. *Id.* at 522 (the court held: “defendant had the right to be in the barn, to possess it, and to exclude others from it. These rights are sufficient to establish defendant’s reasonable expectation of privacy in the barn”).



The dissent in *Pittman* noted, and disagreed with, the majority's focus on the defendant's possessory interest.<sup>62</sup> After surveying state and federal case law on the subject, the dissent concluded that when considering whether a person has a reasonable expectation of privacy in a barn outside the curtilage of a home, the proper inquiry should be whether the barn was still used for agricultural purposes and "whether the owner or occupier had taken reasonable steps to effect privacy."<sup>63</sup> In the dissent's view, Mr. Pittman did not have a reasonable expectation of privacy, since the barn was no longer used for agricultural purposes, and no one had taken steps to protect the interior of the barn from observation.<sup>64</sup>

### C. How Other Courts Have Applied the "Open Fields Doctrine" to Structures Outside the Curtilage

In *United States v. Pennington*, the Eighth Circuit analyzed the issue by focusing on the steps that the owner or possessor had taken to ensure privacy.<sup>65</sup> The case involved a warrantless search of an "underground bunker" that contained a trailer and anhydrous ammonia tank, used in the manufacture of methamphetamine.<sup>66</sup> The entryway to the bunker was visible although partially covered by a wooden pallet and officers could see a ladder leading down into the bunker.<sup>67</sup> The court held that due to the bunker's location in an open field, the visible entryway and ladder, and the absence of a door or lock, the defendant had no legitimate expectation of privacy.<sup>68</sup> The court recognized, however that the case involved a "very close issue" and suggested that the officers "would have been well advised to seal the surrounding area and apply for a second warrant."<sup>69</sup> Other jurisdictions have taken a path similar to the Eighth Circuit and focused on the reasonable steps of the owner or possessor to protect privacy.<sup>70</sup>

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62. *Id.* at 529–30 (Thomas, J., dissenting).

63. *Id.* at 532.

64. *Id.* at 533–34.

65. *United States v. Pennington*, 287 F.3d 739, 745 (8th Cir. 2002).

66. *Id.* at 745.

67. *Id.*

68. *Id.* at 746.

69. *Id.* at 745 (the officers had a warrant to search the defendant's residence, but the bunker was outside of the warrant's scope).

70. *See, e.g.*, *United States v. Santa Maria*, 15 F.3d 879, 883 (9th Cir. 1994) (locked trailer outside the curtilage not an "open field" and thus protected by Fourth Amendment); *Siebert v. Severino*, 256 F.3d 648, 654 (7th Cir. 2001) (landowner had legitimate expectation of privacy in barn outside the curtilage that had locking doors and was located within fenced area).

*Pennington* contains an important caveat. The “structure” at issue was essentially a hole in the ground, so it is not clear that the court would apply the same reasoning to something like a barn. The language of the opinion also suggests this possibility. The court stated that although the open fields doctrine permits warrantless searches of what is in plain view within an open field, “[i]t does not justify a warrantless search of a man-made enclosure found in an open field. The Supreme Court made that clear in *Dunn* . . . .”<sup>71</sup> Thus, the opinion suggests that the court might hold that a person always has a reasonable expectation of privacy in a man-made structure such as a barn, even when located outside the curtilage.

### III. ANALYSIS

Courts have taken different approaches in applying the open fields doctrine to structures. Each approach has potential advantages and drawbacks. Additionally, some courts have applied the doctrine in ways that are inconsistent with Supreme Court case law. Some courts have focused only on the steps an individual has taken to protect privacy when deciding whether to extend Fourth Amendment protection to structures within open fields. Others have limited their inquiry to whether the individual has a possessory interest in the land and an ability to exclude others. Another option is to categorically recognize a reasonable expectation of privacy in all structures (no court has adopted such an approach). Finally, a two-part inquiry has been suggested. This method focuses on the steps an individual has taken to protect privacy and society’s willingness to recognize the expectation of privacy as reasonable. This two-part inquiry is consistent with Supreme Court case law and strikes the best balance between protecting privacy and addressing the legitimate concerns of law enforcement.

#### A. Focus on Steps the Individual Took to Protect Privacy

One option is for courts to look only at the steps the individual has taken to protect privacy in a structure outside the curtilage. This approach was the basis for the Eighth Circuit’s decision in *Pennington*.<sup>72</sup> Focusing on steps the individual took to protect privacy has an obvious practical advantage. Individuals know that if they take appropriate steps to protect their privacy (e.g., window coverings, locking doors, no trespassing signs) then they can reasonably expect police and other government officials not to enter without

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71. *United States v. Pennington*, 287 F.3d 739, 745 (8th Cir. 2002).

72. *Id.* at 746.

a warrant. Similarly, police and other officials know to stop short of actual entry and obtain a warrant whenever they see indications that a person views a particular structure as private. However, this sort of approach raises the exact same concern that the Supreme Court had in *Oliver*.

In *Oliver*, the Court was worried that a case-by-case analysis of whether a person had a reasonable expectation of privacy in an “open field” would require police to “guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy.”<sup>73</sup> But, police already have to use a case-by-case analysis when deciding whether a particular structure or area is within the curtilage of a home.<sup>74</sup> It is difficult to understand why the Court believes that a case-by-case curtilage determination is not an unreasonable burden on law enforcement, yet a case-by-case determination of whether a person has a reasonable expectation of privacy in an open field would be. Commentators have noted that a case-by-case approach would not pose as many difficulties as the Court seemed to think in *Oliver*.<sup>75</sup> Some state courts have agreed and have adopted a case-by-case approach as a matter of state constitutional law.<sup>76</sup>

Notwithstanding the potential burden a case-by-case analysis may place on law enforcement, an approach that focuses solely on the steps the individual has taken to protect privacy is not consistent with Supreme Court case law. In *Oliver*, the Court explicitly stated that a person’s efforts to protect privacy are not decisive on the question of whether they have a reasonable expectation of privacy in an open field.<sup>77</sup> There is no reason to believe the Court would hold differently in the case of a structure within an open field.

Additionally, focusing solely on an individual’s efforts to protect privacy completely ignores the second part of the *Katz* analysis, which requires that

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

74. *Dunn*, 480 U.S. at 301 (the court held that “curtilage questions 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.”).

75. See LAFAVE, *supra* note 12 at 622.

76. See, e.g., *State v. Dixon*, 766 P.2d 1015, 1024 (Or. 1988) (“A person who wishes to preserve a constitutionally protected privacy interest in land outside the curtilage must manifest an intention to exclude the public by erecting barriers to entry, such as fences, or by posting signs. This rule will not unduly hamper law enforcement officers in their attempts to curtail the manufacture of and trafficking in illegal drugs, because it does not require investigating officers to draw any deduction other than that required of the general public”).

77. *Oliver*, 466 U.S. at 182.

the person's expectation of privacy is one that society is prepared to recognize as reasonable. For example, under this analysis, a person would have a legitimate expectation of privacy in an old barn used to manufacture methamphetamine, provided that the barn had covered windows, a locking door and possibly a fence or "no trespassing" signs. This result would not change even if the individual did not use the barn for *any* legitimate purpose. It is doubtful that society is willing to recognize a reasonable expectation of privacy in the manufacture of illegal drugs.

This approach, despite its potential practical advantage, is inconsistent with both *Oliver* and *Katz* and should not be applied by lower federal courts. State courts are free to interpret their state constitutions in a manner that affords broader protection to individuals from unreasonable search and seizure, so this approach could be adopted as a matter of state law.<sup>78</sup>

#### B. Categorical Recognition of a Reasonable Expectation of Privacy in Structures Within Open Fields

Focusing solely on an individual's efforts to protect privacy is not the only approach to deciding whether a reasonable expectation of privacy exists in a structure within an open field. Another possible method is a categorical rule that a person *always* has a reasonable expectation of privacy in a structure, regardless of whether it is located in an open field. In *Dunn*, the Supreme Court assumed that a person has a reasonable expectation of privacy in a barn located in an open field.<sup>79</sup> If the Court actually addresses the issue, it may adopt a categorical rule that the Fourth Amendment's protection against unreasonable searches and seizures extends to structures within open fields. This seems unlikely, however, if the court applies the two-part analysis established in *Katz*. An individual may not exhibit a subjective expectation of privacy in some structures. The most obvious example are structures that are located on private property, but have been totally abandoned by the landowner. Additionally, society may not always recognize a reasonable right to privacy in a structure within an open field, such as a barn used *only* for the cultivation of marijuana.

A categorical rule has some practical advantages. First, a person knows that their privacy is always protected in a structure located on their property. This is important, since many legitimate activities can be carried out in structures outside the curtilage of the home, some of which landowners may want to shield from prying eyes. Commentators have argued that it is crucial

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78. *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001).

79. *Dunn*, 480 U.S. at 303.

to consider the expectations of innocent individuals, not just those of the guilty.<sup>80</sup> An illegal search is not harmless just because no incriminating evidence is obtained.<sup>81</sup>

A categorical rule also sets a clear and easy standard for law enforcement to utilize: Don't enter structures located on private property without a warrant. An argument could be made, however, that this approach unduly burdens law enforcement, since situations may arise where immediate entry into a structure is justified and necessary. Upon closer scrutiny, this argument becomes less tenable. Police already have the ability to trespass onto an open field, walk up to the threshold of a structure, and observe any part of the interior visible from the outside.<sup>82</sup> If police observe activity that falls into the "exigent circumstances" exception to the warrant requirement, they may enter immediately.<sup>83</sup> If officers observe activity sufficient to provide probable cause for a search warrant, they can secure the scene while they wait for the warrant.<sup>84</sup>

There are, however, conceivable situations in which no exigent circumstances exist and securing the area and waiting *would* prove an unreasonable hardship to law enforcement. For example, suppose an officer observes an active methamphetamine laboratory from outside a structure. Further assume that the individual manufacturing the drug is present *inside* the structure. If alerted to the officer's presence, the individual could easily destroy evidence while the officer waited patiently for his warrant to arrive. This is an unlikely scenario, but it illustrates the possible hardship that a categorical rule could place on the legitimate needs of law enforcement. Courts that have considered the issue of whether a person has a legitimate expectation of privacy in a structure located within an open field have chosen not to adopt a categorical rule, perhaps due to law enforcement considerations.

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80. See LAFAVE, *supra* note 12 at 641. ("In seeking to honor reasonable expectations of privacy through our application of search and seizure law, we must consider the expectations of the innocent as well as the guilty. When innocent people are subjected to illegal searches . . . their rights are violated even though such searches turn up no evidence of guilt.").

81. *Id.*

82. *Dunn*, 480 U.S. at 304 (this is exactly what the officers did in *Dunn*).

83. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

84. *Illinois v. McArthur*, 531 U.S. 326, 334 (2001) ("We have found no case in which this Court has held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time.").

### C. Focus on Possessory Interests and Ability to Exclude

Another option is for courts to look solely at whether an individual has a possessory interest in the structure and consequently has the ability to exclude others. This is essentially the approach taken by the majority of the Illinois Supreme Court in *Pittman*.<sup>85</sup> The practical simplicity of this approach is obviously apparent. A person has a reasonable expectation of privacy in a structure that they own or possess with the right to exclude others. Courts, as well as law enforcement officers would have no trouble applying this method of analysis. Police would know the exact limits placed on them, and individuals could carry out private activities in structures without fearing warrantless intrusion. Simplicity of application aside, this approach is completely inconsistent with the decisions of the U.S. Supreme Court.

The Supreme Court has never ruled that possessory interests have no bearing on whether a person has a legitimate expectation of privacy. However, the Court recognized in *Oliver* that “[t]he existence of a property right is but one element in determining whether expectations of privacy are legitimate.”<sup>86</sup> The mere existence of the open fields doctrine casts serious doubt on the validity of this approach. If possessory interests alone are enough to create a legitimate expectation of privacy, police would need a warrant to enter *any* privately owned land.<sup>87</sup> Lower federal courts have recognized that “the Supreme Court has rejected a property-line approach to the Fourth Amendment, concluding instead that the government may enter a person’s private property (outside the curtilage) and conduct a warrantless search, unless that individual has a legitimate expectation of privacy in the property searched.”<sup>88</sup>

One possible explanation for the majority’s approach in *Pittman* is that the case involved a barn, where prior cases rejecting the property-line approach have dealt with “open fields”. However, applying the two-part test announced in *Katz* to structures outside the curtilage reveals the problems with this analysis. The *Katz* test looks at *both* the individual’s subjective expectation of privacy and society’s willingness to recognize that expectation as reasonable.<sup>89</sup> A person could easily have a possessory interest in a structure without exhibiting a subjective expectation of privacy, such as a dilapidated

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85. *Pittman*, 211 Ill.2d at 522.

86. *Oliver*, 466 U.S. at 183.

87. This would be the case unless their entry could be justified under another exception to the warrant requirement, such as exigent circumstances.

88. *Siebert v. Severino*, 256 F.3d 648, 654 (7th Cir. 2001).

89. *Katz*, 389 U.S. at 361.

shed no longer used for any purpose.<sup>90</sup> Also, trespass laws alone do not create an expectation of privacy that society is willing to recognize as reasonable.<sup>91</sup> An analysis that focuses exclusively on possessory interests is quite simply inconsistent with Supreme Court case law.

#### D. Two-Part Inquiry: Steps the Individual Took to Protect Privacy and Whether Society Recognizes a Reasonable Expectation of Privacy

A two-part inquiry, focusing first on the steps an individual took to protect privacy and second on whether society is willing to recognize a reasonable expectation of privacy is consistent with the decisions of the Supreme Court and strikes an appropriate balance between protecting individual privacy and accommodating the legitimate needs of law enforcement. This was the approach taken by the dissent in *Pittman*.<sup>92</sup> This method is more consistent with Supreme Court case law than the others considered thus far. It incorporates *both* elements of the two-part *Katz* analysis. By focusing first on the steps an individual took to protect privacy, a person's subjective expectation of privacy is considered. This approach also looks to whether society is willing to recognize that person's expectation of privacy as reasonable. The dissent in *Pittman* believed that because no efforts were made to protect the interior of the barn from observation and the barn was no longer used for agricultural purposes, no reasonable expectation of privacy existed.<sup>93</sup> Essentially, this approach is a restatement of the two-part *Katz* inquiry. This is appropriate, since the Supreme Court continues to apply the two-part *Katz* test to determine when an individual has a legitimate expectation of privacy in a given place.<sup>94</sup>

In addition to being consistent with Supreme Court jurisprudence, this approach has practical advantages. First, an individual can confidently insure privacy by taking simple measures such as covering windows, closing doors, and posting "no trespassing" signs. These actions would put others on notice that the landowner wishes the activities carried out in the structure to be kept private.

Second, this approach would not unduly interfere with the legitimate concerns of law enforcement. If a person has taken measures to protect their

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90. See, e.g., *State v. Martin*, 553 A.2d 1264 (Me. 1989) (old shed outside the curtilage used only as a shelter for animals to get out of the rain, so not protected by the Fourth Amendment).

91. *Oliver*, 466 U.S. at 183.

92. *Pittman*, 211 Ill.2d at 532 (Thomas, J., dissenting).

93. *Id.* at 533–34.

94. COLB, *supra* note 45, at 120.

privacy, law enforcement officers would likely stop short of actual entry and obtain a search warrant. An individual's steps to protect privacy are not determinative in this two-part analysis. Courts would also consider society's willingness to recognize the expectation of privacy as reasonable. The presence of this second factor means that a person could not claim a reasonable expectation of privacy for purely illegal activity that is well concealed. If officers enter a structure despite an individual's efforts to protect privacy, they will only be deemed to have run afoul of the Fourth Amendment if the structure is put to at least one use that society is willing to protect.

Some might argue that this approach would allow officers to conduct warrantless searches and justify them later based on evidence found inside the structure. This argument is untenable. Police, upon seeing indications that a person desires privacy, would be hesitant to go ahead and enter, even if they were sure the structure was used for illegal activity. Even if police knew to a certainty that illegal activity were taking place, they would run the risk of having evidence excluded if the structure were used for *any* legitimate purpose. For example, a warrantless search of a structure containing a methamphetamine laboratory might violate the Fourth Amendment if the structure were also used for storage of personal effects or a workshop. Officers would be very hesitant to risk exclusion, as this could easily result in the dismissal of an otherwise meritorious case. The practical effect of this approach is that police would most likely stop short of entry and obtain a warrant when a person took appropriate steps to protect their privacy.

This approach admittedly involves the kind of case-by-case analysis that the Supreme Court deemed unworkable in *Oliver*.<sup>95</sup> However, the difficulty of a case-by-case analysis may be overstated.<sup>96</sup> Also, the Supreme Court already uses a case-by-case approach to decide questions of curtilage.<sup>97</sup> This approach has proved workable and is more complex than the case-by-case analysis proposed for structures located within open fields.<sup>98</sup> All things considered, a two-part inquiry focusing on the individual's attempts to protect privacy and the use to which the structure is put is consistent with the decisions of the Supreme Court and represents an acceptable balance between the privacy rights of individuals and the legitimate needs of law enforcement.

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

96. See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 622 (Thompson West 4th ed. 2004).

97. *Dunn*, 480 U.S. at 301.

98. *Id.* (the analysis in *Dunn* involved four factors, whereas the proposed analysis for structures contains only two).



#### IV. CONCLUSION

Since the creation of the open fields doctrine, courts have had to decide whether the Fourth Amendment protects structures located outside the curtilage of the home. Courts have taken markedly different approaches to the resolution of this question. Each method has potential advantages and disadvantages. One possible approach is to provide categorical Fourth Amendment protection to structures, even when located outside the curtilage in an “open field.” This method has the obvious advantage of consistency and ease of application. However, this approach is inconsistent with the Supreme Court’s *Katz* test for determining when a person has a reasonable expectation of privacy in a given place. This inconsistency is likely the reason why no courts have adopted the approach.

Other options are to focus solely on possessory interests or an individual’s efforts to protect privacy. Both of these methods provide a relatively straightforward analysis. However, each of these approaches ignores one part of the *Katz* analysis that has become the touchstone for deciding when a person has a reasonable expectation of privacy in a particular location. Since these methods are inconsistent with the ruling of the Supreme Court, state courts should not adopt them as law.

The best approach for deciding whether a structure outside the curtilage is afforded Fourth Amendment protection is the two-part inquiry advocated by the dissent in *Pittman*. This approach first focuses on the efforts the individual took to protect privacy. Then the focus shifts to whether society is willing to recognize the expectation of privacy as reasonable. This method essentially tracks the *Katz* analysis that the Supreme Court has repeatedly applied. Also, this two-part inquiry strikes an appropriate balance between protecting individual privacy and accommodating the legitimate needs of law enforcement. Until the Supreme Court actually rules on the question, the law in this area will likely remain inconsistent across jurisdictions. Nevertheless, enlightened courts should establish an approach that protects individuals but does not overburden law enforcement. A two-part inquiry focusing on efforts to protect privacy and the actual use to which the structure was put is the approach that strikes the best compromise between these two important concerns.

