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Dwelling in Doubt: Do Tenants Have a Reasonable Expectation of Privacy in the Common Areas of Their Apartment Buildings?

Alexander Porro†

I. INTRODUCTION

The United States Constitution resolutely protects the right to privacy and the freedom from government intrusion. The Fourth Amendment of the Constitution provides: “The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹ A search “occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”² The profoundness of this guarantee of protection is demonstrated by its extension to both innocent and guilty people alike.³ However, over the years, courts have disagreed over the degree of protection that the Fourth Amendment affords.

Currently, the federal circuit courts are split as to whether a tenant who lives in an apartment has a reasonable expectation of privacy in the common areas of their building under the Fourth Amendment. The First, Third, Seventh, Eighth, and Ninth Circuits hold that tenants do not have a reasonable expectation of privacy in the common areas of their apartments.⁴ These Circuits reason that because common areas are open to people beyond the control of each tenant (e.g.,

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¹ U.S. CONST. amend. IV.


³ See McDonald v. United States, 335 U.S. 451, 453 (1948).

⁴ See, e.g., United States v. Hawkins, 139 F.3d 29, 32 (1st Cir. 1998) (holding that the defendant tenant did not have a reasonable expectation of privacy in the common areas of their apartment building); United States v. Correa, 653 F.3d 187, 188 (3d Cir. 2011) (same); Harney v. City of Chicago, 702 F.3d 916, 925 (7th Cir. 2012) (same); United States v. Brooks, 645 F.3d 971, 976 (8th Cir. 2011) (same); United States v. Nohara, 3 F.3d 1239, 1241 (9th Cir. 1993) (same).
other tenants, delivery people, the landlord, other authorized individuals), they are not protected under the Fourth Amendment. These Circuits also hold that, because common areas are not protected by the Fourth Amendment, evidence obtained by law enforcement officers from these areas is admissible in court proceedings.

The Sixth Circuit is the only circuit that recognizes that tenants have a reasonable expectation of privacy in the common areas of their apartment buildings, at least when the door is locked. The Sixth Circuit agrees that people beyond the tenants’ control can enter the common areas, but there is an actual expectation of privacy from the general public and trespassers. In 2001, the Sixth Circuit reaffirmed this holding, stating that “any entry into a locked apartment building without permission, exigency or a warrant is prohibited.” Under the Sixth Circuit’s approach, evidence accumulated by law enforcement officers in common areas of apartment buildings is protected by the Fourth Amendment, and thus inadmissible in court proceedings.

This Comment will argue that while the position of the Sixth Circuit is preferable to the positions held by the majority of circuits, it is still too narrow. The Sixth Circuit’s analysis could be made stronger by incorporating other common law privacy doctrine-based arguments—namely, that the common areas in apartment buildings should be considered part of a tenant’s curtilage. This Comment will then argue that existing Supreme Court precedent and the curtilage doctrine should allow courts to recognize that tenants do enjoy a reasonable expectation of privacy in the common areas of their apartment buildings.

Further, this Comment will argue that extending Fourth Amendment protections to common areas in apartment buildings is good public policy. Treating privacy protections afforded to houses differently from those afforded to apartments could disproportionately affect the poorest citizens in society and incentivize unjust law enforcement practices. In The Wire, we are exposed to this disparate treatment when officers Carver, Hauk (“Herc”), and Pryzbylewski (“Prez”) travel to The Terraces, a Barksdale-controlled high-rise public housing project, in the middle of the night after feeling frustrated with

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5 See United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977).
6 See United States v. Carriger, 541 F.2d 545, 550 (6th Cir. 1976) (holding that a tenant has a constitutionally protected privacy interest within the locked common areas of an apartment building, and an officer’s entry into these areas without a warrant or permission violates the Fourth Amendment).
7 Id. at 551.
9 Carriger, 541 F.2d at 550.
the progress of their case against the Barksdale drug operation. In an attempt to intimidate the Barksdales, we witness all three officers harass, threaten, and strip-search two innocent Terrace residents, one of whom was simply carrying his laundry back to his apartment. Moments later, Prez encounters Kevin Johnston, a fourteen-year-old kid, eating a bag of chips and mouthing off while leaning on the hood of their police cruiser. Prez proceeds to pistol whip Johnston in the face causing him to be hospitalized and ultimately, to lose his left eye. This Comment believes that poorer law-abiding tenants, whose lack of resources force them to live in crime-ridden apartment complexes, such as The Terraces, should not be subject to unreasonable searches without probable cause. As such, law-abiding tenants could benefit from a more accurate application of Fourth Amendment privacy protections to the common areas in (and around) their homes.

Finally, this Comment will examine new perspectives that can potentially help resolve this circuit split. This Comment will first explore alternative models of Fourth Amendment protection outside the reasonable expectation of privacy standard. In addition, this Comment will argue that the determination of protections afforded to common areas based on whether they are locked or unlocked is arbitrary and should be eliminated.

Thus, the discussion proceeds as follows: Part II of this Comment will provide an overview of the development of Fourth Amendment protection and how it has been interpreted by courts, summarizing the more notable decisions. Part II will then provide an overview of the curtilage doctrine, its limitations, and a definition of “common areas” for the purposes of this Comment. Part III will provide a summary of the circuit split that currently exists in the federal circuits. Part IV will argue that tenants should have a reasonable expectation of privacy in the common areas of their apartment building under the Fourth Amendment by pointing to supportive Supreme Court precedent and showing how the curtilage doctrine can fit into the current analysis. Part IV will also examine the larger public policy implications of granting unequal levels of Fourth Amendment protection to single-family homes and multi-unit dwellings. Finally, Part V will discuss how exploring alternative models of Fourth Amendment protection could improve circuit court analyses. In the end, this Comment hopes

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10 The Wire: The Detail (HBO television broadcast June 9, 2002) (Season One, Episode Two).
11 Id.
12 Id.
13 Id.
14 This could not actually be known without studying the effects of Fourth Amendment privacy rights expansion on crime control.
to provide an updated perspective on this circuit split and address the uneven distribution of Fourth Amendment privacy protection between individuals living in single-family homes and those living in apartment buildings.

II. THE FOURTH AMENDMENT AND RELATED DOCTRINES

A. Overview of the Fourth Amendment

The Fourth Amendment of the United States Constitution protects people from unreasonable searches and seizures. The Fourth Amendment provides:

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.\(^\text{15}\)

The word “unreasonable” is not defined in the Constitution. As a result, there has been considerable debate over the scope of the protections afforded by the Fourth Amendment.

Further, “the application of the ‘exclusionary rule’ to evidence obtained in violation of the amendment has made the determination of its protections a crucial, if not dispositive, issue in many criminal prosecutions.”\(^\text{16}\)

In attempting to outline the extent of Fourth Amendment protections, the courts have relied substantially on the trespass doctrine and property concepts. This approach to the Fourth Amendment appeared in Olmstead v. United States,\(^\text{17}\) where federal agents had obtained incriminating evidence by wiretapping the defendant’s telephones.\(^\text{18}\) Chief Justice Taft stated that the historical purpose of the Fourth Amendment was to prevent the use of governmental force to search and seize a man’s property and his effects.\(^\text{19}\) But, because there had

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\(^{15}\) U.S. Const. amend. IV.

\(^{16}\) William J. Desmond, Constitutional Law—Search and Seizure—Warrantless Searches of Private Areas in Locked Apartment Building without Permission Violate Reasonable Expectations of Privacy under the Fourth Amendment, 4 N. Ky. L. Rev. 161, 163 (1977); see Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that the warrantless seizure of items from a private residence constitutes a violation of the Fourth Amendment; only applied to federal courts); see also Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that the exclusionary rule applies to state courts as well).

\(^{17}\) 277 U.S. 438 (1928).

\(^{18}\) Id. at 455.

\(^{19}\) Id. at 463.
been no physical trespass, nor any seizure of “persons, houses, papers, and effects,” the Court held that there was no search and seizure within the traditional meaning of the Fourth Amendment. Therefore, there was no violation of the defendant’s constitutional rights. Here, the Court affirmed the doctrine of “constitutionally protected areas,” determining that any search and seizure that resulted in a trespass of a “constitutionally protected area” was a violation of the Fourth Amendment.

However, after struggling to concretely define “constitutionally protected areas,” the Court appeared to do away with property and trespass considerations in *Katz v. United States.* *Katz,* like *Olmstead,* concerned the wiretapping of a suspected criminal’s telephone call. Specifically, the suspect in *Katz* was using a public phone booth to place a call and the government had attached a listening device to the outside of the phone booth. Rather than designating the phone booth as a “constitutionally protected area,” the Court concluded that “the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure” and that property interests and the “trespass” doctrine could “no longer be regarded as controlling.” Writing for the majority, Justice Stewart famously stated that “the Fourth Amendment protects people, not places.”

In his concurrence, Justice Harlan articulated the two-pronged test that courts ultimately adopted to determine whether there was Fourth Amendment protection, stating, “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” Finding the defendant’s expectation of privacy to be reasonable, the Court stated that “[o]ne who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.” In so holding, the Court abandoned the traditional

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20 *Id.* at 466.
21 *Id.*
24 *Id.* at 348.
25 *Id.* at 353.
26 *Id.* at 351.
27 *Id.* at 361 (Harlan, J. concurring).
28 *Id.* at 352.
“trespass” doctrine and replaced it with a “reasonable expectation of privacy” test.

However, when the Court was unable to confidently apply the reasonable expectation of privacy test in United States v. Jones, it was quick to revive the physical trespass test. In Jones, the government attached a GPS tracker to the defendant’s car while it was parked in a public parking lot after suspecting the defendant was trafficking drugs. The government tracked the vehicle’s movement for 28 days. The Jones Court held unanimously that attaching the GPS device constituted a search. Writing for the majority, Justice Scalia highlighted the physical trespass of placing the GPS device on Jones’ car, noting that “[b]y attaching the device to the [car], [the] officers encroached on a protected area.” Justice Scalia also wrote that the reasonable expectation of privacy test had not replaced the trespass test; rather it had merely supplemented it. Jones reiterates that a physical trespass may trigger Fourth Amendment protections. Jones also stands for the proposition that one’s Fourth Amendment analysis should begin by asking whether a physical trespass occurred, and if not, then one should move on to applying Katz’s reasonable expectation of privacy standard.

B. The Curtilage Doctrine and Its Limitations

Inextricably linked with the aforementioned Fourth Amendment doctrines is the concept of curtilage. At common law, “the curtilage is the area to which extends the intimate activity associated with the sanctity of a man’s home and the privacies of life.” Classic examples of curtilage include attached garages, back patios, and fenced-in backyards. Because the occupants of a home have a reasonable expectation of privacy in their home and the curtilage is considered as part of the home, it is protected by the Fourth Amendment. This means that if an area is considered part of a home’s curtilage, it cannot be searched by

30 Id. at 403.
31 Id.
32 Id. at 404.
33 Id. at 410; but see id. at 415 (Sotomayor, J., concurring) (making clear that the reasonable expectation of privacy test “augmented, but did not displace or diminish, the common-law trespassory test that preceded it”); id. at 419–431 (Alito, J., concurring) (arguing that there are problems with the property-based analysis and that the reasonable expectations of privacy test is the sole determining factor as to whether government actions implicate the Fourth Amendment).
34 Id. at 409.
35 Oliver v. United States, 466 U.S. 170, 180 (1984) (internal quotation marks and citation omitted).
a law enforcement officer without a warrant, unless one of the exceptions to the warrant requirement applies.\textsuperscript{36}

The Supreme Court first incorporated the protection of curtilage into the Fourth Amendment in \textit{Oliver v. United States}.\textsuperscript{37} In \textit{Oliver}, Kentucky State Police officers traveled to the defendant’s farm upon receiving reports that marijuana was being grown there.\textsuperscript{38} After ignoring a “No Trespassing” sign, the police officers proceeded to investigate the defendant’s farm without a warrant and found a field of marijuana over a mile from the defendant’s home.\textsuperscript{39} The Court stated that, although the police officers trespassed on Oliver’s property, the trespass occurred in “open fields,” which were not protected by the Fourth Amendment.\textsuperscript{40} The Court then went on to reaffirm the rule that “an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”\textsuperscript{41} As such, the \textit{Oliver} Court defined “curtilage” as “the area around the home to which the activity of home life extends.”\textsuperscript{42}

In \textit{United States v. Dunn},\textsuperscript{43} the Court elaborated on this definition when presented with the question of whether a barn on the defendant’s property could be considered part of the defendant’s curtilage, and thus part of the defendant’s home.\textsuperscript{44} In determining that the barn was not “so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection,”\textsuperscript{45} the Court outlined four factors that must be considered when determining whether a space is part of the home’s protected curtilage: (1) “the proximity of the area claimed to be curtilage 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

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\textsuperscript{36} See Craig M. Bradley, \textit{Two Models of the Fourth Amendment}, 83 MICH. L. REV. 1468, 1473 (1985) (stating that “there are over twenty exceptions to the probable cause or the warrant requirement or both”); United States v. Dunn, 480 U.S. 294 (1987) (stating that the curtilage is “treated as the home itself” for Fourth Amendment purposes).

\textsuperscript{37} 466 U.S. at 180–81.

\textsuperscript{38} Id. at 173.

\textsuperscript{39} Id.

\textsuperscript{40} Id. at 177–79; see Hester v. United States, 265 U.S. 57, 59 (1924) (“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”).

\textsuperscript{41} \textit{Oliver}, 466 U.S. at 178.

\textsuperscript{42} Id. at 182 n.112.

\textsuperscript{43} 480 U.S. 294 (1987).

\textsuperscript{44} Id. at 296.

\textsuperscript{45} Id. at 301.
by.” The Dunn Court was careful not to establish a bright line rule. Rather the Court reasoned:

We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a “correct” answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home’s “umbrella” of Fourth Amendment protection.

Importantly, not all four factors are necessary for the Court to find that the area in question is part of the home’s curtilage.

Together, Oliver and Dunn represent the modern theory of curtilage. The Oliver “open fields” doctrine rests on the idea that expectations of privacy in areas far-removed from the home itself are not reasonable, regardless of whether those areas may be part of one’s private property. The Dunn factors attempt to identify characteristics of a space that mark it as part of a home such that it is objectively reasonable to expect privacy there. Accordingly, curtilage (and reasonable expectation of privacy) analyses tend to be based on the extent to which an individual has tried to completely exclude others or obscure from view the space in question. As the Supreme Court emphasized in California v. Ciraolo, the protection afforded by curtilage is rooted in “a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.” Thus, curtilage is ultimately about protecting closely held privacy and security rights in the home.

However, the Court has recognized some limitations to the Fourth Amendment protections granted by the curtilage doctrine. For example, in Ciraolo, the Court held that naked-eye observations by police from an airplane lawfully operating at an altitude of 1,000 feet into the curtilage of a home does not violate the reasonable expectation of privacy that a resident has in that curtilage. Justifying the decision, the Court explained that “Fourth Amendment protection of the home

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46 Id.
47 Id. at 301 n.4.
48 Id. at 301 (emphasis added).
49 See United States v. Seidel, 794 F. Supp. 1098, 1103 (S.D. Fla. 1992) (three of the four Dunn factors were found to “militate in favor of the defendant”).
50 476 U.S. 207 (1986).
51 Id. at 213.
52 Id. at 213–14.
has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares,\(^{53}\) thus supporting the idea that objects or activities set in plain view do not enjoy privacy protection. Further, the Court has been reluctant to extend Fourth Amendment protection beyond the curtilage of the home. For instance, in *California v. Greenwood*,\(^ {54}\) the Court refused to grant Fourth Amendment protection to garbage left for collection on the curb because the curb was outside the curtilage of the home and “readily accessible to animals, children, scavengers, snoopers, and other members of the public.”\(^ {55}\)

While there are plenty of interesting cases that weigh and balance the four *Dunn* factors in considering whether curtilage applies to single-family homes,\(^ {56}\) the more complicated Fourth Amendment question is whether and how the concept of curtilage applies to multi-unit dwellings—particularly the common areas within these dwellings. This will be explored further in Section IV.A below.

C. “Common Areas” Defined

Before examining the relevant circuit case law and the resulting circuit split below, it is important to note that, for the purposes of this Comment, the term “common area” will refer only to the common areas outside of the individual unit that a tenant would inhabit within a multi-unit dwelling. Thus, the term “common area” will not refer to the shared spaces inside of an individual unit such as a living room, bedroom, bathroom, kitchen, closet or foyer. The term “common areas” will refer to areas including, but not limited to, hallways, garages, basements, laundry rooms, and storage spaces—all of which are usually accessible by the people living and working in the building. Although there are cases that address co-tenants’ rights to privacy within an apartment unit and issues like whether a co-tenant can give permission to law enforcement officers to conduct a search of the shared spaces within an apartment unit, such cases and issues are outside of this Comment’s scope.

The federal circuit courts have looked at a number of different “common areas.”\(^ {57}\) Common areas have included hallways,\(^ {58}\) under-

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\(^{53}\) *Id.* at 213.

\(^{54}\) 486 U.S. 35 (1988).

\(^{55}\) *Id.* at 40.

\(^{56}\) See, e.g., *Harris v. O'Hare*, 770 F.3d 224, 240–41 (2d Cir. 2014) (holding that the plaintiff’s fenced-in backyard constituted curtilage of their single-family home after going through the four *Dunn* factors and that the officers were not entitled to qualified immunity for their Fourth Amendment intrusion into this curtilage).

\(^{57}\) See, e.g., *United States v. Sweeney*, 821 F.3d 893, 900 (7th Cir. 2016) (basement); United
The circuit courts often face the difficult task of ascertaining the extent to which Fourth Amendment protection should be given to tenants based on which type of common area the protection would extend to and other particular facts in the case. The majority of circuits reason that, because these common areas “are available for the use of other tenants, friends and visitors of other tenants, the landlord, delivery people, repair workers, sales people, postal carriers and the like,” tenants have little control over these common areas and thus, do not have a reasonable expectation of privacy in these common areas.

III. EXAMINING THE RELEVANT CIRCUIT CASE LAW

A. The Majority Rule

Currently, the federal circuit courts are split as to whether a tenant who lives in an apartment has a reasonable expectation of privacy in the common areas of his or her building under the Fourth Amendment. The First, Third, Seventh, Eighth, and Ninth Circuits have used the reasonable expectation of privacy standard to hold that tenants do not have a reasonable expectation of privacy in the common areas of their apartment buildings. The Sixth Circuit is the only circuit to reach the opposite conclusion.

The First Circuit addressed this issue in several cases spanning from 1976 to 1998. The court ultimately concluded that “[i]t is now beyond cavil in this circuit that a tenant lacks a reasonable expectation of privacy in a basement storage area was undermined by the unlocked door guarding the area].” Initially, the Third Circuit established no objective reasonable expecta-

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58 United States v. Carriger, 541 F.2d 545, 548 (6th Cir. 1976).
59 United States v. Cruz Pagan, 537 F.2d 554, 557 (1st Cir. 1976).
60 United States v. Hawkins, 139 F.3d 29, 32–33 (1st Cir. 1998); see also United States v. Breland, 715 F. Supp. 7, 8–10 (D.D.C. 1989) (holding that defendant’s claim to a protected privacy interest in a basement storage area was undermined by the unlocked door guarding the area).
62 See supra note 4.
63 For some First Circuit cases reiterating the majority position on this issue, see Cruz Pagan, 537 F.2d at 557–78; United States v. Thornley, 707 F.2d 622, 625 (1st Cir. 1983); Hawkins, 139 F.3d at 32–33.
64 Hawkins, 139 F. 3d at 32.
tion of privacy in *unlocked* common areas in *United States v. Acosta*. Further, the Third Circuit’s decision in *United States v. Correa* extended *Acosta*’s rationale to *locked* common areas. The Third Circuit’s approach is unique among circuits taking the majority position in that it focuses almost exclusively on the ability of others to access the space; it does not look at their reason for being in the building. The unlocked-locked distinction will be addressed further in Section V.B.

Additionally, the Seventh Circuit agreed with the majority position in several cases spanning from 1991 to 2012. Together, these Seventh Circuit cases establish that tenants are not entitled to a reasonable expectation of privacy in the common areas of their apartment buildings. For example, in *Harney v. City of Chicago*, when the police entered an area that was partially blocked from public view, the court concluded that “the fact that a gate barred—to some unknown extent—public viewing or access does not create a reasonable expectation of privacy in common or shared areas.”

However, the Seventh Circuit held in a recent decision, *United States v. Whitaker*, that, although a tenant does not have Fourth Amendment rights in common areas generally, use of a drug-sniffing dog in the hallway at the tenant’s door is a “search” within the meaning of the Fourth Amendment. Citing Justice Kagan’s concurrence in *Florida v. Jardines*, it argued that a drug-sniffing dog is a “super-sensitive instrument” that has the ability to detect objects and activities that are “not in general public use, to explore details of a home that would previously have been unknowable without physical intrusion.” Although, the Seventh Circuit did not use the curtilage doctrine to come to its decision in *Whitaker*, the holding points to equal Fourth Amendment treatment of houses and apartments.

The Eighth Circuit adopted the majority position in *United States v. McCaster* and later reaffirmed it in *United States v. Brooks*. In

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66 United States v. Correa, 653 F.3d 187, 190 (3d Cir. 2011) (stating even locked exterior doors do not give rise to a reasonable expectation of privacy in a building’s common areas).
68 See Harney v. City of Chicago, 702 F.3d 916, 924–25 (7th Cir. 2012); United States v. Villegas, 495 F.3d 761, 767-68 (7th Cir. 2007); United States v. Espinoza, 256 F.3d 718, 723 (7th Cir. 2001); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991).
69 702 F.3d 916 (7th Cir. 2012).
70 Id. at 925.
71 820 F.3d 849 (7th Cir. 2016).
72 Id. at 853.
73 569 U.S. 1 (2013).
74 Id. at 14 (internal quotation marks and citations omitted).
75 193 F.3d 930, 933 (8th Cir. 1999).
validating its decisions, the Eighth Circuit referred to the plain view doctrine, “which permits an officer to seize evidence without a warrant when (1) the officer does not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed, (2) the object’s incriminating character is immediately apparent, and (3) the officer has a lawful right of access to the object itself.” The court ultimately concluded that the backyard was a part of the curtilage of the home and the police did not violate the Fourth Amendment in accessing that area during the search.

Finally, the Ninth Circuit also takes the majority position and holds that tenants lack a reasonable expectation of privacy in the common area of their apartment buildings under the Fourth Amendment. In United States v. Nohara, police officers observed the defendant holding a methamphetamine pipe in the hallway of his apartment. The court rejected the defendant’s argument that he was entitled to a reasonable expectation of privacy in the hallway of his apartment, and the evidence was ruled admissible. However, the court did not determine the issue of subjective expectation of privacy, concluding it unnecessary given that the objective expectation of privacy was unreasonable.

B. The Sixth Circuit Stands Alone

Among the federal circuit courts, the Sixth Circuit is the only one that recognizes that tenants have a reasonable expectation of privacy in the common areas of their apartment not open to the general public. The Sixth Circuit first addressed this Fourth Amendment issue in 1976 in United States v. Carriger. From late 1972 to early 1973,
Bureau of Narcotics and Dangerous Drugs (BNDD) agents conducted an investigation of Charles Beasley.\(^{85}\) Undercover agents had purchased a large amount of heroin from Beasley with the purpose of identifying Beasley’s source, who BNDD had been led to believe was Carriger.\(^{86}\) After following Beasley to Carriger’s apartment building, the BNDD agents discovered that both of the apartment building entrances, one in the front and one in the back, were locked and could only be opened by someone with a key or by someone in the building who could activate the buzzer system.\(^{87}\) Later, as several workmen were leaving Carriger’s apartment building, one of the BNDD agents was able to slip in quickly before the door closed.\(^{88}\) Once inside, the agent inside saw Beasley walking down a corridor with a green shopping bag under his arm, which appeared to have something in it.\(^{89}\) A few moments later, the BNDD agent saw Beasley conversing with Carriger and then saw Beasley give Carriger the green shopping bag.\(^{90}\) As Beasley and Carriger began to walk away from the apartment, the BNDD agent told the other officers what happened, and went downstairs to let them into the building.\(^{91}\) The agents went to the apartment where they had seen the suspected drug transaction, identified themselves, and forced entry.\(^{92}\) Carriger and Beasley were not present during the search of the apartment, which resulted in a clear bag of heroin being found.\(^{93}\) Carriger was arrested when he returned to the apartment and Beasley was arrested as he was walking to his car.\(^{94}\) The green shopping bag, “discovered behind a carton on a stairwell near Carriger’s apartment,” contained 89.5 grams of heroin.\(^{95}\) A search warrant was later obtained, and more heroin was found in a safe in a storage area that was reserved for all tenants.\(^{96}\)

The dispositive issue in Carriger was whether the entry by BNDD agents into a locked apartment building, without permission or a warrant, violated the defendant’s Fourth Amendment rights.\(^{97}\) Like the other circuit court cases, Carriger dealt with a common area of an

\(^{85}\) Id. at 547.
\(^{86}\) Id.
\(^{87}\) Id. at 548.
\(^{88}\) Id.
\(^{89}\) Id.
\(^{90}\) Id.
\(^{91}\) Id.
\(^{92}\) Id.
\(^{93}\) Id.
\(^{94}\) Id.
\(^{95}\) Id.
\(^{96}\) Id.
\(^{97}\) Id. at 547.
apartment building that was not accessible to the general public.98 However, unlike the other cases, the BNDD agents did not have probable cause to arrest Carriger or Beasley before they invaded an area where Carriger had a legitimate expectation of privacy.99 The court stated that “[a] tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers.”100 Thus, “when . . . an officer enters a locked building, without authority of invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed.”101 Ultimately, the court held that tenants do have a reasonable expectation of privacy in the locked common areas of their apartment buildings, and that officers’ unlawful entry into these areas are violative of tenants’ Fourth Amendment rights.102

C. The Sixth Circuit’s Position is Only a Starting Point

The Sixth Circuit’s approach to the Fourth Amendment in the locked common area context provides a firm foundation for the Supreme Court to resolve this important constitutional issue. Previous scholarship has argued that the Sixth Circuit’s understanding of the Fourth Amendment is a good starting point.103 However, it is important to note that, although the Sixth Circuit’s position in Carriger may be a good starting point, it is only that; there are shortcomings to overcome. Most notably, the holding in Carriger is limited to a particular set of facts and can only realistically extend Fourth Amendment

98 Id. at 549.
99 Id. at 547.
100 Id. at 551; see also, e.g., Piazolla v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971) (holding that although university students may have no justifiable expectation of privacy against an inspection of their rooms pursuant to university regulations, they do have a justifiable expectation of privacy against an intrusion made for the purpose of obtaining evidence in a criminal investigation).
101 Carriger, 514 F.2d at 552.
102 Id. at 550. This holding stood in direct conflict with the Second Circuit’s holdings in United States v. Miguel, 340 F.2d 812, 814 (2d Cir. 1965) (holding that the lobby of a high-rise building where the officers arrested the defendant was not within the defendant’s curtilage even though the officers gained entry to the lobby when the entrance door was opened by a woman leaving the building) and United States v. Conti, 361 F.2d 153, 157 (2d Cir. 1976) (holding that the Fourth Amendment protection accorded to an apartment dweller’s home does not extend to an area just inside a hallway door that was meant to be kept locked and which could only be opened by tenant’s keys or buzzes from tenants; but testimony indicated that the lock was broken and could be opened by almost any key).
protection to the hallways in apartment buildings. Whether intentional or not, the Sixth Circuit did not explicitly extend Fourth Amendment protection to the other common areas mentioned in the case, including the stairwell where the green shopping bag was found or the storage space in the basement where one of the safes of heroin was found. The Sixth Circuit’s failure to be more inclusive of different common areas in Carriger means that it will be more difficult to apply Carriger to other cases with different common areas in the future.

With that said, it would be unfair to say that no progress towards more expansive Fourth Amendment protections has been made. The courts have limited police’s ability to enter a locked building without permission or warrant, or to have a drug dog sniff the porch of a house or the door of apartment. 4 Fourth Amendment jurisprudence, as exemplified by Kyllo v. United States, also maintains that law enforcement officers are not allowed to use advanced technology to learn facts about the inside of a residence that were previously unknowable without physical entry. The issue in Kyllo was whether government-funded use of a thermal-imaging device “to detect relative amounts of heat” within a private home amounted to a “search” for purposes of the Fourth Amendment. In this case, government agents suspected that marijuana was being grown in the defendant’s home and decided to use a thermal-imaging device to scan the home to determine whether the heat emanating from the home was consistent with the use of high-intensity heat lamps typically used to grow marijuana plants indoors. On the basis of this heat scan, the government agents obtained a search warrant for the defendant’s home, and upon executing the warrant found a marijuana growing operation involving more than 100 marijuana plants. The defendant moved to suppress the evidence, claiming that the government agents violated his Fourth Amendment rights when they scanned his home with the thermal-imaging device. The Court held that “the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the

104 See Florida v. Jardines, 569 U.S. 1, 7–8 (2013) (drug dog sniffing the porch of a house); United States v. Whitaker, 820 F.3d 849, 852–53 (7th Cir. 2016) (drug dog sniffing the door of an apartment).
106 See id. at 34.
107 Id. at 29.
108 Id.
109 Id. at 30.
110 Id.
meaning of the Fourth Amendment” and that such a search violated the defendant’s Fourth Amendment rights.\textsuperscript{111}

While one might worry about the technology used in \textit{Kyllo}, it is more concerning that law enforcement agencies use even more advanced technologies for surveillance and have yet to fully disclose the details of these technologies. These technologies are much more intrusive than a drug-dog sniffing the outside of a door or a thermal scanner searching for heat signatures from across the street. News articles indicate that there are high-tech radar devices that allow police officers to effectively see through the walls of a house.\textsuperscript{112} These radars “work like finely tuned motion detectors, using radio waves to detect movements as slight as human breathing from more than 50 feet away. They can detect whether anyone is inside of a house, where they are and whether they are moving.”\textsuperscript{113} Other technologies that can map the interiors of buildings and locate the people within them are being developed by the Justice Department.\textsuperscript{114}

Unfortunately, police officers are doing more than simply surveilling residences from a public street. The bigger problem is that sometimes police officers are unlawfully and forcefully entering into private, limited-access buildings in the hopes of finding illicit substances or obtaining evidence of illegal activity.\textsuperscript{115} While it is established that a person growing marijuana in his home enjoys Fourth Amendment protection from thermal-imaging technology, it is still unclear whether a tenant living in an apartment building is free from unwarranted intrusions by law enforcement officers into the common areas of his or her apartment building. Extending Fourth Amendment protections to common areas in apartment buildings could prove vital to protecting tenants’ privacy and security interests from more intrusive technology and practices that will be utilized in the future, and ensuring justice is carried out fairly.

\textsuperscript{111} Id. at 29, 40.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Compare \textit{Kyllo} v. United States, 533 U.S. 27 (2001), \textit{with} United States v. Carriger, 541 F.2d 545 (6th Cir. 1976), \textit{and} McDonald v. United States, 335 U.S. 451 (1948); \textit{see also} United States v. Sweeney, 821 F.3d 893, 900 (7th Cir. 2016) (holding that Sweeney did not have any rights in basement crawl space of his multi-unit apartment from which police seized incriminating evidence).
IV. COURTS SHOULD RECOGNIZE THAT TENANTS HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE COMMON AREAS OF THEIR APARTMENT BUILDINGS

The Supreme Court has shown a commitment to protecting privacy in and around the home. This commitment could support an expansion of Fourth Amendment protection to tenants from unauthorized, warrantless searches by law enforcement officers in the common areas of apartment buildings. Specifically, this Part will demonstrate that the Supreme Court’s decision in Florida v. Jardines, along with the curtilage doctrine, can be used as a springboard for circuit courts to recognize that tenants have a constitutionally protected privacy interest in the common areas of their apartment buildings.

A. Supreme Court Precedent Supports Extending Fourth Amendment Protection to Common Areas in Apartment Buildings

Historically, courts have not extended curtilage protection to the common areas of multi-unit dwellings, though they have recognized curtilage protection of similarly proximate spaces surrounding single-family homes.116 The reason the circuit courts have been reluctant to grant curtilage to common areas might be because, to date, the Supreme Court has not ruled on the precise question of whether a tenant has a reasonable expectation of privacy within the common areas of their apartment building. The closest case that the Supreme Court has heard on this issue is Florida v. Jardines,117 but that case dealt with a single-family home. In Jardines, the police used a drug-sniffing dog to investigate the porch outside of the Jardines’ house based on a tip that marijuana was being grown inside.118 The dog alerted the police to the presence of marijuana and the police used that information to receive a warrant to search the residence.119 In finding the Jardines’ porch to be curtilage, the Court wrote:

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116 Compare United States v. Acosta, 965 F.2d 1248, 1256–57 (3d Cir. 1992) (arguing that courts may need to apply the Dunn factors differently in urban settings, and then holding that the backyard of an apartment building was not the tenants’ curtilage on the facts of the case), and United States v. Cruz Pagan, 537 F.2d 554, 558 (1st Cir. 1976) (holding that the parking garage of an apartment building was not the tenants’ curtilage, and stating that “[i]n a modern urban multifamily apartment house, the area within the ‘curtilage’ is necessarily much more limited than in the case of a rural dwelling subject to one owner’s control”), with United States v. Reilley, 76 F.3d 1271, 1279 (2d Cir. 1996) (finding that the curtilage of defendant’s home extended to a cottage located 375 feet from the main residence—a single-family home—because the entire property was enclosed by a fence).


118 Id. at 3–4.

119 Id. at 4.
At the [Fourth] Amendment’s very core stands the right of a [person] to retreat into [his or her] own home and there be free from unreasonable government intrusion. . . . We therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes.120

Interestingly, the Court did not apply the Dunn factors or any other test to determine that Jardines’ porch was curtilage. Instead, the Court cited Oliver stating that “the conception defining curtilage . . . is easily understood from our daily experience. . . . Here there is no doubt that the officers entered it.”121

There is no substantive reason to distinguish the front porch in Jardines from common areas in apartment buildings that are not open to the general public. Like the residents of a single-family home, tenants in an apartment building possess property interests in their locked common areas. If anything, locked common areas in apartment buildings deserve more protection than the front porch of a single-family home because they are generally more inaccessible and less visible to the general public. Of course, a greater number of people probably walk through a hallway of a typical apartment building each day than walk onto a single-family home’s porch. However, the quantity of people who have access to a common area is less important than the type of person who has access. What if there was a large single-family home that had ten, twenty, or thirty people living in it? For example, the owner of a single-family home could rent out several rooms in his or her home to multiple individuals or families through Airbnb. Under these circumstances, the owner’s right to privacy should not be questioned or diminished simply because there are more people living there than the average single-family home. On a related note, would it even matter whether all of the people living in a single-family home were actually related to one another? Probably not, since a family can take on many forms. Similarly, the fact that there are lots of people living in an apartment building should not completely discount an individual tenant’s right to privacy.

More importantly, both the front porch and the common areas in apartment buildings are “subject to entry, passage, and occupation by persons other than the resident in question.”122 Just as a resident in a single-family home expects various people—the mailman, the meter

120 Id. at 6 (internal quotation marks and citations omitted).
121 Id. at 7 (internal quotation marks omitted) (quoting Oliver v. United States, 466 U.S. 170, 182 n.12 (1984)).
122 Fifield, supra note 67, at 172.
maid, the pizza delivery person, the landscaper—to encroach onto their front porch/yard to some degree, the tenant in an apartment building expects various people—residents, their guests, the landlord, maintenance professionals—to legitimately enter their apartment building and have some level of access to their common areas, especially the hallways. The Court in *Jardines* recognized that “residents of any type of home may not always have the power, right, or ability to exclude others from the area immediately surrounding their home, yet that space is nonetheless protected as curtilage.” To that end, once an individual, particularly a law enforcement officer, has exceeded the scope permitted by the “license” to physically enter or pass through one’s property, it becomes an objectively unreasonable trespass and entitles the resident to Fourth Amendment protection.

Because of the similar characteristics between front porches and apartment common areas, courts should be more inclined to use *Jardines* to provide Fourth Amendment protection to tenants in apartment buildings. The power to exclude others should no longer be a determinative factor in whether a tenant should have Fourth Amendment protection in a common area of their apartment building. Instead, “the relevant inquiry is first whether the area in question is curtilage,” and then whether the non-resident, law enforcement officer is within the scope of his or her property right to be there.

The Seventh Circuit, perhaps most notably in its *Whitaker* decision, became the first appellate court to apply the *Jardines* ruling to the common area of an apartment building. In *Whitaker*, the court claimed to extend the *Jardines* analysis, noting that:

Whitaker’s lack of a right to exclude did not mean he had no right to expect certain norms or behavior in his apartment hallway. . . . [T]he fact that a police officer might lawfully walk by and hear loud voices from inside an apartment does not mean he could put a stethoscope to the door to listen to all that is happening inside. . . . This means that because other residents might bring their dogs through the hallway does not mean that police can park a sophisticated drug-sniffing dog outside an apartment door, at least without a warrant.

However, it was pointed out that the court in *Whitaker* based its rationale on the privacy interests in *Kyllo* rather than the property in-

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123 *Id.* at 173; see also *Jardines*, 569 U.S. at 6–7.
125 *Id.*
126 United States v. Whitaker, 820 F.3d 849, 853–54 (7th Cir. 2016).
terests in *Jardines*. Some argue that by applying the more open-ended reasonable expectations of privacy standard, *Whitaker* missed the opportunity “to extend the . . . property-based rationale and provide a stronger foundation for the equal allotment of Fourth Amendment protections.” Despite this, the *Whitaker* and *Jardines* decisions, taken together, hopefully indicate that more courts will begin to recognize common areas in apartment buildings as part of tenants’ curtilage.

The reasons courts should rely more on the curtilage doctrine in these cases rather than the reasonable expectation of privacy standard are not discussed enough. One reason for relying more on the curtilage doctrine is that protecting privacy through the reasonable expectation of privacy doctrine is prone to circumvention. It has already been established that a determination of a subjective expectation of privacy can sometimes be preempted by the determination that the objective expectation of privacy was unreasonable. If Fourth Amendment protections are based on subjective expectations of privacy, then changing people’s expectations would allow for greater government intrusion. To provide an extreme example, what is stopping the government from issuing a statement in a press conference that people should no longer expect privacy in the common areas of their building? The likely answer is fear of public and legislative blowback. Also, public expectations of privacy do not shift overnight. Still, it will be important for courts to keep both the inevitable advancement of technology and the flaws of the existing reasonable expectations of privacy standard in mind when trying to develop a sustainable and flexible Fourth Amendment standard that can effectively apply to and resolve a growing number and variety of situations within the multi-unit dwelling context.

128 Id. at 1043–44.
129 See United States v. Acosta, 965 F.2d 1248, 1252 (3d Cir. 1992) (holding that the resident of an unlocked apartment building lacked an objectively reasonable expectation of privacy in the building’s common areas); United States v. Nohara, 3 F.3d 1239, 1241 (9th Cir. 1993) (“It is unclear whether Nohara had a subjective expectation of privacy in his building and hallway. However, we need not decide this issue because we conclude that any expectation Nohara might have had is not one that society recognizes as reasonable.”).
130 See Matthew B. Kugler & Lior Jacob Strahilevitz, The Myth of Fourth Amendment Circularity, 84 U. CHI. L. REV. 1747, 1812 (2017) (finding that popular expectations of privacy are not highly responsive to changes in legal rules; they are stubborn); see also Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979) (“In such circumstances, where an individual’s subjective expectations had been ‘conditioned’ by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.”).
B. Extending Fourth Amendment Protection to Common Areas in Apartment Buildings is Good Public Policy

Extending the protections of the Fourth Amendment to common areas in apartment buildings can not only be supported by precedent, but it is also good public policy. Fourth Amendment privacy rights should not depend on a person’s style of housing. Having two different Fourth Amendment standards—one for single-family homes and one for apartments—affects the poorer citizens in society because they are more likely to live in apartments.131 While this Comment realizes that there are affluent people who live in apartments and less affluent people who live in single-family homes, it is more likely that one makes less money if one lives in the former than if one lives in the latter. In 2016, the median income for renter-occupied households was $37,264, while the median income for owner-occupied households was almost twice that amount at $73,127.132 The disparity in Fourth Amendment protection could also be framed as an urban versus rural, rather than a rich versus poor, dynamic. However, these two sets of contrasting characteristics most accurately depict the extent of Fourth Amendment protection when they are combined together. The urban poor, in particular, are uniquely positioned to experience the inequities of the Fourth Amendment as compared to their wealthier, rural or suburban counterparts.133 Some argue that the deficiency is so great that a “poverty exception” to the Fourth Amendment exists in our jurisprudence.134 Thus, extending privacy to common areas in apartments could help combat the uneven distribution of Fourth Amendment protection perpetuated by geographical and class dynamics.

131 See Lewis, supra note 103, at 306 n.229 (“Poor tenants, especially minorities, are much more likely to live in neighborhoods subject to close police scrutiny and are, therefore, more likely to feel the sting of unbridled police discretion.”); David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 IND. L.J. 659, 678 (1994) (minorities are disproportionately more likely to be stopped and frisked).


133 See generally William J. Stuntz, The Distribution of Fourth Amendment Privacy, 67 GEO. WASH. L. REV. 1265, 1272 (1999) (explaining that while poverty is not exclusively an urban phenomenon, concentrated urban poverty creates its own set of issues—those who live in cities tend to live in apartment buildings and spend more time on the street, two situational contexts that afford them less privacy); see also Kami Chavis Simmons, Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 240, 272 (2014) (explaining that there is also a racial component to the distribution of Fourth Amendment privacy rights).

134 See Christopher Slobogin, The Poverty Exception to the Fourth Amendment, 55 FLA. L. REV. 391, 406–07 (2003) (positing that an implicit but very real “exception” to the Fourth Amendment exists and that, even though Supreme Court case law sounds neutral on its face, its effect is discriminatory upon urban poor residents for whom privacy protections were not designed).
Also, ensuring broad privacy protection allows for a more equitable balance between the needs of law enforcement and the Fourth Amendment interests of tenants. Extending the scope of Fourth Amendment protection to cover the common areas of an apartment building does not restrict the ability of law enforcement officers to do their jobs because they are still free to enter and search the common areas of apartment buildings if they obtain permission from a landlord or another person with the authority to grant access to the property (e.g., the board of directors of a condominium or homeowners association). Moreover, preventing law enforcement officers from entering and searching common areas of apartment buildings without a warrant or permission from a landlord protects the privacy interests of the tenants.

Here, critics might argue that expanding Fourth Amendment protections to apartment building common areas would not protect the privacy interests of all tenants. Critics would point out that there are some tenants who would prefer to grant law enforcement officers greater access to their building and thus, have less privacy, if that meant lowering or preventing crime in their apartment building. However, it is not clear whether granting law enforcement more access to the common areas of apartment buildings would lead to lower or even prevent crime. In some circumstances, granting law enforcement more access to the common areas of apartment buildings could create more problems than it solves. There is no doubt that if we relaxed restrictions on search and seizure, more people would end up in prison. Granted, that would probably mean that more people who deserved to be in prison were being sent to prison, but that would also probably mean that more innocent people, or people not intended to be the target of particular laws (e.g., a person who recreationally smokes marijuana in the privacy of his home as compared to a major cocaine dealer), would be sent to prison as well.

One solution might be for property managers or landlords of apartment buildings to adopt a policy or a rule granting access to police to the common areas of the apartment building. On one hand, adopting such a policy or rule would give notice to the tenants and would likely reduce their expectation of privacy in the common areas of the apartment building. Such an approach may also more effectively

135 See Monica Davey, Chicago to Hire Many More Police, but Effect on Crime Is Debated, N.Y. TIMES (Sept. 21, 2016), https://www.nytimes.com/2016/09/22/us/chicago-to-hire-many-more-police-but-effect-on-crime-is-debated.html [https://perma.cc/H3V5-Z4KY] ("[P]olicing experts and criminologists say that increasing the size of a police force does not ensure a decrease in crime. Jim Bueermann, the president of the Police Foundation, a nonprofit group focused on improving policing, said that once a police department reached a needed minimum number of officers, the equation was not as simple as more police equals less crime.")
deter tenants from conducting criminal activities on the premises. On the other hand, law enforcement officers’ power under such a policy could go unchecked and result in the routine violation of Fourth Amendment rights. This is what happened in Operation Clean Halls, one of the New York Police Department’s stop-and-frisk programs that allowed law enforcement officers to patrol thousands of private apartment buildings, most of which were inhabited by Black and Latino tenants, across New York City.\footnote{See Julie Turkewitz, In New York, a 20-Year-Old Policy Suddenly Prompts a Lawsuit, THE ATLANTIC (May 1, 2012), https://www.theatlantic.com/national/archive/2012/05/in-new-york-a-20-year-old-policy-suddenly-prompts-a-lawsuit/256584/ [https://perma.cc/9ATF-EVVN].} At the very least, one could argue that this approach would allow some tenants to self-select out of or into the apartment building that best reflected their views on privacy. It is important to keep in mind, however, that low-income tenants often lack the financial resources to actually self-select out of or into an apartment building of their choice, so an alternative solution might be required.

Perhaps this issue could be resolved through legislative means rather than through the judiciary. Congress or a state legislature could, in theory, pass a law that granted law enforcement officers unfettered access to the common areas of multi-unit buildings and relieve the courts of having to deal with this circuit split. However, much like the government trying to change popular expectations of privacy overnight with a radical press announcement, practical realities suggest that fear of public blowback to such policy changes, harbored by either Congress or, to a lesser extent, property managers and landlords, would likely prevent either scenario from happening.

As a matter of public policy, society should not declare that tenants who choose to live in apartment buildings lose all legitimate claims of privacy in the common areas of their apartment building because of their proximity to other tenants and their guests. While tenants neither do nor should expect to enjoy complete privacy in the common areas of their buildings, a tenant’s reasonable expectation of privacy in those areas should be treated as a more substantive protection against warrantless and permission-less searches by law enforcement officers than it is today. Additionally, with the continuous advancement of technology and the increasing ease of government intrusion, extending protections to the common areas in apartments could help create a level playing field between those individuals who live in apartments and those who live in single-family homes. In short, the privacy and security interests an individual has in the areas close to the home do not disappear merely because that individual lives in an apartment building or another type of multi-unit dwelling.
Similarly, courts should not immediately dismiss tenants’ privacy interests and claims because they are not absolute.\textsuperscript{137} To say that common areas, which are open to use by other tenants and their guests, offer no shield of privacy or protection ignores practical reality.\textsuperscript{138} Certainly, an apartment garage that is only open to tenants that have paid an additional monthly fee and acquired the appropriate means of access (e.g., a keycard) offers those tenants a certain level of privacy and protection from other tenants who have not paid that additional fee and especially from the general public. Cases mentioned in this Comment show that tenants do rely on the privacy of locked common areas and are consequently led to deposit various items in designated private storage areas, at the end of hallways, or in stairwells, albeit with improper motives.\textsuperscript{139} Consequently, Fourth Amendment jurisprudence should make room to protect tenants’ privacy interests where tenants have taken precautions to exclude unauthorized persons from the common areas of their apartment buildings.

The Fourth Amendment confers “[t]he right of the people to be secure in their persons, houses, papers and effects” and does so without distinguishing among the types of dwellings that may comprise “houses.” The protections of the Fourth Amendment are too strong and too important for our courts to grant them in an unequal and unjust manner. It is bad enough to think that law enforcement officers are conducting unlawful searches in and around our homes. However, it might be worse knowing that they are searching some of our homes—apartment buildings—and not others.

V. NEW PERSPECTIVES THAT CAN HELP RESOLVE THE CURRENT CIRCUIT SPLIT

A. Four Alternative Models of Fourth Amendment Protection

Courts have long used the reasonable expectation of privacy standard to define searches under the Fourth Amendment, albeit to the chagrin of most scholars in the legal community. As many have realized, the doctrine is subjective, unpredictable, and sometimes confusing.\textsuperscript{140} However, viable alternatives to the reasonable expectations

\textsuperscript{137} See McDonald v. United States, 335 U.S. 451, 458 (1948) (Jackson, J. concurring) (“[E]ach tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry.”).

\textsuperscript{138} See, e.g., United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977) (“The locks on the doors to the entrances of the apartment complex were to provide security to the occupants.”).

\textsuperscript{139} See, e.g., United States v. Carriger, 541 F.2d 545, 548 (6th Cir. 1976).

\textsuperscript{140} See, e.g., ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 46 (2003) (“How do we know what society is prepared to
of privacy standard, while slow to emerge, have been discussed and are available for consideration. According to Orin Kerr, there are four alternative models of Fourth Amendment protection that the Supreme Court should recognize: (1) a “probabilistic model,” (2) a “private facts model,” (3) a “positive law model,” and (4) a “policy model.” Kerr provides a summary of what each model entails:

The probabilistic model considers the likelihood that the subject’s information would become known to other or the police. The lower the likelihood, the more likely it is that a reasonable expectation of privacy exists. The private facts model asks whether the government’s conduct reveals particularly private and personal information deserving of protection. This approach focuses on the information government collects rather than how it is collected. The positive law model considers whether the government conduct interferes with property rights or other legal standards outside the Fourth Amendment. When courts apply the positive law model, an expectation of privacy becomes reasonable when it is backed by positive law such as trespass. The fourth and final model, the policy model, reflects the direct approach. Courts applying the policy model focus directly on whether the police practice should be regulated by the Fourth Amendment.

Each of these models of Fourth Amendment protection have their own strengths and weaknesses. Because of this, Kerr argues that having multiple models of Fourth Amendment at one’s disposal is better than having only one model. Kerr explains that no one model can provide the exclusive guide to Fourth Amendment protection: each model works quite well in some cases and fails in others. For example, the policy model identifies police practices that are reasonable per se and separates those from intrusive police practices that could only be reasonable in certain situations. When a court applies the policy model, it determines whether a range of practices should be regulated. However, no consistent method exists for identifying the proper range

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142 Id. at 506.
143 Kerr discusses the strengths and weaknesses of each of these models, but this Comment does not discuss them in detail.
144 Id. at 534.
145 Id. at 536.
146 Id. at 537.
of practices, which means that courts are unlikely to pick the same range. This leads to inconsistent rules being developed in the court system. Consequently, “the policy model cannot provide an exclusive guide to Fourth Amendment protection.”

Unlike Kerr, Professors William Baude and James Y. Stern argue that Fourth Amendment protection should be based solely on the positive law model. Rather than focusing on whether the expectations of privacy are reasonable for an individual or a place, the positive law model focuses on government actors and their actions. The question the positive law model asks is: “[H]as a government actor done something that would be unlawful for a similarly situated nongovernment actor to do?” If we apply the positive law model to the facts in Kyllo, for example, the question we would ask would be something like: Would an ordinary citizen breach any kind of legal duty by using a thermal-imaging device that detects relative amounts of heat to learn about what is going on inside a stranger’s house?

When determining whether there has been a violation of the Fourth Amendment, courts could first ask whether law enforcement officers have committed an act that is tortious, criminal, or violative of some legal duty. For example, whether the law enforcement officer was trespassing on the property would be vitally important in determining whether there was an unconstitutional search or not. This would depend on whether the law enforcement officer received permission or consent from a party authorized to give such permission or consent before entering the premises. From there, the courts could move on to reasonable expectation of privacy and curtilage considerations. Whether this or another approach is adopted, a systematic progression of evaluative steps could be valuable in assigning Fourth Amendment protection.

Regardless of whether one believes in multiple models or a single model of Fourth Amendment protection, there is sufficient reason to believe that the underlying analysis employed by the circuit courts might benefit from a reexamination of the reasonable expectation of privacy.

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147 Id.
148 Id.
149 See William Baude & James Y. Stern, The Positive Law Model of the Fourth Amendment, 129 HArv. L. Rev. 1821, 1823 (2016) (“We argue that Fourth Amendment protection should be anchored in background positive law... In short, Fourth Amendment protection should depend on property law, privacy torts, consumer laws, eavesdropping and wiretapping legislation, anti-stalking statutes, and other provisions of law generally applicable to private actors, rather than a freestanding doctrine of privacy fashioned by courts on the fly.”).
150 Id. at 1831.
151 Id. at 1876.
privacy standard and a greater focus on different evaluative perspectives on Fourth Amendment protection.

B. Locked or Unlocked: A Relevant but Non-Determinative Factor

Another way that courts can help clear up some of the confusion in this space is by not making Fourth Amendment protection depend on whether a common area is locked or unlocked. Most cases and legal scholarship have explored Fourth Amendment protection in the locked common space context. However, the distinction between locked and unlocked common areas is arbitrary and represents unnecessary line-drawing. Interestingly enough, the problems that this distinction creates have seemingly been overlooked by the courts. Looking back to Katz, this Comment argues that the outcome of the case should not have depended on whether the door to phone booth was closed or open, locked or unlocked. If the door to the phone booth had been left slightly ajar, the wiretapping of the phone booth would likely still have been a violation of the defendant’s privacy. Also, the walls of a phone booth are typically made of glass. Thus, the contents of a phone booth are inherently available for the public to see. The defendant might reasonably expect for his conversation to not be heard, but surely, he could not commit some criminal act inside of the phone booth and expect to maintain his privacy. Why should the rule focus on the closing and/or locking of a door rather than focus on whether the walls of a space are see-through? It seems absurd to think that the reasonable expectation of privacy test would protect the privacy of someone living in a glass house with locked doors more so than the privacy of someone in an apartment common area with regular walls but unlocked doors.

That said, the inherent differences between a phone booth and an apartment common area do not go unnoticed. The biggest difference, possibly, is that people using a phone booth are not expecting someone else to be in the phone booth with them when they are using it, whereas people in a common area of an apartment do and should expect others to share that space with them sometimes. However, if courts are going to use a reasonable expectation of privacy standard, they should apply it more fairly and to do that, the locked-unlocked distinction should not be as determinative of a factor as it is.

152 See Lewis, supra note 103, at 277.

153 One’s reasonable expectation of privacy is contextual to the means of surveillance. Some read Katz to say that there is a reasonable expectation of privacy versus a wiretap, but not versus a trained lipreader. See John M. A. DiPippa, Searching for the Fourth Amendment, 7 UALR L. J. 587, 616 (1984).
One can see how having this distinction can be detrimental to the efforts to protect privacy by slightly changing the facts of a case that this Comment has already discussed. For example, take the facts of *Carriger* and suppose that, instead of the police gaining entry to the apartment by catching a door before it closed, the police had found one of the two doors to the defendant’s apartment building to be unlocked. Maybe, someone forgot to lock the door behind them, the buzzer system was on the fritz, or the lock on the door was broken.\textsuperscript{154} A tenant in that apartment building should be afforded the same reasonable expectation of privacy when the door to the apartment building is locked as when the door to the apartment building is presumed to be locked, but actually is not. A tenant’s expectation of privacy should not depend on an ex post evaluation of the apartment building door’s locking mechanism. Rather, a tenant’s reasonable ex ante beliefs as to the accessibility and security of the apartment building should be the key to his or her expectation of privacy. This Comment is not suggesting that a court should never consider whether a door was locked or not when determining the extent of an individual’s expectation of privacy; the locked-unlocked factor is a relevant consideration. However, courts should realize that, often, it is outside a tenant’s control whether the door to his or her apartment building is actually working properly. It is even more outside the tenant’s control if a locked door is bypassed by the police through illegitimate means. Maybe, the fact that a tenant cannot control whether an apartment building door is actually locked makes the majority’s position easier to accept, but this does not seem fair. By analogy, an individual living in a single-family home cannot completely control who opens the gate to their yard, especially if the lock on the gate is broken or, as the mailman leaves, the gate is caught before it closes, yet he or she is still afforded an expectation of privacy in his or her yard and home.

In addition, granting Fourth Amendment protection based on a space being locked incentivizes law enforcement to gain entry through manipulation, guile, or force. Several cases mentioned in this Comment involve instances in which police gained entry into the defendant’s apartment building through illegitimate means, including catching the door to the building as someone left before it closed and preventing a garage door from closing by parking their vehicle over the electronic sensor.\textsuperscript{155} These cases should illustrate that just because

\textsuperscript{154} See United States v. Conti, 361 F.2d 153, 157 (2d Cir. 1966) (testimonies indicated that the lock on the apartment building door was broken).

\textsuperscript{155} See United States v. Carriger, 541 F.2d 545, 548 (6th Cir. 1976) (catching the door before it closes); State v. Dumstrey, 873 N.W.2d 502, 506 (Wis. 2016) (preventing garage door from closing).
an unlocked door can be opened does not mean that it should be opened. A tenant can reasonably expect people like the landlord, other tenants, and invited guests to have unrestricted access to the common areas of the building, but he or she does not expect trespassers or law enforcement officers to have the same level of access.\textsuperscript{156}

The biggest counterargument is that many circuits have already addressed the question of whether a tenant has a reasonable expectation of privacy in unlocked common areas within an apartment building and have held that there is no Fourth Amendment privacy interest.\textsuperscript{157} Perhaps, a greater focus on the trespass doctrine and other legal concepts like fraud could help combat the majority’s stout position. Nevertheless, for the aforementioned reasons, the locked-unlocked distinction should be revisited.

Further, the concept of an apartment should be redefined: common areas of an apartment should be considered extensions of an apartment. Tenants should be able to feel safe and secure from unwarranted intrusions in the common areas of their apartment, regardless of whether those areas are actually locked or not. Just as one would not expect people living in a house to make sure that they locked the door to their living room (if applicable), or their garage, or laundry room to ensure that their privacy was protected, one should not expect tenants in an apartment building to ensure that the common areas in their buildings are locked. Clearly, tenants who live in a multi-unit apartment building that is open to hundreds of tenants, visitors, workers, and others who have regular access to the common areas in the building have a lesser expectation of privacy than people who live in a single-family home where only their family has access. This Comment is simply saying that the Fourth Amendment gap between the two groups is not as wide as it appears. The privacy protect-

\textsuperscript{156} Law enforcement officers can be invited guests, such as when a tenant calls 911 and expects the police to come to their apartment, but the real problem is when those same officers enter the building without any kind of invitation or authorization.

\textsuperscript{157} See Lewis, supra note 103, at 274 n.5 (“The First Circuit holds that there is no Fourth Amendment privacy interest in unlocked common areas.”); see also United States v. Hawkins, 139 F.3d 29, 32 (1st Cir. 1998) (“It is now beyond cavil in this circuit that a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building.”) (citing United States v. Cruz Pagan, 537 F.2d 554, 557–58 (1st Cir. 1976) (holding, in a case of first impression, that the defendant’s Fourth Amendment rights were not violated when agents entered the apartment building’s garage without a warrant, because defendant had no reasonable expectation of privacy in the garage)). The Third Circuit interprets the Fourth Amendment in this manner as well. See United States v. Acosta, 965 F.2d 1248, 1252 (3d Cir. 1992) (holding that a tenant’s zone of privacy protected by the Fourth Amendment does not extend to the unlocked, common hallways of apartment buildings). Similarly, the Fifth Circuit does not interpret the Fourth Amendment to protect unlocked common areas. See United States v. Clark, 67 F.3d 1154, 1162 (5th Cir. 1995) (holding that there can be no reasonable expectation of privacy in an exterior breezeway of an apartment building that is “neither enclosed nor locked”).
tions a tenant receives should not turn on his or her ability to lock a
door or maintain complete control of a space. Instead, courts should
first look to whether law enforcement officers had probable cause to
count the search, whether they had a warrant (or an exception ap-
plied), and/or whether they had permission to enter the premises.

VI. CONCLUSION

For over half a century, the reasonable expectation of privacy
standard has been the coat of arms under which the Fourth Amend-
ment has marched, seemingly ignorant of the changes imposed on res-
idential life by the ever-evolving urban landscape. The standard, how-
ever, is ambiguous and unpredictable, suffering from a dependence on
highly subjective analyses of context and disputed facts. The Supreme
Court’s commitment to protecting privacy interests in and around the
home through concepts like curtilage calls for an interpretation of the
Fourth Amendment that provides multi-unit tenants with a property-
based, rather than a privacy-based protection, in the common areas of
their apartments from unreasonable searches and seizures. As the
weight of precedent on each side of the current circuit split grows,
there will be an increasing need for the Supreme Court to resolve this
important Fourth Amendment issue.

Accordingly, the Court should reevaluate its position on the rea-
sonable expectation of privacy standard and consider other models of
Fourth Amendment protection. Moreover, the distinction between
locked and unlocked common areas should not be a differentiating fac-
tor when it comes to providing Fourth Amendment protection. Overall,
a more systematic approach to determining whether Fourth Amend-
ment protection applies would help both tenants and law enforcement
better navigate the contours of privacy within the home.

Additionally, expanding Fourth Amendment protections to the
common areas of apartment buildings is good public policy. An indi-
vidual’s Fourth Amendment privacy rights should not depend on the
style of housing that he has chosen, or in which he has been forced to
live. Having a more protective Fourth Amendment standard for sin-
gle-family homes and a less protective Fourth Amendment standard
for apartment buildings disproportionately affects the less fortunate in
our society because they are more likely to reside in apartments. Also,
just because a tenant in an apartment building does not have exclu-
sive control over a common area, such as a hallway, garage, or laundry
room, does not mean that courts should not consider these common
areas as part of the curtilage of the tenant’s home. A more uniform
treatment of the American residential landscape, including the areas
in and around homes, would ensure that the less fortunate in our society are treated with the dignity and respect that they deserve.