NOTE

LET THIS JARDINES GROW: THE CASE FOR CURTILAGE PROTECTION IN COMMON SPACES

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It is axiomatic that the Fourth Amendment to the United States Constitution protects Americans from unwarranted police intrusions in their homes. Areas immediately surrounding the home which are so "intimately tied" to the home's activities similarly protect Americans against warrantless search and arrest, or so says the doctrine of curtilage. However, courts have typically not extended curtilage protection to common areas, such as hallways, garages, or storage spaces within multi-unit structures, while they have recognized curtilage protection of similarly proximate spaces surrounding single-family homes. These courts rely almost entirely on an individual resident's inability to totally exclude others—landlords, repairmen, fellow tenants, or their guests—from these areas to conclude that these spaces cannot constitute curtilage or that expectations of privacy within these spaces are not objectively reasonable. The Wisconsin Supreme Court decided as such in *State v. Dumstrey*. Courts' reluctance to recognize curtilage protection in multi-unit dwellings creates a gap in privacy protection, particularly with respect to low-income urban residents, that belies deeply rooted privacy, property, and security interests. This Note argues that courts should utilize the licensing approach articulated in *Florida v. Jardines* to diminish the importance of the right to exclude, and that the Wisconsin Supreme Court should have taken this approach in *Dumstrey*.

INTRODUCTION

What's in a lock? For the average American, a lock not only stands as the physical barrier that keeps their possessions, homes, and persons secure from interference by outsiders, the lock symbolizes a social compact—the understanding that when a space is locked, those who do not possess a key are not permitted to invade it. However, the law has effectively denied increasing numbers of Americans the benefit of that compact. Each year, more and more American citizens are transitioning to multi-unit residential buildings. For some, this is a choice motivated by the increasing popularity of urban dwelling.[1] For many, however, single-family home ownership is not a financial option. Regardless, in the majority of United States jurisdictions, both categories of residents will be denied Fourth Amendment protection in the locked, common spaces of their buildings despite that these areas are private, inaccessible to the general public, and likely carry the same privacy and security expectations that single-family homeowners hold in the areas surrounding their houses.

Though security of "persons" precedes "houses" within the text of the Fourth Amendment, that amendment's protections have always been rooted in the sanctity of the home.[2] As Sir Edward Coke famously said, "[t]he house of every one is to him as his castle and fortress, as well for his defence [sic] against injury and violence as for his repose," and even "[t]he poorest man may in his cottage bid defiance to all the force of the crown."[3] As the home is protected under the law, so too is any area "so intimately tied to the home itself that it should be placed under

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1. Lucy Westcott, *More Americans Moving to Cities, Reversing the Suburban Exodus*, ATLANTIC (Mar. 27, 2014), http://www.theatlantic.com/national/archive/2014/03/more-americans-moving-to-cities-reversing-the-suburban-exodus/359714/ [https://perma.cc/EJ48-EBVM].

2. *See Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

3. *Seyman's Case*, 5 Coke's Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1603); William Pitt, Earl of Chatham, Address to House of Commons (1763).

the home's 'umbrella' . . . ."[4] These areas, known as "curtilage," have included front porches,[5] attached garages,[6] driveways,[7] and back yards.[8]

Despite the broad range of spaces in which single-family homeowners enjoy Fourth Amendment protection, the vast majority of courts in the United States—both state and federal—have declined to extend the same protection to similarly proximate spaces in multi-unit homes such as apartment or condominium buildings.[9] Recently, in *State v. Dumstrey*,[10] the Wisconsin Supreme Court joined them. In *State v. Dumstrey*, officers of the City of Waukesha police department detained and arrested Brett Dumstrey after he had already entered the private, locked garage underneath his apartment building.[11] Although Dumstrey shared the garage with other residents of his apartment complex, the garage was only accessible to tenants via an elevator inside the building or remote control on the outside.[12] The officer who initially detained Dumstrey was able to enter the parking garage because he intentionally parked his vehicle over the electronic sensor, preventing the garage door from closing.[13] The Wisconsin Supreme Court held that Dumstrey lacked Fourth Amendment protection in his garage because the garage was not included in the curtilage of his home, and he did not possess a reasonable expectation of privacy in the garage he shared with other residents.[14] Though the Wisconsin Supreme Court denied Dumstrey protection under two different Fourth Amendment theories, it relied almost entirely on a singular factor to do so—Dumstrey's inability to prevent other residents, their guests, or anyone else having legitimate business from accessing the garage. This Wisconsin case powerfully illustrates how the current formulation of the curtilage analysis unreasonably privileges Americans residing in single-family homes. This formulation has become confused in the era of privacy post-*Jones*—expectations of privacy versus property interest-based protection. The doctrine of curtilage presents the perfect opportunity to unify these two theories.

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4. *United States v. Dunn*, 480 U.S. 294, 301 (1987).

5. *See Jardines*, 133 S. Ct. at 1414 (2013).

6. *See Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 885 (9th Cir. 1990).

7. *See United States v. Wells*, 648 F.3d 671, 678 (8th Cir. 2011).

8. *See United States v. Struckman*, 603 F.3d 731, 747 (9th Cir. 2010).

9. *See* Carol A. Chase, *Cops, Canines, and Curtilage: What Jardines Teaches and What it Leaves Unanswered*, 52 HOUS. L. REV. 1289, 1303–09 (2015).

10. *State v. Dumstrey*, 873 N.W.2d 502, 516 (Wis. 2016).

11. *See id.* at 506.

12. *Id.*

13. *Id.*

14. *Id.* at 505.

This Note argues that locked, common spaces within multi-unit dwellings such as hallways, garages, and storage rooms should receive Fourth Amendment protection under the curtilage doctrine. This Note further argues that courts denying this protection, including the Wisconsin Supreme Court, have misconstrued both curtilage and reasonable expectations of privacy in defiance of the theoretical roots of Fourth Amendment security. This trend persists to the detriment of increasing numbers of Americans who choose to—or must—reside in multi-unit residential buildings. Part I of this Note discusses the Wisconsin Supreme Court's approach in *State v. Dumstrey*. Part II overviews the history of Fourth Amendment privacy, property, and curtilage and summarizes the United States Supreme Court's approach in *Florida v. Jardines*[15] to emphasize that Fourth Amendment privacy is really about security.[16] Part III examines how courts across the United States have treated both curtilage and reasonable expectations of privacy in common spaces. Part IV makes the case for curtilage in common spaces, arguing that *Jardines* supports the application of curtilage to common spaces notwithstanding objectively reasonable expectations of privacy, and that this approach is correct as a matter of law and policy.

I. *DUMSTREY* FIRE: ILLUSTRATING THE PROBLEM OF FOURTH AMENDMENT PROTECTION IN COMMON SPACES

On April 20, 2012, Officer Paul DeJarlais of the City of Waukesha Police Department, off duty at the time, observed a vehicle driving at a high rate of speed and tailgating other drivers.[17] Suspecting that the driver was intoxicated, DeJarlais attempted to catch his attention and identify himself as a police officer, but the driver stared blankly at DeJarlais and then drove away, apparently "trying to lose" DeJarlais.[18] The driver, Brett Dumstrey, entered the garage underneath his apartment building.[19] The garage door, locked from the outside, was operated by remote control.[20] The garage itself sat underneath Dumstrey's apartment building and could only be accessed from the building by elevator.[21] DeJarlais parked his personal vehicle underneath the garage door, covering the electronic sensor and preventing the

15. 133 S. Ct. 1409 (2013).
16. *Id.* at 1414–15.
17. *Dumstrey*, 873 N.W.2d at 502.
18. *Id.* at 505–06.
19. *Id.*
20. *Id.*
21. *Id.*

garage door from closing.[22] This allowed DeJarlais and another responding officer to enter the garage and detain Dumstrey.[23] Dumstrey was later charged with operating a vehicle under the influence of an intoxicant.[24] Dumstrey challenged the stop in his garage and subsequent arrest, arguing that DeJarlais's warrantless entry, absent probable cause and exigent circumstances, violated the Fourth Amendment.[25] The Wisconsin Supreme Court did not agree.

The court framed the question before them as whether Dumstrey's seizure occurred in a "constitutionally protected area," violating his Fourth Amendment rights.[26] The court split this question in two, asking first whether the garage constituted Dumstrey's "curtilage"—an area immediately surrounding the home which is protected as part of the home for Fourth Amendment purposes—and second, if the garage is not curtilage, whether Dumstrey had a "reasonable expectation of privacy" in the garage.[27] In drawing the distinction between the so-

22. *Id*. at 506.

23. *Id*. After a trial judge denied Dumstrey's motion to suppress on Fourth Amendment grounds, Dumstrey pled guilty to operating while intoxicated (OWI) under Wisconsin statute section 346.63(1)(a). *Dumstrey*, 873 N.W.2d at 506–07. Dumstrey's blood alcohol level was .178. *Id.* at 506.

24. *See* WIS. STAT. § 346.63(1) (2015–16).

25. *Dumstrey*, 873 N.W.2d at 506. Dumstrey argued that, because the garage constituted curtilage of his home, the State needed to prove the presence of probable cause to believe Dumstrey had committed a crime and exigent circumstances. Brief for Petitioner at 1, *State v. Dumstrey*, 873 N.W.2d 502 (Wis. 2016) (No. 2013-AP-857) 2015 WL 1832348, at *1. In Wisconsin, a first-time OWI offender does not face a criminal penalty, only a civil forfeiture. *See* WIS. STAT. §§ 346.63(1), 346.65(2) (2015-16). Because Officer DeJarlais could not have been aware of Dumstrey's criminal history, he could not have had probable cause to suspect that Dumstrey was committing a crime. *See* Oral Argument at 9:50, *State v. Dumstrey*, 873 N.W.2d 502 (Wis. 2016), http://www.wiseye.org/Video-Archive/Event-Detail/evhdid/10029 [https://perma.cc/ZS9G-SZ8H]. The State also conceded that, given that Dumstrey may not have been aware that Officer DeJarlais was a police officer, hot pursuit was not appropriate. *Id.* at 58:03. Thus, the court did not consider whether Dumstrey's arrest was acceptable under "hot pursuit" or exigent circumstances exceptions to the warrant requirement. *See generally Dumstrey*, 873 N.W.2d. at 502. The Wisconsin Supreme Court focused solely on whether Dumstrey's garage constituted a constitutionally protected area for the purposes of the Fourth Amendment. *Id*. at 507.

26. *Id*.

27. *Id.* at 509. In addition to discussion regarding whether the garage was a constitutionally protected area, the court spent some time discussing the analytical differences given that Dumstrey was subjected to a seizure (an arrest) within the garage as opposed to a search. *See id*. at 508. The court itself stated that, if the seizure occurred in a "constitutionally protected area," it violated Dumstrey's Fourth Amendment rights unless otherwise justified by an exception to the warrant requirement. *Id.* at 508. Thus, it is unclear why the court draws multiple distinctions between "search cases" such as *Katz v. United States*, 389 U.S. 347 (1967), and *Florida v. Jardines*, 133 S. Ct. 1409 (2013), and "seizure cases" such as *United States v. Santana*, 427 U.S. 38 (1976). *Dumstrey*, 873 N.W.2d at 509–11 & n.7. This Note does not address this distinction, except to point out that the Wisconsin Supreme Court

called "curtilage" analysis as opposed to a "reasonable expectation of privacy" (REOP) analysis,[28] the court rejected its previous determination that "the privacy issue is interwoven with the curtilage determination and need not be considered separately."[29] The court noted that, in *United States v. Jones*,[30] the United States Supreme Court held that "Fourth Amendment rights do not rise or fall with the *Katz* [REOP] formulation,"[31] and in *Florida v. Jardines*,[32] that "the curtilage of a person's home remains a constitutionally protected area without the consideration of whether a reasonable expectation of privacy exists."[33] The Wisconsin Supreme Court characterized the United States Supreme Court's holdings in *Jones* and *Jardines* as emphasizing a "distinction between the trespassory, curtilage analysis and the reasonable expectation of privacy analysis."[34] "While it may be true that the two inquiries sometimes overlap," the court mused, "this approach may not accurately relate the current state of the law."[35]

The court first considered whether Dumstrey's enclosed, locked garage could be considered curtilage. The court structured its analysis around four factors for determining curtilage as provided by the United States Supreme Court in *United States v. Dunn*:[36]

> (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the

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stated that "there may be instances in which an area constitutes constitutionally protected curtilage for one purpose, such as a warrantless search, while not for another purpose, such as a warrantless arrest." *Id.* at 511 n.7. This Note presumes that, if an area is considered "curtilage" of the home, the Fourth Amendment protects the resident against warrantless arrest in that space. *See, e.g.*, *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010); *United States v. Brown*, 510 F.3d 57, 64 (1st Cir. 2007); *United States v. French*, 291 F.3d 945, 951 (7th Cir. 2002) ("The Fourth Amendment protects individuals from unreasonable searches and seizures. This protection is not limited to the four walls of one's home, but extends to the curtilage of the home as well.").

28. This Note will refer to the analytical approach, which examines reasonable expectations of privacy for Fourth Amendment purposes with the abbreviation REOP. This abbreviation refers only to the analytical approach used by courts to answer Fourth Amendment questions, which may be distinct from actual privacy expectations that individuals hold in a certain space.

29. *Dumstrey*, 873 N.W.2d at 510 n.6 (quoting *State v. Martwick*, 604 N.W.2d 552, 559 (Wis. 2000)).

30. 132 S. Ct. 945 (2012).

31. *Dumstrey*, 873 N.W.2d at 510 (quoting *Jones*, 132 S. Ct. at 950).

32. 133 S.Ct. 1409 (2013).

33. *Dumstrey*, 873 N.W.2d at 510 (citing *Jardines*, 133 S. Ct. 1409).

34. *Id.* at 510.

35. *Id.* at 510 n.6.

36. 480 U.S. 294 (1987); *see Dumstrey*, 873 N.W.2d at 512.

> area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by.[37]

The court noted that it does not "mechanically" apply the factors, but uses them as "useful analytical tools" to address the "centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."[38]

Under each factor, the court narrowly focused on Dumstrey's lack of exclusive control over the garage and his inability exclude others. When considering the proximity of the garage to Dumstrey's home, the court relied on the First Circuit's pronouncement in *United States v. Cruz Pagan*[39] that "a tenant's [home] cannot reasonably be said to extend beyond his [or her] own apartment and perhaps any separate areas *subject to his [or her] exclusive control*."[40] With regard to the second factor, whether the garage was within an enclosure surrounding the home, the court said that, although the garage was enclosed within the apartment building, that enclosure also included twenty-nine other apartments which could not reasonably be considered part of Dumstrey's home.[41] The court further held that the garage did not fit the nature of use associated with curtilage because "[h]e puts the area to no other use such as storing personal belongings in an exclusively controlled area or conducting other personal activities such as we would equate with a garage attached to a single-family home."[42] Finally, the court determined that because Dumstrey had not—and certainly would not be able to—shielded the interior of the garage from fellow tenants and their guests as opposed to the non-resident general public, it cannot be said that he took reasonable steps to protect the garage from outside observation.[43]

The court relied on the same lack of "dominion and control" to hold that any expectations of privacy Dumstrey might have had in the garage were not objectively reasonable.[44] Because Dumstrey had "no

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37. *Dumstrey*, 873 N.W.2d at 512 (quoting *Dunn*, 480 U.S. at 301) (internal quotation marks and citations omitted).

38. *Id.*

39. 537 F.2d 554 (1st Cir. 1976).

40. *Dumstrey*, 873 N.W.2d 502, 512 (insertions included in original) (emphasis added) (quoting *Cruz Pagan*, 537 F.2d at 558).

41. *Id.* at 513.

42. *Id.* at 514.

43. *Id.*

44. *Id.* at 515. The Court utilized six factors to determine wither Dumstrey's expectation of privacy in the garage were reasonable:

> (1) whether the defendant had a property interest in the premises; (2) whether he [or she] was legitimately (lawfully) on the premises; (3) whether

right to exclude the 29 other tenants or their guests," he could not conceivably exercise the type of "dominion and control" signaling protection under the Fourth Amendment.[45] Additionally, because fellow tenants were able to observe Dumstrey's parking space as well as any activities he conducted in the garage, he could have no reasonable expectation of privacy whether he put that area to private use or not.[46] Accordingly, the Wisconsin Supreme Court held that Brett Dumstrey was not entitled to Fourth Amendment protection in his underground parking garage.[47]

The court purportedly applied two different Fourth Amendment theories, but the court's analytical approach in these two sections of the opinion was more or less identical. This is no coincidence. As this Note will show, prior to the revival of a trespass-based test in *Jones* and its application to curtilage in *Jardines*, the curtilage analysis was really about reasonable expectations of privacy. The *Dunn* factors were designed to measure whether expectations of privacy in areas surrounding a person's home are objectively reasonable.[48] Thus, when the Wisconsin Supreme Court applied the factors *in addition to* the REOP analysis, it was not only being redundant, it was denying the kind of Fourth Amendment protection that *Jones* and *Jardines* were meant to resurrect.

II. CURTILAGE IN CONTEXT: PRIVACY, SECURITY, AND PLACE-BASED PROTECTION

As technology and living conditions have evolved, legal concepts of privacy have changed significantly. This has required the United States Supreme Court, at times, to completely overhaul the application of the Fourth Amendment, producing a multi-doctrinal approach.[49] In the shadow of these changes, the curtilage doctrine has experienced relatively steady development. Though the theory of curtilage is rooted

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> he [or she] had complete dominion and control and the right to exclude others; (4) whether he [or she] took precautions customarily taken by those seeking privacy; (5) whether he [or she] put the property to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.

Id. at 512 (citing *State v. Rowlinski*, 464 N.W.2d 401, 407 (1990)). While the court acknowledged that the first two factors fell in Dumstrey's favor, the remaining four did not. *Id.* at 512–15.

45. *Id.* at 515–16.

46. *Id.* at 515.

47. *Id.* at 516.

48. *See infra* Part II.C.

49. *See, e.g.*, *United States v. Jones,* 132 S. Ct. 945, 952 (2012) (reviving the trespass test); *United States v. Katz*, 389 U.S. 347, 353 (1967) (repudiating the *Olmstead* trespass test).

in property interests, its legal application has been shaped by reasonable expectations of privacy. In the curtilage context, the distinction between place-based privacy and reasonable expectations of privacy begins to blur, especially in light of the recent revival of the trespassory test.[50] This Part will outline the development of Fourth Amendment privacy and the curtilage doctrine to emphasize that Fourth Amendment protection is less about technical or absolute privacy and more about security.[51] Despite the broad security interests implicated by the Fourth Amendment and its history, American courts have divided Fourth Amendment protection by narrowly focusing on either property or privacy interests. This need not be the case, especially following the revival of the trespass test in *Jones* and particularly with respect to its curtilage application in *Florida v. Jardines*. The United States Supreme Court's approach to curtilage in *Jardines* demonstrates that the right to be secure in one's curtilage does not rise and fall with the absolute right to exclude.

A. The Right to be Secure and the Promise of the Fourth Amendment

The Fourth Amendment is fundamentally about security. In 1761, a young John Adams observed James Otis challenge far-reaching British search and seizure practices under general "Writs of Assistance."[52] Adams recorded Otis's arguments, and his notes included assertions such as "This [w]rit is against the fundamental [p]rinciples of [l]aw . . . [a m]an, who is quiet, is as secure in his [h]ouse, as a [p]rince in his [c]astle . . . ."[53] Adams later reproduced his observations in an "abstract" which has been cited as evidence of Adams' early views on privacy, search, and seizure.[54] With phrases

50. *See Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Jones*, 132 S. Ct. at 952; *Katz*, 389 U.S. at 353.

51. This Note distinguishes between "privacy" as a legal concept and "privacy" that refers to the state of being alone or literally private. Privacy as a legal concept refers to the spaces and things that are protected against government invasion under American law. This Note will argue that legal privacy is more synonymous with notions of security than it is with spaces or things that are totally private or inaccessible to others.

52. Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 980 (2011). Writs of assistance, issued pursuant to statute, authorized customs officers to search for contraband or smuggled goods independent of actual suspicion or any specificity as to what they were looking for or where they expected to find it. *Id.* at 991.

53. *Id.* at 996.

54. *Id.* at 997–98. Clancy notes that Adams' "abstract" may not necessarily be regarded as a truthful account of Otis' arguments in the Writs of Assistance case, but it is more valuable as an insight into Adams' beliefs about inherent rights of privacy, especially in the home. *Id.*

such as "wanton exercise of . . . power," and "absurdity," Otis—by and through Adams's account—argued forcefully that general writs, unrestricted by mention of specific places, times, or probable suspicion, violated "one of the most essential branches of English liberty," and, without legal basis, should be rejected.[55]

John Adams became the principal architect of the concepts underlying the Fourth Amendment, and scholars believe that John Otis and the Writs of Assistance case were formative in Adams's strong belief in the importance of privacy in society and governance.[56] As a result of Adams's influence, the following text appears in the Fourth Amendment to the United States Constitution:

> 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.[57]

The text reflects Adams's observations of the Writs of Assistance case as well as his and many other colonists experience with the evil of general warrants under British rule.[58] This strongly suggests that the Fourth Amendment was designed to protect the privacy and security of individuals, with an understanding that those interests are particularly strong where they are tied to property.

A "personal security" narrative of the Fourth Amendment captures the true harm of general warrants.[59] Professor Jed Rubenfeld painted the following picture in a 2008 article:

> Imagine for a moment the police systematically violating the Fourth Amendment's paradigmatic prohibitions. How might such a society look? Perhaps police routinely sweep people off the streets, out of airports, out of restaurants, out of their houses, and these people disappear into detention, with no right to a hearing at which the state must show probable cause to believe that they committed a crime. Say that police with impunity seize thousands of people in this way, on the basis of mere "suspicion." Imagine too that government agents can and systematically do enter into people's homes, without

55. *Id.* at 998–1001.
56. *Id.* at 1005.
57. U.S. CONST. amend. IV.
58. Clancy, *supra* note 52, at 1046.
59. Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 126 (2008).

> warning, if not to arrest them then at least to ransack their papers and effects, all on mere suspicion.[60]

The true harm in this scenario is not the theft of physical liberty, although that would certainly be harmful.[61] The true harm in such a society would be the psychological loss of security, of never knowing when, where, or to what extent you are safe. To ignore the "fear" that the Fourth Amendment protects against is to deny the "fundamental constitutional harm" caused by suspiciousness, warrantless searches and seizures.[62]

The United States Supreme Court protected broad security interests in *Boyd v. United States*,[63] linking personal security, property, and privacy in one's papers and effects.[64] *Boyd* concerned a court order that required the production of incriminating documents produced by a business.[65] These documents were transactional in nature and contained little personal information.[66] Moreover, by relying on a court order compelling production, the government did not need to engage in a physical intrusion to obtain the documents.[67] Even so, the Court declared the order to be a violation of the Fourth Amendment, and held that the government is broadly prohibited from intruding upon the personal affairs of American citizens absent probable cause.[68]

The Court spoke about privacy and security principles in broad terms, noting that they affected "the very essence of constitutional liberty and security."[69] The Court held that the critical injury under the Fourth Amendment was not the physical invasion of a space.[70] Rather, it is "the invasion of [a person's] indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense."[71] The privacy and security principles undergirding the Fourth Amendment, the Court said, "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."[72] The

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60. *Id.*
61. *Id.*
62. *Id.* at 127.
63. 116 U.S. 616 (1886).
64. *Id.* at 618.
65. *Id.* at 618.
66. *Id.* at 622.
67. *Id.*
68. *Id.*
69. *Id.* at 630.
70. *Id.* ("It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offense").
71. *Id.*
72. *Id.*

Supreme Court's view of the Fourth Amendment in *Boyd* was not limited by the absence of physical barriers nor by the minor degree of personal intimacy involved. In *Boyd*, the Supreme Court did not require an individual to take affirmative steps to prevent intrusions by the government.[73] Rather, the Court required government to act affirmatively if it wished to intrude upon the personal security, privacy, and liberty of American citizens.

B. Privacy and Place-Based Protection in Fourth Amendment Jurisprudence

Following *Boyd*, the Supreme Court departed from a broad, security-centered view of the Fourth Amendment, and began articulating specific types of invasions that violated privacy rights in the twentieth century. The trespass doctrine and a property-based approach to the Fourth Amendment appeared in *Olmstead v. United States*.[74] Writing for the majority, Chief Justice Taft stated that the historical purpose of the Fourth Amendment was to prevent the use of governmental force to search and seize a man's personal property and effects.[75] Because the electronic eavesdropping that occurred in that case did not involve a physical invasion of a "protected interest"—that is, a person, home, paper, or effect—it was not a search for Fourth Amendment purposes.[76]

The *Olmstead* trespass doctrine survived for forty years until the decision in *Katz v. United States*.[77] *Katz*, like *Olmstead*, concerned the wiretap of a telephone call of a suspected criminal. The suspect in *Katz* used a public phone booth to place the call, and the government attached a listening device to the outside of the booth.[78] Rather than designating the phone booth as a constitutionally protected space, Justice Stewart for the majority famously wrote, "[T]he Fourth Amendment protects people, not places."[79] The Court focused on the fact that the suspect made a visible effort to exclude the prying ears of others by closing the door of the phone booth.[80] Although Katz could be *seen* inside the phone booth, he had preserved his *conversation* as

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73. *See generally id.*; *see also* Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1314 (2014).

74. 277 U.S. 438 (1928).

75. *Id.* at 466.

76. *Id.*

77. 389 U.S. 347 (1967).

78. *Id.* at 348.

79. *Id.* at 351.

80. *Id.* at 352.

private.[81] Justice Harlan's concurrence articulated the two-prong approach that courts ultimately adopted as the "reasonable expectation of privacy" test for Fourth Amendment protection, stating, "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[82]

Given that what is "public" is, by definition, not "private," *Katz* has also come to stand for the proposition that what individuals hold out to the public cannot be expected to be private.[83]

Forty-five years later, *United States v. Jones* revived the property-trespass test. In *Jones*, the government attached a GPS tracker to a suspect's personal vehicle while it was parked in a public lot and subsequently tracked it for twenty-eight days.[84] While the justices unanimously agreed that a search had occurred, all were confounded by the inability to directly apply a *Katz* analysis.[85] Because the government tracked the suspect's car in public at all times, a direct *Katz* analysis failed on the reasoning that one sheds his right to privacy in public.[86] The majority approach held that, because the government physically "occupied" the vehicle, a trespass to chattels had occurred, and therefore a violation of the suspect's lawful right to privacy.[87] Justice Scalia stated that the *Katz* test had not replaced the common-law trespass test, but supplemented it.[88]

Katz and *Jones* now exist side by side in Fourth Amendment jurisprudence. Accordingly, neither objectively reasonable expectations

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81. *Id.*

82. *Id.* at 361 (Harlan, J. concurring).

83. *Id.* at 351.

84. *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

85. *See id.* at 950–54 (discussing the flaws of the *Katz* approach taken by the two concurrences). In addition to the majority, which followed a property-trespass approach, Justices Sotomayor and Alito respectively authored two concurrences that focused more on the reasonable expectation of privacy analysis. *Id.* at 954, 957. Justice Sotomayor was concerned with the "aggregation" of data and the idea that persons have a reasonable expectation of privacy in the "picture" of their lives which may reveal intimate details. *Id.* at 956. Justice Alito was concerned with the *degree* of surveillance that had occurred and suggested that there is a point at which surveillance, even in public, becomes so prolonged and/or invasive that it violates a person's reasonable expectation of privacy. *Id.* at 964. Justice Scalia's majority criticized the concurrences, arguing that the application of a *Katz* analysis in cases like *Jones* would "eliminate[ ] rights that previously existed." *Id.* at 953.

86. *Id.* at 950 ("[W]e need not address the Government's contentions, [that a reasonable expectation of privacy analysis fails] because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation.").

87. *Id.* at 949.

88. *Id.* at 952.

of privacy nor recognized property interests are necessary to find Fourth Amendment protection. Either condition should be sufficient. Particularly in curtilage cases where either REOP or trespass could apply, courts tend to apply both.[89] However, as the next Section and Part III will show, the question of curtilage prior to *Jones* was, as a legal matter, a question of reasonable expectations of privacy.

C. Curtilage: Unifying Privacy, Security, and Place-Based Protection

The concept of curtilage arose out of the English common law.[90] The term itself comes from the French word "*courtillage*," meaning "little court," as British homes at the time were typically surrounded by physical walls.[91] English courts crafted curtilage for the purposes of defining the crime of burglary—if an intruder entered the enclosure surrounding the home and committed a theft or simply possessed intent to commit a felony, he would face higher penalties than if he had committed the same crime outside of the enclosure.[92] William Blackstone recognized, as American courts would later, that privacy concerns were not limited to the four walls of one's dwelling.[93] A heightened punishment for theft augmented by physical trespass emphasized the relationship between privacy, property, and security.[94]

Curtilage, along with other deeply rooted traditions of property and common law, transferred to American law, although not without some difficulty.[95] Unlike English homes, early American homes were not typically surrounded by a wall or other physical enclosure.[96] Further, the American residential landscape complicated the definition of curtilage, particularly in urban centers where homes were more closely situated or in rural areas where settlers owned vast tracts of territory.[97] Prior to 1984, the only certainty was that the curtilage and any attached Fourth Amendment protection did not extend out into "open fields."[98]

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89. *See infra* Part III.B.

90. Ferguson, *supra* note 73, at 1314; *see also Oliver v. United States*, 466 U.S. 170, 180 (1984); *United States v. Pineda-Moreno*, 617 F.3d 1120, 1121 (9th Cir. 2010) (order denying rehearing en banc) (Kozinski, J., dissenting).

91. *Pineda-Moreno*, 617 F.3d at 1121 (Kozinski, J., dissenting).

92. Brendan Peters, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 952 (2004).

93. *Id.*

94. *See* Ferguson, *supra* note 73, at 1319 & n.212.

95. *Id.* at 1315.

96. *Id.*

97. *Id.* at 1315–16.

98. *See Hester v. United States*, 265 U.S. 57, 59 (1924) ("[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses,

The United States Supreme Court read the protection of curtilage into the Fourth Amendment in *Oliver v. United States*.[99] In *Oliver*, Kentucky State Police officers, ignoring "No Trespassing" signs on the property, investigated the defendant's farm without a warrant and discovered a field of marijuana over a mile from the defendant's home.[100] The Court stated that, although the officers trespassed upon Mr. Oliver's property, the trespass had occurred in "open fields," which lay beyond the extent of his Fourth Amendment protection.[101] The court said that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[102] This statement implied that an individual may legitimately demand privacy in the area immediately surrounding the home and that such space is protected by the Fourth Amendment.

The Court confirmed as such in *Dunn*, which presented the question of whether a barn on the defendant's property could be included in the curtilage.[103] In determining that the barn was not a part of the curtilage, the court outlined a set of four factors used to determine whether a space may be considered protected curtilage: (1) the proximity of the claimed curtilage to the home; (2) the presence of a common enclosure; (3) the nature of the uses to which the area is put; and (4) the affirmative steps taken by the individual to protect the area from outside observation.[104]

Together, these two cases represent the modern theory of curtilage.[105] The *Oliver* "open fields" doctrine emphasizes that one cannot rightly claim closely held privacy and security rights in areas that are far flung from the home itself. The *Dunn* factors attempt to identify broadly applicable characteristics of the home. In the absence of physical demarcations of curtilage—not common in America as they were in England—this formulation of curtilage is subjective and amorphous, but the protection is ultimately about personal security in the home.

The threat of government invasion is particularly injurious in spaces intimately connected with the home because it chills autonomy,

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papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."); *see also Oliver v. United States*, 466 U.S. 170, 173 (1984) (acknowledging the "confusion" surrounding the so-called "open fields doctrine").

99. *Oliver*, 446 U.S. at 180–81.

100. *Id.* at 173.

101. *Id.* at 177.

102. *Id.* at 178.

103. *United States v. Dunn*, 480 U.S. 294, 301–03 (1987).

104. *Id.* at 301.

105. *See* Ferguson, *supra* note 73, at 1317.

association, and threatens the security of the body.[106] The United States Supreme Court has repeatedly emphasized that the protection afforded by curtilage is rooted in "[a] protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[107] Further, while "[f]encing configurations are important . . . the primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home."[108] Despite the Supreme Court's apparent repudiation of place-based Fourth Amendment protection following *Katz*, the Court upheld strong protection within the home and in the curtilage. Indeed, the curtilage doctrine came of age in the *Katz* era and embodies all of the same principles underlying reasonable expectations of privacy.[109]

The legacy of property-based Fourth Amendment protection, privacy interest-based Fourth Amendment protection, and the resilience of the curtilage doctrine emphasize that, at least where curtilage is concerned, the distinction between a *Jones*/trespass analysis and a *Katz*/REOP analysis is unnecessary. Curtilage, by definition, protects those privacy interests so closely held because they are intimately associated with the home. Further, as the Supreme Court makes clear in *Florida v. Jardines*, those interests need not be obscured by an absolute right to exclude.

D. The Return of the "Constitutionally Protected Area:" Florida v. Jardines

Jardines presented the opportunity for the Court to flex its privacy-on-property muscles post-*Jones*. In *Jardines*, the Court asked whether a search occurred under the Fourth Amendment when officers, accompanied by a drug-sniffing dog, stepped onto the defendant's porch for the purposes of investigation.[110] After receiving an unverified tip that Jardines was growing marijuana in his home, Detective William Pedraja of the Miami-Dade Police Department, accompanied by

106. *See id.* at 1319 & n.212.

107. *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

108. *Dunn*, 480 U.S. at 301 n.4.

109. *Oliver* was decided in 1984 and *Dunn* was decided in 1987. *See Dunn*, 480 U.S. 294; *Oliver v. United States*, 466 U.S. 170 (1984). This Note refers to the "reasonable expectation of privacy" or the "*Katz* era" as the period of years between the Supreme Court's decisions in *Katz*, which came down in 1967, and its decision in *Jones*, which came down in 2012 and reinvigorated the *Olmstead* trespass/property-based theory of the Fourth Amendment. *United States v. Jones*, 565 U.S. 400 (2012); *Katz v. United States*, 389 U.S. 347 (1967); *Olmstead v. United States*, 277 U.S. 468 (1927).

110. *Florida v. Jardines*, 133 S. Ct. 1409, 1413–14 (2013).

Detective Douglas Bartelt and his drug-sniffing dog, went to the home to investigate the tip.[111] As Detective Bartelt and the dog approached the front porch, the dog began "energetically exploring" the area and continued to do so once on the porch.[112] Detective Bartelt informed Detective Pedraja that there had been a positive alert for narcotics, and, based on this information, Pedraja applied for and received a warrant to search Jardines' home.[113] After being charged for trafficking in cannabis, Jardines moved to suppress the marijuana found in his home on the grounds that the officers' (and the dog's) warrantless trespass onto his property constituted a search within the meaning of the Fourth Amendment.[114] The United States Supreme Court agreed.

Writing for the majority, Justice Scalia, as in *Jones*, relied on a property/trespass-based theory to recognize that Jardines' porch fell within the zone of Fourth Amendment protection.[115] The Court affirmed that, although individuals are protected against government invasions of reasonable expectations of privacy under *Katz*, they are no less protected in instances where the government has physically trespassed upon a "constitutionally protected area."[116]

The Court's analysis proceeded in two parts, first asking whether the officers had trespassed upon a constitutionally protected area. In finding that Jardines' porch constituted curtilage, the Court said:

> At the [Fourth] Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. . . . We therefore regard the area immediately surrounding and associated with the home—what our cases call curtilage—as part of the home itself for Fourth Amendment purposes.[117]

The Court did not apply the *Dunn* factors, or any other test, to determine that Jardines' porch constituted curtilage.[118] Instead, the Court referred to *Oliver*, stating that "the conception defining the curtilage . . . is easily understood from our daily experience. . . . Here there is no doubt that the officers entered it."[119]

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111. *Id.* at 1413.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1414.

116. *Id.* (Brennan, J. concurring) (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983)).

117. *Id.* (internal quotation marks and citations omitted).

118. *See id.* at 1414–15.

119. *Id.* at 1415 (internal quotation marks omitted) (quoting *Oliver v. United States*, 466 U.S. 170, 182 n.12 (1984)).

Having determined that the area was curtilage, the Court next considered "whether [the search] was accomplished through an unlicensed physical intrusion," or, in other words, whether the trespass was "objectively reasonable."[120] The Court noted that members of the general public, including police officers, possessed a "license" to step on the porch and approach the door with the intention of speaking to, soliciting, or otherwise calling upon Jardines. In Jardines's case, however, the officers exceeded the scope of that license. Their actions on the porch constituted far more than what would be customary or appropriate in the case of a private citizen.[121] The Court distinguished between a visitor who steps on a porch to knock on the door and "that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello . . . ."[122] In such instances, "most of us [would,] well, call the police."[123] The Court dismissed the state's argument that the intent of the officer was irrelevant by affirming that the inquiry at hand was not the officers' subjective intent, but whether the intrusion itself was objectively reasonable.[124] Where there exists an "implied license" to enter a constitutionally protected area, such as curtilage, the scope of that license "is limited not only to a particular area but also to a specific purpose."[125] In the case of *Jardines*, though the officers might have justifiably stepped on constitutionally protected curtilage, they exceeded the scope of the license they had to do so, thereby executing a search under the Fourth Amendment.[126]

Jardines' treatment of curtilage and privacy in a "constitutionally protected area" represents a commonsense approach to Fourth Amendment protection in those spaces where privacy and security concerns are most heightened. A man can hardly be empowered to retreat into the safety and security of his home if he is insecure in those areas immediately surrounding the home.[127] As Justice Scalia pointed out, the front porch of the home is an easy case.[128] If an area is easily understood as curtilage, an REOP analysis is not required because privacy expectations are presumed. Part IV of this Note argues that

120. *Id.* at 1415–17.

121. *Id.* at 1416 (citing *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011)).

122. *Id.*

123. *Id.*

124. *Id.* at 1417.

125. *Id.* at 1416.

126. *Id.* at 1417–18.

127. *See id.* at 1414 ("This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.").

128. *Id.* at 1417.

locked, common spaces within multi-unit dwellings similarly fit this description. However, as Part III discusses, courts in the majority of United States jurisdictions have not held this to be the case.

III. CONFLATING CURTILAGE IN COMMON SPACES

For most of the life of the curtilage doctrine, whether an area was curtilage necessarily included an REOP analysis. The "open fields" doctrine rests on the idea that expectations of privacy in far-flung open fields are not reasonable, despite the fact that those areas may be private property. The *Dunn* factors aim to isolate those characteristics of a space that make it so like a home that it is objectively reasonable for individuals to expect privacy there. Thus, the curtilage doctrine, as applied during the *Katz* era and even post-*Jones*, largely relies on the same questions as an REOP analysis. Accordingly, curtilage and REOP analyses both tend to rise and fall with an individual's ability to completely exclude others from a space and/or obscure it from view. As a result, Fourth Amendment protection in common spaces, even if they are locked and inaccessible to the general public, has been rare.

This Part analyzes patterns in Fourth Amendment protection in common spaces across state and federal jurisdictions in the periods before and after *Jardines*. A survey of pre-*Jardines* cases demonstrates that, even when courts mention curtilage or consider a curtilage approach, they are really talking about reasonable expectations of privacy. These cases also rely almost exclusively on an individual's inability to claim complete privacy or control over a space as the dispositive factor in denying Fourth Amendment protection in common spaces. Post-*Jardines*, courts have been somewhat more willing to recognize Fourth Amendment protection in common spaces. Interestingly, these cases still largely rely on REOP concepts and the *Dunn* factors rather than a straightforward *Jardines*-style curtilage analysis.

*A. Fourth Amendment Protection in Common Spaces Pre-*Jardines

Prior to the revival of the property-based trespass test, the REOP approach dominated questions of Fourth Amendment protection in common spaces of multi-unit buildings. Some federal circuits and state courts also considered or mentioned curtilage, but following the ascendance of *Katz*, few courts truly considered whether common areas immediately surrounding apartment homes constituted curtilage independent of an REOP analysis.

Out of the eight federal circuits that considered whether an individual could claim a reasonable expectation of privacy in common spaces prior to 2012, seven of them declined to extend Fourth

Amendment protection.[129] The most recent federal pre-*Jardines* case exemplifies the rationale for denying Fourth Amendment protection in common spaces under an REOP theory. In *United States v. Correa*,[130] members of a local task force apprehended the defendant in the common-use stairwell of his apartment building.[131] Because the main front entrance to the building was locked, an officer entered the building by climbing through a partially opened side window.[132] The officer then opened the building's front door, enabling the rest of the task force to enter the building and detain the defendant.[133] The defendant argued that the lock on the front door of his apartment building signified an objectively reasonable expectation of privacy in the common areas, but the court disagreed.[134]

Following the majority approach, the Third Circuit determined that the defendant could not possess an objectively reasonable expectation of privacy in the building's common areas because "he did not have control over these areas."[135] The Third Circuit cited the ability of other

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129. *United States v. Correa*, 653 F.3d 187, 190–91 (3d Cir. 2011); *United States v. Miravalles*, 280 F.3d 1328, 1333 (11th Cir. 2002); *United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993); *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991); *United States v. Barrios–Moriera*, 872 F.2d 12, 14–15 (2d Cir. 1989), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 130 (1990); *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977); *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976). It should be noted that the Eleventh Circuit's reasoning in *Miravalles* rested partially on the fact that the building's lock in that case was broken on the day in question, thus opening the building's hallways to the general public. *Miravalles*, 280 F.3d at 1333.

130. 653 F.3d 187 (3d Cir. 2011). Though the court construed the issue as a question of standing to challenge a seizure, it applied the same substantive analysis as courts asking whether an individual possesses Fourth Amendment protection in a space. *Id.* at 190–91.

131. *Id.* at 189.

132. *Id.*

133. *Id.*

134. *Id.* at 190. The Third Circuit had previously held that individuals do not possess an objectively reasonable expectation of privacy in common areas of apartment buildings that are not protected by locks. *United States v. Acosta*, 965 F.2d 1248, 1252 (3d Cir. 1992). The court extended *Acosta* to hold that individuals similarly cannot claim an objectively reasonable expectation of privacy in *locked* common areas of multi-unit buildings. *Correa*, 653 F.3d at 190–91.

135. *Correa*, 653 F.3d at 191. *See also United States v. Miravalles*, 280 F.3d 1328, 1333 (11th Cir. 2002) ("[T]he lobby of this apartment building and the hallways and other common areas of it were open and accessible . . . to all the many tenants and their visitors, to the landlord and all its employees, to workers of various types, and to delivery people of all kinds . . . ."); *United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993) (citing *United States v. Roberts*, 747 F.2d 537, 542 (9th Cir. 1984) (proposing that lack of control equates to lack of reasonable expectations of privacy)); *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (noting that the defendant could not expect privacy in in a common hallway "because the other five tenants sharing the same entrance used the space and could admit as many guests as

tenants, their guests, and others possessing legitimate business in the building to access the common areas of the buildings.[136] The court dismissed the significance of the lock, stating that the purpose of the lock on the front door was to provide security to the building's residents rather than privacy in the common hallways.[137]

The Third Circuit's approach is emblematic in that it focuses almost entirely on the ability of other individuals to access the space, regardless of their purpose for being in the building. Despite the presence of other factors which might tip the scale in favor of privacy interests—locks, physical enclosures, subjective expectations of security once inside the locked portions of a building, as well as actual property interests—the lack of complete dominion and control almost always tips the scale away from Fourth Amendment protection.

The leading case purportedly considering whether a locked common area is part of an apartment home's curtilage is *United States v. Cruz Pagan*[138] out of the First Circuit.[139] State and federal courts across the country regularly cite *Cruz Pagan* for the proposition that common areas of multi-unit dwellings, not subject to an individual's exclusive control, cannot be included in the curtilage.[140] In *Cruz Pagan*, federal agents, while investigating the condominium building where one of the defendants lived, came upon a delivery van in the locked underground parking garage of the building, from which they detected a strong odor of marijuana.[141] The agents departed, intending to seek a search warrant for the van, but as they were leaving, the van began to exit the garage.[142] The agents stopped the van, apprehended two of the defendants, and located a large stock of marijuana in the cargo area of

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they pleased; [the defendant] had no expectation that goings-on in the common areas would remain his secret"); *United States v. Barrios-Moriera*, 872 F.2d 12, 14 (2d Cir. 1989) (no legitimate expectation of privacy in a common hallway); *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977) ("An expectation of privacy necessarily implies an expectation that one will be free of any intrusion, not merely unwarranted intrusions. The common hallways of [the] apartment building were available for the use of residents and their guests, the landlord and his agents, and others having legitimate reasons to be on the premises.").

136. *Correa*, 653 F.3d at 191.

137. *Id.* (citing *Nohara*, 3 F.3d at 1242 (quoting *Eisler*, 567 F.2d at 816)).

138. 537 F.2d 554 (1st Cir. 1976).

139. *Id.* at 557–58.

140. *E.g.*, *United States v. Sweeney*, 821 F.3d 893, 901 (7th Cir. 2016); *Rogers v. State*, 543 So. 2d 719, 721 (Ala. Crim. App. 1988); *United States v. Bain*, 155 F. Supp. 3d 107, 120 (D. Mass. 2015) (disagreeing with, but following *Cruz Pagan* on the question of curtilage in common spaces); *State v. Williford*, 767 S.E.2d 139, 142 (N.C. Ct. App. 2015); *State v. Williams*, 862 N.W.2d 831, 834 (N.D. 2015); *State v. Nguyen*, 841 N.W.2d 676, 680 (N.D. 2013); *State v. Dumstrey*, 873 N.W.2d 502, 512 (Wis. 2016).

141. *Cruz Pagan*, 537 F.2d at 557.

142. *Id.*

the van.[143] The defendants challenged the agents' warrantless entry into the garage as a Fourth Amendment violation.

"The legal question which we must resolve," the First Circuit said, "is whether the agents' entry into the garage defeated the reasonable expectation of privacy of any of the appellants."[144] The First Circuit reasoned that "a person cannot have a reasonable expectation of privacy . . . in such a well traveled common area of an apartment house or condominium."[145] Without context or explanation, the First Circuit referenced curtilage, essentially applying the same reasoning as its REOP analysis:

> Nor can it reasonably be maintained that such a common basement area was protected from search because it formed part of the 'curtilage' . . . . Assuming that concepts of curtilage have some relevancy to the *Katz* inquiry . . . [i]n such an apartment house, a tenant's 'dwelling' cannot reasonably by said to extend beyond his own apartment and perhaps any seperate areas subject to his exclusive control.[146]

While the First Circuit certainly considered whether the area in question was curtilage, it is clear from their analysis that this consideration was not distinct from the question of whether the defendants possessed an objectively reasonable expectation of privacy in the condominium garage. *Cruz Pagan* fits the pattern of cases denying Fourth Amendment based solely on the individual's inability to control a common space or exclude all others from accessing the space.

Among federal circuits, the Sixth Circuit stands alone in having recognized categorical Fourth Amendment protection in a common hallway of an apartment building. In *United States v. Carriger*,[147] the Sixth Circuit held that the defendant possessed a reasonable expectation of privacy in the locked, common hallway of his apartment building.[148] The Sixth Circuit framed their inquiry in terms of *Katz*, and did not mention curtilage, but they did consider tenants' property interests in the common areas of apartment buildings.[149] The court said that, while "property concepts," are not controlling, they are "helpful" in "establishing the parameters of the Fourth Amendment guarantees as

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143. *Id.*

144. *Id.* (citing *Ouimette v. Howard*, 468 F.2d 1363, 1365 (1st Cir. 1972); *Katz v. United States*, 389 U.S. 347, 351–52 (1967)).

145. *Id.* at 558.

146. *Id.*

147. 541 F.2d 545 (6th Cir. 1976).

148. *Id.* at 550.

149. *Id.* at 549–50.

they related to the home."[150] While no tenant can lawfully exclude persons with legitimate business from being in the hallway, tenants do have "a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry."[151] Tenants expect "other tenants and invited guests to enter in the common areas of the building, but [they do] not except trespassers."[152] Therefore, there can be no justification for reducing the degree of privacy protection when a subjective expectation of privacy accompanying a locked apartment building remains.[153]

Courts have continuously cited both *Cruz Pagan* and *Carriger* for opposing propositions regarding curtilage in common spaces,[154] yet both cases preceded *Dunn*, and therefore did not apply the factors or any other test to determine whether these areas constituted curtilage. Curtilage cases prior to *Jardines*, including *Dunn*, were ultimately about reasonable expectations of privacy. This suggests that the *Dunn* factors are not the key curtilage inquiry. Rather, these cases demonstrate that the *Dunn* factors are merely a vehicle with which to reach reasonable expectations of privacy in the curtilage context.

*B. Fourth Amendment Protection in Common Spaces Post-*Jardines

Despite *Jardines*'s focus on curtilage and trespass independent of reasonable expectations of privacy, courts post-*Jardines* continue to apply the *Dunn* factors and cite cases that are rooted in reasonable expectations of privacy to determine whether locked common spaces in multi-unit dwellings constitute curtilage. Two recent state cases, *State v. Williams*[155] out of North Dakota and *People v. Burns*[156] out of Illinois, make for a useful comparison.[157] While the cases reached opposite conclusions regarding protection in a common hallway of a multi-unit dwelling, both failed to properly distinguish REOP, the *Dunn* factors, and *Jardines*.

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150. *Id.* at 550.

151. *Id.* (quoting *McDonald v. United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring)).

152. *Id.* at 551.

153. *Id.*

154. *See supra* note 140. For cases citing *Carriger*, see, for example, *United States v. Maestas*, 639 F.3d 1032, 1038 n.3 (10th Cir. 2011); *Titus v. State*, 696 So. 2d 1257, 1262 (Fla. Dist. Ct. App. 1997); *Commonwealth v. Reed*, 851 A.2d 958, 961 (Pa. Super. Ct. 2004); *State v. Talley*, 307 S.W.3d 723, 731 (Tenn. 2010).

155. 862 N.W.2d 831 (N.D. 2015).

156. 50 N.E.3d 610 (Ill. 2016).

157. *Williams*, 862 N.W.2d 831; *Burns*, 50 N.E.3d 610.

Williams relied heavily on a previous North Dakota case, *State v. Nguyen*,[158] which came out almost immediately after *Jardines* and concerned Fourth Amendment protection in an apartment building's hallway.[159] *Nguyen* resolved the question of the defendant's Fourth Amendment rights in the common hallway strictly on REOP grounds.[160] The North Dakota Supreme Court dismissed Nguyen's argument that *Jardines* applied at all because the United States Supreme Court "did not determine if the officer had violated Jardines' reasonable expectation of privacy . . . ."[161] *Nguyen* briefly discussed curtilage, stating that the *Dunn* factors determine the extent of curtilage in "urban areas," but that "the concept [of curtilage] is significantly modified when applied to a multifamily dwelling" because "a party does not have a legitimate expectation of privacy in the common hallways and shared spaces of an apartment building."[162]

Nguyen presumed that an REOP approach controlled and that the concept of curtilage was wholly inapplicable to common spaces in multi-unit dwellings. *Williams* upheld that determination, adding:

> Unlike the front porch in Jardines, we are not convinced a condominium building's common hallway is a "classic" example of an area adjacent to the home and to which the activity of home life extends. An analysis of the *Dunn* factors regarding curtilage, alone, is insufficient to determine whether the drug sniff was a search; a reasonable expectation of privacy analysis must also be conducted. It is undisputed Williams has a property interest in the hallway, but *his interest is not exclusive*. Like in Nguyen, the common hallway of the condominium building was *available for the use of the other co-owners and their guests and others having legitimate reasons to be on the premises, and Williams cannot unilaterally exclude individuals from the area because his co-owners also have a property interest in the shared space*. Like in Nguyen, we conclude the condominium building's common hallway was not curtilage, and Williams had *no reasonable expectation that the shared space would be free from any intrusion*.[163]

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158. 841 N.W.2d 676 (N.D. 2013).

159. *Id.* at 678.

160. *Id.* at 679–82.

161. *Id.* at 682.

162. *Id.*

163. *State v. Williams*, 862 N.W.2d at 837–38 (N.D. 2015) (emphasis added) (internal citations omitted).

The *Nguyen-Williams* approach shows that REOP concepts are alive and well when curtilage considerations are at play. It also demonstrates the slippery combination of *Jardines*, *Dunn*, and REOP generally in cases like these. Courts attempting to apply *Jardines* in common spaces of multi-unit dwellings fail to recognize that, like the front porch on which visitors are welcome as long as they behave within the parameters of their license, common hallways are thoroughfares to the home where persons are permitted and expected to pass, but only under certain circumstances. If anything, locked, common spaces in multi-unit dwellings should carry more privacy protection because, unlike a front porch, they are not visible to the general public.

People v. Burns is part of an interesting trend of cases, which, cite *Jardines* but also apply the *Dunn* factors and other REOP concepts to find Fourth Amendment protection in locked common spaces.[164] While *Burns* was decided "under *Jardines*,"[165] the court in *Burns* did not apply the logic of *Jardines*, except to say that the landing in front of a person's apartment is "easily understood from our daily experience" as curtilage.[166] The State of Illinois argued that *Jardines* was inapplicable to multi-unit dwellings, and the court responded that "the entrances to defendant's apartment building were locked every time police attempted to enter the secured building. Officers were only admitted to an area not accessible to the general public by a resident or by another officer."[167] The Illinois Supreme Court also applied the *Dunn* factors, finding that all four factors weighed in favor of the defendant's privacy interests.[168]

The "either or" approach that courts have taken to Fourth Amendment questions in common spaces post-*Jardines* is a smoke screen. In the context of curtilage, the struggle to precisely apply Fourth Amendment theory has produced astounding gaps which, rather than strengthening Fourth Amendment protection, as both *Katz* and *Jones* were intended to do, has only weakened them. This is inconsistent with the norms maintained by the Supreme Court, for as Justice Rhenquist said in *Rakas v. Illinois*,[169] "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment . . . . [This] Court has not altogether abandoned the use of

164. *People v. Burns*, 50 N.E.3d 610, 617–22 (Ill. 2016); *see also, e.g.*, *United States v. Whitaker*, 820 F.3d 849, 852–55 (7th Cir. 2016); *State v. Kono*, SC 19613, 2016 WL 7422877, at *86–87, *103–04 (Conn. Dec. 22, 2016) (deciding the case on state law grounds, but applying Fourth Amendment reasoning).

165. *Burns*, 50 N.E.3d at 622.

166. *Id.* at 621.

167. *Id.* at 620.

168. *Id.* at 620–21.

169. 439 U.S. 128 (1978).

property concepts in determining the presence or absence of the privacy interests protected by that Amendment."[170]

IV. PROTECTING PRIVACY, PROPERTY AND SECURITY INTERESTS: THE CASE FOR CURTILAGE IN COMMON SPACES

This Note has thus far argued the following: that the Fourth Amendment is ultimately about security, that the theory of curtilage advances security interests because it broadens the scope of protection surrounding the home where privacy interests are most heightened, but that courts have failed to apply curtilage to protect residents of multi-unit dwellings by over-relying on exclusive control and reasonable expectations of privacy, neither of which are necessary to determine that an area is curtilage. The Supreme Court's approach in *Jardines* demonstrates this. Though some scholars have panned *Jardines* for further limiting Fourth Amendment rights under a *Jones* trespass theory,[171] this Note argues that *Jardines* strongly supports privacy and security where *Katz* left gaps, particularly in shared spaces. *Jardines*'s "licensing" approach represents a flexible, commonsense construction of curtilage and Fourth Amendment protection that unifies reasonable expectations of privacy and property concepts, expanding protection in common spaces rather than limiting it. This Part argues that, by applying *Jardines* to locked, common spaces in multi-unit dwellings, courts can better protect fundamental security interests that are at the root of the Fourth Amendment.

There is no meaningful reason to distinguish the front porch in *Jardines* from locked common spaces in multi-unit dwellings. As with the front porch of a single family home, residents of multi-unit dwellings possess property interests in their locked common spaces. Further, locked common spaces that are enclosed within the residential building, especially hallways, are similarly proximate to the home as a front porch. If anything, locked common spaces in multi-unit dwellings are more deserving of protection than the front porch because they are generally inaccessible and not visible to the general public.

Most importantly, both the front porch and shared spaces in multi-unit are subject to entry, passage, and occupation by persons other than the resident in question. It seems beyond dispute that residents of multi-unit dwellings do not expect and would not approve of non-resident trespassers roaming the hallways, particularly if those individuals

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170. *Id.* at 143 n.12.

171. *See, e.g.*, David C. Roth, Florida v. Jardines*: Trespassing on the Reasonable Expectation of Privacy*, 91 DENV. U. L. REV. 551, 553 (2014) ("[T]he Jardines decision threatens to diminish Fourth Amendment protections for those citizens who do not live in single-family detached houses.").

would threaten the safety and security of residents. Individuals who may legitimately enter the building—residents, their guests, the landlord, maintenance professionals, etc.—are also subject to limits on customary or appropriate behavior. While they may be permitted to pass through the hallways, they would not be permitted to investigate or detain others in the hallways.

Due to the shared characteristics and expectations between the front porch of a single family home and locked common spaces in multi-unit dwellings, courts should unambiguously apply *Jardines* to provide Fourth Amendment protection to residents in these spaces. The *Jardines* majority is premised on the reality that residents of any type of home may not always have the power, right, or ability to exclude others from the area immediately surrounding their home, yet that space is nonetheless protected as curtilage.[172] Once an individual, specifically law enforcement, has exceeded the scope permitted by the "license" to physically invade the property of another, the trespass is no longer objectively reasonable and entitles the resident to protection under the Fourth Amendment.[173]

Based on *Jardines*, the relevant inquiry is first whether the area in question is curtilage, and then whether the non-resident individual's presence there is objectively reasonable, or within the scope of his or her permissible property right to be there. Therefore, the right or power to exclude should no longer be determinative of whether an individual, such as Brett Dumstrey, has Fourth Amendment protection in a common area of a multi-unit dwelling.

Though Brett Dumstrey shared the garage with twenty-nine other residents, he had a property interest in the garage as well as an expectation that the garage was inaccessible to anyone but his fellow tenants, their guests, or others with a legitimate reason for being present in the garage.[174] The Wisconsin Supreme Court's use of the *Dunn* factors, REOP, and a focus on the right to exclude improperly divided Dumstrey's relevant Fourth Amendment interests in order to deny him protection under that Amendment. The court's holding and reasoning paradoxically defy both the sacred protection of the home consistently protected throughout the *Katz* era as well as the expectations of privacy clearly signaled by the locked garage.

Applying *Jardines* to locked common spaces in multi-unit dwellings is consistent with the principles evident in Fourth Amendment jurisprudence. Throughout the *Katz* reasonable expectation of privacy era, the Supreme Court weighed privacy and property concepts flexibly to reflect societal customs and expectations. In

172. *See Florida v. Jardines*, 133 S. Ct. 1409, 1414–15 (2013).

173. *See id.* at 1415–17.

174. *State v. Dumstrey*, 873 N.W.2d 502, 506–07 (Wis. 2016).

Minnesota v. Olson,[175] the Court held that an overnight guest was entitled to Fourth Amendment protection in the home of his host despite the fact that he possessed neither a property interest nor total dominion and control over the premises.[176] That the guest has no "ultimate control of the house" or that the house is "shared" "is not inconsistent with the guest having a legitimate expectation of privacy" in that space.[177] The "long standing social custom" of staying in the home of another specifically because one is unable to stay in his or her own home demonstrates that "society recognizes . . . a legitimate expectation of privacy."[178]

Ten years before the Supreme Court heard *Jardines*, Assistant Federal Defender Carrie Leonetti theorized that the Supreme Court had already blessed the notion that "implied permission to enter" did not diminish Fourth Amendment protection in certain spaces such as hotel rooms.[179] She highlighted the Court's decision in *McDonald v. United States*[180] wherein the Court determined that it was unreasonable for police to break into McDonald's landlady's apartment and demand that she unlock McDondald's apartment.[181] Justice Jackson, concurring, wrote, "[E]ach tenant of the building, while *he has no right to exclude from the common hallways* those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry."[182] "An exclusive right to exclude," as Leonetti said, divides reasonable expectations of privacy and property interests that would otherwise protect residents of multi-unit dwellings. This fissure "mistakenly ignores the collective right that the residents of an apartment building, condominium complex, or hotel have to exclude all individuals that do not have a legitimate purpose there."[183] The Court's reasoning in *Jardines* affirms the constitutional viability of Leonetti's analysis, and emphasizes that even if spaces are shared, they carry no less expectations of security.

The *Jardines* approach also has the benefit of being straightforward and easily applicable. Unlike the *Dunn* factors, which

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175. 495 U.S. 91 (1990).

176. *Id.* at 93, 96–98.

177. *Id.* at 99.

178. *Id.* at 98.

179. Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. CIV. RTS. L.J. 297, 310 (2005).

180. 335 U.S. 451 (1948).

181. *See McDonald*, 335 U.S. at 458 (Jackson, J., concurring); Leonetti, *supra* note 179, at 317–18.

182. *McDonald*, 335 U.S. at 458 (Jackson, J., concurring) (emphasis added).

183. *See* Leonetti, *supra* note 179, at 316–17.

are subjective and difficult to formalistically apply, the *Jardines* approach is a bright-line rule—if an area is understood as curtilage, law enforcement requires a warrant or an exception to the warrant requirement to enter it. This rule would greatly simplify matters for courts and for law enforcement while protecting the safety and security of residents of multi-unit buildings, many of whom are members of already vulnerable populations.

Dumstrey and cases like it pose a threat to the growing number of Americans who live in multi-unit buildings. As of 2014, growth of multi-unit building has outpaced housing starts for single-family homes.[184] Experts attribute this growth to millennials who increasingly reject single-family homeownership.[185] However, this threat is even greater for the urban poor, who already experience diminished Fourth Amendment protection.

Residents of poor neighborhoods generally experience far less Fourth Amendment protection than their wealthier peers.[186] This is frequently due to the justified "exigencies" present in "high crime areas."[187] These deficiencies occur to such an extent that some argue a "poverty exception" to the Fourth Amendment exists in American jurisprudence.[188] In his article, *The Poverty Exception to the Fourth Amendment*, Professor Christopher Slobogin posits that an implicit but very real "exception" to the Fourth Amendment exists and that, even though Supreme Court case law sounds neutral on its face, its effect is discriminatory upon poor, urban residents for whom privacy protections were not designed.[189]

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184. Conor Dougherty, *New-Home Building is Shifting to Apartments*, WALL ST. J., (Mar. 10, 2014, 8:43 PM), http://www.wsj.com/articles/SB10001424052702304020104579429280698777544 [https://perma.cc/X9JF-ALU3].

185. *E.g.,* Jordan Rappaport, *Millenials, Baby Boomers, and Reboudning Multifamily Home Construction*, FED RESERVE BANK OF KAN. CITY: ECON. REV. SECOND Q. 37, 38 (2015), https://www.kansascityfed.org/~/media/files/publicat/econrev/econrevarchive/2015/2q15rappaport.pdf [https://perma.cc/G36W-SDET].

186. 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, 317 (2011).

187. *See* Robin M. Collin & Robert W. Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACKLETTER J. 181, 189–93 (1991) (asserting that "privacy is a commodity which is bought and sold," leaving poor people to be "compelled to live in conditions where their economic condition affects their ability to satisfy their taste for privacy and may affect their ability to enforce privacy related rights against trespass and seclusion").

188. Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003).

189. *Id.*

The examples of uneven distribution of Fourth Amendment protection are obvious. Even as *Katz* stated that "The Fourth Amendment protects people, not places," the Court has consistently held that expectations of privacy outside of the single-family home are not "reasonable."[190] It seems clear that, in order to preserve the right to privacy, one must be able to afford the type of homes or exclusive accruements that create affirmative barriers to the outside world, things which are typically not true of the urban poor.[191]

Examples of the "affirmative steps" requirement are abundant. In *Dunn*, the court held that the search of a barn did not implicate the Fourth Amendment in part because target had only covered opening into the barn with see-through netting.[192] In *United States v. Ciraolo*,[193] the Court held that a police flyover of a backyard does not implicate the Fourth Amendment in part because anyone flying over the property or on a large vehicle could have seen over target's fence.[194] "Legitimate expectations of privacy" may exist only when the search target has taken precautions that are customarily taken by those seeking privacy.[195]

As a matter of law and policy, neither an REOP approach nor the *Dunn* factors should apply to "easy" curtilage cases, which this Note has argued include locked common spaces in multi-unit dwellings such as hallways, garages, basements, and storage areas. Instead, the logic of *Jardines*—that while a space may be shared, it is only available to people with a legitimate licenses to access them—should control. In these spaces, behind locked doors, residents have expectations of privacy and security associated with the intimacy of the home. As Justice Scalia said in *Jardines*, we have certain expectations for how others behave in proximity to our homes.[196] While residents of apartment buildings expect that fellow residents will traverse the hallways, they do not similarly expect that strangers—especially those strangers who pose a threat to their bodily security and autonomy in areas where they assume they are at home—will have license to roam the halls outside of any purpose tied to a resident of that building.

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190. Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty, and Policing*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 240, 244 (2014).

191. Slobogin, *supra* note 188, at 400–03.

192. *United States v. Dunn*, 480 U.S. 294, 305 (1987).

193. 476 U.S. 207 (1986).

194. *Id.* at 211–14.

195. *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980).

196. *Florida v. Jardines*, 133 S. Ct. 1409, 1414–16 (2013).

CONCLUSION

In October of 2016, the United States Supreme Court denied Brett Dumstrey's writ of certiorari.[197] This is unsurprising, given the relative consensus amongst courts in the United States that common spaces are not entitled to Fourth Amendment protection. That said, this Note has argued that there exists a significant amount of confusion regarding current Fourth Amendment doctrine, particularly with respect to curtilage, and especially in the context of shared spaces. It seems likely that cases like *Dumstrey* will only increase following *Jardines*, and opportunities to grant certiorari on these questions will not evaporate in the coming years. Should that moment arrive, this Note calls on the Supreme Court to accept an invitation to provide some doctrinal clarity and carefully consider the impact of continuing to limit place-based Fourth Amendment protection to single-family homes. The strength of the privacy, property, and security interests in shared hallways, garages, storage areas, and other locked spaces within multi-unit dwellings suggest that those spaces are equally as deserving of Fourth Amendment protection as Jardines's front porch. Without the extension of curtilage protection to common spaces in multi-unit dwellings, an increasing number of Americans' Fourth Amendment protection will be seriously diminished in exactly the way *Jardines* warned against. By applying *Jardines* to common spaces, courts can reconcile theories of the Fourth Amendment previously used to divide important Fourth Amendment interests. This will combat a trend of limited privacy protections for the urban poor and will reinforce protections for the growing number of Americans who choose to or must live in multi-unit dwellings.

197. *Dumstrey v. Wisconsin*, 137 S. Ct. 43 (2016) (cert. denied).