THE LACK OF PRIVACY IN VERMONT

INTRODUCTION

> There was of course no way of knowing whether you were being watched at any given moment. . . . It was even conceivable that they watched everybody all the time. . . . You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and except in darkness, every movement scrutinized.[1]

This chilling quote from George Orwell's *1984* began Justice Johnson's dissent to the recent Vermont Supreme Court decision *State v. Costin*.[2] The scenario described demonstrates, to the extreme, the loss of privacy and security that is possible under Vermont's current open fields doctrine. Under this doctrine, a landowner is denied search and seizure protection on the property outside his home and curtilage that is not posted or enclosed with a fence.[3] According to the *Costin* majority, such property will be treated like public property.[4] Police may enter and conduct any type of search, including surreptitious video surveillance, without the judicial oversight of a search warrant.[5]

Article 11 of the Vermont Constitution and its corresponding provision in the United States Constitution, the Fourth Amendment, have traditionally provided citizens with a sense of privacy via protection from unreasonable searches and seizures and unnecessary governmental intrusions.[6] For years, these provisions have fostered a widely accepted concept known as the "right to be let alone."[7] However, recent state and federal case law has jeopardized this right with respect to certain areas of private property.[8] This jurisprudence, known as the "open fields doctrine," holds that open fields,[9] notwithstanding private ownership, fall outside the realm of property that

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1. State v. Costin, 9 Vt. L. Wk. 193, 195, 720 A.2d 866, 871 (1998) (Johnson, J., dissenting) (quoting GEORGE ORWELL, 1984 4 (1949)).

2. *Id.*

3. *See id.* at 193-94, 720 A.2d at 868.

4. *See id.* at 194, 720 A.2d at 869.

5. *See id.* at 195, 720 A.2d at 870.

6. *See* VT. CONST. ch. I, art. 11; U.S. CONST. amend. IV.

7. Samuel O. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

8. *See infra* Parts II-III.

9. An "open field" is the area of private property outside the home and curtilage. *See infra* Part II. Curtilage is defined as "those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment." BLACK'S LAW DICTIONARY 384 (6th ed. 1990).

Article 11 and the Fourth Amendment protect.[10] As a result, the open fields doctrine denies open fields the privacy privileges afforded by these constitutional provisions and in effect treats them like public property.[11]

This Note contends that Article 11 of the Vermont Constitution should protect people, not just certain places. Accordingly, search and seizure protection should not automatically exclude open fields. To the contrary, the analysis of whether constitutional protections apply to open fields should incorporate a variety of factors, including the nature and location of the land, the landowner's expectation of privacy, and society's acceptance of that privacy expectation. Furthermore, in light of modern technological advances, the method and intrusiveness of police activity are important issues that must be considered.

This Note first addresses the scope of Article 11 and the protections it provides for Vermont citizens. Part I examines the text of the Vermont Constitution, its history, and its relationship to the United States Constitution. Part II analyzes federal search and seizure jurisprudence. This section traces the origins of the open fields doctrine and various approaches to Fourth Amendment issues. Part III of this Note investigates how Vermont's search and seizure jurisprudence has evolved from federal case law, yet has diverged in the realm of open fields. Part IV examines the defects of the modified open fields doctrine as adopted in Vermont, namely its inconsistencies with established jurisprudence and its inadequacies as an approach to modern search and seizure cases. Finally, Part V concludes that a more favorable alternative to Vermont's current approach to open fields searches is to combine the reasonable expectation of privacy analysis developed in *Katz v. United States*[12] with a warrant requirement.

I. BACKGROUND

Vermont is a beautiful state with miles of fields and mountains. It is unique from other states in that its rural landscape fosters an extensive culture of outdoor activities such as hiking, hunting, and snowmobiling. The Vermont General Assembly has enacted a number of laws to preserve the land and to encourage landowners to develop recreational uses of their property in

10. *See infra* Parts II-III.
11. *See infra* Parts II-III.
12. *See* Katz v. United States, 389 U.S. 347 (1967).

a responsible manner.[13] In this context, the use of open fields and the protections thereon are very important to Vermonters.

Article 11 of the Vermont Constitution states in part that "people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure."[14] Furthermore, it establishes that the state should not grant warrants for searches and seizures without a "particularly described," adequate foundation.[15] While this provision appears straightforward, its scope is unclear.

The first three categories of Article 11—people, houses, and papers—are specific and clear about what they include. However, the scope of the fourth category, "possessions," is ambiguous.[16] Even the Vermont Supreme Court has acknowledged that what this category includes is not readily apparent.[17] A historical analysis of "possessions" indicates that the framers may have intended it to include real property. When Vermont created its Constitution, "possessions" usually referred to property, including both personal items and real estate.[18] In addition, legal dictionaries generally define "possessions" as encompassing both personal and real property.[19] Rules of statutory construction dictate that every word in a statute has meaning.[20] Therefore, a

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13. *See generally* Limitations on Landowner Liability, VT. STAT. ANN. tit. 12, §§ 5791-5795 (1998) (limiting landowner liability to encourage owners to make their land and water available to the public for recreational uses); State Land Use and Development Plans (Act 250), VT. STAT. ANN. tit. 10, §§ 6001-6108 (1998) (controlling development by means of a separate permitting requirement for subdivisions).

14. Article 11 of the Vermont Constitution provides:

> That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

VT. CONST. ch. I, art. 11.

15. *Id.*

16. *See* State v. Kirchoff, 156 Vt. 1, 4-5, 587 A.2d 988, 991 (1991).

17. *See id.*

18. *See* Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179 (1988) (examining a variety of sources, including dictionaries, contemporary commentators, debates at the federal Constitutional Convention, the Federalist Papers, early United States Supreme Court opinions, and state court interpretations).

19. *See id.* at 194. McCabe notes that legal dictionaries primarily define "possessions" in the abstract sense, as control or the right to control something. *See id.* at 194 & n.77 (citing BLACK'S LAW DICTIONARY 1325 (4th ed. 1968)). However, McCabe further notes that when legal dictionaries use "possessions" in a concrete sense, "they generally regard it as being synonymous with 'property,' both personal and real property." *Id.* at 194 & n.81 (citing WEST LEGAL THESAURUS/DICTIONARY 586 (W. Statsky ed. 1985) and BLACK'S LAW DICTIONARY (4th ed. 1968)).

20. The United States Supreme Court recently reiterated this rule stating: "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory

reasonable interpretation is that "possessions" provides protections in addition to those categories listed. Otherwise, the inclusion of "possessions" in Article 11 is superfluous.

Furthermore, Article 11 refers to obtaining a warrant to search "suspected places."[21] As Professor Neil C. McCabe points out, if the framers intended to include only the real property of "houses" in Article 11, then they would have written "suspected houses."[22] However, because they used the general term "places," McCabe reasons that they most likely considered other real property, in addition to "houses," to be included under Article 11 via "possessions."[23]

At one time or another, twenty-one states included "possessions" in their constitutional provisions regarding search and seizure.[24] A comparison of the Vermont Constitution to these other constitutions yields conflicting results.[25] Some states broadly interpret "possessions" to include all property,[26] whereas other states use a more limited definition that does not include all real property.[27]

In *State v. Kirchoff*, the Vermont Supreme Court took the position that while real property is not explicitly included in Article 11, it is not excluded either.[28] The court noted that its "duty is to discover and protect the core value that gave life to Article 11."[29] The court defined that value as the "freedom 'from unreasonable government intrusions into . . . legitimate expectations of privacy.'"[30] In its interpretation, the court looked beyond the text to the provision's underlying meaning and purposes "in light of contemporary experience."[31]

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construction that significance and effect shall, if possible, be accorded to every word." Regions Hospital v. Shalala, 118 S. Ct. 909, 920 (1998) (quoting Washington Market Co. v. Hoffman, 101 U.S. 112, 115-16 (1879)).

21. VT. CONST. ch. I, art. 11.

22. *See* McCabe, *supra* note 18, at 214-15.

23. *See id.*

24. *See id.* at 190.

25. *See* State v. Kirchoff, 156 Vt. 1, 5-6, 587 A.2d 988, 991-92 (1991).

26. *See id.* at 6, 587 A.2d at 992 (citing Faulkner v. State, 98 So. 691, 692-93 (Miss. 1924) (defining "possessions" as "embrac[ing] all of the property of the citizen")).

27. *See id.* at 5-6, 587 A.2d at 991-92 (citing State v. Pinder, 128 N.H. 66, 74, 514 A.2d 1241, 1245-46 (1986) (holding that the New Hampshire Constitution defines "possessions" as not including real property outside the curtilage) and Brent v. Commonwealth, 194 Ky. 504, 509-10, 240 S.W. 45, 47-48 (1922) (defining "possessions" as "the intimate things about one's person")).

28. *See id.* at 6, 587 A.2d at 992.

29. *Id.*

30. *Id.* (citing Oliver v. United States, 466 U.S. 170, 187 (1984) (Marshall, J., dissenting) (quoting United States v. Chadwick, 433 U.S. 1, 7 (1977))).

31. *Kirchoff*, 156 Vt. at 6, 587 A.2d at 992. The court further noted that:

> [w]e do not construe constitutional provisions of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those

In his concurring opinion, retired District Judge Lewis E. Springer asserted that the "[p]rotection of citizens' rights to security in their land was a key motivating force in creating the Vermont Constitution."[32] He explained that property rights were important to Vermont's constitutional framers because of Vermont's recent break from New York and subsequent attempts by New York law enforcement officers to invade and recapture Vermont land.[33] As such, Springer reasoned that the framers were not concerned with the trespass of strangers, but rather with the intrusion of law enforcement officers.[34] Springer concluded that "the prohibition in Article 11 is unequivocal: it gives the owner or possessor of the land an expectation of privacy with regard to any law enforcement officer."[35]

Analysis of the Fourth Amendment to the United States Constitution provides an additional source of insight into the meaning of Article 11.[36] However, comparison to the text of the United States Constitution is not dispositive because it uses slightly different language.[37] For example, the Fourth Amendment explicitly states that "unreasonable" searches and seizures are prohibited,[38] whereas Article 11 does not mention reasonableness.[39] In response, the Vermont Supreme Court has held that "[r]egardless of this difference . . . the word 'unreasonable' is as implicit in Article Eleven as it is express in the Fourth Amendment."[40]

Another difference between the constitutions is the lists of items protected. The Fourth Amendment protects "persons, houses, papers, and *effects*,"[41] while Article 11 protects "persons, houses, papers, and

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prescriptions when they become obsolete.

Id. (citing Oliver v. United States, 466 U.S. 170, 186-87 (Marshall, J., dissenting) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819))).

32. *Id.* at 17, 587 A.2d at 998 (Springer, J., concurring).

33. *See id.*

34. *See id.*

35. *Id.*

36. The federal Constitution provides a baseline for state law; while a state may not afford lesser protections for its citizens than the federal constitution, it may provide greater protections. *See* State v. Badger, 141 Vt. 430, 449, 450 A.2d 336, 347 (1982).

37. The Fourth Amendment of the United States Constitution states:

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

U.S. CONST. amend. IV. Compare to the text of Article 11 of the Vermont State Constitution. *See* VT. CONST. ch. I, art. 11.

38. *See* U.S. CONST. amend. IV.

39. *See* VT. CONST. ch. I, art. 11.

40. State v. Record, 150 Vt. 84, 85, 548 A.2d 422, 423 (1988).

41. U.S. CONST. amend. IV (emphasis added).

possessions."[42] According to the Vermont Supreme Court, the use of "effects" as opposed to "possessions" "sheds little light on the issue."[43] The court further noted that "[f]rom a definitional standpoint, in many contexts the two words were, and remain, largely interchangeable."[44]

While the exact scope of Article 11 remains unclear, the framers arguably intended to include real property, other than the home, under the category of "possessions." Regardless, the framers did not specifically exclude such real property or open fields from protection. Recognizing this conundrum, the Vermont Supreme Court opted to look beyond the text of the provision to its underlying meaning and purpose. With this broad-minded position, Vermont search and seizure jurisprudence diverged from federal case law.

II. FEDERAL SEARCH AND SEIZURE JURISPRUDENCE

In 1924, in *Hester v. United States*, the United States Supreme Court established the open fields doctrine in an attempt to define the parameters of the Fourth Amendment.[45] In that case, the Court held that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields."[46] However, the scope of this new doctrine was unclear because the Court failed to define "open fields."[47]

A few years later, in *Olmstead v. United States*, the Court further clarified and developed the open fields doctrine when it addressed the constitutionality of warrantless electronic surveillance, in the form of wiretapping.[48] The Court found no violation of the Fourth Amendment because an actual, physical trespass on the telephone user's person, home, papers, or effects had not occurred.[49] The Court's analysis focused on the

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42. VT. CONST. ch. I, art. 11 (emphasis added).

43. State v. Kirchoff, 156 Vt. 1, 4, 587 A.2d 988, 991 (1991).

44. *Id.* at 5, 587 A.2d at 991.

45. *See* Hester v. United States, 265 U.S. 57 (1924).

46. *Id.* at 59.

47. *See* Susan Gellman, Comment, *Affirmation of the Open Fields Doctrine: The Oliver Twist*, 46 OHIO ST. L.J. 729, 731 (1985).

48. *See* Olmstead v. United States, 277 U.S. 438 (1928). *See also* Denise Troy, *Video Surveillance–Big Brother May Be Watching You*, 21 ARIZ. ST. L.J. 445, 446 (1989) (citing Olmstead v. United States, 277 U.S. 438 (1928)). Troy defines "wiretapping" as "when telephone communications are intercepted." *Id.* at 446 n.6 (quoting BLACK'S LAW DICTIONARY 1436 (5th ed. 1979)).

49. *See Olmstead*, 277 U.S. at 466. Compare *Olmstead's* majority opinion with its renowned dissent by Justice Brandeis emphasizing that the goal of the Fourth Amendment was to protect privacy interests, not property interests. *See* Gellman, *supra* note 47, at 732 n.23. In addition, Brandeis reminded the Court of Chief Justice Marshall's words in *McCulloch v. Maryland*: "We must never forget . . . that it is a constitution we are expounding." *Id.* (quoting McCulloch v. Maryland, 17 U.S. 316 (1819)). *Olmstead* was extended to warrantless bugging in 1942 in *Goldman v. United States*. *See* Troy, *supra* note 48, at 446

location of the search and later became known as the "constitutionally protected areas" test.[50] This test concluded that the Fourth Amendment does not protect open fields because they are not included in the accepted list of constitutionally protected areas, namely one's person, house, papers, effects, or curtilage.[51] The Court maintained this locational perspective in its search and seizure jurisprudence for almost forty years.[52] In effect, the *Hester* and *Olmstead* decisions formed a per se exception to the warrant requirement in open fields.[53]

In 1967, in the landmark decision *Katz v. United States*, the Supreme Court abandoned its purely geographical determination of what the Fourth Amendment protects.[54] The Court took a new position and established the standard that "the Fourth Amendment protects people, not places."[55] In *Katz*, police used electronic monitoring equipment to listen to a suspect's conversation while he was in a public phone booth with the door closed.[56] The Court found that Katz justifiably relied upon an expectation of privacy and that government officials violated his privacy by electronically listening to and recording his words when he clearly meant to keep them private.[57] While not overruling the "constitutionally protected areas" test, the Court noted that it is not the "talismanic solution to every Fourth Amendment problem."[58] To the contrary, the Court reasoned that "[w]hat a person

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& n.11 (citing Goldman v. United States, 316 U.S. 129 (1942)). However, even the minimalist physical intrusion (by the spike of a microphone that was inserted under the party wall and hit a heating duct that acted as an amplifier) on the property of another resulted in a Fourth Amendment violation. *See id.* (citing Silverman v. United States, 365 U.S. 505 (1961)).

50. *See* Edward M. Buxbaum, Note, *Florida v. Brady: Can Katz Survive in Open Fields?*, 32 AM. U. L. REV. 921, 926 (1983).

51. *See* Gellman, *supra* note 47, at 731-32. Fourth Amendment protections for the home have been extended to the curtilage because of its close proximity to the home and use for domestic purposes. *See* Oliver v. United States, 466 U.S. 170, 180 (1984). The United States Supreme Court explained that curtilage is "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of home itself for Fourth Amendment purposes." *Id.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). Curtilage is further defined as "those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment." BLACK'S LAW DICTIONARY 384 (6th ed. 1990). Commonly curtilage has been said to include the yard, garden, outbuildings and area around a home used for family or domestic purposes. *See* Gellman, *supra* note 47, at 732 (internal citations omitted). Distance from the home is an important factor to consider in defining curtilage, in addition to other factors, including owner's use of the area. *See id.*

52. *See* Troy, *supra* note 48, at 446.

53. *See* Gellman, *supra* note 47, at 732.

54. *See* Katz v. United States, 389 U.S. 347 (1967).

55. *Id.* at 351.

56. *See id.* at 348.

57. *See id.* at 353.

58. *Id.* at 351 n.9.

knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[59]

The two-prong test articulated in *Katz* indicated that in order to implicate the Fourth Amendment's protection of privacy "a person [must] have exhibited an actual (subjective) expectation of privacy, and . . . the expectation [must] be one that society is prepared to recognize as 'reasonable.'"[60] Although this new test did not explicitly overrule the *Hester* open fields doctrine, it arguably narrowed it.[61] The location of the search was now only relevant as a reflection of the reasonableness of the expectation of privacy.[62]

Seventeen years later, the Court retreated from *Katz's* subjective formula and moved towards its former categorical approach when it revived its open fields doctrine in *Oliver v. United States*.[63] In that case, law enforcement officials entered the petitioner's property without a warrant.[64] They walked around a locked gate and ignored several "No Trespassing" signs in order to find a patch of marijuana that was in a "highly secluded" area more than a mile from the petitioner's home.[65] Despite the petitioner's expectations and his attempts to keep his property private, the Court reaffirmed its *Hester* rule and held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. . . . [A]n individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers."[66] The Court reasoned that because the Fourth Amendment specifically lists "persons, houses, papers and effects," it applies only to those categories, which do not include open fields.[67] In addition, the Court indicated that "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."[68] Therefore, the Court contended that any expectation of privacy in open fields is per se unreasonable; consequently, the *Katz* test can never be met in open

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59. *Id.* at 351 (citations omitted).

60. *Id.* at 361 (Harlan, J., concurring). In his concurrence, Justice Harlan laid out the "two-pronged test for applying the 'constitutionally protected reasonable expectation of privacy' standard established by the [*Katz*] majority," that is still used today. Gellman, *supra* note 47, at 733 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

61. *See* Gellman, *supra* note 47, at 734.

62. *See id.* at 732.

63. *See* Oliver v. United States, 466 U.S. 170, 178 (1984).

64. *See id.* at 173 n.1.

65. *Id.* at 173-74.

66. *Id.* at 178, 181.

67. *Id.* at 176 (quoting U.S. CONST. amend. IV).

68. *Id.* at 179.

fields.[69] While the Court couched its decision in terms of *Katz*'s reasonable expectation of privacy test, it seemed to be based on the now-defunct "constitutionally protected areas" test.

Three Justices dissented in *Oliver*, questioning the majority's "startling conclusion" that the police conduct at hand was not an unreasonable search under the Fourth Amendment.[70] They contended that while the Fourth Amendment does not explicitly mention open fields, it does afford them some protection.[71] They pointed to other types of places not listed in the Amendment that nonetheless have received protection.[72] In addition, the dissenters reiterated recent decisions that "expressly rejected a proffered locational theory of the coverage of the Amendment, holding that it 'protects people, not places.'"[73]

The dissent further noted that "[o]ne of the main rights attaching to property is the right to exclude others, . . . one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."[74] Moreover, the dissenters noted that "[p]rivately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy."[75] The dissent concluded that "[t]he Fourth Amendment, properly construed, embodies and gives effect to our collective sense of the degree to which men and women, in civilized society, are entitled 'to be let alone' by their governments."[76] Thus, the dissenters recognized the validity of some expectations of privacy in open fields.

In sum, the landmark decision of *Katz v. United States* modified the United States Supreme Court's traditional view that a search must occur in a "constitutionally protected area" in order to qualify for Fourth Amendment

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69. *See id.* at 181.

70. *Id.* at 184 (Marshall, J., dissenting). The dissent emphasized the traditional procedure of examining three important factors in considering the reasonableness of one's expectation of privacy: (1) whether the expectation is ground in positive law entitlements, (2) the uses to which a place is susceptible, and (3) whether steps were taken to exclude others from the land. *See id.* at 189.

71. *See id.* at 185.

72. *See id.* at 185-86 (citing Katz v. United States, 389 U.S. 347 (1967) (finding Fourth Amendment protections in public telephone booth) and Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (establishing Fourth Amendment protections in office and on commercial premises)). Furthermore, the dissent noted that the freedom accorded by the Fourth Amendment would be incomplete if protections were limited only to those items listed. *See id.*

73. *Id.* at 187 (quoting Katz, 389 U.S. at 351).

74. *Id.* at 190 (alteration in original) (quoting Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978)).

75. *Id.* at 192. The dissent gave numerous examples of uses of woods and fields that society acknowledges deserve privacy: solitary walks, agricultural businesses, lover meetings, worshipping, and other creative endeavors. *See id.*

76. *Id.* at 197 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928)).

protections.[77] With *Katz*, the Court abandoned this geographical test for an approach recognizing Fourth Amendment protections for people as well as places.[78] The two-prong test adopted by the Court in *Katz* requires that an individual have a subjective expectation of privacy that society is willing to recognize as reasonable.[79] Despite this reasonableness test, in recent years the Court has resurrected its locational open fields doctrine. This doctrine once again takes a bright-line approach and proclaims any expectation of privacy outside the home and curtilage as per se unreasonable and therefore outside the scope of the Fourth Amendment.[80]

III. VERMONT SEARCH AND SEIZURE JURISPRUDENCE

A. Vermont's Divergence from the Federal Open Fields Doctrine

The Vermont Supreme Court has generally paralleled federal jurisprudence. However, the two courts have diverged in the area of open fields. In *State v. Kirchoff*, the Vermont Supreme Court adopted a modified version of the federal open fields doctrine.[81] This modified open fields doctrine is similar to the federal approach in that it excludes certain areas of private property, namely open fields, from constitutional protection.[82] However, unlike federal jurisprudence, the Vermont version affords protection to open fields that are posted with "No Trespassing" signs or enclosed by a fence.[83]

In *Kirchoff*, the court disagreed with the federal approach that all expectations of privacy on private property outside the home and curtilage are per se unreasonable.[84] To the contrary, the Vermont court acknowledged that at times a person might reasonably expect privacy in this area.[85] The court further noted that federal jurisprudence generally views the open fields doctrine as a rule that limits the scope of the Fourth Amendment by removing open fields from its purview.[86] In contrast, the *Kirchoff* court held that Vermont should treat "government searches of a person's land as

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77. *See* Gellman, *supra* note 47, at 732.

78. *See id.*

79. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring).

80. *See* Gellman, *supra* note 47, at 729-30.

81. *See* State v. Kirchoff, 156 Vt. 1, 587 A.2d 988 (1991).

82. *See id.* at 10, 587 A.2d at 994..

83. *See id.*

84. *See id.* at 7, 587 A.2d at 992 ("In our opinion, the *Oliver* Court misinterpreted its own Fourth Amendment precedent, as expressed in *Katz* and its progeny. We believe Article 11 embraces the core value of privacy discarded in *Oliver*.").

85. *See id.* at 8, 587 A.2d at 993.

86. *See id.* at 13, 587 A.2d at 996.

presumptively implicating Article 11, and consequently the State has the burden of proving that such a search does not violate Article 11."[87]

In *Kirchoff*, which involved a situation similar to that in *Oliver v. United States*,[88] police officers without a warrant climbed a fence, passed several "No Trespassing" signs, and walked through woods and a marsh to find a marijuana patch that was 100 yards from the defendant's house and not visible from any road.[89] The Vermont Supreme Court found that the defendant's intent to exclude the public was apparent considering the fence and the "No Trespassing" signs posted around the land.[90] Therefore, the court held that the officers' warrantless "walk-on" search violated the defendant's right to privacy under Article 11.[91] The court acknowledged that drug-related activities are a significant social problem; however, it refused to dispense with the warrant requirement as a mere "technicality."[92] The court held that police must "obtain a warrant, based upon probable cause, before they enter land where it is apparent to a reasonable person that the owner or occupant intends to exclude the public."[93]

In its analysis, the Vermont Supreme Court noted that Article 11 protects Vermont citizens "from unreasonable, warrantless governmental intrusion into affairs which they choose to keep private."[94] Accordingly, the right to expect privacy is available in open fields in situations where the landowner manifests his desire to exclude the public.[95] The court affirmed that:

> [A] lawful possessor may claim privacy in "open fields" under Article 11 of the Vermont Constitution where indicia would lead a reasonable person to conclude that the area is private. On the other hand, Article 11 does not afford protection against searches of lands where steps have not been taken to exclude the public.[96]

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87. *Id.*

88. *See supra* notes 63-69 and accompanying text.

89. *See Kirchoff*, 156 Vt. at 3, 587 A.2d at 990.

90. *See id.* at 14, 587 A.2d at 996.

91. *See id.*

92. *Id.*

93. *Id.* at 14, 587 A.2d at 996-97.

94. *Id.* at 10, 587 A.2d at 994 (quoting State v. Zaccaro, 154 Vt. 83, 91, 574 A.2d 1256, 1261 (1990)).

95. *See id.* at 8, 587 A.2d at 993. This is a significant break from the federal approach that "an individual's expectations of privacy in land—regardless of steps taken to establish that expectation—can never be legitimate." *Id.* (citing Oliver v. United States, 466 U.S. 170, 182 (1984)). The Vermont Supreme Court commented that "[t]his per se approach cannot be squared with Article 11—nor, we believe, can it be squared with the Fourth Amendment principles of Katz." *Id.*

96. *Id.* at 10, 587 A.2d at 994.

The court reasoned that when a landowner or occupant posts "No Trespassing" signs or erects a fence, he notifies strangers that they are not welcome on his land, and as a result he may reasonably expect privacy.[97] However, the court emphasized that when an area or activity is "willingly exposed to the public," Article 11 provides no protection.[98]

While approving of *Katz*'s reasonable expectation of privacy test,[99] the Vermont Supreme Court nonetheless cautioned against applying the test "to reflect merely what society will at any given moment recognize as reasonable."[100] Rather, the court viewed its task as protecting individual rights as provided by the Vermont Constitution.[101] It feared that if left solely to society's discretion, constitutional rights could diminish with advances in technology if the public's expectations adjust to and accept technologies that encroach on privacy.[102]

In a concurring opinion, specially assigned retired District Judge Lewis E. Springer agreed with the *Kirchoff* majority that the search violated Article 11.[103] However, he disagreed that landowners must put up signs or barriers in order to expect privacy.[104] He explained that:

> Article 11 is not concerned with "strangers" unless they are law enforcement officers. . . . [T]he prohibition in Article 11 is unequivocal: it gives the owner or possessor of the land an expectation of privacy with regard to any law enforcement officer. The landowner should not have to take any action to make that right effective.[105]

In sum, the *Kirchoff* court rejected the federal open fields doctrine, which declares any expectation of privacy in open fields per se unreasonable and thereby automatically excludes all open fields from the scope of Fourth Amendment protection. In the alternative, the Vermont Supreme Court adopted a modified open fields doctrine that recognizes expectations of privacy in open fields when the landowner manifests a desire to exclude the

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97. *See id.*

98. *Id.* at 7, 587 A.2d at 993. This stance is consistent with that taken by the United States Supreme Court in *Katz*: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967).

99. *See supra* note 61 and accompanying text.

100. *Kirchoff*, 156 Vt. at 12, 587 A.2d at 995.

101. *See id.* at 12, 587 A.2d at 995-96.

102. *See id.* at 12-13, 587 A.2d at 996.

103. *See id.* at 14, 587 A.2d at 997 (Springer, J., (Ret.), Specially Assigned, concurring).

104. *See id.* at 17, 587 A.2d at 998.

105. *Id.*

public. This approach affords search and seizure protections to open fields posted with "No Trespassing" signs or enclosed by a fence.

B. Further Development of Vermont's Modified Open Fields Doctrine

Months after *Kirchoff*, the Vermont Supreme Court applied Article 11 jurisprudence to two companion cases involving electronic surveillance technology.[106] In *State v. Blow*, a detective wore an electronic audio transmitter while he went undercover into the defendant's home to purchase drugs.[107] The court held that warrantless electronic monitoring in a defendant's home "offends the core values of Article 11."[108] In reaching its conclusion, the court utilized the reasonable expectation of privacy test formulated in *Katz*.[109] Because the defendant had not intentionally exposed the conversation outside his home, the court found that he reasonably possessed a subjective expectation of privacy that satisfied the first prong of the *Katz* test.[110] Furthermore, the court found that "deeply-rooted legal and societal principle[s]" accept the expectation of privacy in one's home as reasonable, thus satisfying the second prong of the test.[111]

In addition, the court stressed the use of advanced technology in *Blow*, noting that "privacy expectations do not necessarily decline as surveillance technology advances."[112] The opinion commented that evidence obtained by an undercover officer without the aid of electronic technology is admissible without a warrant.[113] However, in the court's view, the use of technology distinguished this case and raised the intrusiveness of the search to the level of requiring a warrant.[114]

The court also emphasized that by acknowledging the importance of the home to the defendant's expectations of privacy, it was not regressing to the "constitutionally protected areas" approach of *Olmstead*.[115] To the contrary,

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106. *See* State v. Blow, 157 Vt. 513, 602 A.2d 552 (1991); State v. Brooks, 157 Vt. 490, 601 A.2d 963 (1991).

107. *See Blow*, 157 Vt. at 515, 602 A.2d at 553.

108. *Id.* at 519, 602 A.2d at 556.

109. *See supra* note 61 and accompanying text.

110. *See Blow*, 157 Vt. at 518, 602 A.2d at 555 (citing Katz v. United States, 389 U.S. 347, 351 (1967)).

111. *Id.* at 518, 602 A.2d at 555.

112. *Id.* at 517, 602 A.2d at 555 (citing State v. Kirchoff, 156 Vt. 1, 12-13, 587 A.2d 988, 996 (1991)).

113. *See id.* at 519, 602 A.2d at 556 (citing State v. Zaccaro, 154 Vt. 83, 90-91, 574 A.2d 1256, 1261 (1990)).

114. *See id.*

115. *See id.* at 520, 602 A.2d at 556 (referring to Olmstead v. United States, 277 U.S. 438 (1928)).

the court stated that "the privacy value should be protected wherever it is unreasonably threatened."[116]

In the companion case of *State v. Brooks*, the court held that electronic surveillance of a conversation between the defendant and an undercover officer in a public parking lot did not violate Article 11.[117] The court again applied the *Katz* test, but in contrast to *Blow* found that because the monitoring took place outside the defendant's home, the defendant was not entitled to any expectations of privacy.[118] The court recognized that the use of informants intrudes on privacy and that "widespread and unrestricted use of government informants is surely one of the basic characteristics of a totalitarian state."[119] However, the court found justification in the fact that the conversation occurred in a public place "subject to the eyes and ears of passersby."[120] Therefore, regardless of the defendant's intentions and expectations, the court denied him Article 11 protections.

In a strongly worded dissent, Justice Morse[121] noted that he was "disturbed by the [c]ourt's parsimonious view that Article 11 offers protection against the electronic surveillance used here only in the home."[122] Instead of the majority's home-based rationale, Morse emphasized the intrusiveness of the search.[123] He asserted that "[t]he [c]ourt misses the point. The concept of home does not trigger Article 11 protection; the technological device's power to invade privacy triggers it. Article 11 focuses on personal expectations of privacy rather than defined places."[124] Justice Morse acknowledged that people may reasonably expect more privacy at home but refused to accept that as a result they could never reasonably expect privacy outside the home.[125] He noted that "[i]ntimate conversation is no less private in lovers' lanes than in living rooms."[126]

Morse's dissent also criticized the majority for not considering society's views on privacy.[127] In *Kirchoff*, the court cautioned against too much reliance

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116. *Id.* The court went on to note that "determining what is reasonable in an age when surveillance technology is increasingly sophisticated and pervasive will continue to present difficult and complex cases." *Id.*

117. *See* State v. Brooks, 157 Vt. 490, 494, 601 A.2d 963, 965 (1991).

118. *See id.* at 493, 601 A.2d at 964.

119. *Id.* at 494, 601 A.2d at 965.

120. *Id.* at 493, 601 A.2d at 964.

121. It is notable that Justice Morse authored the *Kirchoff* opinion that introduced the *Katz* reasonable expectation of privacy policy into Vermont jurisprudence. *See* State v. Kirchoff, 156 Vt 1, 587 A.2d 958 (1991).

122. *Brooks*, 157 Vt. at 497, 601 A.2d at 966-67 (Morse, J., dissenting).

123. *See id.* at 497-98, 601 A.2d at 967.

124. *Id.* at 494-95, 601 A.2d at 965 (citations omitted).

125. *See id.* at 495, 601 A.2d at 965.

126. *Id.* at 497-98, 601 A.2d at 967.

127. *See id.* at 500, 601 A.2d at 968.

on public ideas that may change with "exigencies of the day."[128] Nonetheless, Justice Morse urged that societal values were important and should be taken into account.[129] He cited a 1978 public opinion poll regarding surveillance technologies and their erosive effects on privacy.[130] The poll found that approximately one-half of Americans were concerned "that within ten years, 'we will have lost much of our ability to keep important aspects of our lives private from government.'"[131] Furthermore, according to the poll, the public perceived the largest number of privacy invasions to be by "police searching without warrants."[132] This data demonstrates that privacy is important to Americans, and they feel that it is being invaded, most often by police.[133] Justice Morse suggested that the solution to these concerns is the enforcement of the warrant requirement of Article 11.[134]

Justice Morse observed that in the past the court required a "compelling" or "special" public safety or law enforcement need in order to bypass the warrant requirement.[135] For example, in *State v. Berard*, the court found that the state had a "special need" to operate its prisons in a safe manner.[136] The court balanced this need with the prisoners' limited privacy rights and concluded that cell searches without a warrant were permissible as long as clear, objective guidelines were established.[137] Such guidelines furnish the safeguards normally provided by warrant procedures and ensure that inmates will not be singled out without probable cause.[138]

In *Brooks*, the majority's decision provided an exception to the warrant requirement without a showing of "special" need or a balancing test to justify the electronic surveillance.[139] Morse's dissent reminded the court of its recent

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128. *Kirchoff*, 156 Vt. at 12, 587 A.2d at 995. The court in *Kirchoff* found that society's views are subject to change with the "political winds," therefore the court held that "[t]he question is not what society is prepared to accept but what the constitution requires." *Id.* at 12, 587 A.2d at 995-96.

129. *See Brooks*, 157 Vt. at 502, 601 A.2d at 969 (Morse, J., dissenting).

130. *See id.*

131. *Id.* (quoting HARRIS & WESTIN, THE DIMENSIONS OF PRIVACY 3, 5 (1981)).

132. *Id.* (quoting HARRIS & WESTIN, *supra* note 128, at 19).

133. *See id.* at 502, 601 A.2d at 970.

134. *See id.* at 503-04, 601 A.2d at 970.

135. *Id.* at 504, 601 A.2d at 970-71. In these situations, when law enforcement showed a compelling or special need, the courts replaced the warrant requirement with a balancing analysis. *See id.* (Morse, J., dissenting). Justice Morse cited to *State v. Record* where the Court held that the "compelling" need of addressing the public safety threat posed by drunk drivers outweighed the "relatively minor and brief intrusion on privacy" caused by warrantless DUI roadblocks. *Id.* (citing State v. Record, 150 Vt. 84, 89-90, 548 A.2d 422, 426 (1988)). In addition, Justice Morse referred to *State v. Berard* and the balancing of the "special" law enforcement needs in prisons to justify warrantless searches of prison cells. *See id.* (citing State v. Berard, 154 Vt. 306, 311, 576 A.2d 118, 121 (1990)).

136. *Id.*, 601 A.2d at 971 (citing *Berard*, 154 Vt. at 311, 576 A.2d at 121).

137. *See id.*

138. *See id.* at 505, 601 A.2d at 971 (citing *Berard*, 154 Vt. at 314, 576 A.2d at 122).

139. *See id.*

ruling that "the warrant requirement 'is and must remain a central part of Article 11' and that '[a]ny exceptions . . . must be factually and narrowly tied to exigent circumstances and reasonable expectations of privacy.'"[140]

The November 1991 companion cases of *Blow* and *Brooks* shifted the Vermont Supreme Court away from *Katz*'s reasonable expectation of privacy approach, as adopted in *Kirchoff*, toward a more geographical-based analysis. Although the court couched these decisions in reasonable expectation of privacy language, it stopped short in the analysis by drawing a bright line around the home and curtilage, and declined to conduct the test outside that line. The court simply denied that there could ever be a reasonable expectation of privacy outside that area. Furthermore, while the court acknowledged the heightened concerns and intrusiveness that occur with the use of advanced technology, it failed to incorporate these concerns into its analysis. In these cases, the majority ultimately based its decisions on the location of the electronic monitoring "search," that is, whether it took place in the home[141] or outside the home.[142] Justice Morse's dissent in *Brooks* criticized this geographical approach.[143] He argued that the "technological device's power to invade privacy," not the location of the monitoring, triggers Article 11 protections.[144]

Two years later, the court further entrenched its modified open fields doctrine and locational approach in *State v. Rogers*.[145] The court utilized the open fields doctrine in conjunction with the plain view doctrine[146] to conclude that the observation of marijuana inside the curtilage from a vantage point outside the curtilage was not a search and therefore did not implicate Article 11 protections.[147] The court reasoned that because the landowner had taken no steps to exclude the public, such as fencing or posting, he was not entitled to any protection under Article 11.[148] As a result, the court held that "the police were justified in entering such 'open fields' and observing anything in plain view."[149] However, the court emphasized that the use of technology to aid the police officers' observation could have led to a different outcome.[150]

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140. *Id.* (quoting State v. Savva, 159 Vt. 75, 616 A.2d 774, 780-81 (1991)).

141. *See Blow*, 157 Vt. at 520, 602 A.2d at 556.

142. *See Brooks*, 157 Vt. at 493, 601 A.2d at 964.

143. *See id.* at 494-95, 601 A.2d at 965 (Morse, J., dissenting).

144. *Id.*

145. State v. Rogers, 161 Vt. 236, 638 A.2d 569 (1993).

146. The plain view doctrine is defined as: "[i]n search and seizure context, objects falling in plain view of officer who has the right to be in position to have that view are subject to seizure without a warrant and may be introduced in evidence." BLACK'S LAW DICTIONARY 1150 (6th ed. 1990).

147. *See Rogers*, 161 Vt. at 243-45, 638 A.2d at 573-74.

148. *See id.* at 247, 638 A.2d at 575.

149. *Id.* at 240, 638 A.2d at 571.

150. *See id.* at 245, 638 A.2d at 574.

C. Vermont's Current Approach to Open Fields and Advanced Technology

1. Approval of Warrantless Video Surveillance in *State v. Costin*

The court's opportunity to address the use of technology to aid in observation came a few years later in *State v. Costin*.[151] State troopers acting on a tip had entered Costin's thirty-acre property by traveling through thick woods and climbing a ridge.[152] They found five marijuana plants in a densely wooded area approximately fifty yards from the defendant's house.[153] The troopers concealed a video surveillance camera with an infrared motion sensor in the woods nearby.[154] Whenever the sensor detected activity near the plants, the camera turned on for ten minutes.[155] After five days, the troopers retrieved the video camera by crawling on their stomachs across the defendant's field and woods.[156] The Vermont Supreme Court applied the modified open fields doctrine as established in *Kirchoff*, *Blow*, and *Brooks* and held that because the defendant had not posted or fenced in his property, he was not entitled to any expectations of privacy or Article 11 protections.[157] The court found that he had "no greater protection against electronic surveillance on his unposted, open land than he would if such surveillance were conducted in a public place."[158]

The opinion acknowledged the "dangers of widespread use of video surveillance," but dismissed that risk because here it was used in a limited manner.[159] The court rejected the defendant's argument that the use of electronic technology raised the level of the observation to a search that implicated Article 11 protections.[160] The majority maintained that the video camera merely acted as a substitute for a lawful, in-person stakeout of an open field by a law enforcement officer; therefore, it did not implicate Article 11 and no warrant was necessary.[161]

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151. State v. Costin, 9 Vt. L. Wk. 193, 720 A.2d 866 (1998).

152. *See* Brief of the Appellant at 3-4, State v. Costin, 9 Vt. L. Wk. 193, 720 A.2d 866 (1998) (No. 96-624).

153. *See id.*

154. *See Costin*, 9 Vt. L. Wk. at 193, 720 A.2d at 867.

155. *See id.*

156. *See* Brief of the Appellant at 3-4, State v. Costin, 9 Vt. L. Wk. 193, 720 A.2d 866 (1998) (No. 96-624).

157. *See Costin*, 9 Vt. L. Wk. at 193-95, 720 A.2d at 868-69.

158. *Id.* at 194, 720 A.2d at 869.

159. *Id.* at 194, 720 A.2d at 870.

160. *See id.* at 195, 720 A.2d at 869.

161. *See id.* at 195, 720 A.2d at 870.

2. A Call for More Protections of Privacy—The *Costin* Dissent

Justices Johnson and Morse dissented in *Costin*, expressing concern that the majority's decision took a step towards recreating the dismal, totalitarian regime described in George Orwell's novel *1984*, and threatened "to erode the expectations of privacy we take for granted in a free and open society."[162] They questioned the court's acceptance of the State's "startling argument" that Article 11 does not apply to police conduct in open fields, no matter how intrusive.[163] The result, they argued, marked a return to the discredited "constitutionally protected area" analysis.[164]

While the dissenters acknowledged that the location of the search is a consideration in determining what expectations of privacy are reasonable, they contended that the location is not dispositive.[165] In addition to location, Justices Johnson and Morse emphasized the nature of police surveillance conduct as a "relevant, indeed critical, factor in determining whether Article 11 is implicated."[166] They cited to *Kirchoff's* assertion that "constitutional rights do not diminish with technological advances that enable the government to further encroach our privacy."[167]

Furthermore, the dissent maintained that ownership and possession of land endow a person with the right to some expectations of privacy:

> Surely, regardless of whether we display "No Trespassing" signs or erect barriers, the expectation of privacy we have with respect to our own land is not so low as to give the government free reign to conduct any type of surveillance, no matter how intrusive in nature, without judicial oversight.[168]

Justices Johnson and Morse acknowledged that the landowner who does not post his land opens himself to occasional passersby.[169] However, because the landowner allows hikers and hunters to cross his land for recreational purposes, it does not follow that he acquiesces to unrestricted, covert, around-the-clock surveillance; he is still entitled to some privacy.[170] In the past, the court used similar reasoning when it recognized that people retain

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162. *Id.* at 195-96, 720 A.2d at 871 (Johnson, J., dissenting). The dissent began with a chilling quote from GEORGE ORWELL'S 1984. *See supra* note 1.

163. *Costin*, 9 Vt. L. Wk. at 196, 720 A.2d at 872 (Johnson, J., dissenting).

164. *See id.* at 197, 720 A.2d at 873.

165. *See id.* at 197, 720 A.2d at 874.

166. *Id.* at 197, 720 A.2d at 873.

167. *Id.* (citing *Kirchoff*, 156 Vt. at 12-13, 587 A.2d at 996).

168. *Id.* at 197, 720 A.2d at 874.

169. *See id.* at 198, 720 A.2d at 875.

170. *See id.* at 197, 720 A.2d at 874.

expectations of privacy when they leave trash at the street curb for pickup, even though it is readily accessible to the public.[171]

The dissenters conceded that unposted, unfenced land is vulnerable to brief, warrantless police observation, such as is necessary to verify a tip. However, they disagreed with the majority's blanket statement that video surveillance merely takes the place of a lawful, in-person stakeout and therefore does not constitute a search.[172] As the dissent pointed out, there is a significant difference between a brief walk-on observation and intensive, unrestricted covert surveillance.[173] Justice Johnson reasoned that "at some point even on private property outside the curtilage, the nature of police activities becomes so intrusive that it violates reasonable expectations of privacy. I believe that that point is reached when police decide to surreptitiously videotape persons on their private property."[174] Johnson pointed out that in a related case Judge Posner noted, "covert video surveillance is exceedingly intrusive, inherently indiscriminate, and so susceptible to abuse that it has the potential to 'eliminate personal privacy as understood in modern Western nations.'"[175]

Although the video surveillance in this case was limited, Justices Johnson and Morse feared that the majority's decision opened the door to future misuses of the technology and threatened to "destroy[] our sense of security, freedom, and trust."[176] They suggested that the solution is to require officers to obtain a search warrant with a showing that no other means of evidence gathering are feasible before using covert video surveillance on private property.[177] They believed this procedure would meet Article 11's purpose of "protecting the rights of everyone—law-abiding as well as criminal—by involving judicial oversight before would-be invasions of privacy."[178]

The dissenters also argued that requiring the police to get a warrant from a neutral and detached judge would minimize the risk of unreasonable encroachments on the privacy of innocent citizens, who have no recourse once the damage is done.[179] To reach this solution, the dissent balanced "society's interest in privacy and freedom from governmental intrusions with society's equally valid interest in effective law enforcement," and found that the

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171. *See id.* (citing State v. Morris, 165 Vt. 111, 118-19, 680 A.2d 90, 95-96 (1996)).

172. *See id.* at 198, 720 A.2d at 875.

173. *See id.*

174. *Id.*

175. *Id.* at 198, 720 A.2d at 875-76 (quoting United States v. Torres, 751 F.2d 875, 882 (7th Cir. 1984) (allowing use of video surveillance only after FBI agents received a search warrant based on stringent requirements with consideration of its extreme intrusiveness)).

176. *Id.* at 199, 720 A.2d at 878.

177. *See id.* at 199, 720 A.2d at 877.

178. *Id.* (citing *Savva*, 159 Vt. at 86, 616 A.2d at 780).

179. *See id.*

benefits of a warrant requirement outweigh any inconveniences to law enforcement.[180] Moreover, they maintained that "Article 11 does not require us to remain inside behind drawn shades to feel assured of being free from around-the-clock government surveillance."[181]

In sum, the majority in *Costin* held that video surveillance on unposted, unfenced open fields falls under Vermont's modified open fields doctrine and does not constitute a search under Article 11. A powerful dissent by Justices Johnson and Morse disagreed. They argued that a landowner who does not post or fence in his property exposes himself to an occasional passerby or a brief, police walk-on observation; nonetheless, he is still entitled to the protections afforded by the Vermont Constitution against unreasonable searches and seizures. Furthermore, the dissenters maintained that in light of the intrusiveness and susceptibility to abuse of covert video surveillance, a search warrant should be required before such methods are used on private property.

IV. DEFECTS OF VERMONT'S MODIFIED OPEN FIELDS DOCTRINE

A. Inconsistencies with Established Jurisprudence

Current Vermont search and seizure jurisprudence holds that land outside the home and curtilage that is not posted or enclosed by a fence automatically falls outside the scope of Article 11 and will be treated like public property.[182] This theory is inconsistent with the Vermont Supreme Court's earlier statement that "[this court] view[s] government searches of a person's land as presumptively implicating Article 11, and consequently the State has the burden of proving that such a search does not violate Article 11."[183] As the court's open fields doctrine developed in later cases, culminating in *State v. Costin*, Article 11 was no longer presumed to apply to all searches. To the contrary, the court has come to treat unposted open fields searches more like federal open fields searches—as outside Article 11 altogether.

Vermont's modified open fields doctrine is also inconsistent with the *Katz* theory adopted by the Vermont Supreme Court in *State v. Kirchoff*.[184]

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180. *Id.* at 199, 720 A.2d at 878.

181. *Id.* at 197, 720 A.2d at 874 (citing Melvin Gutterman, *A Formulation of the Value and Means Model of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 686-87 (1988) ("Surely, one has reason to expect that he need not hide himself in a soundproof home, with the curtains drawn, and remain quiet to enjoy the precious liberties derived from the Constitution.")).

182. *See* State v. Costin, 9 Vt. L. Wk. 193, 720 A.2d 866 (1998).

183. State v. Kirchoff, 156 Vt. 1, 13, 587 A.2d 988, 996 (1991).

184. *See* Gellman, *supra* note 47, at 748.

According to *Katz*, "the Fourth Amendment protects people, not places."[185] This approach provides Fourth Amendment protections of privacy, irrespective of location, as long as the actor has a subjective expectation of privacy and society is willing to recognize that expectation as reasonable.[186] In *Katz* the United States Supreme Court emphasized that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[187] Accordingly, the Court found that the petitioner possessed a reasonable expectation of privacy that society is willing to recognize when he entered a public telephone booth and shut the door behind him.[188]

The modified open fields doctrine does not evaluate an individual's expectation of privacy or society's assessment of its reasonableness. Instead, this approach draws a line at unposted open fields and refuses to acknowledge any expectations of privacy beyond that line. Common sense dictates that an individual on his own property, in his back pasture or woods, should be allowed some expectation of privacy, at least equal to that found in a public telephone booth on a busy city street. A landowner who does not post or fence in his property may knowingly expose himself to occasional passersby. However, it is a stretch of the imagination that he likewise knowingly exposes himself to unlimited, unrestricted government surveillance. Indeed, the modified open fields doctrine, similar to the federal open fields doctrine, affords more privacy to individuals in public places than on one's own property![189]

Another divergence from the *Katz* approach in Vermont's jurisprudence involves the warrant requirement. The Supreme Court in *Katz* emphasized that the warrant requirement is a necessary and integral part of search and seizure jurisprudence.[190] Any searches conducted without prior judicial approval were deemed "per se unreasonable under the Fourth Amendment—subject to only a few specifically established and well-delineated exceptions."[191] Similarly, the Vermont Supreme Court has

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

186. *See id.* at 361 (Harlan, J., concurring).

187. *Id.* at 351 (citations omitted).

188. *See id.* at 353.

189. Courts have applied *Katz* outside the realm of the home and curtilage in a variety of public areas. *See* Gellman, *supra* note 47, at 748 (referring to searches in *Terry v. Ohio*, 392 U.S. 1 (1968) (citizens on a street); United States v. Rengifo-Castro, 620 F.2d 230 (10th Cir. 1980) (luggage); State v. Bryant, 177 N.W.2d 800 (Minn. 1970) (in public restrooms); Katz v. United States, 389 U.S. 347 (1967) (public telephone booth)).

190. *See Katz*, 389 U.S. at 359.

191. *Id.* at 357. Examples of such exceptions include searches: incident to arrest, in hot pursuit, and pursuant to suspect's consent. *See id.* at 357-58 (internal citations omitted).

recognized the importance of the warrant requirement.[192] However, the modified open fields doctrine nevertheless bypasses the requirement for any and all searches of unposted private property outside the home and curtilage. As noted by the dissent in *Brooks*, given the nature of electronic technology, "[t]he need for a warrant requirement is even more compelling."[193]

B. Inadequacies of the Modified Open Fields Approach

1. The Modified Open Fields Doctrine Encourages a Closed Society

The dissent in *Costin* argued that ownership and possession of land "provide persons with certain expectations of privacy."[194] Furthermore, a landowner is required to pay property taxes each year and is held responsible for unsafe conditions that exist on his property. As a result, he should receive core constitutional protections and the privilege of a minimal amount of privacy. Landowners who do not post or fence in their property extend the courtesy of the use of their land for recreational purposes. They may expect the passing intrusions of hikers and hunters; however, they do not expect to open themselves to unrestricted police surveillance.

The modified open fields doctrine provides an incentive for landowners to post "No Trespassing" signs and fence in their property simply to secure the basic right to privacy from unlimited governmental intrusions. Consequently, hikers, hunters, and other recreational users are deprived of the opportunity to enjoy the activities that are a staple of Vermont culture. While the modified open fields doctrine benefits a few law enforcement officers who need not go through the inconvenience and delay of obtaining a warrant before entering an open field, innumerable residents and visitors to Vermont bear the burden by not being able to freely hike, hunt, or snowshoe.

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192. "The circumstances under which warrantless searches or seizures are permitted, however, must be 'jealously and carefully drawn.'" State v. Jewett, 148 Vt. 324, 328, 532 A.2d 958, 960 (1987) (quoting United States v. Watson, 423 U.S. 411, 427 (1976) (Powell, J., concurring)).

193. State v. Brooks, 157 Vt. at 506, 601 A.2d at 972 (Morse, J., dissenting).

194. *See Costin*, 9 Vt. L. Wk. at 197, 720 A.2d at 874 (Johnson, J., dissenting). In addition, the dissent in *Oliver* referred to a previous United States Supreme Court decision holding that "[o]ne of the main rights attaching to property is the right to exclude others, . . . one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." Oliver v. United States, 466 U.S. 170, 190 (1984) (Marshall, J., dissenting) (quoting Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978)).

Furthermore, the removal of an inspection by a neutral and detached judicial officer increases the likelihood that an overzealous police officer will infringe on the privacy rights of an innocent person.[195] Such an intrusion is irreversible.[196] This risk encourages a closed society in which people, in order to avoid unrestricted surveillance, shut themselves off from the outside world by building thicker walls, covering windows, and avoiding public interaction.[197]

Thus, while society benefits from effective law enforcement, it also stands to lose if proper safeguards are not maintained. By requiring a warrant before a search or a seizure, Article 11 of the Vermont Constitution ensures citizens protection from unreasonable government intrusions.[198] The modified open fields doctrine disregards Article 11's guarantees on unposted, unfenced open fields. Consequently, landowners seek protection by restricting access to their property via "No Trespassing" signs and fences. As a result, they move towards creating a closed society that excludes all outsiders in an attempt to keep out unrestricted government surveillance.

2. The Modified Open Fields Doctrine Disregards the Nature of the Area

Furthermore, the modified open fields doctrine is inadequate because it does not consider the nature of the searched area.[199] This factor can have an enormous impact on the reasonableness of an individual's expectations of privacy and on society's willingness to accept those expectations as reasonable. For example, in *Costin* the defendant owned thirty acres of land, most of which was densely wooded and not posted or enclosed by a fence.[200] While Costin may have expected an occasional passerby, he could have reasonably thought the location and overgrown nature of his property meant that he was alone and free from excessive intrusions. This situation is distinguishable from a landowner who owns two acres that are visible from a public road or are commonly used by hikers and hunters. In the latter scenario, any expectation of privacy by the owner would be unreasonable by virtue of the open and accessible nature of his property and the increased likelihood of public use. In *Costin* the state troopers went to great lengths to reach their destination and to avoid being detected by the defendant, even

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195. *See* Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 398-401 (1997) (referring to Tentative Draft Standard 2-6.1(b)).

196. *See id.*

197. *See id.* at 399.

198. *See* VT. CONST. ch. I, art. 11.

199. *See Costin*, 9 Vt. L. Wk. at 197, 720 A.2d at 874 (Johnson, J., dissenting).

200. *See id.* at 193, 720 A.2d at 867.

climbing down a ridge and crawling on their stomachs.[201] These actions demonstrate that they were aware that the defendant expected privacy.

3. The Modified Open Fields Doctrine Ignores the Intrusiveness of the Search

In addition, the per se approach of the modified open fields doctrine does not take into consideration the intrusiveness of the search. This factor bears on the reasonableness of one's expectation of privacy.[202] If an individual thinks he is alone, he will have a higher expectation of privacy than if he knows he is being watched.[203]

Moreover, the level of intrusiveness affects society's perception of what is reasonable.[204] For example, metal detectors are considered more acceptable than strip searches, "not because the former is not a 'search,' but because it is less intrusive and thus more reasonable."[205] It follows that more intrusive methods of observation should have higher thresholds of justification and more safeguards in place to prevent abuse.[206] As the American Bar Association's 1997 Tentative Draft Standards Concerning Technologically-Assisted Physical Surveillance recognized, technologically assisted physical surveillance "can diminish privacy, freedom of speech, association and travel, and the openness of society."[207]

With advancing technologies, one can no longer ignore the intrusiveness of a search.[208] Current law does not adequately address the issues raised by "this merger of space-age science and modern-day law enforcement."[209] The few courts that have addressed police use of surveillance technology have produced inconsistent results, and any legislative and administrative rules are limited in scope and applicability.[210] In response to *Katz*, Congress enacted

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201. *See* Brief of the Appellant at 3-4, State v. Costin, 9 Vt. L. Wk. 193, 720 A.2d 866 (1998) (No. 96-624).

202. *See* Nancy J. Montroy, *United States v. Torres: The Need For Statutory Regulation of Video Surveillance*, 12 NOTRE DAME J. LEGIS. 264, 269-70 (1985).

203. *See id.* ("[W]hen a person believes he is alone, absent any known observers, he has an absolute expectation of privacy even if engaging in criminal activity.")

204. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 804 (1994).

205. *Id.*

206. *See id.*

207. Slobogin, *supra* note 195, at 408 (referring to Tentative Draft Standard 2-6.1(b)).

208. New methods of surveillance and tracking include video cameras, helicopters with nightscope that has magnification capability of 500x and heat detector, transponders installed on cars, beepers installed on cars by projectile launcher, checkpoints with "see-through" capability, and satellite photographs. *See* Slobogin, *supra* note 195, at 385-86.

209. *Id.* at 386.

210. *See id.*

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III) to regulate audio surveillance, but it did not explicitly address video surveillance.[211] The Electronic Communications Privacy Act of 1986 amended Title III; however, Congress still declined to extend coverage to videotape cameras.[212] For lack of better or specific guidance, federal case law has generally applied Title III provisions to video surveillance.[213] To protect individual privacy rights and to regulate the use of video surveillance, states should also incorporate into their open field doctrines basic requirements such as consideration of the intrusiveness of a search.

4. Society's Views Are Not Considered in the Modified Open Fields Doctrine

The modified open fields doctrine also does not take into account society's views on what expectations of privacy are reasonable and how far police surveillance should go without judicial supervision. The United States Supreme Court found this factor to be so influential, that it inserted it as the second prong of the *Katz* test.[214] The Vermont Supreme Court adopted the *Katz* test but expressed reluctance in relying on this factor too much because public opinion is subject to change with "political winds."[215] However, as the

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211. *See* Cheryl Spinner, *Let's Go to the Videotape: the Second Circuit Sanctions Covert Video Surveillance of Domestic Criminals*, 53 BROOK. L. REV. 469, 469-72 (1987) (referring to Pub. L. No. 95-351, § 802, 82 Stat. 211-225 (1968), 18 U.S.C. §§ 2510-2520 (1984)). Under Title III in order to conduct audio electronic surveillance a judicial officer must determine that: (1) there is probable cause to conclude that the person committed one of the offenses enumerated in Title III, (2) communications concerning the offense will be obtained through interception, (3) normal investigative techniques have failed, appear unlikely to succeed, or would be too dangerous, and (4) the facilities from which the communications are to be intercepted are being used in connection with the commission of the offense. *See* 18 U.S.C. § 2518(3). Moreover, Title III severely restricts the scope of warrants for electronic surveillance. *See id.* (referring to 18 U.S.C. § 2518(4)).

212. *See id.* at 472 n.11 (1987) (citing Pub. L. No. 99-508, Oct. 21, 1986, 100 Stat. 1848). New types of electronic devices were added to the scope of Title III including: electronic mail, computer-to-computer communications, cellular telephones and remote computer services. *See id.* However, the Senate Report for this amendment clearly states that Title III does not pertain to videotape surveillance. *See id.* (citing S. REP. No. 541, 99th Cong., 2d Sess., Oct. 17, 1986, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3555, 3570-71).

213. *See Costin*, 9 Vt. L. Wk. at 198, 720 A.2d at 876 (Johnson, J., dissenting) (citing United States v. Biasucci, 786 F.2d 504, 510 (2d Cir. 1986) (holding that Title III standards, together with more general constitutional requirements, form sufficient outline of showing government must make before obtaining warrant for video surveillance); United States v. Torres, 751 F.2d 875, 885 (7th Cir. 1984) (holding that Title III provides a measure of government's constitutional obligation in seeking a warrant for video surveillance)).

214. *See supra* note 60 and accompanying text.

215. State v. Kirchoff, 156 Vt. 1, 12, 587 A.2d 995-96.

dissent in *State v. Brooks* emphasized, societal views are nonetheless important and should be taken into account.[216]

A recent national study asked interviewees to rate what they viewed to be intrusive police conduct.[217] The results showed that those surveyed considered open fields searches as intrusive as frisk searches.[218] The Vermont citizenry's reaction to *Costin* emphasized its closely held interest in privacy protections and landowners' rights. A *Burlington Free Press* editorial characterized the decision as "[t]he state Supreme Court continu[ing] its logic-defying redefinition of Vermonters' rights on their own land."[219] In addition, the editorial noted that "[t]he decision is based on a tormented reading of the law. . . . [W]hile Vermonters might think there is a difference between the acres surrounding their home and a parking lot," the Vermont Supreme Court held otherwise.[220] In response to *Costin*, a group of state senators introduced a bill in the Vermont Senate as an attempt to regain the protections the decision stripped away.[221] As one sponsor noted, "[w]e have an open-land tradition in Vermont that I believe is important to foster and support."[222]

5. Application of the Modified Open Fields Doctrine Is Complicated and Imprecise

The open fields doctrine attempts to eliminate on-the-spot law enforcement decisions about the reasonableness of a defendant's expectations of privacy by declaring all expectations of privacy in open fields per se unreasonable.[223] However, these decisions are merely replaced by ad-hoc assessments of where to draw the line between protected curtilage and unprotected open fields.[224] What exactly constitutes curtilage in each case is

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216. *See Brooks*, 157 Vt. at 502, 601 A.2d at 969 (Morse, J., dissenting).

217. *See* Slobogin, *supra* note 195, at 400, n.84 (citing Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at 'Understandings Recognized and Permitted by Society'*, 42 DUKE L.J. 727, 737-41 (1993)).

218. *See id.*

219. Stephen Kiernan, Editorial, *Court Decision Sets Dangerous Precedent*, BURLINGTON FREE PRESS, Aug. 6, 1998, at 8A.

220. *Id.*

221. *See* S. 39, 1999 Leg. (Vt. 1999). "Notwithstanding the Vermont Supreme Court decision in the case of *State v. Costin* (1998), law enforcement shall obtain a search warrant prior to using photographic surveillance equipment to record activities or objects on private property." *Id.* In addition, the bill proposes that "[a] search warrant is required regardless of whether the property is posted against trespass or is located outside the curtilage surrounding the landowner's or tenant's home." *Id.*

222. Diane Derby, *Surveillance Cameras Are Target of Bill*, THE TIMES ARGUS (Barre, Vt.), Jan. 27, 1999, at A1 (citing Senator Cheryl Rivers, D-Windsor).

223. *See* Gellman, *supra* note 47, at 740.

224. *See id.*

difficult to define.[225] Courts have historically delineated this area in a result-oriented manner, producing inconsistent interpretations.[226] As a result, it is often confusing in practice for an officer to make an instantaneous determination.[227] Furthermore, what constitutes sufficient posting or fencing is subject to varied interpretations. Consequently, the application of the open fields doctrine is complicated and imprecise. Thus, it is not easier or more efficient in practice than administering the *Katz* reasonable expectation of privacy test.[228]

C. A Reasonable Alternative

The *Katz* reasonable expectation of privacy test, in combination with a warrant requirement, resolves the difficult question of where to draw the line by having a neutral, trained judicial officer make the decision. This approach provides a thoughtful, careful inquiry into the specific circumstances of each search to ensure that it is justified and does not irreversibly encroach on legitimate privacy rights, thus furthering the *Katz* goal of protecting people, not just places.[229] The analysis examines what the landowner expects and what society considers reasonable.[230] The location of the search is included in the inquiry as it relates to the reasonableness of the expectation of privacy; however, it is not dispositive.[231] In addition, this approach examines the nature of the property and the intrusiveness of police conduct.

The recommended alternative prevents overzealous or mistaken intrusions by requiring police officers to obtain from a detached judicial officer a warrant that demonstrates that less intrusive means of gathering evidence are not feasible. If a search is justified, then obtaining a warrant should not present a major obstacle. Furthermore, the United States Supreme

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225. *See id.* at 741-43. State courts struggle to define curtilage using factors including distance from dwelling and use of area searched. *See id.* at 741-42 & n.125 (citing Masters v. State, 453 So.2d 183, 184 (Fla. Dist. Ct. App. 1984) (marijuana patch forty feet from house not within curtilage because not within fence and used for commercial, not family or domestic purposes); State v. Neale, 145 Vt. 423, 491 A.2d 1025 (1985) (garden 400 feet away, across road, not within curtilage); State v. Burch, 320 S.E.2d 28 (N.C. App. 1984) (marijuana patch within brush pile eighty-four feet behind defendant's home within curtilage because grass mowed between patch and house and cider press, still in use, behind the pile)). Similarly, federal courts have had difficulty in defining consistent parameters. *See* Buxbaum, *supra* note 50, at 927 & n.51 (citing United States v. Minton, 488 F.2d 37 (4th Cir. 1973) (outbuilding eighty to ninety feet from dwelling held beyond the curtilage); Walker v. United States, 225 F.2d 447 (5th Cir. 1955) (outbuilding 240 feet from dwelling held within curtilage)).

226. *See* Gellman, *supra* note 47, at 740.

227. *See id.*

228. *See id.*

229. *See supra* notes 54-60 and accompanying text.

230. *See* Buxbaum, *supra* note 50, at 940-41.

231. *See id.*

Court has held that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."[232] On balance, the minimal inconvenience of obtaining a warrant is outweighed by the interests of society. The *Katz* approach, in conjunction with a warrant requirement, protects the constitutional right to privacy and freedom from unreasonable searches and seizures without unduly impairing effective law enforcement.[233]

CONCLUSION

Article 11 of the Vermont Constitution and the Fourth Amendment to the United States Constitution promise protection from unreasonable searches and seizures, unless a warrant, particularly described, is issued in advance.[234] However, over the years case law has whittled away at these safeguards, jeopardizing privacy in open fields. While the Vermont Supreme Court has generally followed the course of the United States Supreme Court, in the area of privacy in open fields it took its own course and adopted a modified version of the federal doctrine.

Early federal jurisprudence provided protection for an individual's privacy only when a search took place in a "constitutionally protected area," which consisted of those areas listed in the constitutional provision itself.[235] Later, the United States Supreme Court rejected this locational approach in *Katz v. United States*.[236] *Katz* professed to protect people, not places.[237] The *Katz* inquiry focused on the individual's subjective expectation of privacy and society's assessment of the reasonableness of that expectation.[238] Years later, the Court resurrected its locational approach in *United States v. Oliver*.[239] In that case, the Court held that regardless of the circumstances, expectations of privacy in open fields are per se unreasonable, and therefore activities in such areas automatically fall outside the scope of constitutional protection.[240] The reasoning behind the *Oliver* decision is flawed because it is premised on the questionable assumption that there are no possible privacy interests in open fields that society would deem to be reasonable.[241] Furthermore, it does not

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232. Gellman, *supra* note 47, at 739 (quoting Mincey v. Arizona, 437 U.S. 385, 393 (1978)).
233. *See* Buxbaum, *supra* note 50, at 942.
234. *See* VT. CONST. ch. I, art. 11; U.S. CONST. amend. IV.
235. *See* Katz v. United States, 389 U.S. 347, 351 n.9 (1967).
236. *See id.* at 351.
237. *See id.*
238. *See id.* at 361 (Harlan, J., concurring).
239. Oliver v. United States, 466 U.S. 170, 178 (1984).
240. *See id.* at 178, 181.
241. *See* Gellman, *supra* note 47, at 738.

take into consideration the nature of the area or the intrusiveness of police activity, which is intensified by modern surveillance techniques.

The Vermont Supreme Court adopted the *Katz* approach in *State v. Kirchoff*.[242] In that decision the court declined to follow the United States Supreme Court's return to a strict locational approach in *Oliver* and rejected *Oliver*'s per se rule that "privacy in land beyond the curtilage can never be constitutionally sanctioned."[243] In its place, the court adopted a modified per se rule. Instead of drawing the line for search and seizure protection at all open fields, like the federal doctrine, the Vermont Supreme Court drew its line at open fields without fences or signs. However, this approach still relies on questionable assumptions regarding activities and privacy expectations and refuses to accept that a landowner may have reasonable expectations of privacy in open fields that are not posted or enclosed by a fence. Although the court has acknowledged that it "cannot presume how an individual will employ private lands—that is the nature of privacy," it has taken the position that regardless of the intentions and expectations of the landowner, or society in general, it will not recognize privacy in open fields that are not posted or enclosed by a fence.[244] Thus, under Vermont's modified open fields doctrine, notwithstanding private ownership, unposted and unfenced open fields are treated as public property that falls outside the scope of Article 11.

This modified open fields doctrine is inconsistent with Vermont jurisprudence because it ignores the *Kirchoff* theory that all searches of land presumptively implicate Article 11. To the contrary, the modified open fields doctrine estranges Article 11 altogether when confronted with open fields that are not posted or enclosed by a fence. Furthermore, this doctrine is inconsistent with the accepted theory of *Katz* because it reverts to the discredited locational approach and bypasses the warrant requirement that is "basic to the guarantee of individual freedoms."[245] Landowners are denied any expectation of privacy that they may subjectively hold and that society is willing to accept. Their only recourse, to ensure themselves the minimum of privacy rights, is to post or fence in their property. This deprives hikers, hunters, and other recreational users access to activities that are intertwined with Vermont's culture and encourages a closed society. These costs to society outweigh the efficiency, if any, that bypassing the warrant requirement provides to law enforcement.

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242. State v. Kirchoff, 156 Vt. 1, 587 A.2d 988 (1991).
243. *Id.* at 8, 587 A.2d at 993.
244. *Id.* at 9, 587 A.2d at 993.
245. State v. Brooks, 157 Vt. at 505, 601 A.2d at 971 (Morse, J., dissenting).

A more favorable approach is to remain true to the traditional *Katz* inquiry in conjunction with a warrant requirement. This approach focuses on protecting people and privacy rights, rather than certain predetermined locations. It incorporates important circumstances, such as the nature and location of the property, societal views, and the intrusiveness of police activity in light of modern technological advances. This analysis balances all relevant factors in order to protect privacy interests without unduly impairing effective law enforcement.

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