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## Driving Into Unreasonableness: The Driveway, the Curtilage, and Reasonable Expectations of Privacy

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# DRIVING INTO UNREASONABLENESS: THE DRIVEWAY, THE CURTILAGE, AND REASONABLE EXPECTATIONS OF PRIVACY

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## INTRODUCTION

Recognizing that the home is an individual's castle,<sup>1</sup> the American legal system has traditionally reserved Fourth Amendment privacy rights to individuals in their homes.<sup>2</sup> The law extends this constitutional privilege to areas beyond the home as well.<sup>3</sup> One such

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1. See *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting) ("A man can still control a small part of his environment, his house . . . society must provide some such oasis, some shelter from public scrutiny . . . some inviolate place which is a man's castle."); see also *Silverman v. United States*, 365 U.S. 505, 511 n.4 (1961) (upholding the dissenting opinion in *United States v. On Lee*, 193 F.2d 306, 315-16).

2. See *Silverman*, 365 U.S. at 511 (noting that at "the very core" of Fourth Amendment protection "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion").

3. See *Katz v. United States*, 389 U.S. 347, 352 (1967) (noting that courts extend

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area is the curtilage, the “area to which extends the intimate activity associated with the sanctity of a man’s home and the privacies of life.”<sup>4</sup> This extension of privacy rights originates from the common law recognition of trespass as a violation of privacy.<sup>5</sup>

Today, the area defined as the curtilage may potentially include any number of different places and areas, such as barns,<sup>6</sup> chicken coops,<sup>7</sup> and backyards.<sup>8</sup> The driveway may be included within the curtilage as well, and consequently, it constitutes a unique area within the curtilage doctrine,<sup>9</sup> although not all jurisdictions recognize this.<sup>10</sup> Widespread acceptance of the “knock and talk”<sup>11</sup> and the plain view<sup>12</sup> doctrines uniquely impacts a home occupant’s privacy right in the driveway.<sup>13</sup> The collective result is a trend toward sanctioning seizures that occur as a result of warrantless police intrusion in one’s driveway.<sup>14</sup> Consequently, driveways are increasingly subject to police search.<sup>15</sup> One major reason for this phenomenon is the ambiguity

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Fourth Amendment protection to several areas beyond the home, including offices, taxi cabs and phone booths).

4. *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

5. See 4 W. BLACKSTONE, COMMENTARIES 225 (1769) (“[N]o distant barn, warehouse, or the like are under the same privileges . . . as a man’s castle of defence . . . [h]owever, . . . the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall.”).

6. See, e.g., *Rosencranz v. United States*, 356 F.2d 310, 313 (1st Cir. 1996) (recognizing the barn as an area that may constitute curtilage); see also *Walker v. United States*, 225 F.2d 447 (5th Cir. 1955).

7. See, e.g., *Cantu v. Texas*, 557 S.W.2d 107, 109 (Tex. Crim. App. 1977) (identifying a chicken coop as an area within the protected curtilage).

8. See, e.g., *Florida v. Parker*, 399 So. 2d 24 (Fla. Dist. Ct. App. 1981); *Illinois v. Pakula*, 411 N.E.2d 1385 (Ill. App. Ct. 1980).

9. See *Oliver*, 466 U.S. at 197 (distinguishing a home’s protected curtilage as an area distinct and separate from constitutionally unprotected open fields).

10. See, e.g., *California v. Edelbacher*, 766 P.2d 1, 16 (Cal. 1989) (failing to recognize the special relationship the driveway bears upon the curtilage determination).

11. See generally WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(c), at 483 (1996) (“[T]here is no rule . . . which makes it . . . a condemned invasion of [a] person’s right of privacy, for anyone openly and peaceably . . . to walk up the steps and knock on the front door of any man’s ‘castle’ with the honest intent of asking questions of the occupant thereof.”).

12. See *infra* notes 85-87 and accompanying text (stating briefly the principles underlying the plain view doctrine).

13. See generally Mei Fung So, Annotation, *Search and Seizure: Reasonable Expectation of Privacy in Driveways*, 60 A.L.R. 5th 1 (1998).

14. See Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 585 (1989) (noting that recent judicial attitudes toward search and seizure law have resulted in investigative practices that increasingly impinge on the privacies of daily life).

15. Cf. *id.* (discussing the threat imposed by governmental techniques that

left behind after the Supreme Court's decision in *United States v. Dunn*.<sup>16</sup> The other reason lies in the failure of the nation's courts to recognize the special considerations associated with the driveway as part of the curtilage.

This Comment addresses the development of the curtilage doctrine and its relevant impact on driveways. Exploring these issues, an examination of the *Dunn* criteria<sup>17</sup> and the "reasonable expectation of privacy" analysis<sup>18</sup> assists in demonstrating how the driveway occupies a distinct niche within both the curtilage doctrine and Fourth Amendment law. Part I of this Comment outlines the historical relevance of the Curtilage Doctrine as it originated and was later expounded in *Dunn*.<sup>19</sup> Part II addresses the unique considerations applicable to driveways and argues that, in light of these variations, there is a paramount need that driveways be accorded a special privilege under the curtilage doctrine.<sup>20</sup> Part III examines how federal and state courts apply a *Dunn*/curtilage analysis and a reasonable expectation of privacy test to assess the privacy rights to which a driveway may or may not be entitled.<sup>21</sup> Part IV argues the need for a bright line rule that is more effective and less arbitrary than the analyses currently being utilized.<sup>22</sup> The proposed rule recognizes that where a homeowner makes efforts to retain privacy in his driveway by posting a sign or erecting any type of gate/fence blocking immediate access, courts should not hesitate to affirm the existence of the homeowner's Fourth Amendment rights.<sup>23</sup> Because such actions invariably attest to at least a minimal degree of an expectation of privacy, depriving the owner of such a privilege despite one's earnest efforts is inequitable.<sup>24</sup>

Significantly, the manner in which the *Dunn* criteria apply to driveways demonstrates that they are distinct from most other areas

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increasingly impinge upon "the privacies of everyday life"). See generally So, *supra* note 13, at 1-37.

16. 480 U.S. 294 (1987) (holding that the curtilage of a home is entitled to Fourth Amendment protection from unwarranted intrusion by law enforcement).

17. See *infra* note 70 and accompanying text (outlining the factors constituting the *Dunn* criteria).

18. See discussion *infra* Part III.B.

19. See discussion *infra* Part I.

20. See discussion *infra* Part II.

21. See discussion *infra* Part III.

22. See discussion *infra* Part IV.

23. See *infra* notes 231-34 and accompanying text.

24. See *id.*

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lying outside the home.<sup>25</sup> In one sense, the *Dunn* factors are likely to be inherently satisfied when applied to a home's driveway because of the fact that as a means of access to the home, the driveway is by its very nature connected to the intimate activities that occur in the home.<sup>26</sup> First, because a driveway functions as a connection between a public street and a private home, it inherently lies within adequate proximity to the home.<sup>27</sup> Second, while it is true that not all driveways are enclosed within a gate/fence,<sup>28</sup> the absence of a fence itself is not dispositive.<sup>29</sup> Finally, the role of the driveway in providing a means of access to the residence necessitates the conclusion that it is invariably put to use for domestic purposes.<sup>30</sup> Thus, in light of the driveway's special status and its right to privacy currently being threatened by law enforcement<sup>31</sup> and sanctioned by the legal system,<sup>32</sup> the need for a predictable standard<sup>33</sup> that accommodates the special interests involved is paramount.<sup>34</sup>

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25. See *United States v. Redmon*, 138 F.3d 1109, 1133 (7th Cir. 1998) (Manion, J., dissenting) (noting that part of the driveway's uniqueness lies in the fact that its property line remains conspicuous to all: "it is where the sidewalk stops and the yard begins. A driveway, even one shared . . . typically becomes private past the curb or sidewalk, whichever comes last.").

26. See, e.g., *id.* at 1135 (Rovner, J., dissenting) (arguing that if a yard is deemed curtilage, then courts should properly accord driveways a similar status).

27. But see *United States v. Depew*, 8 F.3d 1424, 1427 (9th Cir. 1993) (declining to identify a specific distance at which the curtilage around the home ends).

28. See, e.g., *United States v. Humphries*, 636 F.2d 1172, 1179 (8th Cir. 1982) (noting that the defendant had failed to secure the driveway within a fence or other barrier).

29. See *Oregon v. McIntyre*, 860 P.2d 299, 301 (Or. Ct. App. 1993) (holding that the presence of a fence does not resolve the curtilage issue as a whole, as a fence may be erected for many different reasons, not all of which relate to privacy).

30. See *Idaho v. Clark*, 859 P.2d 344, 350 (Idaho Ct. App. 1993) (alluding to the fact that in many cases, the driveway will function as the normal and only access to a home's front entry).

31. See *Serr*, *supra* note 14, at 585 (noting that law enforcement searches and investigative techniques are gradually eroding the privacy of day-to-day life).

32. See *id.* at 624 (noting that the Supreme Court's recent decisions reflect staunch support for the goal of permitting aggressive law enforcement).

33. See *id.* at 594 (arguing that a predictable standard that offers a more concrete definition of such protection is greatly needed).

34. See *id.* at 614 (emphasizing the objectively important nature of privacy interests in curtilage activities).

I. THE RELEVANT CASE LAW CONTRIBUTING TO THE DEVELOPMENT  
OF THE CURTILAGE DOCTRINE

In *Hester v. United States*,<sup>35</sup> two revenue agents testified for the government by describing how they had hidden in the bushes on one of the defendant's property and observed activity leading them to believe that he was selling moonshine whiskey.<sup>36</sup> On appeal, Hester argued that the agents' testimony should have been suppressed because the containers were found while the agents were trespassing on his property.<sup>37</sup> However, the Supreme Court rejected this argument, declaring that the Fourth Amendment was more than a rule against trespass.<sup>38</sup> The Court emphasized that Fourth Amendment protection extended to "persons, houses, papers, and effects," but not to "open fields."<sup>39</sup> Despite this distinction, the Court declined to specify the nature of the dividing line separating constitutionally protected areas from open fields.<sup>40</sup>

The decision in *Olmstead v. United States*<sup>41</sup> was the first step in clarifying the *Hester* decision. Defendant Roy Olmstead had been convicted of a conspiracy to violate the National Prohibition Act by participating in a complex scheme involving illegal liquor distribution.<sup>42</sup> Prohibition agents obtained incriminating information against Olmstead by placing wire-taps on his telephone.<sup>43</sup> The Supreme Court held that because there had been no trespass of private property,<sup>44</sup> transcripts of the telephone conversations were properly admitted into evidence against the defendant.<sup>45</sup> Implicit within the decision was the notion that the open fields included areas

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35. 265 U.S. 57 (1924).

36. *See id.* at 57-59 (noting that subsequent to such observations, the defendants were apprehended and jugs containing moonshine whiskey were seized from an area near their home).

37. *See id.*

38. *See id.* at 59 (insisting that even if there had been a trespass, the testimony would still be admissible).

39. *Id.*

40. *See id.* at 58-59.

41. 277 U.S. 438 (1928).

42. *See id.* at 464.

43. *See id.* at 439-40.

44. *See id.* at 466 (arguing that to rule otherwise would be to adopt a policy lending an impermissibly "enlarged and unusual meaning" to the Fourth Amendment).

45. *See id.* at 464 ("The [Fourth] Amendment does not forbid what was done here. There was no searching. There was no seizure.").

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of real property lying beyond the home and curtilage.<sup>46</sup> Despite the significance of the ruling, the Court still failed to provide a test to determine where the curtilage ended and the open fields began.<sup>47</sup>

The Supreme Court's decision in *Katz v. United States*<sup>48</sup> profoundly impacted the development of Fourth Amendment search and seizure law.<sup>49</sup> In *Katz*, the Court convicted the defendant for transmitting wagering information by telephone.<sup>50</sup> He was prosecuted after FBI agents attached electronic listening and recording devices to the outside of a public telephone booth that he had used to make the calls.<sup>51</sup> Responding to arguments about whether the telephone booth was a constitutionally protected area, the Court declared that "the Fourth Amendment protects people, not places."<sup>52</sup> Although that which a person exposes to the public, even within his own home, is not entitled to Fourth Amendment protection, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>53</sup>

To the extent that *Olmstead* had previously identified property interests as the controlling factor in Fourth Amendment law, that decision was overruled and replaced with *Katz*'s new "reasonable expectation of privacy" standard.<sup>54</sup> Although the presumption in favor of protecting activities within the curtilage remained after *Katz*, the presumption could now be overcome by a demonstration that the activity by the suspect was conducted in plain view and was thus undeserving of Fourth Amendment protection.<sup>55</sup> Justice Harlan's famous concurrence in *Katz* also provided the specific formula, which

46. See S. Bryan Lawrence, *Curtilage or Open Fields?: Oliver v. United States Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis*, 46 U. PITT. L. REV. 795, 799 (1985) (noting that the Court construed the open fields to include areas beyond the home and the curtilage without further offering a test to distinguish between open fields and curtilage).

47. See *id.*

48. 389 U.S. 347 (1967).

49. See generally Thomas Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 323 (1998) (observing that *Katz* rejected the trespass theory and the property law premise that had previously functioned as the analytical framework for evaluating claims arising under the Fourth Amendment).

50. See *Katz*, 389 U.S. at 348.

51. See *id.*

52. *Id.* at 351.

53. *Id.*

54. See Lawrence, *supra* note 46, at 804-05 (remarking that the *Katz* decision significantly altered the open fields doctrine as articulated in *Oliver*).

55. See *id.* (explaining further that individuals exhibiting acts demonstrating their subjective expectation of privacy could potentially rebut the presumption against them).

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currently functions as the two-prong test for evaluating whether government conduct under a particular set of circumstances amounts to a search.<sup>56</sup>

The concept of “open fields” was further delineated by the Supreme Court’s decision in *Oliver v. United States*.<sup>57</sup> In *Oliver*, narcotics agents drove to a private farm to investigate reports of marijuana cultivation.<sup>58</sup> Once at the farm, agents drove past the residence until they reached a locked gate with a sign that read “No Trespassing.”<sup>59</sup> The agents followed a footpath and walked around the gate, eventually coming across a field of marijuana located approximately one mile from the petitioner’s home.<sup>60</sup>

Although the defendant had taken steps to protect the field from public view,<sup>61</sup> the Court refused to grant the area constitutional protection,<sup>62</sup> reaffirming that such a privilege was reserved “to the people in their ‘persons, houses, papers, and effects,’ [and could not be] extended to the open fields.”<sup>63</sup> *Oliver* explained that it was only the area recognized as the curtilage, and not the neighboring open fields that was entitled to the Fourth Amendment protection typically reserved for the home.<sup>64</sup> However, the Court notably left the question of how far the curtilage would extend virtually unaddressed in its final decision.<sup>65</sup>

Prior to the Supreme Court’s decision in *Dunn*, courts generally looked to three criteria when discerning the extent of the curtilage.<sup>66</sup> However, in *Dunn*, the Court more concretely addressed the issue of

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56. See *Katz*, 389 U.S. at 361 (“[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

57. 466 U.S. 170 (1984).

58. See *id.* at 173.

59. See *id.*

60. See *id.*

61. See *id.* (noting that the road to the defendant’s property was blocked by a locked metal gate, a “No Trespassing” sign was posted at the gate, and the road was enclosed by fences on both sides).

62. See *id.* at 173-74.

63. *Id.* at 180 n.11 (commenting that the term “open fields” was meant to 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.”).

64. See *id.* at 197.

65. See *id.* (remarking only that the curtilage constitutes “the area immediately surrounding the home”).

66. See *Care v. United States*, 231 F.2d 22, 25 (10th Cir. 1956) (listing the three criteria as, (1) “Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, (2) its inclusion within the general enclosure surrounding the dwelling, and (3) its use and enjoyment as an adjunct to the domestic economy of the family.”).



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how far the curtilage would extend in a case where, during the course of an investigation, law enforcement officials made a warrantless entry onto the defendant's ranch property.<sup>67</sup> Subsequent to their entry on the premises, police discovered a drug laboratory in a barn located about fifty yards from the fence surrounding the home.<sup>68</sup> The question ultimately before the Court was whether the area near the barn was within the curtilage of the house and whether the officers' acts constituted an unlawful intrusion.<sup>69</sup>

Concluding that the area around the barn lay outside the protected curtilage, the Court cited the relevance of four factors in reaching its conclusion: (1) the proximity of the area to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by.<sup>70</sup>

## II. THE SPECIAL INTERACTION BETWEEN DRIVEWAYS AND CURTILAGE

Because a typical driveway functions as a means of access to the home, it consequently bears significant implications in relation to the curtilage issue.<sup>71</sup> Therefore, courts should accord driveways a special curtilage status, for without such a privilege, it is unlikely that the home itself can truly enjoy the heightened degree of privacy it has traditionally been granted.<sup>72</sup>

Related arguments have previously been made;<sup>73</sup> for example, Justice Brennan, dissenting in *Dunn*, advocated for the adoption of a similar recognition in relation to barns.<sup>74</sup> Brennan also criticized the

67. See *Dunn*, 480 U.S. 294, 297-98 (1987).

68. See *id.*

69. See *id.*

70. *Id.* at 301 (noting, however, that these factors were not meant to function as "a finely tuned formula" to be "mechanically applied" in all circumstances).

71. See *Idaho v. Clark*, 859 P.2d 344, 349 (Idaho Ct. App. 1993) (observing that areas such as driveways, sidewalks, and pathways to the entry are deemed access routes to the house itself).

72. See *Poe v. Ullman*, 367 U.S. 497, 549 (1961) (concluding that "[I]f the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of life within").

73. See, e.g., *United States v. Redmon*, 138 F.3d 1109, 1135 (7th Cir. 1998) (Rovner, J., dissenting) (ruling that "[I]f the yard is within a home's curtilage, then certainly the portion of the driveway abutting the door of an attached garage is as well").

74. See *Dunn*, 480 U.S. at 307-08 (Brennan, J., dissenting) (arguing that the Court's decision failed to take into account the role a barn plays in rural life and that as a general rule, a barn is in domestic use). Other courts have followed by adopting per se rules that other areas outside the home are necessarily entitled to Fourth Amendment protection, regardless of whether or not the factual circumstances of a

inconsistency between the Court's decisions in *Oliver* and *Dunn*, noting that while *Oliver* refused to entertain a case-by-case analysis in ascertaining the existence of a legitimate expectation of privacy in an open field, *Dunn* adopted an ad hoc approach by insisting that the expectation of privacy in an area be evaluated pursuant to the unique factual circumstances of each case.<sup>75</sup> This same logic applies with equal force in the case of driveways.<sup>76</sup>

The manner in which other doctrines impact the curtilage doctrine further demonstrates the driveway's unique status in the realm of Fourth Amendment law.<sup>77</sup> First, the interaction between the driveway and what has come to be casually referred to as the "knock and talk" doctrine,<sup>78</sup> has resulted in subjecting the security of privacy rights in driveways to a greater hurdle than the rights accorded most other areas outside of the home.<sup>79</sup> In part, this is because of the increasingly accepted view of a driveway as "only a semi-private area."<sup>80</sup> Some courts have even gone so far as to analogize private driveways to the constitutionally unprotected open field described in *Oliver*.<sup>81</sup> This vision of the driveway as a semi-private area is mirrored by the widely accepted notion that simply because a driveway serves as an access route to a home, the privacy to which it is entitled is necessarily limited.<sup>82</sup> The "knock and talk" doctrine is founded on

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given case meet with a positive curtilage analysis. See, e.g., *United States v. Hayden*, 140 F. Supp. 429, 434-35 (D. Md. 1956).

75. See *Dunn*, 480 U.S. at 307-08 (Brennan, J., dissenting) (remarking that the Court's willingness to generalize about the absence of a privacy interest in an open field and unwillingness to do so with regard to a barn located near a residence is "manifestly inconsistent and reflect[s] a hostility to the purpose of the Fourth Amendment").

76. See discussion *infra* Part III (surveying cases that have assumed a similar ad hoc approach in assessing the privacy due to driveways).

77. Cf. *Redmon*, 138 F.3d at 1133 (Manion, J., dissenting) (noting that part of the driveway's uniqueness lies in the fact that its property line remains conspicuous to all; thus, privacy rights therein should always be respected).

78. See generally H. Morley Swingle & Kevin Zoellner, "Knock and Talk" Consent Searches: If Called by a Panther, Don't Anther, 55 J. MO. B. 25 (1999) (explaining that the "knock and talk" procedure involves a practice whereby officers simply march up to someone's front door, knock, and speak with the resident).

79. Cf. *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

80. *United States v. Magana*, 512 F.2d 1169, 1170 (9th Cir. 1975); see also *New Hampshire v. Pinkham*, 679 A.2d 589, 591 (N.H. 1996) (analogizing the defendant's driveway to a walkway and arguing that its semi-private nature justified police officials' unwarranted entry thereon).

81. See, e.g., *United States v. Brady*, 734 F. Supp. 923, 928 (E.D. Wash. 1990) (citing with approval the analogy of a private driveway to an open field).

82. See So, *supra* note 13, at 10-12.

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the view that it is never objectionable for an officer to enter private property, which is presumably open to public use.<sup>83</sup> Consequently, although the driveway, unlike a barn or other structure situated some distance from the home, is by its nature more likely to satisfactorily comport with the *Dunn* curtilage criteria, it nevertheless struggles to retain an equal degree of privacy rights against unwarranted governmental intrusion.<sup>84</sup>

The second doctrine further complicating this matter is the plain view doctrine,<sup>85</sup> applied in situations where an officer who may not be searching for evidence against a suspect nevertheless has a legitimate reason to be where he is and inadvertently encounters incriminating evidence.<sup>86</sup> Law enforcement officials, free to “knock and talk,” are equally free to keep their eyes open as they do so.<sup>87</sup> Additionally, because what a person knowingly exposes to the public is not a subject of Fourth Amendment protection,<sup>88</sup> there is an abundance of cases where officers, using a driveway as a means of gaining access to a home’s front door for the alleged purpose of questioning the resident, come across some evidence of illegal activity and either seize such material immediately,<sup>89</sup> or later return with a warrant based on their observations authorizing search and seizure of the same evidence.<sup>90</sup>

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83. See LAFAVE, *supra* note 11, at 499-500 (arguing that “The route which any visitor to a residence would use is not private . . . and thus if police take that route ‘for the purpose of making a general inquiry’ or for some other legitimate reason, they are ‘free to keep their eyes open. . . .’”).

84. See *Washington v. Ridgway*, 790 P.2d 1263, 1265 (Wash. Ct. App. 1990) (observing that while police may approach a home by use of the driveway, they may not deviate from the normal access route while doing so).

85. See *generally Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971) (explaining that if officers have a right to be in a particular place and, while in that place, happen to see evidence that they have probable cause to believe is subject to seizure, they may seize it).

86. See, e.g., *Harris v. United States*, 390 U.S. 234, 236 (1968) (noting that, “It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view . . . are subject to seizure and may be introduced in evidence.”).

87. See *Minnesota v. Crea*, 233 N.W.2d 736, 739 (Minn. 1975) (pointing out that, “[P]olice may walk on the sidewalk and onto the porch of a house and knock on the door if they are conducting an investigation and want to question the owner, and in such a situation the police are free to keep their eyes open and use their other senses.”).

88. See *Katz v. United States*, 389 U.S. 347, 351 (1967) (concluding that, “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).

89. See, e.g., *California v. Edelbacher*, 766 P.2d 1, 19-20 (Cal. 1989) (affirming the validity of an officer’s decision to photograph footprints he observed while walking along the driveway towards the defendant’s residence).

90. See, e.g., *United States v. Smith*, 783 F.2d 648, 649 (6th Cir. 1986) (holding

Of further concern in this area is the fact that by sanctioning warrantless police invasions upon a driveway as long as there is some legitimate reason for an officer's intrusion, courts are essentially giving police the "legal equivalent of a green light" to use that form of surveillance "unreasonably and without limitation."<sup>91</sup> Such a practice is highly objectionable, insofar as it stands in complete opposition to "the objective privacy interests of a free and open society."<sup>92</sup> Further, the overt potential for abuse is not only permitted, but, is even encouraged under such a system.<sup>93</sup> Such considerations raise grave doubts about the legitimacy of a system that continues to permit such flagrant constitutional abuses, resembling, as it does, the tactics so frequently employed by the traditional police state.<sup>94</sup> In light of these numerous arguments, a grant of the driveway's special status is not only necessary, but wholly justified.

### III. FEDERAL AND STATE DETERMINATIONS OF PRIVACY RIGHTS GUARANTEED TO DRIVEWAYS

Each curtilage determination is distinctive and "stands or falls on its own unique set of facts."<sup>95</sup> Although *Oliver* predicted that for most homes, the boundaries of the curtilage would be clearly marked and that the curtilage was a familiar concept easily understood from daily experience,<sup>96</sup> this prediction has proven inaccurate.<sup>97</sup> In fact, an examination of recent federal and state decisions applying *Dunn* and the reasonable expectation of privacy analysis reveals that quite the opposite is true.<sup>98</sup> The lack of consensus here intimates the

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that officers seeking to verify an informant's tip could enter a defendant's driveway and proceed to the area of evidence). Officers could then obtain a warrant based on the evidence they observed at the defendant's house. *Id.*

91. See Serr, *supra* note 14, at 586 (reasoning that, "When the Supreme Court rules that a particular form of governmental surveillance does not implicate the Fourth Amendment, the result is that the government can use that form of surveillance to gather and record intimate information about anyone, at any time, for as long as the government desires.").

92. *Id.* at 620.

93. See *id.* at 586 n.19 (observing the government's ability to easily single out any given individual and destroy that person's privacy with little or no regard for the constitutional standards that would typically govern such actions).

94. See *Lorenzana v. California*, 511 P.2d 33, 41 (Cal. 1973) (expressing concern about excessive and inappropriate police intrusion upon private property).

95. *United States v. Depew*, 8 F.3d 1424, 1426 (9th Cir. 1993).

96. See *Oliver v. United States*, 466 U.S. 170, 182 n.12 (1984).

97. See *Dunn*, 480 U.S. at 312 n.3 (1987) (Brennan, J., dissenting) (commenting upon the difficulty police incur in making judgments as to how far the curtilage extends) (citing *Oliver*, 466 U.S. at 194 n.20).

98. See discussion *infra* Parts III.A-B (observing how courts have failed to concretely identify what area constitutes the curtilage).

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inadequacy of both the *Dunn* decision and the reasonable expectation of privacy analysis in their ability to address the special considerations implicated by the inclusion of the driveway within the curtilage doctrine and Fourth Amendment law.<sup>99</sup> The result is a series of case-by-case analyses revealing an utter lack of consistency and uniformity as to what determinatively resolves the question of when a driveway is entitled to constitutional protection.<sup>100</sup> What is regarded as “protected curtilage” in one instance is easily regarded unworthy of protection in another instance, despite the presence of similar factual circumstances.<sup>101</sup>

### A. The Curtilage Analysis

In general, there are two types of driveway cases.<sup>102</sup> One category consists of those instances when a law enforcement officer observes an illegal substance/activity in a homeowner’s driveway while standing in a place where the officer undoubtedly has a right to be.<sup>103</sup> Because any member of the public may just as easily make similar observations, the officer in these instances has neither intruded upon the curtilage nor violated any reasonable expectation of privacy.<sup>104</sup> The second and more problematic category of driveway cases encompasses those situations when police officers, while proceeding on a homeowner’s driveway, observe some evidence of criminal activity or wrongdoing.<sup>105</sup> Upon discovery of such activity, the officer may either seize the evidence immediately<sup>106</sup> or obtain a warrant based on the observations, allowing police to later return and conduct a search

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99. See *Oliver*, 466 U.S. at 196 n.20 (Marshall, J., dissenting) (voicing a prediction that the Supreme Court’s approach to such privacy issues would prove to be unworkable and inadequate).

100. See discussion *infra* Parts III.A-B.

101. Compare *Idaho v. Christensen*, 953 P.2d 583, 587 (Idaho 1998) (holding that an officer had impermissibly trespassed upon the defendant’s curtilage by disregarding the presence of a gate when entering), with *United States v. Brady*, 734 F. Supp. 923, 928 (E.D. Wash. 1990) (maintaining that the presence of a fence did not support an inference that the driveway was within the curtilage).

102. See *So*, *supra* note 13, at 10.

103. See *id.* (noting that observations made by officers from the street or some other public place are permissible).

104. See *id.*; see also *Michigan v. Tate*, 352 N.W.2d 297, 300-01 (Mich. Ct. App. 1984) (holding that officers did not violate the Fourth Amendment when they observed the defendant’s car parked in his driveway from a road used by the general public because the driveway was clearly exposed to the public and the officers made their observation in an area where they had a right to be).

105. See *So*, *supra* note 13, at 10.

106. This option is typically utilized and justified only when the circumstances of the discovery qualify the item for seizure under the plain view doctrine. See *supra* notes 85-87 and accompanying text.

and seizure.<sup>107</sup> In these instances, scrutiny is exerted to determine whether the officers' entry constitutes an intrusion of the home's curtilage or, more broadly, an area in which the homeowner was entitled to a reasonable expectation of privacy.<sup>108</sup> An application of the *Dunn* criteria is one method utilized as a means of resolving this inquiry,<sup>109</sup> however, the decisions resulting from such analyses suggest there is little consensus as to what warrants a finding of curtilage.<sup>110</sup>

In determining whether a driveway should be accorded constitutional protection, some courts conduct a traditional curtilage analysis.<sup>111</sup> Because the curtilage enjoys an equal degree of protection against governmental intrusion as does the home,<sup>112</sup> an evaluation concluding that a driveway is within the curtilage should provide a sufficient foundation for granting protection from such intrusion.

In some instances, courts conducting a curtilage analysis have adopted a *per se* rule that the driveway is within a home's curtilage.<sup>113</sup> Recognizing the inadequacy and unfairness resulting from the arbitrary *Dunn* criteria, a few states have declined to adopt the formula, opting instead to institute specialized laws of privacy rights in driveways pursuant to curtilage interpretations arising under their own state constitutions.<sup>114</sup> Particularly illustrative is *Idaho v. Cada*,<sup>115</sup> in which the court recognized that the *Dunn* factors were unduly

107. See, e.g., *United States v. Brady*, 734 F. Supp. 923, 926 (E.D. Wash. 1990) (demonstrating that even officers who come upon a sophisticated "marijuana grow operation" are likely to leave, obtain a warrant, and return later for its execution).

108. See *LAFAVE*, *supra* note 11, at 505 (remarking that while the constitutionality of police observations made upon one's premises may be dependent upon whether that portion of the premises constitutes curtilage, in some cases, it is further dependent upon whether the police presence was an intrusion of a home occupant's reasonable expectation of privacy).

109. Cf. *So*, *supra* note 13, at 14-18.

110. See generally *id.*

111. See *id.* at 10; see, e.g., *Idaho v. Christensen*, 953 P.2d 583, 587-88 (Idaho 1998); *Nebraska v. Merrill*, 563 N.W.2d 340, 344 (Neb. Ct. App. 1997).

112. See *Dunn*, 480 U.S. at 300 (1987) (explaining that the curtilage concept originated as a means of extending to the area surrounding the home similar protection as that accorded to the house itself).

113. See *Georgia v. O'Bryant*, 467 S.E.2d 342, 344-45 (Ga. Ct. App. 1996) (asserting that an officer's entry upon the defendant's private driveway by itself constituted an intrusion upon the curtilage); see also *New Hampshire v. Pinkham*, 679 A.2d 589, 591 (N.H. 1996) (holding that a private driveway leading to a house is clearly included within the curtilage of a home).

114. See *Cooper v. California*, 386 U.S. 58, 62 (1967) (explaining that state courts conducting a curtilage analysis under the provisions of their own state constitutions are free to reject federal holdings permitted that the state action does not fall below the minimum standards provided by federal constitutional protections).

115. 923 P.2d 469 (Idaho Ct. App. 1996).

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restrictive and failed to reflect the scope of the privacy interest protected by Article I, § 17 of the Idaho State Constitution.<sup>116</sup> Specifically, the court criticized the *Dunn* factors' failure to secure equal privacy rights to homeowners in rural areas.<sup>117</sup> The court cited Justice Brennan's dissent in *Dunn*, insisting that "[o]ur society is not so exclusively urban that it is unable to perceive or unwilling to preserve the expectation of farmers and ranchers that [their property is] protected (literally) from unwarranted government intrusion."<sup>118</sup>

The inadequacy of *Dunn* in its ability to guarantee Idaho citizens equal privacy rights has been further demonstrated by the specific application of the second and fourth factors of the curtilage analysis to rural driveways.<sup>119</sup> For instance, in *Cada*, the court noted that a failure to erect extensive fencing might depend upon any number of factors<sup>120</sup> and that absence of such fencing should consequently not weigh against a finding of curtilage.<sup>121</sup> Similarly, with regard to the steps taken by a resident to block his driveway from public observation, the court asserted that a rural driveway's visibility from a public street should not have any influence over whether it may validly be recognized as part of the curtilage.<sup>122</sup> Accordingly, *Cada* disregarded *Dunn* and instead adopted a general rule recognizing the driveway as automatically occupying a niche within the protected curtilage.<sup>123</sup>

116. IDAHO CONST. art. I, § 17. Article I, § 17 of the Idaho Constitution is identical to the Fourth Amendment of the United States Constitution. *Id.*

117. *See Cada*, 923 P.2d at 475-77 (rejecting the *Dunn* criteria as unduly restrictive in their application to rural environments); *see also* United States v. Reilly, 76 F.3d 1271, 1277 (2d Cir. 1996) (noting that the *Dunn* factors fail to be determinative in assessing whether the special circumstances of a rural property warrant a finding of curtilage).

118. *See Cada*, 923 P.2d at 475 (quoting *Dunn*, 480 U.S. at 306 (1987) (Brennan, J., dissenting)); *see also* New Mexico v. Sutton, 816 P.2d 518, 524 (N.M. Ct. App. 1991) ("In New Mexico, lot sizes in rural areas are often large, and land is still plentiful. Our interpretation and application of the state constitution must take [this] into account.").

119. *See Cada*, 923 P.2d at 476-77 (relating that whether a driveway is within an enclosure surrounding the home and is protected from observation by outside observers is of limited assistance in distinguishing the curtilage).

120. *See id.* at 476-77 (citing such relevant factors as including an individual's sense of aesthetics, dictates of the terrain, and how much fencing an individual can economically afford).

121. *See id.*

122. *See id.* at 477 (noting further that with respect to both rural and urban homes, areas that unquestionably lie within a home's curtilage, such as front and side yards immediately adjacent to the dwelling, are generally visible from public streets and roads).

123. *See id.* (affirming the validity of defining the curtilage as an area adjacent to a home which a reasonable person may expect to remain private, even though accessible to the public).

The conclusion reached in *Cada* was secured only as a result of the special implications provided by Idaho's state constitution, and in a majority of jurisdictions, homeowners of rural properties remain unfairly disadvantaged.<sup>124</sup> Ownership of large quantities of land makes it difficult to take the extensive steps typically interpreted as being required under *Dunn*.<sup>125</sup> Even more disturbing is that several courts have ventured so far as to declare that as a matter of federal law, a landowner can never have a reasonable expectation of privacy in a rural driveway.<sup>126</sup> Because of the arbitrary curtilage interpretations derived under *Dunn*, equal privacy rights are being denied to individuals on the basis of the locale in which they reside.

The majority of courts conducting a curtilage analysis does not operate on an automatic assumption that a home's curtilage includes the driveway and instead use a traditional *Dunn* analysis.<sup>127</sup> However, these decisions are inconsistent, making it difficult to pinpoint what specific elements are actually integral to a curtilage finding.<sup>128</sup> Because *Dunn* remained silent on the issue of quantitative value, in applying the criteria, courts are unaware of how much weight to assign any one factor.<sup>129</sup> Consequently, the method now used is the very technique the Supreme Court sought to avoid with its majority decision in *Oliver*.<sup>130</sup> *Oliver* rightfully noted that an ad hoc approach to determining whether a particular area was entitled to constitutional protection would not only make it difficult for police to discern the scope of their authority, but would also perpetuate a danger that

124. Cf. *So*, *supra* note 13, at 35-36 (observing the special scrutiny exerted upon rural driveways).

125. See, e.g., *United States v. Brady*, 734 F. Supp. 923, 926 (E.D. Wash. 1990) (requiring that despite owning large parcels of land, homeowners wishing to retain privacy protection must not only erect extensive fencing but also ensure that such fencing is of the variety that blocks outside observation altogether).

126. See, e.g., *Williams v. Garrett*, 722 F. Supp. 254, 258 (W.D. Va. 1989); *United States v. Smith*, 783 F.2d 648, 651 (6th Cir. 1986); *United States v. Ventling*, 678 F.2d 63, 66 (8th Cir. 1982).

127. See, e.g., *Idaho v. Christensen*, 953 P.2d 583, 587-88 (Idaho 1998) (conducting a traditional analysis before ruling that the defendant's driveway was entitled to protection from warrantless governmental intrusion).

128. See generally *So*, *supra* note 13, at 14-18. Compare *Oregon v. Russo*, 683 P.2d 163, 165 (Or. Ct. App. 1984) (holding that a driveway was within the curtilage, despite the fact that there was no gate/fence obstructing entry), with *Hubbel*, 951 P.2d at 977 (citing the lack of a gate/fence at the driveway's entry as a significant factor discouraging a finding of curtilage).

129. See *Dunn*, 480 U.S. at 301 (1987) (demonstrating that rather than providing a "finely tuned formula" to assist in resolving curtilage questions, enumerated factors are to be applied on a case-by-case basis).

130. 466 U.S. 170, 181 (1984) (remarking that its decision was driven in part by a conscious desire to avoid the difficulties created for courts, police, and citizens by an ad hoc approach to defining Fourth Amendment standards).



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constitutional rights would be arbitrarily and inequitably enforced.<sup>131</sup> Yet, this case-by-case approach is exactly what has been promulgated by the *Dunn* decision.<sup>132</sup>

A primary cause of the conflict arising in this area is the tendency of many courts to assign a disproportionate amount of weight to the issue of whether the driveway is included within an enclosure surrounding the home,<sup>133</sup> with little or no regard for the other relevant criteria.<sup>134</sup> Consequently, these courts must frequently address the question of what constitutes a sufficient enclosure.<sup>135</sup> In *United States v. Brady*,<sup>136</sup> for example, the court refused to find that a rural driveway was within the curtilage because, although wire fencing surrounded the entire area and there was a chained gate across the driveway's entrance, the fence did not directly connect to the gate, resulting in a gap on either side.<sup>137</sup> *Brady* noted that such a path could reasonably be construed as a pedestrian path, and thus, neither the presence of the fence nor the gate adequately supported a finding of curtilage.<sup>138</sup> The court further criticized the fact that the perimeter fence was composed of wire and thus, the typical passerby's view remained essentially unobstructed.<sup>139</sup> *Brady's* conclusion in this regard, however, is troubling because not all individuals will have the economic means to erect fencing at all, let alone fencing superior to

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131. See *id.* at 181-82. This is precisely why the Court in *Oliver* opted for a bright line rule declaring that open fields would never be entitled to constitutional protection. But see *Oliver*, 466 U.S. at 196 (Marshall, J., dissenting) ("[T]he [rule] announced by the Court today is incapable of determinate application.").

132. See So, *supra* note 13, at 1 (discussing the way in which courts juggle a variety of factors in reaching a conclusive decision regarding privacy rights in the driveway).

133. See, e.g., *Nebraska v. Merrill*, 563 N.W.2d 340, 344 (Neb. 1997) (assigning great significance to the fact that the driveway was not enclosed within a gate/fence in declining to grant the driveway Fourth Amendment protection from police intrusion).

134. See *Oregon v. McIntyre*, 860 P.2d 299, 303 (Or. Ct. App. 1993) (refusing to grant the driveway protection because it was not adequately enclosed within the fence the defendant had erected).

135. See, e.g., *United States v. Brady*, 734 F. Supp. 923, 923 (E.D. Wash. 1990).

136. *Id.*

137. *Id.* at 928.

138. See *id.* at 926. But cf. *Lorenzana v. California*, 511 P.2d 33, 40-41 (Cal. 1973) (declaring that although windows into which officers peered were covered by shades leaving several inches of the bottom sill uncovered, such gaps did not dispel the reasonableness of the occupants' expectation of privacy).

139. See *Brady*, 734 F. Supp. at 929. But see *United States v. Johnson*, 256 F.3d 895, 903 (9th Cir. 2001) (arguing that such a position places a considerably greater economic burden on rural residents who find that chain-link fencing is the most cost-effective way to fence in their property).

the basic wire or chain-link variety; to that extent, the holding in *Brady* mandates that privacy interests depend on an individual's wealth.<sup>140</sup>

In contrast to these limited analyses, other courts utilize a broader range of factual considerations while assessing a driveway's potential curtilage status.<sup>141</sup> For example, in *United States v. Depew*,<sup>142</sup> the court engaged in a broader *Dunn* analysis and found that even though the driveway was enclosed only by a low picket fence that permitted observation by outsiders, the driveway could still be considered within the home's curtilage.<sup>143</sup> The court referenced a series of factors in favor of a finding of curtilage and asserted that the court below had failed to accord significant weight to the full range of the defendant's efforts to maintain privacy.<sup>144</sup> A similar approach was implemented in *United States v. Johnson* as the court weighed a variety of factors in their totality before making a curtilage assessment rather than disproportionately focusing on any one component of the inquiry.<sup>145</sup> While the approach adopted by these courts is more appropriate than the limited analyses sometimes used, the danger still exists that undue weight might be assigned to any one element of the analysis.<sup>146</sup>

### B. The Reasonable Expectation of Privacy Analysis

Generally, "the mere intonation of curtilage does not end the Fourth Amendment inquiry."<sup>147</sup> Although some courts regard the matter of whether the driveway constitutes curtilage as determinative when assessing privacy rights, most courts conduct further

140. See *Johnson*, 256 F.3d at 903. But see *id.* at 918 n.11 (Kozinski, J., concurring) ("Judge Ferguson's concern for economic inequality [does not] change the fact that one can see through a chain-link fence, no matter whether a rich or poor man stands on the other side."). See generally Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 399-405 (1974) (arguing that the privacy rights of people with limited economic resources is gradually being diminished "to a compass inconsistent with the aims of a free and open society").

141. See, e.g., *United States v. Depew*, 8 F.3d 1424, 1424-25 (9th Cir. 1993).

142. *Id.*

143. See *id.* at 1427-28.

144. See *id.* (weighing several facts, including that the area was enclosed by a fence, the driveway was in a remote, secluded area, was not visible from the highway, and was blocked by a row of dense trees).

145. 256 F.3d at 901-03 (commenting that the curtilage/driveway inquiry is broader in rural cases and that in rural cases, natural boundaries such as trees and shrubbery adequately function as an enclosure, as does chain-link fencing).

146. See *Montana v. Hubbel*, 951 P.2d 971, 977 (Mont. 1997) (balancing a variety of criteria in its analysis and according undue weight to the enclosure factor, thereby rendering it the determinative component of the inquiry).

147. *United States v. Shanks*, 97 F.3d 977, 979 (7th Cir. 1996).

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investigation by inquiring whether the homeowner exhibited and was entitled to a reasonable expectation of privacy in his/her driveway.<sup>148</sup> Thus, although the *Dunn* criteria are highly relevant in this area,<sup>149</sup> mechanical application of these factors is unwarranted as the essential inquiry remains “whether the area harbors ‘intimate activity associated with the sanctity of a man’s home and the privacies of life.’”<sup>150</sup> The criteria remain pertinent insofar as they may be utilized as instruments gauging different degrees of individual privacy expectations.<sup>151</sup>

The reasonable expectation of privacy analysis prevents resolution of Fourth Amendment issues solely on the basis of an abstract analysis of a particular area and instead directs the focus of the inquiry to what an individual actually sought to preserve as private.<sup>152</sup> The use of this test is at least partially due to the view that the Fourth Amendment “protects legitimate expectations of privacy, rather than simply places.”<sup>153</sup> However, while property concepts are concededly no longer controlling in Fourth Amendment analyses,<sup>154</sup> the traditional curtilage determination should continue to bear a key role in determining the privacy rights to which a given area may be entitled. Failure to do so renders the curtilage distinction itself superfluous in light of the broader “reasonable expectation of privacy” inquiry by which it is essentially superseded.<sup>155</sup>

This modern justified-expectation-of-privacy approach has been widely implemented in American courts.<sup>156</sup> Relative to driveways, the

148. See *Dunn*, 480 U.S. at 300 (1987) (“[T]he extent of the curtilage is determined by factors that bear upon whether an individual *may reasonably expect* that the area in question should be treated as the home itself.”).

149. See LAFAYE, *supra* note 11, at 495 (remarking that some post-*Katz* cases continue to rely upon the curtilage doctrine when assessing Fourth Amendment privacy rights).

150. *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1986)).

151. See So, *supra* note 13, at 14-18 (discussing cases that continue to utilize the *Dunn* criteria to assess whether a reasonable expectation of privacy exists).

152. See Edward M. Boxbaum, *Florida v. Brady: Can Katz Survive in Open Fields?*, 32 AM. U. L. REV. 921, 929 (1983) (noting that the expectation of privacy analysis marks a departure from the former use of common law property distinctions in determining constitutional rights).

153. *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

154. See *United States v. Ventling*, 678 F.2d 63, 66 (8th Cir. 1982) (holding that the standard for determining when the search of an area outside the home violates the Fourth Amendment depends upon whether a homeowner possesses a legitimate expectation of privacy in that area).

155. See So, *supra* note 13, at 14-37 (discussing cases that focus on the homeowner’s expectation of privacy in determining whether a driveway is entitled to protection).

156. See generally *id.*

primary force behind this approach has been the growing acceptance of the view that a driveway, as a normal route of access for those visiting the premises, is only a “semi-private” area and thus entitled to a lesser degree of privacy.<sup>157</sup> Some courts have even begun to suggest that a homeowner can never possess a reasonable expectation of privacy in his/her own private driveway.<sup>158</sup> Courts engaging in this expectation of privacy analysis identify the focus as whether the driveway was impliedly open to the public, an inquiry that is evaluated in light of a variety of factors.<sup>159</sup>

The decisions under this approach are as equally inconsistent and troubling as those arrived at through the traditional curtilage analysis.<sup>160</sup> In examining whether a homeowner has taken steps to rebut the presumption that his driveway is impliedly open, courts frequently characterize the efforts as insufficient and customarily require significant and precise demonstrations of an owner’s intent to exclude members of the public from his/her premises.<sup>161</sup> One element that is frequently regarded as indicative of a homeowner’s intent to exclude others is the presence or absence of a gate/fence.<sup>162</sup> While the absence of a gate/fence will nearly always weigh in favor of a ruling that a driveway is impliedly open, the presence of such an obstruction does not necessitate the opposite conclusion.<sup>163</sup> If a

157. See, e.g., *Oregon v. Corbett*, 516 P.2d 487, 490 (Or. Ct. App. 1973).

In the course of urban life, we have come to expect various members of the public to enter upon . . . a driveway . . . . If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that police will do so.

*Id.*

158. See *Burdysaw v. Arkansas*, 10 S.W.3d 918, 920 (Ark. Ct. App. 2000) (stating that an expectation of privacy in driveways is generally not considered reasonable); see also *Lorenzana v. California*, 511 P.2d 33, 38-39 (Cal. 1973) (explaining that a driveway, being a normal access route to a house, is an exception to the curtilage doctrine because it offers the public implied permission to enter).

159. Because the relevant factors are in part derived from those used in a typical *Dunn* analysis, the analysis here often bears similarity to the curtilage analysis previously discussed. See So, *supra* note 13, at 14-37 (describing the way in which some courts use the *Dunn* factors to probe the extent of a homeowner’s expectation of privacy as opposed to using them for the sole purpose of determining whether the area itself is included within the curtilage).

160. See generally *id.* at 18-37 (analyzing cases with regard to a reasonable expectation of privacy in a private driveway).

161. See generally *id.* at 13, 16-18, 24-37.

162. See *id.* at 24-33 (analyzing cases wherein the issue of restrictions such as fences, gates and signs were a determinative issue).

163. Compare *Washington v. Gave*, 890 P.2d 1088, 1090-91 (Wash. Ct. App. 1995) (assigning significant weight to the absence of a gate/fence in deciding that the defendant had no reasonable expectation of privacy in his driveway), with *Burdysaw*, 10 S.W.3d at 919-20 (asserting that the three gates the defendant had erected along his driveway were insignificant).

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homeowner does enclose the driveway with a gate/fence, courts next inquire whether such an obstruction was closed or locked at the time of police intrusion.<sup>164</sup> Thus, despite the presence of gates/fences along driveways, unless these obstructions are closed at the time of the intrusion and additional evidence of a homeowner's intent to exclude is demonstrated, courts may construe an implied invitation to encroach upon the driveway and justify police intrusion.<sup>165</sup>

Another key factor in the expectation of privacy analysis is the presence or absence of "No Trespassing" signs.<sup>166</sup> Although one might logically infer that the posting of such signs would sufficiently express a homeowner's desire to exclude others, most courts refuse to accept the presence of these signs as indicative of intent.<sup>167</sup> The reason for this reluctance is the belief that other reasonable individuals, such as neighbors or salesmen, would not refrain from entering one's driveway merely because of the presence of a "No Trespassing" sign<sup>168</sup> and thus, homeowners cannot claim a violation of their privacy merely because police officers act as other reasonable individuals would.<sup>169</sup>

An extreme example of this reluctance arose in *Washington v. Gave*,<sup>170</sup> where the court ruled that five "No Trespassing" signs officers encountered while approaching the resident's home were not dispositive of the privacy issue.<sup>171</sup> *Gave* declared that the signs were but one factor to be considered in conjunction with other manifestations of privacy and that the lack of other such affirmative

164. See *Burdyslaw*, 10 S.W.3d at 920-21 (stating that the fact that three gates were positioned along the driveway was irrelevant because of testimony revealing that they were usually kept open).

165. See *Connecticut v. Liptak*, 573 A.2d 323, 328 (Conn. App. Ct. 1990) (stating that because the driveway gate was typically kept open, the defendant had only a diminished expectation of privacy in his driveway); see also *Oregon v. Gorham*, 854 P.2d 971, 975 (Or. Ct. App. 1993) (remarking that the officers' entry upon the driveway was not unlawful because the gate to the driveway had been left open).

166. See *So*, *supra* note 13, at 33-35 (concluding that "there was no reasonable expectation of privacy in the driveway, even where there were 'No Trespassing' signs posted on or near the driveway").

167. Cf. *United States v. Oliver*, 466 U.S. 170, 179 (1984) (indicating that it was permissible for officers to ignore a posted "No Trespassing" sign at the farm's locked gate because, according to the Court, "[i]t is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas").

168. See, e.g., *Idaho v. Clark*, 859 P.2d 344, 350 (Idaho Ct. App. 1993) ("[A] 'no trespassing' sign cannot reasonably be interpreted to exclude normal, legitimate inquiries or visits.").

169. See *LAFAVE*, *supra* note 11 ("[P]olice with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public.").

170. 890 P.2d 1088 (Wash. Ct. App. 1995).

171. See *id.* at 1091 (quoting *Gave* as admitting "that he did not put up the signs and that he does not know who did").

acts in the record before the court contributed to a finding that there was in fact no expectation of privacy in the driveway that society would be willing to recognize as reasonable.<sup>172</sup> Indeed, a majority of the courts conclude that the presence of “No Trespassing” signs alone will never be regarded as dispositive of the underlying constitutional issue.<sup>173</sup> The court in *Washington v. Hornback*<sup>174</sup> indicated that this will be true even where the sign is clearly and directly posted at a driveway’s entrance.<sup>175</sup> Thus, the posting of “No Trespassing” signs is apparently a futile act devoid of meaning unless further efforts expressing an intent to exclude are manifested by the homeowner.<sup>176</sup> Ironically, while courts hold that the presence of a “No Trespassing” sign is never dispositive, they do recognize that the absence of such signs can be conclusive.<sup>177</sup>

A series of cases recognize the relevance of two other conditions when assessing whether a driveway is impliedly open, including whether the driveway is visible and accessible from the public road.<sup>178</sup> Courts look to visibility and accessibility as indicative of whether other individuals might reasonably use the driveway as a means of approaching the home itself.<sup>179</sup> Presumably, the rationale operates on the premise that if the driveway is visible from the public roadway and provides the only means of access to the residence, it should be anticipated that members of the public will use the driveway for that purpose.<sup>180</sup>

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172. See *id.* (further noting that Gave’s failure to personally post the signs was yet another factor prohibiting him from relying on them).

173. See generally *So*, *supra* note 13, at 33-35 (describing a number of cases where courts have refused to recognize the presence of a “No Trespassing” sign as a determinative factor in the curtilage inquiry).

174. 871 P.2d 1075 (Wash. Ct. App. 1994).

175. See *id.* at 1078 n.4 (concluding that the presence of a “No Trespassing” sign does not by itself prohibit entry of access routes to a home or other portions of the curtilage impliedly open to the public).

176. See *So*, *supra* note 13, at 33-35.

177. Compare *Gave*, 890 P.2d at 1091 (arguing that the presence of five “No Trespassing” signs was not dispositive and did not preclude the court’s conclusion that the defendant was not entitled to privacy in his driveway), with *Delosreyes v. Texas*, 853 S.W.2d 684, 689-90 (Tex. Crim. App. 1993) (noting that the absence of such signs was a significant factor in reaching the same conclusion).

178. See *Connecticut v. Liptak*, 573 A.2d 323, 328 (Conn. App. Ct. 1990) (holding that the defendant had a diminished expectation of privacy in his driveway where it was the principal means of ingress and egress to the property); *Nebraska v. Merrill*, 563 N.W.2d 340, 344 (Neb. 1997) (ruling that the defendant had no legitimate expectation of privacy in his driveway because it was visible from the public roadway).

179. See *So*, *supra* note 13, at 10-11 (providing a general overview of cases regarding “reasonable expectation of privacy in one’s own private residential driveway”).

180. See *id.*

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This issue of visibility and accessibility is troubling when one considers that many homes are located in environments where the homeowner actually has little control over the fact that his/her driveway may be visible to the road and accessible therefrom.<sup>181</sup> For instance, in urban areas, homes and their driveways are typically visible from the public road.<sup>182</sup> As a result, homeowners in urban areas are unfairly disadvantaged insofar as the mere location of their home weighs against a finding of a reasonable expectation of privacy in their favor.<sup>183</sup> In one case, an officer's observation of damage to a vehicle parked in the defendant's driveway was held permissible, despite the fact that he had entered the driveway in order to make the observation.<sup>184</sup> The court declared that the act "was no more intrusive an event than ordinarily occurs during the daily incidents of life in an urban neighborhood."<sup>185</sup> Under almost identical factual circumstances, another court made a similar observation, noting that "[i]n the course of urban life, we have come to expect various members of the public to enter upon . . . [the] driveway."<sup>186</sup> Thus, the prevailing view is that the degree to which urban dwellers may presume to possess an expectation of privacy in their driveway is inherently less than that afforded to other occupants of non-urban homes.<sup>187</sup>

Few courts since *Dunn* have ruled that a particular driveway is not impliedly open to the public.<sup>188</sup> The few cases where such findings have been made demonstrate the exceptional strides that must be

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181. See, e.g., LAFAVE, *supra* note 11, at 486-89, 509-12 (discussing the special privacy issues and problems that arise when multiple occupancy structures are involved).

182. See *Oregon v. Corbett*, 516 P.2d 487, 490 (Or. Ct. App. 1973) (implying that in urban settings, the driveway will likely be the direct and only route of access to the home).

183. See *New York v. Lewis*, 162 A.D.2d 760, 763 (N.Y. App. Div. 1990) (ruling against the possibility of a legitimate expectation of privacy with regard to a truck parked in an urban driveway); see also *New York v. Crapo*, 103 A.D.2d 943, 943-44 (N.Y. App. Div. 1984) (justifying an officer's act of walking up an urban driveway to the door of a garage and looking through the garage door window).

184. See *Lewis*, 162 A.D.2d at 763 (reasoning that the truck, parked in an urban driveway, was unrestricted from public view or access, and thus not entitled to Fourth Amendment protection).

185. *Id.* (quoting *Crapo*, 103 A.D.2d at 943-44).

186. *Massachusetts v. A Juvenile* (No. 2), 580 N.E.2d 1014, 1016 (Mass. 1991) (quoting *Corbett*, 516 P.2d at 490).

187. See *United States v. Acosta*, 965 F.2d 1248, 1256 (3d Cir. 1992) (suggesting that the context of urban life renders the *Dunn* analysis largely inapplicable in this area).

188. See generally *So*, *supra* note 13, at 18-21 (citing four cases where the driveway was not deemed impliedly open).

taken to retain a reasonable expectation of privacy in one's own driveway.<sup>189</sup> In *Washington v. Ridgway*,<sup>190</sup> for instance, the court found that because the property itself was located in an isolated setting where it was hidden from the road and from the neighbors, the driveway was blocked by a closed gate, barking guard dogs were present, and deputies deviated from the driveway in approaching the home, an inference that the driveway was impliedly open could not be supported.<sup>191</sup> In order to demonstrate a legitimate expectation of privacy in one's driveway, it is thus necessary to guarantee that all or most of the factors typically weighed in a reasonable expectation of privacy analysis are satisfied.<sup>192</sup> Courts apparently accept as a universal truth that a solitary measure manifesting a desire to exclude others can never solely negate the implied consent.<sup>193</sup> This proposition is unwarranted because it requires a homeowner to take broad measures to rebut an invitation merely presumed and implied by courts.<sup>194</sup> Further, demanding such extensive efforts from the homeowner inevitably necessitates that the homeowner expend considerable economic resources on, for example, posting signs,<sup>195</sup> erecting a fence,<sup>196</sup> and purchasing a home in an isolated location,<sup>197</sup> all in the name of securing the right to be free from warrantless governmental intrusion in one's own private driveway.<sup>198</sup>

The last relevant inquiry under the reasonable expectation of privacy analysis relates not to the driveway itself but to the manner in

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189. See *id.*

190. 790 P.2d 1263 (Wash. Ct. App. 1990).

191. See *id.* at 1265 (describing a curtilage that was not open to the public).

192. See *Oregon v. McIntyre*, 860 P.2d 299, 303 (Or. Ct. App. 1993) (Riggs, J., dissenting) (criticizing the dominant approach employed by a majority of courts which necessitates "that citizens cannot exclude casual visitors without posted warnings *and* a fence *and* a moat filled with crocodiles").

193. See, e.g., *id.* at 303.

194. See So, *supra* note 13, at 11 (describing how courts look at a variety of facts in implying an open invitation to encroach upon a driveway).

195. See, e.g., *New Hampshire v. Pinkham*, 679 A.2d 589, 591 (N.H. 1996) (relying in part on the fact that there was a complete absence of any "No Trespassing" signs posted on the property in declaring the driveway a semi-private area that was unprotected from unwarranted police intrusion).

196. See, e.g., *California v. Edelbacher*, 766 P.2d 13, 30 (Cal. 1989) (commenting that there is no reasonable expectation of privacy in a driveway if the owner fails to erect a fence as a means of reserving privacy rights).

197. See, e.g., *United States v. Depew*, 8 F.3d 1424, 1428 (9th Cir. 1993) (relying in part on the fact that the defendant had chosen a house in a remote and secluded area in asserting that he was entitled to privacy in his driveway).

198. But see *Idaho v. Christensen*, 953 P.2d 583, 587 (Idaho 1998) (arguing that citizens should not have to convert the area around their homes into the modern equivalent of a medieval fortress to prevent uninvited entry by the public).



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which police act when entering.<sup>199</sup> In essence, police officials are required to act within the scope of the implied invitation when entering the driveway and using it to approach the home.<sup>200</sup> As with all other inquiries in this realm, whether an officer remains within the scope of an implied invitation depends upon the facts and circumstances of a particular case.<sup>201</sup> Typically, where officers do not act as other reasonable citizens could be expected to act when entering a homeowner's driveway, the implied invitation is revoked and any observations subsequently made cannot be adversely used against the homeowner.<sup>202</sup>

#### IV. PROPOSAL OF A BRIGHT LINE RULE: RECOGNIZING THE PRESENCE OF A SIGN OR A GATE/FENCE AS INDICATIVE OF AN OWNER'S RIGHT TO PRIVACY WITHIN THE DRIVEWAY

In the aftermath of recent state and federal decisions relating to the issue of privacy rights in driveways, citizens concerned about retaining such rights can only be certain of the uncertainty surrounding whether their efforts to do so will be recognized as satisfactory.<sup>203</sup> However, the Supreme Court consistently notes "the virtue of providing 'clear and unequivocal' guidelines to the law enforcement profession."<sup>204</sup> Indeed, law enforcement, courts, and citizens alike have much to gain from a set of clear, informative rules dictating the boundaries of what constitutes protected activity.<sup>205</sup> The Supreme

199. See *Bower v. Texas*, 769 S.W.2d 887, 897-98 (Tex. Crim. App. 1989) (en banc) ("An officer, or any other member of the public, is authorized . . . to enter premises by the indicated usual route for the purpose of knocking on the front door, but once he deviates from this purpose, the officer loses his status as an invitee.").

200. See *LAFAVE*, *supra* note 11, at 499 (observing that if officers depart from the scope of the implied invitation, their subsequent actions may constitute an unlawful search).

201. See *Washington v. Ross*, 959 P.2d 1188, 1190 (Wash. Ct. App. 1998) (noting that among the factors to be considered are whether, in approaching the home, the officer acted secretly, entered in the daylight, and used the normal, most direct access route to the house); see also *Washington v. Ridgway*, 790 P.2d 1263, 1265 (Wash. Ct. App. 1990) (holding in part that officers deviating from the path of the driveway to avoid barking dogs were unreasonably intruding at that point).

202. See *Bower*, 769 S.W.2d at 897-98.

203. See *United States v. Redmon*, 138 F.3d 1109, 1138 (7th Cir. 1998) (Rovner, J., dissenting) (noting that the balancing approach leaves ordinary citizens no other choice but to make guesses about their privacy and hope that the court "will know unconstitutional police work when they see it").

204. See, e.g., *California v. Acevedo*, 500 U.S. 565, 577 (1991); see also *New York v. Belton*, 453 U.S. 454, 458 (1981).

205. See Daniel T. Gillespie, *Bright Line Rules: Development of the Law of Search and Seizure During Traffic Stops*, 31 LOY. U. CHI. L.J. 1, 3 (1999) (observing that the development of bright line rules assists officers in understanding proper legal procedures, results in fewer appeals, and functions as a guideline on which citizens

Court further opts for the adoption of bright line rules as tests within various Fourth Amendment contexts.<sup>206</sup> While implementation of bright line rules may not always be devoid of problems,<sup>207</sup> efforts to effect such guidelines should not be avoided where they would be straightforward and beneficial to society as a whole.<sup>208</sup>

The Supreme Court also rejects the adoption of intricate tests composed of 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.”<sup>209</sup> Ironically, this is the very method currently being employed as judges attempt to define privacy boundaries of the driveway.<sup>210</sup> The curtilage analysis has prompted courts to advance arbitrary decisions as to whether, under the facts of a particular case, an individual is entitled to privacy in his/her driveway.<sup>211</sup> One primary cause of the resulting disparity among these decisions is the obstacle judges face in attempting to discern what quantitative value to assign any one variable of the relevant *Dunn* factors.<sup>212</sup> After *Oliver*, the curtilage clearly constitutes a constitutionally protected area.<sup>213</sup> However, after *Dunn*, the question of what area constitutes the curtilage remains unclear.<sup>214</sup>

The arbitrariness and ambiguity of the reasonable expectation of privacy test is equally problematic.<sup>215</sup> Gauging an individual’s expectation of privacy on the basis of such random criteria sanctions

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may model their actions accordingly).

206. See, e.g., *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (adopting a rule removing discretion from police in evaluating the quantum of proof in individual search and seizure cases); see also *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (“A single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”).

207. See Albert T. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 231 (1984) (noting that implementing bright line rules may be problematic at times; for example, the task of marking the boundary of even a bright line rule is not usually mechanical and is often a product of guesswork).

208. See *id.* at 228 (“When rules can limit the play of atomistic, idiosyncratic choice without yielding significant injustice, of course they should be adopted.”).

209. *Oliver v. United States*, 466 U.S. 170, 181 (1984).

210. See generally *So*, *supra* note 13, at 15-37 (discussing cases where courts drew a number of hairline distinctions in reaching a conclusion).

211. See discussion *supra* Part III.A-B.

212. See *supra* notes 133-34 and accompanying text.

213. See *Oliver*, 466 U.S. at 179-80 (affirming that the area immediately surrounding the home is legitimately entitled to privacy).

214. See *Dunn*, 480 U.S. at 306-12 (1986) (Brennan, J., dissenting) (discussing generally the ambiguity engaged when making curtilage distinctions).

215. See *So*, *supra* note 13, at 15-37 (discussing cases where the reasonable expectation of privacy analysis has resulted in a series of inconsistent decisions).

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exactly the type of hairline distinctions that the Supreme Court seeks to avoid.<sup>216</sup> Further, to declare as a general rule that a homeowner may never have a protected privacy interest in his/her own private driveway merely because of its location in a particular environment<sup>217</sup> is the very crux of injustice. In order to cease perpetuation of these erratic rulings, the adoption of a bright line rule that intelligibly articulates the measures by which to evaluate an individual's privacy rights in his/her driveway is essential.<sup>218</sup>

Justice Marshall's dissent in *Oliver* can be seen as one proposed rule in addressing this specialized area of law: "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 [should be] protected by the Fourth Amendment."<sup>219</sup> While the rule tactfully narrows the inquiry considerably, it still leaves an unsettling amount of ambiguity within the allowance it makes for an interpretation of what types of "markings" will be deemed sufficient for purposes of the rule.<sup>220</sup>

Another proposed formula shifts the focus away from the reasonable expectation of privacy component of the inquiry and back to the basic curtilage distinction.<sup>221</sup> This proposal argues that the sole test which should be used to determine whether a particular area is within the curtilage is an objective determination of the area's proximity to the home.<sup>222</sup> The immediate problem with this rule is that it is not easily adaptable to driveways.<sup>223</sup> A driveway might extend

216. See *Oliver*, 466 U.S. at 181 (noting that an ad hoc approach to privacy issues based on minor distinctions makes it difficult for police to discern the scope of their authority and creates a danger that constitutional rights will be arbitrarily enforced).

217. See, e.g., *Williams v. Garrett*, 722 F. Supp. 254, 258 (W.D. Va. 1989) (declaring that a driveway located within a rural environment is not entitled to protection from unwarranted police intrusion).

218. See, e.g., *United States v. Redmon*, 138 F.3d 1109, 1132 (7th Cir. 1998) (Posner, J., dissenting) (urging the court to avoid uncertainty in distinguishing between curtilage and open fields by adopting a concrete rule).

219. *Oliver v. United States*, 466 U.S. 170, 195-96 (1984) (Marshall, J., dissenting); see also *Dunn*, 480 U.S. at 312 n.3 (1987) (Brennan, J., dissenting) (embracing Marshall's proposed rule and arguing that it provides the clearest answer to the question of when persons possess a reasonable expectation of privacy in their property).

220. Cf. *LaFAVE*, *supra* note 11, at 493-501 (noting that the definition of "trespass" has itself failed to function as a specific and determinative factor).

221. See *Redmon*, 138 F.3d at 1132 (Posner, J., dissenting) (arguing that the court should have relied on a basic curtilage distinction in rendering its decision instead of the reasonable expectation of privacy analysis).

222. See *Lawrence*, *supra* note 46, at 816-17 ("The sole test which should be used to determine whether a particular area is part of the curtilage is its proximity to a constitutionally protected building.").

223. Because driveways are likely to differ from one case to the next, a test focusing purely on issues of proximity will be incapable of accommodating the special

hundreds of yards or perhaps just a few feet.<sup>224</sup> Additionally, under such a test, questions would arise as to what portion of the driveway would be relevant to this inquiry.<sup>225</sup> Although this test is problematic as applied to driveways, the objective and straightforward foundation upon which it rests is exactly the type of articulable guideline needed.<sup>226</sup> Somewhere between the test suggested in Marshall's dissent in *Oliver* and this basic formula is the resolution to the problem of developing a bright line rule that establishes parameters by which a driveway may be deemed constitutionally protected.

The bright line test this Comment proposes is a simple one: where a homeowner has posted a "No Trespassing" sign at the driveway's entrance or where there is a closed gate/fence at the entrance, the effort to exclude members of the public should be recognized, even if it is plausible that a member of the public might potentially enter upon the premises. The posting of a sign is a clear indication of a homeowner's subjective intent to protect his/her privacy and exclude others from entering.<sup>227</sup> A closed gate/fence conveys a similar message.<sup>228</sup> Merely because one individual may choose not to comply with such measures does not necessitate a conclusion that a homeowner's acts are consequently devoid of any exclusive effect and appreciable meaning.<sup>229</sup> Indeed, as enforcers of the law, police

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circumstances that might easily arise. See, e.g., *Michigan v. Taormina*, 343 N.W.2d 236, 239-40 (Mich. Ct. App. 1983) (observing the analytical complications arising where the driveway at issue was long and circular).

224. Compare *Ohio v. Payne*, 662 N.E.2d 60, 62 (Ohio Ct. App. 1995) (noting that the end of a driveway thirty to forty yards long was not entitled to protection), with *New York v. Crapo*, 103 A.D.2d 943, 943-44 (N.Y. App. Div. 1984) (noting that a driveway between ten to twenty feet long was similarly unworthy of protected curtilage status).

225. See *United States v. Depew*, 8 F.3d 1424, 1427 (9th Cir. 1993) (declining to identify a specific distance at which the curtilage around the home ends).

226. See *Oliver v. United States*, 466 U.S. 170, 181-82 (1984) ("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.").

227. See *Idaho v. Christensen*, 953 P.2d 583, 587 (Idaho 1998) (commenting that a clearly posted "No Trespassing" sign sends an unambiguous message that does not require the additional presence of a fence in order to be effective).

228. See *Washington v. Johnson*, 879 P.2d 984, 992 (Wash. Ct. App. 1994) (noting that the presence of a closed gate obstructing direct access to the driveway demonstrates the owner's subjective expectation of privacy in that area).

229. See *United States v. Redmon*, 138 F.3d 1109, 1132 (7th Cir. 1998) (Posner, J., dissenting).

[I]t is incorrect to say that because strangers and snoops could have invaded [the defendant's] property . . . [it is] okay for the police to do so. They *all* would be trespassers . . . If an owner sees a . . . snooper [on his premises], when he tells the intruder to leave or he'll call the police, the response should not be "we *are* the police!"

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should be bound to respect basic property boundaries as they are expressed by a homeowner.<sup>230</sup>

The proposed rule is not immune to criticism. Like the proposed rule in Marshall's dissent in *Oliver*, it is partially based upon a view of common law property concepts.<sup>231</sup> However, the Supreme Court has never held that property concepts are irrelevant to the Fourth Amendment.<sup>232</sup> To the contrary, the Court acknowledges that "because property rights reflect society's explicit recognition 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."<sup>233</sup> While this proposed rule represents a willingness to protect basic property rights, it is further driven by an overriding concern that where minimal steps are taken by a homeowner to express an intent in securing such rights, these steps should be regarded as precluding entry by the public.<sup>234</sup> Thus, although grounded in trespass considerations, the rule also focuses on *Katz*'s concern with the owner's expectation of privacy.

Recognizing that the driveway is an area where activity intimately connected to the sanctity of the home is inherently conducted,<sup>235</sup> this bright line rule requires only minimal affirmative steps from the owner seeking to exclude others.<sup>236</sup> Because the driveway is frequently (if not always) used for domestic purposes and commonly functions as an access route to the home, a per se rule acknowledging it as part of the home's protected curtilage is entirely appropriate.<sup>237</sup> If the Court has extended Fourth Amendment protection against

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*Id.*

230. See *id.* (insisting that both citizens and "peace keepers" should respect the property lines of homeowners).

231. See *Oliver v. United States*, 466 U.S. 170, 189 (1984) (Marshall, J., dissenting) ("We have frequently acknowledged that privacy interests are not coterminous with property rights.").

232. See Clancy, *supra* note 49, at 345 (affirming that even after *Katz*, occasional references to property as a ground for the [Fourth Amendment's] protections are still made).

233. *Oliver*, 466 U.S. at 189-90 (Marshall, J., dissenting).

234. See *Redmon*, 138 F.3d at 1130-31 (Posner, J., dissenting) (arguing that there is no reason why a "modern-property-plus-privacy test" should not be implemented as a means of reconciling the traditional property theory with the new reasonable expectation of privacy test by which it has largely been replaced).

235. See Serr, *supra* note 14, at 609 (noting that the Supreme Court's consideration that the curtilage is "part of the home for Fourth Amendment purposes" imposes an arbitrary and rigid standard).

236. See *supra* notes 223-26 and accompanying text.

237. See *New Hampshire v. Pinkham*, 679 A.2d 589, 591 (N.H. 1996) (observing that because driveways typically lead directly to the home, they necessarily constitute curtilage).

warrantless entry to the curtilage,<sup>238</sup> it is unnecessary to further require that entitlement to such protection be dependent upon the owner's satisfaction of a series of endeavors,<sup>239</sup> including erecting fences that substantially block vision from outsiders,<sup>240</sup> maintaining gates that connect to the surrounding fences,<sup>241</sup> and purchasing a home located on an isolated parcel of land.<sup>242</sup> There is simply no reason to believe that such ardent strides need be taken in order to assure a reasonable expectation of privacy in one's own driveway.<sup>243</sup> Indeed, in most instances, citizens who come across a clearly posted sign or closed gate at the entry of a driveway will realize the owner's intentions.<sup>244</sup>

Even if these steps do not prohibit entry by outsiders in all cases, the potential benefits secured by a bright line rule should not be discredited on that account alone.<sup>245</sup> A distinction should be made between the salesman who, encountering a closed gate, still decides to trespass upon the premises, and the officer who acts similarly.<sup>246</sup> The courts' readiness to equate "the officer engaged in the often competitive enterprise of ferreting out crime"<sup>247</sup> with the Girl Scout

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238. See *Oliver*, 466 U.S. at 180.

239. See Clancy, *supra* note 49, at 330 (noting that where the Court holds that the interest at stake is protected by the Fourth Amendment, it is unclear that there is any real need to further investigate the expectation of privacy issue).

240. See, e.g., *Nebraska v. Merrill*, 563 N.W.2d 340, 344 (Neb. 1997) (noting that a defendant might have had a legitimate expectation of privacy in his driveway if a fence or other type of obstruction limited access to the driveway).

241. See, e.g., *United States v. Brady*, 734 F. Supp. 923, 928 (E.D. Wash. 1990) (finding that a wide gap in an otherwise surrounding fence was essentially a pedestrian path, therefore precluding an expectation of privacy by the residents).

242. See, e.g., *United States v. Depew*, 8 F.3d 1424, 1428 (9th Cir. 1993), *overruled on other grounds by* *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (holding that the defendant's successful efforts to ensure privacy were sufficient for an expectation of privacy).

243. See *Lorenzana v. California*, 511 P.2d 33, 40 (Cal. 1973) ("Surely our state and federal Constitutions and the cases interpreting them foreclose a regression into an Orwellian society in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, air-proof box.").

244. See *United States v. Redmon*, 138 F.3d 1109, 1132 (7th Cir. 1998) (Posner, J., dissenting) (explaining that both citizens and police should respect a homeowner's subjective expectations regarding the boundaries of his premises).

245. See Serr, *supra* note 14, at 641 (commenting that a failure to protect individual freedom perilously threatens society's interest in retaining privacy and shielding itself from unwarranted governmental intrusion).

246. Cf. *id.* at 615 (remarking that observations made by disinterested persons who impinge on one's curtilage are inherently different from those made by government agents because the former do not constitute a significant and immediate threat to privacy).

247. *Johnson v. United States*, 333 U.S. 10, 14 (1948) (explaining the need for a neutral and detached magistrate to evaluate the sufficiency of existing probable cause where officers desire to effect a search or seizure).

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selling cookies is a false analogy. Simply because other individuals may choose to act improperly by disregarding a homeowner's expectation of privacy and trespassing on his property does not sanction the government in similarly violating the owner's rights.<sup>248</sup> Officers desiring to speak with or question a homeowner may just as easily do so by use of the mail or the telephone.<sup>249</sup> If probable cause to obtain a search warrant is lacking, it is unjust to allow officers to circumvent that requirement by permitting them entry along a private driveway because of a mere presumption that all driveways are impliedly open.<sup>250</sup>

A number of policy concerns further support the proposition that the arbitrary standards currently utilized should be abandoned in favor of the more concrete conception of privacy rights in the driveway that has been articulated.<sup>251</sup> As previously noted, the current legal practice has discriminated against individuals who reside in both rural and urban developments.<sup>252</sup> This discrimination remains unacceptable, particularly because it leads to disparate and unequal Fourth Amendment protection amongst the population.<sup>253</sup> The realization that courts typically couch their opinions in language emphasizing the "rural" or "urban" nature of a community is especially troublesome<sup>254</sup> because the classes ultimately being denied equal privacy rights consist of both minorities and the poor.<sup>255</sup> For instance, in the context of urban communities, the practice of some courts<sup>256</sup> has been to declare that compromised privacy rights are an

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248. See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) ("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 the law.").

249. See *Ohio v. Nay*, 735 N.E.2d 526, 531 (Ohio 2000) (advancing the proposition that where the sanctity of the home is involved, officers should employ the least intrusive means necessary in pursuing their own governmental interests).

250. See Clancy, *supra* note 49, at 334 n.195 (observing that the practice of declaring that a person does not have a protected interest at stake allows police to circumvent the warrant requirement by which they are bound).

251. See generally *United States v. Redmon*, 138 F.3d 1109, 1132 (7th Cir. 1998) (Rovner, J., dissenting) (discussing some general justifications for favoring a bright line approach over the balancing approach typically advocated by courts).

252. See, e.g., *id.* (commenting that both wealthy citizens and residents of rural areas enjoy greater physical privacy).

253. Cf. *id.* (noting the greater Fourth Amendment protection accorded to different classes of citizens).

254. See discussion *supra* Part III.

255. See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1007, 1118 n.34 (2000).

256. See, e.g., *United States v. Magana*, 512 F.2d 1169, 1170-71 (9th Cir. 1975) (implying through its ruling that members of urban communities must necessarily accept that they are entitled to a lesser degree of privacy).

inescapable consequence of urban life.<sup>257</sup> However, because minorities and the poor are likely to reside in urban communities,<sup>258</sup> both social classes are consequently forced to accept a lesser degree of privacy than that afforded to their more affluent, and more likely suburban, counterparts.<sup>259</sup>

Of further concern is that the reasonable expectation of privacy standard imposes significant and direct consequences for less wealthy individuals.<sup>260</sup> By erroneously using such a standard as a “talismanic solution,”<sup>261</sup> courts now require that in order to benefit from Fourth Amendment protection, an individual must essentially ensure that none of one’s driveway is accessible or visible to the public.<sup>262</sup> By requiring a series of steps on behalf of the home occupant,<sup>263</sup> courts are essentially asserting that privacy rights are not in fact constitutionally guaranteed but rather, must be purchased at a cost to the homeowner.<sup>264</sup> For example, a homeowner who can only afford chain-link fencing, as opposed to his neighbor who erects tall, wooden fencing, is likely to be deemed less entitled to privacy in his driveway, even though he has attempted to express the same subjective expectation of privacy as his neighbor.<sup>265</sup> Thus, less

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257. *See id.*

258. *See* Luna, *supra* note 255 (noting that the modern inner city is typically inhabited by a “poor, urban, largely minority community”).

259. *See, e.g.,* United States v. Redmon, 138 F.3d 1109, 1128 (7th Cir. 1998) (Evans, J., concurring) (“[I]t’s simply an unfortunate fact of life that in a modern urban setting . . . the area where one can reasonably expect privacy to prevail is very narrow.”).

260. *See* United States v. Johnson, 256 F.3d 895, 903 (9th Cir. 2001) (noting that some courts “would place a considerably greater economic burden on rural residents who wish to fence in their property and find that chain-link fence is the most cost-effective way to do so”).

261. *See* Serr, *supra* note 14, at 597-98 (noting that courts have severed from *Katz* the “knowingly exposes to the public” language and used it as a talisman to hold that anything exposed to the public in any way is consequently undeserving of constitutional protection).

262. *Cf. id.* at 619 (arguing that the reasonable expectation of privacy standard “has been perverted by the [c]ourts to render subjective expectations ‘illegitimate’ or ‘unreasonable’ whenever the [c]ourt[s] can conceive of a scenario under which a member of the public might observe that which the targeted individual seeks to keep private”).

263. *See, e.g.,* Oregon v. Gorham, 854 P.2d 971, 975 (Or. Ct. App. 1993) (holding that the defendant’s act of posting signs and maintaining a gate was insufficient to secure right to privacy in his driveway; the defendant should have further ensured that the gate blocking access to the driveway was closed and locked at all times).

264. *See, e.g.,* Redmon, 138 F.3d at 1132 (Posner, J., dissenting) (intimating that if the driveway is to be considered an open field, “then no place outside [the home is] . . . within the curtilage, and, indeed . . . urban dwellings have no curtilage . . . [C]urtilage is confined to farmers and to wealthy suburbanites and exurbanites”).

265. *Compare* United States v. Brady, 734 F. Supp. 923, 926 (E.D. Wash. 1990), *with* Oregon v. McIntyre, 860 P.2d 299, 300-01 (Or. Ct. App. 1993).



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wealthy individuals are guaranteed less protection as a result of their inability to spend a great deal of resources on ensuring a “certainty of absolute solitude.”<sup>266</sup> By subjecting less wealthy individuals to a heightened risk of intrusion in their own driveway, courts allow government officials to use the courts’ authority as a justification for selectively targeting members of a given community.<sup>267</sup>

The bright line rule proposed by this Comment is preferable to the standards commonly used today because it allocates constitutional protection to individuals who make a basic showing of a subjective expectation of privacy in their driveway.<sup>268</sup> Because the Supreme Court considers the curtilage part of the home itself,<sup>269</sup> and because the nature of privacy interests in curtilage activities are “objectively important,”<sup>270</sup> the test adopted should be one that tips *in favor of* the homeowner rather than *against* him.<sup>271</sup> Thus, when it is conceded that the driveway is more likely than not to constitute curtilage in any given case,<sup>272</sup> it naturally follows that the driveway should be protected from unwarranted governmental entry where an owner has expressed a simple and clear indication of his desire to restrict access to his premises.<sup>273</sup> The *Dunn* criteria and the reasonable expectation of privacy standard as they are employed today unjustly allocate a

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266. See Serr, *supra* note 14, at 612 (noting that the reasonable expectation of privacy standard as promulgated turns the Fourth Amendment inquiry from one of reasonableness to “certainty of absolute solitude”).

267. See *id.* at 586 n.19 (noting that where Fourth Amendment constraints are not present, government authorities may easily destroy the privacy of selected persons on the basis of discriminatory, vindictive, and arbitrary criteria).

268. See *supra* notes 227-30 and accompanying text (arguing for the application of a bright line rule with regard to the issue of the constitutional protection of driveways).

269. See *Oliver v. United States*, 466 U.S. 170, 180 (1984) (indicating that the common law concept of curtilage extends to intimate activities associated with, and therefore essentially part of, the home).

270. Serr, *supra* note 14, at 614 (commenting upon the objective importance of a privacy interest in curtilage activities).

271. See *id.* at 625-26 (arguing that to find against a homeowner where he has obviously expressed a desire to prohibit intrusion “is to ignore the very essence of the [F]ourth [A]mendment”).

272. See *New Hampshire v. Pinkham*, 679 A.2d 589, 591 (N.H. 1997) (“A driveway leading directly to a house clearly falls within the scope of ‘land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment’ . . . [thus], the driveway is part of the curtilage of the home.”).

273. See Serr, *supra* note 14, at 625-26 (arguing that where there is both a socially recognized privacy interest at stake, and an intrusive governmental technique at issue, subjectively held expectations of privacy should be deemed legitimate).

large degree of discretion to the judge, enabling him a great deal of leeway to deny constitutional protection to an area that is in fact entitled to such protection.<sup>274</sup>

### CONCLUSION

The decisions examined within this Comment indicate the general confusion underlying the notion of the driveway as part of the home's curtilage.<sup>275</sup> While some courts automatically recognize a driveway as part of the curtilage, others engage in a *Dunn* analysis to reach such a conclusion. The *Dunn* analysis itself, however, is inefficient in that it typically varies from one case to the next.<sup>276</sup> There is currently no uniformity as to whether, in conducting such an analysis, courts may accord a disproportionate amount of weight to one element,<sup>277</sup> or whether they should employ a full evaluation.<sup>278</sup> Reasonable expectation of privacy analyses have proven equally inefficient,<sup>279</sup> requiring extensive steps on behalf of the homeowner seeking to preserve a right to be free from warrantless governmental intrusion in his driveway.<sup>280</sup> Perhaps the most disturbing aspect of these decisions is their failure to accord equal privacy rights to homeowners of rural and urban developments and homeowners with limited economic resources.<sup>281</sup>

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274. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 212-14 (1986) (holding that despite the fact that the defendant had manifested a subjective expectation of privacy by erecting a fence around his curtilage, the area was nevertheless unworthy of constitutional protection because it remained exposed to public view).

275. See *United States v. Redmon*, 138 F.3d 1109, 1125 n.4 (1998) (Flaum, J., concurring) (addressing the inconsistencies and confusions incited by the courts' treatment of the driveway and curtilage issues).

276. See, e.g., *United States v. Depew*, 8 F.3d 1424, 1426 (9th Cir. 1993) (observing that a curtilage determination varies according to the specific facts involved).

277. See, e.g., *United States v. Smith*, 783 F.2d 648, 651-52 (6th Cir. 1987) (focusing almost exclusively on the fact that the fencing erected by the defendant was of the chain-link variety).

278. See, e.g., *Idaho v. Christensen*, 953 P.2d 583, 587-88 (Idaho 1998) (engaging in a comprehensive *Dunn* inquiry while assessing the defendant's privacy rights).

279. See generally Clancy, *supra* note 49, at 339 (noting that the expectation of privacy analysis is plagued by numerous flaws).

280. See, e.g., Serr, *supra* note 14, at 614 (commenting that those seeking to preserve privacy rights in their curtilage may have to perform tasks such as purchasing a home in a remote area or encircling the curtilage with a fence that exceeds eye level).

281. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1439 (2d ed. 1988) ("The Supreme Court, from its earliest examination of socioeconomic regulation has considered that equal protection demands reasonableness in legislative and administrative classifications.").

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Under the law as it stands, there are no clear steps for those seeking to ensure that their driveway be recognized as part of the protected curtilage of their home.<sup>282</sup> They may indeed even discover that the necessary course of action lies outside the realm of what for them is even economically possible.<sup>283</sup> Police and courts also remain adversely impacted by the uncertainty wrought under today's judicial rulings concerning the curtilage and the driveway.<sup>284</sup>

The solution here need not be as complex as the problem. Clearly, the complexity of the analyses heretofore has been ineffective.<sup>285</sup> Where "No Trespassing" signs are clearly posted or where a gate has been erected and is closed at the time of entry, the homeowner has manifested a subjective intent to exclude members of the public.

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282. See *supra* note 210 and accompanying text.

283. See, e.g., *United States v. Brady*, 734 F. Supp. 923, 923 (E.D. Wash. 1990) (involving a homeowner who was denied any recognition of his reasonable expectation of privacy in his driveway because of the presence of a wire fence on his premises, rather than a sight-obstructing wooden fence).

284. See *Oliver v. United States*, 466 U.S. 179, 196 (1984) (Marshall, J., dissenting) (predicting that future courts would see a "spate of litigation" attempting to discern where the open fields would end and the curtilage would begin).

285. See, e.g., Clancy, *supra* note 49, at 339-40 (remarking that the reasonable expectation of privacy analysis leaves the concept of privacy to the arbitrary discretion of judges and that it remains difficult, if not impossible, to say precisely what such a concept means).