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Pot in My Backyard: Curtilage Concept Endorsed by the Queens Supreme Court to Suppress Physical Evidence of Marijuana

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POT IN MY BACKYARD: CURTILAGE CONCEPT ENDORSED BY THE QUEENS SUPREME COURT TO SUPPRESS PHYSICAL EVIDENCE OF MARIJUANA

SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

People v. Theodore[1]
(decided February 13, 2014)

I. INTRODUCTION

The right to be free from unreasonable search and seizure, particularly in and around the home, has been recognized for centuries as one of the most treasured rights held by American citizens.[2] The Supreme Court has stated that included within the definition of home for the purposes of the Fourth Amendment, is the land immediately surrounding the home, also known as curtilage.[3]

Conflicting interpretations of the Fourth Amendment by the Supreme Court have led a number of state courts to invoke their own constitutions in order to afford individuals greater protection[4] against unreasonable searches and seizures.[5] For example, the federal open

[1] 980 N.Y.S.2d 148 (App. Div. 2d Dep't 2014).

[2] *See* Silverman v. United States, 365 U.S. 505, 511-12 (1961).

[3] *See* Oliver v. United States, 466 U.S. 170, 180 (1984).

[4] A state may grant its citizens greater protection under its own constitution than that offered under the Federal Constitution. *See* People v. Harris, 570 N.E.2d 1051, 1053 (N.Y. 1991) ("Our federalist system of government necessarily provides a double source of protection and State courts, when asked to do so, are bound to apply their own Constitutions notwithstanding the holdings of the United States Supreme Court.").

[5] *See* People v. Scott, 593 N.E.2d 1328, 1330 (N.Y. 1992) (rejecting the federal open fields doctrine and holding that the New York State Constitution provides a landowner with a protectable privacy interest in land beyond that immediately surrounding the home, where the landowner had taken steps to maintain privacy); State v. Bullock, 901 P.2d 61, 70 (Mont. 1995) (reconsidering the applicability of the federal open fields doctrine to the Montana State Constitution because of "seeming inconsistencies in the decisions of the Supreme Court"); State v. Johnson, 879 P.2d 984, 990 (Wash. Ct. App. 1994) (rejecting the Supreme Court's reasonable expectation of privacy inquiry because it was incompatible with the

fields doctrine dictates that the Fourth Amendment does not apply to open fields.[6] By contrast, under the New York State Constitution, landowners are protected against unreasonable searches and seizures in their open fields, so long as the landowner has taken steps to manifest an expectation of privacy.[7]

In *People v. Theodore*,[8] the Appellate Division, Second Department held that physical evidence of marijuana should have been suppressed due to the violations of the defendant's rights under the Fourth Amendment of the United States Constitution and its New York State analogue.[9] The court in *Theodore* found that the arresting police officer conducted an illegal search of the defendant's home curtilage, when he entered the defendant's rear yard without a warrant, and observed the defendant smoking marijuana in his car parked at the end of the driveway.[10]

The case of *Theodore* is important because it arose in a neighborhood densely packed with homes, where virtually no open fields exist. The case demonstrates the willingness of New York courts to apply the curtilage concept to a crowded urban neighborhood,[11] and not simply to rural multi-acre homesteads.[12] The court's opinion in *Theodore* springs from a straightforward application of

search and seizure provision of the Washington State Constitution); State v. Kirchoff, 587 A.2d 988, 994 (Vt. 1991) (rejecting the federal open fields doctrine under the Vermont State Constitution, and holding that "[w]here the indicia, such as fences, barriers or 'no trespassing' signs reasonably indicate that strangers are not welcome on the land, the owner or occupant may reasonably expect privacy"); State v. Dixson, 766 P.2d 1015, 1024 (Or. 1988) (same).

[6] *Oliver*, 466 U.S. at 180. *See also infra* section III.B for a discussion of the federal open fields doctrine.

[7] *Scott*, 593 N.E.2d at 1338.

[8] 980 N.Y.S.2d 148 (App. Div. 2d Dep't 2014).

[9] *Id.* at 150, 152.

[10] *Id.* at 152. *See also infra* Section II.C (explaining that the officer's search also did not fall under any recognized exception to the warrant requirement).

[11] *See, e.g.*, *Scott*, 593 N.E.2d at 1330 (holding that the New York State Constitution provides a landowner with a protectable privacy interest in land beyond that immediately surrounding the home); People v. Machovoe, 662 N.Y.S.2d 949, 950 (App. Div. 2d Dep't 1997) (affirming the county court's decision to suppress evidence obtained after a warrantless entry into the area behind the trailer home where defendant resided); People v. Sutton, 798 N.Y.S.2d 712 (Cnty. Ct. Jefferson County 2004) (holding that landowners in upstate New York had protectable privacy interest in their open fields and that the officer's warrantless search was unlawful).

[12] *See, e.g.*, *Theodore*, 980 N.Y.S.2d 148; People v. Terrell, 277 N.Y.S.2d 926, 930 (Sup. Ct. Bronx County 1967), *aff'd*, 291 N.Y.S.2d 1002 (App. Div. 1st Dep't 1968) (holding that a fire escape was part of the curtilage of the apartment and entitled to the protection of the Fourth Amendment).

core constitutional principles and illustrates the ongoing vitality of the curtilage doctrine under New York law.[13]

II. *PEOPLE V. THEODORE*

A. Facts

On September 29, 2011, a child called 911 reporting a residential fire.[14] The child gave two addresses—123-06 Rockaway Boulevard and 123-06 Sutphin Boulevard.[15] Firefighters from a neighboring precinct responded to the Rockaway Boulevard address, but found no evidence of a fire.[16] The 911 dispatcher handling the call then radioed Detective Anderson of the New York City Police Department to investigate the second address, 123-06 Sutphin Boulevard.[17] Upon arriving at the second address, Detective Anderson found neither a fire nor a house, but a vacant lot.[18]

Detective Anderson went to the house closest to the empty lot—123-09 Sutphin Boulevard.[19] The detective did not ring the doorbell; instead, he walked about thirty feet down a walkway to the left of the house, turned right, and proceeded into the rear yard.[20] From there Detective Anderson saw Rashid Theodore rolling a marijuana cigarette in a car parked at the end of his driveway.[21] Detective Anderson walked towards the car, announced that he was investigating a fire, and instructed Theodore to step out of the vehicle.[22] Once Theodore exited the car, Detective Anderson saw a firearm on the driver's seat; Anderson quickly seized the gun and drug paraphernalia, and arrested Theodore.[23]

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[13] *Theodore*, 980 N.Y.S.2d at 150-52.

[14] *Id.* at 150.

[15] Petition for Writ of Certiorari, New York v. Theodore, No. 14-329, 2014 WL 4704642, at *3 (N.Y. App. Div. 2d Dep't Sept. 2, 2014).

[16] *Theodore*, 980 N.Y.S.2d at 150.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Petition for Writ of Certiorari, *supra* note 15, at *4.

[22] *Id.* at *2.

[23] *Theodore*, 980 N.Y.S.2d at 150.

B. Procedural History

Theodore was charged in the Queens County Supreme Court with two counts of criminal possession of a weapon in the second degree, and one count of criminal possession of marijuana in the fifth degree.[24] The defendant sought, "*inter alia*, to suppress the physical evidence" seized on the night of his arrest.[25] He argued that the police obtained the evidence in a manner that violated his Fourth Amendment rights against unreasonable search and seizure.[26] The supreme court denied the defendant's motion to suppress.[27] Theodore "subsequently pled guilty to the entire indictment" and received a prison sentence of three and one-half years.[28]

C. Appellate Division, Second Department

Theodore appealed to the Appellate Division of the Second Judicial Department of New York.[29] The appellate court considered whether the supreme court properly denied the defendant's motion to suppress evidence, or should have excluded the evidence and dismissed the indictment.[30] The court explained that the protection of the Fourth Amendment, in addition to the analogous provision of the New York State Constitution, is triggered when police invade an individual's constitutionally protected privacy interest.[31] Therefore, to sustain the supreme court's ruling, the Appellate Division had to find that Detective Anderson lawfully was in a position to make his observations.[32] The Government argued that Detective Anderson's warrantless entry into the defendant's rear yard fell within the emergency aid exception[33] to the Fourth Amendment's warrant requirement, and

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[24] *Id.* at 148, 150.

[25] *Id.* at 150.

[26] *Id.* at 150-51.

[27] *Id.* at 150.

[28] Petition for Writ of Certiorari, *supra* note 15, at *5.

[29] *Theodore*, 980 N.Y.S.2d at 148, 150.

[30] *Id.* at 150.

[31] *Id.* at 151-52.

[32] *Id.* at 152.

[33] The emergency aid exception applies when police reasonably believe that an emergency exists requiring their assistance, and "there was some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." *Id.* at 151. *Theodore* involved two issues: curtilage and the emergency aid exception to the Fourth Amendment warrant requirement. This case note discusses only the curtilage issue.

the court properly admitted the evidence under the plain view doctrine.[34]

The Appellate Division reversed and held that Detective Anderson's observations were not made from a lawfully obtained point of view because he was within Theodore's curtilage, and additionally that no Fourth Amendment exception applied.[35]

The court explained that curtilage may be determined by considering four factors: (1) proximity of the area to the home itself; (2) whether the area is located "within an enclosure surrounding the home"[36]; (3) the "nature of the uses to which the area is put"[37]; and (4) the steps taken towards ensuring privacy from passers-by.[38] The court issued a brief statement concluding that the defendant's rear yard was within the curtilage because it "was in close proximity to the home, shielded from view by those on the street, and within the natural and artificial barriers enclosing the home."[39]

D. What Was Missing from the Appellate Division's Opinion

The court's curtilage analysis was less than rigorous. Notably absent from the opinion was any attempt to canvas the facts concerning the defendant's rear yard—a step critical to a properly detailed curtilage analysis. Thus, the court left a number of unanswered questions. Specifically, what sort of "natural and artificial barriers"[40] must exist to compel a finding of curtilage in an urban New York neighborhood? What was the nature of the thirty-foot walkway on which Detective Anderson traveled?[41] Also, did a clear boundary exist between the walkway and the rear yard?[42]

The Appellate Division's superficial analysis is nevertheless telling. The absence of any nuanced details, which might have pointed towards a different outcome, indicates that Fourth Amendment

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[34] *Theodore*, 980 N.Y.S.2d at 151-52 (explaining the plain view doctrine applies when the investigating officer sees incriminating evidence from a lawfully obtained point of view).

[35] *Id*. at 148, 152.

[36] *Id.* at 151 (quoting United States v. Dunn, 480 U.S. 294, 301(1987)).

[37] *Id.*

[38] *Id.*

[39] *Theodore*, 980 N.Y.S.2d at 151.

[40] *Id*. at 151.

[41] *Id*. at 150.

[42] *Id.*

protections are liberally enforced in the Second Department—readily embraced by a critical court with responsibility for core segments of urban New York.

III. FOURTH AMENDMENT HISTORICAL BACKGROUND

The Fourth Amendment to the United States Constitution provides, in relevant part: "[t]he right of the people to be secure, in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[43] The Supreme Court of the United States has identified the entrance to the home as a bright line for Fourth Amendment protection.[44] Included within the protected area of the home, is the curtilage, or "land immediately surrounding and associated with the home."[45] The Supreme Court has established that Fourth Amendment protection does not extend to "open fields"[46] or areas within the view of the general public.[47]

In 1914, the United States Supreme Court announced the "exclusionary rule,"[48] explaining that evidence obtained in a manner violative of the Fourth Amendment would not be permitted to establish a defendant's guilt in federal court.[49] In 1961, the Court in *Mapp v. Ohio*[50] extended the exclusionary rule and made it applicable to the states through the Due Process Clause of the Fourteenth Amendment.[51] Consequently, the general rule today is that when an unlawful search or seizure occurs, a defendant may move to have the illegally obtained evidence excluded under the Fourth Amendment.[52]

A. Fourth Amendment Analysis: Property vs. Privacy

Until 1967, Fourth Amendment decisions were based, primarily, upon notions of physical trespass and real property law.[53] The

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[43] U.S. CONST. amend. IV.

[44] *See* Payton v. New York, 445 U.S. 573, 590 (1980).

[45] *See Oliver*, 466 U.S. at 180.

[46] *See generally* Hester v. United States, 265 U.S. 57, 59 (1924).

[47] *Oliver*, 466 U.S. at 179.

[48] Weeks v. United States, 232 U.S. 383, 398 (1914).

[49] *Id*. at 398.

[50] 367 U.S. 643 (1961).

[51] *Id.* at 660.

[52] *Id.*

[53] *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 466 (1928) (upholding the government's eavesdropping because it had not been accomplished by means of actual physical in-

main issue courts have considered in Fourth Amendment cases prior to this period was whether the government's search or seizure physically invaded a constitutionally protected "place" or "material thing."[54]

A major turning point in Fourth Amendment jurisprudence came in 1967, when the Supreme Court decided *Katz v. United States*.[55] The defendant in *Katz* moved to suppress incriminating evidence of interstate gambling that the government obtained using a wiretapping device placed on a public telephone booth.[56] In this landmark decision, the Supreme Court announced that the Fourth Amendment exists to protect "people, not places."[57] The Court reasoned that because the defendant justifiably relied on the privacy of the phone booth to shield his conversation from uninvited listeners, he did not forfeit his right to privacy "simply because he made his calls from a place where he might be seen."[58]

Arguably, the most important aspect of the *Katz* case was Justice Harlan's concurrence. Justice Harlan outlined his understanding of the two-prong test which the Court adopted as the standard to determine when individuals can successfully assert a Fourth Amendment violation: "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[59]

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vasion); Goldman v. United States, 316 U.S. 129, 134 (1942); *Silverman*, 365 U.S. at 511 (declining to uphold the government's eavesdropping because the "spike mike" utilized physically encroached upon the petitioner's premises).

[54] *Olmstead*, 277 U.S. at 466 (explaining that a Fourth Amendment violation occurs only when "there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure"); *but see id.* at 474 (Brandeis, J., dissenting) (arguing for privacy-based, rather than property-based Fourth Amendment protections).

[55] 389 U.S. 347 (1967). *See also Oliver*, 466 U.S. at 177 (describing the *Katz* test as the "touchstone of Fourth Amendment analysis").

[56] *Katz*, 389 U.S. at 348-49.

[57] *Id.* at 351.

[58] *Id.* at 352. The Court explained:

> The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear.

Id.

[59] *Id.* at 361 (Harlan, J., concurring).

The Court in *Katz* recognized, for the first time, that the Fourth Amendment's protection does not turn on the defendant's physical location when the search occurred, but what level and form of privacy the defendant was reasonably entitled to expect.[60] Following *Katz*, the Court began applying Justice Harlan's privacy test—apparently in place of the former property-based test—to resolve questions regarding the scope of the Fourth Amendment.[61]

B. No Privacy in Open Fields

Seventeen years after *Katz* the Supreme Court, in *Oliver v. United States*,[62] sought to reaffirm the vitality of the long-standing open fields doctrine.[63] *Oliver* consolidated the appeals of two cases with nearly identical fact patterns.[64] Acting on anonymous or unverified tips, law enforcement agents ignored "No Trespassing"[65] signs and fences, entered private property, and observed marijuana plants.[66]

Subsequently, both defendants were arrested and indicted for manufacturing controlled substances.[67] Petitioner Oliver argued that under the rule of *Katz*, he had a reasonable expectation of privacy in his field because he "had done all that could be expected of him to assert his privacy in the area of the farm that was searched."[68] The Sixth Circuit held that *Katz* should not apply to open fields, because " 'human relations that create the need for privacy do not ordinarily take place' in open fields."[69]

The majority employed a plain language interpretation of the Fourth Amendment—arguably a step backwards from the approach taken in *Katz*—and held that the open fields doctrine was still good

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[60] *Katz*, 389 U.S. at 351.

[61] *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 740 (1979) (explaining that the application of the Fourth Amendment depends on whether the individual seeking its protection passes Justice Harlan's two-part *Katz* test); Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) (explaining that the old Fourth Amendment common-law trespass doctrine had been repudiated by the new *Katz* expectation of privacy doctrine).

[62] 466 U.S. 170 (1984).

[63] *Id.* at 174.

[64] *Id.* at 173-74.

[65] *Id.* at 173.

[66] *Id.* at 173-74.

[67] *Oliver*, 466 U.S. at 173-74.

[68] *Id.* at 173 (citations omitted).

[69] *Id.* at 174 (quoting United States v. Oliver, 686 F.2d 356, 360 (6th Cir. 1982)).

law.[70] The Court reasoned that because the Amendment seeks only to protect people, houses, papers, and effects, no protectable privacy interest could attach to an open field.[71]

As a secondary line of reasoning, the Court rejected Oliver's *Katz* argument. The Court wrote that an individual cannot reasonably expect privacy in an open field because an open field is generally accessible to the public and to police surveillance.[72] The Court explained that open fields are different from curtilage, because curtilage is viewed as an extension of the home itself—"the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' "[73] By contrast, the majority found no societal interest in protecting the privacy of activities that typically occur in open fields, such as crop cultivation.[74]

The Court also stated that the illegal nature of the defendants' activities (i.e., growing marijuana) lessened the legitimacy of their privacy expectations under *Katz*.[75] The Court concluded that no matter how many "No Trespassing" signs the defendants had posted, their expectations of privacy in the open fields were neither reasonable nor "legitimate in the sense required by the Fourth Amendment."[76]

Justice Marshall issued a dissenting opinion in *Oliver*, calling attention to a number of inconsistencies in the majority's reasoning.[77] First, he argued that the *Oliver* majority's plain-language interpretation directly contradicted the Court's other post-*Katz* decisions, none of which the Court intended to overrule. [78] Justice Marshall pointed out that "neither a telephone booth nor a conversation conducted therein"[79] could be characterized as a "person, house, paper, or effect,"[80] yet *Katz* established that both are nevertheless protected.[81]

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[70] *Id*. at 176-77.

[71] *Id.* at 178 n.7 ("The Framers would have understood the term 'effects' to be limited to personal, rather than real, property.") (citing 2 WILLIAM BLACKSTONE, COMMENTARIES 16, 384-85)); *id.* at 180-81.

[72] *Id.* at 179.

[73] *Id.* at 180 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[74] *Id.* at 179.

[75] *Id.* at 182 n.13.

[76] *Oliver*, 466 U.S. at 182-83.

[77] *Id.* at 185 (Marshall, J., dissenting).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Oliver*, 466 U.S. at 185 (Marshall, J., dissenting).

He observed that curtilage similarly does not fall into any of these categories, yet curtilage too has been granted Fourth Amendment protection.[82] Further, Justice Marshall indicated that contrary to the Court's contention, Oliver's field was not accessible to the general public or the police.[83] In fact, the field was shielded from view completely by trees, fences, and other natural embankments.[84]

Justice Marshall concluded his dissent by stating a rule that he believed would best serve citizens, law enforcement, and the lower courts:

> 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 of unreasonable searches and seizures. One of the advantages of the foregoing rule is that it draws upon a doctrine already familiar to both citizens and government officials. In each jurisdiction, a substantial body of statutory and case law defines the precautions a landowner must take in order to avail himself of the sanctions of the criminal law. The police know that body of law, because they are entrusted with responsibility for enforcing it against the public; it therefore would not be difficult for the police to abide by it themselves.[85]

To the contrary, Justice Marshall predicted that the majority's rule would create an influx of litigation because it would require police to make "on-the-spot judgments as to how far curtilage extends,"[86] just to be litigated later by courts on a case-by-case basis.[87]

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[82] *Id.* at 185-86. Justice Marshall argued:

> Indeed, the Court's reading of the plain language of the Fourth Amendment is incapable of explaining even its own holding in this case. The Court rules that the curtilage, a zone of real property surrounding a dwelling, is entitled to constitutional protection. We are not told, however, whether the curtilage is a 'house' or an 'effect'—or why, if the curtilage can be incorporated into the list of things and spaces shielded by the Amendment, a field cannot.

Id. (internal citations omitted).

[83] *Id.* at 184-85 (Marshall, J., dissenting).

[84] *Id.* at 174.

[85] *Id.* at 195.

[86] *Oliver*, 466 U.S. at 195-96 (Marshall, J., dissenting).

[87] *Id.* at 196.

In sum, *Oliver* instructed that Fourth Amendment protection would not extend to land falling outside of the curtilage, regardless of steps taken to assure privacy.[88] However, the majority offered little guidance on how to distinguish between curtilage and open fields.[89] The opinion also left unaddressed the issue of whether and to what extent the curtilage concept might apply in a relatively dense urban environment.

IV. POST-*OLIVER* CURTILAGE: CURTILAGE OR OPEN FIELDS

Four years later, in *United States v. Dunn*,[90] the Supreme Court attempted to shed light on the issues left open in *Oliver*.[91] Specifically, it analyzed how law enforcement officers and lower courts should determine where the curtilage ends and the open fields begin.[92] The defendants in *Dunn* were charged with manufacturing a controlled substance after Drug Enforcement Agents observed evidence of illicit drug activity through the window of the defendant's barn.[93] The issue before the Supreme Court was whether the barn fell within the curtilage, which would have rendered unlawful the officer's visual flashlight search conducted through the barn window.[94]

Drawing from its own previous cases, the Supreme Court proposed four factors to assist lower courts in resolving the question of whether an area is intimately tied to the home itself: (1) the proximity of the land in question to the home; (2) whether the land is within an enclosure surrounding the home; (3) the nature of its use; and (4) the steps taken towards ensuring privacy in the land.[95] The Court further added that these factors will not "produce[] a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration."[96] The Court ultimately concluded that Dunn's barn was not within the curtilage be-

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88 *Id.* at 179.
89 *Id.* at 180 n.11.
90 480 U.S. 294 (1987).
91 *Id.* at 296.
92 *Id.* at 301.
93 *Id.* at 298-99.
94 *Id.* at 299-300.
95 *Dunn*, 480 U.S. at 301.
96 *Id.* at 301.

cause (1) it was located sixty yards away from the home itself; (2) it was located fifty yards outside of the fenced area that surrounded the home; (3) the officers believed that it was being used as a drug lab; and (4) a separate fence surrounding the barn offered no privacy because it was "constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed areas."[97]

Justice Brennan, who was joined by Justice Marshall, authored a dissenting opinion that rejected the majority's opinion in its entirety.[98] He believed that the majority's application of the four-part test disregarded the significance of a barn to rural life.[99] Justice Brennan wrote that the Court's *willingness* to reject privacy in open fields, and its *unwillingness* to recognize privacy in the defendant's barn, "are manifestly inconsistent and reflect a hostility to the purpose of the Fourth Amendment."[100]

Since *Dunn*, courts have varied in their interpretations of the four factors, further demonstrating that there are neither clear-cut answers, nor bright line rules useful for resolving questions of home curtilage.[101]

V. THE NEW YORK STATE APPROACH

A. Open Fields in New York

In 1992, the New York Court of Appeals in *People v. Scott*[102] considered whether to adopt the Supreme Court's ruling in *Oliver* regarding the open fields doctrine.[103] The Court of Appeals rejected the federal open fields doctrine because of its uncertainty, and implemented a standard that it believed would better protect its citizens'

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[97] *Id.* at 302-03.

[98] *Id.* at 307 (Brennan, J., dissenting).

[99] *Id.*

[100] *Dunn*, 480 U.S. at 310 (emphases added).

[101] *See, e.g.*, United States v. Reilly, 76 F.3d 1271, 1278 (2d Cir. 1996) (applying "actual use" test to determine what actual uses were made of the alleged curtilage, and analyzing whether those uses qualified as "intimate activities of the home"); *contra* United States v. Shates, 915 F. Supp. 1483, 1498 (N.D. Cal. 1995) (considering the officers' objective observations of the alleged curtilage to determine nature of use factor); *see also* United States v. Ishmael, 843 F. Supp. 205, 209 (E.D. Tex. 1994) ("[T]here are no bright lines that determine where the curtilage of a home ends."), *rev'd on other grounds*, 48 F.3d 850 (5th Cir. 1995).

[102] 593 N.E.2d 1328 (N.Y. 1992).

[103] *Id.* at 1330.

privacy rights.[104] The New York State Constitution now protects privately owned open fields against unreasonable searches and seizures, as long as the landowner has made efforts on the land to manifest an expectation of privacy.[105]

The case of *Scott* presented facts remarkably similar to those considered by the Supreme Court in *Oliver*.[106] Law enforcement officers received information from a private citizen that marijuana was being grown in a field on the defendant's property.[107] Despite clear signs prohibiting trespassing, the officers subsequently searched the field, seized evidence, and arrested the defendant on charges of criminal possession of marijuana.[108] The court ultimately held that *Oliver* "d[id] not adequately protect [the] fundamental constitutional rights" of New York citizens.[109]

The majority cited three main reasons for its decision.[110] First, the court explained that the rule of *Oliver* is contrary to New York decisions regarding searches and seizures.[111] The court wrote that since *Katz*, New York courts have consistently applied the rule that the Fourth Amendment "protects a person's privacy, not particular places"[112] and to adopt the rule of *Oliver* would undermine New York law.[113]

Second, the court found *Oliver* to be in direct conflict with "the right to be let alone"[114]—a core New York principle.[115] This right, the court explained, is rooted in New York search and seizure jurisprudence, and is similarly recognized by the legislature through the enactment of statutes.[116] Specifically, the court found that New York's criminal trespass statute[117] represented a societal recognition

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[104] *Id.* at 1338.
[105] *Id.*
[106] *Id.* at 1330-31.
[107] *Scott*, 593 N.E.2d at 1330-31.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 1337.
[111] *Id.* at 1335.
[112] *Scott*, 593 N.E.2d at 1334.
[113] *Id.* at 1336.
[114] *Id.* at 1335 (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).
[115] *Id.*
[116] *Id.*
[117] *See* N.Y. PENAL LAW § 140.10(a) (McKinney 2012) ("A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property (a) which is fenced or otherwise enclosed in a manner designed to ex-

of the right to exclude the public as "one of the most treasured strands in [a New York] owner's bundle of property rights."[118]

Finally, the court took issue with the Supreme Court's proposition that "the very conduct discovered by the government's illegal trespass (i.e., growing marijuana) could be considered as a relevant factor in determining whether the police had violated defendant's rights."[119] Agreeing with Justice Marshall's *Oliver* dissent, the court reasoned that Fourth Amendment protections should not turn on the legality of the activities sought to be kept private.[120] The court found "[s]uch after-the-fact-justification"[121] to be incompatible with New York's longstanding recognition of fundamental fairness in criminal justice.[122]

As an additional line of reasoning, the court found that *Oliver* was incompatible with New York law because *Oliver* "presupposes the ideal of a conforming society,"[123] where law-abiding citizens should have nothing to hide.[124] According to *Scott*, this rationale seemed contrary to New York's tradition of tolerating "the unconventional . . . bizarre or even offensive."[125] The court concluded that for these reasons, it was compelled to reject *Oliver*, and turn instead to the analogous provision of the New York State Constitution to adequately safeguard its citizens' rights.[126]

B. New York Curtilage

During the years since *Scott*, New York courts consistently have invoked the curtilage concept to exclude evidence seized from

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clude intruders.").

[118] *Scott*, 593 N.E.2d at 1335-36 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)). The court wrote that it would not ignore the police's commission of both civil and criminal trespass when they searched the defendants' properties. *Id.* at 1336. Quoting Justice Brandeis, the court explained, " 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law.' " *Id.* (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)).

[119] *Id.* at 1336.

[120] *Id*. at 1333-34 n.2, 1336. For a discussion of Justice Marshall's dissent in *Oliver*, see *supra* text accompanying notes 77-87.

[121] *Scott*, 593 N.E.2d at 1336.

[122] *Id.*

[123] *Id.* at 1337.

[124] *Id.*

[125] *Id.*

[126] *Scott*, 593 N.E.2d at 1338.

non-rural home yards. In *People v. Saurini*,[127] the Appellate Division for the Fourth Judicial Department held that the warrantless seizure of marijuana plants growing in flower beds immediately behind the defendant's home could not be justified by either the plain view or open fields doctrines because the police officers made their observations from an adjoining neighbor's rear yard.[128]

In *People v. Vernon B.*,[129] the Supreme Court, Kings County, held that the defendant's unkempt rear yard was within the curtilage of his Brooklyn home, and thus fell under the home's umbrella of Fourth Amendment protection.[130] In *Vernon B.*, a police officer allegedly observed the defendant toss a black bag out of his bedroom window.[131] The officer then jumped over the defendant's fence to retrieve the discarded bag containing a loaded handgun.[132] The defendant was charged with criminal possession of a weapon and moved to suppress the evidence on the grounds that the officer's warrantless search and seizure were unlawful.[133]

The court conducted the four-factor *Dunn* analysis and held that the yard, although overgrown and seemingly neglected, was within the curtilage because the resident intended that it be treated as part of the home.[134] The yard was immediately next to the home, extended behind the home for only twenty feet, and was enclosed by a fence.[135] Although the fence was chain-linked and did not shield the yard from public view, the court found that the resident took steps to protect the yard from public view because it was overgrown with vegetation.[136] The court stated that the record shed no light as to the nature of use factor, but deduced from the overgrowth of vegetation

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[127] 607 N.Y.S.2d 518 (App. Div. 4th Dep't 1994).

[128] *Id*. at 519. *But see Commonwealth v. Busfield*, 363 A.2d 1227, 1229 (Pa. Super. Ct. 1976). Police obtained permission from the defendant's neighbor to look into defendant's kitchen window from the neighbor's adjoining property. *Id.* The court admitted the officer's observations as evidence and held that "even though a [sheer] curtain was drawn across the window," the defendant "exposed his transactions to the public." *Id.*

[129] 954 N.Y.S.2d 835, 838 (Crim. Ct. Kings County 2012).

[130] *Vernon B.*, 954 N.Y.S.2d at 838 (quoting *Dunn*, 480 U.S. at 300-01). The court ultimately excused the officer's warrantless search and seizure because it found that the Fourth Amendment exigent circumstance exception applied. *Id.* at 841.

[131] *Id*. at 837.

[132] *Id*.

[133] *Id*. at 836.

[134] *Vernon B.*, 954 N.Y.S.2d at 838.

[135] *Id.*

[136] *Id*.

that it must have been neglected.[137] Nevertheless, the court found that the vegetation could be viewed as a "step taken by the resident to protect the yard from observation."[138] The court concluded, rather dubiously, that the yard qualified as curtilage.[139]

The court also went on to say that the officer's unlicensed entry onto the defendant's property was "consistent with New York's statutory definition of trespass."[140] Therefore, although the officer made his observation from a lawful vantage point (i.e., outside the curtilage), he "trespass[ed] onto a constitutionally protected area"[141] when he jumped over the fence into the defendant's rear yard.[142]

New York courts in cases such as *Theodore* and *Vernon B.* consistently have endorsed the curtilage doctrine to include urban yards within the home's protected core.

VI. CONCLUSION

As the Supreme Court has revisited the Fourth Amendment over time, it has expanded the basic concepts of home protection to embrace various American developments such as multi-acre homesteads and urban home-sites. Today, the home as a concept is defined expansively for purposes of Fourth Amendment jurisprudence and includes all of the various settings within which Americans live.

New York's protection of the home against unreasonable searches and seizures exceeds the protection available under the Federal Constitution. Illustrative in this regard, New York citizens who live in the wide-open country with enormous tracts of land remain entitled to a cognizable level of home-invasion protection, so long as the landowner has made efforts to maintain privacy. Citizens who live in densely populated urban settings also have curtilage rights, as demonstrated in *People v. Theodore.*[143] It is understandable and quite predictable that a court such as the Second Department, responsible for one of the most densely populated urban environments in the nation, would not hesitate to defer to the expectation of privacy in the

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137 *Id*.
138 *Id*.
139 *Vernon B.*, 954 N.Y.S.2d at 838.
140 *Id.* at 838-39.
141 *Id*. at 839.
142 *Id*.
143 980 N.Y.S.2d 148 (App. Div. 2d Dep't 2014).

backyard typical for that particular neighborhood.

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