DO RESIDENTS OF MULTI-UNIT DWELLINGS HAVE FOURTH AMENDMENT PROTECTIONS IN THEIR LOCKED COMMON AREA AFTER *FLORIDA V. JARDINES* ESTABLISHED THE CUSTOMARY INVITATION STANDARD?

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I. INTRODUCTION

Millions of Americans do not realize that one of their constitutional rights is threatened simply by choosing to live in multi-unit dwellings.[1] People choose to live in multi-unit dwellings for a variety of reasons, including because they desire to live in an urban environment, but also because they belong to a lower socio-economic class.[2] The law regarding warrantless searches treats these habitants differently from those who live in typical, single-family homes with a yard, a porch, and a clear path to the front door.[3] The government knows and exploits this fact to obtain search warrants that they would not otherwise be able to obtain.[4] The Fourth Amendment of the Constitution protects Americans from unreasonable searches of their premises by requiring that no officers issue warrants without probable cause.[5] The law firmly establishes that a police officer cannot establish probable cause by trespassing onto property or using implements that are not available to the public to gain insight as to what may be occurring inside a home.[6] Examples of such implements include thermal imagers, and in some cases, drug sniffing

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1. *See* Sean M. Lewis, *The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?*, 101 MICH. L. REV. 273, 277 (2002) (discussing the difference between the circuits and the housing choices); *see also* Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 386 (2010) (asserting that poverty lowers the Fourth Amendment protection thresholds).

2. Sam Frizell, *The New American Dream Is Living in a City, Not Owning a House in the Suburbs*, TIME (Apr. 25, 2014), http://time.com/72281/american-housing/; *see also* Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 402–07 (2003) (suggesting that poorer Americans live in multi-unit buildings not by choice, but because these are the only affordable homes for them).

3. *See* Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 HASTINGS CONST. L.Q. 297, 303 (2011).

4. *See* Budd, *supra* note 1, at 386 (arguing that the government may perform warrantless searches on those Americans receiving welfare to ensure no fraudulent activities are occurring).

5. U.S. CONST. amend. IV:

> 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.

Id.

6. *See* Kyllo v. United States, 533 U.S. 27 (2001); United States v. Jones, 132 S. Ct. 945 (2012); Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).

canines.[7] Despite this, in countless cases, police have conducted warrantless searches in the common areas of multi-unit buildings to establish the probable cause necessary to secure a search warrant even when probable cause was not present.[8]

However, in *Florida v. Jardines*, the Supreme Court recently explored what constitutes a search.[9] The Court determined that a search occurs when the police exceed the implicit license of that property, as established by a reasonable resident and applied to all uninvited visitors.[10] This Note analyzes whether lower courts' application of *Jardines'* customary invitation standard, a property-based qualification test, should be applied to multi-unit buildings and, if so, whether *Jardines* limits the government's actions as to establishing probable cause and creates a higher burden for the government to obtain a warrant.[11] Furthermore, this Note discusses whether *Jardines* erodes owners' and tenants'[12] common-law trespass protections, or if the customary invitation standard reinforces residents' protections for the common area outside an entry door from unwarranted government investigation.[13]

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7. *Id.*

8. *See generally* United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977) (ruling that there is no reasonable expectation of privacy in an apartment hallway even though the building was locked and entry was gained by following another tenant who unlocked the door); United States v. Barrios-Moriera, 872 F.2d 12, 14 (2d Cir. 1989) (finding no reasonable expectation of privacy in a hallway enclosed by a locked door); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991) (holding that there is no reasonable expectation of privacy in the common areas of an apartment building); United States v. Acosta, 965 F.2d 1248, 1253 (3d Cir. 1992) (holding that there is no reasonable expectation of privacy in an inner hallway that is accessible via an unlocked door); United States v. Hawkins, 139 F.3d 29, 32–33 (1st Cir. 1998) (holding that there is no reasonable expectation of privacy in a basement common area); United States v. Espinoza, 256 F.3d 718, 723 (7th Cir. 2001) (ruling that no reasonable expectation of privacy exists in common areas of multi-family buildings); United States v. Miravalles, 280 F.3d 1328, 1333 (11th Cir. 2002) (finding that there is no reasonable expectation of privacy in common areas of a high-rise apartment building where the lock on the building's door was inoperable on the relevant date); United States v. Dillard, 438 F.3d 675, 682 (6th Cir. 2006) (holding that there is no reasonable expectation of privacy in a duplex's common hallway where doors were unlocked and ajar); United States v. Villegas, 495 F.3d 761, 766–68 (7th Cir. 2007) (holding that a tenant has no reasonable expectation of privacy in a common hallway of a duplex); United States v. Correa, 653 F.3d 187, 191–92 (3d Cir. 2011) (reasoning that locked exterior doors do not give rise to a reasonable expectation of privacy in a building's common areas).

9. *Jardines*, 133 S. Ct. at 1417.

10. *Id.* (noting the new customary invitation standard).

11. *Id.*

12. Hereinafter "residents."

13. *Id.*

Further, the customary invitation standard is not the only standard courts use in determining whether a search has occurred under the Fourth Amendment. In *Katz*, through Justice Harlan's concurring opinion, the Court established a two-prong *reasonable expectation of privacy* test to determine Fourth Amendment protections.[14] The first prong is a subjective interpretation, while the second prong is an objective interpretation.[15] This Note proclaims that courts should expand the objective prong of the *reasonable expectation of privacy* test to recognize that a locked common area is afforded an expectation of privacy. While courts are split as to whether a locked common area is an area which society would recognize as having a reasonable expectation of privacy,[16] the view on this objective standard should instead reflect both current societal views and urban development throughout the United States. As a result, courts should expand the objective standard to better align with the societal norms of today.

In order to predict where and how courts may apply the customary invitation standard in the future,[17] the background of Fourth Amendment jurisprudence and relevant doctrine must be discussed. Therefore, this Note contains a relevant background discussion of the Fourth Amendment separated into four sections: (1) an examination of case law surrounding how police officers conducted searches historically, and the issue of trespass, (2) an examination of modern era case law and its application to searches, (3) a background of the *reasonable expectation of privacy threshold* test, and (4) a background of the modern view of the trespass threshold.[18]

In addition, this Note describes the relationship between locked common areas and the established judicial doctrine, particularly in the Second and Sixth Circuits, to analyze whether Fourth Amendment protections apply to locked common areas.[19] It discusses whether courts should apply a presumption of an expectation of privacy in locked common areas. It then answers whether, under the Fourth Amendment, locked common areas are protected and whether the amendment affords this protection due to the curtilage doctrine or due to other judicial concepts. In addition, it considers whether *Jardines* aligns with the

14. Katz v. United States, 389 U.S. 347, 357 (1967) (Harlan, J., concurring).

15. *Id.*

16. *See* United States v. Nohara, 3 F.3d 1239 (9th Cir. 1993); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991); *but see* United States v. Carriger, 541 F.2d 545, 552 (6th Cir. 1976); United States v. Thomas, 757 F.2d 1359, 1366–67 (2d Cir. 1985).

17. *Id.*

18. *See infra* Part II.

19. *See infra* Part III.

already-established jurisprudence of the Second and Sixth Circuits. Moreover, this Note considers whether *Jardines* should be combined with other Fourth Amendment tests to establish Fourth Amendment protections within a locked common area. A brief analysis of post-*Jardines* cases establishes how lower courts have applied *Jardines*. Finally, this Note considers what *Jardines* may mean for the future and how courts may use the customary invitation standard to ensure Fourth Amendment protections for residents of locked common areas in those circuits that once believed that government intrusion into these areas was neither a violation of property-based trespass law nor a violation of the resident's reasonable expectation of privacy.

II. BACKGROUND

"It is a measure of the Framers' fear that a passing majority might find it expedient to compromise [Fourth] Amendment values that these values were embodied in the Constitution itself."[20]

The Fourth Amendment of the United States Constitution provides protection from unreasonable searches.[21] The purpose of the Fourth Amendment is deeply rooted in the founding fathers' beliefs that the right to privacy is too valuable to entrust to the discretion of the government,[22] a fact that the Supreme Court has not taken lightly in interpreting this constitutional right.[23] Moreover, the Founding Fathers highly valued a citizen's right to protection of in-home privacy from government intrusion, a sentiment the Supreme Court has continued to uphold.[24] In upholding these ideals, the Supreme Court has established

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20. Illinois v. Krull, 480 U.S. 340, 365 (1987) (O'Connor, J., dissenting).

21. U.S. CONST. amend. IV:

> 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.

Id.

22. *See* McDonald v. United States, 335 U.S. 451, 455–56 (1948).

23. *Id.* (citing United States v. Jeffers, 342 U.S. 48, 51 (1951) (the Supreme Court has emphasized that the Fourth Amendment "requires adherence to judicial processes")); *see also* Jones v. United States, 357 U.S. 493, 497 (1958) (searches conducted without judicial approval are per se unreasonable under the Fourth Amendment, subject to a few established exceptions) (internal citations omitted).

24. *See McDonald*, 335 U.S. at 455–56 (reasoning that the right to privacy was not only deemed too valuable by the founding fathers to entrust to the discretion of the government, but also requires a "magistrate between the citizen and the police [so that] an objective mind might weigh the need to invade that privacy in order to enforce the law").

two standards to determine whether a search has occurred under the Fourth Amendment-a trespass standard and a reasonable expectation of privacy standard.[25]

This section discusses the origin and history of searches and how early Supreme Court decisions interpreted searches including an in-depth discussion of *Boyd v. United States*[26] and *Olmstead v. United States*.[27] Furthermore, this section discusses modern era searches and the Supreme Court's Fourth Amendment jurisprudence. The discussion of modern era searches focuses on the reasonable expectation of privacy standard from the landmark case *Katz v. United States*[28] as well as the curtilage and open fields doctrines as examined through *Oliver v. United States*[29] and *Dunn v. United States*.[30] Moreover, this section concludes with an examination of modern era property right theory focusing on the landmark cases of *United States v. Jones*[31] and *Florida v. Jardines*.[32]

A. Searches – In the Beginning

The common law claim of trespass originated in England during the thirteenth century.[33] Under English law, a defendant who committed any wrong, including entering another's land, was subject to a fine for damages.[34] The English Court did not distinguish between tort law and criminal law and thus emphasized civil remedies for all violations.[35] However, as English law evolved, Parliament in the late Fourteenth Century established criminal statutes, thereby creating a judicial action, for forcible entry onto real property.[36] By the Eighteenth Century, a series of English cases explicitly recognized common-law criminal trespass as a crime.[37] Accordingly, since the American Revolution,

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25. *See id.*; *see also* Katz v. United States, 389 U.S. 347, 357 (1967) (Harlan, J., concurring).
26. Boyd v. United States, 116 U.S. 616 (1886).
27. Olmstead v. United States, 277 U.S. 438 (1928).
28. *Katz*, 389 U.S. at 357 (Harlan, J., concurring).
29. *See* Oliver v. United States, 466 U.S. 170, 182 (1984).
30. United States v. Dunn, 480 U.S. 294 (1987).
31. United States v. Jones, 132 S. Ct. 945 (2012).
32. Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).
33. *Id.*
34. *See* CRIMINAL TRESPASS – HISTORICAL BACKGROUND, http://law.jrank.org/pages/2201/Trespass-Criminal-Historical-background.html (last visited Feb. 7, 2016).
35. *See id.*
36. *See id.*
37. *See id.*

individual states have adopted common law criminal trespass and the prohibition of forcible entry.[38]

Over the years, the Supreme Court has wrestled with the notion of what constitutes the threshold for determining when a search has occurred. The Court's earliest landmark case on the issue, *Boyd v. United States*, set threshold criteria that lasted for nearly forty-two years.[39] The *Boyd* Court held that a court order requiring an individual to produce incriminating business invoices qualified as a search and was therefore protected under the Fourth Amendment umbrella.[40] The *Boyd* Court's decision was expansive and relied on reasoning beyond papers or property but instead into privacy and personal liberty:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence change.[41]

In 1928, the Court granted *certiorari* to *Olmstead v. United States*, in which the Court changed its criteria from *Boyd's* expansive, non-physically invasive search threshold to a narrower, property-based threshold.[42] The *Olmstead* majority held that for there to be a search, the government must have caused an actual physical invasion of a person,

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38. *See id.*

39. Boyd v. United States, 116 U.S. 616 (1886).

40. *Id.* at 622:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.

Id.

41. *Id.* at 630.

42. Olmstead v. United States, 277 U.S. 438 (1928).

home, paper, or effect or a trespass upon a protected location.[43] Reinforcing *Olmstead's* actual physical invasion threshold, in the 1948 case, *McDonald v. United States*, the Supreme Court held that tenants' Fourth Amendment protection is based upon the narrow view of common law trespass as applied to real property.[44] The *McDonald* Court held that a search is unconstitutional if government agents establish probable cause only after breaking into a rooming house.[45] Petitioner Earl McDonald, who rented a room in a rooming house, had been under police surveillance for two months.[46] Three police officers, without an arrest or search warrant, surrounded the rooming house in mid-afternoon.[47] While outside the residence, an officer thought that he heard a machine known for its use in illegal gambling.[48] Acting on this suspicion, an officer entered the house through a window.[49] Once inside, the officer identified himself to the landlord, who did not grant permission to the officers to enter the rooming house. The officer nevertheless let the other two officers inside.[50] Together, they searched the first floor.[51] Discovering nothing, the officers moved to the second floor, where, at the end of a hallway, they found a closed bedroom door.[52] An officer stood on a chair and peered inside the room where he observed McDonald with money, betting slips, and an adding machine.[53]

In his concurring opinion, Justice Jackson clarified that the officers did not have probable cause to enter the premises.[54] Further, Justice Jackson opined that if the landlords had allowed the officers entry as guests of another tenant of the landlord, the government agents would not have been trespassing.[55] However, Justice Jackson was adamant in stating that "each 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

43. *Id.* (In using this newly formed criteria, the Court held that wiretapping did not trespass onto any property right and therefore did not impact a person, home, paper, or effect; therefore, a search had not occurred for Fourth Amendment purposes).

44. *See* McDonald v. United States, 335 U.S. 451, 456 (1948).

45. *Id.* at 459.

46. *Id.* at 452.

47. *Id.*

48. *Id.*

49. *Id.* at 453.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 457.

55. *Id.* at 458.

security of the entire building against unlawful breaking and entry."[56] Thus, under the *McDonald* rationale, the Fourth Amendment protects residents from unlawful government intrusion into the building.

B. Searches – In the Modern Era

Following *Olmstead*, the Supreme Court heard three electronic eavesdropping cases where it applied *Olmstead's* actual physical invasion threshold.[57] In *Goldman v. United States*, the Court held that Fourth Amendment protections were not invoked when the government placed a "detectaphone" onto an outer wall to listen to conversations occurring inside the building.[58] In *Silverman v. United States*, the Court held that the government's actions were an actual physical invasion.[59] The Court reasoned that a technical trespass was not needed under *Olmstead*, but that a physical intrusion was sufficient, thus constituting a search within the meaning of the Fourth Amendment.[60] In *Silverman*, agents inserted a microphone with a spike into a party wall to listen to conversations passing through heating ducts.[61] The Court, in addressing the different outcomes between *Goldman* and *Silverman*, stated that the *Silverman* holding was "based upon the reality of an actual intrusion into a constitutionally protected area."[62] Lastly, in *Clinton v. Virginia*, the Court held that a search had occurred when the government installed a listening device into a wall, causing a thumbtack-sized hole.[63] According to James Tomkovicz, a noted author in criminal procedure:

> Although *Olmstead's* physical intrusion requirement still survived, the [*Goldman*] Court proved that it had been serious in *Silverman* when it had 'decline[d] to go beyond [the physical intrusion boundary]' . . . [b]y 1964, the *Olmstead* criterion for resolving the threshold

56. *Id.*
57. Goldman v. United States, 316 U.S. 129 (1942); Silverman v. United States, 365 U.S. 505 (1961); Clinton v. Virginia, 377 U.S. 158 (1964).
58. *Goldman*, 316 U.S. 129.
59. *Silverman*, 365 U.S. 505.
60. *Id.*
61. *Id.*
62. *Id.* at 512.
63. Clinton v. Virginia, 377 U.S. 158 (1964).

question had clearly become a fragile, tenuous barrier to Fourth Amendment regulation.[64]

1. Katz and Curtilage – Reasonable Expectation of Privacy Threshold

As a result of the fragile threshold, the Court was ready to set a new standard for determining what constitutes a search. The Court found this opportunity in another eavesdropping case, *Katz v. United States*.[65] In *Katz*, the Court formulated the *reasonable expectation of privacy* test.[66] The groundwork for establishing this test was the civil custom for privacy established in the earlier trespass cases and in *Boyd's* expansive reliance on personal liberty and privacy.[67] Similar to *Boyd*, the *Katz* Court again expanded the search threshold and broadened Fourth Amendment protections to allow a plaintiff to invoke its protection even when there was no trespass.[68] The *Katz* Court held that "the Fourth Amendment protects people, not places."[69] Further, the Court recognized that what a person knowingly discloses to the public, even from inside his own home, is no longer a subject of Fourth Amendment protection.[70] On the other hand, he may invoke Fourth Amendment protections when the intention is to remain private, even in public areas.[71]

This idea of constitutionally protected people was at the core of the Court's decision in *Katz*. In this case, the government conducted electronic surveillance on Petitioner while he was in a partially glass enclosed public telephone booth.[72] The government argued that the surveillance techniques employed by its agents were not physical invasions and did not cross any threshold into the physical space of the phone booth.[73] Moreover, the government contended that the Petitioner's actions were visible through the glass phone booth to the public and thus

64. James J. Tomkovicz, *Criminal Procedure: Constitutional Constraints Upon Investigation and Proof*, 4 (LexisNexis 7th Ed. 2012).

65. Katz v. United States, 389 U.S. 347, 357 (1967) (Harlan, J., concurring).

66. *Id.*

67. Olmstead v. United States, 277 U.S. 438 (1928); Boyd v. United States, 116 U.S. 616 (1886).

68. *Katz*, 389 U.S. at 357 (Harlan, J., concurring).

69. *Id.* at 361.

70. *Id.* at 351 (citing Lewis v. United States, 385 U.S. 206, 210 (1966); United States v. Lee, 274 U.S. 559, 563 (1927)).

71. *Id.* (citing Rios v. United States, 364 U.S. 253 (1960); *Ex parte* Jackson, 96 U.S. 727, 733 (1877).

72. *Id.* at 349.

73. *Id.* at 351.

Katz forfeited any expectation of privacy.[74] The Court disagreed, finding that searches performed without judicial approval are per se unreasonable.[75]

The *Katz* Court, through Justice Harlan's concurring opinion, also established a two-prong test to determine whether the government has performed a search pursuant to the Fourth Amendment.[76] Justice Harlan explained that the first prong consists of determining whether a person has an actual, subjective expectation of privacy.[77] The second prong was an objective determination of whether that expectation of privacy is one that society would recognize as reasonable.[78] According to Justice Harlan, the critical factor in *Katz* was that when one enters a telephone booth, closes the door, and pays for the use of the phone, one may assume that the conversation is free of surveillance techniques.[79] Moreover, Justice Harlan stated that the "point is not that the booth is accessible to the public at other times, but that it is a temporarily private place where an occupants' expectation of freedom from intrusion is recognized as reasonable."[80] Thus, under *Katz*, where there was not a physical trespass onto a property, a person's Fourth Amendment protections apply when the government violates a subjective expectation of privacy that society recognizes as reasonable.[81] Since *Katz*, courts have applied the *reasonable expectation of privacy* test almost exclusively in determining whether the government has performed a search under the Fourth Amendment.[82]

Modern courts have used the *reasonable expectation of privacy* test almost exclusively since *Katz*, foregoing the standard of trespass regardless of the type of entrance or the area of the structure in question. Nevertheless, the *reasonable expectation of privacy* test is not an all-inclusive test. For instance, an area just outside the home and open to the public may not, in a *Katz* analysis, be considered protected under the umbrella of the Fourth Amendment; however, the homeowner may consider this area to be as private as his bedroom. As a result, the Court

74. *Id.* at 352.
75. *Id.* at 357.
76. *Id.* at 360.
77. *Id.* at 361.
78. *Id.*
79. *Id.*
80. *Id.* (internal citations omitted).
81. *Id.*
82. *See supra* note 9.

paired the curtilage doctrine with the *reasonable expectation of privacy* test.[83]

Curtilage protections trace back to Eighteenth Century England where the common law regarding burglary was developing.[84] At that time, a wall or fence surrounded most private property as a result of the predominant enclosure acts of England.[85] As English law developed, the concept of curtilage emerged.[86] Courts have interpreted curtilage to include the area that is not part of the house but that is located within the wall or the fence surrounding the home.[87] English common law treated the burglary of a house or its curtilage as a more severe offense than a similar burglary of a store or a barn.[88] As a result, English common law used the curtilage as a vehicle to expand the burglary offense.[89]

The Supreme Court recognized the concept of, but not the term, curtilage in the early 1900s;[90] however, two post-*Katz* cases established the definition of curtilage as known today.[91] In *Oliver v. United States,* the Court decided whether the government had conducted a search when officers entered a locked gate at the entrance of a highly secluded farm that was not visible from any point of public access.[92] The Court determined that this intrusion was outside the protection of the Fourth Amendment because the area entered by the officers was an open field.[93] The Court defined curtilage as "the area around the home to which the activity of home life extends," noting that, "for most homes, the boundaries of the curtilage will be clearly marked [and] easily understood from our daily experience."[94]

Likewise, in *Dunn v. United States*, the Supreme Court interpreted the Fourth Amendment protection as extending from the home into the curtilage because individuals possess a "reasonable expectation of

83. Oliver v. United States, 466 U.S. 170, 182 (1984); United States v. Dunn, 480 U.S. 294 (1987).

84. *See* Carol A. Chase, *Cops, Canines, and Curtilage: What* Jardines *Teaches and What It Leaves,* 52 HOUS. L. REV. 1289, 1300 (2015).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See* Amos v. United States, 255 U.S. 313, 314–15 (1921); *see also* Hester v. United States, 265 U.S. 57 (1924).

91. *See* Oliver v. United States, 466 U.S. 170, 182 (1984); United States v. Dunn, 480 U.S. 294 (1987).

92. *Oliver*, 466 U.S. at 182.

93. *Id.*

94. *Id.*

privacy in the area surrounding . . . the home."[95] Moreover, in describing the protection surrounding the home, the *Dunn* Court elaborated on the definition of curtilage by concluding that "the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself."[96] As a result, the Court effectively outlined the four factors that determine whether a particular area constitutes curtilage: (1) the proximity of the area to the home, (2) the degree of the area within an enclosure surrounding the home, (3) the use of the area, and (4) the steps taken to seclude the area from public view.[97]

Katz's *reasonable expectation of privacy test* and the curtilage doctrine are intertwined. These two concepts are so closely related that one author commented, "[A]pplying the open fields 'doctrine' of *Oliver* and *Dunn* involves virtually the same inquiries as the '*reasonable expectation of privacy*' test of *Katz*."[98] Despite the four *Dunn* factors and the open field doctrine, the Court did not provide a bright line rule that could efficiently provide an answer to this kind of Fourth Amendment problem or even separate an analysis under *Katz* from the open fields doctrine.[99] On the other hand, some scholars have noted that with the emergence of the open fields doctrine in *Oliver*, the *Katz* presumption in favor of protecting activities within the curtilage can now be overcome by simply demonstrating that the suspect conducted the activity in plain view, thus eroding the Fourth Amendment protection.[100]

2. *Jones and Jardines – The Trespass Threshold*

In the modern era, the *reasonable expectation of privacy* test has been the "go to" standard that courts use to perform an analysis when determining whether a search has occurred within the meaning of the Fourth Amendment.[101] However, in 2012, the Court reminded us that *Katz* did not eliminate the trespass standard.[102] In *Jones,* the Supreme Court issued a second landmark decision discussing common-law

95. *Dunn*, 480 U.S. at 315.

96. *Id.* at 300.

97. *Id.* at 301.

98. Thomas E. Curran, III, *The Curtilage of* Oliver v. United States *and* United States v. Dunn*: How Far is Too Far?,* 18 GOLDEN GATE U. L. REV. 397 (1988).

99. *Id.*

100. Vanessa Rownaghi, *Driving into Unreasonableness The Driveway, The Curtilage, and Reasonable Expectations of Privacy*, 11 AM. U.J. GENDER & SOC. POL'Y & L., 1170 (2003).

101. *See* Tomkovicz, *supra* note 64.

102. United States v. Jones, 132 S. Ct. 945 (2012).

trespass.[103] In *Jones,* the government installed a physically mounted GPS receiver onto a suspect's automobile without a warrant.[104] The government then monitored the automobile's whereabouts on public roads for twenty-eight days.[105] The *Jones* Court held that the installation and monitoring of the GPS device was a search under the Fourth Amendment.[106] The Court held that the government's physical intrusion for the purpose of gathering information constituted a search and thus violated the defendant's Fourth Amendment rights.[107] Moreover, the Court reasoned that such an intrusion has been protected from the Fourth Amendment's inception because the violation was directly tied to the property rights present in the language of the Amendment.[108] The Court in clarifying its holding noted that *Jones* did not erode the reasonable expectation of privacy standard but instead "added to, not substituted for, the common-law [trespass] test."[109]

The following year, the Supreme Court decided a case that elaborated upon the *Jones* trespass standard.[110] In *Florida v. Jardines*, the Supreme Court reaffirmed both *Katz* and *Jones* by clarifying that the *Katz reasonable expectation of privacy* test was not the sole standard in establishing Fourth Amendment rights.[111] Instead, the Court intended *the reasonable expectation of privacy* test to expand the traditional-property-based-standard.[112] The Court created the customary-invitation standard, an elaboration on the trespass threshold standard previously articulated in *Jones*.[113] The Court, in establishing this new standard, reasoned that an implied license exists for anyone to approach the front door, knock, and briefly wait for a response.[114] However, this license has a limited scope

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 954. (Sotomayor, J., concurring).
107. *See id.* at 953–54.
108. *Id.* at 949 (quoting Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765), describing "a monument of English Freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law") (internal citations omitted).
109. *Id.* at 952 ("the Fourth Amendment directly refers to property rights since the language of the amendment would have omitted the conditions 'in their persons, houses, papers, and effects'").
110. Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*

based on custom.[115] Specifically, the Court articulated that this license is limited in space, time, and, most importantly, purpose.[116]

The officers in *Jardines* used a drug-detection canine to look for incriminating evidence in the defendant's yard.[117] Ultimately, the officers led the canine to the defendant's front porch where the canine alerted officers to the presence of narcotics at the door.[118] The officers used this alert as probable cause to secure a warrant.[119] In applying the customary invitation standard, the Court, focusing on property rights, held that there is no customary invitation to use **"a trained police dog to explore the area around the home in hopes of discovering incriminating evidence."**[120] Furthermore, the Court found that the Jardines' front porch was well within the protected curtilage of the home,[121] and so the unlicensed physical intrusion constituted a search under the Fourth Amendment.[122] Justice Scalia, writing for the majority, eloquently stated:

> Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."[123]

Therefore, Justice Scalia opined that the presence of the police and the drug canine exceeded the scope of their license and therefore unlawfully intruded onto Petitioner's property.[124] Following *Jones*, Justice Scalia concluded that the government had committed a violation of the Fourth Amendment because the officers physically intruded into the curtilage with the purpose of gathering information.[125] Consequently, Justice Scalia determined that there was no need to examine whether the

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115. *Id.* at 1415.
116. *Id.* at 1416.
117. *Id.* at 1413.
118. *Id.*
119. *Id.*
120. *Id.* at 1416 (Scalia joined by Thomas, Ginsburg, Sotomayor, and Kagan, concurring) (emphasis added).
121. *Id.* at 1417.
122. *Id.* at 1417; *see also* David C. Roth, *Florida v. Jardines: Trespassing on the Reasonable Expectation of Privacy*, 91 DENV. U.L. REV. 551, 565 (2014).
123. *Id.* at 1416 (quoting Kentucky v. King, 131 S. Ct. 1849 (2011)).
124. *Id.* at 1417–18.
125. *Id.* at 1417.

police violated the Petitioner's privacy rights under *Katz*.[126] On the other hand, three concurring justices did conclude that the police conduct, in part due to the sniffing capability of the drug canine under a *Kyllo*[127] analysis, infringed on the defendant's reasonable expectation of privacy, thus violating his Fourth Amendment protections.[128]

The Court has altered and modified the search threshold criterion for the Fourth Amendment over the last century from a purely property based theory to a personal privacy based theory, and most recently toward a combination of the two. Additionally, the Court has tried to fill in the gaps between these theories with judicially created doctrines, such as the curtilage and the open fields doctrines, to reinforce the founding fathers' views for this constitutional right. The Court, in establishing the *customary invitation* test, nonetheless created a new threshold standard that incorporates the reasonable expectation of privacy theory with property rights theory and can be applied in areas traditionally analyzed under the curtilage or open fields doctrine.

III. ANALYSIS

This section will discuss how lower circuit courts have analyzed a resident's right to privacy in locked common areas within multi-unit dwellings before *Jardines*. Furthermore, this section provides an in-depth examination of the two circuits that find a right to privacy in the common area. Additionally, this section investigates the curtilage doctrine and its applicability to the common area surrounding the resident's entry door. Further, this section examines societal norms and presents an argument that due to the influx of multi-unit buildings, courts should reconsider society's position on whether there is an expectation to privacy in common areas.

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126. *Id.*

127. Kyllo v. United States, 533 U.S. 27 (2001) (Using a thermal-imaging device to scan defendant Kyllo's triplex, the police determined that the amount of heat emanating from the home was consistent with that from high-intensity lamps typically used for indoor marijuana growth. Based on informants, utility bills, and the thermal imaging, the police were able to obtain a warrant to search Kyllo's home. The Supreme Court held that the use of the thermal-imaging device to scan within Kyllo's home was a violation of his Fourth Amendment protections).

128. *Jardines*, 133 S. Ct. at 1419 (Kagan, J., joined by Ginsburg and Sotomayor, J.J., concurring).

A. Pre-Jardines Privacy Analysis of Locked Common Areas Within Multi-Unit Dwellings

In the post-*Katz* era, the Supreme Court has not explicitly heard a case involving a Fourth Amendment search within a locked common area of a multi-unit dwelling not open to the general public.[129] As a result, the lower courts' interpretation of *Katz* varies about whether a resident has a reasonable expectation of privacy in locked common areas. The Sixth and Second Circuits have the most liberal view, holding that a reasonable expectation of privacy exists in common areas of multi-unit dwellings when the common area is not accessible by the general public.[130] On the other hand, the Third, Seventh, Eighth, and Ninth Circuits hold that the second prong of Justice Harlan's *reasonable expectation of privacy* test is not met with respect to locked common areas.[131] This Note contends that the Sixth and Seventh Circuits' reasonable expectation of privacy analysis should govern how courts apply the *Katz* test. Furthermore, this Note contends that with the changing societal norms, the second prong of Justice Harlan's test should be expanded to meet the norms of twenty-first century.

1. Lower-Court Analysis of Common Areas Within Multi-Unit Dwellings

In the Sixth Circuit's leading case, *United States v. Carriger*, the court ruled on facts concerning government agents who waited for workmen to leave an apartment building and snuck in before the door closed in order to gain entry into a twelve-unit apartment building

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129. *See* Chase, *supra* note 84, at 1303:

> The Supreme Court has yet to consider a thorny issue: does the Fourth Amendment protection-afforded concept of curtilage exist outside the context of a single family dwelling? Thus far, that is the only context in which it has been examined by the Court. Even *Jardines* involved a single-family dwelling[.]

Id.

130. *See* United States v. King, 227 F.3d 732, 748 (6th Cir. 2000) (at issue was whether a shared basement has protection or curtilage, and whether a reasonable expectation of privacy exists. The court held that a basement is not part of the curtilage but that a reasonable expectation of privacy exists among the tenants. Further, the court noted that the basement was accessible only to the tenants of the building, and distinguished it from common hallways in multi-unit dwellings through which visitors must pass to reach particular units); *see also* United States v. Thomas, 757 F.2d 1359, 1366–67 (2d Cir. 1985).

131. *See supra* note 8.

through a locked exterior door.[132] Once inside, the agents witnessed a drug transaction.[133] The court held that when "an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed."[134] In its reasoning, the court concluded that a subjective expectation of privacy does not vary in the degree of privacy and that "a tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers."[135] Subsequent Sixth Circuit pre-*Jardines* cases confirm the *Carriger* holding and rationale.[136] Moreover, a number of federal appellate courts equate the *Carriger* court's rationale to that of *McDonald* and *Jones*, while other courts have rejected the *Carriger* court's analysis of *McDonald's common-law trespass standard.*[137]

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132. United States v. Carriger, 541 F.2d 545, 548 (6th Cir. 1976).

133. *Id.*

134. *Id.* at 552.

135. *Id.* at 551.

136. *See* United States v. Sandlain, No. 14-CR-20283, 2015 WL 5042322, at *2 (E.D. Mich. Aug. 26, 2015) (discussing whether a parole agent and police officer, who entered a locked common area and entered an apartment under exigent circumstances, violated the petitioner's reasonable expectation of privacy. The court held that if the petitioner were an ordinary citizen, a search would have occurred; however, as a parolee, the petitioner had a diminished expectation of privacy); *see also* State v. Talley, No. M2007-01905-CCA-R9-CD, 2009 WL 1910949, at *1 (Tenn. Crim. App. July 1, 2009), *aff'd*, 307 S.W.3d 723 (Tenn. 2010) (discussing appellant's condominium building with 21 units where "the building's front door was always locked and" where "residents only gained entry to the building by entering an access code into a keypad outside the main door." FedEx, the Postal Service, and the police department all had the access code on file; however, while waiting for the access code, the police were let in by another tenant who was walking out the front door. The court disagreed with the Sixth Circuit's decision in *Carriger*, and a reasonable expectation of privacy in locked common areas; thus, the court also reasoned that "the determination as to whether a tenant has a reasonable expectation of privacy in the common areas of a locked apartment building is a fact-driven issue." The court held that since "various nonresidents . . . such as delivery and cleaning people, used the code," the appellant "did not have an actual, subjective expectation of privacy in those areas").

137. *See Sandlain*, 2015 WL 5042322; Titus v. State, 696 So. 2d 1257, 1258 (Fla. Dist. Ct. App. 1997). *See, e.g.*, Reardon v. Wroan, 811 F.2d 1025 (7th Cir. 1987); United States v. Booth, 455 A.2d 1351 (D.C. 1983); People v. Trull, 380 N.E.2d 1169 (Ill. App. Ct. 1978); State v. Di Bartolo, 276 So. 2d 291 (La. 1973); Garrison v. State, 345 A.2d 86 (Md. Ct. Spec. App. 1975); People v. Beachman, 296 N.W.2d 305 (Mich. Ct. App. 1980); *but see* United States v. Nohara, 3 F.3d 1239 (9th Cir. 1993); United States v. Barrios-Moriera, 872 F.2d 12 (2d Cir. 1989), *cert. denied*, 493 U.S. 953 (1989); United States v. Holland, 755 F.2d 253 (2d Cir. 1985), *cert. denied*, 471 U.S. 1125 (1985); United States v. Luschen, 614 F.2d 1164 (8th Cir. 1980), *cert. denied*, 446 U.S. 939 (1980); United States v. Eisler, 567 F.2d 814 (8th Cir. 1977); *see also* Wayne R. LaFave, Search and Seizure, § 2.3(b), at 477–478 (3d. ed. 2015).

However, these opposing courts have mistaken *Carriger's* interpretation of *Katz* and the court's reasoning of an expectation of privacy.[138] The *Carriger* court did not explicitly hold that the government cannot enter a locked common area, but that because the common area "was not open to the general public," it was the manner in which the government entered that violated the defendant's reasonable expectation of privacy.[139] Further, the *Carriger* court addressed the government entry as a violation of *Katz*'s reasonable expectation of privacy test by stating that the:

> [T]respass doctrine could no longer be regarded as controlling and was intended to expand the protection afforded by the Fourth Amendment. Certainly, that was the effect in *Katz* where the Court found an illegal search and seizure even though no trespass was committed by FBI agents. Accordingly, we are of the view that *Katz*, considered with the case law before it, should be read as holding that trespassing is one form of intrusion by the Government that may violate a person's reasonable expectation of privacy.[140]

Subsequently, the court determined that a trespass is one form of a violation of the expectation of privacy.[141] The court reasoned that because the government intruded into the common area, under either a *Katz* or a *McDonald* analysis, society would find that the defendant's expectation of privacy was violated.[142]

Similarly, the Second Circuit, in *United States v. Thomas* held that "the defendant had a legitimate expectation that the contents [behind his closed apartment entry door] would remain private."[143] Furthermore, those contents were not open to the public to be "sensed from outside his door" and "the use of the trained canine impermissibly intruded on that

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138. *See* United States v. Nohara, 3 F.3d 1239 (9th Cir. 1993).

139. United States v. Carriger, 541 F.2d 545, 552 (6th Cir. 1976).

140. *Id.* at 549.

141. *Id.*

142. *See* Katz v. United States, 389 U.S. 347, 361 (1967).

143. United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985); *but see* United States v. Holland, 755 F.2d 253, 254 (2d Cir. 1985) (pre-dating *Thomas,* the *Holland* court elected not to extend Fourth Amendment protections to hallways and vestibules leading to a locked outer door a of two-story multi-resident dwelling. The court reasoned that a reasonable expectation of privacy does not exist if the tenants of the building share the "right to use the hallway." Because, in the court's estimation, the defendant did not have more than a customary easement for the common hallway, and because he did not have exclusive control, there was no expectation of privacy).

legitimate expectation."[144] In *Thomas*, the government, in an effort to establish probable cause, conducted a drug sniff outside the defendant's door in the hallway after receiving tips that the defendant was "a narcotics dealer and the operator of several narcotics processing mills."[145] Due in part to a positive sniff, the government obtained a search warrant.[146] The court took issue with the canine search, conducted in the hallway, which gave the government insight as to what was occurring behind the exterior door of the apartment.[147] As a result of the defendant's "heightened expectation of privacy" within his dwelling, the court held that "the canine sniff at his door constituted a search."[148]

This case is analogous to the *Carriger* decision in that the court did not use the trespass doctrine to hold that the government violated the defendant's Fourth Amendment protections, but instead chose to use *Katz*. The court, in analyzing the canine sniff, reasoned that an unreasonable government intrusion occurs when a trained canine is brought into a common area to conduct a sniff search outside private dwellings, thus intrudes on a legitimate expectation of privacy.[149]

In distinguishing its holding from *Place*,[150] the *Thomas* court reasoned that an individual maintains a diminished expectation of privacy in the contents of "luggage in the custody of an air carrier" versus property in a locked common hallway.[151] Furthermore, the court stated that "it is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search."[152] A sniff of a home, according to the court, mandates a different result than an airport

144. *Thomas*, 757 F.2d at 1367; *see also* United States v. Fluker, 543 F.2d 709, 712 (9th Cir. 1976) (holding that, because the common door and area were usually locked and only the tenants and the landlord had keys, these facts were sufficient to construe a reasonable expectation).

145. *Thomas*, 757 F.2d at 1366.

146. *Id.* at 1367.

147. *Id.*

148. *Id.*; *see also* United States v. Hayes, 551 F.3d 138 (2d Cir. 2008); United States v. Hogan 122 F. Supp. 2d 358 (E.D.N.Y. 2000) (reaffirming *Thomas* in another multi-dwelling case involving the government's use of a canine at an apartment door to detect the presence of narcotics located inside the home. *Thomas* was controlling authority on the issue stating that "*Thomas* remains law in this circuit."); *see also* United States v. Parrilla, 2014 WL 2111680, at *7 (S.D.N.Y. May 13, 2014).

149. *Thomas*, 757 F.2d at 1367.

150. United States v. Place, 462 U.S. 696 (1983) (holding that canine sniffs in public airport of luggage is not a search under the Fourth Amendment because a canine sniff is not intrusive and provides a limited disclosure of information—either nothing or an illegal substance).

151. *Thomas*, 757 F.2d at 1366.

152. *Id.* at 1367.

sniff.[153] As a result, the *Thomas* court clearly determined that a common hallway was not a public place, therefore distinguishing it from *Place*.[154] Moreover, the court focused on the second prong of Justice Harlan's *reasonable expectation of privacy* test to establish that public policy distinguishes a canine sniff in an airport from a sniff in a common hallway.[155] The court concluded that a canine sniff might be a legal technique which is "not intrusive in a public airport may be intrusive when employed at a person's home."[156]

Alternatively, the Ninth Circuit in *Nohara* refused to extend Fourth Amendment protections to tenants in hallways or other common areas in high-rise buildings,[157] distinguishing from previous Ninth Circuit precedent.[158] In *Nohara*, the defendant resided in a high security, high-rise apartment building consisting of twenty-seven floors and seven apartments on each floor.[159] The building had around-the-clock security guards and provided residents with the ability to monitor the entrances on their televisions.[160] Moreover, a guest entrance provided a telephone intercom system to reach each tenant.[161] Once provided access, the elevator would take guests arriving after hours "directly to their hosts' floors."[162] DEA agents, using an informant known to the defendant, contacted the defendant through the intercom.[163] The defendant subsequently buzzed in the informant, and, unknowingly, the DEA agents.[164] Furthermore, additional DEA agents identified themselves to the security guard to gain access to the building.[165] After gaining access, the agents proceeded to the twenty-fifth floor where the informant knocked on the door with the agents shielded from the peephole line of sight.[166] The *Nohara* court concluded that while the defendant may have had a reasonable expectation of privacy in the entire building, the privacy

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir.1993).
158. United States v. Fluker, 543 F.2d 709, 716 (9th Cir. 1976) (distinguishing *Nohara* from *Fluker*, where *Fluker* relied "on the fact that the appellant lived in one of only two basement apartments as opposed to a multi-unit complex.").
159. *Nohara*, 3 F.3d at 1240.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*

in the building's common area "is not one that society recognizes as reasonable."[167]

Rejecting *Carriger*, the *Nohara* court concurred with the decisions of other circuits that an apartment dweller has no reasonable expectation of privacy in the common areas of the building, whether the government trespasses or not.[168] The *Nohara* court reasoned that a locked common area was intended to provide security and not for the purpose of privacy.[169] Moreover, the court, in finding the Eighth Circuit's *Eisler* case persuasive to illustrate, distinguished *Nohara* from *Carriger* by reasoning that an expectation of privacy "implies an expectation that one will be free of *any* intrusion, not merely unwarranted intrusions."[170] The court quoted *Eisler*, stating that because common hallways "were available for the use of [anyone with] legitimate reasons to be on the premises," including residents and their guests, an expectation of privacy does not exist.[171] Accordingly, while the court acknowledged that the government was "a technical trespasser in a common hallway," the court held that it did not matter because the defendant did not have a reasonable expectation of privacy.[172]

This Note contends that the *Nohara* court interpreted *Carriger* only for the trespass language, but it did not extrapolate that, according to *Carriger*, the trespass test is just "one form of intrusion by the Government that may violate a person's reasonable expectation of privacy."[173] The *Carriger* court focuses on determining whether an area is open to the general public in deciding whether a search had occurred.[174] On the other hand, the *Noraha* court explicitly relied on the Eighth Circuit's decision in *Eisler* in stating that the hallways were "for the use of residents and their guests, the landlord and his agents, and others having legitimate reasons to be on the premises."[175] By its own admission, the *Nohara* court confirmed that the common area in that case was not open to the general public but open only to select individuals.[176] As a result, the *Nohara* court is misguided in its reasoning, so that the

167. *Id.* at 1241.

168. *Id.* (citing United States v. Barrios-Moriera, 872 F.2d 12, 14 (2d Cir. 1989); United States v. McGrane, 746 F.2d 632, 634 (8th Cir. 1984); United States v. Cruz Pagan, 537 F.2d 554, 558 (1st Cir. 1976)).

169. *Id.* at 1242 (quoting United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977)).

170. *Id.*

171. *Id.*

172. *Id.*

173. United States v. Carriger, 541 F.2d 545, 549 (6th Cir. 1976).

174. *Id.* at 549–50.

175. *Nohara*, 3 F.3d at 1241.

176. *Id.*

ruling of the Sixth Circuit in *Carriger* is more persuasive than that of the Eight Circuit in *Eisler*.

2. Curtilage Compliments the Reasonable Expectation of Privacy Standard

Even with the reasonable expectation of privacy and trespass theories, there is a doctrinal gap between these two standards when the trespass is not into a house or effect but is onto an area "intimately tied" to the house or effect.[177] The courts have long used the curtilage doctrine to tie these loose ends together, when there is no physical entry into the home but instead into an area open to the public, outside the four walls of the home that "is intimately tied to the home."[178] For example, courts generally find curtilage protections exist for the front porch or the patio of a single-family home.[179] The reasoning behind the doctrine is quite simple: homeowners, even those without fences, should have a reasonable expectation that strangers will not enter the property but to walk straight to the front porch or patio.[180] For instance, a Girl Scout entering the property to knock on the front door would not surprise a homeowner.[181] Nearly every court applies the four *Dunn* factors[182] to establish whether an area qualifies as curtilage and is thus protected.[183] Nevertheless, the *Dunn* factors are not immalleable, and courts should apply them in conjunction with the particular setting of the home in question.[184]

In the Third Circuit, the *Acosta* Court held that the modifying or weighing of the *Dunn* factors differently in urban settings was appropriate.[185] *Acosta* revolved around whether a backyard of an apartment building was curtilage.[186] Therefore, the *Dunn* factors do not

177. Oliver v. United States, 466 U.S. 170, 180 (1984).

178. *Id.*

179. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013).

180. *Id.* at 1415.

181. *Id.*

182. United States v. Dunn, 480 U.S. 294, 301 (1987) (The four factors that determine whether a particular area constitutes curtilage are: (1) the proximity of the area to the home, (2) the degree of the area within an enclosure surrounding the home, (3) the use of the area, and (4) the steps taken to seclude the area from public view).

183. *See e.g.*, United States v. Jackson, 728 F.3d 367 (4th Cir. 2013); United States v. Cousins, 455 F.3d 1116 (10th Cir. 2006); United States v. Jenkins, 124 F.3d 768 (6th Cir. 1997); United States v. Garrott, 745 F. Supp. 2d 1206 (M.D. Ala. 2010).

184. *See* United States v. Acosta, 965 F.2d 1248 (3d Cir. 1992); United States v. Romano, 388 F. Supp. 101, 104 n. 5 (E.D. Pa. 1975).

185. *Acosta*, 965 F.2d at 1256.

186. *Id.*

constitute a bright-line rule, but they merely suggest guidelines for a court to consider and to apply to the actual home setting.[187] Moreover, the decision did not overrule the four factors in *Dunn*; yet, the prevailing theme in a *Dunn* analysis hinges on whether an area is intimately tied to the inner working and the privacy of the home.[188] On one hand, courts have found that the common area surrounding an apartment or condominium does not reveal the inner working or invade the privacy within the home, thus failing the test for curtilage protections.[189] On the other hand, courts have found that a common basement or an open landing at the top of an open common staircase constitutes curtilage.[190] Where an individual lives in the country should not govern whether an area is protected curtilage. Courts need a definitive guideline to use, in addition to the dynamic *Dunn* factors, to establish whether an area is curtilage and thus protected. This new standard may be the *customary invitation* test set forth in *Jardines*.[191] Under *Jardines*, courts may use an implicit license test in lieu of *Dunn*'s four-factor test to establish what constitutes curtilage in urban areas.[192]

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187. *But see* Reeves v. Churchich, 484 F.3d 1244, 1254 (10th Cir. 2007) (holding the test for curtilage is if one could exclude others from the area); United States v. Arboleda, 633 F.2d 985, 992 (2d Cir. 1980) (concluding that "it is doubtful that the curtilage concept has much applicability to multifamily dwellings . . . "); United States v. Cruz Pagan, 537 F.2d 554, 556 (1st Cir. 1976) ("[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"); People v. Shaw, 97 Cal. App. 4th 833 (2002) ("what might be one person's curtilage, in the context of a private single occupancy residence, becomes less subject to privacy expectations in the context of the grounds of a multi-unit apartment complex.").

188. United States v. Dunn, 480 U.S. 294, 300 (1987); *see also* United States v. Penaloza-Romero, No. CRIM. 13-36 RHK/TNL, 2013 WL 5472283, at *3 (D. Minn. Sept. 30, 2013); State v. Nguyen, 841 N.W.2d 676, 682 (N.D. 2013).

189. *Reeves*, 484 F.3d at 1244–55 (holding that the front yard of a duplex was not within the curtilage, because it was open to the street, was not used for "intimate activities" or "in any way protected from obstruction"); Lindsey v. State, 127 A.3d 627, 642–43 (Md. Ct. Spec. App. 2015) (finding that a lock and buzzer system on the apartment building's exterior door does not shield the area or show that steps were taken to protect the area from observation by the public).

190. *See* United States v. King, 227 F.3d 732 (6th Cir. 2000) (holding that the tenants of a duplex had a reasonable expectation of privacy in a shared basement); State v. Rendon, 476 S.W.3d 77, 833 (Tex. App. 2014), *aff'd*, 477 S.W.3d 805 (Tex. Crim. App. 2015).

191. Florida v. Jardines, 133 S. Ct. 1409 (2013).

192. *Id.* at 1417; *but see* Wayne R. LaFave, *Search and Seizure* § 2.3(c), at 39 (5th ed. Supp. 2014) (noting that the impact of *Jardines* on Fourth Amendment analysis may be limited to "single-unit dwellings" because "the concept of 'curtilage' appears to have little [if] anything to do with multiple-unit structures").

3. Changing Societal Norms Suggest Supporting a Reasonable Expectation of Privacy in Multi-Unit Dwellings

Similar to residents of single-family homes, where there is a presumption of privacy, residents in multi-unit dwellings should be entitled to a reasonable expectation of privacy in locked common areas. Under *Katz*'s two-pronged *reasonable expectation of privacy* test, the subjective prong is rarely the issue.[193] On the other hand, the objective prong—the expectations of privacy that society is willing to recognize—is hotly debated among the circuits.[194] Nevertheless, courts should consider the societal norms of the twenty-first century when deciding whether a defendant's reasonable expectation of privacy has been violated.[195]

This Note contends that the expansion of the objective prong is warranted. Societal norms are changing from owning a single-family home with a white picket fence to the twenty-first-century dream of both urban development and residence in multi-unit buildings.[196] Furthermore, according to the 2014 United States Census Bureau, many urban areas have more multi-unit dwellings than single-family homes.[197] Even further, in places like New York City, apartments constitute fifty percent of the housing; in Washington DC, Houston, Dallas, and Los Angles, forty percent of residences are part of multi-family buildings.[198]

Moreover, Americans are not just choosing to live in multi-unit buildings in the largest of cities. Instead, data shows that rental building

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193. *See* Eric Dean Bender, Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 744–45 (1985).

194. United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir.1993) (determining whether society would reasonably recognize an expectation of privacy in a condominium building consisting of 27 floors); United States v. Miravalles, 280 F.3d 1328, 1333 (11th Cir. 2002) (concluding that there is no reasonable expectation of privacy in common areas of a high-rise apartment building without a working lock on the building's entrance door).

195. Petition for Writ of Certiorari at 9, Nguyen v. State of North Dakota, 841 N.W.2d 676 (2015).

196. *Id.*; *see also* Darryl T. Cohen, *Population Trends in Incorporated Places: 2000 to 2013*, UNITED STATES CENSUS BUREAU (March 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1142.pdf; Frizell, *supra* note 2.

197. United States Census Bureau, *Selected Housing Characteristics* (2014) http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_DP04&prodType=table (buildings with two or more residential units constitute roughly 26.5% of the country's housing stock, and there are approximately 25 million residential units with 19 million Americans who reside in buildings with two-to-four units, and 37 million Americans who reside in buildings with five or more residences).

198. National Multifamily Housing Council, *Quick Facts: Resident Demographics*, (2015) http://www.nmhc.org/Content.aspx?id=4708#Rent_and_Own.

construction is currently at its highest in forty years.[199] The age of renters is also increasing.[200] Thus, societal preferences are shifting to multi-unit dwellings.[201] Additionally, there are more requests for multi-unit building permits than thirty years ago as well as a steady increase for permit requests since the 1990s.[202] Likewise, today there are more multi-generational families living together in multi-unit buildings.[203] Americans simply have different housing aspirations than they did during the time the Court decided *Katz*.[204]

Despite this data, when courts continually look to the second prong and decide what society is willing to recognize as reasonable, they fail to consider the shift of societal preferences to multi-unit housing.[205] Furthermore, courts assume that locked building doors are for security rather than for privacy, thus, rejecting that the common area is an area of shared ownership to which tenants have a greater expectation of privacy.[206] To the contrary, the common areas are typically shared by renters, as the rental monies include the shared use among the residents in those buildings.[207] Hence, the building occupants would not normally permit a drifter to seek refuge in those common areas. Yet, many courts do not hold that government intrusion into these areas, locked or

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199. Conor Dougherty, *New-Home Building Is Shifting to Apartments*, WALL ST. J (Mar. 9, 2014), http://www.wsj.com/articles/SB10001424052702304020104579429280698777544.

200. United States Census Bureau, *2013 Housing Profile: United States American Housing Survey Factsheet*, (2015), http://www2.census.gov/programs-surveys/ahs/2013/factsheets/ahs13-1_UnitedStates.pdf.

201. Dougherty, *supra* note 199.

202. United States Census Bureau, *Building Permits Survey* (2015), http://www.census.gov/construction/bps/uspermits.html.

203. Kevyn Burger, *Today's Multi-Generational Living: Condo Units in the Same Building*, STAR TRIBUNE (October 24, 2015), http://www.startribune.com/today-s-multi-generational-living-condo-units-in-the-same-building/333293181/#1.

204. Frizell, *supra* note 2.

205. *See* State v. Nguyen, 841 N.W.2d 676, 678–79 (holding that while law enforcement officers were technical trespassers in the common hallways, it "is of no consequence because [defendant] had no reasonable expectation that the common hallways of the apartment building would be free from any intrusion"); *but see* Riley v. California, 134 S. Ct. 2473 (2014) (holding that a cell phone seized incident to an arrest cannot be searched, thus showing the societal norm controlling a reasonable expectation of privacy analysis).

206. *Id.* (reasoning that the building entry doors are only there as security for the tenant and not to shield tenants from public view or to give tenants an expectation of privacy).

207. Chris A. Jenny & William R. West, *CAMouflage: What May Be Hiding in Your "Common Area Maintenance Charges" CAM Hurt You*, THE NAT'L L. REV. (2013), http://www.natlawreview.com/article/camouflage-what-may-be-hiding-your-common-area-maintenance-charges-cam-hurt-you.

unlocked, violate Fourth Amendment rights.[208] Justice Harlan's *reasonable expectation of privacy* test was not meant to be a static test that lasted forever, but instead the purpose of the test was to have a dynamic subjective and objective viewpoint, a viewpoint that changes with the times to meet a societal standard.[209]

B. Post-Jardines Privacy Analysis of Locked Common Areas Within Multi-Unit Dwellings

This section examines *Jardines* in greater detail and discusses how the majority opinion used *Jones* to formulate the customary invitation standard. Furthermore, *Jardines* is compared with the illustrative cases in the Second and Sixth Circuits to determine whether those courts' analyses still align with *Jardines*. Next, this section will discuss post-*Jardines* lower court opinions in both the state and federal circuits to gain an understanding on how those courts view and apply the customary invitation standard. Finally, this section discusses what *Jardines* means to the future and whether the implicit license applies to common areas within multi-unit dwellings and whether this new standard will change what constitutes a search under the Fourth Amendment umbrella.

Courts and scholars have long debated which surveillance techniques used by the government constitute a constitutional violation. The Supreme Court has settled many of these debates through its holdings; others have muddied the waters.[210] For instance, when a physical trespass occurs, the majority in *Jones* held that there is a Fourth Amendment search, even if the effect, in that case a car, is on public roads and visible to the general public.[211] Furthermore, the majority held that the government conducts a search even if the fruits of the search are public information.[212] Justice Scalia, in applying traditional property rights explained:

> The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. . . . The text of the Fourth Amendment reflects its close connection

208. *Nguyen*, 841 N.W.2d at 678; *see also* United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991); United States v. Scott, 610 F.3d 1009, 1115–16 (8th Cir. 2010).

209. Rakas v. Illinois, 439 U.S. 128, 143 (1978).

210. United States v. Jones, 132 S. Ct. 945 (2012).

211. *Id.*

212. *Id.* at 952.

> to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.[213]

The debated issues in *Jones* were (1) whether people reasonably expect to have their movements tracked and recorded while on public roads and in an effect that is already open to a diminished expectation of privacy for Fourth Amendment purposes; and (2) whether the line is drawn for long-term surveillance, short term trespass to place the GPS tracker, or some combination of the two.[214] However, *Jones* did make clear that the Justices believed that there were Fourth Amendment protections from unwarranted entry into an effect.[215] Moreover, the Justices stated that there was a need to bring back the trespass theory, one that basically sat dormant since *Katz*.[216]

The *Jardines* Court explicitly stated that *Jones* and *Jardines* are similar in facts and in analysis.[217] In both cases, the government physically intruded into an area that was generally open to the public.[218] In *Jones*, the government monitored a car on public roads,[219] while in *Jardines,* the government walked a canine onto a front porch of a home.[220] However, while the cases may be similar, this Note contends that as a result of the *customary invitation* test, the questions postulated in *Jones* may now be answered by determining whether an implicit license exists in the particular type of privacy setting.

The significance of *Jardines* may be far-reaching in Fourth Amendment analysis. Most notably, *Jardines* held that the implicit license provided by every resident that allows anyone, including the government, to approach a home and knock on the front door does not extend to allowing the government to ascertain information that may be occurring behind the door.[221] The *Jardines* Court was definitive:

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213. *Id.* at 949.
214. *Id.*
215. *Id.* at 950.
216. *Id.*
217. Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).
218. *Id.*
219. *Jones*, 132 S. Ct. at 947.
220. *Jardines*, 133 S. Ct. at 1411.
221. *Id.*

> To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.[222]

In addition, the Court emphasized that "it is not a Fourth Amendment search to approach the home in order to speak with the occupant, because all are invited to do that. The mere purpose of discovering information in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment."[223]

In relation to the topic of this Note, the *Jardines* Court's implicit license should not allow the government to enter into a locked common area of a multi-unit building. Approaching the exterior of the building to use a buzzer or other means of contacting a resident is permissible under *Jardines* and other "knock and talk" doctrine,[224] but to allow the government to exceed what a normal private citizen is allowed constitutes a search under the Fourth Amendment.[225] Moreover, the exterior building door of a multi-unit building is considered a common door, but the interior side of the exterior door is considered part of the dwelling.[226] Thus, the standard to which the government should be held changes whether the officers approach the exterior of the building or enter to the interior common area.

1. Jardines Does Not Disturb but Reinforces the Analysis of the Illustrative Cases in the Second and Sixth Circuits

The Second Circuit's *Thomas* and Sixth Circuit's *Carriger* opinions follow *Jardines* precedent, even though both courts decided both cases years before *Jardines*. The *Jardines*' *customary invitation* test could easily be applied in both these cases to obtain the same result. Moreover, as previously suggested in the analysis *supra* Part III(C)(1), the same

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222. *Id.* at 1416–17; *see also id.* at 1416 n.4.

223. *Id.* at 1416 n.4.

224. *See generally* Kentucky v. King, 563 U.S. 452, 469 (2011) ("[W]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any citizen might do").

225. *Jardines*, 133 S. Ct. at 1416 (quoting *King*, 563 U.S. at 455).

226. Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, 59 Fed. Reg. 33362-01 (June 28, 1994) (to be codified at 24 C.F.R. Pt. 1) ("The interior of the main entry door is part of the dwelling unit and only needs to meet the requirements for usable doors within the dwelling intended for user passage").

result would occur under a reasonable expectation of privacy analysis or property rights trespass analysis. Therefore, both *Carriger* and *Thomas* should continue to be illustrative cases for the other circuits to establish that under the *reasonable expectation of privacy* test, the *property rights trespass* test, or the *customary invitation* test, government's intrusion into the locked common area of a multi-unit building constitutes a search under the Fourth Amendment.

As noted previously, in the Second Circuit, *Thomas* is the controlling authority. In that case, a government search occurs within a locked common area using a drug-sniffing canine just outside the entrance door to an apartment.[227] The *Thomas* court held that one has a legitimate expectation of privacy to the contents of the apartment behind the closed entrance door because the door shields the protected contents from view.[228] It is reasonable to conclude that society has an expectation of privacy to that area of the home.[229] Therefore, the facts satisfy both prongs of the *Katz reasonable expectation of privacy* test.[230]

Likewise, the Sixth Circuit's *Carriger* opinion should be the controlling authority where government agents break in or sneak into a normally locked common area absent a warrant.[231] The *Carriger* officers, once unlawfully inside the twelve-unit building, witnessed a drug transaction.[232] The court performed a *Katz* analysis and concluded that the subjective expectation of privacy prong does not depend on the quantity of privacy expected, but simply whether one expects or does not expect trespassers.[233]

In comparing *Jardines* to both these circuits, the *Carriger* court relied on the fact that the government's intrusion was not by invitation; hence, a tenant would not expect to have an uninvited trespasser in the common area.[234] This is similar to *Jardines*' *customary invitation* test in determining whether a government official has an implicit license to enter the property.[235] On the other hand, the *Thomas* court relied on reasoning that the Fourth Amendment protects what one keeps private and hidden from the view of public; therefore, a warrantless canine sniff to determine what is located within one's home violates the Fourth

227. United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985).
228. *Id.* at 1367.
229. *Id.*
230. *See supra* note 148.
231. United States v. Carriger, 541 F.2d 545, 549 (6th Cir. 1976).
232. *Id.*
233. *Id.* at 551.
234. *Id.*
235. Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).

Amendment.[236] Again, this is similar to *Jardines*, where officers from the front porch used a canine to detect the presence of drugs within the home.[237] This is also applicable to the concurring opinion in *Jardines* in which Justice Kagan postulates applying *Kyllo* when gathering intimate information from within the home from outside the home.[238]

2. *Post-Jardines Customary Invitation Analysis by the Lower Courts*

Since *Jardines* presented the *customary invitation* test, courts have a third avenue, apart from *Katz* and *Jones*, to determine whether a government intrusion exceeds one's Fourth Amendment rights. In those cases, where a physical intrusion did not occur and the area in question may not meet the objective second prong of the *reasonable expectation of privacy* test, courts may use *Jardines* to nicely fill in that gap.

Due in part to the time that has lapsed since *Jardines* was decided and in part to the specificity of this Note, there are a limited number of lower court cases that are of value to illustrate how *Jardines* may apply. For instance, where an officer used a drug sniffing canine on the outside of a townhouse building, sniffing along a door on a concrete pad shared by a neighbor, a court may find that *Jones* and *Katz* do not apply; therefore, a search had not occurred and the government's actions were permissible.[239] However, under *Jardines*, the government must establish that there is an implied license to bring a drug-sniffing canine onto the cement pad shared by two residences.[240] In *Hopkins*, the court considered, but disregarded, the fact that there was a shared cement slab essentially acting as a front porch.[241] Moreover, the *Hopkins* court emphatically reasoned that the fact that an area is shared does not expand the notion of an implicit license.[242] As a result, the *Hopkins* court opined that the cement slab was curtilage and that there was neither an expressed nor an implied license to enter the curtilage.[243] Similarly, a locked

236. United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985).

237. *Jardines*, 133 S. Ct. at 1417.

238. *Id.* at 1419.

239. United States v. Hopkins, No. CR14-0120, 2015 WL 4087054, at *2 (N.D. Iowa July 6, 2015).

240. *Id.* at *1 (directing a drug sniffing canine to run alongside Hopkins townhouse building officers entered a shared cement pad to sniff six to eight inches from the bottom of each door).

241. *Id.* at *5.

242. *Id.*

243. *Id.*; *see also* State v. Rendon, 476 S.W.3d 77, 83 (Tex. App. 2014), *aff'd*, 477 S.W.3d 805 (Tex. Crim. App. 2015) (concluding that an area directly in front of the entry door to an apartment is "no different from the front porch of a free-standing home." Thus,

common area outside one's entry door may be equated with the cement pad where an implied license for government intrusion simply does not exist. As a result, government intrusion into locked common areas of multiple-resident buildings following *Jardines*' implicit license are treated with the same fortitude as government's intrusion into the curtilage of a single family home, regardless of whether the intrusion is with or without a canine.

Likewise, the Eighth Circuit, once strictly opposed to recognizing any property or expectation of privacy rights in common areas, is changing its stance post-*Jardines*.[244] While this circuit has yet to rule on a *Jardines*-controlled case, the court has provided insight into a post-*Jardines* analysis regarding Fourth Amendment protections within locked common areas.[245] In two Eighth Circuit cases, both involving a canine sniff in the defendant's common hallway of an apartment building, the court conceded that *Jardines* would restrict the government from entering the common area with a canine without a warrant.[246] The court hinted that *Jardines* "cast doubt on our earlier cases sanctioning the use of a drug dog to sniff around the door of an apartment in the common hallway of an apartment building."[247]

Moreover, other state courts have taken *Jardines* a step further and held that government intrusion and a canine sniff near apartment doors, even in unlocked and open areas, constitutes a search.[248] Focusing solely on whether the intrusion was permitted or whether it violated the *customary invitation* test, the court did not need to consider whether the open stairway or the landing constituted curtilage.[249]Additionally, at least

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bringing a drug sniffing canine to sniff the entry door pursuant to discovering incriminating evidence is beyond "the scope of any express or implied license allowed under the Fourth Amendment.").

244. *See* United States v. Matthews, 784 F.3d 1232, 1235 (8th Cir. 2015), *cert denied sub nom*, Matthews v. United States, 136 S. Ct. 376 (2015); United States v. Davis, 760 F.3d 901, 904 (8th Cir. 2014), *cert denied*, 135 S. Ct. 996 (2015).

245. *Matthews*, 784 F.3d at 1234 (deciding that a search occurred in light of *Jardines*); *Davis*, 760 F.3d at 902–03 (where, after the motion to suppress was briefed and argued, but before the court ruled, the *Jardines* decision occurred).

246. *Matthews*, 784 F.3d at 1235; *Davis*, 760 F.3d at 904.

247. *Matthews*, 784 F.3d at 1235; *see also* United States v. Givens, 763 F.3d 987, 992 (8th Cir. 2014), *cert denied*, 135 S. Ct. 1520 (2015) (stating that the *Jardines* holding cast doubt on that circuit's controlling case); United States v. Scott, 610 F.3d 1009, 1016 (8th Cir. 2010) (holding that a canine drug sniff in the hallway of an apartment building and around the door of an apartment did not constitute a search).

248. *See* State v. Rendon, 476 S.W.3d 77, 833 (Tex. App. 2014), *aff'd*, 477 S.W.3d 805 (Tex. Crim. App. 2015) (holding that a canine sniff at the threshold of appellee's apartment-home is "clearly included within the physical-intrusion theory of *Jardines*").

249. *Id.* (electing not to consider whether the portion of the landing to the left of the top of the stairs leading to appellee's door was the curtilage of his apartment and also

one state court combined both *Jones* and *Jardines* to formulate the court's holding.[250] The *Sweeney* court, in determining to apply both *Jones* and *Jardines* together postulated the following three questions that must be analyzed to determine whether a trespass has occurred: (1) Did the police encroach upon an area that is constitutionally protected?; (2) Was the entry into the area by the police permitted by the homeowner meaning that the police were lawfully present in the area?; and (3) Was the intention of entering the area for the purposes of conducting a search?[251] In *Sweeney*, the issue was the search of a common basement that was "accessible to all the tenants but not customarily open to non-tenants."[252] The court held that the constitutionally protected common basement is similar to the interior of the home rather than the curtilage of the home.[253]

Similarly, the locked common area of a home, analyzed under *Sweeney*, should constitute a constitutionally protected area.[254] The homeowner of a single-family residence typically does not expect an uninvited visitor to enter curtilage that is not open to public view.[255] For example, a resident with a locked common area has the same expectation and would not expect to open his common hallway door to find a party or drug activity occurring in the hallway. Moreover, a homeowner typically does not expect the government to enter a locked common area any more than a single-family homeowner would expect the government to enter his attached garage. However, assume that the government enters the locked common area without a warrant to perform a search in establishing probable cause to secure a warrant. In performing a *Sweeney* analysis on the aforementioned hypothetical scenario, the first step is to

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subject to *Jardines* physical-intrusion theory); *but see* McClintock v. State, 405 S.W.3d 277, 284 (Tex. App. 2013) (holding that the landing, akin to a porch, at the apartment's entry door is curtilage. The court reasoned the landing was exclusive to the defendant's apartment, that private house plants were kept on the landing, and that the stairway leading to the landing was not a common area. Nonetheless, the court also applied *Jardines* in concluding that bringing a canine to the landing "exceeded any license which impliedly may have been granted merely to approach and solicit any residents of the apartment.").

250. *See* United States v. Sweeney, No. 14-CR-20, 2014 WL 2514926, at *19 (E.D. Wis. June 4, 2014) (reasoning that *Jardines* and *Jones* may be used together to determine whether a search occurred when the "defendant's co-habiting girlfriend consented to the search of their apartment" and where the "defendant consented to the search of his car, but did not authorize or consent to search in basement of the **apartment** building without a warrant") (emphasis added).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

establish that the government may have "encroach[ed] upon a constitutionally protected area."[256] Courts may now analyze this threshold question by applying the *Jardines*, *Jones*, or *Katz* tests. Answering in the affirmative to the second step under *Sweeny*, the government did enter an area without permission from the homeowner and without probable cause. Finally, in analyzing the third question in *Sweeney*, the government indeed entered the area without provocation to perform search. Therefore, under a *Sweeney* analysis, courts would hold that the common area, and especially the area outside the entry door to one's home, is constitutionally protected.[257] Accordingly, under either a *Jardines* or *Jones* analysis, a Fourth Amendment search has occurred when there is government intrusion into a locked common area; thus requiring a warrant or a judicially created exception to a warrant for lawful entry.

Despite *Jardines*, some circuits still maintain their view prior to the *Jardines* decision that government intrusion into locked common areas and the subsequent canine search do not constitute a search under the Fourth Amendment.[258] Some of these circuits rationalize that the common area is not afforded a reasonable expectation of privacy.[259] Therefore, while any government intrusion may technically be a trespass, it does not matter because there is not an expectation of privacy from such intrusion.[260] Moreover, some of these courts rely on *Jacobson*[261]

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256. *Id.*

257. *Id.*

258. *See generally* United States v. Concepcion, 924 F.2d 1170, 1172 (7th Cir. 1991); United States v. Barrios-Moriera, 872 F.2d 12, 14 (2d Cir. 1989); United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977).

259. *See generally* United States v. Dillard, 438 F.3d 675, 682 (6th Cir. 2006) (holding that there is no reasonable expectation of privacy in a duplex's common hallway where doors were unlocked and ajar); United States v. Miravalles, 280 F.3d 1328, 1333 (11th Cir. 2002) (reasoning that there is no reasonable expectation of privacy in common areas of a high-rise apartment building where the lock on the building's door was not operational on the relevant date); United States v. Hawkins, 139 F.3d 29, 32–33 (1st Cir. 1998) (holding that is no reasonable expectation of privacy in a basement common area); United States v. Acosta, 965 F.2d 1248, 1253 (3d Cir. 1992) (holding that there is no reasonable expectation of privacy in an inner hallway that is accessible via an unlocked door); *Concepcion*, 942 F.2d at 1172 (holding that there is no reasonable expectation of privacy in the common areas of an apartment building); *Barrios-Moriera*, 872 F.2d at 14 (finding no reasonable expectation of privacy in hallway enclosed by locked door); *Eisler*, 567 F.2d at 816 (ruling that there is no reasonable expectation of privacy in an apartment hallway even though the building was locked and entry was gained by following another tenant who unlocked the door).

260. *See* State v. Nguyen, 841 N.W.2d 676, 678–79 (N.D. 2013) (conducting a canine sniff in an apartment after another tenant complained did not constitute a search due to the lack of an expectation of privacy in the common hallway that was available to "tenants and their guests, the landlord and his agents, and others having legitimate reason

and *Place*[262] to establish that the likelihood that the use of a drug-sniffing canine in a common hallway of a secure apartment building will not compromise "any legitimate interest in privacy [because it] is too remote to characterize the use of the drug-sniffing dog as a search subject to the Fourth Amendment."[263] Thus "the entry by the [government] into the common hallways was not a search under" the expectation of privacy doctrine.[264] Therefore, in its reliance of *Jacobson*, *Place*, *Dunn* and *Oliver*, the court determined that, unlike the area immediately surrounding a home, curtilage protections do not extend to the common areas of an apartment building.[265] Similarly, many other courts disregard the curtilage doctrine for common areas and have uniformly held that when the front door to an apartment or other "multi-occupancy dwelling" is exposed to general view rather than enclosed and/or secured from public access, the area around the front door does not enjoy the status of protected curtilage.[266] Relying on *Oliver,* many of these courts hold the position that the curtilage must be an area where there is "intimate activity associated with the sanctity of a man's home and the privacies of life."[267]

However, these courts are misguided in not extending the curtilage doctrine into common areas after *Jardines*. For example, in an illustrative

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to be on the premises." Further, other tenants regularly allowed in "visitors, delivery persons, or other members of the public"); *see also* Sanders v. Commonwealth, 64 Va. App. 734, 739 (2015) (concluding that the occupant of a motel has no legitimate expectation of privacy in areas subject to common use regardless of external or internal hallways, even those "immediately adjacent to private areas such as individual apartments and motel rooms").

261. Jacobson v. United States, 503 U.S. 540 (1992).

262. United States v. Place, 462 U.S. 696 (1983).

263. *Nguyen*, 841 N.W.2d at 678–79.

264. *Id.* at 681.

265. *Id.*

266. *See* 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 2.3(c), at 759, 761–62 (5th ed. 2012):

> What is different about the multiple-occupancy dwelling cases generally is that an occupant can claim an exclusive privacy interest in only a portion of the premises, and areas immediately adjacent to that portion will be open to public or common usage, so that courts are inclined to view those occupying such dwellings as having a reduced privacy expectation. Apartment dwellers fare no better. It is not a search for an officer to look into an apartment while in a common passageway or other common area of the apartment complex[.]

Id.; *see also* Chase, *supra* note 84, at 1305 ("In summary, the overwhelming weight of authority rejects the proposition that a resident of a multi-dwelling residential building can claim curtilage protection in common areas—or even anywhere outside an individual unit.").

267. *Id.*; *see also* Oliver v. United States, 466 U.S. 170, 182 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)); California v. Ciraolo, 476 U.S. 207 (1986).

Iowa state case, an officer used a drug-sniffing canine to run alongside a townhouse building to sniff along the bottom of each door.[268] The canine would come within six to eight inches of each door, which shared a cement pad with its neighbor.[269] Under a *Dunn* analysis, the officers' actions would typically not invoke a Fourth Amendment search.[270] Conversely, under *Jardines*, the Court determined whether the officers' actions constituted an expressed or implied license to conduct a drug sniff in an area shared by two residences.[271] The Iowa court reasoned that the cement slab in front of the residence was, in effect, the "front porch."[272] Therefore, the Court concluded that there was no express or implied license to conduct a drug sniff in this area.[273] The court determined that the area was protected curtilage and the drug sniff constituted an unlawful Fourth Amendment search.[274]

In another example, two police officers and their canine entered Burns locked apartment building in the middle of the night.[275] The building consisted of twelve apartments on three stories with a locked entrance on both the east and west side.[276] Burns lived on the third floor where only a storage closet and one other apartment were accessible from the landing.[277] The officers instructed the canine to sniff the front door of Burn's apartment without a warrant.[278] On the basis of this drug sniff, the officers obtained a search warrant that led to the subsequent search of Burns' home.[279] The court found this search unreasonable.[280] Relying on *Jardines*, the court held that, absent a warrant, there was not an implicit invitation for the police to enter the building or to approach the defendant's front door.[281] The court reasoned that "if the police cannot stand outside the front window and trawl for evidence about the contents of the home, then they cannot stand immediately outside the

268. United States v. Hopkins, No. CR14-0120, 2015 WL 4087054, at *2 (N.D. Iowa July 6, 2015).
269. *Id.*
270. *Id.*
271. Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).
272. *See* Hopkins, No. CR14-0120, 2015 WL 4087054, at *5 (holding that there was not an implied license to enter the shared slab of cement outside Apartments 6 and 8).
273. *Id.*
274. *Id.*
275. People v. Burns, 25 N.E.3d 1244, 1254 (Ill. App. Jan. 30, 2015).
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*

front door and do the same."[282] The court emphasized that Burns' apartment building was not a public thoroughfare and that both entrance doors were always locked.[283] Thus, this case illustrates and further supports the notion that the common area behind a locked building entrance door is a constitutionally protected area.

Moreover, the courts who oppose extending a reasonable expectation of privacy to common areas are in direct opposition to *Katz*, where the person, rather than the place, is protected.[284] Furthermore, these circuits are unwilling to amend the *Dunn* factors and use the factors depending on the type of setting in question. The courts should consider, as a material fact, whether the setting is a farm in the middle of nowhere or an urban apartment building in downtown New York City.[285] Under a *Dunn* factor analysis, at least one state appellate court, post-*Jardines*, does not recognize an indoor or an outdoor hallway as curtilage if it is in common use.[286] The simple fact that an area is common does not eliminate any expectation of privacy for that area.[287] Still further, these courts do not analyze the societal norms under Justice Harlan's second prong to determine whether society is changing and thus the objective test should be reevaluated in these circuits.[288] Moreover, in these courts, *Jardines* and the *customary invitation* test is quickly dismissed with regards to common areas.[289]

As a result, the small sample size does not provide a definitive answer whether the lower courts will embrace *Jardines*. On the other hand, the implicit license and the *customary invitation* test as formulated in *Jardines* would help provide a systematic and uniform application to

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282. *Id.*

283. *Id.*

284. Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring).

285. United States v. Burston, 806 F.3d 1123, 1125 (8th Cir. 2015) (holding that an area outside of an apartment window in the shrubbery constituted curtilage under a *Dunn* analysis).

286. State v. Milton, 821 N.W.2d 789, 799 (Minn. 2012) (concluding that a shared stairway and platform are not curtilage because there is a diminished expectation of privacy in common areas).

287. State v. Rendon, 476 S.W.3d 77, 833 (Tex. App. 2014), *aff'd*, 477 S.W.3d 805 (Tex. Crim. App. 2015) (holding that a common area landing at the top of an open staircase, visible to the public, was curtilage and thus required a warrant).

288. State v. Williams, 862 N.W.2d 831, 832–33 (hinging the court's decision on the fact that the common area cannot be exclusively controlled and therefore, it is not curtilage, without considering societal preference); *but see* Vinson v. Vermilion Cnty., Illinois, 776 F.3d 924, 930–31 (7th Cir. 2015) (considering the background social norms that invite a visitor to the front door do not invite him there to conduct a search).

289. *Williams*, 862 N.W.2d at 837; State v. Nguyen, 841 N.W.2d 676, 679 (N.D. 2013); United States v. Penaloza-Romero, No. CRIM. 13-36 RHK/TNL, 2013 WL 5472283, at *3 (D. Minn. Sept. 30, 2013); *Milton*, 821 N.W.2d at 799.

Fourth Amendment jurisprudence and would help eliminate the differing opinions of the circuits. By embracing *Jardines*, the test becomes much less complex: whether the government's actions would have been allowed by a homeowner either implicitly or explicitly as determined by whether an uninvited stranger would be permitted to perform those same acts.

3. Jardines Indicates That in the Future, the Government May Have a Higher Burden to Prove Their Entry Was Not a Search; Thus, There Will Be Greater Restrictions for Government Searches

In order to predict what *Jardines* means to future Fourth Amendment jurisprudence and where the *customary invitation* test will fit in the future, it is necessary to analyze the Justices' position in *Jardines*. The majority, as authored by the late Justice Scalia and joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, took the position that his case was "straightforward."[290] Using *Jones*, Justice Scalia stated that physical intrusion into houses and effects constitute a search under the Fourth Amendment.[291] Justice Scalia, in emphasizing the ease of the case, did not address the defendant's reasonable expectation of privacy.[292] Instead, he noted that one benefit of property-rights analysis is that it "keeps easy cases easy."[293]

In the concurring opinion, Justice Kagan, joined by Justices Ginsburg and Sotomayor, took the position that the case would have come out the same if they had looked at the privacy interests of the defendant.[294] In the concurring opinion, Justice Kagan emphasized that "'privacy expectations are most heightened' in the home and the surrounding area."[295] Justice Kagan reasoned that *Kyllo* already resolved the issue of a privacy analysis versus a trespass analysis when a canine is used to detect, from outside the home, what may be occurring inside the home.[296]

In the dissenting opinion, authored by Justice Alito, joined by Chief Justice Roberts, Justices Kennedy and Breyer took the position that neither a trespass nor a privacy violation had occurred when the government took a drug sniffing canine onto the front porch to establish

290. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013).
291. *Id.* at 1417.
292. *Id.*
293. *Id.* at 1418.
294. *Id.*
295. *Id.*
296. *Id.*

probable cause.[297] In Justice Alito's opinion, the government did not trespass onto the defendant's porch because the law of trespass provides the public with a license to approach a front door, via a walkway, and to remain there for a short amount of time.[298] Furthermore, Justice Alito reasoned that the motive behind approaching the home is irrelevant as is the category of visitor.[299] Moreover, Justice Alito opined that the license extended to the government, even if the motive was to gather incriminating evidence against the resident.[300] He then attacked the concurrence's *Kyllo*-based approach in writing that, according to the concurrence, a canine's sniff from a "public sidewalk or from the corridor of an apartment building" would constitute a search.[301] Justice Alito concluded that the concurrence's opinion "hamper[s] legitimate law enforcement" activity.[302]

In *Jardines*, if one applies either the *Katz* test or the trespass doctrine, the results are identical when it comes to real property. Both tests would find that the government conducted a search under the Fourth Amendment.[303] The majority and concurring opinions make clear that there is an interaction between the two tests.[304] The dissent may have alluded to this Note's same assertion that there is a reasonable expectation of privacy in locked common areas.[305] Justice Alito saw the majority opinion as restricting the government from enforcing legitimate law because it hampered the government from committing a physical intrusion of a protected area.[306] Justice Alito, in disagreeing with the concurring opinions,[307] argued that *Kyllo* is too wide-reaching because it would apply when a canine alerts from a public sidewalk or in the corridor of the building, even where the canine and handler were allowed lawful entry.[308] Comparing to *Kyllo*, the canine's nose would be treated as a thermal imager from the public sidewalk of a corridor of a building.[309]

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297. *Id.* at 1420.
298. *Id.*
299. *Id.* at 1422.
300. *Id.*
301. *Id.* at 1426.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at 1418.
306. *Id.* at 1426.
307. Kyllo v. United States, 533 U.S. 27 (2001) (using a thermal-imaging device to scan defendant Kyllo's triplex from a public street, thus, in the government's argument, not a trespass).
308. *Jardines*, 133 S. Ct. at 1426.
309. *Kyllo*, 533 U.S. at 30.

This is the exact situation in which the law should protect citizens from unwarranted governmental intrusion. To take a canine into a building to conduct a probable cause sniff gives the government knowledge of what may be occurring behind the locked front door of a home. *Kyllo* is not new precedent and could have been overruled by the Court, but it has not been.[310] *Kyllo* and Justice Alito's dissent suggest that it is not relevant where the imaging was taken from, it only matters what information the imager provided.[311] Thus, if the imager provides details that would not be known from a normal public vantage point, then the imager constitutes a search.[312] The same should apply to a government intrusion into an area not open to the general public, where there are some security measures, thus making it reasonable to expect privacy in the area, and to have an implicit license preventing entry to anyone. As a result, *Jardines* should have a tremendous impact on the use of drug sniffing canines or unwarranted government activity in locked common areas. The other circuits that refuse to recognize government intrusion in common areas should follow the Eighth Circuit's lead and concede that *Jardines* would restrict the government from entering the common area with a canine without a warrant.[313]

Furthermore, under the *customary invitation* test, lower circuits would have a uniform threshold standard to determine whether a search has occurred under the Fourth Amendment. The implicit license would not permit a stranger to snake into a normally locked door gaining entry into a common area. Additionally, the implicit license would not permit the landlord to give a key to the building to a stranger. Therefore, following the logic in the majority *Jardines* opinion, the Constitution restricts the government. The government may not encroach upon an area more than, or in any manner other than, allowed by a private citizen.[314]

However, even if the lower circuits choose not to extend *Jardines* to multi-unit common areas, the Court's logic of incorporating *Katz* and *Jones* should not be denied as applicable.[315] Based upon the two hypotheticals presented previously in this section, under *Jardines*, the government now has less power to enter into an area without the entry constituting a search. According to the majority and concurring opinions

310. *Id.*

311. *Id.*; *Jardines*, 133 S. Ct. at 1426.

312. *Kyllo*, 533 U.S. at 30.

313. United States v. Matthews, 784 F.3d 1232, 1234 (8th Cir. 2015), *cert denied sub nom*, Matthews v. United States, 136 S. Ct. 376 (2015).

314. *Jardines*, 133 S. Ct. at 1427.

315. *Id.*

in *Jardines*, the same holds true on the *Jones* and *Katz* principles.[316] Therefore, while the implicit license creates a strong burden the government must overcome when entering into an area with a drug-sniffing canine for the purposes of gathering information about the home, so do the *property-rights trespass* and the *reasonable expectation of privacy* tests.[317] *Jardines* makes it clear that the government may not attempt to enter an area that an uninvited stranger would not be permitted to enter, in a manner not permitted by an uninvited stranger, or for a purpose not permitted for entry by an uninvited stranger.

IV. CONCLUSION

The Fourth Amendment should provide equal protection to all Americans, rather than offering heightened protections to those living in single-family homes as opposed to those living in multi-unit dwellings. The Fourth Amendment protections were at the forefront of the founding fathers' minds when they drafted the amendment; although they may not have contemplated common areas, surely they did not intend to segregate Americans based upon where they live or upon their socioeconomic status. The *Jardines* opinion gives lower courts another tool for protecting Americans from unwarranted government intrusion. However, it is up to the courts to interpret the *customary invitation* test as it applies in locked common areas. Additionally, public policy suggests that, with the trend of Americans choosing to live in urban settings, the diminished expectation of privacy standard set forth in those circuits that have not held for common area protections should be expanded to match current societal norms.

316. *Id.*
317. *Id.*