Nebraska Law Review

Volume 101 | Issue 2 Article 11

2023

NO DOGS ALLOWED (Without a Warrant): Expanding the Fourth Amendment Sanctity of the Home to Interior Threshold Searches for Tenants in Multiunit Dwellings–United States v. Mathews

Katelin O'Connor
University of Nebraska College of Law

Note*

NO DOGS ALLOWED (Without a Warrant): Expanding the Fourth Amendment Sanctity of the Home to Interior Threshold Searches for Tenants in Multiunit Dwellings–*United States v. Mathews*

TABLE OF CONTENTS

* Katelin O'Connor, J.D. Candidate, University of Nebraska College of Law, 2023, B.S. Nebraska Wesleyan University, 2019. This Note is dedicated to my parents, Timothy and Catherine, and my brother, Joseph. I am truly grateful for their never-ending support in everything that I do. Thank you also to Executive Editor Kevin Freudenburg, Editor-in-Chief Independence Talken, and all the members of *Nebraska Law Review* for their work in preparing this note for publication.

I. INTRODUCTION

Ambiguous privacy expectations under the Fourth Amendment have left tenants in multiunit dwellings vulnerable and lacking full constitutional protection from the government's prying eyes. The storied history of Fourth Amendment interpretation lacks clarity regarding what comprises a permissible search[1] and what limitations are placed on a tenant's reasonable expectation of privacy,[2] particularly concerning the utilization of dogs to conduct sniff searches.[3] As a result, tenants in multiunit dwellings have traditionally received fewer constitutional protections under the Fourth Amendment compared to those who live in single-family, stand-alone homes.[4]

In the United States, a significant portion of the population resides in multiunit dwellings, including apartments, condominiums, duplexes, and the like.[5] As of 2017, nearly 39 million Americans were

1. This Note utilizes the term "search" to mean any search that takes place without a warrant.
2. For a full discussion of the limitations the majority of circuits have placed on tenants' reasonable expectation of privacy, see section III.A.
3. This Note utilizes the term "dog" to mean drug-sniffing dogs that have been trained to detect the presence of narcotics.
4. *See generally* Jackie McCaffrey, Note, *Fourth Amendment Protections in Common Areas of Apartment Buildings: How the Whitaker Holding Contributes to the Circuit Split*, 2018 U. ILL. L. REV. 1147 (2018) (discussing the implications of unequal protection on the basis of housing type and the distinction between houses and apartments under the Fourth Amendment); *see also* Eric Connon, Comment, *Growing Jardines: Expanding Protections Against Warrantless Dog Sniffs to Multiunit Dwellings*, 67 CASE W. RES. L. REV. 309 (2016) (discussing the disparate treatment of the hallway outside a tenant's apartment as compared to the front porch of a stand-alone, single-family home and the unequal application of constitutional protections afforded to each).
5. *United States Needs 4.6 Million New Apartments By 2030 or It Will Face a Serious Shortage*, NAT'L APARTMENT ASS'N, (June 30, 2017), https://www.naahq.org/news-publications/units/june-2017/article/united-states-needs-46-million-new-apartments-2030 [https://perma.cc/Q98Z-YND8] (summarizing a study conducted by Hoyt Advisory Services which attributes the increased demand for apartments to factors such as young adults delaying homeownership, the aging population choosing the convenience of apartment living, and immigration); *see also* McCaffrey, *supra* note 4, at 1164 (stating that, as of 2018, seventeen percent of the United States population was living in either an apartment or condominium).

living in apartments.[6] Today, an average of ten to eleven percent of the population of each state lives in apartments, with fifteen states exceeding this amount.[7] Therefore, this disparate application of privacy protections to tenants in multiunit dwellings impacts a significant portion of the United States' population. Further, such discriminatory treatment based on type of housing effectively apportions constitutional protections on grounds that coincide with race, ethnicity, and socioeconomic status.[8]

The Fourth Amendment guarantees all citizens the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[9] However, Fourth Amendment protections have historically been evaluated based on the type of property in question.[10] To determine the extent of constitutional protections, the Supreme Court has utilized two cornerstone tests: the reasonable-expectation-of-privacy test[11] and the common-law trespassory test.[12] Although these tests were intended to provide a standardized framework for the constitutional analysis of a tenant's right to privacy, courts have inconsistently applied these tests, leading to conflicting and unpredictable outcomes.[13]

---

6. NAT'L APARTMENT ASS'N, *supra* note 5.
7. *Geography of Apartment Residents*, NAT'L MULTIFAMILY HOUS. COUNCIL, https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/geography-of-apartment-residents/ [https://perma.cc/28D3-8QHD] (last updated Nov. 2020) (summarizing data regarding the state distribution of apartment residents from the American Community Survey from the U.S. Census Bureau, conducted in 2019 and updated in 2020. The percentage of the population that lives in apartment varies by state, averaging ten to eleven percent. The states in the Eighth Circuit range from seven to seventeen percent of the population living in apartments: Nebraska 11%, South Dakota 9%, North Dakota 17%, Minnesota 12%, Iowa 9%, Missouri 7%, and Arkansas 7%.).
8. McCaffrey, *supra* note 4, at 1163–64 (citing United States v. Whitaker, 820 F.3d 849, 854 (7th Cir. 2016)).
9. U.S. CONST. amend. IV.
10. State v. Ortiz, 257 Neb. 784, 798, 600 N.W.2d 805, 818 (1999) (stating "the extent of Fourth Amendment protection is determined by reference to a place"); *see also* Illinois v. Caballes, 543 U.S. 405 (2005) (determining the extent of privacy protections afforded to a person's car during a traffic stop, finding a dog-sniff search constitutional); United States v. Place, 462 U.S. 696, 707 (1983) (determining a dog-sniff search of luggage was constitutional).
11. *Infra* section II.B.
12. *Infra* section II.A.
13. *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 13 (2013) (Kagan, J., concurring) (indicating that the use of the common-law trespassory test does not preclude an examination of privacy interests under the reasonable-expectation-of-privacy test, stating "Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes, that as well. The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines' privacy interests."); for a full discussion of the inconsistent application of these tests by various courts, see Part III.

By failing to set and follow a consistent standard to determine the constitutionality of a dog-sniff search, courts have left the door open for arbitrary line-drawing on the basis of housing type, weakening the constitutional rights of tenants in multiunit dwellings.[14] Over time, a few Circuit Courts of Appeals have considered extending tenants' reasonable expectation of privacy into common areas of multiunit dwellings, while others have explicitly declined to do so.[15] This inconsistency has led to a circuit split, particularly regarding the constitutionality of dog-sniff searches at the interior hallway threshold of a tenant's unit. The majority of circuits determine that such a search is constitutional because tenants have no reasonable expectation of privacy in the common area of a multiunit dwelling, while the minority of circuits extend tenants' legitimate expectation of privacy to common areas, rendering such searches unconstitutional.[16]

In 2015, the Eighth Circuit decided *United States v. Mathews* based on the majority view that the common-law trespassory test alone is sufficient to determine the constitutionality of a dog-sniff search; as long as the officer[17] and dog had a right to be where the dog sniff occurred (i.e., the hallway outside a tenant's unit), the search was constitutional.[18] However, this Note argues the Eighth Circuit, and further, all circuits, should utilize the reasonable-expectation-of-privacy test and the common-law trespassory test concurrently to ensure Fourth Amendment privacy protections for each person equally, regardless of housing type.

Part II summarizes the evolution of the Court's analysis and interpretation of the Fourth Amendment protections historically afforded to tenants in multiunit dwellings. Part III examines the circuit split regarding the application of the established tests, the levels of protection afforded to such tenants, and the constitutionality of dog-sniff searches. This section also concentrates on the Eighth Circuit constitutional analysis of dog-sniff searches. Part IV examines the Eighth Circuit opinion in *United States v. Mathews*. Lastly, Part V argues the Eighth Circuit erred in finding the use of a dog at the interior hallway threshold of a tenant's unit was a constitutional search and calls for the Eighth Circuit—along with all other circuits—to employ the full scope of Fourth Amendment analysis to determine the constitutionality of a dog-sniff search.

---

14. *Infra* section V.B.

15. Curtis H. Seal, Comment, *United States v. Mathews: Does a Dog Sniff in Common Areas of an Apartment Building Constitute a Search Subject to the Fourth Amendment?*, 39 AM. J. TRIAL ADVOC. 397, 406–07 (2015).

16. *Id.* at 412–13.

17. This Note uses "officer" to include police officers, detectives, and any other government officials.

18. United States v. Mathews, 784 F.3d 1232 (8th Cir. 2015).

II. THE HISTORY OF FOURTH AMENDMENT PRIVACY PROTECTIONS

For hundreds of years, courts have recognized the inherent importance of a person's right to retreat to their home and feel secure in their privacy.[19] Since its beginnings, the Fourth Amendment's grant of a heightened protection of privacy for the home has been considered "one of the unique values of our civilization."[20] To uphold the purpose of the Fourth Amendment and confer substantial privacy rights to individuals in their home, courts have developed various tests. These tests, taken together, constitute a comprehensive framework to determine the constitutionality of a search.[21] However, not all courts agree on a uniform application of this analytical framework.[22]

Generally, there are two main approaches: (1) a search is unconstitutional if there is a physical intrusion;[23] or (2) a search is unconstitutional regardless of the existence of a physical intrusion because the search violated the person's reasonable expectation of privacy.[24] Each test guarantees specific aspects of an individual's Fourth Amendment right to privacy. Some courts opt to apply one of these tests to the exclusion of the other, while a few other courts have applied these tests together.[25] This variation in Fourth Amendment interpretation and analytical framework has led to a circuit split and disparate outcomes in similar cases. Instead, courts should utilize the full history of Fourth Amendment interpretation and concurrently employ both tests to satisfy the purpose of the Fourth Amendment, establish consistency in constitutionality decisions, and achieve uniformity between the circuits.

A. Unconstitutional Search Requires Physical Intrusion—Common-Law Trespassory Test

Fourth Amendment analysis under the common-law trespassory test centers on the existence of a physical intrusion.[26] If an officer physically intrudes onto a person's property without a license to be there, and is thereby trespassing on the person's property, the officer

19. State v. Ortiz, 257 Neb. 784, 792, 600 N.W.2d 805, 814 (1999) (stating "[i]n 1604, an English court made the now-famous observation that 'the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.'") (quoting Wilson v. Layne, 526 U.S. 603, 609 (1999)).
20. *Id.*
21. *See generally* Seal, *supra* note 15, at 402, 406–07.
22. *Id.* at 406.
23. This Note refers to this approach as the "common-law trespassory test."
24. This Note refers to this approach as the "reasonable-expectation-of-privacy test."
25. *See generally* McCaffrey, *supra* note 4.
26. *See* Florida v. Jardines, 569 U.S. 1 (2013).

has conducted a search in violation of the Fourth Amendment.[27] A license to be on the premises may be explicit or implicit, based on background social norms.[28] However, the scope of such license must be limited to a particular area and a specific purpose.[29]

As an extension of the common-law trespassory test, the plain perception rule further informs whether an unconstitutional search has taken place.[30] Under the plain perception rule, if an officer can perceive evidence of a crime with their own senses from a place where they have a right to be, typically as a member of the general public, the officer's actions do not constitute a search.[31] Courts have consistently held there is "no reasonable expectation of privacy in things that are 'knowingly exposed to the public.'"[32]

Issues implicating the constitutionality of a search often arise when officers utilize sense-enhancing instruments to perceive evidence of a crime.[33] It is generally accepted that the plain perception rule does not apply when officers utilize sense-enhancing instruments to perceive evidence that would otherwise be unknowable.[34] However, courts have differed on whether the plain perception rule applies when officers conduct dog-sniff searches to determine the contents of a person's dwelling.[35] This disagreement centers on the determination of whether a trained drug-sniffing dog constitutes a sense-enhancing instrument that would negate the applicability of the plain perception rule.[36] Even if a court determines that the plain perception rule applies, the officers (and their dog) still must be justified in their presence—not trespassing—in order for the search to be constitutional.[37]

In *Florida v. Jardines*, officers responded to an unverified tip that marijuana was being grown in the respondent's home.[38] Detectives approached the house with a drug-sniffing dog, trained to detect the

27. *See* 3A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 663 (4th ed. 2021) (citing *Jardines*, 569 U.S. 1) (stating the common-law trespassory test has "three requirements: [1] a physical intrusion, [2] on an enumerated interest ('persons[,] houses, papers, and effects'), [3] that is not supported by an implicit license based on social norms."); *see also Jardines*, 569 U.S. at 7–8 (stating that the common-law trespassory test functions as a two-part analysis: (1) Was the information obtained in a constitutionally protected area, and (2) If so, was the officer given leave, explicitly or implicitly, to do so?).
28. WRIGHT & MILLER, *supra* note 27.
29. *Jardines*, 569 U.S. at 9.
30. WRIGHT & MILLER, *supra* note 27.
31. *Id.*
32. *Id.*
33. *See* Kyllo v. United States, 533 U.S. 27 (2001).
34. WRIGHT & MILLER, *supra* note 27.
35. *See id.*
36. For a discussion of whether the court considers trained drug-sniffing dogs to be sensitive sense-enhancing instruments, see section II.B.
37. *See* WRIGHT & MILLER, *supra* note 27.
38. Florida v. Jardines, 569 U.S. 1, 3 (2013).

presence of marijuana, cocaine, heroin, and various other drugs.[39] The dog alerted to the presence of narcotics, indicating that the strongest point of the odor was at the base of the front door.[40] The detectives then obtained a warrant to search the residence based on the dog's positive reaction to the sniff on the front porch.[41] Respondent argued that the dog-sniff search on the respondent's front porch substantiated an unconstitutional search from which respondent had a reasonable right to privacy and freedom from governmental intrusion.[42]

The Court employed the common-law trespassory test and examined whether the police had a right to be where they were when the dog-sniff search took place.[43] To do this, the Court considered the scope of any explicit or implicit license to allow the officers to have remained on the respondent's front porch.[44] Absent an explicit license, the officers were acting under an implicit license; the officers were permitted to approach the home and do "no more than any private citizen might do."[45] This allowed the officers to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[46] The officers' specific purpose for being on the respondent's front porch was to conduct a drug search of the premise via dog sniff, clearly outside the scope of the implicit license granted to private citizens.[47] Therefore, the officers were found to be trespassing, and their actions constituted a warrantless search in violation of the Fourth Amendment.[48]

The Court stated that the heart and purpose of the Fourth Amendment is to protect "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[49] In keeping with this purpose, the Court extended this heightened privilege to

39. *Id.* at 3–4.

40. *Id.* at 4.

41. *Id.*

42. *Id.* at 4–5.

43. *See id.* at 7.

44. *Id.* at 9 (stating "the scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.").

45. 1 GERALD F. UELMEN & ALEX KREIT, DRUG ABUSE AND THE LAW SOURCEBOOK § 5:12 (2021) (quoting Kentucky v. King, 563 U.S. 452, 459 (2011)).

46. *Jardines*, 569 U.S. at 8.

47. *Id.* at 10; *see also* Brian L. Porto, Annotation, *Use of Trained Dog to Detect Narcotics or Drugs as Unreasonable Search in Violation of Fourth Amendment*, 150 A.L.R. Fed. 399 (1998) (stating that the officers in *Jardines* exceeded the scope of the implied license because "[a]n invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker" on a person's door.).

48. *Jardines*, 569 U.S. at 10.

49. *Id.* at 6, quoting Silverman v. United States, 365 U.S. 505, 511 (1961).

the home's curtilage.[50] Curtilage is commonly defined as the area immediately surrounding the home to which the activity of home life extends.[51] In the case *United States v. Dunn*, the Court set out a four-factor test to inform what areas qualify as curtilage, including:

> [1] proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.[52]

The front porch, where the officers and their dog were when the search took place, is a "classic exemplar" of curtilage, which receives the same heightened level of Fourth Amendment protection as the house itself.[53] The *Jardines* court determined that it was not necessary to apply the reasonable-expectation-of-privacy test[54] because the case could be adequately decided using the "baseline" common-law trespassory test, thus reaffirming the continued application of this common-law test.[55] Because the officers were found to be trespassing, the search was necessarily unconstitutional, and there was no reason to further evaluate the reasonable expectation of privacy. This straightforward, simplistic analysis has been employed by the majority of courts, producing a framework that focuses on constitutionality based nearly entirely on property rights.

B. Unconstitutional Search Without Physical Intrusion—Reasonable-Expectation-of-Privacy Test

Katz v. United States, a foundational case addressing the extent of Fourth Amendment privacy protections, challenged the traditional, common-law view that a constitutional infringement of a person's right to privacy required a physical intrusion into the property in question.[56] Instead, the Court indicated that the Fourth Amendment

50. *Id.* (defining curtilage as the area "immediately surrounding and associated with the home" which is considered "part of the home itself for Fourth Amendment purposes") (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)).

51. *Id.* at 7 (stating that the curtilage is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened.").

52. UELMEN & KREIT, *supra* note 45 (quoting United States v. Dunn, 480 U.S. 294, 301 (1987)).

53. *Jardines*, 569 U.S. at 7.

54. For a discussion of the reasonable-expectation-of-privacy test established in *Katz v. United States*, see section II.B.

55. *See Jardines*, 569 U.S. at 11. Although *Jardines* declined to extend *Kyllo v. United States* to drug-sniffing dogs and decided the case based only on property rights, Justice Kagan indicated in her concurrence that the Court could have reached this same outcome—the officers' actions of conducting a dog-sniff search on the respondent's front porch constitutes a search in violation of the Fourth Amendment—by utilizing the reasonable-expectation-of-privacy test.

56. WRIGHT & MILLER, *supra* note 27.

reaches beyond property rights, stating the "Fourth Amendment protects people, not places."[57] This interpretation extends Fourth Amendment constitutional protections to a person's reasonable expectation that their private activities will remain private.[58]

In *Katz*, the petitioner used a glass phone booth where, unbeknownst to him, FBI agents had attached an electronic recording device to the phone booth for the purpose of capturing his conversation to use as evidence against him.[59] The petitioner argued that the evidence was unconstitutionally obtained, in violation of his Fourth Amendment privacy protections; however, the government countered that there was no physical intrusion into the phone booth, so no Fourth Amendment violation could have occurred.[60] Even though he was in an area accessible to the public, the Court found the petitioner was reasonable and justified in expecting that his conversation would only be heard by those on the other end of the phone call.[61]

A lack of physical intrusion does not preclude a Fourth Amendment violation.[62] Fourth Amendment protections, instead, depend on the reasonable-expectation-of-privacy test—a two-prong evaluation of a search and an individual's reasonable expectation of privacy.[63] To establish a constitutionally protected right to privacy, it must be shown "first[,] that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[64]

This analysis was utilized by the Nebraska Supreme Court in *State v. Ortiz* when, in response to an anonymous tip, police officers brought a dog to perform a sniff search outside of Ortiz's apartment door to search for drugs.[65] Applying the reasonable-expectation-of-privacy test, the court acknowledged that Fourth Amendment protections cannot depend on the existence, or lack thereof, of a physical intrusion

57. Stephen J. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 UNIV. MEM. L. REV. 907, 913 (1997) (citing Katz v. United States, 389 U.S. 347, 351 (1967)).

58. *Id.*

59. Katz v. United States, 389 U.S. 347, 348 (1967).

60. *See id.* at 352.

61. *See id.* at 351.

62. *Id.* at 353 (stating that "the reach of t[he Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

63. *See id.*

64. *Id.* at 361 (Harlan, J., concurring) (parenthetical in original); *see also* WRIGHT & MILLER, *supra* note 27 (stating that in most cases, the focus of litigation is the second prong, regarding whether a person's expectation of privacy is one that society is willing to uphold as reasonable).

65. State v. Ortiz, 257 Neb. 784, 788, 600 N.W.2d 805, 812 (1999).

into the apartment.[66] Instead, Ortiz's constitutional right to privacy was deemed to be violated because he had a reasonable expectation to be free from dog-sniff searches for illegal drugs at the interior hallway threshold of his apartment.[67]

The Fourth Amendment affords the home the highest level of protections, which some courts extend beyond the four walls of the home itself.[68] Here, the court determined that Ortiz's expectation to be free from dog-sniff searches for illegal drugs in his apartment is an expectation that society is prepared to accept as reasonable. Even though the dog-sniff search was conducted from the hallway outside Ortiz's apartment, the search revealed the contents of the dwellings itself.[69] Through this application of the reasonable-expectation-of-privacy test, the court extended Ortiz's Fourth Amendment protections to the hallway outside his unit and found the search was unconstitutional.[70]

Following a similar analysis, the United States Supreme Court in *Kyllo v. United States* found a search unconstitutional when the police used thermal-imaging cameras to peer into the petitioner's home.[71] Agents for the Department of the Interior suspected that marijuana was being grown inside petitioner's home and used a thermal imager to detect infrared radiation to confirm the presence of lamps used to grow marijuana indoors.[72] The agents never physically intruded into the home or onto petitioner's property; instead, the agents used the thermal imager by pointing it at petitioner's home from their vehicle across the street.[73] After the thermal images confirmed the presence of excessive heat, strongly suggesting the presence of the lamps required to grow marijuana, this information was used as the basis for the agents' search warrant.[74] The petitioner was indicted for manufacturing marijuana, and he moved to suppress the evidence, claiming it was obtained through an unconstitutional search.[75]

Using the reasonable-expectation-of-privacy test, the Court determined the lack of physical intrusion onto petitioner's property or into

66. *Id.* at 797, 600 N.W.2d at 817 (citing the Court's decision in *Katz v. United States* that Fourth Amendment protections "cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").
67. *Id.* at 796, 600 N.W.2d at 817 (stating that "Fourth Amendment privacy interests may extend in a limited manner beyond the four walls of the home, depending on the facts, including some expectation of privacy to be free from police canine sniffs for illegal drugs in the hallway outside an apartment or at the threshold of a residence.").
68. *Id.*
69. *Id.* at 797, 600 N.W.2d at 817.
70. *Id.*
71. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001).
72. *Id.* at 29.
73. *Id.* at 29–30.
74. *Id*.
75. *Id.* at 30.

petitioner's house did not preclude the finding of a constitutional violation.[76] Although the agents remained on a public street, they "engaged in more than naked-eye surveillance . . . ."[77] Individuals have a minimal expectation of privacy within their home that is inherently reasonable; the "sanctity of the home" provided by the Fourth Amendment has been consistently interpreted to grant the home the highest level of protection.[78] All details of the home are considered intimate and shielded from prying governmental eyes, regardless of the "quality or quantity of the information obtained" from a search.[79] The sanctity of the home has granted homeowners virtually unlimited expectations of privacy and protections against governmental intrusion.[80] Any action that works to destroy such minimal expectation would be to undermine the intent and purpose of the Fourth Amendment.

When the "[g]overnment uses a device that is not in general public use to explore the details of a home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[81] It would be unreasonable for courts to claim that a person's Fourth Amendment privacy protections have been unchanged through the development new technologies.[82] Recognizing the impact that the advancement of technology has on the degree of privacy citizens may expect, the Court determined "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search—at least where . . . the technology in question is not in general public use."[83]

The government argued that the use of thermal imaging was constitutional because it only detected above-average levels of heat (i.e., the existence and operation of thermal heat lamps for the indoor growth of illegal substances) and did not "detect private activities occurring in private areas."[84] However, the sanctity of the home grants a person's dwelling a heightened level of constitutional protection regardless of the amount or type of information gathered from any such surveillance.[85] Because the thermal imaging cameras were not in general public use and were used to peer into the interior of petitioner's

76. *See id.* at 27.
77. *Id.* at 33.
78. *See* WRIGHT & MILLER, *supra* note 27.
79. *Kyllo*, 533 U.S. at 37.
80. Jones, *supra* note 57, at 958.
81. *Kyllo*, 533 U.S. at 40.
82. *Id.* at 33.
83. *Id.* at 34 (citing Silverman v. United States, 365 U.S. 505, 512 (1961)).
84. *Id.* at 37.
85. *Id.*

home, the agents' utilization of these instruments constituted a search in violation of the petitioner's Fourth Amendment privacy rights.[86]

The reasonable-expectation-of-privacy test, informed by the decision in *Kyllo*, thus established a new method for the constitutional analysis of an individual's Fourth Amendment privacy protections. However, the reasonable-expectation-of-privacy test was intended to be used in conjunction with the prior-established, and subsequently reaffirmed, common-law trespassory test.[87] The Supreme Court has consistently held that both the reasonable-expectation-of-privacy test and the common-law trespassory test are not mutually exclusive; rather, they should be simultaneously utilized to fully determine the scope of an individual's Fourth Amendment privacy protections.[88]

III. CIRCUIT SPLIT

Since the establishment of the reasonable-expectation-of-privacy test, courts have disagreed as to the proper approach to the constitutional analysis of Fourth Amendment privacy protections. This analysis is particularly divisive when employed to determine the constitutionality of a dog-sniff search that takes places at the interior hallway threshold of a tenant's unit in a multiunit dwelling. Specifically, courts commonly differ on three main issues: (1) whether a tenant has a reasonable expectation of privacy in a common area of a multiunit dwelling, most often the hallway outside the tenant's unit; (2) whether the common area adjacent to the tenant's unit should be treated with the same heightened protections as the curtilage of a single-family stand-alone home; and (3) whether the use of a trained, drug-sniffing dog to conduct a search constitutes use of a sense-enhancing instrument, the warrantless use of which is a presumptively unconstitutional search.[89]

A. Majority Approach

Most circuits prefer the simplicity and ease of the common-law trespassory test and use it as the sole tool for analyzing the constitu-

86. *See id.* at 40.

87. United States v. Jones, 565 U.S. 400, 409 (2012) (stating "The *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test") (emphasis in original).

88. *See* Florida v. Jardines, 569 U.S. 1, 5 (2013) (quoting Soldal v. Cook County, 506 U.S. 56, 64 (1992) (stating the property rights "are not the sole flat measure Fourth Amendment violations" and further explaining that the *Katz* reasonable-expectation-of-privacy test adds to the constitutional analysis of Fourth Amendment protections); *see also id.* at 13 (Kagan, J., concurring) (stating that *Jardines* could have been decided through an analysis of privacy interests following *Kyllo v. United States*, as a drug-sniffing dog is a specialized device used to discover items within a private dwelling).

89. *See* Seal, *supra* note 15, at 398.

tionality of a dog-sniff search.[90] Consequently, the majority of circuits hold that a dog-sniff search at the interior hallway threshold of a tenant's unit is constitutional because the tenants have no reasonable expectation of privacy in common areas of multiunit dwellings.[91] This area—adjacent to the tenant's unit—is accessible to at least other tenants, so it should be treated as a public place.[92] As such, officers and their dogs act under the implicit license to be in the hallway, just as a member of the public or another tenant.[93] Following the common-law trespassory test, any search in a place where the officer has a right to be must be constitutional.[94] Some circuits have limited this "general public" view of the hallway outside a unit to those buildings that are unlocked; however, most find that this is a public area where the tenant cannot have a justified privacy expectation.[95]

The lack of a reasonable expectation of privacy in the common area outside the tenant's unit follows from the majority's determination that this area is not considered curtilage, and therefore, is not entitled

90. *Id.* at 406 (stating that the "First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits agree there is no reasonable expectation of privacy in the common areas of an apartment or multiple dwelling buildings.").

91. United States v. Hawkins, 139 F.3d 29, 32–33 (1st Cir. 1998) ("a tenant lacks reasonable expectation of privacy in common areas of an apartment building," holding there was "no reasonable expectation of privacy in the basement common area."); United States v. Correa, 653 F.3d 187, 188 (3d Cir. 2011) ("a resident of an unlocked multi-unit apartment building lacks an objectively reasonable expectation of privacy in the building's common areas."); United States v. Jackson, 728 F.3d 367, 375 (4th Cir. 2013) (finding there was no reasonable expectation of privacy in the contents of a trash can, where the trash can was in a common area of the courtyard near common sidewalks, where it was "readily accessible to all who passed by."); United States v. DeWeese, 632 F.2d 1267, 1270 (5th Cir. 1980) ("reasonable expectation of privacy does not exist in the common area" when "access is freely given to all properly and lawfully within" the area); United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir. 1993) (holding the appellant had "no reasonable expectation of privacy in the hallway."); United States v. Maestas, 639 F.2d 1032, 1039–40 (10th Cir. 2011) (holding that the tenant had no reasonable expectation of privacy in the garbage storage area adjacent to the triplex residence where he lived); United States v. Miravalles, 280 F.3d 1328, 1329 (11th Cir. 2002) (holding the tenant had no "reasonable expectation of privacy in common areas of the building" when "the lock on the door of the building [was] not functioning and anyone [could] enter.").

92. Joseph Magrisso, *Protecting Apartment Dwellers from Warrantless Dog Sniffs*, 66 U. MIAMI L. REV. 1133, 1141 (2012) (citing a Maryland court decision stating that the interior hallway outside a tenant's unit is "no different than an open field," so "[t]he police need no justification for being there" to conduct a dog-sniff search).

93. *See Jardines*, 569 U.S. at 8.

94. *See id.*

95. *Id.* (stating the Sixth Circuit has held that there may be a reasonable expectation of privacy in a building that is locked to the general public, so tenants can expect that only tenants and their guests will be within the building; however, this is a limited level of privacy expectation).

to heightened privacy protections.[96] Applying the *Dunn* factors,[97] it is difficult to find that the common area is the curtilage of the individual's unit, particularly due to the tenant's lack of exclusive control over the area.[98] Using the exclusive control theory, the common-law trespassory test requires the tenant to prove "the ability to exclude others from entrance onto or interference with" the common area immediately adjacent to their unit.[99] Without such exclusive control, the area is not afforded the heightened privacy protection of curtilage, and there can be no trespass.[100]

Lastly, most circuits hold that a dog-sniff search for illicit substances, conducted from the hallway outside a tenant's unit, does not violate the tenant's Fourth Amendment rights because it is minimally intrusive. This determination is based on the assumption that there can be no expectation of privacy in contraband.[101] Because the dog can only detect the presence of illicit substances, there is no infringement of a *protected* privacy interest within the unit.[102]

From this reasoning, the majority of courts state that trained drug-sniffing dogs are not considered sense-enhancing instruments, the use of which require a warrant.[103] Most assert that because there is no reasonable expectation of privacy inhered in illegal substances and a drug-sniffing dog only alerts to the presence of illegal substances, an individual's right to privacy is not diminished by the utilization of the drug-sniffing dog.[104] Unless there is an invasion of the tenant's reasonable expectation of privacy, which cannot extend to illegal substances, the use of a drug-sniffing dog does not violate the Fourth Amendment.[105]

Therefore, the majority of circuits find that a dog-sniff search in the hallway outside a tenant's unit is constitutional through this same basic framework: there is no reasonable expectation of privacy in common areas of multiunit dwellings; the interior hallway outside the tenant's unit is not considered curtilage, nor afforded the same level of privacy protections; and no privacy interests are violated by a dog-sniff search because dogs only detect the presence of illicit substances, and there can be no legitimate expectation of privacy in contraband.

96. Seal, *supra* note 15, at 409–10.
97. *See supra* section II.A.
98. *See* McCaffrey, *supra* note 4, at 1166.
99. *Id.*; *see also* State v. Luhm, 880 N.W.2d 606 (Minn. Ct. App. 2016) (concluding that the defendant did not have a strong privacy interest in the hallway immediately outside the door of his unit because he lacked exclusive control of the area).
100. *See* McCaffrey, *supra* note 4, at 1166.
101. Seal, *supra* note 15, at 410.
102. *Id.* (emphasis added).
103. *Id.* at 406–07.
104. *Id.* at 405.
105. *Id.* at 406–07.

B. Minority Approach

A minority of circuits have broadened their view of Fourth Amendment protections beyond property rights, utilizing the reasonable-expectation-of-privacy test and the sense-enhancing instrument analysis in *Kyllo* to determine the full extent of a person's privacy protections.[106] These circuits have determined that the common hallway outside a tenant's door is sufficiently intimately related to the apartment such that the Fourth Amendment protects the tenant's right to privacy, even if the area is accessible to the public.[107] The Sixth Circuit has established that a tenant has a reasonable expectation of privacy in common areas of multiunit dwellings.[108] In *Rendon v. United States*, the court held that "the area immediately in front of Rendon's apartment [was] no different from the front porch of a free-standing home" and the dog-sniff search "exceeded the scope of any express or implied license allowed under the Fourth Amendment."[109]

The Second Circuit has gone a step further, holding that lack of exclusive control over the common area hallway does not preclude a finding of a reasonable expectation of privacy.[110] In *United States v. Thomas*, the court held the Fourth Amendment protected the tenant against warrantless dog-sniff searches conducted from the hallway immediately outside the defendant's unit because there is a reasonable expectation "that the contents of his closed apartment would remain private . . . ."[111] The Second Circuit has extended this reasonable expectation of privacy to its maximum, stating that there is a legitimate expectation of privacy inhered in all property, including illegal contraband—an extreme minority position.[112]

In the Seventh Circuit decision in *United States v. Whitaker*, the court held there was not an expectation of *complete* privacy in the hallway outside tenant's unit; however, this does not preclude the court from recognizing an intermediate level of privacy.[113] While a tenant

106. *See id.* at 412–15.
107. *Id.* at 406–07.
108. *Id.* at 414.
109. State v. Rendon, 476 S.W.3d 77, 83 (Tex. Ct. App. 2014); *contra* State v. Edstrom, 916 N.W.2d 512, 523 (Minn. 2018) (deciding that a warrantless dog-sniff search in the hallway outside the respondent's apartment was unconstitutional because it violated the tenant's reasonable expectation of privacy).
110. *See* Seal, *supra* note 15, at 414.
111. United States v. Thomas, 757 F.2d, 1359, 1367 (2d Cir. 1985).
112. *Id*. (stating "the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation.").
113. *See* United States v. Whitaker, 820 F.3d 849, 853 (7th Cir. 2016) (stating that the lack of complete privacy in the hallway "does not also mean that he had no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public.").

cannot expect complete privacy from those passing through the hallway outside their unit, they have a legitimate expectation to be free from a person in the hallway peering through the door by means of a sense-enhancing instrument not in general public use.[114] Following *Kyllo*, the trained, drug-sniffing dog was considered a sense-enhancing instrument for which a warrant is required.[115]

Through this analysis under the reasonable-expectation-of-privacy test, the minority of courts find that a dog-sniff search from the hallway outside the tenant's unit is unconstitutional. The tenant's reasonable expectation of privacy extends beyond the walls of the unit and into common areas, despite the lack of exclusive control. Therefore, these courts generally hold that a person has a legitimate expectation that all of the contents of their dwelling will remain private, even extending such expectation of privacy to contraband in some courts.

C. Eighth Circuit Analysis

In recent years, the Eighth Circuit has shifted to expand constitutional protections against dog-sniff searches to tenants in multiunit dwellings; however, the constitutionality determination has been based solely on the common-law trespassory test employed by the majority of circuits. In *United States v. Scott*, local officers received a call that Scott was distributing crack cocaine out of his apartment.[116] In response, the officers brought a trained, drug-sniffing dog to Scott's apartment building to sniff the front door of the unit, where the dog alerted to the presence of narcotics.[117] Upon a constitutional challenge by Scott, the court declined to extend the *Kyllo* definition of sense-enhancing instrument to trained, drug-sniffing dogs.[118] The court reasoned that the dog could only detect illegal substances, in which there can be no reasonable expectation of privacy, so the search was constitutional under the Fourth Amendment.[119]

Several other cases in the Eighth Circuit led the court to determine the constitutionality of a dog-sniff search based solely on precedent

114. *Id.* at 853–54 (illustrating that a tenant is not reasonable in expecting his activities to be private from residents and their guests passing through the hallway according to customary norms; however, the tenant has a legitimate expectation to be free from the same residents and guests from "set[ting] up chairs and hav[ing] a party in the hallway right outside the door." In the same way, "a police officer might lawfully walk by and hear loud voices from inside an apartment," but this "does not mean he could put a stethoscope to the door to listen to all that is happening inside.").

115. *See id.* (relying on Justice Kagan's concurrence in Florida v. Jardines, 569 U.S. 1, 12–15 (2013)).

116. United States v. Scott, 610 F.3d 1009, 1012 (8th Cir. 2010).

117. *Id.*

118. *Id.* at 1016.

119. *Id.*

similar to *Scott*.[120] In *United States v. Davis*, the court did not partake in an examination of privacy protections under either test, instead finding the search constitutional because "at the time of the dog sniff, the officers could reasonably rely on our decision in *Scott* as establishing that no warrant to conduct a sniff outside the apartment was required."[121] Similarly, the court in *United States v. Mathews* decided the case solely on the officers' reliance on precedent, upholding the constitutionality of the dog-sniff search.[122]

In subsequent cases, the Eighth Circuit began to show a willingness to find warrantless dog-sniff searches to be unconstitutional; however, this determination has been based solely on the common-law trespassory test as utilized in *Jardines*.[123] For example, in *United States v. Burston*, officers conducted a dog-sniff search approximately six to ten inches from Burston's apartment window.[124] Upon a constitutionality challenge by Burston, the court utilized the *Dunn* factors[125] and determined that the area surrounding the window to Burston's apartment is considered curtilage. Following the *Jardines* utilization of the common-law trespassory test, the court found the officers were trespassing onto Burston's curtilage, and their actions were outside of any explicit or implicit license. As a result, the search was unconstitutional.[126]

Just as *Burston* expanded the definition of curtilage to apartments—in limited circumstances—and determined that reliance on precedent alone may not be sufficient to uphold the constitutionality of a search, the court in *United States v. Hopkins* determined a dog-sniff search was similarly unconstitutional.[127] In *Hopkins*, officers performed a dog-sniff search of the exterior wall of Hopkins' townhouse, including within an area six to eight inches from the front door.[128] Again, applying the *Dunn* factors to the *Jardines* common-law trespassory analysis, the court found this area constituted the curtilage of Hopkins' house. Because the officers had no license to enter the curtilage, the search was unconstitutional.[129] The court explicitly declined to apply the reasonable-expectation-of-privacy test;

120. *See* United States v. Davis, 760 F.3d 901 (8th Cir. 2014); United States v. Mathews, 784 F.3d 1232 (8th Cir. 2015).

121. *Davis*, 760 F.3d at 904.

122. *Infra* Part IV.

123. *See* United States v. Burston, 806 F.3d 1123 (8th Cir. 2015); United States v. Hopkins, 824 F.3d 726 (8th Cir. 2016).

124. *Burston*, 806 F.3d at 1124–25.

125. *Supra* section II.A.

126. *Burston*, 806 F.3d at 1127–28.

127. *Hopkins*, 824 F.3d at 731–32.

128. *Id.* at 732.

129. *Id.* at 732–33.

the case could be decided on trespassory grounds, so an evaluation of privacy interests was deemed to be unnecessary.[130]

Through these recent analytical developments, the Eighth Circuit appears to be shifting toward the minority view that dog-sniff searches for tenants in multiunit dwellings may be unconstitutional. However, these outcomes have been solely based on the common-law trespassory test. The Eighth Circuit has failed to extend such protections to those in multiunit dwellings when the dog-sniff search occurs at an interior threshold (i.e., hallway), rather than an exterior threshold (i.e., window or front door). In *Jardines*, the Supreme Court stated that "[P]roperty rights are not the sole measure of Fourth Amendment violations."[131] Accordingly, the Eighth Circuit should adopt the minority approach for determining the constitutionality of such a search.

IV. *UNITED STATES V. MATHEWS*

In *United States v. Mathews*, the appellant was identified as a possible suspect in the theft of a firearm, and it was alleged that he was involved in heroin trafficking.[132] Police discovered the appellant lived with his mother in an apartment; their unit was accessible from a common hallway inside the secure apartment building, and approximately forty or fifty apartments shared this common hallway.[133] The apartment building owner had given the police access to the entire building by placing a key in a lockbox outside.[134] The police arrived in the common hallway outside the appellant's door on two separate occasions, approximately one month apart.[135] Both times, the officers brought the same drug-sniffing dog, and each time the dog alerted to the presence of drugs in the unit.[136] Upon indictment for being a felon in possession of a firearm, the appellant moved to suppress the evidence and argued that the dog-sniff searches constituted unlawful searches under the Fourth Amendment in violation of his expectation of privacy.[137]

The Eighth Circuit Court of Appeals affirmed the District Court's denial of the motion to suppress evidence obtained from the warrantless dog-sniff search conducted outside the appellant's apartment door.[138] The District Court's denial was based on Eighth Circuit precedent, which stated that dog-sniff searches in a common hallway of

130. *Id.* at 732.
131. Florida v. Jardines, 569 U.S. 1, 5 (2013).
132. United States v. Mathews, 784 F.3d 1232, 1233–34 (8th Cir. 2015).
133. *Id.* at 1234.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 1233.

an apartment building are constitutional.[139] Like the majority of circuits, the Eighth Circuit holds that tenants of multiunit dwellings have no reasonable expectation of privacy in a common area of the building.[140]

V. THE EIGHTH CIRCUIT ERRED IN ITS REASONING IN *UNITED STATES V. MATHEWS*

A. Trained, Drug-Sniffing Dogs are Sense-Enhancing Instruments Which Require a Warrant

The Eighth Circuit erred in determining that the use of a trained drug-sniffing dog did not constitute a search requiring a warrant. In *Kyllo*, the Supreme Court stated that a sense-enhancing instrument is "a device that is not in general public use"[141] which is used "to explore the details of the home that would previously have been unknowable without physical intrusion . . . ."[142] Use of such device to peer into a dwelling constitutes a search which is "presumptively unreasonable without a warrant."[143] State courts within the Eighth Circuit have previously recognized the intrusive nature of such dog-sniff searches, stating that the use of a dog is "not a mere improvement of the officers' sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument."[144]

In *United States v. Mathews*, the officers brought the drug-sniffing dog for the purpose of conducting a search to ascertain the contents of the appellant's apartment without having to breach the threshold of the apartment itself.[145] The officers used the dog as a means to "explore [the] details" of appellant's home which would "previously have been unknowable without physical intrusion . . . ."[146] This directly aligns with the Supreme Court's ruling in *Kyllo*, indicating the Eighth Circuit improperly failed to classify a dog-sniff search as a search which requires a warrant.

Numerous courts have argued that a drug-sniffing dog is distinguishable from the thermal imaging device used in *Kyllo*. While the thermal imaging device may detect private, lawful activities, a dog-sniff search is minimally intrusive because the dog will only alert to

139. *Id.* at 1234.
140. Seal, *supra* note 15, at 406–08.
141. Kyllo v. United States, 533 U.S. 27, 40 (2001).
142. *Id.*
143. *Id.*
144. State v. Ortiz, 257 Neb. 784, 801, 600 N.W.2d 805, 819 (1999) (quoting United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985)).
145. United States v. Mathews, 784 F.3d 1232, 1234 (8th Cir. 2015).
146. *See id.*; *Kyllo*, 533 U.S. at 40.

the presence of contraband.[147] Nearly all courts hold that there can be no reasonable expectation of privacy inhered in illegal substances, so a dog-sniff search does not infringe on a legitimate privacy interest nor violate the Fourth Amendment.[148] However, such a search necessarily implicates Fourth Amendment privacy protections, regardless of how minimally the search intrudes into the tenant's dwelling.[149] The tenant who is the subject of the search has a heightened level of privacy expectation for the contents of their dwelling.[150]

Dog-sniff searches undermine the tenant's constitutionally guaranteed right to privacy and freedom from governmental intrusion. Allowing the validity of the search to be dependent on the items discovered after the dog alerted would directly contradict the purpose of the Fourth Amendment through retroactive validation of an otherwise unconstitutional search.[151] In *Katz*, the Court explicitly refused to retroactively validate the FBI's conduct simply because the agents obtained useful information through their "search" actions.[152]

The purpose of the Fourth Amendment is not to protect only the innocent; rather, it is intended to protect all people from unreasonable searches.[153] The underlying presumption for the constitutionality of a dog-sniff search is that the dog-sniff search is inherently less intrusive than other search methods, and the dog will only alert if there are illicit substances present.[154] However, "the infallible [drug-sniffing] dog is a creature of legal fiction."[155] The error rates for dog-sniff searches are substantial, and a "false positive" alert from a dog-sniff search would subject innocent parties to unreasonable searches.[156]

For example, in *Doe v. Renfrow*, a drug-sniffing dog repeatedly alerted to a young girl during a school-wide drug search.[157] Because of

147. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(g) (6th ed. 2020).
148. Seal, *supra* note 15, 406–07 (noting that the Second Circuit is the only circuit to hold that there is a legitimate expectation of privacy in contraband).
149. Marjorie A. Shields, Annotation, *Use of Trained Dog to Detect Narcotics or Drugs as Unreasonable Search in Violation of State Constitutions*, 117 A.L.R. 5th 407 (2004); 2 DANIEL A. MORRIS, NEBRASKA PRACTICE SERIES § 30:21 (3d ed. 2020).
150. Porto, *supra* note 47.
151. *See* Katz v. United States, 389 U.S. 347, 356 (1967).
152. *Id.*
153. Miller v. United States, 357 U.S. 301, 313 (1958) (stating "[e]very householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion . . . .").
154. Radley Balko, *Opinion: The Supreme Court's 'Alternative Facts' About Drug-Sniffing Dogs*, WASH. POST (Feb. 4, 2019) https://www.washingtonpost.com/opinions/2019/02/05/supreme-courts-alternative-facts-about-drug-sniffing-dogs/ [https://perma.cc/8Z9Q-3USR].
155. *Id*.
156. *Id.*
157. LaFave, *supra* note 147 (citing Doe v. Renfrow, 475 F.Supp. 1012 (N.D. Ind. 1979)).

the continued alerts, even after she emptied her pockets, the young girl was subjected to a nude search.[158] It was later discovered that the drug-sniffing dog was falsely alerting to the girl because she played with her dog earlier that morning, and her dog was in heat.[159] In the same school search, the dogs used for the searches alerted to fifty total students; sixty-six percent of these students did not have any drugs in their possession, indicating the dogs were falsely alerting two out of three times they were utilized.[160]

In *United States v. Bentley*, the court found the dog used in the search was highly susceptible to false positives.[161] The dog alerted in 93% of the open-air sniffs of a vehicle, with an accuracy of merely 59.5%, "not much better than a coin flip."[162] There are numerous factors that contribute to the high error rates in dog-sniff tests.[163] While some handlers may train their dog to alert on command, there are certain traits inherent in dogs that contribute to false positives.[164] Studies have shown that dogs' internal desire to please incentivizes the dogs to alert when they can sense the handler suspects there are drugs present.[165] In other words, the handler's suspicions, as conveyed through their body language, may be what causes the dog to alert, rather than the actual presence of contraband. This risk of individuals being subjected to a search based only on an officer's hunch is precisely what the Fourth Amendment was designed to prevent.[166]

Because of these risks, drug-sniffing dogs should only be utilized where there exists an independent basis for the suspicion of drug possession against a person or place.[167] If dog-sniff searches were presumptively constitutional without a warrant, the rights of innocent individuals would likely be infringed. The chances of a drug-sniffing dog alerting to other stimuli—such as the scent of another dog that has been in the dwelling, trace amounts of drug residue on money or another surface in an innocent individual's dwelling, or simply to please its handler—necessitate restrictions to prevent the wholesale

158. *Id.*
159. *Id.*
160. *See id.*
161. United States v. Bentley, 795 F.3d 630, 635 (7th Cir. 2015).
162. *Id.*
163. *See* Balko, *supra* note 154 (discussing the "alarmingly high error rates—with some close to and exceeding 50 percent.").
164. *Id.* (stating that dogs can be "trained to ignore unintentional cues or body language from their handlers" and they can be "trained not to alert to immeasurable quantities of illicit drugs." However, police departments do not undertake such training for their dogs because they want the dogs to "err on the side of alerting," making these dogs effectively "search warrant[s] on a leash.").
165. *Id.*
166. *Id.*
167. Shields, *supra* note 149.

use of dog-sniff searches.[168] To determine otherwise would undermine Fourth Amendment protections, potentially permit overbearing and harassing police conduct, and leave innocent people vulnerable to potentially serious privacy violations.

Accordingly, the Eighth Circuit should explicitly apply the definition of sense-enhancing instrument outlined in *Kyllo* to the use of trained drug-sniffing dogs. If the classification of sense-enhancing instrument is explicitly extended to drug-sniffing dogs, precedent indicates a dog-sniff search must require a warrant.[169] This will ensure that the purpose of the Fourth Amendment is upheld, police discretion is not abused, and individuals' right to privacy and freedom from governmental intrusion is protected.

B. A Tenant's Legitimate Privacy Interest May Extend into Common Areas of Multiunit Dwellings

The Eighth Circuit further failed to grant the area immediately outside a tenant's unit—the directly adjacent interior common hallway—a heightened level of privacy protection against unwarranted searches. Increasingly, courts are finding that the hallway immediately outside a tenant's unit should be considered curtilage for purposes of the common-law trespassory test, as applied in *Jardines*.[170] However, some courts have been reluctant to declare such common areas to be curtilage, and those that have come to this conclusion vary greatly in their rationale.[171]

Living quarters other than houses have been guaranteed the same constitutional right to privacy under the Fourth Amendment.[172] In fact, the Supreme Court has explicitly stated that stand-alone houses and apartments should be considered equal.[173] Just as courts have unwaveringly held that the sanctity of the home is the highest level of privacy protection granted and such privacy extends beyond the house itself into the immediately surrounding area, apartments and other multiunit dwellings should be afforded the same heightened protections in the common areas immediately adjacent to their individual

168. *See* Balko, *supra* note 154; *see also* Cecil J. Hunt, II, *Calling in the Dogs: Suspicionless Sniff Searches and Reasonable Expectations of Privacy*, 56 CASE W. RES. L. REV. 285, 315–16 ("[A] substantial portion of United States currency. . . is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence.") (Becker, J., concurring in part and dissenting in part) (quoting United States v. Carr, 25 F.3d 1194, 1215 (3d. Cir. 1994)).

169. Kyllo v. United States, 533 U.S. 27, 40 (2001).

170. McCaffrey, *supra* note 4, at 1168–69.

171. *Id.*

172. 2 DANIEL A. MORRIS, NEBRASKA PRACTICE SERIES § 30:2 (3d ed. 2020).

173. Seal, *supra* note 15, at 403.

unit.[174] For both houses and apartments, this area surrounding the dwelling is "intimately linked to the home, both physically and psychologically" affording it the definition of curtilage and the associated privacy protections.[175]

The factors from *United States v. Dunn*[176] are intended to inform whether a particular area should be considered curtilage, not provide an elemental analysis.[177] When evaluating a specific scenario, these factors are so narrow as to nearly guarantee a determination that the area outside the tenant's unit in a multiunit dwelling will not constitute curtilage.[178] Similarly, the exclusive control test would nearly always leave an area outside of a tenant's unit without constitutional privacy protections simply because it may be accessible to a limited number of people—other tenants and their guests.[179] However, these tests were meant to establish a flexible framework to guide an evaluation of constitutionality, not place renters at a disadvantage by preventing them from receiving their full privacy protections under the Fourth Amendment.[180]

Courts further disagree about whether a tenant's reasonable expectation of privacy extends into the common hallway of a multiunit dwelling.[181] The Second Circuit has found that there is a heightened expectation of privacy in residential apartment hallways.[182] However, many courts determine that the tenant's only legitimate privacy interest is within their individual unit; there can be no reasonable expectation of privacy in any common area because the area is "no different from a public street or an open field."[183] Alternatively, other courts recognize that a common hallway in a multiunit dwelling is not a public space, but "a private space intended for the use of the occupants

174. Jones, *supra* note 57, at 958 (stating that the sanctity of the home has provides homeowners with a virtually unlimited expectation of privacy protections against governmental intrusions); UELMEN & KREIT, *supra* note 45; WRIGHT & MILLER, *supra* note 27.

175. Florida v. Jardines, 569 U.S. 1, 7 (2013); LAFAVE, *supra* note 147.

176. *See supra* section II.A.

177. *See* McCaffrey, *supra* note 4, 1170–71 (stating "[T]he *Dunn* factors are nonmandatory factors that should be weighed depending on the nature of the case . . .").

178. *See id.* at 1167.

179. *See id.* at 1166.

180. *See id.* at 1162 (indicating the use of only the common-law trespassory approach and the definition of curtilage fails to afford renters the same protections as homeowners. To avoid such arbitrary line drawing and afford renters equal constitutional privacy protections, the courts should also employ the reasonable-expectation-of-privacy test.).

181. *See* Seal, *supra* note 15, at 406–15.

182. State v. Ortiz, 257 Neb. 784, 796, 600 N.W.2d 805, 817 (1999) (citing United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985)).

183. Magrisso, *supra* note 92, at 1141 (quoting Fitzgerald v. State, 837 A.2d 989, 1025-26 (Md. Ct. Spec. App. 2003).

and their guests, and an area in which the occupants have a reasonable expectation of privacy."[184]

Many courts are now turning to the middle ground as they begin to recognize an intermediate degree of privacy. Such courts note that there is likely no reasonable expectation of *complete* privacy[185] in common areas of multiunit dwellings and, depending on the circumstances, Fourth Amendment protections may extend beyond the walls of the tenant's unit.[186] Lack of a reasonable expectation of complete privacy does not preclude tenants in multiunit dwellings from "expect[ing] certain norms of behavior in [their] apartment hallway" which would not include "park[ing] a sophisticated drug-sniffing dog outside an apartment door, at least [not] without a warrant."[187] Further, state courts within the Eighth Circuit have recognized that tenants have "some expectation of privacy to be free from police canine sniffs for illegal drugs in the hall."[188]

In other circuits, courts only recognize this legitimate privacy interest in common areas of multiunit dwellings where the building is locked.[189] In these situations, officers often must be granted access to the building—most commonly from the building owner or manager. Once the manager grants officers access to the building—either by means of providing them keys or by opening the door for them—courts have found it easy to conclude that the officer is not trespassing.[190] Because the officers are in the hallway with the owner or manager's permission, no trespass claim may exist; therefore, any search that takes place in the building must be constitutional.[191]

However, finding that a search against a tenant is constitutional based upon wide-reaching permission granted by a third-party di-

184. *Ortiz*, 257 Neb. at 800, 600 N.W.2d at 819 (quoting People v. Killebrew, 76 Mich. App. 215, 218 (1977)).

185. *See id.*; *see also* United States v. Whitaker, 820 F.3d 849, 853 (7th Cir. 2016) ("[Tenant]'s lack of reasonable expectation of complete privacy in the hallway does not also mean that he had no reasonable expectation of privacy . . . ."); *see also* Connon, *supra* note 4, at 324 (suggesting that tenants in multiunit dwellings "have an intermediate degree of privacy somewhere between complete secrecy and the absence of any privacy.").

186. *See Ortiz*, 257 Neb. at 796, 600 N.W.2d at 817.

187. Connon, *supra* note 4, at 325 (quoting United States v. Whitaker, 820 F.3d 849, 853–54 (7th Cir. 2016)).

188. *Ortiz*, 257 Neb. at 796, 600 N.W.2d at 817 (stating that a legitimate privacy interest includes "some expectation of privacy to be free from canine sniffs for illegal drugs in the hallway. . . or at the threshold of a residence.").

189. Magrisso, *supra* note 92, at 1141.

190. State v. Edstrom, 916 N.W.2d 512, 524 (Minn. 2018) (stating that a tenant must reasonably expect that police officers will utilize keys voluntarily given to the officers by the building owner to access the building). However, this reasoning presumes that tenants are all notified of the fact that the building manager provided the officers access to the building.

191. *Id.*

rectly conflicts with the purpose of the Fourth Amendment. The Fourth Amendment guarantees every person constitutional protections from unreasonable property searches, with the sanctity of the home holding these protections in the highest force.[192] Under this theory, an uninformed third-party is allowed to effectively eliminate this constitutional privacy right for every tenant taking up residence in their building with one sweeping act. Further, the manager may believe that they are required to comply with an officer's request to search the building because of the officer's status as a law enforcement agent, while likely being unaware of the potential consequences of granting such access—i.e., waiving the tenants' right to privacy. This would greatly diminish, if not effectively eliminate, the constitutional guarantee of privacy for any person living in a multiunit dwelling.

Instead, the hallway outside a tenant's unit should be under the "umbrella of Fourth Amendment protections."[193] The information being sought is within a place that is traditionally afforded a heightened expectation of privacy; as such, the Fourth Amendment protects the tenant from such a warrantless search.[194] For these reasons, the common hallway outside a tenant's unit should be afforded at least an intermediate degree of privacy protections under the Fourth Amendment.[195] Therefore, the officers' use of a trained drug-sniffing dog in the common hallway immediately outside the appellant's unit in *United States v. Mathews* was an unreasonable search in violation of the Fourth Amendment.

C. The Common-Law Trespassory and Reasonable-Expectation-of-Privacy Tests Should be Used Together as a Comprehensive Analytical Framework

Finally, the Eighth Circuit failed to evaluate the appellant's right to privacy under the reasonable-expectation-of-privacy test. The common-law trespassory test, on its own, is unable to provide tenants in multiunit dwellings the same protections afforded to homeowners; therefore, it should not be utilized as the *sole* test to determine the constitutionality of a search.[196] The Supreme Court has explicitly stated that the common-law trespassory test and the reasonable-expectation-of-privacy test are not mutually exclusive.[197] Instead, a ten-

192. *See supra* section II.B.
193. *Ortiz*, 257 Neb. at 799, 600 N.W.2d at 819 (quoting United States v. Dunn, 480 U.S. 294, 301 (1987)).
194. *Id.* at 801, 600 N.W.2d at 820.
195. *See* United States v. Whitaker, 820 F.3d 849, 853–54 (7th Cir. 2016).
196. McCaffrey, *supra* note 4, at 1162 (emphasis added).
197. *See* Florida v. Jardines, 569 U.S. 1, 5 (2013).

ant's constitutional right to privacy is guaranteed to its fullest extent through the utilization of *both* the common-law trespassory test—as applied in *Jardines*—and the reasonable-expectation-of-privacy test—as applied in *Katz* and *Kyllo*.[198]

Justice Kagan's oft-cited concurrence in *Florida v. Jardines* sets forth an illustrative example for how these two tests work together to form a comprehensive analytical framework to determine the constitutionality of a search.[199] In *Jardines*, the Court declined to apply the reasonable-expectation-of-privacy test; however, this decision to utilize the common-law trespassory test alone was due to the fact that the Court found the search was necessarily unconstitutional because the officers were trespassing.[200] Once a search is deemed unconstitutional through the "baseline" common-law trespassory test, there is no need to continue the analysis.[201] However, subsequent courts have erroneously interpreted this precedent to indicate that the common-law trespassory test is the sole measure of privacy rights.[202]

Kagan's concurrence suggests that the analytical framework to determine the constitutionality of a search is as follows: first, the court must determine if there was a constitutional violation under the common-law trespassory test.[203] If the application of the common-law trespassory test results in a Fourth Amendment violation, no further analysis is needed;[204] but if the application of the common-law trespassory test does not result in a Fourth Amendment violation, the court should evaluate whether there was a constitutional violation under the reasonable-expectation-of-privacy test.[205] Only once the court can determine there was no Fourth Amendment violation under *both* tests should the search be deemed constitutional.

Following Eighth Circuit precedent, the court in *United States v. Mathews* only applied the common-law trespassory test.[206] Just as the Court did in *Jardines*, the Eighth Circuit declined to evaluate the

198. *See* McCaffrey, *supra* note 4, at 1161 (emphasis added).
199. *Jardines*, 569 U.S. 1, 13–15 (Kagan, J., concurring) (noting Kagan "could just as happily have decided [the case] by looking to Jardines's privacy interests," because a trained, drug-sniffing dog constitutes a device "not in general public use" that, when fixated on a person's dwelling violates the tenant's reasonable expectation of privacy).
200. *Id.*
201. *See id.* ("One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy.").
202. *See* Seal, *supra* note 15, at 406–12.
203. For a full discussion of what constitutes a violation of Fourth Amendment privacy protections under the common-law trespassory test, see *supra* section II.A.
204. *Jardines*, 569 U.S. at 11.
205. For a full discussion of what constitutes a violation of Fourth Amendment privacy protections under the reasonable-expectation-of-privacy test, see *supra* section II.B.
206. *See* United States v. Mathews, 784 F.3d 1232, 1235 (8th Cir. 2015).

right to privacy any further once there was a determination made under the common-law trespassory test.[207] However, the *Jardines* Court declined to utilize the reasonable-expectation-of-privacy test because the common-law trespassory test resulted in a violation of the Fourth Amendment—the search was found to be unconstitutional, so no further analysis was required.[208]

In contrast, the court in *United States v. Mathews* decided that the common-law trespassory test did not result in a violation of the Fourth Amendment; therefore, the analysis should have continued.[209] Following the analytical framework set forth above, the outcome under the reasonable-expectation-of-privacy test would depend on whether society is willing to recognize as reasonable the tenant's subjective expectation of privacy regarding the contents of his dwelling.[210] The sanctity of the home affords individuals the highest level of Fourth Amendment protections and shields *all* details from prying governmental eyes.[211] The court cannot retroactively validate an otherwise unconstitutional search simply because illegal substances were discovered upon entry.[212] To hold otherwise would undermine an individual's right to retreat to his home—a right deemed as one of the central, unique values of our civilization.[213]

Utilizing this analytical framework will not only uphold an individual's privacy rights to the fullest extent regardless of where they live, this approach would provide consistency between all circuits, eliminate arbitrary line-drawing with a discriminatory impact, and uphold the drafters' intent for Fourth Amendment privacy protections. Courts widely vary on the extent of constitutional privacy protections afforded to tenants in multiunit dwellings.[214] Even those courts that

207. *See id.*

208. *See Jardines*, 569 U.S. 1, 11 (2013) (stating "we need not decide whether the officers' investigation of Jardines' home violation his expectation of privacy under *Katz*." "That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." On this reasoning, the Court found further discussion of dogs as "sensitive sense-enhancing instruments" to be irrelevant to the constitutionality determination.).

209. *Mathews*, 784 F.3d 1232 (8th Cir. 2015).

210. *See* Katz v. United States, 389 U.S. 347, 360–62 (Harlan, J., concurring). For a complete discussion of the application of the reasonable-expectation-of-privacy test, see *supra* section II.B.

211. Kyllo v. United States, 533 U.S. 27, 37 (2001) (emphasis in original).

212. *Katz*, 389 U.S. at 356 (refusing to find the search constitutional and retroactively validate the conduct of the officers).

213. *See* State v. Ortiz, 257 Neb. 784, 792, 600 N.W.2d 805, 814 (1999) (quoting McDonald v. United States, 335 U.S. 451, 453 (1948)).

214. *See* Seal, *supra* note 15, at 406–15.

reach similar outcomes have employed widely different reasonings.[215] Accordingly, providing a comprehensive framework to guide this analysis will ensure that individuals in every state will be guaranteed their full constitutional protections.

Utilizing these tests together, regardless of the type of dwelling, would prevent arbitrary line-drawing that impacts the apportionment of constitutional rights. Making a distinction between houses and apartments leads to inconsistent application and enforcement of constitutional rights.[216] A dog-sniff search that takes place at the door of a homeowner's residence is often deemed unconstitutional, yet the same search at the threshold of a tenant's apartment is just as often deemed lawful. Even more contradictory, courts within the same circuit have found a dog-sniff search is unconstitutional when it takes place at a tenant's exterior threshold (i.e., window), yet constitutional if the facts are nearly identical, but the search takes place at an interior threshold (i.e. door facing an interior hallway) of the tenant's unit.[217]

Evaluating the constitutionality of a search based on both the common-law trespassory test and reasonable-expectation-of-privacy test, regardless of the type of dwelling, will eliminate the inconsistencies in court decisions and avoid discriminatory treatment based on housing type which effectively apportions constitutional protections on grounds that align with race, ethnicity, and socioeconomic status.[218] It would be difficult to conclude that the Framers found an individual's right to privacy so integral to society as to guarantee it through constitutional amendment, yet leave the enforcement of such rights dependent on such arbitrary grounds.[219] It is well established that

215. For a full discussion of the varying levels of privacy protections afforded to tenants in multiunit dwellings and the corresponding reasoning for each circuit, see *supra* Part III.

216. McCaffrey, *supra* note 4, at 1171 ("Until and unless circuit courts reverse their outdated holdings that categorically declare common areas unprotected under the Fourth Amendment, the distinction between the common area of apartments and the curtilage of the home provides an arbitrary barrier to consistent Fourth Amendment protections.").

217. *Compare* United States v. Burston, 806 F.3d 1123, 1129 (8th Cir. 2015) (finding a dog-sniff search at an exterior threshold [window] of tenant's apartment was unconstitutional), *and* United States v. Hopkins, 824 F.3d 726, 734 (8th Cir. 2016) (finding a dog-sniff search at the exterior threshold [door] of tenant's townhouse was unconstitutional), *with* United States v. Scott, 610 F.3d 1009, 1016 (8th Cir. 2010) (finding a dog-sniff search of the threshold of tenant's unit from a common hallway was constitutional) *and* United States v. Davis, 760 F.3d 901, 905 (8th Cir. 2014) (finding a dog-sniff search of the threshold of tenant's unit from a common hallway was constitutional).

218. McCaffrey, *supra* note 4, at 1163–65 (citing United States v. Whitaker, 820 F.3d 849, 854 (7th Cir. 2016)).

219. Connon, *supra* note 4, at 326.

any search of a home requires a warrant.[220] To ensure that individuals are fully protected from warrantless searches, this heightened privacy protection must be extended to all dwellings because "homes are homes."[221]

VI. CONCLUSION

The extensive history of Fourth Amendment interpretation provides a comprehensive framework to determine the constitutionality of a dog-sniff search. Under this precedent, all dwellings should be afforded the same heightened privacy protections under the Fourth Amendment. In *United States v. Mathews*, the court failed to utilize the entirety of this interpretive history, resulting in the retroactive validation of a constitutionally improper search. Under *Kyllo*, trained drug-sniffing dogs directly satisfy the definition of a sense-enhancing instrument which requires a warrant—they allow officers to peer behind closed doors into the individual's dwelling, an area afforded the highest level of privacy protections. Further, a tenant's legitimate privacy interest may extend beyond the threshold of their unit. Although there may be no reasonable expectation of complete privacy, the tenant is afforded at least an intermediate degree of privacy that protects them from dog-sniff searches in the common hallway. Lastly, the application of the common-law trespassory test with the reasonable-expectation-of-privacy test guarantees a tenant's right to privacy to its fullest extent. Taken and utilized as a whole, this ensures that a person's constitutional rights will not be dependent on the type of housing they choose or can afford; instead, this interpretation furthers the intent and purpose of the Fourth Amendment to protect all citizens' fundamental right to privacy.

220. *See* U.S. CONST. amend. IV.
221. UELMEN & KREIT, *supra* note 45.