2019 HOUSE JUDICIARY

HB 1290

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1290
2/6/2019
32493

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek By Elaine Stromme

Explanation or reason for introduction of bill/resolution:

Relating to prohibiting entry onto private land without permission.

Minutes: Attachment: 1 - 8

Vice Chairman Karls: Opened the hearing on HB 1290.

Representative Simons: Introduced the bill. (Attachments #1) Handed out a lot of them together. Went over the handouts and the bill. (Stopped 16:00)

Rep. Rick Becker: The exclusions to this is a person's driveway or roadway.

Representative Simons: Anything that can be seen is buildings we are talking about here. A group called Protect the Harvest are behind this bill.

Vice Chairman Karls: Do you need to stipulate buildings?

Representative Simons: I like the word land. If I am in a ravine no one has a right to be on that land, without permission, whether there is a building there or not. If they can see it from the road or a plane that is fine. What is the fourth amendment? To roam around on someone's land without permission is called criminal trespass without a search warrant.

Rep. Jones: We just had a bill with drones. I found out I do not own the air. There isn't much on our land that can't be seen unless it is in a building.

Rep. Magrum: I like your bill. I don't like, Line 13 you have probable cause? That is too simple to use.

Representative Simons: We were matching the Century Code. Anything over fifty percent is probable cause. My intention is not to limit the law enforcement from anything. My intention is to give a fourth amendment right to agricultural people. Which they do not have right now.

Rep. Hanson: Probable cause is not 51%, Probable cause is reasonable belief.

Representative Simons: Legislative counsel just gave me that definition.

Vice Chair Carls: Any more support?

Pete Hamond: ND Farm Bureau: We support this bill.

Rep. Jones: How much are you hearing it from your members about their concerns along these lines?

Pete Hamond: It is a legitimate concern.

Opposition:

Aaron Burst: Association of Counties and States Attorney's: Everything is private land except the streets, public buildings, the Capitol. I think this bill is too broad. The Supreme Court has been giving us direction for years on the open concept. What about the drive ways? That would be private land. They would not be able to serve due process on these ag people because they are law enforcement officers and they cannot go onto private land. So we object this bill.

Rep. Vetter: On line 12 could you change the language to:" A law enforcement officer may search", would that work? Instead of having (this land) could you change that?

Aaron Burst: That is why we left it at the courts discretion on a case by case basis. You can define outbuildings for ag. But you can't put in statute what the court has to determine.

Rep. Vetter: Officer may not search out buildings on the bill or is that still a problem?

Aaron Burst: There might be a way to address this. I can try to help you. We will have to disagree on keeping people off private land.

Rep. Bob Paulson: I am confused.

Aaron Burst: The current law would say there is no expectation of privacy. It does not say you cannot change the expectation of privacy.

Rep. Jones: The bill is suggesting farm and ranch land and out buildings. They are only saying receives permission from the owner.

Aaron Burst: There is something we can do.

Rep. Jones: We can fix that stuff as law makers.

Rep. Simon: If the sign on a road says no trespassing on private property, how do you serve a warrant right now?

Aaron Burst: That is relatively easy because there is an exception in the trespass law that it doesn't apply to law enforcement.

Representative Simons: There are certain places you can't go in the mall, like someone's office.

Aaron Burst: There is no expectation of privacy

Representative Simons: If that is the case is it not the same thing that it is reasonable if I found a deputy in my field without probably cause?

Dennis Roar, Was Chief of Police of Mandan for 21 years. The focus is primarily expectation of privacy. Open fields document I am familiar with. I can see this causing problems with law enforcement.

Chief Jason Ziegler, Chief of Police, Mandan: (Attachment 2)

Lynn Helms: North Dakota Industrial Commission, (NDIC): (Attachment 3)

Chairman K. Koppelman: We are caught up on law enforcement officers?

Lynn Helms: Yes

Representative Simons: With permission you have all the rights you want.

Chairman K. Koppelman: Visit with Mr. Burst and maybe help us with this bill.

Testimonies handed out: 4,5,6,7,8

Neutral:

Hearing closed.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1290
2/13/2019
32672

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek by Marjorie Conley

Explanation or reason for introduction of bill/resolution:

Relating to prohibiting entry onto private land without permission.

Minutes:

Chairman Koppelman: Opened the meeting on HB 1290.

Rep. Vetter: One of the issues they had was the wording of private land versus buildings.

Rep. Simons: It is not. It is all private land and what is reasonable cause on private land.

Rep. Vetter: The other part is the language of may not enter versus the language of search. Defining expectations of privacy.

Chairman Koppelman: Is there a desire to amend the bill? Are there any amendments prepared for the bill?

Rep. Roers Jones: Based on the testimony that we received and all the concerns on entering on private land and lack of having emergency law enforcement had a lot of concerns about their ability to deliver search warrants and other nonemergency reasons for entering on to property. I would move a Do Not Pass on the bill.

Rep. Hanson: Seconded motion.

Representative Simons: That is not true. The road going into a place is public property. They can drive to someone's home.

Chairman K. Koppelman: So is someone's driveway public property?

Representative Simons: They can walk into a location but they need reasonable cause to go behind without reasonable expectation.

Rep. Hanson: The Mandan Chief of Police testified it would restrict both welfare checks and investigation. Lynn Helms had concerns on the bill too.

Rep. McWilliams: Is this a legal opinion or is that simply a law enforcement opinion not based on the supreme court and other court cases? They can have an opinion that's wrong and it is not legally binding, in which case it is our job to research and educate them as to what the answer is.

Chairman K. Koppelman: Law enforcement are the people that do this every day.

Representative Simons: In regards to the oil fields that is not true. They can go on any property where they have leases and easements. You will hear more about this and what they are saying 60 ft. from your home you have no private property. 13 states have adopted similar language.

Chairman K. Koppelman: We did not have anyone else in favor of the bill.

Rep. Paur: I think we should withdraw the Do Not Pass and follow Rep. Vetter's suggestion that we amend it instead of entry unto private land, search private land.

Rep. Jones: We can vote down the Do Not Pass motion and put it back on the floor. We can get another vote.

Chairman K. Koppelman: Those are both options.

Rep. Becker: Those testimonies on well checks are erroneous and they have an intent behind them and you see it frequently to cause concerns what may or could possibly happen. Privacy in the home is clearly higher than the standards we are looking at here or what exits here, but they can still do wellness checks.

Rep. Roers Jones: I disagree with that wholeheartedly based on the plain language that is written in the bill in front of us, where it says not withstanding any other provision law enforcement officer may not enter private land unless the law enforcement receives permission from the landowner or lessee of the land. The only exceptions are probable cause of this if you have a search warrant or if you are responding to an emergency or accident or other threat to public safety.

Rep. Becker: I would resist the motion with the intent to amend and take a new look at it.

Chairman Koppelman: I am hearing resistance for the withdrawal of the motion and the second for Do Not Pass, so the committee has the opportunity to pass the motion for the Do Not Pass, then it would leave the committee with that recommendation, also has the option to defeat the motion for the Do Not Pass in which case the bill would be back before us and other motions could be made, be they motions for amendments or others.

Voice Vote taken Yes 4 No 10 Absent 0

Chairman Koppelman: Motion fails. We have the bill still before us.

Rep. Jones: On line 10, instead of may not enter private land unless law enforcement officer receives permission. I made a line and said strike the private land and make it so it is farm and ranch land and buildings.

Rep. Koppelman: So then it would only apply to buildings on a farm or a ranch and not other kinds of property?

Representative Simons: We are talking about the 4th amendment here. So what if you are not a farmer or rancher but own land out in the country?

Rep. Jones: I am not sure about the term open fields doctrine. Maybe the thing to do if that's wording that is referenced in his materials and his sources maybe we could say buildings and lands subject to the open fields doctrine.

Chairman K. Koppelman: It might be clearer to say buildings or farm and ranch land.

Rep. Vetter: I would like to add instead of may not enter, add may not search. It should be on number 10 and number 12.

Rep. McWilliams: Do we have a clear meaning of what is a farm and what is a ranch?

Chairman Koppelman: Am I hearing that the wording should be in your amendment may not search buildings or land?

Rep. Roers Jones: I understand the limitation to searching inside of a building, but I think we are going to run into problems if we limit searches of open land. For those who don't understand, the open field doctrine was a US Supreme Court decision that basically said that if it is out in the open and can be viewed by the naked eye, then that is not considered private. Open field doesn't constitute a search or seizure under the 4th amendment because there is no expectation of privacy in something that is not enclosed.

Representative Simons: I provided the information from the US Supreme Court.

Rep. Buffalo: I grew up in a rural area and I understand the concerns. I am concerned when people are being held captive in an outbuilding?

Representative Simons: If I have evidence it is due process and this protects everyone.

Rep. McWilliams: Currently they would have to have a search warrant.

Chairman K. Koppelman: What are the wishes of the committee?

Rep. Vetter: I move the amendment line 10 would say search instead of enter and may not search buildings or private land unless.

Rep. Paulson: Seconded motion.

Chairman Koppelman: Discussion?

Voice Vote carried.

Hearing closed.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1290
2/13/2019
32712

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek by Marjorie Conley

Explanation or reason for introduction of bill/resolution:

Relating to prohibiting entry onto private land without permission.

Minutes:

Chairman Koppelman: Opened the meeting on HB 1290.
We had a Do Not Pass motion which failed 4 to 10. We had an amendment to the bill reads line 9 Notwithstanding any other provision of law and subject to subsection 3 a law enforcement officer may not search buildings or private land unless the law enforcement officer receives permission from the land owner or a lessee of the land.

Representative Simons: Discussed location of private property**.** I do not want special rights in this bill at all.

Chairman Koppelman: We have the amended bill before us. What are the wishes of the committee?

Rep. Magrum: Motion for Do Pass as amended.

Rep. Jones: Seconded motion for Do Pass as amended on HB 1290.

Chairman Koppelman: Discussion?

Roll Call Vote Yes 9 No 4 Absent 1

Rep. Jones is the Carrier.

Hearing closed.

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Adopted by the House Judiciary Committee

February 13, 2019

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1290

Page 1, line 10, replace "enter" with "search buildings or"

Renumber accordingly

Date: 2/13/2019
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1290

House Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☐ Do Pass ☒ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Roers Jones Seconded By Rep. Hanson

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman		x	Rep. Buffalo	x	
Vice Chairman Karls	x		Rep. Karla Rose Hanson	x	
Rep. Becker		x			
Rep. Terry Jones		x			
Rep. Magrum		x			
Rep. McWilliams		x			
Rep. B. Paulson		x			
Rep. Paur		x			
Rep. Roers Jones	x				
Rep. Satrom		x			
Rep. Simons		x			
Rep. Vetter		x			

Total (Yes) 4 No 10

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:
Failed.

Date: 2/13/2019
Roll Call Vote #: 2

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1290

House Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: Page 1, line 10, replace "enter" with "search buildings or"

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Vetter Seconded By Rep. Paulson

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman			Rep. Buffalo		
Vice Chairman Karls			Rep. Karla Rose Hanson		
Rep. Becker					
Rep. Terry Jones					
Rep. Magrum					
Rep. McWilliams					
Rep. B. Paulson					
Rep. Paur					
Rep. Roers Jones					
Rep. Satrom					
Rep. Simons					
Rep. Vetter					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:
Voice Vote Carried.

Date: 2/13/2019
Roll Call Vote # 3

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
HB 1290

House **Judiciary** Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Magrum Seconded By Rep.Jones

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman	x		Rep. Buffalo		x
Vice Chairman Karls	x		Rep. Karla Rose Hanson		x
Rep. Becker	A				
Rep. Terry Jones	x				
Rep. Magrum	x				
Rep. McWilliams	x				
Rep. B. Paulson	x				
Rep. Paur	x				
Rep. Roers Jones		x			
Rep. Satrom		x			
Rep. Simons	x				
Rep. Vetter	x				

Total (Yes) 9 No 4

Absent 1

Floor Assignment Rep. Jones

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1290: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). HB 1290 was placed on the Sixth order on the calendar.

Page 1, line 10, replace "enter" with "search buildings or"

Renumber accordingly

2019 SENATE JUDICIARY

HB 1290

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1290
3/26/2019
#34230 (1:15:37)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel / Marne Johnson

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to create and enact a new section to chapter 29.29 of the North Dakota century code relating to prohibiting entry onto private land without permission.

Minutes: 7 Attachments

Chair Larson opens the hearing on HB 1290.

(1:05-8:45) Luke Simons, District 36 Representative, testifies in favor (see attachment #1)

Vice Chairman Dwyer: You said you want probable cause, but the bill also requires a search warrant?

Representative Simons: That's not the way I read that. It says 'with' those things. They can enter with probable cause, or a search warrant. That's the way it is. All we're asking for is the same rights. If a police officer walks into a gas stations and sees illegal activity, he does not need a search warrant in a privately run business. However, he does need a search warrant to go into the janitor's room or office, because that's not a public place.

Vice Chairman Dwyer: I haven't heard any rumors in this bill. I don't see an 'or' after the 'a.' In paragraph 3, it appears that it would have to be probable cause and a search warrant, or if you don't have a search warrant, it has to be an emergency.

Representative Simons: If it reads that way, I would want you to change that.

Senator Bakke: In the scenario you gave us about the vet going out to check on the horses, does that not qualify as probable cause?

Representative Simons: I could accuse you of something, as a foster parent, and your social workers or the police have the right to ask you something, but they wouldn't have the right to search your home. They would have to have permission or a search warrant. I could accuse anyone of anything, but that's not probable cause unless they see it. 60 feet from

your home is curtilage, after 60 feet, they do not need a search warrant. In your testimony packets, I have two supreme court cases that came before North Dakota where the supreme court ruled what was open fields doctrine and for the most part, all law enforcement is doing this. However, I know dozens of cases that they do this.

Senator Myrdal: Let's do a scenario. I have an old bachelor neighbor who's not doing well, we haven't seen him in three weeks. I call the cops, I'm concerned. They go to his home and look in the windows. Does this affect that? A different scenario, my sister in law calls the cops and says Janne's horses are in the barn and they're starving. I would call that hearsay, and the first one probable cause. How does your legislation affect either of those?

Representative Simons: I would say we need to handle it the same way it is done in town. Your situation would not happen anyway, because your house is protected under the Fourth Amendment. Let's say that my shop in town, same scenario, let's say I didn't have a wife, and you said Luke didn't come home yesterday, he's my neighbor. I wonder if he's not in the shop in town. It would be the same thing at that point.

Senator Luick: What did you call that 60 feet out from the house?

Representative Simons: That is called curtilage. I did provide you a definition of open fields doctrine and curtilage as well. Those farmsteads, 60 feet from those homes are not protected. If it was a construction company in town, every outbuilding would be protected under Effects, under the Fourth Amendment.

Vice Chairman Dwyer: Is curtilage an established legal doctrine?

Representative Simons: My attorney told me that it was.

(16:20) Terry Jones, District 4 Representative, testifies in favor

Representative Jones: To respond to Senator Myrdal's question, under the bill, subsection c of 3, it says or a threat of public safety. If they're called upon to check on someone to see if they are safe, that would be covered under that 'or' provision. Because it says a search warrant is needed, or responding to an emergency situation, an accident or other threat to public safety. That would take care of the person checking on somebody's safety. To answer your question about the horses in the barn. If somebody is trying to cause problems, it's appropriate for them to have to get a search warrant before they go out there, maybe that will reduce some of the nonsense calls that landowners are getting on their livestock. I support this bill. Under the way it's written, everything that needs to be down can be done.

Senator Myrdal: The House changed line 10, under subsection 2, from 'not enter' to 'not search.' Do you recall the reasoning for that?

Representative Jones: We felt it was appropriate to look into a building, to glance in, but not to do a deep search.

(18:55) Caleb Melhoff, rancher, testifies in favor

Caleb Melhoff: As a rancher, my buildings and my land are my place of business. My outbuildings are 8 miles away from my house, they are not covered under the current law, even though they are my place of business. As mentioned before, a police officer can enter a gas station, but he can't go into the office. Basically what this does is expand where a reasonable expectation of privacy is currently acknowledged. This says case law doesn't recognize ranches as private businesses but it should, because that's exactly what they are. It covers that exception in flawed case law. To answer some questions, it changed from 'enter' to 'search' so government officials could check water, to check on people. Search is more specific. The definitions of probable cause would all still apply. If there is an extra 'or' needed in one of those, then that would be in the heart of the law to change that.

(21:05) Pete Hanebutt, North Dakota Farm Bureau, testifies in favor

Pete Hanebutt: It's a simple private property issue for us. If my home is my castle, and if my detached garage is part of my castle, why is my detached pole barn not part of castle? The farmstead should have the same assumption of private property as anybody's house in town. My farmstead and the parts thereof should be given that same respect of private property.

Senator Luick: Do you think that the buildings 4-10 miles away should have the same curtesy in this law?

Pete Hanebutt: I doubt that those buildings would be part of the farmstead. If you are right there on the farmstead and you have separate buildings way far away, of course if someone has probable cause and they smell meth being cooked, that's a different thing. This is about the private property of the owner and their part of life right there.

Senator Luick: What would happen in the case the previous testifier laid out, where their actual functioning buildings for their business are located far away. Do you think that these protections should adhere to those buildings as well?

Pete Hanebutt: We know that we have a lot of farmers with shops at different locations. I would be in favor of protecting their private property at that shop if it's a distant location. It's still their private property, you drive up their lane, you're invading their private property. Even if the barn is not at their domicile, in my view.

Vice Chairman Dwyer: You're talking about the buildings, but you didn't say anything about the land. What's your position on that part?

Pete Hanebutt: We have a different bill to talk about invading people's private property on land. Our stance is pretty clear, all land should be considered posted, and you shouldn't go onto it. This might be parsing with law enforcement; I hate to take a hypothetical question as a non-lawyer.

(24:40) Julie Ellingson, North Dakota Stockmen's Association, testifies in favor

Julie Ellingson: I offer somewhat conflicted testimony. We have a unique organizational structure. We have a membership based, dues based organization. We also have a division which is non-private, where we have statutory responsibilities and administer the brand

inspection recording program for the state and have four law enforcement officers as part of that team. Of course our membership organization founded in the principles of private property rights and supports efforts to fortify those protections for individual owners. We look to this bill in that spirit, that that is trying to be what it captures. Also recognizing as you can tell by this room that there's concerns amongst law enforcement about the words. Capturing that to make sure they have the important tools to protect our safety and the public are in place. We offer our commitment in helping the committee.

Senator Myrdal: How does that effect your brand inspectors? What authority do they have in comparison to a law enforcement officer?

Julie Ellingson: We have a robust brand inspection team. Many of those members are simply inspectors. We have four licensed peace officers, charged with the task of investigating crimes and enforcing livestock related laws. In some cases, that might be stolen animals or things of that nature, so this impacts them as well. Not our entire team would have that ability; only about four of almost 200 across the entire state.

(27:35) Lad Erickson, Mclean County State's Attorney, testifies in opposition

Erickson: I would like to correct some issues. All structures, whether they are eight miles from a farm or eight feet, have to be searched by consent, an emergency, or a search warrant. There are no exceptions to that. You have protection if you have your barn a mile away, or a shed or a tree house, the court has a test on open fields. To give you some background, one of the things I would caution the committee about is getting into search and seizure in legislation. The Fourth Amendment has 54 words in it. It is the most litigious amendment of the Bill of Rights. It has volumes of law books, it's based on reasonableness and expectations of privacy. Every year the North Dakota supreme court and courts throughout the land are dealing with Fourth Amendment issues on cell phones, GPS trackers, and everything. When you fix things in statutes that don't have reasonableness and expectations of privacy, fungibility terms that let you make sure you don't have absurd results, you can get those absurd results. The precipice of this bill seems to be animal cases. That is not all that is impacted by it. There are a number of concerns with broad areas that will be impacted. I'll start with animal cases and briefly talk about how that works with a deputy. You get tips; a lot of times some of those are anonymous, some are unfounded, some are founded but want to remain anonymous. The deputies have to follow up on a tip. For example, a neighbor say some cattle are starving. A deputy drives into the farmyard and notices that the cattle are eating trees. If you look at the bill, they are entering to follow up on a tip, they aren't searching, but the way this is defined, once you look and see some trees that the cows are eating, you take a picture, now you are searching. You're at this point determining if there is validity to a tip. Then the deputy can look around the farmyard and see that a cow is starved, it got hooked in some wire and lay there until it died. You can see the living animals are emaciated and ready to die. From just driving into the farm yard, that's where you then determine that you have a valid tip or not. The second example is a Fish and Wildlife Service fencer was out fixing fence and noticed a horse that had a chain growing into its nose from a halter that had been on there too long. A deputy drives into the farmyard and see this horse with a chain growing into its neck. He's not searching, he's just driving into the yard. Takes a picture of the horse, and gets a close-up and the chain is growing into the nose. Then you start to get to search and seizure stuff on how you deal with it. That initial follow-up on a tip

is what the bill is meant to avoid. I think that's terrible policy, because our animal code seizure stuff is in title 36. We have serious implementation problems with that chapter, it has to be avoided a lot of times when we seize animals. Since the felony law we've had one that has a bunch of functional problems. The precipice of that is concern that animal rights groups will be empowering law enforcement to seize people's animals. I can't think of anything more empowering than if deputies cannot follow up on calls to check out information by driving in a farmstead. I think that will cause serious problems. The implications of this bill, when you talk about open fields, it started in the 1920s.

Senator Luick: What part of the bill are you referring to, that the deputy can't drive into the yard?

Erickson: 'Law enforcement may not enter private land without permission.' The section line is private land. A farm yard is private land. Open fields doctrine started in the 20s in Appalachia, when revenue officers were looking for stills. Then in 1970, some marijuana growers in Kentucky. It further developed the open fields doctrine. In North Dakota, our two leading cases on open fields are Game and Fish cases. One in 1984, there was a duck killing operation, where Wardens sat on a hill a half mile away and watched over limit duck hunting going on. They were stashing the ducks. That was an open fields case, once they approached into the camp, there was consent to search. The challenge came, 'did you originally have permission to stand a half mile away and watch with binoculars?' In 2010 the supreme court revisited a case where a farmer watched some hunters shoot a buck in an illegal area. He gave some information to a deputy, the deputy drove into the farmyard of the people who had shot the buck. They were standing around the pickup with the buck in it, having a beer when the deputy rolled in. The challenge was that was open fields litigation, did the deputy have the right to just drive in the farmstead where this pickup was out in the open? The court reaffirmed you can drive in there; you're not searching any buildings. If that pickup driven to a garage or barn, then you would need a search warrant, under current law. The court tests are four factors. One, the proximity to the home. There's no law on distance, it's not 60 feet, it's not 600 feet, it's based because of the fungibility, the circumstances of the case. The courts look at the distance. The second factor is whether the area is included within the enclosure surrounded by the home. If you have a home that has a fence. The third factor is the nature and uses of the property. The fourth factor is steps taken by the resident to protect the area from observation. That's why all barns, all out buildings, all shops happen to be search warrant. They are already protected under the constitutional cases. You can't look in them from the outside.

Vice Chairman Dwyer: Representative Simons says you can go into a barn without a warrant, you are saying you can't.

Erickson: You can't. That is based on case law interpreting the Fourth Amendment. Absent an emergency, you cannot go in the barn without probably cause. There's ample case law in North Dakota on that.

Senator Myrdal: You were saying that's based in case law. Is it in century code?

Erickson: No it's not, and I would suggest it shouldn't be. The way you do Fourth Amendment litigation, it comes back to this reasonableness, is there an expectation of privacy, here's a

particular court case. If you fix this in statute, then you have to add in their ability to look at all circumstances. Pretty soon you're doing what the case law already does and if you fix without that, you can have some unintended consequences.

Senator Myrdal: I see the intent of the sponsor. It's an intent that's concerning. It's not in century code. As a constituent, if this happens to you, your only remedy is to go to court.

Erickson: I understand, but you would have to go to court either way. If you think that the police violated your rights, whether it's a statute or constitutional principles; the only way to enforce that is to go to court. Constitutional doctrines are traditionally court doctrines. I can't think of areas where the legislature deals with constitutional doctrines. I'm suggesting it's better handled there under the courts. This bill deals with things like missing persons and murder cases, things well beyond these animal searches. There was a lady that pled guilty to negligent homicide. She had a meth problem and she left her 4-month old infant by a slough. The police contact her; she has a vague understanding of where she left the child. That's an open field search, the Sheriff's department has to go. You don't have probable cause; you don't necessarily have an emergency for a specific track of land. You've got a massive amount of land you have to search rapidly. That's why the court test makes sense. This is an outline of the Fort Berthold Indian reservation. Each one of those oil wells has roads to them. As you get close to the lake, it's very much like the badlands. There's very few residences in here. The night Olivia Lone Bear disappeared, a massive search is started, all law enforcement is searching, including deputies on horses. Numerous people are driving on these oil roads looking for her. That goes on for months, hundreds of thousands of acres. If they get to an out building and an oil well, and there is a building there, they need a search warrant to search in there. The way the bill is written, the act of driving in on that oil road to look for a murder scene violates the bill. It doesn't violate the open fields doctrine. If they would run across a murder scene there, you are statutorily say that that is unreasonable under this bill, when the deputies are searching. That would exclude the evidence. It's the thing that is implicated when you are trying to do search and seizure things in statutes. It has all sorts of unintended consequences, the policy is better dealing with the court tests, because the premises of the bill are not accurate. All buildings are subject to probable cause search warrants. No matter where they are. That premise isn't needed, but what you are implicating is missing persons and other types of searches.

Senator Luick: First, subsection 3, line 16. The first part of that section says, 'that law enforcement officer may enter private property without permission if responding to an emergency situation, accident, or other threat to public safety.' Wouldn't that take care of your concerns about these facilities if you had an emergency you are responding to?

Erickson: In some circumstances you could. But Olivia Lone Bear, that went on for months, there's not an emergency at the time. You are just searching all property. There are times when it could be. Like that infant, the court might rule, you had an emergency, but not for a particular track of land, because you don't know where the lady left her child. It will depend on the facts, that's why I think the open fields doctrine and the courts is much better.

Senator Luick: How does this relate to laws that are being upheld within an urban area? How do property rights differ out on the farmstead versus garages or buildings within a political subdivision?

Erickson: That's complex question, because they don't differ. Constitutional rights apply across the board. There are circumstances that happen in urban areas that are different than in rural areas. One thing is houses that are stacked next to each other don't have broad curtilages. They might only have 3 feet from the lot line, whereas in a rural area, you are looking at a house that probably doesn't have neighbors for a couple of miles. The court analysis on privacy next to the home will be different. Officers in town deal with the same constitutional questions. You get an anonymous call that someone is beating their wife. That may or may not have credibility, but it does require an officer response. It's not probable cause when you walk onto that yard. You are following up on a potential call to see if there is probably cause or an emergency happening. Then you start implicating this you may not enter without probable cause. An anonymous tip under court is not enough to establish probable cause. This has urban implications like that, how do you check out a call in an urban area? That's where you run into these unintended consequences when you focus on the animal cases.

Vice Chairman Dwyer: If a law enforcement officer said to a vet, we can go into this barn, that would be wrong.

Erickson: That would be wrong and suppressed in a minute.

Vice Chairman Dwyer: That's based on court precedent. I know a case where a police officer followed a lady into her garage and the supreme court ruled, what was the outcome of that?

Erickson: One of the cases was a report of a neighbor of a domestic dispute with broken glass and the officer responded to the trailer house. The lady was outside and the officer said, 'I would like to check out the noise.' She turned her back, the officer followed her, she opened the door for the officer, and the officer walked in behind her, later finding drugs in plain view. The supreme court suppressed it, because we require overt consent. They upheld that it was not a good search. You have to say to the officer, I agree. You can't give implicit consent, even though she held the door for him. Where the litigation comes in is, did the person who granted consent to search have authority to do it? One of the things in the bill, there was consent without permission from the landowner. Line 11 says without permission from the landowner or the lessee. You can't come in. Here's one of the red flags. I'm going to suggest to the committee that this bill isn't fixable. Officers are going to roll into a farmstead somewhere, and the live-in girlfriend is there, who is not the landowner, and she says go ahead, you can search. That will be suppressed under the bill. Under the supreme court, that was reasonable for the officer to rely on. They're not the landowner or the lease. We have a lot of case law where tenants who are co-tenants giving permission. The renter that gave the permission is not the one that gets charged with the drugs, because the renter did not give permission. If you just focus on landowners and lessees you get absurd results, because somebody a deputy relies on in good faith, like a spouse, that's not the landowner, not on the title. That would have to be severely amended to be addressed, or you'll have problems.

(50:25) Lynn Helms, Director of the North Dakota Industrial Commission, Department of Mineral Resources, testifies in opposition (see attachment #2)

Helms: We've consulted with the Attorney General's Office; our field inspectors do fall under the definition of law enforcement. What they do on the oil and gas sites falls under the definition of search. The ownership of that land and those facilities is extremely complex, sometimes the operator owns it, more often than not, they are there under an oil and gas lease. Sometimes they own the surface rights. Last year, we conducted 184,719 routine well and facility inspections. This bill would upend 35 years of jurisdiction of the Industrial Commission, the sources are cited in my testimony, which gave us jurisdiction to make unannounced inspections of these privately owned facilities. We go inside buildings, we look at what's inside of there, we hope there's no probable cause. We hope we don't find a violation, but we check them once a month, just looking for potential problems and violations. Should you find that you really need to pass this bill and you need to amend it, on the back page I have suggested an amendment that would take care of the regulator agencies, the natural resource agencies in that it would say they are exempted. The work that a public servant does working under the responsibilities and authorities of a regulatory agency would be exempted from these limitations on entry and search.

Vice Chairman Dwyer: Did you testify in the House on this bill?

Helms: I did, for the same reasons.

(53:) John Bradley, Executive Director of the North Dakota Wildlife Federation, testifies in opposition (see attachment #3 for his written testimony and that of Mike McEnroe, North Dakota Wildlife Society)

Bradley: Our major concern about HB 1290 is for the Game Warden, entry onto private land to do field checks on hunters. As the law is currently written, it would hamstring our Game Wardens' abilities to do field checks, ensure bag limits, and licenses.

(54:05-1:00:40) David Glatt, Environmental Health Section Chief, North Dakota Department of Health, testifies in opposition (see attachment #4)

(1:00:55) Bill Helphrey, North Dakota Bowhunter's Association, testifies in opposition

Helphrey: We must remember that when a bill becomes law, it pertains to all the citizens in the state, not just the landowners. Law enforcement's job is to serve and protect, they need to make patrols, drive behind warehouse buildings to see if something is going wrong. This would stop that. If they did drive back there and find something, can't use it as evidence, didn't ask the landowner first. Don't shackle these law enforcement people with that.

(1:02:00) Jesse Jahner, Cass County Sheriff, testifies in opposition

Sheriff Jahner: A majority of the testimony you heard in favor of the bill has to do with cattle, there's a lot of other law enforcement that would be affected if this went through. One thing that's been overlooked is the definition of 'search.' There are several definitions of 'search.' In general, it is trying to find something by looking or otherwise seeking carefully or thoroughly. In reading that definition and the way that it applies to this bill, if you read on line 10 where they made the change here. Line 9-10: 'notwithstanding any other provisions of law and subject to subsection 3, a law enforcement officer may not search buildings or private

land unless the law enforcement officer receives permission from the landowner or lessee.' In my interpretation of search, it would restrict us from doing several different law enforcement functions that we need. One of those is serving civil process papers. In order to serve civil process papers, we don't always know if someone resides at an address, a lot of times we enter onto property to determine if that person resides there. Technically, under the definition of search, that would be a search. In Cass County, we serve 10,000 civil papers a year, we would have to obtain search warrants to serve all those unless we made other arrangements. I don't know how that would be feasible. That is a duty of the sheriff, it would greatly impact our agency and other sheriffs who attempt to do that, in addition to arrest warrants. Oftentimes we will go onto properties and try to determine if they reside there. It would restrict our ability to execute those civil process papers, which is mandated by century code. It would limit us on knock and talks, where we follow up on investigations. If we need to follow up with an investigation, we go to a person's residence, we knock on their door to visit with them. According to the way this bill is written, on line 12, it says 'a law enforcement officer may only enter the private land without permission if you have the following,' which was probable cause. In that situation we wouldn't have those, those wouldn't apply. We would be operating under what's called reasonable suspicion, which is simply a hunch. Oftentimes we go onto a person's property to gather those items of reasonable suspicion so we can eventually get to probable cause to obtain a search warrant to further our investigation. We would not be able to do those things. Lastly, there was a question in reference to welfare checks. If Senator Dwyer and I were brothers and we talked on a regular basis and he hadn't heard from me, he asked if law enforcement could check on me. Our answer would be no we can't, because Senator Dwyer did not give us permission to go onto his land to check on his welfare. Exigency would not be obtained in that circumstance, because a period of time has gone by. We don't know if anything has happened, we're simply going there on a hunch. That reasonable suspicion to see if he was okay. We would not be able to conduct welfare checks. We do a number of those in Cass County, both in the city and out in the county. There are number of circumstances here that don't apply simply to cattle. There are a lot of other law enforcement functions that this affects.

Chair Larson: Would that impede being able to look for missing persons or suspected human trafficking?

Sheriff Jahner: Yes, it would. If we didn't know exactly where it was happening, we don't want to walk up a person's driveway or go up to their door to further investigate that. At that point we would be operating under reasonable suspicion, not probable cause, so we could not do that.

Senator Bakke: Please explain the process you have to go through to get a search warrant. If you do enter onto private property for this reasonable suspicion, would that invalidate anything you found when you get to court?

Sheriff Jahner: In order to obtain a search warrant, we would have to get up to the level of probable cause. That is a level of law enforcement being able to corroborate information that they have that is true and correct. Reasonable suspicion is underneath that, it's only a hunch. When you get reasonable suspicion, you follow up on those much like State's Attorney Erickson mentioned. You would get anonymous information, at that point its reasonable suspicion. When you follow up you then try to articulate facts and corroborate those facts. At

that point you would apply to get a search warrant. As to your second question, according to this bill it would invalidate, because we wouldn't have probable cause. We could be going there trying to establish probable cause.

Senator Bakke: About how long does it take to get a search warrant?

Sheriff Jahner: Once you have all the facts, you can get it fairly quickly in our jurisdiction. But that's going to be different from jurisdiction to jurisdiction based on judge availability and the amount of judges. For us, for the civil process papers, it would be very taxing to the court system.

(1:10:10-1:12:45) Robert Timian, Chief Game Warden of the North Dakota Game and Fish Department, testifies in opposition (see attachment #5)

Chief Timian: Before I start my testimony, the bill itself, it was changed to search, but it also includes not just buildings, but other places or private property.

Vice Chairman Dwyer: Is your understanding consistent with what Mr. Erickson stated? That you have to have probable cause?

Chief Timian: I have been personally conducting search warrants for over 30 years, I haven't known it any other way. If that buildings closed up and is not open to the public, you get permission or you get a warrant. That's been our standard.

(1:14:00-) Jon Patch, Director, Water Appropriation Division, North Dakota State Water Commission on behalf of Garland Erbele (see attachment #6)

Patch: Our agency is charged with managing the waters of the state, as such we enter onto private land hundreds if not thousands of times per year to do water right inspections, complete water course investigations, perform safety of dam inspections, conduct water level monitoring of our well network, monitor stream flow, investigations of construction drainage, complaints, and sovereign land management. Our agency staff is considered law enforcement officers, as we are carrying out our duties enforcing the water laws of the state. This would be a tremendous burden for us. We do as a normal practice try to notify the landowner when we are entering their property, but sometimes it's just not possible for the number that we do, and if we're in an area of the state where we didn't plan on going on property, but we're in the area, it would be very inefficient if we had to miss an opportunity and then come back at another time.

Further testimony with proposed amendments was given to the committee (see attachment #7)

Chair Larson: Closed the public hearing.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1290
3/27/2019
#34298 (27:35)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to provide for a legislative management study of search and seizure procedures.

Minutes: 1 Attachment

Chair Larson begins discussion on HB 1290.

Senator Myrdal: There are some clarifications that I need. Section 1, talks about the definition of law enforcement officer. Please explain.

Chris Joseph, Legislative Council, neutral party

Joseph: A law enforcement officer as defined under 12.1-01-04 is a public servant or state employee or an employee of a public subdivision that has authority to do either investigatory research or arrest crimes. It would be anyone in a police uniform.

Chair Larson: We had a letter from child enforcement. They wouldn't necessarily be in a uniform.

Joseph: Correct. For example, game and fish. I would say child support would also be included since they do enforce laws in statute. It's any police or peace officer.

Vice Chairman Dwyer: The Department of Mineral Resources inspect 200,000 wells a year, but I don't believe they're in uniform.

Joseph: Correct, I do not believe they would fall under the definition of a law enforcement officer.

Vice Chairman Dwyer: According to them they do because they do these inspections under that authority. It says a state employee doing investigations, so it doesn't have to be in uniform.

Joseph: Correct. However, based on case law, I would say they don't fall under the definition, but if that's the concern, we can always add a subdivision d as an exception. I wouldn't count them as a law enforcement officer if I was a judge, but I'm not.

Senator Myrdal: In subsection 2 of section 1, the House changed may not enter to may not search. Then subsection 3 says may enter. Shouldn't that have search in it as well? What is the legal definition for enter versus search?

Joseph: The difference is the intent. I would agree with you and add search on line 12 to keep it uniform. Within 4th amendment jurisprudence, what is protected is what reasonable privacy which has been defined in the supreme court as being anything outside the curtilage of the home. Outside the curtilage is anything beyond the fence and would include your shed, barn, outhouse, but any open fields are not protected. As written right now, first you have to be in violation of subsection 2. Then the exceptions in subsection 3 come into play. I would change that to search.

Chair Larson: We had many people testify in opposition because they are concerned about being able to carry out the duties of their job because of the way this is written. Ladd Erickson said you'd need consent even for an emergency. They're worried about search warrants. They were talking about open fields doctrines. Lynn Helms worried about being able to regulate the oil for spills and those kinds of things, to just be able to go onto land and check out the oil pipelines. Game wardens were concerned about monitoring and inspecting for that. Bow hunters didn't like it and felt that will be changing what we're currently doing. They're worried about being able to serve civil process papers and knock and talks for follow-ups in investigations. Law enforcement must be able to cooperate with all of these other laws. State Water Commission was worried about being able to even manage water and water flow locations. There were a lot of people that were concerned about the implications of this bill. Vice Chairman Dwyer was thinking about turning this into a potential study to get a better handle on it since there are so many people that are concerned they won't be able to do their jobs.

Joseph: Fourth amendment jurisprudence is one of my favorites. Those concerns are valid; however, I think they're slightly extreme. The open fields doctrine is an exception to the warrant requirement. It means that anything that's beyond the curtilage is open for search. If I'm a law enforcement officer, drive down a highway and smell marijuana, I can go search an open field. This bill only prohibits search, not knocking on the door or serving papers, only search. The only part of this bill that I see causing a problem for those entities would be the entering private land. That should be changed to may search if those exceptions are met. To lighten it more on line 13, you can downgrade probable cause down to reasonable suspicion. That's a lower threshold for officers. Any of the scenarios mentioned I don't see having an issue with actually searching the property. Subsection 4 says if you find evidence of illegal activity, you can't use it if you violate it. It's not saying you can't go sample water and leave.

Chair Larson: You're brilliant, and not everyone is. Just the reading of this has a lot of people concerned that it will prohibit what they can do.

(10:20) Senator Bakke: There was an amendment that Lynn Helms brought, and I think it may address some of the concerns that Vice Chairman Dwyer had. Is that something that needs to be added?

Joseph: I would simplify it a little more and maybe cover all agencies, but we can certainly make that a subdivision d and protect any state agency employees and political subdivision employees. We can say as long as they're performing regulatory duties, they are exempt.

Senator Bakke: There was concern that if they were to approach a barn and see an animal that was in distress, they couldn't enter the barn to assist the animal. How does that all work?

Joseph: In that case, there's an exemption for emergencies, subdivision c on line 16. Besides the open field doctrine, you also have things such as the plain view doctrine. In this case, if I'm standing on the street, and I see some type of violation of law in plain sight, I'm allowed to go and pursue that.

Senator Bakke: so this doesn't prevent them from doing that.

Joseph: Correct, in that scenario.

Chair Larson: Along with that, they were asking about a situation where someone hasn't seen a relative and asks law enforcement to check on them. That's not necessarily an emergency.

Joseph: We have community welfare checks, and that would not be impacted by this. Also, if you lowered the standard on line 13 to reasonable suspicion, that would help. I would still consider that under subsection c in responding to a threat to public safety. Public safety can me for just the individual as well.

Vice Chairman Dwyer: A police officer follows a lady into her garage, and the court will determine it one way based on the circumstances and another way based on other circumstances. The jurisprudence on the fourth amendment, just like the first amendment, is vast. One of the worries is that now the courts will try to interpret what this means in the context of the constitution. It could alter the North Dakota case law which is kind of established with all the doctrines you've mentioned. It's the same with first amendment freedom of speech. We can pass law that says this is what you can do, but if the court determines that that's in violation of the first amendment, they're going to strike it down. Case law isn't overnight. We don't get the next 100 cases in the next year; we get them over 10 years. I'm very reluctant to go down this road.

Joseph: You're correct. I don't know how an individual judge will interpret the law. It can be different even among the districts in ND. I'm just going based off of how it reads as of right now and what I believe the legislative intent of it is.

Senator Luick: We had a situation where an individual dropped off her baby out by a slew and couldn't find it. The searches were going on, and the emergency situations would apply here, but the state's attorney was saying after a while, the emergency situation goes away even though you're still searching for the baby. Is that a concerning factor?

Chair Larson: They also didn't know where the exact location was.

Joseph: That's a valid concern. Knowing that factor, maybe emergency should be defined as a 72 or 48-hour period. If an infant is missing and has been gone for more than 5-6 days, most likely the infant if left alone or during winter, will no longer be alive and no longer an emergency.

Senator Luick: After the words "emergency situation", we could add "or continuance of such" to that verbiage there.

Joseph: I would make a subsection 5 and say, "as used in this section, emergency situation means a period for which" then something.

Vice Chairman Dwyer: This last discussion illuminates my concern. We have to take every word and further refine it.

Senator Bakke: Has there been a lot of problems and concerns about this chapter of the Century code to your knowledge?

Joseph: That would be a question for the sponsor of this bill. I don't know any specific situations or the reason behind the bill. Maybe I do, but I couldn't disclose it here.

Chair Larson: Are you aware of any case law that's occurred because of this?

Joseph: No, not recent case law regarding this issue.

Senator Myrdal: We're talking about reasonable right to privacy protection, and it relates to mostly outbuildings, farms and ranches. Is there anywhere else in the Century Code today that that reasonable expectation of privacy is clearly stated?

Joseph: not clearly stated per say. We do have laws against criminal trespass, disorderly conduct and things like that, but as far as actual privacy, there's not. There's nothing for reasonable expectation of privacy as far as searches of police go.

Vice Chairman Dwyer: Jurisprudence is very clear; you can't enter a building without a search warrant.

Joseph: Unless one of the exceptions are met.

Chair Larson: With or without this legislation you mean?

Joseph: Jurisprudence right now regarding open fields doctrine says that when it comes to the curtilage of the home, with anything you have a reasonable expectation of privacy for, triggers the fourth amendment. Because you have reasonable expectation of privacy regarding vast acres of open field or land, the fourth amendment is not triggered. This bill in essence would trigger open fields protections by the fourth amendment in certain scenarios.

It says open fields are protected by the fourth amendment unless one of these three exceptions apply.

Chair Larson: so it does limit open fields doctrine.

Joseph: Correct. Actually, it pretty much destroys it unless one of the exceptions are met.

(see attachment #1)

(21) Vice Chairman Dwyer: I passed out my proposal on doing a study of the fourth amendment and protection of private property. This area is so vast, complicated and extensive that I don't think we can fix the bill. I think this has to be the focus of some legislative investigation.

Senator Bakke: Are you saying you want to remove what's in the bill and put the study in place of it or put the study as section 2?

Vice Chairman Dwyer: The amendment would completely replace the bill and turn it into a study.

Senator Bakke: Motions to adopt amendment 19.0679.03001.
Vice Chairman Dwyer: Seconds.

Senator Bakke: I agree that we need to take some time and really do this right. The last thing we want to do is hamper our police officers in doing their needed job because it could cost someone their life. I don't want to put restrictions on them that don't need to be there. I don't know the circumstances by which this bill came, but I think we need to do more studying of it and get more input from everybody before we make this a unilateral decision.

Senator Myrdal: The amendment says "shall consider", so it's very likely that it won't get studied. This is an extremely important issue. I thought some of the arguments against it was unreasonable. I've heard it from my district that this does happen. If we water it down to a study that likely won't happen, this will just come back again. I'm saddened by some of the testimony of this bill that as a lawmaker, if I vote for this bill, I'm anti-law enforcement. That's absolutely incorrect. I think the intent of this bill was misrepresented by some of the testimony. I think we can fix it and go into conference committee, but I don't think that's the will of the committee.

A Roll Call Vote Was Taken: 4 yeas, 2 nays, 0 absent. Amendment is adopted.

Vice Chairman Dwyer: Motions for a Do Pass as Amended.
Senator Bakke: Seconds.

A Roll Call Vote Was Taken: 4 yeas, 2 nays, 0 absent. Motion carries.

Vice Chairman Dwyer will carry the bill.

SJC 1/01 3/27

19.0679.03001
Title.04000

Prepared by the Legislative Council staff for
Senator Dwyer
March 26, 2019

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1290

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative management study of search and seizure procedures.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE MANAGEMENT STUDY - SEARCH AND SEIZURE PROCEDURES. During the 2019-20 interim, the legislative management shall consider studying the fourth amendment to the Constitution of the United States, including the investigation, search, and seizure of private land, livestock, and buildings. The study must include options for protecting property from unreasonable interference by law enforcement. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-seventh legislative assembly."

Renumber accordingly

Date:3/27/2019
Roll Call Vote: 1

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1290

Senate **Judiciary** Committee

☐ Subcommittee

Amendment LC# or Description: **19.0679.03001**

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Senator Bakke Seconded By Vice Chairman Dwyer

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick		X			
Senator Myrdal		X			
Senator Lemm	X				

Total (Yes) 4 No 2

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date:3/27/2019
Roll Call Vote: 2

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1290

Senate **Judiciary** Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Vice Chairman Dwyer Seconded By Senator Bakke

Senators	Yes	No	Senators	Yes	No
Chair Larson		X	Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick	X				
Senator Myrdal		X			
Senator Lemm	X				

Total (Yes) 4 No 2

Absent 0

Floor Assignment Vice Chairman Dwyer

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1290, as engrossed: Judiciary Committee (Sen. D. Larson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (4 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1290 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative management study of search and seizure procedures.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE MANAGEMENT STUDY - SEARCH AND SEIZURE PROCEDURES. During the 2019-20 interim, the legislative management shall consider studying the fourth amendment to the Constitution of the United States, including the investigation, search, and seizure of private land, livestock, and buildings. The study must include options for protecting property from unreasonable interference by law enforcement. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-seventh legislative assembly."

Renumber accordingly

2019 TESTIMONY

HB 1290

#1
HB1290
2-6-19 pg1

2-6-2019

North Dakota House of Representatives

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Committees:
Judiciary
Political Subdivisions

HB 1290 4th amendment bill regarding open fields Doctoring.

Hello Mr. Chairman and members of the judiciary committee.

For the record I am representative Luke Simons from district 36.

I bring before you HB 1290 which is a common sense Bill regarding the fourth amendment.

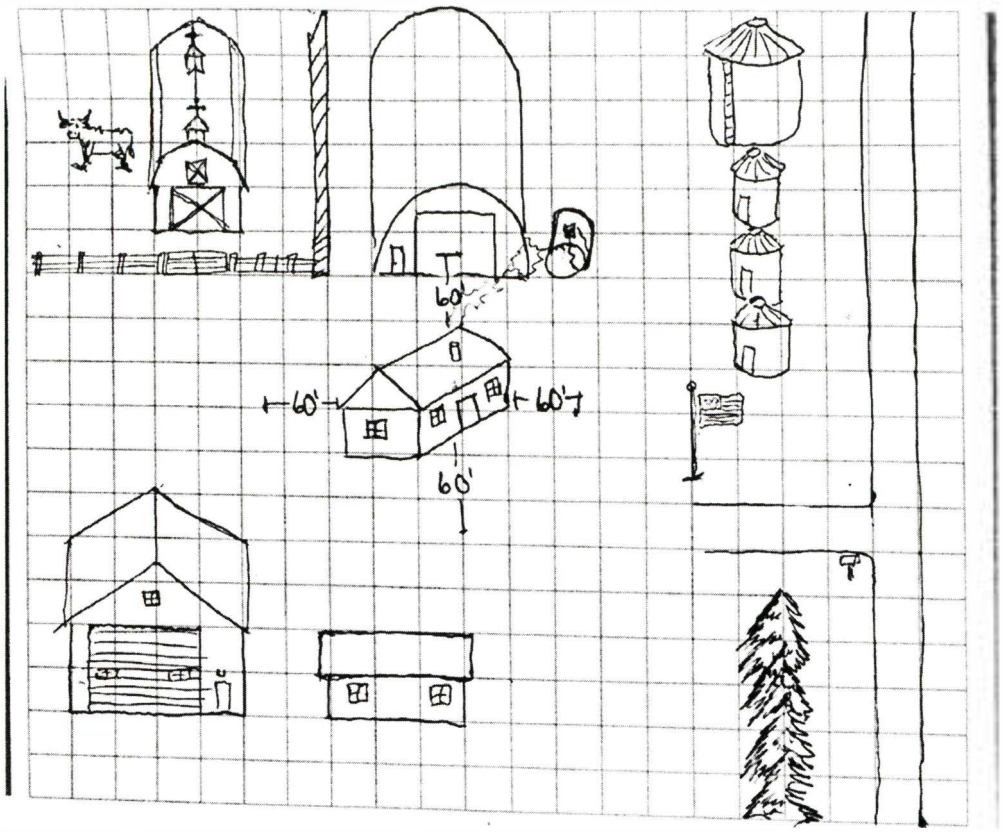
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Our construction company is divided by a wall which is located in town. One side being our shop the other side being our office. If a warrant was served to look into our office, that's fine. But if they go into the shop side without a warrant specifically saying the shop. No evidence could be used due to not having the proper warrant. If they were conducting their warrant and realized we should look into the shop, it's a 15 minute phone call to a judge to get a warrant and use due process.

Would it surprise you that a law officer does not need a warrant to go into a building 60 feet from your home if you live in the country?

Barns, shops, outbuildings, chicken coops, garden sheds, grain bins, Quansett, milking parlor, Horse stable, Calving Barns, Machine sheds.

None of which if there are 60 feet from your home need a search warrant.



I was recently talking to a veterinarian who went with the deputy to go look at a horse that was supposedly in bad shape. The deputy and the vet knocked on the owners door and no one was home.
They did not see a horse anywhere.
The deputy then walked to the barn and open the door, The vet said this is where I stop. You don't have a search warrant. The deputy looked at the vet and said we don't need one. We are far beyond 60 feet from their home.
The horse was not in bad shape, but the veterinarian refused to look at the horse until there was a search warrant. Seems like common sense, however open fields doctrine is interpreted this way.

I had a situation where I was feeding hay bit barley, which is equivalent to alfalfa hay which is some of the best you can buy. A person driving by thought I was feeding my cows straw, and called the local authorities. The sheriff and I went out and looked at the cows and he didn't see any issues. After about the fourth or fifth time with the same person calling the sheriff. I told The sheriff to get a search warrant. He informed me he didn't need my permission or a search warrant to go on my property. As it turned out he didn't do anything because he realized my girls were fat and happy.
I thought he was full of hot air at the time.
I was wrong.

Years later I was a witness add a pre-trial for a man accused of a crime. I was asked by an his attorney if I would take the stand and answer some questions. He said you may look stupid, I'm going to ask you a few things that you probably don't know. When on the stand he asked me would you be surprised or do you feel the average rancher or farmer would be surprised to know that 60 feet from your home you do not need a search warrant to search any of your outbuildings.

I said yes.
Then I heard for the first time what open fields doctrine was being interpreted as.

What open fields doctrine was supposed to be. Would be common sense. If there's a missing person and the deputy is driving down the road and he sees a vehicle that is through the fence and in the middle of a field turned over on its side, he does not need a search warrant. He has probable cause. He could clearly see it. Of course he would investigate it.
It would be literally the same as if my wife had me duck taped and gagged in the backseat of my car and she got pulled over for a taillight. The police officer would not need a search warrant to ask what's going on and to investigate the situation.

To my knowledge open fields has been taken to the supreme court by two different people at different times from North Dakota. In both cases the US Supreme Court upheld what the original Open fields doctrine was.

The definition is what HB 1290 is.

I would ask you to put in our century code once and for all the definition of open fields doctrine.
And give farmers and ranchers the same fourth amendment rights as we have in the private business sector.

I will stand for any questions

Thank you Mr. Chairman and members of the committee.

Respectfully

Luke R Simons

H1 HB 1290
2-6-19
Pg 4

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Thomas F. Murtha
(1934-2017)
Donald M. Murtha
(1905-1993)
Thomas F. Murtha
(1904-1965)
Thomas F. Murtha
(1878-1927)

February 6, 2019

North Dakota House Judiciary Committee
RE: HB 1290

Dear Members of the Committee,

My name is Thomas F. Murtha IV, I am an attorney licensed to practice law in the State of North Dakota. Representative Luke Simons (HB 1290 sponsor) requested that I testify regarding HB 1290. Unfortunately I am scheduled for a hearing in Stark County District Court at the same time as the hearing on HB 1290 and the District Court (Judge Ehlis) on that case denied my request to continue that matter in order to testify on HB 1290.

HB 1290 addresses a concern that all of us in North Dakota have that the Fourth Amendment of the United States Constitution and Article 1 Section 8 of North Dakota's Constitution do not protect what has come to be known as "open fields."[1] The language of the Fourth Amendment and Article 1, Section 8 is identical:

> 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 warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

Our courts have determined that "land" is not included in the term "effects" and therefore the Fourth Amendment and Article 1, Section 8 do not apply to a person's lands outside of a person's home. Law enforcement therefore can trespass on private property without suspicion or any reason to collect evidence against the landowner. HB 1290 will remedy that concern.

HB 1290 would discourage law enforcement or other government from randomly trespassing on private lands by prohibiting the admission in court of any evidence gathered during that trespass. I believe this is a reasonable expectation of privacy that our society here in North Dakota currently supports. HB 1290 would require permission, probable cause, or a warrant before the government to enter and search private lands.

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[1] Hester v. United States, 265 U.S. 57 (1924) first introduced the doctrine that the Fourth Amendment protection does not extend to open fields.

#1 HB 1290
2-6-19
Pg 5

I suggest the following rewrite of the last paragraph of HB 1290:

Any evidence obtained in violation of subsection 2 is not admissible against the land owner or a lessee of the land in any criminal or civil proceeding.

Thank you for your consideration of my writing, feel free to contact me with any questions you may have.

February 6, 2019

Sincerely,

Thomas F. Murtha IV

Thomas F. Murtha IV

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds People v. Scott, N.Y., April 2, 1992

44 S.Ct. 445
Supreme Court of the United States.

HESTER
v.
UNITED STATES.

No. 243.
|
Submitted April 24, 1924.
|
Decided May 5, 1924.

Synopsis
In Error to the District Court of the United States for the Western District of South Carolina.

Charlie Hester was convicted of concealing distilled spirits, and he brings error. Affirmed.

West Headnotes (2)

[1] Criminal Law
Place of business or other premises
Criminal Law
Compelling Self-Incrimination
Intoxicating Liquors
Incriminating or Exculpatory Circumstances
Intoxicating Liquors
Grounds for seizure and forfeiture
Searches and Seizures
Effect of Illegal Conduct;Trespass

Testimony of officers that they concealed themselves near defendant's house, saw defendant taking a jug out of a car, and when they were discovered defendant ran and dropped the jug, which on examination was found to contain moonshine whisky, held not to violate U.S.C.A. Const.Amend. 4, as to unlawful searches and seizures, or Amendment 5, as to compelling accused to give testimony against himself, though officers had no search warrant and were on defendant's land.

169 Cases that cite this headnote

[2] Searches and Seizures
Curtilage or open fields;yards and outbuildings

Protection accorded by Const.Amend. 4, to the people in their "persons, houses, papers and effects," is not extended to open fields.

682 Cases that cite this headnote

Attorneys and Law Firms

****446 *57** Mr. Richard A. Ford, of Washington, D. C., for plaintiff in error.

Messrs. James M. Beck, Sol. Gen., of Washington, D. C., and Mabel Walker Willebrandt, Asst. Atty. Gen., for the United States.

Opinion

Mr. Justice HOLMES delivered the opinion of the Court.

[1] The plaintiff in error, Hester, was convicted of concealing distilled spirits, etc., under Rev. St. § 3296 (Comp. St. § 6038). The case is brought here directly from the District Court on the single ground that by refusing to exclude the testimony of two witnesses and to direct a verdict for the defendant, the plaintiff in error, the Court violated his ***58** rights under the Fourth and Fifth Amendments of the Constitution of the United States.

[2] The witnesses whose testimony is objected to were revenue officers. In consequence of information they went toward the house of Hester's father, where the plaintiff in error lived, and as they approached saw one Henderson drive near to the house. They concealed themselves from fifty to one hundred yards away and saw Hester come out and hand Henderson a quart bottle. An alarm was given. Hester went to a car standing near, took a gallon jug from it and he and Henderson ran. One of the officers pursued, and fired a pistol. Hester dropped his jug, which broke but kept about a quart of its contents. Henderson threw away his bottle also. The jug and bottle both contained

what the officers, being experts, recognized as moonshine whisky, that is, whisky illicitly distilled; said to be easily recognizable. The other officer entered the house, but being told there was no whisky there left it, but found outside a jar that had been thrown out and broken and that also contained whisky. While the officers were there other cars stopped at the house but were spoken to by Hester's father and drove off. The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by the entry into the house and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself ***59** does not require an answer. The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, 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. 4 Bl. Comm. 223, 225, 226.

Judgment affirmed.

All Citations

265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898

End of Document

#1 HB1290, 2-6-19 pg 8
36-21.1 - Humane Treatment

343 N.W.2d 361
Supreme Court of North Dakota.

STATE of North Dakota, Plaintiff and Appellant,
v.
John Arthur LARSON, Defendant and Appellee.
STATE OF North Dakota, Plaintiff and Appellant,
v.
Roger Charles JOHNSEN, Defendant and Appellee.

Cr. Nos. 951, 952.
|
Jan. 13, 1984.

Synopsis

State appealed from order of the County Court, Sheridan County, O.A. Schulz, J., suppressing evidence against defendants in prosecution for alleged violation of game laws. The Supreme Court, Sand, J., held that: (1) given totality of circumstances, including fact that consent to search was given only after game warden told defendant that if warden was not shown where defendant had put allegedly illegally taken ducks, six more wardens and four dogs would be brought in, consent was involuntary, and (2) in view of fact that defendants were faced with warden's threat to use dogs and more wardens, defendants' confessions to having shot more than legal limit of ducks were properly suppressed, defendants having received neither *Miranda* warnings nor anything similar thereto, even though neither defendant was formally placed under arrest at the time.

Affirmed.

West Headnotes (7)

[1] **Searches and Seizures**
Necessity of and preference for warrant, and exceptions in general

Ordinarily, all searches made without valid warrant are unreasonable unless they are shown to come within one of the exceptions to rule that search must be made upon valid warrant. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[2] **Criminal Law**
Evidence wrongfully obtained

Criminal Law
Admission, statements, and confessions

In cases involving voluntariness of confession or consent to search, the Supreme Court will not reverse trial court's determination unless it is contrary to manifest weight of the evidence.

1 Cases that cite this headnote

[3] **Criminal Law**
Admission, statements, and confessions

Trial court's determination as to voluntariness of confession or consent to search will not be overturned if, after conflicts in testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting trial court's determination.

1 Cases that cite this headnote

[4] **Searches and Seizures**
Questions of law or fact

Determination of whether consent to search was voluntary or involuntary is question of fact to be determined from totality of all the circumstances. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[5] **Searches and Seizures**
Particular concrete applications

Totality of circumstances, including fact that consent to search was given only after game warden told defendant that if warden was not shown where defendant had put allegedly illegally taken ducks, six more wardens and four dogs would be brought in, established that consent was involuntary. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[6] **Criminal Law**

What constitutes voluntary statement, admission, or confession

Issue of voluntariness of admissions is always question to be determined from all of the circumstances, regardless of whether or not subject is in custody. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[7] **Criminal Law**

Necessity in general

Criminal Law

Particular cases

Criminal Law

Threats;Fear of Injury

In view of fact that defendants were faced with game warden's threat to use dogs and more wardens in attempt to find allegedly illegally taken ducks if defendant did not cooperate, the interrogation and intimidation being such that wardens should have known it would likely elicit incriminating response from defendants, defendants' confessions to having shot more than legal limit of ducks were properly suppressed, defendants having received neither *Miranda* warnings nor anything similar to them, notwithstanding that defendants were not formally placed under arrest at the time. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

Attorneys and Law Firms

***362** Walter M. Lipp, State's Atty., McClusky, for plaintiff and appellant.

Baer & Asbridge, Bismarck, for defendants and appellees; argued by Darold A. Asbridge, Bismarck.

Opinion

SAND, Justice.

The Sheridan County justice court granted a motion suppressing evidence against the defendants, John A. Larson (Larson) and Roger C. Johnsen (Johnsen), in a prosecution for alleged violation of North Dakota game laws. The State appealed.

On 2 October 1982 Johnsen, his two sons, Larson, his two sons, and a friend, were waterfowl hunting from a camp on Larson's land in Sheridan County. Unbeknown to Larson and Johnsen, state and federal game wardens were watching them from nearby hills from early morning until late afternoon. David Kraft, a special agent for the United States Fish and Wildlife Service, kept a log of events as the wardens watched. Kraft's log indicated that he saw the hunters shoot eighteen to twenty ducks and that the ducks were taken to several locations, a trailer house, a vehicle, an outhouse, an abandoned shed, and some brush near the shed. According to Kraft, Johnsen and his son left the camp in Johnsen's vehicle about 4:00 p.m.

Greg Cleveland, a friend of Larson, arrived at the camp with two more hunters about 5:00 p.m. Shortly thereafter, North Dakota game warden Tim Larson, and special agent Terry Grosz of the United States Fish and Wildlife Service, entered the camp. Grosz questioned the hunters and checked their licenses and guns. Grosz gave no *Miranda* warnings to Larson at that time nor at any time during the investigation.

Meanwhile, warden Larson, who was in radio contact with other wardens from the surveillance point, began a search of the brush area near the shed. When warden Larson returned from his search he reported to Grosz that he did not find any of the ducks. According to Cleveland, Grosz then said to defendant Larson, "We have spotters on the hillside, before daylight they saw you got more birds stashed down here. I will give you one chance and one chance only to show me or we will bring down six wardens and four dogs." [1] Larson then took Grosz to several locations where the ducks had been placed. Meanwhile, two more wardens joined wardens Grosz and Larson at the camp. Because Grosz apparently did not want to involve the children, he advised Cleveland to take the children "far away" and to "come back after dark." After Cleveland and the children had left, Grosz began to question defendant Larson about who had shot which ducks. Larson admitted to Grosz that he shot twelve ducks, seven more than permitted by law. Grosz then confiscated Larson's shotgun.

The wardens were at the camp for about two and one-half hours. When they left, they met Johnsen coming toward the camp in his pickup. Kraft explained to Johnsen that they had talked to Larson and that they "[knew] what had happened." Kraft showed the confiscated ducks to Johnsen and asked him to identify which ones he had shot. Johnsen admitted that he shot more than his limit. The wardens then confiscated Johnsen's gun and told him he could return to the camp.

***363** On 5 October 1982 separate complaints were filed against Larson and Johnsen and warrants were issued for their arrests. The complaints charged that Larson had shot seven ducks more than his limit, and that Johnsen had shot three more than his limit.

Larson and Johnsen moved to suppress all of the evidence and their statements on the grounds that the search was conducted in violation of their fourth amendment protection against unreasonable searches and seizures and that their statements were given in violation of their fifth amendment privilege against compelled self-incrimination. [2]

The Sheridan County court held an evidentiary hearing in which the two complaints were consolidated. The court suppressed all of the evidence and the defendants' statements on the grounds that their fourth and fifth amendment rights had been violated, and the State appealed.

[1] With respect to the State's contention that no fourth amendment violation occurred, we begin by noting that, ordinarily, all searches made without a valid search warrant are unreasonable unless they are shown to come within one of the exceptions to the rule that a search must be made upon a valid warrant. *Stoner v. California,* 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L.Ed.2d 856, 859 (1964).

The State contended that a search warrant was unnecessary because the surveillance and subsequent search of the camp was conducted pursuant to the **"open fields" doctrine** announced in *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). In *Hester* the Court said 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.**" 265 U.S. at 59, 44 S.Ct. at 446, 68 L.Ed. at 900. Thus, the Court drew a distinction between the dwelling and its curtilage, which was protected, and an open field, which was not. See W. Ringel, *Searches and Seizures, Arrests and Confessions,* § 8.4 (1983). Although the open fields/curtilage distinction is not easily drawn, most courts and commentators have **defined curtilage as that area near a dwelling, not necessarily enclosed, that generally includes buildings or other adjuncts used for domestic purposes.** *State v. Vicars,* 207 Neb. 325, 299 N.W.2d 421, 425 (1980); W. LaFave, *Search and Seizure* § 2.4, at 332 (1978).

The utility of the **open fields doctrine,** however, has become suspect in light of the Supreme Court's holding in *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 582 (1967), that the fourth amendment protects people, not places. Thus, a greater emphasis is now placed upon an examination of whether or not one possesses a reasonable expectation of privacy in the object or area to be searched. *Terry v. Ohio,* 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889, 899 (1968); *State v. Matthews,* 216 N.W.2d 90, 103 (N.D.1974). Nevertheless, this Court has not completely abandoned pre-*Katz* concepts, like the **open fields doctrine**, because such concepts are still important in determining whether or not the person searched had a reasonable expectation of privacy. See *Statev . Planz,* 304 N.W.2d 74, 79 (N.D.1981). **Indeed, the United States Supreme Court has said that it "has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the fourth] Amendment."** *Rakas v. Illinois,* 439 U.S. 128, 144, 99 S.Ct. 421, 431, 58 L.Ed.2d 387, 401 n. 12 (1978). The Court has also recently referred to the **open fields doctrine** in determining that a defendant's expectation of privacy with respect to activities inside his cabin did not extend to police observation of a car carrying a container with an electronic beeper inside it as it arrived on defendant's property after leaving a public highway. ***364** *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). See also *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U.S. 861, 94 S.Ct. 2114, 44 L.Ed.2d 607 (1974) (application of **open fields doctrine** to warrantless entry by health inspector on defendant's outdoor premises).

In the instant case, the wardens were watching the defendants from surrounding hills about one-quarter to one-half mile away. The record does not indicate whether

or not the wardens were on defendant Larson's property, although warden Kraft testified that the wardens were on "[what was] known to [Kraft] as the John Larson Hunting Camp, Sheridan County." If the wardens were in fact on Larson's property, the record does not reflect whether or not the camp was also visible from other property, such as a public road or neighboring land.

Kraft testified that the camp was located "kind of in a pasture" between two large sloughs. The camp contained a trailer house, an outhouse, and a dilapidated shed located about thirty feet from the trailer house. The record does not indicate for what purposes, or how often, the buildings were used. The record does indicate that Larson's land was posted, although it does not indicate how many signs there were or where the signs were located. Johnsen testified that one had to drive through a stubble-field to get to the camp, but the record does not indicate whether or not the area was fenced, or whether or not any gates had to be opened.

Many of the unknown factors noted above, while not individually dispositive, would be cumulatively significant in applying the **open fields doctrine** to determine whether or not the defendants had a reasonable expectation of privacy.[3] Because of the nature of the disposition of this case, however, we need not resolve that question. The fact remains that warden Larson's initial search of the area near the shed was unproductive. The wardens did not discover the ducks until defendant Larson led them to the ducks following Grosz' statement that he was prepared to dispatch dogs and more wardens.

[2] **[3]** The State argued, in the alternative,[4] that if the **open fields doctrine** was inapplicable, then Larson voluntarily consented to the search that produced the ducks. In cases involving the voluntariness of a confession or a consent to search, this Court will not reverse the trial court's determination unless it is contrary to the manifest weight of the evidence. The trial court's determination will not be overturned if, after conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's determination. *State v. Discoe,* 334 N.W.2d 466, 469 (N.D.1983).

[4] A determination of whether a consent to a search was voluntary or involuntary is a question of fact to be determined from the totality of all the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854, 862 (1973); *State v. Lange,* 255 N.W.2d 59, 64 (N.D.1977). To be voluntary, the consent must "not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth, supra,* 412 U.S. at 228, 93 S.Ct. at 2048, 36 L.Ed.2d at 863; see also *State v. Metzner,* 244 N.W.2d 215, 222–23 (N.D.1976).

[5] The most critical fact in the case at bar is Grosz' statement to defendant Larson that if Larson did not show Grosz where the ducks were, then Grosz would "bring [in] six wardens and four dogs." Grosz' statement was an implicit, if not explicit, threat that the wardens did not intend to leave until the ducks had been found. The implication was that defendant ***365** Larson had no other alternative than to submit to a search and that the wardens had authority to wait "until hell froze over" for his reply. Threats of force or authority of the type made by Grosz constitute impermissible ultimatums, ultimatums abhorrent to the principles of the fourth amendment.

In *Schneckloth, supra,* 412 U.S. at 227, 93 S.Ct. at 2048, 36 L.Ed.2d at 863, the Court held that a defendant's knowledge of the right to refuse consent is one factor in determining whether or not the consent was voluntary, but the State need not demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Although the record does not specifically indicate whether defendant Larson knew or did not know of his right to refuse consent, it does appear that, under the circumstances, Larson believed he could not refuse. Larson testified that he showed Grosz where the ducks were because "[he] wasn't going to fool around with [Grosz]."

There were additional factors which indicate that defendant Larson's consent may have been involuntary. Despite over two hours of questioning by wardens Grosz and Larson, defendant Larson gave no indication that he intended to consent to a search until Grosz threatened a more intensive search. Grosz' suggestion to Cleveland that he and the children should leave and go "far away" indicates that Grosz' threat was not frivolous. When Cleveland and the children left, defendant Larson was left by himself to confront the four wardens. The investigation, by the time Grosz made his threat, was not routine and the questions were not general. Finally, we note that Grosz was 6# 5# tall and weighed about 280 pounds. Although the physical stature of a police officer alone is not dispositive of whether or not a consent to a

search was voluntary, it may, under some circumstances, have an intimidating effect.

The State argued that our decision in *State v. Lange,* 255 N.W.2d 59 (N.D.1977) should apply. In *Lange,* a police officer stopped the defendant's car after the officer observed the car weaving across a city street. When the officer approached the car he noticed a small pipe in the ashtray and several empty paper bags. The officer read Lange his *Miranda* rights and asked him some questions. When Lange admitted that he had been drinking, the officer took him to the police station. At the station, the officer asked Lange for permission to search his vehicle. Lange initially consented, but after the thorough nature of the search was explained, Lange's companion in the car asked, "What if we said no?" When the officer replied that the vehicle would be impounded and searched anyway, Lange consented to the search. When the car was searched, police officers found several controlled substances. On appeal Lange argued that his consent was involuntary.

In upholding the search in *Lange,* we said that the officer did not even use any subtle methods of coercion or deception to obtain the consent. We further held that an officer's claim that he could obtain a warrant was not, per se, coercive.

The facts in *Lange* are easily distinguished from those in the instant case. In this case the wardens did not ask permission to search. Furthermore, the wardens never mentioned the word warrant, much less claim that they could obtain one. The wardens gave no explanation to defendant Larson of his rights, nor did they give him his *Miranda* warnings.

We believe that, considering the totality of the circumstances, defendant Larson's consent to a search of the premises was involuntary.

[6] Larson not only "consented" to the search, he also led the wardens to the places where the ducks had been placed. At the suppression hearing, the defendants argued, and the trial court agreed, that the defendants' fifth amendment privilege against compelled self-incrimination was violated because the defendants were entitled to *Miranda* warnings. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). On appeal the State argued that no fifth amendment violation occurred because the questioning was more ***366** like a "noncustodial interview" within the meaning of *Beckwith v. United States,* 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976).

Miranda defined custodial interrogation as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda, supra,* 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. In *Beckwith* the court rejected any extension of *Miranda* to situations involving noncustodial circumstances in which a police investigation has focused on the suspect. *Beckwith, supra,* 425 U.S. at 345, 96 S.Ct. at 1615, 48 L.Ed.2d at 6–7; see also *State v. Fields,* 294 N.W.2d 404, 407–08 (N.D.1980) (adoption of "custody" test for application of *Miranda;* "focus" language of *State v. Iverson,* 187 N.W.2d 1 (N.D.1971), *cert. denied,* 404 U.S. 956, 92 S.Ct. 322, 30 L.Ed.2d 273 (1971), limited to context of *Iverson*).

Neither Larson nor Johnsen were formally placed under arrest. Further, although the defendants disputed the fact, wardens Kraft and Larson testified that the defendants were free to leave during the questioning. While we view the wardens' assertions with skepticism, we are not prepared to conclude, as the trial court did, that the defendants were in custody within the meaning of *Miranda.* Nevertheless, the issue of voluntariness is always a question to be determined from all of the circumstances, regardless of whether or not a subject is in custody. *State v. Lange,* 255 N.W.2d 59, 64 (N.D.1977).

[7] In *Beckwith* the court recognized "that noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where 'the behavior of ... law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined ....' " *Beckwith, supra,* 425 U.S. at 347–48, 96 S.Ct. at 1617, 48 L.Ed.2d at 8. The Court went on to say that "When such a claim is raised, it is the duty of an appellate court ... 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness.' " *Beckwith, supra,* 425 U.S. at 348, 96 S.Ct. at 1617, 48 L.Ed.2d at 8. The Court added that "Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the

questioning was in fact coercive." *Beckwith, supra,* 425 U.S. at 348, 96 S.Ct. at 1617, 48 L.Ed.2d at 8.

Neither Larson nor Johnsen received either *Miranda* warnings or anything similar to them.[5] Moreover, the defendants were faced with Grosz' threat to use dogs and more wardens in an attempt to find the birds if Larson did not cooperate with him. The interrogation and intimidation by the officers in this case was such that the wardens should have known it would likely elicit an incriminating response from the defendants. *Cf. Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297, 308 (1980).

Viewing the totality of the circumstances in this case we conclude that the trial court's determination regarding the voluntariness of Larson's consent to search and the defendants' subsequent confessions, is not against the manifest weight of the evidence. Accordingly, we affirm the trial court's order suppressing Larson's consent to the search and Larson and Johnsen's confessions.

ERICKSTAD, C.J., and GIERKE, PEDERSON and VANDE WALLE, JJ., concur.

All Citations

343 N.W.2d 361

Footnotes

1 Warden Larson agreed that Grosz made the statement to defendant Larson. However, warden Larson testified that he thought Grosz said five wardens.

2 The fourth and fifth amendments are applicable to the states by virtue of the fourteenth amendment to the United States Constitution. *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); *Malloy v. Hagan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

3 Although the trial judge concluded that the camp fell "well within the ... open field doctrine," we are not prepared to say that it did.

4 The State also argued, in the alternative, that the inevitable discovery doctrine applied. Given the facts of the case, however, particularly the fact that the wardens' initial search was unproductive, we find the argument meritless and unworthy of discussion.

5 Although the defendant in *Beckwith* was not given a literal reading of the *Miranda* warnings, he was advised of his right against compelled self-incrimination, and his right to seek the assistance of an attorney before responding. *Beckwith, supra,* 425 U.S. at 348--49, 95 S.Ct. at 1617, 48 L.Ed.2d at 8.

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KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds People v. Scott, N.Y., April 2, 1992

104 S.Ct. 1735
Supreme Court of the United States

Ray E. OLIVER, Petitioner
v.
UNITED STATES.
MAINE, Petitioner
v.
Richard THORNTON.

Nos. 82-15, 82-1273.
|
Argued Nov. 9, 1983.
|
Decided April 17, 1984.

Synopsis

In a federal prosecution of a defendant charged with manufacturing marijuana, the United States appealed from an order of the United States District Court for the Western District of Kentucky, Edward H. Johnstone, J., sustaining a motion to exclude evidence obtained in a warrantless search of land of the defendant. After a panel 657 F.2d 85, affirmed the suppression order, the Court of Appeals for the Sixth Circuit, sitting en banc, reversed the District Court, 686 F.2d 356. Certiorari was granted. In a state drug prosecution, the Supreme Judicial Court of Maine, 453 A.2d 489, affirmed a Superior Court order granting the defendant's motion to suppress observations made and items seized at the defendant's property by the police. Certiorari was granted. The Supreme Court, Justice Powell, held that the "open fields" doctrine was applicable to determine whether the discovery or seizure of marijuana in question was valid.

Decision of Sixth Circuit affirmed; decision of Supreme Judicial Court of Maine reversed and remanded.

Justice White, filed opinion concurring in part and concurring in the judgment.

Justice Marshall, filed a dissenting opinion, in which Justice Brennan and Justice Stevens joined.

Opinion on remand, 485 A.2d 952.

West Headnotes (13)

[1] **Searches and Seizures**
Persons, Places and Things Protected

Special protection accorded by Fourth Amendment to people in their "persons, houses, papers, and effects" does not extend to open fields. U.S.C.A. Const.Amend. 4.

120 Cases that cite this headnote

[2] **Searches and Seizures**
Curtilage or Open Fields; Yards and Outbuildings

Open fields are not "effects" within the meaning of the Fourth Amendment. U.S.C.A. Const.Amend. 4.

90 Cases that cite this headnote

[3] **Searches and Seizures**
Curtilage or Open Fields; Yards and Outbuildings

Government's intrusion upon open fields is not one of those "unreasonable searches" proscribed by the Fourth Amendment. U.S.C.A Const.Amend. 4.

64 Cases that cite this headnote

[4] **Searches and Seizures**
Expectation of Privacy

Touchstone of Fourth Amendment is question of whether a person has a constitutionally protected reasonable expectation of privacy. U.S.C.A Const.Amend. 4.

141 Cases that cite this headnote

[5] **Searches and Seizures**
Expectation of Privacy

Fourth Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society

is prepared to recognize as "reasonable." U.S.C.A Const.Amend. 4.

213 Cases that cite this headnote

[6] **Searches and Seizures**
Curtilage or Open Fields; Yards and Outbuildings

Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance. U.S.C.A Const.Amend. 4.

130 Cases that cite this headnote

[7] **Searches and Seizures**
Curtilage or Open Fields; Yards and Outbuildings

Because open fields are accessible to the public and police in ways that a home, office or commercial structure would not be, and because fences or "No Trespassing" signs do not effectively bar public from viewing open fields, asserted expectation of privacy in open fields is not one that society recognizes as reasonable. U.S.C.A Const.Amend. 4.

180 Cases that cite this headnote

[8] **Searches and Seizures**
Curtilage or Open Fields; Yards and Outbuildings

The common law, by implying that only the land immediately surrounding and associated with the home warrants the Fourth Amendment protections that attach to the home, conversely implies that no expectation of privacy legitimately attaches to open fields. U.S.C.A Const.Amend. 4.

937 Cases that cite this headnote

[9] **Searches and Seizures**
Curtilage or Open Fields; Yards and Outbuildings

Analysis of circumstances of search of open field on case-by-case basis to determine whether reasonable expectations of privacy were violated would not provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment; ad hoc approach not only would make it difficult for policeman to discern the scope of his authority but would also create the danger that constitutional rights would be arbitrarily and inequitably enforced. U.S.C.A Const.Amend. 4.

402 Cases that cite this headnote

[10] **Controlled Substances**
Open Fields; Curtilage or Yard; Growing Plants

Steps taken to protect privacy such as planting marijuana on secluded land and erecting fences and "No Trespassing" signs around property did not establish that expectations of privacy in an open field were "legitimate" in the sense required by the Fourth Amendment. U.S.C.A. Const.Amend. 4.

292 Cases that cite this headnote

[11] **Searches and Seizures**
Curtilage or Open Fields; Yards and Outbuildings

Test of legitimacy of expectation of privacy in open field is not whether individual chooses to conceal assertedly "private" activity, but whether government's intrusion infringes upon personal and societal values protected by Fourth Amendment. U.S.C.A Const.Amend. 4.

477 Cases that cite this headnote

[12] **Searches and Seizures**
What Constitutes Search or Seizure

Fact that government's intrusion upon an open field is a trespass at common law does not make it a "search" in the constitutional sense. U.S.C.A. Const.Amend. 4.

22 Cases that cite this headnote

[13] **Searches and Seizures**
Effect of Illegal Conduct;Trespass

In case of open fields, general rights of property protected by common law of trespass have little or no relevance to applicability of Fourth Amendment. U.S.C.A Const.Amend. 4.

39 Cases that cite this headnote

Syllabus [a1]

In No. 82–15, acting on reports that marihuana was being raised on petitioner's farm, narcotics agents of the Kentucky State Police went to the farm to investigate. Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign, but with a footpath around one side. The agents then walked around the gate and along the road and found a field of marihuana over a mile from petitioner's house. Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance" in violation of a federal statute. After a pretrial hearing, the District Court suppressed evidence of the discovery of the marihuana field, applying Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), and holding that petitioner had a reasonable expectation that the field would remain private and that it was not an "open" field that invited casual intrusion. The Court of Appeals reversed, holding that Katz had not impaired the vitality of the open fields doctrine of Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), which permits police officers to enter and search a field without a warrant. In No. 82–1273, after receiving a tip that marihuana was being grown in the woods behind respondent's residence, police officers entered the woods by a path between the residence and a neighboring house, and followed a path through the woods until they reached two marihuana patches fenced with chicken wire and having "No Trespassing" signs. Later, the officers, upon determining that the patches were on respondent's property, obtained a search warrant and seized the marihuana. Respondent was then arrested and indicted. The Maine trial court granted respondent's motion to suppress the fruits of the second search, holding that the initial warrantless search was unreasonable, that the "No Trespassing" signs and secluded location of the marihuana patches evinced a reasonable expectation of privacy, and that therefore the open fields doctrine did not apply. The Maine Supreme Judicial Court affirmed.

Held: The open fields doctrine should be applied in both cases to determine whether the discovery or seizure of the marihuana in question was valid. Pp. 1740–1744.

***171** (a) That doctrine was founded upon the explicit language of the Fourth Amendment, whose special protection accorded to "persons, houses, papers, and effects" does "not exten[d] to the open fields." Hester v. United States, supra, at 59, 44 S.Ct., at 446. Open fields are not "effects" within the meaning of the Amendment, the term "effects" being less inclusive than "property" and not encompassing open fields. The government's intrusion upon open fields is not one of those "unreasonable searches" proscribed by the Amendment. P. 1740.

(b) Since Katz v. United States, supra, the touchstone of Fourth Amendment analysis has been whether a person has a "constitutionally protected reasonable expectation of privacy." Id., 389 U.S., at 360, 88 S.Ct., at 516. The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.' " Id., at 361, 88 S.Ct., at 516. Because open fields are accessible to the public and the police in ways that a home, office, or commercial structure would not be, and because fences or "No Trespassing" signs do not effectively bar the public from viewing open fields, the asserted expectation of privacy in open fields is not one that society recognizes as reasonable. Moreover, the common law, by implying that only the land immediately surrounding and associated with the home warrants the Fourth Amendment protections that attach **1738 to the home, conversely implies that no expectation of privacy legitimately attaches to open fields. Pp. 1741–1742.

(c) Analysis of the circumstances of the search of an open field on a case-by-case basis to determine whether reasonable expectations of privacy were violated would not provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Such an ad hoc approach not only would make it difficult for the policeman to discern the scope of his authority but also would create the

danger that constitutional rights would be arbitrarily and inequitably enforced. P. 1742.

(d) Steps taken to protect privacy, such as planting the marihuana on secluded land and erecting fences and "No Trespassing" signs around the property, do not establish that expectations of privacy in an open field are legitimate in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity, but whether the government's intrusion infringes upon the personal and societal values protected by the Amendment. The fact that the government's intrusion upon an open field is a trespass at common law does not make it a "search" in the constitutional sense. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. Pp. 1743–1744.

686 F.2d 356 (CA6 1982), affirmed; 453 A.2d 489 (Me.1982), reversed and remanded.

Attorneys and Law Firms

***172** *Frank E. Haddad, Jr.,* argued the cause for petitioner in No. 82-15. With him on the briefs was *Robert L. Wilson. Wayne S. Moss,* Assistant Attorney General of Maine, argued the cause for petitioner in No. 82-1273. With him on the briefs were *James E. Tierney,* Attorney General, *James W. Brannigan, Jr.,* Deputy Attorney General, *Robert S. Frank,* Assistant Attorney General, and *David W. Crook.*

Alan I. Horowitz argued the cause for the United States in No. 82-15. With him on the brief were *Solicitor General Lee, Assistant Attorney General Jensen,* and *Deputy Solicitor General Frey. Donna L. Zeegers,* by appointment of the Court, 461 U.S. 924, argued the cause and filed a brief for respondent in No. 82-1273.†

† Briefs of *amici curiae* urging reversal in No. 82-15 were filed for the American Civil Liberties Union of Northern California et al. by *Eric Neisser, Alan Schlosser, Amitai Schwartz, Joaquin G. Avila, Morris J. Baller,* and *John E. Huerta;* and for the California Farm Bureau Federation et al. by *Thomas F. Olson.*

Briefs of *amici curiae* urging affirmance in No. 82-15 were filed for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau, Wayne W. Schmidt,* and *James P. Manak;* for the State of California by *John K. Van De Kamp,* Attorney General, *Harley D. Mayfield,* Assistant Attorney General, and *Jay M. Bloom,* Deputy Attorney General.

A Brief of *amici curiae* was filed in No. 82-1273 for the State of Alabama et al. by *Charles A. Graddick,* Attorney General of Alabama, and *Joseph G.L. Marston III,* Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Norman C. Gorsuch* of Alaska, *Aviata F. Fa'alevao* of American Samoa, *Robert K. Corbin* of Arizona, *Duane Woodard* of Colorado, *Charles M. Oberly III* of Delaware, *Robert T. Stephen* of Kansas, *Steven L. Beshear* of Kentucky, *Paul L. Douglas* of Nebraska, *David L. Wilkinson* of Utah, *John J. Easton, Jr.,* of Vermont, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Archie G. McClintock* of Wyoming.

Opinion

***173** Justice POWELL delivered the opinion of the Court.

The "open fields" doctrine, first enunciated by this Court in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), permits police officers to enter and search a field without a warrant. We granted certiorari in these cases to clarify confusion that has arisen as to the continued vitality of the doctrine.

I

No. 82–15. Acting on reports that marihuana was being raised on the farm of petitioner Oliver, two narcotics agents of the Kentucky State Police went to the farm to investigate.[1] Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards, passing a barn and a parked camper. At that point, someone standing in front of the camper shouted: "No hunting is allowed, come back up here." The officers shouted back that they were Kentucky State Police officers, but found no one when they returned to the camper. The officers resumed their investigation of the farm and found a field of marihuana over a mile from petitioner's home.

Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance." 21 U.S.C. § 841(a)(1). After a pretrial hearing, the District Court suppressed evidence of the discovery of the marihuana field. Applying Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967), the court found that petitioner had a reasonable expectation that the field would remain private because petitioner "had done all that could be expected of him to assert his privacy in the **1739 area of farm that was searched." He had posted "No Trespassing" signs at regular intervals and had locked the gate at the entrance to the center of the farm. App. to Pet. for Cert. in No. 82–15, *174 pp. 23–24. Further, the court noted that the field itself is highly secluded: it is bounded on all sides by woods, fences, and embankments and cannot be seen from any point of public access. The court concluded that this was not an "open" field that invited casual intrusion.

The Court of Appeals for the Sixth Circuit, sitting en banc, reversed the District Court. United States v. Oliver, 686 F.2d 356 (CA6 1982).[2] The court concluded that Katz, upon which the District Court relied, had not impaired the vitality of the open fields doctrine of Hester. Rather, the open fields doctrine was entirely compatible with Katz' emphasis on privacy. The court reasoned that the "human relations that create the need for privacy do not ordinarily take place" in open fields, and that the property owner's common-law right to exclude trespassers is insufficiently linked to privacy to warrant the Fourth Amendment's protection. 686 F.2d, at 360.[3] We granted certiorari. 459 U.S. 1168, 103 S.Ct. 812, 74 L.Ed.2d 1012 (1983).

No. 82–1273. After receiving an anonymous tip that marihuana was being grown in the woods behind respondent Thornton's residence, two police officers entered the woods by a path between this residence and a neighboring house. They followed a footpath through the woods until they reached two marihuana patches fenced with chicken wire. Later, the officers determined that the patches were on the property of respondent, obtained a warrant to search the property, and seized the marihuana. On the basis of this evidence, respondent was arrested and indicted.

*175 The trial court granted respondent's motion to suppress the fruits of the second search. The warrant for this search was premised on information that the police had obtained during their previous warrantless search, that the court found to be unreasonable.[4] "No Trespassing" signs and the secluded location of the marihuana patches evinced a reasonable expectation of privacy. Therefore, the court held, the open fields doctrine did not apply.

The Maine Supreme Judicial Court affirmed. State v. Thornton, 453 A.2d 489 (Me.1982). It agreed with the trial court that the correct question was whether the search "is a violation of privacy on which the individual justifiably relied," id., at 493, and that the search violated respondent's privacy. The court also agreed that the open fields doctrine did not justify the search. That doctrine applies, according to the court, only when officers are lawfully present on property and observe "open and patent" activity. Id., at 495. In this case, the officers had trespassed upon defendant's property, and the respondent had made every effort to conceal his activity. We granted certiorari. 460 U.S. 1068, 103 S.Ct. 1520, 75 L.Ed.2d 944 (1983).[5]

**1740 *176 II

[1] The rule announced in Hester v. United States was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style: "[T]he 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." Hester v. United States, 265 U.S., at 59, 44 S.Ct., at 446.[6]

[2] [3] Nor are the open fields "effects" within the meaning of the Fourth Amendment. In this respect, it is suggestive that James Madison's proposed draft of what became the Fourth *177 Amendment preserves "[t]he rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures...." See N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 100, n. 77 (1937). Although Congress' revisions of Madison's proposal broadened the scope of the Amendment in some respects, id., at 100–103, the term "effects" is less inclusive than "property" and cannot be said to encompass open

fields. [7] We conclude, as did the Court in deciding Hester v. United States, that the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.

III

[4] **[5]** This interpretation of the Fourth Amendment's language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. Since Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the touchstone of Amendment analysis has been the question whether a person has a "constitutionally protected ****1741** reasonable expectation of privacy." Id., at 360, 88 S.Ct., at 516 (Harlan, J., concurring). The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.' " Id., at 361, 88 S.Ct., at 516. See also Smith v. Maryland, 442 U.S. 735, 740–741, 99 S.Ct. 2577, 2580–2581, 61 L.Ed.2d 220 (1979).

A

No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. See ***178** Rakas v. Illinois, 439 U.S. 128, 152–153, 99 S.Ct. 421, 435–436, 58 L.Ed.2d 387 (1978) (POWELL, J., concurring). In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, e.g., United States v. Chadwick, 433 U.S. 1, 7–8, 97 S.Ct. 2476, 2481–2482, 53 L.Ed.2d 538 (1977), the uses to which the individual has put a location, e.g., Jones v. United States, 362 U.S. 257, 265, 80 S.Ct. 725, 733, 4 L.Ed.2d 697 (1960), and our societal understanding that certain areas deserve the most scrupulous protection from government invasion, e.g., Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.

In this light, the rule of Hester v. United States, supra, that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. See also Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865, 94 S.Ct. 2114, 2115, 40 L.Ed.2d 607 (1974). This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Payton v. New York, supra, 445 U.S., at 601, 100 S.Ct., at 1387. [8] See also Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734 (1961); United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972).

***179** **[6]** **[7]** In contrast, open 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. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air. [9] For these reasons, the asserted ****1742** expectation of privacy in open fields is not an expectation that "society recognizes as reasonable." [10]

***180** **[8]** The historical underpinnings of the open fields doctrine also demonstrate that the doctrine is consistent with respect for "reasonable expectations of privacy." As Justice Holmes, writing for the Court, observed in Hester, 265 U.S., at 59, 44 S.Ct., at 446, the common law distinguished "open fields" from the "curtilage," the land immediately surrounding and associated with the home. See 4 W. Blackstone, Commentaries *225. The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. 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," Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, 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. See, e.g., United States v. Van Dyke, 643 F.2d 992, 993–994 (CA4 1981); United States v. Williams, 581 F.2d 451, 453 (CA5 1978); Care v. United States, 231 F.2d 22, 25 (CA10), cert. denied, 351 U.S. 932, 76 S.Ct. 788, 100 L.Ed. 1461 (1956). Conversely, the common law implies, as we reaffirm today, that no expectation of privacy legitimately attaches to open fields. [11]

***181** We conclude, from the text of the Fourth Amendment and from the historical and contemporary understanding of its purposes, that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.

B

[9] Petitioner Oliver and respondent Thornton contend, to the contrary, that the circumstances of a search sometimes may indicate that reasonable expectations of privacy were violated; and that courts therefore should analyze these circumstances on a case-by-case basis. The language of the Fourth Amendment itself answers their contention.

****1743** Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Under this approach, police officers would have 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. The lawfulness of a search would turn on " '[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions....' " New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981) (quoting LaFave, "Case–By–Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142). This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances. See Belton, supra, at 458–460, 101 S.Ct., at 2863–2864; Robbins v. California, 453 U.S. 420, 430, 101 S.Ct. 2841, 2847, 69 L.Ed.2d 744 (1981) (POWELL, J., concurring in judgment); Dunaway v. New York, 442 U.S. 200, 213–214, 99 S.Ct. 2248, 2257–2258, 60 L.Ed.2d 824 (1979); United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 476, 38 L.Ed.2d 427 (1973). The ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority, Belton, supra, 453 U.S., at 460, 101 S.Ct., at 2864; it also creates a danger that constitutional ***182** rights will be arbitrarily and inequitably enforced. Cf. Smith v. Goguen, 415 U.S. 566, 572–573, 94 S.Ct. 1242, 1246–1247, 39 L.Ed.2d 605 (1974). [12]

IV

[10] **[11]** In any event, while the factors that petitioner Oliver and respondent Thornton urge the courts to consider may be relevant to Fourth Amendment analysis in some contexts, these factors cannot be decisive on the question whether the search of an open field is subject to the Amendment. Initially, we reject the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate. It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marihuana upon secluded land and erected fences and "No Trespassing" signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marihuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was legitimate in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. [13] Rather, the correct inquiry is whether the government's intrusion infringes upon the personal ***183** and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

[12] Nor is the government's intrusion upon an open field a "search" in the constitutional sense because that intrusion is a **1744 trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate. " 'The premise that property interests control the right of the Government to search and seize has been discredited.' " Katz, 389 U.S., at 353, 88 S.Ct., at 512 (quoting Warden v. Hayden, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782 (1967)). "[E] ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." Rakas v. Illinois, 439 U.S., at 144, n. 12, 99 S.Ct., at 431, n. 12.

[13] The common law may guide consideration of what areas are protected by the Fourth Amendment by defining areas whose invasion by others is wrongful. Id., at 153, 99 S.Ct., at 435 (POWELL, J., concurring). [14] The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. [15] Thus, in the case of open fields, the general *184 rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

V

We conclude that the open fields doctrine, as enunciated in Hester, is consistent with the plain language of the Fourth Amendment and its historical purposes. Moreover, Justice Holmes' interpretation of the Amendment in Hester accords with the "reasonable expectation of privacy" analysis developed in subsequent decisions of this Court. We therefore affirm Oliver v. United States; Maine v. Thornton is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice WHITE, concurring in part and concurring in the judgment.

I concur in the judgment and join Parts I and II of the Court's opinion. These Parts dispose of the issue before us; there is no need to go further and deal with the expectation of privacy matter. However reasonable a landowner's expectations of privacy may be, those expectations cannot convert a field into a "house" or an "effect."

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

In each of these consolidated cases, police officers, ignoring clearly visible "No Trespassing" signs, entered upon private land in search of evidence of a crime. At a spot that could *185 not be seen from any vantage point accessible to the public, the police discovered contraband, which was subsequently used to incriminate the owner of the land. In neither case did the police have a warrant authorizing their activities.

The Court holds that police conduct of this sort does not constitute an "unreasonable search" within the meaning of the **1745 Fourth Amendment. The Court reaches that startling conclusion by two independent analytical routes. First, the Court argues that, because the Fourth Amendment by its terms renders people secure in their "persons, houses, papers, and effects," it is inapplicable to trespasses upon land not lying within the curtilage of a dwelling. Ante, at 1740. Second, the Court contends that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." Ante, at 1741. Because I cannot agree with either of these propositions, I dissent.

I

The first ground on which the Court rests its decision is that the Fourth Amendment "indicates with some precision the places and things encompassed by its protections," and that real property is not included in the list of protected spaces and possessions. Ante, at 1740. This line of argument has several flaws. Most obviously, it is inconsistent with the results of many of our previous decisions, none of which the Court purports to overrule. For example, neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; [1] yet we have held that the Fourth Amendment forbids the police without

a warrant to eavesdrop on such a conversation. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Nor can it plausibly ***186** be argued that an office or commercial establishment is covered by the plain language of the Amendment; yet we have held that such premises are entitled to constitutional protection if they are marked in a fashion that alerts the public to the fact that they are private. Marshall v. Barlow's Inc., 436 U.S. 307, 311, 98 S.Ct. 1816, 1819, 56 L.Ed.2d 305 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 358–359, 97 S.Ct. 619, 631–632, 50 L.Ed.2d 530 (1977). [2]

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. Ante, at 1742. 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.

The Court's inability to reconcile its parsimonious reading of the phrase "persons, houses, papers, and effects" with our prior decisions or even its own holding is a symptom of a more fundamental infirmity in the Court's reasoning. The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed, not to prescribe with "precision" permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion. [3] We do not construe constitutional provisions ***187** of this sort the way we do statutes, whose drafters can be expected to ****1746** indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when they become obsolete. [4] Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials. [5]

The liberty shielded by the Fourth Amendment, as we have often acknowledged, is freedom "from unreasonable government intrusions into ... legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 7, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977). That freedom would be incompletely protected if only government conduct that impinged upon a person, house, paper, or effect were subject to constitutional scrutiny. Accordingly, we have repudiated the proposition that the Fourth Amendment applies only to a limited set of locales or kinds of property. In Katz v. United States, we expressly rejected a proffered locational theory of the coverage of the Amendment, holding that it "protects people, not places." 389 U.S., at 351, 88 S.Ct., at 511. Since that time we have consistently adhered ***188** to the view that the applicability of the provision depends solely upon "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." Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). [6] The Court's contention that, because a field is not a house or effect, it is not covered by the Fourth Amendment is inconsistent with this line of cases and with the understanding of the nature of constitutional adjudication from which it derives. [7]

****1747** II

The second ground for the Court's decision is its contention that any interest a landowner might have in the privacy of his woods and fields is not one that "society is prepared to recognize as 'reasonable.' " Ante, at 1740 (quoting Katz v. United States, 389 U.S., at 361, 88 S.Ct., at 516 (Harlan, J., concurring)). ***189** The mode of analysis that underlies this assertion is certainly more consistent with our prior decisions than that discussed above. But the Court's conclusion cannot withstand scrutiny.

As the Court acknowledges, we have traditionally looked to a variety of factors in determining whether an expectation of privacy asserted in a physical space is "reasonable." Ante, at 1740. Though those factors do not lend themselves to precise taxonomy, they may be roughly grouped into three categories. First, we consider whether the expectation at issue is rooted in entitlements defined by positive law. Second, we consider the nature of the uses to which spaces of the sort in question can be put. Third, we consider whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect. [8] When the expectations of privacy asserted by petitioner Oliver and respondent Thornton [9] are examined through these

lenses, it becomes clear that those expectations are entitled to constitutional protection.

A

We have frequently acknowledged that privacy interests are not coterminous with property rights. E.g., United States v. Salvucci, 448 U.S. 83, 91, 100 S.Ct. 2547, 2552, 65 L.Ed.2d 619 (1980). However, because "property rights reflect society's explicit recognition ***190** of a person's authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual's expectations of privacy are reasonable." Rakas v. Illinois, 439 U.S. 128, 153, 99 S.Ct. 435 (1978) (POWELL, J., concurring). [10] Indeed, the Court has suggested that, insofar as "[o]ne of the main rights attaching to property is the right to exclude others, ... one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." Id., at 144, n. 12, 99 S.Ct., at 431 n. 12 (opinion of the Court). [11]

****1748** It is undisputed that Oliver and Thornton each owned the land into which the police intruded. That fact alone provides considerable support for their assertion of legitimate privacy interests in their woods and fields. But even more telling is the nature of the sanctions that Oliver and Thornton could invoke, under local law, for violation of their property rights. In Kentucky, a knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public, constitutes criminal trespass. Ky.Rev.Stat. §§ 511.070(1), 511.080, 511.090(4) (1975). The law in Maine is similar. An intrusion into "any place from ***191** which [the intruder] may lawfully be excluded and which is posted in a manner prescribed by law or in a manner reasonably likely to come to the attention of intruders or which is fenced or otherwise enclosed" is a crime. Me.Rev.Stat.Ann., Tit. 17A, § 402(1)(C) (1964). [12] Thus, positive law not only recognizes the legitimacy of Oliver's and Thornton's insistence that strangers keep off their land, but subjects those who refuse to respect their wishes to the most severe of penalties—criminal liability. Under these circumstances, it is hard to credit the Court's assertion that Oliver's and Thornton's expectations of privacy were not of a sort that society is prepared to recognize as reasonable.

B

The uses to which a place is put are highly relevant to the assessment of a privacy interest asserted therein. Rakas v. Illinois, supra, at 153, 99 S.Ct., at 435 (POWELL, J., concurring). If, in light of our shared sensibilities, those activities are of a kind in which people should be able to engage without fear of intrusion by private persons or government officials, we extend the protection of the Fourth Amendment to the space in question, even in the absence of any entitlement derived from positive law. E.g., Katz v. United States, 389 U.S., at 352–353, 88 S.Ct., at 511–512. [13]

***192** Privately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy. Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. [14] ****1749** Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refuge for wildlife, where flora and fauna are protected from human intervention of any kind. [15] Our respect for the freedom of landowners to use ***193** their posted "open fields" in ways such as these partially explains the seriousness with which the positive law regards deliberate invasions of such spaces, see supra, at 1748, and substantially reinforces the landowners' contention that their expectations of privacy are "reasonable."

C

Whether a person "took normal precautions to maintain his privacy" in a given space affects whether his interest is one protected by the Fourth Amendment. Rawlings v. Kentucky, 448 U.S. 98, 105, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980). [16] The reason why such precautions are relevant is that we do not insist that a person who has a right to exclude others exercise that right. A claim to privacy is therefore strengthened by the fact that the claimant somehow manifested to other people his desire that they keep their distance.

Certain spaces are so presumptively private that signals of this sort are unnecessary; a homeowner need not post a "Do Not Enter" sign on his door in order to deny entrance to uninvited guests.[17] Privacy interests in other spaces are more ambiguous, and the taking of precautions is consequently more important; placing a lock on one's footlocker strengthens one's claim that an examination of its contents is impermissible. See United States v. Chadwick, 433 U.S., at 11, 97 S.Ct., at 2483. Still other spaces are, by positive law and social convention, presumed accessible to members of the public unless the owner manifests his intention to exclude them.

Undeveloped land falls into the last-mentioned category. If a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not welcome, ***194** he cannot object if members of the public enter onto the property. There is no reason why he should have any greater rights as against government officials. Accordingly, we have held that an official may, without a warrant, enter private land from which the public is not excluded and make observations from that vantage point. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 865, 94 S.Ct. 2114, 2115, 40 L.Ed.2d 607 (1974). Fairly read, the case on which the majority so heavily relies, Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), affirms little more than the foregoing unremarkable proposition. From aught that appears in the opinion in that case, the defendants, fleeing from revenue agents who had observed them committing a crime, abandoned incriminating evidence on private land from which the public had not been excluded. Under such circumstances, it is not surprising that the Court was unpersuaded by the defendants' argument that the entry onto their fields by the agents violated the Fourth Amendment.[18]

****1750** A very different case is presented when the owner of undeveloped land has taken precautions to exclude the public. As indicated above, a deliberate entry by a private citizen onto private property marked with "No Trespassing" signs will expose him to criminal liability. I see no reason why a government official should not be obliged to respect such ***195** unequivocal and universally understood manifestations of a landowner's desire for privacy.[19]

In sum, examination of the three principal criteria we have traditionally used for assessing the reasonableness of a person's expectation that a given space would remain private indicates that interests of the sort asserted by Oliver and Thornton are entitled to constitutional protection. An owner's right to insist that others stay off his posted land is firmly grounded in positive law. Many of the uses to which such land may be put deserve privacy. And, by marking the boundaries of the land with warnings that the public should not intrude, the owner has dispelled any ambiguity as to his desires.

The police in these cases proffered no justification for their invasions of Oliver's and Thornton's privacy interests; in neither case was the entry legitimated by a warrant or by one of the established exceptions to the warrant requirement. I conclude, therefore, that the searches of their land violated the Fourth Amendment, and the evidence obtained in the course of those searches should have been suppressed.

III

A clear, easily administrable rule emerges from the analysis set forth above: 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 ***196** 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.

By contrast, the doctrine announced by the Court today is incapable of determinate application. Police officers, making warrantless entries upon private land, will be obliged in the future to make on-the-spot judgments as to how far the curtilage extends, and to stay outside that zone.[20] In addition, we may expect to see a spate of litigation over the question of how much improvement is necessary to remove private ****1751** land from the category of "unoccupied or undeveloped area" to which the "open fields exception" is now deemed applicable. See ante, at 1742, n. 11.

The Court's holding not only ill serves the need to make constitutional doctrine "workable for application by rank-and-file, trained police officers," Illinois v. Andreas, 463 U.S. 765, 772, 103 S.Ct. 3319, 3325, 77 L.Ed.2d 1003 (1983), it withdraws the shield of the Fourth Amendment from privacy interests that clearly deserve protection. By exempting from the coverage of the Amendment large areas of private land, the Court opens the way to investigative activities we would all find repugnant. Cf., e.g., United States v. Lace, 669 F.2d 46, 54 (CA2 1982) (Newman, J., concurring in result) ("[W] hen police officers execute military maneuvers on residential property for three weeks of round-the-clock surveillance, can that be called 'reasonable'?" ***197**); State v. Brady, 406 So.2d 1093, 1094–1095 (Fla.1981) ("In order to position surveillance groups around the ranch's airfield, deputies were forced to cross a dike, ram through one gate and cut the chain lock on another, cut or cross posted fences, and proceed several hundred yards to their hiding places"), cert. granted, 456 U.S. 988, 102 S.Ct. 2266, 73 L.Ed.2d 1282, supplemental memoranda ordered and oral argument postponed, 459 U.S. 986, 103 S.Ct. 338, 74 L.Ed.2d 381 (1982). [21]

The Fourth Amendment, properly construed, embodies and gives effect to our collective sense of the degree to which men and women, in civilized society, are entitled "to be let alone" by their governments. Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); cf. Smith v. Maryland, 442 U.S., at 750, 99 S.Ct., at 2585 (MARSHALL, J., dissenting). The Court's opinion bespeaks and will help to promote an impoverished vision of that fundamental right.

I dissent.

All Citations

466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214

Footnotes

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 It is conceded that the police did not have a warrant authorizing the search, that there was no probable cause for the search, and that no exception to the warrant requirement is applicable.

2 A panel of the Sixth Circuit had affirmed the suppression order. United States v. Oliver, 657 F.2d 85 (CA6 1981).

3 The four dissenting judges contended that the open fields doctrine did not apply where, as in this case, "reasonable effort[s] [have] been made to exclude the public." 686 F.2d, at 372. To that extent, the dissent considered that Katz v. United States, implicitly had overruled previous holdings of this Court. The dissent then concluded that petitioner had established a "reasonable expectation of privacy" under the Katz standard. Judge Lively also wrote separately to argue that the open fields doctrine applied only to lands that could be viewed by the public.

4 The court also discredited other information, supplied by a confidential informant, upon which the police had based their warrant application.

5 Respondent contends that the decision below rests upon adequate and independent state-law grounds. We do not read that decision, however, as excluding the evidence because the search violated the State Constitution. The Maine Supreme Judicial Court referred only to the Fourth Amendment of the Federal Constitution and purported to apply the Katz test; the prior state cases that the court cited also construed the Federal Constitution. In any case, the Maine Supreme Judicial Court did not articulate an independent state ground with the clarity required by Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

Contrary to respondent's assertion, we do not review here the state courts' finding as a matter of "fact" that the area searched was not an "open field." Rather, the question before us is the appropriate legal standard for determining whether search of that area without a warrant was lawful under the Federal Constitution.

The conflict between the two cases that we review here is illustrative of the confusion the open fields doctrine has generated among the state and federal courts. Compare, e.g., State v. Byers, 359 So.2d 84 (La.1978) (refusing to apply open fields doctrine); State v. Brady, 406 So.2d 1093 (Fla.1981) (same), with United States v. Lace, 669 F.2d 46, 50–51 (CA2 1982); United States v. Freie, 545 F.2d 1217 (CA9 1976); United States v. Brown, 473 F.2d 952, 954 (CA5 1973); Atwell v. United States, 414 F.2d 136, 138 (CA5 1969).

6 The dissent offers no basis for its suggestion that Hester rests upon some narrow, unarticulated principle rather than upon the reasoning enunciated by the Court's opinion in that case. Nor have subsequent cases discredited Hester's reasoning. This Court frequently has relied on the explicit language of the Fourth Amendment as delineating the scope

of its affirmative protections. See, e.g., Robbins v. California, 453 U.S. 420, 426, 101 S.Ct. 2841, 2845, 69 L.Ed.2d 744 (1981) (opinion of Stewart, J.); Payton v. New York, 445 U.S. 573, 589–590, 100 S.Ct. 1371, at 1381–1382, 63 L.Ed.2d 639 (1980); Alderman v. United States, 394 U.S. 165, 178–180, 89 S.Ct. 961, 969–970, 22 L.Ed.2d 176 (1969). As these cases, decided after Katz, indicate, Katz' "reasonable expectation of privacy" standard did not sever Fourth Amendment doctrine from the Amendment's language. Katz itself construed the Amendment's protection of the person against unreasonable searches to encompass electronic eavesdropping of telephone conversations sought to be kept private; and Katz' fundamental recognition that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures," see 389 U.S., at 353, 88 S.Ct., at 512, is faithful to the Amendment's language. As Katz demonstrates, the Court fairly may respect the constraints of the Constitution's language without wedding itself to an unreasoning literalism. In contrast, the dissent's approach would ignore the language of the Constitution itself as well as overturn this Court's governing precedent.

7 The Framers would have understood the term "effects" to be limited to personal, rather than real, property. See generally Doe v. Dring, 2 M. & S. 448, 454, 105 Eng.Rep. 447, 449 (K.B.1814) (discussing prior cases); 2 W. Blackstone, Commentaries * 16, * 384–* 385.

8 The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment. See Marshall v. Barlow's, Inc., 436 U.S. 307, 311, 98 S.Ct. 1816, 1819, 56 L.Ed.2d 305 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 355, 97 S.Ct. 619, 630, 50 L.Ed.2d 530 (1977).

9 Tr. of Oral Arg. 14–15, 58. See, e.g., United States v. Allen, 675 F.2d 1373, 1380–1381 (CA9 1980); United States v. DeBacker, 493 F.Supp. 1078, 1081 (WD Mich.1980). In practical terms, petitioner Oliver's and respondent Thornton's analysis merely would require law enforcement officers, in most situations, to use aerial surveillance to gather the information necessary to obtain a warrant or to justify warrantless entry onto the property. It is not easy to see how such a requirement would advance legitimate privacy interests.

10 The dissent conceives of open fields as bustling with private activity as diverse as lovers' trysts and worship services. Post, at 1748–1749. But in most instances police will disturb no one when they enter upon open fields. These fields, by their very character as open and unoccupied, are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment. One need think only of the vast expanse of some western ranches or of the undeveloped woods of the Northwest to see the unreality of the dissent's conception. Further, the Fourth Amendment provides ample protection to activities in the open fields that might implicate an individual's privacy. An individual who enters a place defined to be "public" for Fourth Amendment analysis does not lose all claims to privacy or personal security. Cf. Arkansas v. Sanders, 442 U.S. 753, 766–767, 99 S.Ct. 2586, 2594–2595, 61 L.Ed.2d 235 (1979) (BURGER, C.J., concurring in judgment). For example, the Fourth Amendment's protections against unreasonable arrest or unreasonable seizure of effects upon the person remain fully applicable. See, e.g., United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

11 Neither petitioner Oliver nor respondent Thornton has contended that the property searched was within the curtilage. Nor is it necessary in these cases to consider the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself. It is clear, however, that the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech. For example, contrary to respondent Thornton's suggestion, Tr. of Oral Arg. 21–22, a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment. See, e.g., United States v. Pruitt, 464 F.2d 494 (CA9 1972); Bedell v. State, 257 Ark. 895, 521 S.W.2d 200 (1975).

12 The clarity of the open fields doctrine that we reaffirm today is not sacrificed, as the dissent suggests, by our recognition that the curtilage remains within the protections of the Fourth Amendment. Most of the many millions of acres that are "open fields" are not close to any structure and so not arguably within the curtilage. And, for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience. The occasional difficulties that courts might have in applying this, like other, legal concepts, do not argue for the unprecedented expansion of the Fourth Amendment advocated by the dissent.

13 Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post "No Trespassing" signs.

14 As noted above, the common-law conception of the "curtilage" has served this function.

15 The law of trespass recognizes the interest in possession and control of one's property and for that reason permits exclusion of unwanted intruders. But it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. To the contrary, the common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers. Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property. And the civil action of trespass serves the important function of authorizing an owner to defeat claims of prescription by asserting his own title. See, e.g., O. Holmes, The Common Law 98–100, 244–246 (1881). In any event, unlicensed use of property by others is presumptively unjustified, as anyone who wishes to use the property is free to bargain for the right to do so with the property owner, cf. R. Posner, Economic Analysis of Law 10–13, 21 (1973). For these reasons, the law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests.

1 The Court informs us that the Framers would have understood the term "effects" to encompass only personal property. Ante, at 1740, n. 7. Such a construction of the term would exclude both a public phone booth and spoken words.

2 On the other hand, an automobile surely does constitute an "effect." Under the Court's theory, cars should therefore stand on the same constitutional footing as houses. Our cases establish, however, that car owners' diminished expectations that their cars will remain free from prying eyes warrants a corresponding reduction in the constitutional protection accorded cars. E.g., United States v. Martinez–Fuerte, 428 U.S. 543, 561, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976).

3 By their terms, the provisions of the Bill of Rights curtail only activities by the Federal Government, see Barron v. Mayor and City Council of Baltimore, 7 Pet. 243 (1833), but the Fourteenth Amendment subjects state and local governments to the most important of those restrictions, see, e.g., Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (First Amendment); Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949) (Fourth Amendment).

4 Cf. McCulloch v. Maryland, 17 U.S. 316, 407, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819) ("[W]e must never forget, that it is a constitution we are expounding." Such a document cannot be as detailed as a "legal code"; "[i] ts nature ... requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves") (emphasis in original).

5 Our rejection of the mode of interpretation appropriate for statutes is perhaps clearest in our treatment of the First Amendment. That Amendment provides, in pertinent part, that "Congress shall make no law ... abridging the freedom of speech, or of the press" but says nothing, for example, about restrictions on expressive behavior or about access to the courts. Yet, to give effect to the purpose of the Amendment, we have applied it to regulations of conduct designed to convey a message, e.g., Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963), and have accorded constitutional protection to the public's "right of access to criminal trials," Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604–605, 102 S.Ct. 2613, 2618, 2619, 73 L.Ed.2d 248 (1982).

6 See also United States v. Chadwick, 433 U.S. 1, 7, 11, 97 S.Ct. 2476, 2481, 2483, 53 L.Ed.2d 538 (1977) (disagreeing with the suggestion that the Fourth Amendment "protects only dwellings and other specifically designated locales"; asserting instead that the purpose of the Amendment "is to safeguard individuals from unreasonable government invasions of legitimate privacy interests"); Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978) (holding that the determinative question is "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place").

Our most recent decisions continue to rely on the conception of the purpose and scope of the Fourth Amendment that we enunciated in Katz. See, e.g., United States v. Jacobsen, 466 U.S. 109, at 113–118, 104 S.Ct. 1652, 1656–1659, 80 L.Ed.2d 85 (1984); Michigan v. Clifford, 464 U.S. 287, 292–293, 104 S.Ct. 641, 646, 78 L.Ed.2d 477 (1984); Illinois v. Andreas, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983); United States v. Place, 462 U.S. 696, 706–707, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983); Texas v. Brown, 460 U.S. 730, 738–740, 103 S.Ct. 1535, 1541–1542, 75 L.Ed.2d 502 (1983) (plurality opinion); United States v. Knotts, 460 U.S. 276, 280–281, 103 S.Ct. 1081, 1084–1085, 75 L.Ed.2d 55 (1983).

7 Sensitive to the weakness of its argument that the "persons and things" mentioned in the Fourth Amendment exhaust the coverage of the provision, the Court goes on to analyze at length the privacy interests that might legitimately be asserted in "open fields." The inclusion of Parts III and IV in the opinion, coupled with the Court's reaffirmation of Katz and its progeny, ante, at 1740, strongly suggest that the plain-language theory sketched in Part II of the Court's opinion will have little or no effect on our future decisions in this area.

8 The privacy interests protected by the Fourth Amendment are not limited to expectations that physical areas will remain free from public and government intrusion. See supra, at 1740. The factors relevant to the assessment of the reasonableness of a nonspatial privacy interest may well be different from the three considerations discussed here.

See, e.g., Smith v. Maryland, 442 U.S. 735, 747–748, 99 S.Ct. 2577, 2583–2584, 61 L.Ed.2d 220 (1979) (Stewart, J., dissenting); id., at 750–752, 99 S.Ct., at 2585–2586 (MARSHALL, J., dissenting).

9 The Court does not dispute that Oliver and Thornton had subjective expectations of privacy, nor could it in view of the lower courts' findings on that issue. See United States v. Oliver, No. CR80–00005–01–BG (W.D.Ky. Nov. 14, 1980), App. to Pet. for Cert. in No. 82–15, pp. 19–20; Maine v. Thornton, No. CR82–10 (Me.Super.Ct., Apr. 16, 1982), App. to Pet. for Cert. in No. 82–1273, pp. B–4–B–5.

10 The Court today seeks to evade the force of this principle by contending that the law of property is designed to serve various "prophylactic" and "economic" purposes unrelated to the protection of privacy. Ante, at 1744, and n. 15. Such efforts to rationalize the distribution of entitlements under state law are interesting and may have some explanatory power, but cannot support the weight the Court seeks to place upon them. The Court surely must concede that one of the purposes of the law of real property (and specifically the law of criminal trespass, see infra, at 1748, and n. 12) is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities. The views of commentators, old and new, as to other functions served by positive law are thus insufficient to support the Court's sweeping assertion that "in the case of open fields, the general rights of property ... have little or no relevance to the applicability of the Fourth Amendment," ante, at 1744.

11 See also Rawlings v. Kentucky, 448 U.S. 98, 112, 100 S.Ct. 2556, 2565, 65 L.Ed.2d 633 (1980) (BLACKMUN, J., concurring).

12 Cf. Comment to ALI, Model Penal Code § 221.2, p. 87 (1980) ("The common thread running through these provisions [a sample of state criminal trespass laws] is the element of unwanted intrusion, usually coupled with some sort of notice to would-be intruders that they may not enter. Most people do not object to strangers tramping through woodland or over pasture or open range. On the other hand, intrusions into buildings, onto property fenced in a manner manifestly designed to exclude intruders, or onto any private property in defiance of actual notice to keep away is generally considered objectionable and under some circumstances frightening").

13 In most circumstances, this inquiry requires analysis of the sorts of uses to which a given space is susceptible, not the manner in which the person asserting an expectation of privacy in the space was in fact employing it. See, e.g., United States v. Chadwick, 433 U.S., at 13, 97 S.Ct., at 2484. We make exceptions to this principle and evaluate uses on a case-by-case basis in only two contexts: when called upon to assess (what formerly was called) the "standing" of a particular person to challenge an intrusion by government officials into an area over which that person lacked primary control, see, e.g., Rakas v. Illinois, 439 U.S., at 148–149, 99 S.Ct., at 432–433; Jones v. United States, 362 U.S. 257, 265–266, 80 S.Ct. 725, 733–734, 4 L.Ed.2d 697 (1960), and when it is possible to ascertain how a person is using a particular space without violating the very privacy interest he is asserting, see, e.g., Katz v. United States, 389 U.S., at 352, 88 S.Ct., at 511. (In cases of the latter sort, the inquiries described in this Part and in Part II–C, infra, are coextensive). Neither of these exceptions is applicable here. Thus, the majority's contention that, because the cultivation of marihuana is not an activity that society wishes to protect, Oliver and Thornton had no legitimate privacy interest in their fields, ante, at 1742, and n. 13, reflects a misunderstanding of the level of generality on which the constitutional analysis must proceed.

14 We accord constitutional protection to businesses conducted in office buildings, see supra, at 1745; it is not apparent why businesses conducted in fields that are not open to the public are less deserving of the benefit of the Fourth Amendment.

15 This last-mentioned use implicates a kind of privacy interest somewhat different from those to which we are accustomed. It involves neither a person's interest in immunity from observation nor a person's interest in shielding from scrutiny the residues and manifestations of his personal life. Cf. Weinreb, Generalities of the Fourth Amendment, 42 U.Chi.L.Rev. 47, 52–54 (1974). It derives, rather, from a person's desire to preserve inviolate a portion of his world. The idiosyncracy of this interest does not, however, render it less deserving of constitutional protection.

16 See also Rakas v. Illinois, supra, 439 U.S., at 152, 99 S.Ct., at 435 (POWELL, J., concurring); United States v. Chadwick, supra, 433 U.S., at 11, 97 S.Ct., at 2483; Katz v. United States, supra, 389 U.S., at 352, 88 S.Ct., at 511.

17 However, if the homeowner acts affirmatively to invite someone into his abode, he cannot later insist that his privacy interests have been violated. Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966).

18 An argument supportive of the position taken by the Court today might be constructed on the basis of an examination of the record in Hester. It appears that, in his approach to the house, one of the agents crossed a pasture fence. See Tr. in Hester v. United States, O.T.1923, No. 243, p. 16. However, the Court, in its opinion, placed no weight upon—indeed, did not even mention—that circumstance.

In any event, to the extent that Hester may be read to support a rule any broader than that stated in Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974). It is undercut by our decision in Katz, which repudiated the locational theory of the coverage of the Fourth Amendment enunciated in Olmstead v. United

States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), and by the line of decisions originating in Katz, see supra at 1746, and n. 6.

19 Indeed, important practical considerations suggest that the police should not be empowered to invade land closed to the public. In many parts of the country, landowners feel entitled to use self-help in expelling trespassers from their posted property. There is thus a serious risk that police officers, making unannounced, warrantless searches of "open fields," will become involved in violent confrontations with irate landowners, with potentially tragic results. Cf. McDonald v. United States, 335 U.S. 451, 460–461, 69 S.Ct. 191, 93 L.Ed. 153 (1948) (Jackson, J., concurring).

20 The likelihood that the police will err in making such judgments is suggested by the difficulty experienced by courts when trying to define the curtilage of dwellings. See, e.g., United States v. Berrong, 712 F.2d 1370, 1374, and n. 7 (CA11 1983), cert. pending, No. 83–988; United States v. Van Dyke, 643 F.2d 992, 993–994 (CA4 1981).

21 Perhaps the most serious danger in the decision today is that, if the police are permitted routinely to engage in such behavior, it will gradually become less offensive to us all. As Justice Brandeis once observed: "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...." Olmstead v. United States, 277 U.S., at 485, 48 S.Ct., at 575 (dissenting opinion). See also Solem v. Stumes, 465 U.S. 638, 667, 104 S.Ct. 1338, 1354, 79 L.Ed.2d 579 (1984) (STEVENS, J., dissenting).

End of Document

Probable Cause

"Probable cause" generally refers to the requirement in criminal law that police have adequate reason to arrest (https://criminal.findlaw.com/criminal-procedure/arrest.html) someone, conduct a search, or seize property (https://criminal.findlaw.com/criminal-rights/the-fourth-amendment-reasonableness-requirement.html) relating to an alleged crime. [redacted] requirement comes from the Fourth Amendment of the U.S. Constitution (https://criminal.findlaw.com/criminal-rights/u-s-[redacted]titution-fourth-amendment.html), which states that:

> "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 searched."

As seen in those words, in order for a court to issue a warrant – for someone's arrest, or to search or seize property – there must be probable cause. In situations where police are allowed to effect an arrest, search or seizure without a warrant, they also must have probable cause and it's required for prosecutors to charge a defendant with a crime as well.

Warrants and Probable Cause

Typically, to obtain a warrant (https://criminal.findlaw.com/criminal-rights/the-fourth-amendment-warrant-requirement.html), an officer will sign an affidavit stating the facts as to why there is an adequate reason to arrest someone, conduct a search or seize property. Judges issue warrants if they agree, based on "totality of the circumstances (https://constitution.findlaw.com/amendment4/annotation02.html)" that adequate cause exists.

There are many instances where warrants are not required to arrest or search, such as arrests for felonies witnessed in public by an officer. Here is more information on when warrants are not required (https://criminal.findlaw.com/criminal-rights/the-fourth-amendment-reasonableness-requirement.html).

If a warrantless arrest occurs, probable cause must still be shown after the fact, and will be required in order to prosecute a defendant.

Probable Cause for Arrest

Probable cause for arrest exists when facts and circumstances within the police officer's knowledge would lead a reasonable person to believe that the suspect has committed, is committing, or is about to commit a crime. Probable cause must come from specific facts and circumstances, rather than simply from the officer's hunch or suspicion.

"Detentions" short of arrest do not require probable cause. Such temporary detentions require only "reasonable suspicion (https://criminal.findlaw.com/criminal-[redacted]s/the-fourth-amendment-reasonableness-requirement.html)." This includes car stops, pedestrian stops and detention of occupants while officers execute a search [redacted]nt. "Reasonable suspicion" means specific facts which would lead a reasonable person to believe criminal activity was at hand and further investigation was required.

Detentions can ripen into arrests, and the point where that happens is not always clear. Often, police state that they are arresting a person, place him/her in physical restraints, or take other action crossing the line into arrest. These police actions may trigger the constitutional requirement of probable cause.

Someone arrested or charged without legal cause may seek redress through a civil lawsuit for false arrest or malicious prosecution (https://public.findlaw.com/civil-rights/more-civil-rights-topics/police-misconduct-rights.html).

Probable cause to search exists when facts and circumstances known to the officer provide the basis for a reasonable person to believe that a crime was committed at the place to be searched, or that evidence of a crime exists at the location.

Search warrants must specify the place to be searched, as well as items to be seized.

There are many instances where a search warrant is not required. Common situations in which police are allowed to search without a warrant include:

- when they have consent from the person in charge of the premises (although who that person is can be a tricky legal question);
- when conducting certain searches connected to a lawful arrest; and
- in emergency situations which threaten public safety or the loss of evidence.

Police also do not need a warrant to search or seize contraband "in plain site" when the officer has a right to be present.

Probable Cause to Seize Property

Probable cause to seize property exists when facts and circumstances known to the officer would lead a reasonable person to believe that the item is contraband, is stolen, or constitutes evidence of a crime.

When a search warrant is in play, police generally must search only for the items described in the warrant. However, any contraband or evidence of other crimes they come across may, for the most part, be seized as well.

Should evidence prove to have resulted from an illegal search, it becomes subject to the "exclusionary rule" (https://criminal.findlaw.com/criminal-rights/the-fourth-amendment-and-the-exclusionary-rule.html) and cannot be used against the defendant in court. After hearing arguments from the prosecuting and defense attorneys, the judge decides whether evidence should be excluded.

Conclusion

Probable cause refers to the amount and quality of information required to arrest someone, to search or seize private property in many cases, or to charge someone with a crime. Legal cause to arrest, search, or seize property exists when facts and circumstances known to the police officer would lead a reasonable person to believe:

- that the person to be arrested has committed a crime;
- that the place to be searched was the scene of a crime;
- that the place to be searched contains evidence of a crime; and/or
- that property to be seized is contraband, stolen, or constitutes evidence of a crime.

Get Legal Help with Your Probable Cause Questions

Probable cause is perhaps one of the most important concepts when it comes to criminal law. However, determining whether actions by law enforcement were supported by probable cause often depends on the unique facts of your case. To learn more about probable cause, or to discuss your particular case, you should contact an experienced criminal defense lawyer (https://lawyers.findlaw.com/lawyer/practice/criminal-law?fli=dcta) near you.

#1 HB1290
2-6-19 P.32

BLACK'S LAW DICT.

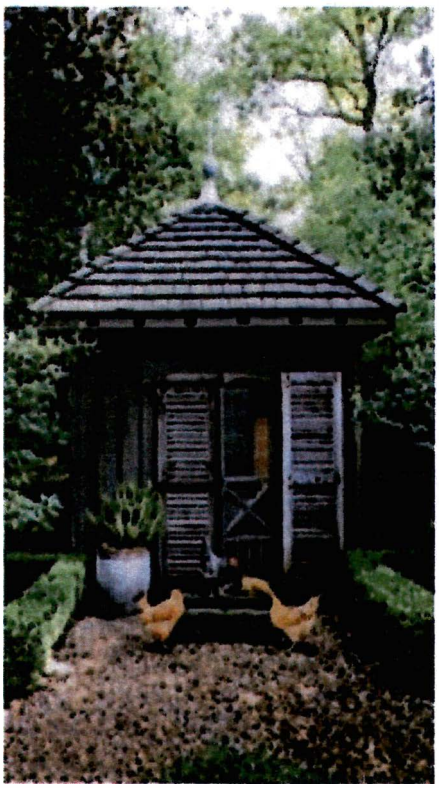
action. • A person applying for legal aid has to show a reasonable basis for the proposed legal action.

probable cause. (16c) 1. *Criminal law.* A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. • Under the Fourth Amendment, probable cause — which amounts to more than a bare suspicion but less than evidence that would justify a conviction — must be shown before an arrest warrant or search warrant may be issued. — Also termed *reasonable cause*; *sufficient cause*; *reasonable grounds*; *reasonable excuse* Cf. *reasonable suspicion* under SUSPICION. [Cases: Arrest ⇨63.4(2).]

> "Probable cause may not be established simply by showing that the officer who made the challenged arrest or search subjectively believed he had grounds for his action. As emphasized in *Beck v. Ohio* [379 U.S. 89, 85 S.Ct. 223 (1964)]: 'If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police.' The probable cause test, then, is an objective one; for there to be probable cause, the facts must be such as would warrant a belief by a reasonable man." Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 3.3, at 140 (2d ed. 1992).

2. *Torts.* A reasonable belief in the existence of facts on which a claim is based and in the legal validity of the claim itself. • In this sense, probable cause is usu. assessed as of the time when the claimant brings the claim (as by filing suit). 3. A reasonable basis to support issuance of an administrative warrant based on either (1) specific evidence of an existing violation of administrative rules, or (2) evidence showing that a particular business meets the legislative or administrative standards permitting an inspection of the business premises. [Cases: Searches and Seizures ⇨129.]

probable-cause hearing. 1. See PRELIMINARY HEARING. 2. See *shelter hearing* under HEARING.

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Crockers Family Farm
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Luke R Simons ND
~ Simons and Son Roofing and Gutters LLC ~
We can sleep on a stormy night.
Remember smile & be kind and happy trails

#2 HB 1290
2-6-2019 Pg1

HB1290

Chairman Koppelman and members of the House Judiciary Committee.

For the record I am Jason Ziegler, and today I am here as the Chief of Police from the City of Mandan, and in opposition of House Bill 1290.

As an experienced law enforcement officer I am opposed to HB1290. This Bill will prohibit law enforcement officers from conducting their duty, not only to protect the public, but also to reasonably conduct their sworn duty.

This Bill would restrict the following:

1. **Welfare Checks:** When officers conduct welfare checks, they do it as a community caretaker. They may end up investigating a crime but when they initially go there they are just checking on the welfare of the person. This bill limits officer's ability as a community caretaker if the only way for them to go on someone's property is in section 3c. None of the exceptions in 3c will give an officer the ability to assist as a community caretaker.

2. **Investigations:** Many criminal investigations do not start based on probable cause. A call for service comes in to a dispatch center, which then sends an officer to the location. Dispatchers, under this Bill, will have to not only ask if the individual calling is the lawful owner or lessee, but have some means to verify that this is true and factual. Without verification the officer will not have any permission to investigate any situation. This Bill would prohibit neighborhood canvases, where the officer would go door to door to see if they can locate any witnesses to a crime.

Law enforcement officers exist to protect our public and are called upon to bring those who wish to harm the innocent to face the justice system. This law will not allow the good men and women of our honorable profession to reasonably do our duty to protect and serve.

I would strongly encourage this committee to give a do not pass on this Bill.

Chief Jason J. Ziegler

#3 HB1290
2-6-2019
Pg 1

Testimony of Lynn D. Helms
Director, North Dakota Industrial Commission Department of Mineral Resources
February 6, 2019
House Judiciary
HB 1290

The NDIC is very concerned about the potential negative impacts of HB1290 on our oil and gas inspection and enforcement program and urges a do not pass from this committee.

Over 90% of the oil and gas sites and pipelines in North Dakota are located on private land and are there by virtue of the dominant rights of the mineral estate and a surface damage compensation agreement or an easement. Many salt water disposal and waste treating facility operators purchase the surface rights so under this bill they could deny our field inspectors access unless we could demonstrate probable cause, an emergency, an accident, a threat to public safety, or produce a search warrant. A current example of this is a salt water disposal operator who has purchased land adjacent to the new Williston airport and applied for a disposal permit. Clearly this facility will need substantial oversight.

The language in line nine of the bill would supersede the authority that the NDIC has held for over 35 years to enter, inspect, plug and reclaim problem sites. For your convenience I have provided those citations below:

38-08-04. JURISDICTION OF COMMISSION.

1. The commission has continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of this chapter. The commission has authority, and it is its duty, to make such investigations as it deems proper to determine whether waste exists or is imminent or whether other facts exist which justify action by the commission. The commission has the authority:

38-08-04.7. RIGHT OF ENTRY. The commission, its agents, employees, or contractors shall have the right to enter any land for the purpose of plugging or replugging a well or the restoration of a well site as provided in section 38-08-04.4.

43-02-03-14. ACCESS TO SITES AND RECORDS. The commission, director, and their representatives shall have access to all records wherever located. All owners, operators, drilling contractors, drillers, service companies, or other persons engaged in drilling, completing, producing, operation, or servicing oil and gas wells, pipelines, injection wells, or treating plants shall permit the commission, director, and their representatives to come upon any lease, property, pipeline right-of-way, well, or drilling rig operated or controlled by them, complying with state safety rules and to inspect the records and operation, and to have access at all times to any and all records. If requested, copies of such records must be filed with the commission. The confidentiality of any data submitted which is confidential pursuant to subsection 6 of North Dakota Century Code section 38-08-04 and section 43-02-03-31 must be maintained.
History: Amended effective April 30, 1981; January 1, 1983; May 1, 1992; May 1, 1994; April 1, 2014; October 1, 2016.

43-05-01-04. ACCESS TO RECORDS. The industrial commission and the commission's authorized agents shall have access to all storage facility records wherever located. All owners, operators, drilling contractors, drillers, service companies, or other persons engaged in drilling, completing, operating, or servicing storage facilities shall permit the industrial commission, or its authorized agents, to come upon any lease, property, well, or drilling rig operated or controlled by them, complying with state safety rules and to inspect the records and operation of wells and to conduct sampling and testing. Any information so obtained shall be public information. If requested, copies of storage facility records must be filed with the commission.
History: Effective April 1, 2010.

I would like to provide a couple of examples:

In February 2014 an abandoned gas station in Noonan, ND was reported to be full of garbage bags believed to be filled with low level radioactive waste.

The absentee land owner had an address in western Montana, was delinquent on payment of property taxes, and multiple attempts to contact her failed. Her son, who operated the disposal company believed to be responsible, had relocated to Mexico.

Until the bags were retrieved and opened by inspectors wearing proper personal protective equipment the contents of the bags was uncertain so no evidence of a violation, emergency situation, accident or threat to public safety could be confirmed. The packing slip for the purchase of the filter bags was found in one of the bags with the used filter socks.

The only recourse would have been to secure a large area including the Main Street of the city of Noonan and request a search warrant.

Currently a well site exists in Burke County that was drilled by Monsanto in 1980, transferred to Avalon, then JN, then Bay Rock, then Earl Schwartz, and finally to Carlson Oil. In 2007 Carlson plugged the well. Surface ownership has changed twice and the current owner surface owner is a huge problem.

The operator has filed the following:
When we were plugging the well, we were approached by a man that said he wanted the well pad and road left into well. Turns out he was Darcy Nicholson's boyfriend. When we finished plugging well, we cleaned out treater and all the tanks on location with vac truck and hot oil truck. Once tanks were cleaned out, we had a crew there to remove equipment and the crew called to say there was a guy watching them through a scope on a rifle. I told them to leave and contacted the sheriff. Turns out that the individual said that he owned the equipment since it was their land and we were not going to remove it. Since then, he has filled the tanks with grain and parked a bunch of vehicles and other equipment on well site. We have had the Burke County States Attorney send them letters through regular mail, also certified, and that they can sign a waiver to take ownership of equipment or we need to remove per NDIC. There was no response, they would not even open the mail before returning. The current Burke County sheriff has tried to serve papers concerning this matter, with no response. The attached documents will show proof of our efforts.

The operator is clearly in violation of NDIC rules, but can't get access to the site. Until the equipment is inspected by inspectors wearing proper personal protective equipment the threat to public safety can't be confirmed, a situation of more than 10 years can't be considered an emergency situation, and it is clearly not an accident.

#4 HB1290
2-6-19
Pg 1

Testimony
House Bill 1290 – Office of the State Engineer
House Judiciary Committee
Representative Koppelman, Chairman
February 6, 2019

Chairman Koppelman and members of the House Judiciary Committee, my name is Garland Erbele and I am the State Engineer for the State Water Commission.

House Bill 1290 proposes to place limitations on private land access by "law enforcement officers" unless specific criteria are met. While not intuitive, the regulatory staff of my office fit the legal definition of a law enforcement officer as North Dakota Century Code (N.D.C.C) § 12.1-01-04 defines the term to mean "a public servant authorized by law or by a government agency or branch to enforce the law and to conduct or engage in investigations or prosecutions for violations of law."

The state engineer has the regulatory authority to enforce the water laws of the state. Hundreds of water permits are inspected each year, as well as numerous other site investigations, under authorization from numerous sections of N.D.C.C, which include 61-03-21.1, 61-04-09, 61-04-11, and 61-04-23 (Attachment 1).

The state engineer's standard operating procedure prior to entering on to private land is to notify the landowner ahead of the intended site visit. While this is an agency chosen method, there are scenarios where notification may be either not possible or not practical. As such, this bill could have a profound effect on the sound management of state's water resources by limiting the process of entry onto private property.

#4 HB 1290
2-6-19 pg 2

My office conducts site visits for the purposes of making determinations at the request of local water resource districts and road authorities, investigation of construction and drainage permitting complaints, field verification of water appropriation permits, and alleged violations of water appropriation law.

With the advent of hydraulic fracturing, violations of water law have risen dramatically. Many of these violations occur when a party takes water without a permit. In these cases, immediate entry upon private property to investigate and gather information is crucial. This usually involves taking photos, identifying equipment ownership, etc.

For these reasons, we oppose the proposed blanket limitations on entry to private property by law enforcement officers. However, we welcome a conversation to discuss the specific concerns the bill intends to address so a workable solution that does not contradict existing regulatory responsibilities of my office can be developed.

I will stand for any questions.

Attachment 1

Below are some of the sections in North Dakota Century Code (N.D.C.C.) relating to the responsibilities for access on to private property by Office of the State Engineer staff:

N.D.C.C. § 61-01-23. Investigation or removal of obstructions in channel.

In order to investigate or remove obstructions from the channel or bed of any watercourse and thus prevent ice from gorging therein and to prevent flooding or pollution of such watercourse, the state water commission, any water resource district, any municipality, any board of county commissioners, and any federal agency authorized to construct works for prevention of damage by floods or for abatement of stream pollution, may enter upon lands lying adjacent to such watercourse to investigate or remove, or cause to be removed from the bed, channel, or banks of such watercourse obstructions which prevent or hinder the free flow of water or passage of ice therein. However, such entry upon adjacent lands must be by the most accessible route and the entering agency is responsible to the landowner for any damage.

N.D.C.C. § 61-02-41. Surveys for the diversion of waters.

For the purpose of regulating the diversion of the natural flow of waters, the state engineer may enter upon the means and place of use of all appropriators for the purpose of making surveys of respective rights and seasonal needs.

N.D.C.C. § 61-03-21.1. Inspection by state engineer.

Whenever the state engineer is authorized or mandated by law to inspect or investigate an alleged violation of a statute under this title, the state engineer shall have the authority to enter upon land for the purposes of conducting such an inspection or investigation. Except in emergency situations as determined by the state engineer, the state engineer shall request written permission from the landowner to enter the property. If the landowner refuses to give written permission, or fails to respond within five days of the request, the state engineer may request the district court of the district containing the property for an order authorizing the state engineer to enter the property to inspect or investigate the alleged violation.

N.D.C.C. § 61-04-09. Application to beneficial use - Inspection - Perfected water permit.

After the permit's beneficial use date, or upon notice from the permitholder that water has been applied to a beneficial use, the state engineer shall notify the conditional water permitholder and inspect the works. The inspection must determine the safety, efficiency, and actual capacity of the works. If the works are not properly and safely constructed, the state engineer may require the necessary changes to be made within a reasonable time. Failure to make the changes within the time prescribed by the state engineer shall cause postponement of the permit's priority date to the date the changes are made to the satisfaction of the state engineer. Any intervening application submitted before the date the changes are made will have the benefit of the postponement of priority. When the works are properly and safely constructed and inspected, the state engineer shall issue the perfected water permit, setting forth the actual capacity of the works and the limitations or

conditions upon the water permit as stated in the conditional water permit authorized by section 61-04-06.2. All conditions attached to any permit issued before July 1, 1975, are binding upon the permittee.

N.D.C.C. § 61-04-11. Inspection of works.

If the state engineer, in the course of the state engineer's duties, shall find that any works used for the storage, diversion, or carriage of water are unsafe and a menace to life or property, the state engineer at once shall notify the owner or the owner's agent, specifying the changes necessary and allowing a reasonable time for putting the works in safe condition. Upon the request of any party, accompanied by the estimated cost of inspection, the state engineer shall cause any alleged unsafe works to be inspected. If they shall be found unsafe by the state engineer, the money deposited by such party shall be refunded, and the fees for inspection shall be paid by the owner of such works. If such fees are not paid by the owner of such works within thirty days after the decision of the state engineer, they shall be a lien against any property of such owner and shall be recovered by a suit instituted by the state's attorney of the county at the request of the state engineer. The state engineer, when in the state engineer's opinion it is necessary, may inspect any works under construction for the storage, diversion, or carriage of water and may require any changes necessary to secure their safety. The fees for such inspection shall be a lien on any property of the owner and shall be subject to collection as provided in this chapter but neither the United States nor the state of North Dakota nor any agency thereof shall be required to pay such fees.

N.D.C.C. § 61-04-23. Forfeiture of water rights - Inspection of works.

Any appropriation of water must be for a beneficial use, and when the appropriator fails to apply it to the beneficial use cited in the permit or ceases to use it for the beneficial use cited in the permit for three successive years, unless the failure or cessation of use has been due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause, the state engineer may declare the water permit or right forfeited. For purposes of this chapter, an incorporated municipality or rural water system has good and sufficient cause excusing the failure to use a water permit, if the water permit may reasonably be necessary for the future water requirements of the municipality or the rural water system. The state engineer shall, as often as necessary, examine the condition of all works constructed or partially constructed within the state and compile information concerning the condition of every water permit or right and all ditches and other works constructed or partially constructed thereunder.

N.D.C.C. § 61-16.1-53.1(1). Appeal of board decisions - State engineer review - Closing of noncomplying dams, dikes, or other devices for water conservation, flood control, regulation, and watershed improvement.

1. The board shall make the decision required by section 61-16.1-53 within a reasonable time, not exceeding one hundred twenty days, after receiving the complaint. The board shall notify all parties of its decision by certified mail. Any aggrieved party may appeal the board's decision to the state engineer. The appeal to the state engineer must be made within thirty days from the date notice of the board's decision has been received. The appeal must be made by submitting a written notice to the state engineer, which must

specifically set forth the reason why the board's decision is erroneous. The appealing party shall also submit copies of the written appeal notice to the board and to all nonappealing parties. Upon receipt of this notice the board, if it has ordered removal of a dam, dike, or other device, is relieved of its obligation to procure the removal of the dam, dike, or other device. The state engineer shall handle the appeal by conducting an independent investigation and making an independent determination of the matter. The state engineer may enter property affected by the complaint to investigate the complaint.

N.D.C.C. § 61-16.2-11. Authority to enter and investigate lands or waters.

The state engineer or any community must notify all landowners prior to making any entry upon any lands and waters in the state for the purpose of making an investigation, survey, removal, or repair contemplated by this chapter. An investigation of a nonconforming use or existing construction or structure shall be made by the state engineer either on the state engineer's own initiative, on the written request of an owner of land abutting the watercourse involved, or on the written request of a community.

N.D.C.C. § 61-32-08. Appeal of board decisions - State engineer review - Closing of noncomplying drains.

1. The board shall make the decision required by section 61-32-07 within a reasonable time, but not to exceed one hundred twenty days, after receiving the complaint. The board shall notify all parties of its decision by certified mail. Any aggrieved party may appeal the board's decision to the state engineer. The appeal to the state engineer must be made within thirty days from the date notice of

the board's decision has been received. The appeal must be made by submitting a written notice to the state engineer, which must specifically set forth the reason why the board's decision is erroneous. The appealing party shall also submit copies of the written appeal notice to the board and to all nonappealing parties. Upon receipt of this notice the board, if it has ordered closure of a drain, lateral drain, or ditch, is relieved of its obligation to procure the closing or filling of the drain, lateral drain, or ditch. The state engineer shall handle the appeal by conducting an independent investigation and making an independent determination of the matter. The state engineer may enter property affected by the complaint to investigate the complaint.

#5 HB 1290
2-4-19
P1

BURLEIGH COUNTY SHERIFF'S DEPARTMENT

KELLY LEBEN
SHERIFF

Testimony provided for: House Judiciary
By: Dustin Olson, Lieutenant, Burleigh County Sheriff's Department

My name is Dustin Olson and I am a Lieutenant with the Burleigh County Sheriff's Department. I oversee the Enforcement Division which includes our Patrol and Investigation Sections. I come here today in opposition to House Bill (HB) 1290.

The Burleigh County Sheriff's Department is opposed to HB 1290 because this bill contradicts several decisions already made by the U.S. Supreme Court. HB 1290 will affect every aspect of what law enforcement can do. This bill puts more restrictions on law enforcement than the citizens of North Dakota. We would have to obtain permission to go inside a convenience store or a restaurant in order to buy a beverage or get something to eat while taking a break. Presently, North Dakota Statute regarding Criminal Trespass "12.1-22-03(6)" does not apply to a peace officer in the course of discharging the peace officer's official duties. HB 1290 will change that.

Duties that law enforcement are involved with that this bill will affect would be a neighborhood canvas for a missing child, conducting a walk and talk with neighboring residents when a crime occurred and probable cause has not been established, or to simply notify residents of a public concern that is non-emergency in nature. Other examples of how this bill would restrict law enforcement would be conducting welfare checks or responding to alarm calls. Since these are non-criminal in nature, we would have to obtain permission to enter the property which is not always possible.

In addition, Sheriff Departments across the state are tasked with delivering Civil Papers. HB 1290 will require us to obtain permission or get a search warrant in order to enter the individual's property to serve that paper. This is simply not cost effective and would put a strain on other agencies such as the District Court and the State's Attorney's Office.

For these reasons, I ask that you oppose HB 1290 and recommend a do not pass.

COURTHOUSE
514 E. Thayer • PO Box 1416
Bismarck, ND 58502-1416
P 701-222-6651 • F 701-221-6899
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BURLEIGH MORTON DETENTION CENTER
4000 Apple Creek Road • PO Box 2499
Bismarck, ND 58502-2499
P 701-255-3113 • F 701-258-5319

#6 HB1290
2-6-19
P1

House Judiciary Committee
Testimony on HB 1290

North Dakota Game and Fish Department
Robert Timian, Chief Game Warden
February 6, 2019

Chairman Koppelman, Vice Chair Karls, and members of the House Judiciary Committee, my name is Robert Timian, Chief Game Warden of the North Dakota Game and Fish Department. I am testifying today in opposition of HB 1290.

The fourth amendment to the US Constitution prohibits unreasonable search and seize by the State. This creates a balance between an individual's rights and the State's need to protect the whole. In addition to subsequent Federal and State laws, the United States Supreme Court and North Dakota Supreme Court have produced rulings that more clearly define what the State may or may not do related to search and seizure. Game Wardens and all other North Dakota licensed peace officers receive extensive and continuing training on all laws and court decisions dealing with search and seizure and the limits those place on law enforcement. In my experience in addition to any internal or States Attorney review of cases to ensure search and seizure was done appropriately, most all defenses involve filing a motion to suppress, in which case a Judge will look at the facts and if the Judge fines the State did not act appropriately the evidence is suppressed and generally results in the case being dismissed. As such I believe that based on the above there are currently laws and court rulings that do provide for a reasonable balance.

The bill language uses the term, notwithstanding, and if passed as is greatly reduce a Game Warden's ability to enforce current laws and regulations as related to hunting, fishing, and trapping. It may be possible that under this bill a private person would still be able to utilize section line trails while hunting, but Game Wardens would not be able to unless the Game

Warden received permission from every landowner and lessee along the entire trail. Violators could simply leave over limits or illegally killed game laying in the field and with a much greater chance the violation would go undetected. There are other possible scenarios that may unreasonably favor the violator should this bill be enacted.

This bill would also impact the ability of Game Wardens provide service to public outside of enforcing game and fish law. Two examples of this from my personal experience. Early in my career as a Game Warden, I was patrolling in a rural area during hunting season when I noticed two vehicles, one a flatbed truck and a pickup, parked by an empty farmhouse with no one in sight. While this was curious, I had no probable cause to believe a violation had or was occurring. I drove up the driveway to the house to see if anyone was around and if they were hunting. It turned out there were two individuals using chainsaws to cut the window frames out to the house and load them unto the flatbed and were not the property owners. A second example is this past fall while patrolling southeast of Bismarck, I came across some cows and calves out of the fenced pasture wandering along the rode in the ditch. There was an active farmstead about a mile away. I drove into the farmyard by way of about a quarter mile of private driveway. I met with husband and wife living there and informed them of the cattle, which were theirs. In both incidents under HB1290 I would have been prohibited from entering the farmyards without prior permission.

We believe there are appropriate and balanced protections under current law, while allowing Game Wardens to provide the services excepted.

The Department respectfully requests a DO NOT PASS on HB1290.

#7 HB 1290
2-6-19
Pg 1

Department of Human Services
House Judiciary Committee
Representative Kim Koppelman, Chairman

February 6, 2019

Chairman Koppelman and members of the Judiciary Committee, I am Jim Fleming, Director of the Child Support Division of the Department of Human Services (Department). The Department defers to this Committee on the merits of House Bill 1290, but requests an amendment that would continue current processes to hold parents responsible for supporting their children.

The first part of the Department's requested amendment would authorize service of a summons and complaint on a parent who is located on private land. Child support obligations in North Dakota are established by court order in a legal action, which is commenced with a summons and complaint served on the defendant personally. The Department frequently attempts to serve the parent by certified mail, but it often must resort to hand-delivery by the county sheriff's office. Even if the parent works in a public place, parents often prefer not to be served at their place of work.

The second part of the Department's requested amendment would authorize a court-issued warrant or order to be served on a parent who owes past-due child support. Failure to pay a court-ordered child support obligation can cause the court to issue an order requiring the parent to come to a hearing and explain the failure to pay. If the parent does not show up for the hearing, a warrant can be issued by the court to take the parent into custody. The ability of law enforcement officials to serve these orders and warrants is an important part of enforcing the court's child support order.

We encourage the Committee's favorable consideration of these amendments. This concludes my testimony, and I am happy to answer any questions you may have.

Prepared by the North Dakota
Department of Human Services
02/06/2019

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1290

Page 1, line 15, remove "or"

Page 1, line 16, replace the underscored period with an underscored semicolon

Page 1, after line 16, insert:

"d. Legal process in a civil action needs to be served; or

e. An order to show cause, warrant of attachment, or warrant for failure to appear has been issued by a court"

Renumber accordingly

#8 HB 1290
2-6-19
Pg 1

Watford City

City of Watford City
213 2nd St. NE | P.O. Box 494
Watford City, ND 58854
Ph. 701-444-2533
Fax 701-444-3004

www.cityofwatfordcity.com

2/6/2019
3:10 PM – Prairie Room

Urge a DO NOT Pass Recommendation for HB 1290

Chairman Koppelman and members of House Judiciary,

The city of Watford City would like to take this opportunity to ask the committee to recommend a DO NOT Pass recommendation for HB 1290. For the last 30 plus years, local law enforcement agencies have been initiating community policing. This concept of working with the community and property owners has served to bring communities together and foster public safety, together. This bill would effectively end that initiative.

Through community policing and promotion of community wellbeing, law enforcement has built bridges, not fences. As proposed in 1290, ONLY if "probable cause exists that a violation of law has occurred, is occurring, or is about to occur; a search warrant has been issued; or responding to an emergency situation, accident, or other threat to public safety" occurs, we will be banned from activities that foster community safety and wellbeing.

It is ironic that if this bill were to pass, protesters in North Dakota would have greater access and freedom to 'place' than law enforcement officers that are rigorously vetted, trained, who are carrying out a sworn oath to protect and serve.

Chairman Koppelman and House Judiciary committee members, thank you so much for your consideration of Watford City's concerns with HB 1290 and for the opportunity to urge a DO NOT Pass recommendation on HB 1290.

Shawn Doble, Chief of Police
Watford City
sdoble@nd.gov

#1
HB 1290
3.26.19

HB 1290 Open Fields Doctrine

Hello Chairman and Members of the Senate Judiciary Committee.

For the record, I am Luke Simons of District 36.

I bring before you HB 1290 which is a common sense bill regarding the farm and ranch private property rights as it pertains to lawless search and seizures.

Would it surprise you that law officers do not need a warrant to go into a building 60 feet from your home if you live in the country?

Barns, shops, outbuildings, chicken coops, garages, garden sheds, grain bins, quonsets, milking parlors, horse stables, calving barns, machine sheds...none of these currently require a search warrant or permission to search if they are located 60 feet from your curtilage or 60 feet from your home.

I was recently talking to a veterinarian who went with a deputy to go look at a horse that was reported to be in bad shape. The deputy knocked on the owner's door and no one was home. The deputy *then* walked to the barn and opened the door, and the vet said, "This is where I stop. You don't have a search warrant."

The deputy looked at the vet and said, "We don't need one. We are far beyond 60 feet from their home."

It turned out that the horse was not in bad shape, but the veterinarian refused to look at the horse until there was a search warrant. Unfortunately, with open fields doctrine, you would not currently need a search warrant to enter any out-building.

I, personally, had a situation where I was feeding haybet barley, which is equivalent to alfalfa hay and is some of the best you can buy. One person driving by thought I was feeding my cows straw and called the local authorities. The sheriff and I went out and looked at the cows, and he didn't see any issue. After about the fourth or fifth time with the same person calling the sheriff, I told the sheriff to get a search warrant. He informed me he didn't need my permission or a search warrant to go on my property because of open fields doctrine. As it turned out, he didn't do anything because he realized my girls were fat and happy. I thought he was full of hot air at the time. I was wrong.

The fourth amendment protects one's house, person, papers, and effects against unreasonable searches and seizures. *Effects* covers motorized vehicle etc.

A motorized vehicle is covered and a tractor is covered under *effects* of the fourth amendment. However, the shop that it is in, if it is in the country, is not protected from unreasonable searches and seizures?

If one's vehicle is covered under effects, I believe outbuildings should be protected in statute, as well.

The same building in town with the same equipment in it is protected under the fourth amendment. Why is this not true for people that live in the country?

What open fields doctrine was *supposed* to be would be common sense. If there is a missing person and the deputy is driving down the road and sees a vehicle that went through a fence in the middle of a field and was overturned, he doesn't need a search warrant or permission. The officer has probable cause. He/she could clearly see it. Of course the officer would investigate it.

It would be literally the same as someone driving without a working tail light, and getting pulled over, and the officer noticed there was someone tied in the backseat and beaten up severely. He/she would not need permission to search the vehicle, which is covered under the fourth amendment. He/she would have probable cause to search and investigate the situation.

If we pass this bill into statute, it would give all out-buildings on farms and ranches the same rights as people in town with their shops, yard sheds, detached garages, etc.

I would happily stand for any questions.

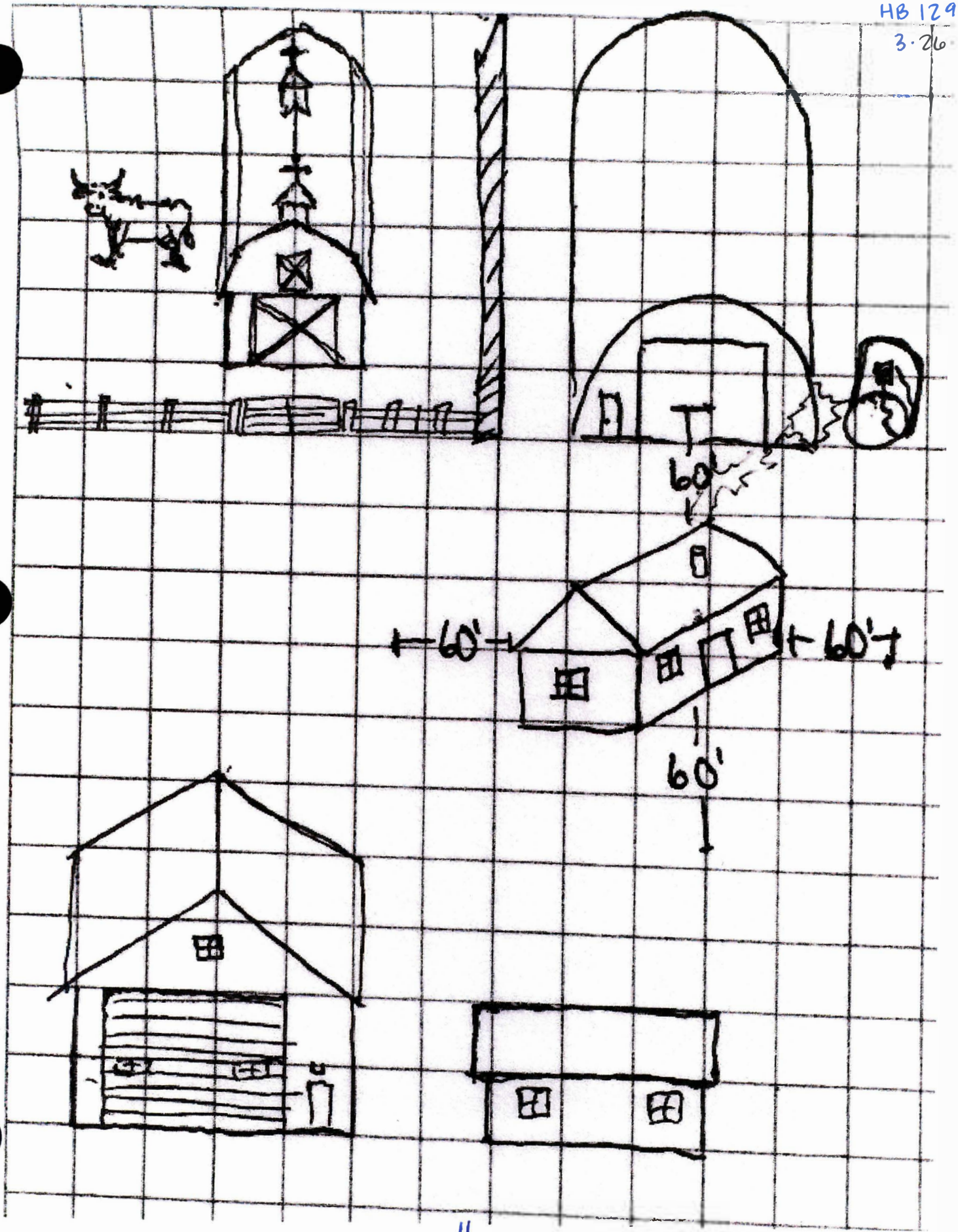
Thank you for your time Chairman and members of the Senate Judiciary committee.

Respectfully

Luke R Simons

#1
HB 1290
3.26.19

#1
HB 1290
3-26-19



BLACK'S LAW DICT.

#1
HB 1290
3.26.19

action. • A person applying for legal aid has to show a reasonable basis for the proposed legal action.

probable cause. (16c) **1.** *Criminal law.* A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. • Under the Fourth Amendment, probable cause — which amounts to more than a bare suspicion but less than evidence that would justify a conviction — must be shown before an arrest warrant or search warrant may be issued. — Also termed *reasonable cause*; *sufficient cause*; *reasonable grounds*; *reasonable excuse* Cf. *reasonable suspicion* under SUSPICION. [Cases: Arrest ⇨63.4(2).]

> "Probable cause may not be established simply by showing that the officer who made the challenged arrest or search subjectively believed he had grounds for his action. As emphasized in *Beck v. Ohio* [379 U.S. 89, 85 S.Ct. 223 (1964)]: 'If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police.' The probable cause test, then, is an objective one; for there to be probable cause, the facts must be such as would warrant a belief by a reasonable man." Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 3.3, at 140 (2d ed. 1992).

2. *Torts.* A reasonable belief in the existence of facts on which a claim is based and in the legal validity of the claim itself. • In this sense, probable cause is usu. assessed as of the time when the claimant brings the claim (as by filing suit). **3.** A reasonable basis to support issuance of an administrative warrant based on either (1) specific evidence of an existing violation of administrative rules, or (2) evidence showing that a particular business meets the legislative or administrative standards permitting an inspection of the business premises. [Cases: Searches and Seizures ⇨129.]

probable-cause hearing. 1. See PRELIMINARY HEARING. **2.** See *shelter hearing* under HEARING.

probable consequence. (16c) An ...

#1
HB 1290
3.26.19

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HB 1290 3.26.19

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HB 1290
3.26.19

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HB 1290
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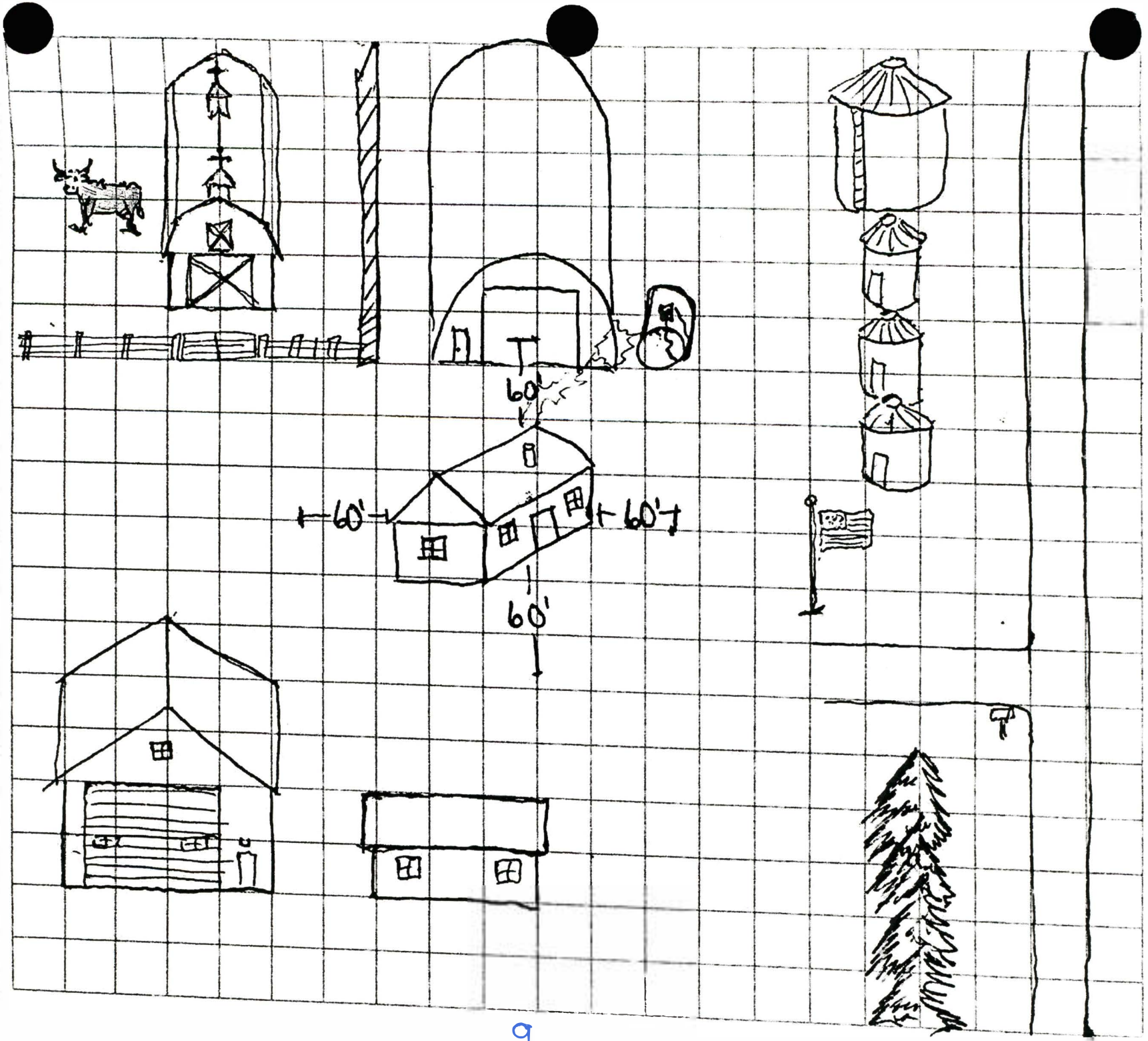

#1
HB 1290
3.26.19

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Thomas F. Murtha
(1934-2017)
Donald M. Murtha
(1905-1993)
Thomas F. Murtha
(1904-1965)
Thomas F. Murtha
(1878-1927)

February 6, 2019

North Dakota House Judiciary Committee
RE: HB 1290

Dear Members of the Committee,

My name is Thomas F. Murtha IV, I am an attorney licensed to practice law in the State of North Dakota. Representative Luke Simons (HB 1290 sponsor) requested that I testify regarding HB 1290. Unfortunately I am scheduled for a hearing in Stark County District Court at the same time as the hearing on HB 1290 and the District Court (Judge Ehlis) on that case denied my request to continue that matter in order to testify on HB 1290.

HB 1290 addresses a concern that all of us in North Dakota have that the Fourth Amendment of the United States Constitution and Article 1 Section 8 of North Dakota's Constitution do not protect what has come to be known as "open fields."[1] The language of the Fourth Amendment and Article 1, Section 8 is identical:

> 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 warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

Our courts have determined that "land" is not included in the term "effects" and therefore the Fourth Amendment and Article 1, Section 8 do not apply to a person's lands outside of a person's home. Law enforcement therefore can trespass on private property without suspicion or any reason to collect evidence against the landowner. HB 1290 will remedy that concern.

HB 1290 would discourage law enforcement or other government from randomly trespassing on private lands by prohibiting the admission in court of any evidence gathered during that trespass. I believe this is a reasonable expectation of privacy that our society here in North Dakota currently supports. HB 1290 would require permission, probable cause, or a warrant before the government to enter and search private lands.

[1] Hester v. United States, 265 U.S. 57 (1924) first introduced the doctrine that the Fourth Amendment protection does not extend to open fields.

#1
HB 1290
3.26.19

I suggest the following rewrite of the last paragraph of HB 1290:

Any evidence obtained in violation of subsection 2 is not admissible against the land owner or a lessee of the land in any criminal or civil proceeding.

Thank you for your consideration of my writing, feel free to contact me with any questions you may have.

February 6, 2019

Sincerely,

Thomas F. Murtha IV

Thomas F. Murtha IV

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds People v. Scott, N.Y., April 2, 1992

104 S.Ct. 1735
Supreme Court of the United States

Ray E. OLIVER, Petitioner
v.
UNITED STATES.
MAINE, Petitioner
v.
Richard THORNTON.

Nos. 82-15, 82-1273.
|
Argued Nov. 9, 1983.
|
Decided April 17, 1984.

Synopsis

In a federal prosecution of a defendant charged with manufacturing marijuana, the United States appealed from an order of the United States District Court for the Western District of Kentucky, Edward H. Johnstone, J., sustaining a motion to exclude evidence obtained in a warrantless search of land of the defendant. After a panel 657 F.2d 85, affirmed the suppression order, the Court of Appeals for the Sixth Circuit, sitting en banc, reversed the District Court, 686 F.2d 356. Certiorari was granted. In a state drug prosecution, the Supreme Judicial Court of Maine, 453 A.2d 489, affirmed a Superior Court order granting the defendant's motion to suppress observations made and items seized at the defendant's property by the police. Certiorari was granted. The Supreme Court, Justice Powell, held that the "open fields" doctrine was applicable to determine whether the discovery or seizure of marijuana in question was valid.

Decision of Sixth Circuit affirmed; decision of Supreme Judicial Court of Maine reversed and remanded.

Justice White, filed opinion concurring in part and concurring in the judgment.

Justice Marshall, filed a dissenting opinion, in which Justice Brennan and Justice Stevens joined.

Opinion on remand, 485 A.2d 952.

West Headnotes (13)

[1] **Searches and Seizures**
Persons, Places and Things Protected

Special protection accorded by Fourth Amendment to people in their "persons, houses, papers, and effects" does not extend to open fields. U.S.C.A. Const.Amend. 4.

120 Cases that cite this headnote

[2] **Searches and Seizures**
Curtilage or Open Fields; Yards and Outbuildings

Open fields are not "effects" within the meaning of the Fourth Amendment. U.S.C.A. Const.Amend. 4.

90 Cases that cite this headnote

[3] **Searches and Seizures**
Curtilage or Open Fields; Yards and Outbuildings

Government's intrusion upon open fields is not one of those "unreasonable searches" proscribed by the Fourth Amendment. U.S.C.A Const.Amend. 4.

64 Cases that cite this headnote

[4] **Searches and Seizures**
Expectation of Privacy

Touchstone of Fourth Amendment is question of whether a person has a constitutionally protected reasonable expectation of privacy. U.S.C.A Const.Amend. 4.

141 Cases that cite this headnote

[5] **Searches and Seizures**
Expectation of Privacy

Fourth Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society

#1.
HB 1290
3.26.19

is prepared to recognize as "reasonable." U.S.C.A Const.Amend. 4.

213 Cases that cite this headnote

[6] **Searches and Seizures**
Curtilage or Open Fields;Yards and Outbuildings

Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance. U.S.C.A Const.Amend. 4.

130 Cases that cite this headnote

[7] **Searches and Seizures**
Curtilage or Open Fields;Yards and Outbuildings

Because open fields are accessible to the public and police in ways that a home, office or commercial structure would not be, and because fences or "No Trespassing" signs do not effectively bar public from viewing open fields, asserted expectation of privacy in open fields is not one that society recognizes as reasonable. U.S.C.A Const.Amend. 4.

180 Cases that cite this headnote

[8] **Searches and Seizures**
Curtilage or Open Fields;Yards and Outbuildings

The common law, by implying that only the land immediately surrounding and associated with the home warrants the Fourth Amendment protections that attach to the home, conversely implies that no expectation of privacy legitimately attaches to open fields. U.S.C.A Const.Amend. 4.

937 Cases that cite this headnote

[9] **Searches and Seizures**
Curtilage or Open Fields;Yards and Outbuildings

Analysis of circumstances of search of open field on case-by-case basis to determine whether reasonable expectations of privacy were violated would not provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment; ad hoc approach not only would make it difficult for policeman to discern the scope of his authority but would also create the danger that constitutional rights would be arbitrarily and inequitably enforced. U.S.C.A Const.Amend. 4.

402 Cases that cite this headnote

[10] **Controlled Substances**
Open Fields;Curtilage or Yard; Growing Plants

Steps taken to protect privacy such as planting marijuana on secluded land and erecting fences and "No Trespassing" signs around property did not establish that expectations of privacy in an open field were "legitimate" in the sense required by the Fourth Amendment. U.S.C.A. Const.Amend. 4.

292 Cases that cite this headnote

[11] **Searches and Seizures**
Curtilage or Open Fields;Yards and Outbuildings

Test of legitimacy of expectation of privacy in open field is not whether individual chooses to conceal assertedly "private" activity, but whether government's intrusion infringes upon personal and societal values protected by Fourth Amendment. U.S.C.A Const.Amend. 4.

477 Cases that cite this headnote

[12] **Searches and Seizures**
What Constitutes Search or Seizure

Fact that government's intrusion upon an open field is a trespass at common law does not make it a "search" in the constitutional sense. U.S.C.A. Const.Amend. 4.

22 Cases that cite this headnote

[13] **Searches and Seizures**
Effect of Illegal Conduct; Trespass

In case of open fields, general rights of property protected by common law of trespass have little or no relevance to applicability of Fourth Amendment. U.S.C.A Const.Amend. 4.

39 Cases that cite this headnote

Syllabus [a1]

In No. 82–15, acting on reports that marihuana was being raised on petitioner's farm, narcotics agents of the Kentucky State Police went to the farm to investigate. Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign, but with a footpath around one side. The agents then walked around the gate and along the road and found a field of marihuana over a mile from petitioner's house. Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance" in violation of a federal statute. After a pretrial hearing, the District Court suppressed evidence of the discovery of the marihuana field, applying Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), and holding that petitioner had a reasonable expectation that the field would remain private and that it was not an "open" field that invited casual intrusion. The Court of Appeals reversed, holding that Katz had not impaired the vitality of the open fields doctrine of Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), which permits police officers to enter and search a field without a warrant. In No. 82–1273, after receiving a tip that marihuana was being grown in the woods behind respondent's residence, police officers entered the woods by a path between the residence and a neighboring house, and followed a path through the woods until they reached two marihuana patches fenced with chicken wire and having "No Trespassing" signs. Later, the officers, upon determining that the patches were on respondent's property, obtained a search warrant and seized the marihuana. Respondent was then arrested and indicted. The Maine trial court granted respondent's motion to suppress the fruits of the second search, holding that the initial warrantless search was unreasonable, that the "No Trespassing" signs and secluded location of the marihuana patches evinced a reasonable expectation of privacy, and that therefore the open fields doctrine did not apply. The Maine Supreme Judicial Court affirmed.

Held: The open fields doctrine should be applied in both cases to determine whether the discovery or seizure of the marihuana in question was valid. Pp. 1740–1744.

***171** (a) That doctrine was founded upon the explicit language of the Fourth Amendment, whose special protection accorded to "persons, houses, papers, and effects" does "not exten[d] to the open fields." Hester v. United States, supra, at 59, 44 S.Ct., at 446. Open fields are not "effects" within the meaning of the Amendment, the term "effects" being less inclusive than "property" and not encompassing open fields. The government's intrusion upon open fields is not one of those "unreasonable searches" proscribed by the Amendment. P. 1740.

(b) Since Katz v. United States, supra, the touchstone of Fourth Amendment analysis has been whether a person has a "constitutionally protected reasonable expectation of privacy." Id., 389 U.S., at 360, 88 S.Ct., at 516. The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.' " Id., at 361, 88 S.Ct., at 516. Because open fields are accessible to the public and the police in ways that a home, office, or commercial structure would not be, and because fences or "No Trespassing" signs do not effectively bar the public from viewing open fields, the asserted expectation of privacy in open fields is not one that society recognizes as reasonable. Moreover, the common law, by implying that only the land immediately surrounding and associated with the home warrants the Fourth Amendment protections that attach **1738 to the home, conversely implies that no expectation of privacy legitimately attaches to open fields. Pp. 1741–1742.

(c) Analysis of the circumstances of the search of an open field on a case-by-case basis to determine whether reasonable expectations of privacy were violated would not provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Such an ad hoc approach not only would make it difficult for the policeman to discern the scope of his authority but also would create the

#1
HB 1290
3.26.19

danger that constitutional rights would be arbitrarily and inequitably enforced. P. 1742.

(d) Steps taken to protect privacy, such as planting the marihuana on secluded land and erecting fences and "No Trespassing" signs around the property, do not establish that expectations of privacy in an open field are legitimate in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity, but whether the government's intrusion infringes upon the personal and societal values protected by the Amendment. The fact that the government's intrusion upon an open field is a trespass at common law does not make it a "search" in the constitutional sense. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. Pp. 1743–1744.

686 F.2d 356 (CA6 1982), affirmed; 453 A.2d 489 (Me.1982), reversed and remanded.

Attorneys and Law Firms

***172** *Frank E. Haddad, Jr.*, argued the cause for petitioner in No. 82-15. With him on the briefs was *Robert L. Wilson. Wayne S. Moss,* Assistant Attorney General of Maine, argued the cause for petitioner in No. 82-1273. With him on the briefs were *James E. Tierney,* Attorney General, *James W. Brannigan, Jr.,* Deputy Attorney General, *Robert S. Frank,* Assistant Attorney General, and *David W. Crook.*

Alan I. Horowitz argued the cause for the United States in No. 82-15. With him on the brief were *Solicitor General Lee, Assistant Attorney General Jensen,* and *Deputy Solicitor General Frey. Donna L. Zeegers,* by appointment of the Court, 461 U.S. 924, argued the cause and filed a brief for respondent in No. 82-1273.†

† Briefs of *amici curiae* urging reversal in No. 82-15 were filed for the American Civil Liberties Union of Northern California et al. by *Eric Neisser, Alan Schlosser, Amitai Schwartz, Joaquin G. Avila, Morris J. Baller,* and *John E. Huerta;* and for the California Farm Bureau Federation et al. by *Thomas F. Olson.*

Briefs of *amici curiae* urging affirmance in No. 82-15 were filed for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau, Wayne W. Schmidt,* and *James P. Manak;* for the State of California by *John K. Van De Kamp,* Attorney General, *Harley D. Mayfield,* Assistant Attorney General, and *Jay M. Bloom,* Deputy Attorney General.

A Brief of *amici curiae* was filed in No. 82-1273 for the State of Alabama et al. by *Charles A. Graddick,* Attorney General of Alabama, and *Joseph G.L. Marston III,* Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Norman C. Gorsuch* of Alaska, *Aviata F. Fa'alevao* of American Samoa, *Robert K. Corbin* of Arizona, *Duane Woodard* of Colorado, *Charles M. Oberly III* of Delaware, *Robert T. Stephen* of Kansas, *Steven L. Beshear* of Kentucky, *Paul L. Douglas* of Nebraska, *David L. Wilkinson* of Utah, *John J. Easton, Jr.,* of Vermont, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Archie G. McClintock* of Wyoming.

Opinion

***173** Justice POWELL delivered the opinion of the Court.

The "open fields" doctrine, first enunciated by this Court in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), permits police officers to enter and search a field without a warrant. We granted certiorari in these cases to clarify confusion that has arisen as to the continued vitality of the doctrine.

I

No. 82–15. Acting on reports that marihuana was being raised on the farm of petitioner Oliver, two narcotics agents of the Kentucky State Police went to the farm to investigate.[1] Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards, passing a barn and a parked camper. At that point, someone standing in front of the camper shouted: "No hunting is allowed, come back up here." The officers shouted back that they were Kentucky State Police officers, but found no one when they returned to the camper. The officers resumed their investigation of the farm and found a field of marihuana over a mile from petitioner's home.

Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance." 21 U.S.C. § 841(a)(1). After a pretrial hearing, the District Court suppressed evidence of the discovery of the marihuana field. Applying Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967), the court found that petitioner had a reasonable expectation that the field would remain private because petitioner "had done all that could be expected of him to assert his privacy in the **1739 area of farm that was searched." He had posted "No Trespassing" signs at regular intervals and had locked the gate at the entrance to the center of the farm. App. to Pet. for Cert. in No. 82–15, *174 pp. 23–24. Further, the court noted that the field itself is highly secluded: it is bounded on all sides by woods, fences, and embankments and cannot be seen from any point of public access. The court concluded that this was not an "open" field that invited casual intrusion.

The Court of Appeals for the Sixth Circuit, sitting en banc, reversed the District Court. United States v. Oliver, 686 F.2d 356 (CA6 1982).[2] The court concluded that Katz, upon which the District Court relied, had not impaired the vitality of the open fields doctrine of Hester. Rather, the open fields doctrine was entirely compatible with Katz' emphasis on privacy. The court reasoned that the "human relations that create the need for privacy do not ordinarily take place" in open fields, and that the property owner's common-law right to exclude trespassers is insufficiently linked to privacy to warrant the Fourth Amendment's protection. 686 F.2d, at 360.[3] We granted certiorari. 459 U.S. 1168, 103 S.Ct. 812, 74 L.Ed.2d 1012 (1983).

No. 82–1273. After receiving an anonymous tip that marihuana was being grown in the woods behind respondent Thornton's residence, two police officers entered the woods by a path between this residence and a neighboring house. They followed a footpath through the woods until they reached two marihuana patches fenced with chicken wire. Later, the officers determined that the patches were on the property of respondent, obtained a warrant to search the property, and seized the marihuana. On the basis of this evidence, respondent was arrested and indicted.

*175 The trial court granted respondent's motion to suppress the fruits of the second search. The warrant for this search was premised on information that the police had obtained during their previous warrantless search, that the court found to be unreasonable.[4] "No Trespassing" signs and the secluded location of the marihuana patches evinced a reasonable expectation of privacy. Therefore, the court held, the open fields doctrine did not apply.

The Maine Supreme Judicial Court affirmed. State v. Thornton, 453 A.2d 489 (Me.1982). It agreed with the trial court that the correct question was whether the search "is a violation of privacy on which the individual justifiably relied," id., at 493, and that the search violated respondent's privacy. The court also agreed that the open fields doctrine did not justify the search. That doctrine applies, according to the court, only when officers are lawfully present on property and observe "open and patent" activity. Id., at 495. In this case, the officers had trespassed upon defendant's property, and the respondent had made every effort to conceal his activity. We granted certiorari. 460 U.S. 1068, 103 S.Ct. 1520, 75 L.Ed.2d 944 (1983).[5]

**1740 *176 II

[1] The rule announced in Hester v. United States was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style: "[T]he 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." Hester v. United States, 265 U.S., at 59, 44 S.Ct., at 446.[6]

[2] [3] Nor are the open fields "effects" within the meaning of the Fourth Amendment. In this respect, it is suggestive that James Madison's proposed draft of what became the Fourth *177 Amendment preserves "[t]he rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures...." See N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 100, n. 77 (1937). Although Congress' revisions of Madison's proposal broadened the scope of the Amendment in some respects, id., at 100–103, the term "effects" is less inclusive than "property" and cannot be said to encompass open

#1 HB 1290 3.26.19

fields. [7] We conclude, as did the Court in deciding Hester v. United States, that the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.

III

[4] [5] This interpretation of the Fourth Amendment's language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. Since Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the touchstone of Amendment analysis has been the question whether a person has a "constitutionally protected **1741 reasonable expectation of privacy." Id., at 360, 88 S.Ct., at 516 (Harlan, J., concurring). The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.' " Id., at 361, 88 S.Ct., at 516. See also Smith v. Maryland, 442 U.S. 735, 740–741, 99 S.Ct. 2577, 2580–2581, 61 L.Ed.2d 220 (1979).

A

No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. See *178 Rakas v. Illinois, 439 U.S. 128, 152–153, 99 S.Ct. 421, 435–436, 58 L.Ed.2d 387 (1978) (POWELL, J., concurring). In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, e.g., United States v. Chadwick, 433 U.S. 1, 7–8, 97 S.Ct. 2476, 2481–2482, 53 L.Ed.2d 538 (1977), the uses to which the individual has put a location, e.g., Jones v. United States, 362 U.S. 257, 265, 80 S.Ct. 725, 733, 4 L.Ed.2d 697 (1960), and our societal understanding that certain areas deserve the most scrupulous protection from government invasion, e.g., Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.

In this light, the rule of Hester v. United States, supra, that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. See also Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865, 94 S.Ct. 2114, 2115, 40 L.Ed.2d 607 (1974). This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Payton v. New York, supra, 445 U.S., at 601, 100 S.Ct., at 1387. [8] See also Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734 (1961); United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972).

*179 [6] [7] In contrast, open 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. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air. [9] For these reasons, the asserted **1742 expectation of privacy in open fields is not an expectation that "society recognizes as reasonable." [10]

*180 [8] The historical underpinnings of the open fields doctrine also demonstrate that the doctrine is consistent with respect for "reasonable expectations of privacy." As Justice Holmes, writing for the Court, observed in Hester, 265 U.S., at 59, 44 S.Ct., at 446, the common law distinguished "open fields" from the "curtilage," the land immediately surrounding and associated with the home. See 4 W. Blackstone, Commentaries *225. The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. 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," Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, 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. See, e.g., United States v. Van Dyke, 643 F.2d 992, 993–994 (CA4 1981); United States v. Williams, 581 F.2d 451, 453 (CA5 1978); Care v. United States, 231 F.2d 22, 25 (CA10), cert. denied, 351 U.S. 932, 76 S.Ct. 788, 100 L.Ed. 1461 (1956). Conversely, the common law implies, as we reaffirm today, that no expectation of privacy legitimately attaches to open fields. [11]

***181** We conclude, from the text of the Fourth Amendment and from the historical and contemporary understanding of its purposes, that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.

B

[9] Petitioner Oliver and respondent Thornton contend, to the contrary, that the circumstances of a search sometimes may indicate that reasonable expectations of privacy were violated; and that courts therefore should analyze these circumstances on a case-by-case basis. The language of the Fourth Amendment itself answers their contention.

****1743** Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Under this approach, police officers would have 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. The lawfulness of a search would turn on " '[a] highly sophisticated set of rules, qualified by all sorts of if's, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions....' " New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981) (quoting LaFave, "Case–By–Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142). This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances. See Belton, supra, at 458–460, 101 S.Ct., at 2863–2864; Robbins v. California, 453 U.S. 420, 430, 101 S.Ct. 2841, 2847, 69 L.Ed.2d 744 (1981) (POWELL, J., concurring in judgment); Dunaway v. New York, 442 U.S. 200, 213–214, 99 S.Ct. 2248, 2257–2258, 60 L.Ed.2d 824 (1979); United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 476, 38 L.Ed.2d 427 (1973). The ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority, Belton, supra, 453 U.S., at 460, 101 S.Ct., at 2864; it also creates a danger that constitutional ***182** rights will be arbitrarily and inequitably enforced. Cf. Smith v. Goguen, 415 U.S. 566, 572–573, 94 S.Ct. 1242, 1246–1247, 39 L.Ed.2d 605 (1974). [12]

IV

[10] **[11]** In any event, while the factors that petitioner Oliver and respondent Thornton urge the courts to consider may be relevant to Fourth Amendment analysis in some contexts, these factors cannot be decisive on the question whether the search of an open field is subject to the Amendment. Initially, we reject the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate. It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marihuana upon secluded land and erected fences and "No Trespassing" signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marihuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was legitimate in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. [13] Rather, the correct inquiry is whether the government's intrusion infringes upon the personal ***183** and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

#1
HB1290
3.26.19

[12] Nor is the government's intrusion upon an open field a "search" in the constitutional sense because that intrusion is a ****1744** trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate. " 'The premise that property interests control the right of the Government to search and seize has been discredited.' " Katz, 389 U.S., at 353, 88 S.Ct., at 512 (quoting Warden v. Hayden, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782 (1967)). "[E] ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." Rakas v. Illinois, 439 U.S., at 144, n. 12, 99 S.Ct., at 431, n. 12.

[13] The common law may guide consideration of what areas are protected by the Fourth Amendment by defining areas whose invasion by others is wrongful. Id., at 153, 99 S.Ct., at 435 (POWELL, J., concurring). [14] The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. [15] Thus, in the case of open fields, the general ***184** rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

V

We conclude that the open fields doctrine, as enunciated in Hester, is consistent with the plain language of the Fourth Amendment and its historical purposes. Moreover, Justice Holmes' interpretation of the Amendment in Hester accords with the "reasonable expectation of privacy" analysis developed in subsequent decisions of this Court. We therefore affirm Oliver v. United States; Maine v. Thornton is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice WHITE, concurring in part and concurring in the judgment.

I concur in the judgment and join Parts I and II of the Court's opinion. These Parts dispose of the issue before us; there is no need to go further and deal with the expectation of privacy matter. However reasonable a landowner's expectations of privacy may be, those expectations cannot convert a field into a "house" or an "effect."

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

In each of these consolidated cases, police officers, ignoring clearly visible "No Trespassing" signs, entered upon private land in search of evidence of a crime. At a spot that could ***185** not be seen from any vantage point accessible to the public, the police discovered contraband, which was subsequently used to incriminate the owner of the land. In neither case did the police have a warrant authorizing their activities.

The Court holds that police conduct of this sort does not constitute an "unreasonable search" within the meaning of the ****1745** Fourth Amendment. The Court reaches that startling conclusion by two independent analytical routes. First, the Court argues that, because the Fourth Amendment by its terms renders people secure in their "persons, houses, papers, and effects," it is inapplicable to trespasses upon land not lying within the curtilage of a dwelling. Ante, at 1740. Second, the Court contends that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." Ante, at 1741. Because I cannot agree with either of these propositions, I dissent.

I

The first ground on which the Court rests its decision is that the Fourth Amendment "indicates with some precision the places and things encompassed by its protections," and that real property is not included in the list of protected spaces and possessions. Ante, at 1740. This line of argument has several flaws. Most obviously, it is inconsistent with the results of many of our previous decisions, none of which the Court purports to overrule. For example, neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; [1] yet we have held that the Fourth Amendment forbids the police without

a warrant to eavesdrop on such a conversation. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Nor can it plausibly ***186** be argued that an office or commercial establishment is covered by the plain language of the Amendment; yet we have held that such premises are entitled to constitutional protection if they are marked in a fashion that alerts the public to the fact that they are private. Marshall v. Barlow's Inc., 436 U.S. 307, 311, 98 S.Ct. 1816, 1819, 56 L.Ed.2d 305 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 358–359, 97 S.Ct. 619, 631–632, 50 L.Ed.2d 530 (1977). [2]

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. Ante, at 1742. 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.

The Court's inability to reconcile its parsimonious reading of the phrase "persons, houses, papers, and effects" with our prior decisions or even its own holding is a symptom of a more fundamental infirmity in the Court's reasoning. The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed, not to prescribe with "precision" permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion. [3] We do not construe constitutional provisions ***187** of this sort the way we do statutes, whose drafters can be expected to ****1746** indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when they become obsolete. [4] Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials. [5]

The liberty shielded by the Fourth Amendment, as we have often acknowledged, is freedom "from unreasonable government intrusions into ... legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 7, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977). That freedom would be incompletely protected if only government conduct that impinged upon a person, house, paper, or effect were subject to constitutional scrutiny. Accordingly, we have repudiated the proposition that the Fourth Amendment applies only to a limited set of locales or kinds of property. In Katz v. United States, we expressly rejected a proffered locational theory of the coverage of the Amendment, holding that it "protects people, not places." 389 U.S., at 351, 88 S.Ct., at 511. Since that time we have consistently adhered ***188** to the view that the applicability of the provision depends solely upon "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." Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). [6] The Court's contention that, because a field is not a house or effect, it is not covered by the Fourth Amendment is inconsistent with this line of cases and with the understanding of the nature of constitutional adjudication from which it derives. [7]

****1747 II**

The second ground for the Court's decision is its contention that any interest a landowner might have in the privacy of his woods and fields is not one that "society is prepared to recognize as 'reasonable.' " Ante, at 1740 (quoting Katz v. United States, 389 U.S., at 361, 88 S.Ct., at 516 (Harlan, J., concurring)). ***189** The mode of analysis that underlies this assertion is certainly more consistent with our prior decisions than that discussed above. But the Court's conclusion cannot withstand scrutiny.

As the Court acknowledges, we have traditionally looked to a variety of factors in determining whether an expectation of privacy asserted in a physical space is "reasonable." Ante, at 1740. Though those factors do not lend themselves to precise taxonomy, they may be roughly grouped into three categories. First, we consider whether the expectation at issue is rooted in entitlements defined by positive law. Second, we consider the nature of the uses to which spaces of the sort in question can be put. Third, we consider whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect. [8] When the expectations of privacy asserted by petitioner Oliver and respondent Thornton [9] are examined through these

#1
HB 1290
3·26·19

lenses, it becomes clear that those expectations are entitled to constitutional protection.

A

We have frequently acknowledged that privacy interests are not coterminous with property rights. E.g., United States v. Salvucci, 448 U.S. 83, 91, 100 S.Ct. 2547, 2552, 65 L.Ed.2d 619 (1980). However, because "property rights reflect society's explicit recognition ***190** of a person's authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual's expectations of privacy are reasonable." Rakas v. Illinois, 439 U.S. 128, 153, 99 S.Ct. 435 (1978) (POWELL, J., concurring). [10] Indeed, the Court has suggested that, insofar as "[o]ne of the main rights attaching to property is the right to exclude others, ... one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." Id., at 144, n. 12, 99 S.Ct., at 431 n. 12 (opinion of the Court). [11]

****1748** It is undisputed that Oliver and Thornton each owned the land into which the police intruded. That fact alone provides considerable support for their assertion of legitimate privacy interests in their woods and fields. But even more telling is the nature of the sanctions that Oliver and Thornton could invoke, under local law, for violation of their property rights. In Kentucky, a knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public, constitutes criminal trespass. Ky.Rev.Stat. §§ 511.070(1), 511.080, 511.090(4) (1975). The law in Maine is similar. An intrusion into "any place from ***191** which [the intruder] may lawfully be excluded and which is posted in a manner prescribed by law or in a manner reasonably likely to come to the attention of intruders or which is fenced or otherwise enclosed" is a crime. Me.Rev.Stat.Ann., Tit. 17A, § 402(1)(C) (1964). [12] Thus, positive law not only recognizes the legitimacy of Oliver's and Thornton's insistence that strangers keep off their land, but subjects those who refuse to respect their wishes to the most severe of penalties—criminal liability. Under these circumstances, it is hard to credit the Court's assertion that Oliver's and Thornton's expectations of privacy were not of a sort that society is prepared to recognize as reasonable.

B

The uses to which a place is put are highly relevant to the assessment of a privacy interest asserted therein. Rakas v. Illinois, supra, at 153, 99 S.Ct., at 435 (POWELL, J., concurring). If, in light of our shared sensibilities, those activities are of a kind in which people should be able to engage without fear of intrusion by private persons or government officials, we extend the protection of the Fourth Amendment to the space in question, even in the absence of any entitlement derived from positive law. E.g., Katz v. United States, 389 U.S., at 352–353, 88 S.Ct., at 511–512. [13]

***192** Privately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy. Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. [14] ****1749** Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refuge for wildlife, where flora and fauna are protected from human intervention of any kind. [15] Our respect for the freedom of landowners to use ***193** their posted "open fields" in ways such as these partially explains the seriousness with which the positive law regards deliberate invasions of such spaces, see supra, at 1748, and substantially reinforces the landowners' contention that their expectations of privacy are "reasonable."

C

Whether a person "took normal precautions to maintain his privacy" in a given space affects whether his interest is one protected by the Fourth Amendment. Rawlings v. Kentucky, 448 U.S. 98, 105, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980). [16] The reason why such precautions are relevant is that we do not insist that a person who has a right to exclude others exercise that right. A claim to privacy is therefore strengthened by the fact that the claimant somehow manifested to other people his desire that they keep their distance.

Certain spaces are so presumptively private that signals of this sort are unnecessary; a homeowner need not post a "Do Not Enter" sign on his door in order to deny entrance to uninvited guests.[17] Privacy interests in other spaces are more ambiguous, and the taking of precautions is consequently more important; placing a lock on one's footlocker strengthens one's claim that an examination of its contents is impermissible. See United States v. Chadwick, 433 U.S., at 11, 97 S.Ct., at 2483. Still other spaces are, by positive law and social convention, presumed accessible to members of the public unless the owner manifests his intention to exclude them.

Undeveloped land falls into the last-mentioned category. If a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not welcome, ***194** he cannot object if members of the public enter onto the property. There is no reason why he should have any greater rights as against government officials. Accordingly, we have held that an official may, without a warrant, enter private land from which the public is not excluded and make observations from that vantage point. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 865, 94 S.Ct. 2114, 2115, 40 L.Ed.2d 607 (1974). Fairly read, the case on which the majority so heavily relies, Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), affirms little more than the foregoing unremarkable proposition. From aught that appears in the opinion in that case, the defendants, fleeing from revenue agents who had observed them committing a crime, abandoned incriminating evidence on private land from which the public had not been excluded. Under such circumstances, it is not surprising that the Court was unpersuaded by the defendants' argument that the entry onto their fields by the agents violated the Fourth Amendment.[18]

****1750** A very different case is presented when the owner of undeveloped land has taken precautions to exclude the public. As indicated above, a deliberate entry by a private citizen onto private property marked with "No Trespassing" signs will expose him to criminal liability. I see no reason why a government official should not be obliged to respect such ***195** unequivocal and universally understood manifestations of a landowner's desire for privacy.[19]

In sum, examination of the three principal criteria we have traditionally used for assessing the reasonableness of a person's expectation that a given space would remain private indicates that interests of the sort asserted by Oliver and Thornton are entitled to constitutional protection. An owner's right to insist that others stay off his posted land is firmly grounded in positive law. Many of the uses to which such land may be put deserve privacy. And, by marking the boundaries of the land with warnings that the public should not intrude, the owner has dispelled any ambiguity as to his desires.

The police in these cases proffered no justification for their invasions of Oliver's and Thornton's privacy interests; in neither case was the entry legitimated by a warrant or by one of the established exceptions to the warrant requirement. I conclude, therefore, that the searches of their land violated the Fourth Amendment, and the evidence obtained in the course of those searches should have been suppressed.

III

A clear, easily administrable rule emerges from the analysis set forth above: 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 ***196** 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.

By contrast, the doctrine announced by the Court today is incapable of determinate application. Police officers, making warrantless entries upon private land, will be obliged in the future to make on-the-spot judgments as to how far the curtilage extends, and to stay outside that zone.[20] In addition, we may expect to see a spate of litigation over the question of how much improvement is necessary to remove private ****1751** land from the category of "unoccupied or undeveloped area" to which the "open fields exception" is now deemed applicable. See ante, at 1742, n. 11.

The Court's holding not only ill serves the need to make constitutional doctrine "workable for application by rank-and-file, trained police officers," Illinois v. Andreas, 463 U.S. 765, 772, 103 S.Ct. 3319, 3325, 77 L.Ed.2d 1003 (1983), it withdraws the shield of the Fourth Amendment from privacy interests that clearly deserve protection. By exempting from the coverage of the Amendment large areas of private land, the Court opens the way to investigative activities we would all find repugnant. Cf., e.g., United States v. Lace, 669 F.2d 46, 54 (CA2 1982) (Newman, J., concurring in result) ("[W] hen police officers execute military maneuvers on residential property for three weeks of round-the-clock surveillance, can that be called 'reasonable'?" ***197**); State v. Brady, 406 So.2d 1093, 1094–1095 (Fla.1981) ("In order to position surveillance groups around the ranch's airfield, deputies were forced to cross a dike, ram through one gate and cut the chain lock on another, cut or cross posted fences, and proceed several hundred yards to their hiding places"), cert. granted, 456 U.S. 988, 102 S.Ct. 2266, 73 L.Ed.2d 1282, supplemental memoranda ordered and oral argument postponed, 459 U.S. 986, 103 S.Ct. 338, 74 L.Ed.2d 381 (1982). [21]

The Fourth Amendment, properly construed, embodies and gives effect to our collective sense of the degree to which men and women, in civilized society, are entitled "to be let alone" by their governments. Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); cf. Smith v. Maryland, 442 U.S., at 750, 99 S.Ct., at 2585 (MARSHALL, J., dissenting). The Court's opinion bespeaks and will help to promote an impoverished vision of that fundamental right.

I dissent.

All Citations

466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214

Footnotes

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 It is conceded that the police did not have a warrant authorizing the search, that there was no probable cause for the search, and that no exception to the warrant requirement is applicable.

2 A panel of the Sixth Circuit had affirmed the suppression order. United States v. Oliver, 657 F.2d 85 (CA6 1981).

3 The four dissenting judges contended that the open fields doctrine did not apply where, as in this case, "reasonable effort[s] [have] been made to exclude the public." 686 F.2d, at 372. To that extent, the dissent considered that Katz v. United States, implicitly had overruled previous holdings of this Court. The dissent then concluded that petitioner had established a "reasonable expectation of privacy" under the Katz standard. Judge Lively also wrote separately to argue that the open fields doctrine applied only to lands that could be viewed by the public.

4 The court also discredited other information, supplied by a confidential informant, upon which the police had based their warrant application.

5 Respondent contends that the decision below rests upon adequate and independent state-law grounds. We do not read that decision, however, as excluding the evidence because the search violated the State Constitution. The Maine Supreme Judicial Court referred only to the Fourth Amendment of the Federal Constitution and purported to apply the Katz test; the prior state cases that the court cited also construed the Federal Constitution. In any case, the Maine Supreme Judicial Court did not articulate an independent state ground with the clarity required by Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

Contrary to respondent's assertion, we do not review here the state courts' finding as a matter of "fact" that the area searched was not an "open field." Rather, the question before us is the appropriate legal standard for determining whether search of that area without a warrant was lawful under the Federal Constitution.

The conflict between the two cases that we review here is illustrative of the confusion the open fields doctrine has generated among the state and federal courts. Compare, e.g., State v. Byers, 359 So.2d 84 (La.1978) (refusing to apply open fields doctrine); State v. Brady, 406 So.2d 1093 (Fla.1981) (same), with United States v. Lace, 669 F.2d 46, 50–51 (CA2 1982); United States v. Freie, 545 F.2d 1217 (CA9 1976); United States v. Brown, 473 F.2d 952, 954 (CA5 1973); Atwell v. United States, 414 F.2d 136, 138 (CA5 1969).

6 The dissent offers no basis for its suggestion that Hester rests upon some narrow, unarticulated principle rather than upon the reasoning enunciated by the Court's opinion in that case. Nor have subsequent cases discredited Hester's reasoning. This Court frequently has relied on the explicit language of the Fourth Amendment as delineating the scope

of its affirmative protections. See, e.g., Robbins v. California, 453 U.S. 420, 426, 101 S.Ct. 2841, 2845, 69 L.Ed.2d 744 (1981) (opinion of Stewart, J.); Payton v. New York, 445 U.S. 573, 589–590, 100 S.Ct. 1371, at 1381–1382, 63 L.Ed.2d 639 (1980); Alderman v. United States, 394 U.S. 165, 178–180, 89 S.Ct. 961, 969–970, 22 L.Ed.2d 176 (1969). As these cases, decided after Katz, indicate, Katz' "reasonable expectation of privacy" standard did not sever Fourth Amendment doctrine from the Amendment's language. Katz itself construed the Amendment's protection of the person against unreasonable searches to encompass electronic eavesdropping of telephone conversations sought to be kept private; and Katz' fundamental recognition that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures," see 389 U.S., at 353, 88 S.Ct., at 512, is faithful to the Amendment's language. As Katz demonstrates, the Court fairly may respect the constraints of the Constitution's language without wedding itself to an unreasoning literalism. In contrast, the dissent's approach would ignore the language of the Constitution itself as well as overturn this Court's governing precedent.

7 The Framers would have understood the term "effects" to be limited to personal, rather than real, property. See generally Doe v. Dring, 2 M. & S. 448, 454, 105 Eng.Rep. 447, 449 (K.B.1814) (discussing prior cases); 2 W. Blackstone, Commentaries * 16, * 384–* 385.

8 The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment. See Marshall v. Barlow's, Inc., 436 U.S. 307, 311, 98 S.Ct. 1816, 1819, 56 L.Ed.2d 305 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 355, 97 S.Ct. 619, 630, 50 L.Ed.2d 530 (1977).

9 Tr. of Oral Arg. 14–15, 58. See, e.g., United States v. Allen, 675 F.2d 1373, 1380–1381 (CA9 1980); United States v. DeBacker, 493 F.Supp. 1078, 1081 (WD Mich.1980). In practical terms, petitioner Oliver's and respondent Thornton's analysis merely would require law enforcement officers, in most situations, to use aerial surveillance to gather the information necessary to obtain a warrant or to justify warrantless entry onto the property. It is not easy to see how such a requirement would advance legitimate privacy interests.

10 The dissent conceives of open fields as bustling with private activity as diverse as lovers' trysts and worship services. Post, at 1748–1749. But in most instances police will disturb no one when they enter upon open fields. These fields, by their very character as open and unoccupied, are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment. One need think only of the vast expanse of some western ranches or of the undeveloped woods of the Northwest to see the unreality of the dissent's conception. Further, the Fourth Amendment provides ample protection to activities in the open fields that might implicate an individual's privacy. An individual who enters a place defined to be "public" for Fourth Amendment analysis does not lose all claims to privacy or personal security. Cf. Arkansas v. Sanders, 442 U.S. 753, 766–767, 99 S.Ct. 2586, 2594–2595, 61 L.Ed.2d 235 (1979) (BURGER, C.J., concurring in judgment). For example, the Fourth Amendment's protections against unreasonable arrest or unreasonable seizure of effects upon the person remain fully applicable. See, e.g., United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

11 Neither petitioner Oliver nor respondent Thornton has contended that the property searched was within the curtilage. Nor is it necessary in these cases to consider the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself. It is clear, however, that the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech. For example, contrary to respondent Thornton's suggestion, Tr. of Oral Arg. 21–22, a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment. See, e.g., United States v. Pruitt, 464 F.2d 494 (CA9 1972); Bedell v. State, 257 Ark. 895, 521 S.W.2d 200 (1975).

12 The clarity of the open fields doctrine that we reaffirm today is not sacrificed, as the dissent suggests, by our recognition that the curtilage remains within the protections of the Fourth Amendment. Most of the many millions of acres that are "open fields" are not close to any structure and so not arguably within the curtilage. And, for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience. The occasional difficulties that courts might have in applying this, like other, legal concepts, do not argue for the unprecedented expansion of the Fourth Amendment advocated by the dissent.

13 Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post "No Trespassing" signs.

14 As noted above, the common-law conception of the "curtilage" has served this function.

15 The law of trespass recognizes the interest in possession and control of one's property and for that reason permits exclusion of unwanted intruders. But it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. To the contrary, the common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers. Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property. And the civil action of trespass serves the important function of authorizing an owner to defeat claims of prescription by asserting his own title. See, e.g., O. Holmes, The Common Law 98–100, 244–246 (1881). In any event, unlicensed use of property by others is presumptively unjustified, as anyone who wishes to use the property is free to bargain for the right to do so with the property owner, cf. R. Posner, Economic Analysis of Law 10–13, 21 (1973). For these reasons, the law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests.

1 The Court informs us that the Framers would have understood the term "effects" to encompass only personal property. Ante, at 1740, n. 7. Such a construction of the term would exclude both a public phone booth and spoken words.

2 On the other hand, an automobile surely does constitute an "effect." Under the Court's theory, cars should therefore stand on the same constitutional footing as houses. Our cases establish, however, that car owners' diminished expectations that their cars will remain free from prying eyes warrants a corresponding reduction in the constitutional protection accorded cars. E.g., United States v. Martinez–Fuerte, 428 U.S. 543, 561, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976).

3 By their terms, the provisions of the Bill of Rights curtail only activities by the Federal Government, see Barron v. Mayor and City Council of Baltimore, 7 Pet. 243 (1833), but the Fourteenth Amendment subjects state and local governments to the most important of those restrictions, see, e.g., Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (First Amendment); Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949) (Fourth Amendment).

4 Cf. McCulloch v. Maryland, 17 U.S. 316, 407, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819) ("[W]e must never forget, that it is a constitution we are expounding." Such a document cannot be as detailed as a "legal code"; "[i] ts nature ... requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves") (emphasis in original).

5 Our rejection of the mode of interpretation appropriate for statutes is perhaps clearest in our treatment of the First Amendment. That Amendment provides, in pertinent part, that "Congress shall make no law ... abridging the freedom of speech, or of the press" but says nothing, for example, about restrictions on expressive behavior or about access to the courts. Yet, to give effect to the purpose of the Amendment, we have applied it to regulations of conduct designed to convey a message, e.g., Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963), and have accorded constitutional protection to the public's "right of access to criminal trials," Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604–605, 102 S.Ct. 2613, 2618, 2619, 73 L.Ed.2d 248 (1982).

6 See also United States v. Chadwick, 433 U.S. 1, 7, 11, 97 S.Ct. 2476, 2481, 2483, 53 L.Ed.2d 538 (1977) (disagreeing with the suggestion that the Fourth Amendment "protects only dwellings and other specifically designated locales"; asserting instead that the purpose of the Amendment "is to safeguard individuals from unreasonable government invasions of legitimate privacy interests"); Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978) (holding that the determinative question is "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place").

Our most recent decisions continue to rely on the conception of the purpose and scope of the Fourth Amendment that we enunciated in Katz. See, e.g., United States v. Jacobsen, 466 U.S. 109, at 113–118, 104 S.Ct. 1652, 1656–1659, 80 L.Ed.2d 85 (1984); Michigan v. Clifford, 464 U.S. 287, 292–293, 104 S.Ct. 641, 646, 78 L.Ed.2d 477 (1984); Illinois v. Andreas, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983); United States v. Place, 462 U.S. 696, 706–707, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983); Texas v. Brown, 460 U.S. 730, 738–740, 103 S.Ct. 1535, 1541–1542, 75 L.Ed.2d 502 (1983) (plurality opinion); United States v. Knotts, 460 U.S. 276, 280–281, 103 S.Ct. 1081, 1084–1085, 75 L.Ed.2d 55 (1983).

7 Sensitive to the weakness of its argument that the "persons and things" mentioned in the Fourth Amendment exhaust the coverage of the provision, the Court goes on to analyze at length the privacy interests that might legitimately be asserted in "open fields." The inclusion of Parts III and IV in the opinion, coupled with the Court's reaffirmation of Katz and its progeny, ante, at 1740, strongly suggest that the plain-language theory sketched in Part II of the Court's opinion will have little or no effect on our future decisions in this area.

8 The privacy interests protected by the Fourth Amendment are not limited to expectations that physical areas will remain free from public and government intrusion. See supra, at 1740. The factors relevant to the assessment of the reasonableness of a nonspatial privacy interest may well be different from the three considerations discussed here.

See, e.g., Smith v. Maryland, 442 U.S. 735, 747–748, 99 S.Ct. 2577, 2583–2584, 61 L.Ed.2d 220 (1979) (Stewart, J., dissenting); id., at 750–752, 99 S.Ct., at 2585–2586 (MARSHALL, J., dissenting).

9 The Court does not dispute that Oliver and Thornton had subjective expectations of privacy, nor could it in view of the lower courts' findings on that issue. See United States v. Oliver, No. CR80–00005–01–BG (W.D.Ky. Nov. 14, 1980), App. to Pet. for Cert. in No. 82–15, pp. 19–20; Maine v. Thornton, No. CR82–10 (Me.Super.Ct., Apr. 16, 1982), App. to Pet. for Cert. in No. 82–1273, pp. B–4–B–5.

10 The Court today seeks to evade the force of this principle by contending that the law of property is designed to serve various "prophylactic" and "economic" purposes unrelated to the protection of privacy. Ante, at 1744, and n. 15. Such efforts to rationalize the distribution of entitlements under state law are interesting and may have some explanatory power, but cannot support the weight the Court seeks to place upon them. The Court surely must concede that one of the purposes of the law of real property (and specifically the law of criminal trespass, see infra, at 1748, and n. 12) is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities. The views of commentators, old and new, as to other functions served by positive law are thus insufficient to support the Court's sweeping assertion that "in the case of open fields, the general rights of property ... have little or no relevance to the applicability of the Fourth Amendment," ante, at 1744.

11 See also Rawlings v. Kentucky, 448 U.S. 98, 112, 100 S.Ct. 2556, 2565, 65 L.Ed.2d 633 (1980) (BLACKMUN, J., concurring).

12 Cf. Comment to ALI, Model Penal Code § 221.2, p. 87 (1980) ("The common thread running through these provisions [a sample of state criminal trespass laws] is the element of unwanted intrusion, usually coupled with some sort of notice to would-be intruders that they may not enter. Most people do not object to strangers tramping through woodland or over pasture or open range. On the other hand, intrusions into buildings, onto property fenced in a manner manifestly designed to exclude intruders, or onto any private property in defiance of actual notice to keep away is generally considered objectionable and under some circumstances frightening").

13 In most circumstances, this inquiry requires analysis of the sorts of uses to which a given space is susceptible, not the manner in which the person asserting an expectation of privacy in the space was in fact employing it. See, e.g., United States v. Chadwick, 433 U.S., at 13, 97 S.Ct., at 2484. We make exceptions to this principle and evaluate uses on a case-by-case basis in only two contexts: when called upon to assess (what formerly was called) the "standing" of a particular person to challenge an intrusion by government officials into an area over which that person lacked primary control, see, e.g., Rakas v. Illinois, 439 U.S., at 148–149, 99 S.Ct., at 432–433; Jones v. United States, 362 U.S. 257, 265–266, 80 S.Ct. 725, 733–734, 4 L.Ed.2d 697 (1960), and when it is possible to ascertain how a person is using a particular space without violating the very privacy interest he is asserting, see, e.g., Katz v. United States, 389 U.S., at 352, 88 S.Ct., at 511. (In cases of the latter sort, the inquiries described in this Part and in Part II–C, infra, are coextensive). Neither of these exceptions is applicable here. Thus, the majority's contention that, because the cultivation of marihuana is not an activity that society wishes to protect, Oliver and Thornton had no legitimate privacy interest in their fields, ante, at 1742, and n. 13, reflects a misunderstanding of the level of generality on which the constitutional analysis must proceed.

14 We accord constitutional protection to businesses conducted in office buildings, see supra, at 1745; it is not apparent why businesses conducted in fields that are not open to the public are less deserving of the benefit of the Fourth Amendment.

15 This last-mentioned use implicates a kind of privacy interest somewhat different from those to which we are accustomed. It involves neither a person's interest in immunity from observation nor a person's interest in shielding from scrutiny the residues and manifestations of his personal life. Cf. Weinreb, Generalities of the Fourth Amendment, 42 U.Chi.L.Rev. 47, 52–54 (1974). It derives, rather, from a person's desire to preserve inviolate a portion of his world. The idiosyncracy of this interest does not, however, render it less deserving of constitutional protection.

16 See also Rakas v. Illinois, supra, 439 U.S., at 152, 99 S.Ct., at 435 (POWELL, J., concurring); United States v. Chadwick, supra, 433 U.S., at 11, 97 S.Ct., at 2483; Katz v. United States, supra, 389 U.S., at 352, 88 S.Ct., at 511.

17 However, if the homeowner acts affirmatively to invite someone into his abode, he cannot later insist that his privacy interests have been violated. Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966).

18 An argument supportive of the position taken by the Court today might be constructed on the basis of an examination of the record in Hester. It appears that, in his approach to the house, one of the agents crossed a pasture fence. See Tr. in Hester v. United States, O.T.1923, No. 243, p. 16. However, the Court, in its opinion, placed no weight upon—indeed, did not even mention—that circumstance.

In any event, to the extent that Hester may be read to support a rule any broader than that stated in Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974). It is undercut by our decision in Katz, which repudiated the locational theory of the coverage of the Fourth Amendment enunciated in Olmstead v. United

States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), and by the line of decisions originating in Katz, see supra at 1746, and n. 6.

19 Indeed, important practical considerations suggest that the police should not be empowered to invade land closed to the public. In many parts of the country, landowners feel entitled to use self-help in expelling trespassers from their posted property. There is thus a serious risk that police officers, making unannounced, warrantless searches of "open fields," will become involved in violent confrontations with irate landowners, with potentially tragic results. Cf. McDonald v. United States, 335 U.S. 451, 460–461, 69 S.Ct. 191, 93 L.Ed. 153 (1948) (Jackson, J., concurring).

20 The likelihood that the police will err in making such judgments is suggested by the difficulty experienced by courts when trying to define the curtilage of dwellings. See, e.g., United States v. Berrong, 712 F.2d 1370, 1374, and n. 7 (CA11 1983), cert. pending, No. 83–988; United States v. Van Dyke, 643 F.2d 992, 993–994 (CA4 1981).

21 Perhaps the most serious danger in the decision today is that, if the police are permitted routinely to engage in such behavior, it will gradually become less offensive to us all. As Justice Brandeis once observed: "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...." Olmstead v. United States, 277 U.S., at 485, 48 S.Ct., at 575 (dissenting opinion). See also Solem v. Stumes, 465 U.S. 638, 667, 104 S.Ct. 1338, 1354, 79 L.Ed.2d 579 (1984) (STEVENS, J., dissenting).

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#1
HB 1290
3.26.19

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds People v. Scott, N.Y., April 2, 1992

44 S.Ct. 445
Supreme Court of the United States.

HESTER
v.
UNITED STATES.

No. 243.
|
Submitted April 24, 1924.
|
Decided May 5, 1924.

Synopsis
In Error to the District Court of the United States for the Western District of South Carolina.

Charlie Hester was convicted of concealing distilled spirits, and he brings error. Affirmed.

West Headnotes (2)

[1] **Criminal Law**
Place of business or other premises
Criminal Law
Compelling Self-Incrimination
Intoxicating Liquors
Incriminating or Exculpatory Circumstances
Intoxicating Liquors
Grounds for seizure and forfeiture
Searches and Seizures
Effect of Illegal Conduct;Trespass

Testimony of officers that they concealed themselves near defendant's house, saw defendant taking a jug out of a car, and when they were discovered defendant ran and dropped the jug, which on examination was found to contain moonshine whisky, held not to violate U.S.C.A. Const.Amend. 4, as to unlawful searches and seizures, or Amendment 5, as to compelling accused to give testimony against himself, though officers had no search warrant and were on defendant's land.

169 Cases that cite this headnote

[2] **Searches and Seizures**
Curtilage or open fields;yards and outbuildings

Protection accorded by Const.Amend. 4, to the people in their "persons, houses, papers and effects," is not extended to open fields.

682 Cases that cite this headnote

Attorneys and Law Firms

****446 *57** Mr. Richard A. Ford, of Washington, D. C., for plaintiff in error.

Messrs. James M. Beck, Sol. Gen., of Washington, D. C., and Mabel Walker Willebrandt, Asst. Atty. Gen., for the United States.

Opinion

Mr. Justice HOLMES delivered the opinion of the Court.

[1] The plaintiff in error, Hester, was convicted of concealing distilled spirits, etc., under Rev. St. § 3296 (Comp. St. § 6038). The case is brought here directly from the District Court on the single ground that by refusing to exclude the testimony of two witnesses and to direct a verdict for the defendant, the plaintiff in error, the Court violated his ***58** rights under the Fourth and Fifth Amendments of the Constitution of the United States.

[2] The witnesses whose testimony is objected to were revenue officers. In consequence of information they went toward the house of Hester's father, where the plaintiff in error lived, and as they approached saw one Henderson drive near to the house. They concealed themselves from fifty to one hundred yards away and saw Hester come out and hand Henderson a quart bottle. An alarm was given. Hester went to a car standing near, took a gallon jug from it and he and Henderson ran. One of the officers pursued, and fired a pistol. Hester dropped his jug, which broke but kept about a quart of its contents. Henderson threw away his bottle also. The jug and bottle both contained

what the officers, being experts, recognized as moonshine whisky, that is, whisky illicitly distilled; said to be easily recognizable. The other officer entered the house, but being told there was no whisky there left it, but found outside a jar that had been thrown out and broken and that also contained whisky. While the officers were there other cars stopped at the house but were spoken to by Hester's father and drove off. The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by the entry into the house and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself ***59** does not require an answer. The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, 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. 4 Bl. Comm. 223, 225, 226.

Judgment affirmed.

All Citations

265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898

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36-21.1 - Humane Treatment #1 HB 1290 3.26.19

343 N.W.2d 361
Supreme Court of North Dakota.

STATE of North Dakota, Plaintiff and Appellant,
v.
John Arthur LARSON, Defendant and Appellee.
STATE OF North Dakota, Plaintiff and Appellant,
v.
Roger Charles JOHNSEN, Defendant and Appellee.

Cr. Nos. 951, 952.
|
Jan. 13, 1984.

Synopsis

State appealed from order of the County Court, Sheridan County, O.A. Schulz, J., suppressing evidence against defendants in prosecution for alleged violation of game laws. The Supreme Court, Sand, J., held that: (1) given totality of circumstances, including fact that consent to search was given only after game warden told defendant that if warden was not shown where defendant had put allegedly illegally taken ducks, six more wardens and four dogs would be brought in, consent was involuntary, and (2) in view of fact that defendants were faced with warden's threat to use dogs and more wardens, defendants' confessions to having shot more than legal limit of ducks were properly suppressed, defendants having received neither *Miranda* warnings nor anything similar thereto, even though neither defendant was formally placed under arrest at the time.

Affirmed.

West Headnotes (7)

[1] **Searches and Seizures**
Necessity of and preference for warrant, and exceptions in general

Ordinarily, all searches made without valid warrant are unreasonable unless they are shown to come within one of the exceptions to rule that search must be made upon valid warrant. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[2] **Criminal Law**
Evidence wrongfully obtained

Criminal Law
Admission, statements, and confessions

In cases involving voluntariness of confession or consent to search, the Supreme Court will not reverse trial court's determination unless it is contrary to manifest weight of the evidence.

1 Cases that cite this headnote

[3] **Criminal Law**
Admission, statements, and confessions

Trial court's determination as to voluntariness of confession or consent to search will not be overturned if, after conflicts in testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting trial court's determination.

1 Cases that cite this headnote

[4] **Searches and Seizures**
Questions of law or fact

Determination of whether consent to search was voluntary or involuntary is question of fact to be determined from totality of all the circumstances. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[5] **Searches and Seizures**
Particular concrete applications

Totality of circumstances, including fact that consent to search was given only after game warden told defendant that if warden was not shown where defendant had put allegedly illegally taken ducks, six more wardens and four dogs would be brought in, established that consent was involuntary. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

#1
HB 1290
3-26-19

[6] **Criminal Law**
⇐ What constitutes voluntary statement, admission, or confession

Issue of voluntariness of admissions is always question to be determined from all of the circumstances, regardless of whether or not subject is in custody. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[7] **Criminal Law**
⇐ Necessity in general

Criminal Law
⇐ Particular cases

Criminal Law
⇐ Threats;Fear of Injury

In view of fact that defendants were faced with game warden's threat to use dogs and more wardens in attempt to find allegedly illegally taken ducks if defendant did not cooperate, the interrogation and intimidation being such that wardens should have known it would likely elicit incriminating response from defendants, defendants' confessions to having shot more than legal limit of ducks were properly suppressed, defendants having received neither *Miranda* warnings nor anything similar to them, notwithstanding that defendants were not formally placed under arrest at the time. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

Attorneys and Law Firms

*362 Walter M. Lipp, State's Atty., McClusky, for plaintiff and appellant.

Baer & Asbridge, Bismarck, for defendants and appellees; argued by Darold A. Asbridge, Bismarck.

Opinion

SAND, Justice.

The Sheridan County justice court granted a motion suppressing evidence against the defendants, John A. Larson (Larson) and Roger C. Johnsen (Johnsen), in a prosecution for alleged violation of North Dakota game laws. The State appealed.

On 2 October 1982 Johnsen, his two sons, Larson, his two sons, and a friend, were waterfowl hunting from a camp on Larson's land in Sheridan County. Unbeknown to Larson and Johnsen, state and federal game wardens were watching them from nearby hills from early morning until late afternoon. David Kraft, a special agent for the United States Fish and Wildlife Service, kept a log of events as the wardens watched. Kraft's log indicated that he saw the hunters shoot eighteen to twenty ducks and that the ducks were taken to several locations, a trailer house, a vehicle, an outhouse, an abandoned shed, and some brush near the shed. According to Kraft, Johnsen and his son left the camp in Johnsen's vehicle about 4:00 p.m.

Greg Cleveland, a friend of Larson, arrived at the camp with two more hunters about 5:00 p.m. Shortly thereafter, North Dakota game warden Tim Larson, and special agent Terry Grosz of the United States Fish and Wildlife Service, entered the camp. Grosz questioned the hunters and checked their licenses and guns. Grosz gave no *Miranda* warnings to Larson at that time nor at any time during the investigation.

Meanwhile, warden Larson, who was in radio contact with other wardens from the surveillance point, began a search of the brush area near the shed. When warden Larson returned from his search he reported to Grosz that he did not find any of the ducks. According to Cleveland, Grosz then said to defendant Larson, "We have spotters on the hillside, before daylight they saw you got more birds stashed down here. I will give you one chance and one chance only to show me or we will bring down six wardens and four dogs." [1] Larson then took Grosz to several locations where the ducks had been placed. Meanwhile, two more wardens joined wardens Grosz and Larson at the camp. Because Grosz apparently did not want to involve the children, he advised Cleveland to take the children "far away" and to "come back after dark." After Cleveland and the children had left, Grosz began to question defendant Larson about who had shot which ducks. Larson admitted to Grosz that he shot twelve ducks, seven more than permitted by law. Grosz then confiscated Larson's shotgun.

#1
HB 1290
3-26-19

The wardens were at the camp for about two and one-half hours. When they left, they met Johnsen coming toward the camp in his pickup. Kraft explained to Johnsen that they had talked to Larson and that they "[knew] what had happened." Kraft showed the confiscated ducks to Johnsen and asked him to identify which ones he had shot. Johnsen admitted that he shot more than his limit. The wardens then confiscated Johnsen's gun and told him he could return to the camp.

*363 On 5 October 1982 separate complaints were filed against Larson and Johnsen and warrants were issued for their arrests. The complaints charged that Larson had shot seven ducks more than his limit, and that Johnsen had shot three more than his limit.

Larson and Johnsen moved to suppress all of the evidence and their statements on the grounds that the search was conducted in violation of their fourth amendment protection against unreasonable searches and seizures and that their statements were given in violation of their fifth amendment privilege against compelled self-incrimination. [2]

The Sheridan County court held an evidentiary hearing in which the two complaints were consolidated. The court suppressed all of the evidence and the defendants' statements on the grounds that their fourth and fifth amendment rights had been violated, and the State appealed.

[1] With respect to the State's contention that no fourth amendment violation occurred, we begin by noting that, ordinarily, all searches made without a valid search warrant are unreasonable unless they are shown to come within one of the exceptions to the rule that a search must be made upon a valid warrant. *Stoner v. California,* 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L.Ed.2d 856, 859 (1964).

The State contended that a search warrant was unnecessary because the surveillance and subsequent search of the camp was conducted pursuant to the "**open fields" doctrine** announced in *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). In *Hester* the Court said 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." 265 U.S. at 59, 44 S.Ct. at 446, 68 L.Ed. at 900. Thus, the Court drew a distinction between the dwelling and its curtilage, which was protected, and an open field, which was not. See W. Ringel, *Searches and Seizures, Arrests and Confessions,* § 8.4 (1983). Although the open fields/curtilage distinction is not easily drawn, most courts and commentators have **defined curtilage as that area near a dwelling, not necessarily enclosed, that generally includes buildings or other adjuncts used for domestic purposes.** *State v. Vicars,* 207 Neb. 325, 299 N.W.2d 421, 425 (1980); W. LaFave, *Search and Seizure* § 2.4, at 332 (1978).

The utility of the **open fields doctrine**, however, has become suspect in light of the Supreme Court's holding in *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 582 (1967), that the fourth amendment protects people, not places. Thus, a greater emphasis is now placed upon an examination of whether or not one possesses a reasonable expectation of privacy in the object or area to be searched. *Terry v. Ohio,* 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889, 899 (1968); *State v. Matthews,* 216 N.W.2d 90, 103 (N.D.1974). Nevertheless, this Court has not completely abandoned pre-*Katz* concepts, like the **open fields doctrine**, because such concepts are still important in determining whether or not the person searched had a reasonable expectation of privacy. See *State v. Planz,* 304 N.W.2d 74, 79 (N.D.1981). **Indeed, the United States Supreme Court has said that it "has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the fourth] Amendment."** *Rakas v. Illinois,* 439 U.S. 128, 144, 99 S.Ct. 421, 431, 58 L.Ed.2d 387, 401 n. 12 (1978). The Court has also recently referred to the **open fields doctrine** in determining that a defendant's expectation of privacy with respect to activities inside his cabin did not extend to police observation of a car carrying a container with an electronic beeper inside it as it arrived on defendant's property after leaving a public highway. *364 *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). See also *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U.S. 861, 94 S.Ct. 2114, 44 L.Ed.2d 607 (1974) (application of **open fields doctrine** to warrantless entry by health inspector on defendant's outdoor premises).

In the instant case, the wardens were watching the defendants from surrounding hills about one-quarter to one-half mile away. The record does not indicate whether

or not the wardens were on defendant Larson's property, although warden Kraft testified that the wardens were on "[what was] known to [Kraft] as the John Larson Hunting Camp, Sheridan County." If the wardens were in fact on Larson's property, the record does not reflect whether or not the camp was also visible from other property, such as a public road or neighboring land.

Kraft testified that the camp was located "kind of in a pasture" between two large sloughs. The camp contained a trailer house, an outhouse, and a dilapidated shed located about thirty feet from the trailer house. The record does not indicate for what purposes, or how often, the buildings were used. The record does indicate that Larson's land was posted, although it does not indicate how many signs there were or where the signs were located. Johnsen testified that one had to drive through a stubble-field to get to the camp, but the record does not indicate whether or not the area was fenced, or whether or not any gates had to be opened.

Many of the unknown factors noted above, while not individually dispositive, would be cumulatively significant in applying the **open fields doctrine** to determine whether or not the defendants had a reasonable expectation of privacy.[3] Because of the nature of the disposition of this case, however, we need not resolve that question. The fact remains that warden Larson's initial search of the area near the shed was unproductive. The wardens did not discover the ducks until defendant Larson led them to the ducks following Grosz' statement that he was prepared to dispatch dogs and more wardens.

[2] **[3]** The State argued, in the alternative,[4] that if the **open fields doctrine** was inapplicable, then Larson voluntarily consented to the search that produced the ducks. In cases involving the voluntariness of a confession or a consent to search, this Court will not reverse the trial court's determination unless it is contrary to the manifest weight of the evidence. The trial court's determination will not be overturned if, after conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's determination. *State v. Discoe,* 334 N.W.2d 466, 469 (N.D.1983).

[4] A determination of whether a consent to a search was voluntary or involuntary is a question of fact to be determined from the totality of all the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854, 862 (1973); *State v. Lange,* 255 N.W.2d 59, 64 (N.D.1977). To be voluntary, the consent must "not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth, supra,* 412 U.S. at 228, 93 S.Ct. at 2048, 36 L.Ed.2d at 863; see also *State v. Metzner,* 244 N.W.2d 215, 222–23 (N.D.1976).

[5] The most critical fact in the case at bar is Grosz' statement to defendant Larson that if Larson did not show Grosz where the ducks were, then Grosz would "bring [in] six wardens and four dogs." Grosz' statement was an implicit, if not explicit, threat that the wardens did not intend to leave until the ducks had been found. The implication was that defendant ***365** Larson had no other alternative than to submit to a search and that the wardens had authority to wait "until hell froze over" for his reply. Threats of force or authority of the type made by Grosz constitute impermissible ultimatums, ultimatums abhorrent to the principles of the fourth amendment.

In *Schneckloth, supra,* 412 U.S. at 227, 93 S.Ct. at 2048, 36 L.Ed.2d at 863, the Court held that a defendant's knowledge of the right to refuse consent is one factor in determining whether or not the consent was voluntary, but the State need not demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Although the record does not specifically indicate whether defendant Larson knew or did not know of his right to refuse consent, it does appear that, under the circumstances, Larson believed he could not refuse. Larson testified that he showed Grosz where the ducks were because "[he] wasn't going to fool around with [Grosz]."

There were additional factors which indicate that defendant Larson's consent may have been involuntary. Despite over two hours of questioning by wardens Grosz and Larson, defendant Larson gave no indication that he intended to consent to a search until Grosz threatened a more intensive search. Grosz' suggestion to Cleveland that he and the children should leave and go "far away" indicates that Grosz' threat was not frivolous. When Cleveland and the children left, defendant Larson was left by himself to confront the four wardens. The investigation, by the time Grosz made his threat, was not routine and the questions were not general. Finally, we note that Grosz was 6# 5# tall and weighed about 280 pounds. Although the physical stature of a police officer alone is not dispositive of whether or not a consent to a

search was voluntary, it may, under some circumstances, have an intimidating effect.

The State argued that our decision in *State v. Lange,* 255 N.W.2d 59 (N.D.1977) should apply. In *Lange,* a police officer stopped the defendant's car after the officer observed the car weaving across a city street. When the officer approached the car he noticed a small pipe in the ashtray and several empty paper bags. The officer read Lange his *Miranda* rights and asked him some questions. When Lange admitted that he had been drinking, the officer took him to the police station. At the station, the officer asked Lange for permission to search his vehicle. Lange initially consented, but after the thorough nature of the search was explained, Lange's companion in the car asked, "What if we said no?" When the officer replied that the vehicle would be impounded and searched anyway, Lange consented to the search. When the car was searched, police officers found several controlled substances. On appeal Lange argued that his consent was involuntary.

In upholding the search in *Lange,* we said that the officer did not even use any subtle methods of coercion or deception to obtain the consent. We further held that an officer's claim that he could obtain a warrant was not, per se, coercive.

The facts in *Lange* are easily distinguished from those in the instant case. In this case the wardens did not ask permission to search. Furthermore, the wardens never mentioned the word warrant, much less claim that they could obtain one. The wardens gave no explanation to defendant Larson of his rights, nor did they give him his *Miranda* warnings.

We believe that, considering the totality of the circumstances, defendant Larson's consent to a search of the premises was involuntary.

[6] Larson not only "consented" to the search, he also led the wardens to the places where the ducks had been placed. At the suppression hearing, the defendants argued, and the trial court agreed, that the defendants' fifth amendment privilege against compelled self-incrimination was violated because the defendants were entitled to *Miranda* warnings. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). On appeal the State argued that no fifth amendment violation occurred because the questioning was more ***366** like a "noncustodial interview" within the meaning of *Beckwith v. United States,* 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976).

Miranda defined custodial interrogation as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda, supra,* 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. In *Beckwith* the court rejected any extension of *Miranda* to situations involving noncustodial circumstances in which a police investigation has focused on the suspect. *Beckwith, supra,* 425 U.S. at 345, 96 S.Ct. at 1615, 48 L.Ed.2d at 6–7; see also *State v. Fields,* 294 N.W.2d 404, 407–08 (N.D.1980) (adoption of "custody" test for application of *Miranda;* "focus" language of *State v. Iverson,* 187 N.W.2d 1 (N.D.1971), *cert. denied,* 404 U.S. 956, 92 S.Ct. 322, 30 L.Ed.2d 273 (1971), limited to context of *Iverson*).

Neither Larson nor Johnsen were formally placed under arrest. Further, although the defendants disputed the fact, wardens Kraft and Larson testified that the defendants were free to leave during the questioning. While we view the wardens' assertions with skepticism, we are not prepared to conclude, as the trial court did, that the defendants were in custody within the meaning of *Miranda.* Nevertheless, the issue of voluntariness is always a question to be determined from all of the circumstances, regardless of whether or not a subject is in custody. *State v. Lange,* 255 N.W.2d 59, 64 (N.D.1977).

[7] In *Beckwith* the court recognized "that noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where 'the behavior of ... law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined ....' " *Beckwith, supra,* 425 U.S. at 347–48, 96 S.Ct. at 1617, 48 L.Ed.2d at 8. The Court went on to say that "When such a claim is raised, it is the duty of an appellate court ... 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness.' " *Beckwith, supra,* 425 U.S. at 348, 96 S.Ct. at 1617, 48 L.Ed.2d at 8. The Court added that "Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the

#1
HB 1290
3.26.19

questioning was in fact coercive." *Beckwith, supra,* 425 U.S. at 348, 96 S.Ct. at 1617, 48 L.Ed.2d at 8.

Neither Larson nor Johnsen received either *Miranda* warnings or anything similar to them.[5] Moreover, the defendants were faced with Grosz' threat to use dogs and more wardens in an attempt to find the birds if Larson did not cooperate with him. The interrogation and intimidation by the officers in this case was such that the wardens should have known it would likely elicit an incriminating response from the defendants. *Cf. Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297, 308 (1980).

Viewing the totality of the circumstances in this case we conclude that the trial court's determination regarding the voluntariness of Larson's consent to search and the defendants' subsequent confessions, is not against the manifest weight of the evidence. Accordingly, we affirm the trial court's order suppressing Larson's consent to the search and Larson and Johnsen's confessions.

ERICKSTAD, C.J., and GIERKE, PEDERSON and VANDE WALLE, JJ., concur.

All Citations

343 N.W.2d 361

Footnotes

1 Warden Larson agreed that Grosz made the statement to defendant Larson. However, warden Larson testified that he thought Grosz said five wardens.

2 The fourth and fifth amendments are applicable to the states by virtue of the fourteenth amendment to the United States Constitution. *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); *Malloy v. Hagan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

3 Although the trial judge concluded that the camp fell "well within the ... open field doctrine," we are not prepared to say that it did.

4 The State also argued, in the alternative, that the inevitable discovery doctrine applied. Given the facts of the case, however, particularly the fact that the wardens' initial search was unproductive, we find the argument meritless and unworthy of discussion.

5 Although the defendant in *Beckwith* was not given a literal reading of the *Miranda* warnings, he was advised of his right against compelled self-incrimination, and his right to seek the assistance of an attorney before responding. *Beckwith, supra,* 425 U.S. at 348–49, 95 S.Ct. at 1617, 48 L.Ed.2d at 8.

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#2
HB 1290
3·26·19

Testimony of Lynn D. Helms
Director, North Dakota Industrial Commission Department of Mineral Resources
March 26, 2019
Senate Judiciary
HB 1290

The North Dakota Industrial Commission (NDIC) is very concerned about the potential negative impacts of HB1290 on our oil and gas inspection and enforcement program and urges a do not pass from this committee.

The North Dakota Attorney General's office has advised us that the definition of law enforcement officer in lines 7 and 8 of HB1290 applies to Department of Mineral Resources (DMR) Oil and Gas Division (OGD) field inspectors and the legal definition of search "examination of a person's body, property or other area which the person would reasonably be expected to consider as private by a law enforcement officer for finding evidence of a crime" as used in line 10 of HB1290 applies to the site inspections conducted by field inspectors of the DMR-OGD.

Over 90% of the oil and gas sites and pipelines in North Dakota are located on private land by virtue of the dominant rights of the mineral estate and a surface damage compensation agreement or an easement. Many salt water disposal and waste treating facility operators own the surface rights so they could deny our field inspectors access unless we could produce a search warrant or demonstrate probable cause, emergency, accident, or threat to public safety.

The DMR-OGD conducted 184,719 routine well and facility inspections in 2018.

The language in line nine of the bill would supersede the authority that the NDIC has held for over 35 years to conduct unannounced routine inspections without permission, probable cause of a violation of law, a search warrant, or an emergency situation, accident, or other threat to public safety.

For your convenience I have provided those citations below:

38-08-04. JURISDICTION OF COMMISSION.
1. The commission has continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of this chapter. The commission has authority, and it is its duty, to make such investigations as it deems proper to determine whether waste exists or is imminent or whether other facts exist which justify action by the commission.

43-02-03-14. ACCESS TO SITES AND RECORDS. The commission, director, and their representatives shall have access to all records wherever located. All owners, operators, drilling contractors, drillers, service companies, or other persons engaged in drilling, completing, producing, operation, or servicing oil and gas wells, pipelines, injection wells, or treating plants shall permit the commission, director, and their representatives to come upon any lease, property, pipeline right-of-way, well, or drilling rig operated or controlled by them, complying with state safety rules and to inspect the records and operation, and to have access at all times to any and all records. If requested, copies of such records must be filed with the commission. The confidentiality of any data submitted which is confidential pursuant to subsection 6 of North Dakota Century Code section 38-08-04 and section 43-02-03-31 must be maintained.
History: Amended effective April 30, 1981; January 1, 1983; May 1, 1992; May 1, 1994; April 1, 2014; October 1, 2016.

#2
HB 1290
3.26.19

43-05-01-04. ACCESS TO RECORDS. The industrial commission and the commission's authorized agents shall have access to all storage facility records wherever located. All owners, operators, drilling contractors, drillers, service companies, or other persons engaged in drilling, completing, operating, or servicing storage facilities shall permit the industrial commission, or its authorized agents, to come upon any lease, property, well, or drilling rig operated or controlled by them, complying with state safety rules and to inspect the records and operation of wells and to conduct sampling and testing. Any information so obtained shall be public information. If requested, copies of storage facility records must be filed with the commission.
History: Effective April 1, 2010.

If your committee chooses to recommend do pass on HB1290, the NDIC respectfully recommends the following amendment:

On Page 1 after line 19 insert the following

5. Notwithstanding any other provisions of law, this section does not apply to a public servant acting on behalf of a state natural resource agency when they are performing tasks within the scope of the agency's regulatory responsibilities and authority.

North Dakota Wildlife Federation

Ensuring abundant wildlife, wildlife habitat, and access to wildlife recreational opportunities

#3
HB 1290
3-26-19

TESTIMONY OF JOHN BRADLEY

NORTH DAKOTA WILDLIFE FEDERATION

HOUSE BILL 1290

SENATE JUDICIARY COMMITTEE

March 26, 2019

Madam Chair Larson, members of the Senate Judiciary Committee,

For the Record, I am John Bradley, Executive Director of the North Dakota Wildlife Federation (NDWF). I'm here today representing our 1,500 members in 15 affiliated wildlife and sportsmen's club across North Dakota. While I don't speak for the 100,000 plus hunters that took to the field last year, I would say our views are representative of many of them.

NDWF opposes HB 1290. The bill would greatly restrict when a law enforcement officer could enter on to private land. Removing decades worth of case law called the "Open Fields" Doctrine. This is problematic for numerous reasons, but the one of greatest concern to NDWF is that of game warden's entering on to private land to do field checks on hunters. A game warden, if this law is passed, would have to get permission from the landowner or lawful occupant in order to check a hunter's license in the field. This would hamstring the game wardens from effectively doing their job, while creating a poacher's dream scenario. Game Warden's need to be able to access private lands to do license checks, ensure game limits, or the variety of other duties that game wardens are tasked with doing.

We strongly urge a Do No Pass on HB 1290.

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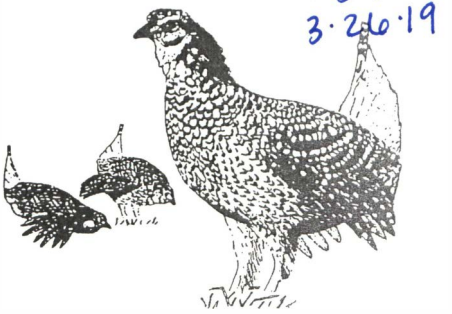
#3
HB 1290
3.26.19

North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



TESTIMONY OF MICHAEL McENROE
ND CHAPTER OF THE WILDLIFE SOCIETY
HOUSE BILL 1290
SENATE JUDICIARY COMMITTEE
MARCH 26, 2019

Chairwoman Larson and Members of the Senate Judiciary Committee:

For the record, I am Mike McEnroe representing the North Dakota Chapter of The Wildlife Society, comprised of some 350 wildlife biologists, land managers, educators, students, game wardens, and natural resource administrators in the State.

HB 1290 effectively negates the "open-fields doctrine" in law enforcement, and would restrict the circumstances under which a law enforcement officer, such as a game warden, could enter private land. Under the provisions of this bill a game warden would need to have landowner or legal tenant permission in order to talk to or check a hunter or group of hunters on private land. This will hamper a warden's ability to check hunters for licenses, bag limits, or numerous other compliance issues. This flies in the face of decades of case law dealing with law enforcement in open fields or places in which there is not a reasonable expectation of privacy. This bill is not a private property rights issue.

We support the North Dakota Game and Fish Department and the other law enforcement agencies in opposition to HB 1290.

The Chapter requests that HB 1290 be given a Do Not Pass recommendation.

Thank you for the opportunity to provide this statement to the Committee, and I apologize that I cannot attend this hearing in person.

#4

HB 1290
3.26.19

Testimony

House Bill 1290

Senate Judiciary Committee

March 26, 2019, 9:00 a.m.

North Dakota Department of Health

Good morning Chairman Larson and members of the Senate Judiciary Committee. My name is David Glatt, Environmental Health Section Chief for the North Dakota Department of Health (NDDoH), soon to be the North Dakota Department of Environmental Quality (NDDEQ). I am here today to testify in opposition to HB 1290 as currently written.

The Environmental Health Section is the primary agency tasked with protecting, maintaining and improving the state's air, water and land resources. Our state consistently receives national recognition for its environmental quality and high level of program compliance. This is only accomplished with the cooperation and engagement of the public, industry and government at all levels. We have had some successes, but many challenges remain; we are constantly reminded that we cannot all live upwind or upstream. The public demands that we monitor and protect public and environmental health through appropriate responses that are timely, transparent, and follow the science and the law. A delay in completing an investigation or initiating a response action can result in increased environmental damage and adverse public health impacts. We are concerned that HB 1290 could limit our ability to initiate timely clean-up or containment responses, conduct environmental assessments, or adversely impact our ability to implement regulations that protect public and environmental health and ensure protection of the land. A few examples of our concerns are:

- We typically contact landowners about our activities to ensure they are aware of our actions and encourage them to participate in our investigations. However, we have encountered instances where landowners are not readily available. They may not be in the state or even within the country, making contact with the landowner in certain instances difficult if not impossible. A recent example is the

#4
HB 1290
3.26.19

filter sock incident in Noonan, ND where the property owner was out of the country.

- HB 1290 identifies that entrance to private land can be allowed if probable cause exists. It is my understanding that the definition of probable cause is "flexible," with the definition changing based upon the site-specific conditions. Is a citizen complaint sufficient to determine probable cause?

- Experience has shown that defining an emergency situation or threat to public safety is not always easily identified prior to initiating an assessment of the incident. A timely comprehensive assessment identifies the degree of risk and whether or not an emergency exists. Delays that would be experienced locating and potentially gaining permission could result in creating additional unnecessary risk due to the lack of a timely response.

- As a condition of obtaining a permit, we require some of our regulated facilities to allow site access by the Department. Does HB 1290 conflict with those statutes and would the Department be required to gain site access permission in addition to that provided in the permit? Also, there are facilities that are required to comply with environmental regulations but that do not currently require a permit. To address the site access issue, would the Department be required to write new permits for thousands of these facilities to address the concern of site access?

- Periodically we get reports of illegal dumping of chemical compounds on private property not owned by the responsible party. HB 1290 could limit our timely access allowing contamination to spread and cause greater damage.

- Our spill investigation program conducts inspections of about 55 spills per month. The majority of these spills affect private land. It is not clear that a spill would meet the definition of "emergency situation, accident, or other threat to public safety." For us to continue to inspect these spills, we will need to contact each

landowner to obtain permission. This will require that the landowner's identity be part of the administrative record and subject to disclosure under the open records laws. If we are unable to contact the landowner right away, it could delay the time for the department to address environmental damage from a spill on the landowner's property. This could also apply to monitoring the effect of discharges on waterbodies. Although the Department does contact landowners to access private property, we are concerned that this law may require them to contact landowners even for lakes with a public access, or wells located along a public road.

- Inspection of radioactive sources used by many hospitals, industries and oilfield operations is required to be unimpeded due to the potential risk of exposure to unsecured or improperly maintained sources. Some of our inspections are conducted in the field where contractors are operating on private land, which only upon inspection can the unacceptable exposure of uncontrolled radioactive sources be determined.

- We are concerned that HB 1290 could impede routine inspections at oil well facilities. Due to the large number of facilities, our inspections are typically random and unannounced. HB 1290 could prohibit the Department from inspecting these facilities if the facility or surface owner does not give site access. The Department would then need to seek a search warrant which would change the character of the inspection from a compliance action to a more aggressive enforcement action. In addition, if the Department cannot gain timely site access, it could necessitate the federal Environmental Protection Agency to become more active in inspections typically handled by the state at this time.

These are just a few of our concerns regarding the impact HB 1290 could have on our ability to protect public and environmental health. We believe that the net effect will be a degradation in environmental quality and increased cost to implement regulatory programs. We ask for a do not pass determination for HB 1290.

#4
HB 1290
3.26.19

As an alternative to a do not pass recommendation by this committee, we would support the amendment provided by the Division of Mineral Resources as it relates to the natural resource agencies.

This concludes my testimony and I will stand for questions.

#5
HB 1290
3·26·19

Senate Judiciary Committee
Testimony on HB 1290

North Dakota Game and Fish Department
Robert Timian, Chief Game Warden
March 26, 2019

Madam Chair Larson, and members of the Senate Judiciary Committee, my name is Robert Timian, Chief Game Warden of the North Dakota Game and Fish Department. I am testifying today in opposition of HB 1290.

The fourth amendment to the US Constitution prohibits unreasonable search and seizure by the State. This creates a balance between an individual's rights and the State's need to protect the whole. In addition to subsequent Federal and State laws, the United States Supreme Court and North Dakota Supreme Court have produced rulings that more clearly define what the State may or may not do related to search and seizure. Game Wardens and all other North Dakota licensed peace officers receive extensive and continuing training on all laws and court decisions dealing with search and seizure and the limits those place on law enforcement. This bill as written would appear to have a negative impact on Game Wardens' ability to inspect hunters in the field and create a fog of legal uncertainty that would require new case law and court rulings to sort out.

In my experience in addition to any agency or States Attorney review to ensure search and seizure was done appropriately, most cases involve a motion to suppress, which require a Judge to review the circumstances and procedures regarding how law enforcement obtained the evidence, and should the Judge find the State did not act appropriately the evidence is suppressed. I know of no other law enforcement activity that is under such constant and continuing case by case legal scrutiny as search and seizure.

In the 30 plus years I have been in law enforcement the legal standard for conducting searches has remained the same. Absent exigent circumstances, in town, out of town, house, barn, garage, any place that a citizen has a reasonable expectation of privacy, you get permission or a warrant.

Current law and Judicial oversite provide, in accordance with the Fourth Amendment that balance between the needs of society and the rights of the individual.

The Department respectfully requests a DO NOT PASS on HB1290.

#6
HB 1290
3.26.19

Testimony
House Bill 1290 – Office of the State Engineer
Senate Judiciary Committee
Senator Larson, Madam Chairman
March 26, 2019

Madam Chairman Larson and members of the Senate Judiciary Committee, my name is Garland Erbele and I am the State Engineer for the State Water Commission.

House Bill 1290 proposes to place limitations on private land access by "law enforcement officers" unless specific criteria are met. While not intuitive, the regulatory staff of my office fit the legal definition of a law enforcement officer as North Dakota Century Code (N.D.C.C) § 12.1-01-04 defines the term to mean "a public servant authorized by law or by a government agency or branch to enforce the law and to conduct or engage in investigations or prosecutions for violations of law."

The state engineer has the regulatory authority to enforce the water laws of the state. Hundreds of water permits are inspected each year, as well as numerous other site investigations, under authorization from numerous sections of N.D.C.C, which include 61-03-21.1, 61-04-09, 61-04-11, and 61-04-23.

The state engineer's standard operating procedure prior to entering on to private land is to notify the landowner ahead of the intended site visit. While this is an agency chosen method, there are scenarios where notification may be either not possible or not practical. As such, this bill could have a profound effect on the sound management of state's water resources by limiting the process of entry onto private property.

My office conducts site visits for the purposes of making determinations at the request of local water resource districts and road authorities, investigation of construction and drainage permitting complaints, field verification of water appropriation permits, and alleged violations of water appropriation law.

With the advent of hydraulic fracturing, violations of water law have risen dramatically. Many of these violations occur when a party takes water without a permit. In these cases, immediate entry upon private property to investigate and gather information is crucial. This usually involves taking photos, identifying equipment ownership, etc.

For these reasons, we oppose the proposed blanket limitations on entry to private property by law enforcement officers. However, we welcome a conversation to discuss the specific concerns the bill intends to address so a workable solution that does not contradict existing regulatory responsibilities of my office can be developed.

I will stand for any questions.

#7
HB 1290
3.26.19

Department of Human Services
Senate Judiciary Committee
Senator Diane Larson, Chairman

March 26, 2019

Chairman Larson and members of the Judiciary Committee, I am Jim Fleming, Director of the Child Support Division of the Department of Human Services (Department). The Department defers to this Committee on the merits of Engrossed House Bill 1290, but requests an amendment that would continue current processes to hold parents responsible for supporting their children.

As line 10 of Engrossed House Bill 1290 was amended in the House (replacing "enter" with "search" in the prohibition), it is unclear whether Lines 12-16 are meant to be an exclusive list of the purposes for which law enforcement may enter private land without permission.

The first part of the Department's requested amendment would authorize service of a summons and complaint on a parent who is located on private land. Child support obligations in North Dakota are established by court order in a legal action, which is commenced with a summons and complaint served on the defendant personally. The Department frequently attempts to serve the parent by certified mail, but it often must resort to hand-delivery by the county sheriff's office. Even if the parent works in a public place, parents often prefer not to be served at their place of work.

The second part of the Department's requested amendment would authorize a court-issued warrant or order to be served on a parent who owes past-due child support. Failure to pay a court-ordered child support obligation can cause the court to issue an order requiring the parent to come to a hearing and explain the failure to pay. If the parent does not show up for the hearing, a warrant can be issued by the court to take the parent into custody. The ability of law enforcement officials to serve these orders and warrants is an important part of enforcing the court's child support order.

#7
HB 1290
3.26.19

We encourage the Committee's favorable consideration of these amendments. This concludes my testimony, and I am happy to answer any questions you may have.

#7
HB 1290
3.26.19

Prepared by the North Dakota
Department of Human Services
03/26/2019

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1290

Page 1, line 15, remove "or"

Page 1, line 16, replace the underscored period with an underscored semicolon

Page 1, after line 16, insert:

"d. Legal process in a civil action needs to be served; or

e. An order to show cause, warrant of attachment, or warrant for failure to appear has been issued by a court"

Renumber accordingly

#1
HB 1290
3-27-19

19.0679.03001
Title.

Prepared by the Legislative Council staff for
Senator Dwyer
March 26, 2019

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1290

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative management study of search and seizure procedures.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE MANAGEMENT STUDY - SEARCH AND SEIZURE PROCEDURES. During the 2019-20 interim, the legislative management shall consider studying the Fourth Amendment of the Constitution of the United States, including the investigation, search, and seizure of private land, livestock, and buildings. The study must include options for protecting property from unreasonable interference by law enforcement. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-seventh legislative assembly."

Renumber accordingly